INTRODUCTION LAWS OF INTESTATE AND TESTAMENTARY SUCCESSION IN INDIA

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MULTIPLICITY OF SUCCESSION LAWS

The laws dealing with intestate[1] and testamentary[2] succession in India are not uniform. A variety of different laws are in vogue and their application depends on multiple factors like the religion or tribe of the parties, domicile, community, sect in the community, marital status of the parties, religion of the spouse, and the type of marriage the parties might have undergone. Before the advent of British rule, the major[3] laws of inheritance in India had either their roots in religion or were deeply influenced by personal laws which owed their allegiance to religion and custom.[4] Muslims followed the Muslim law, while Hindus were governed by the Shastric and the customary law depending upon the region and the specific school or community a particular family adhered to, thus displaying a large variation. The Parsis had their own customary law. Maximum diversity prevailed in the case of Indian Christians. Following the advent of the British, two major Christian communities came into being in India—the East Indian Christians, that followed the European customs and the native Christians, who were either converts or descendants of the converts from the non-Christian communities, mainly the Hindus and the Muslims, and followed their distinct customary laws which were also given judicial recognition.[5] If a convert became westernised, which he had to establish, then English law could be applied to him.[6] With a view to simplifying and unifying the innumerable diverse and conflicting succession laws, Sir Henry Maine, law member of the Viceroy's council caused the enactment of the Indian Succession Act in 1865. Though this Act was intended to be the general law of succession for all Indians, it failed in its attempt to bring in the desired uniformity due to the following reasons:

(i) It incorporated the principles of Roman and English laws that were foreign not only in their contents but also totally unsuited to the Indian cultural and religious environment.

(ii) The Act recognised a woman as an absolute owner of property and preferred her to male collaterals. It did not discriminate between agnates and cognates[7] and even conferred succession rights on daughters, treating them at par with sons. These provisions were totally different from the laws governing the Hindus, Muslims and Parsis.

(iii) It did not recognise the concept of joint family property and consequently no right by birth was granted to the son in the uniform scheme laid down under the Act. This total negation of the superiority of males struck at the root of the son-centred economy that Indian succession laws then portrayed.

Efforts to extend the application of this Act to all Indians were strongly resisted by the Hindus, Muslims, Parsis and even native Christians. Consequently, its application was confined to only some Christians and Jews. As native Christians were not prepared to accept this foreign law, their resistance led to the passing of two Acts for them in the erstwhile States of Travancore and Cochin.[8] In 1872, the application of the Indian Succession Act, 1865, was also extended to all Indians who married under the Special Marriage Act of 1872 and to the property of the issue of such marriage. This Act of 1865 formed part of the Indian Succession Act of 1925 without a single change. In addition to these principles of Roman and English laws, the merger of the Union territories of Goa, Daman and Diu and Pondicherry in the years 1961 and 1962[9] respectively, resulted in the introduction of the principles of two foreign legal systems—the Portuguese and the French legal system—in the existing composite system of personal laws.[10]

The various succession laws in India now categorically fell into two groups:

(i) the earlier laws that owed their allegiance to religion; and

(ii) the later laws introduced by the English, French and Portuguese with a western orientation.

The notable difference between these two groups of laws was that where the latter had no provision regarding the general exclusion of women from inheritance, the former group of laws treated women unfavourably with respect to their inheritance rights. They, as a rule, preferred agnates to cognates and conferred superior rights on males in comparison to the female counterparts. An exception to this rule was the matriarchal system of inheritance prevalent in some parts of South India that, in complete contrast to the situation in the rest of India, traced descent through females, thus granting them better rights in comparison to their sisters elsewhere.

APPLICABILITY CRITERION

Personal laws in India owe their diversity to their varied origin, distinct principles and the bulk of substantive law itself. Broadly speaking, people adhering to five different religions live in India, *viz.*, the Hindus,[11] Muslims, Christians, Parsis and the Jews. Each of these religious communities has distinct laws. There is further divergence in such laws based on considerations like the sex of an intestate, his sect in the community to which he belongs, his domicile at the time of his death and the type of marriage he might have undergone.

Following these considerations, a multiplicity of succession laws are validly operative and applicable in India. Besides, the Scheduled Tribes in India are governed by their customary uncodified laws of inheritance and enjoy Constitutional protection of their culture and identity.[12]

LAWS RELATING TO INTESTATE SUCCESSION

HINDU LAW

The Hindu Succession Act, 1956

Under Hindu law, the property that a person may own, or can have an interest in, can be categorised into two—separate property and joint family property. The law relating to joint family property is governed by the Hindu joint family system that is unique to Hindus and has no parallel anywhere in the world. With respect to separate property, a predominant section of Hindus is governed by the general scheme of succession as laid down under the Hindu Succession Act, 1956.[13]The Act expressly exempts a large number of constitutionally recognised scheduled tribes in various parts of India from its application.[14] These tribes are governed by their distinct laws.[15] Some of the communities governed by the Act are the Jati Vaishnavs,[16] Chamaars,[17] Adi Dravidas,[18] Bairagis,[19] and Gouds.[20]Santhals, after being Hinduised, have adopted customs followed by Hindus and are no longer to be excluded from the application of the Act.[21] However, the Act is not applicable to the Oraons,[22] Gonds of Madhya Pradesh.[23]Further, the Act is not applicable to Hindus domiciled in the State of Jammu and Kashmir, Goa, Daman and Diu and Renocants of Pondicherry who are governed by their distinct laws.[24]

Marumakkattayam and Aliyasantana Laws

In South India, before 1956, the customary Marumakkattayam laws governed a considerable section of Hindus mainly from the non-Brahmin castes and Nair community in Travancore Cochin, the Thiyyas and other cognate castes in the district of North Malabar and South Kanara, and the Mapillas of Malabar and Payyannur Gramam of North Malabar. Similarly, the Bunts, Billawas and the non-priestly castes among the Jains of South Kanara were governed by the Aliyasantana laws.[25] The primary difference between Marumakkattayam and Aliyasantana laws was the provision of a separate scheme of succession for males and female intestates under the former and a uniform scheme for all intestates under the latter.

The district of Malabar formed part of the State of Madras till 31 October 1956. The customary Marumakkattayam law applicable to Malabar was modified in certain respects from time to time by the Madras legislature,[26] but the law relating to property relations between the members of the Tarwad remained in its customary form until the fourth decade of this century. Under the customary law, partition of family property could not be demanded by an individual member or even by a Tavazhi[27] as per the judicial decisions of over 75 years till the Madras legislature enacted a series of legislations settling the law.[28] These modifications were however applicable to the Malabar area which was originally part of the State of Madras and not to the State of Travancore and Cochin as it existed before

the States Reorganisation Act, 1956. There were several legislative measures in the State of Travancore and Cochin before and after these states merged with the Indian Union and in the State of Kerala, making changes in the customary Marumakkattayam law.[29] With the objective of removing caste-based distinction among Hindus of different areas and to improve upon these laws, these Acts were repealed. Special rules were enacted and incorporated under the Hindu Succession Act, 1956,[30] for the Hindus earlier governed by these enactments. These rules differed from the general scheme of succession by retaining the basic principles of the matriarchal system of inheritance.

Laws relating to Hindus of Goa, Daman and Diu

In the State of Goa and the Union Territories of Daman and Diu, the general law applicable to all inhabitants is the Portuguese Civil Code, 1867.[31] Based on the Napoleonic Code, it is the codification of almost all the civil laws on the substantive side.[32] Its enforcement[33] repealed[34] the existing laws of all the overseas provinces. As early as 1880 however, the Portuguese had protected some Hindu usages and customs relating to marriage, adoption and the joint family under the laws of 'Usages and Customs of Gentile Hindus of Goa 1880' and similar laws enacted for Hindus of Daman[35] and Diu.[36] In its application to the local Hindus, the Portuguese laws have been subjected to the provisions of these protective laws. The legal position in this respect remains unchanged till the present day.[37]

MUSLIM LAW

The Indian Muslims are governed by the uncodified Muslim law of inheritance, enjoined in the holy Quran,[38] the teachings of the Prophet, legislative enactments and judicial decisions. The Sunni Muslims[39] follow either the Hanafi or the Shafi law while the Shias adhere to the Ithna Ashari or the Ismaili'i law.[40]

Some centuries ago, Hindu inhabitants of North Malabar were converted en masse to Islam. However, they continued to follow the Marumakkattayam law, especially in matters relating to property among family members. The law administered by the courts to these communities was subject to a body of customs and usages that received judicial recognition.[41]Since the enactment of the Madras Marumakkattayam Act (Act 22 of 1933), if a member of the Mapilla Marumakkattayam family married a person not governed by the Marumakkattayam law, the property of the person governed by the Marumakkattayam law devolved according to that system of law, whereas the property of a person governed by the Islamic law devolved according to the Islamic law of succession. The result was that whereas interests of a Mapilla governed by the Marumakkattayam law devolved by survivorship, his separate property descended by inheritance in accordance with the Islamic law.[42]

The Muslim Personal Law (Shariat) Application Act, 1937[43] expressly directs courts in India to apply the Muslim law of inheritance to all Indian Muslims. This statute had the effect of abrogating all customs relating to personal law and inheritance, which were at variance with the Quranic law.[44]

PARSI LAW

The Parsi immigrants came to India to escape religious persecution by the Arab conquerors of Persia.[45] They adopted the customs of the place where they had first taken shelter.[46]A panchayat, i.e. an assembly of elders, administered decisions in civil and criminal matters while personal matters were governed by decisions of the priests. Due to existence of a parallel system of administration in the Mofussil and Presidency areas, Parsis in the former areas were governed by their customary laws while those in the latter areas were governed by English laws. In complete contrast to the law of the Mofussil Parsis under which women were excluded from inheritance initially and had only a right of maintenance, under the English law, the widow of an intestate had an absolute share to the extent of one-third of his property and the daughter was treated on par with the son. This diverse situation was brought to an end by the Parsi Intestate Succession Act 1865,[47] that framed a uniform scheme for all Indian Parsis and increased the share of a widow and a daughter to a specific absolute ownership rather than a bare claim of maintenance.[48]Thereafter, the said Act was amended and incorporated in ss. 50–60 and Schedule II of the Indian Succession Act, 1925.[49]The Act was amended in 1937[50] and then in 1991[51] effecting major changes in the inheritance laws of Parsis making them more equitable and gender just.

CHRISTIAN LAW

With respect to the Indian Christians, the diversity in inheritance laws is greatly intensified by making domicile a criterion for determining the application of laws.[52]Till January 1986, Christians in the State of Kerala were governed by two different Acts—those domiciled in Cochin were subject to the application of the Cochin Christian Succession Act, 1921 while the Travancore Christians were governed by the Travancore Christian Succession Act, 1916. These

two Acts have now been repealed and the Christians following these laws earlier are now governed by the general scheme of inheritance under the Indian Succession Act, 1925.[53] However, the Travancore Christians following the Marumakka Avakashi system,[54] Roman Catholics who follow Latin rites[55] and the Protestant Christians living in the five taluks, i.e. Karunagapally, Quilon, Chirayinkil, Trivandrum and Neyyattinkara, have their separate customary laws. Similarly, the European Christians, Anglo Indians, Parangi communities of Cochin and the Tamil Christians of Chittur taluk of Cochin are governed by their distinct customary laws.[56] Further, Christians in the State of Goa and the Union Territories of Daman and Diu are governed by the Portuguese Civil Code, 1867[57] while those in Pondicherry adhere to any of the following laws:

(i) Customary Hindu laws[58]

(ii) The Indian Succession Act, 1925[59]

(iii) The French Civil Code, 1804[60]

Indian Christians who are not subject to any of the above customary or statutory laws are governed by the general scheme of inheritance laid down under the Indian Succession Act, 1925.[61]

Christians in Goa, Daman and Diu

Prior to 1961, Goa, Daman and Diu were Portuguese colonies, known as overseas provinces of Portugal to which the Portuguese Civil Code was extended with effect from 1 July, 1870.[62] However, its application in matters of inheritance and succession was confined to non-Hindu communities, largely, Christians. The law relating to succession was amended in 1910,[63] though no major change took place till 1961. In 1961, Goa was liberated and in the following year the Constitution was amended.[64] In 1962 itself, the legislation affecting Goa was passed and that saved the application of the then existing laws to the inhabitants of Goa.[65] Thus, Christians of these areas are still governed by the provisions of the Portuguese Civil Code, 1867.[66]

Before the advent of the French in Pondicherry, its population consisted of Hindus, Muslims and a good number of Christians who were new converts from Hinduism following their distinct laws. The French Civil Code, 1804, was extended to Pondicherry in 1819. However, it was provided that the population of Indian origin whether Hindus, Muslims or Christians, would continue to be governed by the laws and customs of their respective religion[67] with the result that Christians of Pondicherry unlike Christians of the rest of India, did not get a separate succession law and continued to be governed by their original law, i.e., the customary Hindu law. Nevertheless, in matters of marriage and divorce they were subject to the provisions of the French Civil Code, 1804.[68]

The French Civil Code was first applied in Pondicherry to French nationals migrating to India. It provided that Indians[69] could renounce their personal law and embrace French law. Many Indians took advantage of this offer[70] and became ‘Renocants’.[71] Consequently, French law became applicable to them and they were no longer subject to their traditional law in personal matters.

The merger of Pondicherry with India[72]did not affect the legal set-up substantially. The Indian government in conformity with the Treaty of Cession allowed the Renocants and those who became Indian nationals to continue to be governed by their laws. The Indian Succession Act, 1925, was extended to Pondicherry in 1984; yet the instrument of extension excluded the application of this Act to the Renocants. Therefore, Christians in Pondicherry are governed by three different laws—The Indian Succession Act, 1925, the uncodified customary Hindu Law[73] or The French Civil Code, 1804.

JEWS

India also has a small population of about 4500 to 5000 Jews. In matters of inheritance and succession, the Jewish community of India is governed by the general scheme of succession under the Indian Succession Act, 1925.[74]

EFFECT OF MARRIAGE ON THE LAWS OF SUCCESSION

The diversity in matrimonial laws is closely linked to the religion of the parties. Separate marriage laws have been provided for the various religious groups and communities inhabiting India. In addition to these religion specific matrimonial legislations is the Special Marriage Act, 1954[75]that can be availed of by any Indian irrespective of his/her religion. Any Indian who gets married under this Act or gets his/her marriage solemnised under the religion specific law registered under this Act, will, in matters of succession, be governed not by his/her religion based law but by the general scheme of succession laid down under the Indian Succession Act, 1925.[76]This law also applies

to the property of the issue of such marriage. For example, where two Muslims who contract a Nikah under their classical law and get it registered after one year under the Special Marriage Act, 1954, want to separate, the husband cannot pronounce a Talaq on his wife but will have to proceed to the court under the provisions of the Special Marriage Act, 1954 to seek dissolution of the marriage. If any of the parties die, succession to his/her property will be governed by the provisions of the Indian Succession Act, 1925 and not by the classical law of inheritance laid down in the Quran. However, after 1976, this rule is not applicable to two Hindus getting married under the Special Marriage Act, 1954 or registering their marriage solemnised under Hindu law under this Act. They continue to be subject to the application of Hindu law in matters of succession to their property.[77]

RELEVANCE OF SEX OF AN INTESTATE FOR LAWS OF INHERITANCE

The Hindu Succession Act, 1956,[78] and the rules for Hindus governed by the Marumakkattayam and Aliyasantana laws[79] provide different schemes of succession for male and female intestates.[80]

Under the Hindu Succession Act, for female intestates, there is further divergence linked with the source of the property that is the subject matter of inheritance. The property of a female intestate is classified into three categories:1[81]

(i) property inherited from either of her parents in the capacity of their daughter;

(ii) property inherited from her husband or father-in-law in the capacity of a widow or a widowed daughter-in-law; and

(iii) any other property.

The heirs and the order of succession for each of the three categories differ.2[82]

Rules for Hindus governed by the Marumakkattayam and Aliyasantana laws provide for categorisation of the property of a female into two:3[83]

(i) property inherited by her from her husband or her father-in-law; and

(ii) any other property.

Here also the heirs and the order of succession vary for both the properties.

To sum up, the relevant considerations for determining the inheritance law applicable to the property of a deceased are not only his religion but also his sect in the particular religious community, the sex of the intestate, his domicile at the time of his death and also the type of marriage.

GENERAL PRINCIPLES OF INHERITANCE

HINDU LAW

Hindu Succession Act, 1956

The text of Manu4[84] ‘sons take the property to the nearest sapinda, the inheritance next belongs’, is the foundation of the rules of inheritance amongst Hindus.5[85] Prior to the enactment of the Hindu Succession Act, 1956, the ruling canon in determining the order of succession in the Mitakshara system was propinquity while in the Dayabhaga system, it was religious efficacy.6[86] In the matriarchal system it was propinquity. Separate modes of succession were, and still are, provided for male and female intestates. Paramount importance was given to the constitution of the joint Hindu family, a unit headed by the seniormost male member of the family, called ‘Karta’, and comprising all his male descendants, their wives and unmarried daughters. Further, ‘coparcenary’, an institution within a joint family had, as its members, the last holder of the property and his male lineal descendants till four generations including him. Till 1985, coparcenary did not admit females as its members.7[87] For male Hindus, different rules governed succession to their self-acquired property and joint family or coparcenary property, with survivorship being the basic criterion for acquiring an interest in the latter.

Under classical law, the primary heirs of a male intestate were his son, son of a predeceased son and son of a predeceased son of a predeceased son. In case of ancestral property, the rights of the heirs have been effective and equal even during the lifetime of the father. However, in the case of self-acquired property, their rights have

been unequal and subordinate, though effective in the absence of any disposition by the father.8[88] The preferential right to inherit was determined by the family relationship and community of corporeal particles.9[89] In general, agnates were preferred to cognates as a consequence of preference of the male line over the female line based on the ancient standards of propinquity. Contrary to popular myth that females were excluded from inheritance, cognates and females were recognised as heirs right from the time of Yajnavalkya Smriti.10[90] Full-blood relations were preferred to half-blood relations. The rule of representation was recognised save in case of a son, and son of a predeceased son. In case of two or more heirs succeeding jointly, they took the estate as tenants-in-common and not as joint tenants. The doctrine of survivorship was limited to unobstructed heritage or coparcenary property only.

In the case of succession to absolute property (stridhan) of a female, the rules were different and diametrically opposite to the case of a male intestate. Females were preferred to males in the same degree.11[91] However, while males inherited the estate absolutely, females had only a life interest in the inherited property.12[92] Tenancy-in-common was the rule in case of two or more heirs succeeding at the same time. Further, the category of heirs and the order of succession varied with the marital status of a female.13[93]

Though the old law was considerably modified by legislation, yet it was not abrogated totally. The basic framework remains the same. The Hindu Succession Act, 1956 retains the principle of propinquity as the basis of determination of title to succession. Basic rules of separate schemes for male and female intestates, separate rules of devolution in case of coparcenary and self-acquired property, general preference of agnates over cognates,14[94] de-recognition of the principles of representation beyond three degrees for male descendants in case of male intestates15[95] and two degrees for lineal descendants in case of female intestates,16[96] preference to full-blood relations over half-blood relations17[97] and recognition of adoptive relations on par with natural born relations18[98] are some of the principles that have been left untouched. The deviation is in the field of devolution of the undivided interest in Mitakshara coparcenary. The earlier rule of survivorship stands qualified. Till 2005, the presence of any class-I female heir or a class-I male heir claiming through a female, caused devolution of the interest in an undivided coparcenary by intestate succession and not by survivorship. Since the amendment of the Hindu Succession Act in 2005, the doctrine of survivorship has been abolished in case of male coparceners but has been expressly retained in case of female coparceners.19[99]

Disqualification on the grounds of difference in religion again stands qualified so as to exclude from this disqualification, descendents of a convert born before his conversion.20[100] Following the rule of public policy, the murderer of an intestate is disqualified21[101] from inheriting his property if the murder was caused in furtherance of succession. All other disqualifications that were earlier operative22[102] have now been done away with. However, the deletion of Sec. 24 and a conspicuous absence of any further direction has created yet another confusion by the 2005 amendment.

Illegitimate children are conferred recognition for the purpose of inheritance only to the mother's property.23[103]But children born of a void marriage irrespective of its annulment, or a voidable marriage that is annulled by a degree of court can inherit the property of both the parents. Under the old law as interpreted by the Mitakshara and the Dayabhaga, an agnatic relationship extended to 14 degrees. The present Act provides no limitation of degrees or impediments in the way of any agnate. It is a retrograde measure to the extent that the Act overlooks the claim of nearer cognates to succeed in preference to remoter agnates.24[104]

For succession to the property of a female intestate, separate schemes are provided depending upon the source of acquisition of property available for succession. In the absence of children or grandchildren, property inherited by a female from either of her parents in the capacity of their daughter, reverts to her father's heirs25[105] and that inherited from her deceased husband or father-in-law, reverts to her husband's heirs.26[106] It is evident that the old concept of stridhan still lurks in the background. Further, even in her self-acquired property, the entire family and blood relations of her husband, howsoever remote they may be, are preferred to all of her own blood relations except her children or grandchildren.27[107]

Marumakkattayam and Aliyasantana Laws

The primary difference between the Mitakshara system of inheritance and the Marumakkattayam and Aliyasantana laws lies in the former following the patriarchal system and the latter adhering to the matriarchal system i.e., tracing descent from a common ancestress.28[108]

Under this system, a lady and all her children constitute a Tarwad, (an institution of joint family similar to the one followed by the Mitakshara Hindus) in which every member has a right by birth.29[109] The rules of survivorship govern the devolution of property of any member of tarwad. The basis of determination of heirs is propinquity. The

rules for devolution of the separate property of male and female intestates are different.30[110] Similar to the rule applicable generally to Hindus, the source of acquisition of property in case of female intestates is still material though the categorisation has been reduced here from three to two.31[111]

For succession to the separate property of male intestates, the principles are same as under the general law, with one exception, i.e., treatment of remoter agnates and cognates on par.32[112] For female intestates, the mother and her heirs are preferred to the husband and his heirs respectively.33[113]

Hindus in the State of Goa, and Union Territories of Daman and Diu

The Goan Hindus are governed by the Portuguese Civil Code, 1867.34[114] However, some of the basic concepts of Hindu families, like the institution of joint family, its management by the Karta, and maintenance of all its members from the common income so long as they are joint, are given statutory protection.35[115] The Portuguese version of joint family differs materially from the concept of Mitakshara joint family and coparcenary. In this case, we do not come across the doctrine of survivorship save in the case of co-widows, though a provision for partition has been provided.36[116]

As per the general law of marriage, applicable also to Goan Hindus the bridegroom and the bride are supposed to enter into an ante-nuptial contract before their wedding, whereby they agree to bring together all their properties and liabilities, present or future. This contract known as ‘community of assets’ has a bearing on the law of succession also. On the death of one of the spouses, under the system of community of assets, the surviving spouse is entitled in the first instance, to one-half of the total property of the deceased, which is without prejudice to the inheritance rights with respect to the other half available for succession. This other half devolves on the legal heirs.37

The basis for determination of heirs is consanguinity or blood relationship. In general, preference is given to descendants over ascendants who, in turn, are preferred to collaterals. The surviving spouse comes thereafter. His/her secured property rights are evidently the reason for relegation to such inferior placement.38[118]

The distinguishing feature of the law governing Goan Hindus from the law relating to Hindus in the rest of India is the recognition of rights of succession39[119] up to six degrees only for collaterals (ascent and descent) unlike the law for Hindus under the Mitakshara system of inheritance which confers rights of succession on all the blood relatives of the intestates irrespective of their degrees of relations with the intestate. Further, here in general, male and female heirs and agnates and cognates are treated on par. Full-blood relations get double the share of half-blood or uterine blood relations while uterine blood and half-blood relations are again treated on par. Illegitimacy is a disqualification, while difference of religion is not of any consequence. A valid adoption confers the status of a natural born legitimate child on the adoptee.40[120]

Hindus of Daman

The Hindus of Daman, though primarily governed by the Portuguese Civil Code, 1867, are allowed to protect their institution of joint family, joint family property, and the doctrine of survivorship in the restricted sense.41[121] The basis of determination of the title to succession is propinquity. Descendants are given first preference, followed by ascendants and then collaterals.42[122]

A widow, though a primary heir of an intestate, has only a life interest in the property.43[123] All males exclude females in the same degree of relationship.44[124] Agnates are preferred to cognates,45[125] full-blood is preferred to half-blood46[126] and a valid adoption is treated on par with natural birth.47[127] Rules of representation are recognised for lineal male descendants till great grand-children of the brothers and sisters of the deceased.48[128] While difference in religion is immaterial, illegitimacy operates as a disqualification.49[129] The Daman law retains rights of succession in favour of all blood relations of the deceased.

Hindus in the Union Territory of Diu

The Hindus of Diu also follow the institution of joint family, joint family property and survivorship of the undivided interest of a coparcener on his death, though primarily they are subject to the provisions of the Portuguese Civil Code, 1867.50[130] Devolution of separate property differs with the marital status of a deceased. The property of an unmarried Hindu, irrespective of sex, is subject to the provisions of the Portuguese Civil Code, 1867, while the property of a married Hindu, whether male or female, is subject to the Diu Code.51[131]

In general, under the Diu law, daughters are excluded by sons,52[132] agnates are preferred to cognates, full-blood relatives are preferred to those related by half-blood, principle of representation is recognised only for descendants,53[133] succession rights for collaterals are recognised up to only ten degrees,54[134] the widow of the deceased is given only a life estate,55[135] adoption is treated on par with natural birth56[136] and difference of religion does not operate as a disqualification. Illegitimacy, however, operates as a disqualification though the children are deemed to be related to their mother where her marriage was annulled.57[137]

MUSLIM LAW

To determine the fundamental notions of kinship (proximity) underlying the Islamic law of succession, we have to turn to the customary rules of inheritance as were prevalent in Arabia before the revelation.

The ruling canon for determining the title of succession in pre-Islamic Arabia was comradeship-in-arms and consequently blood ties assumed a secondary role. Male agnates were given paramount importance. With the revelation of the holy Quran, the basic principles of comradeship-in-arms were substituted for blood ties. 'There is no bond stronger than the blood tie' became the general principle and the title to the succession was extended to all blood relations in the widest sense. Consequently, near blood relations who were earlier excluded but now included were called the Quranic sharers and in comparison to the already established agnates were awarded half of the shares of the later. The rule, therefore, does not provide that every female relation will take half of the share of her male counterpart but that the newly entitled heir, whether male or female, shall take half of the established heir's share.58[138] Thus if the newly introduced heir is also a male, he stands in no better position than the female counterpart e.g., both the parents, as sharers, take one-sixth share. Similarly, uterine brothers and sisters share equally.59[139]

The interpretations of these Quranic provisions and their incorporation into the already existing system led to a divergence of opinion amongst the Shias and the Sunnis.60[140] The Sunnis retained the old framework, *viz.*, the preference of agnates over cognates, but superimposed the Quranic set-up over the old framework. On the other hand, the Shias blended the old rules with the new. In the light of the newly laid down principles, the resulting scheme of this revision was widely different from the one propounded by the Sunnis.61[141] Both the sects follow the principle of awarding newly entitled heirs half of the share of the already established agnatic heirs and provide a uniform scheme for devolution of property irrespective of the sex or marital status of the intestate, making consanguinity the basis for determination of the title to succession.62[142] Further, both derecognise adoption63[143] and disqualify illegitimate children of male intestates,64[144] non-Muslims,65[145] and the murderer66[146] of an intestate from inheriting the property of the deceased. Under Shia law, barrenness of a widow disqualifies her from inheriting the immovable property of her deceased husband. The principle of representation is not resorted to at all by the Shias while the Sunnis use it for ascertaining the shares of the various heirs.67[147]

Under Shia law, the rule of nearer in degree excluding the more remote is applied strictly while Sunnis do admit some exceptions to it.68[148] The claim of the sharers who have fixed shares is to be satisfied first; the residue of the property then passes on to the residuaries.69[149] In the absence of residuaries, the property reverts to sharers who are entitled to the residue as well. The principle of the property coming back to the sharers is called 'radd'. In presence of any other heir, the surviving spouse is not entitled to the 'radd' and it is only in the absence of the heirs mentioned in all the three categories that the spouse can claim the property.70[150] Under Shia law the doctrine of 'radd' has further exceptions. A mother is not entitled to any 'radd' in the presence of the intestate's father, daughter, two or more full or consanguine brothers or one such brother and two sisters (full or consanguine) or four such sisters. Further, a uterine brother or sister is not entitled to the return in presence of a full-blood sister.71[151]

The Shias do not recognise the category of distant kindred; for them, apart from sharers, the rest of the heirs are residuaries. In case the sum total of the shares which all the sharers are together entitled to succeed to exceeds unity, the shares are proportionately deducted following the doctrine of 'Aul' (increase) and the sharers thus get the reduced shares. The Shias do not recognise the doctrine of 'Aul'. In case the sum total of shares allotted to the sharers exceeds unity, the fraction in excess here is to be deducted from the share of the daughters and sisters (full or consanguine).72[152] Both Sunnis and Shias recognise rights of succession without any limitation on the number of degrees the heir may be removed from the intestate.

PARSI LAW

The Parsi community in India initially had no law of their own.73[153] While preserving their separate identity they had adopted the customs of residents of the area where they had first taken shelter.74[154] These customary laws, mainly

of the Hindu and Muslim communities, underwent various modifications following a series of enactments75[155] passed for Parsis by the British Indian legislature. The present law, though considerably modified and vitally different from the initial customary laws, still indicate the deep influence of Hindu and Muslim laws on the Parsi system of inheritance. Following the principle of Muslim law a Parsi male was allowed to take double of the share of a female standing in the same degree of propinquity till it was amended in 1991 and made equal for all the children.76[156] Like Hindus, Parsis also include affinity and not merely consanguinity as the determining factor for title to succession. Consequently, Parsi law recognises as heirs, widows of descendants, and widows of brothers of the intestate.77[157] A unique feature of Parsi law having no parallel under any other system is the recognition of the widower of a female lineal descendant as also sister's as an heir.78[158] Agnates are preferred to cognates and uterine blood is relegated to an inferior placement.79[159] Illegitimacy and remarriage of a widow prior to the death of the intestate operate as a disqualification and succession rights are recognised till unlimited degrees of relationship.

Adoption is not recognised for the purposes of succession80[160] while the principle of representation is recognised *ad infinitum* for all the heirs.

THE INDIAN SUCCESSION ACT, 1925

The Indian Succession Act, 1925, incorporates the Roman and English principles of inheritance. A uniform scheme is provided irrespective of the sex of the intestate. Consanguinity is the determining factor for title to succession and relations by affinity are excluded from the list of heirs. The Act derecognises adoption81[161] for the purposes of inheritance and difference of religion between the heir and the intestate is of no consequence.

The preference of succession is determined in terms of nearness in relation to the deceased. Accordingly, surviving spouse and lineal descendants are made the primary heirs.82[162] The principles of representation apply without any reservations to lineal descendants and with some restrictions to the brothers and sisters of the deceased and their descendants.83[163] In all other cases the general rule of nearer in degree excluding the more remote applies.84[164]The Act treats agnates and cognates85[165] and male and female heirs equally. All blood relations whether full-blood, half-blood or uterine blood are treated on par.86[166] The only gender discriminatory provision is the exclusion of the mother in presence of the father.87[167] The Act concentrates on securing the rights of the widow of a deceased with special provisions in case of small estates.88[168]

Succession rights in favour of collaterals are recognised only upto six degrees of ascent plus descent, i.e., till the second cousins. Collateral relatives standing in remoter degrees are not entitled to succeed following this limit.89[169]

CHRISTIANS IN THE STATE OF GOA AND UNION TERRITORIES OF DAMAN AND DIU

The uniform law of the State of Goa and the Union Territories of Daman and Diu is the Portuguese Civil Code, 1867.90[170] Based on the Napoleonic Code, it provides for a uniform scheme of succession for all intestates and keeps consanguinity as the basis for determination of title to succession. The rights of inheritance are limited to six degrees, i.e., cousin germane or second cousin. The principle of representation is recognised only for descendants, for others the rule of nearer in blood excluding the more remote applies. Agnates and cognates, male and female heirs have identical rights. Full-blood relations do not exclude half-blood or uterine relations but in their presence, the share of the later is reduced to half of the share of the full-blood relations. The half-blood and uterine blood relations are, however, treated on par vis-a-vis each other.91[171]

The surviving spouse is relegated to a very inferior placement but her rights are to be viewed in light of the ante-nuptial contract which makes her owner of half of the community of assets.92[172] Adoption is treated on par with natural birth while illegitimate children who have been accorded recognition by their parents or with respect to whom a declaration from the court has been obtained,93[173] are entitled to a share equal to two-thirds of the share of a legitimate child.94[174]

LAW RELATING TO RENOCANTS OF PONDICHERRY

The French Civil Code, 1804

The principles of the French Civil Code, 1804 are similar to those of the Portuguese Civil Code, 1867, already discussed above, as the latter is based on the former. A uniform scheme is provided irrespective of the sex of an intestate. The criterion to succeed is blood relationship. Preference is given to descendants over ascendants who in turn are preferred to collaterals. Succession rights of collaterals are recognised till the sixth degree only.95[175] The turn of the spouse to inherit comes only when none of the blood relations is present.96[176] The rule of representation

is allowed only for lineal descendants of an intestate. For others, the rule of nearer in blood excluding the remoter, applies. Illegitimate children whose affiliation to the parents is proved, (either by parental recognition or by a decree of a court given at the suit of the child), have secured inheritance rights and can even exclude the spouse of the deceased.97[177] Their share depends upon the other co-heirs. It is half of the share of the legitimate child in presence of descendants1[178] and is three-fourth of the total property in presence of ascendants or the brothers or sisters of the deceased or their descendants.2[179] Religion of an heir is immaterial. Following the rule of public policy, any heir who has either committed the murder of the intestate or abetted it, will be, alongwith his heirs, disqualified from inheriting the property of the deceased.3[180]

LAWS OF TESTAMENTARY SUCCESSION

INTRODUCTION

India has a variety of laws based on considerations of religion and domicile of the testator, for testamentary succession. However, the number of systems operative in this area is far less in comparison to the laws governing intestate succession. The general law of the land for regulating testamentary succession to the separate property of an Indian is the Indian Succession Act, 1925.4[181]The Act also applies to the undivided interest of a Hindu in a Mitakshara coparcenary and to the member of a Tarvad, Tawazhi, Illom, Kutumba or Kavaru in the property of a Tarvad, Tawazhi, Illom, Kutumba or Kavaru.5[182] It however is inapplicable to:

(i) Muslims;6[183]

(ii) Indians domiciled in the State of Goa and Union Territories of Daman and Diu;7[184]

(iii) renocants of the Union Territory of Pondicherry.8[185]

Muslims are governed by the Quranic law. The procedural rules of the Indian Succession Act, 1925, with some reservations, also apply to Indian Muslims.9[186] The substantive law of the Sunnis and Shia Muslims differs on minor points.10[187] All Indians domiciled in the State of Goa and the Union Territories of Daman and Diu irrespective of their religion are governed by the Portuguese Civil Code, 1867.11[188] The Renocants of Union Territory of Pondicherry are governed by the provisions of the French Civil Code, 1804.12[189]

RULES OF TESTAMENTARY SUCCESSION

Under the Hindu Succession Act, 1956, a person has a power to make a Will or a Testament of the totality of his separate property. The inability of a coparcener to bequeath his undivided share in the coparcenary property and other family corporations governed by the matriarchal system has been removed by the Act. He can now validly make a Will of his undivided interest in the coparcenary property and other family corporations.13[190] As regards Hindus of Goa, Daman and Diu, the system of community of interest applies.14[191] The spouses are prohibited from making a testamentary disposition of their property unless the other spouse gives consent. With respect to the other properties the restrictions vary with different survivors.15[192] Further, individuals who could have easily influenced the mind of a testator are prevented from being the beneficiaries of the legacy.16[193]

The general limit imposed on the testamentary powers of a Muslim is to the extent of one-third of his property. A bequest in excess of one-third requires validation from the heirs whose share is likely to be adversely affected. A slight divergence can be seen under the Sunni and Shia laws with respect to a bequest to an heir.17[194]The Parsis and all Indians who are subject to the application of the Indian Succession Act, 1925 can make a Will of the totality of their property as the Act has not placed any impediments or restrictions on their power to make a Will of their property.18[195]

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1. The term ‘intestate succession’ is used to denote the laws relating to inheritance. The property of a person, on his or her death, in absence of instructions left by him or her with respect to its devolution, devolves in accordance with the law of intestate succession to which the deceased was subject to at the time of his or her death.

2. The term ‘testamentary succession’ refers to devolution of property through a testament or a Will. A Will that is capable of taking effect in law governs succession to the property of a person after his or her death in accordance with the rules laid down in the laws governing testamentary succession to the property of a person to which he or she was subject at the time of his or her death. Diversity prevails in the laws of testamentary succession also, yet it is not as varied as in case of laws of inheritance or intestate succession.

3. The term 'major' refers to the Hindu, the Muslim and the Parsi laws. Besides these, there were, and still are, prevailing, a large number of statutory and customary laws applicable to different communities.

4. The classical Hindu law is part of Dharma while the Muslim law is enjoined in the Holy Quran, the traditions of the rophet, legislative enactments and judicial decisions. The Parsi law in India was based on the principles of the then existing laws of the Hindus and the Muslims.

5. *Abraham v. Abraham*, 9 MIA 105. The Privy Council observed that such of those Indian Christians who were Hindu converts and were still following the Hindu customs and manners would be governed by the ancient Hindu law of succession.

6. Native Christians thus had a right to elect the law, which would apply to them. See Devadasan, *Christian Law in India*, 1974, p. 297.

7. A person is said to be an agnate of another, if the two are related to each other wholly through a chain of male relatives and a cognate if they are related to each other but not wholly through male relatives. Thus, even if a single female relative intervenes in between the heir and the intestate, the relationship is that of a cognate.

8. The Travancore Christian Succession Act, 1916; The Cochin Christian Succession Act, 1921. For the applicability of the Act, see the discussion infra.

9. By the Constitution (Fourteenth Amendment) Act, 1962.

10. Goa, Daman and Diu (Administration) Act, 1962, s. 5(i); and in accordance with the Treaty of Cession entered into between the Indian and the French Government.

11. The term 'Hindu' means and includes 'Hindus, Buddhists, Sikhs and Jains'.

12. See s. section 2 of The Hindu Succession Act, 1956, which provides that the Act is not applicable to any scheduled tribe within the meaning of cl. 25 of Art. 366 of the Constitution, unless the Central Government, by notification in the Official Gazette, directs otherwise.

13. See The Hindu Succession Act, 1956, ss. 8–13 and ss. 15–16. Prior to the enactment of the Hindu Succession Act, 1956, there were two major systems of inheritance besides a number of customary laws, prevailing in India, *viz.*, Mitakshara for the whole of India except Bengal where Dayabhaga law was operative. Apart from the difference in the devolution of property between these two systems, there was a division of sub-schools in Mitakshara, which differed on certain aspects of rules governing the laws of succession. With the objective of codification and bringing about uniformity, along with introducing some basic changes, the Hindu Succession Act was passed in 1956, after stiff resistance from the traditionalists. It was one in a series of enactments purporting to change the personal law of Hindus, promulgated originally by the ancient seers.

14. See The Constitution of India, cl. (25) of Art. 366. It defines 'scheduled tribes' as such tribes or communities as are deemed under Art. 342, to be scheduled tribes for the purposes of the Constitution. Article 342 also authorises the President of India to specify, by notification, the scheduled tribes in various States and Union Territories. Both the President and the Parliament have exercised their powers and presently there exist a large number of constitutionally recognised scheduled tribes in various parts of India. Section 2(2) of the Hindu Succession Act, 1956, applies to all such tribes.

15. *Dasarath v. Guru Bewa*, AIR 1972 Ori 78 [LNIND 1971 ORI 42]; *Gopal Singh v. Giribala*, AIR 1991 Pat 138 ; see also *Ganja Devi v. State of Himachal Pradesh*, 1997(2) HLR 733 (DB) wherein it was held that no writ of mandamus can be issued by the court to apply the Hindu Succession Act, 1956, to the tribal areas of Himachal Pradesh. The Act has been held inapplicable to the Bathudis of Orissa, see *Dasarath v. Gura Bewa*, AIR 1972 Ori 78 [LNIND 1971 ORI 42]; *Kandan v. Jitan*, AIR 1973 Pat 206 . For Borakacharis of Assam, see *Satish Chandra Brahma v. Bagram Brahma*, AIR 1973 Gau 76 . For the Christians of the Union Territory of Pondicherry who adhere to their customary Hindu law, see *Pauline v. Jerome*, 1977 Mad 270 ; *Lousis Marie v. Alexis Sandanaswamy*, 1984 Mad 271 .

16. *Nalinaksha v. Rajani*, (1931) 58 Cal 1392.

17. *Sohan Singh v. Kabla Singh*, 10 Lah 372.

18. *Sugan Chand v. Mangibai*, AIR 1942 Bom 467 .

19. *Sri Raghave Das v. Sarju*, 1946 Mad 413 .

20. *Raja Chattiar Singh v. Roshan Singh*, AIR 1946 Nag 277 .

21. *Labishwer Manjhi v. Ram Manjhi*, 2000 (2) HLR 395(SC); see also *Dhenai Majhi v. Ranga Majhi*, 1999 (2) HLR 402(Pat). For a contrary opinion see *Chukma v. Bhabani*, AIR 1945 Pat 727 .

22. *Surajmani Stella Kujur v. Durga Charan Hansdah*, AIR 2001 SC 938 [LNIND 2001 SC 412], (2001) 3 SCC 13 [LNIND 2001 SC 412].

23. *Shakun Bai v. Siya Bai*, 1999(2) HLR 368 (MP).

24. On the date of commencement of the Hindu Succession Act, 1956, Dadra and Nagar Haveli, Pondicherry, Goa, Daman and Diu were not parts of India and the Act therefore did not apply to them. The enactment annexing them to the Union of India provided that the Central Government may, by notification, extend any enactment in force to these areas. Section 5(1) of the Constitution of India (Twelfth Amendment) Act, 1962, provided that the Portuguese laws in force in Goa, Daman and Diu were protected in their application to the inhabitants of these territories. By virtue of Regulation 6 of 1963, the Hindu Succession Act, 1956 was extended to Pondicherry; however, a specific provision in s. 2A in this Act makes the Act inapplicable to the Renocants of Pondicherry. With respect to the State of Jammu and Kashmir, by virtue of Art. 370 of the Constitution of India, the Union Parliament's power to legislate in this state is limited to matters specified in the Union and the Concurrent Lists only. In 1954, pursuant to the President of India's order, the Concurrent List was excluded from the Seventh Schedule in its application to the State of Jammu and Kashmir and therefore the Parliament has no jurisdiction to apply the Act to the State of Jammu and Kashmir. Their distinct laws thus govern the Hindus of the State of Jammu and Kashmir in matters of succession to their property.

25. Mayne, *Hindu Law and Usage*, 11th edition, (ed. N Chandrashekhar Aiyyar), 1950, pp. 971–94.

26. See e.g., The Malabar Marriage Act 4 of 1896; The Malabar Wills Act, 1896.

27. *N. Venugopala Ravi Varma Rajah v. Union of India*, civil appeal nos. 2436 and 2437 of 1966 decided on 26.02.1969 (SC).

28. The Malabar Marumakkattayam Act 1896, The Madras Marumakkattayam Act, 1932, The Mapilla Marumakkattayam Act, 1939 and The Madras Aliyasantana Act 1949.

29. Cochin Makkathayam Thiyya Act 17 of 1115 (MP), Cochin Marumakkattayam Act 13 of 1095 (MP), Cochin Nair Act 13 of 1095 and Act 29 of 1113 (MP), Cochin Thiyya Act 8 of 1107 (MP), Travancore Nanjinad Vallala Regulation 6 of 1101 (MP), Travancore Nayar Regulation 1 of 1088 (MP) and Regulation II of 1100 (MP) and Travancore Wills Act 6 of 1074 (MP). These statutes made significant changes in the customary law governing family and property relations between members governed by the Marumakkattayam law.

30. The Hindu Succession Act, 1956, ss. 7 and 17.

31. Prior to 1962, the territories of Goa, Daman and Diu were Portuguese colonies commonly known as overseas provinces of Portugal. The Portuguese Civil Code, 1867, which was enforced in Portugal in 1868, was extended to its overseas provinces with effect from 1870. In 1961, Goa was liberated and in the following year, the Constitution of India was amended. In 1962 itself, the legislation affecting Goa namely, the Goa, Daman and Diu (Administration) Act, 1962, was passed. Section 5(1) of this Act provided, 'All laws in force immediately before the appointed date, in Goa, Daman and Diu or any part thereof, shall continue to be in force therein until amended or repealed by a competent legislation or competent authority'.

32. The laws relating to succession, testamentary and intestate are covered under arts. 1735–2166, which included administration of estates and distribution of assets.

33. The Portuguese Civil Code, 1867, art. 8.

34. PMS Usgaocar, 'Family Laws in Goa, Daman and Diu: Are they Uniform', *Family Laws of Goa*, (ed. Sardesai), 1982, pp. 64–71.

35. Usages and Customs of Non-Christian Inhabitants of Daman, 1854.

36. Usages and Customs of Non-Christian Inhabitants of Diu, 1894.

37. T. Mahmood, *Studies in Hindu Law*, 1981, p. 694.

38. Prior to the revelation of the Quran, the general law of the inhabitants of the Arabian peninsula differed from tribe to tribe as each tribe was governed by its own laws based largely on the unwritten customs.

39. Apart from these four schools, two for the Sunni Muslims and two for the Shia Muslims, three more schools are recognised under the Islamic law. Out of these, the Maliki and the Hanbali schools are adhered to by the Sunnis while the Zaidy school is followed by the Shias. India however, does not have followers of these schools.

40. The Sunni and the Shia division in the Muslim community have no legal or theological basis. Both believe in Allah and accept the Quran as the ultimate authority. It is only a historical coincidence that out of the seven schools developed in Muslim law four were by Sunni jurists and three by the Shias.

41. *N. Venugopala Ravi Varma Rajah v. Union of India*, civil appeal nos. 2436 and 2437 of 1966 decided on 26.02.1969 (SC).

42. *Ibid*., para 11.

43. Section 2 provides, 'Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, personal property inherited or obtained under contract or gift or any other provisions of personal law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law'.

44. The situation had arisen as a sizeable population of Indian Muslims included the descendants of Hindu converts, who, even after conversion, from the Hindu faith, continued observing Hindu customs in matters of inheritance, e.g., in Western India, Khojas, Cutchi Memons, Halai Memons, Sunni Bohras and Molesalam Girasias continued following the principles of Hindu customary law. Similarly in Southern India, the Moplas were following the Marumakkattayam law of matriarchal succession. See *Puthiva v. Thavata* *(1956) 1 MLJ 119* [*LNIND 1955 MAD 235*]. See also *Mulla's Principles of Mahomedan Law*, 19th edn., (eds. M. Hidayatullah and A. Hidayatullah), 1990, p. 5.

45. Phiroze K. Irani, 'Personal Law of Parsis in India', *Family Laws in Asia and Africa*, (ed. JND Anderson), 1972, p. 274.

46. The first permanent Parsi settlement in India was at a village called Sanjan (still in existence) in Gujarat around the year 716 AD. This place was then ruled by the Hindu Chief Jadi Rana, who gave the Parsis permission to settle there and reside on four conditions that were:

(a) that the Parsis would adopt the language of the country;

(b)that they would not bear arms;

(c)that their women would dress in Hindu fashion; and

(d) that they would perform their marriage ceremonies after sunset in accordance with Hindu customs.

The Parsis scrupulously observed these conditions.

47. PL Paruck, *The Indian Succession Act*, *1925*, 9th edn., (eds SS Subramani and K. Kannan), Lexisnexis Butterworths, 2002, pp. 107–116.

48. *Mancherji v. Mithibai*, 1 Bom 349; *Erasha v. Jerbai*, 4 Bom 537.

49. These provisions were further amended extensively in order to provide better inheritance rights to the widow, parents, daughters, and widows of the lineal descendants of an intestate. See the Indian Succession (Amendment) Act, Act 18 of 1939.

50. Indian Succession (Amendment) Act, Act 18 of 1939.

51. In 1991, the Act was amended to give absolute gender parity to Parsi women in matters of succession. The shares of the parents and that of the son and daughter were made equal. The Act provided a uniform scheme of succession for Indian Parsis.

52. See the discussion, *supra*.

53. *Mary Roy v. State of Kerala*, *AIR 1986 SC 1011* [*LNIND 1986 SC 44*], *(1986) 2 SCC 209* [*LNIND 1986 SC 44*].

54. The Travancore Christian Succession Act 1916, s. 3.

55. *Abdurahiman v. Joseph*, AIR 1952 TC 176 .

56. *Anthony Swamy v. Chinnaswamy*, (1969) SCC 18, The Vaniya Tamil Christians of Chittur Taluk are governed by the Mitakshara school of Hindu law in regard to inheritance and succession.

57. The Portuguese Civil Code, 1867, art. 5.

58. *Pauline v. Jerome*, 1977 Mad 270 ; *Louis Marie Antoine v. Alexis Sadanasamy*, 1984 Mad 271 .

59. The Indian Succession Act, 1925, ss. 23 and 29.

60. According to the Treaty of Cession, individuals of the Union Territory of Pondicherry were given an option either to follow the Indian laws or to continue to follow the French laws. 'Renocants' are those individuals who opted to be governed by the French laws.

61. The Indian Succession Act, 1925, ss. 23 and 29.

62. Decree of Government of Portugal, dated the 18 Nov., 1867, in pursuance of art. 9, of the Portuguese Civil Code, 1867.

63. Five important legislations were enforced during 1910–1912 which were:

(i)decree dated 22 October, 1910, changing partly the law of succession i.e., arts. 1984–87, 1969; 2000 and 2003–06 of the Portuguese Civil Code, 1867;

(ii)decree dated 3 Nov., 1910 dealing with divorce and separation of persons and properties;

(iii)decree dated 25 Dec., 1910 (Law No. 1) governing marriage;

(iv) decree dated 25 Dec., 1910 (Law No. 2) with respect to the protection of children; and

(v)Code of Civil Registration dated 9 Nov., 1912 relating to matrimony.

64. Constitution (Twelfth Amendment) Act, 1962.

65. *Ibid*., s. 5(1) provided:

All laws in force immediately before the appointed day in Goa, Daman and Diu or in any part thereof, shall continue to be in force therein, until amended or repealed by a competent legislature or other competent authority.

66. After 1961, the applicability of three legislations was extended to these territories:

(i)Births, Deaths and Marriages Registration Act, 1886;

(ii)The Registration of Births and Deaths Act, 1969; and

(iii)The Child Marriage Restraint Act, 1978.

67. This was reiterated by the French Constitution of 1946, as well as by the French Constitution of 1958, which provided that French nationals if they were not subjects to the common law of the country, namely the French personal law as embodied in the Civil Code, would continue to be governed by their own personal law.

68. David Annouswamy, 'Pondicherry: A Babel of Personal Laws', Vol. 14, (1972) JILI, p. 421.

69. Irrespective of their religion.

70. This offer was coupled with the attraction of granting full political rights and preferential appointment to attractive posts in the Metropolitan cadre in the French Army.

71. Renocants are those Indians who have renounced their personal laws and have embraced the application of French law over them.

72. By the Constitution (Fourteenth Amendment) Act made on 16 Aug., 1962.

73. *Louis Marie Antoine v. Alexis Sandanasamy*, 1984 Mad 271 ; *Pauline Luca v. Jerome Pascal*, 1977 Mad 270 .

74. The Indian Succession Act, 1925, ss. 23 and 29.

75. Formerly the Special Marriage Act, 1872.

76. *Ibid*., ss. 15 and 21. If a marriage that is solemnised under a religion based law, is later registered under this Act, it is deemed to be solemnised under this Act, and all the consequences that would have followed as if the marriage was actually solemnised under this Act, will then follow. The parties will be governed by the provisions of this Act in all matrimonial matters and not by the law under which it was actually solemnised. Same is the case with succession laws.

77. *Ibid*., s. 21A.

78. Sections 8–13 and ss. 15–16.

79. Section 17.

80. Till 1991, there was a divergence in the laws of inheritance provided for Indian Parsis on the ground of sex, though it was confined only to close relatives. The Amending Act of 1991, removed the differentiation and now a uniform scheme has been provided irrespective of the sex of the intestate under the Indian Succession Act, 1925.

81 Sections 15(2)(1) and (2).

82 *Ibid*.

83 Section 17.

84 Manu IX, 187; Mayne, *Hindu Law and Usage*, 12th edn., (ed. Kuppuswami), 1986, p. 740.

85 *Adit Narayan v. Mahabir Prasad*, 48 IA 8 : *(1921) 23 Bom LR 692* [*LNIND 1921 BOM 11*].

86 Prior to the passing of the Hindu Succession Act, 1956, the two major systems of inheritance among the Hindus were the Mitakshara and the Dayabhaga. Added to these two, was the completely

different system of matriachate, prevalent among the Hindus in some parts of South India, parts of Himachal Pradesh and parts of North-east India.

87 There are four states which have, after the amendment to the Hindu Succession Act, 1956, introduced unmarried daughters as coparceners in exactly the same manner as the sons. These states are Andhra Pradesh (in 1985), Tamil Nadu (in 1989), Maharashtra and Karnataka (in 1994). Daughters have been introduced as coparceners by the Hindu Succession (Amendment) Act, 2005.

88 Mayne, *Hindu Law and Usage*, 12th edn., (ed. Kuppuswami), 1986, p. 744.

89 *Jadunath v. Bisheswar*, 59 IA 173.

90 The text of Yajnavalkya, which is the foundation of the whole law of inheritance in the Mitakshara jurisdiction provided: 'The wife, and the daughters also, both parents, brothers likewise, and their sons, cognates, a pupil and a fellow student: on failure of the first among these, the next in order is indeed heir to the estate of one, who departed for heaven leaving no putra'. See *Shyam Sunder v. State of Bihar*, *AIR 1981 SC 178* [*LNIND 1980 SC 271*]. The term Putra included the son, son of a predeceased son and son of a predeceased son of a predeceased son.

91 Sons were excluded by daughters and likewise a daughter's son was excluded by a daughter's daughter. See *Amarjit Singh v. Algn*, 5 IA 478; *Bhagwanti v. Ram*, (1944) ALW 491. The Bombay school furnished an exception to the general rule.

92 *Mambhai v. Shankar*, 32 Bom LR 183.

93 Raghavachariar, *Principles and Precedents of Hindu Law*, 7th edn., (ed. Venkataraman), 1980, p. 538. In case of unmarried females, the order of succession is brothers, then mother, then father and so on. See also *Bai Parson v. Bai Somti*, 36 Bom 429; *Munia v. Manohar*, AIR 1941 Oudh 429 .

94 Sections 8 to 13.

95 See the Schedule, Class I heirs.

96 Section 15.

97 Section 18. See also *Purshottam v. Shripad*, AIR 1976 Bom 375 [*LNIND 1976 BOM 23*] which is overruled by *Waman Govind Shindore v. Gopal Baburao*, *AIR 1984 Bom 208* [*LNIND 1983 BOM 165*](FB); *Sarwan Singh v. Dhan Kaur*, AIR 1971 P&H 323 .

98 The Hindu Adoptions and Maintenance Act, 1956, s. 12. See also, SV Gupte, *Hindu Law of Succession*, 2nd edn., 1972, p. 499; *Mulla's Hindu Law*, 18th edn., (ed. SA Desai), Lexisnexis Butterworths, New Delhi, 2001, p. 826.

99 Section 6.

100 Section 26.

101 Section 25.

102 See s. 28. Under the pre-1956 law, the Dayabhaga school also disqualified unchaste widows; insane and congenital idiots; blind, deaf and dumb people; lepers, ascetics and those who had renounced the world. The Mitakshara law disqualified unchaste widows of the intestate and congenital idiots and lunatics. These are no longer the disqualifications under the Hindu Succession Act, 1956.

103 Section 3(j).

104 SV Gupte, *Hindu Law of Succession*, 2nd edn., 1972, p. 505.

105 Section 15(2)(a). See also *Mahadevappa v. Gauramma*, AIR 1973 Mys 142 .

106 Section 15(2)(b). See also *Baiya v. Gopikabai*, *AIR 1978 SC 793* [*LNIND 1978 SC 120*].

107 Section 15(1)(a) to (e). (for a detailed discussion on it see *infra*)

108 Mayne, *Hindu Law and Usage*, 12th edn., (ed. Kuppuswami), 1986, p. 972.

109 *Kalliani Amma v. Govinda Menon*, (1912) ILR 35 Mad 648 ; *Kabakani Kama v. Siva Sankaran*, (1910) 20 MLJ 134 [*LNIND 1909 MAD 207*].

110 Under the earlier two systems, Marumakkattayam and Aliyasantana laws incorporated some different features like provision for two separate schemes depending upon the sex of the intestate;under the Aliyasantana laws a uniform scheme for all intestates was provided. Both the systems now after the passing of the Hindu Succession Act, 1956, follow a uniform pattern.

111 Section section 17, Hindu Succession Act, 1956.

112 Section 17(i), *ibid*.

113 Sections 17(ii)(a) to (e), Hindu Succession Act, 1956.

114 The Portuguese Civil Code 1807, art. 56.

115 Decree of Usage and Customs of the Gentile Hindus of Goa 1880, arts. 16–24.

116 KS Cooper, 'Welcome Address', *Glimpses of Family Laws of Goa*, *Daman and Diu*, (ed. Sardesai), 1982, pp. 16–20.

118 Gopal Apa Kamat, 'Family Laws of Goa, as Compared to Those in the Rest of India', *Glimpses of Family Laws of Goa*, *Daman and Diu*, (ed. Sardesai), 1982, pp. 64–71.

119 *Ibid*.

120 Decree of Usage and Customs of the Gentile Hindus of Goa 1880, art. 15.

121 Code of Usages and Customs of the Non-Christian Inhabitants of Daman 1854, arts. 24–37.

122 *Ibid*., art. 51.

123 *Ibid*., arts. 53–54.

124 *Ibid*., art. 52.

125 *Ibid*., arts. 24–37.

126 *Ibid*., art. 57.

127 *Ibid*., Part II, art. 25.

128 *Ibid*., Part II, art. 55.

129 *Ibid*., arts. 18, 58 and Part II, art. 16. Among Gates, Deres and Burures, the illegitimate and incestuous children succeed to their mothers.

130 Usages and Customs of the Non-Christian Inhabitants of Diu, 1894.

131 *Ibid*., arts. 31–32.

132 *Ibid*., cl. (i).

133.*Ibid*., art. 34.

134 *Ibid*., art. 32(6).

135 *Ibid*., art. 33.

136 *Ibid*., art. 37.

137 *Ibid*., art. 36.

138 M. Tyabji, *Muslim Law*, 4th edn., 1986, p. 826.

139 *Ibid*., p. 828.

140 The Sunni and the Shia division in the Muslim community have no legal or theological basis. Both believe in Allah and recognise the holy Quran as of utmost authority. It is just a historical coincidence that out of the seven schools developed in Muslim law, four were by Sunni jurists and three by Shia jurists.

141 M. Tyabji, *Muslim Law*, 4th edn., 1986, p. 826.

142 However, under Hanafi law, some persons who are not related to the deceased by blood are entitled to inherit the property in default of his natural heirs. Their order of succession is: (i) succession by contract;

(ii) acknowledged kinsman; and

(iii) universal legatee.

143 *Muhammad Allahdad v*. *Muhammad Ismail*, (1888) ILR 10 All 289; *Muhammad Vinar v*. *Muhammad Niaz-ud-din*, (1912) 39 Cal 418*; Mir Zawan v*. *Nur Alam*, (1936) IC 314.

144 *Tagore Law Lectures*, *1873*, p. 123.

145 *KP Chandrashekhar v*. *Govt of Mysore*, AIR 1955 Mys 26 ; *Mitter Sen Singh v*. *Maqbool*

Hasan Khan, (1930) 57 IA 13; *Chedambaram v*. *Ma Myein Me*, (1928) 6 Rang 143. These restrictions

are subject to the Caste Disabilities Removal Act 1850.

146 Under Hanafi law, if death was caused accidentally or intentionally, while under Shia law, only if death was caused intentionally. See Baillie, *Digest of Muhammedan Law*, Part I, 1865, p. 697; Ameer Ali, *Personal Law of the Musalmans*, (Shorter Edition), pp. 67–68.

147 *Mulla's Principles of Mahomedan Law*, 19th edn., (ed. M. Hidayatullah and A. Hidayatullah), Lexisnexis Butterworths, New Delhi, 1990, p. 86.

148 *Ibid*.

149 Among the list of sharers, daughter of a predeceased son of an intestate in presence of an only daughter and likewise the daughter of a predeceased son of a predeceased son in presence of an only daughter of a predeceased son of an intestate in absence of the male counterpart residuaries are entitled to succeed to the property of the intestate.

150 As among the sharers, under the Sunni as well as the Shias, the father, daughter and the sister (whether full or consanguine) in some situations inherit as residuaries. See *Mulla's Principles of Mahomedan Law*, 19th edn., (ed. M. Hidayatullah and A. Hidayatullah), Lexisnexis Butterworths, New Delhi, 1990, pp. 84–85; T Mahmood, *The Muslim Law of India*, 1980, pp.

242–68; Fyzee, *Outlines of Muhammedan Law*, 4th edn., 1974, pp. 384–467.

151 *Md. Arshad v*. *Sajida Bannoo*, (1878) 3 Cal 702; *Bataun v*. *Bilaiti Khanum* (1903) 30 Cal 683; *Mir Isub v*. *Isub*, (1920) 44 Bom 947.

152 The provision is kept for an equitable distribution. See P Diwan, *Muslim Law in Modern India*, 3rd edn., 1985, pp. 209–18.

153 The Parsi immigrants came to settle in India to escape religious persecution by the Arab conquerors of Persia and brought with them Zoroastrianism. The laws of the Medes and the Persians, which governed ancient Persia, have acquired legendary fame. It is not clear whether they brought any of the laws with them to India.

154 Phiroze K. Irani, 'Personal Law of the Parsis in India', *Family laws in Asia and Africa*, (ed. JND Anderson), 1972, p. 274.

155 Parsi Chattels Real Act, 1837; The Parsi Marriage and Divorce Act, 1865; The Parsi Intestate Succession Act, 1865; The Indian Succession Act, 1925; The Indian Succession (Amendment) Act, 1937; and The Indian Succession (Amendment) Act, 1991.

156 Sections 51, 53(a) and 54(b). See the Indian Succession (Amendment) Act, 1991.

157 Sections 52, 54 and Schedule II, Part II, entries 10–12.

158 *Ibid*., Schedule II, Part II, entry 13. Prior to the amendment to the Indian Succession Act in 1925 in the year, 1939, the remarriage of a widower of a lineal descendant did not impeach his rights of succession in the property of his former wife's ascendants. See *Jahangir v*. *Pirozbai* 11 Bom 1. The amendment had the effect of making remarriage of the widower prior to the death of an intestate a disqualification.

159 See Schedule I, Part II.

160 During the British period there was a custom among the Mofussil Parsis of adoption of sons similar to that under the Hindu law, but it was not recognised in the Succession Act of 1865 and therefore a son purported to be the adopted son of a Parsi intestate cannot succeed to his estate. See *Jehangir v*. *Kaikhushru,* 39 Bom 296 (PC); *Kesarji v*. *Kaikhushru*, 31 Bom LR 1081.

161 *Ranbir Karan v*. *Joginder Chandra*, AIR 1940 All 135 ; *Makhun v*. *Ahma*, 12 Rang 184.

162 Section section 33, The Indian Succession Act, 1925.

163 Sections 37, 40 and 44, *ibid*.

164 Section 48, *ibid*.

165 Section 27(a), *ibid*.

166 Section 27(b), *ibid*.

167 Sections 42 and 43, *ibid*.

168 Section 33A, *ibid*.

169 Sections 25, 26 and 28.

170 The Portuguese Civil Code 1807, art. 5.

171 Gopal Apa Kamat, 'Family Laws of Goa, as Compared to Those in the Rest of India', *Glimpses of Family Laws of Goa*, *Daman and Diu*, (ed. Sardesai), 1982, p. 64.

172 *Ibid*., p. 28.

173 Within the prescribed time and on the grounds specified therein in case of the father.

174 Gopal Apa Kamat, 'Family Laws of Goa, as Compared to Those in the Rest of India', *Glimpses of Family Laws of Goa*, *Daman and Diu*, (ed. Sardesai), 1982, p. 28.

175 The French Civil Code, 1804, arts. 748, 750–752.

176 *Ibid*., art. 767.

177 Amos and Walton, *Introduction to French Law*, 2nd edn., (ed. Lawson, Anton and Brown), 1963, p. 95.

178 The French Civil Code, 1804, Article 759.

179 *Ibid*, Article 761.

180 *Ibid*., Article 727.

181 The Indian Succession Act, 1925, s. 58(2).

182 The Hindu Succession Act, 1956, s. 30. Though the preamble to the Hindu Succession Act, 1956 speaks about the law relating to intestate succession among Hindus, Chapter III of the Act, titled 'Testamentary Succession' enacts inter alia, in express and implicit terms, that a male/female Hindu is entitled to dispose of by Will his/her interest in the property of the Mitakshara coparcenary. It also recognises similar powers in case of the property of a Tarwad and other family corporations governed by the Marumakkattayam and Aliyasantana laws.

183 The Indian Succession Act, 1925, s. 58 (1).

184 The Portuguese Civil Code, 1867, art. 5.

185 Renocants and those Christians who still follow the customary Hindu law.

186 The Indian Succession Act, 1925, ss. 217–390.

187 For details see *infra*.

188 The Portuguese Civil Code, 1867 was extended to its overseas provinces with effect from

1870.

189 According to the Treaty of Cession, individuals of the Union Territory of Pondicherry were given an option either to follow Indian laws or to continue to follow the French law. 'Renocants' are those individuals who opted for the application of French law over them.

190 The Hindu Succession Act, 1956, s. 30.

191 The Portuguese Civil Code, 1867, art. 5.

192 *Ibid*., art. 1784.

193 Gopal Apa Kamat, 'Family Laws of Goa, as Compared to Those in the Rest of India', *Glimpses of Family Laws of Goa*, *Daman and Diu*, (ed. Sardesai), 1982, p. 69.

194 *Mulla's Principles of Mahomedan Law*, 19th edn., (ed. M. Hidayatullah and A. Hidayatullah), Delhi, 1990, p. 101–102.

195 The Indian Succession Act, 1925, s. 59.

CHAPTER 1 SOURCES OF HINDU LAW

INTRODUCTION

The Indian civilisation is one of the oldest civilisations in the world and Hindus form a majority in this civilisation. Hindus currently form a population of around 800M, and Hindu law applies to a vast majority of them. Trying to trace the original source of Hindu law has some difficulties as it means going back to a point of time in the past when written material was unavailable and most of the communication was oral. During the early period, there was no distinction between religion, law and morality, and they were cumulatively referred to as 'Dharma'. The 'Shrutis' (primarily the Vedas), the 'Smritis' (the memorised word) and the 'Sadachara' are considered the three sources of Dharma and consequently the sources of Hindu law. Yet, at the same time it is difficult to comprehend that before the Shrutis, society existed without any rules or regulations. However, due to dearth of historical evidence of that period, it is difficult to locate when exactly such rules and regulations came into existence. The description of society in the Vedas, which, if taken as a starting point of the source of Hindu law, reveals not a nomadic society but a considerably advanced society. Therefore, it is imperative that such a civilised society should have had certain laws or well-established norms, and recognised customs necessary for its good governance. From the description of such a society, one can discern that there existed a clear emphasis on the practice of Dharma signifying the privileges, duties and obligations of a man.[1] Hindu Dharma is therefore so ancient that it is difficult to put it into a time frame. Hence, in explaining the sources of Hindu law, when no other evidence is available, Shrutis become a convenient point to start. In order to add a touch of authenticity and unique authority, an element of divinity has been attached to it initially by the original interpreters, preachers and custodians of law, and later by courts and the writers of Hindu law.[2]

Presently, Hindu law as administered by the courts is found in:

(i) Shrutis

(ii) Smritis

(iii) Commentaries and Digests

(iv) Customs

(v) Judicial decisions

(vi) Legislative enactments

SHRUTIS

The term 'Shru' means 'to hear' and refers to the four Vedas with their respective Brahmanas. Originating in the opinion of individual sages, imparted by oral tradition and preserved as well as supplemented by their families and disciples, they all date from the period of transition from Vedic institution and culture to the Brahmanic mode of thought and social order. Each of the Vedas comprises two parts—Samhita and Brahma. The former is primarily a collection of hymns or mantras praising God and the latter a theological explanation of the former. The Brahmanas are ritualistic treatises that enjoin sacrifices and explain their meanings. They give injunctions as to the performance of sacrificial acts and explain their origin. They also specify the occasions on which mantras are to be used; sometimes adding illustrations and reasons and sometimes also including mystical and philosophical speculations.

Mantras literally mean ‘thoughts’ (of primeval saints) centered upon that divine light which illumines the darkest recesses of the human mind. They were either invocations or prayers, or hymns in praise of the Almighty. The Vedas were originally three in number—Rigveda, Yajurveda and Samaveda. At a later point of time a fourth one, Atharvaveda, was added. While Rigveda is rich in sacred mantras, Samaveda and Yajurveda freely borrowed it from Rigveda. Therefore, Rigveda is described as a tree while the other two as its offshoots, though all of them are held in highest veneration.

Yajurveda is divided into two schools, with their textbooks being referred to as Black and White Yaju, the former known as ‘Taittiriya Sanhita’ and the latter ‘Vajasaneya Sanhita’. The ‘Taittiriya Brahmana’ is attached to the former while ‘Satapatha Brahmana’ to the latter. ‘Gopatha Brahmana’ is associated with Atharvaveda.[3]

The Vedas contain no statement of law as such but their statements of facts find occasional reference in the Smritis and commentaries and as conclusive evidence of local usage.[4]

The hymns of the Vedas reflect the social conditions of Hindus as not that of pastoral or nomadic people but as an advanced stage of civilisation. Hindu society during the Vedic age was an aggregation of patriarchal families. Each family was a complete unit in itself with the management vested in the oldest living ascendant, called the master of the household or the ‘Grihapati’. The patriarch was the ruler, legislator, judge, counselor and spiritual guide, all rolled into one. He had absolute authority and all the members of the household blindly followed his behest. He was the absolute master of the family property and exercised supreme control over persons and property of family members. His dominion extended even to the lives and deaths of members. Rules laid down by him for the management of the family estate could not be interfered with and his verdict had no appeal against it. The patriarch administered his own laws and differed the application according to individual circumstances. The patriarch’s word was the law and at the root of his dictates was the promotion of family interests for which individual personal interests could be sacrificed.

The traditions of the patriarchal family of the Vedic age must have formed the basis of family law. With the gradual recognition of an individual as an entity distinct from the family, social necessities outgrowing family wants, and increase in business transactions, there arose a need for defining accurately social relations. A body of rules defining uniform conduct in different social relations and laying down provisions for breach of social agreement alongwith a civil government to protect public interests became necessary. This necessity supplied the legal aphorisms.[5] Thus, with a view to cement the union of different social elements and promote the collective happiness of different social groups and individual members, jurists undertook the mammoth task of creating a body of laws with the ancient and approved customs as the primary guide.[6] These aphorisms were of two types: one based on the Vedas and the other on traditions and customs. They were further subdivided into domestic (grihya)[7] and those relating to law and government called the sutras, *i.e.*, Dharmasutras. The study of the ceremonial and legal aphorism was inseparable for a long time; yet, the distinction was evident as ceremonial aphorism belonged to religion while Dharmasutra comprised civil matters.

Since spiritual interests held more importance for man than temporal interests, the study of Dharmasutra was neglected and the spiritual brotherhood engaged themselves in the cultivation of a ceremonial branch of law. This religious law is guarded with jealous care even now while Dharmasutra is left to the administration.

Gradually, with the firm establishment of a civil government, decay in patriarchal powers and enlargement of civil rights, administration of law and justice was taken out of the hands of the spiritual brotherhoods and entrusted to specific tribunals for enforcing civil obligations that monopolised administration of law with progress of kingly powers. Such an establishment demanded obedience of people and diminished the influence of spiritual brotherhood[8] in areas that affected the life of people with respect to outsiders (public sphere). Priests or the spiritual brotherhood retained supremacy over matters connected with personal lives and religious rites. An important factor of the doctrine of spiritual brotherhood was the conferment of exclusive privileges by them on their group and a denial of the same to the other three castes: Kshatriya Vaishys & Shudra. The Charanas were confined to the priestly castes and laws were made by them. This resulted in unequal treatment of the members of other castes. The section of the community excluded by the Brahmanas from the community of religion found acceptance in Buddhism, Jainism, Sikhism, Virashaivism and later the Bhakti movement etc, which with slight variations preached equality and tried to unite different classes of society with a common bond. This was a result of the oppressive Brahminical hold over the scriptures and the Sanskrit language. In retaliation these reformers preached in the local language of the common people, denounced caste based hierarchies and concepts of purity and pollution laid down under the Smritis, and encouraged promotion of brotherhood and equality of human beings. Instead of elaborate rituals, they insisted on simple and practical ceremonies for matrimonial matters, peaceful co-existence and better status to women and lower caste Hindus.

Marching slowly with these revolutions, kings deprived the spiritual brotherhood of legislative and executive powers with respect to matters relating to civil government and laws of property. Thus, the legal aphorisms, the Dharmasutras, were taken out of their possession while the Vedic ceremonial aphorisms and domestic sacraments i.e., the Dharmashastras were still their sacred heirloom.[9] As already pointed out, with the spiritual brotherhood having no concern whatsoever with the study and preservation of ancient Dharmasutras, the study of these legal maxims has been almost totally neglected and their application in practice completely discontinued.

SMRITIS

The second source of Hindu Law after the Vedas are institutes or manuals known by the collective name of 'Smritis' authored by great medieval authorities on Hindu Law called 'Rishis' or Sages. The Smritikars were neither kings, nor religious heads, nor legislators.[10] They were philosophers, social thinkers and teachers. From spiritual to temporal, the entire code of conduct of life was preached by them in the form of Dharma covering a very wide range of topics including amongst others, behaviour and relations between husband and wife, father and son, and other members of the family towards each other, rules of exogamy and endogamy, punishment for sexual improprieties, rituals of birth, death and marriage, worship and sacrifice, philosophy of Karma and rebirth, social behaviour between men and women of different castes, duties of individuals in their various stages of life, rules of governance, principles of punishment and warfare for kings and officials, civil or financial matters like rules of contracts, property devolution, mortgage and interest rates. Some of these rules were mandatory while others were merely recommended as appropriate conduct. The legal aspects were known as 'vyavahara' while the personal, religious or moral aspects were called 'ahara'. At that time, the art of writing was unknown and knowledge was imparted orally by a teacher to his disciple. Such communication of these precepts in every generation inevitably led to modifications and inclusions of customs or traditions of that age by the disciples into the Smritis.

Smritis are classified into:

I. (a) Dharmasutras or aphorisms of law

(b) Fragments of aphoristic treatises

II. (a) Metrical redactions of Dharmasutras

III. (a) Independent metrical or prose treatise

(b) Fragments of metrical treatises[11]

The exact number of Smritis is not conclusively established as different jurists put their number differently.[12] The most important for the purposes of Hindu law are three—Manu Smriti, Yajnavalkya Smriti and Narada Smriti. Manu, Yajnavalkya and Narada followed each other in point of time.

Manu Smriti

Of the numerous Smritis, the foremost in rank or authority is the Manu Smriti, a view that is subscribed to by the other Smritikars.[13] The fact that it is the most ancient of all the metrical Smritis is evident by a general survey of the work of Manu, Yajnavalkya and Narada which reveals the promulgation of their works in different ages and also that Manu was the oldest member of the triad and Narada the youngest. The Manu Smriti was compiled around 200 BC. There is, however, some mystery regarding the identity of the real author of Manu Smriti.

Manu was accepted as the first expositor of law. This law existed before writing was invented; hence, human memory was its sole repository.[14] It continued to grow while being handed down for centuries from preceptor to disciple in succession. Therefore, it is hard to confirm the original contribution of Manu and his predecessors and determine how much was supplemented by later writers. Hence, under the name of Manu a huge bulk of opinions of different ages have been recorded. Manu Smriti thus was compiled at a later date and was not in the Vedic language. It is a collection of current laws and creeds rather than a systematic digest with theological and metaphysical speculations all mixed up[15] with moral precepts and legal maxims. The extant Code of Manu is divided into twelve chapters. In the eighth chapter are stated rules on eighteen titles of law[16] including both civil and

criminal law. Laws of inheritance, property, contracts, partnership, master and servant are some of the branches of law comprising the Code.[17] The work shows that Manu was a protagonist of Brahminical revival giving Brahmins an eminent position in the society[18] and treating women and Shudras harshly.

One of the most important point to be noted about Manu Smriti is the supreme authority that it vests with the king to uphold and implement the law. With a view to strengthen the power of implementation of law, it specified the duties of the king, implored him to give adequate recognition to customs and usages in deciding the disputes and recommended the use of sanction in case of disobedience of the law by the subjects or in other appropriate cases.

Yajnavalkya Smriti

Next in point of time as also in authority was Yajnavalkya who according to Max Mueller flourished in the period between Buddha and Vikramaditya. His work refers to Buddhist habits and doctrines. Yajnavalkya Smriti, compiled in about the first century after Christ, was, in comparison to Manu Smriti, more concise and systematically arranged and more liberal than Manu especially in the recognition of woman's rights to hold and inherit property and the status of Shudras. His punishments were less severe than those specified by Manu and though he was also in support of Brahminic revival, his work shows an influence of Buddhist teachings. Yajnavalkya did not treat the king as having a divine right to implement the law but implored him to look after the administration of justice with righteousness and modesty. His work dealt elaborately with laws of partnership, mortgages and hypothecation and laid special emphasis on laws of procedure and evidence; an aspect not adequately dealt with in Manu Smriti. It separated legal matters from theological and metaphysical theories and domestic and civil duties, of administration of justice and of the regulation as to purification and penance in three separate books. It was originally written in verse and bore no connection to the aphoristic works of any Vedic school. Several commentaries were written on this Smriti, the predominant among them was Mitakshara. It virtually became the starting point of Hindu law for the Hindus of the areas governed by it.

Narada Smriti

Narada Smriti was compiled around 400–500 AD[19] after the start of the Brahminical reaction to the spreading of Buddhism. Narada was a Nepali sage and gave a Code unhampered by religious and moral preaching. He was more broadminded than both Manu and Yajnavalkya and this fact is evident by the recognition in his work of widow's remarriage, a woman's power to hold and inherit property and father's absolute rights to gift his separate property to his sons. He postulated supremacy of king-made law over that provided for in Smritis. He provided that rules and ordinances issued by kings were superior to even established customs and texts and could override them in cases of conflict. Though based on Manu Smriti, it was much liberal as it was compiled later in point of time. Stating the law in a straightforward manner and logical sequence, the work deals with law of partnership, gifts, inheritance, ownership of property and its hypothecation. A unique feature of this Smriti was laying down of rules with respect to pleadings, evidence of witnesses and procedure.

A comparison of laws of ordeals, the rule of judicial procedures, regulations with respect to gambling and maxims relating to law of property as they are treated by these institutes can show clear and distinctive traces of growth in the work of these sages. In terms of advancement, Narada Smriti shows a greater degree of advancement than Yajnavalkya. Similarly, the law of commerce is fully developed in Yajnavalkya and Narada while Manu's law on this subject was still in a crude stage. Among the commentaries written on Narada Smriti, Narada Bhashya by Ashaya is important.

COMMENTARIES

Although the Vedas are considered to be of paramount importance by jurists, they do not contain positive law. Hence, rules of family and social relations expounded by the commentaries and digests became very important. Gradual development of society gave rise to complex situations and multifaceted problems. This necessitated the need for codification of law for offering authoritative explanation for real or apparent contradictions, the answer to which was also sought in approved legal treatises bearing the name of sages and when a solution was sought for in these authorities, emergence of contradictions amongst these texts was a puzzling phenomenon. All of these medieval legislators were considered independent authorities on disputed points of law. The belief was firm that there could neither be any contradiction between the words of the inspired sages nor could they err. Whatever contradiction appeared on the surface was a result of defective understanding of mortals incapable of discerning

the real meaning or significance of these sacred texts. Thus, the fault lay not with the lawgivers but with the interpreter. Therefore, if they were correctly interpreted there would be no room for contradictions and a consistency would be found on virtually every point. However, as the situation then existed, all these sacred authorities were of equal importance; one could not be preferred over the other and with the contradictions and absence of clear authority for application of a specific provision, adjudication became virtually impossible, throwing the law in a state of anarchy. Though infallibility of the sages held paramount sway as questioning it meant an attempt to sap the foundation of the Hindu religion yet growing consensus favoured a remoulding or even alteration of the old laws. Two options were available at this stage, one to repeal old laws and enact new ones to suit the changing needs of time and society, and the other to retain the old foundation and repair or alter it. Not only did the guardians of Hindu religion protected these sacred authorities with zealous care but public opinion was also vehemently against repealing them. Thus only, the latter option was feasible. At this point of time commentators capable of entering the spirit of law entered the scenario, to explain the most appropriate interpretation of law while explaining these writings of the sages. In this manner, the apparently conflicting or contradictory statements of the lawgivers were reconciled to bring in the desired need for uniformity and clarity. This resulted in the writing of commentaries on the sacred texts or Smritis. The primary purpose was to explain the true meaning incorporated in it for achieving a uniformity and consistency to enable the society to march forward in accordance with the rule of law.

Medhatithi

As no Code that contradicted Manu's was approved, a number of commentaries on Manu Smriti came to be written as expositions of the inner meaning of his rules. The earliest of these commentaries is that of Medhatithi, son of Bhatta Birasvani. He was not only a mere expositor but read between the lines and while giving explanations to Manu's texts in fact advanced opinion conducive to the requirements of his time and wherever necessary, supported his views by resorting to other authorities. The exposition given by him was authoritative and could not be contradicted by other commentators. Though the work flourished around the 10th century, it was recast and rehabilitated at the end of the 12th century by Prince Madanpala of Kashthanagara. Medhatithi was soon followed by Srikara, Dharesvara, Bisvarupa and Vijananeshwara in the 11th century.

Mitakshara

Mitakshara is a commentary on Yajnavalkya Smriti by Vijananeshwara[20] as told to him by his Guru Visvarupa[21] and written in the later half of the eleventh century. It is also called Riju Mitakshara Tika or Riju Sam Mitakshara or Parmitakshara. Vijananeshwara, in the introduction to his commentary, mentions that the Code of Yajnavalkya was explained to him by his Guru Visvarupa in a hard and diffused language and the same has been abridged by him in a simple and concise style.

Mitakshara literally means 'a brief compendium'. The work is not merely confined to a specific commentary but encompasses within itself the quintessence of the Smriti law and its precepts and injunctions, giving it the colour of a digest. Vijananeshwara explains the meaning of recondite passages, supplies omissions and reconciles discrepancies by frequent references to other old expounders of law,[22] thus analysing the Yajnavalkya Smriti in great detail and synthesising the various Smriti texts. He deals with several important topics of law, classifying them with reasonable precision without any antiquarian trifling or wild philosophical discussions. The intrinsic worth of this treatise made it a juridical work inspiring others to write commentaries on it.[23]

By the 11th century, the country was formed into powerful and independent states often with rivalry among them. Distinct customs and usages were sometimes recognised as a superior force to the medieval laws. Thus, the legislators of each state interpreted ancient texts in the light of requirements of that time so that the Code enacted could be enforced by the sovereign authorities. Written and unwritten laws were harmonised in the light of the wants of people and their characteristic unique customs and traditions without altering the foundation. This is how the different schools of law originated and to this day, Hindu law is divided into five sub-schools[24] or branches. The term 'school' is of a later origin and the word 'sampradaya' depicted the region-based variations previously. These five schools are the Mithila, the Benaras, the Dravida, the Maharashtra and the Bengal schools.[25] Mitakshara prevailed in the Mithila, Benaras, Dravida and Maharashtra schools while in Bengal school Jimutavahana propounded the Dayabhaga law. In the four sub-schools governed by the Mitakshara, the primary source of Hindu law and the general principles are common. All these schools acknowledge Mitakshara as the supreme authority but give preference to specific treatises and commentaries controlling passages from Mitakshara resulting in divergences between them. Yajnavalkya promulgated his Code at Mithila. Mithila and Dravida were anterior to Benaras which remained the most important school as Mitakshara was virtually the text book of this school and a source of inspiration for all other schools and writers including Jimutavahana.[26] The doctrine of Vijananeshwara and those of the teachers of the Mithila school were widely prevalent even in Bengal when Jimutavahana undertook to refute

their doctrine[27] and conclusively proved that the principles laid down by the teachers of Benaras and Mithila were not applied in Bengal. He attempted to show the northern interpretations as incorrect and though his reasoning was attacked by the former, he remained firm. While other teachers cited authorities to support their viewpoint, Jimutavahana appealed to reason and therefore his Dayabhaga sustains his reputation as a great jurist unrivalled in his power of reasoning. Therefore, Mitakshara remained the supreme authority in the whole of India except Bengal where Dayabhaga was the law.

In the Benaras school, the primary work is Mitakshara by Vijananeshwar, followed by a commentary on Mitakshara and Madan Parijata known as Subodhini by Visvesvara Bhatta, Madhava Acharya's commentary on Parasara Smriti, Kalpataru by Lakshmidhara, Vivada Tandava by Kamalakara, Keshava Vaijayanti and a commentary on the Mitakshara by Nanda Pandita, Vira Mitrodaya by Mitra Mishra and a commentary on Mitakshara by Lakshmi Devi, known as Balam Bhatta. In the Dravida school, Mitakshara is of supreme authority and is followed by Smriti Chandrika by Devananda Bhatta, a commentary on Parasara Smriti by Madhava Acharya, Saraswati Vilasa attributed to Pratapa Rudra Deva and Vyavahara Nirnaya by Varada Raja. In the Mithila school, again the Mitakshara was of supreme authority and was followed by Vivada Ratnakara by Chandesvara, Vivada Chandra by Misaru Misra or Lakshmi Devi, and Vivada Chintamani by Vachaspati Mishra. Mitakshara was followed by Vyavahara Mayukha by Nilkantha and a commentary on Parasara Smriti by Madhava Acharaya in Maharashtra. In Bengal, Dayabhaga by Jinutavahana was of paramount importance and was followed by Dayatatwa by Raghunandana and Dayakrama Sangraha by Srikrishna Tarkalankara. Among the several commentaries on Dayabhaga, the ones by Srinatha, Achyuta, Raghunandana, Mahesvara, Srikrishna and Rambhadra are important.

The Mitakshara System

The primary source of Hindu law is common to all Hindus and became the subject for subsequent commentators. With multiple commentators interpreting the same source, the difference in the finished works was inevitable. Added to this was the regionwise acceptance of the authority or superiority of a particular work and a comparative rejection of the other. Thus Mitakshara, a commentary on the Yajnavalkya Smriti by Vijananeshwara,[28] became the authority for the whole of India except parts of Punjab[29] and Bengal. In Bengal also, Mitakshara was received as high authority except with respect to those points on which it conflicted with Dayabhaga that is of paramount authority in Bengal. Even Mitakshara was subject to different interpretations leading to its sub-division into several schools. In absence of any major divergence with respect to the fundamental or constitutive principles, it remained in fact a minor sub-division resulting primarily due to disparate interpretations of individual commentators. Even the divergences merely supplemented the principle works and did not abrogate or replace it.

During the British regime, initially, the opinions of Pundits were often sought by the European judges to help them adjudicate on matters of Hindu law. It is doubtful whether the Pundits so consulted had access to all the leading authorities at the relevant time. Moreover, popular regionwise variations were also responsible for an understanding of the sub-divisions. However, these strict sub-divisions were diluted considerably with the widening of knowledge and familiarity of jurists with the Sanskrit language. For example, in some cases[30] the authorities of all the schools were examined to settle questions of Hindu law, which are necessarily common to all the schools. It was positively established that the basic concepts of a Hindu undivided family are same in all the schools.

The Benaras school, also described as the most orthodox school,[31] prevails in practically the whole of northern India including Orissa[32] and the central province[33] but does not cover Punjab where customary law, modifying Mitakshara to a large extent, still prevails. The Maharashtra or the Bombay school also called the most liberal of all schools, covers the entire Western India including the island of Bombay, Gujarat, North Konkan, and Berar.[34] Sparing the island of Bombay, Gujarat and North Konkan, Vyavahara Mayukha's authority on certain points in the event of a conflict between the two is even superior to Mitakshara. However, in Poona, Ahmednagar and Khandesh, the 'Mayukha' in terms of authority is considered parallel to Mitakshara. Consultation of other works[35] including Subodhini and Kaustubha[36] by the High Court of Bombay was not uncommon, but the principle adopted by it was to construe the various works in harmony with each other and not to rake up controversies and conflicts among them to the extent possible. The Mithila School covered the Tirhoot and certain parts of Bihar, while the Dravida school covers the southern parts of India.

Dayabhaga

Written by Jimutavahana in around the latter half of the twelfth century, the Dayabhaga is not a commentary on a specific work but a digest of all the Codes. It was part of a larger work titled 'Dharmaratna' and is a valuable work on the laws of inheritance and succession. Jimutavahana's doctrines of inheritance, succession, and joint family system controvert some basic rules of Mitakshara by Vijananeshwara. Without accepting the set of propositions laid

down by other commentators, he deals with the subject of inheritance and succession as an objective science with a forthright and direct approach. He appeals to reason and logic and not merely to precepts, precedents or postulations. Examining the roots by digging up various standpoints, he plunges into the heart of the subject to come up with doctrines that were close to practicality and rationality.

Mitakshara and Dayabhaga: Difference

Mitakshara and Dayabhaga thus remain the primary schools of law and differ on the following basic aspects:[37]

(i) Under Mitakshara, the basis for the law of inheritance is the principle of propinquity, that is, nearness in blood relationship or consanguinity of blood, which means that one who is nearer in blood relationship succeeds. This is purely a secular principle and means that sons and daughters should inherit equally as they are equally nearer to the deceased parent. It nevertheless admits two exceptions, namely, exclusion of females[38] and preference to agnates over cognates. The law of succession under Dayabhaga is based on the principle of religious efficacy or spiritual benefits and therefore a person who confers more religious benefit on the deceased is preferred to those who confer less spiritual benefit. The conferment of religious benefit is linked to the doctrine of offering of oblations or Pindadan to the deceased. It therefore rejects the preference of agnates to cognates, which distinguishes the other system and arranges the limits of cognates upon principles peculiar to it. The Hindu Succession Act, 1956 has abrogated the difference between the two schools and has provided for a uniform law relating to succession of Hindus.

(ii) With respect to joint family under Mitakshara, the son, grandson and great grandson have a right by birth in the joint family property having an equal interest with the father. Under Dayabhaga, the son or grandson or great grandson has no such right till the father is alive and as he is the master of the property, he can dispose it of at his pleasure.[39] After his death, property, whether ancestral or separate, devolves by inheritance or succession. Consequently, it does not recognise the right of the son to ask for a partition during the lifetime of the father.

(iii) Under Mitakshara law, the coparceners have community of interest and unity of possession, while under the Dayabhaga law coparceners have specified and ascertained shares in the joint family property. The interests do not fluctuate but the coparceners have a unity of possession.

(iv) While under the Mitakshara system the brothers and even collaterals so long as they are joint do not have a right to dispose of their shares, under the Dayabhaga system the brothers or other collaterals hold their shares quasi-severally and while still undivided, have a right to dispose of their shares.

(v) Under the Mitakshara system, the doctrine of survivorship applies and on the death of a coparcener his share is taken by the surviving coparceners[40] but under the Dayabhaga system, in the event of a coparcener dying issueless, his widow has a right to succeed to his share and to enforce a partition on her own account.[41]

Matriarchal System of Inheritance

There are no sacred authorities on the matrilineal system in India and the law is firmly established in the customs and usages of the communities. Matriarchal system is recognised in some parts of Himachal Pradesh, and in some areas of South India particularly in Kerala and Tamil Nadu. On the Malabar coast, not only the Nairs for whom the joint family system has now been abolished, but also around 99% the predominantly Muslim population of the Lakshwadweep Island follows the matrilineal system of Marumakkattayam. Despite conversion to Christian faith, the Khasi, Jaintia and Garo tribes of the North-eastern region continued following the matrilineal inheritance. Plurality of marriage, to begin with, was a common phenomenon called ‘Sambandhanam’ with spouses maintaining separate homes. Exact physiological paternity was often unknown, as the male lineage in the family was not institutionalised as a legal, economic or residential unit. Women were the bearers of family name and property and inheritance passed from the mother to the children who had a permanent and uncon-tested right of residence and sustenance in the family home. Women in these societies were financially and physically secure and their marriage had no adverse effect on their residence, property, name and family. In South India, males and females who descended from a common female ancestor constituted a ‘Tarvad’. Though a male descendant was a member of his mother Tarvad, his children were not, as a person belonged to the Tarvad of his or her mother only. The Tarvad of a female did not change with her marriage and all members of the Tarvad owned property jointly, though the seniormost male member called ‘Karnavan’ managed it. Yet, at the same time, he was not analogous to Karta of the patriarchal families nor was he competent to alienate the properties. The system was considerably modified by the British and later by the Indian Parliament with the help of a series of statutes ending in the Kerala Joint Family (Abolition) Act, 1975. However, this modification was only with respect to the State of Kerala and did not affect the

matrilineal societies outside Kerala.

CUSTOM

The importance of customs as a source of law is unparallelled. Customs are often described as the parent of all laws in a society as all rules can trace their origin or roots in the popular customs or usages, howsoever distinct or complex they are. They have become the primary source inspiring lawmakers to obtain the substantive content of legal principles from the prevalent customs and usages. In fact, customs are so important that a law contrary to popular custom has found little success and unless they are reformative and their compliance strictly insisted upon, they remain in cold storage.

Though the Smritikar's, the commentator's and the digest writer's work was confined primarily to postulating and interpreting the Shrutis, incorporation of customary practices in the resulting texts was unavoidable at each and every stage. Therefore, certain customs did find their way into the commentaries and digests. Even the earlier postulations were not totally divorced from the customs. Sages explained that the four legs of law were the Dharam, Vyavahara, Charitra and Rajya Shasana with their importance in the reverse order. For *e.g.*, laws made by a king could overrule the Charitra and so on.

Customs must have come into being due to their sheer utility. In the early stages of development of Hindu law, customs were accepted as an embodiment of principles and rules prescribed by sacred traditions. Many of them incorporated the rules of nature while some had religious sanction. Under Hindu law, old customs have *proprio vigore*, the efficacy of law. The expressions used by Smritikars to denote customs were 'achara', 'sadachara', and 'shishtachara'. It primarily meant practices of good people incorporating the principles of reasonableness. Shishtachara also includes the principles of morality signifying the connection between custom, morality and public policy. Gautam states at the outset of his work, 'the Veda is the source of the sacred law and the traditions and practices of those who know the Veda'.[42] Customs of countries, castes and families which are not opposed to sacred records, have authority. The Smritikars therefore do refer to origin, and the binding nature of the customs in their works.[43]

Manu said that it was the duty of a king to decide all cases which fell under the eighteen titles of Vyavahara or civil law according to the principles drawn from local usages and from the institutes of the sacred law.[44] Yajnavalkya laid emphasis that 'one should not practise that which though ordained by the Smritis is condemned by the people'.[45] Whatever the custom, law and usage, those should be observed and followed by the monarchs and the people. Narada said that custom decides everything and overrules the sacred law.[46] Asahaya commenting upon the text of Narada wrote: 'Immemorial usage of every country (or province) handed down from generation to generation can never be overruled on the strength of Shastras'.[47] Medhatithi, opined that customs and usages of the people supplied the nucleus as it is found in the Smritis. Brihaspati said that suppression of customs would give rise to resentment.[48] The importance of customs has been recognised by the judiciary as it has the potentiality of migrating with the families adhering to a particular established custom.[49]

The Privy Council observed:[50]

> The commentators do not enact, they explain and are evidence of the congeries of the custom, which forms the law.

> The duty of a European Judge who is under an obligation to administer Hindu law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage. For under the Hindu system of law clear proof of usage will outweigh the written text of the law.

Essential Attributes of Custom

Custom must be ancient,[51] reasonable,[52] certain,[53] uniform,[54] obligatory and observed continuously[55] without interruption and should not be immoral[56] or opposed to public policy[57] or written rule of law or a statute[58] unless and until it is expressly saved by the statute[59] and should be construed strictly.[60] The Privy Council observed:[61]

> It is of the essence of the special usage modifying ordinary law that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence and that they possess the condition of antiquity and certainty on which alone their title to recognition depends.

Customs can be of various kinds, *viz.* local or territorial, family customs or customs of castes, tribes or classes.[62] Though a compilation of customs in India is a near impossibility, due to the co-existence of innumerable and varied customs, in Punjab and United Provinces, under the authority of the settlement officer, records of village and tribal customs have been compiled.[63]

A family custom followed for a long time is binding on the family,[64] and in case of an established family custom, a general custom cannot be set up.[65] A custom cannot come into existence by agreement between some persons to adopt certain practices.[66]

RULES OF EQUITY, JUSTICE AND GOOD CONSCIENCE

The spirit of equity underlies many legal fictions.[67] As no law including the traditional law can be exhaustive, and the driving force behind laying down of the law and its application is to maintain peace and good order in the society without doing injustice, the principles of equity, justice and good conscience were bound to find their way in the process of implementation of justice. 'Dharma' itself includes 'Nyaya' or 'Yukti' a judicial connotation of the principles of equity. Narada favoured an appeal to Yukti.[68] Jamini in his Mimansa laid down the principle of Atidesha *i.e.*, principles of analogy.[69] Yajnavalkya enjoins that Nyaya (natural equity and reason) should prevail in case of conflicting rules of law.[70] Brihaspati cautioned that there might be failure of justice due to mechanical application of written laws if no reason or approved usage was kept in mind.[71] Thus the conflict between law and justice was harmonised by Smritikars by incorporating the importance of right reason, good sense and equable justice.

The courts in India during British regime applied the rules of equity, justice and good conscience under the express charters of the British Parliament,[72] in cases where no concrete rule of law existed. Gradual development of society and comparatively new situations gave rise to complex and unforeseen problems. With no readymade concrete judicial material or even customs affording a guideline for their solutions the courts in these situations derived principles from reason, equity, parallel situations, and in absence of a text or theory to the contrary,[73] applied them to the problem before them to further the ends of justice. For example, disqualification imposed on a murderer to succeed to the property of the murdered (intestate)[74] was based on the English principle of public policy and recognition of the succession rights of an adopted son[75] was based on the general principles of equity and good conscience and analogy of texts. The Privy Council drew analogy from the laws of gifts and applied them to a case of Wills.[76] The Supreme Court has also recognised the principles of equity, justice and good conscience as a source of law.[77] It observed:

> It is now well settled that in absence of any rule of Hindu law, the courts have the authority to decide cases on the principles of equity justice and good conscience unless in doing so decision would be repugnant to or inconsistent with any doctrine or theory of Hindu law.

JUDICIAL PRECEDENTS

With the establishment of the courts and the introduction of the formal adversary litigative system in India during the British regime, initially the courts applied the Smriti law as found in the commentaries to a specific case before them. During the application, not only the well-established interpretations but also their own understanding and interpretations were included in the judgments. Thus the final judgment that was binding on the parties comprised the interpretations of the texts by the judges and its specific application to the facts of the case and if a similar case came before the court the earlier interpretation and application was applied to the later also. In this way, the decision of one case was binding not only on the specific litigants but also indirectly to the entire community. Thus,

judicial authority by way of precedents came to be recognised simultaneously with the authority of the texts. There was however a marked difference in the acceptance of these authorities in comparison to the reverence with which the texts were treated; more so in cases where judicial decisions had the effect of upsetting the established practices or customs. Usually rigid and binding, they were rarely revised in view of vehement public opposition.[78] With several superior courts in different parts of undivided India and the number of cases involving personal laws growing at an alarming speed, case law also grew manifold and now several points were 'settled' in the courts. Preserved in law reports, their easy availability and binding authority resulted in according them a distinguished importance as a source of law so much so that they often superseded in terms of importance to even the written texts. Another factor contributing to the superiority of judicial texts over the ancient texts was the time specific application of the ancient texts, the viability and suitability of the textual precepts to the ancient society as opposed to their unsuitability to the then prevalent conditions. Therefore, the same texts suitable for application in the past might not have been useful in comparison to the present society by the courts. Thus, even modified interpretations by the courts were tolerated and accepted as it applied to the 'modern and somewhat changed society' or on the ground that it was 'in tune with the changing times'. Bose J. has observed:[79]

> The laws we are administering are judge made laws. The ancient sages said nothing about the present matter and even where they often spoke with conflicting voices and when they did, it sometimes spoke so enigmatically that the learned and able commentators were unable to agree as to what they meant. In the circumstances, it is the courts, which have moulded the Hindu law and made what it is.

By far the most important and unique feature of judicial precedent is its easy availability and accessibility to all persons interested to gather information about a specific question of law. Conserved in legal reports, they form part of important legal literature and are no longer the sacred heirlooms of a particular community. In relation to the importance of judicial precedents the Supreme Court observed:[80]

> Fundamentals do not any more require a study of streak texts, digests and commentaries because judicial decisions rendered over the last century and more have given a legalistic form to what was in a large measure a mingling of religious and moral edicts with rules of positive law. Hindu law today, apart from the piecemeal codification of some of its branches like the laws of marriage, succession, minority, guardianship, adoption and maintenance is judge-made law, though that does not detract from the juristic weight of Smritis like the Yajnavalkya Smriti nor from the profundity of Vijananeshwara's commentary on it, the critique bearing the humble title of 'Mitakshara'.

Authoritative precedents therefore are an important source of law calling for unquestioned obedience and binding authority on the subordinate courts of their jurisdiction. The decisions and the ratio laid down by the Privy Council and now the Supreme Court are binding on all courts in India. The decisions of High Courts have only a persuasive authority on the parallel High Courts but are binding on the subordinate courts within their jurisdiction.

LEGISLATIONS

Legislation is a concrete, easily accessible, ascertainable and authoritative source of law whose importance is now unparalleled. During the British period, as different parts of India were subject to diverse rules and practices, the British Government was initially hesitant to legislate on the personal matters of Indians. The earliest legislations therefore backed by a cautious approach were either reformative or were with a view to supersede the established rules of Hindu Law. Nevertheless, legislation became a specific, easily ascertainable modern source of law. Some of the important legislations passed by the British Indian Parliament in the area of succession laws or having a bearing on the succession laws are hereafter discussed.

The Caste Disabilities Removal Act, 1850

Also known as the Freedom of Religion Act, this statute was a part of the Bengal Code of 1932. Section 9 of the Regulation VII of the Code was passed to negate the adverse effect on the inheritance rights of a convert. Under the strict rules of inheritance applicable under the Hindu and Muslim law, a difference of religion as between the intestate and his heirs operated as a disqualification for the heirs to succeed to his property. The general rule is that from a Hindu, only a Hindu can inherit and from a Muslim, only a Muslim. Thus if a Hindu converted or was even ex-communicated, he forfeited his rights of inheritance from his Hindu relatives and was expelled from the joint family. Same was the situation on his expulsion from a caste or community. Thus, whether it was a voluntary act of renunciation of religion or an involuntary act of excommunication or expulsion from a caste or community,

impediments in the nature of forfeiture of property rights were inevitable.[81]In order primarily to protect the rights of the convert or the one who has been excommunicated, the Caste Disabilities Removal Act was passed and promulgated in the whole of India in 1850. The effect of the Act was that if a person due to a renunciation or conversion ceased to adhere to a particular religion or was excommunicated or expelled from his community, neither the difference of religion with that of his former relatives nor the fact of his excommunication or expulsion could have any adverse effect on his property rights. He could continue to be the member of his former family despite his conversion and could inherit the property of his deceased relatives. However, the Act protected only the rights of a convert or a person who had been expelled from a caste or community but did not alter the fundamental rule of inheritance,*i.e.*, the intestate and the heir should be of the same religion under the Hindu and Muslim law. Thus, though a convert's rights were protected and he could inherit from his Hindu relatives, his descendants and other Hindu relatives could not enjoy the same protection.[82] For example, if a Hindu man *H*, having a wife *W*, and a son *S* converted to Muslim faith and died, his Hindu wife *W* and son *S* could not inherit from him as they were Hindus on the date of the opening of the succession *i.e.*, on the date of the death of *H*, and he at the time of his death was a Muslim and in accordance with the principles of Muslim law, a non-Muslim cannot inherit the property of a Muslim intestate. However, if *W* died before *H*, then *H* would inherit from her as his inheritance rights were protected under the Act and the fact that he was not a Hindu would be immaterial.

Section 1 of the Act provided:

> So much of any law or usage now in force within India as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of, any religion or being deprived of his caste shall cease to be enforced as law in any court.

The Hindu Widows' Remarriage Act, 1856

The Hindu Widows' Remarriage Act, 1856 passed in response to the call of social reformers and 'intended to legalise the remarriage of widows' has now been repealed by the Hindu Widows' Remarriage (Repeal) Act, 1983 (Act 24 of 1983). The primary purpose of the Act was to enable a Hindu widow to remarry validly and consequently her issue from this second or subsequent marriage was legitimate. Her remarriage had no adverse effect on her absolute property that was settled on her either in lieu of maintenance or otherwise. However, upon her remarriage, she was deemed dead for her former husband's family and all her rights and interests in his property ended and passed on to the reversioners as if she was dead.

The Indian Succession Act, 1865

The Indian Succession Act, 1865 was passed with a view to unify and simplify the multiplicity of laws prevalent in India governing different communities. It incorporated the Roman and English principles of inheritance laws and laid down a simple uniform scheme providing for succession to the property of an intestate. It did not differentiate between separate and ancestral property, nor did it accord any preferential rights to the son. Granting an absolute right in the properties to the women, it preferred them to male collaterals and treated a son and daughter totally on par with each other. The major communities in India rejected this Act and therefore its application was confined only to some Christians and the Jews. Later its application was also extended to Indians who married under the Special Marriage Act, 1872, and to the issue of such marriage.

The Parsi Intestate Succession Act, 1865

Different laws governed Parsis living in the Presidency towns and the Mofussil areas. For those living in the Presidency areas, English laws were applied in matters of inheritance, which they resisted. Mofussil Parsis were meanwhile governed by their customary laws. The Parsi Intestate Succession Act, 1865 was passed to unify and modify the law relating to Parsis in India.

The Hindu Wills Act, 1870

During colonial times, it was only the Muslim community, which had a well-developed law of testamentary succession. Hindus did not have any law relating to Wills. Under the Mitakshara law, a coparcener was prohibited from making a Will of his undivided interest in the coparcenary property. With respect to his separate property, he had absolute power of disposal so long as he was alive but he was not empowered to control the distribution of the property after his death by making a Will. The Hindu Wills Act was passed in 1870, to enable Hindus to make a

testamentary disposition of their property. The Act was later consolidated in the Indian Succession Act in 1925.

The Special Marriage Act, 1872

Personal laws had a limited scope for inter-religious marriages and the validity of such marriages was often questioned. Further, under Hindu law there were additional prohibitions because of gotra and castes, and even sub-castes. This Act was passed to set at rest questions relating to validity of inter-religious, inter-caste or intra-caste marriages. One of the important aspects of this Act was that it enabled all Indians to marry under this Act irrespective of differences in gotra, caste, domicile, and sect in a community or religion. Barring prohibitions owing to consanguinity and affinity,[83] all other considerations were made irrelevant by removal of customary restrictions. The shift from religious to secular aspects in marriages was evident as it provided a simple form of marriage in court in presence of a Registrar and witnesses. Though the Act provided that a marriage could be performed in any form yet it was not complete till the parties made a declaration in accordance with the Act in presence of these persons. A marriage solemnised under this Act took away the right of a Hindu to adopt a son[84] and if he was a member of a joint family at the time of his marriage the marriage under the Act had the effect of his automatic severance from the joint family.[85] One of the important provisions under the Act was that it enabled two people to marry if they were professing either Hinduism, or Buddhism, or Sikhism, or Jainism[86]or when neither of them professed the Hindu, Buddhist, Sikh, Jain, Muslim, Christian or Parsi religion. Thus if two persons belonging to either the Hindu, Buddhist, Sikh or Jain religion, wanted to marry each other under this Act, they could do so while retaining their religion. But if a Hindu, Buddhist, Sikh or Jain wanted to marry a Muslim, Christian, Jew or Parsi he could not do so under the Act as such a marriage was a nullity.[87]Therefore, except in cases where a marriage was solemnised between two persons both of whom professed either the Hindu, Buddhist, Sikh or Jain religion, all others wanting to avail the provisions of this Act and get married under it had to make a declaration that they did not profess any of the following religions—Hinduism, Buddhism, Sikhism, Jainism, Islam, Christianity, Jew or Parsi religion. Matrimonial remedies and the rules of procedure other than those provided in this Act were subject to the provisions of the Indian Divorce Act, 1869[88] and succession to the property of a person married under this Act and to the property of the issue of such marriage[89] was governed by the Indian Succession Act, 1865.[90]This Act was repealed by the Special Marriage Act, 1954.

The Hindu Disposition of Property Act, 1916

Under the classical law Hindus were permitted to transfer the property by a gift or by a Will provided the beneficiary was in existence on the date of the making of the gift or the settlement. A gift to a person not in existence on the date of such a transfer was earlier void. The Act[91] enabled a Hindu to make a disposition of property in favour of persons not in existence on the date of making the settlement. A Hindu could now make a gift or settlement in favour of a person subject to the creation of a prior interest in favour of a living person on whose death the entire property was to go to such unborn person provided he comes into existence on the date of the death of such intermediary. This Act was specifically extended to the Khoja community.

The Hindu Inheritance (Removal of Disabilities) Act, 1928

Under Hindu law, there were several impediments in the way of a person inheriting the property of another. Some of them were related to physical and mental disabilities while others were linked to morality, rules of public policy, and even religion. Accordingly, persons incapable of managing or dealing with their property; the blind,92[92] deaf93[93] and dumb,1[94] idiot or insane,2[95] an unchaste widow,3[96] the murderer4[97] of the intestate, a person suffering from absolute lameness or loss of limbs,5[98] an outcaste6[99] or a person converted to another faith7[100]or those incapable to perform sacrifice and religious ceremonies were disqualified from inheritance. Under the Act, except for a person who was by birth a lunatic or an idiot, no one else could be excluded from inheritance under the broad category of ‘Disease and deformity.’ Thus, only the mentally challenged and not the visibly impaired or physical handicapped, suffered from incapability to inherit. It however did not affect the rule of disqualification imposed on an unchaste widow or a murderer or the one in respect of any religious office or service or management of a religious institution or a charitable trust. The Act was not retrospective and did not apply to those governed by the Dayabhaga law.8[101]

HINDU LAW AS ADMINISTERED BY BRITISH JUDGES IN THE COLONIAL ERA

When the British started active intervention in the Indian judicial system the focus initially was on issues that formed part of the public sphere of a native, *i.e.*, dealings purely commercial or criminal and adjudication on personal matters like marriage, inheritance and property rights came later. To begin with, confronted with a mass of totally unfamiliar and vast body of rules or laws, they relied on 'Pundits' (Brahmin priests) to adjudicate upon and decide these disputes between Hindus. This happened only when the dispute went beyond the 'Traditional Panchayat', which was treated with high respect and veneration. The Panchayat's decisions were binding on parties as they were backed by a community force. However, these Panchayats were soon replaced by formal courts or adalats, with a shift from the conciliatory or settlement approach to the adversary form of litigative approach. Technical and formal procedures established on the lines of British courts presided by an unfamiliar judge and an unfamiliar legal language further compounded the confusion.

With respect to substantive law, to start with, Pundits were consulted by the courts and asked to supply them the Shastric Hindu law. However, the Pundits failed to meet their expectations for the following reasons:

(i) All Pundits (though they were highly respected in their own sphere and community) were not of equal calibre and therefore their level of knowledge was uneven; this led to the emergence of different conclusions with respect to similar problems.

(ii) It is not clear whether they had access to all the texts available on Hindu law at the relevant point of time.

(iii) The law varied locally as different communities followed different sets of rules. Shastric law did not apply evenly to all Hindus. It was not a Code that uniformly applied to all Hindu communities in India.

Abolishing the practice of consulting Pundits, the British judges tried to apply the law themselves. What helped them was the fact that by this time, many texts were available in English and they became an easy and authentic source of Hindu law. Although not all texts were translated or could be translated at that time, yet this extensive research primarily by the Europeans, of the sacred authorities, was of great assistance to the Indian courts. While adjudicating upon issues of Hindu law, courts relied on the translations of these sacred texts and very few modifications in the shape of legislations passed by the British Indian Parliament. As the translations were few it was erroneous to assume that Hindu law was contained only in these translations. Thus, untranslated texts that were important reference material in case of gaps or contradictions were neglected and eventually totally ignored. The law was thus confined to these translated texts and made static. From the date of availability of the translated text, to the date of its application, the scope for any new development was not comprehensible. Hindu law never was and still cannot be bound by books alone. Litigants started bringing up arguments based on existence of customs at variance with the translated texts. The judiciary had its own limitation to remould the law and keep it abreast with the needs and requirements of the people. This law that was never static and had always responded positively to progress with time right from the time of Manu Smriti, now became rigid. Further, at the time of its application during the later colonial era, Hindu law as applied by the British deviated from even the Shastric law due to the following reasons:

(i) Hindu law that was not confined to a few texts was reduced to a few translated texts as were available at that time.

(ii) Sanskrit texts when translated into English language often could not convey the same meaning or connotation of a specific term resulting often in distortion of the term. This was often compounded by the fact that English judges unfamiliar with the original language were called upon to implement a system that necessitated the understanding of not only the theoretical and practical aspects of the concepts of law but also a familiarity with the lives of people whom they were dealing with, their customs, usages and culture.

(iii) The importance of custom as influencing the law was ignored as despite their pronouncements that under Hindu law the 'proof of a clear custom or usage would outweigh the written law', proving a custom was made very difficult with the result that the law became very static and often divorced from the lives of the people. In translated texts, judges, in the course of interpreting them, often found gaps that necessitated them to fill these gaps with their own ideas of justice.

(iv) There was a clear dividing line between the public and private sphere of a Hindu, that was not always understood in the real perspective by the judges, and they sought to mix the two. The Privy Council had expressed its concern over the inability of some of the judges to distinguish clearly secular and religious matters and their tendency to impose their own precepts that were at variance with the spirit of Hindu law. This whole exercise led to the mixing of the Shastric law translated into English language with the rules of justice in line with the common law principles resulting in an 'Anglo Hindu law'.

(v) By far the most important point was the attempt by the British judges to apply this law over the widely diverse communities including those that were formed as a result of the revolt against the Brahminical superiority and Sanskrit orthodoxy right from the days of Buddha and Mahavir. The reversal of this structure by the colonial regime led to the application of the same Smriti law over these communities, which these communities in protest had rejected and renounced long back and caused considerable hardships and confusion. It was an erroneous assumption on the part of the colonial regime that this highly diverse society in all personal matters is governed by one text or the other or a few texts. There was no uniformity and as proof of custom became very difficult, imposition of this Shastric law mixed with English concepts over all natives other than Christians, Muslims, Parsis and Jews called 'Hindus'by the native judges was not only wholly inappropriate but also added to the already compounding confusion. This Brahminical law therefore extended even to those communities, which could hardly be called Hindus, and their contesting rights were decided according to the Smriti rule. As no definition of the term 'Hindu' existed, this was the origin of a negative definition of the term 'Hindu', *i.e.* a person who was not a Christian, Muslim, Paris or Jew was a Hindu and therefore subject to the application of this law.

MODERN LEGISLATIONS

The need for clarity and codification of Hindu law thus became a necessity and emerged as one of the demands gaining momentum during India's independence struggle. The crux of the demand was not to impose the Shastric law, but reform, clarify and codify the law, bringing it in tune with the progress of the Hindu society. Therefore, in 1944 under the chairmanship of Sir Benegal Narsing Rau, the Hindu Law Committee was appointed to evolve a uniform Code of Hindu law by blending the most progressive rules of law available in different schools and bringing all Hindus subject to the application of this Code. The draft Code was prepared and in 1948, it went to the Parliament containing recommendations from the committee but was strongly opposed by the arch conservatives. The reasons for such opposition from the Parliamentarians ranged from their unpreparedness and unwillingness to give up the special customs of their community to a belief of these man-made laws as an attack on the 'sacred law', and even an exercise in futility, an impossible task to put together in black and white in the form of legislation the vast and complex laws governing the Hindu society. The Committee itself recommended its gradual codification starting from marriage and inheritance. These rough times continued with the debate going on it for over four years. Prime Minister Jawaharlal Nehru decided to drop the controversy ridden property angles and focus on other aspects of family law and the first law minister of independent India, Dr. Babasaheb Ambedkar, resigned in protest.

The Code could not be passed in the original shape and was split in parts. These fragmented legislations saw the light of the day only in 1955–1956. The first to be enacted was the Hindu Marriage Act in May 1955, followed by the Hindu Succession Act in June 1956. Then came the Hindu Minority and Guardianship Act in August 1956 and the last of this quadrate was the Hindu Adoptions and Maintenance Act in December 1956.

The Code had kept its promise of modernising the law applicable to Hindus while retaining the fundamental framework in virtually all areas of family law, that is amply reflected in the Acts that were passed *e.g.*, in the area of matrimonial laws by introduction of the concept of divorce and monogamy; in the area of inheritance, granting of absolute rights in property to women and abolishing limited ownership, granting inheritance rights to women but retaining the concept of Mitakshara coparcenary; in the area of adoption, it validated the adoption of daughters and orphans and also enabled a woman to adopt a child in her own right but retained the right of a man to take a child in adoption amongst married couples; and in the area of guardianship it recognised the mother as a guardian to her minor child after the father or when he was disqualified.

These Acts have consistently been amended to keep pace with the growth of society and the needs of people for whose betterment they have been enacted.

PROBLEMS FACED IN DEFINING THE TERM 'HINDU'

Hindu society is sharply divided along caste lines that are highly accentuated in family matters. According to Derrett:9[102]

> The Hindus are as diverse in race, psychology, habitat, employment, and way of life as any collection of human beings that might be gathered from the ends of earth.

These multiple and diverse castes, sub-castes and communities were brought together under one broad umbrella of 'Hindus'. Thus the Code sought to bring in the desired uniformity by including Hindus, Buddhists, Jains and Sikhs under the term 'Hindu', laying down a uniform law for all of them yet permitting them to retain the performance of their distinct customary rites and ceremonies in solemnisation of marriages. Yet, no exact definition of the term 'Hindu' existed. It was explained with reference to communities, parentage and a negative religious application. In fact, the term 'Hindu' has defied all efforts of an appropriate or acceptable definition by jurists, judiciary and the legislature. The Supreme Court in 1966 attempted to explain it as: 10[103]

acceptance of the Vedas with reverence, recognition and realisation of the truth that the number of Gods to be worshipped is large, is the distinguishing features of Hindu religion.

HINDUS UNDER CODIFIED LAW

Under the Code and presently under the split Acts, a person professing the Hindu, Buddhist, Jain or Sikh religion is a 'Hindu' and a person who is not a Christian, Muslim, Parsi or Jew is a Hindu. According to the statutes governing Hindu law, if both the parents are Hindus the child will be a Hindu and thus the time for determination of the religion of the child in these cases is the time of its birth. In case there is a difference of religion as between the spouses in the Indian patriarchal set-up, usually the father's religion is appended to the child. That however is not the requirement of law and it is merely a customary practice that is not obligatory. If only one of the parents of a child is a Hindu then the pointer for determination of his religion is not the time of birth but the upbringing of the child. If he is being brought up as a member of only his Hindu mother's tribe or community, then notwithstanding that his father was a non-Hindu, he will carry his mother's religion and Hindu law can be applied to him. For example, Sanjay Gandhi, son of a Parsi father and a Hindu mother was a Hindu at the time of his death as he was brought up as a member of his mother's (Indira Gandhi's) community.11[104]

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1. Mulla, *Hindu Law*, 18th edn. (ed. Satyajeet A Desai), Lexisnexis Butterworths, New Delhi, 2001, p. 6. According to Paras Diwan, two sets of rules existed at that time—rules of customary law and the law of divine wisdom. See Paras Diwan and Peeyushi Diwan, *Modern Hindu Law*, 11th edn., 1997, p. 25.
2. *Tagore Law Lectures 1880*, Rajkumar Sarvadhikari, *The Principles of Hindu Law of Inheritance*, 1882, p. 137. The author says, 'Law is two fold—Divine and Human. Law has its origin in the divine will, and is interpreted by eminent sages of antiquity, whose writings are of highest esteem'. See also, Mayne, *Hindu Law and Usage*, 15th edn., (ed. Justice Ranganath Mishra), 2003, p. 15. The author says, 'The Shrutis (that which has been heard) is in theory the primary and paramount source of Hindu law and is believed to be the language of divine revelations'. See also RK Agarwala, *Hindu Law*, 19th edn., 1996. The author says, 'Shrutisis believed to contain the very word of Deity revealed to the inspired sages. In theory, Shrutis are considered the primary and paramount source of *Hindu Law*'. See also Paras Diwan and Peeyushi Diwan, *Modern Hindu Law*, 11th edn., 1997, p. 24. The authors say, 'Hindu law is considered a divine law, a revealed law. The theory is that some of the Hindu sages had attained great spiritual heights so much so that they could be in direct communion with God. At some such time, the sacred law was revealed to them by God himself'.
3. *Tagore Law Lectures 1880*, Rajkumar Sarvadhikari, *The Principles of Hindu Law of Inheritance*, 1882, p. 143.
4. For example, reference is found in the Vedas of the forms of marriages, of the necessity of having a son and mention of some of them, of exclusion of females from inheritance.
5. Aphorisms are short pithy sentences conveying a word of meaning within a short compass. They are concentrated essences of distilled thoughts, and are as different from ordinary prose as solid rocks from loose molehills.
6. *Tagore Law Lectures 1880*, Rajkumar Sarvadhikari, *The Principles of Hindu Law of Inheritance*, 1882, p. 150.
7. *Ibid.,* p. 152.
8. *Ibid.,* p. 154.

9. *Ibid.,* p. 156.

10. AM Bhattacharjee, *Hindu Law and the Constitution*, 2nd edn., 1994, p. 17.

11. *Tagore Law Lectures 1880*, Rajkumar Sarvadhikari, *The Principles of Hindu Law of Inheritance*, 1882, p. 170.

12. Padma Purana names 36 of them. Yajnavalkya and Parasara names 20 of them. In the Nirmaya Sindhu, Kamalakara refers to 131 Smritis and Ananta Deva in the Sanskara Kaustubha quotes 104. Dr. Stenzler enumerates 46, Dr. Buhler prepared a list of 78 names and Dr. Maudalik quotes 97 of them. Raghavachariar classifies them into primary and secondary Smritis. Several treatises are sometimes ascribed to the same author when Vriddha (old) and Brihat (great).

13. *Tagore Law Lectures 1880*, Rajkumar Sarvadhikari, *The Principles of Hindu Law of Inheritance*, 1882, p. 194.

14. Mulla, *Principles of Hindu Law*, 18th edn., (ed. Satyajeet A. Desai), Lexisnexis Butterworths, New Delhi, 2001, p. 21.

15. *Tagore Law Lectures 1880*, Rajkumar Sarvadhikari, *The Principles of Hindu Law of Inheritance*, 1882, p. 195.

16. The eighteen titles of law are recovery of debts, deposit and pledge, sale without ownership, concerns among partners, resumption of gifts, non-payment of wages or hire, non-performance of agreements, rescission of sale and purchase, disputes between master and servant, disputes regarding boundaries, assault, defamation, theft, robbery and violence, adultery, duties of man and his wife, partition (of inheritance) and gambling and betting.

17. Mulla, *Principles of Hindu Law*, 18th edn., (ed. Satyajeet A Desai), Lexisnexis Butterworths, New Delhi, 2001, p. 23.

18. For instance, intentional killing of Brahmins was the greatest sin having no reparation. It also provided death sentence as the punishment for a Shudra man marrying a Brahmin woman.

19. *Tagore Law Lectures 1880*, Rajkumar Sarvadhikari, *The Principles of Hindu Law of Inheritance*, 1882, p. 192.

20. An ascetic also mentioned as bearing the name of Vijnana Yogin of Kalyanpura in the present Hyderabad state. He was a contemporary of King Vikramaditya 1076–1127 AD.

21. *Tagore Law Lectures 1880*, Rajkumar Sarvadhikari, *The Principles of Hindu Law of Inheritance*, 1882, p. 331.

22. *Buddha Singh v. Laltu Singh,* (1915) ILR 37 All 604, 611 : (1915) 42 IA 208, 214, 220. As to Colebrooke's *Translation of Mitakshara*, see *Shamlal v. Amarnath, AIR 1970 SC 1643* [*LNIND 1969 SC 347*]: *(1970) 1 SCC 33* [*LNIND 1969 SC 347*].

23. A number of commentaries were written on Mitakshara. See *Buddha Singh v. Laltu Singh,* (1915) 37 All 604, 611 : (1915) 42 IA 208, 214, 220.

24. *Bhugwandeen Doobey v. Myna Baee,* (1867) 11 MIA 487, 507, 508.

25. *Venkanna Narasinha v. Laxmi Sannappa,* AIR 1951 Bom 57 [*LNIND 1950 BOM 95*]: 53 Bom LR 192. The sub-division was once carried even to the extent of dividing the Dravida into a Tamil, a Karnataka and an Andhra School for which there was no justification. See *Mor Digest*, Introduction, p. 221; *The Ramnad's* case (1866) 2 MHC 206 : (1868) 12 MIA 397, 435; *Narasammal v. Balaramacharlu,* (1868) 1 MHC 420.

26. *Tagore Law Lectures 1880*, Rajkumar Sarvadhikari, *The Principles of Hindu Law of Inheritance*, 1882, p. 410.

27. *Ibid.,* p. 402.

28. See *Surjit Lal Chhabda v. Commissioner of Income Tax,* (1976) 2 ITR 164, for importance of Mitakshara and Yajnavalkya Smriti presently and its juristic weight.

29. Punjab was governed by the customary law.

30. *Ramachandra's* case (1914) 14 IA 290, 42 Cal 384, and *Buddha Singh v. Laltu Singh,* (1915) 37 All 604, 611 : (1915) 42 IA 208.

31. *Bhyah Ram Singh v. Bhyah Ugur Singh,* (1870) 13 MIA 373, 390.

32. *Basanta Kumar v. Jogendra Nath,* (1906) ILR 33 Cal 371, 374, 375.

33. *Ram Chandra v. Ramabai,* AIR 1930 Nag 267 ; *Bhaskar v. Laxmibai,* AIR 1953 Nag 326 ; *Udebhan v. Vikram,* AIR 1957 MP 175 . See also *Ramaji v. Manohar, AIR 1961 Bom 169* [*LNIND 1959 BOM 127*].

34. *Baji Rao v. Atma Ram*, AIR 1930 Nag 265 .

35. *Gojabai v. Shrimant Shahajirao,* (1892) ILR 17 Bom 114.

36. *Bhagirathibai v. Kahnujirao,* (1887) ILR 11 Bom 285, 293(FB); *Collector of Madura v. Muttu Ramlinga Sathupathy* (2 Sutherland Privy Council Appeals 135, p. 140), (1868) 12 MIA 397, 436.

37. *Lekhraj Singh v. Ganga Sahai,* (1887) ILR 9 All 253, 292.

38. Corrected recently by the Hindu Succession (Amendment) Act, 2005, *ibid*.

39. *Partha Talukdar v. Mina Hardinge, AIR 1993 Cal 118* [*LNIND 1992 CAL 305*].

40. The position was clarified and unified by the Hindu Women's Right to Property Act, 1937.

41. See *Ram Dulare v. Batul Bibi,* AIR 1976 All 135 wherein, on the death of a coparcener, his widow alienated a portion of the property for financing a holy trip to Gaya. The reversioner challenged the alienation saying it was not binding on him. The court held that religious acts done by the widow are beneficial to the spiritual well-being of the husband and therefore binding on the reversioner.

42. *Athatah samayacharikan Dharman Vyakhyasyamah: Dharmagnasamayah pramanam vedashcha*.

43. Asahaya states that this verse accepts the rule that custom is superior to written law. The Romans took the view that an existing statute might even be replaced by adverse usage. '*Ea vers (i.e., jura) i*'. Ashaya cites, '*Deshe deshe ya acharah paramparayakaramagatha: Sa shastrarthobalannaiva langhaniyah kadachana, Desha Jati kulanam cha ye Dharamah prak pravartitha: Tathaiva te palaneeyah prajah prakshubhyatenyatha'.*

44. Manu, 83, '*Pratyaham Deshdyashestacha Shastradyashtaishcha Haitubhih, ashtadashsu margeshu Nibadwani Prathakah Prathakah'.*

45. Yajnavalkya 3343, '*Yasmin deshe ya acharo yvhara cha kulastithih, tatheva Paripalyoasoh yada vanshumupagatah*'.

46. *Vyavaharo hi Balwana Dharmastenavahiyate.*

47. *Praja Praksubhayate anyatha*.

48. *Parbati v. Jagdis,* (1902) 29 IA 82.

49. *Balwant Rao v. Baji Rao,* ILR 48 Cal 30 (PC).

50. *Collector of Madura v. Muttu Ramlinga Sattuputty* 2 Sutherland Privy Council Appeals 135, 140. However in reality, during the British administration proof of such custom was made very difficult and only a few customs came to be recognised as law.

51. The English rule of 'memory of man runneth not to the contrary' is not strictly applicable in India. See *Gokulchand v. Parvin Kumar, AIR 1952 SC 231* [*LNIND 1952 SC 33*]. For the test of antiquity see *Ambalika Dasi v. Aparna Dasi,* (1918) 45 Cal 835, 858; *Nolin Behari v. Hari Pada,* AIR 1934 Cal 452 . See also *Kumar Basant Singh v. Kunwar Brijraj Singh,* (1935) 62 IA 180, 193, wherein the custom was shown to have existed for about 50 years. See also *Subhani v. Nawab,* AIR 1941 Lah 154 .

52. *Shib Narain Mookherjee v. Bhut Nath,* (1918) 45 Cal 475, 479; *Deivanai Achi v. Chidambaram Chettiar,* 1954 Mad 657 ; *Saraswati Ammal v. Jagadambal,* AIR 1954 SC 201 ; *Muharram Ali v. Barkat Ali,* (1930) 12 Lah 286.

53. *Sivananja v. Muttu Ramalinga,* (1866) 3 Mad HC 75, 77; *Bhujangrav v. Malojirav,* (1868) 5 Bom HC 161 (ACJ); *Saraswati Ammal v. Jagadambal,* AIR 1954 SC 201 ; *Indramani Devi v. Raghunanadha Banja,* AIR 1961 Ori 9 .

54. *Saraswati Ammal v. Jagadambal,* AIR 1954 SC 201 .

55. *Shyam Sunder v. State of Bihar, AIR 1981 SC 178* [*LNIND 1980 SC 271*]; *Sahabjit v. Indrajit,* (1905) 27 All 203; *Amina Khatun v. Khalilur Rahman,* AIR 1933 Oudh 246 ; *Rajkishen v. Ramjoy,* (1876) 1 Cal 186; *Chundri v. Bibi,* AIR 1931 All 547 .

56. Custom among dancing girls to adopt daughters for initiating them later into this profession or adoption of daughters by prostitutes is held as immoral custom, see *Hira v. Radha,* (1913) 37 Bom 116; *Mathura Naikin v. Esu,* (1880) 4 Bom 545; *Kamalakshi v. Ramaswami Chetty,* (1896) 19 Mad 127; *Guddattureddi v. Ganapathi,* (1912) 23 MLJ 493 [*LNIND 1912 MAD 471*].

57. *Murugappa v. Nagappa,* (1906) 29 Mad 161, a custom to pay money for adoption of a boy is bad as opposed to public policy; see also *Kothandaram Reddi v. Thesu Reddi, (1914) 27 MLJ 416* [*LNIND 1914 MAD 309*]; *Danakoti v. Balasundara,* (1913) 36 Mad 19. See also *Rajah Vurmah v. Ravi Vaurmah,* (1876) 4 IA 76 wherein it was held that a proposed custom enabling the trustees of a religious institution to sell the trust was opposed to public policy and bad in the eyes of law. See also *Keshav v. Bai Gandi,* (1915) 39 Bom 538; wherein it was held that a custom permitting a Hindu husband to dissolve the marriage without the consent of the other party after payment of a sum of money to her fixed by the caste is bad and therefore void. See also *Budansa Rowther v. Fatimabi, (1914) 26 MLJ 260* [*LNIND 1913 MAD 218*] wherein a custom permitting a woman to remarry during the lifetime of the husband was held as bad.

58. A custom at variance with any legal rule cannot be upheld.

59. The Hindu Marriage Act, 1955, s. 5(iv) and (v). Here, it has been provided that two Hindus cannot marry if they are Sapinda of each other or are within prohibited degrees of each other. However, if there is a custom to the contrary in the community to which both of them belong the custom will override the law.

60. *Harihar Prasad v. Balmiki Prasad, AIR 1975 SC 733* [*LNIND 1974 SC 403*]; *Harprasad v. Sheo,* 3 IA 254.

61. *Raja Rup Singh v. Ram Baisini, (* 1884) 11 IA 149, 169.

62. These records are known by the terms Wajib-ul-arz meaning written representations or petition and Riwazi-I-am meaning common practice or customs. See *Uman Parshad v. Gandharp Singh,* (1888) 14 IA 127; *Nitepal Singh v. Jai Singh,* (1897) 23 IA 147.

63. *Harihar Prasad v. Balmiki Prasad,* AIR 1975 SC 733 [LNIND 1974 SC 403].

64. *Ibid*.

65. *Nazir Singh v. Kehar Singh,* 62 Punj LR 692.

66. *Abraham v. Abraham,* (1863) 9 MIA 195.

67. *In Fictione Juris Semper Aequitas existit*.

68. *Dharamashastra virodhe tu yuktiyukto vidhih Smritah* (in case of conflict between Smritis decision should be based on reason).

69. *Yasya Lingamartha- sanyogad abhidhanavat*; Atidesha is a relation in which one thing contains the indication of another thing and deriving its force from that other becomes an incident of it.

70. *Smrityorvirodhe nyayastu balvan vyavaharatah*– IV, 20.

71. *Kevalam Shastramashritya na kartavyo hi nirnayah: yuktiheen vichare tu Dharmahanih prajayate*.

72. *Waghela Rajsanji v. Sheikh Masludin,* (1887) 14 IA 89.

73. *Gurunath v. Kamlabai,* (1951) 1 SCR 1135; *Peramanayakam v. Sivaraman,* 1952 Mad 419, 472, 473. See also *Kamalakshy v. Narayani,* AIR 1968 Ker 123 [LNIND 1967 KER 28].

74. *Kenchava v. Girmalappa,* (1924) 51 IA 368. Presently this rule has become a part of the Hindu Succession Act, 1956. See s. 25.

75. *Subramania Aiyyar v. Rathnavelu Chetty,* (1918) 41 Mad 44, 74.

76. *Tagore v. Tagore,* (1872) 1 IA Supp 47, 68.

77. *Gurunath v. Kamlabai,* (1951) SCR 1135.

78. A notable case was that of *Dadaji Bhikaji v. Rukmabai,* IX ILR 529 (Bom Series 1885) which involved the case of a girl married at the age of 11 years who sought to avoid this marriage on reaching the age of 21 years on the ground that at the time of the solemnisation of her marriage she was a child and had not consented to this marriage. Her marriage brought about without her consent was therefore not binding on her. The lower court presided by Pinhey J. agreed with her and dismissed the petition of restitution of conjugal rights filed by her husband. The result of the case caused shockwaves among the orthodox society and a vehement public uproar forced the High Court to overrule the judgment and to remand it back to the trial court under another judge for considerations afresh.

79. *Udhao v. Beshar,* AIR 1946 Nag 203 .

80. *Surjit Lal Chhabda v. Commissioner Income Tax,* (1976) 2 ITR 164.

81. *Subbaraya v. Ramaswami,* (1900) 23 Mad 171; *Khunni Lal v. Gobinda Krishna,* (1911) 38 IA 87; *Ram Pergash v. Daln Bibi,* (1924) 3 Pat 152. For deprivation of castes see *Vedammal v. Vedanayaga,* (1908) 31 Mad 100; *Bhujjanlal v. Gya Pershad,* (1870) 2 NWP 446; *Honamma v. Timanna Bhat,* (1877) 1 Bom 559. See also *Nalinaksha v. Rajanikant,* (1931) 58 Cal 1392.

82. *Miter Sen v. Maqbul Hasan,* AIR 1930 PC 251 ; *Vaithilinga v. Aiyadorai,* (1917) 40 Mad 1118; *Chidambara v. Ma Nyein,* (1928) 6 Rang 243; *Mohamed Ismail v. Abdul Hameed,* (1948) 2 MLJ 87 [LNIND 1948 MAD 49].

83. The Special Marriage Act, 1872, s. 2(4) and provisos 1 and 2.

84. His father nevertheless could take a son in adoption if he had no other son living. This virtually meant that a son marrying under this Act would be deemed non-existent for the purposes of adoption as under the Hindu law only a person having no Hindu son could adopt another son.

85. The Special Marriage Act, 1872, s. 22.

86. *Niranjan v. Eva,* (1943) ILR 1 Cal 201.

87. *Ratan v. Maragaretha,* (1939) ILR 1 Cal 201.

88. The Special Marriage Act, 1872, s. 17.

89. *Ibid.,* s. 24.

90. Presently the Indian Succession Act, 1925.

91. Hindu Disposition of Property Act (Act 15 of 1916); The Hindu Transfer and Bequests Act (Madras Act of 1914) and the Hindu Transfers and Bequests Act (City of Madras) Act 8 of 1921. Later the provisions of ss. 113–116 of the Indian Succession Act, 1925 were made applicable to Hindus and in 1930 the application of provisions of Chapter II of the Transfer of Property Act, 1882 was also extended to Hindus.

92 *Mahesh Chunder v. Chunder Mohan,* (1975) 14 BLR 273; *Gunjeshwar Kunwar v. Durga Prashad Singh,* (1917) 44 IA 229, 45 Cal 17; *Murarji v. Parvathibai,* (1876) 1 Bom 177; *Umabai v. Bhavu,* (1876) 1 Bom 557; *Pudiava v. Pavanasa,* (1922) 45 Mad 949 (FB).

93 *Ankul Chandra Bhattacharya v. Surendra Nath Bhattacharya,* (1939) ILR 1 Cal 592; *Pareshmain v. Dinanath,* (1862) 1 BLR (ACJ) 117; *Hira Singh v. Ganga Sahai,* (1884) ILR 6 All 322.

94 *Bharamppa v. Ujjaingowda,* (1922) 46 Bom 455; *Savitri Bai v. Bhabat,* (1927) 51 Bom 50; *Bhai Pratapgavri v. Mulshankar,* AIR 1924 Bom 353 ; *Mara v. Bittaswamy,* (1942) 46 Mys HC 706.

95 Insanity did not mean want of ordinary intelligence; see *Tirumamagal v. Ramaswamy,* (1863) 1 Mad HC 214. It need not be congenital; see *Baboo v. Omrao,* (1870) 13 MIA 519; *Ram Singh v. Bhani,* (1916) 38 All 117; *Bhagwati Saran Singh v. Parmeshwari Nandan Singh,* (1942) ILR All 515; *Muthusami Gurukkal v. Meenammal,* (1920) 43 Mad 464. Subsequent lunacy is not a disqualification; see *Parameswaran v. Parameswaran,* 1961 Mad 345 .

96 *Vedammal v. Vedanayaga,* (1908) 31 Mad 100; *Ganga v. Ghasita,* (1879) 1 All 46; *Baldeo v. Mattura Kunwar,* (1911) 33 All 702; *Dal Singh v. Drini,* (1910) 32 All 155; *Kojiyadu v. Lakshmi,* (1882) 5 Mad 149.

97 *Vedammal v. Vedanayaga,* (1908) 31 Mad 100.

98 *Venkata Subbarao v. Purshottam,* (1903) 26 Mad 113; *Murarji v. Parvatibai,* (1876) 1 Bom 117, 185.

99 *Subbaraya v. Ramasami,* (1900) 23 Mad 171.

100 *Nalinaksha v. Rajani,* (1931) 58 Cal 1392. The rights of an outcaste or the one who converted to another faith were saved by the Caste Disabilities Removal Act, 1850. See the discussion *supra*.

101 *Muthummal v. Subramanya Swamy Devasthanam, AIR 1960 SC 601* [*LNIND 1960 SC 9*].

102 JDM Derrett, *Hindu Law: Past and Present*, 1957, p. 1.

103 *Shastri Yagnapurushadasji v. Muldas Vaishya, AIR 1966 SC 1119* [*LNIND 1966 SC 16*].

104 *Maneka Gandhi v. Indira Gandhi, AIR 1985 Del 114* [*LNIND 1984 DEL 219*].

CHAPTER 2 HINDU JOINT FAMILY

INTRODUCTION

The Hindu joint family is a normal condition of the Hindu society. Its origin can be traced to the ancient patriarchal system where the patriarch or the head of the family was the unquestioned ruler, laying down norms for the members of his family to follow, obeyed by everyone in his family, and having an unparallel control over their lives and properties. At the root was the general family welfare or promotion of family as a unit for which personal interests of the family members could be sacrificed. Under Hindu law therefore the joint family system came first in historical order and the individual recognition of a person distinct from the family came later. The ancient system generally treated the property acquired by the members of the family as family property or the joint property of the family with family members having one or the other right over it. With gradual transformation of the society and recognition of the members of the family as independent in their own right, concept of separate property and rules for its inheritance were developed. This dual property system, though considerably diluted[1], has survived the lashes of time, the judicial and legislative onslaught and the Hindu society still recognises the joint family and joint family property as unique entities having no similar concept alive anywhere else in the world.

COMPOSITION OF HINDU JOINT FAMILY : CLASSICAL CONCEPT

A 'Hindu Joint Family' consists of all male members descended lineally from a common male ancestor together with their mothers, wives or widows and unmarried daughters.[2] An unmarried daughter on marriage ceases to be a part of her father's joint family and joins her husband's joint family as his wife. If a daughter becomes a widow or is deserted by her husband and returns to her father's house permanently, she again becomes a member of her father's joint family. Her children however don't become members of her father's joint family and continue being members of their father's joint family. Even an illegitimate son of a male descendant would be a member of his father's joint family.[3] A child in womb till it is born is not a member of the joint family for taxation purposes[4] but is treated as in existence for certain purposes under Hindu law.

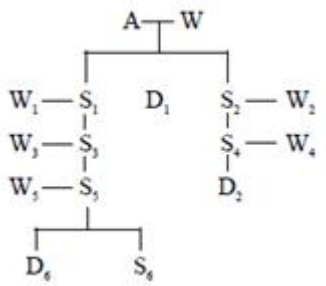

Fig. 2.1

In Fig. 2.1, *A* is the seniormost male member. He together with his wife, *W*, his two sons S1 and S2 and their wives *W* 1 and *W* 2, grandsons S3 and S4 and their wives *W* 3 and *W* 4, great-grandson S5 and his wife *W* 5 and great-great grandson S6 will form a Hindu joint family. *D* 1, *D* 2 and *D* 6 will be members of the joint family of *A* till they are unmarried. On their marriage they will cease to be the members of *A*'s joint family and will be part of their husband's joint family. To bring into existence a joint family for the first time the presence of the seniormost male member is an essential condition. However, once the joint family comes into existence it continues despite the

death of this male member. Fresh members are added by marriage of lineal male descendants and birth of children in the family while the existing members may die, as death is a natural phenomenon. The continuation of the joint family is not restricted in point of time and until it ends by the death of all members of the family capable to form such family, it continues.

The members of a joint family are bound together by the fundamental principle of sapinda-ship or family relationship, which is the essential feature of this institution. The cord that knits the members of the family is not property but the relationship with one another. The Mitakshara doctrine of joint family property is founded upon the existence of an undivided family as a corporate body.[5] The first requisite is the family unit, and the possession by it of family property is the secondary requisite. Such body with its heritage, is purely a creature of law and cannot be created by acts of parties save in so far that by adoption a stranger may be affiliated as a member of that corporate family.[6] In absence of any evidence to the contrary a uterine brother is a member of the Hindu joint family in Nepal.[7]

OUSTER OF A MEMBER FROM THE JOINT FAMILY

An unmarried daughter ceases to be a part of her father's joint family on her marriage and may regain her status if she becomes a widow or if on being deserted by the husband comes back to her father's house permanently. A child male or female born in the family can cease to be a member of this family if he or she is given in adoption to another family by a person competent to do so under the law. Since adoption is an irrevocable act, such child cannot become a member of this family again in future. The marriage of a lineal male descendant under the Special Marriage Act, 1954 to a non-Hindu will result in his automatic severance from the joint family and he cannot become a member of this family even by agreement.[8]Till the passing of the Caste Disabilities Removal Act, 1850, also known as the Freedom of Religion Act, conversion of a Hindu to another faith meant an automatic expulsion from the joint family. Since the Act protected and removed the disabilities imposed earlier on a convert,[9] he or she could not be so expelled from the joint family when they ceased to be Hindus by converting to another faith. Yet, since a Hindu joint family is an institution available only to Hindus under Hindu law, such converts can neither form a joint family nor claim the benefit of it for taxation purposes. It has been held that a Hindu father with his Christian wife and a son will form a Hindu joint family.[10] The correctness of the decision is doubtful, as in a joint family the father and son constitute a coparcenary. In the coparcenary, the son has a right by birth. As being Hindu is an essential qualification to be a member of the joint family, the son of a Hindu father by a Christian mother need not be a Hindu in all cases. He will be a Hindu only if he is being brought up as a member of his Hindu parent's tribe or community. In other words, his religion cannot be determined at the time of his birth but is dependent upon his being brought up as a Hindu. As membership of a son in the joint family is to be determined at the time of birth, a son who may not be a Hindu would not be a member of his father's joint family.[11]In fact, a Hindu man marrying a non-Hindu is incompetent to form a Hindu joint family. Presently marriages between a Hindu and a Christian can be validly solemnised under the Special Marriage Act, 1954 and under the Indian Christian Marriage Act, 1872. If they marry under the former Act, a Hindu man will cease to be a member of the joint family, there is no reason why the same consequences should not apply if they marry under the latter Act. Thus, the concept of a Hindu joint family would mean a Hindu father, having a Hindu wife and Hindu children. It is a Hindu joint family and cannot comprise non-Hindu members let alone a family having only a Hindu father, a non-Hindu wife and children whose religion cannot be determined at birth but is dependent upon the contingency of them being brought up as Hindus.

COPARCENARY

Coparcenary is a narrower institution[12] within a joint family comprising only male members.[13] The primary purpose of understanding the concept of coparcenary is to determine the group of persons who can offer spiritual ministrations to the father. It signifies a relationship. These descendants, *i.e.* son, son of a son, son of a son of a son also have a right by birth in the property of the father and therefore its incidental implications are also property related. Gradually the spiritual aspect was dominated by the understanding of the concept in relation to the property that they can collectively own. With this segregation between the legal purpose and the religious purpose, the concept of coparcenary, which initially had the dominant objective rooted in relationship, is currently understood to ascertain the rights and obligations of the members of the family in the property owned by the joint family which is also called the joint family property or the coparcenary property. The seniormost among the coparceners is called the last holder of the property and from him a continuous chain of three generations of male members form the

coparcenary. All the coparceners have an interest in the coparcenary property by birth and have a right to ask for partition of the same. Under the classical law no female could be a member of coparcenary.[14] A person removed by more than four degrees is not a coparcener.[15] An illegitimate son of a lineal male descendant is a member of the joint family but is not a coparcener.[16]

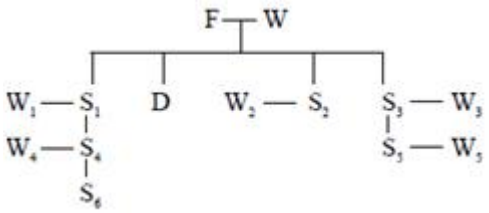

Fig. 2.2

In Fig. 2.2, a family comprising the father, *F*, his wife, *W*, his daughter *D*, three married sons, S1, S2, S3, with their wives *W* 1, *W* 2, *W* 3, and married grandsons, S4 and S5 with their wives *W* 4 and *W* 5 and a great grandson S6, all will be members of a joint family. However, the daughter will be a member of this family till she is unmarried but as far as the coparcenary is concerned, father's wife, *W*, as also the lineal descendants' wives, *W* 1, *W* 2, *W* 3, *W* 4 and *W* 5 and the daughter *D* will not be members of the coparcenary and the father, *F*, his three sons S1, *S2*, *S3*, grandsons S4 and S5 and great-grandson S6 would be members of coparcenary and will have a right by birth in the ownership of this property.

INCIDENTS OF HINDU JOINT FAMILY

(i) A common male ancestor is necessary to bring the Hindu joint family in existence but is not necessary for its continuation. After the death of such common male ancestor the rest of the family continues to be a joint Hindu family. It is said that upper links are removed and the lower links are added *e.g.*, in Fig. 2.3, the seniormost male member *A* with his wife *W* and two sons constitute a joint Hindu family. One son S1 is married and has a son S3. On the death of *A*, the joint family does not end and it continues with *W*, *W* 1, S1, *S2*, and *S3* as its members.

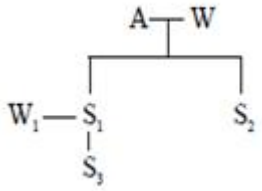

Fig. 2.3

(ii) A Hindu joint family is purely a creature of law. This means, it cannot be created by the act of the members or an agreement between the parties. Therefore, a stranger cannot be made a member of a Hindu joint family even by agreement among all members. The only exception to that is marriage and adoption. A female can be introduced as a member of the joint family by virtue of her marriage with a lineal male descendant and a child, male or female, can be added to the family by birth or by a valid adoption into the family.

(iii) A Hindu joint family has no legal entity distinct or separate from its members.[17] It is a unit and is represented by the manager of the joint family who is called 'Karta'[18] in all family matters. It cannot sue or be sued in its own name. It is neither a juristic person[19] nor a corporation and therefore cannot convey the property in its joint character.

(iv) A Hindu joint family is not a juristic personality capable of holding property as an entity separate from its members. Therefore when it is said in relation to joint family that it possesses joint family property or coparcenary property, it literally means that not only the family as a unit but also its members collectively own property.[20]

(v) The status of a joint family member can be lost by conversion to another faith, by marriage to a non-Hindu, on being given in adoption by the competent parents, and for a daughter, on getting married.

(vi) All members in a joint family do not have equal rights in the family property. Coparceners have an interest in the coparcenary property while females and male members other than coparceners or disqualified coparceners have a right of maintenance and a right of residence in the joint family house.

(vii) The continuation of a joint family is not dependent upon the presence of a male member in the family.

(viii) Plurality of members is necessary for constitution of or continuation of joint family but plurality of male members is not necessary for its continuation. The joint family does not end even with the death of a male member as long as it is possible in the nature of things to add a male member in the family.

(ix) A Hindu joint family may continue in perpetuity until it ends. Even where a partition is effected this joint family may break but does not end as in its place two or more joint families come into existence.

In Fig. 2.4, a joint family comprises the father *F*, his wife *W*, his three married sons S1, S2, S3, with their wives, *W* 1, *W* 2 and *W* 3, four grandsons, S4, S5, S6 and S7 and two unmarried daughters *D* 1 and *D* 2. When a partition is effected, instead of one, four smaller joint families will come into existence. *F*, along with *W* and the daughters will form one joint family. S1 along with his wife and son will form another, while S2 and S3 will form joint families with their sons and wives.

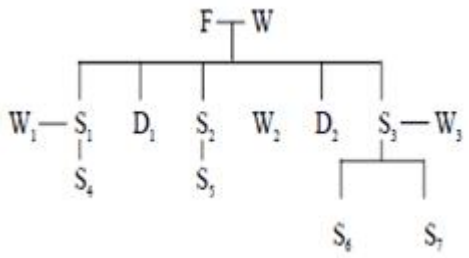

Fig. 2.4

Presumption of Jointness

The general principle is that every Hindu family is presumed to be a joint Hindu family[21] and continues to be joint[22] unless contrary is proved. It is presumed to be joint in food, worship and estate.[23] But that does not mean that they must necessarily have a common kitchen, a joint place of worship or that they should worship at all. However, if they do have one kitchen in their house, it is presumed to be joint unless contrary is established. The joint family members may be living for the sake of convenience in different parts of the house, may not even share a common kitchen; yet the family will be presumed to be joint. For *e.g.*, in Fig. 2.5, a Hindu family comprises a Hindu male *A* and his wife *W*, his three married sons S1, S2 and S3 with their wives *W* 1, *W* 2, and *W* 3, all living together at Delhi. The family will be presumed to be a joint Hindu family.

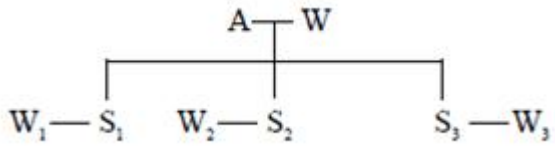

Fig. 2.5

All three sons might be living in different rooms; they might be having different kitchens, yet, the family will be presumed to be a joint family. Suppose S1 gets a job at Mumbai and with his wife goes to Mumbai, S2 gets a job at Chennai and goes to live there with his wife and S3 gets a job at Bangalore and goes to live there with his wife. Yet,

the family would continue to be a joint family[24] as mere severance in food and worship does not result in or operates as a separation.[25]

Thus even if a member starts living separately he continues to hold his joint status for the purposes of his share as a member of Hindu Joint family[26].

***Commissioner of Income Tax v. Gomedalli Lakshminarayan,* AIR 1935 Bom 412**

A Hindu Joint family consisted of the father, his wife, his son and the son's wife. Upon the death of the father, the question before the Income Tax Commissioner was whether the joint family can continue even when there was only one male member *i.e.*, the son in this case and whether he is to be assessed as an individual or as the Karta of the joint family of which he was a member. The importance of this question lay in the fact that for the purposes of super tax he would be allowed a large exemption if he was taxed as the manager of a joint Hindu family than if he is taxed as an individual. It also means that if the Hindu joint family is taxed as a unit the individual members are not liable to be charged in respect of what each member receives as his or her share of the joint income. The court held that he was to be assessed as the Karta of the Hindu undivided family. Explaining the concept of a Hindu undivided family and a coparcenary and the distinction between the two, the court observed that while for a coparcenary the presence of at least two male members in the joint family is a necessary requirement, a Hindu joint family can continue even with one male member, and accordingly in this case the son was competent to be assessed as the Karta of his joint family.

Though every Hindu family is presumed to be a joint Hindu family yet the strength of the presumption necessarily varies in each case.[27] The presumption is peculiarly strong in the case of father and sons,[28] sons of one father[29] and also in the case of brothers[30] than in case of cousins. The further one goes from the founder of the family the presumption becomes weaker and weaker.[31] Even where one son separates from the father, the other sons, more so in case they are minors, would be presumed to be joint with their father.[32] This presumption of jointness can be rebutted by direct evidence or by course of conduct. Thus, where an estate was originally ancestral belonging to a joint family, the presumption of law is, that a family once joint retains that status and this presumption can only be rebutted by evidence of partition or acts of separation. The onus probandi lies on the party who claims a share in such estate to prove that it is a divided family[33] or the one who disputes the joint status of the family.[34] Where a person claims property, as on partition, it is he who has to prove that there was a division of the joint family estate.[35] So, till some positive action is taken to effect partition of a joint family property, it would remain joint family property.[36] It is also settled that there is no presumption that when one member separates from others, the latter remain united and whether the latter remain united or not must be decided on the basis of the facts of each case.[37]

No Presumption that the Hindu Joint Family possesses Joint Property or any Property at all

A Hindu joint family is presumed to be joint in food, worship and estate, yet there is no fundamental requirement of law that it must possess joint property. Practically it is difficult to conceive of a situation where the joint family members are living together and yet do not have some common or joint items of property. They may not be expensive items but a normal common habitation is indicative of common sharing of at least some household items. Similarly, a common kitchen indicates utensils and kitchen appliances that can be shared; likewise, a common puja room will have common things that may be owned and used by the family jointly. However, in law there is no presumption that a joint family possesses joint family property or any property at all or that it should be of value.[38] This has to be shown by affirmative evidence.[39] Similarly, proof of existence of a joint family does not lead to the presumption that property held by any member of the family is joint[40] and the burden rests upon anyone asserting that any item of the property was joint to establish the fact. But where it is established that the family possessed some joint family property which from its very nature and relative value may have formed the nucleus from which the property may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property.[41]

While maintaining joint family status, property can also be acquired in the name of different members individually.[42] Even where the Karta purchases property in the name of his wife it will not be presumed to be the joint family property[43] unless there is evidence that he could not have acquired the property with his income or the acquisition of it was not in keeping with his financial position.[44] The important thing to consider is the income which the nucleus yields. A building in occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income, which may, well form the foundation of the subsequent acquisitions. These are not abstract questions of law but questions

of facts that have to be determined on the facts and circumstances of each case.[45]

Position when there is only One Male Member

A single male or a female cannot constitute a joint Hindu family individually even if the assets in their hands are purely ancestral.[46] Further, presence of a male member is an essential requisite to start a joint Hindu family. However, it is not necessary that there should be at least two male members to form a Hindu undivided family as a taxable entity or for its continuity. Where the joint family comprises a man, his son, and their wives, all of them together would constitute a joint Hindu family. On the death of the father, the family comprising the son, his wife and his mother would maintain the same status, *viz.*, a single male member with female members of the joint family can constitute a joint Hindu family.[47] Similarly, where two out of three married brothers die, the surviving brother and the widows of the deceased coparceners will continue to constitute a Hindu joint family[48] and therefore the arrears of maintenance received by a widow of the deceased coparcener will be exempt from tax under s. 14(1) of the Act.[49]

One of the basic arguments against the holding that a single male member can form a joint family is that his authority over the property in his hands, whether separate or ancestral, is absolute. He can dispose it of in any manner he likes. He also has the capability to treat the joint family property as his separate property and thus he should be treated as an individual for the purposes of income tax. To that Rangnekar J. said in *Commissioner of Income Tax v*. *Lakshmi Narayan* [50] that the powers of a sole surviving coparcener over disposal of the coparcenary property are subject to well-recognised rights of the female members of a family. The widow of a deceased coparcener has a right to be maintained out of the family property and a right to a due provision for her residence. An unmarried daughter has a right to maintenance and to marriage expenses. Similarly, the disqualified heirs such as of unsound mind have similar rights. If the rights of these persons are threatened or if the holder of the estate is dealing with the property in a manner inconsistent with or endangering the rights of these persons, he may be restrained by a proper action from acting in that manner. Similarly, the widow of a deceased coparcener may adopt a son to her deceased husband and he would then become a coparcener with the sole surviving coparcener. Then expenses of religious ceremonies such as ‘Shraddha’ relating to the deceased coparceners also have to be provided from such property. Therefore, only because there is no coparcenary it does not follow that there is no undivided family.

Even in the absence of an antecedent history of jointness, a Hindu male can constitute a joint Hindu family with his wife and unmarried daughter. There is an assumption that joint and undivided family is the normal condition of Hindu society. The presumption, therefore, is that the members of a Hindu family are living in unison, unless the contrary is established. The absence of an antecedent history of jointness between a Hindu man and his ancestors is no impediment to his forming a joint Hindu family with his wife and unmarried daughter or with other females in the family. ‘Those that are called by nature to live together, continue to do so’[51] and form a joint Hindu family. A single male may constitute an undivided family with his wife and daughter.

Continuation of a Joint Family at the Instance of Only Female Members

The term ‘continuation’ suggests the existence of a joint family in the past and the maintenance of the same status in the present. It is different from starting or forming a joint family for the first time and therefore the conditions for maintaining the same status are different from initiation or starting of the family. On the question whether there can be a Hindu undivided family comprising only female members, the Apex Court has held[52] that on the disappearance (death) of the last male member, which suggests that a male member was present in the joint family, the other members of the family though not coparceners, continue to be members of an undivided family. So, on the death of the sole male member of a Hindu undivided family, females who were earlier members of the Hindu joint family are allowed to continue with that status. So long as the property that was originally of the joint Hindu family remains in the hands of the widows of the members of the family and is not divided among them, the joint family continues.[53] The law provides that so long as it is possible in the nature of things to add a male member to the family, a joint family does not come to an end.[54] Accordingly, where the joint family comprises two brothers with their wives, on the death of both the brothers, their two widows have the capability to add a male member to the family if one of them was pregnant or they decide to adopt a male child; in this manner the joint family continues. The test laid down is the potentiality of the widows to bring a male member into existence either by nature or by law.[55] In *Attorney General of Ceylon v*. *A.R. Arunachalam Chettiar*,[56] a father and his son constituted a joint family governed by the Mitakshara school of Hindu law. They were domiciled in India and had trading and other interests in India, Ceylon and far Eastern countries. The undivided son died in 1934 and the father became the sole surviving coparcener in the Hindu undivided family to which a number of female members belonged. The father died in 1938 and the question to be determined was whether he died as a member of joint family or as a separate member because under the relevant ESTATE DUTY ORDINANCE, it was provided that property passing on the death of a

member of a Hindu undivided family was exempt from payment of estate duty. Here at all material times, the female members of the family had the right to maintenance and other rights in the property. The widows in the family including the widow of the predeceased son also had the power to introduce coparceners in the family by adoption though that power was exercised after the death of the father. It was held that the deceased at his death was a member of Hindu undivided family, the same undivided family of which his son, when alive was a member and of which the continuity was preserved after the father's death through adoptions by the widows of the family.

One thing is noteworthy here. All these cases involved a situation where the joint family was in existence and had one or more male members in this family. The status of this family was determined when the male members died and only females were left. In these cases, courts held that a joint family did not end if the females had the capability to add a male member in the family. However, in none of the cases the claim was from the females to form a joint family for the first time.

Continuation of Joint Family at the Instance of only Daughters

Under Hindu law the presence of a male member is not necessary for the continuation of a joint family so long as the females who became members of the family by marriage to lineal male descendants maintain the joint status and have the capability to add a male member to the family either by giving birth to sons or adopting a son to them. However, where a situation is reached when it is not possible to add a male member to the family, the joint family will come to an end, *e.g.*, in Fig. 2.6, where the joint family initially comprised the father *F* his wife *W*, two sons S1 and S2 and their wives *W* 1 and *W* 2, and two daughters *D* 1 and *D* 2, on the death of the father, mother and the sons, the widows in the family have the capability to add a male member in the family while remaining joint and the family will continue as a joint Hindu family.

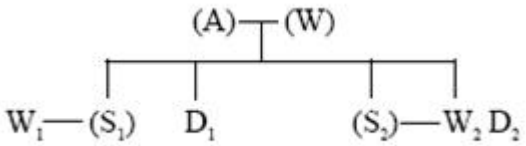

Fig. 2.6

On the death of both the widows when the family comprises only two daughters will the joint family come to an end? Under the law as it stood before 1956, a daughter did not have the capability to add a male member to her father's joint family. Therefore, when only a daughter was left in the family, the joint family of the father ended. The reason was that the daughter could give birth to a legitimate offspring only after her marriage and the moment she got married, she ceased to be a member of her father's family, and her child would be a member of her husband's joint family and not her father's family. After 1956 with the permissibility of adoption of a child, male or female[57] to a single woman including an unmarried daughter, a daughter can have a legitimate son without getting married and while remaining a member of the father's joint family. The Hindu Adoptions and Maintenance Act, 1956 has granted an unmarried female the ability to carry on her father's joint family by adding a male member to the family. The reason why the child adopted by the unmarried daughter will be an addition to her father's family is that a child adopted by a single parent can have only one parent family *e.g.*, where an unmarried woman adopts a son, he will have only a mother and no father and if the mother subsequently marries, her husband will be related to the child as his stepfather.

After the amendment of the Hindu Succession Act, in 2005, a daughter now is coparcener and can, not only continue a joint family, but also form one with her father and brothers.

Formation of a Joint Hindu Family by Women Alone

On the death of the last male member in the family the status of joint family does not end and the females so long as they have the capability to add a male member to the family continue as the members of the joint family. However, such situations are to be differentiated with cases where Hindu women claim to form a joint family in the first place in the absence of an antecedent joint family status. It is to be noted that for the starting of or for bringing a joint family into existence for the first time the presence of a seniormost male member is an essential requisite. On the question of the feasibility of a Hindu undivided family comprising only females, the Apex Court answered in the negative[58] and held that the concept of a Hindu undivided family formed by females only by agreement was alien to

Hindu personal law. In the case in hand, the widow and two daughters of a Hindu male governed by Dayabhaga law, inherited his properties and the mother blended her share of the inheritance into the joint family kitty of such an undivided family that they claimed to form. The Court held:[59]

We have no authority before us which can lead us to the conclusion that the assessee and her two daughters were capable of forming a joint Hindu family or of throwing the interest of any one of them in the inherited property therein. Concept of Hindu females forming a joint family by agreement amongst themselves appears to us to be contrary to the basic tenets of the Hindu personal law. Even when the joint family is already in existence a female member of the family is incapable of blending her absolute property into the joint family hotch potch.[60]

From the point of view of revenue statutes, the ascertainment of the status of a family whether joint or individual is confined to certain basic questions, viz whether a person is to be assessed as an individual or as the Karta of the joint family. If the money is spent for the maintenance of a joint family member, that can be shown as an expense of the joint family. These issues remain the focal point of inquiry whenever there is an examination of the character of the family for income tax purposes, while all other considerations are subsidiary. It is this difference in approach primarily that has created a distinction between a Hindu joint family under Hindu law and a Hindu undivided family for taxation purposes. Though it has been held by the Supreme Court that the expression 'Hindu undivided family' is to be understood in the same manner as the concept of 'Hindu joint family' under Mitakshara law yet the difference in approach is inevitable.[61] This is why under the Hindu law a mother and a daughter will not constitute a joint family and the mother cannot be a Karta of the joint Hindu family; yet for the purposes of income tax she can be assessed as the head/manager of the Hindu undivided family.[62] Similarly, the courts have held that a joint family can exist where there are only widows or a widow and an unmarried daughter[63] so long as the property which was originally of the Hindu joint family remains in the hands of the widows of the members of the family and is not divided among them.[64] As aforesaid, a Hindu Joint family cannot be finally brought to an end if it is possible to add a male member by a female by way of giving birth to a male child or through adoption.[65] However, after the coming into force of the Hindu Succession Act, 1956, granting absolute rights of ownership to the widow, the situation has changed. Now if a person holding property as joint family property in his hands dies leaving behind his widow and his daughter, the property in the hands of the widow and daughter even if practically joint will be their separate property and his widow cannot be assessed as the head of the joint family.[66]

Position when there are only Husband and Wife

There is a conflict of judicial opinion on the question whether a husband and wife can form a joint family. The Supreme Court held in *TS Srinivasan v. Commissioner Income Tax,*[67] that a Hindu undivided family comes into existence only on the birth of a son. The case involved a situation where on the partition of the bigger joint family, the son obtained his share. He filed his returns as an individual until he got married. His status was to be determined when the wife was pregnant. It was held by the court that until the birth of the son, he did not form a joint family and could be assessed only as an individual. This decision that appears to be incorrect was later overruled by the Supreme Court in *Surjit Lal*'s[68] case. This question, whether a Hindu male along with his wife even before the birth of the son can form a Hindu joint family or not arose for the consideration before the Madhya Pradesh High Court in *Commissioner of Income Tax v*. *Vishnukumar Bhaiya*.[69] On exactly the same facts, the court held that when the property was received by the assessee on partition, he was a single member and did not constitute a Hindu undivided family. His status was that of an individual. The fact of his marriage did not alter the position and, in the absence of a son, the personal law of the assessee regarded him as the owner of the property received by him on partition and the income therefrom as his individual income. The Gujarat High Court,[70] also held that a sole surviving coparcener of a Hindu undivided family is the owner of the property, and therefore even the existence of a female member did not affect the absolute right of the male member to deal with and enjoy the property as his own as if it was his absolute property. The character of the property that he holds as a sole surviving coparcener is analogous to that of his exclusive property and makes him an individual rather than the head of the joint family. Rajasthan High Court has also held that a husband and wife alone cannot form a Hindu undivided family as a wife cannot create a charge on husband's property.[71] It is the personal obligation of the husband to maintain the wife even though he has no property. In *Seth Tulsidas Bolumal v*. *Commissioner of Income Tax* [72] an assessee was the karta of a joint Hindu family consisting of himself, his wife and major son. He converted some of his individual properties as joint family property by a declaration. All these properties were assessed as income of the Hindu undivided family. The joint family properties were partitioned five years later, between the assessee and his son, each taking a half share *i.e.*, the father and his wife separated from the major son. For the assessment year subsequent to the above partition, the assessee claimed that the amounts which he paid to the smaller joint family was not his individual income, but that of the smaller Hindu undivided family. The court repelled that contention and held that the portion of the converted asset which fell to the share of the assessee after partition was his individual property, notwithstanding the fact that the karta and his wife formed a Hindu undivided family. The reasoning of the

court was that, in the absence of a son, the property belonged to the Hindu male (karta) absolutely and, therefore, the joint family had no right in the property or the income arising therefrom. The gist of the judgment was that a Hindu male and his wife would form a joint family but the properties held by him may be his separate properties, as that would depend on the facts and circumstances of each case.

However in *Kalyanji Vithaldas*'s case[73] a Hindu man having a wife and a daughter claimed that the properties held by him were joint family property and the Judicial Committee disagreeing with them observed:

> It would not be in consonance with ordinary notions or with a correct interpretation of law of the Mitakshara to hold that property, which a man has obtained from his father, belongs to a Hindu Undivided family by reason of his having a wife and daughters'Interest' is a word of wide and vague significance and no doubt it might be used of a wife's or daughter's right to be maintained which right accrues in the daughter's case on birth, but if the father's obligations are increased, his ownership is not divested, divided or impaired by marriage or the birth of a daughter. This is equally true of ancestral property belonging to himself alone as of self-acquired property.

They, therefore held that in all cases where the family comprised a man, his wife and daughters only or only himself and his wife, the income falling to their shares cannot be treated as income belonging to the joint Hindu family. Even where the sources from where the income received were ancestral but merely because the source held by the member who received it from his father and was on that account ancestral, the income could not be deemed for the purpose of assessment to be income of the Hindu undivided family even though a wife had rights to be maintained under Hindu Law.

On the other hand in complete contrast to the aforesaid judgments in *Narendranath*'s case,[74] the Supreme Court held, almost on similar facts, that the ownership of the dividing coparcener is such that female members of the family may have a right to maintenance out of it and, in some circumstances, to a charge for maintenance upon it and therefore when a coparcener having a wife and two minor daughters and no son receives his share of the joint family properties on partition, such property, in the hands of the coparcener, belongs to the Hindu undivided family comprising himself, his wife and minor daughters and cannot be assessed as his individual property. The Patna and Allahabad High Courts[75] and recently the Gujarat High Court have also held[76] that a husband and a wife can form a joint family all by themselves, as every Hindu family is joint until contrary is proved. Where a coparcener obtains property on partition and then subsequently marries, the status of the property that he holds is either ancestral or joint family property. According to the Karnataka High Court in such a situation the property in the hands of such a person will be joint family property because if he gets a wife, he will be burdened with an obligation to maintain her and if he later begets a son the character of the property will again be termed as joint family property. If he begets only daughters, the burden of maintaining them will be fastened on the property. According to the reasoning of the Karnataka High Court, even in the hands of a single male, the character of the property is that of coparcenary property as he is given the title of a sole surviving coparcener. The Supreme Court has held[77] that as far as the obligation to maintain the wife is concerned, the obligation is personal as well as with respect to the property of an individual and therefore the obligation to maintain the wife extends with respect to the personal property of the husband. The court said that as far as the self-acquired property of an individual is concerned, he has to be assessed as an individual even though he with his wife and daughters constitutes a joint family. In other words the character of the family may differ from the character of the property it may possess. The family may be a joint family but the property that its head may possess may be his separate property. Therefore, what the court said was not that a Hindu male with his wife cannot constitute a joint family but that with respect to his separate property he has to be assessed as an individual. There can therefore be a joint family comprising a man and his wife.[78]

The Supreme Court further held,[79] that the property which a coparcener obtains on partition does not become for all times his individual and separate property. If he has a wife or a daughter depending on him the property will be charged by the obligation to maintain them. If he marries later, his ancestral or self-acquired property will be burdened by an obligation to maintain his wife. If he begets a son, that son becomes entitled to a share in the property which thereby revives the character of a joint family property. If he begets only daughters, the obligation to maintain them will be fastened on the property. It is not as if an unmarried Hindu male obtaining a share of ancestral property in partition retains property as his absolute property even after marriage, encumbered by any obligation to maintain his wife or other dependants. In that absolute sense, it may not be his absolute property after he marries. It sheds the character of separate property and revives its character as joint family property of the smaller unit consisting of himself and his wife. The obligation is with respect to the ancestral property only and not with respect to the separate or self acquired property.

Conclusion

In both the conflicting opinions, the arguments are as follows. The authorities that subscribe to the view that a man and his wife alone cannot form a joint family even if the husband receives a share from the property by virtue of being a coparcener, rely on the argument that as a sole surviving coparcener, he has absolute powers of disposal over it and therefore his ownership is akin to separate ownership. Meanwhile, the other view is that though he may for the time being be treated as having an absolute ownership over the property yet the females have a right of maintenance out of this property and this differentiates his ownership from the one that he may have over his exclusive or personal property where, though he has an obligation to maintain the female dependants, it remains a personal obligation and is not with respect to his separate property.

The primary question here is not whether a man and his wife can form a joint family but it is whether the husband here can be assessed in the capacity of the Karta of a Hindu undivided family with respect to the property that he possess which is to be assessed presently. Therefore, the character of the property becomes the focal point of the investigation. According to the court, if a man receives property after a partition of the joint family of which he was previously a member, and gets married then even where no child is born, he is to be assessed with respect to that property as the Karta of a Hindu undivided family. However, if this person is not only married but also has a daughter, then with respect to his separate property or self-acquired property he is still to be assessed as an individual. So the character of the property in his hands will determine how he is to be assessed and not the fact whether he has a son or not, as even in the presence of a son he is to assessed as an individual with respect to his separate properties.

Two basic arguments have been used here. One is the right of a sole surviving coparcener over this property and the other is the maintenance right of females over this property. Both the arguments have substance in themselves but cannot and should not be used in isolation. If seen in isolation they will lead to contradictory conclusions. The right of maintenance cannot be ignored as ignoring it will only create confusion; therefore both have to be seen together to make the law certain.

It is true that under Hindu law a Hindu male receiving property on partition in absence of a son holds it as his separate property till a son is born but he is always described as a sole surviving coparcener in relation to his share. The son on birth becomes a coparcener having an equal interest in this property with the father and it is the conception of the son who is subsequently born alive that restricts or puts limitations on the power of the father to dispose of the property in any manner he likes. However, till the birth of the son a Hindu male has no impediments on his power of sale of the property. On his death, the property will go by inheritance to the heirs and not by survivorship, survivorship being an essential feature of ancestral/coparcenary/joint family property. The question arises, can the property that goes by inheritance on the death of the holder (owner) of this property and not by survivorship be termed as joint family property? The birth of a son would clearly determine the character of a property as joint family property but should future possibilities or eventualities have a bearing on the decision and assessment at present? The situation has to be viewed in light of what is the character of the property and composition of the family presently and not what may happen in future. Thus, presently as the situation stands, absolute powers of disposal, no right of partition in favour of anyone, and application of laws of inheritance make it look like separate property in contrast to the collective ownership and consequent restrictions on alienation and application of doctrine of survivorship, the essential distinguishing features of the two kinds of properties. However, a surface reading of these distinguishing features can lead to an erroneous assumption. Except for the fact that nobody can demand a partition of this property, the other two terms viz, powers of disposal and heritability of the property cannot be the decisive factors as their consequences vary depending upon whether the property was the separate property of an individual or whether it was previously joint and now in the hands of a sole surviving coparcener. Where separate property is inherited, the heirs get it without any charge over it. But where the property of the sole surviving coparcener is inherited and there were females present in the family who had a claim of maintenance over this property the heirs getting the property are under an obligation to maintain them out of this property. So the argument that there is a difference between the self acquired property of an individual and the one obtained on partition in the capacity of a sole surviving coparcener as far as the right of the maintenance of the female members is concerned has substance and in fact it is this difference that makes the assessment of the property in the hands of a married Hindu male as the Karta of the joint family property. The mother, wife and a daughter have a right to claim maintenance from a Hindu male irrespective of the kind of property he possesses. The right is therefore not limited to joint family property. It means that if there is no joint family property, the rights of maintenance are not non-existent. They can be exercised even against the self-acquired property of an individual. Therefore, maintenance is both a personal as well property obligation. However, there is a difference here between the rights that a female can exercise against the separate property in the hands of a Hindu male and the property that he may receive on partition from an earlier joint family. A female claiming maintenance from a Hindu male when he has self-acquisitions will proceed against him personally and the question whether he has property or not

will be seen at the time of granting of maintenance. Nevertheless, if he has property that he had received on partition a female has the capacity to enforce her rights of maintenance against this property. Further, no female can prevent a Hindu male from alienating his self-acquired property or can force him to make a provision for her maintenance before he sells it. But, where the property was received by a Hindu male on partition from the joint family of which he was a member earlier, and there is a wife or a daughter, they have a right of maintenance from this very property. If the man decides to sell such property, he has to make provisions for their maintenance out of it or independently. Where he tries to sell the property without making any provision for them, the court may at the instance of these females, direct him to make an adequate provision for them and then only transfer it. Where a sole surviving coparcener transfers property without the matter going to the court and without making a provision for the female dependants, the rights of maintenance can be exercised even against a transferee who takes it with actual or constructive notice of their claim against this property. For that certain conditions need to be satisfied viz:

(i) that these females are denied maintenance by the Hindu male;

(ii) they are incapable of maintaining themselves;

(iii) the property has been transferred without making any arrangements for their maintenance;

(iv) the transferee takes the property with actual or constructive notice of their rights of maintenance.

The position can be summed up as follows: where a man has both his self-acquisitions as well as property that he obtains after a partition, female dependants if they file a claim against him for maintenance, can be granted maintenance from either of these properties. If he attempts to sell any of these properties before such a claim is filed, they cannot prevent him from doing so but can sue him for making a provision for them and once the property goes out of his hands by a voluntary transfer to a third party, then again the difference surfaces. If it is the personally acquired property they cannot proceed against the property but if it is one that is received by him on partition they can enforce their claim of maintenance against it.

Secondly, property in the hands of a sole surviving coparcener on his death goes to his legal heirs burdened with an obligation to maintain those female members who have such a right but where self-acquired property is inherited, there is no such obligation. This argument shows that there is a difference between the two kinds of properties. Confining the case to a husband and wife, an individual getting a share in the property at partition will not constitute a joint family as he is single and a plurality of persons is required for the same. When he gets married, he and his wife will form a family of which both of them are members. Even before the birth of any child let alone a male child, the moment he marries, the wife acquires a right of maintenance out of the property that he obtains on partition and a right of residence in this property if it comprised a house. In case of a denial, she can enforce maintenance and residential rights as against this property so long as she is married. She can proceed against the husband personally also but her maintenance rights are more secure against the joint family property. Therefore the view that an individual receiving property on partition and getting married and having no son but daughters or no child at all is to be assessed as the Karta of the joint family, appears to be correct. However, for that, the property, which is to be treated as the undivided property of the joint family, must have been held earlier by the coparcenary in which a member of that family was a coparcener. If the property is included in the joint family property for the first time, to be called a joint family property there should be at least two male members.[80]

WHETHER ‘HINDU UNDIVIDED FAMILY’ AND ‘JOINT HINDU FAMILY’ IS SAME

In revenue statutes, the expression ‘Hindu Undivided Family’ has been used. This appears slightly different from the term ‘Joint Hindu Family’ under Hindu law. Section 2(9) of the Indian Income-tax Act, 1922 defines a ‘person’ to include, *inter alia*, a ‘Hindu undivided family.’ A Hindu undivided family is a taxable unit for the purposes of income tax and super-tax. The expression ‘Hindu undivided family’ finds reference in various provisions of the Act but this expression is not defined in the Act. The reason for the omission according to the Supreme Court is that the expression has a well-known connotation under Hindu law and being aware of it, the legislature did not want to define the expression separately in the Act. Therefore, the expression ‘Hindu undivided family’ must be construed in the sense in which it is understood under Hindu law.[81] The Supreme Court[82] has said that there is nothing in the scheme of the Wealth Tax Act also to suggest that it is different from joint Hindu family and therefore a joint Hindu family and undivided family are synonymous terms. However in a recent decision the Rajasthan High Court made an interesting observation:[83]

> There is no such thing as HUF's property. In fact the subject index of Mulla's Hindu law which deals with nearly every matter discussed in the book does not refer to any such thing as HUF or the Hindu undivided family much less property belonging to such a family.

Even in light of the Supreme Court's observation that the expressions 'Hindu undivided family' and 'Hindu joint family' are synonymous, there are some basic differences between the two:

(i) One of the basic presumptions under Hindu law is that every Hindu family is presumed to be a joint Hindu family until contrary is proved. There is no such assumption under the taxation laws for a Hindu family. On the other hand, this is the main point of contention.

(ii) Under Hindu law though there is a presumption that every Hindu family is a joint family there is no presumption that it owns joint family property. Therefore, under Mitakshara law there can be a joint family without joint family property. However, the concept of Hindu undivided family under the revenue laws is linked only with the property. The concept of a Hindu undivided family without owning any property is meaningless as far as its assessment is concerned.

(iii) Under Hindu law, a son in the womb of his mother in many aspects is treated as equal to a son in existence. He can also restrict the rights of a sole surviving coparcener to alienate the property, yet for the purposes of revenue laws, such a son is not taken into cognizance till he is actually born alive.

(iv) The very purpose for which the expression Hindu joint family or Hindu undivided family is understood by these two legal branches, viz. the revenue authorities and Hindu law, are different. The importance of the difference lies in the fact that for the purposes of super tax a person will be allowed a larger exemption if he is taxed as the manager of a joint Hindu family than, if he is taxed as an individual.[84] For imposition of tax, whether a person is to be assessed as an individual or as the Karta of a joint family is the primary consideration. If the money is spent for the maintenance of a joint family member that can be shown as an expense of the joint family. Thus this remains the focal point of inquiry whenever there is an examination of the character of the family for revenue purposes. All other considerations are subsidiary.

(v) These differences in approach have created a distinction between a Hindu joint family under Hindu law and a Hindu undivided family for taxation purposes. This is the reason why under Hindu law there cannot be a joint family consisting only of a mother and a daughter and the mother will not be a Karta of this Hindu family; yet for the purposes of income tax she can be assessed as the head/manager of the Hindu undivided family.[85] Under Hindu law, to understand the concept of Hindu joint family, its composition and its unique feature has multifarious purposes. Concept of Hindu joint family is the starting point of understanding the Hindu law of ownership and devolution of ancestral property, the rights and obligations of its various members, rights of survivorship in this property, rights and modes of partition and the ascertainment of their shares. The concept of joint family also has a bearing on succession laws and the power of a member to dispose of his share inter vivos or through a Will. The purposes are beyond comparison. In complete contrast to the narrow object under the revenue laws the joint family concept under Hindu law is the starting point of a fully developed separate branch of law altogether.

LAW APPLICABLE TO MATRIARCHAL FAMILIES

The Mitakshara law of joint family is founded upon agnatic relationship, the undivided family is characterised by community of interest and unity of possession among persons descended from a common ancestor in the male line. The principal incident of matriarchal families is that descent is traced through a female ancestress. In South India, a woman with all her children forms a 'Tarvad'—an institution akin to joint family under the Mitkashara law. The members of a Tarvad live in commensality with joint rights to property[86] by birth.[87]A male descendant is a member of the Tarvad of his mother but his children are not. They belong to the Tarvad of their mother. A female member does not change her Tarvad upon her marriage. The rules of survivorship govern the devolution of property of any member of Tarvad. Property is jointly owned and managed by all members of the Tarvad but more specifically by the eldest male member called 'Karnavan'. However, he does not have any better rights in the property in comparison to other members in the family, as he is neither empowered to sell the property nor to represent the family. Under the customary Marumakkattayam law no partition of the family estate may be made as no individual could claim any property as his or her own, but items of the family property may by agreement be separately

enjoyed by the members. On death, the interest of a member in the Tarvad devolved by survivorship. It is neither an essential condition nor a practice that all members of the Tarvad should live together. A woman of a particular Tarvad with her descendants can establish a different home; such a branch is known as 'Tavazhi'. Women have an interest in the Tarvad properties besides having independent or individual properties. Changes in the pattern of Tarvad were witnessed with the advent of the British. A Tarvad was defined as an impartible and corporate unit by the East India Company officials whose main interest in these matrilineal groups of South India that were a prominent land owing group was imposition of revenue related laws and regulations. These sets of rules and regulations were based on the pattern of patriarchal families and for sheer convenience of dealing with a man, they gave prominent importance to Karnavan making his position superior to that of anyone else in the family. Unawareness of the customs of the matrilineal societies led to the British carrying out various experiments with these societies. They applied the English common law and Roman law principles, principles of equity, and the patriarchal norms over these families completely distorting the concept in the process. In 1810, the provincial court ruled that an undivided share of an individual in a Tarvad could be sold for debt contracted by him. In other words, the impartible share was made not only partible but also alienable. In 1814, the Sadar Court conferred proprietary rights on the Karnavan by applying the custom of the patriarchal Namboodris. It resulted in the gradual deterioration in status of women. Unable to comprehend the unique features governing matrilineal societies, the British encroached them with patriarchal norms and the Kerala Joint Family Abolition Act, 1975, finally brought these families to an end. Their right to the Tarvad property was brought to an end and the existing members held it as tenants-in-common. The concept of gender parity was maintained with men and women in the family having equal rights over the property.

The primary difference between the Mitakshara system of inheritance and the Marumakkattayam and Aliyasantana laws lies in the former following the patriarchy and the latter adhering to the matriarchy, *i.e.*, tracing descent from a common ancestress.[88]

COMPOSITE FAMILIES

In certain communities particularly in Andhra Pradesh, there is a custom of existence of composite families. The culture of composite families arises by agreement between the families and the primary objective is convenience and efficient management of the family properties. When two or more families live together, work together, pool in their resources and labour and throw their gains of labour into a common stock, they are called composite families.[89] A long duration such as living together of a few generations can in itself raise a presumption of merger of various families into composite families.[90]

RIGHTS OF MEMBERS OF JOINT HINDU FAMILY

In a Hindu joint family, all its members do not have equal rights. The interest in the coparcenary property is with the coparceners, including a right to demand its partition, and a right to challenge its unauthorised alienation made by Karta. All other female members including the widows of deceased coparceners, male members beyond four generations, disqualified coparceners, and illegitimate sons of lineal male descendants, have a right of maintenance out of the joint family funds and a right of residence in the joint family home. The right of residence cannot be enforced as a matter of right if any member, including a coparcener has proved to be a nuisance to the other family members and his continued residence in the family will adversely affect the interests of the other members or disturb the peace of the family. In such cases, the Karta can hand him his share and throw him out of the family. Unmarried daughters in the family also have a right to be married out of the joint family funds.[91]

LEGISLATIVE INROADS INTO THE CONCEPT OF JOINT FAMILY

One of the basic incidents of the concept of joint family is the existence of joint as well as separate property in the family. In a joint family property, the son has a right by birth while the daughter though a member of the family till her marriage, was not a coparcener and had no interest in the coparcenary property. At the time of the discussion on the Hindu Succession Bill in the Parliament in 1954–55, several parliamentarians recommended its abolition as it

treated women unfavourably, but a considerable majority favoured its retention in the name of it symbolising the very essence of Hindu religion. In order to give better rights to women in the joint family property without abolishing it, the concept of notional partition was introduced in the Hindu Succession Act but the result was still an unequal treatment to women. In the light of the constitutional mandate of gender parity, these property-related provisions stood out as discriminatory and to remove that, two options were available with the legislature. First, to abolish the joint family and separate property distinction by abolishing the very concept of joint family system and the other to make the daughter also a coparcener in the same manner as a son with a right by birth in the coparcenary property. The Kerala legislature opted for the former and passed the Kerala Joint Hindu Family (Abolition) Act in 1975. The enactment was equally applicable to matriarchal families and also to patriarchal families governed by the Mitakshara law.

THE KERALA JOINT HINDU FAMILY (ABOLITION) ACT, 1975

The Kerala Joint Hindu Family (Abolition) Act received the assent of the President on 10 August 1976. It was enacted to abolish the joint family system among Hindus in the State of Kerala. It applied to both undivided families governed by Mitakshara law1[92] as well as matriarchal families including a Tarvad or Thavazhi,2[93] a Kutumba or Kavaru3[94] or an Illom.4[95] The Act abolished the right by birth of the coparceners5[96] and replaced joint tenancy by tenancy in common.6[97]Therefore on the date of the coming into force of this Act it was to be presumed that, a partition had taken place in every family and each person who was earlier entitled to get a share was deemed to hold his share as his distinct, separate and absolute property.7[98] If under the custom a female was entitled to ask for partition or was to be granted a share in the property in lieu of her maintenance or marriage expenses, then only she was entitled to a share in the property.8[99] The Act also safeguarded the right of those members of the family who were not coparceners and were not entitled to get a share. Their right of residence in the erstwhile joint family house, and the right of maintenance and even marriage expenses or payment of funeral expenses out of the erstwhile joint family funds were protected.9[100]The Act also abolished the pious obligation of the son to repay the debts of the father, paternal grandfather or the paternal great grandfather.10[101] However since the Act is prospective in application and not retrospective it did not apply to debts contracted by the father, father's father or father's father's father before the passing of the Act. Thus the liability of the joint family members for debts contracted before the Act remained unaffected.11[102] In State of Kerala therefore, the concept of joint family does not exist. All families are separate or nuclear families. The head of the family even where all the members are living together for the sake of convenience has to be assessed as an individual and not as the head of a joint family. The right of inheritance has replaced the doctrine of survivorship in which the daughters have equal share with the sons.

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1. While in the state of Kerela the concept of joint family has been abolished, four states to begin with introduced unmarried daughters as coparceners. The Hindu Succession Amendment Act has brought equality and presently a daughter and a son are members of their father's joint family in an identical manner. For detailed discussion, see *infra*.
2. *Surjit Lal v. Commissioner of Income Tax*, (1978) 101 ITR 776.
3. *Gur Narain Das v. Gur Tahal Das*, AIR 1952 SC 225 [LNIND 1952 SC 34]; *Vellaiyappa Chetty v. Natarajan*, AIR 1931 PC 294 : 61 Mad LJ 522.
4. *Srinivasan v. Commissioner of Income Tax*, 1962 Mad 146 .
5. *Sudarsanam Maistri v. Narasimhulu Maistri*, (1902) ILR 25 Mad 149, 154.
6. *Ganasvant Bal Savant v. Narayan Dhond Savant*, (1883) ILR 7 Bom 467, 471.
7. *Tek Bahadur Singh v. Devi Singh*, AIR 1966 SC 292 .
8. See The Special Marriage Act, 1954, s. 19.
9. See The Caste Disabilities Removal Act, 1850, s. 3.
10. *K. Devabalan v. M. Vijayakumari*, AIR 1991 Ker 175 [LNIND 1990 KER 253]. See also *Rose Marie v. WTC*, 1970 Mad 249 wherein it was held that the son of a Hindu father and a Christian mother married under the Special Marriage Act will be a member of his father's joint family. However see also *Lingappa Goudan v. Esudasan*, ILR 27 Mad 13, where the plaintiff was not regarded as a Hindu as his mother was a Christian.
11. For details see Poonam Pradhan Saxena, 'Validity of Inter-religious marriages under Hindu Law', 14 Del Law Rev, 1992, p. 128.

12. *Bhupatrai Hirachand v. Commissioner of Income Tax*, (1977) 109 ITR 97 (Cal); *Krishna Prasad v. Commissioner of Income Tax, Bangalore*, (1974) 97 ITR 493.

13. *CED v. Harish Chandra*, (1987) 167 ITR 230 (All); *Rameshwar Mistry v. Bebulal Mistry*, AIR 1991 Pat 53 .

14. *Commissioner of Income Tax v. Govinda Ram Sugar Mills*, AIR 1966 SC 240 ; *Pushpa Devi v. Commissioner Income Tax*, AIR 1977 SC 2230 [LNIND 1977 SC 258]; see also *Desappa Setty v. Vedavathamma*, AIR 1972 Mys 283 ; *Rajendra Nath v. Shiv Nath*, AIR 1971 All 448 ; *CED v. Harish Chandra*, (1987) 167 ITR 230 (All); *Rameshwar Mistry v. Bebulal Mistry*, AIR 1991 Pat 3 ; *Sabitri v. FA Savi*, AIR 1933 Pat 306 ; *Punna Bibi v. Radha Kissen*, (1904) 31 Cal 476; *Commissioner of Income Tax v. Govinda Ram Sugar Mills*, AIR 1966 SC 240 ; *Kanji v. Permanand*, AIR 1992 MP 208 [LNIND 1991 MP 172]; *Seetha Bai v. Narasimha*, (1945) Mad 568; *Seethamma v. Veerana*, (1950) Mad 1076; *Maguni Padhano v. Lakananidhi*, AIR 1956 Ori 1 wherein it was held that the mother cannot act as Karta; *Sushila Devi v. Income Tax Officer*, AIR 1959 Cal 697 [LNIND 1959 CAL 117]; *Hira Singh v. K. Mangla*, AIR 1928 Lah 122 ; *Sitla Prasad v. Sri Ram*, (1944) Luck 450; *Gangamma v. Kuppammal*, 1939 Mad 139 ; *Commissioner of Income Tax v. Pannbai*, AIR 1913 Nag 160 .

15. *Deshnath Rao v. Ramchander Rao*, AIR 1951 Bom 143 .

16. *Gur Narain Das v. Gur Tahal Das*, AIR 1952 SC 225 [LNIND 1952 SC 34]; *Vellaiyappa Chetty v. Natarajan*, AIR 1931 PC 294, 61 Mad LJ 522.

17. *Ram Kumar v. Commissioner of Income Tax*, AIR 1953 All 150 .

18. *Suraj Bansi Koer v. Sheo Persad*, (1874) 14 Beng LR 188, 195.

19. *Chotelal v. Jhandelal*, AIR 1972 All 424 .

20. *Ibid*.

21. *State Bank of Travancore v. Aravinan Kunju Panicker*, AIR 1971 SC 996 ; *Jagannath v. Lakhanath*, AIR 1981 Ori 51 ; *Basittappa v. Irawwa*, AIR 1988 Kant 174 [LNIND 1987 KANT 190]; *Jugal v. Gobind*, AIR 1992 Pat 128 ; *Radhamoni v. Dibakar*, AIR 1991 Pat 15 ; *Bhagwan Dayal v. Reoti Devi*, AIR 1962 SC 287 [LNIND 1961 SC 465].

22. *Raghavamma v. Chenchamma*, AIR 1964 SC 136 [LNIND 1963 SC 101]; *Govind Darsu v. Kuldip Singh*, AIR 1971 Del 151 [LNIND 1970 DEL 60]; *Charandassi v. Kanailal*, AIR 1955 Cal 205 ; *Rukmabai v. Laxmi Narayan*, AIR 1960 SC 335 [LNIND 1959 SC 205].

23. *Sri Raghunada v. Brozon Kishor*, (1876) 1 Mad 69, 89, 3 IA 154; *Dulachand v. Certificate Officer*, (1964) 68 CWN 349; *Neelkisto Deb v. Beerchunder*, (1869) 12 MIA 523, 540; *Katha Perumal v. Rajendra*, 1959 Mad 409 .

24. *Chowdhary Ganesh Dutt v. Jewach*, (1904) 31 IA 10.

25. *Indoor Kuer v. Pirthipal Kuer*, AIR 1945 PC 128 .

26. *V.M. Patel v. K.M. Patel,* AIR 2000 NOC 74 (Guj).

27. *Mathuri Bewa v. Prafulla Routrey*, AIR 2003 Ori 136 [LNIND 2003 ORI 140]; *Panchani Singh v. Rani Raj Rajeshwari Devi*, 1970 All LJ 983 (DB).

28. *Nageshar Baksh Singh v. Ganesha*, AIR 1920 PC 46 .

29. *Nazi v. Mohanlal*, AIR 1957 Raj 28 [LNIND 1956 RAJ 195](DB).

30. *Inder Kuer v. Pirthipal Kuer*, AIR 1945 PC 128 ; *Ramgopal v. Mohanlal*, AIR 1960 Punj 226 ; *Chandeswar Singh v. Ram Chandra Singh*, AIR 1973 Pat 315 ; *Rukmabai v. Lala Lakshminarayan*, AIR 1960 SC 335 [LNIND 1959 SC 205]; *Kanhaya Lal v. Devi Dayal*, AIR 1936 Lah 514 ; *Moro Vishwanath v. Ganesh Vithal*, (1873) 10 Bom HC 444, 468; *Muna Mahto v. Raghunath*, AIR 1933 Pat 153 ; *Indranarayan v. Roopnarayan*, AIR 1971 SC 1962 [LNIND 1971 SC 305].

31. *Harprasad v. Ram Devi*, AIR 1964 All 64 [LNIND 1962 ALL 191].

32. *Chandeswar Singh v. Ram Chandra Singh*, AIR 1973 Pat 315 ; *Jaai Kishore v. Govind Singh*, AIR 1920 Pat 128 ; *Cheetha v. Baboo Miheen Lal*, (1867) 11 MIA 369 reaffirmed in *Shankarrao Dajisaheb Shinde v. Vithalrao Gangapatrao Shinde*, AIR 1989 SC 879 .

33. *Bannoo v. Kashee Ram*, ILR 3 Cal 315 (PC); *Bharat Singh v. Bhagirathi*, (1966) 2 SCJ 53 [LNIND 1965 SC 204]; *Girijanadini v. Birendra*, AIR 1966 SC 1124 .

34. *Naragunty Lutchmeedavamab v. Vengama Naidoo*, (1861) 9 MIA 66.

35. *Commissioner of Income Tax, Assam v. Nand Lal Agarwal*, AIR 1966 SC 899 [LNIND 1965 SC 316].

36. *Bhagwan Dayal v. Reoti Devi*, AIR 1962 SC 287 [LNIND 1961 SC 465].

37. *Mathuri Bewa v. Prafulla Routrey*, AIR 2003 Ori 136 [LNIND 2003 ORI 140]; *Jankiram v. Nagamony*, 1926 Mad 273 ; *Laldas v. Motidai*, (1908) 10 Bom LR 175; *Pandit Mohan Lal v. Pandit Ram Dayal*, AIR 1941 Ori 331 ; *Rai Shadilala v. Lal Bahadur*, AIR 1933 PC 85 ; *Nisar Ahmed Khan v. Raja Mohun Manucha*, AIR 1940 PC 204 .

38. *Janakiram v. Nagamony*, (1926) 49 Mad 98.

39. *Babu Nisar Ahmad Khan v. Babu Raja Mohan Manucha*, AIR 1940 PC 204 .

40. *Shadilal v. Lal Bahadur*, AIR 1933 PC 85 ; *Baishnas v. Baiadhser*, (1973) CWR 993; *Appalaswami v. Suryanarayanmurthy*, AIR 1947 PC 189 .

41. *Selyaraj v. Radhakrishna*, 1976 Mad 156 .

42. *Patrama v. Bahadur*, AIR 1983 All 346 .

43. *Savitri v. Jiwan*, AIR 1960 Pat 48 ; *Chandreswar v. Ramchandra*, AIR 1973 Pat 215 ; *Prabhalila v. Sakuntala*, AIR 1986 Pat 1 ; *Shyamlal v. Madhusudan*, *AIR 1959 Cal 380* [*LNIND 1958 CAL 205*].

44. *Ananda v. Suman*, *AIR 1988 Cal 375* [*LNIND 1988 CAL 73*].

45. *Srinivas Krishnarao Kango v. Narayan Devi Kango*, *AIR 1954 SC 379* [*LNIND 1954 SC 52*].

46. *Gowli v. Commissioner of Income Tax*, *Mysore*, AIR 1966 SC 1521 .

47. *Commissioner of Income Tax v. Laxmi Narayan*, AIR 1935 Bom 412 ; *Anant v. Shanker*, 70 IA 232 : AIR 1943 PC 196 .

48. *Commissioner of Income Tax v. Sarwan Kumar*, (1945) ILR All 509; *Draupadi v. Vikram*, (1938) ILR Nag 88; *Anant v. Shankar*, (1944) 70 IA 232; *Baji Rao v. Ram Krishan*, (1941) ILR Nag 707.

49. *Vedathanni v. Commissioner of Income Tax*, 56 Mad 1.

50. *Commissioner of Income Tax v. Laxmi Narayan*, AIR 1935 Bom 412 .

51. *Surjit Lal v. Commissioner of Income Tax*, (1978) 101 ITR 776.

52. *Commissioner of Income Tax v. Sarwan Kumar*, 13 ITR 361.

53. *Commissioner of Income Tax v. Verappa Chettiar*, 76 ITR 467.

54. *Attorney General of Ceylon v. Arunachalam Chettiar*, *(1957) AC 540*.

55. *Ashok Kumar Ratanchand v. Commissioner of Income Tax*, *(1990) 186 ITR 475*; BKD *Bhatia v. Commissioner of Income Tax*, (1993) 199 ITR 190 (Ker); *Krishna Prasad v. Commissioner of Income Tax*, (1970) 75 ITR 526; *Prem Kumar v. Commissioner of Income Tax*, (1980) 120 ITR 347 (All). For a contrary opinion see *Commissioner of Income Tax v. Vishnu Kumar Bhaiya*, (1983) 142 ITR 357 (MP); *Shankar Lal v. Budhia*, (1987) 165 ITR 380 (Patna).

56. (1957–34) ITR Supp 42.

57. See The Hindu Adoptions and Maintenance Act, 1956, s. 14(4).

58. *The Commissioner of Income Tax v. Sandhya Rani Dutta*, JT 2001(3) SC 163 [*LNIND 2001 SC 513*].

59. *Ibid*., para 11.

60. *Pushpa Devi v. Commissioner of Income Tax*, 109 ITR 730.

61. For details, see the discussion, *infra*.

62. *Rukmini Bai v. Commissioner of Wealth Tax*, AIR 1964 Orissa 274 (DB).

63. *Krishna Prasad v. Commissioner of Income Tax*, *Bangalore*, (1974) ITR 493 (SC).

64. *Mangala v. Jayabai*, *AIR 1994 Kant 276* [*LNIND 1994 KANT 84*].

65. *Anant Bhikkappa Patil v. Shankar Ramchandra Patil*, AIR 1943 PC 196 .

66. See The Hindu Succession Act, 1956, ss. 8–13.

67. (1966) 60 ITR 36 (SC), [1966] 2 SCR 755.

68. *Surjit Lal v. CIT*, (1978) 101 ITR 776.

69. (1983) 142 ITR 357.

70. *Anilkumar B Laskari v. Commissioner of Income Tax*, (1983) 142 ITR 831.

71. *Mukut Bihari Lal Bhargava v. Commissioner of Income Tax*, (1964) 53 ITR 613.

72. (1980) 170 ITR 1.

73. AIR 1937 PC 36 .

74. *NV Narendra Nath v. Commissioner*, *Wealth Tax*, *AIR 1970 SC 14* [*LNIND 1969 SC 101*].

75. *CWT v. Panna Lal Rastogi*, (1974) 96 ITR 110 (Patna HC); *Prem Kumar v. Commissioner of Income Tax*, (1980) 121 ITR 347 (All HC).

76. *Commissioner of Income Tax v. Parshottamdas K. Panchal*, (2002) 170 Taxation 653 Gujarat, *(2002) 257 ITR 96* [*LNIND 2001 GUJ 40*] (Guj); *Commissioner of Income Tax v. Madan Lal Parikh*, (2002) 123 Taxman 603 Raj, (2002) 168 Taxation 525 Raj, 2002 (175) CTR 277 Raj. See also *Bharat Kumar Chinubhai v. Commissioner of Income Tax*, (1969) 71 ITR 1; *CWT v. Harshadlal Manilal*, (1974) 97 ITR 86; *WPAR Rajagopalan v. CWT*, *(2000) 241 ITR 344* [*LNIND 1998 MAD 1247*] (Mad); *Commissioner of Income Tax v. Arun Kumar Jhunjhunwalla and Sons*, (1997) 223 ITR 45 (Gau); *Balkrishna Goyal v. CWT*, (1996) 218 ITR 671 (MP); *Commissioner of Income Tax v. Krishna Kumar*, (1983) 143 ITR 462; *Apporva Shantilal Shah v. Commissioner of Income Tax*, (1983) 141 ITR 558; *Atul Kumar Ramanlal*, ITA reference no. 178/Ahd of 1984.

77. *Surjit Lal v. CIT*, (1978) 101 ITR 776; *CIT v. SP Chopra*, (1991) 191 ITR 455 (Del).

78. *Ibid*.

79. *Ibid*.

80. *Commissioner of Income Tax v. Parshottamdas K. Panchal*, (2002) 170 Taxation 653 Gujarat : *(2002) 257 ITR 96* [*LNIND 2001 GUJ 40*](Guj).

81. *Commissioner Income Tax v. Arun Kumar Jhunjhunwalla*, (1997) 223 ITR 45 (Gau); *Gomedalli Laxminarayan (deceased) v. Commissioner of Income Tax, Bombay*, 8 ITC 239 (see particularly the judgment of Rangnekar J. at p. 244) 3 ITR 367, 369–370, AIR 1935 Bom 412 .

82. *NV Narendra Nath v. Commissioner Wealth Tax*, *AIR 1970 SC 14* [*LNIND 1969 SC 101*]; *Surjeet v. Commissioner of Income Tax, Bombay*, *AIR 1976 SC 109* [*LNIND 1975 SC 386*]: (1978) 101 ITR 776 and earlier in *Gowli v. Commissioner of Income Tax*, AIR 1966 SC 1521 .

83. *Commissioner of Income Tax v. Madan Lal Parikh*, 2002 (123) Taxman 603 (Raj) : 2002 (175) CTR 277.

84. *Commissioner of Income Tax, Bombay v. Gomedalli Lakshmi Narayan*, AIR 1935 Bom 412 .

85. *Sushila Devi v. Income Tax Officer*, *AIR 1959 Cal 697* [*LNIND 1959 CAL 117*].

86. *V. Venugopala Ravi Varma Rajab v. Union of India*, *AIR 1969 SC 1094* [*LNIND 1969 SC 93*].

87. Mayne, *Hindu Law and Usage*, 12th edn., (ed. Kuppuswami), 1986, p. 972.

88. *Kalliani Amma v. Govinda Menon*, (1912) 35 Mad 648; *Kabakani Kama v. Siva Sankaran*, (1910) 20 MLJ 134 [*LNIND 1909 MAD 207*].

89. *Anchuru v. Gurijala*, AIR 1961 AP 434 .

90. *Kakrala Subbayya v. Makkena Sitaramamma*, *AIR 1959 AP 86* [*LNIND 1957 AP 124*]. See also *Allareddi Subbamma v. Nallapareddi Adi Lakshmamma*, 22 MLJ 260; *Veerappa v. Venkayya*, *AIR 1961 AP 534* [*LNIND 1960 AP 294*]; *Venkata Subbareddy v. Pitichamma*, 1960 ALT 383.

91. With respect to the rights of Karta and coparceners, see the discussion *infra*.

92 See The Kerala Joint Hindu Family (Abolition) Act, 1975, s. 2(4).

93 Governed by the Madras Marumakkattayam Act, 1932; The Travancore Nayar Act, 1100; The Travancore Ezhava Act, 1100; The Nanjinad Vellala Act of 1108; The Travancore Kshatriya Act, 1108; The Travancore Krishnavaka Marumakkattayam Act, 1115; The Cochin Nayar Act, 1113 or The Cochin Marumakkattayam Act, 1113.

94 Governed by the Madras Aliyasantana Act, 1949.

95 Governed by the Kerala Nambudiri Act, 1958.

96 See The Kerala Joint Hindu Family (Abolition) Act, 1975, s. 3.

97 *Ibid*., s. 4. See also *Dharmambal v. S. Lakshmi Ammal*, AIR 2003 NOC 117 (Ker) : 2002 AIHC 3399.

98 *WTO v. K. Madhavan Nambiar*, (1988) 169 ITR 810; *CWT v. PM Padmanabhan*, *(1989) 179 ITR 243*.

99 *CWT v. P.M. Padmanabhan*, *(1989) 179 ITR 243*.

100 The Kerala Joint Hindu Family (Abolition) Act, 1975, s. 4 proviso.

101 *Ibid*., s. 5.

102 *Ibid*., s. 5(2), and s. 6.

CHAPTER 3 COPARCENARY

INTRODUCTION

The primary purpose of understanding the concept of Mitakshara coparcenary was spiritual in nature. A coparcener in relation to the father is a person who can offer a funeral cake to him. This capability to offer spiritual salvation by the performance of funeral rites was with the son, son of a son (grandson), and son of a son of a son (great-grand-son)[1] and as a consequence of it they were conferred a right by birth in the property of the father. This religious aspect that associated it primarily with relationships and spiritual benefits and not merely from the property perspective were totally sidelined later by the legal aspect. The revenue authorities view coparcenery purely from the property angle. Presently it is understood to ascertain the rights and obligations of the members in the joint family property that is also called the ancestral property or the coparcenary property.1

A person is the exclusive owner of his self-acquisitions and no one else, including his family members, have the legal power to restrict his rights over the separate property, save in accordance with the provisions of law. However, under Hindu law, where a person possesses an interest in ancestral or coparcenary property he is not the sole owner of it and his son, son of his son (grandson), and son of his son of his son (great-grandson) acquire a right by birth in this property.[2] All such sons, grandsons and great-grandsons irrespective of their numbers will be coparceners with him having joint ownership in this property. Presently the concept of coparcenary is linked with the ownership in this property.

CONCEPT : UNDER CLASSICAL LAW

The system of coparcenary is a narrower institution within a joint family comprising only male members[3]. This group of persons, unlike the joint family, is related to each other only by blood or through a valid adoption. No person can by marriage and no stranger can by agreement become a member of coparcenary, as it is a creation of law.[4] Under the classical law, no female could be a member of coparcenary. The seniormost male member is called the last holder of the property and from him a continuous chain of three generations of male members form the coparcenary. These males up to three generations from the present/last holder of the property have a right by birth in the joint Hindu family property and have a right to ask for partition of the same. Thus in Fig. 3.1, where the family comprised the father, *F*, his wife, *W*, two married sons, S1 and S2, with their wives, *W* 1 and *W* 2 and their sons, S3 and S4 and two unmarried daughters, *D* 3 and *D* 4; all will be the members of the joint family, but as far as the coparcenary is concerned, father's wife, lineal descendant's wives and the two daughters will not be members of the coparcenary but the father, his two sons, and grandsons would be members of the coparcenary and will have a right by birth in the ownership of this property.

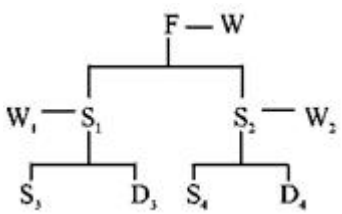

Fig. 3.1

FORMATION OF MITAKSHARA COPARCENARY

A single person cannot form a coparcenary. There should be at least two male members to constitute it. Like a Hindu joint family, the presence of a seniormost male member is a must to start a coparcenary. As aforesaid, a minimum of two members is required to start and even continue a coparcenary. Moreover, the relationship of father and son is essential for starting a coparcenary. For e.g., as shown in Fig. 3.2, a Hindu male obtains his share at the time of partition from his father and then gets married. Till a son is born he is the sole male in this family and the income in his hands i.e., the share he had received at partition may be assessed as the joint family income, but he alone will not form a coparcenary. On the birth of his son, a coparcenary comprising him and his son will come into existence. When this son gets married and a son is born to him, the coparcenary will comprise the father *F*, his son *S* and his grandson *SS*. If the son dies, the coparcenary will not come to an end and will comprise the father and the son of the deceased son. Where the family consists of the father, *F*, his son *S*, his grandson *SS*, his great-grandson *SSS*, all four will be coparceners.

Fig. 3.2

On the death of *S*, the coparcenary will consist of *F*, *SS* and *SSS*. If *SS* dies, it will continue with *F* and *SSS*. Thus there can be a coparcenary consisting of father and son or father and his grandson or the father and his great-grandson or of all of them together.

Coparcenary is not limited to four male members but is limited to four generations of male members irrespective of their numbers. In Fig. 3.3, *F*, his sons, S1, S2 and S3, their sons, S4, S5, S6 and S7 and their sons S8, S9, S10 and S11 will be coparceners with the rest of the male members.

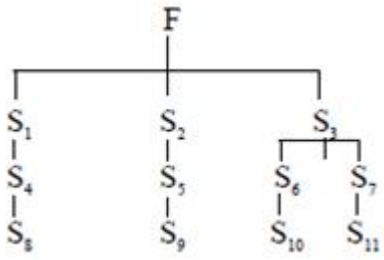

Fig. 3.3

COPARCENARY NOT LIMITED TO FOUR GENERATIONS FROM THE COMMON ANCESTOR

Where a coparcenary is started, the seniormost male member with his lineal male descendants till four generations (inclusive of him) of male line will form a coparcenary. If there is a lineal male descendant in the fifth generation he

will be a member of the joint family but will not be a coparcener as he is removed from the seniormost male member by more than four generations. In the examples cited in Fig. 3.4, F and his lineal male descendents from S1 to S6 (till seven generations) are members of his joint family. Here *F*, S1, S2 and S3 will be coparceners. But this does not mean that S4 will never be a coparcener. On the death of *F*, S1 will become the last holder of the property and if four generations are counted from him S4 will be included in the coparcenary. Similarly, on the death of S1, S5 will become a coparcener as instead of S1, S2 will become the last holder of the property. S6 will become a coparcener on the death of S2, as from S3, who will become the last holder of the property, he will be within four generations. The rule is that so long as one is not removed from the last holder of the property by more than four generations he will be a coparcener.[5] Like in a joint family, in a coparcenary upper links are removed and lower links are added, and the coparcenary may continue indefinitely provided there are at least two male members (coparceners) maintaining the joint family status.

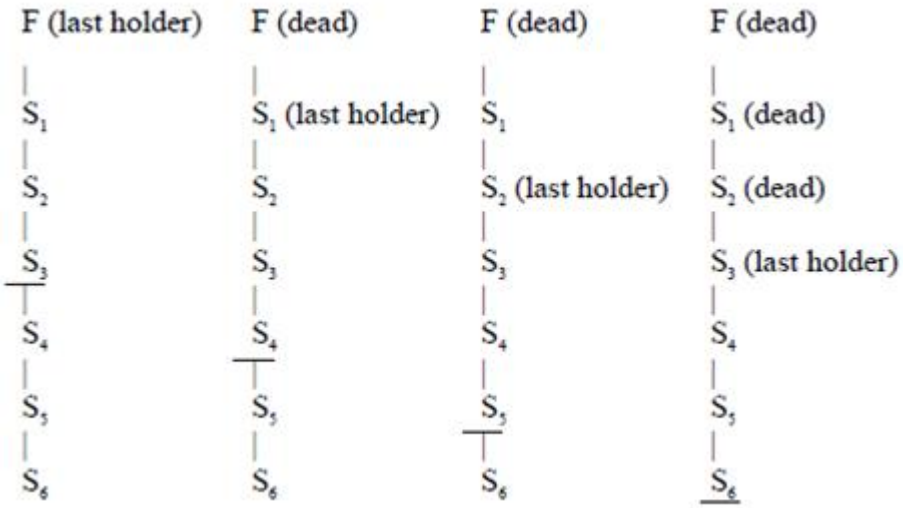

Fig. 3.4(i)Fig. 3.4(ii)Fig. 3.4(iii)Fig. 3.4(iv)

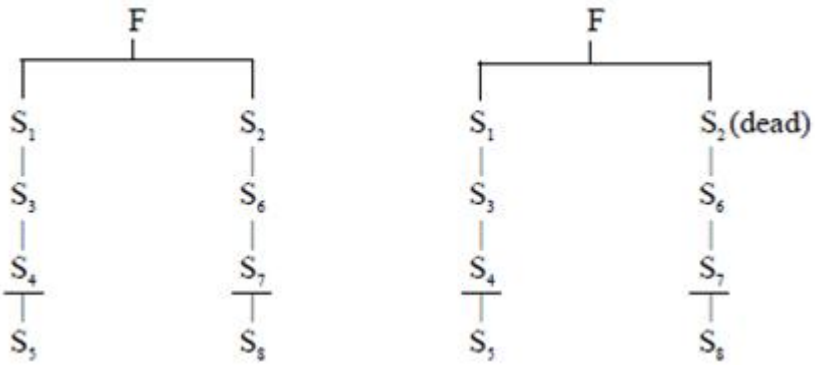

Fig. 3.5(i)Fig. 3.5(ii)

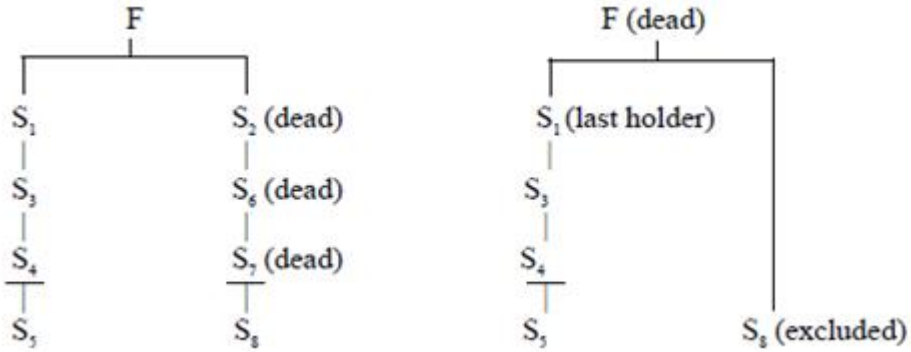

Fig. 3.5(iii)Fig. 3.5(iv)

In Fig. 3.5(i), where the father has two sons S1 and S2, with S3, S4 and S5 and S6, S7 and S8 as the sons of S1 and S2 respectively, the coparcenary will consist of *F*, S1, S2, S3, S4, S6 and S7. S5 and S8 are removed from *F* by more than four generations and they will not be included in the coparcenary. Suppose S2 dies, the coparcenary will consist of *F*, S1, S3, S4, S6 and S7 [Fig. 3.5(ii)]. During the life time of *F*, S6 and S7 also die one after the other. The coparcenary will now consist of *F*, S1, S3 and S4 only [Fig. 3.5 (iii)]. S8 will not be included in the coparcenary because he is still in the fifth generation as *F* is alive. If *F* dies now S1 will become the last holder of the property and the coparcenary will now comprise his three lineal male descendants i.e., S3, S4 and S5 will also be included in the coparcenary as counting from S1, he will be in the fourth generation [Fig. 3.5(iv)]. But S8 will not be a coparcener as the coparcenary property has gone to the parallel branch due to the death of his three immediate ancestors in the male line. However, as in Fig. 3.5(v) if *F* dies before the death of S2, S6 and S7 then S8 will be included in the coparcenary as his links with the last holder of the property existed.

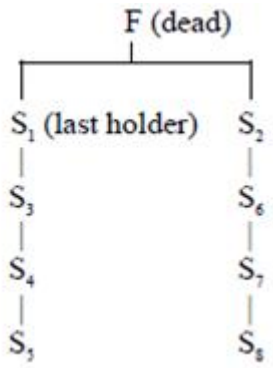

Fig. 3.5(v)

SOLE SURVIVING COPARCENER

When all the coparceners die leaving behind only one of them, the surviving coparcener is called the sole surviving coparcener. As a minimum of two male members are required to form a coparcenary, a sole surviving coparcener cannot form a coparcenary all by himself. If another coparcener comes into existence the coparcenary will be revived but if that does not happen, then the sole surviving coparcener is entitled to treat the coparcenary property as his separate property and enjoy absolute power over its disposal. However, if there are female members who have a right to maintenance out of this property, then before or after the transfer of the property, a provision has to be made for their maintenance by the sole surviving coparcener. On the death of the sole surviving coparcener the property does not go by doctrine of survivorship as no other coparcener is there, but it will go to the legal heirs of the deceased. If during the lifetime of the deceased the female members had a right of maintenance out of this property these rights will be carried along with the property to the heirs and such heirs will be under an obligation to provide maintenance to the female members out of the property.

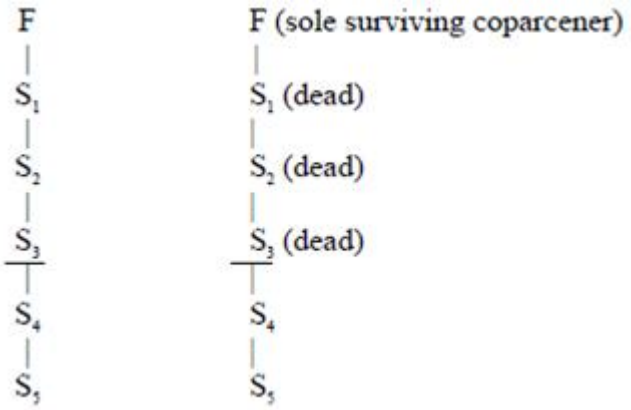

Fig. 3.6(i)Fig. 3.6(ii)

For instance, a coparcenary consisted of *F*, and his lineal male descendants in the direct male line from S1 to S5. The coparcenary will comprise *F*, S1, S2 and S3. S4 and S5 are removed by more than four generations from the last holder of the property and therefore will not be coparceners [*See* Fig. 3.6(i)]. If S1, S2 and S3 die one after the other, *F* will become the sole surviving coparcener and now if *F* dies, this coparcenary comes to an end and the property in his hands will be treated as his separate property and will go by inheritance to his legal heirs [*See* Fig. 3.6(ii)].

WHY IS COPARCENARY LIMITED

The coparcenary is limited to three generations of lineal male descendants of the last holder of the property only. According to the tenets of Hinduism, only descendents upto three generations can offer spiritual ministration to the ancestor. Besides only males can be coparceners because the females invariably leave the father's house and assume domestic and spiritual duties in their husband's house.

WOMEN AS COPARCENERS

Under Mitakshara coparcenary, women cannot be coparceners.[6] A wife under Hindu law has a right of maintenance out of her husband's property yet she is not a coparcener with him.[7] A widow of a deceased coparcener is not a coparcener and therefore cannot be treated as the Karta of the family. Consequently, an alienation made by her will not be binding on the family members and will bind her own share in the property.[8]Even a widow succeeding to her deceased husband's share in the joint family under the Hindu Women's Right to Property Act, 1937 is not a coparcener.[9] However, even though she cannot be a manager or Karta, yet she can be assessed as the head of the joint family for the purposes of income tax.[10] A mother is neither a coparcener with her sons[11] nor with her daughter even if they happen to be devadasis.[12] Similarly, a mother-in-law cannot be a coparcener with her daughter-in-law.[13]

WOMEN AS COPARCENERS UNDER THE HINDU SUCCESSION (AMENDMENT) ACT, 2005

Presently a daughter has been introduced as a coparcener. However, a mother and all females who become members of a Hindu joint family upon their marriage to male coparceners are not coparceners themselves.

ILLEGITIMATE SONS

A Mitakshara coparcenary consists of only the legitimate male offspring of the lineal male descendants. Illegitimate sons are not coparceners but members of joint family, and if a partition takes place between the father and the sons, they can be allotted a share.[14] The father can give an equal share to the illegitimate son. However after the death of the father, if a partition takes place, the illegitimate son will get half the share of a legitimate son. The Hindu Marriage Act confers legitimacy on children born out of void and voidable marriages to enable them to inherit the property of their parents, but this legitimacy does not enable the children to inherit the property of any other relations of their parents. Children born of live in relationship are akin to illegitimate children and would not be coparceners[15].

SANE AND INSANE PERSON

An insane male member of the family is not a coparcener and his rights are temporarily suspended till he recovers, but if a partition takes place he has to be allotted a share.[16] There can be a coparcenary, under Mitakshara law, with a lunatic member. A coparcener gets his right in the coparcenary property by birth and there appears nothing in the texts irrevocably to extinguish that right on the supervening insanity. On the other hand, texts show that although such a person may not have a right to share or claim a partition, when another coparcener disrupts the joint family status, such right is given to him on the malady being cured. Further, the sons of such disqualified persons are not excluded from taking a share in the coparcenary property. The texts providing for the reopening of the partition on the insane being cured clearly show that his rights remain in abeyance and are not irrevocably lost in the case of supervening insanity. When an insane member himself may not have the volition to declare a separation, there is no reason to hold that insanity takes away the right of another sane member of the coparcenary to declare an intention to disrupt the family status. It cannot be disputed that if there are two sane brothers and one insane brother, it is open to one of the sane brothers to declare his intention to sever the status with the result that the two brothers can partition the property for the time being among themselves. If such a right exists in favour of the two sane brothers, there appears no reason why it cannot exist when the coparcenary consists of only a sane and an insane person.[17]

OUSTER FROM COPARCENARY

A coparcener who renounces his religion and converts to some other faith ceases to be a member of the joint family and is therefore also ousted from the coparcenary. Similar is the case where he gets married to a non-Hindu under the Special Marriage Act, 1954.[18] However, in both these abovementioned cases, his rights in the coparcenary property will not be forfeited and he is entitled to take his share of the property. A Hindu man who gets married to a non-Hindu cannot form a coparcenary with his son.[19]

A minor coparcener, if given in adoption by his competent parent, is deemed to be dead for the biological family from the date he is given in adoption to another family.[20] His interest in the coparcenary property prior to his adoption will be taken by the surviving coparceners and when he goes to the adoptive family he goes there without any property but will acquire an interest in the coparcenary property of the adoptive family with the adoptive father as his son from the date of adoption as from that date he is deemed to be born in the adoptive family.

COPARCENARY BETWEEN A HINDU MAN AND HIS SON BORN OF A NON-HINDU WIFE

Rosie Marie v. CWT21. 1970 Mad 249 .

A Hindu male getting married to a non-Hindu female under the Special Marriage Act, 1954 is ousted from the

coparcenary. But, can he form a coparcenary with the son born to him from a non-Hindu wife? The High Court of Madras considered this question in *Rosie Marie*'s case,[22] and held that as such a son is a legitimate son and as per the provisions of the Special Marriage Act, 1954[23]his succession rights on the death of the father will be governed by the Indian Succession Act, 1925 and not by the Hindu Successionact.

> ... this would not injunct a Hindu parent from treating a legitimate son of his, born in lawful wedlock as per the provisions of the Special Marriage Act, 1954 as an undivided member of the Hindu joint family. This joint family will be so created by the father by an option exercised for that purpose by himself and no sooner such option is exercised by him, there springs from it a Hindu joint family, which has to be recognized and whose legal entity has to be given effect to in accordance with the provisions of the Hindu law both traditional and statutory and a fortiorari by the taxing statute as well.

Like in this case, in a majority of cases the concept and constitution of the joint family and coparcenary has been discussed and explained by the Indian courts while adjudicating upon revenue matters. It must be noted here, that the court did not discuss what was the kind of property in the hands of the father and from where he had acquired it? That, it was separate property in his hands was obvious. It is submitted that the decision appears to be incorrect for the following reasons:

(i) Since the joint family and coparcenary are essentially concepts available under Hindu law having no parallels under any other law or systems; in a coparcenary the members must be Hindus, and the son here may not be a Hindu in all cases. He will be a Hindu only when he is being brought up as a Hindu and therefore in the first place it is difficult to comprehend that a Hindu man can form a coparcenary with his son whose religion is conditional on his being brought up as a Hindu.

(ii) The court noted here that it was later that he declared his son to be a coparcener with him and so he can constitute a joint family. It must be remembered that in law a Hindu joint family or a coparcenary does not come into existence in accordance with the wishes or declaration by the father. It is a presumption that arises in law. Its coming into existence does not depend upon the will of a person by a mere declaration that can be exercised at his option or convenience.

(iii) The decision throws open questions that are difficult to answer. The court noted that on the death of the father it is not the Hindu Succession Act, 1956 but the Indian Succession Act, 1925 that would govern succession to his property. Is the institution of coparcenary recognised under the Indian Succession Act, 1925? There is only one kind of property recognised under the Indian Succession Act, 1925 and that is separate property according to which in case of the death of a male, 1/3rd of the property goes to the widow and 2/3rd will go to the son. But if, as according to the court, the deceased constituted a coparcenary with his son, the judiciary in fact ended up changing the law of succession in clear contradiction to a specific provision of a statute. If there was a coparcenary between the father and the son here on the death of the father the property will not be distributed between the son and the widow of the deceased but will come to the son by the doctrine of survivorship to the complete exclusion of the widow. Deprivation of her rights by a mere declaration in presence of a statute that gives her an absolute ownership by way of inheritance does not appear to be proper at all.

Accordingly it is submitted that a Hindu man cannot constitute a coparcenary with his son born of a non-Hindu wife. In *Margaret Palai v. Savitri Palai,* [24] a Christian woman got married to a Hindu man under the Hindu Marriage Act, 1955, it was held that this marriage under Hindu law was not permissible and the woman would not even be called his legally wedded wife. She would neither be entitled to a share in the coparcenary property held by her partner nor would she be empowered to succeed to his separate property.

COPARCENARY WITHIN A COPARCENARY

There is no limitation on the number of members that a coparcenary may have. There can be a big coparcenary consisting of father, his sons, grandsons and great grand sons. There can be a coparcenary within a coparcenary comprising sons and their descendants also. If the father has separate property, on his death the sons inherit the property jointly. Now if a child is born to one of the sons he will form a coparcenary within a coparcenary. For example, in Fig. 3.7, the family comprises the father *F*, his two sons S1 and S2. On the death of the father the two sons will inherit the property jointly. On the birth of S3, a coparcenary will come into existence between S1 and S2 and within this coparcenary a smaller coparcenary comprising S1 and S3 will bethere.

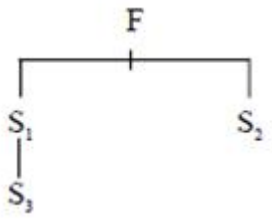

Fig. 3.7

COPARCENARY PROPERTY

Under Mitakshara law two kinds of properties are contemplated, that can be acquired by a male member viz., the joint family property or the coparcenary property and the separate property. For acquiring an interest in coparcenary property there is no obstruction by way of the wishes of the father or the consent of other coparceners. It is a right of the coparcener and cannot be defeated by the acts of the other sharers of the property. If there is coparcenary property, a male child taking birth in the family will become the owner of the property. This is in contrast to the succession to the separate property of an individual. As a person has absolute power of disposal over the separate properties, a son's right to inherit the property may be defeated by the acts of the father as during his life time he may transfer it, disinheriting his own son. In other words, there is no guarantee that he would inherit the property of the father. The father's power of disposal and the probability of exercising such powers to the detriment of the son are an obstruction in his way of inheriting the separate property.

Ownership of Coparcenary Property

The ownership in the coparcenary property is with the coparceners collectively but it is subject to the rights of the female members and other joint family member's rights of maintenance that includes unmarried daughter's right to marriage expenses. As no female could be a coparcener, she could not become the owner of coparcenary property. Minority is not a bar to its ownership, as the moment a coparcener is born he gets an interest in the coparcenary property. So long as the coparceners are joint, the title to the coparcenary property is also joint. It is demarcated and becomes exclusive only when a partition takes place and the property is divided among the members entitled to it.

INCIDENTS OF COPARCENARY

(i)Four Generation Rule

The lineal male descendants of a person, up to third generation (excluding him), acquire on birth, an interest in the coparcenary property held by him.

(ii) Creation of Law

Like a joint family, coparcenary is also a creation of law and cannot be formed by an agreement between the parties.

(iii) Only Males

No stranger can be introduced in the coparcenary. Only a male child[25], born in the family or validly adopted, can become a coparcener .

(iv) Acquisition of Interest by Birth

A coparcener in a joint family is born with an interest in the coparcenary property which means that the moment he is born in the family he gets a right by birth in the ownership of the coparcenary property. Thus, if the family comprises the father and his two sons, all three of them have an interest in the coparcenary property. When another son is born he also becomes a sharer in the property jointly with the rest of the coparceners bybirth.

(v) Unity of Possession and Community of Interest

One of the basic features of coparcenary is unity of possession and community of interest.[26] All the coparceners jointly own the coparcenary property and till a partition takes place and their shares are specifically demarcated no one can claim ownership over any specific item of the coparcenary property. For example, take the case of a family comprising the father and his three sons with all of them living in the joint family house belonging to the family along with their wives and children. The house comprises four bedrooms. Each brother might be occupying a separate room, with common consensus but this does not give him a right to call that specific room his exclusive property. It is merely a convenient arrangement that does not confer an exclusive ownership in their favour of that item of the property because the ownership of each of these rooms vests in all the coparceners collectively and not individually.

(vi) Fluctuating and not a Specific Interest

Although a coparcener on birth gets an interest in the coparcenary property his interest in the property is not of a specific share and is subject to fluctuation with the deaths and births of other coparceners in the family. For example, a joint family comprises a father and two sons. Each of these coparceners is the owner of a probable one-third of the family property. Where another son is born in the family, the share of each of them fluctuates and is reduced to a probable one-fourth. On the birth of another son it will again fluctuate and will be further reduced to a probable one-fifth. Similarly, on the death of a coparcener, it will fluctuate again and will be increased to a possible one-fourth. The reason why it is called a possible share and not a specific share is that till a partition takes place the shares can never be called specific shares.[27] Thus, in a Hindu undivided family governed by the Mitakshara law no individual member of the family while it remains undivided can predicate that he has a certain definite share in the property of the family. The rights of the coparceners are defined when there is a partition.[28]

(vii) Collective Enjoyment

The proceeds of undivided family must be brought to the common chest or purse and then dealt with according to the modes of enjoyment by the members of an undivided family as till a partition takes place they hold everything jointly.[29] Coparcenary property suggests ownership by one group collectively and enjoyment and possession of it by not only this group exclusively but by the joint family members who are outside this group.

(viii) Doctrine of Survivorship

The shares of the coparceners are not specific and are subject to change with the births and deaths of coparceners in the family. Under the traditional or the classical law, on the death of a coparcener in the joint family his interest in the family property is immediately taken by those coparceners who survive him and thus he leaves nothing behind out of his interest in the coparcenary property for his female dependants.[30] This phenomenon is called doctrine of survivorship. On birth he takes an interest, enjoys it during his lifetime but leaves nothing for his female dependants on his death.

(ix) Right to Ask for Partition

In the Mitakshara coparcenary a major coparcener can at any time ask for partition and demarcation of his share. It is the inherent right of a coparcener and can be exercised by him at any time. Where the family members more specifically the Karta, do not give in to his demand he can exercise the right by filing a suit for a partition in a court of law. A minor coparcener cannot demand a partition but can file a suit for partition through his next friend in a court of law for partition and specification of his share.

(x) Alienation of Undivided Interest

Generally, a coparcener on his own or individually is not entitled to alienate his undivided interest in the coparcenary property.[31] Only in certain specific situations the father or the Karta can alienate the undivided interest

or even the whole of the property.[32]

DISTINCTION BETWEEN A JOINT FAMILY AND COPARCENARY

A coparcenary is an institution within a joint family and the primary differences between the two are as follows:

(i) The joint family is a bigger institution and includes a coparcenary within it. Thus, there can be a joint family without a coparcenary, but there can never exist a coparcenary without a Hindu joint family.

(ii) There is no presumption in law that a joint family has any property at all. However, the concept of coparcenary is presently understood to determine the rights and obligations of the members of the joint family over the property. This is the reason why in the joint family the seniormost male member is called Karta[33] and for the purposes of coparcenary he is described as the 'Last holder of the property.'

(iii) Joint family is much broader than the coparcenary and there is no limitation on the number of members in the joint family or the number of generations that it may encompass within it, but a coparcenary is limited to four generations of male members only.

(iv) A joint family has both males and females as its members but coparcenary under the classical law comprised only male members and no female could be a member of the coparcenary.

(v) In a joint family, members can be added by birth, adoption or even by marriage to lineal male descendants. In a coparcenary, a member can be added only by birth or a valid adoption i.e., all coparceners must be related to each other by blood or adoption and no person can become a coparcener by marriage.

(vi) All the members in the joint family do not have equal rights over the joint family property. Some have only a right to maintenance out of the joint family funds or a right of residence in the family house, while others may have a right to seek partition and have an interest in the coparcenary property. But in the coparcenary all members have an interest in the coparcenary property by birth and have a right to demand a partition of their interest in this property.

(vii) Disqualified coparceners are members of the joint family but not members of coparcenary even though they may be within four generations from the last holder of the property and therefore cannot ask for partition of the property.[34]

(viii) A Hindu joint family may consist of only two members or a male member and one or more female members, but for a coparcenary a minimum of two male members is must. A single male member is called a sole surviving coparcener. For example, a Hindu male can form a joint family with his wife but he cannot form a coparcenary all by himself.

(ix) A joint family needs only a plurality of members who need not necessarily be males as even females in certain situations can continue the joint status of the family. So the joint family continues even after the death of a last male in the family so long as there is a capability of a female to add a male member in the family but the coparcenary cannot be continued on the death of male members.

In *Kamalakanta Mohapatra v. Pratap Chandra Mohapatra*[35], the court observed:

A joint family stands clearly distinguished from a coparcenary and if a joint family is the genus, coparcenary is the species. No female could be a coparcener under Mitakshara and therefore a gift of joint family property cannot be held to be void at the instance of a married daughter who was not a coparcener at the relevant time.

RIGHTS OF COPARCENERS

Coparceners have the following rights with respect to the coparcenary property:

(i) Right by Birth in the Property

Co-existing with the ability of the coparceners to perform funeral rites of the father enabling him to attain spiritual

salvation, is the right by birth in the coparcenary property. The moment a coparcener is born, he acquires an interest in the coparcenary property which is equal to the interest of his father.[36] In fact this right dates back to the time of its conception. He gets a title to the property, a right to posses and enjoy it, and his presence puts restrictions on the power of the Karta to alienate the joint family property.[37] The acquisition of an interest is indicative of ownership even though of a probable share in the property. For a coparcener who is introduced in the family by a valid adoption, from the date of the adoption he is deemed to be born in the adoptive family and acquires an interest in the coparcenary property from that date. In case of adoption by a Hindu widow to her deceased husband, the adopted child is deemed to be related to her deceased husband from the date of the death of the husband by the application of doctrine of relation back and if he died as an undivided coparcener, his share in the coparcenary property will be taken by the adopted son by the doctrine of survivorship.[38]

(ii) Right of Common Ownership

The coparceners together possess the title to the coparcenary property. Since the joint family or coparcenary is neither a juristic person nor a corporation capable of holding property by itself, the property is popularly called the joint family property or coparcenary property, but is not owned by joint family or coparcenary as a unit. The ownership vests with the members of the coparcenary. All coparceners together have a joint or common title or ownership of this property and till they work out their shares, the extent of their ownership is not discernible. Common or joint ownership signifies joint liabilities to pay off the debts due to the family, and also that without the consent of the owners, the property cannot be generally alienated.

(iii) Right of Common Enjoyment of the Coparcenary Property

Unity of possession and community of interest are two basic ingredients of coparcenary. Each coparcener has a right to possess and enjoy the coparcenary property by virtue of being a coparcener and therefore, a co-owner of it. The right is of common enjoyment which means that till a partition by metes and bounds takes place, no coparcener can claim an enjoyment exclusively of a specific portion of the property. He can neither predict his exact share nor his specific portion in the property.[39] Where he takes possession of a specific portion, he cannot claim the same adversely to the rights of other coparceners. Even if he erects a building on a vacant joint family land, he cannot claim exclusive rights to use it, and if he does that, the other coparceners can secure a decree to pull it down.[40] The court may in appropriate cases order compensation to be paid[41] to the other coparceners rather than ordering a demolition of the building. The rule is that a right to common enjoyment does not entitle an individual coparcener, so long as he is undivided, to select one specific portion of property and build upon it as per whim and pleasure without there being any agreement to this effect with the other members of the family. With mutual understanding or consent, or for sheer convenience and for maintaining good relations, the coparceners may occupy different portions of the house but that would not give them a right to treat those as their exclusive portions. The possession by one coparcener is a possession by all and a coparcener is not entitled to claim a bigger portion of the house or a comparatively higher maintenance on the ground that his branch has more members than the branch of the other coparceners. Enjoyment also signifies that each coparcener along with his wife and children is entitled to a right of residence in the family dwelling house and a right of maintenance from out of the joint family funds. The quantum of maintenance would depend upon the discretion of Karta. Similarly, the amount to be spent on the marriage of an unmarried daughter would be at the discretion of the Karta, and a coparcener cannot claim a specific sum of money for this purpose.

A temporary absence of a coparcener does not mean an ouster from possession.[42] Where a coparcener, due to reasons of employment, maintains a separate residence in a different city, he retains the rights of possession and enjoyment over the coparcenary property. A coparcener can be ousted from the enjoyment of the joint family property only when he proves to be a nuisance to the family members or his continued presence constitutes a threat to the peace and danger to the life of other members in the family. In such cases the father can demarcate his share, hand it over to him and oust him from the family. However an unjustified ouster entitles him to obtain a decree for joint possession from the court,[43] although the courts will not grant him a permanent injunction restraining the other members to deny him joint possession in future.[44] But where one member transfers his share, a coparcener can be granted an injunction restraining the transferee from claiming or dispossessing the coparcener of a portion of property till they work out the equity of alienee by the formal portion.[45]

(iv) Right of Survivorship

Coparceners have a right by birth in the coparcenary property and the moment a son is born he acquires an interest in the property. The quantum of this interest is not fixed as it fluctuates with deaths and births in the family. Where a coparcener dies as a member of an undivided coparcenary, his interest in the property is immediately taken by

thesurviving coparceners and he leaves nothing behind that can be called his own share in the joint property. This right of the surviving coparceners to enlarge their shares in the property is due to the application of the doctrine of survivorship. For example, a coparcenary comprises the father and his two sons. Each of them has a probable 1/3rd share in the property till the undivided status is maintained. On the death of one of the sons, his probable 1/3rd in the property is taken by the surviving coparceners ie father and the surviving brother and the deceased will die without any share in the coparcenary property. The share of the father and the surviving son will be increased to a probable half. The right of survivorship is one of the basic rights of a coparcener.

(v) Right to Accounts

In a joint family, Karta has the authority to manage its affairs and also the property in the best interests of the family. However, even though it is a fiduciary capacity, the Karta is not bound to economise or be very vigilant with the income of the family. He is not liable be to accountable to the other members except in three situations:

(a) he is conducting the family business and the nature of business is such as necessitates maintenance of proper accounting; or

(b) there are charges of fraud or misappropriation of income or conversion;

(c) when a coparcener asks for a partition.

In such cases, the coparcener can ask the Karta to render the account, but, the Karta cannot be asked to give the past accounts and he would be within his rights to render only the then existing accounts.

A suit for mere accounts or mesne profits without the existence of any of the three above-mentioned situations would not be maintainable. However, there may be an agreement between the Karta and the other members of the family whereby Karta undertakes to render accounts to the family either periodically or at such intervals as may be agreed by the members. Such an agreement would be valid. An improper or incorrect accounting by the Karta can be challenged by the coparceners and the court can order the re-opening of accounts. At the time of partition, the Karta is under a legal obligation to give proper accounts of the complete income of what all he has spent. A coparcener is not entitled to any mesne profits except where he was excluded from the enjoyment of the property.

(vi) Right to Make Acquisitions

A coparcener can hold an interest in the coparcenary property and possess separate property of his own at the same time. Law does not restrict him from acquiring property in his individual capacity and for this the consent of the other coparceners is not an essential requirement. He can earn a salary if he is engaged in a separate business, can inherit property from his relations, receive property through gift or Will, win a prize or a lottery, acquire property or money through his special skills or learning or otherwise.

He is also entitled to maintain a complete segregation of both the kinds of properties i.e., his separate properties and his share in the coparcenary property. Unless it can be shown that his acquisitions are with the help of the coparcenary property or are acquired to its detriment, no other coparcener including his own son can claim any interest whatsoever in these properties. He has full powers of disposal over his separate properties as in law he has an exclusive title to it. No other coparcener can claim a right of survivorship in it and on the death of the owner, this property will pass to the legal heirs under the relevant laws of inheritance or testamentary succession if he leaves behind a valid Will (Testament).

Where a coparcener wants to blend his separate property into the joint family property he can do so by expressing a clear intention to do so. Upon blending or throwing his separate property into the common stock, his separate property will be converted into the joint family property for the benefit of all the joint family members, including him. His interest in such property will now be on par with all the other coparceners and he would not be empowered to claim any better rights over it on the ground that it was once his separate property. His exclusive control over it will be lost, and on his death his share in it will pass to the other coparceners under the doctrine of survivorship. Blending is an irrevocable act and once he blends his separate property into the joint family common stock, he cannot reclaim it.

A coparcener therefore is competent to acquire the separate property in his individual capacity, can blend his separate property into joint family property but is not empowered to convert any portion of the joint family property into his separate acquisitions.

(vii) Right to ask for Partition

The interest of a coparcener in the coparcenary property is a fluctuating interest that changes with the deaths and births of other coparceners in the family. A coparcener is competent to convert this fluctuating and probable share to a fixed and specific share in the property by demanding a partition. Except in Bombay[46] and Punjab,[47] where a son cannot demand a partition from the father if he is joint with his own father without his consent, every coparcener has a right to demand a partition.[48] All that he needs to do is to form and manifest an unequivocal intention to separate himself from the joint family and communicate it to the other coparceners.[49] No coparcener including even the Karta can refuse the demand of a partition by a coparcener. In fact there is no scope for a refusal, because the moment an adult coparcener demands partition, a severance of status takes place.[50] Since the management of the joint family property is with the Karta, for actual division of property by metes and bounds, if the Karta refuses, the coparcener has a right to go to the court and seek its help by filing a suit for partition. The court in such cases is not competent to go into the reasons, which prompted the coparcener to approach it, nor is it competent to seek justifications from him to break away from the family. Minority is not a bar to seek partition,[51] but a minor cannot seek partition directly. He can institute a suit for partition through a next friend in a court of law.[52] Here the court will take cognisance of the situation and would enforce partition only when it is satisfied that the partition would be beneficial to or would promote the interests of the minor.[53] But where it comes to the conclusion on the basis of the facts before it, that the interests of the minor are being adequately taken care of by the other coparceners or the father, no partition will be effected.

A coparcener can ask for a partition and demarcation of his shares, generally and he is not permitted to seek partition from only one or some of the coparceners and remain joint with the rest.[54] Either he is a joint member with all, or becomes separate as against all the members. At his instance there cannot be a partial separation. Similarly depending upon the wishes of the other coparceners, there can be a total fragmentation of the joint family or only one of them can separate and the rest of the members may remain joint. In law there is no presumption therefore that if one of the coparceners seeks partition, the rest of the family also separates. There cannot be a partition between a sole surviving coparcener and the female members if the latter are not coparceners.[55] Mere specification of shares without intention to sever does not result in severance.[56]

Partition is an irrevocable act, and once it is effected and is complete, it cannot be revoked and the parties can come back together only through a reunion.[57]

(viii) Right to Renounce his Interest

Every coparcener has an interest in the joint family property that he can enjoy with all other members and if he so desires can also demarcate it by effecting a partition. He cannot ordinarily transfer his undivided share except under some specific situations, but a coparcener is empowered to renounce his undivided share in the joint family property, in favour of all the remaining coparceners. Two things are important here. Firstly renunciation should be of the entire undivided interest of the coparcener.[58] Either he renounces his total interest or none at all. Secondly, such renunciation must be in favour of all the remaining coparceners.[59] Therefore, renunciation has to be of the totality of interest and not of partial or part of undivided interest and in favour of the collective body of coparceners and not some of them. Renunciation of interest does not mean a partition of the family.[60] It only reduces the number of shares of the property. The coparcener who renounces his interest is now no longer entitled to get a share in the property when a partition takes place. However, a renunciation of interest in favour of the coparceners after agreeing to receive maintenance is valid.[61] Since the coparcener renouncing his interest is no longer entitled to get a share, a son begotten after such renunciation is also not entitled to claim any share.[62]But, sons living at the time of such renunciation are not effected by the act of the father.[63] Any coparcener can renounce his own interest in the coparcenary property, even though it is undivided, but cannot renounce the share of his whole branch. Each coparcener in his own right acquires an interest in the coparcenary property and the same cannot be renounced by anyone else including his own father in favour of the whole body of coparceners. Since an after born son in majority of cases becomes a coparcener with the father after a partition takes place, when the father does not have a share due to his renunciation of the same, a son begotten afterwards cannot claim any share in the original coparcenary property.

For example, a Hindu joint family consists of the father, his wife and two sons. The father and the two sons constitute a coparcenary, each having a probable 1/3rd share in the property. The father renounces his probable undivided 1/3rd share in favour of his sons. Though he would continue to be a member of the joint family,[64] his share in the coparcenary property is extinguished, and the number of sharers in the property is reduced to two from three. Since renunciation by the father is in presence of sons, the rights of the sons are not affected at all, and each of them now has a probable half share in the property. Suppose after such renunciation by the father, a third son is

begotten and is born a year later. This son will not acquire any interest in the coparcenary property held by his brothers. No person has a right by birth in the property of the brothers, but has such a right in the property of the father, or lineal male ascendants up to three generations only. Here, since the father himself does not have any interest in the original coparcenary property, the son begotten after the renunciation will also not have any interest in it. It has been held by the Bombay High Court that renunciation of share by a coparcener who continues to be a member of joint family after renunciation does not deprive his sons, including the after born sons, of a share in the joint family property when they continue to be coparceners.[65] The judgment does not seem to be correct with respect to sons begotten after such renunciation as it would virtually mean giving a right by birth to such son in the property held by the collaterals. For example, in Fig. 3.8, three brothers *A*, *B* and *C* along with *A*'s two sons constitute a coparcenary. *A* renounces his share in favour of the other two brothers.

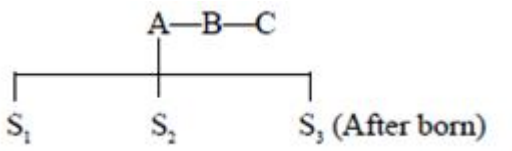

Fig. 3.8

Since S1 and S2 also have a right by birth, the same will not be affected by such renunciation as it merely reduces the number of sharers. The individual share of *A*, that was a probable 1/9th will pass on to the whole body of coparceners including his own sons. Now S3, who was begotten after such renunciation is born to *A*, who has already renounced his interest with respect to the other coparceners in the family. The relation of S3 is that of a brother (with regard to S1 and S2) and of a nephew as regards *B* and *C*. A son acquires a right by birth in the property held by the father (who in this case does not have any property) and not in the property of brothers or uncles. Therefore, a son begotten after renunciation by the father of his interest in the property, cannot claim any share in the original coparcenary property.

(ix) Right to Restrain Improper Acts

A coparcener who commits an act that is either improper, illegal or prejudicial to the interest of the joint family members or the coparcenary property including common enjoyment and possession, can be restrained by an injunction from doing such an act. One coparcener alone in presence of others cannot maintain such a suit, as a suit restraining such action must be filed on behalf of all the coparceners. Where all the coparceners are living in the joint family house and one of them improperly and illegally prevents the others from using a common staircase, an injunction can be obtained against him. The court's powers are restricted to the acts of illegitimate use of family property or acts amounting to ouster, or acts of waste with respect to property only. Where an individual coparcener commits an improper act and the rest of the family is affected, all the family members have to join in the suit against him. But where one of the coparceners is ousted from the family property's enjoyment, he can file a claim individually against the whole of the family. Similarly, where a decision has been given by the court against the joint family, one coparcener alone can appeal against it even though the other members including the Karta do not join him.[66]

(x) Right of Alienation

As a general rule a Mitakshara coparcener does not have a right to dispose of his undivided share in the coparcenary property by alienation[67] unless all the coparceners give a valid consent to it.[68] However in Bombay, Madras[69] and Jammu and Kashmir,[70] an undivided coparcener is permitted to either sell or mortgage his share in the Mitakshara coparcenary without the consent of the other coparceners. Where a mortgage is therefore effected by a coparcener in these regions, it will be valid to the extent of his share and the mortgagee's rights will be unaffected with the deaths and births of the other coparceners in the family.[71] In other areas governed by Mitakshara law, a coparcener cannot alienate his undivided share without the consent of other coparceners even where it is in favour of another coparcener.[72] The reason is that the ownership of the property as a whole vests with all the coparceners. If all of them agree, they can sell the entire property. Similarly, even a sole surviving coparcener can alienate the property after making a provision for maintenance and other rights of the female members. An alienation by a sole surviving coparcener cannot be challenged by any person except an after born son, provided he was in the womb of his mother at the time of such alienation.

An undivided interest of a coparcener can be sold in execution of a money decree obtained by the court. Such an

alienation is called an involuntary alienation. If the undivided share is attached by the court during the life time of such a coparcener, it will be sold later and can be purchased by anyone. If before such attachment but after the filing of the suit the coparcener dies, his undivided interest passes to the other coparceners under doctrine of survivorship and there will be nothing left, that the court can attach.[73]

A coparcener cannot alienate his undivided share by way of gift,[74] except when it is with the consent of all the coparceners or it is of a small portion of the property in favour of a daughter or a sister.[75] With respect to a disposition by Will, only a sole surviving coparcener can make a Will of the coparcenary property. As it will be valid only from the date of the death of such coparcener, if another coparcener is born between the date of executing the Will and the date of its operation, the Will, will become invalid.[76] But if the testator after making the Will dies as a sole surviving coparcener, it will be valid. Post-1956, a coparcener is competent to make a valid Will, with respect to his undivided share in the coparcenary property.[77]

(xi) Right to challenge an unauthorised alienation

The power of alienation of joint family property is with the Karta. He can exercise this power only for some permitted purpose viz., he can sell the property for legal necessity, benefit of estate, or for performance of some indispensable religious or charitable duties. Where the Karta is the father, he can also sell the property for payment of his antecedent debts. Where Karta sells the joint family property for an unauthorised purpose, the coparceners have three remedies in the alternative:

(a) Where the Karta is contemplating an alienation, but it is not actually effected, a coparcener can seek partition and separate from the family. Once he separates, Karta cannot sell his share.

(b) Where the act of Karta amounts to a waste or an ouster,[78] he can be restrained by an injunction obtained from the court from committing such waste. However no injunction can otherwise be obtained by coparceners restraining Karta from alienating the joint family property.[79]

(c) Where an alienation of the property is already effected, it can be challenged by the coparceners as invalid and not binding on their shares.[80] The burden of proof in such cases will be on the alienee to prove that Karta was authorised to sell the property.[81] However, where the property is sold by the father to pay his antecedent debts and the sons claim that such alienation was not binding on them as the debts were contracted by the father for an illegal or immoral purpose, not only do they have to prove the immoral or illegal character of the debt but also that the creditor had notice of it.

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1. The sages declared the partition of the heritable property to be co-ordinate with the gifts of funeral cake. Since it was said that the son can offer a funeral cake to the father and the grandfather, there was a conflict of opinion on whether the class of coparceners would include only the sons and grandsons or would also include a great-grandson. However, Vyavahara Mayukha says that the term grandfather refers to a class as including the great-grandfather also and therefore a man's sons, sons of sons and sons of sons of sons can offer spiritual salvation to him and would be his coparceners.

2. *Sunder Lal v. Chittar Mal*, (1907) ILR 29 All 1; *Anandrao v. Vasantrao*, *(1907) 9 Bom LR 595* [*LNIND 1907 BOM 24*] (PC).

3. For the position after 2005, see *infra*.

4. *Sudarsanam v. Narasimhulu*, (1902) ILR 25 Mad 149, 154–157.

5. *Sudarsanam v. Narasimhulu*, (1902) ILR 25 Mad 149 ; see also *Bhagwan Das v. Reoti Devi*, AIR 1962 SC 287 [LNIND 1961 SC 465]; *Karsan Das Dharamsey v. Gangabai*, (1908) ILR 32 Bom 479; *Packiriswamy v. Doriaswamy*, (1931) ILR Rang 266; any arrangement amongst members will not have any affect on the devolution of the property, see *Sobhag Singh v. Pirthe Singh*, (1950) ILR Nag 160.

6. *Comm of Income Tax v. Govinda Ram Sugar Mills*, AIR 1966 SC 240 ; *Pushpa Devi v. Comm of Income Tax*, *AIR 1977 SC 2230* [*LNIND 1977 SC 258*]; see also *Desappa Setty v. Vedavathamma*, AIR 1972 Mys 283 ; *Rajendra Nath v. Shiv Nath*, AIR 1971 All 448 ; *CED v. Harish Chandra*, (1987) 167 ITR 230 (All); *Rameshwar Mistry v. Bebulala Mistry*, AIR 1991 Pat 3 .

7. *Sabitri v. FA Savi*, AIR 1933 Pat 306 ; *Punna Bibi v. Radha Kissen*, (1904) ILR 31 Cal 476.

8. *Comm of Income Tax v. Govinda Ram Sugar Mills*, AIR 1966 SC 240 ; *Kanji v. Permanand*, *AIR 1992 MP 208* [*LNIND 1991 MP 172*].

9. *Seetha Bai v. Narasimha*, (1945) ILR Mad 568; *Seethamma v. Veerana*, (1950) ILR Mad 1076; *Maguni Padhano v. Lakananidhi*, AIR 1956 Ori 1, wherein it was held that the mother cannot act as Karta.

10. *Sushila Devi v. Income Tax Officer*, *AIR 1959 Cal 697* [*LNIND 1959 CAL 117*].

11. *Hira Singh v. K Mangla*, AIR 1928 Lah 122 ; *Sitla Prasad v. Sri Ram*, (1944) ILR Luck 450.

12. *Gangamma v. Kuppammal*, 1939 Mad 139 .

13. *Com of Income Tax v. Pannbai*, AIR 1913 Nag 160 .

14. *Gur Narain Das v. Gur Tahal Das*, *AIR 1952 SC 225* [*LNIND 1952 SC 34*]; *Vellaiyappa Chetty v. Natarajan*, AIR 1931 PC 294 .

15. *Bharatha Matha v. R. Vijaya Ranganathan*, *AIR 2010 SC 2685* [*LNIND 2010 SC 515*].

16. See *Amirthammal v. Vallimayil Ammal*, 1942 Mad 693 .

17. *Ratneshwari Nandan Singh v. Bhagwati Saran Singh*, AIR 1950 FC 142, 1950 SCJ 514.

18. See The Special Marriage Act, 1954, s. 21A.

19. See however *Rosie Marie v. CWT*, 1970 Mad 249 wherein it was held that a Hindu man getting married to a Christian woman under the Special Marriage Act, 1954 will form a coparcenary with his son.

20. See the Hindu Adoptions and Maintenance Act, 1956, s. 12.

22. *Ibid*, para 10.

23. Special Marriage Act, 1954, s. 21A.

24. *AIR 2010 Ori 45* [*LNIND 2009 ORI 116*].

25. For introduction of daughters as coparceners see *infra*.

26. *Katama Natchiar v. The Rajah of Shivagunga*, (1863) 9 MIA 539.

27. *Appovier v. Rama Subba*, (1886) 11 MIA 75, 89.

28. *Girijanandini Devi v. Bijendra Narain Choudhary*, *AIR 1967 SC 1124* [*LNIND 1966 SC 149*]; *Comm of Gift Tax, Madras v. NS Chettiar*, *AIR 1971 SC 2410* [*LNIND 1971 SC 469*].

29. *Appovier alias Seetaramier v. Rama Subba Aiyan*, (1866) 11 MIA 75; *State Bank of India v. Ghamandi Ram*, *AIR 1969 SC 1330* [*LNIND 1969 SC 67*], 1333.

30. *Bhaga Pruseth v. Purini Dei*, AIR 2003 NOC 171 (Ori).

31. In certain states a coparcener can transfer his undivided interest in the coparcenary property. For details see Chapter 8, *infra*.

32. For details see Chapter 8, *infra*.

33. *Ram Kumar v. Commissioner of Income Tax*, AIR 1953 All 150 .

34. For details, see Chapter 11.

35. AIR 2010 Ori. 13 [*LNIND 2009 ORI 89*].

36. *Mandly Prasad v. Ramcharan Lal*, (1947) ILR Nag 848.

37. *Shantabai v. Sheshappa Kallappa Todkar*, (2001) 1 HLR 67 (Bom); *Janakamma v. Comm of Gift Tax, Andhra Pradesh*, (1968) 1 Andh LT 161.

38. *Pratapsing v. Agarsingji*, (1919) 46 IA 97.

39. *State Bank of India v. Ghamandi Ram*, *AIR 1969 SC 1330* [*LNIND 1969 SC 67*]; *Appovier v. Rama Subba*, (1886) 11 MIA 75; *Sudarsan v. Narasimhulu*, (1902) ILR 25 Mad 149 .

40. *Shadi v. Anup Singh,* (1890) ILR 12 All 436 (FB); *Mohan Chand v. Isakbhai,* (1901) ILR 25 Bom 248; *Mathu v. Ammalu,* AIR 1993 Ker 272 .

41. *Paras Ram v. Sherjit*, (1887) ILR 9 All 661.

42. *Gopala Krishnan v. Meganathan*, *(1972) 2 MLJ 481* [*LNIND 1972 MAD 91*].

43. *Naranbhai v. Ranchod*, 3 Bom LR 598.

44. *Ibid*; but see also *Radhakanta v. Manmohinee*, AIR 1933 Cal 397 .

45. *Shankar v. Gulab*, (1945) Nag LJ 172.

46. *Apaji v. Ramachandra*, (1812) 16 Bom 29; *Aher Hamiry v. Aher Duda*, AIR 1978 Guj 10 [*LNIND 1977 GUJ 24*]; *Bhupal v. Tavanappa*, AIR 1922 Bom 292 .

47. *Gahru Ram v. Hardevi*, AIR 1926 Lah 85 .

48. *Nilkanta Krishnarao Apte v. Ramachandra*, *AIR 1991 Bom 10* [*LNIND 1990 BOM 253*]; *Digambar v. Dhanraj*, (1922) 1 Pat 361; *Kaliprasad v. Ramacharan*, (1876) 1 All 159 FB.

49. *A. Raghavamma v. A. Chenchamma*, *AIR 1964 SC 136* [*LNIND 1963 SC 101*].

50. *Putrangamma v. Rangamma*, *AIR 1968 SC 1018* [*LNIND 1968 SC 36*].

51. *Dnyaneshwar Vishnu v. Anant Vasudeo,* (1936) 60 Bom 736; *Pooran Chand v. Radha Raman,* AIR 1934 All 197 .

52. *Kakamanu Pedasubbayya v. Kakamanu*, *AIR 1958 SC 1042* [*LNIND 1958 SC 98*].

53. *Nagappa Chettiar v. Subramanian*, (1946) ILR Mad 103, *China Venkata v. Venkatarama*, AIR 1957 AP 93 ; *Chandrashwar Singh v. Ramchandra Singh*, AIR 1973 Pat 215 .

54. *BT Ravindranath v. Commissioner of Income Tax*, *(1989) 179 ITR 243* (Kant).

55. *Girijanandini Devi v. Brijendra Narain*, *AIR 1967 SC 1124* [*LNIND 1966 SC 149*].

56. *Putrangamma v. Rangamma*, *AIR 1968 SC 1018* [*LNIND 1968 SC 36*].

57. *Thangavelu Pillai v. Purshottam Reddi*, *(1914) 27 MLJ 272* [*LNIND 1914 MAD 256*]; *Alluri Venkatapathi v. Dantaluri Venkatanarasimha*, (1937) ILR 1 Mad, AIR 1936 PC 264 ; *Rattamma v. Subbama*, *AIR 1973 AP 226* [*LNIND 1972 AP 150*].

58. *Alluri Venkatapathi v. Dantaluri Venkata Narasimha*, AIR 1936 PC 264 .

59. *Choudhuri Raghubans Narain Singh v. State of Uttar Pradesh*, AIR 1972 SC 2096 .

60. *Guruswamy v. Marappa*, 1950 Mad 140 .

61. *K. China Anjaneyulu v. K. China Ramaya*, *AIR 1965 AP 177* [*LNIND 1964 AP 149*](FB) ; *Krishna Namboodri v. Chena Kesavan*, *AIR 1959 Ker 336* [*LNIND 1959 KER 24*].

62. *Pathak Hayagriv Vishvanath v. Pathak Thakorlai Manilal*, AIR 1967 Guj 192 .

63. *Kishen Chunder v. Board of Revenue*, AIR 1973 Raj 171 .

64. *Pannamma v. Aspinwal*, AIR 1988 Kant 99 .

65. *Pandurang Narayan v. Bhagwandas*, (1920) 44 Bom 341; *Gundayya v. Shriniwas*, AIR 1937 Bom 51 .

66. *Ambi v. Kelen*, 1937 Mad 843 .

67. *Syed Karam v. Jorawar Singh*, AIR 1922 PC 353 ; *Bhoj Raj v. Nathuram*, AIR 1916 Nag 25 ; *Ramkishan v. Damodar*, AIR 1934 Nag 108 ; *Ganpatrao v. Kanhayalal*, AIR 1934 Nag 132 .

68. Where all the coparceners agree, the complete or part of the joint family property can be sold.

69. *Nallappa Gounder v. Lakshmi,* 1993 Mad 78 ; *Subba v. Venkatrami,* (1915) 38 Mad 1187; *Aiyyagiri v. Aiyyagiri,* (1902) 25 Mad 609; *Rajah Vasi Reddy v. Lakshminaran Simhan,* (1940) ILR Mad 913.

70. *Gian Chand v. Krishna Singh,* AIR 1978 J&K 16 .

71. *Angraj v. Ram Rup*, AIR 1930 Ori 284 ; *Puttoo Lal v. Raghubir Prasad*, AIR 1933 Ori 535 ; *Ralia Ram v. Atma Ram*, AIR 1933 Lah 343 ; *Jwala Prasad v. Maharaja Pratap*, AIR 1916 Pat 203 ; *Amar Dayal v. Har Persaud*, AIR 1920 Pat 433 ; *Krishna Deb v. Jokhilal*, AIR 1956 Pat 290 ; *Shamboo v. Ramdeo*, AIR 1982 All 508 ; *Kali Shanker v. Nawab Singh*, (1909) 31 All 507; *Madho Parshad v. Mehrban Singh*, (1891) 18 Cal 157; *Mahubeer Persad v. Ramyad*, (1878) 12 Beng LR 90; *Sadabart Prasad v. Foolbash Koer*, (1869) 3 Beng LR 31 (FB).

72. *Faiz Ali v. Harkaur*, AIR 1932 Nag 334 ; *Gundayya v. Shriniwas*, AIR 1937 Bom 51 .

73. *Gauramma v. Mallappa*, *AIR 1964 SC 510* [*LNIND 1963 SC 195*]; *Sundaramya v. Seethamma*, (1911) 21 MLJ 695 [*LNIND 1911 MAD 110*].

74. *Vallammal Achi v. Nagappa Chettiar*, *AIR 1967 SC 1153* [*LNIND 1967 SC 17*]; *Lalita Devi v. Ishar Das*, AIR 1933 Lah 544 ; *Venkatrao v. Venkatesh Rao*, AIR 1956 AP 1 .

75. The Hindu Succession Act, 1956, s. 30.

76. *Sant Singh v. Mata Ram*, 1989 (1) HLR 214 (SC).

77. *Sunil Kumar v. Ram Prakash*, *AIR 1988 SC 576* [*LNIND 1988 SC 20*].

78. *Kailash Chand v. Bajrang Lal*, 1997 (1) HLR 342.

79. *Pethu Reddiar v. Kanda Swami*, 1950 Mad 560 ; *Raveneshwar Prasad Singh v. Chandi Prasad Singh*, (1911) 38 Cal 721; *Hanooman Persaud v. Babbooee*, (1856) 6 MIA 393; *Muddun Thakoor v. Kantoo Lall*, (1874) 14 Beng LR 187; *Bed Nath v. Rani Rajeshwari Devi*, AIR 1937 Ori 406 ; *Sreeramulu v. Thandana Krishnayya*, *(1942) 2 MLJ 452*; *Muthachi v. Kandaswami*, (1945) MLJ 207; *Ramdin v. Rampori Chan*, AIR 1942 Pat 170 ; *Munisam v. Rajgopal*, (1947) 1 MLJ 452.

80. *Kailash Chand v. Bajrang Lal*, (1997) 1 HLR 342.

81. *Pethu Red Bair v. Kanda Swami*, 1950 Mad 560 .

CHAPTER 4 DAYABHAGA JOINT FAMILY

INTRODUCTION

The Dayabhaga system of law was prevalent in Bengal and parts of Bihar and Orissa, while in rest of India the Mitakshara law prevailed. A joint family under the Dayabhaga law differs from a Mitakshara joint family in certain fundamental aspects, the primary among them is absence of a right by birth of a son. Dayabhaga law does not recognise the doctrine of survivorship. There is no distinction between separate and coparcenary property and the entire concept is based on inheritance, i.e. that the sons inherit the property[1] of the father on his death, as tenants-in-common. Accordingly, when a son inherits the property of the father under a Dayabhaga coparcenary, his own son and grandson do not acquire any right in the property.[2]

In a Dayabhaga joint family, the father has absolute powers of management[3] and disposal over the separate as well as the coparcenary property and the sons have only a claim of maintenance. Therefore, the sons under a Dayabhaga coparcenary have neither a right to ask for partition of the property from the father nor a right to even ask for accounts of the joint family property. Where it comes to them on the death of the father they hold it quasi-severally and have a specific defined share in complete contrast to Mitakshara coparcener's fluctuating interest. A coparcener here is the absolute owner of his share with full powers of alienation.[4] Thus a purchaser of a share at a court sale can successfully get the physical possession of the share.[5]

On the death of a coparcener under the Dayabhaga joint family, his share does not pass to the surviving coparceners but goes to his heirs including even a legatee.[6] The income from the properties of a Dayabhaga family are assessed separately in the hands of the members in proportion to their shares.[7] Unlike a Mitakshara joint family, a Dayabhaga joint family is not a creation of law but a result of a desire of the family members to live together; therefore rather than a fiction it originates on fact.[8] Similar to the concept of joint family under Mitakshara law, a Dayabhaga joint family also is joint in food, worship and estate. Property in a Dayabhaga joint family may comprise acquisitions, ancestral property or property thrown into common stock.

DISTINCTION BETWEEN MITAKSHARA COPARCENARY AND DAYABHAGA COPARCENARY

(i) Formation of Coparcenary

A Mitakshara coparcenary is a creation of law and cannot be formed by agreement between the parties. A Dayabhaga coparcenary on the other hand stems from a desire of the coparceners to live together.

(ii) Commencement of Coparcenary

One of the primary differences between Mitakshara and Dayabhaga law is the commencement or the starting of coparcenary itself. Under the Mitakshara law the starting point of coparcenary is the birth of the son in the family of a person who after inheriting the property from his father or paternal grandfather or paternal great grandfather or obtaining property on partition holds it as a sole surviving coparcener. On the birth of his son the coparcenary

comes into existence or is revived if it was in abeyance. For eg, in a coparcenary consisting of a father *F* and his two sons *A* and *B*, *A* demands a partition, takes his share and then gets married. When a son is born to him, he will form a coparcenary with his son. Similarly a Hindu male having a wife inherits property under the classical law from his father. He has a son and will form a coparcenary with him. Thus the birth of a son is the starting point or reviving point of Mitakshara coparcenary. However in complete contrast to it, under the Dayabhaga law, the father so long as he is alive holds the property as a sole or exclusive owner of it. On his death if he is survived by two or more sons, they inherit the property and form a coparcenary. It is the death of the father that becomes the starting point of the formation of coparcenary under the Dayabhaga law and not the birth of the son as is the case under Mitakshara law. The sons can bring an end to this coparcenary by effecting a partition among themselves but till it is done, it continues.

(iii) Coparcenary between two Generations of Male Members

While under the Mitakshara law a coparcenary may consist of father and son or father and sons, between brothers, grandfather and grandsons or even a father, his sons and grandsons, under the Dayabhaga law a coparcenary cannot consist of a father and son or grandfather and grandsons or a single son. For eg, a family comprises father *F* and his son *A* and the two sons of *A*, *B* and *C* [see Fig 5.1]. On the death of *F*, *A*, *B*, and *C* cannot form a coparcenary under the Dayabhaga law as a single son cannot form a coparcenary and he will inherit the property of the father as an absolute owner with no right passing to *B* and *C* over this property. However, if the family is governed by the classical law Mitakshara law, on the death of the father *F*, *A* takes the property with the rights of *B* and *C* in it.

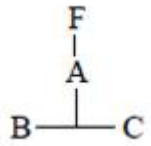

Fig. 5.1

Thus, under the Dayabhaga law there cannot be a coparcenary between a male ancestor and his male descendants, but that does not mean that there cannot be a coparcenary if more than two generations are present. Suppose a family comprises the father and his two sons *A* and *B*. On the death of the father, *A* and *B* will form a coparcenary. On the death of *A*, his two sons *C* and *D* will take a fixed half each of the share of *A*, and if no partition takes place *C*, *D* and *Bi.e.*, nephews and uncle, will form a coparcenary [See Fig 5.2].

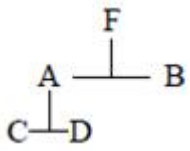

Fig. 5.2

(iv) Absolute Powers of Disposal of Shares

The father has an absolute right of disposal over the property that he holds so long as he is alive. Similar is the situation of each coparcener. Since the share of each of the coparceners is a fixed share, his powers of alienation over this share are absolute.[9] He can dispose of his share in the property by way of sale, gift, lease[10] or even a Will.

(v) Unity of Possession and Partition under the Dayabhaga Law

Under the Dayabhaga law on the death of the father, where he is survived by two or more of his sons, all of them inherit his property jointly and hold it as tenants-in-common.[11] As the doctrine of fluctuating interest is not applicablehere, each of them will have a fixed definite share over which they can also exercise full powers of disposal. For *e.g.*, if the father dies leaving behind three sons *A*, *B* and *C*, each son will have a fixed 1/3rd share in

the property. Till a partition takes place they will have unity of possession over the entire property together *viz.*, though they have a definite 1/3rd share, each share can be ascertained only after a partition is effected. Till then no one can claim any specific portion of the property as his own. A clear cut demarcation can come only with a partition. Thus unity of possession is an essential feature of Dayabhaga coparcenary.

(vi) Females as Representing Coparceners (Pre-1937)

Another distinguishing feature of Mitakshara and Dayabhaga coparcenary was the inclusion of females as representing the share of the deceased coparceners under Dayabhaga and absolute incapability of females to be representatives of sharers under Mitakshara coparcenary.

With the strict application of the doctrine of survivorship under the Mitakshara law, if a coparcener died leaving behind only female dependants including widows and daughters, his interest in the Mitakshara undivided coparcenary was immediately taken by the surviving coparceners while the widows and daughters had a right of maintenance only. Under the Dayabhaga coparcenary on the death of a coparcener, since the shares of such coparceners in absence of application of the doctrine of survivorship will go by way of inheritance, the widow/daughter will inherit the property. If the possession is united, they by representing the deceased coparcener will form a coparcenary with the surviving brother of the deceased coparcener. Under the Dayabhaga coparcenary therefore, both males and females could form a coparcenary. For example, in Fig 5.3, a coparcenary comprises the father *F*, his three sons *A*, *B*, and *C*. *A* is married having a wife *W* and a daughter *D*. On the death of the father, all three brothers will collectively form a coparcenary.

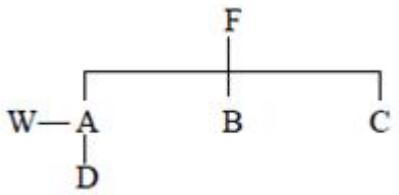

Fig. 5.3

If the family is governed by the Mitakshara law each of the brothers *A*, *B* and *C* will have a fluctuating interest in the coparcenary property that can be called a probable 1/3rd and if *A* dies, his probable 1/3rd will be taken by the surviving brothers *B* and *C* with the application of doctrine of survivorship and their shares will be increased to a probable half. *W* and *D* will have only a right of maintenance from this property. But if the family is governed by the Dayabhaga system *A*, *B* and *C* will have a fixed 1/3rd share in the property though possession of it will be united in absence of a partition. On the death of *A*, his 1/3rd share would go by inheritance to his wife and daughter. In absence of a partition, they would step into the shoes of *A* and will form a coparcenary with *B* and *C*. This coparcenary will comprise two females *W* and *D* and two males *B* and *C*. Thus, a coparcenary under Dayabhaga law can have both males and females but under the Mitakshara law, coparcenary will have only male members.

ENJOYMENT OF COPARCENARY PROPERTY

Due to unity of possession in a Dayabhaga coparcenary each coparcener is entitled to enjoy the property in a reasonable manner and not commit an act injurious to the property.[12] By virtue of having a distinct share each coparcener has an absolute power of disposal but he cannot claim a right to possess a specific share. A coparcener therefore cannot enter a specific portion of the property such as an agricultural field and cultivate it for his benefit without the consent of the other coparceners.[13] He may nevertheless with consent of other coparceners occupy a specific portion of the field and use the income from such cultivation as his separate property. In such cases it will constitute his own separate income.[14]

PRESUMPTION OF JOINT FAMILY AND JOINT FAMILY PROPERTY

Every Dayabhaga family is also presumed to be a joint family, but there is no presumption that the property that each of the coparcener occupies is joint family property. So where during the lifetime of the father, the son is in exclusive possession of a piece of property there is no presumption that the property in the hands of the son is joint family property and the burden of proof is on the person who alleges that it is joint family property,[15] irrespective of the fact that the property might be occupied by the father and the son[16] or is in exclusive possession of the son.

RIGHT OF COPARCENERS TO DEMAND A PARTITION

In a Dayabhaga coparcenary every adult coparcener has a right to demand a partition,[17] and physical demarcation of their shares.

MANAGER OR KARTA

In a Dayabhaga Coparcenary, it would be inappropriate to call the father, a Karta or a manager of the joint family property as he is not a mere manager but an absolute owner of the property. Nevertheless, his powers are similar to those of Karta under Mitakshara law.[18] He can mortgage the family property for a family business;[19] can contract a debt for the joint family purposes and in the event of a decree passed against him, the decree will be binding on the other members of the family also even if they were not parties to the suit.[20]

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1. *KKR Paul v. Manoranjan Kar,* AIR 1968 Tripura 34 .
2. *Kunj Behari v. Gauhari Ram*, *AIR 1958 Cal 105* [*LNIND 1956 CAL 101*].
3. See *Makhan Lal v. Sushma Ram, AIR 1953 Cal 164* [*LNIND 1952 CAL 35*].
4. *Kounla v. Ram Huree,* (1827) 4 Beng Sel R 196; *Anunchand v. Kishen,* (1805) 1 Beng Sel R 115.
5. *Koonwar Bijoy v. Shama Soonduree,* (1865) 2 WR (Mis) 30; *Eshan Chunder v. Nund Coomar,* (1867) 8 WR 239.
6. *Soorjeemoney v. Denobundoo,* (1857) 6 MIA 523–553; *Batia Bala v. Chabilal Sen,* AIR 1974 Pat 147 .
7. *Commissioner of Income Tax v. Prafulla Kumar Panja,* (1993) ITR 706 (Cal); *CWT v. Bishwanath Chatterjee,* (1976) 103 ITR 536 (SC).
8. *Commissioner of Income Tax v. Gowrishanker,* (1968) 68 ITR 345.
9. *Kounla v. Ram Huree,* (1827) 4 Beng Sel R 196; *Anunchand v. Kishen,* (1805) 1 Beng Sel R 115.
10. *Ram Debul v. Mitterjeet,* (1872) 17 WR 420; *Macdonald v. Lalla Shib,* (1873) 21 WR 17.
11. *Commissioner, Wealth Tax v. Biswanath Chatterjee, AIR 1976 SC 1492* [*LNIND 1976 SC 166*], 1495–97; see also *Commissioner, Wealth Tax v. Gauri Shankar,* (1972) 84 ITR 699 (SC); *Commissioner of Income Tax v. Bani Rani Rudha,* 59 ITR 216; *Charandasi Devi v. Kanai Lal, AIR 1955 Cal 206* [*LNIND 1954 CAL 124*]; *Biswa Ranjan v. Income Tax Officer,* 47 ITR 927; *Commissioner of Income Tax v. Balaichandra,* 105 ITR 666; *Partha Talukdar v. Nina Hardinge, AIR 1993 Cal 118* [*LNIND 1992 CAL 305*].
12. *Gopee Kishen v. Hem Chunder,* (1870) 13 WR 322, wherein it was held that a coparcener should not pull down a common verandah.
13. *Stalkarti v. Gopal,* (1873) 20 WR 168.
14. *Robert Watson and Co. v. Ramchund,* (1891) 18 Cal 10, 21.
15. *Ramesh Chandra v. Hemendra,* AIR 1949 Cal 519 ; *Sarada v. Mahananada,* (1904) 31 Cal 448. See also *Jugal Kishore v. Narayan, AIR 1982 Cal 342* [*LNIND 1982 CAL 17*].
16. *Hemchandra Ganguli v. Matilal Ganguli,* AIR 1934 Cal 68 . See also *Kunja Behari v. Gourhari Ram, AIR 1958 Cal 105* [*LNIND 1956 CAL 101*].
17. *Sreemutty Soorjeemoney Dossee v. Denobundoo,* (1856) 6 MIA 526, 539.

18. *Balakrishna v. Muthasami,* (1909) 32 Mad 271, 274.
19. *Bemola v. Mohun,* (1880) 5 Cal 792.
20. *Dwarka Nath v. Bungshi,* (1905) 9 CWN 879. See also *Sukhadakanta v. Bhattachariya,* AIR 1934 Cal 73 .

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CHAPTER 5 CATEGORISATION OF PROPERTIES

Kusum & Poonam Pradhan Saxena - Family Law

Poonam Pradhan Saxena

CHAPTER 5 CATEGORISATION OF PROPERTIES

Under Hindu Law, the property that a Hindu male may possess, can be of two types: his acquisitions in his individual capacity, that can be described as his exclusively owned or separate property, and a share in the joint family property or coparcenary property, that he holds with other members of the family.

SEPARATE PROPERTY

'Separate property' is owned by a person exclusively and he enjoys absolute powers of disposal over it. He can sell it,[1] mortgage it, gift it,[2] bequeath it under a Will[3] to anyone, or donate it for religious or charitable purpose or for public benefit in general. He can even gift it to his sons, in equal[4] or unequal shares or to just one son to the exclusion of all others,[5] or to any other family member. No one can ask for its partition[6] or control its disposal in any manner. On his death, the property will go as per the laws of inheritance or testamentary succession (in case he leaves behind a Will) and not by the doctrine of survivorship,[7] as no person can claim a right by birth, in this property. Since a person has the power of making a Will of his separate property, he can legally disinherit his wife or children by bequeathing the property in their presence, to a third person.

Incidents of Separate Property

Property acquired by a Hindu male or female, a coparcener or a non-coparcener, in his/her individual capacity or through individual efforts and without detriment to the coparcenary property, is called separate property and has five basic features:

(a) Every Hindu can own separate property. It is not necessary that he or she must be a member of a Hindu joint family. Even a single individual, male or female, can possess separate property.

(b) The owner enjoys an absolute ownership over the property, with absolute powers over its disposal, inter vivos or through a Will. No one else can either claim any right of partition or ownership or possession over it, including even the son of the owner, without his consent.[8] The right of the son over the separate property of the father can be described as a mere *spes successionis* i.e., the chance of an heir to succeed to the property of the father. There are two reasons why it is a bare chance and not a certainty, viz., firstly, during the lifetime of the heir, the property may be disposed of by the owner and there might not be anything left for him to succeed to, and secondly, as life is uncertain, the son may die during the lifetime of the owner. Here again, the son may die without inheriting the property. However, in such cases, if the son dies leaving behind a son, such grandson acquires a similar chance to succeed to the property of the grandfather.

(c) In separate property, the owner alone has the right to possess and enjoy it. Thus, no one else can claim to have a right to possess and enjoy it without the permission of the title holder.

(d) On the death of the owner, the separate property of a person goes by inheritance or intestate succession, or by testamentary succession in case he dies after making a Will. The doctrine of survivorship does not apply to a separate property at all.

(e) The separate property of a person can be converted into coparcenary property by a coparcener, without the consent of the other coparceners, by a voluntary and intentional act of throwing in the property into the common, joint family stock. The only requirement is that the intention for such blending must be clear[9]. A female in general, is incapable of throwing in her properties into the joint family pool, but it has been held

that she can make a gift[10] of her separate properties to the joint family as a whole, and in that case, the property so gifted would become the coparcenary or joint family property.

Acquisition of Separate Property

Property that is acquired by a Hindu in his individual capacity, without any detriment to the joint Hindu family funds, would be his separate property. It would include the following:

(a) property acquired through his learning or special skills;

(b) property received by way of a prize or scholarship;

(c) inheritance by way of an obstructed heritage;[11]

(d) property gifted[12] or bequeathed to him[13] by any person, whomsoever he/she may be, unless the donor or the testator expressly makes it a coparcenary property;

(e) government grants, where again, a contrary intention in not manifested;[14]

(f) property acquired through adverse possession;[15]

(g) salary and remuneration received in a job or an avocation;[16]

(h) property inherited from any relation other than the father, father's father or father's father's father (pre-1956);[17] and

(i) property that cannot be called coparcenary property due to any reason whatsoever.

JOINT PROPERTY

Property that is held jointly by two or more persons, with the incidents of survivorship, is called joint property. It is not necessary in such cases, that the owners of the joint property should be family members. They can be family members, distant relatives or even strangers to each other. Property owned and held jointly by two or more business partners will be their joint property.

JOINT FAMILY PROPERTY

As the term indicates, property held jointly by the members of a family is called joint family property. Under Hindu law, this term has a special significance. As the property is called joint family property, all members of the joint family have one or the other right over it, which are not equal with respect to each other. Similarly, all members of the family cannot contribute towards this joint family property corpus. This property is owned collectively by the coparceners, while non-coparceners have a right of maintenance out of the joint family funds, and a right of residence in the joint family house. Funeral expenses of joint family members are met with the joint family funds, which are also used for performing other essential religious ceremonies.

In absence of any property owned collectively by the joint family, the coparceners can pool in their separate property, throw it in what is called 'common stock', with a clear intention to deprive themselves of their individual or exclusive control over it[18] and such property will also be called joint family property. Female members and non-coparcenary male members cannot throw in their separate properties into the common stock,[19] but are competent to realise their rights of maintenance, including marriage expenses and residence, from the property that is thrown in by the coparceners into the common stock. It is not necessary that the coparceners can pool in their separate acquisitions only in cases where the joint family property is not already in existence. Even where the joint family property is already in existence, its quantum can be increased by any coparcener if he decides to throw or merge or blend his individual property with the common stock. However, once the property is so thrown or blended into the common stock, the coparcener cannot claim any better rights over it on the ground that he had substantially contributed towards its value, and his rights will be on par with the rights of other coparceners.

JOINT FAMILY ANCESTRAL PROPERTY

Joint family ancestral property has two characteristics:

(a) it is a joint family property; and

(b) it is ancestral.

The term 'ancestral' denotes that the property had come to the joint family from an ancestor, hence it signifies the pre-existence of the property within the family, or with the ancestor of the family and with reference to Hindu law, two things become very important, viz.:

(a) who was this ancestor; and

(b) what was the mode of devolution of the property from this ancestor to the joint family members.

The term 'ancestor', here, is not used in a general or broad sense, but refers to three immediate paternal ancestors in a whole male line i.e., father, grandfather (father's father) and great-grandfather (father's father's father).[20] With respect to the devolution of this property, generally speaking, where the property comes to the joint family by inheritance[21] from these three ancestors, or in some cases even by a Will,[22] it will be termed as the joint family ancestral property.

COPARCENARY PROPERTY

The joint family property and the joint family ancestral property is collectively or individually, called 'coparcenary property'. Coparcenary property is collectively owned by the coparceners, and therefore, to own an interest in the ancestral or joint family property, a Hindu male must be a coparcener. There is joint possession and since the ownership is collective,[23] a Hindu male has limited powers of disposal over it.[24] An ordinary coparcener cannot dispose of his undivided share except in certain specific situations.[25] He also had no power to make a Will of his undivided share till 1956,[26] and on his death, the share will not go by inheritance to his legal representatives, but will pass to the surviving coparceners under the doctrine of survivorship.[27]

Heritage and its Classification under Mitakshara Law

Vijananeshwara classifies property (daya) into two categories, 'apratibandhdaya' and 'sapratibandhdaya'. 'Sa' means together or 'with' and 'pratibandh' refers to an obstruction or an impediment. Thus, sapratibandhdaya refers to a heritage that is currently with an obstruction, and can be acquired or inherited provided that obstruction or restriction is removed. It has a specific reference to the inheritance of the property of an individual.

'A' in Apratibandhdaya, refers to 'without' or 'minus' and therefore, apratibandh means without any restrictions or impediments; a heritage that comes to a person without any obstruction. He acquires an interest in such property the moment he is born.

These terms have been explained[28] in Mitakshara as follows:

> The wealth of the father or of the paternal grandfather becomes the property of his son or his grandsons, in right of them being his sons or grandsons and that is an inheritance not liable to obstruction. But property devolving on parents or uncles, brothers or the rest, upon the demise of the owner, if there be no male issue and thus, the actual existence of a son and the survival of the owner are impediments to succession and on their ceasing, the property devolves on the successor, in right of his being uncle or brother. This is an inheritance subject to obstruction.[29]

In an unobstructed heritage, the heir is bound to succeed to the property unless his rights are defeated by an alienation of the property or by his own death, as no other heir nearer in relation is present. But his death will make his own son an heir, i.e., on his death, he has the capability to transmit the interest in the estate to his son. On the

other hand, a brother cannot succeed to the property if the owner has a son. The presence of the son is an obstruction to his right to succeed to the estate, and if the son dies and there is no other nearer heir present, only then can he succeed.

Right by Birth and Right of Ownership

It is often said that a coparcener has a right by birth and a right of ownership in the coparcenary property. These two expressions—right by birth and a right of ownership—are used presently to denote the same rights. But under Mitakshara law, they had a different meaning, while the former referred to a son's right to inherit the property of the father, the latter meant a subsisting ownership that a coparcener acquired in the coparcenary property.

In obstructed heritage, the son of a person had no equal right of ownership with the father. Under Mitakshara law, there were only two divisions—unobstructed and obstructed. The son had a right by birth in the property of his father, as also that of his grandfather (father's father), but there was a difference between the two, and Vijananeshwara explains the difference as[30]—while the son and the grandsons took an equal interest in the grandfather's property on his death, the right of the son over his father's estate is not equal to that of the father, so long as the latter is alive and is free from any defect. The father in such a situation, is competent to exercise control over it and the son cannot demand a partition from the father of his property, but can do so where the grandfather's property is concerned. The mode of enjoyment of the father's separate property is determined by the doctrine of 'Pitru Prasad'[31] and shows that there is a difference between the two expressions—right by birth and an equal ownership. Right by birth refers to the right of the son to inherit the property of the father (of which the father alone is the owner) by virtue of his birth in his family as his son. It indicates the separate property of the father, but once he so inherits it, his own son *SS* acquires an equal ownership over this property. The right of *SS* therefore, is not merely a right by birth, but that of a 'subsisting ownership', that he can exercise by asking for a partition of this property.[32]

These propositions from the Mitakshara are reflected in the later rephrasing of the categories of properties into ancestral, coparcenary and separate, and that of heritage into succession and devolution by survivorship, though only to a limited extent.

Incidents of Coparcenary Property

(a) Only a coparcener can hold coparcenary property. A Hindu female generally or a non-coparcener male Hindu cannot own the property as coparcenary property. Property in the hands of a sole surviving coparcener, in the absence of female members of the joint family, is analogous to his separate property.

(b) Coparcenary property is jointly owned by the coparceners. There is collective title, collective possession and collective rights of disposal over it. Therefore, there is no general right in favour of any coparcener to transfer it.

(c) In the coparcenary property, the holder's son, grandson (son of a son) and a great-grandson (son of a son of a son) acquire a right of ownership by birth and hence, a right to ask for its partition and demarcation of their shares. An unauthorised alienation of the coparcenary property can be challenged by them in a court of law.

(d) The coparcenary property is owned by the coparceners, but is enjoyed by not only the coparceners, but also by other members of the joint family who are not its owners. They have a right of maintenance, residence, and of marriage expenses etc.

(e) Unlike separate property where the title and enjoyment vest in the same person, in a coparcenary property, the title vests in the coparceners but the right of enjoyment is with all the joint family members.

(f) unlike separate property, where the title, possession and enjoyment and right of alienation vests in the same person, here the right of alienation of the complete property can be exercised not merely by all the coparceners collectively but in some specific situations by the Karta /father only even without the consent of the other coparceners.

(g) On the death of a coparcener, his interest in the coparcenary property is taken by the surviving coparceners under the doctrine of survivorship, and the laws of inheritance do not apply. In the case of a sole surviving coparcener, upon his death, the property goes by inheritance, to his legal representatives.

(h) Unlike separate property or exclusive property that cannot be explained by any other description or character, whether it is seen with respect to the descendants of the owner or by his collaterals or by

strangers to the family, the coparcenary property changes its character depending upon who the claimant is. A person acquiring property from his male ancestors, holds the same as ancestral property or joint family property, only with respect to his lineal male descendants, and the same property will be called his separate property if there are no lineal male descendants, i.e., sons, grandsons (sons of sons) and great-grandsons (sons of sons of sons), and the claimants to the property are uncles, or collaterals etc.,[33] and on the death of the holder of the property, it is only the above mentioned lineal male descendants who are entitled to claim the benefit of the doctrine of survivorship (only these descendants can ask for a partition of the property during his lifetime). In the absence of lineal male descendants, neither a right of partition, nor a right to claim the property by survivorship on his death, is available to the male collaterals. The property goes by succession in such a case.

For example in Fig. 6.1, a family consists of the father *F*, his brother *Br*, a son *S* and his wife *W* and a grandson *SS*.

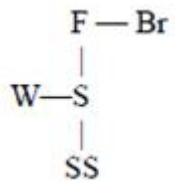

Fig. 6.1

The father and his brother were separate during the former's lifetime. If the son had a son *SS*, the properties in the hands of *S*, are ancestral property vis-a-vis *SS*, as *SS* can ask for its partition during the lifetime of *S* and he will take the complete property on the death of *S* by survivorship, but if *SS* dies before *S*, and the character of the property in the hands of *S* is seen with respect to *Br*, it will be described as the separate property of *S*, that would go on his death by inheritance, to his nearest heir and would not pass by survivorship to his father or the brother, *Br*.

In *Dipo v*. *Wassan Singh*,[34] two brothers *A* and *B*, inherited the property from their father and separated by effecting a partition between themselves [see Fig. 6.2]. *A* had a daughter *D* and a son *S*. On the death of *A*, his son *S*, took the properties by survivorship. He later died without leaving any male descendants, and his sister *D*, claimed the properties by succession.

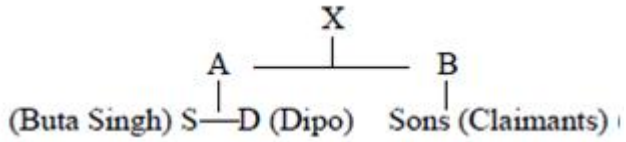

Fig. 6.2

At this time, the sons of *B*, i.e., sons of *S*'s paternal uncle, took the possession of the property on the ground that the properties in the hands of *S* were ancestral property and in Punjab, a female cannot own ancestral property. Accordingly, they contended that they were the rightful owners of the property. The Supreme Court rejected their contention and held that the character of the property varies, depending upon who the claimant is. In the absence of any male issue of *S*, he held it during his lifetime as a sole surviving coparcener and its character with respect to both his sister as also the sons of his paternal uncle, was that of a separate property and not that of an ancestral property. On his death, the property was to go to the nearest heir in accordance with the laws of inheritance, who in this case, happened to be the sister, and not to collaterals, who were remoter heirs in her comparison.

The character of the property therefore, would be ancestral vis-a-vis the male issues of the holder. In the absence of male issues, though he holds it as a sole surviving coparcener and is entitled to treat it as his separate property, its character as a coparcenary property will revive the moment he gets a son. But if he dies without any male descendants, the property loses its character of ancestral or coparcenary property, and would be called his separate property and will go by inheritance.

ORIGIN OF PROPERTY IMMATERIAL FOR DETERMINING CHARACTER SUBSEQUENTLY

The original mode of acquisition of property is immaterial for the determination of its character subsequently. A separate property of a Hindu male, when inherited by his son on his death, becomes ancestral or coparcenary property with respect to his male issue. This property therefore, was the separate property of the acquirer to begin with, but changed its character and became ancestral after its inheritance by the son of the owner, with respect to his own son.[35]

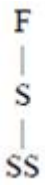

Fig. 6.3

In Fig. 6.3, the father F was the owner of some properties that were his separate acquisitions. During his lifetime, he held them as his separate property and neither *S* (his son), nor *SS* (son of a son), could claim any right to have a partition of it. *S* or *SS* could not claim the property even by survivorship, on the death of *F*, but *S* could take it by succession. But the moment *F* dies and *S* takes the property, its character changes and it becomes ancestral property in his hands, vis--vis *SS*, who can, not only claim a partition of the property, but would also claim it by survivorship on the death of *S*. So, the property that was originally the separate property of a Hindu male, would become ancestral or coparcenary property once it is inherited by his son or by his male descendants. Similarly, the property may be ancestral in the hands of the father but would later become separate if he dies without any male issues and it is inherited by a male heir.

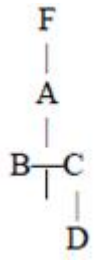

Fig. 6.4

For example, as illustrated in Fig. 6.4, *B* and *C*, two brothers, have a right by birth, in the properties that *A* inherits from his father *F*. *D*, who is *C*'s son, also has an interest in these properties. *B* seeks a partition of this property, takes his share and separates from the family. *A*, *C* and *D* continue as members of the joint family and together, hold the property as coparcenary property. *A* and *C* die one after another and then *B* dies. *D* will inherit the property of *B* as his nearest heir, but will hold the property as a separate property even with respect to his male descendants, if any.

ACQUISITION OF COPARCENARY PROPERTY

Property Inherited from Ancestors (Classical Hindu Law)

A property that a Hindu male inherits from his father, grandfather (father's father) or great grandfather (father's father's father), would be ancestral or coparcenary property in his hands, with respect to his son, grandson (son of son) and great grandson (son of a son of a son),[36] even where the father inherits it after the death of a life tenant.[37]

The position has been substantially modified after the passing of the Hindu Succession Act, 1956.[38]

Property Inherited from Maternal Grandfather

A maternal grandfather can be described as an ancestor, as the term ancestor literally means a lineal ascendant and it does not qualify the sex of the line of the ancestor. However, property inherited from any ancestor will not be ancestral property in the hands of the heir, for the purposes of Hindu Law. The original text of Mitakshara shows that the term used to denote an 'ancestor', inheritance from whom will be ancestral or coparcenary property in the hands of the son, is 'Pita' and 'Pitamaha', which means father, and father's father only[39] and the expression does not include a maternal grandfather. He may be called an ancestor in a general sense, but property inherited from him would not be ancestral property or coparcenary property in the hands of his daughter's son. The reason is that the primary heir of the maternal grandfather would be his son and the presence of such a son would make it an obstructed heritage as far as the daughter's son is concerned. Therefore, unless the property comes by descent, from a lineal male ancestor in the line, it is not deemed ancestral in Hindu Law.[40]

In an early decision of *Chelikani Venkayyamma Guru v. Chelikani Venkataramanayyamma*,[41] the court held that property inherited by two brothers jointly, from their maternal grandfather, was ancestral property with rights of survivorship. The brothers here had maintained their joint status and were holding properties that they had inherited after the death of their mother, from their maternal grandfather, and also other joint family properties. On the death of one of the brothers, his widow claimed a portion of the property belonging to her deceased husband. The court held that on the death of one brother, his share in the properties, including the one that he had inherited from the maternal grandfather, passed to the other brother under the doctrine of survivorship and the widow was not entitled to get anything. This decision, which did not lay down a correct proposition of law, was later overruled by the Privy Council, in *Muhammad Hussain Khan v. Babu Kishva Nandan Sahai*.[42] The court, after considering Colebrooke's translation and the original terms used in Mitakashara, held that property inherited from a maternal grandfather would constitute the grandson's separate property. In this case, one *A*, had inherited some properties, including a village, from his maternal grandfather. He executed a Will of these properties, giving a life estate in it to his son, and on the death of the son, the properties were to go to the son's widow, absolutely. The situation is illustrated in Fig. 6.5.

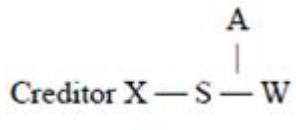

Fig. 6.5

During his lifetime, the son contracted some debts that he was unable to repay and the creditors obtained a money decree against him. In the execution of the money decree, the village was sold at a court auction. The son filed a petition claiming that the suit filed by the creditor was vitiated by fraud. During the pendency of the suit, the son died and his widow, *W* who was substituted in his place, contended that the son *S* had only a life interest in his favour and she was the absolute owner of the property and the sale was not binding on her. On behalf of *X*, it was contended that the properties in the hands of *A*, that he had inherited from his maternal grandfather, were ancestral properties, and on his death, passed to the son, *S*, under the doctrine of survivorship. They further contended that as the properties were coparcenary properties, *A* was incompetent to make a Will of the same, and if he did execute a Will, the same was invalid. The court held that there were several clear pointers in the Mitakshara which showed that 'ancestral property' is one that is inherited by a Hindu male from his father or paternal grandfather, or great paternal grandfather only and properties inherited from a maternal grandfather are separate properties in the hands of his daughter's son. Accordingly the Will executed by A was valid as it related to his separate properties.

The earlier decision of *Chelkani Venkayyamma* [43] was incorrect in the light of Vijananeshwara's classification of property, into obstructed and unobstructed heritage. The presence of the son or a son's son is an obstruction for the son of a daughter to inherit the property of his maternal grandfather, and if he inherits it, it would always be his separate property, even if he is a co-inheritor with his brother and maintains an otherwise joint status with him. Even while maintaining a joint status, coparceners are empowered to hold separate properties of their own.

Property Inherited from any other relation

Property that a Hindu male inherits from any relation other than his three immediate paternal ancestors in the male line, will be obstructed heritage and would constitute his separate property. Similarly, property inherited from a

female would always be the separate property of the heirs.[44] The property that a person inherits from his mother,[45] including an adoptive mother,[46] maternal uncle,[47] maternal grandfather,[48] or maternal grandmother,[49] or from a collateral,[50]like a brother, nephew or uncle, would be his separate property. But where a woman takes a share in the coparcenary property on the death of her husband, under the Hindu Women's Right to Property Act, 1937, and holds it for her life and on her death, such share reverts to the collaterals, who take it as reversioners, such share that the collaterals take by reversion, would be coparcenary property in their hands, with respect to their male descendants, and would not be their separate property.[51]

Property Gifted by Father to the Son

Devolution of property from father to son can be through survivorship, inheritance, gift or Will. While the first refers to the father's undivided share in the coparcenary property that the sons take upon his death by survivorship, the later three devolutions are with respect to the father's separate property. The character of the property that the son takes by survivorship, is coparcenary property and his male issue has an equal interest in it, including a right to ask for its partition. There is little scope for confusion in this situation as this property was to begin with, coparcenary property and it maintains the same status and character in the hands of the sons. But properties that were separate acquisitions of the father, when passed on to the son through inheritance, gift or Will, will be ancestral in the hands of the sons in the first case, under the classical law, but the character may vary in the later cases, depending upon the facts and circumstances of each case. The primary reason is that the laws regulating inheritance, operate on the death of a person, in the absence of his instructions, with respect to its devolution (Will). These laws of inheritance do not differentiate between two sons, i.e., between a bad son and a good son, or a son who took care of the father or the one who was away and totally engrossed in his own family, a son who proves to be a nuisance and the one who is an asset, and the property under these laws, goes to all the sons in equal shares. However, in the case of a gift or a Will, it is the perception and express decision of the owner, as to whether one son deserves a better treatment than the others, or in absence of any unfair behaviour, whether one son requires a share larger than others, due to his needs or wants. These things can be determined, assessed and settled by the owner, while taking into account the situation that actually exists and this very fact makes succession through inheritance, different from a devolution of the property through a gift or a Will. This also clearly shows that the character of the property in the hands of the son, will vary depending upon the mode of devolution of the property from the father to the son.

A father's competency to make a gift of his separate properties in favour of anyone, including a son, is undisputed, but the question that arises is, what would be the character of the gifted property in the hands of his son with respect to the son's male issue? In this context, the Mitakshara provides that:[52]

> Excepting what is gained by valour, the wealth of a wife and what is acquired by science, which are three sorts of property exempt from partition, and any favour conferred by a father.

A favour of the father reflects the doctrine of 'Pitra Prasada Labdabd', meaning a special favour to a chosen one.

A text of Yajnavalkya says:[53] 'The wealth which is given to one by parents belongs to him alone.'

Mitakshara is thus, very clear on this point, as it has specifically ordained that the wealth given to the son by the father, either before or after the separation, appertains solely to him,[54] and is shared by no one else.[55]

The expression 'no one else', includes even the male issue of such son and the character of the property would therefore, be separate in the hands of the recipient of the gift, with respect to his male issue. These provisions are an exception to the general rule, that a self-acquisition of a person, should have been acquired by him without detriment to the father's estate.[56]

Thus, a gift by the father, of his separate properties to his son, would be the absolute property of the son with respect to his male issue due to the following reasons:

(a) it has specifically been so provided under Mitakshara law.

(b) a father has the power to make a gift of his self-acquisitions, in favour of anyone, including his progeny, but where he gifts his property to the son, the son gets it not just because he was the son, but because the father chose by a conscious or a voluntary decision, to confer a benefit on him during his lifetime.

(c) Through a gift, a person gets a share of the father's property well ahead in point of time and becomes competent to exercise control over it, because the father made him so capable by giving an ownership, while others, who were not the recipients of such preferential treatment by the father, would have to wait for him to die before they can exercise any such control.

(d) A gift by the father to one son alone, clearly shows that the father wanted the son to exercise absolute control over the gifted property. To hold it otherwise would mean that during the lifetime of both the donor and the donee, the donee's sons would become equal owners of the property and would be in a position to exercise complete control over it, along with the father. The gift in such a case, would turn into a gift to a class, rather than to an individual, in clear contravention of the intention of the donor.

(e) Just as the father is competent to choose the donee, he is also capable of determining the character of the property in the hands of the recipient of such gift. For example, where the father makes a gift of his properties to one out of his three sons and provides in the document (gift deed) or otherwise, that the son is to enjoy the property absolutely, or to the exclusion of his descendants, the son takes the property absolutely, but where the father expressly provides in the gift deed, that the son is to enjoy the property along with his male descendants, with each having an equal ownership in it, the property would be treated as coparcenary property in the hands of the son, with respect to his male issues,[57] but not because the son receiving the property from his father under a gift holds it as ancestral property, but because it was in accordance with the intention of the donor, as expressed in the gift.

Therefore, where the intention of the father can be gathered from the contents of the gift, or even otherwise, that alone will be the determining test, but in absence of any contradictory intention, it would be the absolute property of the son. A gift by the father to his illegitimate son for his maintenance,[58] or the one to a son at the time of his marriage,[59] is not ancestral in his hands.

Separate Property of the Father received by the Son through a Will (Testament)

The primary difference between a gift and a Will is that though a Will is executed during the lifetime of a person, again by a voluntary act, it becomes operative only after the death of the testator. The testator therefore, retains not only the ownership of the property during his lifetime, but also its possession. Secondly, a Will is revocable. Even where the testator makes a Will, he can cancel it, change it or even modify or supplement it in accordance to his wishes. He need not inform anyone about it, nor is he required to take the permission of any person or of any statutory authority. Executing a Will therefore, does not have any adverse effect on his ownership or on his powers to dispose of the property. On the other hand, in the case of a gift, with a few exceptions, a gift takes effect immediately and the donor loses control over it. Once executed, it cannot generally, be revoked, unless it is a conditional gift. Property received under a gift therefore, is the separate property of the donee, unless the donor expressly provides it to be ancestral property in the hands of the donee, but the same cannot be said about Will.

A Will is also different from an inheritance as it gives greater freedom to the owner in choosing the beneficiaries, while retaining control over the property during his lifetime. A just and fair distribution of the property, based on the testator's perception of the quality of his progeny, their needs, desirability of giving the property to a member outside the family, or its settlement for a religious and charitable purpose, are possible only through a Will. Where a Hindu father makes a Will of his property, he can give his total properties to one son, to the exclusion of all the others, or disinherit the family members completely, something that is not possible under inheritance laws and therefore, the character of the property in the hands of the son, where he receives the property under a Will from the father, need not necessarily be the same as it is when he receives the property through inheritance.

As in the case of a gift, in the case of a testamentary disposition or a Will also, the testator is competent to determine not only the beneficiary under the Will, but also the character of interest that he takes in the property. If the intention of the testator was that the son should enjoy the property with his branch, the character of the property would be ancestral with respect to his male issue, but where the intention was that the son should enjoy it absolutely, or to the exclusion of his male descendants, it would be the separate property of the son. This intention can be expressly provided in the Will or can be implied from the language, and if it can be ascertained from the Will, that alone will be the determining factor with respect to the character of the property in the hands of the son.[60] Difficulties may arise in a situation where the intention of the testator cannot be gathered from the language of the Will. Before the decision of the Apex Court in *Arunachalam's* case, there was a conflict of judicial opinion on this point. Madras[61] and Patna[62] High Courts adopted the view that where the intention of the father cannot be ascertained from the Will, the character of the property would be ancestral in the hands of the son, vis--vis his male issues, while Bombay,[63] Allahabad,[64] Oudh[65] and Lahore[66] High Courts held that in the absence of a clear intention, the property would be the separate property of the son.

In *C.N. Arunachalam v. C.A. Murugantha Mudaliar,* [67] the Supreme Court after a review of the Smriti Texts and a large number of contradictory judicial opinions, came to the conclusion that unless an intention appears from the language of the Will, that it should be treated as ancestral property in the hands of the son, it would be the son's separate property. Where the intention is not clear, the contents of the Will and the class of beneficiaries, will be the determining tests. What has to be seen is, whether the testator had made a distribution that is identical to or close to what would have been the case if the property would have devolved on the family members through inheritance and not through the Will. In such cases, it can be presumed that the father did not want to deviate from the general inheritance laws and the purpose of his making the Will was to avoid a dispute with respect to its distribution, after his death. The Court said:[68]

> The court would have to collect the intention of the donor from the language of the document taken along with the surrounding circumstances. Could it be said that the donor intended to confer a bounty upon his son exclusively for his benefit and capable of being dealt with by him at his pleasure or that the apparent gift was an integral part of a scheme for partition and what was given to the son was really the share of the property which would normally be allotted to him and in his branch of the family on partition?

In the present case, the father had made a Will of his separate properties, in favour of his three sons, his wife, and the widows of his two brothers, with a provision for marriage expenses of his daughter [See Fig. 6.6].

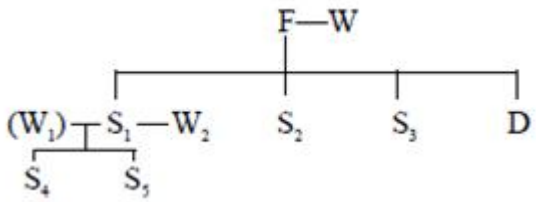

Fig. 6.6

The father had given *A* schedule properties to S1, B schedule properties to S2 and C schedule properties to S3 .. The D schedule properties were kept apart for the marriage expenses of the daughter *D* and a son S3, who at the time of the execution of the Will were unmarried. *W*, the wife of the testator, was given an authority to sell this property for marrying them. The testator had created a life interest in some portions of the property in favour of his wife and the widows of his two brothers, which, on their death, were to revert to his sons. Two years later, the testator executed a revocation deed, under which the C schedule properties, that were earlier bequeathed to his third son S3, were given in equal shares, to S1 and S2, with a direction to them that they were to provide maintenance to S3. The reason for this revocation was of the testator's displeasure with S3, who had fallen into bad company and was disobedient to him. Around 17 days later, the father executed another revocation, whereby the share of S3, given by the first revocation to S1 and S2, was taken away from them and given to his son-in-law, with a direction to him to hand it over to S3 in case he reforms himself. The original Will expressly stated that the sons were to enjoy the properties allotted to them, with absolute rights and with powers of alienation such as gift, exchange, sale etc., from son to grandsons, hereditarily. The revocation deeds affected only the share of S3 and did not disturb the bequests in favour of S1 and S2. The father died and S1 and S2 took possession of the properties allotted. S1 got married and had two sons, S4 and S5. On the death of his first wife W1, S1 remarried, but relations between the new wife *W* 2 and the sons S4 and S5, deteriorated. S4 filed a suit asking for a partition of the properties in the hands of S1 that he had received from *F* under the Will, on the ground that these properties were ancestral in character and he had a right by birth, in them, including a right to ask for partition and ascertainment of his one-third share. The Court held that the properties in the hands of the father were his separate properties and could not be partitioned at the instance of the sons. The Court observed:[69]

> On reading the Will as a whole, the conclusion becomes clear that the testator intended the legatees to take the properties in absolute rights as their own self-acquisition, without being fettered in any way, by the rights of their sons or grandsons He did not intend that the property should be taken by the sons as ancestral property.

According to the Apex Court, therefore, where the Will expressly provided that the property bequeathed to the son, will be held by him as ancestral property, or where, by the distribution effected in the Will, the class of beneficiaries

is such that it is either identical to or very close to what is provided under the inheritance laws, the sons will take the property as ancestral property with regard to their male issues. In all other cases, it would be the separate property of the legatee.

Property Inherited from the Father under the Hindu Succession Act, 1956

The Hindu Succession Act was passed in 1956. The Act specifies in the preamble, that it is intended to amend and codify the law governing intestate succession among Hindus. It both modifies and codifies the Hindu Law. Section 4 also provides that any rule of Hindu law or custom, inconsistent with the provisions of the Act, would cease to have any effect and it is the statutory provisions that would prevail. A cumulative reading of both the preamble and of s. 4, would show that wherever the classical law has been modified or abrogated by any provision of the Act, the law as given by the Act, will apply. With respect to the character of property inherited by the son, from his three paternal ancestors in the male line, the law was well established, that it would be coparcenary property in his hands with respect to his male descendants up to three generations, who would acquire a right by birth in it and would also be entitled to enforce a partition. The property is in fact, held to be inherited by the whole branch, with the son taking it not in his individual capacity, but as the Karta or the last holder of the property. After the enactment of the Act, the law of inheritance regarding the property of a male Hindu, was laid down in the Act under Ss. 8–13 and Sch I, where some basic principles were retained, many rules were modified and some were totally abrogated. As far as the son is concerned, he is still a primary heir and inherits the property of the father, but the question that arises is: what is the character of this property in his hands with respect to his male issue? Does he take it as his separate property, to the exclusion of all his descendants, male and female, or does he take it as the Karta of his branch, with his male descendants unto three generations having a right by birth in it? Judicial interpretations on this issue have been fairly consistent and except for a lone decision of the Gujarat High Court,[70] courts including the Apex Court, have affirmed[71] and reaffirmed[72] that the son inheriting the property from his father, grandfather or great grandfather, under the Hindu Succession Act, 1956, would take it as his exclusive or absolute property, with no right of his male descendants over it.

The classical law in this respect, therefore, stands abrogated. Inheritance under the Act creates an absolute ownership in favour of the son of the Hindu father to the complete exclusion of his lineal male descendants due to following reasons:

(a) The basis for conferring a right by birth in the property of the father or a paternal ancestor, was the spiritual benefit that the son, grandson or a great grandson could confer on such ancestor. Under the Act, however, this spiritual benefit rule has been replaced by the rule of ‘nearness in relationship’. The rule of equality, affinity and nearness in blood is very evident, as the children of a predeceased daughter, who previously ranked after the intestate’s father, brother, his son grandson and paternal grandmother, have been promoted and made class I heirs on the basis of the nearness in relationship to the intestate. None of the nine other heirs[73]introduced in the Act could, under classical law, spiritually benefit the intestate, but have found their place under the class I category in 1956. This indicates that the legislature wanted to make a clear departure from the classical law, and with spiritual benefit no longer a rule, there is no reason why the grandson should continue to have a right by birth in the property that his father inherits under s. 8.

(b) The terms used to denote class I heirs under the Act are ‘son, son of a predeceased son and son of a predeceased son of a predeceased son’, and not ‘son, grandson or great grandson’. The use of the expression ‘predeceased son’ shows that the son of a living son will not be an heir and cannot succeed to the property of his grandfather in his own right, as he will be excluded by a person nearer in degree to the intestate, which in this case, happens to be the son of the intestate and his own father.

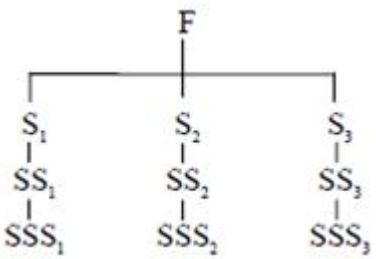

Fig. 6.7

For example, as illustrated in Fig. 6.7, *F* is the owner of his separate properties and two of his sons S2 and S3 and a grandson *SS* 3 die during his lifetime. Under the Act, his properties will be inherited by the living son S1, grandson *SS* 2, because he is covered under the expression 'son of a predeceased son' and great grandson *SSS* 3, son of a predeceased son of a predeceased son. The grandson *SS* 1 and great-grandson *SSS* 2, will not inherit the property since the ascendant through whom they are related to the intestate, is alive and his presence will exclude them from inheritance. It is only when such ascendant is dead that they succeed to the property. So long as the father is alive, a grandson cannot inherit the property of the grandfather, to conclude that he gets a right by birth in such inherited property with the father, would result in making him a co-sharer of the inherited property in the hands of the father. This would be totally contradictory to the entire scheme of succession contemplated under the Act.

(c) The Act uses the expressions 'son', 'son of a predeceased son' and 'son of a predeceased son of a predeceased son', and as aforesaid, not 'son', 'grandson' and 'great grandson'. 'Son' means a natural born legitimate son or an adopted son only and no other kind of son. The term 'son' does not include even an illegitimate son or a son of a permanently kept concubine, who was a recognised heir to his putative father before 1956. By no strech of imagination can a 'son' include a grandson or a great grandson. Nothing prevented the legislature, if it so intended, to use the terms grandson and great grandson in the class I category and the reason why they have not done it is that they did not intend making the grandson a co-sharer in the property inherited by the son.

(d) The argument that the son, even after the passing of the Hindu Succession Act, 1956, inherits the property as coparcenary property vis--vis his male descendants, has a serious flaw. If this is taken to be coparcenary property and the son takes it as the Karta of his family and not in his individual capacity, it would mean that not only a grandson, but also a great grandson and a great-great grandson (as male descendants upto four generations) as male descendants unto four generations, would acquire a right by birth in it, as coparceners. It should be noted here, that such a great great grandson, who would acquire a right by birth in such property, is not even a class II heir of the intestate under the present scheme of succession under the Act and is covered under a broad category of agnates [See Fig. 6.8].

F(Intestate)

S(Last Holder)

SSGrandson

SSSGreat Grandson

SSSSGreat Great Grandson

Fig. 6.8

To treat the property as coparcenary property would mean that the great great grandson, who is a class III heir will make a back door entry, having a right by birth in the property inherited by the son of an intestate, becoming a co-sharer with him to the exclusion of the entire class II category of heirs, including the father, brother etc. Further, if the same principle is extended, then there would be no end to it, as the same argument can be used for the grandson and the great grandson also. If the contention that property in the hands of a son will be coparcenary property with respect to his male issue, is accepted, there is no reason why property inherited by the son of a predeceased son, will not bear the same character. He will also take it, not individually, but as the Karta of his branch. The same rule will apply to the property inherited by the son of a predeceased son of a predeceased son. He will also take it as the Karta, with a right by birth going to his three generations of male descendants. Such an incongruous result could never have been intended by the legislature.

(e) Under the class I heir category, there are sixteen heirs and eleven of them are females. Besides the son, the son of a predeceased son and the son of a predeceased son of a predeceased son, this category also includes the son of a predeceased daughter. The Act nowhere mentions either expressly or impliedly, that the character of the property inherited by all or any one of these heirs, is any different from that of the other(s). On the other hand, there are enough indications to show that the legislature treated them all on an equal platform. Rule 2[74] provides that the surviving sons and daughters and the mother shall, each, take one share. Similarly, Rule 4 (i), which deals with the distribution of the property among the branch of a predeceased son, says clearly that the surviving sons and daughters get 'equal portions'. Therefore, the

legislature intended that the share of the son and daughter be equal. If the son's male issue acquires a right by birth in this inherited property, his share would automatically be diminished and would not be considered equal to the share of the daughter or mother. It is only when the son takes an absolute right in the property that his son's share would be equal to the share of the daughter.

(f) All class I heirs inherit together. If the property in the hands of the sons is coparcenary property, while for the others it is their separate property, it would mean that within the class I heir category there are two sub-classes, one comprising three heirs who take the share as coparcenary property with respect to their male descendants, viz., the son, the son of a predeceased son and the son of a predeceased son of a predeceased son, and the other as including the rest of the thirteen heirs. For example, a Hindu father dies leaving behind a son *S* and a daughter *D*, as illustrated in Fig. 6.9.

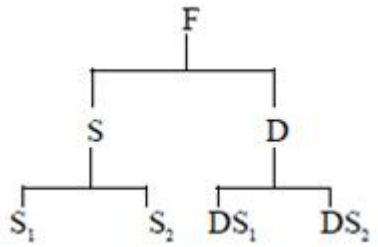

Fig. 6.9

Both *S* and *D* have two sons each, S1, S2 and *DS* 1 and *DS* 2. The property will be inherited by both *S* and *D*, in equal shares. If the son takes it as coparcenary property, his share in it will be 1/2 1/3 = 1/6, as S1 and S2 will be equal owners of the property in it, but the share of *D* will be half (1/2), as she takes it as her absolute property. Such an interpretation again, will be contradictory to the intention of the legislature.

(g) The intention of the legislature, to make a clear departure from the classical Hindu law concept, is evident as it has made the daughter of a predeceased son and the daughter of a predeceased son of a predeceased son, an heir with her brother and has expressly provided that her share would be equal to that of her brother.

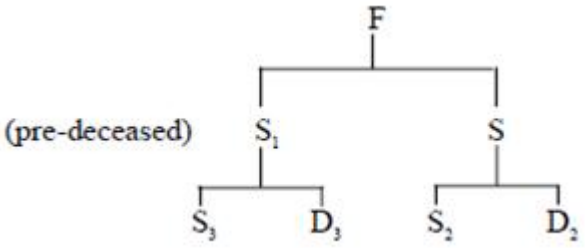

Fig. 6.10

In Fig. 6.10, *F* dies leaving behind a son *S*, his two children S2 and *D* 2 and two children of a predeceased son S1, S3 and *D* 3. If we take a look at the distribution of property amongst them, the intention to treat both the children of a predeceased son on an equal platform, has been expressly provided in s. 10. Therefore, property will firstly be divided in two parts, one going to S1 and the other going to the branch of *S*. The half share of *S* will be divided equally between S2 and *D* 2, who will take a one-fourth share of the property each, i.e., the share of both would be equal with respect to each other. This would be in conformity with the rule laid down in s. 10. Now let us take the family of S1. He has two children, a son and a daughter, i.e., his family composition and that of his deceased brother *S*, is identical. Now, if we treat the property in his hands as his separate property, on his death, it would go to S3 and *D* 3 in equal shares, in other words, the distribution would be the same as was in case of S2 and *D* 2. If S1 dies, his share will be 1/2 1/2 = 1/4 and this will go to *D* 3 and S3 even if we effect a notional partition, with the result that *D* 3 will get 1/2 1/4 = 1/8 and S3 will get 3/8 of the property and the final shares will be, S2 and *D* 2 will get 1/4 each, S3 will get 3/8th and *D* 3 will take 1/8th of the property. The very fact that the daughter of a predeceased son has been placed on an equal footing with her brother, negates the coparcenary character of the

inherited property. If the legislature wanted the son to inherit the property as the Karta, nothing prevented it from laying it down by an express provision in the Act.

In fact, the whole scheme of the Hindu Succession Act, 1956, shows that the legislature wanted to be fair towards women, and this is the reason why the concept of joint family, though not abolished, has been narrowed down. The concept of coparcenary property is gender discriminatory and the principles underlying ss. 8–13 are generally, based on equality and nearness in relation and affinity. These equitable principles have no room for encroachment by inequitable principles of an automatic conversion of separate property into coparcenary property by the operation of law. However, nothing prevents a person from blending his separate inherited property, into coparcenary property, by throwing it in the joint family common property, but that is purely a voluntary act.

Post 1956, therefore, the property inherited by a son from his father, under s. Section 8 of the Hindu Succession Act, 1956, would be his separate or exclusive property and his male issue will not have a right by birth, in this property. The son does not inherit the property as the Karta of his branch, but does it in his individual capacity as the son of the intestate, and not as the representative of his male issue. He retains the exclusive power of disposal of this property and his male issue is not competent to restrain him from doing it or to ask for a partition of the property.

In *CWT v*. *Chander Sen*,[75] the family comprised the father, his son and grandsons. After effecting a partial partition, both the father and the son carried on their respective businesses. On the death of the father, the son inherited his separate properties and received the undivided share, by survivorship. The son, Chander Sen, was now the Karta of his family comprising two sons. In the capacity of the Karta, he filed a return of his net wealth and showed the joint family income, including the one that he had got by survivorship, but did not include in it, the property that he had inherited from his father, on the ground that it was his separate property. The wealth tax officer did not accept his contention and maintained that the property received from the father, either by survivorship or through inheritance, was coparcenary property in the hands of the son. The Supreme Court, after discussing a number of cases and the scheme of the Hindu Succession Act, 1956, held that after the passing of the Act, the properties inherited by a son from his father, would constitute his separate property and not coparcenary property. This decision was reaffirmed by the Supreme Court in *Commissioner of Income Tax v*. *PL Karuppan Chettiar*.[76]

In *Gaurav Sikri v Kaushalya Sikri* [77], upon the death of the intestate, his widow, three sons and a married daughter inherited his property. All the children namely the three sons and the daughter executed a release deed in favour of their mother relinquishing all rights in the property in her favour and by this W became the absolute and sole owner of the property. However the estranged wife and two male children of one of the living son of the intestate claimed the share in the deceased‘s property. Rejecting their claim the court held that it is only the sons, daughters and the widow of the intestate who are the heirs and can inherit the property of the intestate. Wife of the son, and sons of the son are not heirs during the life time of the son and have no share whatsoever in the property of the deceased. The court quoted apex court’s pronouncement in *Commissioner of Wealth Tax v. Chander Sen* [78] and said that the heirs to a Hindu male include a son and son of a predeceased son and not son of a living son who is an heir otherwise it would mean giving a right by birth to the son in the property of the father and also the grandfather. The apex court deliberated on this issue again, in *Makhan Singh v. Kulwant Singh*[79]. Here the father had purchased eleven marlas of land and constructed a building thereon from his savings as an employee of the Railways. On the death of the father his four sons inherited this property. The primary issue before the apex court was: what is the nature of this land in the hands of the sons ? Is it the separate property of each son or is the joint family property qua their sons? The court held that the property inherited by the sons would be their separate property and could not be said to be the joint family property. However, this issue was again taken up by another bench of the Supreme Court comprising JJ S B Sinha and Markendey Katju in *Ass Kaur v. Kartar Singh*[80] and in complete contrast to the earlier pronouncement, the court here held that property inherited from paternal ancestors is ancestral property as regards the male issue of the propositous but it is his absolute property as regards his other relations. The ratio of Ass Kaur it is submitted does not lay down a correct proposition in light of the current scheme of the enactment.

Property Received after Partition

Where a coparcener separates from the joint family after effecting a partition, the character of the property with respect to his share, is coparcenary property with respect to his male descendants, but with respect to his father and brothers, from whom he separates, it is his separate property. Where a single male Hindu obtains his share at a partition and separates, he holds the property as a sole surviving coparcener. When he gets married, the property in his hands would be called the joint family property, and when he gets a son, his son would acquire a right by birth in this property. Where the father effects a partition in the family consisting of himself and his sons and takes a

share, his share would constitute his separate property and he can exercise full control over it. The sons no longer would have a right of survivorship in it and on the death of the father, the property would go by inheritance and not by the doctrine of survivorship. However, if the father gets a son after his separation from the family, he will have a coparcenary with the after born son. For example, as given in Fig. 6.11, a Hindu joint family comprises the father *F*, his wife *M*, three sons *S*, S1 and S2 and their wives *W*, *W* 1 and *W* 2, two sons of S1 —*S* 3 and S4 and one son of S2 —*S* 5.

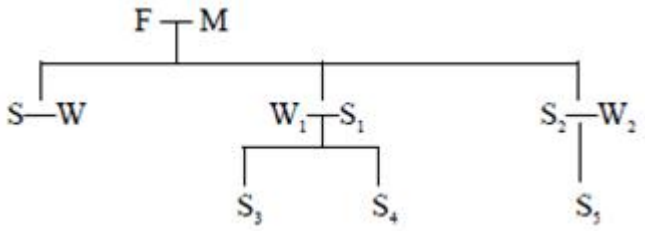

Fig. 6.11

On a partition effected by the father, he takes his share and separates from *S*, S1 and S2, giving them their portion out of the total property. S1 will take the property with his branch, in the capacity of a Karta and the property with respect to S3 and S4 will be coparcenary property, but with respect to *S*, S1 and S2 it would be separate. Similarly, S2 will take the property with the right of S5 over it. The rule is that a coparcener having a male issue takes his portion as representing the branch,[81] and so long as the father and son relationship continues, the property will be coparcenary in his hands.[82]*S* will take the property as a sole surviving coparcener till a son is born[83] or is adopted.[84] Similarly, the father *F*, will also take his share exclusively, with full powers of disposal over it and hence, a gift or Will of this property in favour of his wife, would be perfectly valid.[85]

Acquisitions made by male members of a family, after a partition has been effected, would constitute the separate property of the acquirer,[86] unless the contrary is proved.[87] The Patna High Court has explained that there is a difference between the character of the property when a person holds it as a sole surviving coparcener, and when he obtains his share on partition, and being alone, holds it separately. The court says that in the former case, there is a temporary reduction of male members to one, and the character of the property that was previously also coparcenary property, would be maintained. In the case of a Hindu male obtaining his share at the time of partition, till his son is born or adopted, the coparcenary does not come into existence and therefore, he will hold the share as his separate property till such male issue comes into existence.

At the time of partition, where the property is allotted to a woman, before 1956, it stood on the same footing as the one inherited from her husband and she had no absolute rights of disposal over it.[88] On her death, when the property went to the reversioners, they took it as coparcenary property. Where a portion of the coparcenary property was given to one coparcener after a partition was effected, so that he could discharge a debt due to the family, with this property, the character of the property would remain as that of a coparcenary property.[89]

Conversion of Separate Property into Coparcenary Property

A coparcener having an interest in the coparcenary property, can also own separate property. So long as they are joint, no coparcener is empowered to convert any portion of the undivided property into his exclusive or separate property by a unilateral act, but he is competent to convert his separate property into coparcenary property without taking anybody's permission. This conversion at the instance of a coparcener, can be done in two ways:

(a) Where some coparcenary property is existing, a coparcener can throw his separate property into the joint family funds, with a specific intention of merging it or blending it with the same, and the separate property so blended with the joint family property would in itself, become the joint family property. For example, a Hindu joint family comprised the father and his three sons and all of them jointly owned a field *X*. Adjoining to field *X* was field *Y*, that the father had purchased using his separate income. The father, with a specific intention of throwing in or blending field *Y* with *X*, made a declaration that henceforth, field *Y* would be a part of field *X*, and would belong to all the coparceners. The joint family property would now comprise both *X* and *Y* fields and the father would lose his exclusive control over it.

(b) It is not necessary that for converting the separate properties into coparcenary property, there must exist a joint family property,[90] or even that there should be at least two coparceners.1[91] Where the family does not

possess any property at all, a coparcener can, by a declaration, convert his separate property into joint family property, and where there are more than one coparceners, all of them may pool in their separate properties, if they so desire, to form a joint family property corpus.

Blending

For blending of separate property into coparcenary property, the pre-existence of some coparcenary property is a necessary condition,2[92] but not for converting the separate property into coparcenary property so as to create or bring into existence, the joint family property, where the family does not possess it at all.

'To blend' means to 'share along with other', to merge, or to amalgamate into an existing fund, and it has to be contrasted with a renunciation or surrender of one's interest, in favour of others, to the exclusion of oneself.3[93] In a surrender or relinquishment, a person ceases to have any interest in it, by surrendering his right in favour of others, who by virtue of this surrender, acquire a right over it to the complete exclusion of the one who so renounces his rights. In blending, on the other hand, the exclusive rights are converted into joint rights. Once the property is thrown into the common stock of the joint family or is blended with it, this blended property becomes the joint family property, and the interest of the coparcener who had thrown his separate property into the coparcenary property, is on par with the interest of the other coparceners. He cannot claim any better rights over it and has to allow the Karta to manage it. In comparison to the rights he had previously enjoyed, it is in fact, a diminution of his rights and an enlargement of the rights of all the coparceners generally.4[94] Blending of property must be in favour of the entire body of coparceners5[95] and once the property is thrown into the common stock, it is an irrevocable act and it cannot be taken out of the joint family property to be again impressed with the character of separate property of the coparcener, who had earlier thrown it in.6[96] Where a separate property is either converted into coparcenary property or is blended with the already existing joint family property, an unequivocal and clear declaration is sufficient and it need not be accompanied with a registered7[97] or stamped8[98] instrument, as it is neither a gift,9[99] nor a disposition.10[100]

The intention to blend the separate property into coparcenary property must be supported by a matching conduct of the member to treat it so. Where a property holder had been alienating property from 1958, always describing them in the sale deeds as his self acquired property, mere filing of income tax returns showing that it is joint family properties is not by itself enough to infer that it is joint11[101].

A female cannot throw her property into the joint family stock by blending. The reason for this is that the ownership of coparcenary property is with the coparceners and a female is not a coparcener. A blending signifies sharing and a female is incapable of sharing her title with other coparceners.12[102] Her property, when thrown into the common stock, would be a gift13[103] to the joint family as a whole and would not be covered under blending.

Effects of Blending

Where a member of the Hindu joint family, blends his self-acquired property with the property of the joint family, either by bringing his self-acquired property into the joint family account or by bringing the joint family property into his separate account, the effect would be that all the property so blended, would become the joint family property.14[104]

The doctrine therefore, invariably postulates that the owner of the separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property.

Intention to abandon separate claim must be clearly established

There is no presumption in law, that a coparcener would convert his separate property into coparcenary property for the general benefit of the family or will blend his separate property into the joint family property, and therefore, a person who alleges that conversion or blending has taken place, must clearly establish that. Due to the nature of the relationship or closeness between the family members and the owner, members may be allowed to use the property of the owner with his express or implied consent, but this would not alter the character of the property from separate to coparcenary. For example, if a house is constructed by a Hindu male with his separate property and he lives in this house with his sons, his brother, who may not own a house, might be permitted by him, to occupy a portion of this house. Neither the son nor the brother can claim, as a matter of right, a residence or ownership of this house, as their occupation is with the permission of the owner, and such permission cannot be equated with the intention of the owner to blend his separate property into joint property. Thus, the mere fact that family members were permitted to use the property jointly with him or that the income of the separate property was utilised out of

kindness or generosity, to support persons whom the owner was not bound to support, abandonment cannot be inferred, as an act of generosity or kindness will not be regarded as an admission of a legal obligation.15[105] For example, where the family members were allowed to cultivate the property of a Karta, and enjoy the benefit of the produce, the property would continue to belong to the Karta exclusively.16[106] Similarly, the mere fact that the son assisted the father in his business, would not convert the father's separate business into a family business.17[107] Where a coparcener added his separate property to the joint family property, that was to be mortgaged in order to secure a higher loan for the benefit of the joint family members, the property so added would maintain the character of separate property of the coparcener, as no blending can be implied.18[108] Where a person constructs a house with his separate property, on the land belonging to his mother, the house would constitute his separate property.19[109] Similarly, where the father constructs a house of substantial value, on an ancestral land of nominal value, started living there and subsequently, adopted a son, the intention of blending is not proved and the super structure would continue to belong to the father.20[110] However, where, in the ancestral home, an upper storey is constructed by one member, the upper storey would be a part of the ancestral home and will not be called the separate property of that member.21[111]

The mere fact of a common bank account would not effect a blending, as long as proper account books are maintained.22[112] If no separate accounts are kept for the earnings of two properties, no blending would be implied.23[113] If the accounts are such as to show a blending of the properties, the ordinary inference to be drawn would be that the member has thrown his self-acquired property into the common stock.24[114] Where the joint family funds are enriched by other contributions, properties acquired with such mixed up funds, would be joint family properties.25[115]

Declaration of Status in the Income Tax Returns

A coparcener can blend his separate property into the joint family property, by manifesting a clear intention, either verbally or in writing. Where a person is required to fill up a form for revenue purposes and he shows his separate property as joint family property, can it be taken as a conclusive proof of his intention to blend his separate property into coparcenary property? If, in the absence of an existing joint family property, he declares his status as that of the Karta of the joint family and his property as joint family property, should this reflect his intention of conversion of the property from separate to joint? There is a conflict of judical opinion on this issue. The Andhra Pradesh High Court26[116] has held that since the declaration of the status and of his property in the revenue forms is not decisive of the real status of the individual and the property, the entire facts and circumstances have to be considered, and a mere declaration is not enough proof of his intention to convert or blend the separate property with coparcenary property. However, the Delhi27[117] and Madras High Courts28[118] have held that since, for blending and conversion, what is required is not a formal document, but a clear and unequivocal intention, which can also be expressed through a revenue form once the intention is manifested, it would be irrevocable and incapable of being taken back. Thus, the same should be taken as decisive.

Property Acquired with Aid of Joint Family Property

The general rule is that any property acquired with the help of joint family funds or detriment of joint family property, would itself take the character of joint family property.29[119] It is irrespective of the fact of whether it is the Karta who acquires it or an ordinary coparcener.

There is no presumption in law, that a Hindu joint family should possess joint family property.30[120] However, if it can be shown that not only did the family possess property, but also that more property was acquired with its help, the character of the acquisitions would also be that of family property and not of an individual property of the acquirer, and if a person alleges that it is his self-acquired property, then the burden of proving it is on him. Therefore, all profits, purchases, savings etc., if the nucleus came from the joint family, will belong to the family and not to an individual member.31[121]

Where Total Investment comes from the Joint Family Funds

Where the joint family property is sold and the total fund is used to purchase another piece of property, or it is invested in a profitable manner, the character of the property so acquired or profits so earned, would be that of a joint family property, irrespective of the fact that in acquiring it, the skill, labour or judgment of the acquirer were also major factors. For example, a joint family land is sold by a Hindu father having two sons, and the sale proceeds are invested by him, in shares and stocks, or in a manner which requires a study and an understanding of market development and timely action. The father makes huge profits and purchases immovable property with these profits. The character of the property would be joint family property and the sons would have a right to effect a

partition of the same, if they so desire. Similarly, in one case, a Hindu father having three minor sons, sold the family land in a small village in Karnataka and migrated to Delhi. With the sale proceeds, he opened a small restaurant. His business flourished due to his hard labour, and by working day and night, he was able to open a chain of South Indian restaurants in Delhi. The entire property acquired by him, took the character of joint family property, with the sons having an equal ownership over it. It is despite the fact that the sons might not have contributed anything towards the running of these restaurants and the father alone had worked hard for it. Where the joint family property is movable and is converted into land, the land would, in itself, become the joint family property.

Temporary Use of Joint Family Property or Taking it by way of Loan

The above situation has to be contrasted with the case where a coparcener takes a loan from the joint family funds, starts a business and repays the loan. For example, one coparcener borrows a sum of money from the joint family of which he is a member, starts his business and repays the loan within the stipulated time. The business and the earnings would constitute his separate property. Similarly, where a coparcener mortgages the joint family property to raise a loan that he uses to finance his business and subsequently, discharges the mortgage with his money, and the property comes back to the joint family, his business would continue to maintain the character of his separate property.32[122]

Similarly, where ancestral property was mortgaged to raise a loan and the same was used to start a business, but long before the birth of the son, the property was redeemed, the business, its profits and other acquisitions would be the separate property of the father, and would not be ancestral.33[123]

Property acquired Partly with Joint Family Funds and Partly with Separate Property

Where the property is acquired using both the joint family income and the separate property, by a coparcener, the character of the property so acquired, would be that of a joint family property. For example, a family comprises the father and his two sons. On a partition effected amongst them, the share of each son was around Rs. two lakh. One of the sons had contracted to purchase a property for a consideration of Rs. five lakh. He paid an advance of Rs. 50,000 out of the joint family funds and the rest of the consideration was paid out of his separate earnings. It was held by the Madras High Court, that the property so purchased would be joint family property.34[124] Similarly, the Allahabad High Court held that if a person takes the aid of any portion of the joint family property, howsoever small it may be, to acquire property, the property thus acquired, cannot be claimed as a self-acquisition.35[125] In a case, where family land was left in Pakistan upon the partition of the country and in lieu of that, the son was given proprietary rights in certain properties in India, without having to pay any money for that, the land granted would be joint family property and not his separate acquisition.36[126]

Improvement of Separate Property with Joint Family Funds

Where the separate and the joint family funds are mixed in a manner that it is no longer possible to distinguish between the two, the entire body of funds will take the character of joint family property. The same rule applies when joint family funds are used by a family member to improve his separate property. Such improvement, that is to the detriment of the joint family property, would result in the alteration of the character of the separate property and give it the colour of a joint family property. For example, a Karta sells a piece of family land and with the sale proceeds, carries out substantial repairs and improvements in his own separate house. The money applied is not by way of a loan. This property is now the joint family property and the Karta can no longer claim it as his separate property.

However, it has been held that where a house was constructed by a coparcener using his separate funds, on a land belonging to the joint family, the house would belong to him exclusively, constituting his separate property, unless he intended it to be a joint family property.37[127] The court also held that the site on which the house stood, should be allotted to such a coparcener on partition, if possible. Similarly, where a coparcener, with the permission of other coparceners, constructed a cinema hall with his separate funds, on a joint family land, and ran his business, both the hall as well as his business and earnings, would constitute his separate property.38[128] It must be kept in mind that both these cases have a distinguishing feature. In the first case, the home constructed was of a substantial value and in the second case, the consent of the other coparceners was expressly obtained. As a general rule, an improvement of a separate property, with the help of coparcenary property, would change its character to that of a joint family property.

Improvement of Joint Family Property with Separate Property

Where a coparcener uses his separate funds to improve the coparcenary property without intending to use the funds as a loan, the separate property would merge in the coparcenary property and the character of the whole of the property would become that of a coparcenary property. Thus, where a Hindu builds the upper storey of his ancestral home, using his separate funds, such upper storey would also constitute a part of the home and therefore, would become coparcenary property,39[129] and not his separate property. This case has to be compared with *Peria Kuruppan's* 40[130] case, where the house constructed was of a substantial value, while the ancestral land that it stood on, was of a nominal value. Secondly, the house was constructed much before the son was adopted by the father. Even so, the correctness of this decision is doubtful on both the points. An adopted son here, would be treated as an after born son, forming a coparcenary with the father and having an equal ownership in the coparcenary property.

Where a coparcener is allotted some property at the time of effecting a partition, by the family, that is subject to a mortgage, and the coparcener discharges the mortgage and pays the entire loan using his separate property, the unencumbered property would still be treated as coparcenary property with respect to his male issue.41[131] Further, where the mortgage is foreclosed and the property is purchased by the coparcener, using his separate money, the character of coparcenary property is not lost and it would continue to be a coparcenary property.42[132]

Savings and Profits (Doctrine of Accretion)

As a general rule, savings and profits made or earned out of the sale of or using coparcenary property, would also form part of the coparcenary property. Where money is invested and the transaction brings in profit, the profits would be an accretion and their character would be of coparcenary property. It is irrespective of the fact whether such accretions were made before or after the birth of the son.43[133] Interest realised by a member in possession of family funds, would be in itself, joint family property44[134] in his hands, even where the interest was earned prior to a partition, but was received after the disruption in the family was effected.45[135] For example, where the Karta constructs flats on the family land, with the help of joint family funds, and sells them at huge profits, the profits would belong to the family and not to the Karta alone, as profits made with the help of joint family property, would also bear the same character. Similarly, if with the help of joint family funds, a plot of land is purchased, and after extensive landscaping, this spacious land is made suitable to hold weddings and is given on huge rents for the same purpose, the money so earned would belong to the family.

However, where the Karta gives a specific sum of money to a member of the joint family, to be used by him for his maintenance or personal use, any savings or profits made out of these funds, would not constitute the joint family property, and would be the separate property of that member.46[136] The reason for this is that the profits or savings made out of the joint family property that are not to its detriment, would not be coparcenary property, but the separate property of such person.47[137] Therefore, where some property is allotted to a member of the joint family, so that the income coming out of it can be used by him for his maintenance, without any obligation to either bring the surplus to the common chest48[138] or to account for the same, any acquisition made by such member from the savings of this income, would be his separate property.49[139] Where he invests the savings into a business and earns profits, the character of such business and the profits would also be that of his separate property.50[140]

Burden of Proof and Sufficiency of Nucleus

There is no presumption that any property, whether movable or immovable, held by a member of a joint family, is joint family property. Therefore, the burden of proof is upon the person who alleges that it is the joint family property, to establish it. If he establishes that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to that member of the family who says that it is his separate or personal property.51[141] It is then that this person has to prove that he had acquired the property without the aid of the joint family property.52[142] However, the burden will not shift if the nucleus is such that with its help, the property claimed to be joint, could not have been acquired.53[143] For example, a building in the occupation of a member of the family and yielding no income, could not have been the nucleus out of which acquisitions could have been made, despite the fact that the building may be of considerable value. On the other hand, a running business, in which the capital invested is comparatively small, might produce substantial income, which may form the foundation for a subsequent acquisition.54[144] This is determined on the basis of the facts and circumstances of the case.55[145] Though the test is the income that the nucleus yields,56[146] the presumption varies depending upon who the acquirer and the beneficiary are. Accordingly, the following categories can be made:

(a) where the acquisition is by a coparcener, in his name;

(b) where the acquisition is by the Karta, either in the name of:

(c) the Karta himself;

(ii) any coparcener; or

(iii) a female member.

Where the acquisition is by a coparcener, in his name, and the court is not satisfied that sufficient joint family nucleus existed out of which such property could have been acquired, the property would be treated as his separate property.57[147] Where the acquisition is by the Karta, in his name, and he is unable to show any independent income, a presumption will arise that it is the joint family property.58[148] It is he who has to prove that he acquired it with his separate funds.59[149] Where the Karta purchased a property in the name of one of his sons, the presumption under law, will be that it was a benami purchase and the burden of proof lies on the party in whose name it is purchased, to prove that he was solely entitled to the legal and beneficial interest in such estate.60[150] However, where an acquisition was made by the father, in the name of his son, with the private funds of the son that were in control of the father, they will constitute the separate property of the son.61[151]

Where the property is purchased by the Karta, in the name of a female member, there is no presumption that it is the joint family property.62[152]

Gains of Learning

The general rule is that 'any property or income acquired with the aid of joint family funds or with detriment to the joint family property, would in itself, become joint family property.' But if it is applied without any exceptions, it can lead to strange consequences. For example, the children in a joint family, may receive their primary and even secondary education, out of joint family funds. Can the family as a whole, claim the benefit of the emoluments they draw on getting employment or otherwise, on the ground that since their education was financed with the joint family money, their salary would also bear the same character? On this question, as to whether the gains of learning, where learning was imparted at the cost of joint family funds, should be the separate property of the acquirer or coparcenary property, prior to 1930, there was a conflict of judicial opinion. Some courts tried to create a distinction between primary education and special learning, between gains as a direct result of learning and as an indirect result, or gains acquired due to the special skill of the person, etc., but the predominant view was that the income earned by a member of the joint family, by practising a profession or occupation requiring special training, was joint family property, if such training was obtained by the member with the help of joint family funds.63[153] It virtually made a person incapable of having self-acquisitions through his own efforts, if he was educated or trained or acquired a special skill that became the basis of his employment or avocation, with joint family funds.

It does appear strange because primary education is imparted at a time when a person cannot even be seen as capable of having an income of his own or of taking any decision as to how to finance his education. Whether joint family funds are to be utilised or a separate property should meet his educational expenses, is for his father to decide, and over this decision of the father, the child has absolutely no control. In this situation, to make him compulsorily share the gains that he makes, after acquiring an avocation, makes the whole scenario look like an investment on the part of the father or the other members of the family, whose profits can be reaped in later by them, despite the lack of consent of such child. In the Indian situation, maintenance also includes educational expenses of the children and it must be kept in mind that in spite of getting similar education or training, the ability to make money varies with each individual, depending upon his mental and physical capabilities and the dedication and sincerity to work. The law as it stood and interpreted prior to 1930 appeared strange as the following were held by the courts as joint family property earnings: the earnings of a vakil,64[154] an astrologer,65[155] a civil servant,66[156] a clerk,67[157] a dancing girl,68[158] a broker,69[159] an army contractor,70[160] a mill manager71[161] and a pleader.72[162] Judicial opinion was based on the dictates of the Shastric texts, some of which provided (though distinguishing between general and special learning), that what is acquired at the expense of joint family funds, would be partible at the instance of the family members.73[163] Narada expressly provided that: 74[164]

> He who maintains the family of a brother, while that brother was engaged in study, shall get a share from the latter's money that he makes with the help of this learning.

To put an end to this controversy and set at rest the confusion, at the instance of Sir Bhashyam Iyenger, the Hindu Gains of Learning Bill was passed by the Madras legislature, in 1901, but it could not see the light of day as it was vetoed by the Governor of Madras. The uncertainty and the inequitable position continued till the central legislature,

in 1930, passed the Hindu Gains of Learning Act, that was sponsored by Dr. MR Jayakar. The Act aimed to clarify the doubts and provide a uniform rule with respect to the character of acquisitions made by a person whose education and training were financed by joint family funds. Section 3 of the Act provided:

Notwithstanding any custom, rule or interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of:

(a) his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of the joint funds of his family, or with the aid of the funds of any member thereof; or

(b) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family or by the funds of any member thereof.

'Learning' means education, whether elementary, technical, scientific, special or general and training of any kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life. The expression 'gains of learning' means all acquisitions of property, made substantially by means of learning, whether such acquisition be made before or after the commencement of this Act, or whether such acquisitions be the ordinary or extraordinary result of such learning. The Act made the source of funding of learning of a joint family member, irrelevant. It was retrospective in application and was declaratory in nature and therefore, covered all cases where learning was imparted prior to the passing of the Act and also covered acquisitions made before or after the commencement of the Act. It did not affect any partition or an agreement to partition or a transfer that was effected before the Act was passed.75[165]

However, even under the Act, the excepting of the gains of learning from being considered or included in the joint family property, does not mean a blanket permission to a coparcener to invest the joint family funds, post learning, into an establishment and make that his exclusive source of living. For example, a coparcener's education is funded with the joint family funds and on completing his engineering course, he gets employment in an establishment or a department and gets a salary. This salary would be his 'gains of learning' and his exclusive property. If he establishes an industry, either himself or in a partnership concern, with any other person, using his separate funds; or finances it with his personal security, the 'gains' would still be his separate property. But if he sets up an industry using the joint family funds, the industry and the profits that the industry makes, would be joint family property. Similarly, a coparcener trained as a doctor, when his entire education is financed with the joint family funds, gets an employment, his salary would be his separate property, but if he sets up a hospital or a nursing home, using the joint family funds, the profits made by these establishments would go to the whole family. Even in these cases, the coparcener, or even a Karta, if he is getting a salary as the director of the industry or the nursing home, will take it as his separate property.76[166] These must be separable from the profits of the establishment as a whole. Therefore, two things are noteworthy:

(a) Once the education is complete and the training is imparted, if a private enterprise is set up by the coparcener with the help of the joint family funds, the profits or the gains such establishment makes, will not belong to the coparcener alone, but would go to the whole family.

(b) The character of the salary or the emoluments received for rendering service, have to be distinguished from the income of the business or establishment.

Salary and Remuneration

Though the term 'salary', is not difficult to comprehend, the cases where it is in fact, a share of joint family property, taken by a coparcener to avoid the incidents of income tax, cannot be ruled out.77[167] Where a private enterprise is set up by a coparcener, using the joint family funds, and he contributes substantially, through his skills and personal services, the salary that he would draw would be his individual property.78[168] Yet at the same time, the answer may vary if the salary is in fact, a coloured disguise to hide a share in the profit of the enterprise itself.79[169] The test is, whether a nexus or connection can be established between the emoluments given to one coparcener, and detriment to the joint family property. If yes, then the character of the emoluments would be that of a joint family property, but if no nexus can be established, it would be taken as his separate property.

Insurance Policy

An insurance policy, taken in a person's name, is perceived usually, as belonging to him alone and on his death, it passes to his legal heirs, as any other separate acquisition of his will do. The very idea of an insurance policy is that the interests of the immediate family relations (legal representatives) should not be adversely affected in case of the

untimely death of the person whose life is so insured. Therefore, an application of the doctrine of survivorship to the benefits of an insurance policy, in case the insured was an undivided coparcener, does not appear to be the general norm. But the question that arises is, what would be the character of the policy if the periodical payments (premium) were made from the joint family funds. In 1960, the Apex Court held80[170] that the amount realised would belong to the joint family and not to the individual member, if the premium was paid out of the joint family funds. The rule that should be applied here should be one of intention, keeping in mind the basic purpose behind insurance policies. If the intention was to benefit the family as a whole, the policy should be treated as belonging to the family, but of course, where the premium was paid out of the joint family funds, but if the intention was that the insured or his immediate family should alone be benefited, then despite the fact that the premium was not paid out of his self-acquisitions, the policy should go to him or for his legal heir's benefit. Thus, where a father paid the premiums of an insurance policy in the name of his son, out of love and affection for the son, it was held that the policy would belong to the son and would be considered his exclusive property.81[171]

Government Grants

The government, in the exercise of its sovereign powers, may give or confer property on an individual, personally, or as the head of a family. Here, the intention or purpose of such conferment of property,82[172] and also, in some cases, the conduct of the donees,83[173] would decide the character of the property. Where the property of a family was confiscated by the government, but such confiscation was subsequently annulled, the property coming back to the family, came with the old title and with its character intact.84[174] Similarly, where one member of the family claimed an exclusive right to possess a land and denied the same to the other members, under a statutory protection, and where this statutory protection was taken away by the government by issuing a notification, the rights of the other members were revived, and the interest that was claimed as personal or exclusive, became a joint family interest.85[175]

RECOVERY OF JOINT FAMILY PROPERTY

There may be a situation where the joint family property is lost to the family because it has been seized by others, or a stranger takes it by adverse possession, or it was lost due to non-payment of taxes,86[176] and the family members were unable to recover it. In such an eventuality, if one of the members of the joint family uses his separate money to recover it, with or without the consent of the other coparceners, then the character of the property would depend upon who the recoverer is, and whether the property is movable or immovable. Where the recovery is by the father, then irrespective of whether the property is movable or immovable, the whole of it will constitute his separate property. But where it is recovered by a coparcener other than the father, it will become his separate property only when it is movable. Out of the totality of the landed property or immovable property that he retrieves, one-fourth of it will be his separate property and three-fourths of it will be the joint family property, in which he will also have an interest with the other family members. However, the above rule does not apply where the property has gone to the hands of a stranger, by a sale in execution of a money decree or insolvency proceedings87[177] against the Karta, or even against any other coparcener. Thus, where the property is sold in execution of a money decree against the Karta, and one coparcener subsequently, acquires it using his separate funds, the character of the property in his hands, would be his self-acquired property and not the joint family property, even if it happens to be a landed property.88[178] However, for that to happen, the person from whom it is recovered, must be holding a valid title to it. Therefore, where a coparcener purchases a property, which originally belonged to his ancestors, using his own money, from a valid title holder, the property purchased would be his separate property.89[179]

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1. *Muddun Gopal v. Ram Buksh*, (1863) 6 WR 71.
2. *Rao Balwant Singh v. Rani Kishori*, (1898) ILR 20 All 267.
3. *Bishen v. Bawa*, 20 WR 137 (PC); *Nagalingam v. Ramachandra*, (1901) ILR 24 Mad 429 ; *Somasundara v. Ganga*, (1904) ILR 28 Mad 386 ; *Purshotam v. Vesudeo*, (1871) 8 Bom HC (OC) 196.
4. *Bawa Misser v. Raja Bishen*, (1868) 10 WR 287.
5. *Sital v. Madho*, (1877) ILR 1 All 394.
6. *Lochun Singh v. Nemotharee Singh*, (1873) 20 WR 170; *Yamunabai v. Manubai*, (1899) ILR 23 Bom 108.

7. *Katama Natchiar v. Rajah of Sivagunga*, (1863) 9 MIA 539.

8. *Dipo v. Wassan Singh*, AIR 1983 SC 846 [LNIND 1983 SC 142]; *Arjan Kumar v. Pingle Devi*, AIR 1993 HP 34 ; *Om Prakash v. Sarvjit Singh*, AIR 1995 HP 92 ; *Janki v. Nand Ram*, (1889) ILR 1 All 194–197 (FB).

9. *M R J Narasimha Phani Kumar v. M K Somayajulu,* AIR 2000 NOC 9 AP.

10. *Satyendra Kumar v. Commissioner of Income Tax*, (1983) 140 1TR 840; *Vasant v. Sakharam*, AIR 1983 Bom 495 ; *Pushpa Devi v. Commissioner of Income Tax*, AIR 1977 SC 2230 [LNIND 1977 SC 258].

11. *Sirtaji v. Algu Upadhiya*, AIR 1936 Ori 331 .

12. *Appan Patra v. Srinivasa*, 1918 Mad 531 .

13. *Arunachalam Mudaliar v. Murugantha,* AIR 1953 SC 495 [LNIND 1953 SC 90].

14. *Katama Natchiar v. Rajah of Shivagunga*, (1863) 9 MIA 539; *Sri Mahant Govind v. Sitaram*, (1899) ILR 21 All 53.

15. *Jamarathbee v. Pralhad*, (1978) Mah LJ 204 [LNIND 1977 BOM 115].

16. The Hindu Gains of Learning Act, 1930.

17. *Muhammad Hussain v. Babu Kishvanand*, AIR 1937 PC 233 .

18. *K.V. Narayanan v. K.V. Ranganadhan*, AIR 1976 SC 1715 [LNIND 1976 SC 95]; *Narayana Raju v. Chandaraji*, AIR 1968 SC 1276 [LNIND 1968 SC 74]; *Venkata Reddi v. Lakshmama*, AIR 1963 SC 1601 [LNIND 1963 SC 322]; *Selvaraj v. R Radhakrishna*, 1976 Mad 156 .

19. *Pushpa Devi v. Commissioner of Income Tax*, AIR 1977 SC 2230 [LNIND 1977 SC 258]. See also *Satyendra Kumar v. Commissioner of Income Tax*, (1983) 140 ITR 840; *Vasant v. Sakharam*, AIR 1983 Bom 495 (A female member can make a gift to the joint family, of her property.)

20. *Bhagwandas v. Roshanlal*, 1981 HLR 194; *Shyam Behari v. Rameshwar Prasad*, (1941) ILR 20 Pat 904; *Budh Raj v. Bhanwar Lal*, AIR 1954 Ajmer 69 ; *Kundanbai v. Satnarayan*, (1950) ILR Nag 491; *Narayana Prabhu v. Janardhana Mallan*, AIR 1974 Ker 108 [LNIND 1973 KER 257].

21. *Kundanbai v. Satya Narayan*, (1950) ILR Nag 491; *Shyam Behari Singh v. Rameshwar Prasad Sahu*, AIR 1942 Pat 213 ; *Ram Dei v. Gyarse*, (1949) ILR All 160 (FB).

22. *Arunchala Mudaliar v. Murugantha*, AIR 1953 SC 495 [LNIND 1953 SC 90]; *Parthasarthi v. Commissioner of Income Tax*, 1967 Mad 227 .

23. *Katama Natchiar v. The Rajah of Shivagunga*, (1863) 9 MIA 539.

24. For details, see Ch 8 *infra*.

25. In certain states, a coparcener can alienate his undivided share in the copercenary property. For details, see Ch 8 *infra*.

26. The Hindu Succession Act, 1956, s. 30.

27. *State Bank of India v. Ghamandi Ram*, AIR 1969 SC 1330 [LNIND 1969 SC 67].

28. *Bai Parsan v. Bai Samli*, (1912) ILR 36 Bom 424.

29. Mitakshara I, pp 1,2,3. See also *Devi Parshad v. Thakur Dial*, (1875) ILR 1 All 105 (FB).

30. Mitakshara, I, V, pp 5, 9 and 10. See also *Shyam Behari Singh v. Rameshwar Prasad*, (1941) ILR 20 Pat 904.

31. *Lakshmi Bai Narayanarao Narlekar v. Commissioner of Gift Tax*, 65 ITR 19 (Mys).

32. *Venkayamma v. Venkataramanayyamma*, (1902) 29 IA 156 : (1902) ILR 25 Mad 678 ; See also *Md. Hussain Khan v. Babu Kishvanand*, (1937) ILR All 655.

33. *Adjoodhia v. Kashee Gir*, (1872) 4 NWP 31.

34. *Dipo v. Wassan Singh*, AIR 1983 SC 846 [LNIND 1983 SC 142]: (1983) 3 SCC 376 [LNIND 1983 SC 142].

35. *Chattur Bhooj v. Dharamsi*, (1885) ILR 9 Bom 438; *Ram Narain v. Pritum Singh*, (1873) 20 WR 189.

36. The father in such cases cannot hold the property absolutely. See *J.P. Varma v. Commissioner of Income Tax*, (1991) 187 ITR 465 (All); *Bhagwandas v. Roshanlal*, 1981 HLR 194; *Narayna Prabhu v. Janardhan Mallan*, AIR 1974 Ker 108 [LNIND 1973 KER 257]; *Budh Raj v. Bhanwar Lal*, AIR 1954 Ajmer 69 ; *Kundanbai v. Satnarayan*, (1950) ILR Nag 491; *Shyam Behari v. Rameshwar Prasad*, (1941) ILR 20 Pat 904; *Sirtaji v. Algu Upadiya*, AIR 1936 Ori 331 ; (In Pondicherry however, the sons do not acquire a right by birth in such property. For example, see) *Pandurangan v. Sarangapani*, 1982 Mad 372 .

37. *Beni Prashad v. Puran*, (1896) ILR 23 Cal 262; *Nanabhai v. Achrat Bai*, (1888) ILR 12 Bom 122.

38. For details, see the discussion, *infra*.

39. *Muhammad Hussain Khan v. Babu Kishvanandan Sahai*, AIR 1937 PC 223 .

40. *Atar Singh v. Thakur Singh*, 35 IA 206.

41. 29 IA 156.

42. IR 1937 PC 233.

43. See *Chelkani Venkayyamma Garu v. Chelikani Venkataramanayyamma,* 29 IA 156.

44. *M. Shanmugha Udayar v. Sivanandan*, 1994 Mad 123 .

45. *Narinjan Das v. Krishan Lal*, AIR 1941 Lah 31 ; *Vijaya College Trust v. Kumta Co-operative Arecanut Sales Society*, *AIR 1995 Kant 35* [*LNIND 1994 KANT 58*]; *Madan Lal Phulchand Jain v. State of Maharashtra*, *AIR 1992 SC 1254* [*LNIND 1992 SC 320*]; *Raj Kishore v. Madan Gopal*, AIR 1932 Lah 636 ; *Babu Nund Coomar v. Razeeoooddeen*, (1873) 10 Beng LR 183.

46. *Sellamani v. Thillai*, AIR 1946 PC 185 .

47. *Manibhai v. Shanker Lal*, (1930) ILR 54 Bom 323; *Karuppai v. Sankaranarayana*, (1904) ILR 27 Mad 300 ; *Bai Parson v. Bai Somli*, (1921) ILR 36 Bom 424.

48. *Lakshminarasamma v. Rama Brahman*, (1950) ILR Mad 1084; *Mohammad Hussain v. Babu Kishva Nandan Sahai*, AIR 1937 PC 233 ; *Atar Singh v. Thakur Singh*, (1908) 35 IA 206; *Commissioner of Income Tax v. Rangnaswamy*, 1970 Mad 441 ; *Seri Ram v. Chandrahmma*, AIR 1952 Hyd 45 ; *Ranganadha v. Balaram*, 1982 HLR 613 (Mad); *Suntu v. Abbe Singh*, AIR 1931 Lah 708 .

49. *Mohan Lal v. Ram Dayal*, (1942) ILR 16 Luck 708.

50. *China Venkata v. Venkata Rama*, AIR 1957 AP 93 ; *Karuppai v. Sankaranarayam*, (1904) ILR 27 Mad 300 (FB).

51. *Ram Prasad v. Radhaprasad*, (1885) ILR 7 All 402; *Beni Prasad v. Puranchand Narain*, (1896) ILR 23 Cal 262; *Nanabhai v. Achrat Bai*, (1888) ILR 12 Bom 122; *Hiralal v. Sankar Lal*, (1938) ILR 2 Cal 250; *Sashi Bhusan v. Hari Narain*, (1921) ILR 48 Cal 1059.

52. Mitakshara I, I, p. 19.

53. Mitakshara I, vi, p. 13; Yajnavalkya II, p. 123.

54. Mitakshara I, vi, p. 14.

55. Mitakshara I, vi, p. 16.

56. See *Muddan Gopal v. Ram Buksh*, (1863) 6 WR 71 (where this issue was discussed in detail).

57. *Jaidial v. Seth Sitaram*, (1881) 8 IA 215.

58. *Krishnaswami Naidu v. Seetha Lakshmi*, (1916) ILR 39 Mad 1029 : 18 Mad LT 542.

59. *Muddun Gopal v. Ram Buksh*, (1863) 6 WR 71; *Adhar Chandra v. Nobin Chandra*, (1907) 12 CWN 103.

60. *Arunchalam v. Murugantha Mudaliar*, *AIR 1953 SC 495* [*LNIND 1953 SC 90*]: *(1954) SCR 243* [*LNIND 1953 SC 90*].

61. *Nagalingam Pillai v. Ramachandra*, (1901) ILR 24 Mad 429 .

62. *Bhagawat Sukul v. Kaporni*, (1944) ILR 23 Pat 212 (FB); *s* ee also *Mukti Prasad v. Iswari*, 24 CWN 938.

63. *Nanabhai v. Achratbai*, (1888) ILR 12 Bom 122; *Jugmohundas v. Mangaldas*, (1886) ILR 10 Bom 528; see also *Ahmedbhoy v. DM Petit*, (1909) 11 Bom LR 545.

64. *Purushottam v. Janki*, (1907) ILR 29 All 534; *Jai Prakash v. Bhagwandas*, AIR 1937 All 453 .

65. *Brij Kunwar v. Sankata Prasad*, AIR 1930 Oudh 39 .

66. *Amarnath v. Guranditta Mal*, AIR 1918 Lah 394 ; *Kanhaiya Lal v. Deep Chand*, AIR 1947 Lah 199 ; *Kishen Chand v. Punjab and Sind Bank Ltd*., AIR 1934 Lah 534 ; *Ram Singh v. Ram Nath*, AIR 1932 Lah 533 .

67. *CN Arunachalam v. CA Murugantha Mudaliar*, *AIR 1953 SC 495* [*LNIND 1953 SC 90*].

68. *Ibid*., para 16.

69. *Ibid*., para 18.

70. *Commissioner of Income Tax v. Babubhai Mansukhbhai*, (1977) 108 ITR 417 (Guj).

71. *CWT v. Chander Sen*, (1986) 161 ITR 370 : *AIR 1986 SC 1753* [*LNIND 1986 SC 214*]; *Commissioner of Income Tax v. Ram Rakshpal Ashok Kumar*, (1968) 67 ITR 164; *Shri Vallabhdas Madani v. Commissioner of Income Tax*, (1982) 138 ITR 673 : (1983) Tax LR 559; *Addl Commissioner of Income Tax v. P L Karuppan Chettiar*, 114 ITR 523; *CWT v. Mukundgiriji*, *(1983) 144 ITR 18* [*LNIND 1983 AP 47*]; *Commissioner of Income Tax v. Virender Kumar*, 2001 (252) ITR 539 (Delhi).

72. *Commissioner of Income Tax v. P L Karuppan Chettiar*, Tax Ref Case No. 1 of 1986, decided on 11 May, 1992, MANU/SC/0623/1993.

73. These heirs include the daughter, son and daughter of a predeceased daughter, daughter and widow of a predeceased son, widow and daughter of a predeceased son of a predeceased son (*SSW* and *SSD*), and the widow and the mother of the intestate.

74. The Hindu Succession Act, 1956, s. 10, r 2.

75. *(1986) 3 SCC 567* [*LNIND 1986 SC 214*] : *AIR 1986 SC 1753* [*LNIND 1986 SC 214*].

76. Tax Reference Case 1 of 1986, decided on 11 May, 1992, MANU/SC/0623/1993; see also *Commissioner of Income Tax v. Lun Karan Goyal*, MANU/RH/0063/1992 DB, Income Tax Reference No. 76 of 1983, decided on 29 July, 1992; *Commissioner of Income Tax v. Ram Rakspal*, (1968) 67 ITR 164; *CWT v. Mukund Girji*, *(1983) 144 ITR 18* [*LNIND 1983 AP 47*]; *Commissioner of Income Tax v. Virendra Kumar*, 2001 (252) ITR 539 (Delhi).

77. *AIR 2008 Del 40* [*LNIND 2007 DEL 663*].

78. *Commissioner of Wealth Tax v. Chander Sen, AIR 1986 SC 1753* [*LNIND 1986 SC 214*].

79. *AIR 2007 SC 1808* [*LNIND 2007 SC 404*].

80. *AIR 2007 SC 2369* [*LNIND 2007 SC 736*].

81. *Lakshmibai v. Ganpat Morabo*, (1868) 5 Bom HC (OCJ) 129; *Lal Bahadur v. Kanhaiya Lal*, (1907) 34 IA 65; *Bejai v. Bhupinder*, (1895) 22 IA 139; *Baijnath v. Maharaj*, AIR 1932 Oudh 158 .

82. *Haribaksh v. Babulal*, (1924) 51 IA 163.

83. *Pratap Narain v. Commissioner of Income Tax,* (1967) 63 ITR 505 (All).

84. *Gulab Chand v. Mani Lal*, AIR 1941 Oudh 230 .

85. *Padmaja v. Jaisoorya*, (1959) All LT 67.

86. *Gunjo Singh v. Chandra Narayan Singh*, (1962) ILR 42 Pat 331.

87. *Hanuman Mal v. Commissioner of Wealth Tax*, ILR 46 Pat 529, (1967) 1 ITJ 482 (Pat).

88. *Kamla Devi v. Bachulal Gupta*, *AIR 1957 SC 434* [*LNIND 1957 SC 5*] *(1957) SCR 452* [*LNIND 1957 SC 5*].

89. *PN Easwara Iyer v. PN Venkatsubramaniya Iyer*, (1978) 3 SCC 373, 381.

90. *Commissioner of Income Tax v. Pushpa Devi*, 1971 Ker LR 578; *Kewal Krishan v. Kailash Chand*, (1977) ILR 1 Del 97; *Commissioner of Income Tax v. Inder Singh*, 98 ITR 368 (Guj).

91 *Subramaniya Iyer v. Commissioner of Income Tax*, 1955 Mad 623 ; *Commissioner of Income Tax v. Sadashiv Mudaliar*, (1983) 2 Mad LJ 419; *Sadasina Vittal v. Rattain*, AIR 1958 AP 145 .

92 *JV Vijaya Bhaskar v. J. Kesava Rao*, *AIR 1994 AP 134* [*LNIND 1994 AP 6*]; *Commissioner of Income Tax v. Ashok Kumar Jalan*, (1993) 204 ITR 16 (Pat).

93 *Pushpa Devi v. Commissioner of Income Tax*, *New Delhi*, *AIR 1977 SC 2230* [*LNIND 1977 SC 258*].

94 *Controller of Estate Duty v. Satyanaryana*, 140 ITR 158.

95 *Rajagopal Pillai v. Pakkiammal*, (1968) ILR 2 Mad 168 .

96 *Tirumaliyappa v. Shanmuganatha*, (1969) ILR 3 Mad 296 ; *Hanumantharao v. Commissioner of Wealth Tax*, (1970) 1 Andh WR 365, 75 ITR 714.

97 *Hanumantharao v. Commissioner of Wealth Tax*, (1970) 1 Andh WR 365, 75 ITR 714.

98 *Controller of Estate Duty v. Satyanarayana*, 140 ITR 158.

99 *Laxmi Bai Narayan Rao v. Commissioner of Gift Tax*, 65 ITR 19 (Hyd).

100 *Commissioner of Gift Tax v. Gethi Chettiar*, *(1971) 82 ITR 599* [*LNIND 1971 SC 469*] (SC); *Commissioner of Estate Duty v. Shankaran*, (1992) 193 ITR 28 (SC); *Commissioner of Estate Duty v. Kantilal Trikamal*, (1976) 105 ITR 92.

101 *M R J Narsimha Phani Kumar v. M K Somayajulu*, AIR 2000 NOC 9 (AP).

102 Post 2005 a daughter is competent to blend her share in the joint family property.

103 *Pushpa Devi v. Commissioner of Income Tax*, *New Delhi*, *AIR 1977 SC 2230* [*LNIND 1977 SC 258*].

104 *Mallesappa Bandeppa Desai v. Desai Mallapa*, *AIR 1961 SC 1268* [*LNIND 1961 SC 51*], *[1961] 3 SCR 779* [*LNIND 1961 SC 51*].

105 *Lakkireddi Chinna Venkata Reddi v. Lakkireddi Lakshmana*, *AIR 1963 SC 1601* [*LNIND 1963 SC 322*].

106. *Gangadhar v. Uchhab*, (1973) ILR Cut 994.

107 *Narayan v. Dasarathi*, (1959) ILR Cut 167.

108 *Raman v. Kunchu*, 1967 Ker LT 640.

109 *Kashinath v. Pranash*, AIR 1978 Cal 509 .

110 *Peria Karuppan Chetty v. Arunachalam Chetty*, (1927) ILR 50 Mad 582 ; *Kali Prasad v. Chandrika Prasad*, AIR 1927 Oudh 335 .

111 *Venkata Sastry v. Venkataramanayya,* 1940 Mad 626 .

112 *Nathehari Das v. Nanilal Das*, AIR 1937 PC 61 .

113 *KV Narayanan v. Ranganadhan*, *AIR 1976 SC 1715* [*LNIND 1976 SC 95*].

114 *Radhakant Lal v. Nazma Begum*, AIR 1917 PC 128 .

115 *Rajani Kant Lal v. Jagmohan Pal*, AIR 1923 PC 57 .

116 *J.V. Vijaya Bhaskar v. J. Kesava Rao*, *AIR 1994 AP 134* [*LNIND 1994 AP 6*].

117 *Commissioner of Income Tax v. Madan Lal Mehra*, *(1992) 198 ITR 287* [*LNIND 1992 DEL 111*] (Del).

118 *Ranganathan v. Controller of Estate Duty*, 1963 Mad 432 ; see also *Narayanan v. Krishnan*

Venki, AIR 1955 Tr & Coch 199; *Commissioner of Income Tax v. Mahendra Kumar*,

(1983) 140 ITR 300.

119 *Mangal Singh v. Harkesh*, AIR 1958 All 42 (DB); *Sham Lal v. Yesaram*, AIR 1954 Nag 334 ; *Sivarama Krishnan v. Kaveri Ammal*, 1955 Mad 705 ; *Manicka Mudaliar v. Thangavelu*, 1964 Mad 35 .

120 *Baji Rao v. Ramkrishna*, AIR 1942 Nag 19 .

121 *Gurnam Singh v. Pritam Singh,* AIR 2010 (NOC) 983 (P&H).

122 *Ethirajamma v. Lakshmi Devi*, (1978) 91 Mad LW 590.

123 *Manicka Mudaliar v. Thangavelu*, 1964 Mad 35 .

124 *S. Periannan v. Commissioner of Income Tax*, *(1991) 191 ITR 278* [*LNIND 1990 MAD 585*] (Mad).

125 *Mangal Singh v. Harkesh*, AIR 1958 All 42 (DB).

126 *Mayaram v. Satnam Singh*, AIR 1967 Punj 353 .

127 *Peria Karuppan Chetty v. Arunachala*, (1927) ILR 50 Mad 582 ; *Nutbehary Das v. Nanilal Das*, AIR 1937 PC 61 .

128 *Satchidananda Samantha v. Rajan Kumar Basu*, *AIR 1992 Cal 222* [*LNIND 1991 CAL 391*].

129 *Malladi Venkata Sastry v. Malladi Venkataramanayya*, 1940 Mad 626 ; *Nilkantha Krishnarao Apte v. Ramchandra Krishnarao Apte*, *AIR 1991 Bom 10* [*LNIND 1990 BOM 253*].

130 See *supra*.

131 *Visalatchy v. Annaswami*, (1869) 5 Mad HCR 150.

132 *Krishnaswami v. Rajagopala*, (1895) ILR 18 Mad 73 ; *Balwant Singh v. Rani Kishori*, (1898) 25 IA 54.

133 *Ayyangouda Basangouda v. Gadigeppa Gouda*, AIR 1940 Bom 200 ; *Lal Bahadur v. Kanhaiya Lal*, (1907) 34 IA 65; *Kandiram Kirdat v. Krishna Kirdat*, AIR 1995 SC 297 .

134 *Lakshmanaswami v. Sitaramamurthi*, (1950) 1 Mad LJ 31.

135 *Shanker Lal v. Official Receiver*, AIR 1938 Lah 328 .

136 *Bengal Insurance and Real Property Co. v. Velayammal*, (1937) ILR Mad 990; *Ramayya v. Kolanda*, (1940) ILR Mad 322.

137 See *Lachmeswar Singh v. Manowar Hossein*, (1892) 19 IA 48 (a case involving co-owners).

138 *Venkata Subramaniya Iyyer v. Eswara Iyyer*, 1966 Mad 266 .

139 *Bengal Insurance and Real Property Co. v. Velayammal*, (1937) ILR Mad 990.

140 *Chinna v. Venkata*, 1954 Mad 282 .

141 *Rukmabai v. Lala Laxminarayan*, *AIR 1960 SC 335* [*LNIND 1959 SC 205*]; *Raghunath Tiwary v. Ramakant Tiwari*, AIR 1991 Pat 145 ; *Melaram v. Amarnath*, AIR 1957 HP 39 ; *Bipra Charan v. Mohan Sunder*, AIR 1960 Ori 109 ;

Chandrasekhar v. Pitamber, AIR 1953 Ori 315 ; *Brij Kunvar v. Sankata Prasad*, AIR 1930 Oudh 639 ; *Kamlakant v. Madhavji*, AIR 1935 Bom 343 .

142 *Gopeekrist Gosain v. Gungapersaud Gosain*, (1854) 6 MIA 53; *Bannoo v. Kashee Ram*, ILR 3 Cal 315 (PC); *Chandar Sah v. Godhani*, AIR 1981 Pat 43 ; *Subba Reddy v. Nagi Reddy*, AIR 1973 AP 184 [LNIND 1972 AP 120](DB); *Budhia v. Raghu*, AIR 1973 Ori 85 [LNIND 1972 ORI 25]; *Mangal Singh v. Harkesh*, AIR 1958 All 42 ; *Jagat Krishna Das v. Ajit Kumar Das*, AIR 1964 Ori 75 [LNIND 1960 ORI 36]; *Venkatasami v. Radha Krishna*, AIR 1963 AP 476 [LNIND 1962 AP 113]; *Gauri Parshad v. Raj Rani*, AIR 1941 Lah 286 ; *Chanderdeb Lall v. Nandji Lall*, AIR 1950 Pat 33 ; *Tulsi Ram v. Narain Das*, AIR 1931 Lah 113 ; *Appala Swamy v. Suryanarayanamurti*, AIR 1947 PC 189 ; *Amrita Lal v. Surath*, AIR 1942 Lah 553 ; *Manik Rao v. Dei Rao*, AIR 1955 Nag 290 ; *Muthiswami Gounder v. Rangammal*, 1981 HLR 789; *Sulai Bewa v. Guuruvari Rana*, AIR 1971 Ori 299 [LNIND 1971 ORI 13]; *Neelavva v. Bhimavva*, AIR 1982 Ker 307 [LNIND 1982 KER 79]; *Binodjena v. Abdul Hamid*, AIR 1975 Ori 159 ; *DR Hampali v. Renukappa*, AIR 1993 Kant 148 [LNIND 1992 KANT 370]; *Akshoy Kumar v. Sukumara*, AIR 1951 Cal 320 [LNIND 1949 CAL 37]; *Bhagwathi Lal v. Modulal*, AIR 1952 Ajmer 52 .

143 *Venkappa Durgappa Patil v. Ningappa Balesha Govindappagal Patil*, AIR 1970 SC 160 ; *Parmananand v. Sudama Ram*, AIR 1994 HP 87 ; *Ramdas v. Babulal*, AIR 1988 MP 155 [LNIND 1987 MP 200]; *Srinivasa Krishna Kango v. Narayana Devji Kango*, AIR 1954 SC 379 [LNIND 1954 SC 52]; *M. Shanmugha Udayar v. Sivanandam*, 1994 Mad 123 ; *Karoo Singh v. Ujagir Singh*, AIR 1954 Pat 524 .

144 *Srinivas Krishnarao Kango v. Narayan Devi Kango*, AIR 1954 SC 379 [LNIND 1954 SC 52]; *K.V. Narayanaswami Iyer v. K.V. Ramakrishna Iyer*, AIR 1965 SC 289 [LNIND 1964 SC 109]; see also *Baikuntha Nath Pramanik v. Sashi Bhusan Pramanik*, AIR 1972 SC 2531 ; *Girimallappa Betgeri v. R. Yellappa Gonda Patil*, AIR 1959 SC 906 ; *Prankishen Paul Chowdry v. Mothooramohan Paul Chowdry*, (1865) 10 MIA 403; *Achuthan Nair v. Chinnammu Amma*, AIR 1966 SC 411 [LNIND 1965 SC 189]; *Rampershad Tewarry v. Sheochurn Doss*, (1866) 10 MIA 490; *Chikkam Kereswara Rao v. Chikkam Subba Rao*, AIR 1971 SC 1542 [LNIND 1970 SC 80]; *Dhurm Das Pandey v. Shama Soondri Dibiah*, (1843) 3 MIA 229.

145 *Namedvaru v. Rama Rao*, AIR 1959 Mys 173 .

146 *Obulreddy v. Venkatanarayana*, AIR 1984 SC 1171 .

147 *Kameshwar Singh v. Raghubir Mahto*, AIR 1964 Pat 290 .

148 *Srinivas Krishnarao Kango v. Narayana Devji Kango*, AIR 1954 SC 379 [LNIND 1954 SC 52]; *Hareshwar Das v. Nareswari Dasya*, AIR 1967 Assam 99 ; *Giri Mallappa v. Yallappa Gouda*, AIR 1959 SC 906 .

149 *Mallesappa v. Mallappa,* AIR 1961 SC 1268 [LNIND 1961 SC 51]; *Gangaiah v. Hosalaiah,* AIR 1991 NOC 42 (Kant); *Mudigowda v. Ramchandra,* AIR 1969 SC 1076 [LNIND 1969 SC 540].

150 *Gopeekrist Gosain v. Gungapersaud Gosain*, (1854) 6 MIA 53 (Benami Transactions have been abolished now).

151 *Chikkam Kareswara Rao v. Chikkam Subba Rao*, AIR 1971 SC 1542 [LNIND 1970 SC 80].

152 *Kistappa Naicker v. Elumalai Naicker*, 1977 Mad 38 ; *Nagayasami v. Kochadai*, 1969 Mad 329 ; *Manikrao v. Deb Rao*, AIR 1955 Nag 290 ; *Dasarath Prasad v. Daswanti Kaur*, (1976) ILR 55 Pat 161; *Jayanthi Bai v. Popular Bank*, AIR 1966 Ker 296 [LNIND 1965 KER 331].

153 *Lakshman v. Jannabai*, (1882) ILR 6 Bom 255; *Dhunookharee v. Gumpat*, (1868) 11 Beng LR 20.

154 *Durvasulu v. Durgasulu*, (1872) 7 Mad HCR 47.

155 *Durga Dutt v. Ganesh Dutt,* (1910) ILR 32 All 305.

156 *Gokul Chand v. Hukamchand*, (1921) 48 IA 162, AIR 1921 PC 35 .

157 *Krishnaji v. Maro Mahadev*, (1891) ILR 15 Bom 32.

158 *Metharam v. Rewachand*, (1918) 45 IA 41, AIR 1917 PC 105 .

159 *Chalakonda Alasani v. Chalakonda Ratnachalam*, (1864) 2 Mad HCR 56; *Pauliem v. Pauliem*, (1877) ILR 1 Mad 252 ; *Boologam v. Swornam*, (1882) ILR 4 Mad 330 .

160 *Lachmin Kaur v. Debi Prasad*, (1898) ILR 20 All 435.

161 *Jugmohan Das v. Mangaldas*, (1886) ILR 10 Bom 528.

162 *Bai Manccha v. Narotamdas*, (1869) 6 Bom HCR (ACJ) 1.

163 Mitakshara I, Vol. iv, pp 7, 8, 9–14.

164 Katayana cited in Mitakshara I, Vol. iv, p. 8.

165 The Hindu Gains of Learning Act, 1930, s. 4.

166 *Brij Mohan v. Commissioner of Income Tax*, (1993) 201 ITR 836 (SC).

167 *Dhanwantry v. Commissioner of Income Tax*, *AIR 1968 SC 683* [*LNIND 1967 SC 307*], 68 ITR 365.

168 *Commissioner of Income Tax v. DC Shah*, *AIR 1969 SC 297* [*LNIND 1968 SC 200*].

169 *Krishna v. Commissioner of Income Tax*, AIR 1968 SC 893 .

170 *Parbati Kaur v. Sarangadhar*, AIR 1960 SC 403 ; *Radha Devi v. Controller of Estate Duty*,

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171 *Karuppa Gounder v. Palani Ammal*, 1963 Mad 245 .

172 *Babu Rani v. Rajendra Baksh*, (1933) 60 IA 95; *Mahant Govind Rao v. Sitaram*, (1898) 25 IA 195.

173 *Kedar Nath v. Ratan Singh*, (1910) 37 IA 161.

174 *Mirza Jehan v. Badshoo Bahoo*, (1885) 12 IA 124.

175 *Janardhan Naik v. Khageswar Naik*, *AIR 1963 Ori 130* [*LNIND 1962 ORI 61*].

176 *Revappa v. Madhava Rao*, *AIR 1960 Mys 97* .

177 *Kannika Parmeswari Devasthanam v. Sadasiwam Chettiar*, (1980) 2 Mad LJ 435 (DB).

178 *Srinivasa v. Kapini Gonda*, (1950) Mys HCR 214.

179 *Sitaram v. Munni Bibi*, (1942) 55 Mad LW 444; see also *Suresh Chandra v. Bai Ishwari*, AIR 1938 Bom 206 ; *Srinivasa v. Kapini Gonda*, (1950) Mys HCR 214.

CHAPTER 6 KARTA

INTRODUCTION

Joint family is a unique institution under Hindu Law. It is an institution whose members own property in its name, which has several persons as its members, having distinct rights over the property, and rights and obligations towards each other. As a unit, it deals with outsiders and even statutory authorities, and therefore, it becomes imperative that as a unit, it must be headed by a person from within the family who is not only capable of representing it in law and virtually all matters, but is also competent to bind all family members with his *bona fide* actions or decisions taken with respect to the family, and its property. He should also be a person who can generally be trusted to act in the best interests of the family.

Ancient family units were headed by the seniormost male member in the family, the 'Patriarch,' who had more or less an absolute control over the property and even over the lives of the family members. He was the unquestioned ruler of the family, he represented the family in all matters and his decisions were final as he was obeyed by all members. The conferment of near absolute control went hand in hand with the promotion of family welfare as his implied responsibility. Presently, the basic framework has remained the same, but the powers of the head of the family have been considerably diluted. Absolute powers have been replaced by superior powers co-existing with superior responsibilities. The term 'Patriarch' has been replaced with 'Karta',[1] also described as 'Manager' (an inapt translation into English language) of the Hindu joint family.

WHO CAN BE A 'KARTA'

The father and in his absence, the seniormost male member is presumed to be the Karta of a Hindu joint family.[2] The presumption is very strong as this position is regulated by seniority[3] and does not depend upon merely the consent of the other family members. A temporary absence of the father is not sufficient for the son to become a Karta, if there is nothing to show that the father is in a remote country or his whereabouts are not known or his return within a reasonable time is out of question.[4] Therefore, so long as the Karta is alive no one else on his own can be a Karta, and if the Karta so desires, he continues to occupy the representative capacity even though he may be inadept to look after the family affairs by reasons of age or health. If he does not want to continue as the Karta, he can expressly relinquish this position and with the concurrence of the family members, another coparcener, not necessarily the next in seniority, may be appointed as the Karta.[5] But, for this, the agreement of all the members is necessary[6] and in the case of a conflict, the seniormost will be presumed to be and would continue as the Karta. The mere fact that a younger brother joins the elder brother in some transactions of the family, would not adversely affect the position of the elder brother as the Karta.[7] Even a minor can act as the Karta and represent the family through the guardian.[8]

Two persons may look after the management of the property,[9] but the joint family can be represented only by one Karta.[10] Therefore, there is no scope for two 'Kartas' or two representatives. There can be one and only one Karta. On the death of the Karta, the next male in seniority will become the Karta and if there are some legal proceedings pending in the court involving the joint family, his name will be substituted as the representative of the family, in place of the deceased Karta.[11]

JUNIOR MEMBER OF COPARCENARY AS KARTA

It is a settled principle of Hindu law that the position of *Karta* in the joint family goes to a person by birth and is regulated by seniority and the *Karta*/manager occupies a position superior to that of the other members. A junior member cannot therefore deal with the joint family property as a manager so long as the *Karta* is available except where the *Karta* relinquishes his right expressly or by necessary implication or in his absence in exceptional and extraordinary circumstances such as distress or calamity affecting the whole family and for supporting the family or where his whereabouts were not known or he was away in a remote place due to compelling circumstances and his return within a reasonable time period was unlikely or not anticipated[12].

In *Nopany Investments (Pvt) Ltd. v. Santokh Singh* [13], the *Karta* of a Hindu joint family was staying in the United Kingdom and was not in a position to handle the joint family affairs in India. He executed a power of attorney in favour of his younger brother and the whole family accepted the latter's management of the joint family affairs without any protest. This younger brother filed a suit for eviction against the tenant, and the tenant raised a preliminary objection that as he is not the *Karta*, the suit for eviction filed by him does not hold good in law. The Court dismissed the contention of the tenant and observed that it was not open for the tenant to raise such a kind of objection with respect to the maintainability of the suit at the instance of the younger brother as the records clearly showed that all along it was the younger brother of the *Karta* who was realizing the rent from the tenant and the tenant is now stopped from raising any such question, and the suit was maintainable at the instance of the younger brother claiming himself to be the *Karta* of the joint family despite the fact that he was not the senior most male member of the Hindu Joint family. The court held that where the *Karta* of the joint family is away in a foreign land for a long time and his return within a short time period is unlikely and due to his absence he cannot look after the affairs of the Hindu joint family, a younger member of the coparcenary with the consent of all the members of the family can act as the *Karta* of the family. He is also empowered to enter into transactions on behalf of the joint family, such as execution of a lease or filing a suit for eviction of the tenant inducted into the joint family premises. The court here clarified that though the settled principle of classical Hindu law remains that *Karta* would be the senior most male member of the family in the following circumstances a younger brother of the joint Hindu Family can deal with the family property as *Karta*:

(i) if the senior member or the *Karta* is not available

(ii) where the *Karta* relinquishes his right expressly or by necessary implication;

(iii) in the absence of the manager in exceptional and extraordinary circumstances such as distress or calamity affecting the whole family and for supporting the family ;

(iv) in absence of the father;

(v) father's whereabouts are not known

(vi) who was away in a remote place due to compelling circumstances and his return within a reasonable time was unlikely or not anticipated.

Females as Karta

The position of the Karta is regulated by birth and is guided by seniority. For being a Karta and to be entitled to manage the family affairs, including the property, it is essential that the Karta is capable of acquiring an interest in the family property. The Karta, therefore, must have not merely an interest of residence and maintenance, but of ownership in this property. A daughter is born in the family, but ceases to be a member of the family on her marriage. In contrast, other female members become members of the joint family on their marriage to lineal male descendants, but are not born in this family. Therefore, a position that is regulated by birth cannot be conferred on these females. Secondly, to be a Karta, it is essential that not only should he be a male, but he should also be a coparcener, as a non-coparcener male cannot become a Karta.[14]

Since a female is not a coparcener,[15] she cannot be a Karta,[16] nor is she empowered to represent the family generally.[17] However, Nagpur High Court has held[18] that under certain special situations, even a female can act as a Karta and her decision would be binding on the family members. This decision does not appear to be correct, as she is neither a coparcener, nor is she entitled to a share in the coparcenary property. On behalf of a minor coparcener, she can act as a guardian, but that would not make her the Karta. A mother, therefore, cannot be a Karta.[19] A wife cannot act as the Karta in absence of her husband,[20]nor can she act as the Karta in a joint family

comprising her husband and her son.[21] Similarly, a Hindu widow cannot be a Karta, even if rights are conferred on her, in the deceased husband's coparcenary property.[22]

POSITION POST 1985

Beginning with 1985, till 1994, the States of Andhra Pradesh (1985), Tamil Nadu (1989), Maharashtra and Karnataka (1994) introduced the possibility of unmarried daughters being coparceners in the same manner as a son. Since now, in these states, upon marriage, a daughter continues to be a coparcener, she fulfils the requirements for becoming a Karta. Born in the family, she acquires an interest in the coparcenary property and therefore, she can be a Karta, if she is the seniormost member in the family and she will be entitled to represent the family in all legal proceedings.[23]

POSITION POST 2005

Presently, a daughter is a coparcener in the same manner as a son. Since she is a coparcener, she is also entitled to be a Karta and represent the family in all matters.

POSITION OF KARTA

The position of a Karta is *sui generis*. It comes to him by being born in the family and is regulated by seniority. It is terminable by resignation and relinquishment but is not indefeasible. It is a unique position and the relation between him and the other family members is difficult to explain, as it has no parallel in any other kind of relationship. He is the custodian of the family interest and his actions are backed by a presumption of the promotion of general family affairs. He is the head of the family, but the relationship is not that of principal and agent[24] under the Contract Act,[25] nor even of partners. It is at best, comparable to that of a trustee,[26] as he stands in a fiduciary relationship with the other members of the family, but unlike a trustee, he is not accountable to the family generally, and even where he mis-manages or incurs a loss while managing the family affairs, unless he is charged with fraud or misappropriation of the joint family property his actions and decisions are binding on all the members of the family, including those who may not like his decisions. The Karta cannot be held liable for negligence[27] and where he acts honestly and with bonafide intentions, in the best interests of the family, his discretion cannot be closely scrutinised,[28] but where he misappropriates the joint family funds or uses them for purposes other than for family benefits, he is accountable and will be called upon to refund the amount to the joint family corpus.[29]

RESPONSIBILITIES OF KARTA

The superior position of a Karta is saddled with superior responsibilities. He has the primary responsibility of providing food, shelter, clothing, or in other words, a residence and maintenance to all the family members. This also includes a responsibility to provide for marriage expenses of unmarried children, more specifically the daughters, and for funeral expenses of the departed members. As he represents the family, he has to defend the family in all litigations that may be filed against the family, by a member of the family or outsiders. As he manages the property, he has the responsibility to pay all the statutory or other dues, such as taxes, debts etc, due to the family or to the family property.[30]

REMUNERATION FOR SERVICES

The position of a Karta is purely honorary and he is not entitled to draw or receive any salary for the services rendered, unless there is an agreement to this effect. In the absence of such an agreement, money received by him while managing the family affairs, would belong to the family and not to him alone. This also distinguishes his position as the Karta from that of a manager of any concern, holding property in common, where the manager's work would undoubtedly fetch him a salary or a share in the profits. A Karta's labour is perceived with sanctity. As the head of the family, he is expected to selflessly and without expecting a monetary return, discharge his duties for the welfare of the family. It is comparable to the labour involved and efforts taken by parents to raise their children and cannot be measured with a price tag. However, in cases where the Karta uses his time and labour in looking after the family affairs or conducting the family business, where he could have spent the same time in a full fledged avocation, there is no reason why he should not get a monetary return for it. Therefore, if in pursuance to an agreement, he agrees to receive a salary, the agreement would be valid and the family can show it as an expenditure in the income tax returns. No third party, including the income tax officer, can challenge the validity of such an agreement. The Supreme Court, in *Jugal Kishore*'s case,[31] while adjudicating on the dispute as to whether a Karta can be granted a remuneration for managing the family business, observed:

> The general view expressed by commentators on Hindu law, as well as in decided cases, is that the Karta of a family can be paid remuneration for carrying on the family business, provided it is under some agreement. There seems to be no reason why, if all the persons competent in a Hindu undivided family, to enter into an agreement on its behalf, consider it appropriate that the Karta should be paid remuneration and enter into an agreement to pay remuneration to him, that remuneration should not be held as an expenditure deductible under the Income Tax Act.

The court seems to have distinguished between the right of the Karta to manage the family affairs and conducting the family business. It held that the Karta has a right to manage the family affairs but he is under no obligation or duty to carry a particular business of the family, and where a junior member of the family conducts the business of the family and is granted a salary for doing so, there is no reason why the Karta cannot be granted the same. Treating it as essentially, a matter between the family members, it held that it would be treated as an expenditure of the family. In *Ashok Kumar v. Commissioner of Income Tax, Amritsar,* [32] a Hindu joint family consisted of the father, his wife and two minor children. The father was looking after the family business. He, as the Karta of the family, and his wife entered into an agreement, pursuant to which he was empowered to draw a salary of Rs. 500 per month, as remuneration for the services rendered by him in conducting the business. This salary paid to him, was shown as an expense of the family in the income tax returns that he filed as the Karta. The income tax officer, however, disagreed with him and argued that such an agreement was invalid, as a Karta is not entitled to draw any salary for the work that he is under a duty to perform, and that therefore, it is not an expense that will be deducted from the income of the family. The Jammu and Kashmir High court, following the Apex Court's judgment, held that the Karta is empowered to draw a salary pursuant to an agreement and no third party is empowered to challenge the validity of such an agreement, as it is a matter essentially between the family members.

POWERS OF THE KARTA

Power to Manage Family Affairs

The Karta is the head of the family and has the power to manage the family affairs and the family property. It is said that though his powers of alienation are limited, his powers of management are absolute.[33] He has the power to take possession of the total property and receive the joint family income from whichever source it may come. No individual coparcener can either retain the exclusive possession of a specific joint family property or joint family income, without his permission. If a coparcener insists on possessing a specific portion of the property without the consent of the Karta, the Karta can evict him from that portion.[34] If a coparcener's presence in the family home proves to be a nuisance due to his disorderly behaviour or bad habits, the Karta has the power to throw him out of the house. The coparcener cannot challenge his decision and the only remedy available with him is to ask for partition, specify the share and go out of the family.

The Karta, therefore, has a right to decide or allot specific portions of the house for family member's residence, which the latter have to obey. While taking decisions with respect to family members, the Karta need not be equitable or even impartial. He can bestow excessive favoritism on one child in comparison to another, he can give a specific reasonable sum of money to one son for his maintenance, while on others, he can spend lavishly. It is he who has to decide, how much is to be spent on each person's education and no one can legally interfere with his

decision. He may or may not pay a fixed amount of maintenance to any member, and even if he enters into any kind of agreement to this effect, he is free to repudiate it at his pleasure, only to enter into any other kind of arrangement, or no agreement at all. If there is an emergency that requires an application of money, issues like from where the money is to be raised, whether it is to be raised at all or not and what action is to be taken, would be for the Karta to decide, as that is an inherent part of management. No member of the family, and for that matter, not even the court, can force the Karta to take a particular decision, as that would mean an interference in his inherent powers of management.

Right of Representation

The Karta has a right to represent the family in all legal, social, religious and revenue matters, including litigations,[35] with respect to matters connected with immovable properties or otherwise. A suit will be filed in a court by the family in his name and likewise, a suit filed against the family will be defended by him. The joint family, therefore, acts through the Karta, as it has no corporate existence, and a decree passed against the Karta binds all the members, including minors,[36] irrespective of the fact that they were not direct parties to the suit. It is presumed that the Karta represents the family in all legal proceedings and there may not be a specific mention of him being in the representative capacity,[37] unless it can be shown that he himself is claiming an interest that adversely affects the interests of the family.[38] The Karta is expected to pursue the litigation with utmost sincerity, but if he does not do so and because of this, the family loses a case or a decree is passed against the family, such decree cannot be set aside on the ground that, had the Karta been more vigilant, the family might have won the case.[39] Similarly, where the father represents the minors in a suit, the contention that his actions are not in the interests of the minors, will not alter the binding nature of the judgment.[40]

Power to receive and spend the Family Income

As aforesaid, the right to receive the joint family income is one of the inherent powers of the Karta, in the exercise of the management of joint family affairs. The income, from whichever source, will be received by him. The decision of how to spend this joint family income and on whom to spend it, is with the Karta. He is not under any obligation to economise or save, as in the case of an agent or a trustee.[41]

The Karta can spend the income for the maintenance of family members and for one of the permitted purposes,[42] i.e., legal necessity, benefit of estate and for performance of religious and indispensable duties. He can spend the money for providing for the residence of the family members, including for the maintenance of a destitute daughter.[43]

Powers of Alienation

The Karta's power of alienating the joint family property are limited or qualified, and can be exercised with the consent of all the coparceners. Where the coparcener does not give consent or is incapable of giving consent, being a minor, the Karta can alienate the property only for legal necessity or for performance of religious or charitable purposes or where the transaction would amount to benefit of estate. In such cases, the alienation would bind all the members of the family, including minors.[44] In the case of an unauthorised alienation, the coparceners have a right to challenge it and get a decree setting it aside.

Liability to Account

The Karta is not bound to keep accounts of how he has spent the family funds, as he is presumed to act in the best interests of the family, but where a coparcener demands partition, he can require the Karta to give him accounts.[45] The Karta has to give him accounts for the money he had actually received and not what he could have received if he had managed the property in a better manner.[46] Further, he can only be asked to render the accounts as they existed on the date of the demand[47] and he cannot be forced to render past accounts,[48] unless there are charges of fraud, misappropriation or conversion of joint family property into his personal acquisitions,[49] or the nature of business is such that necessitates proper accounting at all times. In such cases, the Karta has to give accounts to a member demanding it,[50] at the time of partition. The coparcener can also refute the stand of the Karta where the accounts are not acceptable to him, on the ground that either the Karta has not spent the money that he claims to have spent,[51] or the Karta has not been honest in showing the properties available for partition and has not included all the joint family properties.

In Bengal, however, for families governed by Mitakshara or Dayabhaga law, a coparcener has a right to require the Karta to give him accounts of the dealings with respect to the joint family property, including that of the income and

profits thereof and upon a refusal by the Karta to do the same, a coparcener can take the help of the court by filing a suit for the rendition of accounts.[52]

Power to Acknowledge and Contract Debts

The Karta has the authority to acknowledge debts due to the family and to pay interest on it,[53] though he cannot, however, revive a time barred debt.[54] The debt might have been contracted by all members of the family or by the Karta alone, acting on behalf of the family. The Karta also has the power to contract debt for using the loan in family business or for any other lawful purpose and such a debt binds the share of all the coparceners. A coparcener, even after seeking partition, cannot escape the liability of the debt contracted by the Karta, from his share of the property. Where a loan is raised by the Karta by executing a promissory note in his name, but for a lawful purpose, such a note binds the other coparceners, but only to the extent of their shares,[55] unless it can be shown that they were parties to this contract.[56]

Power to settle Family Disputes

In case of a dispute between the members of the family or between family members and outsiders, the Karta can refer the dispute for arbitration.[57] He can also enter into a compromise on behalf of the family, but not where such a compromise is for his personal advantage.[58] Where such reference to arbitration or compromise is for the benefit of the family,[59] all family members including minors, are bound by it.[60]

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1. See *Suraj Bunsi Koer v. Sheo Persad*, (1880) ILR 5 Cal 148.
2. *A. Kunjipokkarukutty v. A Ravunni*, AIR 1973 Ker 192 ; *Varoda Bhaktavatsaludu v. Venkata Narasimha Rao*, 1940 Mad 530 .
3. *Lalbarani v. Bhutnath*, AIR 1974 Cal 109 [LNIND 1973 CAL 165]; *Himchandra v. Matilal*, (1933) ILR 60 Cal 1253; *Jasoda Sundari v. Lal Mohan Basu*, AIR 1926 Cal 361 .
4. *Siddappa v. Linappa*, 42 Mys HCR 669.
5. *Nemi Chand v. Hira Chand*, (2000)1 HLR 250 (Raj).
6. *Mudit v. Ranglal*, (1902) ILR 29 Cal 797; *Narendra Kumar v. Commissioner of Income Tax*, AIR 1976 SC 1953 [LNIND 1976 SC 247].
7. *Ghasi Ram v. Hiralal*, AIR 1954 MP 67 .
8. *Sarda Prasad v. Umeshwar Prasad*, (1963) ILR Pat 274; *Budhi Jena v. Dhobai Naik*, AIR 1958 Ori 7 .
9. *Union of India v. Shree Ram*, AIR 1965 SC 1531 [LNIND 1965 SC 18].
10. *Damodar Misra v. Sanamali Misra*, AIR 1967 Ori 61 .
11. *Chandradip v. Jagannath*, AIR 1978 Cal 157 [LNIND 1976 CAL 178].
12. *Tribhovan Das Haribhai Tamboli v. Gujarat Revenue Tribunal*, (1991) 3 SCC 442 [LNIND 1991 SC 282] : (1991) SCW 1467.
13. AIR 2008 SC 673 [LNIND 2007 SC 1445].
14. For the position post 2005 see the discussion *infra*.
15. *Commissioner of Income Tax v. Govindram Sugar Mills*, AIR 1966 SC 24 [LNIND 1965 SC 572];*Manglal v. Jayabai*, AIR 1994 Kant 276 [LNIND 1994 KANT 84]; *Kanji v. Parmanand*, AIR 1992 MP 208 [LNIND 1991 MP 172].
16. *Sahdeo Singh v. Ramchabila Singh*, AIR 1978 Pat 258 .
17. *Ram Avadh v. Kedar Nath*, AIR 1976 All 283 .
18. (1947) ILR Nag 299; *Commissioner of Income Tax v. Lakshmi Narang*, (1948) ILR Nag 775.
19. *Magunti v. Lingaraj*, AIR 1956 Ori 1 .
20. *Sheogulam v. Kisun Choudhuri*, AIR 1961 AP 212 .
21. *Krishnayya v. Balavankata Subbayya*, (1968) 1 Andh LT 197.
22. *Radha Ammal v. Commissioner of Income Tax*, (1951) ILR Mad 56.
23. See Chapter IV, *supra*.

24. *Kandasami Asari v. Somaskanda*, (1912) ILR 35 Mad 177 .

25. *Muhammad v. Radha Ram*, (1900) ILR 22 All 307; *Sirkant Lal v. Sidheshwari Prasad*, AIR 1937 Pat 455 .

26. *Perrazu v. Subbarayadu*, AIR 1922 PC 71 .

27. *Raya v. Gopal*, 11 IC 666.

28. *Vaikuntam v. Avudiappa*, 1937 Mad 127 .

29. *Abhay Chandra v. Pyari Mohan*, 5 Beng LR 347.

30. *Lalitha Kumari v. Rajah of Vizianagram*, 1954 Mad 19 .

31. *Jugal Kishore Baldeo Sahai v. Commissioner of Income Tax*, (1967) 63 ITR 238, 242; see also *Jitmal Bhuramal v. Commissioner of Income Tax*, (1962) 44 ITR 887.

32. *Ashok Kumar v. Commissioner of Income Tax*, *Amritsar*, IT Reference 17/ 1982, decided on 19 July, 2000 (J&K).

33. *Bhaskaran v. Bhaskaran*, (1908) ILR 31 Mad 318 .

34. *Baldeo Das v. Shamlal*, (1876) ILR 1 All 77.

35. *Singriah v. Ramanuja*, AIR 1959 Mys 239 (DB).

36. *Rajayya v. Singa Reddy*, AIR 1956 Hyd 200 .

37. *Narain Sarup v. Daya Shanker*, (1938) ILR All 455; *Devi Das v. Shailappa*, *AIR 1961 SC 1277* [*LNIND 1961 SC 408*]; *Govindarajulu v. Sivaramakrishnan*, 1953 Mad 822 .

38. *Papamma v. Narayana*, 1948 Mad 54 .

39. *Krishnamurthi v. Chidambaram*, (1946) ILR Mad 670.

40. *Gurbasappa v. Vankat*, AIR 1956 Hyd 146 (DB).

41. *Bhowani v. Jagannath*, (1909) 13 CWN 309.

42. See Chapter 8, 'Alienation of Joint Family Property', *infra*.

43. *Ramayya v. Kolanda Goundan*, (1940) ILR Mad 322.

44. *VVV Ramaraju v. Korada Malleswara Rao*, (1999) 2 HLR 257 (AP).

45. *Girijanandini Devi v. Brijendra Narain*, *AIR 1967 SC 1124* [*LNIND 1966 SC 149*].

46. *Official Assignee v. Rajabadar*, (1924) 40 Mad LJ 145; *Kanahayalal v. Jumma Devi*, AIR 1973 Del 160 ; *Vishwa v. Prem Nath*, AIR 1975 J&K 92 .

47. *Gopal v. Trimbak*, AIR 1953 Nag 195 ; *Ramanathan v. Narayanan*, 1955 Mad 629 ; *Ramnath v. Goturam*, AIR 1920 Bom 236 .

48. *Bappu Ayyar v. Renganayaki*, 1955 Mad 394 ; *Sukhdeo v. Basudev*, AIR 1935 All 594 .

49. *Suryanarayana v. Sugamanathi*, *AIR 1961 AP 393* [*LNIND 1960 AP 233*]; *Seethamma v. Veerannachetty*, 1950 Mad 785 .

50. *Girijanandini Devi v. Brijendra Narain*, *AIR 1967 SC 1124* [*LNIND 1966 SC 149*].

51. *Manaharanlal v. Jagiwanlal*, AIR 1952 Nag 73 ; *Tammireddi v. Gangireddi*, 1922 Mad 236 .

52. *Benoy Krishna Ghosh v. Amrendra Krishna Ghosh Choudhri*, AIR 1940 Cal 51 ; *Abhaychandra v. Pyari Mohan*, (1870) 5 Beng LR 347.

53. *Ananda Charan v. Jhatee Charan*, AIR 1935 Cal 648 ; *Nagarmal v. Bajranglal*, (1950) 77 IA 22; *Ram Autar v. Beni Singh*, AIR 1922 Oudh 135 .

54. *Nallamilli Veerayamma v. Karri Ammireddi*, (1949) 1 Mad LJ 189.

55. *Krishnanand v. Raja Ram Singh*, AIR 1922 All 116 .

56. *Sirikant Lal v. Sidheshwari Prasad*, AIR 1937 Pat 455 .

57. *Jagananath v. Mannu Lal*, (1894) ILR 16 All 231.

58. *Bhola Prasad v. Ramkumar*, (1932) ILR 11 Pat 399; *Mahabir Prasad v. Ram Tahal*, (1937) ILR 16 Pat 724.

59. *Lakhmichand v. Kolloolal*, (1956) ILR Nag 783; *Ramji Ram v. Salig Ram*, (1911) 14 CLJ 188.

60. *Nawal Kishore v. Sardar Singh*, AIR 1935 Lah 667 ; *Datta Mal v. Amar Nath*, AIR 1938 All 414 .

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CHAPTER 7 TRADING FAMILIES

INTRODUCTION

A family whose main avocation is trade or commerce, can generally be called a trading family, but under Hindu Law, this term has a specific connotation or significance. It refers to a class within the Hindu community that is identified with the profession that it is generally engaged in, whose hereditary profession or 'Kulachar' is trade and commerce and whose main source of livelihood is trade. The profession of trade under the Dharmashastras was meant for the third and the last of the twice born castes, ie, the Vaishyas. The Brahmins and the Kshatriyas were allowed to trade only in cases of necessity and in times of distress. Special rules were laid down for traders and it was provided that where the joint family takes to trading and that is handed down from one generation to the next and so on, it is called a trading caste or a trading family and trade becomes its duty to practice, called 'Kulachar'. The Dharmashastras also enjoined that it was the duty of the king to ensure that the Kulachar of every caste was properly preserved.[1]

Presently, this caste and profession based rigid distinction has been totally obliterated. Any person can adopt any trade or profession and he does not have to substantiate his action by proving necessity or conditions of distress. People belonging to the Vaishya community have left trade to explore other options of earning a livelihood, and Hindus of other castes have taken to trade as their main avocation, due to an absolute freedom to choose any profession by members of any community. However, under the Hindu law, there still exists a distinction between a Hindu family carrying on a family business and business carried on by a trading family.

Where members of any community other than the Vaishyas carry on business, even if for generations together, it would be called a Hindu family that is engaged in a trading activity or a family which is conducting a family business, but it would not be called a trading family. For example, a Brahmin family, that has been engaged in a business activity for the past four or five generations, would be termed a family engaged in business, but would not be described as a trading family. However, if a Vaishya family starts a business that is continued by the next generations, it will be called a trading family.

FAMILY BUSINESS

All members of a family may be engaged in business, either with strangers or all by themselves, using their separate acquisitions[2]or the joint family properties. When one or more members of the same family enter into a partnership concern with strangers, the business is governed by the Indian Partnership Act, 1932 and is not a family business.[3]Even where the Kartas of two different families enter into a partnership concern, the consequences are the same. However, where all the family members start a business without including any stranger, it is called a family business, and on their death, this business, like any other heritable property, is taken by the coparceners and is called ancestral business. Family or ancestral business is subject to the rules of Hindu law and not to the Partnership Act.[4] Similarly, where the members of a family conduct business with a stranger, upon the death of the stranger, the business may take the character of a family business, and in the course of time, will become an ancestral business.

Distinction between Family Business and Business in Partnership with Strangers

The main points of distinction between a family business and a business in partnership with strangers are as follows:

(i) A family business signifies that all the members conducting or managing the business, are related to each other as members of the same family, while the same is not true of a partnership. Partners may be strangers or family members and strangers or even Kartas of two or more families.

(ii) A family business is governed by the rules of Hindu law, which is different in many aspects from the Partnership Act, 1932 that governs partnership firms. Firms also require registration for full action, which is not required under Hindu Law.[5]

(iii) In a partnership firm, the share of each partner is specific and fixed, but in a family business, the share of none of the members is fixed. With the typical incident of joint family property, all members jointly own everything and not merely a specific portion.

(iv) Unlike in a partnership firm, in a family business, on the death of one member, the doctrine of survivorship applies and his probable or common share in the property or business is taken by the surviving coparceners or members.

(v) Where a family business is started by the family, it is a heritable property, which is not the case with a partnership firm.[6]

(vi) A minor has an interest by birth, in the family or ancestral business and for becoming a member of a family business, an agreement is not necessary. However, a person cannot become a partner without any agreement, because unlike under the Hindu Law, partners arise out of contract and not out of mere status.[7]

(vii) The manner of keeping accounts is entirely different in a family business as compared to the book keeping and proper accounting required in a partnership concern. The Karta is not bound to maintain proper accounts and if there is a need, he can be asked to render the then existing accounts[8] and not past accounts, unless the nature of business necessitates keeping and rendering proper accounts.

(viii) In a family business, a coparcener can demand a partition at any time and specify or ascertain his share, but in a partnership concern, a partition at the instance of one member is not permissible.[9]

Joint Family Firm

The members of a Hindu joint family can form a firm and start a partnership concern with their separate capitals, but if the joint family funds are invested, the firm also takes the character of a joint family firm.

A family business is also ordinarily, managed by the Karta, but due to the peculiar nature of the business or by consensus, another coparcener or more than one coparcener can either look after the business or manage it. In such a case, the action of such coparceners will bind the whole family.[10]

Starting a Family Business

Where a male Hindu starts a business with his separate property, upon his death, the business, along with his other property, is inherited by his family members and will be called the family business. Where the father, along with all the coparceners, starts a business with the joint family property, the business is again called a family business, but rather than going by inheritance, since its character is that of a joint family business, it goes by survivorship, to the surviving coparceners. The father, however, can start a joint family business only with the consent of all the coparceners. When there are minor coparceners in the family, who are incapable of giving a valid consent, the father is not permitted to start a new business with the joint family funds, so as to expose the share of the minors to the risks involved in the new business.[11] Where the father inherits the business from his ancestors, he is competent to carry it on despite the presence of minors and the restriction on his powers is only when he, with the help of joint family funds, wants to start a new business, in presence of minor coparceners. The reason is that although a business or trade is perceived as a profitable commercial activity, it has its own challenges and risks. A new business needs an initial investment and starting a new commercial activity, conducting it and earning profits, depends upon multiple factors, predominant among them being the nature of the business activity, the amount of capital invested, infrastructure facilities, skills of the members and knowledge of the trade, etc. Therefore, there is no certainty that there would be a smooth sailing. Secondly, the funds with which the Karta wants to start a new business, do not belong to him alone, but to the family or, to be more specific, to the other coparceners as well, including the minor coparceners. Minors and their properties need special care and protection. It must be noted that

as far as the separate property of a minor is concerned, the Karta cannot alienate it without the permission of the court, but with respect to a minor's undivided share in the joint family property, the Karta has superior powers. He has the power to manage it and is even competent to sell it if the alienation is for legal necessity, benefit of estate or for performance of certain indispensable religious and charitable duties. As starting a business is not covered under any of the three categories mentioned above, the Karta cannot expose a minor's interest in the joint family funds, to the risks and hazards of a new venture. Where the family business is already in existence, the same will be continued by the Karta, despite the presence of minors, since it is not at the starting level, but is at the continuation level. Whatever risks and hazards are involved in the setting up of the business, have already been taken. Secondly, maximum investment is ordinarily needed at the time of starting a business and the expenses at a later stage can be met with the profits it starts yielding. Thirdly, to hold that the Karta is not empowered to carry on the ancestral business only because there are minors in the family, would mean that he would have to close down the business whenever a coparcener is born, which is both illogical and detrimental to the interests of the family. Therefore, the Karta is permitted to carry on an ancestral business in the presence of minors and even expand it, reconstruct it, spread it, by way of opening new branches or offices, but he is not permitted to start an altogether new business. He can start a new business only in three situations:

(i) he does it with his separate funds; and

(ii) where he starts it with joint family funds,

(a) all coparceners are major and he does it with their concurrence, or

(b) he does it as a sole surviving coparcener.

Consequences of Starting a New Business in the Presence of Minors

When it is said that the Karta is not empowered to expose a minor's undivided interest to the risks and hazards involved in starting a new business, it does not mean that if the Karta does so, he will be penally liable or that the status of such new business will be adversely affected. What it means is that the Karta can use the undivided share of the minors and even invest it in the new business, but cannot make it liable in any way, such as by mortgaging it to raise a loan. If he does that and the minors, on attaining majority, do not object, there are no adverse consequences. However, problems may arise when in the course of setting up of this new business or conducting it, the undivided interest of the minors is kept as a security to raise a loan, or debts are contracted. Such debts or security can be enforced only against the Karta and not against the share of the minors, by the creditors. Where the major coparceners give their consent, they will also be bound by these debts to the extent of their shares. Since the minors are incapable of giving consent, their shares will not be and cannot be touched by the creditor, even through the court. The rule therefore, protects the interest of the minors by preventing the Karta from starting a new business with joint family funds, in the presence of minors. But it does not adversely affect the character of the business, nor does it prevent the minors from taking the benefits of the profits of the new business. In reality, it works against the alienee or the creditor, besides protecting the minor. In cases where the Karta borrows money on the strength of a joint family property, is unable to repay it and the creditor brings a suit to enforce the bond or the mortgage, it is the alienee or creditor who has to prove that the Karta was empowered to contract debts, if he wants the decree to be executed against the whole of the joint family property so mortgaged, including the share of the minors. If he is unable to prove it, the decree will bind only the Karta and his share and will not be enforceable against the shares of the minors in the property. For example, a Karta having two minor sons, mortgages the joint family property to start a new business. On his failure to repay the loan, the creditor secures the money decree and wants to enforce it against the property that was kept as the security under the mortgage. If the minors object, the decree will be enforceable only against the one-third share of the Karta and not against the two-third share of the minors. Therefore, in cases where the Karta or the minors plead the incompetence of the Karta to start a new business, the business is not adversely affected, but what is attempted is to save the interests of the minors from being attached. It is no wonder therefore, that in majority of such cases, the creditor tries to prove that the new business started by the Karta was in fact, either the ancestral business and therefore, not new, or it was merely an extension or continuation of the old business that was earlier being carried.

Rule in cases of Trading Families

The rules mentioned above apply to family businesses and the caste of the family that is conducting it, is irrelevant. However, where the family is a trading family, ie, it is a Vaishya family whose kulachar is trade, and the former generations of the Karta were in fact engaged in some kind of trading or business activity, then the Karta is empowered to start even a new business and bind the interests of the minors, unless the new business is of a hazardous or speculative nature, such as of stocks and shares. The temporary suspension of trading activity or the

difference in the character of goods in the new venture will not then, make a difference, and it would be treated as an extension of the old trading activity or business. The Karta can even alienate the joint family property if the sale proceeds are to be utilised for investment in the business.[12]

In trading families, there is usually no distinction between the trade assets and the family properties, unless there is an agreement to the contrary and there is a segregation of properties.[13] The business is carried on usually, on the credit of the whole of the property, and where there is a profit, the property keeps on increasing due to inputs of the profits.

The Karta of a trading family, therefore, has wider powers than the Karta of a non-trading family, because the essential necessities of a trading family, such as incurring debts, drawing of negotiable instruments,[14] and borrowing and purchasing on credit,[15] empower him to pledge the property and credit of the family, for ordinary purposes of trade.[16] An action taken by him as a prudent person, binds the whole family. This power includes even an alienation of family properties for investment in ancestral business, as that is presumed to be for the benefit of the family as a whole.[17]

Concept of Continuation of Old Business

The Karta is empowered to start a business with the concurrence of adult coparceners and even in a situation where he is a sole surviving coparcener and minors are born later, he cannot escape the liability if any, to the extent of their shares. However, even in the presence of minors, the Karta can start a business and bind their shares, provided it is not an altogether new business but in fact, a continuation or expansion of the old business. Under what situation a business so started will be a new one or merely an extension of the old business would depend on the facts and circumstances of the case. Where the Karta, who was carrying on a business in partnership with a stranger, continued the same under a different name and a different set of account books on the retiring of the stranger from the partnership, it would not be considered to be a new business, but would be taken as a continuation of the old one.[18] Similarly, where the family was a trading family and the business carried on by the grandfather, which was closed for a few years, was revived or restarted by the father, it was held that the business was a continuation of the old business.[19] However, if there is a complete termination of the old business, a fresh start would not be a continuation of the old business but in fact, a new one. Thus, where a rice milling business started by the father, was closed by the sale of all the plants and the assets were liquidated after his death, and after five years, his son bought a new rice mill out of the money that he raised by mortgaging the joint family property, it was held that the business was a new business and not a continuation of the old one. There, during the interval of five years, there was absolutely no kind of business activity undertaken by the family.[20] Similarly, where the father was carrying on the business of a commission agent in various goods, including indigo and cotton, but the son, with a cousin, carried on the commission business for some time, closed it, and several years later, started a business in partnership with a stranger, in yarn and cloth, despite the fact that it was a trading family, it was held that the business started by the son was a new business.[21] An alienation by the Karta of the joint family properties for starting a new business, does not bind the minors.[22] In *Agney Lal Narain v. Agney Lal Munni Lal*,[23] on the death of the father, his business of money lending and cloth and corn was suspended for around 6 years, because his posthumous son was still an infant. The guardian of the minor son was appointed and he, on behalf of the son, started a ‘Kirana’ and cloth business, in the same shop from where the father was carrying on the business during his lifetime. The son, Agney Lal, helped his guardian in the business and attained full control of it by the time he become a major. He mortgaged the joint family properties when he had two minor sons, to raise a loan for investing the money in the family business. Unable to repay the loan on time, he was sued by the mortgagee and at this time, the minors contended that the mortgage was not binding on their shares, as the loan was utilised for a new business and therefore, only the Karta will be bound by the loan. The money borrowed, as was stated in the bond, was for investing in the cloth shop and for the continuation of the Kirana shop and was in fact, used for that. The court noted that it was a trading family, and comparing both the businesses carried on by the father and restarted by the guardian on behalf of the son, held that in case the family is a trading family and is engaged in the sale and purchase of one kind of goods, it is permitted to take or start a venture which involves a similar sale and purchase of another kind of goods, but not more speculative or adventurous than the previous one, and in such circumstances, the extension of the old business cannot be called a new business. The Kirana business here, was held to be an extension of the old business.

In *Kulilalia Bank Ltd. v. SV Nagamanickam,* [24] the father, as the guardian of four sons, three of whom were minors, executed a security bond to raise a loan of around is 20,000 rupees, after mortgaging ancestral properties which also included the share of minors. The money was used in the new venture of rice business, which ran into difficulties after seven years. The bank brought a suit against the Karta, and a sum of Rs. 9000 was raised after the sale of one-fifth of the property, which was the share of the Karta. This family was a trading family, whose

hereditary avocation or Kulachar was trade or commerce. The father here, during his lifetime, had a money lending business, and his son was assisting him. In addition, the son started a rice mill, and for that, he had borrowed the loan from the bank.

However, the representation made to the bank was that the loan was required for the family business of 'shroff merchants'. The counsel of the family tried to explain the distinction between a 'money lending' activity and 'shroff merchants' to prove that the loan borrowed on the strength of the joint family properties did not bind the interests of the minors. The courts however, held that the business started by the son was akin to the old business and observed:

> Not only that the family is a trading family by birth but also by a vocation and as such the carrying on of the shroff businessfor which purpose he borrowed from the (bank), is a family business and he was competent to incur debts in the course of the running of the business so as to bind his minor sons.

With respect to the distinction between a family business and business carried on by a trading family, the court noted that as far as an ancestral business is concerned, the adult son is competent to carry on the business after the death of the father and incur debts for that purpose and the same would bind the interests of the minors also. However, the difficulty arises in the case of a new business. If the new business is started by a member of the trading family, in the sense that its ancestor's profession was trade and they actually carried on some business, then the mere fact that a new business is started, which may not be the very same business started by the father, would not be a sufficient defence to the minor sons to resist any proceedings against their interests in the family properties for debts incurred by their father in such a business. The court cautioned that even in such a case, it may not be open to the father or the Karta to start a new business, which would be attended with risks and not akin to or of the nature carried on by his ancestors. The trade or business carried on need not be an identical one, but the father is not empowered to carry another speculative or hazardous business. Secondly, the mere fact that the business carried on, though started for the first time, is by a member who belonged to a family whose Kulachara is trade, but none of the ancestors of the family at any time engaged themselves in trade, cannot entitle the Karta, by starting a trade and incurring debts, to seek to bind the interests of the other members of the family. To permit therefore, a member of a Vaishya community, whose family, for two or three generations previously, had not engaged themselves in trade, to start a new business and incur debts so as to bind the minor member of the family on the ground that he belongs to the community of Vaishya, would be placing in jeopardy, the minor's interests in the joint family. In order to bind the minor's interest in the property it has to be shown that not only is the family a Vaishya family, but in fact, the ancestors engaged themselves in trade.

The limitation upon the powers of the Karta apply equally under the Mitakshara and the Dayabhaga law, as also on a Karnavan in matriarchal system.[25]

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1. *Raghunathji Tarachand v. The Bank of Bombay*, (1909) ILR 34 Bom 72, 76, per Chandavarkar J.
2. *Prakash Chandra Sharma v. Narendranath Sharma*, AIR 1976 SC 2456 .
3. *Commissioner of Income Tax v. Shiv Mohan Lal*, *(1993) 202 ITR 60* [*LNIND 1993 ALL 34*].
4. *Gulab Chand v. Manni Lal*, (1941) 16 Luck 302.
5. The Indian Partnership Act, 1932, s. 69.
6. *Raghumull v. Lucha Mondas*, (1916) 20 CWN 708; *Ramlochan Ram Firm v. Maikha Sehethani*, AIR 1960 Pat 271 .
7. *Probodh Chandra v. Bharat Loan Co.*, AIR 1964 Assam 114 .
8. *Nachiappa v. Muthu Karuppan*, (1946) ILR Mad 858.
9. *Virupakshappa Malleshappa Sankalpur v. Akkamaha Devi*, (2002) 1 HLR 703 (Kant), AIR 2002 Kant 83 .
10. *Veerayya v. Rama Rao*, 1969 Mad LR 101 (SC).
11. *Benaras Bank v. Hari Narain*, AIR 1932 PC 182 .
12. *Niamat Rai v. Din Dayal*, (1927) 54 1A 211; *Ram Krishna v. Ratan Chand*, AIR 1931 PC 136 ; *Agney Lal Narain v. Agney Lal Munni Lal*, AIR 1951 All 400 [*LNIND 1950 ALL 228*].

13. *Ghasiram v. Otla Gaurai,* AIR 1936 Pat 435 ; *Sheo Ram v. Lutt Ram,* AIR 1937 Lah 6 ; *Arunachalam Chetty v. Velling,* (1914) 27 Mad LJ 631; *Palaniappa v. Harvey,* AIR 1953 Tr & Coch 481.

14. *Ram Krishna v. Ratan Chand*, AIR 1931 PC 136 ; *Ram Prasad v. Bishamber Nath*, AIR 1936 All 607 ; *Nibaran Chandra v. Lalit Mohan*, (1938) ILR 2 Cal 368; *Tulsi Ram v. Anni Bai*, *AIR 1963 Ori 11* [*LNIND 1961 ORI 58*].

15. *Suganchand v. Laduram Balkishandas*, AIR 1941 Nag 105 ; *Ramamohini v. Kasinath*, *AIR 1960 Ori 199* [*LNIND 1960 ORI 58*].

16. *Bhagat Ram Mohan Lal v. Commissioner of Excess Profit Tax*, *Nagpur*, *AIR 1956 SC 374* [*LNIND 1956 SC 13*].

17. *Ramnath v. Chiranji Lal*, (1935) ILR 57 All 605.

18. *Ram Krishna v. Ratan Chand*, AIR 1931 PC 136 .

19. *Damodaran Chetty v. Bansilal*, 1928 Mad 566 .

20. *DA Kalandar Rowther v. Sivapunyam Chettiar*, 1939 Mad 686 .

21. *Venkata Ratham v. Sambasiva Rao,* 1939 Mad 525 .

22. *Benaras Bank v. Hari Narain*, AIR 1932 PC 182 ; *Sanyasi Charan Mandal v. Krishnadham Banerji*, AIR 1922 PC 237 .

23. AIR 1951 All 400 [*LNIND 1950 ALL 228*]; *The Kulitalia Bank Limited v. SV Nagamanickam*, (1956) ILR Mad 307.

24. (1956) ILR Mad 307.

25. *Gordhan Das v. Anand Prasad*, ILR (1942) All 247; *Jagmohan v. Ranchhoddas*, AIR 1946 Nag 84 ; *Nathubhai v. Chhotubhai*, AIR 1962 Guj 68 [*LNIND 1961 GUJ 37*]; *Nasirabad Urban Co-op Bank v. Gyan Chand*, AIR 1980 Raj 73 .

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CHAPTER 8 ALIENATION OF JOINT FAMILY PROPERTY

INTRODUCTION

Alienation or transfer of property is one of the basic incidents of ownership. The term 'alienation', here, refers to the transfer of property inter vivos, such as by sale, mortgage, gift, licence[1] or even a lease,[2] including a perpetual lease.[3]

Where a property is owned by more than one person, no single person can acquire the power to alienate the whole of it, unless and until other co-owners expressly authorise him to do so.[4] With respect to a joint family property, the Karta is entrusted with its management. However, he does not own the property as a whole, and has an interest in it just like the other coparceners and if all the coparceners give their consent or authorise him to sell the property, he can do so and such a transfer will be binding on the interests of all the members[5] and the purpose of the sale will be immaterial.[6] But in this collective ownership, if one or more of the coparceners withhold their consent, or express their dissent to such alienation, or where coparceners are incapable of giving a valid consent due to minority, there is a collective ownership, though no collective consent to transfer it, and ordinarily, the property cannot be transferred. The predominant reason behind this is, that till the family is joint, its property should not be sold to the detriment of its members, yet at the same time, an absolute denial of permission to the Karta to sell the property or otherwise transfer it, even when the family needs money, can be disadvantageous to the family itself.

The Dharmashastras cautioned against the indiscriminate transfer of joint family property to the detriment of its members, as property is always a security in times of need and it is this need backed authorisation that is reflected in the dictates of the Smritis and the commentaries which empower the Karta to alienate the property, despite the dissent of the other major coparceners or the presence of minor coparceners. Vijananeshwar specifies in Mitakshara,[7] that joint family property can be transferred in three cases:

(i) Apatkale;

(ii) Kutumbarthe; and

(iii) Dharmarthe.

(i) **Apatkale:** Apatkale refers to an emergency faced either by the family together or by one of its members, or with respect to its property. It does not refer to a mere benefit accruing to the family by such transaction. Rather, it is more in the nature of averting a danger, an attempt to avoid a calamity for which money has to be raised. It has been explained in Mitakshara as 'times of distress'. The term 'Apatkale' also suggests that money needs to be procured on an urgent basis. Where it refers to the property, it indicates the transfer as being necessary for its protection, or conservation, and for which, immediate action is to be taken. It is not a mere profitable transaction, but a transfer, which if not effected, may result in loss to the family, to this property or some other property owned by the family.

(ii) **Kutumbarthe:** Kutumbarthe was explained in Mitakshara as meaning, 'benefit of "Kutumb" or family members'. It therefore, permits the transfer of property where the sale proceeds are utilised for the sustenance of the family members, such as for providing for their needs of food, clothing, shelter, education, medical expenses etc.

(iii) **Dharmarthe:** Dharmarthe means 'for pious purposes', i.e., for the performance of indispensable duties, such as obsequies of ancestors. The Shastric law laid down elaborate rituals and religious ceremonies, the performance of some of which were obligatory for a Hindu.

The Dharmashastras therefore, specified three broad categories for which the joint family properties could be sold by the Karta, even without consulting the other coparceners. It is not clear when and how the three categories authorising the sale of property were diluted or expanded, and rephrased as ‘legal necessity, benefit of estate and performance of religious and indispensable duties’.

While setting aside a mortgage bond executed in 1839, by the mother, of the property of her minor son, his lordship Knight Bruce LJ of the Privy Council treated the powers of the mother (guardian) as similar to that of the Karta of a joint family and observed:[8]

> The power of the manager for an infant heir, to charge an estate not his own, is under the Hindu law, a limited and qualified power. It can only be exercised in a case of need or benefit of the estatethe actual pressure on the estatethe danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.

In 1929, the court held[9] that the instances mentioned in the Dharmashastras are not exhaustive but are only illustrative and should be so interpreted as to be conducive to the need of modern life.

It is apparent therefore, that the rephrasing and dilution of the concept must have been a result of the interpretation of these categories by the British Indian courts in light of the needs of the society then. The present categories, as recognised by the courts, are as follows:

(i) Legal necessity[10]

(ii) Benefit of estate

(iii) Performance of religious and indispensable duties

AUTHORISATION FOR ALIENATION

The authorisation for alienation of a joint family property by the Karta, can be either express or judicial. It is an express authorisation when besides the Karta, all the coparceners in the family are major and they all consent to the alienation. Where some coparceners are major and some are minors and the Karta sells it after taking the consent of only the major coparceners, he is not expressly authorised to do so, though this can be of help in filling the gaps to a limited extent, while proving legal necessity.[11] The authorisation is judicial when either the other coparceners do not consent to the alienation or are minors, but the alienation is for one of the three permitted purposes, as aforesaid. Though this authorisation had its origin in the Dharmashastras as expounded by the commentaries, it has been recognised and upheld as valid all along, by the judiciary. The legal empowerment therefore, vests in the Karta, a right to effect a transfer of property if it is for legal necessity,[12] benefit of estate or for performance of religious or indispensable duties.

RIGHTS OF COPARCENERS AGAINST ALIENATION OF JOINT FAMILY PROPERTY BY KARTA

The Karta has a right to manage the joint family affairs and in course of its management, he can also decide whether there exists a need of the family, justifying an alienation of the property, or not; what appropriate action is to be taken for the sustenance of the family members or for the protection and benefit of the property; and to what extent money is to be spent for the performance of religious and indispensable duties. Though normally in a family, a person who sells the property that does not belong to him exclusively, will consult the other co-owners, there is no legal obligation however, on the Karta to either take the consent of the other coparceners or to even communicate his decision to others.

Where the Karta is contemplating the transfer of the joint family property for a permitted purpose, as ascertained by him, the coparceners cannot prevent him from transferring this property by seeking a temporary or permanent injunction from the court.[13] Managing the joint family property is one of the inherent powers of the Karta and even

the court is not empowered to encroach upon this power, unless the validity of the transfer is challenged before it. However, in case of waste or ouster, an injunction can be granted.[14]

Where the coparceners do not consent to the alienation, they have two remedies in the alternative. The first can be exercised by them before the alienation is complete and the other, after its completion. The first remedy is that a coparcener, who does not want to go ahead with the Karta with this intended transfer, can demand his share in the joint family property[15] and cease to be a member of this family. The moment he demands his share with a clear intention that is communicated to the Karta, the Karta becomes incapable of touching his share, as that passes with the adult coparcener, to his family. If he is single, he takes it exclusively as a sole surviving coparcener (for the time being, till a son is born to him) and if he has sons, his branch will take his share collectively, but the Karta will be divested of the power to manage this share. He can exercise the power to transfer only the remaining property, i.e. the original minus the share of the separated member. Even a minor coparcener can demand a partition by instituting a suit in a court through the next friend, but in these cases, whether or not a partition can be effected, would be subject to the outcome of the suit.[16] However, the moment a suit for the partition of the joint family property is instituted in the court, either by a minor or a major coparcener, the alienation of the property (if effected) will be subject to the decision of the court, due to the operation of the doctrine of 'Lis Pendens'.[17]

The second remedy is available where the transfer has been effected. If it has been effected without the consent of the other coparceners, they can challenge the validity of the transfer in a court of law, on the ground that none of the three categories for which the Karta is permitted in law to alienate the property, existed.[18] The court in such cases, will determine whether the Karta was legally authorised to transfer the property or not. Where the court comes to the conclusion that the transfer was valid, it will bind the shares of all the members of the joint family, including the one who impugns the transfer, but where the court decides that the transfer was without judicial or legal authorisation, the transfer would be void and the alienee would be directed to deliver the property back to the joint family.

RIGHT TO CHALLENGE ALIENATION IS NOT OPEN TO NON-COPARCENERS

The validity of an alienation effected by the Karta can be challenged only by the other coparceners who do not give their consent to the alienation. An alienation effected by Karta cannot be challenged by any other member of the family who is not a coparcener. For instance females who are members of the joint family but are not coparceners cannot challenge the validity of the alienation effected by the Karta. In *Ananda Krishna Tate v. Draupadibai Krishna Tate,* [19] an alienation effected at the behest of the joint family was challenged by the mother and the wife of the coparcener. It was held that the mother and the wife do not have the capacity to challenge the alienation as they are not coparceners. They do not have a right by birth in the coparcenary property. They can get a share at the time of the partition if and when it actually takes place but till the family is joint they have a right of maintenance out of the joint family property but cannot acquire an interest in it.

LEGAL NECESSITY

The term 'Legal Necessity' is not present in the religious texts and is of a later origin. Its concept has evolved over time and as illustrated consistently by the court, it has moved beyond the 'Apatkale' and 'Kutumbarthe' specified in the Dharmashastras and what has emerged is a combination of the two.

'Legal Necessity' literally, means any necessity that can be sustained in law or justified in law. With respect to joint family, it means a necessity of the family, with respect to its members and in certain cases, also with respect to its property, that can be justified in law. Thus, where the term 'legal' signifies its justification in law, 'Necessity' connotes the existence of a situation, a need or a purpose that requires money, and that the family does not presently have that kind of money or alternative resources, with which that need can be satisfied. It does not mean an actual compulsion but pressure that is serious and sufficient in law,[20] e.g., the family has to pay debts for which money has to be raised. The pressure of debts is sufficient and it is not necessary that the creditors have either threatened to go to the court or have actually filed a suit in this connection.[21] However, if a decree has been passed by the court, a sale would undoubtedly be justified.[22]

Both purpose and necessity are distinguishable and a transfer in order to be justified, must be backed by a lack of alternate resources, in addition to the presence of a purpose, e.g., the joint family owns considerable financial resources and property. Payment of government dues is an illustration of what can be called a purpose with respect to the property of the family that requires money. But, there is no necessity, as sufficient resources are available from which dues can be paid. The test is what a reasonable, prudent man, entrusted with the welfare of his family and family property, will do. A prudent person should pay the dues or even debts, from his savings rather than from the sale of joint family property,[23] and if that is not possible, from a mortgage rather than a sale, unless the mortgage is at a very high rate of interest.[24] A sale of coparcenary property for inadequate[25] or no consideration[26] cannot be valid, despite legal necessity and would not be binding on the other caparceners.[27] What should be the appropriate course of action to be taken, is an inherent aspect of the management of the joint family property, that is vested in the Karta. Thus, whether the property is to be sold or to be mortgaged,[28] or whether the business is to be closed down or sold off,[29] will be for the Karta to decide, but this decision will be subject to a judicial scrutiny in case of a challenge.[30]

For an alienation to be valid under legal necessity, four things therefore, must be present:

(i) existence of a need or purpose, i.e., a situation with respect to family members or its property that requires money,

(ii) such requirement is for a lawful purpose, i.e., it is not for an immoral, illegal purpose or one which is opposed to public policy,[31]

(iii) the family does not posses monetary or alternative resources from which the requirement can be met, and

(iv) the course of action taken by the Karta is such as an ordinary prudent person will take with respect to his property.

Instances of Legal Necessity

An exhaustive enumeration of the purposes covered under legal necessity is not possible. However, it would include the following, for which the Karta, exercising his discretion as a prudent person, can alienate the joint family property:

(i) for providing for food, clothing and shelter to his family members;

(ii) for the education of family members;[32]

(iii) for general maintenance;[33]

(iv) for defraying marriage expenses of the children,[34] more specifically, unmarried daughters,[35] though it may not include second marriages[36] and marriage of minors;[37]

(v) providing for medical treatment to family members;[38]

(vi) for the establishment of the adoption of a minor son;[39]

(vii) for defending a member of the family,[40] including himself,[41] against serious criminal charges, unless the charge is of murder of a family member;[42]

(viii) for migrating to a new place for better living;[43]

(ix) for the performance of family ceremonies, including the funeral of departed family members,[44] and annual Shraddha;[45]

(x) for the payment of debts due to the family, i.e., antecedent debt,[46] with respect to the family property;

(xi) for the payment of rent or arrears of rent to the landlord;[47]

(xii) for the payment of government revenue[48] or debts payable of family property;

(xiii) for providing for litigation expenses for preserving or recovering the family property;[49]

(xiv) to discharge a mortgage of the family property of either higher value or of special significance to the family;[50]

(xv) to avert a sale or avoid the destruction of whole or part of the property;

(xvi) for maintaining a family estate or garden that is the source of income for the family.[51]

In *Dev Kishan v. Ram Kishan*,[52]the Karta effected a mortgage, a sub-mortgage and a sale of two houses belonging to the joint family, worth around Rs. 8000 to 9000, for a consideration of Rs. 400 to Rs. 900, which according to him, were to be utilised for the marriage of his three minor children. The sale deed was executed on the day the son was getting married. The transfers were held void as opposed to public policy, in view of the Child Marriage Restraint Act, 1929. The court held that even if the amount of money was actually spent on the marriage of such children, who were in the age group of 8–12 years, it cannot be termed as a legal necessity. Secondly, the members of the family were earning and there was no need to sell the family property to raise the money. Thirdly, the transfer was grossly undervalued and if there was a need of money, the transfers should have been effected for an adequate consideration.

In *Arvind v. Anna*,[53] the Karta executed a mortgage of his property, to raise a loan of Rs. 1600. He executed another mortgage of ten items of properties, including the first item of land previously mortgaged, to raise a loan of Rs. 1000 and further executed a simple sub-mortgage of the same properties, for another loan of Rs. 131. All these transactions took place in the years 1933-1934. The first two mortgages were usufructory or possessory mortgages where the possession of the properties was delivered to the mortgagee. The mortgagee then leased these properties back to the family for a stipulated rent, i.e., the mortgagors started living in their own premises but were required to pay rent to the mortgagee. The Karta had three sons, the eldest of whom was a major and the other two were minors. On the death of the Karta, his eldest son became the Karta, and in 1935, he, for himself and as the guardian of his two minor brothers, executed a sale deed of four out of the ten of the mortgaged properties, with the result that the other six items of properties that were also mortgaged, were released from the mortgage and came back to the family. The second brother attained majority in 1946, and the third brother become a major in 1951. In 1953, he filed a suit for himself and his other brother, challenging the validity of the sale deed executed by the Karta, on the ground that it was neither for a legal necessity, nor for the benefit of the estate and therefore, was not binding on them. The value of the land sold was around Rs. 4000, but the sale was effected for Rs. 3000. The verdict of the court that came in 1980, i.e., 45 years after the sale, was in favour of the validity of the sale. According to the court, the consideration was not grossly inadequate, and the sale was for legal necessity as it had the effect of releasing six items of properties from the burden of the mortgage. The family was also relieved from the burden of paying rent to the mortgagee under the lease and all this was for the benefit of the family.

Partial Necessity

The necessity can be of a specific amount of money or of an appropriate estimate. Where the worth of the property to be alienated is of a higher value than that of the necessity, the appropriate action on the part of the Karta would be to either mortgage the property so that the loan for an exact amount can be raised, or to sell a portion of the property to raise an amount closer to the required one. Where the need is for a certain amount, and a higher amount is realised through the mortgage of the property, the excess amount will not bind the non-consenting coparceners.[54] Where the property is sold with an intention that the sale proceeds are to be applied for a legal necessity, but the amount realised is in excess of the requirement and the excess amount is not substantial, but relatively small, the sale would be valid in its entirety.[55]

However, where the excess amount is substantial, the sale would be termed as for ‘partial necessity’ and would be partially valid, consequently, binding the shares of the other coparceners to the extent of the necessity only,[56] e.g., where the property is sold for Rs. 43,500, but the necessity was for Rs. 38,000[57] or where the consideration was Rs. 18,400, but the money used for legal necessity was Rs. 16,400,[58] the sale would be valid. It is necessary to establish in these cases, that the alienee had acted in good faith and after making due inquiries.[59]

Benefit of Family

An alienation for the benefit of the family will be valid provided it is within reasonable limits.[60] A modern extended version of Vijananeshwar’s ‘Kutumbarthe’ will come into force, if it is shown that the transaction was one which was clearly beneficial to the interests of the family as a whole, and the transaction will be held valid.[61]

BENEFIT OF ESTATE

Like legal necessity, the term ‘benefit of estate’ is not mentioned in the Dharmashastras, nor is it capable of a precise definition. As the term indicates, if by the transfer of the joint family property or by its sale proceeds, their property or any other family estate is benefited, the transaction would be for benefit of estate. According to the Privy Council:[62]

> It is impossibleto give a precise definition of it applicable to all cases. The preservation however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions, from injury or deterioration by inundation, these and such like things would obviously be benefits.

‘Benefit’ means an advantage, betterment or to profit. ‘Estate’ literally, means landed property, while personal estate refers to movable property. Since the expression here is referred to and used in connection with joint family property and not personal or individually owned property, ‘estate’ would refer to a joint family landed property. So, a transaction that brings an advantage to the landed property of the family would be covered under the expression ‘benefit of estate’.

Since the expression ‘benefit of estate’ was not found in the Dharmashastras and is of later origin, the early judicial views were influenced by Mitakshara’s ‘Apatkale’ with respect to the property, and permitted transfers that were purely defensive or protective in nature[63] and with the dilution of the concept of Apatkale, ‘benefit of estate’ also gradually included not only defensive transactions, but also alienations that an ordinary prudent man would view as appropriate in the given set of situations.[64] However, having regard to the circumstances within the knowledge of the Karta, at the time when he enters into a transaction for the transfer of the family property, the degree of prudence required from him would be a little greater than that expected of a sole owner of the property.[65]

As aforesaid, the term ‘benefit of estate’, to begin with, covered cases purely of defensive nature, such as to protect it from a threatened danger or destruction. Therefore, the sale of property for the construction of dikes and bunds, to prevent flooding of land, the sale of a house in a dilapidated condition, to prevent it from falling down, more so when the municipality had issued a notice to pull it down, the sale of a portion of property to provide for expenses for defence of property involved in a hostile litigation, would be acts of conservation or protection and would undoubtedly, be covered under the expression ‘benefit of estate’.

Mortgage of property and loan utilised for making additions and improvements to a family house, within reasonable limits, transfer of property to a company with a view to preserve it, sale to reclaim a portion of property to prevent it from being leased to others, or sale of a portion of the property to convert leasehold rights in residence to ownership rights, would be other illustrations of benefit of estate.

Though what transactions would amount to benefit of estate will depend on the facts and circumstances of each case,[66] the following can serve as illustrations:

(i) where the alienation is for a defensive or protective purpose necessary for this, or any other family property;[67] or

(ii) where it brings an advantage or improvement to the family estate;[68] or

(iii) where the transfer, according to the Karta, who acts as a prudent person, will be suitable for the family estate. This transaction would be subject to two important conditions:

  (a) the degree of prudence required from the Karta is higher than the level that is expected of a person when he deals with his exclusive property;[69] and

  (b) how the sale proceeds are to be utilised remains a major factor to be considered. Sale of property to convert it into money simpliciter or to spend it into speculative transactions such as stocks and shares, would not amount to benefit of estate, even if the consideration fetched after the sale of property is in excess of the market value, or where the subsequent utilisation brings a monetary advantage.[70] If the intention was to use the money raised for the purchase of more productive land, but the money was kept in the bank till the transaction was finalised, the sale would be for benefit of estate, even if the money is lost in the bank.[71] Therefore, it must be shown that the sale proceeds are used or are intended to be used to benefit the family property, or the rights of the family members in the property.

Instances of Benefit of Estate

Sale of inconveniently situated, encumbered and unprofitable property and the purchase in its place, of property

that is a sound investment,[72] or sale of property that could not easily be cultivated, for purchase of cultivable land,[73] sale of scattered lands of inferior quality, to purchase better lands[74] or for investment in family business,[75] a mortgage of property so as to use the loan for purchase of a share in the village property, to consolidate the existing share,[76] or to make the family landlords instead of tenants,[77] or for the application of sale proceeds for making additions and improvements in the family home,[78] are illustrations of what may amount to benefit of estate. A gift of a small portion of land to defeat the pre-emption claim of the family property, is also covered under benefit of estate.[79]

A Karta is not empowered to alienate the joint family property, either land or home, to simply purchase another land[80] or property with the loan[81] or sale proceeds, or to pay the premium for the lease of a different property,[82] or solely for pre-empting another property[83] or to defeat a pre-emption suit,[84] or for the purpose of speculative litigation[85] or speculative developments of family estates,[86] or for acquisition of mortgage rights in the property of the brother who has separated from the family,[87] or for subscribing to a chit fund.[88] A permanent lease of land for a fixed rent would not be covered under ‘benefit of estate.[89]

It is solely the prerogative of the Karta, which he has to exercise with due care and diligence, whether to alienate the joint family property or not. Since the utilisation of the amount received on alienation is an important test of whether a transaction would amount to benefit of estate or not, a mere contract to sell the property at a higher rate by the Karta, cannot be enforced in a court of law by the alienee, on the ground that it would be of monetary advantage to the family.[90]

In *Balmukund v. Kamlavati*,[91] a Hindu joint family owned a small portion of a big plot of land owned by the alienee, who approached the Karta for the purchase of the joint family land, and offered him a higher consideration than the market value. Initially, accepting his offer, the Karta accepted the earnest money, but he later failed to execute the sale deed. The alienee filed a suit for specific performance of the contract and the Karta contended that he was not empowered to sell the land as it was neither for legal necessity nor for benefit of estate. The family was in affluent circumstances and there was nothing in evidence to show that the Karta was having any difficulty in managing the property or that the family was incurring a loss in retaining that property. Nor was there any suggestion that he wanted to invest the sale proceeds in a profitable manner. Rather, the Supreme Court observed that there was nothing to suggest that any sale was being contemplated by any consideration of prudence. The Court therefore, held that the contract and the proposed sale was not for benefit of estate and no suit for specific performance of the contract could be decreed.

RELIGIOUS AND INDISPENSABLE DUTIES

This is a modern version of Vijananeshwar’s ‘Dharmarthe’. An illustration of this category mentioned therein was ‘obsequies (funeral rites) of the father or the like’.[92]

The Dharmashastras provided for elaborate rituals and ceremonies to be performed on various occassions in a man’s life, and these rituals constitute an integral part of the life of a Hindu. These rites and ceremonies start even before the birth, continue during the lifetime, and even after the death of family members. Out of such ceremonies that extend from the beginning to beyond the end of life, some are considered indispensable, while others are optional. It is the belief of Hindus that occasions that are either preceded or supplemented with proper rituals, always bring good results, such as peace, harmony and prosperity to the family, its members and even help the departed ancestors to attain salvation. Joint family property can be alienated by the Karta for the performance of indispensable religious and charitable purposes. The term indispensable makes the alienation unavoidable. However, here also, for an alienation to be valid, it must be shown that the family did not possess alternative resources from which money could be raised to spend in these ceremonies. Performance of proper funeral rites, not only of the father, but also of every family member who dies, is one such ceremony. Similarly, the annual ‘Shraddha’ ceremony is so important that under the Hindu calendar, a full fortnight is dedicated to paying homage to the departed ancestors. Property can therefore, be alienated for the performance of Shraddha of an ancestor and for providing feast to the Brahmins in this connection. Property can also be alienated to pay off the debts contracted in the past, for the performance of these ceremonies.

Similarly, a marriage symbolises the starting point of a new stage in the life of a person. It is described as an essential Sanskar and is mandatory for every Hindu. Alienation of a joint family property for the marriage of a coparcener and of unmarried daughters and for the performance of related ceremonies, is covered both under legal

necessity and the performance of indispensable duties.[93] Alienations are also permitted for charitable and pious purposes. However, here the quantum of the property sold is material. The totality of the property can be alienated for a legal necessity or for the performance of indispensable religious ceremonies or where the transaction would be for benefit of estate, but only a small portion of family property can be alienated for pious or charitable purposes. Therefore, a small portion of the property can be gifted for the maintenance or provision of an idol in a public temple[94] or for 'Choultry Satram' or 'Dharamshala',[95] but a gift to a worshipper or 'archaka' of an idol would be void.[96]

Gifts of Love and Affection

'Pious purposes' include only religious and charitable purposes and do not include gifts made out of love and affection.[97] The Karta cannot gift a joint family immovable property to his wife,1[98] including a second wife,2[99] or to a pregnant wife,3[100] an intended wife,4[101] a concubine,5[102] a daughter in law,6[103] or to sons7[104] or to coparceners,8[105] even where it is supported by a renunciation of the Karta's own share, or to a stranger,9[106] or a relative.10[107] The Madras High Court, in a recent decision, has held that a gift of the properties by a coparcener without the consent of others is invalid.11[108]

Gift of Joint Family Property to Daughter

A joint family comprises both male and female members. Coparceners have a right by birth, in the coparcenary property, but females have a right to claim maintenance. Amongst the females, a daughter's place is different from that of the others. She is born in this family, but unlike her brother, she does not get an interest in the coparcenary property and on her marriage, her rights of maintenance end as she ceases to be a member of this family.12[109]A gift of the joint family property to her by the father, therefore, is neither a religious act nor a charitable one, but is in the nature of a contribution of the natal family property to a member of the family with whom the threads of the relation remain intact even after her marriage. A father's powers to make a gift of immovable property to his daughter stem from an express mandate in the Dharmashastras, to give her a share.

Manu says: 13[110]

> To the unmarried daughters by the same mother, let their brother give portions out of their allotments respectively, according to the class of their several mothers. Let each give one-fourth part of their distinct share and those who refuse to give it shall be degraded.

The allotment of a share to the daughters is considered obligatory by Vijananeshwara and his Mitakshara specifically mentions the providing for a share for the sisters, when the father is dead and the brothers partition the property amongst themselves. He says: 14[111]

> The allotment of such a share appears to be indispensable requisite since the refusal of it is pronounced to be a sin.

Katyana also authorises the father to make a gift of immovable property to the daughters, besides a gift of movables, upto the amount of 2,000 phanams a year.15[112]

The author of 'Madhaviya' quotes a text of Brihaspati: 16[113]

> Let him give adequate wealth and a share of land also if he desires.

Devala says: 17[114]

> To maidens should be given a nuptial portion of the father's estate.

The texts therefore, clearly indicate that there was an express recommendation to give property to the daughters at the time of partition or at the time of her marriage. There was also a condemnation for those who refused to follow this dictate. The condemnation of a dereliction from this duty is a clear pointer, that an act done in pursuance to a

duty enjoined by the Dharmashastras can never be void, more so when it has expressly been provided that those who refuse to follow it will be degraded. Four things are noteworthy here, that:

(i) The father, and in his absence, the brothers were under a duty to give a portion of the property to the daughter, either at the time of allotment of the shares, i.e., at the time of partition, or at the time of her marriage.

(ii) It could be one-fourth of the share of each brother or a reasonable portion of the property.

(iii) Since refusal was pronounced to be a sin, it meant that at any time subsequent to the most appropriate occasion to discharge this duty (i.e., at the time of partition or at the time of marriage of the daughter or the sister as the case may be), the father or the brothers could save themselves from this degradation or sin by giving to her a portion of the family property, which in fact, means that property could be given to the married daughter also.

(iv) Since, at the time of partition or subsequent thereto, what she gets is not a share in her own right, but something out of the share of the brother at his instance, it takes the shape of a 'Gift'.

A father's competence to make a gift of a reasonable portion of the joint family property, therefore, cannot be doubted.

Judicial View

Except for a few dissents,18[115] the judiciary upholds the right of the father and brothers, to validly gift a portion of the joint family immovable property to the daughter/sister at the time of her marriage or even afterwards.19[116] A gift by a Hindu father to his daughter, out of the family property, to a reasonable extent, by way of marriage portions is perfectly valid.20[117] Thus, a gift of 8 acres out of the 200 acres held by the joint family, even after 40 years of the marriage of a daughter21[118] or a gift of one-sixth of the total holding of an ancestral immovable property,22[119] is valid. Similarly, where the family possessed considerable ancestral property, a gift of Rs. 20,000 to the daughter, is valid.23[120] The same principle has been extended to assess the powers of a Hindu widow to make a gift to the son in law after two years of marriage. The Supreme Court upheld the validity of such gift and said that it was binding on the reversioners.24[121] Recently, the Supreme Court upheld a gift of one-twentysixth of the joint family property, made in favour of a married daughter, by the father, out of love and affection.

In *R. Kuppayee v. Raja Gounder* 25[122] the father had executed a registered deed of settlement in favour of his married daughter, of immovable properties, and had delivered possession to her, but later, he himself wanted to vitiate the settlement on the ground, that this being a joint family property, he was incapable of making a gift in favour of the daughter and even if he were so capable, the gift was bad as it was not of a small portion. Rejecting both his contentions, and upholding the validity of the gift, the Court observed: 26[123]

> The question as to whether a particular gift is within reasonable limits or not has to be judged according to the status of the family and the extent of the property gifted.

In *Gauramma v*. *Mallappa*,27[124] the Supreme Court, after analysing the various decisions and the Hindu texts, upheld the validity of the gift executed in favour of his daughter by the father. At the time of making of this gift, the father had three wives, one out of whom was pregnant and later gave birth to a son. The court held that the father was competent to make a gift of a reasonable portion of the immovable property to the daughter and summarised the law in this respect as follows:

> The Hindu law texts conferred a right upon a daughter or a sister, as the case may be, to have a share in the family property at the time of partition. That right was lost by efflux of time. But it became crystallised into a moral obligation. The father or his representative can make a valid gift by way of reasonable provision for the maintenance of the daughter, regard being had to the financial and other relevant circumstances of the family. By custom or by convenience, such gifts are made at the time of the marriage, but the right of the father or his representative to make such a gift is not confined to the marriage occasion. It is a moral obligation and it continues to subsist till it is discharged. Marriage is only a customary occasion for such a gift, but the obligation can be discharged at any time, either during the lifetime of the father or thereafter. It is not possible to lay down a hard and fast rule, prescribing the quantitative limits of such a gift, as that would depend on the facts of each case and it can only be decided by the courts, regard being had to the overall picture of the extent of the family estate, the number of daughters to be provided for and other paramount charges and other similar

circumstances.

ALIENATION OF JOINT FAMILY PROPERTY BY FATHER/KARTA IN FAVOUR OF DAUGHTER

Under the law, a Karta can validity sell the joint family property exceeding his own share and including the portion of the dissenting coparceners for a legal necessity, or for benefit of estate or for the performance of certain essential indispensable religious or charitable duties. Where the karta happens to be the father, he has wider powers of alienation. An issue as to whether a father as a karta can sell the joint family property without the consent of his sons in favour of his daughter for the satisfaction of the debts she contracted while looking after him in wake of the neglect of the sons, was the focal point of adjudication in *Sunder Yadav v. Asha Kumari* 28[125]. Here, the father in the capacity of the Karta purchased land. He had two sons and two daughters. In 1976, the father executed a registered sale deed in favour of his wife's brother and another deed of a different property in favour of his daughter. The sons who in pursuance of these sales were dispossessed of the property, challenged the validity of both the sales pleading that the property was the joint family property; they were coparceners and without their consent such sales would be void and would not confer a valid title in favour of either the wife's brother or the daughter. The issue before the Patna High Court was, whether the father who also happens to be the Karta of the joint family, has some special powers to dispose of the joint family property unlike an ordinary Karta of the joint family? Answering the issue in the affirmative, the court held that the manager of a joint Hindu Family has power to alienate for value joint family property so as to bind the interests of both adult and minor coparceners, provided the alienation is made for legal necessity or for the benefit of estate. A manager (not being a father) can alienate even the share of a minor coparcener to satisfy an antecedent debt of the minor's father (or grandfather) when there is no reasonable course open to him. It is not necessary that the express consent of adult members should have been obtained in such cases. With respect to the powers of Karta when he happens to be a father as well, the court noted that a Hindu father as such has special powers of alienating coparcenary property which no other coparcener has. In the exercise of these powers he may make a gift of the ancestral property or may sell or mortgage ancestral property whether movable or immovable including the interest of his son, grandson or great grandson therein for the payment of his own debt, provided the debt was an antecedent debt and was not incurred for immoral or illegal purposes. Thus the powers of an ordinary Karta and Karta who happens to be the father are slightly different. In the present case the court noted that it was in evidence that when the Karta became old, the sons neglected him; did not maintain him and hence he was forced to live with his daughter and for meeting the costs of maintenance and his other necessary requirements including his debts, Karta had to execute the sale deeds in favour of the wife's brother and his daughter. The court said: 29[126]

> The texts of Hindu law is very clear in that regard and provides an obligation upon the sons to maintain the father, specially when the father becomes old and needy, but here it has been found that the sons had neglected their father and failed to discharge their pious obligations due to which the father was forced to live with the daughter, but to pay the debt of his daughter which she incurred in his maintenance he had to sell the suit property as any self respecting person would do. Thus in the circumstances being the Karta, the father was perfectly justified and had full authority to sell the joint family property to the brother of the wife and to his daughter by sale deeds which were also binding upon sons and the purchasers validly acquired full rights, title, interests in the property and accordingly they were holding valid possession.

The court thus held the sales to be valid and alienation within the permissible purposes as legal necessity and presence of antecedent debts was proved by unambiguous evidence.

With the changing times and redefining of equations amongst close family members, property tussles are displaying an ugly side of human behaviour. This greed laced relationship bares an ugly consciousness of the entitlements and evasion of responsibilities making the old in the family extremely vulnerable. In addition the dependency on only the son in a patriarchal society even in presence of a concerned daughters willing to look after the parents in old age brings in the traditional issues of honour and prestige that can hardly be sustained in the materialistic, and pragmatic world of today. The present case shows the courage on part of the father to break the stereotype and compensate the daughter for looking after him in old age and it also shows a judicial sensitivity to the whole issue in upholding the validity of the sale in favour of the daughter. A message that clearly tells the sons that benefits come with duties and failure to discharge the duties may result in forfeiture of the privilege. It is also a clear departure

from the ruling of the Bombay High court in *Jinnappa Mahadevappa v. Chimmava* 30[127], wherein, Rangnekar J. had held that under Mitakshara Hindu law, a father had no right to make a gift even of a small portion of joint Hindu family immovable property in favour of his daughter although it is made on the ground that she looked after him in his old age. The judge had observed:

> Undoubtedly the gift is a small portion of the whole of the property, but if one were to ignore the elementary principles of Hindu law out of one's sympathy with gifts of this nature, it would be difficult to say where the line could be drawn, and it might give rise to difficulties which no attempt could overcome.

In the present case the father had not executed a gift but the alienation of the property was by way of sale. However the consideration for the sale was not adequate but far below what the property could have fetched in the market. In reality it was in lieu of the amount that the daughter had spent on her father. Thus it was akin to compensation. The court observed that even where the consideration was inadequate this alone would not lead to a conclusion with respect to the invalidity of the sale if it was for an authorized purpose, and payment of one's debts was included in legal necessity, hence the sale was justified and was valid.

CHALLENGE TO ALIENATIONS

The title of the coparcenary property is with all the coparceners in a Hindu Joint family and its alienation would be valid only where all the coparceners collectively decide to effect it. Where all the coparceners do not consent to alienation or some are incapable to give consent owing to minority, Karta is empowered to alienate the joint family property even without the consent of any coparcener, but only under certain specified situations such as legal necessity, or for benefit of estate or for the performance of certain indispensable religious or charitable duties. The validity of this alienation can be challenged by any coparcener, in a court of law on the ground that it is not for the permitted purposes and would not be binding on them. This challenge is open to only the coparceners and not to a widow of a coparcener31[128]. However, it is amply clear that one of the undivided coparcener alone cannot alienate the coparcenary property even to the extent of his share even for a permitted purpose as this authority is available only to *Karta*. Such alienation would be void and not binding on the joint family property at all. Thus where the property was situated in the Madhya Bharat erstwhile region32[129] and the parties were governed by the Mitakshara law, a sale deed executed by one of the coparceners with respect to only his share in the undivided coparcenary property without the consent of the other coparceners and without partitioning the property by metes and bounds, was held as void. Similarly, in another case33[130], the owner of the property had a wife, one son and four married daughters. After his death, half of the property was alienated by the son even though he owned only one sixth of the undivided share in the property. The court held that the sale deed would be valid only to the extent of one sixth undivided share of the son.

STATUS OF UNAUTHORISED ALIENATION

An alienation without express authorisation of all the coparceners or where it is outside the three permitted purposes is not void, but merely voidable at the option of the other coparceners who, if major, did not consent to this alienation, or were minors at that time. An adult coparcener who consented to the alienation cannot later challenge its validity. Where the coparceners, though against the alienation, do not express their dissent by challenging it as invalid or by asking for partition and ascertainment of their shares before it is effected, the alienation remains valid.

BURDEN OF PROOF

Where the validity of an alienation of the joint family property is challenged in a court of law, the burden of proving that the Karta had the competency to alienate the property, is on the alienee (*i.e.*, the one in whose favour the transfer has been effected) and not on the Karta, irrespective of the fact that the Karta may be alive. This rule is in

tune with the principle that where a transferee enters into a transaction with a transferor who is not the exclusive owner of the property, but has limited or qualified powers of alienation, the duty is on the transferee to act with caution and due diligence and enter into the transaction only when he satisfies himself after making bonafide inquiries about the transfer being permissible in law. An unauthorised transfer is prejudicial or against the interests of the coparceners and the alienee is seen here as the beneficiary. The possibility of this transfer being challenged in future and being declared invalid by the court is enough for the alienee to make the Karta explain to him, the situation that the family is confronted with and the necessary action that the Karta is contemplating.

Factual Difficulties

(i) Where the alienation by the Karta is challenged as invalid, the alienee has to prove that it was either for legal necessity or for the performance of religious or indispensable duties or was one that would bring benefit to the family estate. These situations that are essentially family matters, if asked to be proved by the alienee, who may be a total stranger, would be virtually asking him to peep into the family affairs of somebody else, which may be very difficult for him, if not impossible.

(ii) The alienee has to not only prove the existence of a purpose, but he also has to show that the family had a necessity to transfer the property,34[131] i.e., he has to show that the family did not possess enough alternative financial resources from which the required money could be raised. Financial affairs are again a private matter of the family and the alienee may have difficulty in proving that.

(iii) The utilisation of the money raised after the transfer is effected, has a strong bearing on the justification of the transfer. The purpose and also the necessity, may co-exist but the misuse of money by the Karta, who is entrusted with the responsibility of looking after the welfare of the family, cannot be ruled out. For example, A Karta has a 20 year old unmarried daughter and the family does not have enough money to bear her marriage expenses. He sells the family property against the wishes of his major sons, and uses the money to pay off his personal debts, contracted for immoral purposes. Once the alienee pays the consideration, even with the knowledge that a legal necessity exists, he can never control the application of the money by the Karta. Therefore, the alienee can neither assess independently, the needs of the family, nor can he control the application of the money that he pays for the property, once he parts with it.

(iv) One of the most important difficulties that an alienee may be confronted with, is the time taken in the adjudication of the disputes. Litigation is very time consuming and with the hierarchy of the courts and the ability of the litigants to pursue the matter to the highest courts, these kind of property related cases may go on in the courts for several years. Meanwhile, the value of the property goes up manifold, in comparison to the appreciation of the consideration or cash that the alienee might have paid towards this property. Where the transaction is declared invalid after around 35–40 years, the consideration plus interest on this money will be much less than the value of the property that the alienee would have to give back to the joint family. For example, in *Arvind v*. *Anna*,35[132] the transaction executed in 1935, was challenged in 1953 and ultimately decided in 1980, i.e., 45 years later than the date of the transfer. The alienee was asked to prove the existence of legal necessity with respect to a transfer that took place 18 years back, at the lower court level. Similarly, in *Ram Sunder v*. *Lachmi Narain*,36[133] the sale was questioned 14 years later.

Though one can hardly sympathise with the alienee where the real owners (coparceners) were deprived of their shares in the property due to an unauthorised transfer by the Karta, yet cases of fraud by the Karta, or of an actual collusion between the family members putting the alienee in difficulties at a later point of time, cannot be ruled out, and to insist upon a strict proof of existence of a purpose, a necessity and a proper application of money etc, by the alienee, can be disadvantageous to his interests, and also against the principles of justice.

Rules Governing Burden of Proof

In order to avoid cases of misuse of these beneficial provisions by the family members, to the disadvantage of the alienee, yet at the same time, without jeopardising the interest of the coparceners, the courts relaxed the rules of burden of proof, making them practical, workable and rationale. The principles laid down by the courts are as follows:

(i) The burden of proving the validity of the alienation is on the alienee.

(ii) The alienee has to show that he had made reasonable and appropriate inquiries with respect to the fact that the alienation was for legal necessity, performance of indispensable religious duties or would have amounted to a benefit to the estate of the joint family and that the Karta had acted in the interest of the family.37[134]

(iii) Since the Karta is not the sole owner of the property and has limited or qualified powers of disposal over the joint family property, the nature of inquiries by the alienee should be such as would be made by a reasonable prudent person, who as a transferee, deals with a transferor having only limited powers of alienation. The transaction should be finalised by the alienee only when he satisfies himself with respect to the competency of the Karta to effect the alienation.

(iv) The alienee has to prove that the necessity existed, that the family did not have alternative resources from where money could be raised and that there was sufficient pressure on the family to sell the property.

(v) Mere recitals in the transfer deed do not prove the validity of the alienation,38[135] but only have the effect of putting the alienee on guard, to probe further into the matter, e.g., a recital in the mortgage deed executed by the Karta may say that the property is mortgaged to use the loan for payment of government dues. Whether these dues exist, whether the family has alternate resources to pay them off or not, and whether the amount of dues is in consonance with the consideration or not, are the facts that must be ascertained by the alienee, from the Karta, the coparceners or from other family members or even through independent means.

(vi) The alienee must show that he had acted honestly and his actions were not mala fide. Where the alienation became unavoidable due to a mismanagement of property by the Karta, the alienee should not be a party to the same.

(vii) The alienee has to prove that he had paid a fair price for the alienation. Where the consideration paid is unreasonably low, the transaction, on the face of it, would not be justified, as a need based transfer can never be for inadequate consideration.

(viii) The alienee is not bound to see the actual application of the money advanced or of the consideration and it is sufficient for him to show that he had became a party to the transfer after making due inquiries. It is in tune with the practical reality that after the payment of consideration, it is impossible for the alienee to control the utilisation of the money.39[136] However, if he contends before the court that he had knowledge of the existence of a purpose and also that the money was used for that purpose, then the burden of proof is on him to show that.40[137]

(ix) A lapse of time does not affect the onus of proof regarding the validity of the alienation, but it may give rise to a presumption of acquiescence or save the alienee from adverse inferences arising from the scanty proof,41[138] which might be offered, on his behalf.

Recitals of Necessity

Recitals of necessity in the transfer deeds executed by the Karta are not conclusive proofs of the existence of necessity justifying the transfer, but are admissible in evidence, and if supplemented with other proof, can be of importance with the passage of time. In the absence of contradictory evidence, their evidentiary value increases and they can be used to fill in the gaps obliterated by time.42[139]

Rate of Interest

The Karta can mortgage the joint family property and raise a loan, on reasonable commercial terms.43[140] Where the alienation is in the nature of a mortgage of the family property and the interest rate charged is very high, not only will the alienee have to show that there was sufficient pressure on the family to mortgage the property, but he can also be called upon to show that the rate of interest charged was reasonable44[141] and not excessive.45[142] The court has the power to reduce the rate of interest if it is unreasonably high, at the same time, maintaining the validity of the transfer.46[143]

FATHER'S POWERS OF ALIENATING THE JOINT FAMILY PROPERTY

As the seniormost male member is the Karta of the family, the father would usually be the Karta of the joint family and his powers of alienating the property would be the same47[144] as discussed above. In addition to that, he can make a gift of a reasonable portion of the property, to his daughter,48[145] and can also sell or mortgage the property for payment of his antecedent49[146] debts (personal), where they were not contracted for an immoral or illegal purpose.50[147] It may be a debt incurred in connection with a trade started by the father51[148] or for constructing a house.52[149]

Where the Karta happens to be not the father but the elder brother, the younger brothers are not bound by the alienation to satisfy his personal debts unless it is for legal necessity or for the benefit of the family.53[150]

Where an alienation by the father is challenged by his sons, on the ground that the debt contracted by the father was for an immoral or illegal purpose, the alienee has to prove that he had acted after making bonafide inquiries and had paid a fair price.54[151] If the alienee proves that he had acted honestly, then it is upon the sons to prove that the debt was contracted for immoral purposes.55[152] They have to show a direct connection between the debt and the immorality, if they set up a plea that the father lived an extravagant or immoral life.56[153]

A Will executed by the father, of the entire joint family properties, including the share of the sons, even post 1956, will be invalid.57[154]

COPARCENER'S POWERS OF ALIENATION

Sole Surviving Coparcener

The ownership of the coparcenary property is with the coparceners, and if there are several coparceners, the whole of the property can be alienated with their consent. This is in consonance with the basic incidents of ownership. Similarly, where there is only one coparcener, he has the freedom to treat the property as his separate property and dispose it of at his pleasure. This power can be curtailed only in some specific situations. Where a female member has a right of maintenance out of this property, the property cannot be sold without securing her maintenance rights, and if there is a necessity, such female can enforce her rights against this property.

Where a sole surviving coparcener alienates the property, such alienation can be challenged by a subsequently born coparcener, provided he was in the womb of his mother at the time of alienation, and not otherwise.

Where a sole surviving coparcener makes a Will of the property, and before his death, i.e., the time when the Will, will become operative, another coparcener comes into existence, the Will, will become invalid as he is no longer a sole surviving coparcener. If at the time of his death he has the same status i.e., of a sole surviving coparcener, the Will, will be valid.

Alienation by a Coparcener of his Undivided Interest in the Coparcenary Property

The interests of every coparcener in the joint family property are that of ownership, possession and alienation, but these interests can only be exercised collectively, as a general rule. This means that unless all coparceners agree (and are also capable of giving the consent i.e., they are major and of sound mind), one coparcener cannot independently sell his individual share.58[155]

It must be remembered that the Dharmashastras cautioned against indiscriminate transfer of the joint family property and empowered the Karta to do it only when the alienation was unavoidable, where, but for this transfer, the interests of the family would have been adversely affected and to protect or benefit the family members or the property itself, the alienation was necessary. The predominant reason for this was that the joint family property was a security for the family in times of need and was necessary for its prosperity, and if there were individual wants, they should be satisfied or met with out of self-acquisitions.

Secondly, a sale of undivided interest in the property to the alienee, who might have been a total stranger, could mean that the stranger may step into the shoes of an undivided coparcener and may claim a collective right of possession, enjoyment, title and alienation with the other members. This would literally lead to a situation where the joint family, in which no person could become a member by agreement or contract, could have total strangers making a back door entry with comparable, collective rights in the property. In the alternative, the members of the joint family would have a partition forced upon them, and the handing over of the alienated share to the alienee would defeat their rights of survivorship. Further, if all the coparceners decide to alienate their undivided shares, it would lead to an automatic disruption of the joint family at the whims and pleasure of individual members, to the detriment of members other than coparceners, whose rights over the property will be adversely affected.

Thirdly, the general rule of inalienability of the coparcenary property was with respect to the coparcener's undivided

interest in the coparcenary property only, and did not prevent the coparcener from selling his share after demarcating it with the help of a partition. Competency to sell necessitates a competency to contract. The general presumption exists (and validly so) that the interests of a minor coparcener will be adequately taken care of by the father. But where a major coparcener, either solely or with his branch, needed money for personal or for his family's purposes, or had a general need, for the satisfaction of which either the Karta was not empowered to alienate the property or refused to do so, the inalienability of his undivided share will not be an impediment, as he can always ask for partition (this being one of the inherent right of a major coparcener), specify or demarcate his share and then alienate it. It was only when he wanted to sell his probable share in the property and at the same time, wanted to remain undivided, that the restriction applied. That however, gave rise to a problem. Where an undivided coparcener incurred a financial liability by taking a loan or otherwise, and had no other property which could be utilised for the satisfaction of this loan or pecuniary liability, he could plead his inability to pay back this financial liability on the ground that the undivided interest could not be alienated. Though nothing would ordinarily prevent him from enforcing a partition and selling his share, or the family could collectively decide to alienate the property to pay off the debt, in absence of such a decision taken either by the coparcener or the Karta, the creditors could be put to a disadvantage. These beneficial provisions that were meant to protect the interests of the family members could be misused or exploited by them to their undue advantage and to the disadvantage of the creditors or third parties.

This rigidity was broken by the courts, initially at the behest of the creditors who wanted repayment of their loan or execution of money decrees obtained by them from the court against the property of the coparcener (borrower), even if it meant an undivided interest in Mitakshara coparcenary. The courts directed that the money decree be enforced against the undivided interest of the coparcener.59[156] Such interest when sold through a court auction, could be purchased by any person. This was the starting point of judicial permissibility of involuntary alienations of the undivided interest of a coparcener, after a certain amount of conflict. The Privy Council observed: 60[157]

> There can be little doubt that all such alienation, whether voluntary or compulsory, or inconsistent with the strict theory of a joint or an undivided Hindu family and the law as established in Madras and Bombay, has been one of gradual growth, founded upon equity, which a purchaser for value has to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition.

The court also noted with approval, that under the Mitakshara Law, there was special emphasis on the payment of debts and therefore, the sanctity that was attached to this obligation enabled them to make a major inroad into the concept of total inalienability of an undivided interest of a coparcener.

One of the basic limitations of this rule was that if the coparcener died, either before the creditor could institute a suit in a court of law for getting a money decree passed in his favour, or died during the pendency of the litigation, but before his undivided interest could be attached at the instance of the court, such undivided interest then, could not be attached by the court.61[158] The reason was that on the death of a coparcener, his undivided interest devolved by survivorship, on the surviving coparcener and he left behind nothing that could be attached. However, once the interest was attached by the court, his subsequent death would not result in the application of the doctrine of survivorship on his interest and the same would be sold in execution of the money decree.

Voluntary Alienations

Sale, Mortgage and Lease

In Bombay,62[159] Madhya Pradesh,63[160] Madras,64[161] and Jammu and Kashmir65[162] regions, a coparcener can either sell or mortgage his undivided interest in a Mitakshra coparcenary, without the consent of the other coparceners. However, in the regions of West Bengal,66[163] Uttar Pradesh,67[164] Bihar, Orissa,68[165] Punjab69[166] and Delhi,70[167] a coparcener cannot sell his undivided interest in a Mitakshara coparcenary without the consent of the other coparceners, even where it is in favour of another coparcener. In areas where a coparcener is permitted to alienate his undivided share, a mortgage effected by a coparcener will be valid to the extent of his share and the mortgagee's rights will be unaffected with the deaths and births of other coparceners in the family.71[168]

Alienations without Consideration

Gifts

A coparcener cannot make a valid gift of his undivided share in the coparcenary property, unless it is with the

consent of all the coparceners72[169] or is in favour of all the coparceners to the extent of his total share.73[170] A gift made otherwise, is void74[171] and can be recovered by the coparcener who had earlier executed it. A gift by the father, of a small portion of joint family property, in favour of his daughter,75[172] but not in favour of anyone else, is valid,76[173] but a gift by a coparcener in favour of another coparcener, to the exclusion of others is void.77[174] There has not been a change in the law relating to gifts of an undivided share in the Mitakshara coparcenary even after the passing of the Hindu Succession Act, 1956, and the same position continues presently.

A gift of the property by a sole surviving coparcener in favour of persons who looked after him is valid.78[175]

Renunciation of Coparcenary Interest

A renunciation is comparable to, but not identical to a gift. It does not amount to an alienation.79[176] A coparcener is empowered to renounce his share in favour of the other coparceners as a whole80[177] and not in favour of some, to the exclusion of others.81[178] Once he renounces his share he remains a member of the family82[179] as before, unless there is an intention to separate, but his interest in the coparcenary property comes to an end. With his renunciation, the shares of the other coparceners fluctuate and increase collectively, as if one member had died.83[180] Therefore, though he is a member of the joint family, he is no longer a coparcener and if a partition of the property takes place, he is not entitled to get a share. Similarly, a son born to him subsequent to such renunciation, will not have a right by birth, in the coparcenary property.84[181]Since a renunciation of the interest in the coparcenary property is not a 'transfer' within the meaning of s. 5 of the Transfer of Property Act, 1882,85[182] no specific formalities are required to effect it,86[183] but it must be strictly construed. Renunciation can be conditional or unconditional. Thus, where a father agreed to renounce his interest in favour of his sons on the condition that they will maintain him, the renunciation is valid.87[184]

Will

Pre-1956 **:** Under the classical Hindu Law, no coparcener, including a father88[185] (except in some situations, a sole surviving coparcener) was empowered to dispose of his undivided share89[186] under a Will,90[187] even with the consent of the other coparceners. The father was permitted to make a gift of a reasonable portion of the coparcenary property, but could not do so under a Will. In fact, testamentary disposition was opposed to the basic incidents of coparcenary, as a Will, if allowed to be validly operative, could have frustrated the application of the doctrine of survivorship. In case of a sole surviving coparcener, a Will could be made, but whether it could be validly operative was to be determined on the date of the death of the sole surviving coparcener. If, at the time of his death, there was no other coparcener in existence (including a coparcener in the womb of his mother), the testamentary disposition was valid. But a Will in case of a subsequently born son,91[188] such as a posthumous son,92[189] or even an adopted son,93[190] was invalid.

Post 1956 **:** The Hindu Succession Act 1956, which primarily deals with succession to the separate property of a Hindu, specifically empowers an undivided coparcener to make a testamentary disposition of his undivided interest in the Mitakshara coparcenary. The expression used in s. 30, 'Notwithstanding anything contained in the Act or in any other law for the time being in force', has an obvious reference and clear intention of abrogating the rule under Hindu law that prohibited a coparcener from making a Will. Therefore, post 1956, any coparcener can make a valid Will with respect to his undivided share in the coparcenary property, in favour of 'anyone'. The class of beneficiaries will not be limited to family members only, as even a stranger can be given the property under a Will. Therefore, presently, there is no limitation on the quantum of the property that can be bequeathed, (the whole of it can go by Will, or a part of it) and no specification with respect to the legatees. It can be given to a coparcener to the exclusion of the others or to all the coparceners, to his sons or to a non-coparcener, to a family member or to a total stranger, to a living person or the interest can be dedicated to a religious or even charitable purpose.

Where a coparcener bequeaths his undivided interest in a Mitakshara coparcenary, on his death, the doctrine of survivorship would no longer apply to his interest. Further, if he has bequeathed his share to a stranger, the latter will step into his shoes and would be entitled to ask for a partition and specification of the share as it stood at the time of the death of the testator (coparcener). Where a coparcener makes a Will of his undivided share, it is not necessary for him to bring it to the knowledge of the Karta or the other members. As a Will is operative only from the death of the testator, the Karta can alienate the interest so bequeathed, during the lifetime of such coparcener, for a legal necessity and a situation may arise that there may not be any property that can go under the Will.

CHALLENGE TO AN UNAUTHORISED ALIENATION

In the states where an undivided coparcener is entitled to alienate his interest in a Mitakshara coparcenary, such alienation cannot be challenged. However, in the states where he is not permitted to do so, any coparcener in existence at the time of the alienation,94[191] or was conceived and subsequently born alive,95[192] can set it aside with the help of the court.

Challenge by a Coparcener Born after Alienation

Since all coparceners have an interest by birth and coparcenary extends to four generations of male members in the family, an unauthorised alienation can be challenged even by a son's son or a son's son's son, who are born after the alienation was effected. But in case the challenge comes from an after born grandson, it is subject to the following rules:

(i) Where the alienation is by the father, in the presence of his son, who ratifies it,96[193] an after born grand son cannot challenge it.

(ii) Where the alienation is by the father, in the presence of his sons, and the sons do not challenge it and lose the right to challenge it by law of limitation, the grandson born after the alienation, cannot challenge it.97[194]

(iii) Where the father alienates the property in the presence of his sons and the sons die during the lifetime of the father, after such alienation is effected, and consequently, the father remains a sole surviving coparcener for some time, and then the grandson is born, such a posthumous grandson cannot challenge the alienation.[195]

(iv) In case of an alienation by the father in the presence of the sons and a grandson being born after the alienation but during the lifetime of the sons, and where the sons neither ratify the alienation nor lose the right to challenge it by law of limitation, an after born grandson can challenge it.[196]

Rights of Purchaser of an Undivided Share

In the case of an involuntary alienation, i.e., in execution of a decree, the sale of the undivided interest of the concerned coparcener is permitted in all regions governed by the Mitakshara Law.1[197] In states which permit a coparcener to voluntarily sell his undivided interest in a Mitakshara coparcenary, the alienation is valid to the extent of the alienating coparcener's share only.2[198]

Right to Joint Possession

Rule in Bombay: The purchaser of an undivided interest of the coparcener is entitled to sue for partition of the property and specification of his share. Once the partition is effected, he can get an exclusive possession of the same. In case the partition is not effected and the property is delivered to the purchaser, and he takes the possession, the other coparceners are entitled to have joint possession with him,3[199] or they can file a suit for the recovery of possession from him.4[200] In the latter case, the discretion will be with the courts to either pass an order for evicting the purchaser (which they would normally do if the purchaser was a stranger to the family), or allow him to retain the joint possession until a partition takes place, as a tenant-in-common, in accordance with the facts and circumstances of the case.5[201] Where the purchaser was a relative and had been in possession of the property for a long time, the court may pass an order for joint possession, rather than an eviction order.6[202] Where the non-alienating coparceners do not want to have joint possession, the remedy is to sue for partition.7[203]

Where the property was in the possession of the coparceners, including the share alienated by one coparcener, and this property has not been partitioned, the purchaser cannot enforce his rights to have joint possession with the other coparceners, and can only sue for a general partition.8[204]

Position in Madras , Uttar Pradesh , West Bengal , Patna , Madhya Pradesh.— Where a coparcener alienates his undivided share in a Mitakshara coparcenary, the alienee gets only an interest to the extent of the coparcener's share as it stood at the time of the alienation. Since he does not have a right to a joint possession of the property with the coparceners,9[205] he is entitled to file a suit for partition,10[206] making all the coparceners defendants, as the executing court has no power to direct a partition.11[207] He can never be given joint possession, nor can he become a tenant in common with the other coparceners, and has merely an equity to enforce his rights by enforcing a

partition. If the possession was delivered to him by the alienating coparcener, he can be ejected at the instance of the non-alienating coparceners.

Where the coparcener alienates more than what would have been his share in the coparcenary property and the purchaser claims the total property, including the share of the non-alienating coparcener, the court will only allow him the specification of the share to the extent of the alienating coparcener's interest and nothing beyond that would be given to him.12[208] The court can, however, confirm the possession of the coparcener with respect to the remaining property, at the same time. The purchaser therefore, does not have a right to claim joint possession of the property with the other coparceners and his suit for partition stands on a different footing in comparison to a suit for partition filed by an ordinary coparcener, as it does not affect the status of the rest of the joint family. Where instead of a general undivided interest, the coparcener alienates a specific item out of the coparcenary property or a share in a specific property, the purchaser's remedy will be merely to sue for a general partition and he cannot claim that very property or a share in a specific property.13[209] For example, in a joint family, three coparceners collectively own a house and four pieces of land *A*, *B*, *C* and *D*. One of the coparceners *X*, sells *D*, a land whose value was to the extent of one-third of the total property, to the purchaser. Since the entire interest is undivided, in a suit for partition and handing over of the share to the alienee, he cannot insist on obtaining only land *D*, as which property will go to which coparcener's share can be ascertained only after a partition.

The alienee is permitted to stand in the shoes of the coparcener and is therefore, entitled to only that interest of the coparcener, which the latter had in the property on the date of the alienation. This rule applies irrespective of whether the alienee is a purchaser at a court auction14[210] or in a private sale.15[211] The reason for not permitting him to have joint possession with the coparceners is to avoid the introduction of a stranger into the family, and the reason why he cannot claim a specific item of property or a share in a specific property even when he files a partition suit is, that it was the undivided interest that was alienated to him, and till it is undivided, there is collective ownership and possession and the alienating coparcener himself, is incompetent to claim any specific property or a portion of the property as his exclusive property, as that would go against the basic incident of unity of possession. Even at the time of partition, a specific property or portion cannot be claimed by a coparcener, unless there is a general agreement amongst all the coparceners to that effect. The alienee cannot, therefore, have any better right than what the coparcener had in the property. If the alienee obtains possession of a specific property, the non-alienating coparcener can sue him for a partition of the property, without bringing a general suit for partition, but such a suit has to be a collective suit and a single coparcener cannot individually maintain a suit for a recovery of property to the extent of his share only.16[212]

Equities for Refund of Consideration in an Unauthorised Alienation

Where the joint family property is alienated without express or legal authorisation and the alienee pays a consideration to the transferor, but the alienation is set aside by the court as it was not permitted under Hindu law, the alienee can proceed against the transferor personally, for a refund of the amount that was advanced by him. If he was delivered the possession of the property, the coparceners are entitled to have it back from him. The alienee would be entitled to a refund of the amount by the coparceners, only where he is able to prove (with the burden of proof being on him) that the consideration that he had paid went to the joint family assets17[213] or were used in paying off charges on the property.18[214] Where the coparcener who sued to set aside the sale, had taken a benefit or an advantage out of the money paid by the alienee,19[215] the court will set aside the alienation, subject to the condition that the coparceners refund the money to the alienee. Even in such cases, there is no necessity for such an offer to have been made by the coparceners expressly.20[216] Where, however, the alienee fails to prove that the coparceners had benefited from the consideration that he had paid for the unauthorised alienation, the court will set aside the sale without there being any requirement on the part of the coparceners to refund the amount.

In case the alienation is by the father, and it is set aside at the instance of the son on the ground that it was neither for a legal necessity, nor for any authorised purpose, the court will set aside the transfer without making it obligatory on the son to refund the amount paid by the alienee to the father. However, where the sale is partially valid, it will be set aside on the condition of refund of the excess amount. Where the alienation is by the Karta, not being the father, the Karta alone is liable, and the coparceners are not bound to refund the money paid to him by the alienee, for an unauthorised alienation.

LIMITATION

The limitation period varies depending upon who had alienated the property and the nature of remedy asked for and is as follows:

(i) Where the alienation was made by the father, of either movable or immovable properties, and the son files a suit for a setting aside of the alienation, he can do so within a period of 12 years from the date of alienation.21[217]

(ii) Where immovable properties are alienated by the Karta or by an ordinary coparcener, and the alienee has taken possession of the property, and a coparcener files a suit for recovery of possession, he can do so again, within a period of 12 years.22[218]

(iii) Where the suit is for a declaration that the alienation is void and not binding on the family, the limitation time period is 6 years from the date from which the right to sue arises.23[219]

(iv) Where the challenging coparcener was a minor at the time of alienation, he can file a suit for setting aside such alienation within three years of his attaining majority.24[220] Where there were two minor sons and the father alienated the property in 1935, including their interest and the elder son lost the right to challenge the alienation as he did not file the suit within three years of attaining majority, the younger son's rights were held not to have been affected.25[221] Thus, where the father, having three minor sons, alienated the property in 1935, and his second son attained majority in 1946, and the third son become a major in 1951, his suit to set aside the alienation made by the father, and for recovery of possession, filed in 1953, was within time.26[222]

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1. When the practical effect of the license is the same as that of a lease, the same terms will govern it. *Pheku v. Harish Chandra*, AIR 1953 All 406 [LNIND 1953 ALL 8].

2. *Haribhan v. Hakim*, AIR 1951 Nag 249 ; *Narain Das v. Abhinash Chandar*, AIR 1922 PC 347 .

3. *Basdeo v. Muhammad*, AIR 1928 All 617, 116 IC 491, (1929) 51 All 285.

4. *Muthoora v. Bootan*, (1869) 13 WR 30.

5. *Kandasami v. Somakanta*, (1912) 35 Mad 177*; Shiv Shanker v. Bhola*, (1954) ILR Punj 368; *Mahadu v. Gajara Bai*, AIR 1954 Bom 442 [LNIND 1953 BOM 133](DB).

6. Where it is made without the consent of all the coparceners, when all are major, the alienation so effected would bind the shares of those of the coparceners who had given the consent. In Uttar Pradesh and West Bengal, it will not bind the shares of even the consenting members due to a total incapacity of a coparcener to alienate even his own individual shares.

7. The text of Vyasa cited in Mitakshara is as follows:

Even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress, for the sake of the family and especially for pious purposes., Mitakshara I, i, 28,29, Mit I, 1, 30.

8. *Hunoomanpersaud Pandey v. Mussamat Babooee Munraj Koonweree*, (1854–1857) 6 Moore's Ind. App 393 (PC).

9. *Ragho v. Zaga*, (1929) 53 Bom 419, 426; see also *Baijnath Prasad v. Binda Prasad Singh*, (1938) 17 Pat 549, 561; *Govind Gurunat v. Deekappa Mallappa*, AIR 1938 Bom 388, 390; *Nagindas v. Mahomed*, (1922) 46 Bom 312, 316; *Babulal v. Babulal*, (1941) ILR All 343, 349–350.

10. *Dhiraj Singh v. Satpal Singh,* AIR 2010 (NOC) 526 (All) : 2010 (1) ALJ 431; *Jagir Singh v. Amarjit Singh*, AIR 2004 P&H 51 .

11. *Salamat Khan v. Bhagat*, AIR 1930 All 379 ; *Khushi Ram v. Mehr Chand*, AIR 1950 East Punjab 272.

12. *P. Subramania Chettiar v. Amritham*, 2003 Mad 153 ; *Dhiraj Singh v. Satpal Singh,* AIR 2010 (NOC) 526 (All) : 2010 (1) ALJ 431.

13. *Sunil Kumar v. Ram Prakash*, AIR 1988 SC 576 [LNIND 1988 SC 20].

14. *Sant Singh v. Mata Ram*, (1989) 1 HLR 214 (SC).

15. *Nuniyappa v. Ramaiah*, AIR 1996 Kant 321 [LNIND 1996 KANT 174].

16. *Kakamam Pedasubhaya v. Kakamanu Akkamma*, AIR 1958 SC 1042 [LNIND 1958 SC 98], [1959] SCR 1249 [LNIND 1958 SC 98]; see also *Chelimi Chetty v. Subbamma*, (1917) ILR 41 Mad 442. See *Lalta Prasad v. Sri Mahadeoji Birajman Temple*, (1920) ILR 42 All 461; *Hari Singh v. Pritam Singh*, AIR 1936 Lah 504 ; *Rangasayi v.*

Nagarathanamma, (1933) ILR 57 Mad 95 ; *Mandliprasad v. Ramcharanlal*, (1947) ILR Nag 848; *Ram Sing v. Fakira*, (1939) ILR Bom 256.

17. The Transfer of Property Act, 1882, s. 52.

18. *Kailash Chand v. Bajranglal*, (1997) 1 HLR 342 (Raj).

19. AIR 2010 Bom 83 .

20. *Rani v. Shanta*, *AIR 1971 SC 1028* [*LNIND 1970 SC 419*]; *Santosh Kumar Mullick v. Ganesh Chandra*, (1926) 31 CWN 65; *Ramsumran v. Shyamkumari*, (1922) 49 IA 343; *Lakshmi Singh v. Mahendra*, AIR 1949 All 501 .

21. *Ponneria Rao v. Lakshmi Narasamma*, (1938)1 Mad LJ 154, 157; *Kaihur v. Roop Singh*, (1871) 3 NWP 4; *Nagammal v. Varada Kandar*, (1950) 1 Mad LJ 505*; Vembu Iyer v. Srinivasa Iyengar*, (1912) 23 Mad LJ 638.

22. *Sheoraj v. Nukchedee*, (1870) 14 WR 72; *Parmessur v. Goolbee*, (1869) 11 WR 446.

23. *Bukshum v. Doolhin*, 3 BLR ACJ 423, 12 WR 337.

24. *Muthoora v. Bootun*, 13 WR 30.

25. *Dudhnath v. Satnarainram*, AIR 1966 All 315 [*LNIND 1965 ALL 179*](FB); see also *Prasad v. Govind Swamy Madaliar*, *AIR 1982 SC 84* [*LNIND 1981 SC 455*], 97; *Basavaraj v. Kushal Chand*, AIR 1992 Kant 393 [*LNIND 1992 KANT 10*]; *Helava v. Sesigouda*, *AIR 1960 Mys 231* .

26. *Rajamma v. Dhondura*, AIR 1970 Mys 270, 276, (1970)1 Mys LJ 489.

27. *Kasaram Jagamma v. Jajala Lakshmamma*, (1998) 2 HLR 79 (AP).

28. *Ambalavana v. Gowri*, 1936 Mad 871 ; *Poochmmal v. Chinasamy Thevar*, (1983) Mad LJ 36; *Niamat Rai v. Din Dayal*, (1927) 54 IA 211.

29. *Niamat Rai v. Din Dayal*, (1927) 54 IA 211; *Ambalavana v. Gowri*, 1936 Mad 871 .

30. *Bindyawasini v. Dharmanath*, AIR 1968 Pat 378 .

31. *Maheswar Das v. Sakhi Dei*, *AIR 1978 Ori 84* [*LNIND 1977 ORI 57*]; *Rapasram v. Naraini Devi*, AIR 1972 All 357 ; *Rulia v. Jagdish*, AIR 1973 P&H 335 .

32. *Babaji Behara v Laxmidhar Behara* 2000 AIHC 45 (Ori). It does not however justify a gift of the coparcenary property. See *Lilavatibai v. Takappa*, 1948 Mad 301 .

33. *Vijay Ramraj v. Vijay Ananda*, AIR 1952 All 564 ; *Makundi v. Sarabsukh*, (1884) 6 All 417; *Onkar v. Babu Ram*, AIR 1981 All 128 ; *Janardhan v. Gangadharan*, *AIR 1983 Ker 178* [*LNIND 1982 KER 268*].

34. *Nataraja Dikshitar v. Mahaganapathi*, (1942) 1 Mad LJ 522; *Kameswara Sastri v. Veeracharlu*, (1911) 34 Mad 422; see *Narasimhan v. Venkata Narasimhan*, (1973) AP 162 wherein it was held that the sale for marriage expenses of his son is not valid and can be avoided by the minor son. See also *Bhagirathi v. Jokhu*, (1910) 32 All 575.

35. *Sellappa v. Suppan*, 1937 Mad 496 ; *Indira Bai v. Shyam Sunder*, (1988) 2 HLR 262 (Kant); *Prabhu Dayal v. Ralla Ram*, AIR 1930 Lah 672 .

36. *Patel v. lakkireddigari*, (1947) Mad 379.

37. *Dev Kishan v. Ram Kishan*, AIR 2002 Raj 370 ; *Ramjas Agarwala v. Chand Mandal*, ILR (1937) 2 Cal 764 .

38. *Babaji Behara v. Laxmidhar Behara,* 2000 AIHC 45 (Ori).

39. *Govind Gurunath v. Deekappa Mallappa*, AIR 1938 Bom 388 .

40. *Murli v. Bindeswari*, AIR 1933 Pat 708 ; *Sitla Bakhshsingh v. Ram Raji*, AIR 1933 Oudh 289 ; *Ram Raghubar v. Dip Narain*, (1923) ILR 45 All 311.

41. *Ramalingam v. Muthayan*, (1914) 26 Mad LJ 528; *Dhanukdhari v. Rambirich*, (1922) ILR 1 Pat 171*; Beni Ram v. Man Singh*, (1912) ILR 34 All 4.

42. *Maruthappan v. Niraikulathan*, (1937) ILR Mad 943.

43. *Vanimisatti v. Jayavarapu*, *AIR 1955 AP 105* [*LNIND 1954 AP 44*].

44. *Babaji Behara v. Laxmidhar Behara,* 2000 AIHC 45 (Ori).

45. *Nathuram v. Shona Chhagan*, (1890) ILR 14 Bom 562; *Saravana v. Muttayi*, (1871) 6 Mad HC 371; *Lalla Ganpat v. Tooran Koonwar*, (1871) 16 WR 52; *Bajrangi v. Padarath*, AIR 1930 All 504 ; *Churaman v. Gopi*, (1910) ILR 37 Cal 1.

46. *Mudit v. Ranglal*, (1902) ILR 29 Cal 797; *Garibullah v. Kholak Singh*, (1903) 30 IA 105, 25 All 407; *Poochammal v. Chinnsamy Thevar*, (1983) 1 Mad LJ 36.

47. *Srimohan Jha v. Brij Behary*, (1909) ILR 36 Cal 753. See also *Manrup Mandol v. Badri Sao*, AIR 1942 Pat 383 .

48. *Gharibullah v. Kholak Singh*, (1903) 30 IA 105, 25 All 407; *Sagarsingh v. Mathura Prasad*, AIR 1925 Oudh 750 ; *Venkataraman v. Sivagurunatha*, 1933 Mad 639 ; *Gaya Prasad Tiwary v. Ram Pal Meer*, (1915) 13 All LJ 246; *Muddit v. Ranglal*, (1902) ILR 29 Cal 797; *Mukesh Kumar v. Harbans*, (2000) 1 HLR 95 (SC).

49. *Miller v. Ranga Nath*, (1886) ILR 12 Cal 389; *Kaloo Singh v. Sunderbai*, AIR 1926 Nag 449 .

50. *Arvind and Abasaheb Ganesh Kulkarni v. Anna and Dhanpal Parsia Chougle*, *AIR 1980 SC 645* [*LNIND 1980 SC 30*]; *Lal Bahadur v. Ambika Prasad*, AIR 1925 PC 264 .

51. *Budh Karan Chaukhani v. Thakur Prasad Shah*, (1942) ILR 1 Cal 19.

52. AIR 2002 Raj 370 .

53. *AIR 1980 SC 645* [*LNIND 1980 SC 30*].

54. *Benaras Bank v. Hari Narain*, AIR 1932 PC 182 .

55. *Ram Sunder Lal v. Lachmi Narain*, AIR 1929 PC 143 ; *Radhakrishna Das v. Kaluram*, AIR 1961 SC 574 ; *Niamat Rai v. Din Dayal*, (1927) 54 IA 79; *Gauri Shankar v. Jiwan Singh*, (1927) 53 Mad LJ 786 (PC), 30 Bom LR 64; *Masit Ullah v. Damodar Prasad*, (1926) 53 IA 204, AIR 48 All 518; *Ram Sunder v. Lachmi*, AIR 1929 PC 143, (1929) ILR 51 All 430; *Suraj Bhan Singh v. Sah Chain Sukh*, AIR 1927 PC 244 ; *Jagannath v. Srinath*, (1934) 61 IA 150, AIR 56 All 123; *Hitendranarain v. Sukhebprasad*, (1929) ILR 8 Pat 558; *Subramaniam Asani v. Jaya Devan Nair*, (1985) 1 Mad LJ 189.

56. *Benaras Bank v. Hari Narain*, AIR 1932 PC 182 .

57. *Niamat Rai v. Din Dayal*, (1927) 54 IA 79, AIR 8 Lah 597.

58. *Suraj Bhan Singh v. Sab Chain Sukh*, AIR 1927 PC 244 .

59. *Nagappa v. Brahadambal*, (1936) 2 IA 70, 58 Mad 350 ; *Krishan Das v. Nathuram*, (1927) 54 IA 79, 88.

60. *Vembu v. Srinivasa*, (1912) 23 Mad LJ 638, 642; *Ram Nath v. Chiranji Lal*, (1934) ILR 57 All 605 (FB); *Krishna Chandra Chowdhury v. Ratan Ram Pal*, (1915) 20 CWN 645; *Chhotey Lal v. Dilip Narain*, (1938) 17 Pat 386.

61. *Ram Bilas v. Ramyad*, (1920) 5 PLJ 622; *Sheik Jan v. Bhikoo*, (1928) ILR 7 Pat 798.

62. *KPLS Palanippa Chetty v. Sreemath Deivasikamony*, AIR 1917 PC 33, (1917) 44 IA 147, 39 IC 722, (1917) CLJ 153 (PC).

63. The Allahabad High Court that took this view later, overruled it by its Full Bench judgment in *Jagatnarain v. Mathuradas*, AIR 1929 All 454 (FB).

64. *Balmukund v. Kamlavati*, AIR 1964 SC 1386 .

65. *Jagat Narain v. Mathuradas*, AIR 1929 All 454 (FB).

66. *Medikenduri v. Venkatayya*, 1953 Mad 210 ; *Radha Krishna v. Bhushan Lal*, AIR 1971 J&K 62 ; *Sengoda v. Muthuvellappa*, 1955 Mad 531. See also *A Subramanium Asari v. Jayadeva Nair*, 1985 Mad 372 ; *Pattamal v. Nagarajan*, (1977) 2 Mad LJ 286.

67. *Nagindas v. Mahomed Yusuf*, (1922) 46 Bom 312; *KC Kapoor v. Radhika Devi*, 1982 HLR 10.

68. *Hemraj v. Nathu*, (1935) 59 Bom 525.

69. *Balmukund v. Kamlawati*, AIR 1964 SC 1386 ; *Jagat Narain v. Mathuradas*, AIR 1929 All 454 (FB).

70. *Palaniappa Chetty v. Deivasikamony Pandara*, 44 IA 147.

71. *Jagat Narain v. Mathura Das*, AIR 1928 All 454, (1928) ILR 50 All 969.

72. *Jado Singh v. Nathusing*, (1926) ILR 48 All 592, AIR 1926 All 511, 98 IC 773.

73. *Hemraj v. Nathu*, (1935) ILR 59 Bom 525.

74. *Markandey v. Badan Singh*, AIR 1933 All 568 .

75. *Jagmohan v. Phag Ahir*, AIR 1925 All 61, (1925) 47 All 452, 87 IC 27.

76. *Beni Madho v. Chander Prasad*, AIR 1925 Pat 189, (1924) ILR 3 Pat 451, 83 IC 603; *Sital v. Ajab Jalal Mander*, (1939) Pat 306; *Shaikh Jan v. Bikoo*, AIR 1929 Pat 130, (1928) ILR 7 Pat 789, 116 IC 33.

77. *Baijnath Prasad v. Bindi Prasad*, AIR 1939 Pat 97, (1938) ILR 17 Pat 549.

78. *Ramrichpal v. Bikaner Stores*, *AIR 1966 Raj 187* [*LNIND 1966 RAJ 35*](where money was used to reconstruct a 'kuchha' structure); *Rantnam v. Govindarajulu*, (1879–1881) ILR 2 Mad 339, 341. See also *Gollamudi Shiva Kumari v. Indian Overseas Bank*, *AIR 1978 AP 37* [*LNIND 1977 AP 27*](where the transaction was for the family business of hotel).

79. *Mohib Ali Khan v. Baldeo Prasad*, (1939) ILR All 305.

80. *Nirmal Singh v. Satnam*, AIR 1960 Raj 313 ; *Surendranath Das v. Sudhir Kumar*, AIR 1982 Ori 9 [LNIND 1981 ORI 68].

81. *Ram Bilas v. Ramyad*, AIR 1920 Pat 441 ; *Ramkaran Thakur v. Baldeo Thakur*, AIR 1938 Pat 44 ; (1938) ILR 17 Pat 168; *Sellappa v. Suppan*, 1937 Mad 496, (1937) ILR Mad 906.

82. *Manna Lal v. Karu Singh*, AIR 1919 PC 108, 56 IC 766.

83. *Shankar v. Bechu*, AIR 1925 All 333 ; *Amrej Singh v. Shambhu Singh*, AIR 1932 All 632 ; *Kishen Sahai v. Raghunath*, AIR 1929 All 139 .

84. *Balzor Singh v. Raghunandan Singh*, AIR 1932 All 548 .

85. *Krishna Chandra Choudhri v. Ramratan Pal*, (1915) 20 CWN 645; *Ishani Das v. Ganesh Chandra Rakshit*, (1918) 23 CWN 858, 860.

86. *Bhagwan v. Mahadeo*, (1923) ILR 45 All 39.

87. *Hans Raj v. Khushal Singh*, (1933) ILR 14 Lah 162.

88. *Natesa v. Sahasranama*, (1927) 53 Mad LJ 550; *Narayanan v. Varnasi*, 1947 Mad 76 (FB).

89. *Palaniappa Chetty v. Deivasikamony Pandara*, 44 IA 147.

90. *Balmukund v. Kamlavati*, AIR 1964 SC 1386 .

91. AIR 1964 SC 1386 . See also *Sellappa v. Suppan*, 1937 Mad 496 ; *Re AT Vasudevan*, 1949 Mad 260 ; *Sital Prasad Singh v. Ajab Lal Mander*, ILR 18 Pat 306, AIR 1939 Pat 370 .

92. Mitakshara I, 1,28,29.

93. *Churman v. Gopee*, (1910) ILR 37 Cal 1; *Vaikuntum v. Kallapiran*, (1903) ILR 26 Mad 497 .

94. *Raghunath v. Govind*, (1886) ILR 8 All 76; *Thakurji v. Nanda Ahir*, (1946) ILR All 130, 158; (1921) 43 All 560; *Karam v. Surendar*, AIR 1931 Lah 289 .

95. *Kalu v. Barsu*, (1895) ILR 19 Bom 803; *MSBY Board v. Subramanya*, 1973 Mad 277 .

96. *Gangi Reddi v. Tammi Reddi*, (1927) 54 IA 13.

97. *Perumalakka v. Kumaresan Balakrishnan*, AIR 1967 SC 569 [LNIND 1966 SC 188], [1967] 1 SCR 353 [LNIND 1966 SC 188].

98 *Kandammal v. Kandiah Thevar*, (1977) 1 Mad LJ 121; *Gangadhar Narasing Das v. CIT*, (1986) 162 ITR 320 (Bom); *Ammathayee Ammal v. Kumaresan*, (1967) 1 SCR 353 [LNIND 1966 SC 188].

99 *Sivagana Thevar v. Thevar*, 1961 Mad 356 .

100 *Janakamma v. Commissioner Gift Tax*, (1967) 2 Andh WR 392.

101 *Sivagana Thevar v. Thevar*, 1961 Mad 356 .

102 *Dwarampudi v. Kunuku*, AIR 1980 SC 253 .

103 *Perumalakka v. Kumaresan Balakrishnan*, AIR 1967 SC 569 [LNIND 1966 SC 188], [1967] 1 SCR 353 [LNIND 1966 SC 188].

104 *Ram Rao Singh v. Ajodhya Singh*, AIR 1952 All 83 [LNIND 1951 ALL 112].

105 *Sanika Munda v. Jhablu Munda*, (2002) 1 HLR 372 (Jhar).

106 *Nagarathnamamba v. Ramayya*, (1962) 2 Andh WR 169.

107 *Gauramma Bhratar Chanbasappa Deshmukh v. Mallappa Chanbasappa*, AIR 1964 SC 510 [LNIND 1963 SC 195].

108 *Kanna Gounder v. Arjuna Gounder*, 2003 Mad 157 .

109 The position of a daughter post 2005 has substantially changed in this regard see *infra*.

110 Manu Ch. IX, S. 118.

111 Mitakshara Ch. I, S. 7, pp. 10–11.

112 Madhaviya, pp. 41–42.

113 Vyavahara Mayukhya, p. 93.

114 *Colebrooke's Digest of Hindu Law*, Vol. I, p. 185.

115 *Jinnappa Mahadevappa v. Chimmava*, AIR 1935 Bom 324 (In this case, the Bombay High Court held that under the Mitakshara school of Hindu Law, the father has no right to make a gift of even a small portion of joint family immovable property in favour of his daughter, even though she looked after him in his old age).

116 See *Pugalia Vottorammal v. Vettor Goundan*, (1912) 22 Mad LJ 321 (where the extracts of all the relevant texts have been quoted).

117 *Kudutamma v. Narasimha Charyalu*, 17 Mad LJ 528.

118 *Anivillah Sundaramayya v. Cherla Silamma*, 1911 (21) Mad LJ 695.

119 *Pugalia Vettorammal v. Vettor Goundan*, 1912 (22) Mad LJ 321.

120 *Devalaktuni Sithamahalakshmamma v. Pamulpati Kotayya*, 1936 Mad 325 ; see also *Commissioner of Gift Tax v. Tej Nath*, 1972 Punj LR (74) 1; *Tara Sabuani v. Raghunath* AIR 1963 Ori 59 .

121 *Kamla Devi v. Bachulal Gupta*, *(1957) SCR 452* [*LNIND 1957 SC 5*].

122 *AIR 2004 SC 1284* [*LNIND 2003 SC 867*].

123 *R. Kuppayee v. Raja Gounder*, *AIR 2004 SC 1284* [*LNIND 2003 SC 867*].

124 *Gauramma Bhratar Chanbasappa Deshmukh v. Mallappa Chanbasappa*, *AIR 1964 SC 510* [*LNIND 1963 SC 195*].

125 *AIR 2009 Pat 131* [*LNIND 2009 PAT 260*].

126 *Ibid*, p. 136.

127 (1935) ILR 59.

128 *Subhash Eknathrao Khandekar v. Prayagabai Manohar Biradar*, *AIR 2008 Bom 46* [*LNIND 2007 AUG 257*].

129 *Baital Singh v. Shrilal*, AIR 2008 (NOC) 485 (MP).

130 *Anandi Gangaram Dhuri v. Gangubai Raghunath Ayare*, AIR 2008 NOC 483 (Bom) : 2007 (6) AIR Bom R 799.

131 *Babu Lal v. Satya Narain Prasad*, AIR 1941 All 372 : (1941) ILR All 680; *Ganpat Rao v. Ishwar Singh*, AIR 1938 Nag 816 : (1940) ILR Nag 20.

132 *AIR 1980 SC 645* [*LNIND 1980 SC 30*].

133 *Ram Sunder Lal v. Lachhmi Narain*, AIR 1929 PC 143 .

134 *P. Subramania Chettiar v. Amritham*, 2003 Mad 153 ; *Muthachi v. Kandaswami*, (1945) Mad LJ 207. See also *Bhagwan Singh v. Bishambar Nath*, (1940) ILR All 267 (PC); *Munisami v. Rajagopal*, (1947) 1 Mad LJ 68.

135 *Sreeramulu v. Thandana Krishanayya*, (1942) 2 Mad LJ 452.

136 *Hanooman Persaud v. Babooee*, (1856) 6 MIA 393; *Anant Ram v. Collector of Etah*, AIR 1917 PC 188 ; *Dalibai v. Gopibai*, (1902) ILR 26 Bom 433; *Soorendro v. Nundun*, (1894) 21 WR 196; *Muddun Thakoor v. Kantoo Lall*, (1874) 14 Beng LR 187; *Chintamani v. Satyabadi Kar*, AIR 1923 Pat 71 ; *Bed Nath v. Rani Rajeshwari Devi*, AIR 1937 Ori 406, 168 IC 725, (1938) 13 Luck 357; *Baijnath v. Gokul*, AIR 1924 All 37, (1923) ILR 45 All 718.

137 *Pethu Reddiar v. Kandaswami*, 1950 Mad 560, (1950) 1 Mad LJ 469.

138 *Raveneshwar Prasad Singh v. Chandi Prasad Singh*, (1911) ILR 38 Cal 721.

139 *Chintamanibhatla v. Rani of Wadhwan*, (1919) 47 IA 6; *Thimmanna v. Rama Bhatta*, 1938 Mad 300 ; *Tej Singh v. Hannu Prasad*, AIR 1940 All 433 ; *Venkayamma v. Sitaramaraju*, (1938) 1 Mad LJ 157.

140 *Nazir Begum v. Rao Raghunath Singh*, AIR 1919 PC 12 .

141 *Radhakishun v. Jagsahu*, (1924) 51 IA 278; *Kamta Prasad v. Durga Dut*, AIR 1935 Pat 368 ; *Nazir Begum v. Rao Raghunath Singh*, 46 IA 145; *Sunder Mull v. Satya Kinkar*, (1928) 55 IA 85; *Nand Ram v. Bhupal Singh*, (1912) 34 All 126; *Govind Dani v. Purushottam*, AIR 1943 Pat 430 ; *Mahadeo v. Bissessar*, (1923) ILR 2 Pat 488.

142 *Ambala Vana v. Gowri*, 1936 Mad 871 ; *Kruthivaenti Perraju v. Sitarama*, (1925) 48 Mad LJ 584.

143 *Nazir Begum v. Rao Raghunath Singh*, AIR 1919 PC 12 . See also *Ram Bujhawan Prasad v. Nathu Ram*, AIR 1923 PC 37 (where compound interest at 3% per month was reduced to simple interest at 1%); *Hurro Nath v. Randhir Singh*, (1891) ILR 18 Cal 311; *Ram Khelawan v. Ram Naresh*, AIR 1919 All 268 .

144 See *Mahendra Singh v. Attar Singh*, *AIR 1967 All 488* [*LNIND 1965 ALL 177*]; *Rayakkal v. Subbanna*, (1893) ILR 16 Mad 84 ; *Chinnayya v. Perumal*, (1890) ILR 13 Mad 51 .

145 *Gauramma v. Mallappa*, *AIR 1964 SC 510* [*LNIND 1963 SC 195*]; *Pugalia Vottorammal v. Vettor Gounder*, (1912) 22 Mad LJ 321; *Kudatamma v. Narasimha Charayalu*, 17 Mad LJ 528; *R. Kuppayyee v. Raja Gounder*, MANU/SC/1011/2003, Civil Appeal No. 16757 of 1996, decided on 10/12/03 (SC).

146 *Chet Ram v. Ram Singh*, AIR 1922 PC 247, (1922) 49 IA 228; *Brij Narain Raj v. Mangal Prasad*, AIR 1924 PC 50 ; *Jogi Das v. Ganga Ram*, AIR 1917 PC 76, (1917) 21 CWN 957; *Narain Prasad v. Sarnam Singh*, AIR 1917 PC 41 (1917) 44 IA 163.

147 *Sat Narain v. Sri Kishen Das*, AIR 1936 PC 277, (1936) 63 IA 384.

148 *Bal Rajaram Tukaram v. Maneklal Mansukh Bhai*, AIR 1932 Bom 136, (1932) ILR 56 Bom 36.

149 *Kolasani Sivakumari v. Kolasani Sambasiva Rao,* 2000 AIHC 2512 (AP).

150 *Ibid.*

151 *Jamsetji v. Kashinath*, (1902) ILR 26 Bom 326; *Tolaram v. Veenjaraj*, AIR 1957 Raj 256 ; *Jamma v. Nain Sukh*, (1887) ILR 9 All 493.

152 *Raj Kishore v. Madan Gopal*, (1932) ILR 13 Lah 491, AIR 1932 Lah 636 ; *Balwant Singh v. Clancey*, (1912) 39 IA 109; *Girdhari Lall v. Kantoo Lall*, (1874) 14 Beng LR 187. See also *Luhar Amrit Lal v. Doshi Jayanti Lal*, *(1960) 3 SCR 842* [*LNIND 1960 SC 155*].

153 *Sri Narain v. Lala Raghubans*, (1912) 17 CWN 124; *Chintamanrao v. Kashinath*, (1890) 14 Bom 320; *Ralia Ram v. Balmokand*, AIR 1927 Lah 60 ; *Sita Ram v. Zalim Singh*, (1886) ILR 8 All 231; *Ulfat Rai v. Tej Narain*, AIR 1928 Lah 83 ; *Sydulu v. Venkatesh Warlu*, *AIR 1965 AP 318* [*LNIND 1964 AP 90*]; *Shankar Rao v. Kanta Prasad*, (1946) ILR Nag 844; *Udmiram v. Balram Das*, AIR 1956 Nag 76 .

154 *VK Thmmaiah v. VK Parvathi*, AIR 2003 Kant 245 [*LNIND 2003 KANT 58*].

155 *Pannamma v. Aspinwal*, AIR 1988 Kant 99 .

156 *Dropadi Devi v. Jagdish*, AIR 1989 Raj 110 ; *Deen Dayal v. Jugdeep Narain*, (1877) 4 IA 247.

157 *Suraj Bunsi v. Sheo Persaud*, (1879) 6 IA 88, (1880) ILR 5 Cal 148, 166.

158 *Deen Dayal v. Jugdip Narain*, (1877) 4 IA 247; *Shamughan v. Hagaswami*, (1947) 2 Mad LJ 550; *Dropadi v. Jagdish*, AIR 1989 Raj 110 ; *Suraj Bansi v. Sheo Prasaud*, (1880) 6 IA 88; *Ramjee Rai v. Gopal Ahir*, AIR 1963 Pat 34 .

159 *Pandurang Narayan v. Bhagwandas*, (1920) ILR 44 Bom 341; *Gundayya v. Shriniwas*, AIR 1937 Bom 51 .

160 *Syed Kasam v. Jorawar Singh*, AIR 1922 PC 353, (1922) 49 IA 358; *Bhojraj v. Nathuram*, AIR 1916 Nag 25, (1917) 37 IC 498; *Ramkishan v. Damodar*, AIR 1934 Nag 108 ; *Ganpatrao v. Kanhyalal*, AIR 1934 Nag 132 .

161 *Nallappa Gounder v. Lakshmi*, 1993 Mad 78 ; *Rajah Vasi Reddy v. Lakshminaraimham*, (1940) ILR Mad 913; *Subba v. Venkatrami*, (1915) ILR 38 Mad 1187 ; *Aiyyagari v. Aiyyagari*, (1902) ILR 25 Mad 609 .

162 *Gianchand v. Krishna Singh*, AIR 1978 J&K 16 .

163 *Sadabart Prasad v. Foolbash Koer*, (1869) 3 Beng LR 31 (FB); *Mahubeer Persad v. Ramyad*, (1878) 12 Beng LR 90.

164 *Madho Parshad v. Mehrban Singh*, (1891) 17 IA 194, (1891) ILR 18 Cal 157; *Kali Shankar Nawab Singh*, (1909) ILR 31 All 507; *Shamboo v. Ramdeo*, AIR 1982 All 508 .

165 *Krishnadeb v. Jokhilal*, AIR 1956 Pat 290 ; *Amar Dayal v. Har Persaud*, AIR 1920 Pat 433 ; *Jawla Prasad v. Maharaja Pratap*, AIR 1916 Pat 203 .

166 *Ralia Ram v. Atma Ram*, AIR 1933 Lah 343, (1933) ILR 14 Lah 584.

167 *Puttoo Lal v. Raghubir Prasad*, AIR 1933 Ori 535 ; *Angraj v. Ram Rup*, AIR 1930 Ori 284 .

168 *Ponnamma v. Aspinwal*, AIR 1988 Kant 99 .

169 See *T. Venkatasubramma v. Rattamma*, *AIR 1987 SC 1775* [*LNIND 1987 SC 463*]. See also *Tagore v. Tagore*, (1872) 9 Beng LR 377; *Durai v. Devarajulu*, (1980) 1 Mad LJ 507, (1973) 1 APLJ 139.

170 *Ram Saran v. Prithipal*, *AIR 1950 All 224* [*LNIND 1949 ALL 144*]; *Alluri Venkatapathi v. Dantaluri Venkatnarasimha*, (1936) 63 IA 397; *Indranarayan v. Rupnarayan*, AIR 1965 MP 107 ; *Rattamma v. Subbamma*, *AIR 1973 AP 226* [*LNIND 1972 AP 150*].

171 *Abhinaj Razdan v. Nidhan Chand*, 2000 AIHC 4699 (J&K).

172 *Kuppayye v. Raja Gounder*, MANU/SC/1011/2003; *Gauramma v. Mallappa*, *AIR 1964 SC 510* [*LNIND 1963 SC 195*].

173 *Radhakant Lal v. Nazma Begum*, (1918) ILR 45 Cal 733; *Dwarampudi Nagaratnamba v. Kunuku Ramayya*, *AIR 1968 SC 253* [*LNIND 1967 SC 207*]; *Lila Ram v. Rampyari*, *AIR 1952 Punj 293* .

174 *Bujhawan Singh v. Shyamaderi*, AIR 1964 Pat 301 .

175 *Ashwani Kumar v. Rajinder Kumar,* AIR 2010 HP 44 [LNIND 2009 HP 49].

176 *Subbanna v. Balasubbareddi*, (1945) ILR Mad 610.

177 *Thangavelu Pillai v. Purshottam Reddi*, (1914) 27 Mad LJ 272; *Alluri Venkatapathi v. Dantaluri Venkatanarasimha*, (1937) ILR Mad 1

178 However, in *Anantachari v. Krishnaswami*, (1938) ILR Mad 410, where one of the coparceners had paid the whole of the family debt with his separate property and the other, as a consideration for this, relinquished a part of his share to him at the time of partition, the court held such relinquishment valid on grounds of equity.

179 *Rajagopal v. Pakkiam*, (1968) ILR 2 Mad 138 .

180 *Alluri Venkatapathi Raju v. Venkatanarasimha Raju*, (1937) ILR Mad 1. See also *Anand Rao v. Vasant Rao*, *(1907) 9 Bom LR 595* [*LNIND 1907 BOM 24*] (PC); *Karam Singh v. Surendar Singh*, AIR 1931 Lah 289 ; *Mukund v. Balkrishna*, (1927) 54 IA 413.

181 *K. China Anjaneyulu v. KC Ramaya*, *AIR 1965 AP 177* [*LNIND 1964 AP 149*](FB); *Krishnan Namboodri v. Chena Kesavan*, *AIR 1959 Ker 336* [*LNIND 1959 KER 24*].

182 *Mahalingayya v. Sangayya*, AIR 1943 Bom 397 ; *Indranarayan v. Rupnarayan*, AIR 1965 MP 107 .

183 *C. Anjaneyulu v. C. Ramaiah*, *AIR 1965 AP 177* [*LNIND 1964 AP 149*](FB).

184 *Guruswamy v. Marappa*, 1950 Mad 140 .

185 *Nagalutchmee v. Gopoo Nadaraja*, (1856) 6 MIA 309; *Narottam v. Narsandas*, (1866) 3 Bom HC 6.

186 *Lalta Prasad v. Sri Mahadeoji*, AIR 1920 All 116 ; *Vitla Butten v. Yamenamma*, (1874) 8 Mad HC 6; *Venkatrao v. Venkateshrao*, AIR 1956 AP 1 .

187 *Vaillammal Achi v. Nagappa Chettiar*, *AIR 1967 SC 1153* [*LNIND 1967 SC 17*].

188 *Lalita Devi v. Ishar Das*, AIR 1933 Lah 544 .

189 *Hanmant v. Bhimacharya*, (1888) ILR 12 Bom 105.

190 *Parma Nand v. Shiv Charan Das*, AIR 1921 Lah 147 ; *Rani Raghubans v. Raghuraj Singh*, (1947) ILR All 556; *Venkatanarayana v. Subbammal*, AIR 1915 PC 37 .

191 *Poonam Bala v. Sudarappayyar*, (1897) ILR 20 Mad 354 .

192 *Gauramma v. Mallappa*, *AIR 1964 SC 510* [*LNIND 1963 SC 195*]; *Tirupurasundari v. Katyanaramana*, 1973 Mad 99 ; *Venkata Chenchayya v. Ramalingam*, AIR 1957 AP 744 ; *Sant Ram v. Mohinder Singh*, AIR 1994 HP 109 ; *Ramanna v. Venkata*, (1888) ILR 11 Mad 246 .

193 *Chuttan Lal v. Kallu*, (1911) ILR 33 All 283.

194 *Kumaraswami v. Rajamanikkan*, *AIR 1966 Ker 266* [*LNIND 1965 KER 353*]; *Ranodip Singh v. Parmeshwar Prasad*, AIR 1925 PC 33 ; *Raju Ram v. Luchmun*, (1867) 8 WR 15; *Seshamma v. Venkayya*, *AIR 1957 AP 386* [*LNIND 1956 AP 131*].

195. *Hitendra v. Sukhdeo*, AIR 1929 Pat 360 ; *Viswesvar Rao v. Surya Rao*, 1936 Mad 440 ; *Mukund v. Wazirruddin*, AIR 1933 Lah 359 .

196. *Tulsi Ram v. Babu*, (1911) ILR 33 All 654; *Narayan v. Namdeo*, AIR 1955 Nag 208 ; *Bhup Kumar Balbir Sahai*, AIR 1922 All 342 ; *Bhagwat Prasad v. Bahidar Debichand Bogra*, AIR 1942 Pat 99 .

197 See *Dropadi Devi v. Jagdish*, AIR 1989 Raj 110 .

198 *Vitla Butten v. Yamennamma*, (1874) 8 Mad HC 6; *Patilhari v. Hakam Chand*, (1886) ILR 10 Bom 363

199 *Babaji v. Vasudev*, (1876) ILR 1 Bom 95; *Mahabalya v. Timaya*, (1875) 12 Bom HC 138.

200 See *Dugappa v. Venkataramnaya*, (1881) ILR 5 Bom 493 (The coparceners had filed a suit for the recovery of the entire property that was in possession of the purchaser, but instead of the exclusive possession, the court held that they were entitled to only a joint possession with the purchaser). See also *Nana v. Appa*, (1896) ILR 20 Bom 627; *Patil Hari v. Hakam Chand*, (1886) ILR 10 Bom 363.

201 *Bhau v. Budha*, AIR 1926 Bom 399 .

202 *Babaji v. Vasudev*, (1876) ILR 1 Bom 95; *Achut Sitaram v. Shivaji Rao*, AIR 1937 Bom 244 ; *Kallappa v. Venkatesh*, (1878) ILR 2 Bom 676.

203 *Bhau v. Budha*, AIR 1926 Bom 399 .

204 *Krishanji v. Sitaram*, (1881) ILR 5 Bom 496; *Pandu v. Goma*, AIR 1919 Bom 84 ; *Ishrappa v. Krishna*, AIR 1922 Bom 413 .

205 *Maharaja of Bobbili v. Venkataramanjulu*, 1915 Mad 453 ; *Bhubneshwar Prasad v. Sidheswar*, AIR 1949 Pat 309 ; *Hardi Narain v. Ruder Perkash*, (1883) ILR 10 Cal 626; *Suraj Bansi Koer v. Sheo Persad*, (1880) ILR 5 Cal 148; *Ramkishore v. Jainarayan*, (1913) ILR 40 Cal 966.

206 *Vitla Butten v. Yamenamma*, (1874) 8 Mad HC 6. See also *Satya Narain v. Panalal*, *AIR 1980 Ori 169* [*LNIND 1980 ORI 20*]; *Manikayala v. Narasimha Swami*, *AIR 1966 SC 470* [*LNIND 1965 SC 207*].

207 *Yelumalai v. Srinivasa*, (1906) ILR 29 Mad 294 .

208 *Subba v. Krishnamachari*, 1922 Mad 112 ; *Kandasamy v. Velayutha*, 1926 Mad 774 ; *Deen Dayal v. Jagdeep Narain*, (1877) ILR 3 Cal 198; *Papayamma v. Gopala Krishnamurthy*, *AIR 1969 AP 341* [*LNIND 1968 AP 130*]; *Medni Prasad v. Nand Keshwar*, AIR 1923 Pat 451 .

209 *Madras Hardware Mart v. Hutcheeswaran*, 1997 (1) HLR 569 (Mad).

210 *Medni Prasad v. Nand Keshwar*, AIR 1923 Pat 451 .

211 *Kandasamy v. Velayutha*, 1926 Mad 774 ; *Subba v. Krishnamachari*, 1922 Mad 112 .

212 *Shyam Sunder v. Jagarnath*, AIR 1923 Pat 590 .

213 *Srinivasa Ayengar v. Kuppuswami Ayengar*, (1921) ILR 44 Mad 801 ; *Lingayya v. Punnayya*, (1942) ILR Mad 502.

214 *Permanayakam v. Sivaraman*, (1952) 1 Mad LJ 308 (FB); *Nagappa v. Brahadambal*, (1935) 62 IA 70; *Madhavrao v. Shankar*, AIR 1943 Bom 278 .

215 *Madhoo v. Kolbur*, (1869) BLR Sup Vol. 1018, per Peacock CJ.

216 *Bhagwat Dayal v. Devi Dayal*, (1908) 35 IA 48.

217. The Indian Limitation Act, 1908, art 126.

218 *Ibid*., art. 144; see also *Bunwari Lal v. Daya Sunkar*, (1909) 13 CWN 815.

219 The Indian Limitation Act, 1908, art. 120; see also *Chintaman v. Bhagvan*, AIR 1928 Bom 383 .

220 *Jawahar Singh v. Udai Prakash*, (1926) 53 IA 36; *Dharu Indar Pal Singh v. Badri Das Sohan Lal*, (1943) ILR 25 Lah 287 (FB).

221 *Lal Bahadur v. Ambika Prasad*, (1925) 52 IA 443.

222 *Arvind v. Anna*, *AIR 1980 SC 645* [*LNIND 1980 SC 30*].

CHAPTER 9 SON'S LIABILITY TO PAY FATHER'S DEBTS

INTRODUCTION

Under Hindu law, there is a special emphasis on the payment of one's debt, as necessary for the salvation of the soul. The duty of a person to pay his debts personally and during his lifetime, has a religious connotation. Due to the belief in rebirth, it is said that even though the body is left behind, the soul carries the fruits of the deeds and the burden of the debts into the next life and that decides in what capacity and in which family a person is reborn. Inability to pay a debt or non-payment due to a conscious decision, will see him reborn in the creditor's house as a slave, a servant, a woman or a quadruped.[1] Law relating to debts is therefore, considered so important that it is the first law relating title out of the eighteen titles that are discussed under the Dharmashastras. The consequences of non-payment of debts are inescapable. The only category of persons who can save a debtor from living a whole life of serving the creditor in the event of a rebirth, are his sons, grandsons (sons of sons) and great-grandsons (sons of sons of sons). If they repay the debt of the departed father, the next life of such father would be free from bondage, with his soul liberated from the burden of debts. Therefore, the obligation of the sons to pay the debts of the father is religious and important for according spiritual benefits to the departed father. A text of Narada says:[2]

> The son born should without keeping his self interest in mind, liberate his father from debts earnestly so that he (father) may not go to hell.

Thus, the emphasis was not that the creditor should get his due, but that the father (as he did not pay his debts) should not incur the wrath of a destiny that may see him living the life of bondage and drudgery. The payment of debt was not an obligation to the creditor, it was for the welfare of the father and even of one's own self, a religious or spiritual duty. The Privy Council observed,[3] 'This doctrine was not based on any necessity for the protection of third parties, but was based on the pious obligation of the sons to see their father's debts paid'.

The emphasis on the payment of debts is so strong that according to the dictates of the Dharmashastras, if a man has to pay both his and his father's debts, he must pay the latter first, and as among the father's and the grandfather's, the grandfather's debts should be paid first.[4]

AVYAVAHARIKA DEBTS

Since payment of debt was a religious and spiritual duty, the purpose for which the debt was contracted becomes important. Debts contracted for a purpose that could not be justified in accordance with religious tenets or a person's 'dharma', could not extend the obligation on the son or male descendants, for its repayment. Payment of debts that were 'avyavaharikam' was not the spiritual or religious duty of the sons.

According to Vrihaspati, 'sons shall not be made to pay a debt incurred by their father for spirituous liquor, for idle gifts, for promises made under influence of love or wrath or for suretyship, nor the balance of a fine or toll liquidated in part by their father.'[5]

Other writers express almost identical views. Narada says, 'A father must not pay the debts of his son but a son must pay a debt contracted by the father excepting those debts which have been contracted from love, anger, spirituous liquor, games or bailments.'[6]

Vyasa says, 'the son need not pay in relation to his father's debts, a fine or a balance of a fine or tax or its balance or that which is not proper.'[7]

Therefore, in relation to payment of debts, a particular conduct or behaviour is indicated by the Dharmashastras. They do not lay down a specific conduct, but what they seem to be postulating is that if the purpose for which the debt was contracted by the father, was such as would not set a good example for his progeny or the people amongst whom he was living, rather, such conduct would be considered improper, immoral or illegal, in other words 'avyavaharik' or 'adharmic', it would not bind the sons.

Hindu law writers and the judiciary have tried to convey the meaning of the Sanskrit term 'avyavaharika' and although an exact equivalent in English language that meets the description does not exist, several authors have come up with its explanation or meaning that is close to this term.

Knight J., explains 'avyavaharika' as 'unusual or not sanctioned by law and attributable to his father's fallings, follies or caprices.'[8] Colebrooke describes it as any debt for a cause repugnant to good morals.[9] Sadasiva Iyar J., explains it as a debt which is not supportable as valid by legal arguments and on which no right could be established in a creditor's favour.[10] According to Mookerjee J., it is that which is not lawful, usual or customary.[11] Aparaka explains it as not righteous or proper.[12] The Supreme Court has accepted the definition given by Colebrooke as representing the correct meaning.[13]

Instances of Avyavaharika Debts

'Avyavaharika' does not mean debts contracted due to lack of prudence,[14] lack of good managerial skills or negligence,[15]needless or wasteful litigation, but it means a debt arising out of a contract that is for an immoral or illegal purpose or for an act which in itself, amounts to a criminal offence. The payment of these debts cannot be imposed on the sons. The following have been held as 'avyavaharik' debts by the courts and the son will not be legally bound to repay them:

(i) Money borrowed to pay a fine inflicted for a criminal offence.[16]

(ii) Money to be paid under a decree passed against the father, for the amount he obtained after committing a theft.[17]

(iii) Repayment in case of misappropriation of money by a minor, when the father was its guardian.[18]

(iv) Payment of damages awarded under a decree obtained against the father for defamation, assault, false imprisonment or for malicious prosecution.[19]

(v) The liability to pay the mesne profits and costs awarded against the father for forcibly and wrongfully dispossessing a '*math*' of its properties.[20]

(vi) Debts contracted for meeting the costs of a suit brought by the father dishonestly, on the basis of a fraudulent and collusive deed.[21]

(vii) Loan taken by the father to meet expenses of his vices.[22]

(viii) Criminal misappropriation of goods and money as a cashier,[23] agent,[24] employee,[25] receiver[26] or surety.[27]

(ix) Payment to a Hindu woman as a bribe so as to induce her to take one of his sons in adoption.[28]

(x) Debt taken for paying the expenses for the marriage of the granddaughter of his permanently kept concubine.[29]

(xi) Where the father constructed a dam which resulted in an obstruction to the passage of water to the property of a neighbour, consequent to which he brought a suit and was successful in obtaining a decree for damages, the Bombay High Court held that as in the first place, the father, as 'a decent and respectable man' should not have done it, this act of him was 'avyavaharik' and therefore, the repayment of a loan taken to pay the damages would not be binding on the sons.[30]

(xii) Debts contracted by the father to fight a litigation against the son himself, to defeat the legitimate rights of the sons.[31]

DEBTS THAT ARE NOT 'AVYAVAHARIKA' AND ARE BINDING ON SONS

A just debt, for which a father is competent to alienate family lands, as against his sons, means a debt which is actually due, which is not immoral, illegal or opposed to public policy and which has not been contracted as an act of reckless extravagance or wanton waste and will be binding on the sons.[32] The sons are liable to pay the telephone bills of the father after his demise,[33] the liability of father for mesne profits,[34] or for torts committed by him in relation to the property.[35] Where the debts were contracted by the father to defend himself in a lawsuit for charges of forgery or fabrication,[36] of defamation,[37] or one under the Cattle Trespass Act, 1871,[38] or for a decree passed against him for causing injury to crops by obstruction of a channel,[39] or for debts contracted for business,[40] or where the father was the managing director of a co-operative bank, drawing a salary, and he incurred the liability as a result of negligence in the discharge of his duties, such liability will be binding on the son.[41]

MATERIAL TIME FOR EXAMINING THE NATURE OF DEBT

To examine whether a debt is avyavaharika or not, the relevant time is the inception, when the loan was raised. Where the debt was contracted for an illegal or immoral purpose, payment of it will not be binding on the son. But where receiving money was lawful at the time of the receipt, subsequent commission of an offence by the father will not absolve the son from his obligation to pay the debts.[42]Therefore, where receiving money was not a criminal offence, a subsequent misappropriation by the father would still bind the son, unless the misappropriation was done under circumstances that rendered the act criminal.[43] For example, a father purchases a house subject to a mortgage and later, removes materials, which act diminishes the security. In such cases, a personal decree passed against the father would be binding on the son.[44] Venkata Subbarao J., has propounded the twin rules for determining whether a debt contracted by the father would be binding on the sons.[45] They are as follows:

(i) if the debt, in its inception is not immoral, subsequent dishonesty of the father does not exempt the son, and

(ii) it is not every impropriety or every lapse from right conduct, that stamps the debt as immoral. The son can claim immunity only when the father's conduct is utterly repugnant to good morals, or is grossly unjust or flagrantly dishonest.

These rules were approved by the judicial committee subsequently,[46] and it was observed that, the examination of the nature or character of the debt should be made with reference to the time when it originated, *i.e.*, when the liability was first incurred by the father. If the inception was not tarnished by or tainted with immorality or illegality, it would be binding on the son. Where at the time of partition between two brothers, one brother undertook to hand over a promissory note to the other, in exchange of a loan, but failed to do it deliberately and wrongfully, forcing the other to take the matter to the court, the court held that the former was liable to pay the money due under the promissory note and passed a decree against him for the amount, loss and damages. Such decree was binding on his sons also, as at the time when the amount was taken by him, it was lawful. His subsequent act of wrongfully not returning the money, was an 'illegal and improper act'. The debt, therefore, was binding on his sons.[47] This case has to be distinguished from a situation where the receipt of money was at two stages, one in the official capacity and the other for its application. Where the taking of money was proper, as part of the duty of the father and its withdrawal later by the bank was also part of the official routine, but for specific purposes only, a withdrawal for an authorised purposes would be the time of inception of debt or liability. In *Toshan Pal Singh v. District Judge of Agra*,[48]the father was the secretary of Balwant Rajput High School Committee, Agra. The Government of India had given the school a huge grant for additions and alterations in the school building. The money was to be deposited in a specific bank and could be used for the above purposes only. A part of the money was put in a fixed deposit and some amount was deposited in the father's account, which he misappropriated and then died. The amount was sought to be recovered from the sons, who contended that the act of the father was criminal in nature and the sons cannot be made liable for that. The Privy Council held that the drawing of money for unauthorised purposes, which amounted to a criminal breach of trust under the Indian Penal Code, was not binding on the son. However, there was also a civil liability for the money that was received by the father, but was not accounted for and for which no criminal liability could be attracted. The sons were held liable for paying that amount.

LIABILITY EXTENDS TO GREAT-GRANDSON

The term 'son' here, includes a grandson (son of a son) and a great-grandson (son of a son of a son). In fact, the preference for a son in Hindu society is closely linked to Shastric precepts postulating the ability of sons to relieve the father from the sins of non-payment of monetary and other debts and benefit the father spiritually. These debts bind the three immediate male descendants and the obligation ceases with the fourth descendant. Under the Shastric tenets, the liability of all three differs slightly. The son has to pay the debts as if they were contracted by himself, and therefore, he has to pay both the principal amount as well as the interest on it. The grandson has to pay the principal, and need not pay the interest, but a great-grandson need not pay at all, unless he has assets.[49] The judicial view is that the liability of the grandson and a great-grandson is co-extensive.[50]

The liability to pay the debt of a person is only on his son,[51] and not on any of his other relatives. Even though he dies as an undivided member of a coparcenary, his brother, father, uncle, nephew or any other collateral, is not under an obligation to pay his debts.[52] The liability does not extend even to a wife who receives a share at the time of partition between her husband and her son.[53] When a brother, who is the Karta of the joint family, contracts debts, the doctrine of pious obligations has no application and the other members of the family are bound only when the debt was for legal necessity or for the benefit of the family.[54]

LIABILITY NOT PERSONAL

The liability of the sons, to pay the debts of the father and grandfather, is not a personal liability, but it is a liability that extends to the undivided interest in the coparcenary property.[55] It cannot and does not bind the separate property of the sons. These debts bind only the undivided share of the son in the coparcenary property. Where the debts were contracted after the son had separated himself by a partition, the share so obtained at the time of partition is not liable for payment of the father's debts.

This undivided share can be sold at the instance of the creditor, even to the extent of the whole of the property, but the property is liable only where the debts were contracted for a purpose that was neither immoral, nor illegal. In places where the son does not have a right to seek partition when the father is alive, his interest can be attached and sold even during the lifetime of the father, for the latter's debts.[56] This pious obligation of the son to pay his father's debt, exists despite the fact that the father himself may be alive,[57] but does not extend beyond the undivided share of the son in the property.

WHEN CHARACTER OF DEBTS IMMATERIAL

The pious obligations of the son, grandson and great-grandson, depend upon the nature of the debts contracted by the father. If they were 'avyavaharik', *i.e.*, they were contracted for illegal or immoral purposes or were improper, the sons cannot be compelled to repay them. Even in cases where the debts were 'vyavaharik', and were contracted for a proper purpose, they will be binding only on the undivided share of the sons in the family property and not on the separate property of the sons. However, where the son inherits the property of the father, he can be compelled to pay the debts of the father from out of that property and here, the nature of the debts that the father might have contracted, would be totally immaterial. Even where the debts were tainted with immorality or illegality, the son will be liable, but the liability would extend only upto the assets that he has received from his father and not beyond that. Under Dayabhaga law also, where the son does not have a right by birth and succeeds to the property of the father as an heir, the rule is the same. The character of the debts is immaterial and the son is liable to the extent of the property inherited by him. Similarly, this liability extends to whosoever inherits the property of the person.[58] Where, in the absence of a male issue, a collateral inherits the property, the liability to pay the debts is fastened on him, to the extent of the inherited property, irrespective of whether the debts were for an illegal or an immoral purpose.

SHIFT IN THE APPROACH OF 'DOCTRINE OF PIOUS OBLIGATION'

The Dharmashastra's emphasis on payment of debts of the father by the sons, was to save the soul of the father from evil consequences, and was not directed towards benefiting the creditor or the third parties. But the gradual implementation of this doctrine by the courts, shifted the focus from the benefits that it may accord to the father, to the rights of the creditors to have their money back. Now, if the sons wanted to escape the liability of payment of their father's tainted debts, they had to prove not only that the debt was for immoral, illegal or improper purposes, but also that the creditor or purchaser had knowledge of the fact that it was for such purposes or was 'avyavaharik'. The burden of proof therefore, became very heavy for the son. If he was able to prove that the debt was such that he was under no obligation to pay, he had no choice but to pay it, if the proof that the creditor knew about the character of the debt fell short of what was required by the formal courts. While the original dictates from where the rule was deduced by the courts were silent about the knowledge of the creditors, the imposition on the son to come up with strict proof of the same was the essential feature of the formal and technical adversarial form of litigation practised by the British Indian courts. So, while the payment of 'avyavaharik' debts did not bind the sons under the Dharmashastras, it could nevertheless bind them unless they could come up with strict proof of notice on the part of the creditor or purchaser. The burden of proof, therefore, tilted the balance in favour of the creditor. Pious obligations turned into legal liabilities. In 1874, the court held[59] that the father could sell the joint property of himself and also his sons, for his personal debts, provided they were not for an illegal or immoral purpose. The joint family property could even be sold in execution of a money decree against the father. In one case, two properties belonging to the joint family, that included the share of the son, were sold, one by the father and the other at the instance of the court. The liability had emanated from a bond that was executed by the father when he had borrowed money. He was unable to repay it, and the creditor sued him in the court and obtained a decree. In execution of the money decree, the property was sold. The High Court held that the sale would not bind the half share of the son, as it took place before his birth. The Privy Council however, reversed the decision of the High Court and held that the son, who sued to recover the properties, was not entitled to any relief and observed that:

> Where the alienation has been effected by the father for the payment of his antecedent debt and the said antecedent debt is not shown to be immoral, the son cannot challenge the validity of the alienation.

Here, as the debt was not shown to be immoral, no question arose as to what would be the nature of the onus which the son would have to discharge if the antecedent debt were in fact, shown to be immoral. In *Suraj Bansi Koer v*. *Sheo Proshad* [60] the father executed a mortgage bond for ancestral immovable properties. When he failed to pay, the mortgagee obtained an ex parte decree against him and sought to bring the property to sale. Before he could do that, objections were filed by the infant son and the co-heir, which was converted into a regular suit, in which it was contended that the debts were for an immoral purpose and therefore, not binding on the sons. The purchaser at the court auction, pleaded that the debt was nevertheless binding on the sons. The Privy Council held that the shares of the minors were not bound either by the mortgage deed, or by the decree or execution sale, as the debt was for an immoral purpose, and the purchaser had constructive notice of it, as the suit was pending at the time when he bought the properties. The two propositions that were approved by the Council were as follows:

(i) Where joint ancestral properties have passed out of a joint family, either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debts, his sons, by reason of their duty to pay the father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were contracted for such purposes.

(ii) The purchaser at an execution sale, being a stranger to the suit, if he had no notice that the debts were so contracted, is not bound to make any inquiry beyond what appears on the face of the proceedings.

These propositions were laid down with the object of doing justice to the claims of the *bona fide* alienees and protect them against frivolous or collusive claims made by the debtor's sons, challenging the transactions.

However, Patanjali Sastri J., created a distinction between the rules that are to be applied to alienations made by a Hindu father to satisfy his antecedent debts and the cases where the sons challenge the binding character of the debts which are not antecedent and are in fact, immoral.[61] The court was dealing with a debt contracted by the father on a promissory note executed by him, for payment to his concubine, for meeting the expenses of her granddaughter's marriage. The sons had no difficulty in proving the immoral purpose but it was contended on behalf

of the creditor, that in order to claim that the debt was not binding on the sons, they also have to prove that the creditor had knowledge of the fact that the debt was for an immoral purpose. To support this contention, the creditor relied on the two propositions that were propounded in the *Suraj Bunsi Koer'* s case. The court however, rejected his contention and held that once the sons were successful in proving that the debt was for an immoral purpose, they would not be bound by the same and they need not establish notice on the part of the creditor. But in *Kishan Lal v*. *Garuruddhwaja Prasad Singh*,[62] Burkitt J., observed that the sons will not be liable if they prove that the debt was contracted for an immoral purpose and that the person who advanced the money was aware of the purpose for which it was being borrowed.

The Supreme Court in *Luhar Amrit Lal Nagji v*. *Doshi Jayantilal Jethalal and others*,[63] did not agree with the views of Patanjali Sastri J. on the distinction between a mortgage and a sale and held that not only do the sons have to prove the immoral character of the debt, they also have to prove knowledge on the part of the creditor, about the debt being for an immoral purpose. Here a joint family consisted of the father, his wife and two sons. The father executed a mortgage of the joint family property to raise a loan. He was unable to repay the loan and the mortgagee sued on the bond and brought the property to sale. The sons and the wife of the mortgagor contended that the sale was binding only on the one-fourth share of the mortgagor, and not on their collective three-fourths share, as the debt was contracted for an immoral purpose. They also asked for a permanent injunction restraining the alienee from executing the decree against their shares. The Court held that not only should the sons prove that the debt was contracted for an immoral purpose, but they must also prove that the alienee had notice of the fact that it was indeed for such purposes, and as the sons could only establish the immoral character of the debt, and were not able to establish knowledge on the part of the alienee, they could not escape the liability.

Religious Duty Converted into Strict Secular Liability

The religious dictates postulated that it is the duty of the son to pay the debts contracted by the father, but if they were 'avyavaharik', then he was under no obligation to pay them. However, 'pious' and 'obligation' signify the performance of it by the son through a conscious voluntary decision, taken due to the special relationship of father and son, to spiritually benefit his creator and no outsider (with reference to the family), would have any role to play in it. Although meant to take a preference over the son's other responsibilities and liabilities, it still did leave some choice to the son, but the enforcement of it by courts has totally distorted the original concept. The son has a pious duty to rescue the father from his torments in the next world, but can a creditor force him to relieve his father by dragging him to the court, while the son tries desperately to evade its payment out of his share? Non-payment of debts benefits the creditor also, in his next life, according to religious dictates, as by not coercing the son to pay the debts of his father, the creditor will be born in a family where he will have the debtor as either his servant or slave and would also be entitled to take the benefit of the good deeds of the debtor himself.

Pious or religious obligations, if literally interpreted, would have been confined to a strict framework *i.e.*, where the son wanted to sell the joint family property to pay his father's vyavaharik debts, his male issue's objections to it could be legally sidelined on that ground, but a compulsion at the instance of the court, by alienating the undivided interest on the ground that his father's debts are his liability, is not in the real sense, an enforcement of a pious obligation, but that of a legal duty. A 'pious' or 'religious' obligation comes from within one's self, it is a matter of faith, has a sanctity attached to it, and if it is imposed on a person by a third party by a formal attachment and sale of property, it gains a coercive element that negates the 'pious' or religious elements of this obligation. It also takes away the right of the son to take decisions with respect to when and how to discharge it. Therefore, the main aim of the whole exercise now, is not to benefit the debtor or his soul, but the creditor and the whole theory of pious obligations and spiritual or religious benefit to the father is in, fact, reduced to a secular principle of the creditor getting his due during his lifetime, by extending the liability of payment to the debtor's son. The payment of one's father's debts is no longer a pious obligation, but has been turned into a strict legal liability.

ANTECEDENT DEBT

A debt, the payment of which permits the father to sell the joint family property, must be an antecedent debt. Therefore, it is not every debt that would validate an alienation made by the father. 'Antecedent' means prior in time and an antecedent debt means a debt that is prior in time to the present alienation of property by the father. The alienation should be for the satisfaction or payment of a debt that existed before the above alienation was contemplated by the father, and this alienation should be one that is challenged by the coparceners as not binding on them.[64] An antecedent debt therefore, means a debt that is not only prior in time and independent in origin of

that particular dealing or alienation, such as a mortgage, sale etc., but it must also have been taken by the father himself,[65] and not for an immoral or illegal purpose.

Two conditions are necessary to bind the entire joint family properties, including the share of the sons *viz.*:

(i) the debt should be an antecedent one; and

(ii) it should not have been incurred for an immoral purpose.[66]

A debt is a liquidated or ascertained sum of money. In a suit for a claim of damages for a breach of contract or a tort committed by the father, a decree passed for a specific sum of money would be a judgment debt, which is different from an unliquidated sum of money. An alienation for the payment of an antecedent debt before the due date, is valid.[67]

Where an alienation is sought to be justified on the ground that it was effected for the payment of antecedent debts, there is no need to prove a legal necessity.[68] However, antecedent debts contracted for an immoral purpose by the father, would not empower him to alienate the joint family property. Thus, a loan taken to repay the losses incurred in speculation and gambling cannot be further repaid by the alienation of the joint family property, so as to bind the shares of all the members.

Father's Power to Alienate Property for an Antecedent Debt

As has been explained above, the whole doctrine of a son's pious obligation to pay the debt of his father is based on the precept that the burden of these debts is carried by the soul in the next life, with evil consequences that the debtor must face unless relieved by his sons. When they pay the debts, the father's soul will be liberated from the weight of these debts. Therefore, in order in improve one's life in the next world, it is imperative that a person should not leave the world with a debt left to be repaid. Rather than depending upon his sons, who may have liabilities and responsibilities of their own, it should be his own endeavour to settle all his debts while he is still alive. The father therefore, has special powers to alienate the joint family property to pay his antecedent debts. It must be remembered that the father ordinarily, as the Karta of the family, only manages the property, but the ownership in it vests with all the coparceners. So, as a general rule, until all the coparceners give their consent or the alienation is either for legal necessity, benefit of estate or for performance of a religious or indispensable duty, the father cannot alienate it. An unauthorised alienation can be challenged and avoided at the instance of the non-consenting coparceners, but if the sale of the properties is undertaken to pay the antecedent debts of the father, it is valid and permissible, even to the extent of the whole of the estate.[69] The coparceners can neither prevent the father from effecting such an alienation, nor can they obtain an injunction restraining him from doing so. The only remedy that they have is to ask for a partition and demarcation of their shares. If they separate under a partition, then their shares cannot be touched by the father to repay his own debts.

Burden of Proof

In the first instance, it is the alienee who has to prove that the alienation is for the repayment of an antecedent debt. He also has to show to the court, that he had acted in good faith, with *bona fide* intentions, after making due inquiries and had paid a fair price.[70] Where the sons refute the stand of the alienee and impeach the alienation, they then, have to prove that the debt was for an immoral purpose[71] and the alienee had notice of it. Even if they prove the immorality aspect, but fail to establish notice on the part of the alienee, the alienation would be binding on them.[72] This burden of proving that the father's debt was tainted with immorality, is not discharged by simply showing that the father lived an extravagant life, instead what they have to establish is the direct connection between the debt and the immorality.[73]

In *Brij Narain's case*,[74] a Hindu father executed a mortgage of the joint family properties, to raise a loan, though not for a family necessity. Two years later, he executed a second mortgage on the same property, to a different mortgagee. A year after that, he executed a third mortgage to raise a loan in order to repay with it, the first and the second mortgages. The loan was held binding on the sons' shares as well. The Court laid down the following propositions:

(i) the managing member of a joint undivided estate, cannot alienate or burden the estate *qua* manager, except for purposes of necessity, but

(ii) if he is the father and the other members are the sons, he may, by incurring debts, so long as they are not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for the payment of such debts;

(iii) if he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate;

(iv) an antecedent debt means antecedent in fact, as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached;

(v) there is no rule implying that, this result is affected by the question of whether the father, who contracted the debt or burdens the estate, is alive or dead.

PLACING GREATER POWERS IN THE HANDS OF THE FATHER TO BURDEN THE JOINT FAMILY PROPERTY

The beneficial provisions regarding payment of debts, meant to ensure spiritual salvation of the father, do put a greater power or control in his hands, to burden the joint family property. The father's power to alienate the joint family property to pay his antecedent debts, goes contrary to the whole theory of limited permissibility of alienation of the coparcenary property, to be exercised in special cases only. The Dharmashastras had ordained that the coparcenary property could be alienated in cases of 'Apatkale', 'Kutumbarthe' and 'Dharmarthe' only, it neither envisaged nor permitted the father to use the whole of the property, including the shares of the minors, for his personal benefit. The permissibility of a sale of property for the satisfaction of an antecedent debt, puts not only the management of joint family property, but also its alienation at the disposal of the father. It has been reiterated in a number of cases, that a Hindu father cannot alienate the joint family property to use the money for his personal business. But if he takes a loan to use it for his personal business, and for its repayment, sells the joint family property later, he is competent to do that, as the debt will be both antecedent and not immoral. The joint family property does not belong to him alone, but is owned by all the coparceners, but it can be sold by the father to indirectly gain a personal advantage. The previous loan might have been taken by the father without the knowledge of the other coparceners, but a sale of such coparcener's shares for the satisfaction of that debt, will be binding on them. An unscrupulous father can thus, legally misappropriate the whole of the property for his benefit, to the detriment of the other coparceners.

The only way in which the coparceners can escape the liability is by showing that the debt was tainted with immorality. But for this also, not only do they have to establish a connection between the debt and the purpose, they also have to prove that the creditor had knowledge of the debt being immoral and being contracted for such purpose, otherwise, as the Supreme Court puts it, 'collusive suits by sons whose father had recklessly incurred debts, alleging immorality by the father, would undermine the confidence of lenders'.[75]

The sons cannot prevent their undivided interest in the property from being sold off to pay their father's debt, even where the father borrows heavily for his personal use and fails to pay and dies, as this debt, during the lifetime of the father, could be recovered by the creditor as the former's antecedent debt, and after his death, can be recovered against the interests of the sons, under the theory of 'pious obligation of the sons to pay their father's debts'. Even a separation by the son, in between the time of contracting of the debt and its realisation by sale of the property, cannot leave the interest of the son untouched. Therefore, while the Karta has, in fact, limited or qualified powers of alienation of the joint family property, the father's powers of disposal of the coparcenary property, including the shares of the minor sons, are comparatively very liberal and vast. Though not directly, but indirectly, he can legally alienate the whole of the property by meticulous planning.

IMPORTANT CASES

In *Sidheshwar Mukherjee v. Bhubeneshwar Prasad Narain Singh*,[76] the grandson, in the presence of his father and grandfather, who was the Karta, borrowed a sum of money on the strength of a promissory note. The creditor obtained a money decree against him and executed it against his undivided share and then sold it to the purchaser. The purchaser claimed the share against the joint family and the trial court observed that as the debt was not

incurred for any immoral purposes, the creditor could realise the debt, not merely from the father's undivided coparcenary interest in the joint family property, but against the total property. The Supreme Court held that one coparcener can alienate his undivided interest even without the consent of the other coparceners, and the creditor can obtain a decree against him and attach his share in execution of the same. Secondly, even though such a coparcener is not the Karta, he, in the capacity of a father, can bind his and his son's share for the payment of a debt contracted by him, unless it was for an immoral purpose.

In *Panna Lal v. Naraini*,[77] the father, as the Karta of the joint family, comprising himself and his sons, mortgaged the joint family properties to secure a loan. Three years later, one of the sons filed a suit for partition against the father, and sought separation from him and his minor brothers. The partition was effected by metes and bounds, at the instance of the court. After the partition, the creditor filed a suit seeking a money decree. The father died during the pendency of this litigation, and the suit was compromised by the sons. They however, argued that the debt taken by the father could not be recovered from their shares, as they constituted their separate properties, the creditor having sought the repayment after the partition had taken place. The Supreme Court held that the sons were liable for the discharge of their father's debts since they were not tainted with immorality and were contracted before the partition was effected. It also observed that a partition effected soon after taking debts by the father, has to be examined, as to whether it was effected fraudulently, so as to defeat the rights of the creditors, or was a genuine partition. Even if it was a *bona fide* partition, the sons cannot escape the liability of payment of their father's debts.

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1. The text of Katyana referred in Vyavahara Mayukha V, I, II says *'Udvarikamadaya Swaminay na dadati yah; Satasyah daso bhratya ismepshoorivah jayategrahe'*.
2. '*Atah putrain jaten swarthmusrajya yalatah; ridat pitah mochneeyoh yathah no narake*'.
3. *Sat Narain v. Rai Bahadur Sri Kishan Das*, 63 IA 384, 395.
4. *Chockalingam v. Official Assignee of Madras*, (1943) ILR Mad 603, 612 (PC). See also Brih XI, 48, 49.
5. *'Sourakshikam Vrithdanam kama krodh prati shrutam, prapti bhavyam danda shulka shesham putram na datyate'*.
6. *'No putrarana pita dadyanam dadyat putrast paitrakam; kama krodha suradyute praptibhavja krata dvina.'*
7. *'Danda va dandshesh va shukram Tachcheshmev va, na datavyam tu putrane yachch nee vyavaharikam.'*
8. *Durbar v. Khachar*, (1908) 32 Bom 348.
9. *Colebrooke's Digest of Hindu Law*, Vol. 1, p 211.
10. (1914) ILR 37 Mad 458, 460.
11. *Chhakauri Mahton v. Ganga Prasad*, (1912) ILR 39 Cal 862–868.
12. *Bai Mani v. Usafali*, AIR 1931 Bom 229 .
13. *Luhar Amrit Lal Nagji v. Doshi Jayanti Lal Jetha*, *AIR 1960 SC 964* [*LNIND 1960 SC 155*], *(1960) 3 SCR 842* [*LNIND 1960 SC 155*].
14. *Paryag v. Kasi*, (1909) 14 CWN 659.
15. *Khalilul Rahman v. Govind Persaud*, (1893) ILR 20 Cal 328.
16. *Garuda Sanyasayya v. Nerella Murthenna*, 1919 Mad 943 ; *Said Ahmed v. Raja Barkhandi*, AIR 1932 Oudh 255 ; *Savumian v. Narayan Chetty*, (1914) 15 Mad LT 372.
17. *Pareman Dass v. Bhattu*, (1897) ILR 24 Cal 672.
18. *Sitaram v. Tarachand*, *AIR 1962 Raj 136* [*LNIND 1961 RAJ 67*]; *Alapati Anandrao v. President, Co-operative Credit Society*, 1940 Mad 828 .
19. *Kamalammal v. Senthil*, 2003 Mad 337 ; *Sunder Lal v. Raghunandan*, (1924) ILR 3 Pat 250; *Raghunandan Sahu v. Badri*, (1938) ILR All 330.
20. *Sheodhar v. Sitaram*, AIR 1962 Pat 308 (FB).
21. *Darbeshwari v. Raghunath*, AIR 1949 Pat 515 .
22. *Ningappa Adivivappa Desai v. Madivalappa*, AIR 1991 NOC 40 (Kant).
23. *McDowell v. Raghava Chetty*, (1904) ILR 27 Mad 71 .
24. *Mahabir Prasad v. Basdeo Singh*, (1884) ILR 6 All 234.

25. *Widyavanti v. Jai Dayal*, (1932) ILR 13 Lah 356.
26. *Jagannath v. Jugal Kishore*, (1926) ILR 48 All 9.
27. *Satyacharan v. Satpir*, (1921) 4 PLJ 309.
28. *Sitaram v. Harihar*, (1911) ILR 35 Bom 169.
29. *Lakshmanaswami v. Raghavacharulu*, 1943 Mad 292 .
30. *Durbar Khachar v. Khachar Hassur*, (1908) 32 Bom 348.
31. *M. Veraghaviah v. M. Chini Veeriah*, *AIR 1975 AP 350* [*LNIND 1975 AP 17*].
32. *Kirpal Singh v. Balwant Singh*, (1913) ILR 40 Cal 288 (PC).
33. *S. Santhenaraman v. Telecom District Engineer*, *Thanjavur*, 1999 (1) HLR 331 (Mad).
34. *Peda Venkanna v. Sreenivasa*, (1918) ILR 41 Mad 136 (FB); *Devi Das v. Jada Ram*, (1934) ILR 15 Lah 50; *Bulaqi Das v. Lalchand*, AIR 1934 Lah 865 .
35. *Kashiraim v. Collector 24 parganas*, *AIR 1958 Cal 524* [*LNIND 1955 CAL 86*].
36. *Beni Ram v. Man Singh*, (1912) ILR 34 All 4.
37. *Sumer Singh v. Liladhar*, (1911) ILR 33 All 472.
38. *Hanumat v. Sonadhari*, AIR 1920 Pat 708 .
39. *Chhakauri v. Ganga*, (1912) ILR 39 Cal 802.
40. *V. Murugan v. R. Sankar*, 1999 (2) HLR 586 (Mad).
41. *Jakati v. Borkar*, *AIR 1959 SC 282* [*LNIND 1958 SC 108*].
42. *Alapati Anandrao v. The President Co-operative Credit Society*, *Pedatapatti*, 1940 Mad 828 .
43. *Chhakauri Mahton v. Ganga Prasad*, (1912) ILR 39 Cal 862. See also *Ratna Mudaliar v. Ellammal*, 1929 Mad 792 .
44. *Hiradas Narayandas v. Jagannath*, AIR 1945 Nag 294 .
45. *Ramasubramania v. Sivakami Ammal*, 1925 Mad 841 .
46. *Hemraj v. Khem Chand*, (1943) ILR All 727.
47. *Ibid*.
48. (1934) 61 IA 350.
49. Brih, XI, pp. 48, 49. See also *Chet Ram v. Ram Singh*, AIR 1922 All 247 .
50. *Masit Ullah v. Damodar Prasad*, AIR 1926 PC 105 ; *Sheo Ram v. Durga*, AIR 1928 Ori 378 (FB).
51. Including the grandsons and great grandsons.
52. See *Ram Ratan v. Lachman Das*, (1908) 30 All 460; *Hari Prasad v. Sourendra*, AIR 1922 Pat 450 .
53. *Nathubai v. Chhotubhai*, AIR 1962 Guj 68 [*LNIND 1961 GUJ 37*]. For a contrary view see *Keshav Nandan v. Bank of Bihar*, AIR 1977 Pat 185 .
54. *Kolasani Sivakumari v. Kolasani Sambasiva Rao*, 2000 AIHC 2512 (AP).
55. *Ram Kripal v. Bhura Mal*, AIR 1941 Oudh 62 ; *Lalta Prasad v. Gajadhar*, (1933) ILR 55 All 283; *Venkataramana v. Narayana*, 1937 Mad 556 .
56. *Nihal Chand v. Mohan Lal*, (1932) 13 Lah 455.
57. *Guruswami v. Chinna Mannar*, (1882) ILR 5 Mad 37 .
58. *Karimuddin v. Gobind Krishna*, (1909) 36 IA 138.
59. *Girdharee Lal and Ranjit Pandy v. Kantoo Lall*, (1874) 1 IA 321; *Muddun Thakoor v. Kantoo Lall*, (1874)1 IA 333.
60. (1879) 6 IA 88.
61. *Pulavartni Lakhmanaswami v. Srimat Tirumala Peddinti Tiruvengala Raghavacharyulu*, 1943 Mad 292 .
62. (1899) ILR 21 All 238.
63. *AIR 1960 SC 964* [*LNIND 1960 SC 155*].
64. *Brij Narain Raj v. Mangal Prasad*, AIR 1924 PC 50 ; *Prasad v. Govindasami*, *AIR 1982 SC 84* [*LNIND 1981 SC 455*].

65. *Ganga Saran v. Ganeshi Lal*, AIR 1929 All 255 .

66. *Sat Narain v. Sri Krishen Das*, AIR 1936 PC 277 .

67. *Damodaram v. Bansi Lal*, 1928 Mad 566 .

68. *Ramo Rao v. Hannumantha*, 1930 Mad 326 .

69. *Rajan v. K. Reddiar*, 1975 Mad 117 ; *Brij Narain Raj v. Mangal Prasad*, AIR 1924 PC 50 ; *Jogi Das v. Ganga Ram*, AIR 1917 PC 76 ; *Narain Prasad v. Sornam Singh*, AIR 1917 PC 41 .

70. *Sahib Singh v. Girdhari*, AIR 1924 All 24 ; *Tolaram v. Veenjaraj*, AIR 1957 Raj 256 .

71. *Girdhari Lall v. Kantoo Lall*, (1874) 14 Beng LR 187; *Suraj Bansi Koer v. Sheo Pershad*, (1878) ILR 5 Cal 148.

72. *Suraj Bansi Koer v. Sheo Pershad*, (1874) 14 Beng LR 187.

73. *Sri Narain v. Lala Raghubans*, (1912) 17 CWN 124 PC; *Tulshi Ram v. Bishnath Prasad*, AIR 1927 All 735 .

74. *Brij Narain Rai v. Mangla Prasad*, AIR 1924 PC 50 .

75. *Luhar Amrit Lal Nagji v. Doshi Jayantilal Jethalal*, *AIR 1960 SC 964* [*LNIND 1960 SC 155*].

76. *AIR 1963 SC 487* [*LNIND 1962 SC 48*].

77. *AIR 1952 SC 170* [*LNIND 1952 SC 16*].

CHAPTER 10 PARTITION

PARTITION

'Partition' means to divide into parts or to separate, and under Hindu law, it generally means a division or splitting of a joint Hindu family into smaller, separate and independent units, with conferment of separate status on the undivided coparceners. No partition is possible unless there are at least two coparceners in a joint family, as it is not merely the division of the family, but in essence, it is the disruption of the undivided coparcenary in a joint family. For example, a Hindu joint family comprises the father *F*, his wife *W*, a son *S*, son's wife *SW* and a daughter *D* as illustrated in Fig. 11.1(i).

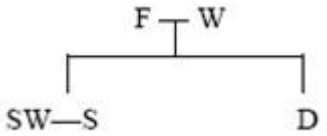

Fig. 11.1(ii)

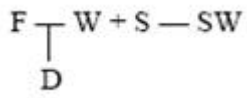

Fig. 11.1(i)

This joint family has two coparceners, father and son[1], and therefore, a partition is possible and when it is effected, this family will break and give way to two families, the first comprising the father, his wife and daughter and the second, that of the son and his wife [see Fig. 11.1(ii)]. The undivided status of both the father and the son will also come to an end. However, in this illustration, if the father dies before a partition is effected, the joint family will not come to an end, but will continue with the mother, son, daughter and son's wife as its members, and then, no partition of this joint family would be possible because there would be only one coparcener, *i.e.,* the son, who would be called a sole surviving coparcener.

WHERE THERE IS ONLY ONE COPARCENER

As aforesaid, for a partition, at least two coparceners must be present, and no partition can take place if there is only one coparcener, in which case, he would be called a sole surviving coparcener. For the continuation of a joint family, however, the presence of two coparceners is not a mandatory condition. A joint family therefore, can comprise a single male member and female members. Since this single male member would be the Karta of this joint family, he would be under an obligation to perform the duties of a Karta, which include managing the joint family affairs, making a provision for the maintenance of the joint family members, providing marriage expenses for the unmarried daughters, and meeting the funeral expenses of the deceased members. He would also be under a duty to represent this joint family in litigation and in all religious and other family ceremonies. Where this single male

coparcener wants to escape the responsibilities of representing the family and providing for their above mentioned needs, he can separate himself from the family, but only after making due provisions for the female members. This is not a partition but would be called a family arrangement, whereby, the single male, by separating himself, can absolve himself from the responsibilities of managing the joint family. A family arrangement is, though recognised as valid, is not the same as a partition, but in fact, enables even a single coparcener to maintain a status distinct from the rest of the joint family members.

DE JURE AND DE FACTO PARTITION

Unless and until a coparcenary within a joint family exists, a partition cannot be effected. Coparcenary has two basic incidents, *viz.*, community of interest and unity of possession. Community of interest indicates that the ownership of the coparcenary property is joint, and unity of possession signifies its common physical enjoyment.

In an undivided coparcenary, all the coparceners have a joint ownership of the coparcenary property and till a partition takes place, no one can specify the exact share that he owns. Further, due to the application of the doctrine of survivorship, the interest keeps on fluctuating with the deaths and births of other coparceners in the family. At any given time, the interest can at the most, be called a probable share. For example, in a coparcenary consisting of a father and two sons, each has a probable one-third (1/3rd) share in the property, and it is not even fixed at one-third, as it may fluctuate with the birth of another son or due to deaths in the family. Where this community of interest is broken or divided, either at the instance of one of the coparceners or by a mutual agreement among all the coparceners and the shares are clearly specified or demarcated, it means that the probable share is now converted into a fixed share. Unity of possession, the other basic incident of a coparcenary, might be retained, but the moment community of interest is broken or specified, in law, a partition has taken place. The extent of ownership and the shares are now fixed, and are no longer probable or fluctuating, with no scope of the application of the doctrine of survivorship. This is called a *de jure* partition or a simple severance of status.

Unity of possession signifies common possession and the enjoyment of property by the coparceners together with all the joint family members, that may continue even after the division of the community of interest or severance of status. The shares might become fixed, but no coparcener can lay his hands on a specific item of property claiming it as falling into his exclusive share, as which part of the property would go to which coparcener, would be clear only when unity of possession is broken and is replaced by exclusive possession. For example, a joint family consists of the father, his son and son’s wife. All of them live in the joint family house. The father and his son effect a severance of status, but continue having common enjoyment of the house. Here, the share of each of them is a fixed half, but which half of the house will fall to their exclusive possession cannot be ascertained. But, because the severance has taken place, the shares are no longer fluctuating. If the son dies, his half share will not go to the father under the doctrine of survivorship, but will be taken by the son’s wife by inheritance. Thus, unity of possession is maintained even after a severance of status has taken place. This breaking up of or division of this unity of possession is effected by an actual physical division of the property and is also called a *de facto* partition or partition by metes and bounds.

A partition, strictly speaking is complete the moment the community of interest is severed or severance in status takes place. The actual physical division of the property by metes and bounds may, or may not follow and the members may continue to hold the property in joint possession as tenants-in-common, without the incidents of fluctuation of interest and application of the doctrine of survivorship.

PROPERTY CAPABLE OF BEING PARTITIONED

A partition refers to a severance of the joint status of coparceners and a division of the coparcenary property only. The separate property of a coparcener cannot be subjected to a partition as, by its very nature, no one else, except the owner, can claim any right over it. Property that is impartible, either because of the application of the rule of primogeniture or otherwise, under a valid custom, cannot be partitioned.

INDIVISIBLE JOINT FAMILY PROPERTY

Besides the fact that the property should be a coparcenary property, for a partition, it is necessary that each and every item is of a nature that it can be partitioned or divided. Joint family property may comprise items that are incapable of division due to their very nature, such as artefacts, books, clothes, arms, ornaments, household appliances and kitchen utensils, furniture, carriage or vehicle, animals, well, staircase, road, pasture land, family idols and shrines etc.

The rule for division of property is, that if it is capable of division, it should be so divided or partitioned but, if in trying to divide it, either its intrinsic value is lost[2] or is substantially diminished,[3] or the property itself would be destroyed, then the following rules should be observed at the time of partition.

Previous Enjoyment Irrelevant

The manner of enjoyment of a property before partition, may not be a conclusive test for its allotment, nor would it have a bearing on its actual division. For example, a family owned a vehicle which was earlier being used by one coparcener. He does not get a preferential right over it at the time of partition just because in the past, it was in his exclusive control. Similarly, if one of the coparceners was occupying one particular portion of the dwelling house, that fact would not give him a better claim over that portion. This rule applies even in those cases where a coparcener substantially improves his portion, but without the consent of, or in absence of an agreement with the other coparceners.

Compulsory Common Enjoyment

Despite a severance in status and effecting a partition by metes and bounds, there might be some property which, by its very nature, cannot be given exclusively to one person, nor can it be sold, as it is essential to the enjoyment by the family members, of their shares, *e.g.*, a well, staircase, road and right of way[4] etc. Even after the partition, these items will have to be shared by the erstwhile coparceners and their families.

Balancing Corresponding Values of Properties

This rule applies to those impartible properties which are usually multiple in number and whose value can reasonably be ascertained at the time of partition and which is not likely to rise substantially in the future, such as household items, kitchen utensils, vehicle or carriages, furniture, books, clothes, ornaments, artefacts etc. In these cases, the items are to be so divided that although each coparcener may not get identical things, but what one takes, its value is comparable to the items that are given to the other coparceners.[5] For example, if one coparcener gets a sofa and a television, the other may get a dining table and a refrigerator.

Money Compensation: Principle of Owelty

Where there is only one impartible property, or these are few in number and the sharers are more, or where no balancing is possible due to the difference in the value of the properties, then such items can be allotted to one person, while the other is given a compensation in terms of its money equivalent.[6] This is also known as principle of owelty or equality of partition.

Sale of Impartible Property and Distribution of Cash Proceeds

Where either no balancing is possible or there is no agreement with respect to receiving money compensation; or where one or more coparceners wants a single item of impartible property, it can be sold and the cash proceeds can be equally shared by all the sharers.

Sharing by Turns

Where the impartible property has a special significance to the family, such as family idols or a place of worship, the members may share them by turns[7] and in the event of a disagreement, the court may direct the eldest in the family to retain it, yet at the same time, with junior members having a liberty to have access to it.[8]

Consequences of Partition

Upon a partition, a Hindu male gets the status of an individual, in comparison to the status that he enjoyed previously, as that of an undivided coparcener. The share that he receives is now a fixed specific share, over which he can exercise exclusive control. It is his separate property with respect to all those from whom he has separated,

but if he has male issues, the share of coparcenary property that he receives on partition, would still be coparcenary property with respect to such male issue, who would have a right of equal ownership in it and would take it by survivorship upon his death. In the absence of a male issue, he would hold the property as a sole surviving coparcener, and on his demise, where he has left behind him, his female dependants, they will take the property as per the laws of inheritance, or the property would go by testamentary disposition, as a sole surviving coparcener is competent to make a Will of his property. The male collaterals from whom he had separated, would have no claim over his property. In case such a person dies as a bachelor and is survived by his father or brothers, from whom he had earlier separated, they would take the property as per the laws of inheritance and not under the doctrine of survivorship.

Adjustment of Claims before Partition of Property

It must be remembered that although the ownership of the coparcenary property is with the coparceners only, the right to possess and enjoy it is held by all the joint family members, including non-coparceners. Where the coparceners are allowed to specify their shares as its owners, the members of the joint family who do not own coparcenary property, but have a right of maintenance out of the joint family funds, a right of residence in the joint family house and a right to enjoy the property till it was common, in their own right, will be left without any means to support themselves. For example, a joint family comprises three brothers and an unmarried sister, and the property that the family owns, consists of three houses and cash savings. Till the family was joint, they used one house as common residence for all the members and the other two houses were given on rent. All the income was brought to a common chest and the elder brother, as the Karta of the family, provided for each person's maintenance. Here, these three brothers, by virtue of being coparceners, would be the owners of the property, while the unmarried sister would have a right of residence, maintenance and even to marriage expenses out of the joint family funds.[9] If, after the partition, each brother divides the entire cash savings and takes a house each, these will then constitute their separate properties, and the sister would be left with no property to even sustain herself. Similar would be the position of a disqualified coparcener. The rule therefore is, that before the coparceners actually effect a division of the property among themselves, a provision must be made for the maintenance and residence of unmarried daughters, female members, and disqualified coparceners. These include, a provision for meeting their funeral expenses,[10] for the payment of the father's debts that are not tainted with immorality,[11] and for paying the expenses of the thread ceremonies of the children.[12] A provision must be made for meeting the marriage expenses of an unmarried sister, who is without a father.[13] All the Smriti texts provide that the brothers must provide for their sisters.[14] The rule is that either they should give one-fourth of their shares to her or provide for her maintenance and marriage expenses.[15] As a male coparcener is entitled to get a share at the time of partition, he has no right to have his marriage expenses paid out of the joint family funds, before a partition is effected.[16] For coparceners whose father is alive, the responsibility for providing their marriage expenses is on their branch.

RULES FOR ACCOUNTING

After the provisions for non-coparceners and certain essential ceremonies have been taken care of, stock of the existing properties has to be taken.[17] Till the family is joint, it is the Karta's responsibility to provide for the maintenance of the different members of the family, as has been explained in the previous chapters. The Karta can also prefer one coparcener of his branch, over another, *i.e.,* he need not be totally impartial. This partiality in allocating larger funds for a coparcener or his family, may be due to love and affection or can be due to the coparcener having either a large family[18] or special needs, or an average or bad financial condition in comparison to the others, or it can be due to the fact that this coparcener and his family might be very attentive in looking after the Karta and his daily needs, other than those monetary in nature, or it can be any other reason or there may be no reason at all. At the time of partition, all these considerations, *viz.*, whether one coparcener was consistently given a larger amount for his general maintenance in comparison to the others, or whether his needs are more than those of the others, or the size of his family is larger, are irrelevant and the rule of equal share to all brothers apply. Just as the Karta cannot be asked for past accounts at the time of partition, no coparcener can be asked to account for the additional money or amount that was given to him for his maintenance before the partition, by the Karta.[19] Similarly, where less money was spent on one coparcener, he is not entitled to a bigger share at the time of partition. However, this rule is confined only to cases where there was a disparity in the amount spent by way of maintenance of coparceners or for their general welfare, but if the money was spent by one coparcener to discharge his personal debts, without the authority of the other members, the same has to be brought into the accounts at the time of partition. Where a coparcener has alienated his share in the states where he is competent to do so, the same has to be taken care of and debited from his share at the time of partition. Similarly, making a

provision for funeral expenses of the female members, more specifically the mother,[20] and for the marriage of a sister,[21] is a common responsibility of the brothers and while remaining joint, if one of the brothers performed these ceremonies, he is entitled to have such amount adjusted at the time of partition. Where a coparcener spends his separate income to improve the family property, he would be entitled to re-imbursement, unless the expenditure was in the nature of a gift.[22]

At the time of partition, no coparcener has a right to ask the Karta to account for the profits that he might have made, unless there are specific charges of fraud, or misappropriation of funds.[23] However, if a suit for partition is brought by one coparcener, such coparcener is entitled to mesne profits from the date of the suit. Similarly, if a coparcener was entirely excluded from the enjoyment of the property when the family was joint, he would also be entitled to mesne profits at the time of partition.

Persons Entitled to Ask for Partition

As has been already explained, a partition is a severance of the status of coparceners as such and a division of the coparcenary property by metes and bounds. Therefore, as a general rule, it is the coparceners who have a right to demand a partition and destruct their joint status. However, a partition can be demanded in certain situations by an alienee or a purchaser, in the execution of a decree of court of the undivided share of a coparcener.

Alienee or Purchaser in Execution of a Court's Decree

The general rule is that the right to demand a partition is not available to a non-coparcener. Thus, a suit by an alienee, claiming equitable remedy from a coparcener, for an allotment of the shares of the alienating vendor, is not maintainable.[24] However, it has one exception. Where an undivided coparcener alienates his share in states where he is permitted to do so, the alienee can demand a partition. In states where he is not permitted to alienate his share, if he contracts a debt and the debtor brings a decree against him, the purchaser of his share in execution of the money decree, is also entitled to demand a partition and ascertain his share. Since these persons are strangers to the family, they, in law, do not have a right to have joint possession of the property with the rest of the coparceners and are entitled to demarcate only the share that they are entitled to. This partition will not have any adverse effect on the status of the rest of the coparceners, who would continue to be members of the joint family as before. Such alienee or purchaser may file a suit for partition in a court of law, for ascertaining his share, under all schools of Mitakshara.

Coparceners

A coparcener, who is major and of sound mind, can, at any time, demand a partition and specification of his share. The person from whom he can demand partition, is the father or the Karta. It is one of his inherent rights, being the owner of the property collectively with the other coparceners, and what he does by demanding a partition is simply asking for a demarcation and specification of what exactly belongs to him exclusively and for a right to deal with it as a separate person. He does not have to give any reason or explanation or justification for seeking partition, nor is the Karta legally entitled to seek the same. No person, including the Karta, has a legal right to force the coparcener to change his mind. A moral or informal persuasion stands on a different footing altogether. Even a court is not empowered to go into the reasons or seek justifications from a major coparcener, when he approaches it with a suit for partition. The Karta does not have a legal right to say no to a demand of partition coming from such a person. His desire to separate from the family may stem purely from personal reasons or due to a displeasure with the other coparceners, including the Karta, or simply due to the way the Karta is managing the family affairs, though none of this is material. A demand from the coparcener, with or without reasons, if manifested clearly, is sufficient and the Karta legally, has no choice but to comply with this demand. If the Karta does not give in to the demand of partition made by the coparcener, such a coparcener can go to the court and institute a suit for partition.

Minor Coparcener

Unlike a major coparcener, who has a right to demand partition personally, and this demand need not be supported with reasons or justifications, a minor coparcener, though equal in ownership of the property with a major coparcener, does not have a right to demand a partition from the father or the Karta. But this does not mean that at his instance, no partition can be effected. A minor needs special protection and ordinarily, the father or the Karta is presumed to act in his interests. But there may arise a situation where the father or the Karta acts in a manner that may adversely affect the interests of the minor. It may be a sheer mismanagement, a fraud, a misappropriation, an alienation or conversion of joint family properties in their name, or a denial of maintenance to the minor. In such cases, the minor can file a suit for partition against the Karta, not personally, but through a next friend. In these

cases, the court acts as *parens partriae* and assumes a very important role. The court will assess the complete situation as it existed in the family, which led to the presentation of the suit and will decide whether the assessment of the next friend is correct or not. The court will also look into the question as to who are the persons who can manage the property effectively, for the benefit of the minor and what would be the consequences of the partition as regards the interests of the minor. The test would be whether the partition in the circumstances, would be for the benefit of the minor.[25] Would it advance his interests or protect his share from danger?[26] The court has a discretion and it may order for effecting a partition only when it is satisfied that it would be beneficial to his interests, otherwise, it will not direct a partition.[27] A refusal of the father to maintain a minor son, his immoral behaviour and the investment of joint family funds into speculative transactions, would be sufficient for the courts to conclude that a partition would benefit the minor.[28] However, the mere fact that minor sons were born to the second wife, would not lead to a presumption that a partition would be beneficial to the minor.[29]

In *Aryan Kamal Wadhwa v. Biharilal Wadhwa* [30], the senior most male member acquired property through his efforts and then established a Hindu Undivided Family. He had two married sons. The property in the income tax records was shown as the HUF property. W, who was his daughter in law had a matrimonial problem with his son. With the matrimonial litigation going on, she was awarded maintenance by the court under sec. 24 of the Hindu Marriage Act, 1955. A son, born of this relationship was also with the estranged mother since birth. She on behalf of the minor son sought partition of the HUF property as his next friend claiming one sixth share. The husband contended that the family was ready to maintain the child out of the share in the joint family property and there was no need of a formal partition as minor's financial interests were adequately protected by his father and other joint family members. The court cited with approval its earlier decision in *Kakamanu Pedasubhayya v. Kakamanu Akkamma* [31] and held that a partition of the joint family property through the filing of a suit by the next friend (in this case the mother) can be validly effected. The court has to be convinced in such cases that the partition would be in the interests of the minor and not affecting a partition would adversely affect his interests. In the present case, as the parents were young the court opinioned that the possibility of the father getting married again may not be ruled out. In that event he would get other children and may not be in a position to take care of the interests of this minor. On the other hand the mother offered to deposit the share of the minor in the court and to invest it according to the directions of the court showed bonafide on her part. The court called for the account of the total property, worked out one sixth share of the minor and directed the Karta to hand it over to the grandson. This sum was ordered to be deposited in the court with in a period of eight weeks with the specific direction for its investment in any nationalized Bank during minority of the grandson and with a prohibition on its withdrawal even on account of maintenance of the minor if he was otherwise maintained.

Rule in Punjab and Bombay

The general rule is that all coparceners, irrespective of whether they are sons, grandsons or great-grandsons, can ask for a partition, notwithstanding whether the whole family is joint or only their own branch has an undivided status.[32] However, in Bombay, a son cannot ask for a partition if his father is joint with his own father, brothers or collaterals.[33] This right to ask for partition can only be exercised if the father is separate as regards his brothers, collaterals or father. In Punjab, the rule is slightly different. Here also, the son does not have a right to demand a partition from the father, because under the customary law applicable in Punjab, sons do not have a right by birth in the property held by the father.[34] The same rule was earlier applied in Delhi as well, but the courts have held that a son can file a suit for partition against his father, despite the fact that the latter has not consented.[35]

Dayabhaga Law

In a Dayabhaga coparcenary, the son has no right by birth in the property held by the father and therefore, he does not have a right to ask for its partition from him. Where the property is held jointly by the brothers, having a common enjoyment, each of them has a fixed share, but a partition by metes and bounds can be demanded by any coparcener.

Involuntary Partition or Partition by Specific Conduct

A demand of partition indicates a voluntary act on the part of a coparcener, to separate himself from the joint family. Thus, this intention to destroy the undivided status is manifested through the demand that he makes for a partition. In certain cases, a coparcener may not demand a partition, or it could be that he does not even want to separate himself from the joint family, yet, due to a particular conduct or some action on his part, he finds himself out of the coparcenary, with his share handed over to him. Whether he intended to sever his status or not, is immaterial. It is an automatic severance. It is not an expulsion, but in fact, an involuntary severance that is imposed on him. Two specific conducts of a coparcener would bring upon him, an ipso facto separate status: the first is where he

renounces his religion and the second situation is where he gets married to a non-Hindu under the Special Marriage Act, 1954.

Conversion

As the term 'Hindu Joint family' itself suggests, only a Hindu can be its member. Religion is of utmost importance here and a non-Hindu therefore, cannot be its member. Coparcenary is an institution within a joint family and therefore, unless and until a person is a member of a Hindu joint family, he cannot be a member of a coparcenary. A coparcener who renounces his religion and converts to the Muslim[36] or Christian faith,[37] immediately ceases to be a coparcener, as an automatic severance of status takes place. His share becomes fixed and is to be handed over to him. His rights, either in the joint family or in the coparcenary property, cannot be forfeited[38] upon his conversion, but are ascertained and he goes out of the family immediately, after taking his share as it stood on the date of his conversion.[39]Prior to 1850, the conversion of a coparcener to another religion resulted in an expulsion from the joint family and operated as a forfeiture of his rights in the coparcenary property. The Caste Disabilities Removal Act, 1850, protected the rights of a convert and of a person who was ex-communicated from the community and helped them retain their rights that they had in coparcenary property before the conversion or ex-communication. But separation still follows as a consequence of a renunciation of the religion and the conversion to another faith. For example, a coparcenary consists of a Hindu father and his two sons, S1 and S2. Each of them, so long as they are undivided, owns a probable one-third (1/3rd) share in the coparcenary property. S1 renounces Hinduism and embraces Islam. He becomes a separate member as a consequence of his conversion. From that very moment, his probable share now becomes a fixed one-third (1/3rd) share. Even before his share is physically demarcated and handed over to him, his father dies. The share of S1 will continue to be one-third (1/3rd), and the father's one-third (1/3rd) share in the undivided coparcenary, will be taken by S2 by the application of the doctrine of survivorship, as a sole surviving coparcener. S1 who is already a separated member, will not get the benefit of the death of the father, as his conversion resulted in a severance of his status instantly and he was no longer a member of the family which his father headed.

The primary reason why a convert ceases to be a member of the Hindu joint family and coparcenary is that in India, amongst the multiplicity of family laws, the religion of a person determines which family law will govern his family relations. Till a person is a Hindu, it is the Hindu law that applied to him, but the moment he converts to another religion, his family law also changes.[40] For example, if he becomes a Muslim, he will be governed by Muslim law and by Christian law, if he embraces Christianity. A joint family and coparcenary are concepts available only under the Hindu law and not under any other legal system. Once a coparcener converts to the Muslim faith, he will be governed as aforesaid, by the principles of Muslim law, which does not recognise coparcenary at all, and therefore, he would immediately cease to be a coparcener. The Indian legal system does not give a right to a person to pick and choose provisions from different personal laws, according to his own convenience. A freedom of conversion comes hand in hand with a compulsory change in the application of family law. After becoming a Muslim or a Christian therefore, a person is not allowed to cling to the concepts that were peculiar to his former religion, *i.e.,* Hinduism.

An automatic ouster or a forced partition, upon the conversion of a coparcener, does not adversely affect the status of the rest of the coparceners, as they continue to maintain the same status as before.

Marriage of a Coparcener to a Non-Hindu under The Special Marriage Act, 1954

The present Special Marriage Act, 1954, had replaced the earlier Act with the same name that was passed in 1872. Under the Special Marriage Act, 1872, a coparcener, upon marriage, automatically severed his membership of the coparcenary and of the joint family. The religion of the spouse was immaterial. So, a marriage of a coparcener with a Hindu woman, under the Special Marriage Act, 1872, also resulted in his severance from the coparcenary and the joint family. But the same couple, if they married under the traditional Hindu law, continued as members of the joint family. Therefore, it was the marriage under a statute that resulted in the severance of the status, and not merely the religion of the spouse. The marriage of a coparcener with a non-Hindu again, had the same effect, *i.e.,* of an automatic ouster from the joint family. But, analogous to the consequences that a coparcener faces when he renounces his religion, upon his marriage to a Hindu or a non-Hindu, under the Special Marriage Act, 1872, his rights in the coparcenary property were not forfeited, but were specified and handed over to him.

This Act of 1872 was repealed and the new Act with the same name, but with modified provisions, was passed in 1954. The Special Marriage Act, 1954, had an identical provision with respect to the statutory partition, *i.e.,* a coparcener marrying under the Act, whether to a Hindu or to a non-Hindu, was faced with an immediate severance from the coparcenary. Where his marriage was solemnised under the Hindu law, with a Hindu woman, he would

continue to be a coparcener and his wife would become a member of his joint family. If this marriage is later registered under the Special Marriage Act, 1954, that would also operate as a severance of both the spouses from the joint family, since the consequences of an actual solemnisation of the marriage under the Act, and the registration of an already solemnised marriage (under a different law), under this Act, are identical. In 1976, however, these provisions were modified and instead of a solemnisation of marriage under this Act being the only test for a statutory partition, the religion of the spouse became a material factor. Post 1976, where a Hindu man marries a non-Hindu woman, under the Special Marriage Act, 1954, such marriage effects his automatic severance from the coparcenary. But where his spouse is a Hindu, he continues to be a member of the coparcenary as before. Therefore, presently, it is not the performance of the marriage of a coparcener under the Special Marriage Act, that would effect his severance from the coparcenary, but his marriage to a non-Hindu, under this Act, that would operate as an automatic partition from the coparcenary.[41]

Partition Effected By Father

The father, under Hindu law, has superior powers in comparison to the other coparceners. His share in the joint family property is the same as that of his sons, but by virtue of his rights as *Patria Potesta*, he has the power to not only separate himself from the rest of the joint family by effecting a partition,[42] but also to separate each and every son of his, including minors.[43] He can exercise this right despite the express dissent of the sons, as their consent is not necessary.[44] With respect to a minor's share, the father retains its control as his guardian. However, after a partition, the share of the minor would constitute his separate property, and the father would have no power to alienate it, save with the permission of the court. In effecting a partition among his sons, the father cannot prefer one son over another and he must allot an equal share to all of his sons.[45] This action must be *bona fide* and in accordance with the law. Where he effects an unequal distribution and if all the coparceners agree to such a division, the partition will take the character of a family arrangement and would be binding on all the consenting coparceners.[46] Where the division is unequal or unfair, and the coparceners do not give their consent, they have a right to repudiate or challenge it.[47] In that case, this division would no longer be binding on them and they would be competent to work out their shares afresh. A minor coparcener cannot avoid a partition effected by his father, till he attains majority, whereupon, he can expressly repudiate it personally.[48] Law does not require that a repudiation of an unfair partition must be through a suit,[49] and therefore, an express declaration to that effect is sufficient. Till the partition is avoided or rescinded expressly, it remains binding on the sons.

The father has the power to either effect only a severance of status among his sons, or to actually divide the property by metes and bounds.[50] In the absence of the father, the grandfather does not have a similar power to effect a partition among the grandsons.[51]

Partition by Agreement

Except in cases of partition by the operation of law, a partition cannot be presumed by a conduct of the coparcener and a manifestation of intention to separate is necessary.[52] At the same time, it is not essential that a desire to effect a severance must be initiated either by the father, or by one coparcener alone. If all the coparceners decide to destruct their joint status, it is called a partition by agreement.[53] The presence of a minor coparcener is not an obstacle in the way of the rest of the coparceners coming to an agreement to effect a severance of status among themselves. The minor coparcener, however, should be represented by his guardian.[54] The agreement may be confined to only effecting a severance in their status, or also to the actual division of the property by metes and bounds, but the moment there is a genuine and *bona fide* agreement to effect a severance of status, the joint tenancy is converted into tenancy-in-common, the shares become fixed and the doctrine of survivorship no longer applies.[55] A partition by agreement should not be a sham agreement, in order to defeat the provisions of law or the rights of a third party.[56] It is not necessary in a partition by agreement, that the shares allocated to each and every coparcener, be absolutely equal. It does not however, mean that they can be unjust, unfair or can adversely affect the interests of a minor, as in such cases, it will be open to challenge. A partition by agreement may also include within itself, a family arrangement, where doubtful and disputed rights are compromised, with the primary aims of conserving family property and avoiding litigation.[57]

Agreement not to Effect a Partition

The coparceners may, by mutual consent, agree that they would not effect a partition of the property till a specified time, or till the happening of a certain event, or even till the life of a coparcener. It cannot be a postponement of a partition in perpetuity or an agreement not to effect a partition at all, ever.[58] Where it is restrained in point of time, the life of a coparcener or till the happening of a certain event, it is binding on all the parties personally[59] only and

can never bind their descendants.[60]

Partition at the Instance of an After-born Son

A son who was in the womb of his mother at the time of partition and was subsequently born alive, is treated as if he was in existence at that time.[61] He has a right to demand a re-opening of the partition if no share is reserved for him. The rule is that if the factum of pregnancy is known, either the partition should be deferred till the birth of the child or a share should be kept apart for it. If the child born is a male, his share should be allotted to him, and if the child is not born alive[62] or is a female, such share should be redistributed among all the coparceners.[63] Where the factum of pregnancy was not known and a partition was effected, such an after-born son has a right to re-open the partition.

Where a son was both conceived and born subsequent to the partition, the rights of such a son to demand a partition depends upon whether the father had taken a share himself or not. If the father, at the time of the partition had taken a share equal or equivalent, or even comparable to the share of his sons, an after-born son becomes a coparcener with the father and has a right to take the properties of the father, to the exclusion of the other sons.[64] Such a child born after a partition cannot become a member of the joint family that was disintegrated before his birth. Thus a child in womb is entitled for a share in a coparcenary property of an undivided Hindu Joint family, but the child is entitled for a share in the joint family property when it is born alive and not otherwise and on behalf of a child in womb no partition suit is maintainable. In case of a partition of the joint family property by the father amongst his sons[65], the father had taken a meagre share for himself. The son was conceived and born subsequent to the partition. It was held that this child begotten after partition is entitled to succeed to the father's share and to have his separate or self acquired property as well to the exclusion of the divided sons but he cannot be regarded as a member of coparcenary. The moment the father got separated that relation got snapped and a son who was not conceived by then could not be incorporated into and enjoined to original joint family. But where, either the father had not taken any share, or it is very small or it is just sufficient for the father's maintenance,[66] the other sons must take out the after-born son's portion from the share that they had taken at the time of partition, in such a manner that the after-born son gets an equal share with them, failing which, he can demand a re-opening of the partition.[67]

Partition at the Instance of an Adopted Son

A male child can become a member of a joint family by a valid adoption. From the moment of adoption, he is deemed dead for the natural family and is presumed to be born in the adoptive family, and acquires a right by birth (from the date of adoption), in the joint family property. He has a right to demand a partition and is entitled to a share equal to that of the adoptive father. He is also entitled to have the benefit of survivorship and on the death of the father, an undivided adopted son takes his share by the doctrine of survivorship. Under the classical law, there was a difference between the rights of an adopted son and those of a natural son, born subsequent to this adoption. Under the Dayabhaga law, an adopted son, in comparison to an after born natural son, takes a one-third (1/3rd) share; in Bombay and Madras a one-fifth (1/5th) share; and in Benares, one-fourth (1/4th) of the share of the latter.[68]

Since the passing of the Hindu Adoptions and Maintenance Act in 1956, the law relating to adoption has been modified and clarified. The Act clearly lays down that there is no distinction between the rights of a natural born, legitimate son and those of an adopted son, and post 1956 therefore, not only will the adopted son have a right to demand a partition, but his share will be equal to the share of the after born natural son of his adoptive father.

An illegitimate son and, a disqualified coparcener, do not have a right to demand a partition.

Partition at the instance of a person acquiring an interest in the coparcenary property by virtue of a family arrangement

A family arrangement under Hindu law is a unique permissible concept where by the members of the family may come to a consensus based on agreement for allocation of property belonging to the joint family for maintenance of the members, or for defraying marriage expenses of the daughters/children in the family or for other legitimate purposes such as even payment of family debts etc. It can also be in the nature of compensation to a member who takes a lesser share that what is due to him. The importance of a family arrangement lies in the fact that it can be in relation to the joint family immovable property, yet can be purely oral but legally enforceable. Whereas per a family arrangement a specific property or a share in the property is allocated to a person, such person acquires a right in the joint family property and becomes competent to ask for its partition. An interesting feature of such a situation

would be that even a non-family member can be a part of a family arrangement. In such cases even such a non-family member is entitled to seek the partition of the property but provided he had a pre existing right conferred in his favour under a valid family arrangement[69].

MODE OF EFFECTING PARTITION

Since a major coparcener, who is also of a sound mind, has a right to demand a partition at his pleasure, all that he needs to do is to expressly manifest this demand to the other coparceners. A demand, in order to bring a severance of status, must comprise three essentials, *viz.*,

(i) formation of an intention to separate from the joint family;

(ii) a declaration of this intention; and

(iii) communication of this intention to the Karta and if he is unavailable, to other coparceners.

A partition, is a matter of individual volition. All that the coparcener has to do is to form an unequivocal intention to separate himself from the joint family and then, to communicate it. The most appropriate person to whom it should be communicated, is the Karta, but if he, for the time being, is unavailable, it can be brought to the notice of the other coparceners. Since the Karta manages the property and plays a lead role in its actual division, a partition by metes and bounds cannot take place unless the Karta is informed about the intention to separate. However, there is no need to inform each and every coparcener and a communication to the Karta is sufficient.[70]

The formation and declaration of intention must be clear and unambiguous. There should not be any ifs and buts about it, nor should there be any hesitation. It should be free from any ambiguity or uncertainty and the fact that the coparcener wants a partition should be evident from his words. A simple ‘I want a partition from the joint family and want to lead an independent life’, or ‘I do not wish to continue as a joint family member anymore, so hand me my share’, or ‘I want a partition and demarcation of my share’, is sufficient to indicate a clear intention to effect a severance of status. But a request by one coparcener to the Karta, to hand over his share to his widow on his death,[71] or a statement of what his share in the property is,[72] or merely taking over possession of a certain portion of the property and carrying improvements on it, or a casual statement by the son, that he is not interested in his father’s estate, would not indicate a clear, equivocal and unambiguous intention to demand a partition.[73] This demanding of partition is a personal right of the coparcener and cannot be delegated in favour of anyone. For example, where the wife of a coparcener demands a partition from the Karta, but no confirmation comes from the coparcener himself, there is no severance of status, but a third person can be used as a channel for communicating this intention. The Madras High Court has held that a notice severing the status of the son, sent by a lawyer, on instructions given by the daughter, in the absence of any indication given by the son, to separate from the family, is not valid and would not effect a severance of the status of the son.[74]

Once the coparcener forms an intention, it must be communicated to the Karta. An uncommunicated intention is no intention and does not result in a partition.[75] A member of a coparcenary can effect a severance by giving a clear and unmistakable intimation by his acts or a declaration, of a fixed intention to separate.[76] The intention to separate must be clearly expressed.[77] The form of expression will vary depending upon the facts and circumstances of each case. It can be verbal or in writing, through an informal letter or a formal notice,[78] or even by instituting a suit for partition, in a court of law.[79]

A demand made by a coparcener, for a severance of status, does not depend upon the wishes of the Karta, as the Karta has no choice but to comply with it. This expression of a clear intention to separate, need not be accompanied with an explanation or reason or justification, nor is the Karta empowered to seek the same, as none of them is relevant. A demarcation or severance from the joint family, is a right of a coparcener, which he is entitled to enforce by filing a suit for partition, if the Karta declines to effect it despite his demand. Even a court is not empowered to go into the reasons which necessitated the coparcener to take such a step, nor can it refuse to effect a partition where a *bona fide* suit is filed before it, requesting for the same.

Communication of Intention through a Will

Imported Cases

What is required for effecting a severance in status, is a clear and unequivocal declaration on the part of one member of the coparcenary, and its communication to the other members. The question that arises is, can the declaration and its communication take place through the medium of a Will? This question came up for consideration of the Apex Court, in *A. Raghavamma v. A Chenchamma.* [80] Here, a Hindu joint family comprised four brothers, two of whom died without leaving a male issue. Out of the two who survived and maintained the undivided status, one *Br* 2 was childless, while the other, *Br* 1 had a son *S* and a daughter *D*. *S* got married to *SW* and had a son *SS* and the daughter had a female issue *DD* [See Fig. 11.2].

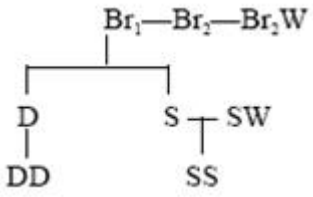

Fig. 11.2

After the death of the brother *Br* 2, and the son *S*, the family comprised the Karta *Br* 1, and his grandson, *SS* and a granddaughter, *DD*. *Br* 1 executed a Will of his undivided properties, dividing it into two equal parts, one part in favour of his grandson, *SS* and the other part to his granddaughter, *DD*. Since both of them were minors, he provided in the Will, that till their minority, the management of these properties would be in the hands of *Br* 2*W*, *i.e.,* the testator's brother's widow, Raghavamma, and if any of these beneficiaries under the Will, *i.e., SS* or *DD*, died before attaining majority, his/her share will vest in Raghavamma absolutely. The widow of his son *SW*, Chenchamma, was neither given the responsibility of maintaining the share, nor was given any share in the property. This Will was executed in 1945 and the testator died four months later. Upon his death, Raghavamma, who, as per the direction under the Will, was to manage the properties, allowed Chenchamma to take possession and manage the properties on behalf of her minor son, *SS*, and the minor daughter of the testator's daughter, *DD*. *SS*, died four years later and as he had died without attaining majority, his half share in the property was claimed by Raghavamma. Her claim nevertheless, was resisted now by Chenchamma, who contended that *SS* had died as a sole surviving coparcener and his share on his death, will go by inheritance to her, as she was his mother, and not as per the directions of the Will. Her main argument was that *Br* 1 was an undivided coparcener with his grandson *SS*, when he executed this Will, and as an undivided coparcener, he did not have the right to execute a Will of his undivided share in the Mitakshara coparcenary. Therefore, this Will was invalid and could not be given any effect.

The counsel for Raghavamma contended that *Br* 1 had died as a separate member, after effecting a partition and dividing himself from his grandson, and therefore, the Will executed by him was valid. His contention was based on the argument that what partition requires is a unilateral, unequivocal and clear declaration by a coparcener, of his intention to bring about a severance in status, and in this case, the recitals in the Will disclosed a clear and unambiguous declaration of the intention of *Br* 1, to divide, and that in itself, should constitute a severance in the status, enabling him to execute a Will. It is pertinent to note here, that such a declaration was not brought to the notice of the other members of the family, but its embodiment in the Will suggested that it would invariably come to their knowledge after his death, when the Will, would become operative. The main question before the court was, whether a member of a joint Hindu family, becomes separate from the other members of the family, by a mere declaration of his unequivocal intention to divide from the family, without bringing the same to the knowledge of the other members of the family. The Court noted that two things are necessary for effecting a severance of status, *viz.*:

(i) declaration of the intention; and

(ii) communication of it to the others affected thereby.

It is implicit in the expression 'declaration', that it should be brought to the knowledge of the persons affected thereby. An uncommunicated declaration is no better than a mere formation or harbouring of an intention to separate. It becomes effective as a declaration only after its communication to the person or persons who would be affected by it.

In the present case, the Court held that *Br* 1 was, at the time of his death, an undivided member of the coparcenary comprising himself and his grandson *SS*. Even where he had expressed his intentions to separate in the Will, the same was not communicated to the guardian of the other coparcener, who was a minor, so on his death, his

interest was taken by the minor coparcener, as a sole surviving coparcener, due to the application of the doctrine of survivorship, and *Br* 1 had no interest in the property that could go by Will. The Court said:[81]

> Even if it (the Will) could be relied upon for ascertaining his intention to separate from the family, (he) could not convey his interest in the family property, as it has not been established that Subbarao (SS) or his guardian had any knowledge of the contents of the said Will before Chimparayya (Br1) died.

This statement clearly indicates that a declaration of the intention, in order to be effective, must be communicated during the lifetime of the one who expresses it. If the contents of the Will had been brought to the knowledge of the guardian of *SS* during the lifetime of *Br* 1, the communication would have been complete and a severance of status would have taken place. In that case, the Will would have been valid. But if the sole reliance is on the Will, to communicate the intention of the testator, there would be no valid communication during the lifetime and therefore, no valid severance of the status.[82] The Will was, accordingly, held to be without any effect and the property went by law of inheritance, on the death of *SS*, to his mother Chenchamma.

The position can be summed up as follows:

A statement in the Will, by a member of the joint family, that he regards himself as a separate member, or that he has been a separate member all along, or that through this Will, he is expressing his clear intention to effect a severance of status, will not be effective at all and will not result in a partition, but where he makes a Will expressing in it, a clear, unequivocal declaration of his intention to separate and brings it to the notice of others who are affected by it, a severance would take place. For example, where a Will containing such declaration, is attested by the Karta and by the other coparceners, the communication would be complete, a severance would take place, and consequently, the Will of his specific share would be valid.

EFFECTIVE DATE OF SEVERANCE OF STATUS

What the effective date of the severance of status would be, would depend upon the manner of communication of the intention to separate. As has been explained already, the formation of an intention to separate and its manifestation must be brought to the knowledge of the persons who will be affected by it. It is not necessary that each and every coparcener is informed individually and if it is communicated to the Karta, that would be considered sufficient communication.[83] The declaration to separate can be communicated verbally, through a written notice, an informal letter or through the medium of a friend or a relative. Presently, it can also be done *via* a telephone or sent through a fax, or an e-mail. Where the communication and its coming to the knowledge of the Karta is instantaneous, the severance of status is also instantaneous. For example, the Karta and his sons are living in the same house. The son goes up to the Karta and tells him about his intention to separate. It is this time, when he expresses his unequivocal intention to separate, that a severance of status takes place. He becomes a separate member, even though the other members may not know about it. His share, from a probable share, becomes fixed and is no longer susceptible to fluctuation by the subsequent births and deaths in the family. If the Karta wants to sell the property for a legal necessity, he cannot touch the share of this son and can exercise control over the rest of the property only. Similar would be the situation when the communication is through telephone.

The reason for the above is that the severance of his status depends upon his expressing a desire to separate and is not dependent upon the pleasure or wishes of the Karta. It is his individual or unilateral decision, which he can exercise at any time, irrespective of whether the other family members react positively or negatively, to his stand. The Karta has no choice but to comply with this demand, because what he expresses through this demand, is merely a desire to take what belongs to him, exclusively. Even if there is a situation confronting the family where it might be necessary for the general welfare of the family, to be together and not to destruct their joint status, one coparcener thinking otherwise, cannot be prevented from demanding a partition and taking his share. Thus, once the demand is made, it cannot be subverted at the instance of any family member, and operates as an immediate severance. The actual shares can be worked out at a later stage, but as far as the status is concerned, that is demarcated immediately and from an undivided coparcener, he takes the label of a separate member.

However, where there is a gap between the time when the coparcener expresses his intention, puts it in course of transmission and when it comes to the knowledge of the Karta, the same rule cannot be applied. For example, as illustrated in Fig. 11.3, a joint family based in Delhi, consists of a father and his two sons.

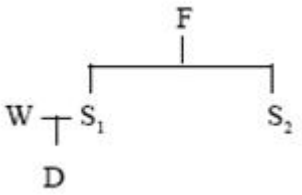

Fig. 11.3

S 1 gets a job at Bangalore and with his wife and daughter, he goes to live there. From Bangalore, he writes a letter to the Karta on 1 January, 1980, expressing his unequivocal intention to separate from the joint family. He also asks the Karta to demarcate his share, so that the same can be possessed by him exclusively. The letter reaches the Karta on 5 January, 1980. On 3 January, 1980, S2 dies. The question that arises is, what will be share of S1 ? What should be the date when he should be deemed to have separated from the family? Is it the initial date, when the letter was posted, or the later date, when it reached the Karta? The consequences would be different in both the cases. If it is the initial date, then S1 's share will become fixed on 1 January, 1980 and that would be one-third (1/3rd) of the total property. When S2 died three days later, S1 would not get the benefit of his death and the Karta would take the entire property by the doctrine of survivorship. However, if it is the later date, then the shares will become fixed on 5 January, 1980, and as there are, on this date, only two coparceners, each of them would be entitled to one-half of the property.

In such situations therefore, a distinction has to be made between the date of determination of the status and the date of the calculation of shares. The date of determination of the status, whether a member is a separate member or an individual member, is the initial date, when the communication is put in the course of transmission, and the date of the calculation of shares, is the later date, when the communication is complete, *i.e.,* it comes to the knowledge of the Karta. In between these two dates, valid transactions with respect to the property are not to be disturbed. In the above example, the date when S1 became separate, was 1 January, 1980, but the date of calculation of what exactly his share should be, will be the later date, when the communication was completed, and since on that date, only two coparceners were present, he would be entitled to half of the property.

Doctrine of Relation Back

The above said rule can be explained in a different manner. The rule that severance of status takes place only when it comes to the knowledge of the Karta, is applied strictly. But where the expression of this intention was put in course of transmission at a former date, with the application of the doctrine of relation back, severance would relate back to the former date and settled rights in between these two dates will not be disturbed. For example, a joint family consists of a father and his two sons. One son S1 writes a letter to the Karta and puts it in the letter box on 15 July, 1952. The letter reaches the Karta on 20 July, 1952. Totally unaware of the desires of S1, the Karta sells a major portion of the property for a legal necessity. Thus, this sale, which creates a valid right or title in favour of a third person, would be binding on the share of S1, despite the fact that he had become a separate member from the time he had posted the letter, although the communication to the Karta had reached on a later date. In the same example, instead of the Karta selling a portion of the property for a legal necessity, let us suppose that immediately after posting the letter, S1 executes a Will of his share in the properties, in favour of a friend. The Will will be valid, as on the date of its execution, he was a separate member and empowered to dispose it of by a Will.

Communication to be Completed during the Lifetime of the Coparcener

For the application of the doctrine of relation back, it is necessary that the communication of intention is complete during the lifetime of the coparcener. Where the communication is sent by the coparcener, but before it reaches the Karta, he dies, his interest will be taken by the surviving coparceners and despite the Karta receiving the communication later, no severance of status would take place.[84] As the moment a coparcener dies, he loses his interest in the coparcenary property, the communication of his intention to separate after his death, is meaningless. Therefore, where a coparcener communicates his intention to separate to the Karta, through a letter, and executes a Will of his share in favour of his friend, the Will, will be valid if he is alive on the day the Karta receives the

communication, but void if he dies before its receipt by the Karta.

Severance of Status through a Suit

A coparcener can manifest his unequivocal intention to separate through a partition suit. A suit demanding a partition, is a clear cut evidence of a declaration of his intention to separate himself from the family, and unless it is a sham proceeding,[85] it will effect a severance of the status from the date of its institution in a court of law, irrespective of whether he gets a decree from the court or not.[86] If he dies during the pendency of the suit, he dies as a separate member and his legal representatives can continue the suit.[87] This is because the court is held to be in the same position as the Karta, and its role is confined to helping the members in working out their shares in accordance with the provisions of law. The court is not empowered to go into the reasons behind the coparcener's seeking a partition, nor is it competent to advise him against it.

SEVERANCE OF STATUS IN CASE OF MINOR

A suit for partition can be filed in a court of law, by a minor, through his next friend. Unlike a suit filed by a major coparcener, in such cases, the court has to play a decisive role. It has to decide the case and not merely divide the property. The court has to examine the case in light of its facts and circumstances and from the effect it may have on the interest of the minor. The court has to actually find out whether the situation was such that it would have adversely affected the interests of the minor, whether the Karta and the other coparceners were acting in a manner so as to deprive the minor of his rightful share in the property, and whether the minor's interests can be protected by effecting a partition. If the court comes to the conclusion that a partition would not be beneficial to the interests of the minor, it would not decree a partition and would dismiss the suit. Therefore, it cannot be said that in all cases where a suit for partition is instituted on behalf of a minor, the court will actually effect a partition. The question that arises is, when a partition suit is instituted at the instance of a minor, what would be the effective date of his severance of status? It must be remembered that a severance of status would take place only in cases where in the opinion of the court, the partition would be beneficial to the minor. Should it be the date of the institution of the suit, like in case of a major coparcener, or the date of the pronouncement of the judgment of the court?

In *Kakamanu Pedasubhayya v. Kakamanu Akkamma*,[88] the Apex Court held that even in the case of a minor coparcener, the effective date for severance of status would be the date of institution of the suit, provided the court actually effects a partition. If the court comes to the conclusion that effecting a partition will benefit the minor, with the application of the doctrine of relation back, such a minor would be deemed to be separate from the date of the institution of the suit. Where the court comes to the conclusion that a partition will not further the interests of the minor, it will not order the effecting of a partition and the minor will remain an undivided member. In such a situation, the question as to what is the effective date of the severance of status, would be meaningless. Here, the maternal grandfather of a minor, aged 2 years, filed a suit for partition on his behalf, as against his father and two brothers. His main contention was that the Karta (father), along with the two major sons born to him from his first wife, were managing the joint family property in a manner that was detrimental to the interests of the minor. They were selling the joint family properties, including the share of the minor and out of the sale proceeds, they were purchasing properties in their individual names. The minor was also thrown out of the family house along with his mother (father's second wife) and sister. The petition was admitted, but during the pendency of the litigation, the minor died. The questions before the court were; firstly, what was the status of the minor on his death? Did he die as an undivided member of the coparcenary, or as a separate member; and secondly, whether the court should continue with the suit, even though the person on whose behalf the suit was filed is dead, or should the suit be abated?

The court observed that under Hindu law, there is no distinction between the rights of a minor and a major coparcener, as far as the coparcenary property is concerned. His share is equal to that of a major coparcener and he has a similar right of maintenance, possession and enjoyment of property. However, as he is a minor, the courts act as *parens partria*, in order to protect his interests and assess whether a partition will benefit him or not. But even this action, which is purely protective in nature, will not make the effective date of severance any different in the case of a minor, than in case of a major coparcener. Therefore, where the suit is filed by a minor, through his next friend, and the court comes to the conclusion that effecting a partition would be in the interests of the minor, the severance of his status would relate back to the date of the institution of the suit and he would be deemed to be a separate member from the date when the petition was presented in the court.[89]

With respect to the second question, as to whether the suit should abate or the court should continue the suit even

after the death of the minor, and examine the issue of whether a partition would have been beneficial to his interests or not, the court held that the moment a suit was filed on behalf of the minor, a severance of status had taken place, and the only difference between the cases of a major and a minor coparcener is, that here, it was conditional upon the court coming to the conclusion that it will further the interests of the minor. Therefore, the severance had already taken place and what the court examines through this suit is, whether the person who filed the suit on behalf of the minor, had acted in the best interests of the minor. The relevance of this question as to whether the court should continue with the suit or not, lies in the fact that severance is conditional upon the court coming to the conclusion that a partition would have been beneficial to the interests of the minor and till the court examines that issue, the status of the minor at the time of his death, would remain uncertain. If he died as a separate member, then his legal representatives will inherit his properties as per the laws of inheritance, who, in this case, would be the mother. But if he died as an undivided member, then due to the application of the doctrine of survivorship, the property will go to the surviving coparceners, in this case, the father and two brothers, the same persons who were accused by the next friend as acting against the interests of the minor. As the status can be determined only when the court decides the suit, the suit will not abate with the death of the minor and the court will decide the case on merits, to determine whether, in the light of the facts and circumstances of the case, a partition would have advanced the interests of the minor. The court here[90] came to the conclusion that the father and two brothers of the minor were acting in a manner so as to defeat his interests and so, a partition was desirable. It was held that with the application of the doctrine of relation back, his severance from the joint family took place on the date of filing of the partition suit and at the time of his death, he was a separate member. Therefore, his share in the property would go by inheritance to his mother and not to the coparceners under the doctrine of survivorship.

REVOCATION OF PARTITION

Once a partition is effected, it cannot be revoked by a unilateral withdrawal of the intention to separate, but it is possible for the members of the family, by a mutual agreement, which also includes the member at whose instance the joint status was disrupted, to come together again and reunite. A unilateral declaration can bring about a partition, but a unilateral withdrawal of this intention, where the partition has already been effected, cannot result in a revocation of partition or in a reunion, as, for demanding a partition, the consent of the other coparceners is not material, but a reunion is not possible unless there is an agreement between all the members.[91]

Unilateral Withdrawal of a Demand for Partition

Once an unequivocal and clear intention is made by a coparcener, demanding a partition, the question arises: can it be withdrawn by him, so as to maintain the same status as before? The rule is that a demand can be withdrawn before it is communicated to the family members, but once the demand is communicated, severance immediately takes place, and it is not open to the party to unilaterally, withdraw it. Where the intention to separate is put in the course of transmission, but withdrawn before it reaches the Karta, it no partition will take place.

In *Kedar Nath v. Ratan Singh,* [92] the coparcener filed a suit for partition, but before the trial could begin, he withdrew the petition. The court held that there was no severance, but where, in a suit for partition, a clear intention is expressed to effect a separation from the date of institution of the suit and summons were served to all the coparceners, the severance takes place from the date of filing of the suit, and if the suit is later withdrawn, such withdrawal would not have the effect of restoring the joint status,[93] because the moment summons are received by the other members, communication is complete, and once the intention is communicated, it cannot subsequently be withdrawn.

In *Puttrangamma v. Ranganna*,[94] the Karta, with his three brothers and their descendants, constituted a joint family. He himself had four daughters and no male issue. He issued a notice from the hospital, to the other members, declaring his unequivocal intention to separate from the joint family, as he was sick. At the time of issuing of this notice, his younger brother's son was present in the hospital. He snatched the notice and attempted to tear it, but was prevented from doing so. After the notice was registered at the post office, the family members intervened, tried to bring about an amicable settlement and persuaded him to withdraw the notice. He wrote an application to the post office to withdraw the notice and the request was complied with. As no agreement could be reached subsequently, he signed the vakalatnama and instructed his lawyer to institute a suit for partition, and died on the day on which the suit was instituted. The question before the court was, what was his status at the time of his death: that of a separate member or of a joint family member? Did the withdrawal of the notice operate as a complete renunciation of his intention that he had earlier expressed to separate from the family? As he had died on

the day the suit was instituted, did it mean that since no summons were sent to the other members, the communication was not complete during his lifetime? The question as to what was his status at the time of his death was very important to determine the devolution of his share in the property. As he died without leaving a male issue, but four daughter only, if he was still an undivided member at the time of his death, his interest in the property would be taken by survivorship, by the surviving coparceners, and the daughters will not be entitled to anything. However, if the severance was already effected and he, at the time of his death, was a separate member, the remaining coparceners would not get anything out of his property, as it will go by inheritance to his four daughters. The brothers therefore, contended that as he had withdrawn the notice unconditionally, he had died as an undivided member. The Supreme Court agreed with the verdict of the trial court and held that it is not necessary that the communication must be through a formal notice, sent through post. Here, even at the time the notice was dictated and signed in the hospital, one of the coparceners was present. Further, the family members, including the coparcener who knew that a notice to this effect had been sent, tried to persuade him to withdraw it and agree to a family settlement, consequent to which only, the notice had been withdrawn. The demand made by the erstwhile Karta was known to all the other coparceners, and therefore, the severance of status had already taken place. The withdrawal of the notice did not take place before the communication of the intention to separate was made, but took place subsequent to the severance of status, consequently, the partition had already been effected, his status had become that of a separate member and a unilateral withdrawal on the persuasion of family members, so that he could rethink his decision, could not restore his formal status, more so as the deceased had instructed his lawyer to file a suit for partition, that was in fact, filed on the day he died. The court therefore, held that he died as a separate member.

FORMALITIES FOR EFFECTING A PARTITION

A partition does not amount to a transfer within the meaning of the Transfer of Property Act, 1882,[95] and can be effected orally or in writing,[96] but if it is reduced to writing and the value of the property partitioned is more than Rs 100, it must be properly attested and registered.[97] Where it is required to be registered and has not been so registered, it will not be admissible in evidence, unless it acknowledges a prior partition,[98] or an intention to separate.1[99] A family arrangement can be oral and as it is not required to be registered, can be admitted in evidence as well.2[100]

PARTIAL PARTITION

While effecting a partition, it is not necessary that the whole of the joint family property should be divided or that all the members should separate at the same time and it is permissible in law, to effect a partial partition, both with respect to property, as well as its members.

Partial with Respect to Persons

Where partition is brought about at the instance of only one of the coparceners, it is he only who separates and where he has a male issue, he, with his branch, separates, while the other members may continue with the joint family status.3[101] A person can either separate himself from the joint family or continue to be a joint member. He cannot be a separate member with respect to some of the members, while being joint with the others, unless the latter are from his own branch. For example, *A*, *B* and *C* are three brothers. If *A* wants to separate from the joint family consisting of all the three of them, he can do so. In such a case, *B* and *C* can continue to maintain their joint status. But *A* cannot maintain a joint status with *B*, and a separate status with *C*, as such a partial separation is not permissible.4[102]

For the purpose of ascertaining the share of the outgoing member, it might, in some cases, be necessary to work out informally, the shares of each and every member. In such cases, if the shares of all the coparceners are ascertained and the share of the one who had demanded the partition is handed over to him, the rest of the members can continue to be joint and the earlier view,5[103] that they all had separated and then reunited, is no longer good law.6[104]

Thus, a partition effected in the joint family can disintegrate the entire family if all members decide to separate; or

would lead to partial disintegration, if the demand for partition is by one or few coparceners only while the rest of them wish to continue as joint family members. In case of partial partition the coparceners demanding separation alone cease to be members of the joint family while the rest of the family members would continue to maintain the joint status. In such a case the separated member would no longer be entitled to claim any share out of the coparcenary property on the death of any coparcener in the joint family of which previously he was a member. In *Meva Devi v. Om Prakash Jagannath Agarwal* 7[105], a Hindu Joint family comprised of the father, his wife and three of their sons. The father had both separate as well as huge joint family property that he was managing as the *Karta.* In 1949, two major sons S1 and S2 expressed their desire to have independent business. A partition was thus affected and they took their respective shares and went out of the joint family now comprising of the father, his wife and the third son who was a minor at that time. One of the outgoing sons requested the father to allow him to live in the joint family home as he had no suitable alternative habitat. The father permitted him to do so. The permission was given out of compassion and was in the nature of a license as the son had no *pucca* house. Upon the death of the father, the doctrine of survivor ship applied and the youngest son became the owner of the entire joint family property. He filed a suit for eviction against the elder brother occupying the family house as a licencee. The court accepted his contention that once a partition had taken place, and the son was given his share out of the joint family property that he had accepted, he had no further claim on the rest of the property belonging to the joint family of which he was no longer a member and held that the younger brother was entitled in law to reclaim the possession of this property from his separated elder brother.

Partial with Respect to Property

All coparceners may, with consent, partition a portion of the property, dividing it amongst themselves, and at the same time, maintain a joint status with respect to the rest of the property.8[106] This will again be a partial partition, but with respect to property. For example, a joint family consisting of three brothers, owns 30 acres of land and a house. They may divide the land, taking 10 acres each, and maintain the joint status with respect to the house. After such division has been effected, the 10 acres of land would constitute the separate properties of each of the coparceners, who are still undivided with respect to the house.

Circumstances Justifying Partial Partition

Under certain situations, a complete partition may not be possible and the coparceners have no choice but to effect a partial partition. Where the joint family possesses certain property that either by its very nature, or due to custom, is impartible, or where certain property is not available with the family, either because it is under a usufructory mortgage, with the mortgagee, or with a tenant under a perpetual lease, or because it is claimed by an outsider under adverse possession, or is otherwise lost or is seized, it may not be both practical as well as feasible in such situations, to subject them to partition.9[107] Coparceners may also have to effect a partial partition due to statutory prohibitions regarding the division of the property, such as the property being subject to anti-fragmentation laws. Where the landed property is situated in various parts of India, or outside Indian territories,10[108] a partial partition may be inevitable.

PRESUMPTION THAT THE PARTITION IS COMPLETE

Despite the permissibility of a partial partition by agreement among all coparceners, where a partition in a joint family takes place, the presumption will be that it is a complete partition, both with respect to its members as well as its properties,11[109] and where a person alleges that it was a partial partition regarding property,12[110] or persons,13[111] it is he who will have to prove it. This question is essentially one of fact and not of law and would vary depending upon the facts and circumstances of each case.

SUIT FOR PARTITION

In a suit instituted for partition, by a member of the joint family, all coparceners should be made parties to it, as defendants,14[112] but where partition is sought between branches, the only respective heads of the branches can be made parties.15[113] Besides the coparceners, all females, in case they are entitled to get a share at the time of partition,16[114] or a purchaser of a coparcener's interest, should also be implicated as defendants.17[115]

A partition suit must embrace the whole of the joint family property, including the share if any, held by the coparcener who brings the suit for partition,18[116] unless the property is situated outside India.19[117]

A suit for partial partition with regard to property, will lie20[118] only when the property that is not sought for partition, is, for the time being, not available with the family,21[119] or is outside the jurisdiction of this court,22[120] or is outside the Indian territory,23[121] or is impartible property.

RE-OPENING OF PARTITION

A partition, once effected, is usually final and binding on the parties and cannot be opened at the whims and pleasures of the parties. The reason is that upon partition, the erstwhile coparceners hold their shares as their separate properties, with an exclusive and valid title to them. They may enter into transactions relating to them, so as to create valid titles in favour of even third parties. However, there could be certain situations where it might become imperative to undertake a re-distribution of the properties, or else, gross injustice will be caused to the family members.

Manu says:

> Once is the partition of inheritance made, once is a damsel given in marriage; and once does a man say 'I give', these three acts of good men are done once for all and are irrevocable.24[122]

A partition, therefore, is generally irrevocable. However, as mentioned above, there could be situations where a re-opening may be advisable. It may become imperative to have a re-distribution of properties in order to prevent gross injustice to the members of a family. An additional distribution was also advised by Manu, where more property was subsequently added or discovered. A partition once made, thus can be re-opened in the following cases:

More Property is Added after Partition

Where, after a partition has been effected, it is discovered that some properties were left out, either by mistake or deliberately, due to some fraud or concealment by either a family member or even a stranger, or where some properties belonging to the family had been seized or lost, and were recovered subsequent to the partition, by the family, and in the interest of the family members, it is desirable that a fresh partition should be made, there can be a re-opening of the partition, but if a distribution of the additional properties can be effectively made without re-opening the earlier partition, then the earlier partition should not be disturbed and the recovered property should be distributed among the family members.

Properties Concealed by Fraud by a Coparcener

Where one or more of the coparceners conceal the joint family property at the time of the partition, to gain an unjust and undue advantage over the others, or with an intention of getting a bigger share than what they would have been entitled to otherwise, the partition can be re-opened on the discovery of this fraud.25[123] However, in a suit for a re-opening of the partition, fraud cannot be added as a ground subsequently,26[124] at a later stage of trial.

Partition Unjust and Unfair to Minor

If the partition earlier effected, was unjust and unfair towards one or more of the coparceners, it can be re-opened, irrespective of the length of time that has passed since the earlier partition.27[125] Ordinarily, a partition effected by the family members, binds a minor also, if he was properly represented by his father or by any other guardian. Such *bona fide* partition, made in good faith, and which is not prejudicial to the minor's interests, cannot be re-opened by him on attaining majority, only on the ground that he was not a consenting party. But where the earlier partition was detrimental to his interests, it would be the duty of the court to protect the interests of the minor and allow a re-opening.28[126]

PERSONS ENTITLED TO GET A SHARE AT THE TIME OF PARTITION

Coparcener

All coparceners, whether minor or major, are entitled to get a share at the time of partition.29[127] Since they had an undivided interest in the property, a partition merely divides their title and gives them exclusive ownership. Where, upon a partition, it is only the branches who separate, the minors in a particular branch may not be allotted a share, and the same can be held by them in common with their father and brothers. Therefore, all coparceners, *i.e.,* sons, son's sons and son's son's sons, have a right to obtain a share on a partition.

Son Born of a Void or Voidable Marriage

A child born of a void or voidable marriage, is a legitimate child of the parents and statutorily entitled to inherit their separate property, yet, at the same time, he cannot inherit from any other relation of the parents. His rights are better than those of an illegitimate child, but inferior to those of a child born of a valid marriage. This statutory legitimacy is therefore, different from a perfect legitimacy. There is absolutely no doubt that a perfectly legitimate child would not only inherit the separate property of the parents, but would also have a right by birth, in the coparcenary property held by his father, grandfather (*FF*) or great-grandfather (*FFF*) and his rights to inherit the property of his grandfather and for that matter, any other relation of the parents, are well-recognised. But a child on whom statutory legitimacy has been conferred, has a right only in the property of his parents and not in any other relation of the parents, which means that he cannot inherit the property of the brother who is a legitimate offspring of the father.

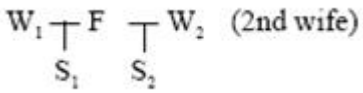

Fig. 11.4

For example, as illustrated in Fig. 11.4, *F*, a male Hindu, has a wife *W* 1 and a son S1, and he, during the lifetime of *W* 1, gets married to *W* 2, and a son S2 is born to him from her. S1 is a legitimate child and S2 is a statutory legitimate child. As the Hindu Marriage Act, 1955, explicitly provides, such statutory legitimate child will not have the rights in the property of any other relation except the parents. Consequently, he would not be deemed to be related to S1, the legitimate son of his father. *F* and S1 would constitute a coparcenary, and on the death of S1, *F* will take his interest by survivorship, but since S2 cannot have any interest in the property of any relation except the parents, he can neither acquire an interest in coparcenary property by birth, nor acquire the interest of any coparcener under the doctrine of survivorship. Such a child would be entitled to inherit the property of the father, but would not be a coparcener with him,30[128] and would not get a share at the time of partition.

Illegitimate Son

Presently, an illegitimate son inherits only from the mother, and not from the father. Under Hindu law, the rights of an illegitimate son to get a share at the time of partition, depends upon his caste. Among the three castes, Brahmins, Kshatriyas and Vaishyas, an illegitimate son is not a coparcener, but a member of his putative father's joint family, and therefore, though he is not entitled to a share in the property his rights of maintenance out of the joint family funds are recognised.31[129] A son of a permanently kept concubine, called *Dasiputra*, who is a Sudra, is neither entitled to ask for a partition, nor to get a share if the father was joint with his collaterals.32[130] Where the father was separated from his collaterals, a *dasiputra* has no right to demand a partition from him,33[131] nor to claim a share if a partition takes place between the father and his legitimate sons, but he can validly be given a share by his father. It is totally the discretion of the father, which he can exercise at his pleasure.34[132] He also has the power to decide the quantum of the share. It can be less than or even equal to the share of that of his legitimate sons, or there can be no share at all, but if the father is dead and the coparcenary comprises only the brothers, then the position is different. Here, not only is the *dasiputra* entitled to enforce a partition, but he can also get a share in his own right and not merely at the discretion of the other brothers. The extent of his share would be one-fourth of what the other brothers (legitimate sons of his father) would take,35[133] but with the incidences of survivorship, *i.e.,* if the family comprised a legitimate son of the father and a *dasiputra*, during the lifetime of the father, the *dasiputra* would have neither a right to ask for a partition, nor a claim to get a share if a partition takes place and no incidences of

survivorship with the father, but if the father gives him a share, such action would be valid, and its quantum will be decided by the father. On the death of the father, he will be a coparcener with the brother, with a right of survivorship, a right to ask for a partition of the property and a right to get a share equal to one-fourth (1/4th)of the latter's share. If the brother dies before a partition has been effected, the *dasiputra* would take the whole of the property under the doctrine of survivorship.

After-born Son

A son who is born after a partition has been effected in the family, can be a son conceived and born after the partition, or born after the partition, but conceived before the partition. The rule is that if the pregnancy is known, then either the partition should be deferred till the birth of the child, or a share should be kept apart for it, to be given to him when he is born. If a female child is born, the share could be redistributed among all the members. When the son is conceived and born subsequent to the partition, he becomes a coparcener with his father, provided he has taken a share and under the old law, was exclusively entitled to inherit his separate properties as well. This rule of sole entitlement to inherit the separate properties has now been abrogated in light of the provisions of the Hindu Succession Act, 1956, which treats a divided and an undivided, son equally in matters of inheritance. Where the father did not take a share at the time of the partition, an after born son can reopen the partition and take a share equal to the share of another son.

Disqualified Coparceners

Ownership carries with it, not only advantages, but responsibilities as well, and a capability, both physical and mental, is required for its effective management and enjoyment. A person who is inherently incapable of managing and enjoying the property, if given ownership in it, may find it detrimental both to his person, as well as to the property itself. An incapability to manage property, therefore, deprives a male Hindu of ownership in the coparcenary property. Under Hindu law, a male child, though within three generations from the last holder of the property, could not acquire an interest in the coparcenary property if he was affected with certain kinds of diseases or infirmities. These diseases or infirmities disqualified him from taking a share and therefore, he was called a disqualified coparcener. Prior to the passing of the Hindu Inheritance (Removal of Disabilities) Act, 1928, a person suffering from congenital and incurable blindness,36[134] deafness and dumbness,37[135] idiocy38[136] or insanity,39[137] virulent and incurable leprosy and other incurable diseases, that made social intercourse virtually impossible, could not acquire an interest in the coparcenary property. Under the 1928 Act, except for congenital idiocy or lunacy, all other diseases or deformities ceased to operate as disqualifications. Even these prohibitions are purely personal and do not extend to the legitimate issue of the disqualified person.

If a member of the joint family has no congenital disqualification, he will acquire a right by birth, in the coparcenary property, and if he subsequently becomes insane, he will not be deprived of his interest, as it is only when he, by birth, is or has been a lunatic or idiot, that he will be disqualified.

Female Members

Although the ownership of the coparcenary property is with the coparceners only, and a female member of the joint family can neither be a coparcener, nor claim any title to the coparcenary property, if and when an actual partition takes place under the classical Hindu law, certain female members in the joint family are entitled to get a share. This rule is applicable in all the sub-schools of Mitakshara, except the Dravida or Madras School. In the Dravida School, no female gets a share at the time of partition, but in the rest of the schools of Mitakshara, three categories of female members are to be given a share. It is noteworthy that these females do not have the right to ask for a partition and claim their share40[138]. They cannot demand a partition of the property themselves. If either a partition is demanded by a coparcener, or the family members, by mutual agreement, decide to destruct their joint status, *i.e.,* a partition takes place at the instance of a person who is competent to ask for it, these females have to be allotted their respective shares. If they die before a partition is effected, their legal representatives would not be in a position to step into their shoes and claim a share that would have been allotted to them if they had been alive. Unlike in the case of a coparcener, where a severance of status is enough, and his subsequent demise would not disentitle his legal representatives to claim his share, for females, the entitlement to take a share arises only when not merely a severance of status among the coparceners, but a partition by metes and bounds takes place. If a partition takes place and she, though entitled, is not given a share, only then is she empowered to reopen the partition and claim her share. These three categories of females who are entitled to get a share are:

(i) father's wife,

(ii) mother, and

(iii) paternal grandmother,

and they get the property subject to the following rules:

(i) Females are entitled to get a share at the time of partition under the Benaras,41[139] Mithila and Bombay42[140] (Maharashtra) Schools only and not under the Madras (Dravida) School.43[141]

(ii) Father's wife and widowed mother are entitled to get a share only when they were not paid stridhana by their husbands or father–in-law that was equal to or more than the value of the share that is to be given to her at partition.44[142] Where she was not given any stridhana, she gets her full share and where she was paid stridhana but its quantum or value was less than her share, the share will accordingly be proportionately reduced.

(iii) Even though these females are entitled to get a share, they are incapable of demanding and ascertaining it before a partition. They cannot demand it since they have no pre-existing right in the property, except for a right of maintenance,45[143] and till a division of the property is actually made by a partition, they do not get their shares.

(iv) Where a female dies before a partition has been effected, her share does not pass to her legal representatives, but remains in the common pool as the joint family property, and at a subsequent partition, will be divided among all those who on such day, are entitled to get a portion from it.

(v) Since a woman does not have an ownership right in the property, she can neither prevent the Karta from alienating the property, nor can she challenge an unauthorised alienation. Even where a preliminary decree in a partition suit, declares her entitlement to a specific share, it would not affect a consent decree made on a mortgage that was executed by her son and her husband.46[144]

(vi) A mere severance in status by the coparceners, does not entitle her to possess or get her share, as a female can be granted her portion only when a partition by metes and bounds is effected.47[145]

(vii) Where a partition by metes and bounds takes place, and a female, though entitled, is not given her share, she can file a suit for a re-opening of the partition and claim her share.48[146]

(viii) Prior to the passing of the Hindu Succession Act, 1956, a female took her share as a limited owner of the property. Though she could enjoy it and possess it, she had no general power to alienate it. Under the Act of 1956, this limited ownership was converted into an absolute ownership, if the female was in possession of her share on the day the Act was enforced.49[147] Post 1956, the share that she takes is her absolute property, with full powers of disposal over it.

(ix) An entitlement to maintenance does not operate as a disqualification for a woman, for getting a share at the time of partition. Presently, a Hindu woman's right to claim maintenance is secured under both the civil and criminal laws, but if she gets a share, her maintenance rights are affected, since for seeking maintenance, she must show that 'she is incapable of maintaining herself', and the quantum of share that she gets at a partition, would be a major factor while deciding on the above point.

Father's Wife

Where a partition takes place between a father and his sons, the father's wife or wives (if he was married prior to 1955), are entitled to a share, which is equal to the share of a son. It is irrespective of whether the father himself effects the partition, or it has taken place at the instance of a son. Where the father has more than one wife (as permitted before 1955), each wife is entitled to a share equal to the share of the son. It would be irrespective of whether she has a son of her own or not. For example, as illustrated in fig. 11.5, a Hindu joint family consists of the father *F*, his wife *W* and a son *S*.

Fig. 11.5

On a partition, each of them will take a one-third (1/3rd) share. If the father was married in 1950, to *W* 1 and *W* 2,

and has a son S1, from *W* 1, upon a partition, each member of the family will take one-fourth (1/4th) of the total property [see Fig. 11.6].

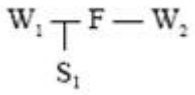

Fig. 11.6

If the father dies before effecting a partition, the son will take the entire property under the doctrine of survivorship and the wife or wives, will not get anything.

Where a partition of the coparcenary property is effected the widow of the last holder of the property as also the widow of the predeceased son of his younger brother with whom he was joint would have a share.50[148]

Widowed Mother

On the death of the father, where a partition takes place between or among brothers, the widowed mother is entitled to a share that is equal to the share of the brother.51[149] The expression 'mother', includes a stepmother also.52[150] For example, as shown in Fig. 11.7, a family consists of a father *F*, mother *M*, and three sons, S1, S2 and S3 .

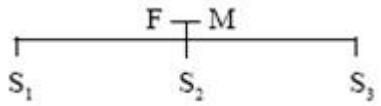

Fig. 11.7

On the death of the father, if the three brothers partition the property, the mother and each of the brothers will get one-fourth (1/4th)of the property. In another example illustrated in Fig. 11.8, *F* had two wives, *W* 1 and *W* 2 (both valid marriages solemnised before 1955), and two sons, S1 and S2, from *W* 2.

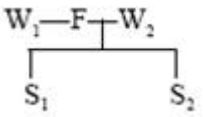

Fig. 11.8

After the death of the father, where the sons effect a partition among themselves, *W* 1 and *W* 2 both, are entitled to get a share equal to the share of the sons, *i.e., W* 1, *W* 2, S1 and S2 will take one-fourth (1/4th) of the property each, irrespective of the fact that *W* 1 is a stepmother and does not have a son. In the above example, if before partition, S2 dies; the family will now consist of *W* 1, *W* 2 and S1. As a sole surviving coparcener, S1 will take the total property. For a partition, a minimum of two coparceners should be present and therefore, no partition can take place here and *W* 1 and *W* 2 will not get a share.

Paternal Grandmother

A paternal grandmother gets a share equal to the share of a grandson, where the sons are dead and a partition takes place among the grandsons.53[151] The expression 'paternal grandmother', includes a step grandmother.54[152] For example, as illustrated in Fig. 11.9, a family consists of a father *F*, his wife *W*, a son, *S* and three grandsons, S1, S2 and S3 .

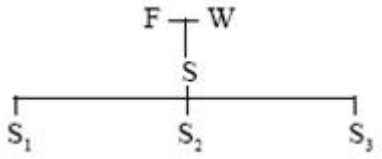

Fig. 11.9

On the death of the father and that of the son, the family will have S1, S2 and S3, and *W* as their paternal grandmother. Where a partition will take place, S1, S2, S3 and *W* will each take a one-fourth (1/4th) share, *i.e.,* the share of *W* will be equal to the share of each grandson. The calculation will be simple where the share of each grandson is identical. But there may be cases where the share of each grandson is different vis a vis each other. For example, as illustrated in Fig. 11.10, on the death of *F*, the father, and also of his three sons, S1, S2 and S3, the family will consist of *W*, the paternal grandmother, S4, son of S1 (deceased), S5 and S6, sons of S2 (deceased), and S7, S8 and S9, sons of S3 (deceased).

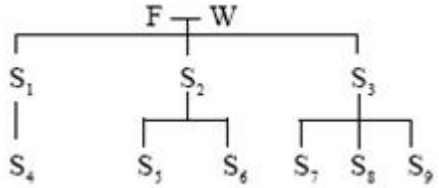

Fig. 11.10

In the absence of *W*, the property would have been divided into three equal parts, one each going to the branch of S1, S2 and S3, respectively. The one-third (1/3rd) share of S1 would have gone to S4 ; the one-third (1/3rd) share of S2 would have gone to S5 and S6 collectively, and they would have taken (1/3 x 1/2 = 1/6) a one-sixth (1/6th) share each; the one-third (1/3rd) share of S3 would have gone to S7, S8 and S9, and each of them would have taken a (1/3 x 1/3 = 1/9) one-ninth (1/9th) share. In such cases, therefore, if we have to ascertain the share of the paternal grandmother, the number of grandsons will be counted, in this case six, and then the grandmother will be added to it as a grandson, *i.e.,* we presume that there are seven grandsons: S4, S5, S6, S7, S8, *S9* and *W*, and divide the total property into seven parts, giving one-seventh of the property (1/7th) to *W*. From the rest of the six-sevenths (6/7th) property, the grandsons will take a share in accordance with the rule of representation. The final shares will be as follows:

W = 1/7

S 4 = 6/21

S 5 = 6/42

S 6 = 6/42

S 7 = 6/63

S 8 = 6/63

S 9 = 6/63

Where the son, as well as the grandsons, are alive, there is a conflict of judicial opinion about whether the paternal grandmother gets a share or not, if a partition takes place between her son and a grandson. According to the Calcutta55[153] and Patna High Courts56[154] (Mithila School), she gets a share, but the Bombay57[155] and Allahabad58[156] High Courts rule that she does not get a share. According to the Bombay High Court, where, in the presence of the paternal grandmother, the grandson seeks a partition from his collaterals, who are not the direct

descendants of the paternal grandfather, she is not entitled to get a share.sq59[157]

Rule under the Dayabhaga Law

Under the Dayabhaga law, the father is the absolute owner of his share and there is no right by birth, in favour of the son, and consequently, the son cannot demand a partition from the father. A partition may take place at the instance of the father, if he so desires, and if he wants. At his pleasure, he can give a share to his wife, which is either equal to or unequal to the share of the son.60[158] A widow, on the death of her husband, becomes his heir with the sons, and where the family continues as joint, she can, in her own right, sue for claiming her share or demand a partition from the joint members. Unlike under the Mitakshara law, she has a pre-existing ownership and a definite share in the property and her rights do not arise only when a partition takes place.61[159]

RULES FOR CALCULATION OF SHARES IN A PARTITION BY METES AND BOUNDS

On a partition among the members of a joint family, all the members may effect a division among themselves, or only the branches may separate. The followings rules are to be observed while calculating the shares of the members who separate:

(i) A partition has to be effected between two generations as the first step, for example, between a father and his sons.

(ii) The shares are to be so calculated that the share of the father on the one hand, and the share of each of the son on the other, are absolutely equal.

(iii) The father takes the share as his exclusive or separate property with respect to the sons, while the son takes it as coparcenary property when he has male issues. In the absence of any male issues, he takes the property as a sole surviving coparcener.

(iv) Where one son dies during the lifetime of the father and leaves behind male issues, the branch of the deceased son takes the share that he would have taken had he been alive,62[160] *i.e.,* the benefit of the death of a son will be taken by his male descendants, and not by his collaterals or ascendants.

(v) Where a joint family comprises only brothers, each of them takes an equal share. This is called a per capita distribution.

(vi) Each branch takes the property as per stirpes (according to the stock), but the members of each branch will take per capita as regards each other.

(vii) When female members, who are entitled to get a share, are present, they must be given a share at the time of partition. The father's wife takes a share equal to that of a son, the mother's (widowed) share is equal to that of the brothers and the paternal grandmother's share is equal to that of a grandson.

PRINCIPLE IN CASE OF AGRICULTURAL PROPERTY

The fundamental principle of a partition is that every co-sharer be given property of equal value, having similar potential. In the case of agricultural property, factors like fertility of land, proximity to metalled roads, previous possession by a member so as to maintain continuity of cultivation, must be taken into consideration while effecting a distribution.63[161]

Illustration (i)

A Hindu father *F*, has three sons, S1, S2 and S3. S1 has two sons, S4 and S5 [see Fig. 11.11].

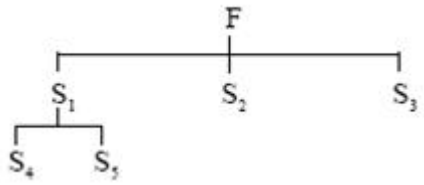

Fig. 11.11

The calculation of the shares will be done according to the following procedure:

Step (i): Effect a partition between *F* and his sons, *i.e.,* between two generations.

Step (ii): The share of *F* and each of his sons, should be absolutely equal, *i.e., F*, S1, S2 and S3, each will take one-fourth of the property (1/4th) (per capita).

Step (iii): If we want to determine the character of the property, it should be kept in mind that the one-fourth (1/4th) share of the father, is his separate property, with respect to his sons. S2 and S3 do not have any male issues and therefore, will take the property as sole surviving coparceners, and S1, who has two male issues, will take the property as the Karta of his branch.

Step (iv): The second step of the partition will be effected between S1 and his two sons, S4 and S5. Applying step (ii), S1 is the father and S4 and S5 are the sons, and the shares of each will be identical. Therefore, the one-fourth (1/4th) share that S1 had taken as the Karta of his joint family consisting of S4 and S5, will be divided into three equal parts, *i.e.,* (1/4 1/3 = 1/12) and each will get a one-twelfth share (1/12th). The final shares and their character will be as follows:

F = One-fourth (1/4th) (separate property with respect to sons)

S 1 = One-twelfth (1/4 1/3 = 1/12th) (separate property)

S 2 = One-fourth (1/4th) (sole surviving coparcener)

S 3 = One-fourth (1/4th) (sole surviving coparcener)

S 4 = One-twelfth (1/4 1/3 = 1/12th) (sole surviving coparcener)

S 5 = One-twelfth (1/4 1/3 = 1/12th) (sole surviving coparcener)

Illustration (ii)

A Hindu father *F*, has two living sons, S1 and S2, two sons of a predeceased son S3, S6 and S7, and two sons of S1, S4 and S5 [see Fig. 11.12].

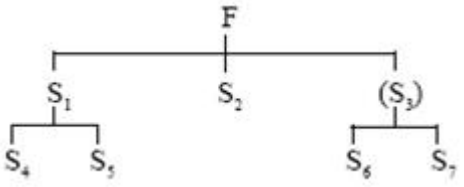

Fig. 11.12

Step (i) Where all the members are to be divided, the first step would be to effect a partition between the first two generations, *i.e.,* between *F* and S1*, S2* and S3. As S3 is dead, but is survived by two male issues, this branch has to be allotted a share.

Step (ii) The shares are to be calculated in such a manner that the share of the father and the share of each son (including the deceased one) is absolutely equal. Therefore, *F*, S1, and S2 will take one-fourth (1/4th), and the branch of S3, will take one-fourth (1/4th) of the property.

Step (iii) With respect to the character of the shares allotted, the share of the father would be his exclusive property with respect to his sons; the share of S1 would be collective with his male issues, *i.e.,* it would be a coparcenary property; and the branch of S3 would get it as joint family property.

Step (iv) The one-fourth (1/4th) share allocated to S1, as the head of his family, will be partitioned among S1, S4 and S5, each taking (1/4 1/3 = 1/12) a one-twelfth (1/12th) share.

Step (v) The one-fourth (1/4th) share allotted to the branch of the deceased son S3, will be taken by S6 and S7 in equal shares, *i.e.,* (1/4 1/2 = 1/8) one-eighth (1/8th) each. The final shares and their character will be as follows:

F = One-fourth (1/4th) (separate)

S 1 = One-twelfth (1/12th) (separate)

S 2 = One-fourth (1/4th) (sole surviving coparcener)

S 3 = Nil, as he is dead

S 4 = One-twelfth (1/12th) (sole surviving coparcener)

S 5 = One-twelfth (1/12th) (sole surviving coparcener)

S 6 = One-eighth (1/8th) (sole surviving coparcener)

S 7 = One-eighth 1/8th) (sole surviving coparcener)

Illustration (iii)

A Hindu family consists of the father *F*, his two sons S1 and S3, one son S6, of a deceased son S2, two sons of S1, S4 and S5, two living sons of S3, S8 and S9, six great grandsons S10, S11, S12, S13, S16, S17, and one great-great grand son, S15, *i.e.,* son of the deceased great-grandson S14. S2, S7 and S14 are deceased [see Fig. 11.13].

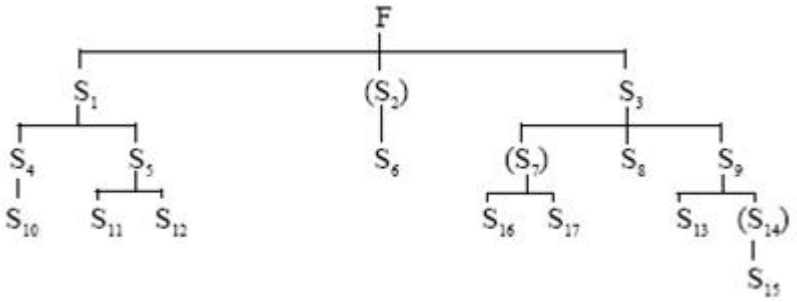

Fig. 11.13

Step (i) Effect a partition between *F*, S1, S3 and S2, who has died leaving behind a male issue, S6 .

Step (ii) The shares of *F*, S1, S3 and the branch of S2, will be equal, *i.e.,* one-fourth (1/4th) each.

Step (iii) The share allotted to S2 ’s branch will descend to S6 .

Step (iv) The share of S1 is one-fourth (1/4th), but its character is that of a coparcenary property and it is the share

of his whole branch, and he takes it as the Karta of the branch. It will be partitioned among S1, S4 and S5, each taking an equal share, *i.e.,* (1/4 1/3 = 1/12) one-twelfth (1/12th) each.

Step (v) The share of S1, which is one-twelfth (1/12th), is his separate share, but the share of S4 is taken by him with his male issue, *i.e., S10*, so this one-twelfth (1/12th) share will be equally divided between the two, each taking a (1/12 = 1/24) one-twenty fourth share.

Step (vi) The share of S5 ’s branch will be divided equally between him and his two sons, S11 and S12, each taking a (1/12 1/3 = 1/36th) one-thirty sixth share.

Step (vii) The branch of S3 has been given one-fourth (1/4th) of the property which will be divided into four equal shares, *i.e.,* (1/4 1/4 = 1/16) *i.e.,* one-sixteenth (1/16th) of the property, going to S8 and the branches of S9 and deceased S7. S3 and S8 will take one-sixteenth (1/16th) each. S3 will take it as his separate property and S8 will take it as a sole surviving coparcener.

Step (viii) The one-sixteenth share (1/16th) that is allotted to S7 ’s branch, will be taken equally by his two sons, S16 and S17. Each will take (1/16) a one-thirty second (1/32nd) share as a sole surviving coparcener.

Step (ix) The branch of S9 again, takes one-sixteenth of the property (1/16th) and this will be divided in two parts, *i.e.,* (1/16 = 1/32) which will be taken by S9 and S13. S14 is already dead, but has left behind a son S15, who is beyond four generations and therefore, will not get any share in the property. The final shares will be as follows:

F = One-fourth (1/4th) (separate)

S 1 = One-twelfth (1/12th) (separate)

S 2 = Nil (deceased)

S 3 = One-sixteenth (1/16th) (separate)

S 4 = One-twenty fourth (1/24th) (separate)

S 5 = One-thirty sixth (1/36th) (separate)

S 6 = One-fourth (1/4th) (sole surviving coparcener)

S 7 = Nil (deceased)

S 8 = One-sixteenth (1/16th) (sole surviving coparcener)

S 9 = One-thirty second (1/32nd) (separate)

S 10 = One-twenty fourth (1/24th) (sole surviving coparcener)

S 11 = One-thirty sixth (1/36th) (sole surviving coparcener)

S 12 = One-thirty sixth (1/36th) (sole surviving coparcener)

S 13 = One-thirty second (1/32nd) (sole surviving coparcener)

S 14 = Nil (deceased)

S 15 = Nil (beyond four generations)

S 16 = One-thirty second (1/32nd) (sole surviving coparcener)

S 17 = One-thirty second (1/32nd) (sole surviving coparcener).

Illustration (iv)

A Hindu joint family consists of the father *F*, his wife *W*, two sons S1 and S2, and their wives *W* 1 and *W* 2, respectively, and one grandson S3 [see Fig. 11.14].

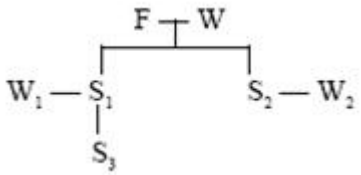

Fig. 11.14

The steps of partition will be as follows:

Step (i) The partition will be effected between the father and his two sons, S1 and S2 .

Step (ii) The father's wife would also be entitled to get a share which would be equal to that of the son. Therefore, the property will be divided into four equal parts, *F*, *W*, S1 and S2, each taking one-fourth (1/4th) of the property.

Step (iii) *F* and *W* will take it as their separate shares, but S1 will take it with his family members. Therefore, the next partition will be between S1 and his son, S3 .

Step (iv) In the partition between S1 and S3, the wife of S1 will be given a share equal to the share of S3. Thus, one-fourth (1/4th) share of this branch will be divided into three equal parts, *viz.*, (1/4 1/3) and each of them will get a one-twelfth (1/12th) share.

Step (v) The one-fourth (1/4th) share that is given to S2, will be held by him as a sole surviving coparcener. *W* 2 will not get any share, as there is no partition in that branch.

The final shares and the character of property will be as under:

F = 1/4th (separate)

W = 1/4th (separate)

S 1 = 1/12th (separate)

W 1 = 1/12th (separate)

S 3 = 1/12th (sole surviving coparcener)

S 2 = 1/4th (sole surviving coparcener)

W 2 = Nil

REUNION

'Reunion' means to unite again. 'Re' means again and 'union' means to come back together, signifying that in the past, these persons had a joint status. Thus, a reunion suggests that members, who were earlier joint, separated from each other and then came back together. In relation to a Hindu joint family, it signifies a joint status, followed by a partition and then, followed again by a restoration of the joint family status. It is only the coparceners who generally affect the joint status and therefore, it is only at the instance of a coparcener, that a reunion can take place.64[162] The joint family status of a coparcener, is acquired by birth (save in the case of an adoption). It is not something that is obtained by choice. As opposed to it, a partition or separation is a conscious decision, a voluntary act on the part of the coparceners, except in cases where the father divides the sons. But in those cases also, it is

open to the parties to remain joint with their branches. A partition therefore, is presumed to be the result of a well thought out, voluntary and conscious act, that is not permitted to be revoked at the whims and pleasures of the parties. It does not merely involve a separation of status, but causes a division of the properties as well. It has very important and significant consequences, that have a bearing on several matters intimately affecting the life of the joint family members, and therefore, if after a partition, the separated members want to come back together, they can do it in two ways:

(i) They can maintain the severance, but can dwell together or trade together. This is usually done when it is practically and financially, for the betterment of the family members. However, they do not regain the status of coparceners and this coming together again, is totally different from a formal reunion.65[163]

(ii) They can come together under a formal reunion.

A reunion under Hindu law, is a restoration of the status of coparceners to the members and a merging of their separate families, into the joint family again. A reunion is different from a formation of a joint family for the first time, even amongst close family members, and only those members are permitted to reunite, who originally or at one point of time, had a joint status in a coparcenary. For example, a Hindu joint family consisted of a father, *F*, and a son, S1. S1 sought a partition, took his share and went out of the family. After his separation, another son, S2, was born. S1 and S2 were never part of a joint family, in spite of being brothers. A reunion is possible between *F* and S1, but not between S1 and S2, if the father either separates from S2, or dies.

In *Balabux v. Rukhmabai*,66[164] the court has held that a reunion in a joint family, more so with respect to the property, can only take place between persons who were parties to the original partition.

The permissibility of a reunion under Hindu laws, is traced up to the Dharmashastras. Some texts67[165] are quoted by nearly all the Hindu law authors, according to which, a reunion is possible only between father and son, brothers and paternal uncles and nephews, and it is not available generally, to all coparceners.68[166] Thus, it cannot take place between a grandfather and a grandson, or a great-grandfather and a great-grandson, or between cousins.69[167]

Mode of Effecting a Reunion

The first and most important element of a reunion is an agreement based on a desire of the parties to come back together again.

Just as in the case of a partition, a reunion may be oral or in writing.70[168] The manner in which the earlier partition was effected, will not have a bearing on how the reunion is to take place. For example, an oral reunion is permissible in cases where the earlier partition was through a registered deed.71[169] Where an agreement to reunite is executed in writing, it must be properly attested and registered, if it relates to a property whose value exceeds Rs 100.72[170]

Existence of Same Properties not Essential

While the rulings of the courts suggest73[171] that only those parties are permitted to reunite, among whom a partition had earlier taken place, the same rule doesn't apply to the properties. The quantum of the property that each member had taken as his respective share, may decrease or increase marginally or substantially, but it will not have any effect on the reunion. A reunion is viewed as a desire on the part of the close relatives, to come back as part of the family and live together again for the sake of love and affection, and is not seen as a profitable, commercial opportunism. Therefore, it is not necessary at all that the parties bring into the common pool, the properties in the same ratio in which they had, at the time of partition, taken them. Where the son has dissipated all his properties, a reunion between him and his father is valid.74[172]

Consequences of Reunion

A reunion restores the joint family and the coparcenary for members who destructed it earlier, through a partition. They regain the status of undivided coparceners and are subject to all the incidences of coparcenary, *viz.*,75[173] unity of possession and community of interest. The shares of each are now probable and fluctuating with the deaths and births in the family, due to the application of the doctrine of survivorship.76[174] They are entitled to joint possession and enjoyment of the property and the seniormost among them will be the Karta, with the responsibility

of managing the joint family affairs.

Reunion whether Binding on Minor

The father or the guardian can effect a partition on behalf of a minor. A partition that demarcates the share of the minor and destructs his joint status, is binding on him if he was properly represented by his father or guardian and where it was not to his manifest disadvantage. However, an agreement for his reunion, entered into on his behalf, by the father or guardian, will not be valid or binding on him.77[175] The Privy Council, in *Balabux v. Rukhmabai*,78[176] had made a passing statement (reunion was neither proved nor accepted by the court) that a guardian of a minor (in the present case, it was the mother) cannot bind a minor under a reunion agreement. A subsequent decision has taken a different view.79[177] The correct position therefore, would be, that a reunion entered into between the father and his brothers, or by his father or guardian, on his behalf, would bind the interests of the minor.

Proof of Reunion

Under Hindu law, the general presumption is that every Hindu family is joint, unless the contrary is proved. But once a partition is proved, the presumption is that the family remains divided or separate. Secondly, partition is a very common phenomenon and a reunion is a rarity and an exception. Even otherwise, breaking away from the joint family is not an extraordinary feature, but after separation, to reunite, or to maintain a joint status with collaterals, is virtually, going back in time and therefore, it is considered extraordinary. Thus, a reunion has to be very strictly proved, like a disputed fact.80[178] If it is in writing, it can be proved easily, otherwise, it has to be proved by incontrovertible conduct.81[179] Therefore, where even after six to seven years of the alleged reunion, partition proceedings were actually being pursued in the court, the court will not admit the possibility of there having been a reunion.82[180]

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1. Since 2005 a daughter is also a coparcener. See the discussion *infra*.
2. *Ganesh Swain v. Nakadi Swain*, AIR 1983 Ori 279 ; (a Thakurbari is not divisible). See *Dukhi v. Landi*, AIR 1978 Ori 279 .
3. *Debendra Nath v. Hari Das*, (1910) 15 CWN 552; *Ashanullah v. Kali Kinkar*, (1884) ILR 10 Cal 675.
4. *Deenanath v. Mausaram*, AIR 1973 P&H 253 .
5. The value of the item can be adjusted towards another.
6. *Ashanullah v. Kali Kinkar*, (1884) ILR 10 Cal 675; *Swaminatha Odayar v. Official Receiver*, AIR 1957 SC 577 [LNIND 1957 SC 30].
7. *Promotha Nath Mullick v. Pradyumna Kumar Mullick*, (1925) 52 IA 245.
8. *Dattatreya v. Prabakar*, AIR 1937 Bom 202 ; *Damodar Das v. Uttamram*, (1893) ILR 17 Bom 271.
9. The example relates to the position under the classical law.
10. *Vaidyanatha v. Aiyasamy*, (1909) ILR 32 Mad 191 ; *Vrijbhukandas v. Bai Parvati*, (1908) ILR 32 Bom 26; *Nand Rani v. Krishna Sahai*, AIR 1935 All 698 .
11. *Sai Narain v. Das*, (1936) 63 IA 384.
12. *Jairam v. Nathu*, (1906) ILR 31 Bom 54.
13. *Ramachandra v. Seeniathal*, 1954 Mad 1011 ; *Sankaranayanan v. Official Receiver*, 1977 Mad 171 .
14. Yajnavalkya, 11, p. 124; Dayabhaga, III, ii, p. 39.
15. See *Gauramma v. Mallappa*, AIR 1964 SC 510 [LNIND 1963 SC 195] where the Supreme Court has quoted all the relevant texts. The case involved a question of whether the father was competent to make a gift of a small portion of the joint family properties to a daughter.
16. Similar is the position of an unmarried daughter. *Bholi Bai v. Dwarka Das*, AIR 1925 Lah 32 ; *Ramalinga v. Narayana*, AIR 1922 PC 201 .
17. *Jagmohan Lakshmichand v. Ramchand Das*, AIR 1946 Nag 84 ; *Perrazu v. Subbarayudu*, (1921) 48 IA 280; *Vaikuntam Pillai v. Avudiappa*, 1937 Mad 127 ; *Radhika Prasad v. Nand Kumar*, (1944) ILR Nag 63; *Manhar Lal v. Jagjivanlal*, AIR 1952 Nag 73 ; *Tammireddi v. Gangireddi*, (1922) ILR 45 Mad 281 .
18. *Abbay Chandra v. Pyari Mohan*, (1870) 5 Beng LR 347 (FB).

19. *Ibid*.

20. *Panna Lal v. Hrishikesh*, (1949) ILR 1 Cal 192; *Vaidyanatha v. Ayyaswami*, (1909) ILR 32 Mad 191 ; *Vribhukandas v. Bai Parvati*, (1908) ILR 32 Bom 26.

21. *Ranagopala v. Venkataraman*, (1947) 2 Mad LJ 37 (PC); *Subbayya v. Anantaramayya*, (1930) ILR 53 Mad 84 .

22. *Vrijbhukandas v. Bai Parvati*, (1908) ILR 32 Bom 26.

23. *Shankar v. Hardeo*, (1889) 16 IA 71; *Pirthi Pal v. Jawahir Singh*, (1887) 14 IA 37.

24. *D. Odabbasappa Basappa Belavigi v. Gadigeppa Verappa Nelogal*, (2003) ILR 4 Kant 2987, AIR 2003 NOC 93 (Kant). See also *K. Adivi Nadu v. E Duruvasulu Nadu*, *(1995) 6 SCC 150* [*LNINDORD 1995 SC 11*], wherein it was held that though the second alienee had no equities, the restrictive share to which the first alienee was entitled, should be allotted to them as a special case.

25. *China Venkata v. Venkatarama*, AIR 1957 AP 93 .

26. *Ranga Thatachari v. Srinivasa*, (1927) ILR 50 Mad 866 ; *Kishan Lal v. Lachmi Chand*, AIR 1937 All 456 .

27. *Bachoo v. Mankorebai*, (1907) ILR 31 Bom 373.

28. *Nagappa Chettiar v. Subramanian*, (1946) ILR Mad 103.

29. *Appalaswami v. Suryanarayana Murti*, (1948) ILR Mad 440.

30. *AIR 2009 Bom 80* [*LNIND 2008 BOM 969*].

31. AIR 1968 SC 1042 .

32. *D. Tuklya v. Shivgya*, AIR 1973 Mys 4 ; *Digambar v. Dhanraj*, AIR 1922 Pat 96 .

33. *Apaji v. Ramachandra*, (1892) ILR 16 Bom 29; *Narayan v. Arjun*, *AIR 1986 Bom 122* [*LNIND 1985 BOM 119*]; *Aher Hamiry v. Aher Duda*, AIR 1978 Guj 10 [*LNIND 1977 GUJ 24*].

34. *Hari Kishan v. Chandu Lal*, AIR 1918 Lah 291 (FB).

35. *Nanak Chand v. Chander Kishore*, AIR 1982 Del 520 [*LNIND 1982 DEL 155*].

36. *Rani Pergash v. Dahan Bibi*, AIR 1924 Pat 420 ; *Gobind v. Abdul*, (1903) ILR 25 All 546.

37. *Kulada v. Haripada*, (1913) ILR 40 Cal 407; *Khunni Lal v. Gobind*, (1911) ILR 33 All 356; *Vaithilinga v. Avyathorai*, (1927) ILR 40 Mad 118, 37 IC 753.

38. *Govind v. Abdul*, (1903) ILR 25 All 546; *Khunni Lal v. Gobind*, (1911) ILR 33 All 356.

39. *Vella Venkatasubbayya v. Yella Venkataramayya*, (1944) ILR Mad 33; *Kulada v. Haripada*, (1913) ILR 40 Cal 407.

40. *Mitter Sen Singh v. Maqbul Hasan Khan*, AIR 1930 PC 251 ; *Chidambaram v. Ma Nyein Me*, AIR 1928 Rang 179 .

41. *Girdhari Lal v. Fateh Chand*, AIR 1955 MB 148 .

42. *Apporva Santilal Shah v. Commissioner of Income Tax*, *AIR 1983 SC 409* [*LNIND 1983 SC 76*].

43. *Laxminarain v. Trimbak*, AIR 1934 Nag 278 ; *Bapu v. Shanker*, AIR 1926 Bom 160 ; *Alluri Venkatapathi v. Dantuluri Venkatanarasimha*, (1937) ILR Mad 1; *Murugayya v. Palaniyandi*, (1916) 31 Mad LJ 147.

44. *Mulan Chand v. Kanchhendillal*, AIR 1958 MP 304 [*LNIND 1957 MP 173*]; *Venkatasubramania v. Easwara Iyer*, 1966 Mad 266 ; *Meyyappa v. Commissioner of Income Tax*, 1951 Mad 506 .

45. *Aiyavier v. Subramania Iyer*, (1917) 32 Mad LJ 439; *Alluri Venkatapathi v. Dantuluri Venkatanarasimha*, (1936) 63 IA 397.

46. *Kuppuswamy v. Perumal*, 1964 Mad 291 ; *Brijraj Singh v. Sheodan Singh*, AIR 1927 All 454 .

47. *Gurusami Naiker v. G. Jayaraman*, 1996 Mad 212 .

48. *Deveerachar v. Viswesariah*, AIR 1968 Mys 211 ; *Gadadhar v. Gangadhar*, *AIR 1972 Ori 24* [*LNIND 1971 ORI 19*].

49. *Hiralal v. Fulchand*, AIR 1956 Sau 89 ; *GP Gackwad v. State*, *AIR 1986 Bom 124* [*LNIND 1984 BOM 190*].

50. *Venkateswara Pattar v. Mankayammal*, (1936) 69 Mad LJ 410.

51. *Subbarami Reddi v. Chenchuraghava Reddi*, (1945) ILR Mad 1714; *Meyyappa v. Commissioner of Income Tax*, 1951 Mad 506 .

52. *Appovier v. Rama Subba Aiyan*, (1866) 1 MIA 75.

53. *Palaniammal v. Muthuvenkatachela*, (1925) 52 IA 83.

54. *Rajendra Nath v. Commissioner of Income Tax*, (1991) 188 ITR 753 (All).

55. *P.G. Hariharan v. Padaril*, AIR 1994 Ker 36 [LNIND 1992 KER 260]; *Harkishan v. Partap*, AIR 1938 PC 189 .

56. *Ramanna v. Jaannatha*, AIR 1941 PC 48 .

57. *Ramcharan v. Girijanandam*, AIR 1966 SC 323 [LNIND 1965 SC 141]; *PG Hariharan v. Padaril*, AIR 1994 Ker 36 [LNIND 1992 KER 260]; *S.S. Pillai v. K.S. Pillai*, AIR 1972 SC 2069 [LNIND 1972 SC 297].

58. *Ramalinga v. Virupakshi*, (1883) ILR 7 Bom 538.

59. *Sobhag Singh v. Pirthisingh*, (1950) ILR Nag 160; *Kameshwar Singh v. Rajbans Singh*, (1943) ILR Pat 433.

60. *Venkataramanna v. Brammanna*, (1869) 4 Mad HC 345.

61. *Jagat Krishna v. Ajit Kumar*, AIR 1964 Ori 75 [LNIND 1960 ORI 36].

62. *Suramma v. Venkataratnam*, 1952 Mad 166 .

63. The rule is presently to be seen in light of the fact that the daughter is also a coparcener. *Mandali Prasad v. Ramchurnlal*, (1947) ILR Nag 848; *Vekeyamian v. Agniswarian*, (1870) 4 Mad HC 307.

64. *Narasimha v. Veerabhadra*, (1894) ILR 17 Mad 287 ; *Bhagwat Ram v. Ramji Ram*, (1947) 2 Mad LJ 67 (PC).

65. *M.S. Subbukrishna v. Parvathi,* AIR 2008 (NOC) 191 (Karn); 2007(6) AIR Kar R 169.

66. *Athilinga Goundar v. Ramaswami Goundar*, (1945) ILR Mad 297.

67. *Chegama v. Munisami*, (1897) ILR 20 Mad 75 ; *Satyabaali v. Sankeetham*, 40 Cut LT 568.

68. See *Radha Behera v. Gangei Behera*, AIR 2003 NOC 532 (Ori) : 2003 AIHC 2802 (Ori) wherein it was held that unless the adopted son is able to prove that the law applicable in Bengal had application over him, he would not be entitled to claim a half share in the property with a natural son.

69. *Zaheda Begum v. Lal Ahmed Khan*, AIR 2010 AP 1 [LNIND 2009 AP 582].

70. *Puttrangamma v. M.S. Ranganna*, AIR 1968 SC 1018 [LNIND 1968 SC 36]; *A. Raghavamma v. A. Chenchamma*, AIR 1964 SC 136 [LNIND 1963 SC 101]; *Lakshmanier v. Krishnamachary*, 1976 (1) Mad LJ 452.

71. *Shivappa Rudarappa v. Rudrava Chambasappa*, (1933) ILR 57 Bom 1.

72. *Indranarayan v. Roopnarayan*, AIR 1971 SC 1962 [LNIND 1971 SC 305].

73. *Sushil Kumar v. Ram Chandra*, AIR 1982 All 129 .

74. *Palanisamy Gounder v. Periammal*, AIR 2003 NOC 3 (Mad) : 2003 AIHC 2306 (Mad).

75. *A. Raghavamma v. A. Chenchamma*, AIR 1964 SC 136 [LNIND 1963 SC 101].

76. *Babu Ramasray Prasad Choudhary v. Radhika Devi*, (1935) 43 LW 172 (PC).

77. *Soundanarain v. Arunachalam Chetty*, (1915) ILR 39 Mad 159 (PC).

78. *Girija Bai v. Sadashiv Dhundiraj*, AIR 1916 PC 104 .

79. *Palaniammal v. Muthu Venkatachala*, (1925) 52 IA 83; *Jagadamba v. Narain Singh*, (1923) 50 IA 1, *Darshan Singh v. Prabhu Singh*, (1946) ILR All 130; *Rachhpali v. Chandresar*, AIR 1924 Oudh 252 .

80. AIR 1964 SC 136 [LNIND 1963 SC 101].

81. *Mulan v. Kanchhendilal*, AIR 1958 MP 304 [LNIND 1957 MP 173].

82. *A. Raghavamma v. A. Chenchamma*, AIR 1964 SC 136 [LNIND 1963 SC 101], para 35.

83. *Lakshmi Perumallu v. Krishnavenamma*, AIR 1965 SC 825 [LNIND 1964 SC 198].

84. *A. Raghavamma v. A. Chenchamma*. AIR 1964 SC 136 [LNIND 1963 SC 101]. For a contrary opinion see *Narayan Rao v. Purushottam Rao*, (1938) ILR Mad 315 that is no longer good law in view of the above mentioned Apex Court's decision.

85. *Bhagwant Kishore v. Bishambhar Nath*, AIR 1950 All 54 [LNIND 1949 ALL 91].

86. *Ramalinga v. Narayana*, AIR 1922 PC 201 ; *Girija Bai v. Sadashiv Dhundiraj*, AIR 1916 PC 104 ; *Sundarajan v. Arunachalan*, 1916 Mad 1170 (FB); *Suraj Narain v. Iqbal Narain*, (1913) 40 IA 40; *Kawal Nain v. Prabhulal*, AIR 1917 PC 39 .

87. *Rajrup Rai v. Sheo Shankar Rai*, AIR 1945 All 287 .

88. AIR 1958 SC 1042 [LNIND 1958 SC 98]: (1959) SCR 1249 [LNIND 1958 SC 98].

89. *Chelimi Chetty v. Subbamma*, (1917) ILR 41 Mad 442 ; *Lalta Prasad v. Sri Mahadeoji Birajman Temple*, (1920) ILR 42 All 461; *Hari Singh v. Pritam Singh*, AIR 1936 Lah 504 ; *Rangasayi v. Nagarathnamma*, (1933) ILR 57 Mad 95 ; *Ram Sing v. Fakira*, (1939) ILR Bom 256; *Mandliprasad v. Ramcharan Lal*, (1947) ILR Nag 848.

90. *Kakamanu Pedasubbayya v. Kakamanu Akkamma*, AIR 1958 SC 1042 [LNIND 1958 SC 98].

91. *Radha Krishna v. Satyanarayan*, 1949 Mad 173 ; *Puttrangamma v. M.S. Ranganna*, AIR 1968 SC 1018 [LNIND 1968 SC 36]: (1968) 3 SCR 119 [LNIND 1968 SC 36].

92. (1910) 37 IA 161; *Shagun Chand v. Data Ram*, AIR 1927 All 465 ; *Palani Ammal v. Muthuvenkatacharia*, AIR 1925 PC 49 .

93. *Radha Krishna v. Satyanarayana*, 1949 Mad 229 .

94. AIR 1968 SC 1018 [LNIND 1968 SC 36].

95. *Chhaya Gupta v. District Registrar, Chennai*, 2004 Mad 94 ; *V.N. Sarin v. Ajit Kumar Poplai*, AIR 1966 SC 432 [LNIND 1965 SC 184]; *Rajagopal Reddy v. Padmini*, (1990) 1 Mad LJ 234; *Controller of Estate Duty v. Kantalal Trikamal*, (1976) 4 SCC 643 [LNIND 1976 SC 233]; *Vidyavathi Devi v. Commissioner of Gift Tax*, (1988) 169 ITR 708 (Raj).

96. See The Transfer of Property Act, 1882, s. 9;*Katama Natchiar v. Rajan of Shivaganga*, (1863) 9 MIA 539; *Kishan Lal v. Lachmichand*, AIR 1937 All 456 ; *Pavayammal v. Devanna Gounder*, (1989) 1 HLR 474 (Mad).

97. *Jogireddi v. Chinnabbireddi*, (1929) 56 IA 6; *Chandravathi v. Lakshmichand*, AIR 1988 Del 13 [LNIND 1987 DEL 103].

98. *Chandravathi v. Lakshmichand*, AIR 1988 Del 13 [LNIND 1987 DEL 103].

99 *Siromani v. Hemkumar*, AIR 1968 SC 1299 [LNIND 1968 SC 97]; *Krishna Bai v. Sivanath Singh*, AIR 1993 HP 65 .

100 *Joginder Singh v. Mohinder Singh*, 1997 (2) HLR 152 (P&H).

101 *Sengoda v. Muthu*, (1924) ILR 47 Mad 567 .

102 *Indranarayan v. Roopnarayan*, (1971) 2 SCC 438 [LNIND 1971 SC 305].

103 *Petambur v. Hurish Chunder*, (1871) 15 WR 200; *Judab Chunder v. Benod Beharry*, (1863) ILR 1 Hyd 214.

104 *Bhagwati Prasad v. Rameswari Kaur*, AIR 1952 SC 72 [LNIND 1951 SC 36]; *Balabux v. Rukhmabai*, (1903) 30 IA 30.

105 AIR 2008 Chh 13 .

106 *Ramalinga v. Narayana*, AIR 1922 PC 20 ; *Girdhari Lal v. Fateh Chand*, AIR 1955 MB 148 ; *Jagmohan v. Ranchhodas*, AIR 1946 Nag 84 .

107 *Moti v. Amarchand*, AIR 1933 Bom 121 ; *Rajendra Kumar v. Brojendra Kumar*, AIR 1923 Cal 501 .

108 *Neelkanth v. Vidya Narasinh*, (1930) 57 IA 194.

109 *Balabux v. Rukhmabai*, (1903) 30 IA 130.

110. *Vaidyanatheir v. Aiyaswamy Aiyer*, (1909) ILR 32 Mad 191 ; *Subbareddni v. Alagammal*, (1918) 34 Mad LJ 596.

111 *Balabux v. Rukhmabai*, (1903) 30 IA 130; *Balakrishna v. Ramakrishna*, (1931) 58 IA 220; *Jatti v. Banwarilal*, (1923) 50 IA 192.

112 *Ramanatha v. Veerappa*, 1956 Mad 89 (DB); *Nalini Kanta v. Surnamoyee*, (1914) 41 IA 247.

113 *Thakar Singh v. Sant Singh*, AIR 1933 Lal 465 ; *Prahladh v. Luchmunbutty*, (1869) 12 WR 256; *Bhikulal v. Kishanlal*, AIR 1959 Bom 260 [LNIND 1958 BOM 68].

114 A grandmother, in case she is not entitled to get a share, need not be made a party. See *Jotiram Ekoba v. Ramachandra Trimbak*, (1941) ILR Bom 638.

115 *Duri v. Tadepatri*, (1910) ILR 33 Mad 246 .

116 *Chamapaklal Chimanlal v. Amubhai Dahyabhai*, (1945) ILR Bom 619.

117 *Ramcharya v. Anatachary*, (1894) ILR 18 Bom 389.

118 *S. Kandaswamy Naicker v. Akkammal*, (1997) 1 HLR 582 (Mad).

119 The property may be in the possession of a mortgagee or lessee or can be impartible. See *Moti v. Amarchand*, AIR 1933 Bom 121 ; *Thakar Singh v. Sant Singh*, AIR 1933 Lah 465 ; *Rajendra Kumar v. Brojendra Kumar*, AIR 1923 Cal 501 ; *Ramaswamy v. Alagiriswami*, (1904) ILR 27 Mad 361 .

120 *Rajendra Kumar v. Brojendra Kumar*, AIR 1923 Cal 501 .

121 *Neel Kanth v. Vidya Narasinh*, (1930) 57 IA 194.

122 Manu IX, pp. 47, 48.

123 *Bishambar Nath v. Lala Amar*, AIR 1937 PC 105 ; *Moro Vishvanath v. Ganesh Vithal*, (1873) 10 Bom HC 444; *A. Venkappa Bhatta v. Gangamma*, AIR 1988 Ker 133 [LNIND 1987 KER 202]; *Veerabhadrappa v. Lingappa*, AIR 1963 Mys 5 .

124 *Raghunath Tiwary v. Ramakant Tiwary*, AIR 1991 Pat 145 .

125 *Ratnam Chettiar v. M. Kuppuswamy Chettiar*, *AIR 1976 SC 1* [*LNIND 1975 SC 352*]; *A. Ganapathi Nayak v. Sri Devenatha*, 1999 (1) HLR 497 (Kant).

126 See *Radhamani Bhaiyanin v. Dibakar Bhuiya*, AIR 1991 Pat 95 where reopening was not allowed; *Bishundeo v. Seogani Rai*, *AIR 1951 SC 280* [*LNIND 1951 SC 33*]; *Sukhrani v. Hari Shankar*, *AIR 1979 SC 1436* [*LNIND 1979 SC 233*].

127 *Sartaj Kuari v. Deoraj Kuari*, (1888) ILR 10 All 272.

128 *Shantaram v. Dugubai*, AIR 1987 Bom 182 [*LNIND 1987 BOM 10*]; *Jagarlamudi Sujata v. Jagarlamudi*, *AIR 1992 AP 291* [*LNIND 1991 AP 283*].

129 *Vellayappa v. Natarajan*, (1931) 58 IA 402.

130 *Gur Narain Das v. Gur Tahal Das*, (1952) 2 Mad LJ 251 (SC); *Vellayappa v. Natarajan*, (1931) 58 IA 402.

131 *Dorai Babu v. Gopala Krishna*, 1960 Mad 501 .

132 *Packirisamy v. Doraiswami*, (1931) ILR 9 Rang 266.

133 *Kamulammal v. Visvanathaswami*, AIR 1923 PC 8 ; *Gur Narain Das v. Gur Tahal Das*, *AIR 1952 SC 225* [*LNIND 1952 SC 34*]; *Uderam v. Thaggu*, (1949) ILR Nag 248.

134 *Gurneshwar v. Durga Prasad*, AIR 1917 PC 146 ; *Fakimath v. Krishna Chandra Nath*, *AIR 1954 Ori 176* [*LNIND 1954 ORI 56*]; *Pudiava v. Pavanasa*, 1923 Mad 215 (FB).

135 *Savitribai v. Bhaubat*, AIR 1927 Bom 103 ; *Bharamappa v. Ujjangavda*, AIR 1922 Bom 173 .

136 *Bijai v. Jagat Pal*, (1891) ILR 18 Cal 111 (PC).

137 *Ram Singh v. Bhani*, AIR 1916 All 47 ; *Bapaji v. Dattu*, AIR 1923 Bom 425 ; *Muthusami v. Meenammal*, 1920 Mad 652 .

138 *Ananda Krishna Tate v. Draupadhbai Krishna Tate,* AIR 2010 Bom 83 .

139 Kerala followed the Benaras School, and not the Dravida or Madras School. See *Seraswathi v. Anantha*, AIR 1966 Ker 66 .

140 *Shiromani v. Hem Kumar*, *AIR 1968 SC 1299* [*LNIND 1968 SC 97*].

141 *Narayanan v. Ponnammal*, *(2002) 4 LW 338* (Mad); *Appayya v. Spl Tehsildar*, (1988) 1 Andh LT 289; *Adusumalli v. Yermeni*, (1974) 1 Andh WR 440, AIR 1974 AP 10 (FB); *Kishta Bai v. Ratna Bai*, (1979) 1 APLJ 250; *Subramaniam v. Aruna Chellam*, (1905) ILR 28 Mad 1 (FB); *Thangavelu v. Court of Wards, Madras*, (1946) 2 Mad LJ 143; *Sitamaha Lakshmamma v. Chelamayya*, *AIR 1974 AP 130* [*LNIND 1974 AP 7*](FB); *Audemma v. Varada Reddi*, 1949 Mad 31 .

142 *Radha Bai v. Pandarinath*, (1942) ILR Nag 534. See also *Lakshmi Chand v. Ishroo Devi*, *AIR 1977 SC 1694* [*LNIND 1977 SC 160*], *(1977) 2 SCC 501* [*LNIND 1977 SC 160*]; *Jagath Krishna v. Ajit Kumar*, AIR 1964 Ori 75 [*LNIND 1960 ORI 36*]; *Bhagirath Agarwalla v. French Motor Car Co. Ltd.*, (1999) 2 HLR 288 (Cal).

143 *Sheo Dyal v. Judoonath*, (1868) 9 WR 61; *Gurudayal v. Sarju*, AIR 1952 Nag 43 ; *Shantaya v. Mallappa*, AIR 1938 Bom 500 .

144 *Pratapmull v. Dhanabhati*, (1936) 63 IA 33.

145 *Sri Gopal v. Janak Dulari*, (1946) ILR All 612 (FB).

146 *Radhabai v. Pandarinath*, (1942) ILR Nag 534; *Ganesh Dutt v. Jewach Thakoorain*, (1904) 31 IA

147 See The Hindu Succession Act, 1956, s. 14.

148 *Sita Devi v. Shamsher Prasad Gupta,* *AIR 2010 Sik 8* [*LNIND 2009 SIK 22*].

149 *Totappa Jolad v. Sharan Basappa Jolad*, (1943) 45 Bom LR 561 : AIR 1943 Bom 272 ; *Harnarain v. Bishambhar*, (1915) ILR 38 All 83; *Bashist Narayan v. Bindeswari*, AIR 1926 Pat 537 .

150 *Indar Singh v. Harnam Singh*, (1925) ILR 6 Cal 457; *Chowdhary Thakur v. Bhagbati Koer*, (1905) 1 CLJ 142.

151 *Kanhaiyalal v. Gaura*, (1925) ILR 47 All 127.

152 *Sriram v. Haricharan*, (1930) ILR 9 Pat 388; *Vithal v. Prahlad*, (1915) ILR 39 Bom 373.

153 *Budry Roy v. Bhagwat*, (1882) ILR 8 Cal 649.

154 *Krishna Lal v. Nadeshwara*, AIR 1918 Pat 91 .

155 *Jamnabai v. Vasudev*, (1930) ILR 54 Bom 417.

156 *Sheo Narain v. Janki*, (1912) ILR 34 All 505.

157 *Jotiram Ekoba v. Ramchandra Trimbak*, (1941) ILR Bom 638.

158 The text of Jimut Vahana lays it down only as a moral precept and it is not obligatory on part of the father to give any share either to the wife or to the son at all. *Sorolah Dossee v. Bhooban Mohun*, (1885) 15 Cal 292.

159 *Soudaminey v. Jogesh*, (1877) ILR 2 Cal 262.

160 *Dharmambal v. S. Laxshmi Ammal*, AIR 2003 NOC 117 (Kerala) [wherein it was held that the son of a predeceased son is entitled to take the share of the father].

161 *Baldev Singh v. Financial Commission*, *Haryana*, AIR 2003 P&H 351 .

162 *Nanu Ram v. Radhabai*, (1942) ILR Nag 24.

163 *Bhagwati v. Rameshwari*, *AIR 1952 SC 72* [*LNIND 1951 SC 36*], *[1951] SCR 603* [*LNIND 1951 SC 36*]; *Nimai Charan v. Maguni Devi*, (1959) ILR Cut 602.

164 (1903) 30 IA 130.

165 Mitakshara provides: 'Effects which had been divided and which are again mixed together, are termed united. He to whom such appertain, is a reunited coparcener.' Mitakshara II, IX, pp. 2, 3; Manu IX, pp. 210–212. See also *Basanta Kumar v. Jogendra Nath*, (1906) ILR 33 Cal 371.

166 Smritichandrika XII, pp. 1–28 ('That Reunion) cannot take place with any person indifferently; but with a father, a brother or a paternal uncle'); Brihaspati XXV, p. 7 ('He, who, being once separated, dwells again through affection with his father, brother or paternal uncle, is termed reunited with him.'). See also *Ram Narain Choudhury v. Pan Kuer*, (1935) 62 IA 16; *Pichayya v. Sarvayya*, 1927 Mad 1118 ; *Balkishan Das v. Ramnarain Sahu*, (1903) 30 IA 139.

167 *Shivarudrappa v. Nanjundamma*, (1944) 48 Mys HC 402.

168 *Venkataramayya v. Seshayya*, (1941) 3 Mad LJ 577; *Venkatasubbaya v. Venkataramayya*, (1944) ILR Mad 33.

169 *Narasamma v. Venkatanarasi*, 1954 Mad 282 .

170 *Mahalakshmamma v. Suryanarayana*, (1928) ILR 51 Mad 977 .

171 *Balabux v. Rukhmabai*, (1903) 30 IA 130.

172 *Venkanna v. Venkatanarayana*, (1947) ILR Mad 382.

173 *Abhai Churn Janav v. Mangal Jana*, (1892) ILR 19 Cal 634 (a Dayabhaga case); *Nana Ogha v. Parbhu*, AIR 1924 Pat 647 ; *Babu v. Gokuldoss*, (1928) 55 Mad LJ 132.

174 *Kristraya v. Venkataramiah*, (1909) 19 Mad LJ 723 (FB); *Narasimha v. Samudrala Venkata*, (1910) ILR 33 Mad 165 ; *Asarfakuer v. Bhuvneswari Rai*, AIR 1959 Pat 210 .

175 *Govinddoss v. Gokuldoss*, (1928) 55 Mad LJ 132.

176 (1903) 30 IA 130.

177 *Balasubramania v. Narayana*, 1965 Mad 409 ; *Hariharan v. Pandaril*, *AIR 1994 Ker 36* [*LNIND 1992 KER 260*]; *Govinddoss v. Gokuldoss*, (1928) 55 Mad LJ 132.

178 *Balabux v. Rukhmabai*, (1903) 30 IA 130; *Jatti v. Banwari Lal*, (1923) 50 IA 192.

179 *Bhagwan Dayal v. Reoti Devi*, AIR 1962 SC 287 [LNIND 1961 SC 465]; *Manorma Bai v. Ramabai*, 1957 Mad 269 ; *Ramadin v. Govind Prasad*, AIR 1959 MP 251 [*LNIND 1958 MP 14*]; *Radhakrishna v. Subbiah*, *AIR 1976 AP 293* [*LNIND 1975 AP 123*].

180 *Bhagbati Dei v. Muralidhar Sahu*, (1943) 2 Mad LJ 63 (PC); *Venkataramayya v. Tatayya*, 1943 Mad 538 ; *Annappa Reddy v. U. Krishna*, *AIR 1982 Ker 301* [*LNIND 1982 KER 73*].

CHAPTER 11 FEMALES AS COPARCENERS

GRADUAL CHANGES INTRODUCED BY THE LEGISLATURE IN THE HINDU JOINT FAMILY AND THE COPARCENARY

INTRODUCTION

With respect to the property rights of a Hindu woman, the dictates of ancient texts were multifarious; some recommending the granting of a share to her and some putting restrictions on her rights to even acquire it herself or hold it as an absolute owner. Whatever, might have been the recommendations of the Dharmashastras, there is no dispute about the fact that the interpretations and selective pickings of its provisions and the influence of customs placed severe impediments on her right to own property. Customary practices denied her absolute ownership and restricted her rights to maintenance. Chastity was made a predominant factor to determine whether she had a right to feed herself or not. Denied of even the basic right of sustenance, she had to approach the court for securing her maintenance rights.

Judiciary did give her some succour by relying on sacred texts and quoting passages from them, *i.e.,* the same texts, which were used by the custodians of Hindu law to keep a woman away from participating in the ownership of material assets. Judicial decisions however, were confined to specific cases and could not lay down a general rule. As a routine, even these isolated cases were helpless in eradicating deep-rooted practices, which deliberately or even erroneously associated religion in denying her a share. The legislative steps taken to improve her position were therefore seen as reformative in nature and in terms of her ability to acquire property, a Hindu woman has come a long way from the late 19th century to the present day, at least on paper.

LEGISLATIVE INTERVENTIONS

The dent in the sacred zone of family laws was made in 1832 with Bengal Regulations and then with the Caste Disabilities Removal Act of 1850, that was based on the former. The British Indian Parliament started legislating in the area of personal laws. These laws affected certain fundamental rules that were established due to their adherence for a long time sometimes even without meaning to do so. The reason was that though the reforms were directed at improving the position of a specific class of persons or members of either the coparcenary or the joint family, this compact branch of law was disturbed so that the implications of the changes reached the areas that the legislature did not contemplate touching. To start with, The Caste Disabilities Removal Act 1850, in itself that was passed to secure the rights of a convert or a person who was excommunicated from the community did have an unwarranted bearing on the classical concept of coparcenary.

The Caste Disabilities Removal Act, 1850

Prior to the passing of this Act, under the strict rules of inheritance applicable under the Hindu law, a difference of religion as between the intestate and his heirs operated as a disqualification for the heirs to succeed to his property. The general rule is that from a Hindu only a Hindu can inherit. Thus a Hindu could by reason of his conversion or his excommunication forfeit his rights of inheritance in the property of his relatives.[1] This Act was passed in order primarily to protect the rights of a convert or a person who was excommunicated by removing disabilities that were hitherto attached to them. Now, despite a conversion or expulsion neither the difference of religion with that of his former relatives nor the fact of his excommunication or expulsion can have any adverse effect on his property rights. He can continue to be the member of his former family despite his conversion and can inherit the property of his deceased relatives. However, though the convert's rights were protected and he could inherit from his Hindu

relatives, his descendants and other Hindu relatives could not enjoy the same protection.[2] For example if a Hindu man *H*, having a wife *W*, and a son *S* converted to Muslim faith and died, his Hindu wife *W* and son *S* could not inherit from him as they were Hindus on the date of the opening of the succession *i.e.,* on the date of the death of *H*, and he at the time of his death was a Muslim and in accordance with the principles of Muslim law, a non-Muslim cannot inherit the property of a Muslim intestate. But if *W* died before *H*, then *H* would inherit from her as his inheritance rights were protected under the Act and the fact that he was not a Hindu would be immaterial.

Section 1 of the Act provided:

> So much of any law or usage now in force within India as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of, any religion or being deprived of his caste shall cease to be enforced as law in any court.

It does appear strange that such near relatives could be debarred from inheriting the property of the intestate. Further, the Act interfered with the classical concept of Hindu joint family by permitting a non-Hindu to be its member. The law before the enactment of the Act was that the moment a Hindu converted to another faith he ceased to be a member of the joint family. Now with this disability removed it meant that a convert could no longer be expelled from the joint family and would continue to be a member. The Hindu joint family could have only Hindus as its members and this incongruent situation was reconciled by postulating that the conversion would mean an automatic partition of the convert from the joint family and he would be entitled to take his share as it stood on the day of his conversion.

LEGISLATIONS DIRECTED AT IMPROVING THE POSITION OF HINDU WOMEN

The active interaction into the classical concept of joint family, coparcenary and its basic features, which restricted the rights of female members only to maintenance and denied them property rights, began from 1937 onwards. The Hindu Women's Right to Property Act, 1937 made a major inroad into the concept of coparcenary by hindering the application of the doctrine of survivorship in the event of the death of a coparcener when he left behind him a widow. Under the classical law, female members had a right of maintenance from the joint family property. The primary reason for passing this Act was to crystallise this right into a statutory right by means of giving her a share in the property even though what she held was limited ownership.

The Hindu Women's Right to Property Act, 1937

The widow of a coparcener dying before 1937 Act as a member of undivided Mitakshara coparcenary was entitled to only a right of maintenance from the joint family property in the capacity of a member of such joint family. As the doctrine of survivorship applied, the share of the deceased coparcener was taken by the surviving coparceners under the doctrine of survivorship and nothing was given to the widow of such undivided deceased coparcener out of the share he held in the coparcenary property during his lifetime. The primary aim of conferring inheritance rights on the widow was to secure her maintenance rights through an Act. Her maintenance rights that were recognised under the old Hindu Law were only because of her exclusion from inheritance and from a share in the coparcenary property. As the Act did not apply to agricultural property, a widow who did not receive a share out of such property still retained her maintenance rights out of this property.[3] However in places where the Act did apply to agricultural land she was not entitled to maintenance but to the rights of inheritance or the right to step into the shoes of her deceased husband.[4]

Effect of Act of 1937 on Joint Family Property and Coparcenary

The Hindu Women's Right to Property Act, 1937, changed the traditional concept of coparcenary under which the doctrine of survivorship applied strictly and instantaneously on the death of a coparcener. Under the provisions of this Act where a coparcener died as a member of the Mitakshara Hindu Joint Family and was survived by his widow, his widow stood in his shoes[5] and prevented his undivided interest to go to the surviving coparceners by application of doctrine of survivorship. Though not exactly a coparcener, she took the share of her deceased coparcener that was fluctuating and subject to the variations with the deaths and births of other coparceners in the family. Under s. 3(2) of the Act, the widow of the deceased coparcener was granted even a right to demand partition of the property and claim the share that the deceased coparcener would have been entitled to. The only major difference between her rights and the rights of the deceased coparcener was that what she took in the property was not an absolute ownership but a limited ownership or a woman's estate terminable on her death or remarriage.[6] Subsequent to the partition, a woman was to hold the property in the capacity of a limited owner, *i.e.,*

she could enjoy it during her lifetime and appropriate the income coming out of the property for her use, but was incapable of alienating it by Will, gift or even a sale[7]. On her death or remarriage the interest would go to the heirs of her deceased husband as if her husband had died on the day when the interest of the woman terminated.

One of the important incidents of the Act, was that after the death of the coparcener, though his widow occupied his place, the death of the coparcener and his widow steping into the shoes of the coparcener had no adverse effect on the status of the joint family as such.[8] The status of the joint family continued with Karta being empowered to represent the family including these statutory heirs in suits to recover money for the family. It did not bring any disruption of the joint family status and the surviving members continued as the joint family members with all fundamental aspects of coparcenary. On the death of one coparcener the doctrine of survivorship continued to apply and the share of all members fluctuated including that held by the widow.

Effect of Hindu Succession Act, 1956 on Joint Family and Coparcenary

The Hindu Succession Act was passed in 1956 to lay down a comprehensive and uniform law of succession for Hindus governed by this Act. It amended and codified primarily the laws of intestate succession and touched briefly the law of testamentary succession as well as the classical law of joint family and the coparcenary. Two primary changes were brought in by the Hindu Succession Act, 1956, having the effect of defeating the application of doctrine of survivorship, one of the basic incidents of coparcenary. This was brought about by the voluntary act of making a bequest of the undivided share by the coparceners and by a presumption of a notional partition effected immediately before the death of an undivided coparcener so as to destruct his joint status at the time he dies not due to his action but due to operation of law.

Permissibility of Disposal of the Undivided Interest in Coparcenary by Will

The basic objective of the Hindu Succession Act, 1956 is to amend and codify the law relating to intestate succession among Hindus,[9] yet Chapter III titled ‘Testamentary Succession’ provides:[10]

(i) that a Hindu (male or female) is empowered to make a Will of his properties (that is capable of being disposed of by him); and

(ii) the explanation to s. 30 clarifies that the interest of a male Hindu in a Mitakshara coparcenary property is capable of being disposed of by him. This is notwithstanding anything contained in this Act, or in any other law for the time being in force.

Therefore according to this Act, since its promulgation, a coparcener is empowered to make a Will (testament) of his undivided interest in the Mitakshara coparcenary. Under the Hindu law, a coparcener could not dispose of his such undivided interest by Will, for certain reasons.

Firstly, the Will takes effect from the death of a person, and the moment a coparcener died, his interest was taken by the surviving coparceners under the doctrine of survivorship. He leaves no interest in the coparcenary property that could go under the Will.

Secondly, till a partition took place, he was the owner of a probable fraction of the total property that could not have been described by him in the Will. Before a partition was effected a coparcener could not know, what his share was in the coparcenary property as it was a fluctuating interest varying with deaths and births of the coparceners in the family. Even where the probable quantum could be known, which portion of the property would come to his share could never be ascertained. So what he could have bequeathed was a probable unascertained share.

Thirdly, a permission to the coparcener to bequeath his share could defeat the application of doctrine of survivorship that is one of the basic incidents of coparcenary. As aforesaid, under Hindu Law, the undivided interest in the coparcenary devolves on the surviving coparceners under the doctrine of survivorship and if a coparcener is permitted to bequeath his share under a Will, his interest will not go to the surviving coparceners, but will go to the beneficiary, defeating the application of doctrine of survivorship.

Fourthly, as there are no limitations on the class of beneficiaries to whom the property can be given, where the property is bequeathed to a stranger to the family, on the operation of the Will, he would have a right to demand partition. This would not have been possible but for this statutory permissibility of making the Will by the coparcener of his undivided share in Mitakshara Coparcenary.

Notional Partition

Despite the constitutional guarantees of equality of law and equal protection of laws, provisions of family laws continue to confer unequal rights on men and women. These provisions have often been challenged in the courts of India but not much could be done to ameliorate the status of women in the area of property rights. Under the Hindu Succession Act, 1956, a daughter, irrespective of her marital status has been made a primary heir to the property of her father. However, due to the continuation of the dual system of property *i.e.,* separate and ancestral, preferential treatment continued to be given to the son with him getting an interest by birth in the ancestral property while denying the same to the daughter. The legislature without abolishing the dual property system, tried to modify the rules in an attempt to give better property rights to women from the coparcenary property.

With s. Section 6 of the Hindu Succession Act, 1956, the concept of notional partition was coined. This interrupted the application of the doctrine of survivorship, when a male Hindu governed by the Mitakshara coparcenary died as an undivided member of the family. The Act provided that if in such cases this undivided member has left behind him a class I female surviving him or the son of a predeceased daughter, it will be presumed that immediately before his death he had asked for a partition (despite the fact whether he was competent to ask for a partition or not) and his share in the coparcenary property will devolve by intestate or testamentary succession under the Hindu Succession Act, 1956, and not in accordance with the doctrine of survivorship. It made an inroad into the application of doctrine of survivorship even where a Hindu male had died as an undivided member of Mitakshara coparcenary by replacing it with a notional partition. Such share ascertained after inflicting this fictional partition is considered the separate property of the deceased and in that, the daughter and the widow succeed as primary heirs. The outcome is that these females who would have been denied a right in the ancestral property without there being any partition will now get a share out of it. The result however was still an unequal distribution as far as the daughter and the son are concerned. For eg where the joint family comprised the father and his son and daughter, and the coparcenary consisted of the father and the son, on the death of the father since he leaves the daughter, *D*, a class I heir, it will be presumed that he died after asking for partition. His share in such partition will be 1/2 of the total family property; the other half going to the son. This half that is calculated as the share of the father will go by intestate succession to the class I heirs of the father. The son and the daughter being the class I heirs will have an equal share in this property and each will get one half of this share *i.e.,* 1/4th share each. Therefore the final share of the son will be half of that he gets at the time of notional partition plus 1/4th that he gets at the time of intestate succession, *i.e.,* 3/4th of the total property while the daughter will get only 1/4th. However in absence of s. 6, on the death of the father, the son would be entitled to the complete property under the doctrine of survivorship and the daughter would get nothing. So introduction of s. Section 6 in the Hindu Succession Act, 1956, did work to the advantage of women but could not remove the discrimination and usher in the concept of gender parity. Two options were available with the legislature to bring in complete parity between the son and daughter, one to abolish the joint family and separate property distinction by abolishing the very concept of joint family system and the other to make the daughter also a coparcener in the same manner as a son with a right by birth in the coparcenary property. While the Kerala legislature opted for the former and passed the Kerala Joint Hindu Family (Abolition) Act in 1975, the State of Andhra Pradesh took the lead and introduced unmarried daughters as coparceners ten years later. The Kerala Joint Hindu Family (Abolition) Act 1975, however applied both to the matriarchal families and families governed by Mitakshara law. The Andhra Pradesh Act became an inspiration for other states and similar enactments were passed in the State of Tamil Nadu in 1989, and Maharashtra and Karnataka in 1994.

The Andhra Pradesh Hindu Succession (Amendment) Act, 1985

The Andhra Pradesh Hindu Succession (Amendment) Act, 1985 in the statement of objects and reasons clarifies that it is in consonance with the constitutional guarantee of equality before law and as the exclusion of the daughter from participation in coparcenary property ownership merely by reason of her sex is contradictory thereto, and her exclusion has led to the creation of the socially pernicious system of dowry and its attendant social evils, the Andhra legislature realised the need to take necessary steps to eradicate the baneful system of dowry by concrete positive measures to ameliorate the condition of Hindu women in the society.

By the amendment to the Hindu Succession Act, 1956 that deals primarily with intestate succession, the legislature has changed fundamentally the concept of Mitakshara coparcenary and consequently the law of joint family also.

The Act did not abolish the joint family system or the coparcenary, but brought in a revolutionary change in the classical concept of coparcenary. It conferred a right by birth in the coparcenary property in favour of an unmarried daughter.[11] The Act provided, that on the date of the promulgation of this Act, *i.e.*, 5 September 1985, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as a son[12] and have the

same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship[13] and shall be subject to the same liabilities and disabilities in respect thereto as the son. She is capable of disposing of this share by Will or other testamentary disposition.[14] It confers on her a right to ask for partition of the property and applies the concept of notional partition on her death if she dies leaving behind children.[15] If she was dead at the time when partition of the joint family takes place and is survived by her children[16] or children of her predeceased children,[17] such children or children of the predeceased children are empowered to step into her shoes and her share will be allotted to them. A daughter has also been given a preferential right to acquire the share of a fellow coparcener in case he decides to sell it at a consideration, which in absence of any agreement between the two, can be fixed by the court.[18]

Changes Made in Other States

The Andhra model inspired other states to come up with similar enactments, with more or less identical language and content. The State of Tamil Nadu followed it with Tamil Nadu Hindu Succession (Amendment) Act in 1989, and the States of Karnataka and Maharashtra passed similar Acts in 1994. The sincerity with which these Acts have been passed is judged by the fact that the Act has nullified partitions effected in between the date of passing of this Act and the date of its notification in the Official Gazette.[19] Thus, the law of joint family stood modified in five Indian states. It has been abolished in State of Kerala and daughters were introduced as coparceners to begin with in Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra. The 15th Law Commission headed by BP Jeevan Reddy J., in the 174th report, dated 4th May, 2000, also suggested conferring equal rights to daughters in the coparcenary property, offering a combination of the Andhra and Kerala models as part the Hindu Succession (Amendment) Bill, 2000. As a consequence of it the Hindu Succession Act has been amended and changes with far reaching consequences have been introduced in the Act.

THE HINDU SUCCESSION (AMENDMENT) ACT, 2005

The Hindu Succession (Amendment) Act came into force on 9th September,2005.

Primary changes brought in by the Amending Act, 2005 are as follows20.For details see Annex. V.

(i) The Act deletes the provision relating to inapplicability of the Hindu Sucession Act to agricultural property, yet at the same time does not clarify whether agricultural property would be or would not be subject to the application of this Act.

(ii) it abolishes the doctrine of survivorship in case of male coparceners who die as members of undivided *Mitakshara* coparcenary;

(iii) it introduces daughters as coparceners in a Mitakshara coparcenary irrespective of her marital status;

(iv) It retains the concept of notional partition but modifies the conditions of its application;

(v) It abolishes the pious obligation of the son to pay the debts of his father;

(vi) it abolishes the special rules relating to dwelling house that prevented class-I female heirs from partitioning their shares, and imposed restrictions on the right of a married daughter to live init;

(vii) It deletes s. Section 24 of the Hindu Succession Act, that was already a superfluous provision;

(viii) It adds four new heirs in the class-I category of heirs to a male intestate;

(ix) It empowers a female coparcener to make a testamentary disposition of her share in coparcenary property.

Primary Changes Introduced in the Classical Law of Coparcenary and Hindu Joint Family

It has been now nearly 34 years since revolutionary changes have been brought in by this amendment. This amendment is an amendment to the Hindu Succession Act, 1956, but more than the succession to the separate property of the intestate it has fundamentally affected the law relating to Mitakshara coparcenary and Hindu joint family.

(i) A Hindu joint family is a bigger institution, which has within itself a narrow institution of coparcenary. Thus all members of a joint family are not necessarily the members of coparcenary but all coparceners are members of the joint family. Joint family comprises both males and females while coparcenary had as its members only males. Now with the introduction of daughters as coparceners, the concept of coparcenary changes radically.

(ii) As the statute provides that a daughter will be a coparcener in the same manner as the son, it means that her subsequent marriage will not have a bearing on her status as a coparcener and she will continue to be a coparcener and also a member of the father's joint family. Thus the traditional Hindu law concept that an unmarried daughter of a lineal male descendant is a member of the joint family till her marriage after which she will cease to be a member of her fathers' s. joint family and become a member of her husband' s. joint family stands abrogated. As her coparcenary rights are not affected by her marriage, so is the joint family membership as no person can be a member of a smaller institution within a broader institution unless and until she can be called a member of the bigger institution that also encompasses within itself the coparcenary.

(iii) Introduction of daughters as coparceners in the same manner as a son has another important consequence that distinguishes it from the clas`sical concept under Hindu Law. Under the traditional law, though a daughter ceases to be a member of her father's joint family on her marriage yet, if she becomes a widow or has been permanently deserted by her husband she could come back to her father's family permanently and be considered a member of that family. After this amendment a daughter will continue to be a member of the father's family even after her marriage. As her coparcenary rights are not affected by her marriage so she will be a member of two joint families at the same time. By birth she will be a coparcener in her father's joint family, will continue to be so upon her marriage, and after her marriage she will also be introduced in her husband's joint family as his spouse. Therefore, such women, will henceforth have dual memberships.

(iv) The same position will be that of the children. All children born, whose mother got married after the amendment, will be members of their father's family by birth, as well as of their mother's natal family. The traditional concept that though the married daughter on certain specific situations can be a member of her father's joint family but her children would continue to be members of their father's family only, also stands modified. With the introduction of daughters as coparceners in the same manner as a son not only does she retain membership of her father's joint family but her children will also be coparceners and consequently members of her father's joint family. At the same time they will be coparceners in their own father's family by birth leading to being members of two joint families at the same time.

(v) Under traditional Hindu law, only a coparcener could be the Karta of a joint family. Since females could not be coparceners, this was a major contentious issue whether in absence of a competent male to govern family affairs, a female could be the Karta or act as a Karta. The primary argument was that since she is not a coparcener she cannot be a Karta but with this amendment, if the daughter is a coparcener and a situation arises where the family is joint and the seniormost member happens to be a daughter, she can be a Karta also and as her marriage does not adversely affect her coparcenary rights in the family property, they will not affect her rights to continue being a Karta. Since in most patriarchal families, a common tradition sees the daughter leaving the house of her parents and joining the husband's household, on her marriage, a situation may arise where, though the female is the Karta of one family yet she has her permanent residence elsewhere in another joint family. This is besides the practical difficulties that she may encounter in managing the affairs of the joint family comprising her natal family members after her marriage. A better option could have been to adopt the Kerala model and abolish the concept of the joint family altogether.

(vi) Under the amended Act, a female as Karta will be entitled to represent the family and can even acquire the status of the head of the family.

(vii) The amended Act, abolishes the concept of doctrine of survivorship in case of male coparceners by providing for, demarcation of the share of the deceased by application of a notional partition and its devolution through intestate or testamentary succession.

(viii) The Act expressly provides that a female coparcener would hold the property with incidents of coparcenary property ownership, but there is no indication in the Act as to what these incidents are, thus making the understanding of the concept of incidents of coparcenary property ownership under the classical law imperative. Application of doctrine of survivorship and fluctuating interest in the coparcenary property remain the primary incidents of coparcenary property ownership and by implication would apply presently to the interest that a female holds in the coparcenary property.

(ix) Under the classical law, an undivided coparcener in Mitakshara coparcenary was incompetent to make a Will of his undivided share in the coparcenary property. This disability was removed for the first time by the Act, in 1956 when under the Hindu Succession Act, 1956, this undivided coparcener acquired capability to make a testamentary disposition of his property including an undivided share in Mitakshara coparcenary

property. This facility has now been extended also to the newly introduced female coparceners. A Hindu female coparcener can also execute a Will of her undivided share in the Mitakshara coparcenary property.

Post-1985

Post-1985, the states where the Hindu Succession Act, 1956 has been amended and unmarried daughters have been made coparceners, daughters have started claiming their share in the coparcenary property. The amending Acts have not only affected the law relating to joint family but also has a bearing on the Land Reform Act. In 1999, the Andhra Pradesh High Court held[21] that a major unmarried daughter by virtue of being a coparcener was entitled to hold one standard holding separately in her own right if two conditions were satisfied:

(a) that she should have been unmarried on the date of the passing of the Act; and

(b) no partition in the family should have been effected before the commencement of the Act.

If both these conditions are satisfied then under the Land Reforms (Ceiling on Agricultural Holding) Act, 1973, she is capable to hold a land unit independently. With respect to the second clause that no partition should have been effected before the passing of the Act, the court held[22]that the right stands in cases where only a preliminary decree effecting partition was passed and the final decree was yet to be passed. In the case in hand the suit for partitioning the property was filed in 1972 and a preliminary decree was passed in 1973 but no final decree was passed. The plaintiff in this suit had filed for passing of a final decree but before that the amendment came into force. The property was not yet divided and the three unmarried daughters filed a suit that since the coming into the force of the amendment Act in 1985, they were also entitled to get a share. Accepting the contention of the daughters the court held that since the final decree was not passed, the right of the daughters to claim their share stands. The court observed:

> It is obvious that under the aforesaid provisions, the difference between the daughter and the son of the Mitakshara Hindu family is removed and the daughter is conferred the coparcenary rights in the joint family property by birth in the same manner and to the same extent as a son. She is therefore now entitled to claim by way of partition her share in the joint family property. The amending provision is a beneficial legislation, which among other things, is also directed towards eradicating the social evils such as dowry and dowry deaths. It also achieves the constitutional mandate of equality between sexes.

The Madras High Court in a case[23] involving parallel facts has also held that a daughter who was unmarried on the date the Madras amendment came into force *i.e.,* 25 March 1989, is entitled to a share at the time of partition. It is irrespective of the fact that a preliminary decree may have been passed specifying the share of the coparcener who had demanded the partition. The court said that there was no bar for passing of more than one preliminary decree and therefore, she was entitled to get an equal share with her brother out of the coparcenary property.

The Supreme Court in *P.S. Sairam v. P.S. Rama Rao Pisey* [24] has also upheld the right of the unmarried daughters to claim a share in their independent right at the time of the notional partition. The father had died as a member of undivided Mitakshara coparcenary leaving behind the joint family business. On the question of whether the daughters would be entitled to the share or not the Supreme Court conceded the right of daughters to get a share at the time of the notional partition but could not grant it due to technical reasons.

In another case[25] before the Andhra Pradesh High Court, the joint family comprised the father, three daughters and a minor son. In 1981, the father for himself and on behalf of his minor son executed an agreement of sale of this property in favour of the alienee, which he did not honour. The alienee filed a suit for specific performance of the contract. Meanwhile the Amending Act was passed. The three daughters now challenged the validity of the sale agreement in their own right as coparceners and sharers of the coparcenary property. The alienee contended though in vain that as the Act was prospective in application and not retrospective, it would not effect the validity of the transactions entered into prior to it's commencement. The court said that the title could pass to the alienee only on the execution of a sale deed, and in this case in pursuance to a decree of specific performance passed by the court. Therefore, the entire estate was intact and the daughters's rights were not affected.

In *Amudha Rani v. K Veeraraghavan* [26], a family in the state of Tamil Nadu comprised of the father, his four sons and three daughters. On the date of the promulgation of the Amendment, two daughters were married but the third one was unmarried. Upon the death of the father the question arose, whether the daughter would be entitled to a share in the joint family property in the same manner as her brothers. The brothers contended that a severance of

status had already taken place with the father ascertaining his share and relinquishing the same in favour of the daughters. The daughter on the other hand claimed that there was no partition by metes and bounds and the Act only speaks about such a partition and not a mere severance of status. The court held that the unmarried daughter would be entitled to get the benefit of the amendment and would be granted a share at the time of partition of the property in the same manner as a son. As only a severance of status had taken pace and a partition by metes and bounds had not taken place, it would not affect the right of the unmarried daughter in the joint family property.

Unmarried Daughter's Claim of Maintenance and Marriage Expenses

As an unmarried daughter has been made a coparcener, she is now no longer entitled to claim her marriage expenses out of the joint family property. The right of maintenance including marriage expenses was available to her only because she was denied a share in the property. Since the conferment of coparcenary rights she can no longer claim both the property as well as maintenance. Eligibility to claim maintenance itself suggests that a person has no available resources to sustain herself and a daughter who has an interest in the property is legally presumed capable to maintain herself.[27]

The Supreme Court in a recent decision[28] held that as a major daughter is not treated as a member of the family unit she would not be entitled to hold a land unit independently even though she is a coparcener but her unit will be declared as surplus land. The Court said that the amendment to the Hindu Succession Act, will not effect the AP Land Reforms (Ceilings on Agricultural Holdings) Act, 1973.

The Amending Acts have no adverse effect on s. Section 6 of the Hindu Succession Act, 1956. The rights of daughters married prior to 5 September 1985 are identified and protected under s. 6 and daughters unmarried on such date have been conferred rights in coparcenary property.[29]

The Term Partition includes a Notional Partition

The amendment is prospective in application and does not benefit daughters where an undivided male coparcener dies prior to the amendment. In *Jayamma v. Muniyamma* [30] a Hindu male died as an undivided member of Mitakshara coparcenary before 1994 in Karnataka. He left behind his widow, one son and four daughters. It was held that since he died before the coming into force of the Karnataka (Hindu Succession Amendment) Act, 1994 (23 of 1994) at the time of effecting of a notional partition daughter would not be given a share as she was not a coparcener on that effective date. In such a case succession would be governed by the unamended Sec. Section 6 of the Hindu Succession Act, 1956 and not Sec. 6A as inserted in the state of Karnataka in 1994. Thus the son would take one half share in the property at the time of effecting a notional partition and from the other half that would fall to the share of the deceased father, the son, daughter and the widow would inherit one sixth share each.

Constitutional Validity of the Act

The state enactments amending the Hindu Succession Act, 1956[31]created a distinction between the rights of daughters on the basis of their marital status. On the day the Act was promulgated in the states, unmarried daughters were made coparceners in the same manner as a son in the family. However, these enactments did not apply to a daughter who was married on the day the same were passed.

The Karnataka (Hindu Succession Amendment) Act, 1990 was challenged as unconstitutional on the ground that it did not treat all daughters equally and created a class within a class of daughters and discriminated against a married daughter and excluded her by including only unmarried daughters.[32]The petitioner prayed that the words 'to a daughter married prior to' in s. 6A(d) of the Karnataka Hindu Succession (Amendment) Act 1990, Act No 23 of 1994 be declared unconstitutional on the contention that daughters married prior to the commencement of the Act are alleged to have wrongly been deprived of the right conferred upon such daughters under (a) and (b). It was further contended that no rationale or nexus was sought to be achieved by making the alleged discrimination against a married woman prior to the date of the amendment. According to the petitioners daughters are daughters and a class in themselves and irrespective of the date of their marriage no differentiation should be made as far their rights in their father's family are concerned. Dismissing the petition of the married daughter and upholding the constitutional validity of the Act, the Court said:[33]

> The daughters married prior to the commencement of the Amendment Act were deprived of the right to claim the share in the coparcenary property as was available to an unmarried daughter or a daughter married after the enforcement of the said Act. The alleged discrimination cannot be termed to be either unreasonable or irrational and without basis. The two

types of married daughters as contemplated by the offending portion of the section are well defined classes in themselves.

Justification for classification in the instant case appears to be on the basis of social necessity keeping in view the prevalent system in a section of the society for whose benefit the Karnataka amendment was made. The object of excluding married daughters and the cases of partition already effected from the application of the Act appear to be reasonably intended to avoid reopening of partition already effected in the family and the settled rights of the brothers and the sisters. Extending the benefit of the Act to a daughter married even prior to the commencement of the Amendment Act is likely to unsettle things which stood settled long back in the family and may even affect the third parties, who might have acquired valid rights and title in the property on the basis of such settled rights or partitions. The court said that they were satisfied that there was a definite nexus between the classification made and the object which has been intended to be achieved by the legislature by making a provision in the form of (d) of s. 6A of the Act.

As the implications of the Act were far reaching, including married daughters as coparceners would have created chaos in the society and would have resulted in upsetting the settled claims in virtually every family.

The principle of equality guaranteed by Art. 14 of the Constitution does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position as the varying treatment. Classification is permissible only for legitimate purposes[34].

As seen from the above discussion, introduction of daughters as coparceners though laudable, may give rise to some complications that were not initially foreseen by the legislature. The interpretation given to these provisions by the courts may not be consistent and that may further compound the confusion. A better option will be to abolish the concept of joint family system and bring the status of daughters absolutely on par with that of sons. As it is, the Hindu Joint family system has lost much of its religious significance, and is used widely to get a better deal from the revenue authorities. In the present day, when the whole game is about control of material resources in a competitive world, there should not be any scope for preferences for a son even in the name of religion or pious obligations. Abolition of the concept of joint family will not prevent the family members from either living together or hinder the practice or performance of religious rites and ceremonies but in fact would make it an equitable system.

EFFECT OF THE CENTRAL AMENDMENT ON THE STATE ENACTMENTS WITH RESPECT TO MATTERS THAT APPEAR CONTRADICTORY

Succession is a subject specified in the concurrent list of the Constitution and consequently both the Union and the States are competent to legislate on this matter. In case of a contradiction between the two, it is an established principle that the Union law would prevail over the state legislation. It should be noted that the initial steps towards securing better rights in the coparcenary property in favour of the daughters were taken by the states more specifically by the state of Andhra Pradesh and were soon followed by the states of Tamil Nadu, Karnataka and Maharashtra. Major changes then were introduced by the Central Amendment in 2005. Two major contradictions appeared between the Central and the state Amendments. Firstly, while all the states had introduced unmarried daughters as coparceners and married daughters were left out, as per the 2005, Central Amendment, all daughters irrespective of their marital status were made coparceners. In light of Art 254(1) of the Constitution, the state amendments in so far as they are inconsistent with the Central Amendment would be inoperative and the Central Amendment would prevail over them even though it was passed later in point of time. Thus all daughters would be coparceners in these states as well[35].

In *Pushpalatha N.V. v. V Padma* [36] the court holding that presently all daughters irrespective of their marital status are coparceners in the same manner as sons made the following observation:

Daughter's marriage would not put an end to the right of the daughter to coparcenary property which she acquired by birth. There cannot be a distinction between a son and a daughter under the Constitutional scheme. Any discrimination between a daughter and a son on grounds of marital status would again run contrary to Art. 14.

In *Sugalabai v. Gunduppu A Muradi* [37], it was held that Sec. 6A (d) of the Karnataka Hindu Succession (Amendment) Act, 1990 is repugnant to the Central Act, 39 of 2005 as a result of substitution of Sec. 6 by a latter

Act and it has also been held that all pending matters would necessarily have to be considered in light of the Central Act (39 of 2005).

The second contradiction appeared with respect to the capability of female coparceners to challenge alienations and re-open partitions effected post the conferment of rights in their favour by the state enactments but later taken by the Central Amendment. For example, in the state of Tamil Nadu, an unmarried daughter was made a coparcener in 1989. She could therefore acquire an interest in the coparcenary property and could also challenge an alienation effected by the Karta without her consent. However the Amendment of 2005 provided that a daughter cannot challenge alienations effected prior to December 20th 2004, which means that the state enactment's conferment of rights in favour of daughters was taken away by the Central amendment retrospectively. In such cases also if the Central Amendment prevails over the state amendments the consequences would go against the very spirit of the Central amendment[38]. The judiciary resolved the conflict by holding that the Central provision taking away the rights of the daughters to challenge the alienations effected prior to 20th December, 2004, is inoperative and ultra vires the principles of gender parity under the Constitution[39].

RIGHT OF THE DAUGHTER TO DEMAND A PARTITION OF THE COPARCENARY PROPERTY POST 2005

The right of the married daughter to demand a partition of the coparcenary property after the amendment of 2005 is absolute and not subject to any rider[40]. Even if she was converted to Muslim religion after her marriage to a Muslim man, the right to ask for partition of coparcenary property cannot be defeated. As far as her succession rights are concerned they are relatable only to the separate property of her father for which she has to wait till his death. Her conversion does not adversely affect her succession rights as it is only the descendants of the convert born to him/her after conversion who are disqualified from inheriting the property of the intestate while the convert enjoys statutory protection under the Caste Disabilities Removal Act, 1950. However, in*R Kantha v. Union of India* [41], strangely enough the Karnataka High court held that a daughter cannot seek partition of the coparcenary property during the life time of the father. The decision of the court appears to be incorrect as it held that Hindu succession Act, 1956, deals only with intestate and testamentary succession and does not confer a right in favour of the daughter to demand a partition during the life time of the father and thus she has to wait till his death before she can claim her share. According to the court a daughter though entitled to get a share in the coparcenary property would get it only when the succession opens and not prior to it. Interpreting the word "devolve" as becoming operative only when the succession opens, the court held that during the lifetime of the father, the succession cannot open and it is only on his demise, that the succession would open and the daughter also would get the property in the same manner as the son. The decision is erroneous as the right of coparceners are effective even during the life time of the father. The coparceners get a right by birth in the coparcenary property in their own right and the death of the father let alone any coparcener is not a pre-requisite for a right to seek partition and demarcation of their shares. In fact every major coparcener has a right to demand a partition from the father or the karta as the case may be and therefore the assumption of the court that till the death of the father, a daughter cannot ask for partition is not only incorrect but appears to be against the spirit of the newly created coparcenary rights in favour of the daughter.

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1. *Subbaraya v. Ramaswami*, (1900) 23 Mad 171; *Khunni Lal v. Gobinda Krishna*, (1911) 38 IA 87; *Ram Pergash v. Daln Bibi*, (1924) 3 Pat 152. For deprivation of castes see *Vedammal v. Vedanayaga*, (1908) 31 Mad 100; *Bhujjanlal v. Gaya Pershad*, (1870) 2 NWP 446; *Honamma v. Timanna Bhat*, (1877) 1 Bom 559; see also *Nalinaksha v. Rajanikant*, (1931) 58 Cal 1392.
2. *Miter Sen v. Maqbul Hasan*, AIR 1930 PC 251 ; *Vaithilinga v. Aiyadorai*, (1917) 40 Mad 1118; *Chidambara v. Ma Nyein*, (1928) 6 Rang 243; *Mohamed Ismail v. Abdul Hameed*, *(1948) 2 MLJ 87* [*LNIND 1948 MAD 49*].
3. *Sarojini Devi v. Subramayam*, ILR (1945) Mad 61; *Venkata Subbarattamma v. Krishniah*, 1943 Mad 417, *(1943) 1 MLJ 235* [*LNIND 1943 MAD 50*].
4. Some of the States had passed parallel legislations e.g., The United Provinces, Madras, Bihar and Bombay making the Act applicable to the agricultural property.
5. The Hindu Women's Right to Property Act, 1937, s. 3(2).
6. *Ibid*., s. 3(3).
7. A widow was empowered to alienate the share only for legal necessity or for performance of indispensable religious duties.

8. *Kallian Rai v. Kashinath* (1943) ILR All 307, 310, 312; *Satyanarayanacharlu v. Narasamma*, *(1943) 2 MLJ 282* [*LNIND 1942 MAD 277*]; see also *Kunj Sahu v. Bhagavan Mahanty*, AIR 1951 Ori 35 ; *Vinod Sagar v. Vishnubhai*, AIR 1947 Lah 388 ; *Seethamma v. Veerana*, 1950 Mad 785. For a contrary opinion see also *Venkatarayudu v. Sivaramakrishnayya*, (1935) 58 Mad 126.
9. See the preamble to the Hindu Succession Act, 1956.
10. *Ibid*., s. 30.
11. The Andhra Pradesh Hindu Succession (Amendment) Act, 1985, s. 29A.
12. *Ibid*, s. 29A(i).
13. *Ibid*.
14. *Ibid*., s. 29A(iii).
15. *Ibid*., s. 29B.
16. *Ibid*., Explanation 1. For details see chapter XII, *infra*.
17. *Ibid*., Explanation 2.
18. *Ibid*., s. 29C.
19. The Tamil Nadu Hindu Succession Amendment Act 1989, s. 3; The Maharashtra Hindu Succession (Amendment) Act 1994; The Karnataka Hindu Succession (Amendment) Act 1994.
21. *Nimmagadda Sambasiva Rao v. State of Andhra Pradesh*, *Land Reforms*, *Guntur*, CRP No. 1878 of 1995 decided on 25-06-1999; MANU/AP/0510/1999.
22. *S. Narayana Reddy v. S. Sai Reddy*, CRP No. 3205 of 1989 decided on 02-02-1990; MANU/AP/0044/1990; (1991) 3 SCC 647. See also *Sarasu v. Baskaran*, 2001 AIHC 2773 (Mad).
23. *M. Shanmuga Udayar v. Sivanandam*, 1994 Mad 123 .
24. See Civil Appeal No. 817 of 2002 decided on 04-02-2004; MANU/SC/0085/2004.
25. *Vanimisatti Adi Kumb v. Jayavarappu Krishnamurthi*, *AIR 1995 AP 105* [*LNIND 1994 AP 162*].
26. 2008 Mad 64 .
27. *Mariappan v. Kasiammal*, (2002) 3 HLR 261 (Mad).
28. *B. Chandra Sekhar Reddy v. State of Andhra Pradesh*, *AIR 2003 SC 2322* [*LNIND 2003 SC 466*].
29. *Dodla Chhinna Abbayi Reddy v. Dodla Kumarasamy Reddi*, 2003 AIHC 261 (AP).
30. 2000 AIHC 4013 (Karn); see also *Nanjamma v State of Karnataka,* 1999 AIHC 3003 (Karn).
31. The Andhra Pradesh (Hindu Succession Amendment) Act, 1985; the Karnataka (Hindu Succession Amendment) Act, 1990, The Tamil Nadu(Hindu Succession Amendment) Act, 1989 and the Maharashtra (Hindu Succession Amendment) Act, 1994.
32. *Nanjamma v. State of Karnataka*, 1999 AIHC 3003 (Kar).
33. *Ibid,* para 5.
34. *Ibid,* p. 3005.
35. *Pushpalatha N.V. v. V. Padma*, AIR 2010 Karn 124 .
36. AIR 2010 Karn 124 .
37. ILR 2007 Kar 4790 : (2007) 6 AIR Karn 501.
38. See *R. Kantha v. Union of India,* AIR 2010 Karn 27 .
39. *Ibid*.
40. *Ganachari Veeraiah v Ganachari Shiva Ranjani,* AIR 2010 NOC 351 (AP).
41. AIR 2010 Karn 27 .

CHAPTER 12 HINDU SUCCESSION ACT, 1956

INTRODUCTION

The Hindu Succession Act came into force on 17 June, 1956, with the basic objective of providing a comprehensive and uniform scheme of intestate succession for Hindus. Prior to the enactment of this Act, different religious communities were governed by different succession laws, and within the Hindu community itself, there was a wide divergence with respect to application of inheritance laws. There were three broad categories, besides the co-existence of a number of sub-communities. The Mitakshara law of inheritance governed those Hindus who were subject to the Mitakshara law and those following the Dayabhaga law, were subject to the Dayabhaga law of inheritance. In addition, Hindus adhering to the matriarchal system were subject to different rules. Besides these three major categories, the sub-schools of Mitakshara had variations at the local level, regionwise. Added to this, a number of tribal communities following Hindu religion, were observing their own distinct rules of succession. Amidst this maze of inheritance laws governing Hindus, it was a formidable task to lay down a uniform law that could be applicable and even acceptable to this inherently diverse community.

CODIFICATION OF HINDU LAW

Desirability of Codification

Disputes relating to family, between its members and with respect to property, were initially settled within the family, and if outside interference and adjudication became imperative, then the traditional local ‘Panchayats’ were the best option. The advantage that these Panchayats had over any other judicial mechanism later established was, the familiarity with the parties, with the disputed matter, and also with the situation or environment under which the dispute arose. The presiding officers of these Panchayats, the ‘Panchas’, were members elected from within the community and were aware of the customs and the rules prevalent in the society at the relevant time. Due to this familiarity with the whole system as such, there was no need for formal evidence, or representation. The direct interaction in the local language had no requirement of rigid technical procedures and an unfamiliar and intimidating atmosphere. The decision of the Panchayat was respected and the gravity of the fear of ex-communication in this close-knit society was beyond the comprehension of any western jurist. With the active intervention of the British in the judicial system, the traditional Panchayats were initially not affected as the nature of the cases dealt with by these courts were criminal or civil and did not touch family matters. However, revenue matters and property disputes relating to family soon dragged the family members to these formal courts with a rigid and technical procedure, unfamiliar surroundings and total strangers deciding their disputes in an unfamiliar language.

Since there could not be a direct interaction due to the difference of language and the technical procedures, a representative of the litigant, conversant with the language of the court and of its procedure, became an intermediary. It was through him, that the nature of the dispute, the circumstance under which it arose and the prevalent rules that they were subject to, was communicated to the judge. With no knowledge of the customs, family culture, the concept of joint family, its property and its devolution, for an impartial adjudication, these courts relied on pundits and a few translated texts. The learned pundits, who were primarily religious preachers and well conversant with the performance of religious rites and ceremonies, were nevertheless, not legal luminaries and when asked to extract legal rules from religious texts, often failed to fulfill the requirements of the courts. Unable to get the exact information that they needed from the pundits, the courts now began to rely only on the few translated texts that were available. The result was that in the absence of any other guidance, Hindu law was confined to

these few texts only and rules contained in other sources, that were either not available with them or were not translated into English language, were ignored completely. If a litigant wanted to establish that he was not governed by the Shastric textual law, his law was branded as customary law, with the requirement of bringing in a very strict proof. As no definition of 'who is a Hindu' existed, the Shastric law was applied to all Indians, who, in fact, displayed an enormous diversity within the Hindu community, on the ground that since they were neither Muslims, Christians, Parsis, nor Jews, they would be subject to 'Hindu law', which was synonymous to what was discernible under the translated texts. These texts that were full of Brahminical superiority and orthodoxy, were previously rejected by many Hindus, who in protest, had formed separate sects, preaching equality, brotherhood, non-violence and simple ceremonies. The British courts applied the same rules, contained in these texts, to all these communities as well, totally reversing the trend of reforms. They also made Hindu law, which was always amenable to change, static. With respect to their reliance on the texts, a glaring difficulty surfaced. It is a known fact that a translation is often inept and cannot convey the exact meaning of the terms, and the near equivalent English terms used in the translated texts, were not always appropriate. An important illustration is with respect to the expressions used in the English language to denote relationships. Terms that could denote an exact relationship in the Sanskrit language were described under the general terms of uncles, aunts and ancestors, etc. Further, while interpreting these texts, the judges applied English concepts and their own notions of justice and this mixture decided the matter before them. This amalgamated Anglo-Hindu law, deviated from the original precepts, and substantially modified, applied to all Hindus and created an uncertainty and an unnecessary confusion. It necessitated the need for clarity and a codification of the law. [1]

Steps Taken towards Codification

In the latter half of the nineteenth century, the firm establishment of the judicial system and the availability of judgments in law reports had a positive effect, as many controversial rules were settled in the court and once they were so settled, they became the law and applied not merely to the litigants, but to their whole communities as such. By this time, several legislations were enacted that aimed at modifying and reforming the personal law of all Indians, including Hindus. The co-existence of textual Shastric rules, several legislations, innumerable customs and conflicting judicial precedents, presented a bewildering maze, necessitating clarity and certainty, that could be achieved only through codification. The Hindu Law Committee was initially appointed by a resolution of the Government of India, on 25 January, 1941. The Committee, to begin with, was assigned the task of examining five Bills relating to amendments proposed in the Hindu Women's Right to Property Act, 1937, with specific reference to resolve the doubts felt as to the construction of the Act, of clarifying the nature of the right conferred upon the widow and remove any injustice that might have been done by the Act, to the daughters, and to examine the Hindu Law of Inheritance (Amendment) Bill and the Hindu Married Women's Rights to Separate Residence and Maintenance Bill. Under the chairmanship of BN Rau J, the Committee had three more members, Dr Dwarka Nath Mitter, Ex-Judge, Calcutta High Court, JR Gharpure, Principal, Law College, Poona and Rajratna Vasudeo Vinayak Joshi, who was a High Court pleader at Baroda.

The Committee, in its reports, expressed itself in favour of a codification of Hindu law by stages, beginning with the law of succession and the law of marriage. The Government of India accepted this view and in pursuance thereof, the Committee furnished the government, in March, 1942, with two draft Bills, the first dealing with the law of intestate succession, and the second with the law of marriage. Thereafter, the Committee ceased to function. As only two aspects of Hindu law, *i.e.,* marriage and succession, were covered under the draft Bill, the Central Legislature was given four years' time to codify the remaining aspects, and it was decided that the complete code would be made effective from 1 January, 1946. A revised Committee, where the only replacement was R. Venkatarama Sastri, advocate from Madras, in place of Rajratna Joshi, while the rest of the members, including the chairman were the same, was constituted in 1944. The purpose of appointing this Committee was to formulate a code of Hindu law, which should be complete as far as possible. It was felt that piece meal legislations should be avoided and an entire Hindu code, acceptable to all Hindus, by blending the most progressive elements in the various schools of law, which prevailed in different parts of the country, should be framed as an integral whole. The committee accordingly, prepared a draft code, published it and invited the views of the general public and for this purpose, toured extensively, in various parts of India, viz., Bombay, Poona, Delhi, Allahabad, Patna, Calcutta, Madras, Nagpur and Lahore.

Difficulties Encountered during Codification

The transition from the Shastric texts to statutory law was not easy. When we read the enactments dealing with Hindu law, we have to appreciate how difficult a task it must have been to reduce the multiple conflicting rules governing this inherently, widely diverse community, amongst wide protests, into a single, common code.

Surprisingly, the vast majority opposed the proposed codification. The reasons were very diverse, and the main arguments against it were as follows:

(i) Majority of Hindus were inclined to the view that the codification was neither possible, nor desirable.

(ii) The Bill was criticised severely for introducing changes of a revolutionary character that had the effect of sweeping away the law laid down by the Smritis and of destroying the Dharma (rules) which were based on high ideals befitting Hindu culture and character that served as an inspiration to the world.

(iii) The contents of the proposed code were such as would arrest the growth and development of Hindu law.

(iv) There was no need for codification as people were satisfied with the Hindu law as administered by the high courts in India, as well as by the judicial committee of the Privy Council, in accordance with the Shrutis, Smritis and the Commentaries.

(v) The Hindus alone should have decided the issue and non-Hindus should not have been allowed to vote or to have any say in the matter.

(vi) The Hindus, as a rule, wanted to retain the right by birth and the doctrine of survivorship, and no rule that effects a departure from these precepts was acceptable to them.

The tenseness of the feelings against the Hindu code, in almost all the provinces, was apparent from the reception the Committee received from the public, on their arrival for holding the meetings. The Committee was accosted with black flag demonstrations at Allahabad, Patna, Calcutta, Nagpur, Amritsar and Lahore. Patna observed an anti-Hindu Code week, while in Chennai, an anti-Hindu Code meeting was called. The most pertinent objection came from Mahamohopadhya Kane, advocate in Bombay, while addressing a conference of the National Council of Women in India, in November, 1943. He said:

> The objections with reference to the course proposed in the Bill, were many and serious. If passed into law at once, these proposals are likely to cause frictions and quarrels amongst the mass of people who are illiterate. The country is not ripe for such an educative propaganda for years.

Sri Sri Sankaracharya of Kumba Konam in Madras, protested that this would disrupt the Hindu society and religion.

The Committee also received a white flag reception from Indian women at Lahore. People who supported the Bill were generally men and women from the Brahmo Samaj, Arya Samaj and Hindu Women's Conference and a certain Atma Raksha Committee, but they formed a small portion of the Hindu community. The Committee prepared the draft code and the same went to the Parliament in 1948. The Committee had recommended its gradual codification, starting from marriage and inheritance. Extensive and furious, sometimes emotionally charged debates, placed innumerable hurdles in the path of its enactment and the fragmented legislation was passed only in 1955–56.

Basic Propositions under the Hindu Code, 1948

The Hindu Code had proposed the abolition of a right by birth in the property and its devolution by the doctrine of survivorship. It recommended replacement of joint tenancy by the rule of tenancy-in-common and an abrogation of rules regarding pious obligations. With respect to intestate and testamentary succession, rules prevalent under all the then existing systems of Hindu law, were fundamentally altered. The guiding principle of 'religious efficacy' under the Dayabhaga law and of 'consanguinity' under the Mitakshara law and its sub-schools, were substituted by a new line of heirs based on 'natural love and affection'. The code also advocated the complete abrogation of custom, except in regard to impartible estates and one or two minor matters. The limited estate for a Hindu woman was abolished and it was provided that henceforth, the property held by a Hindu woman would be her absolute property. The provisions of the code did not apply to agricultural properties in provinces where succession to agricultural properties was a provincial subject.

THE HINDU SUCCESSION ACT, 1956

Basic Features

1956–September, 2005

The arch conservatives, who did not want to give up the right by birth to the son and the concept of the joint family system, won the battle and the Parliament retained this dual system of separate property and joint family property. It is pertinent to note that the right by birth was an essential feature of only one out of the three major systems of inheritance, viz., the Mitakshara. The Dayabhaga and the matrilineal systems did not recognise the right by birth to sons. With respect to other provisions, with a few deviations, they were incorporated into the Act. The Act has the following basic features:

(i) It amends and modifies the aspects of classical Hindu law that related to joint Hindu family and Mitakshara coparcenary, intestate succession and even testamentary succession.

(ii) The Act provides a detailed scheme of devolution of property by intestate succession for Hindus who are subject to the application of this Act. It abolishes the distinct laws of succession under the Dayabhaga and Mitakshara systems and provides a uniform law, based on natural love and affection and nearness in relationship. For the purposes of intestate succession, it is immaterial presently, as to which school of law the intestate was adhering to.

(iii) It abolished the concept of limited estate for Hindu women and replaced it with absolute ownership. The incapability of a Hindu woman to hold the property as a full owner, was removed completely and she acquired full powers of enjoyment, and disposal over her properties.

(iv) It provides for two separate schemes of succession for male and female intestates. In case of female intestates, there is a further divergence linked with the source of acquisition of the property that is the subject matter of succession.

(v) It alters the character of the property inherited by the son from his father, paternal grandfather and the paternal great grandfather and makes it separate property in his hands vis a vis his progeny. Under the classical law the property inherited by the son from the father or his two paternal ascendants was the ancestral property.

(vi) It introduced daughters and her children in her absence as the primary heirs in preference to the male collaterals and made her marital status irrelevant for determining her rights of inheritance.

(vii) Under the Act the eligibility to succeed was not merely consanguinity but affinity as well.

(viii) the right are created in favour of heirs irrespective of the generations they might have been removed from the intestate.

(ix) With respect to testamentary succession, it empowers a Hindu, male or female, to make a testamentary disposition of the totality of properties, in favour of any one. For a male Hindu, who is a member of a Mitakshara coparcenary, the capability to make a Will extends to even an undivided share in the Mitakshara coparcenary property.

(x) The Act modifies the laws of Mitakshara coparcenary and its devolution by survivorship in a situation where an undivided coparcener dies leaving behind class I heirs, other than a son, son of a predeceased son and son of a predeceased son of a predeceased son. In such a case, the law presumes that the deceased had died after demanding a partition, which would determine his share in the coparcenary property, convert it into his separate share, so that it would no longer go by survivorship, but will go to the legal heirs in accordance with the rules of intestate succession.

(xi) The disqualifications for inheritance, based on physical and mental diseases, disabilities and deformities, were removed. In conformity with the principles laid down under the Caste Disabilities Removal Act, 1850, a conversion does not disqualify a person from inheriting the property of an intestate, but his descendants born after his conversion, are disqualified. On the grounds of public policy, the murderer of an intestate is disqualified from inheriting his property. As the Act bases the eligibility to determine the heirs on ‘nearness in relationship’ and the natural assumptions of love and affection, certain widows, who remarry before the succession opens and cease to be members of the family, are disqualified from inheriting the property of the intestate.

(xii) The widow of an intestate is now his primary heir, and her rights to succeed cannot be defeated on the grounds of her unchastity. As she is an absolute owner of the property, on the day of opening of the

succession, her share vests in her, and she cannot subsequently be divested of her share in the property, even if she remarries.

(xiii) With the provisions of a uniform scheme, the matrilineal system prevalent in some parts of southern India, has been substantially affected. Except for minor points, it has virtually been abolished.

(xiv) Under the traditional law, the 'dasiputra' among the Sudras, had a privileged position as far as illegitimate children were concerned. He was entitled to succeed to the property of his father. Under the Act, his position is on par with that of any other illegitimate child who does not have any inheritance rights in the property of the putative father.

(xv) It preferred full blood relations over the half blood relations if the relationship was same in every other respect and relegated those related through uterine blood to a very inferior position.

(xvi) The Act specifically protected the rights of posthumous children.

Classical Law Provisions retained by the Act

The pressure mounted on the Parliament by the conservatives, both from within and outside the Parliament, ensured the retention of certain traditional concepts, despite their abolition by the original Hindu Code of 1948. The legislature that bowed under their pressure, did retain certain basic rules prevalent under the classical law, but tried to sneak in changes in these concepts by providing modifications that ensured some success in achieving the amelioration of the status of women, and yet, at the same time, created complexities and a tremendous amount of confusion. Some of these modifications are mentioned below:

(i) It retained the Mitakshara joint family system and the devolution of undivided share in it by survivorship. Thus it continued the permissibility of holding two-fold interests by a Hindu male, a separate as well as a share in undivided coparcenary. The application of doctrine of survivorship was defeated in presence of class I female heirs or the son of a predeceased daughter. Retention of joint family system and coparcenary made the entire classical law relating to these concepts relevant even in the present day, and the concept of notional partition made the knowledge of the entire chapter on partition a must, to understand the provisions of the Hindu Succession Act, 1956. To understand Hindu law relating to devolution of property, one cannot confine only to this enactment and knowledge of both the classical law as well as this Act is a prerequisite.

(ii) The Act could not make a complete departure from the old concepts of stridhan despite making radical progress with the conferment of absolute ownership on a woman. Not only does it provide two separate schemes of succession for a male and a female intestate, but it also prescribes separate rules of devolution of property in case of a childless married woman depending upon the source of acquisition of the property available for inheritance. Property that she acquired from her father's heirs and the one inherited from her deceased husband or his father, reverts to her father's and husband's heirs respectively.

(iii) Though the heirs were determined on the basis of the nearness in relationship or natural love and affection, and not on the basis of consanguinity and religious efficacy, this rule was limited primarily to class I heirs and to some extent, to the class II heirs also. But with respect to the remoter category, the preference to the male chain is evident, as the entire class of 'agnates' (relations through a whole male line) is preferred to even nearer cognates (heirs related to the intestate, but not through a whole male line). For example, the son of the intestate's father's sister would be a cognate and excluded by a third cousin (great-great grandfather's greatgrandson), if he is an agnate.

(iv) The Act retained the impartible character of a dwelling house, but only with respect to female class I heirs, in the presence of male heirs. Only the male heirs can effect its partition and in their presence, despite being conferred full ownership, none of the class I female heirs, including the widow of the intestate, has a right of demarcation of their shares and their right is confined to a right of residence in it. Married daughters do not even have a right of residence in this property. Thus, the male heirs have a legal right to possess and enjoy the shares of their married sister, without her consent.

(v) With the retention of Mitakshara coparcenary, all its fundamental aspects are still in operation, viz., the categorisation of properties into separate and ancestral, the manner of their acquisition, their distinctive features, the concept of Karta, his powers and responsibilities, including those regarding the alienation of coparcenary property, the pious obligation of the sons to pay the debts of the father, etc.

(vi) The Act has enabled a coparcener, to make a Will of his undivided share in a Mitakshara coparcenary, but has not enlarged his powers so to make any other kind of disposition, inter vivos. Barring a few exceptions, he still is incapable of making a gift of his undivided share or to alienate it otherwise.

(vii) Despite the inclusion of the concept of notional partition, a female heir, who otherwise would be entitled to get a share, remains incapable of demanding it. Except in the states that have further amended the Hindu Succession Act, 1956, viz., Andhra Pradesh in 1985, Tamil Nadu in 1989 and Karnataka and Maharashtra in 1994, a female can neither be a coparcener, nor acquire a share in coparcenary property. On her death, even if she is entitled to get a share on partition, a notional partition is not affected.

THE HINDU SUCCESSION (AMENDMENT) ACT, 2005—PRIMARY CHANGES INTRODUCED BY THE ACT

The Hindu Succession (Amendment) Bill was introduced in the Parliament on 20 December, 2004 and was passed by the Rajya Sabha on 16 august, 2005 and the Lok Sabha on 29 August, 2005 respectively. Based on the recommendations of the 174th Report of the Law Commission on 'Property Rights Of Women—Proposed Reforms Under Hindu Law', its primary aim was to remove gender inequalities under the Act, as it stood before the amendment. The amendment had also become necessary in view of the changes in Hindu Succession Act, 1956, in five Indian states namely, Kerala, Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra. The Bill received President's assent on 5 September, 2005 and it came into force on 9th September, 2005.

It is noteworthy that while in Kerala, the joint family concept and the pious obligation of the son to pay his father's debts were abolished; the other four states retained both, additionally, introducing an unmarried daughter as a coparcener. The present act incorporates changes that are a combination of the Andhra and the Kerala model. It retains the concept of joint family and introduces daughters as coparceners but abolishes the pious obligation of the son to pay the debts of his father. Besides these basic changes, it amends the concept of coparcenary, abolishes the doctrine of survivorship, modifies the provisions relating to devolution of interest in Mitakshara coparcenary, the provisions relating to intestate succession, the category of class i heirs, rules relating to disqualification of heirs and marginally touches the provision relating to testamentary succession. The primary changes introduced by the Act have been discussed in detail under the following headings.

(1) Deletion of provisions exempting application of the Act to agricultural holdings

With respect to the application of the Act, s. 4(2),Hindu Succession Act, 1956, provided:

...

Section 4 (2) . — For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provision of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for fixation of ceilings or for the devolution of tenancy rights of such holdings.

Thus, if there was a law that dealt with:

(i) prevention of fragmentation of agricultural holdings; or

(ii) fixation of ceilings; or

(iii) devolution of tenancy rights of such holdings;

to such property and to the interests in such property, the Hindu Succession Act did not apply. At the same time, if a particular state did not have any such law, then the Hindu Succession Act applied by default. It was only when an express provision existed with respect to devolution of agricultural property owned by an individual or held by him as tenant of the respective state government (the ownership of the land vesting with the state, with the tenant having heritable cultivating rights) that the Hindu Succession Act, 1956, did not apply.

By deleting s. 4(2), a confusion has been created, as the legislature has not provided any express provision, that states or confirms the application of Hindu Succession Act to agricultural property over and above any state law, that also deals with the same. These laws, which provide for prevention of fragmentation of agricultural holdings,

fixation of ceilings and devolution of tenancy rights, apply to the inhabitants of the state uniformly, irrespective of their religion. For example, the whole of the agricultural land (unless otherwise provided) would be subject to a uniform law, and the religion of the land owner or the tenant, as the case may be, will be of no consequence. The deletion of s. 4(2), and an implied presumption that after the amendment, the Hindu Succession Act applies to all kinds of property including rights in agricultural land, would mean that now a diversity would exist state wise with respect to laws governing agricultural property. All inhabitants of a particular state, to whom Hindu Succession Act does not apply, such as non-Hindus, would still be governed by the state laws, while property of those subject to Hindu Succession Act would devolve in a different manner. An exception therefore would be created in favour of Hindus, generally diversifying the application of laws governing agricultural property.

The second point of confusion due to deletion of s. 4(2) and absence of a provision extending the application of Hindu Succession Act over agricultural land, even if a parallel law enacted by a state exists, is with respect to the conflict that may arise over central or state legislations that are diverse in content. Inheritance and succession are subjects specified in list III, entry (v), while land is a state subject. Whether the Centre is competent to legislate on agricultural land is a matter of dispute. Normally, if there is a subject on which both the Centre as well as the state can legislate, in case of conflict, the central legislation prevails. But as provided under Art. 256 of the Constitution, the Centre should be competent to legislate on it. This confusion is bound to crop up paving way for immense litigation in this area.

(2) Abolition of doctrine of survivorship in case of male coparceners

The Amending Act, by a specific provision, abolishes the incidents of survivorship—one of the primary incidents of coparcenary—when a male coparcener dies. Section 6(3) states:

Section 6 (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.

...

Thus, the traditional concept of coparcenary, where coparcenary property was held with incidents of survivorship, stands abolished expressly by the legislature. [2]

Under the classical law, the share of each coparcener fluctuated with births and deaths in the family. It decreased with the birth of a coparcener and increased with the death of a coparcener. On the death of a coparcener, his interest was taken by the surviving coparceners and nothing remained for his female dependents. This rule was first modified by the Act of 1937, where the coparcener's widow was permitted to hold on to his share for the rest of her life, and only on her death, the doctrine of survivorship applied and the male collateral could take the property.

The application of doctrine of survivorship was further diluted in 1956, when the Hindu Succession Act was enacted. The Act confined the application of doctrine of survivorship only to cases where a male Hindu died as a member of Mitakshara coparcenary, having an undivided interest in the property and did not leave behind him, a class I female heir or the son of his predeceased daughter. In such cases, the application of doctrine of survivorship was expressly saved by the Act, but if there was any class I female heir present or the son of his predeceased daughter, then the application of doctrine of survivorship was defeated and the interest of the male Hindu in the Mitakshara coparcenary, calculated after effecting a notional partition, went by intestate succession in accordance with the Act or testamentary succession as the case may be. Thus, the application of doctrine of survivorship was conditional upon an undivided male coparcener dying without leaving behind any of these nine heirs. As per the present Act, the doctrine of survivorship has been abolished unconditionally. Now, if any male Hindu dies, having at the time of his death, an undivided interest in Mitakshara coparcenary, the rule of survivorship would not apply at all.

For example, a Hindu family comprises of a father F, and two sons S1 and S2, who form an undivided coparcenary. Each of them would have a one-third share in the joint family property. Then, S2 dies as a member of this undivided coparcenary.

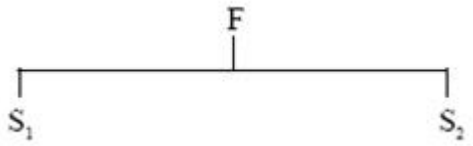


Fig.12.1

Under the old law, on the death of S2, the surviving coparceners would have taken the share of S2 by survivorship and their share would have increased to a half each. Thus, both F and S1 would have been entitled to one half of the property on the death of S2.

After the amendment, and with the abolishing of doctrine of survivorship, the share of S2 would be calculated after affecting a notional partition, and that would come to one-third. This one-third would not go by doctrine of survivorship and would go by testamentary or intestate succession as the case may be. If there is no Will, then this one-third would go according to the Hindu Succession Act, as per which as between the father and the brother, the father will be preferred and the brother will be excluded from inheritance in his presence. Therefore, the father will get two-third of the total property and the brother would take one-third.

Thus, abolition of doctrine of survivorship creates unequal rights between surviving coparceners vis--vis each other, which is contrary to the basic concept of coparcenary. Here, no purpose seems to be served by the abolition of this doctrine.

It should be noted that with the retention of doctrine of survivorship, the legislature in 1955, had not distorted the concept and incidents of coparcenary, and at the same time had not given the females an unfair deal. This doctrine was applicable only when none of the class I female heirs was present. The presence of even one of them would have altered the mode of devolution of property—from survivorship to intestate or testamentary succession, as the case may be. Presently, there is a direct application of succession laws. For example, a Hindu joint family comprises father F, his wife W, and two sons S1 and S2, If any of the male members died between 1956 to September, 2005, the doctrine of survivorship, even though expressly retained by and not abolished by the legislature, would not have applied, due to the presence of W, who is a class I female heir.

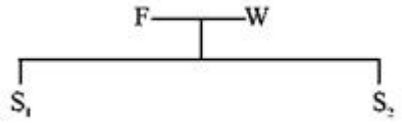


Fig. 12.2

Therefore, abolition of doctrine of survivorship was unnecessary as no useful purpose is served by it. Rather, there is confusion and the newly introduced inequality amongst the coparceners, as illustrated above, may be disadvantageous to the family members.

(3) Introduction of daughters as coparceners

One of the major changes brought in by the amendment is that in a Hindu joint family, the exclusive prerogative of males to be coparceners has been changed altogether and the right by birth in the coparcenary property has been conferred in favour of a daughter as well. This radical change has fundamentally altered the character of a Mitakshara coparcenary. Before the central enactment, four Indian states had brought in a similar change, *i.e.,* introduction of daughters as coparceners. At present, instead of only the son having a right by birth, any child born in the family or validly adopted, will be a coparcener and would have an interest over the coparcenary property. Thus, the traditional concept that only males could be members of the coparcenary and ‘no female could ever be a coparcener nor could own coparcenary property’ is no longer the law. According to s. 6:

...

in a joint 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.

According to this provision, the discrimination against daughter has been brought to an end, as her rights and liabilities are the same as that of a son. This also means that a daughter is now capable of acquiring an interest in the coparcenary property, demand a partition of the same, and dispose it of through a testamentary disposition. Further, daughters would not only be empowered to form a coparcenary along with their other siblings (irrespective of gender), but would also be competent to start a joint family herself. She can even be a karta, throw her self-acquired earnings into the joint family (hotchpotch) fund, something that was not possible before the amendment. The rule that females cannot form or start a joint family on their own but can continue it even on the death of a male member in the family but provided they have the capacity to add a male member to it by birth or through adoption, stands abrogated now. In other words, all the prerogatives and uniqueness of a son's position in the family is available to a daughter as well.

Two classes of females

Section 6(2) makes it very clear that a female Hindu would be entitled to hold property with the incidents of coparcenary ownership. Therefore, a distinction has been created between female members of joint family in relation to their rights over the joint family property. The two classes of females are one, who are born in the family and secondly, those who become members of this joint family by marriage to the coparceners. Females, who are born in the family *i.e.,* daughters, sisters posses a right by birth in the coparcenary property and those who become members of the joint family by marriage to a coparcener, are subject to the same law as it stood before the amendment. Their rights over the joint family property continue to be the same, like maintenance out of its funds, a right of residence in the family house, etc.

(4) Marital status of daughter

It is noteworthy that under the Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra amendments to the Hindu Succession Act, 1956, daughters of coparceners, who were married on the day the amendment was enforced in each state respectively, could not become coparceners. Only daughters who were unmarried on such date could become coparceners. Besides, as the legislature provided that their coparcenary rights were identical to that of sons, their future marital status did not divest them of coparcenary rights. They continued to be coparceners even after marriage and even their children had a right by birth in the coparcenary property. Daughters who were married on the date of enforcement of amendments did not get the benefit under the amendments. In fact, this provision creating distinction between the rights of a married and unmarried daughter was also challenged in Karnataka High Court in a case, and the court had justified the distinction and exclusion of a married daughter on the ground that it was based on a sound policy of the legislature. A contrary stand would have created chaos in the society and would have disturbed settled claims and titles. Under the present amendment, a daughter of a coparcener is included as a coparcener herself without any reference or limitation with respect to her marital status. Therefore, after 9th September, 2005, a daughter who was married even before this date, would be a coparcener. It is interesting to note that the married daughter may have ceased to be a member of the joint family of her father after marriage, but would nevertheless be a member of coparcenary, with an entitlement to seek partition of the joint family property in her own right. To avoid unnecessary confusion and litigation, proviso to s. 1 states: 'Provided that nothing contained in this subsection shall affect or invalidate any disposition or alienation including any partition or testamentary disposition effected before 20th December, 2004'. Thus a partition that took place in 1974 would not be effected by this provision. [3]

This was necessary so that settled rights should not be disturbed. However, a joint family where a daughter has been married before 20th December, 2004, and the male members have not effected a partition, would now have to share this property with their married sisters, as the daughters, irrespective of their marital status, have become coparceners. For example, a family comprises father F, his wife W two sons S1 and S2 and two daughters D1 and D2.

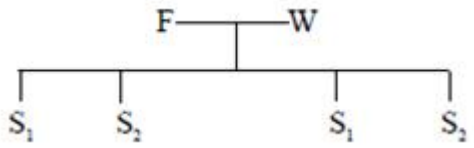


Fig. 12.3

D1 gets married in 1990. As the law stood before the amendment of 2005, D1 would cease to be a member of her father's joint family upon her marriage. The rest of the family continues to be joint and enjoys the joint family property together. This situation continues till September, 2005. Till now, D1 did not have any right over the joint family property nor was even a member of it, but now not only she will become a coparcener, she would have the same rights in the joint family property as her brothers would have. She is entitled to demand a partition and would also get an equal share like her brothers at the time of such partition. If she dies without seeking partition, a notional partition would be effected to ascertain her share which would go to her heirs. Therefore, not only the unmarried daughters, but daughters in general, are benefited by this amendment.

In order to avoid confusion and give meaning to this provision, the partitions and alienation effected prior to 20 December, 2004, have been expressly saved. For example, in Figure 3, if after the marriage of D1, a partition was effected among the family members, or the father as the karta of the family had alienated a portion of the joint family property for a legal necessity, the validity of the partition and the alienation if otherwise valid, can not be challenged. The married daughter, even though a coparcener, would not be entitled to reopen the partition already effected, nor would be empowered to challenge the alienation effected before such date, on the ground that her consent was not obtained for it.

Constitutional validity of proviso to Sec. 6(1)(c) of the Hindu Succession (Amendment) Act, 2005

An unforeseen consequence probably not envisaged by the legislature emerged later due to conflict and contradictions between the reformist approaches taken initially by the states and then at the Central level. For example, prior to the enactment of the Hindu Succession (Amendment) Act, 2005, four states had amended the Hindu Succession Act, 1956 and had introduced unmarried daughters as coparceners in the same manner as a son. In the state of Andhra Pradesh, the amendment came into force with effect from 5th September 1985. Since this date the daughter became a coparcener and consequently all the rights of a coparcener also vested in her, e.g., she acquired a right by birth in the coparcenary property, was empowered to hold the joint possession and joint title of the same; she became competent to demand a partition of her share in the joint family property in her own right and she could also challenge the unauthorised alienations effected by the Karta and thus protect and preserve her share. From 1985 till 2005, i.e. the coming into force of the central enactment that expressly saved the partitions affected prior to 20th December, 2004, the right to demand a partition, and a right to challenge an unauthorised alienation as also to re-open an inequitable partition if she was illegally denied a share, was vested in her. It should be remembered here that the courts have consistently ruled that the term partition includes even a notional partition. Therefore if at the time of effecting a partition, the male members divided the property amongst themselves and deprived her of her rightful share, or on the death of an undivided coparcener, a notional partition was affected and she was denied a share, she had a right to reopen the partition. Thus for these twenty years from 1985 till 2005 her rights with respect to coparcenary property and her share could legitimately be exercised. However the Central enactment came into effect from September 9th, 2005, and proviso to Sec 6(1) (c) of the Act provided that a daughter, though is a coparcener in the same manner as a son, could not question a partition effected before 20th Dec. 2004, which if literally interpreted would mean that while she did acquire the power to question a partition effected post 1985, could do it for twenty years, this right was taken away expressly and the inability to enforce her legitimate rights was imposed on her retrospectively with the help of the Central Amendment of 2005. It virtually meant that an inequitable partition affected in the family of which the daughter was a coparcener in 2003 could be questioned by her soon after its taking place, but not after 9th September, 2005, even though her rights were not barred by the law of limitation. Interestingly, as the Act was enforced with effect from 9th September, 2005, she could have challenged the partition even on 8th of September, but could not do so a day later.

Surprisingly, this restriction is imposed only on the daughters but not on the son. A son is not prohibited from challenging partitions or unauthorised alienations effected even prior to Dec, 2004 but a daughter is, and cannot do so despite cases of illegal denials of her rights. Even where she had acquired this right in 1985 or 1989, or 1994, the right is taken away expressly by the Amendment to the Act, in 2005. Therefore with this interpretation, the

gender friendly amendment actually resulted in gender injustice in several situations. An important judicial pronouncement in this respect came in 2010, from the Karnataka High court where the constitutional validity of the proviso to Sec. 6(1) (c) of the 2005 Amendment taking away the right from the daughters to reopen partitions effected before 2004 that was expressly vested in them by the Karnataka (Hindu Succession Amendment) Act, 1994 was challenged and the court held that this section was ultra vires the provisions of the Constitution of India and thus void, as it discriminated between the rights of coparceners on grounds of sex.

In *R. Kantha v. Union of India* [4], an unmarried daughter, demanded partition and demarcation of her separate share of the joint family property from her father and upon his refusal to do so, filed a suit of partition in the court. At the same time she challenged an allegedly unauthorised alienation of the joint family property affected by her father without her consent. The Trial court was inclined to dismiss the petition on the ground that since the alienation had taken place prior to Dec, 2004, she could not challenge the same in light of the Hindu Succession (Amendment) Act, 2005. She then filed a writ in the Karnataka High court challenging the constitutional validity of the proviso to Sec. 6(1)(c) of the Central Amendment on the ground that it is violative of principles of gender parity under the Constitution and therefore void and inoperative on the grounds that a right that accrued to her in 1994 cannot be taken away by virtue of the Central Amendment in 2005 by substitution of the Karnataka Amendment; the proviso to Sec. 6(1)(c) is not retrospective; the provision is arbitrary and unconstitutional for it discriminates between a son and a daughter for it is open to a son to question an alienation and a disposition prior to 20th December 2004 whereas a restriction is placed on the daughter's rights to question the same; and the restrictions placed on the daughter's right would also run counter to Sec. section 14 of the Hindu Succession Act, which is read with main section 6, in as that provides an unfettered right by birth which cannot be whittled down on the specious reasoning that settled matters ought not to be unsettled when the very same reasoning does not appear to apply to sons in respect of property.

The court framed the following two issues:

(i) Whether the proviso to Sec. 6(1)(c) of the Hindu Succession Amendment Act, 2005 is arbitrary and violative of Art. 14 of the Constitution of India as it denies an equal right to the daughter of a coparcener to question any disposition or alienation of property prior to 20th December, 2004 vis-a-vis a son;

(ii) Whether the petitioner, an unmarried daughter could seek partition of undivided coparcenary property during the lifetime of her father notwithstanding the Hindu Succession (Amendment) Act, 2005.

The main contention of the daughter that the right had accrued to her under the Hindu Succession (Karnataka Amendment) Act, 1994 (23 of 1994) with effect from 30th July 1994 to an equal share in the coparcenary property of her family and the same cannot be taken away retrospectively by a subsequent Amendment was rejected by the court on the following grounds:

(i) The Karnataka Amendment came with effect from 30th July 1994 and the Central Amendment came on 9th September, 2005. Latter prevails over the former in light of Art 254 (1) of the Constitution, which enunciates the normal rule that in case of a conflict between the union and state law in the concurrent field the former prevails over the latter no matter that union law is later in time; union law would prevail and state law shall to the extent of repugnancy be void. It is subject to the exception grafted under clause (2) of Art. 254 of the Constitution.

(ii) The petitioner had filed a suit for partition in 2007 when the Amendment had already come in force and therefore could not draw sustenance from the Karnataka Amendment Act. The position would not be any different even in a pending suit prior to the coming into force of the 2005 Amending Act and on the basis of 1994 Act.

The next contention of the petitioner that there is no basis under the proviso to Sec 6 (1) (c) of the 2005 Act, to restrict the right of the daughter of a coparcener from calling in question any disposition or alienation of coparcenary property prior to 20th Dec, 2004 was accepted by the court. The court said that it was unable to decipher any rationale/basis to this proviso even from an examination of statements of objects and reasons to the Amending Act and an analysis of the 174th Report of the Law Commission of India including their annexure and questionnaires. Though the, main reasons for saving pre-2004 partitions and alienations appeared to be to provide protection to bonafide buyers taking property in good faith and for protection of vested rights, the reasons for exclusion of the daughters appeared more sociological and dowry related and were unjustified. The court noted that the preamble to the Amending Act of 2005 also indicated that the objective of the Amending Act was removal of discrimination against daughters as inherent in Mitakshara coparcenary and eradication of the baneful system of dowry by positive measures thus ameliorating the conditions of women in the human society and concluded that cl (d) of Sec. section

6A of the Karnataka Act and cl. (iv) of 29A of the other three Acts *i.e.,* Andhra Pradesh, Tamil Nadu and Maharashtra should be deleted and the main object of the Acts should be only to remove discrimination inherent in Mitakshara coparcenary against daughters, both married and unmarried. The court further noted that apart from the above there was no indication that the Amending Act of 2005, was prospective and by implications there is no rationale basis to restrict the right of a daughter when the avowed object of the legislation is to create equal rights as between a daughter and a son of a coparcener. Even if it can be accepted that the apparent object to so restrict the right was in order to prevent litigation and to prevent settled positions from being disturbed, the same analogy ought to apply to suits that are brought by sons of the coparceners as well. The inconvenience and hardships would be no different. If alienations or other disposition that took place under the legal position as it stood prior to the amendment, the result would be that a partition that could otherwise be re-opened to address the claims of the daughter with little or no legal complications is denied unreasonably. Similarly, an alienation in respect of which the coparcener can be held to account for, in conferring the daughter her due is also immunised from challenge to the unjustified disadvantages of the daughter. The court concluded that there is no justification for the prescription of a cut-off date or a blanket ban on a daughter in enabling her to claim her due, hence the proviso to Sec 6(1)(c) of the 2005 Act is irrational, and has no nexus with the object of the Act and on the other hand would nullify its declared object. Thus the daughter would face no impediment in questioning the alienations and denial of the right to a share of the proceeds prior to 20th December, 2004. Allowing the writ petition they held the proviso to Sec. 6(1)(c) of the Hindu Succession (Amendment) Act, 2005, in so far as it pertains to saving of any dispositions or alienations prior to 20th December, 2004 as violative of Art. 14 and Art. 16 of the Constitution and bearing no rational nexus to the object of the Amendment Act.

(5) Property held by daughters with incidents of coparcenary ownership

The amendment clarifies that the joint family property would be held by the daughters, as they have become coparceners, with incidents of coparcenary ownership. Section 6(2) states:

...

Section 6 (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, as property capable of being disposed of by her by testamentary disposition.

...

Thus, according to s. 6(2), a female would hold the property with incidents of coparcenary ownership. The legislature has not explained nor provided anywhere as to what these incidents of coparcenary ownership are. Thus the natural step would be to seek their explanation under the classical law under which tthere are two basic incidents of coparcenary ownership. First, that each coparcener holds the property with the incidents of unity of possession and community of interest, *i.e.,* all coparceners jointly have the title to the property and joint possession of the property. Till the time a partition takes place, no one can predict what his share is. Secondly, all coparceners hold the property with incidents of doctrine of survivorship, i.e, on the death of one coparcener, his interest in the coparcenary property is taken by the surviving coparceners and not by his heirs. Does this mean that the doctrine of survivorship would apply in case of female coparceners and not male coparceners, as the legislature expressly provides, that the female coparceners would hold the property with incidents of coparcenary, survivorship being one of such basic incident, or does it mean that if the legislature has abolished the application of doctrine of survivorship for male coparceners, and female coparceners would hold the property and share exactly in the same manner as the males, it stands abolished for them too? By the abolition of the doctrine of survivorship in case of male coparceners by an express provision, the legislature has created another confusion. It is a fundamental rule in laws relating to inheritance and succession that the term ‘his’ does not include ‘her’. This must have been the reason why the legislature amended s. 30 of the Act to add ‘her’ after ‘him’. The use of the term ‘his’ interest and not ‘his or her’ as has been used in s. 30, clearly suggests that it is only in case of an undivided male Hindu dying that doctrine of survivorship would not apply and if a female coparcener dies, the doctrine of survivorship may apply. Besides, explanation to s. 6(3) states:

...

Section 6(3).— For the purposes of this sub- section, the interest of a Hindu Mitakshara coparcener 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. Even assuming

that any reference to a Mitakshara coparcener includes a reference to a daughter of a coparcener, the use of the term his/him throughout leads to a confusion that has been created by the legislature. It appears that the doctrine of survivorship has been abolished for male coparceners but has been retained for females.

(6) Retention of the concept of notional partition

The amendment retains the concept of notional partition but modifies its application. Prior to this amendment, notional partition was effected only if the undivided male coparcener had died leaving behind any of the eight class I female heirs or the son of a predeceased daughter and did not apply generally in every case of death of a male coparcener. The present amendment makes application of notional partition in all cases of intestacies. Section 6(3) states:

...

Section 6(3).— Where a Hindu dies after the commencement of the Hindu Succession 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.

...

From the language of the section, two things are clear. First, the doctrine of survivorship stands abolished in case of male coparceners, and secondly, in all cases where a Hindu male dies, his interest in the Mitakshara coparcenary would be ascertained with the help of a deemed partition or a notional partition.

(7) Calculation of shares while affecting a notional partition

The present Act provides in detail the calculation of shares while affecting a notional partition. Section 6(3) provides:

...

Section 6(3).— (a) the daughter is allotted the same share as is allotted to theson;

(b) the share of the predeceased son or a predeceased daughter, as they would have got had they been alive at the time of the partition, shall be allotted to the surviving child of such predeceased son or of such predeceased daughter; and

(c) the share of the predeceased child of a predeceased son or of a predeceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to him as if a partition has taken place immediately before this death, irrespective of whether he was entitled to claim partition or not.

At present, if a minor child dies, irrespective of the sex, his or her share would be calculated after effecting notional partition and such share would go by intestate or testamentary succession, as the case may be.

(8) Devolution of coparcenary interest held by a female

According to the amending Act, a female coparcener would hold the property with incidents of coparcenary ownership, but it does not specify how the property would devolve if she dies. If a Hindu female seeks partition of coparcenary property, gets her share, marries and then dies, who would succeed to this interest—her husband or her natal family members? This question is very significant in case of females, as in accordance with the rules of intestate succession, her property that may be available for succession is divided into three specific categories:

(i) property that she may have inherited from her parents;

(ii) property that she may have inherited from her husband and/or father in law;

(iii) and any other property.

Coparcenary interest is acquired by a daughter by birth and though it comes from the family of her father, it is not an interest that she has inherited from her parents. In such a case, it will obviously be covered by the third category, *i.e.,* any other property or general property. In such a situation, her heirs would be her husband, her children and children of predeceased children. It would also mean, that if she dies issueless after seeking partition, her husband would succeed to her total property including this interest that she had in the coparcenary property or if she dies as a widow it is the heirs of her husband who would take the interest in the coparcenary property. If she dies without seeking partition, then, her share would be ascertained by affecting a notional partition, and the share so calculated would be taken by her husband as her primary heir or his heirs. This interpretation seems contrary to s. 6(3), which in the first instance provides that if a Hindu dies after the commencement of the Hindu Succession 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. By using the term 'his interest' and not 'his or her interest', a doubt has already been created whether this section applies at all when a female coparcener dies. Assuming that it does apply to a female coparcener as well, then the interest would go by intestate succession in absence of a Will, as per which the husband would take the property along with her children or children of predeceased children.

The substance of ss. 6(3)(b) and (c), however, lends support to the argument that s. 15 of the Act does not apply to the interest of a female coparcener, and her interest goes only to her children. It clearly provides that where a partition takes place and one of the child is already dead, but has left behind a child or child of a predeceased child, the share of the predeceased son or a predeceased daughter, as they would have got had they been alive at the time of the partition, shall be allotted to the surviving child of such predeceased son or predeceased daughter. So, if a female coparcener dies without seeking partition, then a partition would take place, her share will be allotted to her surviving children, and the husband, even if alive, will not get any share. This is in contrast to s. 15, where the spouse succeeds along with the children of a female. A contradiction has been introduced between the first part of s. 6(3) and sub-cll (b) and (c).

(9) Separation of son during the lifetime of father

Under the old law, if a son sought partition during the lifetime of father, and separated from the family after taking his share, the remaining family continuing and maintaining the joint status, on the death of the father, neither such separated son nor any of his heirs were eligible to stake any claim out of the share of the father. For example,

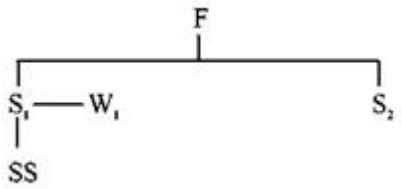


Fig. 12.4

A Hindu family comprises of father F, and his two sons S1 and S2. S1 is married and has a wife W1 and a son SS. S1 seeks partition in 2000, takes his one-third share in the joint family property and goes out of the family. The father dies in 2003. His share in the remaining joint family property would have gone to S2 and S1 would not be taken into account at all.

In the same illustration, if S1 died in 2001 and then the father dies in 2003, even then neither W1 nor SS would have any claim over the undivided share of the father in the joint family property. However, after the amendment and with the abolition of the doctrine of survivorship, in the same situation, if S1 seeks partition and takes his share and goes out of the family, S2 and F remaining joint, on the death of F in October, 2005, the doctrine of survivorship will not apply and the undivided share of the father, calculated after effecting a notional partition, would go straight away by intestate succession, as per which both S1 and S2 would share equally. This means that a separated son after having taken his share from the joint family property would again claim a share, if and when any member of the coparcenary dies intestate.

In the same illustration and in the second situation contemplated above, where the separated son dies before the father and leaves behind his widow and son, these heirs were incapable to inherit the share of the father as they would be deemed to be dead. However, after the amendment, when S1 dies, W1 and SS alone will inherit his

property that he had taken out of the joint family property, and now when F dies, then again both of them would take a share out of his property in the capacity of widow of a predeceased son and son of a predeceased son. It appears not only anomalous but inequitable too.

(10) Abolition of pious obligation of son to pay the debts of father

One of the features of classical Hindu law that imposed upon a son, grandson or great grandson the liability to pay their father's debts, has been abrogated by the present amendment. The emphasis to pay the father's debts was so strong that if the son had to pay his and his father's debts, it was provided that he should pay his father's debts first, to free him from a leading a life of bondage in the next life. At the same time, as a logical rule, the debts contracted before the enforcement of the amendment are subject to the rules of classical Hindu law. It is the date of contracting of debts that would be decisive to determine as to which law would apply, the law prior to the amendment or subsequent to it. Section 6(4) states:

...

Section 6 (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 obligations under the Hindu law of such son, grandson or great-grandson to discharge any such debt:

Provided that in 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 debts 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 was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

...

At present, the repayment of debts contracted by any Hindu would be his personal responsibility and the male descendants would not be liable to the creditor.

(11) Applicability of Amending Act to partitions affected before 20 December, 2004

The Amending Act is prospective in application and therefore its provisions would not apply to any partition that was affected before 20 December, 2004. Section 6(5) states:

...

Section 6(5).— Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. In *Brij Narain Aggarwal v. Anup Kumar Goyal* [5] A suit was filed on behalf of the daughter claiming share from her parents in the coparcenary property on the ground that since the coming into force of the 2005 amendment she has become a coparcener. A partition suit was filed by her two brothers in 1984, pursuant to which the matter was referred to arbitration, and under a decree, the daughter was granted 1/36th share in the property. An appeal against this decree was dismissed and a petition was filed for execution of the award in 1993. On her behalf it was contended that as the partition had not become final, she was entitled to a share equal to the share of the son. The court rejected her claim and held that the first requirement of a daughter becoming a coparcener is the existence of a joint family. If the family had already been disintegrated by a previous partition, there would be no question of daughter becoming a coparcener in it. Here the moment partition was demanded by the coparceners, a severance of status took place and since all coparceners had agreed for a partition, the coparcenary had come to an end. In fact all the members had referred the matter to arbitration much prior to Dec, 20th 2004 and thus the daughter in the present case could not claim any share in the disintegrated joint family.

...

(12) De-Recognition of oral partition

The amending Act clearly says that the term ‘partition’ used in this whole section means a partition that is in writing and duly registered or the one that is affected by a decree of court, in essence, proving which would be easy. It should be noted that under the classical law, partition can be even oral or in writing. Since partition does not amount to a transfer of property within the meaning of s. 5,Transfer of Property Act, 1882, it is not required to comply with the primary formalities of transfer of property, *i.e.,* writing, attestation and registration. However, the present Act makes it clear that the term ‘partition’ refers to only those partitions that are either executed in writing and registered as per the Registration Act, 1908, or have been undertaken in pursuance to the decree of a court. The Act provides:

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, or partition affected by a decree of a court.

(13) Abolition of special rules relating to dwelling house

One of the major gender discriminatory provisions under Hindu Succession Act, 1956, was s. 23, which specified special rules relating to devolution of a dwelling house. Section 23, as it stood before it was abrogated, provided:

...

Section 23.— Where a Hindu intestate has left surviving him or her both male and female heirs specified in class-I of the schedule and his or her property includes a dwelling house wholly occupied by members of his or her family then notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein, but the female heir shall be entitled to a right of residence therein.

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

Under this section, the right of female class I heirs was limited to a right of residence in the dwelling house. Their ownership did not vest in them a right to have the house partitioned and specifying of their shares, till the male heirs chose to destruct their joint status themselves. In case the female heir was a married daughter, her ownership was without even a right of residence unless she was unmarried, widow or was deserted by or separated from her husband. In other words, her marital status and her relations with her husband had a direct reflection on her need to have a residence in her own property.

The purpose envisaged by the legislature for enacting this provision was to defer the actual partition of the dwelling house that was actually and wholly in occupation of the male heirs until they themselves chose to destruct their joint status. Thus, the fragmentation of the dwelling house at the instance of male heirs only was permissible despite the fact that they might be the owners of a fractional share. For example, on the death a Hindu father, his wife W, four daughters D1, D2, D3, D4 and a son S inherited his house.

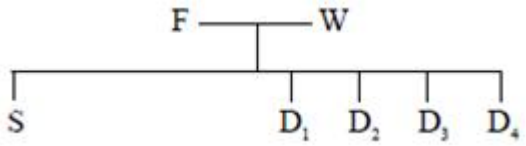


Fig. 12.5

Here, the son was the owner of only one-sixth of the house, yet it was only he at whose instance the house could be partitioned. Even if all the remaining five co-sharers wanted to demarcate their shares, they could not do so. Further, if all the daughters were married, the son, though was the owner of one-sixth of the house, had a legal right to occupy the share of all of his sisters without their consent.

The practical implication of this statutory interdict on a female heir to claim partition of the house till the male heir decides otherwise, resulted in the denial of any claim over the house. They had its ownership but no right to

ascertain which portion of the house had come as their share. A married daughter had no right of residence in it. Further, in case there was only one male heir, then the fact of partition could never arise and despite the fact that the section used the expression in plural, *i.e.,* 'males heirs dividing their respective shares' the judicial interpretation had been that the restriction applied even in case of there being a single male heir. This was a major setback on the inheritance rights of women, as discrimination was visible not only on grounds of sex alone, but also on the marital status of daughters. In presence of male heirs in the family, the females could not partition their shares and married daughters could not live in their own portions without the consent of the brothers, who did not own the portion of the sister but were legally entitled to occupy their shares without any monetary compensation to them even against their wishes. This provision has now been deleted and the rights of all class I heirs on any kind of property is at par with each other. Daughters are eligible to inherit and enjoy the property of the father or the mother in the same manner as the son. Further, irrespective of the nature of property, whether it is a house, cash, jewellery, shares and stocks or commercial ventures, they have not only an equal right to own their share, but they can seek its partition and enjoy it without any impediment. The deletion of s. 23 from the statute book was long overdue and is a very welcome step in attaining gender parity in inheritance laws.

(14) Deletion of Section 24

Under the old law, the general rules of succession in s. 24 clarified the position of the three specific widows, who were eligible to inherit the property of the intestate. These three widows were, widow of a predeceased son, widow of a predeceased son of a predeceased son and brother's widow. The first two were class I heirs, while the third was a class II heir. Sec. 24 as it stood before the deletion, provided as follows

Certain widows re-marrying may not inherit as widows.— Any heir who is related to an intestate as the widow of a pre-deceased son, the widow of a pre-deceased son of a pre-deceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has re-married.

These widows could inherit as such widows only when they had not remarried on the date the succession opened. If they had remarried, they would have ceased to be widows of the respective relatives of the intestate, and would not have been eligible to inherit the property of the intestate. For example, a Hindu family comprises of father F and two sons S1 and S2, and a grandson SS.

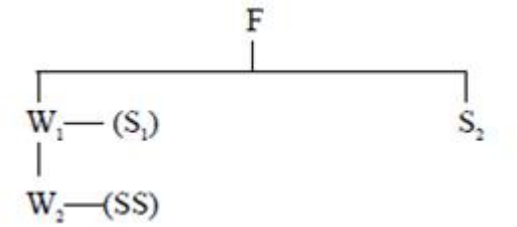


Fig. 12.6

Both S1 and SS are married to W1 and W2 respectively. S1 and SS died during the lifetime of F. On the death of F, all the three heirs, S2, W1 and W2 would inherit the property. S2 taking one-half, and W1 and W2 taking one-fourth each. However, if any of these two heirs W1 and W2 remarry before the death of F, then she would be ineligible to inherit the property of F. Only on the death of F, the succession would open, and on this date if they were already married, they would cease to be the widows of the son and the grandson respectively and would not be counted as heirs. Similarly, if a person dies leaving behind a brother's widow who is a class II heir, she can inherit the property as such widow only if she had not remarried on the date of opening of succession.

Section section 24 has been deleted by the amending Act. However, it does not mean that the situation and the eligibility criteria have changed. Even without s. 24 being on paper, the situation with respect to these widows has remained the same. Section 24 was superfluous and its deletion therefore would not alter the situation at all. One has to understand that under the Hindu Succession Act, 1956, two categories of relatives are recognised as heirs to the intestate. One, who were related to the deceased through blood and second who were related to the deceased through marriage, *i.e.,* who entered the family of the deceased through marriage to the male members. The disqualification of remarriage is attached to those heirs who entered the family by marriage, became widows on the death of the respective male members to whom they were married, and went out of the family again by a remarriage. Marriage or remarriage of blood relatives such as daughters, sisters, mother is of no consequence, but

remarriage of son's widow, son's son's widow, or brother's widow would mean that they cease to be members of the intestate's family, and their inheritance rights would be created in the family they are married into. After remarriage, they would be related to the intestate neither as blood relatives nor by marriage and therefore would not be eligible to be his heirs at all.

(15) Eligibility of female coparceners to make a testamentary disposition

The introduction of daughters as coparceners and creation of rights in their favour that are same as that of the son has been recognised in s. section 30 of the amending Act as well. A female coparcener is empowered to dispose of her undivided share in the Mitakshara coparcenary through a Will. Section 30 specifically provides for substitution of words 'disposed of by him or her' in place of 'disposed of by him'. It should be remembered that under the classical law, a coparcener was not empowered to make a testamentary disposition of his undivided share in Mitakshara coparcenary, and it went by survivorship to the surviving coparceners. Permissibility of testamentary disposition of undivided share would have defeated the application of doctrine of survivorship and therefore such disposition was void. The Hindu Succession Act, 1956, for the first time provided competency to an undivided coparcener to make a valid bequest of his share in Mitakshara coparcenary and the present Act extends this competency to a female coparcener as well.

(16) Introduction of four new heirs in Class I category

The schedule of the principal Act has been amended and four new heirs have been added to the class I category. This change has been brought into only in case of a male intestate, while the category of heirs to a female intestate has not been touched at all. These four heirs were previously class II heirs and were excluded both in presence of the class I heirs and the father of the intestate. Presently, as their placement has been changed, they inherit along with class I heirs and would exclude the father in their presence. These four heirs can broadly be described as the great grand children of the intestate, three through the daughter and one through the son, and more specifically, are son of a predeceased daughter of a predeceased daughter; daughter of a predeceased daughter of a predeceased daughter; daughter of a predeceased son of a predeceased daughter and daughter of predeceased daughter of a predeceased son. This brings the number of class I heirs now to 16 instead of 12, and now 11 female heirs and five male heirs together form the class I category. However, there are two flaws. First, not all the great grand children have been treated equally. As illustrated in Figure 7, the four new heirs are DDS, DDD, DSD and SDD.

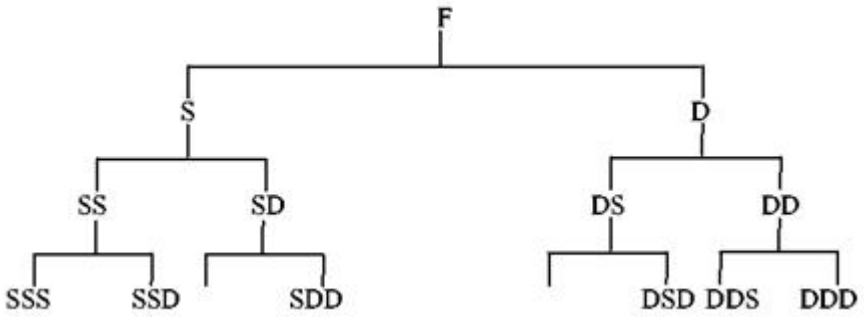


Fig. 12.7

It should be noted that as amongst the great grand children of an intestate, SSS and SSD, *i.e.,* son of a predeceased son of a predeceased son and daughter of a predeceased son of a predeceased son were already class I heirs. Four more have been added now taking the total number of great grand children to six. However, two great grand children have been still left out of the class I category, who are SDS and DSS, *i.e.,* son of a predeceased daughter of a predeceased son and son of a predeceased son of a predeceased daughter. All great grand daughters are class I heirs but two great grand sons are not. DSD is an heir while her brother DSS is not. Similarly, SDD is an heir while her brother SDS is not. One wonder what can be the rationale for leaving two out of four great grand sons and including only their sisters as class I heirs. It is not only perplexing, but appears to be unjust as between the brothers and sisters. This discrimination against the brothers is without any cogent reason and should be corrected with immediate effect by the legislature.

It appears that there was undue haste on part of the legislature to get the amendment through which is also apparent from the second flaw. This second mistake and a very curious one is that all these newly introduced heirs were class II heirs prior to their elevation to the class I category. They were specified in the class II category in entry

(ii) and (iii) respectively. Normally, if an heir is placed in one class and is elevated, his name would be deleted from the former category where he was placed and will now appear in the new category to which he now belongs. The name of the heirs can not and should not appear simultaneously at two places or in two different categories, more so when one excludes the other. Strangely enough, they continue to occupy their place as class II heirs even after their elevation to class I. Their names now appear both as class I and class II heirs. This anomaly is strange, and a piece of faulty legislative drafting, as while the schedule was amended to include these new heirs in class I, strangely enough, the class II category was not modified and these four heirs continue to be both in class I as well as in class II category. The legislature should have amended both class I heirs and class II categories together, when they lifted these four heirs from class II. Their appearance in class II category is now redundant and should be deleted.

I. APPLICATION OF THE ACT

The laws of succession in India, are primarily religion-based laws, and therefore, to decide the applicability of an enactment, what the religion of the deceased was, is the first and the foremost question. As the title of the Act suggests, the Hindu Succession Act, 1956, would apply to Hindus, but to find out as to 'who is a hindu' is in itself a difficult exercise. secondly, does it apply to all hindus without exceptions, or can some categories be excluded from the application of this act because of their conduct or domicile, are questions, an examination of which is extremely relevant for the purposes of determining the application of this Act.

Who is a Hindu?

It is difficult to define a Hindu as it is a very diverse community. Not all Hindus speak the same language, wear similar clothes, observe similar rites and ceremonies, eat the same kind of food, share the same beliefs or even worship the same Gods, but one commonality is that they all descended from the same stock and these variations occurred later in point of time, due to the requirements of their differential habits and of the growing awakening of individualism, as distinct from the identity based on occupation, caste and family name. Several sects were formed within the Hindu community in retaliation to the Brahmin and Vedic orthodoxy, rigid caste based distinction and the application of different rules to different castes. Some were against the elaborate Vedic rituals and formed sub-communities preaching simple ceremonies. Other sects were founded on the principles of non-violence, brotherhood and equality of human beings. Thus, not the present hierarchy or differentiation, but the origin became a convenient point for the legislature to describe who can be called a Hindu. As enunciated in s. 2 of the Act, it applies to: [1]

(i) Hindus, including a Virashiva, a Lingayat or a follower of the Brahmo Prarthana or Arya Samaj;

(ii) Buddhists, Sikhs or Jains; and

(iii) any person who is not a Muslim, Christian, Parsi or Jew by religion, unless it can be proved that he cannot be governed by the provisions of this Act.

Therefore, for deciding the application of the Act over Hindus, four factors must be considered:

(i) that the deceased was a Hindu;

(ii) that though he was not a Hindu, he was also not a Muslim, Christian, Parsi or Jew, unless it can be shown that Hindu law cannot be applied to him;

(iii) that he is a Hindu and with his conduct, he has not ousted the application of Hindu law; and

(iv) that even though he is a Hindu, he may not be subject to the provisions of the Hindu Succession Act due to the application of some other law, owing to his domicile or even the form of his marriage.

Who is a Hindu for the Application of the Hindu Succession Act, 1956?

The Act gives four yardsticks to determine who a Hindu is, viz., if the person is the child of Hindu parents or of only one Hindu parent or he is a convert or a reconvert to the Hindu faith. The term 'Hindu' includes Hindus, Buddhists, Sikhs and Jains. [2] Therefore, 'who is a Hindu' is a question which is not examined by looking at a person's involvement in religious practices and beliefs or the frequency of his private worship or visits to temples, but is seen

with respect to his parentage, his upbringing and his declaration in accordance, with the constitutional guarantees of freedom of religion. Whether he worships at all or not, visits a temple or not, are facts totally immaterial, as he will nevertheless be a Hindu if both his parents were Hindus. He may even be critical of Hindu philosophy and religion and full of praise for the teachings of other religions, but he would continue to be a Hindu. Even where he expressly, by a clear declaration renounces his religion, till he actually converts to a different religion, he would be subject to the application of this Act, as in the current religion based application of laws, no person can be without a religion. So, if a person, by a declaration, renounces his religion, without embracing another religion or declares that he would adhere to, or follow the good teachings of all religions, his former religion would continue to be appended to him.

Time for Determination of Religion

Where Both the Parents are Hindus : Where both the parents profess the same religion, the time for the determination of the religion of the child is the time of its birth. The child will take the religion of the parents and will have the same religion till the attainment of majority. It is the time of the birth and not the time of the conception, that will be decisive. For example, a child is conceived when both parents are Christians. Before its birth however, both the parents convert to the Hindu religion. The child would be a Hindu at the time of its birth. Similarly, if a Muslim man and a Christian woman get married and a child is conceived, and before the birth of the child, both the parents convert to the Hindu faith, the child would be a Hindu.

Where only One Parent is a Hindu : Where only one parent is a Hindu, the time for the determination of the religion of the child is not the time of the birth, but a later time, linked to the way he is brought up. Where the child is brought up as a member of his Hindu parent's tribe or community, the child would be a Hindu. [3] Two things are noteworthy here. First, that in our patriarchal set-up, it is an accepted practice that the child would take the surname of the father, but it is only a practice and not a legal requirement. At the most, it is a presumption that can be rebutted, [4] for example, despite having a Muslim father, if the child born to a Hindu wife is being brought up as a member of her tribe or community, the child would be a Hindu, and it is only a popular misconception that under Hindu law, more so in patriarchal families, the surname of the father or his religion will be the sole determining test for ascertaining the child's religion. Secondly, another popular misconception is that an illegitimate child takes the religion of its mother, as it is not deemed to be related to its father. This is not true, as an illegitimate child of a Hindu father, from a non-Hindu mother, would nevertheless be a Hindu if such child is brought up as a member of his father's tribe or community.

The child of a Hindu father and a Christian mother is a Hindu when brought up as a part of his father's family. [5] Similarly, the child of a Hindu mother and a Christian father, when brought up by the mother all by herself, after the annulment of her marriage, in her natal family, is a Hindu. [6]

Illegitimate Children

As aforesaid, the presumption that an illegitimate child always takes the religion of the mother, is no longer applicable. The Act clearly says: [12]

> Any child, legitimate or illegitimate, one of whose parents is a Hindu...by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged.

The legislature, by using the term 'parent', instead of 'mother', made it very clear that though an illegitimate child is deemed to be related to the mother for the purposes of succession, it is related to the father as well as the mother, for determining its religion. The earlier ruling that Hindu law has application over an illegitimate child of a non-Hindu mother, despite having a Hindu father, no longer holds good. [13] The determination of religion is dependent on two factors, whether the child is legitimate or illegitimate, viz.:

(i) one of the parents (not merely the mother) is a Hindu; and

(ii) the child is being brought up as a part of the Hindu parent's tribe or community. [9]

Convert or Reconvert to Hindu Faith

The Constitution of India guarantees to every citizen of India, a freedom to practise, profess and propagate his religion. Coupled with this is also a freedom to convert to any religion, subject to the rules prevalent in different

religious communities. Presently, the Parsis do not permit conversions to their religion. One can only be a born Parsi and not a convert Parsi. In fact, the rules are so strictly constructed that the children of a Parsi father and a non-Parsi mother can be Parsis, but children of a Parsi mother and a non-Parsi father, would take the religion of the father. Be that as it may, any citizen of India, who is a major and of sound mind, can convert to any religion (except of course, to the Parsi faith) or reconvert to his former religion or to any other religion. In the current scenario, where conversion and adherence to a religion has been thoroughly politicised and is attributed to motives, some states have applied rules, involving the need for information and permission from statutory authorities, to what is purely a private and a personal act.

For the application of the Hindu Succession Act, 1956, it is not necessary that a person should be a born Hindu. [10] A convert or a reconvert (to the Hindu religion), would also be subject to Hindu law. It is pertinent to note here that for a born Hindu, nothing short of a renunciation of the Hindu religion and a conversion to another religion, would strip him of the Hindu religion. A simple renunciation or even not adopting the Hindu way of life, is not sufficient.

In India, a person cannot be without a religion and if a person renounces his religion, but does not embrace a new one, his former religion will still be appended to him. Even a solemn declaration in a court of law, that he is not a Hindu, would not be material till he can show that he has converted to another religion. [11] The twin-fold requirement for a conversion, therefore, is, a renunciation of the former religion and an embracing of another religion. Mere renunciation is not enough. Similarly, a born Hindu may regularly visit the religious places of worship of other religions, observe all religious festivals, but he would continue to be a Hindu till he renounces the Hindu religion and adopts a new religion. [12] A declaration in public, by a born Hindu, that he is renouncing his religion and embracing the Buddhist religion, fulfills both the essentials of conversion and is valid. [13] In case of a Hindu woman getting married to a non-Hindu (not under the Special Marriage Act, 1954), but under the matrimonial law available to the husband, changing her name, renouncing the Hindu way of life and adopting the customs, traditions and way of life of her husband's religion, would be sufficient proof of her conversion. [14]

Conversion to Hindu Religion **:** For a born Hindu, as aforesaid, it is not necessary to prove that he has been practising the Hindu religion. He may constantly visit other religious places, may not visit a temple or worship at all, may make fun of the Hindu way of life, criticise it, scoff at it, show respect or shower praise on other religions or one religion in particular, yet he would be a Hindu till conversion is proved. But where a person converts to the Hindu religion, an adoption and practice of the Hindu way of life must be shown. [15] Under Hindu law, no formal ceremonies are required for induction into the Hindu religion, but some communities do stress on purification or expiatory ceremonies. [16] Thus, what is required to be shownis:

(i) an intention to convert; and

(ii) adoption of the Hindu way of life.

The observation of ceremonies at the time of conversion is merely optional and is not a conclusive proof of conversion, more so where the subsequent conduct of a person contradicts the alleged conversion. [17] The Hindu society is sharply divided along caste lines, but castes can be appended to only born Hindus, and not to convert Hindus. For the purposes of application of Hindu law, it is the religion, and not the caste that is material. As caste is a result of birth and not of choice, a convert may not have a caste, and yet be a Hindu, subject to the provisions of the Hindu Succession Act, 1956. If a Christian woman, whether Indian [18] or European, [19] converts to the Hindu religion, and/or marries a Hindu man, then despite having no caste, she would be a Hindu.

Bona fide of Conversion **:** The court can examine the genuineness of a conversion, [20] but not the sincerity of religious beliefs. Whether it is an intelligent conviction or a farce, is immaterial. Conversion must be made honestly and without any fraudulent intention. A *bona fide* intention and a matching conduct, are mandatory to prove a conversion. [21] Where the intention to convert is genuine, the mere fact that it is also coupled with a motive or a reason, is immaterial. Conversion to escape the discriminatory and humiliating treatment given under the religion of birth, is valid. Similarly, conversion may be due to the availability of better conditions of life or humane values practised by the members of the embraced religion. All that is required is free and voluntary consent, coupled with a *bona fide* intention to convert and subsequent conduct indicating the adoption of the Hindu mode of life. An added purpose for such conversion would not invalidate it. For example, a Christian woman converts to the Hindu religion only because she wants to marry a Hindu man whose parents had given their consent to the marriage on the condition that she should convert to the Hindu religion. She gets married and adopts and observes the Hindu way of life. Here, despite the fact that she did it for a purpose, the conversion would be valid.

Reconvert **:** Conversion is a revocable act, and a convert can come back to his religion of birth at any time, if he so

desires. Upon his conversion to a non-Hindu religion, a Hindu not only loses his religion, but also loses his caste, as the caste system is not recognised under any other religious community. [22] However, with the permissibility of reconversion, a question arises: if on reconversion a person regains his religion, can he regain his caste as well? The Apex Court has held [23] that caste is a result of birth and not of choice, and one cannot escape the caste of birth by pretending to belong to another caste or even by embracing a sect within the Hindu religion, such as the Arya Samaj, [24] but once he converts to another religion, he loses his caste, but, it is not lost permanently and remains in suspended animation. The moment this convert, or even his descendants, reconvert to the Hindu religion, their caste is also revived, though it is dependent upon their acceptability by the members of their caste, as one of them. [25] The true test is, whether the reconvert had a genuine intention to give up the religion of choice and to go back to the religion of birth, back to his old ways and practices. [26] For example, a Hindu man of a particular caste, converts to the Christian religion. His son, born after his conversion, converts to the Hindu religion. Such son will take the caste to which his father belonged prior to his conversion, and will be subject to the application of Hindu law.

Ousting the Application of Hindu Law by Conduct

The application of the Hindu law can be ousted by two specific conducts of a person which are:

(i) conversion; and

(ii) marriage to a non-Hindu under the Special Marriage Act, 1954.

A Hindu by birth or by conversion, will normally be governed, in matters of succession to his property, by the Hindu Succession Act, 1956. However, due to a particular conduct, he may oust the application of this Act in matters of succession. The first conduct refers to his conversion to another religion. If he renounces the Hindu religion and converts to another faith, in the present religion based applicability criterion of family laws, the Hindu Succession Act, 1956, would no longer be applicable to him. [27]

Marriage to a non-Hindu under the Special Marriage Act, 1954 **:** The Special Marriage Act, 1954, enables Indians to marry validly, despite the difference in their religion. Unlike under the provisions of the old Special Marriage Act, 1872, presently, a person can retain his religion and validly contract an inter-religious marriage under this Act. A marriage solemnised under the traditional law, can also be registered under this Act. [28]For example, a Muslim couple gets married under classical Muslim law. After the solemnisation of this marriage, upon their option, they can get this marriage registered under the Special Marriage Act, 1954. Upon such registration, it will be deemed a marriage solemnised under this Act and the rights and liabilities of the parties to the marriage would be governed by the provisions of this Act and not by the traditional law of Muslims. Similarly, if a Hindu couple getting married under Hindu law, get their marriage registered under the provisions of the Special Marriage Act, 1954, the marriage would be treated as solemnised under the Special Marriage Act, 1954, and the provisions of this Act would govern their marital rights and obligations. The solemnisation of the marriage also, has a direct connection with the application of succession laws. The general rule till 1976 was, that where a marriage is solemnised under the Special Marriage Act, 1954 or though solemnised under the traditional law of the parties, is registered under the Special Marriage Act, 1954, the provisions of the Indian Succession Act, 1925, will govern the succession to the property of the parties to the marriage, as well as to the issue of such marriage. The rule was irrespective of the fact, whether it was an inter-religious marriage or the parties professed the same religion. For example, if two Muslims, two Parsis, two Christians or two Hindus or a Hindu and a Parsi, a Hindu and a Muslim, a Christian and a Parsi, a Parsi and a Muslim or a Hindu and a Jew, before 1976, got married under the Special Marriage Act, 1954, succession to the property of the parties to the marriage and also of the issue of such parties, was governed by the provisions of the Indian Succession Act, 1925, and not by the law of succession available to them under their traditional laws. In 1976, the rules were amended and it was provided that if two Hindus get married under the Special Marriage Act, 1954 or under the Hindu Marriage Act, 1955, but get it registered under the Special Marriage Act, 1954, succession to their property would be governed by the Hindu Succession Act, 1956.[29]But if a Hindu gets married to a non-Hindu under the Special Marriage Act, 1954, succession to the property of such Hindu, and also of the issue of such marriage, irrespective of its religion, will not be governed by the Hindu Succession Act, 1956, but by the general scheme of succession laid down under the Indian Succession Act, 1925. Thus, despite the fact that a person may be a Hindu, the Hindu Succession Act, 1956, would not govern succession to his properties, if he marries a non-Hindu under the Special Marriage Act, 1954 or his parents had an inter-religious marriage under the Special Marriage Act.

Sec. section 5 of the Hindu Succession Act provides

5. Act not to apply to certain properties .—This Act shall not apply to—

(i) any property succession to which is regulated by the Indian Succession Act, 1925, by reason of the provisions contained in section 21 of the Special Marriage Act, 1954;

Territorial Application

Act not applicable to Hindus of Jammu and Kashmir , Goa , Daman , Diu and Renocants of Pondicherry : The Act, by an express provision, [30] excludes in its application, Hindus of Jammu and Kashmir, who are consequently governed by their distinct laws of inheritance and succession. [31]Prior to the commencement of this Act, Goa, Daman, Diu, Dadra and Nagar Haveli, and Pondicherry, were not part of the Indian territory, and therefore, the application of the Act did not extend to them. Goa, Daman and Diu were Portuguese colonies till 1961 and the inhabitants of these areas were subject to the application of the Portuguese Civil Code, 1867, since 1 July 1870. [32] Based on the Napoleonic Code, it was the codification of almost all the civil laws on the substantive side and with its enforcement, [33] the existing laws of all the overseas provinces were repealed, but an exception was provided for the provinces of Goa, Daman and Diu and the customs and usages of the Hindus of these provinces, were expressly saved. [34] Consequently, the Hindus of Goa, Daman and Diu were subject to their distinct laws. In 1961, Goa was liberated and in the following year, the Constitution was amended [35] and the legislation affecting Goa was passed in 1962 itself. It provided that: [36]

> All laws in force immediately before the appointed day in Goa, Daman and Diu, or in any part thereof, shall continue to be in force therein, until amended or repealed by a competent legislature or other competent authority.

The Hindu Succession Act, 1956, therefore, does not apply to the Hindus of Goa, Daman and Diu.

Hindus of Dadra and Nagar Haveli and Pondicherry : For the Hindus of Dadra and Nagar Haveli and Pondicherry, the application of the Hindu Succession Act, 1956, was extended by regulations 6 and 7 of 1963, respectively. However, s. 2A of the regulation provided that:

> Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the Renocants of the Union Territory of Pondicherry.

The Act thus, applies to the Hindus of Pondicherry, except the ‘Renocants’, who are still governed by the provisions of the French Civil Code, 1804.

Prior to 1961, Pondicherry was a French colony and the French Civil Code, 1804 was extended to this province in 1819, but due to express provisions, Hindus and Muslims, as also the Christians, were permitted to be governed by their customary laws in matters of property rights. [37] The French Civil Code applied to people of French origin and for Indians, it was provided that if they wanted the application of the French Civil Code over them, in place of their personal law, they could renounce their personal status and embrace the French law. [38] Many Indians took advantage of this offer [39] and became ‘Renocants’, [40] and to them, in personal matters, it was not the customary law, but the provisions of the French Civil Code, 1804, that applied. The position with respect to ‘Renocants’ is unchanged till date.

Hindus who are Members of Scheduled Tribe : The Hindu Succession Act, 1956, does not apply to Hindus who are members of the scheduled tribes. [41] The Constitution of India defines [42]‘scheduled tribes’ as such tribes or tribal communities as are deemed to be scheduled tribes under art. 342 of the Constitution. This article also authorises the President of India to specify by a public notification, the scheduled tribes in the various states and Union Territories. Both the President and the Parliament, have exercised this power and there exist a large number of scheduled tribes, enjoying constitutional protection of their identity, culture, customs and usages. The Act is inapplicable to the Bathwats of Orissa, [43] and to the Bor Borakacharis of Assam, [44] but it is applicable to the Jati Vaishnavas, [45] the Chamars, [46] the Adi Dravidas, [47] the Bairagis, [48] the Goads [49] and the Santhals. [50]

Act not Applicable to the Estate of erstwhile Rulers of Indian States : Before attaining independence, India was divided into several princely states. When the British left India, their sovereign powers were in theory, revived, but their sovereign status would have been inconsistent with the integrity of India as a nation. Thus followed a reluctant and/or voluntary merger of these states with the consolidated Indian Union, through instruments of accession. The former rulers were allowed to retain their title, personal properties and the rule of primogeniture applicable to these properties, but they ceased to be kings in the literal sense and lost their power over the subjects, as the kingdoms were replaced with democratic rules, with former subjects getting equal political rights.

Designated as impartible estates, they are not subject to the application of the Hindu Succession Act, 1956. [51]However, estates that were impartible under the application of the Act, and if properties were subject to the rule of primogeniture owing to a custom, that stands abrogated now. These customary impartible estates have therefore, after the passing of the Hindu Succession Act, 1956, become partible and heritable, in accordance with the rules laid down under this Act. [52]

All customary rules of succession, including the rule of primogeniture, if inconsistent with the provisions of this Act, are expressly abrogated [53] by the Act. But where the estates descend to a single heir by virtue of any covenant or an agreement entered into between him and the Government of India, prior to the commencement of this Act, the provision of this Act would not govern succession to such properties. [54] It would nevertheless, apply to the private properties of the ruler. [55]

However, there may be a situation where the erstwhile ruler or jagirdar may have in his possession both impartible property to which the rule of primogeniture applies as also his separate properties which are subject to the provisions of the Hindu Succession Act, 1956. In such cases both the properties would be subject to different rules of devolution. Another situation can be where more property is acquired with the help or aid of the impartible property, and in such cases, a question may arise as to what would be the character of this acquired property? Would it be treated as the separate property of the Jagirdar or as it was acquired with the help of the Jagir, it would automatically become a part of the Jagir and would be subject to the rules of primogeniture. In *R R Narpat Singh v. Yuv Raj Singh,* [56] the property in question was the im-partible jagir property, subject to the rule of primogeniture in the erstwhile royal family of Jodhpur. He acquired property with the help of the income of the jagir in general and it was held by the Rajasthan High Court that the acquired property would not *ipso facto* become the property of the Jagir and would constitute the separate properties of the jagirdar. In absence of any proof of blending, it would not be presumed to be part of Jagir and thus the rule of primogeniture would not be applicable to it for succession. As it is always open to a person including a jagirdar to impress that property with Jagir nature so as to make it impartible, or to blend it with jagir property and confer the character of impartibility in which event the rule of primogeniture would be attracted. Such blending is a question of fact and in absence of pleading to that effect, the property would continue to retain the character of separate property of Jagirdar and not be subject to the rule of primogeniture.

Section 5 provides

5. Act not to apply to certain properties.— This Act shall not apply to—

(i) any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by terms of any enactment passed before the commencemnt of this Act;

(ii) the Valiamma Thampuran Kovilagam Estate and the Palace Fund administered by the Palace Administration Board by reason of the powers conferred by Proclamation (IX) of 1124 dated 29th June, 1949, promulgated by the Maharaja of Cochin.

The Act also did not apply where there existed a provision of law providing for the prevention of fragmentation of agricultural holdings or for fixation of ceilings or for the devolution of tenancy rights in respect of such holdings. [57]

Though the legislature has deleted s. 4(2) from the statute book, yet it has not included any specific provision that expressly subjects agricultural property to the application of the Hindu Succession Act, 1956. There is thus a confusion with respect to whether or not agricultural property will be governed by this Act.

Effects of disowning a person on laws of inheritance

Inheritance rights are conferred by the statute and cannot be ousted by a mere declaration of the intestate unless the declaration is in the nature of a validly executed Will. There is no legal sanctity of proclamations which are sometimes even published in the local dailies disowning the children/near relations and disinheriting them from the property and they do not have any adverse repercussion on the inheritance rights of such relations. If a parent disowns a child; severs publically the relationship with him, can such a parent then inherit the property of such disowned child or represent him in an ongoing property litigation was the issue that arose in a case from Himachal Pradesh [58]. Here, the mother earlier had snapped all the ties with her son and had published a statement to that effect in the local newspaper. It was held that the notice or the disclaimer of relationship cannot disinherit any

statutory heir as such notice or disclaimer has no legal value and cannot override succession rules.

Ex-gratia payments and rules of inheritance

It is a set rule that whatever property is owned by a person and is capable of being disposed of by him/her in absence of a testamentary disposition would be subject to the rules of inheritance. Property that comes to the share of the deceased post his death is also subject to succession rules. A question arises: can ex gratia payment or compensation paid to the next of kin of a deceased is to distributed in accordance with the rules of inheritance that applied to the deceased? What are the criteria for determining who the next of kin of a deceased is and does the inheritance scheme applies for distribution of the compensation/ex-gratia payments post death of the intestate. In *Ganny Kaur v. State of NCT of Delhi,* [59] four members of a family comprising the husband, wife and their two children, were killed in the unfortunate anti-Sikh riots in 1984. The only two relatives who survived this family were the mother of the wife and the father of the husband. The government announced an *ex gratia* payment to be paid to the next of kin of each of the deceased and the question before the court was, how to determine, who out of these survivors is eligible to claim this money. Both had lost a child and two grandchildren each, but if the laws of inheritance were to be applied for the distribution of the ex-gratia payment that came to Rs 14 lakhs it was only the father of the husband would have got the money while the mother of the wife would not get anything. The court held that it was not necessary that ex-gratia payment is to be distributed in accordance with the rules of inheritance and the total amount was distributed equally between the two survivors.

II.SUCCESSION TO THE PROPERTY OF A MALE INTESTATE

INTRODUCTION

Succession is of two types:

(i) testamentary succession; and

(ii) intestate succession.

TESTAMENTARY SUCCESSION

Where succession is governed by a testament or a Will, it is called testamentary succession. Under Hindu law, a Hindu male or female has the capability to make a Will of his/her property, including of a share in the undivided Mitakshara coparcenary, in favour of anyone. [60] In such cases, the property will devolve on their death, in accordance with the distribution that they effect under this Will, and not according to the laws of inheritance. The only requirement is that the Will should be valid and capable of taking effect in law. Where the Will is not valid, or it cannot take effect due to any reason, the property will devolve as per the laws of inheritance. The person who makes a Will is called a testator or a testatrix, the one in whose favour it is made is called a legatee, and the whole process is called testamentary succession.

INTESTATE SUCCESSION

Where a person dies, leaving behind some property, but no Will or testament capable of taking effect in law, his property will be distributed among his legal heirs in accordance with the laws of inheritance or of intestate succession. All family laws dealing with succession lay down a scheme of inheritance that is applicable in case a person dies leaving behind property but no instructions with respect to its distribution after his death. The person who dies without making a Will is called an ‘intestate’; those who, in accordance with the scheme of inheritance, are entitled to get a share out of his property, are called his ‘heirs’ and the whole process is called intestate succession.

Property Subject to the Rule of Intestate Succession

For the application of the laws of inheritance or those of intestate succession, the first and foremost condition is that the property of the deceased should not have been disposed of by him under a Will. With respect to the character of the property, s. section 8 of the Hindu Succession Act, 1956, which provides a scheme for intestate succession, applies to the following properties of a male Hindu:

Separate Property or Self-acquisitions

This would include the property that the deceased might have earned, *i.e.,* his salary or a share in profits, or what he may have received through a gift or Will, [61] or through inheritance from any relative, or received by way of a prize or a lottery. It is irrespective of the fact that at the time of the acquisition of the property or at the time of his death, he was an undivided member of a Mitakshara coparcenary, as even a coparcener is empowered to hold separate properties.

Undivided Share of a Male Hindu in the Dayabhaga Joint Family Property

An undivided share of a male Hindu in the Dayabhaga joint family property would be subject to the application of s. 8. The doctrine of survivorship has no applicability over this undivided share and it goes in accordance with the provisions of this Act, on the death of its owner. [62]

Property Held by a Sole Surviving Coparcener

The undivided share of a coparcener in a Mitakshara coparcenary, does not go by intestate succession. But where only one coparcener is left, he would be called a sole surviving coparcener, and on his death, the property will go by intestate succession, as if it was the separate property of the coparcener. [63]

Share Obtained on Partition

Where a partition of a coparcenary property takes place, each divided coparcener holds his share allocated to him on partition, as his exclusive property. If he has male issues, the character of the property is again coparcenary property with respect to the male issues. But in their absence, on his death, this property that he had obtained on partition, will be governed by the rules of intestate succession and not by survivorship.

Undivided Share in Mitakshara Coparcenary

The Act has introduced major changes in the devolution of a Mitakshara coparcenary property. Presently, where a male Hindu dies as an undivided member of a Mitakshara coparcenary his undivided share will be demarcated with the help of a notional partition and will go by intestate succession and not by the doctrine of survivorship. [64]

Interest in a Tarvad, Tavazhi, Kutumba, Kavaru or Illom

A male Hindu who was subject to the Marumakkattayam, Namboodiri and Aliyasantana laws, is presently, in matters of intestate succession, governed by s. 8 of the Act. Thus, the provisions of this section would now govern the interest he had in a Tarvad, Tavazhi, Kutumba, Kavaru or Illom. [65]

Death of Male Hindu need not be After the Commencement of the Act

Section 8 applies where succession opens after the commencement of the Act. It does not require that the death of a male Hindu, whose property is to go by inheritance, should have been after the promulgation of the Act. For example, a Hindu male settles his property in favour of his wife, for her life, and provides that after her death, the property would be held by his daughter, again for her life. He dies in 1933, and the wife dies in 1945, but the daughter dies after the commencement of this Act. On the death of the daughter, the succession opens and the property would devolve in accordance with s. 8, even though the male Hindu had died before 1956. [66]

Classification of Heirs

The heirs of a male Hindu are divided into four categories, [67] namely:

(i) Class-I;

(ii) Class-II;

(iii) Class-III (Agnates); and

(iv) Class-IV (Cognates).

By providing this classification, the legislature has expressly revoked the pre-1956, separate systems of inheritance available under the Mitakshara, Dayabhaga, and the matriarchal systems. Rules of propinquity under Mitakshara

and of religious efficiency under Dayabhaga, led to different classifications of heirs and limited them to 14 degrees only. [68]

Presently, heirs are included on the basis of natural love and affection, or nearness in relationship and include blood relations as well as those female relations who are introduced in the family by marriage to its malemembers.

Rules for Devolution of Property

On the death of the intestate, the property devolves in the first instance, on the class-I heirs. So long as even a single class-I heir is present, the property will not go to the heirs under the class-II category. Class-I category had till 2005 twelve heirs, eight of them females and four were males. After the amendment in 2005 four new heirs have been introduced, making it a total of 11 female heirs and 5 male heirs. So on paper, the scheme appears to be tilted in favour of women. When none of the class-I heirs is present, the property would pass to the class-II heirs. This category comprises nine separate entries, the prior excluding the later, and besides the first, which has a lone heir, *i.e.,* the father, the rest contain multiple heirs. In each entry, all these heirs take the property in equal shares. In the absence of the heirs in the class-II category, the property descends to the class-III category, which comprises all blood relatives of the intestate, related to him through a whole male chain of relatives. These heirs, covered under the expression 'agnates', [69] take the property in accordance with the rules specified in this Act. Where none of the agnates is present, the property goes to the rest of the blood relatives of the intestate, called the cognates. [70]It is noteworthy here that the Act does not put a full stop as far as the heirs are concerned. In the absence of near relatives, a person would be eligible to inherit the property of the intestate, if he can trace his/her blood to him, howsoever distant he/she may be. Prior to 1956, relatives beyond fourteen degrees (inclusive), of the intestate, could not succeed, but under the Act, there is no limitation on the number of degrees an heir may be removed from the intestate.

Class-I Heirs

As aforesaid, this category presently includes eleven females and five males. All of them inherit simultaneously and the presence of any one of them, will prevent the property from going to the class-II category. All class-I heirs take the property absolutely and exclusively, as their separate property, and no person can claim a right by birth in this inherited property. Once the property vests in an heir, he/she cannot be divested of this property subsequently, by their remarriage or conversion etc. These heirs are as follows [see Fig. 12.8]:

(i) Mother (M);
(ii) Widow (W);
(iii) Daughter (D);
(iv) Daughter of a predeceased son (SD);
(v) Widow of a predeceased son (SW);
(vi) Daughter of predeceased daughter (DD);
(vi) Daughter of a predeceased son of a predeceased son (SSD);
(vii) Widow of a predeceased son of a predeceased son (SSW);
(viii) Son (S);
(ix) Son of predeceased son (SS);
(x) Son of a predeceased son of a predeceased son (SSS); and
(xi) Son of a predeceased daughter (DS).
(xii) daughter of a predeceased daughter of a predeceased daughter (DDD).
(xiii) son of a predeceased daughter of a predeceased daughter (DDS).
(xiv) daughter of a predeceased daughter of a predeceased son (SDD).
(xv) daughter of a predeceased son of a predeceased daughter (DSD).

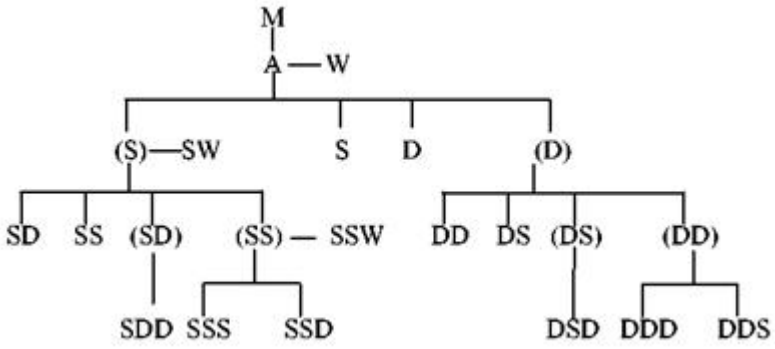


Fig. 12.8

Mother **:** The expression 'mother' includes a biological as well as an adoptive mother, but it does not include a step-mother. [71] If a biological mother gives her son in adoption, she ceases to be his mother, and would not be entitled to inherit from him on his death. Where a man having a plurality of wives (all married prior to 1955), adopts a child, the senior-most of his wives would be the adoptive mother of the child, having mutual rights of inheritance, while the others would be related to him as his step-mothers. [72]

Marital Status of Mother Irrelevant : A mother is a mother and is always deemed to be related to her child, irrespective of whether she is married or unmarried at the time of the birth of the son, or whether her marriage was valid, void or voidable. Her marital status at the time of birth or death, is of no consequence. The legitimacy or illegitimacy of the child does not affect the inheritance rights of the mother. An unwed mother inherits from her son, despite the fact that he is an illegitimate child. [73] A Hindu woman is now empowered to adopt a child to herself. If a single woman (whether unmarried, divorced or a widow) adopts a child, such child would be her legitimate child and on his demise, she would inherit from him. [74] A mother also inherits from her son born to her out of a void or voidable marriage.

Conduct of Mother Irrelevant : For determining eligibility to inherit the property of her son, the conduct of the mother is totally irrelevant. She may be unchaste, or of an immoral character, may be involved in a live-in relationship with the father or any other person, or might have remarried [75] somebody else, other than the father of the child. Even if she renounces Hindu religion and converts to another religion, she retains her rights to succeed to the property of the son.

Mother excludes Father : All the sub-schools of Mitakshara, except Mayukha, preferred the mother to the father, in matters of inheritance to the property of her son. The mother was excluded in the presence of the father under the Dayabhaga law. Under the Hindu Code Bill of 1948, the mother was a class-II heir, placed in entry (I), along with the father. [76] The same position continued when the Hindu Succession Bill was introduced in the Parliament. [77] However, she was lifted from class-II, and placed in the class-I category, along with other 'preferential heirs'. [78]This move was objected to by the parliamentarians, on the ground that as both parents stand in the same degree of propinquity, there was no rationale in preferring one to the other. Some judges also share the same view and have called upon the legislature to amend the Act[79]to correct the imbalance. In this connection, it may be noted that except under the Indian Succession Act, 1925, where the father excludes the mother, under the Islamic law and the law applicable to Parsis,[80] both the parents are placed on an equal footing, but inherit along with the children of the deceased, though their share is smaller in comparison, to that of the children. If the parents need to be treated on an equal footing, both should be placed in the class-I category, with the children and other heirs present.

Widow **:** The widow of an intestate takes a share that is equal to the share of a son. If there is more than one widow (provided they were party to a valid marriage), all of them collectively, take one share that is equal to the share of the son and divide it equally among them, taking it as tenants-in-common. [81] Under the Mitakshara law, they inherited together, but took the property as joint tenants, having a right of survivorship. Presently, each of them takes her share as an absolute owner, with full powers of enjoyment and disposal over it. [82] Inheriting along with the son and daughter, she takes a share equal to that of the daughter and son. [83]

The term 'widow', refers to the spouse of a perfectly valid marriage, [84] which means that this marriage should have been solemnised validly, according to the law, and should conform to the legal requirements as well. Where a Hindu male married a Christian lady under Hindu Marriage Act, this marriage is not permitted under the Hindu law and would not confer the status of a legally wedded wife on the Christian woman. Therefore she is neither entitled

to a share in the coparcenary property held by the family of which the man was a member nor is she entitled to succeed to his separate property [85]. The expression 'widow' does not include a divorced wife, [86] but it includes a 'wife' who, at the time of the death of the male Hindu, was living separately under a decree of judicial separation. Pendency of a litigation praying for decree of divorce is not the same as a divorce and if the husband dies during the litigation, the widow would be entitled to inherit his property, even if a document had been executed stating that the marital tie has been broken that does not affect her legal status as a wife [87], even if the divorce petition was based on her adultery or any other misconduct committed by her. It is pertinent to note that under the present law, the moral character or faithfulness of a wife are not relevant considerations for determining her eligibility to claim inheritance from her husband. In *Daljit Kaur v. Amarjit Kaur* [88], subsequent to the marriage, the wife (W1) left the husband (H1) and started living with another man (H2) and bore him three children. She underwent an operation and wrote the name of her paramour in the place where the name of the husband was to be written. The husband on the other hand did not seek divorce on grounds of his wife's adultery but without putting an end to the first marriage got married to W2, and even mentioned the name of W2 as his wife in the official records. On his death W1 filed a claim to his property that was resisted by W2, but the court ruled in favour of W1 and held that unchastity is a ground for divorce but not a disqualification for succession rights. The court therefore held that the succession rights of W1 were unaffected by the chain of actual events. On parallel facts a contradictory judgment based on the principles of equity, justice and good conscience came from the Andhra Pradesh High court. In *Krishnamma v. P. Subramanyam Reddy* [89], a Hindu wife had deserted the husband to live and give birth to her paramour's children. She re-appeared on the scene after her husband's death and instituted the suit for a claim to his property. The court held that the widow having abandoned all her rights; having left the family once and for all; having been under the roof of another man and having begotten his children cannot claim her husband's property both in law and also in equity. A woman who was a party to a void marriage or a voidable marriage, that was annulled by a decree of nullity, on the death of the man, would not be called his widow and would have no rights to succeed to his property. [90] In case of a voidable marriage, since the marriage is valid till annulled by the court, the wife would be entitled to inherit if the husband dies during the pendency of the petition praying for a decree of nullity, irrespective of the fact that his consent was obtained by force or fraud. In case the marriage was valid, the widow inherits the property despite her unchastity. [91] Where she inherits the property, it vests in her the moment the succession opens and her remarriage subsequent to such vesting, cannot divest her of the property. [92]

Daughter **:** The inclusion of the daughter had raised maximum eyebrows at the time of the passing of the Act, as a majority of Hindus did not want to give her a share. Despite their express dissent, the daughter found her place in the class-I category, along with the son. The term 'daughter' includes a natural born or an adopted daughter, but does not include a step-daughter or an illegitimate daughter. The daughter born of a void marriage or a voidable marriage, where a decree of nullity has been obtained from the court, is a legitimate child and would inherit the property of her father.1 [93]Under the Act, there is no distinction between the rights of a married and an unmarried daughter. Under the Mitakshara law, an unmarried daughter was preferred to a married daughter. Presently, there is no such discrimination. A daughter is a daughter, and her marital status, her chastity or even her financial position, is of no consequence. A wealthy daughter will inherit a share equal to that of a poor son. Similarly, how and to whom she gets married to is totally irrelevant. A daughter may defy the wishes of the father and marry against his choice, yet, this would not stand in her way of inheriting the property of her father on his demise. For example, a daughter of a conservative Hindu father, runs away from home and gets married to a non-Hindu under the Special Marriage Act, 1954, against the wishes of the entire family. Her shocked father is devastated. He neither speaks to her till his death, nor allows her to enter his home. Yet, when he dies, this daughter will inherit his property. Similarly, chastity and the character of a daughter, are of no consequence. A daughter might be involved in a live-in relationship with a man; may have an affair with a married man, or may be living as a traditional, virtuous wife in a patriarchal family, none of this would have any affect on her succession rights in her father's property. Prior to 1956, an unchaste daughter could not inherit her father's property under the Dayabhaga law, but a daughter who led an unchaste life after inheriting her father's property, could not be divested of the share so inherited. Mitakshara law, even prior to 1956, did not consider the character or chastity of the daughter as relevant. Presently, the share of the daughter is equal to that of the son, and her rights to enjoy the property that were curtailed vastly where the property inherited was a dwelling house have been done away with.2 [94]

Son **:** The expression 'son' includes a natural born son or an adopted son. It does not include a step-son or an illegitimate son.3 [95]Under the pre-1956 law, a son of a Shudra by a permanently kept concubine, succeeded to the property of his father, but after the passing of the Act, he is treated on par with other illegitimate children and does not inherit from the father.4 [96] A son born of a void marriage or a voidable marriage that is annulled by a decree of the court, is a legitimate child and would inherit the property of his father along with his other descendants.5 [97]

The right of a son to inherit the property of his father, has never been in dispute. Under the classical law, he was a primary heir. Under Mitakshara law, he took the share in his father's property by inheritance, but in the capacity of

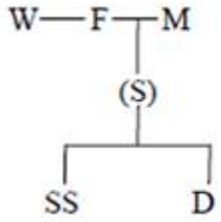
the Karta of his family and the character of such inherited property was coparcenary property as regards his own son.6 [98] However, under the Act, he takes an absolute interest in the property and his son cannot claim a right by birth in it.7 [99] The expression 'son' therefore, does not include a grandson,8 [100]but includes a posthumous son. The Act does not differentiate between a good son or a bad son and a divided son or an undivided son. In the patriarchal set-up, linkage of inheritance rights with the character of a man or his marital status, is unheard of and therefore, a son's inheritance rights are not affected by any of these considerations.

Children born of a live in relationship

The literal interpretation of the enactment shows that children of valid marriages generally or of void/annulled voidable marriages are treated as legitimate for inheriting the property of their father. Progeny of a defective marriage; casual or occasional relationship or even a prolonged consistent live in relationship is treated as illegitimate and ineligible to inherit the property of the father. In *Mohan Singh v. Rajni Kant9* [101] the apex court has held that children born of a live in relationship where the parties have lived together for a very long time and have projected themselves as husband and wife before the society would be entitled to inherit the property of their father. The issue arose in connection with a case wherein a widower having children from the first wife started living with another woman without getting married to her and fathered children from this relationship. On his death the claim of the children from the second union was resisted by his legitimate children on the ground that inheritance rights can be claimed only by the legitimate children and not by the illegitimate children. The court held that this kind of sustained relationship cannot be termed as a "walk in walk out" relationship and it was for the party opposing the presumption of marriage to prove the contrary in such cases. The court upheld the right of the children born out of the second relationship to inherit the property and observed that "if a man and a woman cohabit for a number of years it will be presumed under Sec. section 114 of the Indian Evidence Act that they live as husband and wife and the children born to them will not be illegitimate". The judgment does not appear to be laying down a correct proposition of law. Legitimacy is conferred by a valid marriage and nothing short of a valid marriage. This is precisely the reason why sec. section 16 of the Hindu Marriage Act, 1955, as a special case confers legitimacy for the purposes of inheritance on the children born out of void or voidable marriages. The very fact that they restrict the rights of inheritance in such cases to only the parents and not any other relations of the parents shows that the slight liberal legislative approach is adopted where the marriage has already been validly solemnized but fails the legal validity test. It is either void or voidable but a live in relationship is not a marriage at all and the partners to this intimate union cannot get the status of husband and wife. Where the statute clearly provides a double validity criterion for the validity of a Hindu marriage *i.e.,* it should be solemnized validly and should be in conformity with Sec. 5 that lays down conditions relating to the validity of a marriage, this judicial precedent appears to be in direct conflict with a specific and clear legislation. Unwarranted legislative and judicial contradictions should be avoided as much as possible as they only pave way for undesirable and unnecessary confusions and uncertainties.

***Sons and Daughters of Predeceased Son* :** Where a son of an intestate dies during the life time of the intestate, his children, natural born, but legitimate or adopted, would be entitled to represent him, *i.e.,* to step into his shoes, and they would take such a share along with their mother (if she is also entitled to inherit), that would have come to their father, and would divide it equally amongst them.10 [102]The expression used in the Act is son and daughter of a predeceased son, and not grandson or granddaughter, which means that their turn to inherit would come only when their father, through whom they were related to the deceased, is dead. So long as he is alive, they cannot succeed to the property of the grandfather, as no one can represent a living parent in matters of succession.

Succession Rights of Son and Daughter of a Predeceased Son where the Parents or the Grandparents had a Void or Voidable Marriage: One of the most important points to note here is that not only the son and daughter of a predeceased son must be perfectly legitimate, but their father should also have been a legitimate offspring of the grandfather. If the father was born out of a void marriage or a voidable marriage, that was annulled subsequently, he would be entitled to inherit the property of his parents, but on his death, his children would not be deemed to be related to the grandfather, and therefore, they would not inherit his property.11 [103] For example, in Fig. 12.9(i), F, a male Hindu, was married to W. While his marriage to W was subsisting, he got married to M. This marriage was a void marriage. A son S, is born to him from this void marriage.



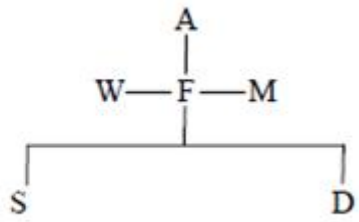


Fig. 12.9(i)

Fig. 12.9(ii)

On the death of the father, *S* would be entitled to inherit the property of *F* , due to conferment of statutory legitimacy on the son. This legitimacy is personal in character and is subsisting only between the parents and the child, and it is not carried forward to the second generation. Thus, the children of a predeceased son, who was born out of a void or voidable marriage, do not succeed to the intestate. Similarly, children born of a void or a voidable marriage, that was annulled subsequently, do not inherit the property of their grand parents, and it has specifically been provided that they would not be entitled to have rights in the property of any other person. For example, as in Fig. 12.9(ii), a Hindu father *A* , has a son *F* . *F* contracts a bigamous marriage, and two children *S* and *D* , are born to him. *F* dies during the lifetime of *A* . On the death of *A* , *S* and *D* , the son and daughter of his predeceased son, would not be eligible to inherit *A* 's property as they were born of a void marriage and are deemed to be related for the purposes of inheritance, only to their parents, and to none of the relatives of their parents.

The quantum of the share of a son and a daughter of a predeceased son, is absolutely equal. They take the property absolutely or exclusively, with full powers of disposal over it.

Son and Daughter of a Predeceased Daughter **:** On the death of a legitimate natural born or adopted daughter of the intestate, during his lifetime, the son and daughter (again legitimate or adopted), would represent their mother, take a share that would have been allotted to her if she had been alive and divide it equally between them. The marital status of the children and their character would not have any adverse effect on their succession rights. Where an unmarried or a single woman adopts children, such adopted children would be legitimate and entitled to inherit the properties of their maternal grandfather, on the death of their mother. However, where either these children or their mother was born of a void or an annulled voidable marriage, they would not be entitled to inherit the property of the maternal grandfather.

Son and Daughter of a Predeceased Son of a Predeceased Son: In case where, during the lifetime of the intestate, his son, and a son of such son, dies, leaving behind children, both of such son and daughter are his class-I heirs and succeed to his property. As has been explained above, the relationship to the intestate should be the natural born legitimate or adopted relationship. Except in the case of a valid adoption, they and their ascendants, should be the progeny and parties to a valid marriage, and not of a void or a voidable marriage that has been annulled. The daughter of a predeceased son of a predeceased son, inherits a share equal to the share of her brother, and neither her marital status, chastity, nor her financial position, is of any consequence for the determination of her eligibility to inherit the property. She was not a preferential heir under the Hindu Code Bill, 1948, but was placed in the class-I heir category in the original Hindu Succession Bill of1954.

Widow of a Predeceased Son **:** The widow of a predeceased son, is not a blood relation and is introduced in the family by marriage to the son. She is a class-I heir and is even preferred to the father of the intestate. The term used here is a 'widow', and not the spouse of the son. The widow of a predeceased son, in order to inherit the property of her deceased father-in-law, must be a widow on the date the succession opens, *i.e.,* the date of the death of the intestate. If she remarries before the succession opens, she would no longer be the widow of his son, nor will she be a member of his family, and will be disqualified from inheriting his property.12 [104] For example, as illustrated in Fig. 12.10, a family consists of the father *F* , his son *S* , his wife *SW* and their son *SS* .

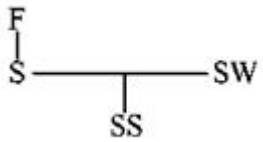


Fig. 12.10

S dies during the lifetime of *F* . *SW* remarries *H* and takes *SS* to the new family. After 6 months, *H* also dies. She had no house of her own, and *F* , due to love and affection for *SS* , brings *SW* and *SS* back to his house. *SW* , in return, looks after him as a member of his family. On the death of *F* , it is only *SS* who would inherit the property and *SW* will be disqualified, as by her marriage to *H* , she could no longer be called the widow of the predeceased son of the intestate.

The term 'widow' does not include a divorced wife of the son, but would include his deserted wife or a wife voluntarily living apart from him, or an unchaste wife, or a wife who was living separately from him under a decree of judicial separation. A widow of an illegitimate son or a son born of a void or a voidable marriage that has been annulled, is not entitled to inherit the property of the intestate.

***Widow of a Predeceased Son of a Predeceased Son* :** The widow of a predeceased son of a predeceased son, is a class-I heir. She was also included as a preferential heir under the Hindu Code Bill, 1948. Her relation with the intestate should be through adoption or natural birth of her husband, but it must be through a legitimate connection. Her chastity and financial situation is irrelevant, but her remarriage before the opening of the succession would operate as a disqualification on her rights of succession.13 [105]

Sons and daughters of a predeceased daughter of a predeceased daughter

In case where during the life time of the intestate, his daughter, and daughter of such daughter dies leaving behind her children, all such children would be the class-I heirs of the intestate. The relationship of the intestate with the daughter and her children as well her grand children should be through legitimate kinship or through adoption.

Daughter of a predeceased son of a predeceased daughter

Where a daughter and her son die during the life time of the intestate, the daughter of such son is a class I heir. Till Sep., 2005 such daughter was a class-II heir placed in entry IV. Ironically while this great grand daughter has been made a class-I heir, her brother is still a class II heir. The legislature has brought in a disparity in the rights of brothers and sisters here that appears to be without any basis.

Daughter of a predeceased daughter of a predeceased son

Where a son and his daughter die during the life time of the intestate, the daughter of such son's daughter is a class I heir. Till Sep., 2005 such daughter was a class-II heir placed in entry IV. Ironically while this great grand daughter again has been made a class-I heir, her brother is still a class II heir. The legislature has brought in a disparity in the rights of brothers and sisters here that appears to be without any basis.

Rules for Distribution of the Property

Among the class-I heirs, the property of an intestate is divided in accordance with the following rules:

(i) The share of each son and daughter and of the mother is equal.

(ii) The widow of the intestate takes one share, and if there is more than one widow, all of them collectively, will take one share, *i.e.,* a share equal to the share of the son, and will divide it equally amongst them.

(iii) A predeceased son, who is survived by a son, daughter or a widow, is to be allotted a share equal to the share of a living son.

(iv) Out of such share allocated to the branch of this predeceased son, his widow (or widows together) and each living son and daughter will take equal portions with respect to each other and the branch of any predeceased son will also get an equal portion.

(v) The rules applicable to the branch of a predeceased son of a predeceased son, are the same, viz., the sons, daughters and the widow or (widows together), will get equal portions.

(vi) A predeceased daughter, who is survived by a son or a daughter, is to be allotted a share equal to that of a living daughter.

(vii) Such share will be taken equally by the sons and daughters of the predeceased daughter.

Illustration (i)

In Fig. 12.11, a Hindu male *A* dies and is survived by his mother *M* , widow *W* , a son *S* and an unmarried daughter *D* .

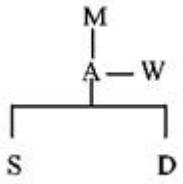


Fig. 12.11

In the present case, the mother, widow, son and the daughter, each will take one-fourth (1/4th) of his property. So, the shares will be as follows:

M = 1/4

S = 1/4

W = 1/4

D = 1/4

Illustration (ii)

A Hindu male *A* dies intestate and is survived by his mother *M* , two widows, *W* 1 and *W* 2, an unmarried daughter *D* 1, a married daughter *D* 2 and two sons, S1 and S2 [see Fig. 12.12].

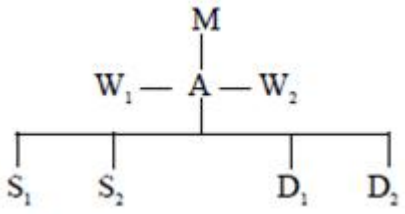


Fig. 12.12

Here, the mother, each of the two sons, each daughter and the widows together, will take a share each. The property will be divided into six equal parts and the share of each heir will be as follows:

M = 1/6

W 1 + *W* = 1/6

S 1 = 1/6

W 1 = 1/12

S 2 = 1/6

W 2 = 1/12

D 1 = 1/6

D 2 = 1/6

Both the widows will, together, take a share equal to that of the son and divide it equally between them. As there is no difference between the rights of a married and an unmarried daughter, both will inherit an equal share.

Illustration (iii)

A Hindu male *A* , dies intestate in 2000, leaving behind his widow *W1* , whom he had married in 1990, and a son *S* , from her. He married *W* 2 in 1994, while his first marriage was subsisting and a daughter *D* was born to him from *W* 2 [see Fig. 12.13].

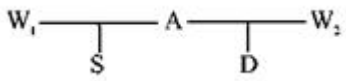


Fig. 12.13

Here, the marriage of *A* with *W* 2 was a void marriage and therefore, she is not entitled to inherit his property, but the daughter who is born of this marriage is a legitimate child and succeeds with his other descendent, *i.e.,* the son. The property will be divided into three equal parts, one each going to *W* 1, *S* and *D* . The final shares will be as follows:

W 1 = 1/3

W 2 = (Nil)

S = 1/3

D = 1/3

Illustration (iv)

A , a Hindu male dies in 2000, leaving behind his widow *W* and an adopted son *DS* 1, a concubine *C* , and a son *DS* 2, born to him from the concubine [see Fig. 12.14].

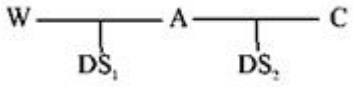


Fig. 12.14

Here, the concubine is not entitled to succeed. *DS* 2 is an illegitimate son and does not inherit from the father. The property will be divided into two equal parts, one each going to the widow *W* and the adopted son *DS* 1. The shares will be as follows:

W = 1/2

C = Nil

DS 1 = 1/2

DS 2 = Nil

Illustration (v)

A , a male Hindu, dies leaving behind his mother *M* , widow *W* , two daughters *D* 1 and *D* 2, the widow of a predeceased son *SW* , and two sons of a predeceased daughter *DS* 1 and *DS* 2 [see Fig. 12.15].

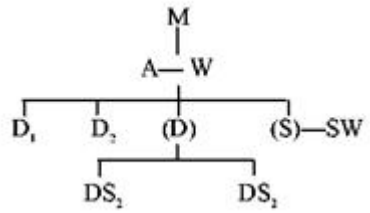


Fig. 12.15

The property will be divided into six equal parts, one each going to the mother *M* , widow *W* , two living daughters *D* 1 and *D* 2, one share to the branch of the predeceased daughter *D* , and one share to the branch of the predeceased son *S* . The share allotted to the branch of the predeceased daughter will be taken equally by her two sons and the share given to the branch of the predeceased son will be taken by his widow. The shares of each of them will be as follows:

M = 1/6

W = 1/6

D 1 = 1/6

D 2 = 1/6

DS 1 = 1/12

DS 2 = 1/12

SW = 1/6

Illustration (vi)

A male Hindu *A* , dies intestate in 2000, and is survived by his parents *F* and *M* , his one son S1, widow of his predeceased son *SW* and two children *SSD* and *SSS* of the predeceased son of a predeceased son S3, who died in 1996. The widow of *SS* , *SSW* , had remarried in 1998. [See Fig. 12.16]

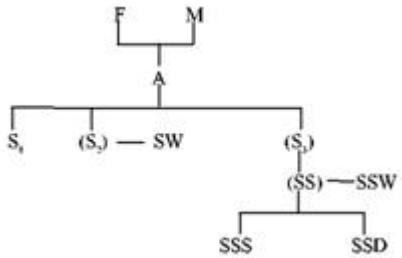


Fig. 12.16

The property will be divided into four parts. As the father *F* is a class-II heir, he does not get a share. The mother *M* , and the living son S1, will take a one-fourth (1/4th) share each. One share will be allotted to the branch of the predeceased son S2, which will be taken by *SW* . Another share will be allotted to the branch of the predeceased son of a predeceased son S3. Out of this share, his children *SSS* and *SSD* will share equally. *SSW* will not get a

share as she remarries before the opening of the succession, viz., before the death of *A* . The shares will be as follows:

F = Nil

M = 1/4

S 1 = 1/4

S 2 *W* = 1/4

SSS + *SSD* = 1/4

SSW = Nil

SSS = 1/4 1/2 = 1/8

SSD = 1/4 1/2 = 1/8

Illustration (vii)

A male Hindu *A* , dies intestate and is survived by his mother *M* , widow *W* , one son S1, one daughter *D* 1, two children of a predeceased son *SS* and *SD* and his widow *SW* ; one son and daughter of a predeceased son of this predeceased son *SSS* , *SSD* and *SSW* , and a son and a daughter of a predeceased daughter *DD* and *DS* . [See Fig. 12.17]

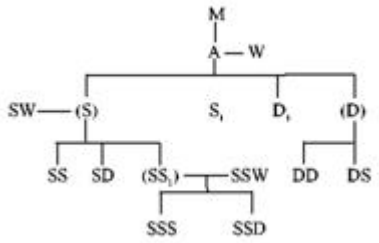


Fig. 12.17

This illustration includes twelve class-I heirs. The property here, would be divided into six equal parts. The mother, widow and each living son and daughter will take a share. The branch of the predeceased son and the predeceased daughter will be allotted one share each. The share allotted to the branch of the predeceased daughter, will be taken by her son and daughter, equally. The share allotted to the branch of the predeceased son will be so divided that his widow, living son and daughter and the branch of his predeceased son, gets an equal share *i.e.,* 1/6 1/4 = 1/24 each. The branch of the predeceased son of the predeceased son, will take the share and will divide it equally among the widow, son and daughter viz., 1/24 1/3 = 1/72. The final shares will be as follows:

M = 1/6 *W* = 1/6

S 1 = 1/6

D 1 = 1/6

DD + *DS* = 1/6

DD = 1/6 1/2 = 1/12

DS = 1/6 1/2 = 1/12

SW + *SS* + *SD* + (*SS* 1) = 1/6

SW = 1/6 1/4 = 1/24,

SS = 1/6 1/4 = 1/24

SD = 1/6 1/4 = 1/24

SS 1 = *SSW* + *SSS* + *SSD* = 1/24

SSW = 1/24 1/3 = 1/72

SSD = 1/24 1/3 = 1/72

SSS = 1/24 1/3 = 1/72

Illustration (viii)

A , a male Hindu, dies on 1 January 2001, and is survived by his father *F* , and a widow of a predeceased son of a predeceased son *SSW* . *SSW* remarried on 3 January, 2001. [See Fig. 12.18]

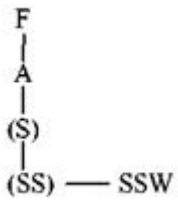


Fig. 12.18

Here, the complete property will be taken by *SSW* , to the exclusion of the father of the intestate, as the presence of a single class-I heir will not let the property pass to the class-II category. The succession opened on 1 January, 2001. As on this day, *SSW* was a widow of *A* 's predeceased son of a predeceased son, she is vested with the property. Her remarriage two days later, will not divest her of the property that has already vested in her.

Class-II Heirs

So long as a single heir from the class I category is present, the property does not pass to the class-II category. When a Hindu male dies unmarried and is not survived by any class-I heir, the property would devolve among class-II heirs14 [106]. Where heirs in category (ii) and (iv) are present the former would exclude the later. Thus in presence of a brother of the intestate, the nephew cannot inherit15 [107]. This category has 19 heirs. Out of these heirs, who have been grouped into nine sub-categories, the prior excluding the later, ten heirs are males and nine are females, and include the father, two great-grand children and grandparents, brothers, sisters, and their children, paternal and maternal uncles and aunts, step-mothers and the widows of the brothers of the intestate. The heirs in the first sub-category exclude those in the second, the heirs in the second exclude those in the third, and so on.16 [108] All the heirs of one category, take the property in equal shares, according to the per capita rule of distribution of property,17 [109] and the order in which their names appear is irrelevant.

These heirs and their sub-categories are as follows:

I. Father

II. (1) Son's daughter's son

(2) Son's daughter's daughter (now also placed in class–I category)

(3) Brother

(4) Sister

III. (1) Daughter's son's son

(2) Daughter's son's daughter (now also placed in class–I category)

(3) Daughter's daughter's son (now also placed in class–I category)

(4) Daughter's daughter's daughter (now also placed in class–I category)

IV. (1) Brother's son

(2) Sister's son

(3) Brother's daughter

(4) Sister's daughter18 [110]

V. Father's father; Father's mother

VI. Father's widow; Brother's widow

VII. Father's brother; Father's sister

VIII. Mother's father; Mother's mother

IX. Mother's brother; Mother's sister

Explanation **:** The term 'brother and sister' here, does not include a reference to a brother or sister by uterine blood.

It should be noted that under the class-II heirs, the patriarchal norms of preference to paternal relations over maternal relations, have been retained. As among the step-brothers and step-sisters also, where the brothers and sisters share a common father, they inherit as class-II heirs from each other, but where they share a common mother, but are from different fathers, they are called uterine brothers and sisters and are not entitled to succeed from each other as class-II heirs. It presents a strange combination, that while the mother, in matters of inheritance, excludes the father, all her relations in the same degree of propinquity, are excluded by the relations of the father.

Father **:** The expression 'father' includes a biological as well as an adoptive father,19 [111] but does not include the stepfather, or a putative father of an illegitimate son. Where the son was born of a void marriage or a voidable marriage that was annulled by the court, his father is related to him and entitled to inherit the property on his death.

The position of the father is such that from the property of the son, by way of inheritance, either he gets nothing, or he gets the total property. Till a single class-I heir is present, the father is excluded.20 [112] But his presence excludes every other class-II heir. He inherits alone. The Hindu Code Bill, 1948, as well as the original Hindu Succession Bill, 1954, had placed both the parents, *i.e.,* the mother and the father as sub-category (i) of class-II heirs, but the mother was later placed in the class-I category, while the father's position remained the same. Presently, both the parents are placed on an equal footing, for succession to the property of a female Hindu, and for Parsi and Muslim intestates, but under the Indian Succession Act, 1925,21[113]the father is preferred to the mother, and she is therefore, excluded in his presence. It is only under the Hindu Succession Act, 1956, and the Indian Succession Act, 1925, that the father is excluded in presence of the children. Even under the Mitakshara law, except the Mayukha, the father's placement was after the mother. Under the Dayabhaga law, the situation was reverse. The placement of the parents should not be different vis--vis each other and as the basis of eligibility to succeed is natural love and affection, there is no reason why both the parents should not find their place in the class-I category.

Son of a predeceased daughter of a predeceased son: The children of predeceased daughter of a predeceased son of an intestate were his class-II heirs and inherited if none of the class-I heirs or the father of the intestate was present. Presently, out of such children, the daughter has been lifted to class-I category, while her brother has retained his original placement.

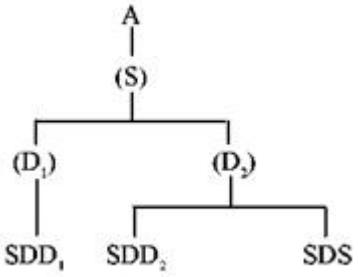


Fig. 12.19

In Fig. 12.19 if SDD1; SDD2 and SDS are present, SDD1 and SDD2 would inherit the property as they are class-I heirs, while SDS will not get anything in their presence. However if none of the class-I heirs or the father is present then, SDS will get the property.

Brother and Sister: Brothers and sisters can be related to each other by blood or by adoption. When the relationship is by blood, it can be a full-blood, half-blood or uterine blood relationship.

Full-blood Relationship : Where the brothers and sisters share both their parents, *i.e.,* they are the descendants of the same mother and father, they are called full-blood brother and sister.

Fig. 12.20

In Fig. 12.20, *S* and *D* are the son and daughter of *F* and *M* . As they share both the parents, they are full-blood brother and sister.

Half-blood Relationship : Where the children have only one common parent, it is a half-blood relationship. But under Hindu law, a half-blood relationship denotes brothers and sisters from a common father, but from different mothers. A Hindu father *F* , and his wife *W1* , have a son *S* . *W1* dies or is divorced, whereupon *F* gets married to *W2* and gets a daughter *D* from her. *S* and *D* are half-blood brother and sister as their father is common, but mothers are different. They are also called, popularly, as step-brother and step-sister.

Inheriting as class-II heirs, brothers and sisters related to the intestate by full-blood, exclude those related by half-blood, if the nature of the relationship is the same in every other respect,22 [114] a full-blood sister would exclude the half-blood brothers and sisters.23 [115]

Uterine Blood Relationship : Where two or more children are from the same mother, but their fathers are different, this is again a half-blood relationship, but is called a uterine blood relationship. For example, in Fig. 12.21, *W* , a Hindu woman, gets married to *H* , a Hindu male, and a daughter *D* is born to her. *H* dies and *W* gets married to *H* 1 and gives birth to a son *S* .

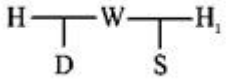


Fig. 12.21

S is *D* 's uterine brother and their relationship is called uterine blood relationship. Uterine brother and sister of an intestate, are not his class-II heirs, but inherit as cognates when no other nearer heir is present.24 [116]

Rights of Brothers and Sisters when the Parents had a Void or Voidable Marriage Annulled by the Court : An offspring of a void or voidable marriage annulled by the court, is a legitimate child, but is deemed to be related only to his parents. Such a child does not inherit from the other natural born, legitimate child of a valid marriage of the father. For example, in Fig. 12.22, the father *F* , gets married to *W* 1 and a son S1 is born to him. While the marriage with *W* 1 is subsisting, *F* gets married to *W* 2 and two sons S2 and S3 are born.

Fig. 12.22

W 1 and *F* die and now, S1 dies. S2 was a child born of a void marriage and therefore, though on the death of *F* , he would succeed to his property along with S1, but on the death of S1, he or S3 would not inherit the property, as in law, they are not deemed to be related to him, despite being half-brothers. However, if S2 dies, S3 would be entitled to inherit his property as a full-blood brother.

A full-blood brother or sister would exclude a half-blood brother or sister. For example, a Hindu male dies leaving behind a full-blood sister, a half-blood brother and a uterine brother. The uterine brother will be totally excluded as he is a class-IV heir or a cognate. The half-brother will be excluded in the presence of a full-blood sister, who alone will inherit the property.

Brothers and sisters inherit with the son of a predeceased daughter of a predeceased son of the intestate, and each of the heirs will share equally. For example, as shown in Fig. 12.23, *A* dies intestate, leaving behind a brother *Br* , a sister *Si* and three sons of a predeceased daughter of a predeceased son of the intestate. Each of them will take one-fifth (1/5th)of the property.

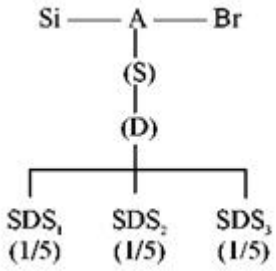


Fig. 12.23

Where a Hindu male dies and is survived by his sister and the sons of a predeceased brother, the sister would inherit the property excluding the later25 [117].

Grandchildren of a Predeceased Daughter **:** All the grandchildren of a predeceased daughter were earlier placed in entry III of the class-II category. They should be related to the intestate through legitimate birth or adoption, or should be the offsprings of a perfectly valid marriage. Presently three grandchildren *i.e.,* daughter's son's daughter; daughter's daughter's son ; daughter's daughter's daughter are placed in class–I category, while the son of a predeceased son of a predeceased daughter alone is left in this entry.

Illustration

A dies intestate, leaving behind three grandsons of a predeceased daughter. Each of these sons will take one-third (1/3rd)of the property. [See Fig. 12.24]

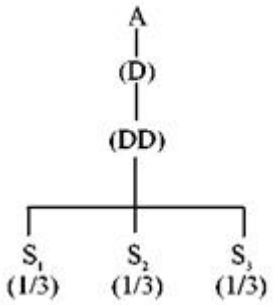


Fig. 12.24

Children of Brothers and Sisters **:** All children of brothers and sisters in absence of their respective parents inherit together under entry IV of the class-II category and share equally, irrespective of their sex or the sex of their parent. However, children of uterine brothers and sisters are excluded, and if the children of both full-blood and half-blood brothers and sisters are present, the former would exclude the later.26 [118] The son of a predeceased sister is a class-II heir and he will be preferred to the grandson of the uncle of the intestate.27 [119]

Illustration (i)

A dies intestate and leaves behind one son of a predeceased sister *S* and two daughters of a predeceased brother, *D* 1 and *D* 2. [See Fig. 12.25]

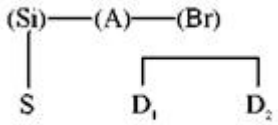


Fig. 12.25

The property would be divided into three equal parts and *S* , *D* 1 and *D* 2 will take one-third (1/3rd) each.

Illustration (ii)

A dies intestate and is survived by a son of a predeceased half-blood brother, *S* and a daughter of a full-blood predeceased sister, *D* [See Fig. 12.26].

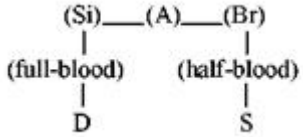


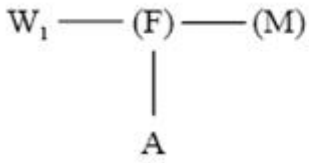
Fig. 12.26

The daughter of a full sister would exclude the son of the predeceased half-blood brother, and will take the entire property.

Paternal Grandparents **:** The fifth entry specifies the father's father and the father's mother. These expressions do not include the step-grandparents, or grandparents where either the intestate or his father was an illegitimate child or the offspring of a void or a voidable marriage that was subsequently annulled. They do not inherit from the intestate. Neither the remarriage, nor the unchastity of the paternal grandmother is of any consequence. These parents inherit together and in equal shares.

Father's Widow and Brother's Widow **:** The expression 'father's widow', includes such widow of the intestate's

deceased father, who was not the mother of the intestate. A mother is a class-I heir. Such widow must have been a party to a valid marriage between her and the father. Further, the term 'widow' also denotes that this marriage had ended by the death of the father and not by a divorce. This is probably the reason why the expression 'step-mother' has not been used. What is surprising is that while for the other relations introduced in the family by marriage, such as the widow of a predeceased son, widow of a predeceased son of a predeceased son and the brother's widow, the marital status at the time of opening of succession as per the Act was material. If, before the death of the intestate, they remarry, they lose their rights to inherit,28 [120]but for the father's widow, her marital status at the time of opening of the succession according to the Act was not material. However, the expression father's widow shows that she is still a member of the family of the intestate. If she remarries before the death of the intestate, she would cease to be the widow of the father and would lose the inheritance rights. Her unchastity however,29 [121] is immaterial.



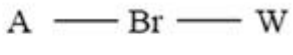


Fig. 12.27 (i)Fig. 12.27 (ii)

A brother's widow inherits with the father's widow, taking an equal share with her. Here, in order that she is competent to inherit, her marriage with the brother of the intestate should have been a valid marriage and not a void or an annulled voidable marriage. It should have been terminated by the death of the brother and not by divorce. Here, after the death of the brother and before the death of the intestate, she should not have remarried, otherwise, she forfeits her rights of inheritance. She can remarry after inheriting the property of the intestate. 'Brother's widow' includes only the widow of a full-blood, or a half-blood brother, the former excluding the later, but not of a uterine brother.

Father's Brother and Sister **:** In the absence of near relations, the full-blood or half-blood brother and sister of the father of the intestate, inherit the property. The rule of full-blood excluding the half-blood applies here as well, and the uterine paternal uncle and aunt are totally excluded from this category. The share of each of such uncle and aunt, irrespective of their number, is equal.

Maternal Grandparents **:** In comparison to the paternal grandparents, maternal grandparents are placed at an inferior position. They must be related to the intestate by legitimate blood, and neither their, nor the marriage of their daughter, should be a void or a voidable marriage that was subsequently annulled. Placed together, they inherit equally. Maternal grandparents do not include the step-grandparents. [See Fig. 12.28]

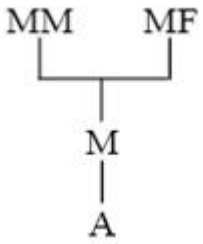


Fig. 12.28

Maternal Uncles and Aunts **:** The last entry in class-II heirs comprise the maternal uncle and aunt. They inherit only when none of the class-I or class-II heirs is present.

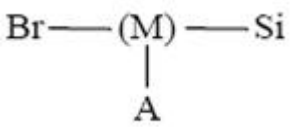


Fig. 12.29

The mother's brother and sister may be related to her by full-blood or half-blood, the former would exclude the latter, but if they are related by uterine blood, they will be excluded from this category. In Fig. 12.29, *A* must have been the offspring of a valid marriage, otherwise, the maternal uncle and aunt will not be entitled to inherit.

Class-III Heirs (Agnates)

An agnate is a person who was related to the intestate through male relatives only. An agnate himself/herself can be a male or a female, as it is the sex of the line of relatives, and not the sex of the heir, that is material. Agnates inherit only when none of the class-I and class-II heirs is present.30 [122] Agnates can be direct ascendants, direct descendants, or collaterals. There is no limitation on the number of degrees an agnate may be removed from the intestate. If the blood can be traced to the intestate and a male relative chain is established the agnate will inherit. Nearer agnates and cognates have already been included as class-I and class-II heirs, and therefore, this category refers to remoter agnates. For example, a male Hindu *A* , dies leaving behind only a paternal great-grandfather *FFF* , a great great grandson *SSSS* and a grandson of his paternal grandfather's brother, *BrSS* .

Fig. 12.30 (i)Fig. 12.30 (ii)Fig. 12.30 (iii)

In Fig. 12.30(i), *SSSS* is a descendent agnate; in Fig. 12.30(ii), *FFF* is an ascendant agnate; and in Fig. 12.30(iii), *BrSS* is a collateral agnate.

***Rules of Preference Among General Agnates* :** For computing the degrees of relationship among agnates and cognates, the following factors need to be understood:

(i) Each generation is called a degree.

(ii) For the computation of degrees, the starting or the first degree, is the intestate himself.

(iii) Degrees of ascent means in the ancestral or upwards direction.

(iv) Degrees of descent means in the descendant or downwards direction.

(v) Where an heir has both ascent and descent degrees, each of them has to be seen separately and not cumulatively.

(vi) An agnate who has only descent degrees, is preferred over the one who has only ascent degrees.

(vii) Where two agnates have ascent and descent degrees, the one with fewer ascent degrees will be preferred.

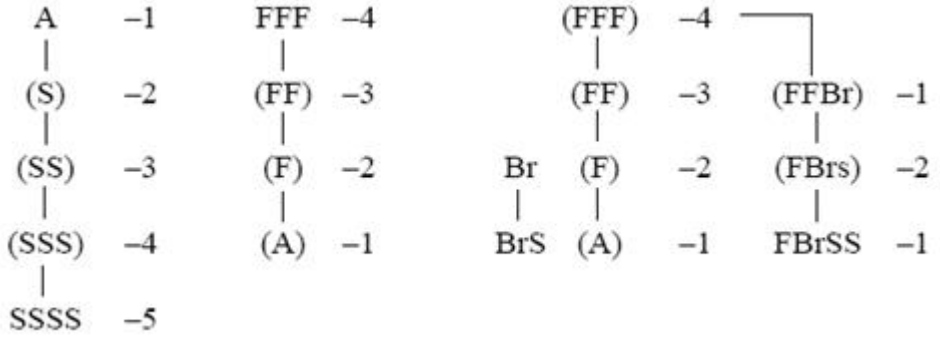


Fig. 12.31 (i)Fig. 12.31 (ii)Fig. 12.31 (iii)

In Fig. 12.31(i), *SSSS* is in the fifth degree of descent, but he has no degree of ascent. In Fig. 12.31(ii), *FFF* is in the fourth degree of ascent and if both *SSSS* and *FFF* are present, *SSSS* will inherit the property, since a person with fewer or no degrees of ascent is preferred.

In Fig. 12.31(iii), two heirs are shown: *BrS* , who is *A* 's father's brother's son and *FBrSS* , who is *A* 's father's father's father's son's son's son. Both are collateral agnates. *BrS* , *i.e.,* father's brother's son, has three degrees of ascent, as the relationship is first traced to a common ancestor in case of collateral agnates, who in this case, is *A* 's great grandfather. Since he is the great grandfather's grandson, he will have an additional two degrees of descent. So *BrS* will have three degrees of ascent and two degrees of descent.

FBrSS will have four degrees of ascent and three degrees of descent, and if only these two agnates of the intestate are present, *BrS* will exclude *FBrSS* , as he has fewer degrees of ascent. If only *FFF* [as in Fig. 12.31(ii)] and Brs [Fig. 12.31(iii)] are present, it would be FFF who will take the entire property, as ascendant agnates are preferred to collateral agnates.

Cognates

The unspecified broad category of cognates includes the rest of the heirs of the intestate. A cognate is a relative who was related to the intestate through a chain of mixed relatives, in terms of sex. It is not a whole male chain, as even if a single female intervenes, it will become a cognatic chain. For example, an intestate's paternal aunt's son, is his cognate, but his paternal uncle's daughter will be an agnate. [See Fig. 12.32]

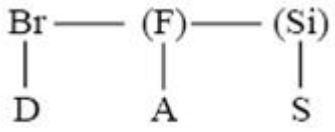


Fig. 12.32

The latter is related to *A* through a chain of male relatives only, while in the case of the former, the father's sister (a female) intervenes. The rules for computation of degrees and calculation of degrees of ascent and descent and the order of preference among cognates, is identical to the one explained above, in the case of agnates.

Cognates inherit when none of the class-I or class-II heirs or the entire category of agnates is present. The patriarchal preference of relations through males over those related through females, is very evident at every stage, as the Act overlooks the claim of nearer cognates in comparison to remoter agnates. For example, *A* , a male Hindu, dies and is survived by his paternal aunt's son *S* , and his father's paternal grandfather's grandson's grandson S4, who has 4 degrees of ascent and four degrees of descent. S4 will be preferred over the paternal aunt's son *S* , as he is an agnate and the latter is a cognate. [See Fig. 12.33]

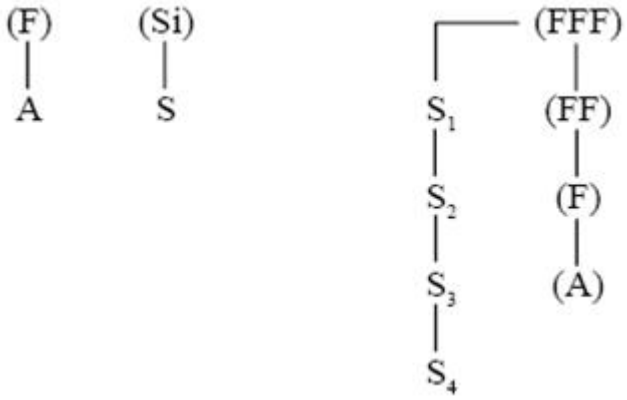


Fig. 12.33

If none of the heirs in class-I, class-II, agnates, and cognates is present, the property of the intestate will pass to the government, under the doctrine of escheat.

III.FULL OWNERSHIP IN PROPERTY FOR HINDU FEMALES

The maximum impact of the Hindu Succession Act, 1956, is visible in the area of a Hindu woman's right to hold property and dispose it of as an absolute owner. For students of the twenty first century, it may be surprising to know that the conferment of an absolute ownership in favour of a Hindu woman, is a little over fifty years old, and considering the stiff opposition presented by the conservatives, who linked the granting of full rights of inheritance to women, as endangering the Hindu religion, and the son-centered economy as the basic symbol of hinduism, it was indeed a miracle how a firm step was taken by the legislature to correct the imbalance in the area of property rights. In the opinion of the Apex Court, s. 14, was introduced as a step in the direction of a practical recognition of the equality of sexes and meant to elevate women from a subservient position in the economic field, to a higher pedestal, where they could exercise full powers of enjoyment and dispose of property held by them, as owners, untrammeled by artificial limitations placed on their rights of ownership by the society in which the will of the dominant male prevailed to bring about a subjugation of the opposite sex.31 [123] To understand the real implication of this provision introduced by the legislature, it is desirable to briefly look into the rights of a woman to hold property as an owner in the past.

HISTORICAL BACKGROUND

If we take a look at the Commentaries and the Vedic age,32 [124] amongst the dictates of Manu, hinting at the negation of the rights of women to be owners of property,33 [125] there are still ample references indicating that a woman was always capable of owning property.34 [126] However, there was a marked difference between theory and practice. In theory, she could hold property, but in practice, its quantum in comparison to men's holdings, was meager,35 [127] and her right to dispose of the property was qualified, the latter considered by the patriarchal set-up as necessary, lest she became too independent and neglect her marital duties and the management of household affairs.36 [128] Narada declared37 [129] that according to the sages, the transactions of a woman had no validity, especially the gift, hypothecation or sale of a house or field. Such transactions were valid only when they were sanctioned by the husband, or on a failure of the husband, by the son.

Prior to the passing of the Hindu Women's Right to Property Act, 1937, the property of a woman comprised 'stridhan' and 'non-stridhan'. A study of the concept of stridhan and non-stridhan, its acquisition, devolution and the extent of the hold of a woman over it is in itself, the subject matter of a full-fledged study. In a nutshell, a woman enjoyed larger powers of disposal over her stridhan, but had a limited interest in non-stridhan. Stridhan comprised, generally speaking, property received by way of gifts and presents given to a woman by her parents, husband, close relations of parents or husband, either at the time of marriage or on other occasions,38 [130] or at the time of the performance of ceremonies, of 'sulka' or bride price, of property acquired by her own exertions and ability or by adverse possession, of bequests from stranger or relations,39 [131] of money or property given to her in lieu of

maintenance40 [132] or its arrears,41 [133] and of savings or purchases made with stridhan.42 [134] Non-stridhan comprised what she inherited from a male or a female relation.

There was a further divergence within this category of stridhan, into 'saudayika' and 'non-saudayika', as regards the powers of a woman to alienate it. Saudayika, that included gifts, presents or property received by way of bequests from parents and other relations, conferred on her an absolute power of alienation, irrespective of her marital status. But over the non-saudayika stridhan, that included property received from non-relations, her powers of alienation were curtailed after marriage, as the husband's consent was necessary before she could part with it by way of a transfer. Non-stridhan property included the one that was inherited by her from a male or a female relation, including the husband,43 [135] or property received at the time of partition. She was called a limited owner of this property.44 [136] The limitation was with respect to the power over its disposal and the inability to transmit this estate to her own heirs, but otherwise, she had full powers to spell it, enjoy it and appropriate the income coming out of it. It was the power to transfer it that was denied to her. Except in the case of need, or for the performance of indispensable religious and charitable purposes, including for according spiritual benefits to her husband, she could not transfer it. During her lifetime, no person had any vested right of succession in it, as her restricted powers of alienation were not for the benefit of the heirs of her husband, but were the essential feature of the estate that she took.45 [137] The heirs of the husband had no powers to dispose it off till she was alive.46 [138] Her limited interest terminated on her death or remarriage (though this was legalised only in 1856).47 [139]

The expression 'stridhan' says it all. 'Stri' means a woman and 'dhan' is her property. The general rules of succession were meant to be applied to the property of a male, and this property was not described as 'purushdhan', because ownership of material assets was normally with men and it was also inherited by men absolutely, while women's rights were either in the nature of gifts made out of love and affection, or in lieu of her maintenance. The responsibility of maintaining the near females relations was on men, and on the death of men, they became the responsibility of either the whole body of male members in the family or those who took the interest of her deceased husband or father by survivorship. Rather than permitting her to claim the share of the husband or the father, the ownership in it vested with the males, with her right reduced to maintenance, which she could enforce in a court of law. To convert this liability of maintenance from the responsibility of others, to her own concern, the Hindu Women's Right to Property Act, 1937, was passed, under which, on the death of the husband, his share, in the presence of his widow (widow of a predeceased son and widow of a predeceased son of a predeceased son), did not go by survivorship to the surviving coparceners, but went to her, so that she could maintain herself with this share. As the emphasis was on securing her maintenance, the limited ownership terminated on her death, or even remarriage, going back to the heirs of her husband. This concept of ownership without absolute powers of disposal, had the purpose of enabling a female to maintain herself, so that she need not be dependent on others for her sustenance, but her position was meant to be so strengthened, that she could do it herself, with some resources at her disposal. She was also permitted to sell this share in times of need. However, this narrow purpose of replacing the tag of 'burden on male relations', to sustenance in her own right, could not alter the rules of premium on her chastity and her rights coming to an end on her remarriage etc., and the next logical step was to enlarge the limited estate, to an absolute estate, and to remove the impediments of moral conduct, chastity or remarriage, which was accomplished by the Hindu Succession Act, 1956.

HINDU WOMEN'S RIGHT TO PROPERTY ACT, 1937

The Hindu Women's Rights to Property Act was passed in 1937 and was amended in 1938. It was prospective in application48 [140] and applied to property other than agricultural property49 [141] and impartible estates, which either under a custom or otherwise, went to a single heir. It applied to Hindus governed by the Mitakshara, Dayabhaga and customary law of Punjab. Section 2 of the Act expressly repealed the pre-Act customs and rules of laws that were contrary to the provisions of this Act. The Act stated in the preamble, that it was expedient to amend the Hindu law in order to give better rights to women with respect to property. Section 3 provided:

(1) When a Hindu governed by the Dayabhaga school of Hindu law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widows, all his widows together, shall subject to the provisions of sub section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son.

> Provided that the widow of a son shall inherit in like manner as a son if there is no son surviving and shall inherit in like manner as a son's son if there is no surviving son of such predeceased son.

Provided further that the same provisions shall apply *mutatis mutandis* , to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall subject to the provisions of sub-section (3) have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a women's estate, provided however, that she will have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession, or by the terms of the grant applicable thereto, descend to a single heir, or to any property to which the Indian Succession Act, 1925, applies.

Primary Changes Effected by the Act

The Act governed the devolution of the property of a male Hindu only and not the property of a female.50 [142] Consequently, the property of a female Hindu devolved according to the rules of Hindu law, which provided a distinction between inheritance to stridhan and non-stridhan properties. This further widened the gap between succession to the property of a female and a male Hindu. Secondly, it affected both the separate property as well as the undivided share of a male Hindu in coparcenary property. For succession to the property of a male Hindu, earlier, the widow succeeded only on failure of his male issue. Now, under the provisions of this Act, she inherited with him, taking a share equal to his. If there were more than one widows, all of them together, took a share equal to that of the son.51 [143] Similar to the right of a son, a widow also had a right to claim a partition, but the similarity ended there, as he took an absolute interest and she got a limited interest and if she died without there being a partition, the doctrine of survivorship applied and her interest was taken by the surviving coparceners.52 [144] The conferment of better rights extended to the widows of a predeceased son and of a predeceased son of a predeceased son as well. Taking of the 'same share as a son' did not mean that for a widow, in order to be eligible for inheritance, a son must be present, because even in the absence of a son, she was entitled to get a share as if she was a son, but what she took was only a limited interest.53 [145]

Succession to Women's Estate: Making Inroads into the Classical Concept of Coparcenary

The changes made by the Act in the area of inheritance to separate property, were in the nature of modifications of earlier laws, and accorded a legislative recognition of the right of a widow. It was a progressive step that strengthened her position, but it did not radically, depart from the old law. However, the rights granted to the widow in the coparcenary property were revolutionary and ended up making major inroads into the concept of coparcenary, that further deepened with later legislative enactments.

The Act, as aforesaid, postulated that when a Hindu dies, having at the time of his death, an interest in the Hindu joint family property, his widow shall have, in the property, the same interest as he himself had.54 [146]

It therefore, provided for the substitution of the widow in the place of her deceased husband in the coparcenary and so long as she was alive, her presence defeated the application of the doctrine of survivorship. Her introduction in the place of her husband did not make her a coparcener, but enabled her to enjoy his share in her own right, something that was not possible before this Act.55 [147] Her substitution did not disrupt the unity of possession in the coparcenary, nor the joint family.56 [148] Her situation was unique, as she could not be called a coparcener, nor could she be a Karta,57 [149] but she continued to be a member of the joint family58 [150] and was empowered to claim a partition and demarcation of this share.59 [151] Till a partition was effected, she was represented by the Karta in all family matters. She was entitled to possess and use the property and, as she was the owner for life, on her death or remarriage, this share reverted to the surviving coparceners, as if the deceased coparcener whose widow interrupted the survivorship, had died now.

Succession to a Woman's Estate

The Act concretised the rights of a woman in clear terms. It was through this Act that for the first time, she could take the place of her husband in a Mitakshara coparcenary. Yet, the Act was totally silent about the devolution of her estate after her death. Since her ownership in this estate terminated on her death and she was not a fresh stock

of descent, *i.e.,* this estate was not heritable among her heirs, the question that arose was, who will succeed to this estate? The rule was that, where she inherited the separate property of her husband, on her death, the property would go to her husband's heirs, and where she inherited an undivided share in a Mitakshara coparcenary, on her death, this share would go to the surviving coparceners, under the doctrine of survivorship.

Mode of Acquisition of the Share by the Widow

The basic purpose of the Act was to protect the rights of the widows of deceased coparceners, but the provisions of the Act were conspicuously silent about the mode of devolution of the property in her favour. All that the Act provided was that she was entitled to the 'same interest' that the deceased husband had. It must be remembered that the husband had been a coparcener and had a right by birth, in this property. Therefore, he had acquired an interest by birth, while his widow could take it only on his death; she did not have a right by birth, in it. So the expression, 'same interest that he had', created confusion with respect to her status, the quantum of the interest and also the mode of devolution of this interest in her favour. He was a coparcener, but she being a female, she could not be a coparcener; his interest in the undivided coparcenary was a fluctuating interest, so was her interest also subject to fluctuation, or was it a fixed share? Thirdly, did she take the interest by survivorship, because it was fluctuating even though she could not be called a coparcener, or did she inherit the share, even if a fluctuating share's inheritance was unknown? These were some perplexing questions that were left unanswered by the Act. With respect to the first question, the judicial opinion was, that although she took the deceased husband's interest, she could not be called a coparcener, and was simply a member of the joint family. 60 [152]She had a right to claim a partition, she did acquire the status of a coparcener, but was not a coparcener.61 [153] Regarding the quantum and nature of the share, it was held that it was a fluctuating interest, till she ascertained it by asking for a partition, and if she died without seeking a partition, the interest would be taken by survivorship, by the surviving coparceners. This introduced a new concept in the law relating to Hindu joint family and coparcenary, viz., a woman, who is a member of the joint family, but is not a coparcener, yet, holds an interest in its property, takes the benefit of the death of other coparceners in the family in the same manner as a coparcener could and can also demand a partition as a coparcener. With respect to the question about the quantum of her share, there was again an ambiguity. Did she take the share of her husband as it was on the date of his death? If yes, then how could it be ascertained as he died as an undivided member? To hold that her share was fixed, yet she held it along with others, would lead to an anomalous situation, and therefore, the judicial view was that her share could be ascertained when she claimed partition.62 [154] Regarding the third question as to whether the widow received the share of her husband by inheritance or through survivorship,63 [155] there was a conflict of judicial opinion, but the predominant and perhaps the appropriate view was, that she took it by inheritance, as being a female and a non-coparcener, she was not entitled to the benefit of the doctrine of survivorship. As there are only two modes of devolution known under Hindu law, inheritance and survivorship, she inherited the property and did not take it by survivorship.64 [156]

An Unchaste Widow

Under the classical Hindu law, an unchaste widow was disqualified from inheriting the property of her deceased husband. This Act was totally silent on this issue. In fact, it did not provide for any disqualification at all. Yet, at the same time, it did not abrogate the entire pre-Act law relating to inheritance, but replaced only those provisions that were inconsistent with this Act. The predominant question was, whether in the absence of any express provision providing for the contrary, would an unchaste widow be entitled to inherit the separate property or an undivided share in a Mitakshara coparcenary? There was a conflict of judicial opinion here also, as the Bombay65 [157] and Calcutta High Courts66 [158] favoured the granting of inheritance rights to an unchaste widow, but the Madras High Court took the contrary view67 [159]on the ground that s. 2 repealed only those rules of custom and of Hindu law, for which a contrary provision had been made under this Act. Since the Act was silent on the disqualification aspect, it meant that the old rules relating to the disqualification of a widow were applicable even after 1937, and they disqualified an unchaste widow from inheriting the property of her deceased husband.

Maintenance Rights of the Widow after the Hindu Women's Right to Property Act, 1937

The basic purpose of passing the Act was that a Hindu widow, after the death of her husband, should not have to be dependent on others for her sustenance, but should be so strengthened economically, that she acquires a capability to look after herself. The predominant motive was securing her maintenance rights by granting her an ownership, even though limited, over the property. Under the classical law, she had maintenance rights out of the property, as inheritance rights from the joint family property were denied to her. Now, when these inheritance rights, which were perceived to be 'in lieu of maintenance', were granted under the Act, the right to claim maintenance was automatically extinguished, as both could not co-exist. However, as the Act did not apply to impartible estates and to agricultural property, families where the only property available was of either of the two abovementioned types,

the widow, even after the passing of the Hindu Women's Right to Property Act, 1937, retained her rights to claim maintenance.

Limited Ownership Converted into Full Ownership under the Hindu Succession Act, 1956

Section 14 of the present Act, converted the limited ownership into a full fledged ownership and also ended the confusion and controversy regarding the exact share that the widow took on the death of her husband as an undivided member in the Mitakshara coparcenary. Presently, she inherits the separate property of her husband as his primary heir, and the quantum of her share and the nature of her estate are absolutely identical to that of the son. From the undivided share of the deceased husband in the Mitakshara coparcenary, her presence defeats the application of the doctrine of survivorship over his undivided share and prevents it from going to the surviving coparceners. The share of the deceased husband is ascertained by means of a notional partition and she inherits his share as his class-I heir, taking it as an absolute owner.

For widows who, on the date of the passing of the Act, were in possession of the property as limited owners, it was provided that henceforth, they would hold these estates as full owners thereof. Section 14 provided:

> **Property of a female Hindu to be her absolute property.—** Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> ***Explanation* :** In this sub-section, 'Property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition or in lieu of maintenance or arrears of maintenance or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription or in any other manner whatsoever and also any such property held by her as stridhan immediately before the commencement of this Act.

There were two basic objectives of the Act. The first one was to remove the disability imposed under Hindu law on a woman, to hold the property only as a limited owner. The Act removed it expressly, enabling her to acquire the property from whatever may be the mode, as a full owner, that included a power to dispose it of at her pleasure. Any property that a woman acquired after the passing of the Act, was her absolute property. In this sense, it abolished the concept of a woman's estate as being different from a man's ownership. Secondly, it also converted the then existing limited ownership, into an absolute ownership, by providing that where a Hindu female was in possession of the property as a limited owner, such limited ownership would automatically mature into an absolute ownership from the date of the commencement of the Act.68 [160]A woman who had no power to alienate her share at her pleasure, a day before the commencement of the Act, overnight acquired such power,69 [161] and instead of her husband's heirs taking her property, the property could be transmitted by her to her own heirs, thus abolishing the concept of reversioners. By providing for absolute ownership and a very wide definition of the term 'property', the Act also abolished the entire distinction between stridhan and non-stridhan, saudayika and non-saudayika stridhan and the different modes of its acquisition and devolution.

Application of Act to Properties Acquired before the Commencement of the Act

One of the aims of the Act was to convert the limited interest of a widow, into an absolute estate, provided she was in its possession on the date of the commencement of the Act.70 [162] It was, therefore, immaterial that the acquisition of this property was prior to the passing of the Act. Where the widow inherited the property of her deceased husband or acquired the same interest as her husband under the Hindu Women's Right to Property Act, 1937, or even prior to that, and was in actual or constructive possession71 [163] of it, the Act converted the limited estate into an absolute estate. However, if she remarried72 [164]before the commencement of the Act, or died, her heirs could not take the benefit of these provisions, as the Act is not retrospective in application.73 [165]

Two conditions were required to be satisfied before the limited estate matured into an absolute estate, viz.:

(i) she possessed the property as a limited owner; and

(ii) she had not remarried.

Possession

The first requirement for the conversion of a limited into an absolute interest is, that the property should be possessed by a Hindu female, as a limited owner. The term used here is 'possessed by' and not merely, 'in possession of a Hindu female'.74 [166] The term 'possessed by' indicates a possession in law. It signifies a valid title to the property and includes a situation where a person is possessed of the property in law, without having its actual or constructive possession.75 [167] It includes a right to have possession as well. In *Gummalapura Taggina v. Setra Veeravva,76* [168] on the death of the husband, the possession of his property was taken by his widow, in 1917, and the same continued with her till 1954. Thereupon, the collaterals, who got a mutation effected in their names, dispossessed her forcibly and illegally. A suit for reclaiming possession was filed by the widow in 1956 and during the pendency of this litigation, the Act was passed. Here, the collaterals had the actual physical possession, but in the capacity of trespassers, and the right to possession in law, was still with the widow. The court held that her limited rights over the property matured into absolute rights. It must be a possession or a right to claim possession that can be sustained in law.77 [169] Actual physical possession, without the right of ownership, will not attract the application of this Act. For example, where a Hindu female was in actual physical possession of the estate, but as a trespasser, her possession will not enlarge into an absolute ownership.78 [170] Similarly, a possession in the capacity of a lessee, a licensee or a mortgagee, is a lawful possession, but is not equivalent to a right of ownership.79 [171]A woman who is in possession as a lessee or a licensee, would not become a full fledged owner of the occupied property. The term, 'as a limited owner', clearly shows that a Hindu female must possess the property as a limited owner and a mere actual physical possession, without limited ownership, would not convert it into an absolute ownership. Section 14 does not enlarge the rights or title of a Hindu female. The title is protected, but it is not modified. From a limited owner, she becomes an absolute owner, but she was an owner before the commencement of the Act, and also continues to be so after it. What actually changes is the limited nature of the ownership. Where a Hindu female was in physical possession of the property by the express permission of its owner, who happened to be her brother, she cannot claim an absolute ownership in it by virtue of this Act, as a permission of residence in the property, does not vest a title of ownership in her.80 [172] Similarly, where a widow was given possession of the property by her maternal uncle and aunt, during their lifetime, out of love and affection, such life interest did not ripen into full estate.

***Possession Lost through Transfer of Limited Interest* :** One of the essential features of a limited estate was its general inalienability at the pleasure of the widow. The widow had limited powers to transfer it, that could be exercised only in times of need, viz., a legal necessity or for the performance of indispensable religious duties, that included ceremonies for the spiritual salvation of her husband. Even these transfers were valid only when the widow did not have enough alternative resources from which money could be raised for meeting these requirements. This qualified power of alienation could not be exercised by her, at her whims and pleasure. But, if the widow lost the possession of the limited estate, by transferring it in favour of a third party, when she was not legally authorised to do it, would this limited estate mature into an absolute estate, so as to confer a full ownership in favour of the alienee? The Act clearly says that the limited interest 'possessed' by a Hindu female, would mature into an absolute estate.81 [173]But if she loses possession by a transfer before the commencement of the Act, then despite s. 14(1), her ownership will not mature into an absolute one.82 [174] Since a widow could not convey a better title than what she had, if she transferred the limited estate, the alienee could not get an absolute title at the time of the transfer and even at the passing of the Hindu Succession Act, 1956, and where the alienee was possessed of a limited interest under a transfer, this limited interest would not mature into an absolute interest, as the Act intended to benefit the Hindu women only suffering from an inability to acquire a full estate, and the legislature never intended to benefit the alienee who purchased property from a limited owner, before the Act, without any justifying necessity and at a time when she had only a limited interest, by any consequential and automatic enlargement of the interest of the vendor.83 [175]

Where the widow is not possessed of the limited interest due to a voluntary transfer of it in favour of a stranger, this section would have no application and the limited estate would not mature into an absolute estate. In such cases, what the alienee holds is also a limited estate, which would be terminable on the death or remarriage of the widow. In such an event, the reversioners (last holder's heirs) would get a valid and absolute title to the property that was in the hands of the alienee, even subsequent to 1956.

In *Kalawatibai v. Soiryabai* ,84 [176] a widow inherited the estate from her husband and executed a gift of the same, in favour of one of her two daughters, in 1954, and then died in 1968. After her death, the recipient of the gift filed a suit claiming that as she was in possession of the property on the date of the commencement of the Act, she became a full owner of the gifted properties and her sister had no claim over any portion of it. Her sister filed a counter petition claiming full ownership over half of the properties, on the ground that the gift executed by the mother was invalid, as a limited interest could not be transferred. The Supreme Court held that if, prior to 1956, a Hindu widow alienated her limited estate beyond permissible limits, she could not acquire a full estate in it, as she

was ‘stripped of her rights in it’. With respect to the rights of the alienee (the daughter in this case), it observed that the position of an alienee was very vulnerable and precarious. It could be called a temporary and transitory ownership. It was a life interest, but not of the life of the alienee, but that of the widow. Had it continued with the widow, there was a possibility of it maturing into an absolute ownership, but because it was with the alienee, under an imperfect transfer, the alienee did not have a valid title. Even if the alienee was a female, as has been explained previously, her title or ownership should be such as could be sustained in law. Here, her ownership could be successfully challenged by the reversioners, as the widow in the first place, was not competent to alienate the property. Hence, the donee daughter was not such a female who was capable of becoming a full owner. Similarly, where a Hindu widow dedicated certain property to a deity and continued to have its possession as a trustee, her rights will not mature into absolute rights, because she possessed the properties as a trustee and not as an owner.85 [177]

Possession Regained after Transfer of the Limited Interest , but before 17 June , 1956 **:** Where the widow transferred her limited interest (though not competent to do so) in favour of a relation or a stranger, for value, or even without value, but such interest was reconveyed to her before the commencement of the Act, either voluntarily or under a compromise following a litigation, this temporary loss of possession would not adversely affect the conversion of the limited ownership, into a full ownership by the Act. For example, a Hindu widow, who had a limited ownership in an estate, executed a gift of it. The reversioners challenged the gift on the ground that she being a limited owner, she had no power to gift the same. The suit at the stage of appeal, ended in a compromise, under which the widow was to enjoy the property during her lifetime. Meanwhile, the Act was passed and her limited estate was converted into a full estate. It was held86 [178]that she was possessed of the property at the time of the passing of the Act, and therefore, acquired a full ownership over it.

Reconveyance of Possession after 17 June , 1956 **:** Loss of possession by a voluntary transfer deprives a widow of the possession of the property in law and such an estate, which has not been possessed by the widow, would not be converted into an absolute estate, but there may arise a situation, where the widow loses the possession by a voluntary transfer, but regains it by a reconveyance, not before, but after the commencement of the Act. Would this reconveyance help her in taking the property as an absolute owner? If there had been no reconveyance in her favour by the alienee, on her death, the property would have gone to the reversioners. But if there had been no transfer in the first place, the limited interest would have converted into an absolute interest. Thus, the question that arises is, would this reconveyance in favour of the widow, obliterate the negative consequences that would have emerged from the first transfer? Will it restore the widow to the position where she was before the first transfer? Would she be deemed to be possessed of the property on the date of the commencement of the Act, or would the reconveyance be covered under the expression, ‘property possessed by a Hindu female... acquired after the commencement of the Act’?

The Supreme Court has held87 [179]that the reconveyance of the transferred limited interest in favour of the widow, even after the commencement of the Act, will convert it into an absolute estate in her favour, if her right was called in question subsequent to it.

In *Daya Singh v . Dhan Kaur* ,88 [180] the husband died in 1933 and his widow, who inherited his properties, gifted them to her daughter. The reversioners challenged the validity of this gift, which was decreed in their favour. The widow executed a gift for a second time, but after the coming into force of the Hindu Succession Act, 1956, and then died in 1963. The reversioners again challenged the gift as void and claimed possession of the property. They contended that having made the gift in 1933, the widow was not in possession of the property and her rights did not mature into full rights, and the second gift was void. The court rejected the contention and held that till the widow was alive, the reversioners did not have any right in this property. Their interests could be described as mere *spes successionis* , viz., a bare chance of inheritance, which is purely contingent. Secondly, on the date of death of the widow, the law in operation on that day, will govern the succession or devolution of this property. It will be presumed that the last owner of the estate had died then. In the present case, if it were presumed that the deceased husband had died not in 1933, but in 1963, succession to his property will be governed by s. section 8 of the Hindu Succession Act, 1956, as per which, his daughter would succeed to his entire property, to the exclusion of the collaterals.

In *Jagat Singh v . Teja Singh* ,89 [181]a Hindu male died in 1938, and his widow inherited his properties as a limited owner. She gifted these properties to two persons, in equal shares. The reversioners challenged the validity of both these gifts, and the court did recognise the title of the reversioners to the property. After the passing of the Act in 1959, one of the donees reconveyed the properties back to the widow, under a gift deed. Five days later, the widow re-gifted the property to two donees and died. In 1961, the reversioners filed a suit for claiming possession of the entire property, including the half share that was reconveyed to the widow and re-gifted by her, subsequent to 1956.

The suit was resisted by the donees of the second gift executed by the widow. The court held that where the widow makes an alienation, which is not for a necessity and therefore, not binding on the reversioners, the alienee gets all the rights which the widow enjoyed in the property and he is the owner to the same extent as the widow was and nobody can disturb his title during the lifetime of the widow or till such time as her estate comes to an end on the happening of an event. Where the alienee retransfers the property back to the widow, the alienation made by the widow should be treated as non-existent, as the alienee had reconveyed the alienated property and the defect was cured and this had the effect of cancelling the original gift made in 1938. There was nothing in law against such reconveyance merely because the alienee had only a limited interest. The court held that the declaratory decree recognised the rights of the reversioners as against those of the alienees, who were the holders of the widow's limited interest, but that could neither prevent the alienee from retransferring the property to the widow, nor could it prevent the widow from gifting it once she obtained an absolute interest in it. The second gift, the court held, conveyed an absolute and perfect title in favour of the two donees, as upon reconveyance, the original gift with respect to half of the property was cancelled and the limited interest in such estate was converted into an absolute estate.

In another case,90 [182] a widow executed a gift deed of the property that she had inherited from her husband in 1948. The reversioners challenged the gift as void and not binding on them in 1958, *i.e.,* two years after the commencement of the Act. During the pendency of this suit, the property was re-transferred to the widow by the alienee. The Madras High Court held that upon such reconveyance, the widow acquired full ownership of the property. The Bombay High Court gave a similar verdict when a widow transferred her limited estate prior to 1956 and repurchased it subsequent to 1956.91 [183] The matter was taken up again by the Supreme Court, in 1987, in *Jagannathan Pillai v . Kunjithapadam Pillai* .92 [184] Prior to this judgment, there was a conflict of judicial opinion on this issue. The Orissa93 [185] and Andhra Pradesh94 [186] High Courts had taken the view that upon a reconveyance, the widow would get only a limited interest, while the Punjab,95 [187] Madras,96 [188] Bombay97 [189] and Gujarat98 [190] High Courts had held that she would take an absolute interest. The Supreme Court put the facts of the case as follows:

(i) a Hindu female acquired a property by reason of the death of her husband, before the commencement of the Act;

(ii) it was a woman's estate or a widow's estate;

(iii) she lost the possession of the property on account of a transaction, whereby, she transferred the property in favour of an alienee, by a registered document of sale or gift; and

(iv) the property in question was re-transferred to her by the said alienee, after the enforcement of the Act, by a registered document, thus restoring to the widow, the interest (such as it was) with which she had parted earlier, by reversing the original transaction.

The question before the court was, whether, upon the reconveyance of the very property which she had alienated, after the enforcement of the Act, she would become a full owner in respect of such a property, by virtue of s. 14(1) of the Act, or not. In such a situation, the fact remains that the widow was not in possession on the date of enforcement of the Act, but it was restored later, and that too, by the same alienee.

The court held that there was nothing in the language of s. 14(1), which suggests that the widow must be possessed of the limited estate on the date of the commencement of the Act. Rather, the court said that the possession is to be seen on the date or time when her right is called in question, when she has an occasion to claim or assert a title thereto. According to the court, the expression, 'any property possessed by a Hindu female, whether acquired before or after the commencement of the Act', means:

(i) any property possessed by a female, acquired before the commencement of the Act, will be held by her as a full owner thereof and not as a limited owner; and

(ii) any property possessed by a Hindu female, acquired after the commencement of the Act, will be held by her as a full owner thereof and not as a limited owner.

So, if the property can be acquired after the commencement of the Act, there could be no question of it being either in physical or constructive possession, before the passing of the Act. Hence, there is no mandatory requirement of the law, that the widow must have possessed the property on the date of the passing of the Act and she can acquire it subsequently as well. Once it is shown that she re-purchased or received the property back from the alienee, to whom she had earlier transferred the property, she acquired it after the commencement of the Act, within the meaning of s. 14(1) of the Act. Now, the transaction by which the vendee of the Hindu female acquired an

interest in the said property, was reversed and she was restored to the position prevailing before the transfer took place, *i.e.,* in the eyes of law, the transaction stood obliterated or effaced. What was done by virtue of the document executed in favour of the transferee, was undone. If a challenge is made during her lifetime or after her death, after the reversal of the transaction, the answer would be that she was a full owner. By this reversal of the transaction, the reversioner's rights are not affected, as even earlier, what they had in the widow's estate was a mere *spes successionis* , *i.e.,* a chance or a hope to succeed to it, and nothing more. Justifying its line of argument, the court said that the whole purpose of s. 14(1) is to make a widow who has a limited interest, a full owner in respect of the property in question, regardless of whether the acquisition was prior to or subsequent to the commencement of the Act. The legislative intent was abundantly loud and clear, viz., to erase the injustice and to remove the legal shackles by abolishing the concept of limited estate or the women's or widow's estate, once for all.

While the legislative intent cannot be disputed, the argument of the court, that a reconveyance cures the defect, restores her interest in the property and undoes the transfer, appears strange. For example:

(i) *W* , a Hindu widow, transfers for value, her limited interest, to the alienee *A* , and dies in 1957. On the date of commencement of the Act, she was not possessed of the property and the interest will not mature into an absolute interest and the reversioners will claim the possession of the property.

(ii) *W* , a Hindu widow, transfers her limited interest to *A* , who transfers it further to *B* . *B* now, retransfers it to *W* , after 1956. *W* dies in 1957. Has she died as an absolute owner or as a limited owner? Is the defect of lack of possession cured when she regains possession? Would her acquisition be within the meaning of 'property acquired after the commencement of the Act', even where the person who reconveyed it was different from the original alienee? The court has not answered this question. If the answer is no, then why should she be prevented from becoming an owner due to an action of the original transferee?

(iii) A Hindu widow *W* , transfers her limited interest in favour of the alienee. After 1956, he re-transfers this interest to *W* . According to the Supreme Court, if *W* now, re-transfers the property to the transferee, he would get a perfect title. The possibility of sham transactions by meticulous planning cannot be ruled out. Collusive transactions, including a transfer and re-transfer, will help the parties to perfect the title under an initial unauthorised transfer. Thirdly, if a re-transfer can cure the defect and restore the interest in favour of the widow, there is no reason why the same analogy should not be applied in case the widow loses the possession by remarriage, followed by an end to her second marriage.

Further, the court has emphasised repeatedly, that the primary purpose of the conversion of a limited estate into an absolute estate is to remove the disability imposed on the widow to own the property as an absolute owner, and not to benefit the transferees of the limited estate. But here, by a manipulation, it is the transferees who may be benefited.

Loss of Possession by Remarriage **:** In order that a limited estate held by a woman, converts into an absolute estate, she must be possessed of the estate on the date of the commencement of the Act. In three cases, the limited estate would not mature into an absolute estate. The first case would be when she dies before the Act is passed. In that case, there would be no question of conversion of the estate, because the reversioners would get a vested title to it. Second, where she relinquishes her estate or transfers it in favour of another person and parts with the possession; and the third, when she remarries. Upon her remarriage, the limited estate terminates as if she had then died. This was due to an express provision contained in the Hindu Widow Remarriage Act 1856, which was passed with the primary aim of validating and legalising the marriage of Hindu widows and to accord legitimacy to their offsprings. Section 2 of this Act provided:

Right of widow in deceased husband's property to cease on her remarriage.— All rights and interests which any widow may have in her deceased husband's property by way of maintenance or by inheritance to her husband or to his lineal successors, or by virtue of any Will or testamentary disposition conferring upon her without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall upon her remarriage, cease and determine as if she had then died, and the next heirs of her deceased husband or other person entitled to property on her death, shall thereupon succeed to the same.

A widow remarrying will be presumed to be dead as far her rights in the former husband 's property are concerned, and the reversioner's right to succeed will be immediately activated. This Act was repealed in 1983 by the Hindu Widow's Remarriage (Repeal) Act, 1983. In a case before the Apex Court,1 [191] a Hindu widow holding a limited estate, remarried her brother-in-law (who was already married) in 1953. The parties, domiciled in Madras, were subject to the provisions of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, which made such polygamous marriages void and a nullity in the eyes of law. This remarriage of the widow was therefore, null and

void in the eyes of law. It neither gave her the status of a wife, nor could it confer legitimacy on the children born of this union. In such a scenario, the Supreme Court was confronted with the question whether such a null and void marriage be called a 'remarriage', so as to terminate her rights to hold the widow's estate and dispossess her of it, 'as if she has died'? The widow claimed an absolute ownership under s. 14(1) and contended that as her marriage was void, s. 2 of the Hindu Widows' Remarriage Act, 1856, had no application. A four Bench judgment of the Supreme Court rejected her argument and held that even if the marriage was void, 'it did not obliterate the disqualification from inheritance by reason of remarriage'. According to the Court, the voidness of marriage could not be termed as an absolute nullity. It further observed that a 'statutory prohibition (of bigamy) cannot be treated to be in aid of the conferment of a right, it is a prohibitory statute and not a conferring statute.' According to this judgment, therefore, if a widow is a party to a marriage that cannot be sustained in law for any purpose, it will nevertheless be treated as a 'remarriage', so as to put an end to her rights in the limited estate that she inherited from the her former husband. The correctness of this judgment is doubtful. Even though the Supreme Court is empowered to overrule its previous judgments, glaring contradictions leading to confusion should be avoided. In a previous judgment,2 [192] the Court, while deciding the issue of commission of an offence of bigamy by a Hindu man, observed that,3 [193] 'Prima facie, the expression "whoever... marries" must mean "whoever... marries validly or whoever marries and whose marriage is a valid one".'

Therefore, in the light of the latter judgment, in order that her rights in the property are forfeited, her marriage should have been a valid one. Secondly, the whole purpose of granting a limited estate in favour of the widow was that traditionally, her inability to inherit the property or to obtain a share in the joint family property, had reduced her to a 'burden' to be maintained by the male members of the family, who controlled the ownership of the material assets. The conferment of a limited ownership in the property helped her to maintain herself. The reason why this limited estate terminated on her death or remarriage was that, in the former case, there was no longer a question of her maintenance and in the latter case, it was then the duty of the new husband to provide for her maintenance during coverture. The reason for the termination of the limited estate in case of remarriage was not that she should be deprived of the resources with which she was sustaining herself, but it was imposed due to the availability of an alternative to her, who would take care of her maintenance.

The primary focus of the legislature was, that even if, due to the operation of these antique, orthodox, unjust and irrational laws and customs, women were successfully deprived of acquiring ownership of the property of their spouses, at least they should be allowed to sustain themselves in their own right. Following the present judgment, the limited estate is terminated, as, in the opinion of the court, 'even if the marriage was void, it did not obliterate the disqualification from inheritance by reason of remarriage', yet at the same time, the court ignored the fact that as the alleged second marriage was void, she could not claim any right, not even of a status, let alone of maintenance, from the other party to the marriage, as it will be incorrect to call him her husband. This step deprived her completely of even a basic sustenance and reduced her to a stage where her property with which she was maintaining herself, is taken away by the reversioners, and the second relationship does not accord her any monetary support. Thus, the very purpose of the Hindu Women's Right to Property Act, 1937, is defeated here. The judgment imposes on her, a penalty, when the very object of all these legislations was to elevate the status of women. Remarriage was never meant to be a disqualification and the reason why her limited ownership rights came to an end was that upon marriage, she had an assured economic support. It is indeed strange that all these legislations, viz., the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, the Hindus Widows' Remarriage Act, 1856, and the Hindu Women's Right to Property Act, 1937, were aimed at improving a woman's social and economic status, but a mechanical interpretation by the judiciary, that goes against the very spirit of these enactments, has resulted in penalising a woman, who can realise her maintenance from 'neither here nor there', as her financial support has been totally extinguished. The obsession with penalising a woman who is a party to a void marriage, appears stronger than a case where she voluntarily transfers the limited estate, without a necessity, and gets a reconveyance of the same later. The courts have said that in those cases, the widow's possession is restored, even if it was done after the passing of the 1956 Act, so that the limited estate would convert into an absolute estate. But here, let alone the defect being cured, there was no defect in the eyes of law in the first place. A void marriage is no marriage in the eyes of law, and a party to a void marriage (in this case the widow), retains her single woman status. She can remarry anyone at any time, without being liable in law, as a void marriage does not confer on her, any status, nor binds her in any manner whatsoever.

A relationship not recognised by law for any right or obligation, cannot be the basis for imposing a disqualification. The judgment therefore, does not appear to be laying down a correct proposition of law.

In *Babulal Kewani v. State of Bihar* 4 [194], the family comprised of two brothers. Shortly before 1956, one of the brothers died and his widow took his share in the property and then remarried. The surviving brother filed a suit for possession of the share on the ground that the remarriage of the widow would result in the forfeiture of her rights

but was unable to specify whether the remarriage had taken place after the commencement of the Act or prior to it. The court held that as the remarriage was subsequent to the enactment of the 1956 Act, her limited rights had already matured into absolute ownership and her remarriage would not have any adverse effect on it.

Constitutional Validity of Section 14(1)

Family law provisions have often been challenged on grounds of gender discrimination. The gradual liberation of a Hindu woman from economic subjugation, started with a series of legislations passed by the British Indian Parliament and was taken forward by the Hindu Succession Act, 1956, which granted her full rights in the inherited property. In practice, the economic dependence of a woman, on her male relations, continues till date, yet in theory, the incapability to acquire property as a full owner has been removed. Ironically, Hindus, who form the majority community and were governed by the Mitakshara system of inheritance and joint family, have been the last to confer equal property rights in favour of their women. The other two systems prevailing in India, viz., the Dayabhaga and the matriarchal systems, conferred better rights on her.

Despite that, generally, men are still perceived as the rightful successors to the father's property, while women, who have statutorily been conferred a right to inherit the property, are visualised as share-snatchers. It is no wonder, therefore, that this provision attracted the maximum ire of the conservatives, and generated passionate, yet purely selfish outbursts from those who opposed the granting of absolute ownership to women.

The constitutional validity of s. 14 was challenged in the Supreme Court on the ground of hostile discrimination against men, as it benefited only one section of the community, viz., the women.5 [195] The petitioner also alleged that the provisions of the section (s. 14) were vague and uncertain. Here, a Hindu male died in 1932, leaving behind two widows, and the petitioner, who was his adopted son. He also left behind considerable agricultural land in Punjab. By an agreement, each of his wives was given a one-third share of his property, in lieu of their maintenance. One of the widows relinquished her one-third share in favour of the petitioner, in 1943. In 1945, the petitioner filed a suit against the other widow, seeking a declaration that she had no right, title or interest, of any sort, in the property of her deceased husband, including in the share that she was given in lieu of her maintenance. During the pendency of the litigation, a compromise was effected, pursuant to which, the parties agreed that the widow would be permitted to retain the one-third share in the property in lieu of her maintenance and on her death, the petitioner would be entitled to take the possession of the property. However, after the commencement of the Hindu Succession Act, 1956, the widow bequeathed the property in her possession, to her relative, the respondent in the special leave petition, Harnam Singh. The petitioner contended that the widow did not have a pre-existing right of maintenance and she had secured possession on the basis of a compromise, so her limited interest in the property could not mature into an absolute interest. Since she was not the absolute owner of the property, the Will executed by her was incapable of taking effect in law, and the petitioner was entitled to take the possession of the property. The case, according to him, was governed by s. 14(2), and not by s. 14(1) of the Act. Perhaps, realising that his case could not be supported by these contentions, he also challenged the constitutional validity of s. 14 itself, relying on certain earlier observations of the Supreme Court, where it had expressed unhappiness over the difficulties encountered in constructing s. 14(1) and (2), which had led to a conflict of judicial opinion on this issue. 6 [196]The court had said that the inapt language or unhappy draftsmanship, necessitated a legislative intervention, so as to bring in clarity and certainty, as it had resulted in an endless confusion for litigants and had proved to be a paradise for lawyers.

The court, in the present case, observed that the earlier observations of the court were made so that the legislature may recast the language, in order to avoid any possible litigation arising out of the 'clumsy language' used in s. 14. However, as regards the content of s. 14, there was absolutely no adverse comment by the Apex Court. The court never lamented the fact that Hindu women were being granted full and absolute ownership rights in the inherited property.

The contention of the petitioner that s. 14 was an example of hostile discrimination, as it favoured only one section of the community, viz., the women, was dismissed by the court in view of Art. 15(3) of the Constitution, which permits the State to enact special provisions in favour of women and children, and overrides the constitutional provisions that the state shall not discriminate on grounds of religion, race, caste, sex or place of birth. The court said that s. 14(1) of the Act was enacted to remedy to some extent, the plight of Hindu women, who could not claim an absolute interest in the property inherited by them from her husbands, but could only enjoy them with all the restrictions attached to the widow's estate under the Hindu law. Expressing surprise, the court said that there was hardly any justification for the males belonging to the Hindu community, to raise any objection to the beneficial provisions contained in the Act, on grounds of hostile discrimination. The court accordingly, dismissed the petition. The case, in fact, bares the stereotyping of property ownership patterns in India. The males are viewed as the

natural and rightful inheritors of the property, and the (now not so new) inheritance rights of women, are perceived as an encroachment on their legitimate rights to take the totality of their parent's property. Everything that belongs to the parents, more specifically the father, automatically goes to the son or the other male heirs and if at all he has to share it with the females, (all class-I heirs and not merely the widow), it is seen as an act of gratuity or benevolence on his part. This is the reason, why a widow enforcing her statutory inheritance rights, is not viewed as a person who has been wronged by the son or a reversioner when he refuses to part with her share, and tries to keep it illegally, but is seen as a share-snatcher, keeping greed above love and affection and forcing him to part with what rightfully belongs to him. The petitioner here, had his one-third share well protected. He got an additional one-third from one of the widows of the father. In his perception, he was the sole owner of the complete property of the adoptive father, and the widow trying to hold on to her share, was an intruder in his ownership. This was the reason why a provision, which was in conformity with the constitutional mandate of gender equality and which removed the discrimination perpetuated by the earlier laws that favoured men only, was challenged as discriminatory. The court, therefore, rightfully dismissed his petition.

Acquisition of Property

The property that a woman may acquire before or after the commencement of the Act, shall be now held by her as a full owner and not as a limited owner. The term 'property' has been explained in the explanation appended to s. 14(1) that says:

> In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition or in lieu of arrears of maintenance, or by gift from any person, whether a relative or not, before, at, or after her marriage, or by her own skill or exertion or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of the Act.

This explanation, which is very exhaustive, also contains a clause saying that it would include property acquired in any manner whatsoever. It clearly shows that the legislature wanted a very comprehensive definition of the term 'property'.

By Inheritance

A Hindu woman inherited a limited interest in the property of her deceased husband under the Hindu Widows' Right to Property Act, 1937, and also received his share in the coparcenary property that he had held as an undivided member of a Mitakshara coparcenary. Similarly, a woman might have inherited a limited estate from her husband or father-in-law, under any other Act. 7 [1]Such limited interests would be converted into absolute interests by virtue of this Act.8 [2]Thus, where a Hindu man died, leaving behind two widows who inherited his properties, in 1946, the nature of the estate that they had inherited was a limited estate. This interest matured into an absolute estate on the passing of this Act. One of the widows died in 1974, without any heirs, and the other widow succeeded to the entire property9 [3] as per the laws of succession available under the Act. Similarly, in another case,10 [4] a Hindu man died in 1934 as a sole surviving coparcener, leaving behind certain property, which his widow inherited as his sole heir. She was in possession of these properties in 1956 and became an absolute owner. Subsequently, in 1964, she adopted a son. It was held by the court that the property held by the widow was her absolute property and had lost the character of a joint family property. Consequently, the adopted son had no right over it by birth.

By Device

A Hindu woman might have received a limited interest in the property given to her under a device of Will or a settlement. Such property will be covered under s. 14(1), Explanation, and will mature into an absolute ownership. Where a widow was put in possession of the property by a deed executed by her husband in 1945, giving her a life estate, upon the commencement of the Act, she would become a full owner and competent to alienate the property. The validity of the alienation cannot be challenged by the heirs of her husband.11 [5] In *A.K. Laxmanagounda v. A.K. Jayaram* ,12 [6] the husband bequeathed his property in favour of his sons and created a life interest in favour of his widow, in lieu of her maintenance. After 1956, the widow sold her share to meet the marriage expenses of her daughter. This sale deed was for a valid consideration. The sons challenged the validity of the sale deed executed by the mother, on the ground that she was merely a limited owner of the property and consequently, incompetent to alienate it. The court upheld the validity of the alienation on the ground that after the passing of the Act, the limited interest that was bequeathed to her by her husband, had matured into an absolute interest, conferring on her, the power of disposal over this property, as a full owner.

In *Karmi v. Amru,13* [7] a Hindu man executed a Will in favour of his wife, expressly stating that she alone was to enjoy the property during her lifetime and it was only after her death that the property should go to his three daughters. In 1955, the widow allotted some parts of the property to her two living daughters and retained the remaining portion with her, as the third daughter had by that time, died. She later executed a gift of that portion and the same was challenged by the heirs of the deceased daughter, for want of competency. The court held that she was the absolute owner of the property and competent to dispose it of by gift. In another case from Patna,14 [8] a Hindu male had two wives and two daughters, one each from each wife. On the death of one wife, he executed a Will, bequeathing his property in favour of the living wife, granting her a limited estate in it and providing that after the death of the wife, the property would go in equal shares, to both of his daughters. The wife took the possession of the property and claiming absolute ownership in 1964, sold this property. Her step-daughter, who was a beneficiary under the Will, filed a suit for the declaration of the sale as invalid, claiming that the widow had only a life interest in the property under the Will. The trial court held that by virtue of s. 14(1), the widow had become an absolute owner of the property and had full competency to execute the sale deed. On appeal, a Single Bench of the High Court reversed the decision of the trial court and held that, under the Will, what was given to her was a limited interest and under s. 14(2), which applied to this case, the interest remained a limited estate, incapable of maturing into an absolute interest. The court declared the sale deed invalid. A letters patent appeal was filed against this decision and the court, exploring the object of s. 14, held that the widow had acquired the property in recognition of her pre-existing rights of maintenance and had not received them for the first time under the Will. As the very object of s. 14 was to remove the disability imposed on a Hindu woman to inherit the property as an absolute owner, 'whatever be the kind of property and whichever be the mode of acquisition', it will be covered under s. 14(1) and will mature into an absolute estate. In *Benibai v. Raghubir Prasad* ,15 [9] the husband conferred a life estate in favour of his wife, under a Will, and on her death, the house was to go to his son absolutely. The widow took the possession of the house in 1943, upon the death of the husband, and in 1962, gifted it by a gift deed, to her daughter. The son challenged the validity of the gift. The Supreme Court held that the widow was given the house in recognition of her pre-existing rights of maintenance and therefore, this limited interest had ripened to an absolute interest in 1956, making her a full owner of the property. The gift in favour of the daughter was held by the court as perfectly valid. Similarly, a Hindu widow, receiving the life estate from her husband under the Will, with vested remainder going to the husband's nephew, was held competent to make a gift of the estate in favour of her own brother, in 1968.16 [10]

However, the Supreme Court has held17 [11] that where the widow receives a life estate from the husband under a Will, with the vested remainder going to the husband's collaterals, it will not convert into an absolute estate, even if she was in its possession in 1956, and upon her death post-1956, the collaterals, and not her own heirs, will be entitled to receive the property. The court reiterated its opinion in *Appaswami Chettiar v. Sarangapani Chettiar* 18 [12] where the Hindu father bequeathed his properties to his daughter for life, and after her death, the property was to go to her specific heirs, failing which, they were to be taken by her husband. The daughter later adopted a son, who took the property on her death. His title was challenged by the testator's heirs who claimed that the limited interest of the daughter was not heritable. The court upheld the claim of the heirs of the testator and held that as the daughter had received the limited estate under a Will, it would remain a limited estate and would not mature into an absolute interest. The court gave a similar opinion in *Gumpha v . Jaibai* ,19 [13] where the validity of the disposition made by the widow in 1966, was challenged by the step-daughter. The widow had received a life estate under a Will executed by her husband in 1941. Under the terms of the Will, on the death of the widow, the property was to vest in the step-daughter. The court held that the widow could not get a larger interest than what was bequeathed to her and as she had only a limited interest, she could not validly dispose it of.

The distinctive feature of these three cases and the earlier judgements is that where under a Will, a widow gets the life estate in lieu of her maintenance, the limited rights are converted into absolute rights by virtue of the Act, but where the testator, as an absolute owner of the property, wants to give a life-estate to the widow or to any other female, not because she needs to maintain herself out of it, but because the testator wanted her to be the legatee and the beneficiary under the Will, it will remain a life interest and would not convert into an absolute ownership, despite the fact that such female was in possession of this property on the date of the commencement of this Act. A person is free to make a disposition of his separate property. He can alienate it inter vivos or dispose it through a Will. He can choose the beneficiaries under the Will and can also determine the character of the interest that the beneficiaries may take under the testamentary disposition and therefore, he can bequeath a life interest in his property in favour of a male as well as a female, and where the language of the Will indicates that this conferment is in lieu of her pre-existing rights of maintenance, such life interest only, will mature into an absolute interest. Thus, where the testator states in the Will that he is duty bound to maintain the widow and that was the reason why he was giving a life-estate to her, such interest will be converted into a full interest after 1956.

At a Partition

A Hindu female is entitled to receive a share at a partition in certain specific situations only. She was not a coparcener and therefore, could not claim a right to ask for a share in the coparcenary property. However, certain females were entitled to receive a share out of the property as and when an actual partition took place in the family, under all the sub-schools of Mitakshara, except the Dravida school. In the rest of the regions governed by the Mitakshara law, the father's wife would get a share equal to the share of the son, when a partition took place between the father and the son. The mother would get a share equal to that of the son if a partition took place among the brothers and the paternal grandmother would get a share equal to that of a grandson, where they effected a partition amongst themselves. If a partition took place and they were not given their shares, they had a right to approach the court and enforce their claims. The nature of the interest that they took in this property, was that of a limited interest, terminable on her death or remarriage. In addition, a widow of an undivided coparcener, under the Hindu Women's Right to Property Act, 1937, was entitled to the same share as that of her husband, and was capable of receiving his (deceased husband's) share on partition and even demand a partition and ascertain the share herself. Any property that she received at a partition, in which she had only a life interest, after 1956, was held by her as an absolute owner, even if she was given the property with some restrictions,20 [14] or with a direction that on her death, it will revert to the family.21 [15] It was also not necessary that her exact share must have been demarcated by effecting a partition by metes and bounds. If it was ascertained by effecting a severance of status, more so through a suit instituted by her in a court of law,22 [16] it was sufficient. If she died after 1956 and after a preliminarily decree was passed, but before a final decree could be passed, she died as an absolute owner of the property.23 [17] In fact, a widow in possession of the joint property, including her share, despite not claiming or ascertaining her share, would hold it as her absolute property.24 [18]

Thus, where, upon the death of the husband, the widow, under a partition deed, was allotted a one-third portion of the house for her residence and the partition deed stated this, and she occupied the same, her one-third share matured into an absolute ownership after the coming into force of this Act.25 [19] Where the sons effected a partition between themselves, and the mother was allotted a share in 1954, in lieu of her maintenance, her limited interest in the property ripened into an absolute interest. Accordingly, a gift deed executed by her in 1968, of this property, in favour of one of her grandsons, was held as perfectly valid.26 [20]

In Lieu of Maintenance

The incapability of a Hindu woman to acquire an absolute ownership in the property was very closely linked to her sole entitlement to the assets for her personal maintenance. Her economic dependence on men was a well-entrenched and deep-rooted practice in the Hindu society and was viewed by the conservatives as essential for her subjugation, lest she became too independent and assertive, a sign that was seen as a danger mark to the stability of the family and even for the protection of marriage as an institution. However, as a human being, without any material assets, she had to be maintained. During coverture, her husband maintained her out of his property and after his death, the heirs who took his property were responsible for her maintenance. The Act of 1937, gave her a share in the husband's property, but in lieu of her maintenance, and that is why, on her death, it reverted to the husband's heirs. Because she got the property in lieu of her maintenance, she lost the right to claim maintenance once she inherited the husband's property or acquired his individual share in Mitakshara coparcenary. Whatever share or property she received in lieu of her maintenance became her absolute property after 1956. 'Maintenance' includes a reasonable provision for food, clothing and shelter. It would vary from case to case, but the basic purpose behind securing a maintenance is that a woman who loses a regular monetary support, should not be left in the lurch, and a suitable alternative amount or property that yields income, should be given to her, more so if her husband died leaving behind property. Maintenance is never to be understood as enabling a woman to strengthen herself economically or to reach the same level as her male counterpart. It is an amount, or income, or property that can take care of her basic expenses or even the comforts of life. It is not a luxury and therefore, the quantum of the property given or settled in favour of the female, can afford a true test of whether the property was given in lieu of maintenance or otherwise, *i.e.,* in lieu of partition.

In *V . Tulasamma v . V . Sesha Reddy* ,27 [21] the Supreme Court had the occasion to determine whether the property received by a Hindu widow, in lieu of maintenance, under an instrument that restricts the nature of interest given to her, would be held by her as an absolute owner after the commencement of the Act, and whether it would be s. 14(1) or s. 14(2) that would apply to such cases. If s. 14(1) is applicable, then the limitation on the nature of her interest is wiped out and she becomes a full owner of the property, but if it is s. 14(2) that governs the case, then her limited interest is not enlarged and she continues to have a restricted estate in the property under that instrument. Here, the widow claimed maintenance after the death of her husband from his brother, as he had taken possession of his property. A decree was passed in her favour and in execution of this decree of maintenance, a

compromise was arrived at between the parties, allotting some properties to her for her maintenance, specifically stating that she had only a limited estate. The court held that a widow is entitled to maintenance out of her deceased husband's estate, irrespective of whether that estate is in the hands of his male issue or other coparceners. In the present case, the property was allotted to her in lieu of her claim to maintenance and therefore, in view of s. 14(1), she acquired an absolute interest in it. This landmark judgment has been quoted by the courts in virtually all the later decisions involving a similar issue. Where the widow receives property in lieu of her maintenance, under a compromise before the Act, her limited rights mature into absolute rights.28 [22] The mode of acquisition is immaterial if it is received in lieu of maintenance. It may be received under a Will,29 [23] a compromise,30 [24] at the time of a partition31 [25] or through any other settlement.32 [26] Where the property comes to the female in recognition of her pre-existing rights of maintenance, she will acquire full ownership in it under s. 14(1). It is irrespective of the fact that she was given a right of residence only. In *V. Muthusami v. Angammal* ,33 [27] on the death of the husband, his father received his property. Under a settlement deed executed in 1946, he gave some property to the widow of his son, for her maintenance, but to be enjoyed by her during her lifetime. This settlement deed was executed upon the intervention of the Panchayat. In 1974, she executed a sale deed with respect to this property and the same was challenged on the ground that since she received the property under a settlement deed, upon the intervention of the Panchayat, it was contractual in nature and would remain a life interest. The court held that the Panchayat had merely helped the parties to arrive at a settlement in recognition of her pre-existing rights of maintenance and therefore, the interest in it was converted into an absolute interest.

However, where a widow had no pre-existing right of maintenance, but was given the right of possession of the property for her lifetime, out of love and affection, such rights will not mature into an absolute interest. Here, the maternal uncle and aunt of a widow, gave her the possession of a property for her life. They had no moral or legal obligation to maintain her and the Calcutta High Court34 [28] held that such an interest would not be covered under s. 14(1) of the Act. In *Gulab Rao Balwant Rao Shinde v. Chhabubai Balwant Rao Shinde* ,35 [29] the Apex Court held that it was necessary to raise a plea that the property was received in lieu of maintenance, to sustain the claim of conversion of the limited interest into an absolute interest. Here, the widow took the possession of the property in 1954, on the death of her husband. Her stepchildren filed a suit for a partition of this property, after the passing of the Hindu Succession Act, 1956. The widow claimed an absolute ownership in the entire property. She did not raise any plea of the property being received in lieu of maintenance, nor led any proof for establishing the same. The court held that the entire ancestral property could not be given to one person, to the exclusion of everyone else, in lieu of maintenance. The widow must plead and prove that the property was given to her in lieu of maintenance. Further, where the property was ancestral and was held by a sole surviving coparcener, in presence of other members of the joint family, he is not empowered to give the entire property to his wife, in lieu of her maintenance alone.

In *Jamunabai Bhalchandra Bhoir v. Moreshwar Mukund Bhoir36* [30], a Hindu male died prior to 1937, leaving behind his widow, son and daughter. The mother took the possession of the property as the children were infant and died in 1990, after the commencement of the Hindu Succession Act, 1956. Thereupon her daughter filed for mutation of names with respect to half of the property, a claim that was resisted by her brother, who contended that as the death of the father had taken place before the coming into force of the Hindu Women's Act, 1937, his mother had no 'limited estate/ownership" in the property but had only a right of maintenance and the same could not mature into an absolute estate and therefore he alone inherited the property of the father. The court held that as the widow had no subsisting right in the property besides only a right to claim maintenance this right could not mature into absolute ownership in 1956, and the complete right in the property vested in the son.

By Gift

The property that a female may receive under a gift, can be from her friends or relatives or from any other person. Any property that she receives under a gift would be held by her as an absolute owner. Prior to 1956, a woman held these properties as her stridhan and had absolute rights over it at all times, except coverture, where the consent of the husband was necessary for its disposal.

By Personal Skill or Exertion

Any property that was acquired by a woman by her skill or exertion or through art or a special learning, in the nature of a salary or a share in profits, with the help of a trade or business, was always considered her exclusive property and continues to be so even now. However, her absolute powers of disposal over it, were constrained during marriage as they were subject to the consent of her husband. This restriction is now removed and even during marriage, a woman is free to dispose of her own property at her pleasure.

Purchase and Prescription

A property purchased with the help of her own funds, would be the absolute property of a woman, with full powers of disposal over it.

Acquired in Any other Manner

The property that a woman acquires in any other manner than the ones specified above, will be held by her as an absolute owner. It is a very wide clause and would cover property received under a decree or award,37 [31] or through adverse possession.38 [32] A widow received compensation from the government in lieu of the ancestral property that was held by her family in Pakistan.39 [33] This amount was used by her to purchase property in India. In 1966, she gifted this property to her son. On a challenge to the validity of this gift, the court held that she was an absolute owner of the property and therefore, competent to gift it to anyone. The gift was accordingly held valid.

Property Acquired After the Commencement of the Act

Section 14(1) of the Act removes the incapability of a woman to acquire property as a full owner. The property could have been acquired by her before the commencement of the Act, as a limited owner, or after the commencement of the Act. It is interesting to note that except for s. section 14, there is no other provision in the entire Hindu Succession Act, 1956, which specifies the nature of interest that a Hindu woman takes in the property that she may inherit under this Act. Had it not been for the phrase used in the section, 'whether acquired before or after the commencement of the Act', controversies and conflicts, genuine or due to vested interests of the parties, were bound to surface. It is these words that enable a woman to inherit the property as an absolute owner under the Act.

Limited Estate Expressly Conferred under a Will or an Award [Section 14(2)]

Section 14(1) removes the statutory incapability of a woman to hold property as an absolute owner. It recognises that the acquisition of property by a woman need not be only for her maintenance, by obliterating the difference between the acquisition of property and the differential consequences based on the sex of the acquirer. But at the same time, it has not interfered with the powers of an owner of the property, to make a disposition of his property in accordance with his wishes. Thus, if a person wants to settle his property in favour of a woman by creating a life interest in it, he is competent to do so. Section 14(1) does not mean that after the commencement of the Act, a woman can never acquire a life interest. She can. The position before the enactment of the Act was, that barring a few exceptions, a woman could not take an absolute ownership in property, and a compulsory limited ownership was imposed on her. The situation presently, is that this statutory disability to acquire a full ownership is removed, and depending upon the terms and conditions of the grant, she can acquire either a limited or an absolute estate. Her position has been brought on par with men. An absolute owner can make any kind of disposition of his property, in favour of anyone, under Hindu law. He can sell it, gift it to anyone, like to a relative, friend, a charitable institution, or for animal homes or for a religious purpose, or can bequeath it in favour of a relative or a friend or even a stranger. Section 14(1) does not come in his way if he wants to create a life interest in favour of a woman. Such life interest or a limited ownership will not mature into an absolute ownership. What is removed by the Act is the inability of the recipient to take a full ownership, but the Act does not impose a disability on the powers of an owner to make a disposition in accordance with his wishes. Section 14(2) provides:

> Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a Will or any other instrument or under a decree or order of a civil court or under an award, where the terms of the gift, Will or other instrument or the decree, order or award prescribe a restricted estate in such property.

Section 14(2), which is an exception to the general rule incorporated under s. 14(1) protects the power of an owner to settle the property in accordance with his wishes. Hence, where a female receives a limited interest in a property under a decree of a court or an award or under a gift or a Will executed by an individual, such limited ownership would not be affected by s. 14(1) and would not mature into an absolute interest. Section 14(1) is very wide in application, but s. 14(2), being an exception, has a restricted application. Both these sections cover cases where a female acquires property by way of gift or Will, but the consequences mentioned are different. Where a female acquires property under a Will or a gift and the case is covered under s. 14(1), the limited interest would mature into an absolute interest, but where it is governed by s. 14(2), the limited interest would remain a limited interest. This overlapping has created confusion and has made this a focal point of litigation. The courts have repeatedly expressed their unhappiness at the language of s. 14(1) and (2). In *V . Tulasamma v . V . Sesha Reddy* ,40 [34] the court noted that cl. 1 and 2 of s. 14, were presenting serious difficulties of construction in cases where property was

received by a Hindu female in lieu of her maintenance and the instrument granting such property prescribed a restricted estate for her in the property, and the divergence of judicial opinions was creating a chaotic situation. An uncertainty with respect to the interpretation of these two clauses of s. 14 was prevailing and the legislature was not bothered about correcting its inapt draftsmanship, which had created endless confusion for litigants and a paradise for lawyers.

In *Santosh v. Saraswathibai* 41 [35] the property was given by the husband to his wife for her maintenance before his death. She took possession of the property and the same was also accepted by the other male relatives of the deceased including the reversioners, in an onset decree passed in the previous suit. According to the consent decree, no one was to disturb the peaceful possession of the widow and the land after her death was to revert back to the reversioners. The widow died in 1992 and her legal representatives filed a suit claiming the land on the ground that since the enactment of the Hindu Succession Act, 1956, in view of sec. 14(1) she had become the absolute owner of the property and the same would not revert back to the reversioners, but would go to her own heirs. The reversioners on the other hand contended that it was the express terms of the consent decree that the property on her death would revert back to them and in view of their terms of the consent decree, she could not be called the absolute owner of the property despite the provisions of the Hindu Succession Act, 1956, as it did not apply to her case. The land was allotted to her only for her life time expressly for the purposes of maintenance, and thus it also prevented the property from vesting in her. The court held that the possession of the widow in the present case even prior to the institution of the present case was accepted by the reversioners in the said consent decree and they undertook not to interfere in her peaceful possession thereof. After the death of the husband, who died after 1956, the widow became the co-owner of the property of her deceased husband being one of his wife and had half share in it. The succession to this property was governed by the Hindu Succession Act, 1956. She was therefore in possession of the land not merely as a possessor of the property but as the co-owner of the property. Therefore the question of divesting her of the property invoking Sec. 14(2) does not arise. Thus the existing right of the widow in light of the consent decree was crystallized by reason of the consent decree and she took the property as a full owner thereof after the passing of the Act. In *Vidya Devi v. Sri Prakash42* [36], in 1954, by a deed of family settlement, the joint family was dissolved and all the ancestral property was divided in three shares. W who was a child widow was given a share but with the condition that she would not transfer it to anyone except the parties to the family settlement or to their heirs. However W in 1970 gave her entire share by way of a registered gift to X who was neither a party to the original settlement nor an heir of any such party. She said that the conditions imposed on her were oppressive and illegal and she was no longer bound by then as since the promulgation of the Hindu Succession Act, 1956, she had become a full owner of the property. The court held that Sec. 14(1) and its explanation are couched in widest possible term and must be liberally construed in favour of female heirs so as to advance the object of the Hindu Succession Act, 1956 and to grant socio-economic rights sought to be achieved by long needed legislation. Under Sec 14, restriction would be legally permissible but only where the restricted right was conferred in favour of a female for the first time under a court's order, decree, award, will, etc but where the widow gets the property under an instrument declaring her pre-existing rights of maintenance or of partition or for a share that she is otherwise entitled to, 14(2) would have no application and such interest would be enlarged into absolute ownership under the 1956 Act. It was held that the gift was valid as W was an absolute owner of the property.

The test to determine whether a case would be governed by cl. (1) or by cl (2) of s. 14, is that, irrespective of whether a woman receives the property under a gift or Will, if she receives the property in recognition of or in lieu of her pre-existing rights, then it is covered under s. 14(1) and if she receives it because the granter wanted her to have a limited interest, then the case will be covered under s. 14(2).

The Andhra Pradesh High Court43 [37] has given three propositions for the application of s. 14(2),*viz.* :

(i) the female gets an interest from an instrument or document that is written;

(ii) it is this document or instrument that creates a right for the first time, in her favour; and

(ii) the language of the document embodies the terms that prescribe a limited estate to her.

So where the testator bequeaths a life interest in favour of the female, with clear instructions that after her death, the property would go to the reversioners,44 [38] or would revert to the settler or his heirs,45 [39] or to a specific person mentioned therein,46 [40] or where a female receives the property without any pre-existing rights of maintenance,47 [41] the case would be governed by s. 14(2) and the limited interest would not mature into an absolute interest.

In *Sharad Subramanyan v. Soumi Mazumdar48* [42], the owner created a life interest in his landed property and absolute ownership with respect to his complete movable property in favour of his wife under a Will. After his death

the wife executed a lease of the landed property and died six years later. On the issue of her competency to execute a lease as an absolute owner of the property the court held against it as she had acquired a limited ownership expressly and it was not in lieu of her pre-existing rights of maintenance. The court observed that s. 14 (2) has carved out a completely different field and for its application three conditions must be satisfied which are as follows:

(i) That the property must have been acquired by way of gift, will, instrument, decree, order of the court or by way of award;

(ii) That any of these documents executed in favour of a Hindu female must prescribe a restricted estate in such property; and

(iii) That the instrument must create or confer a new right, title or interest on the Hindu female and not merely recognize or give effect to a pre-existing right which the female Hindu already possessed.

Under these documents if either a restricted estate is not provided or if it does not create a new title for the first time on a female Hindu, s. 14(2) would not apply. Commenting on the statutory provision the court termed s. 14(2) as a salutary provision incorporated in the enactment for historical reasons to maintain a link between the *shastric* Hindu law and Hindu law that was sought to be changed by the legislation of 1956, so that where a female Hindu becomes possessed of property not by virtue of any pre-existing right but otherwise and the granter chose to impose certain conditions on the grantee the legislature did not want to interfere with such a transaction by obliterating or setting at naught the conditions imposed.

IV. SUCCESSION TO THE PROPERTY OF A FEMALE INTESTATE

Section 15 is the first statutory enactment dealing with succession to the property of a Hindu female intestate. Prior to 1956, the property of a woman went according to the rules provided under the uncodified Hindu law. [49]In majority of cases, her limited interest terminated in the event of her death and therefore, the question of succession to her property did not arise. The efforts on the part of the legislature were aimed more towards securing her maintenance and property rights, rather than towards providing a scheme of succession to her property, as property ownership in absolute capacity by a female, was a rarity and her general and complete economic dependence, a rule. The two statutes that were enacted to improve her conditions of life, viz., the Hindu Law of Inheritance (Amendment) Act, 1929, and the Hindu Women's Right to Property Act, 1937, concentrated on securing her rights, rather than on focusing on who, after her, will be eligible to take her property. These statutes thus, dealt with succession to the property of a Hindu male intestate and securing the rights of the widow in case he died as an undivided member of a Mitakshara coparcenary, having at the time of his death, an interest in it.

SECTION 15 APPLICABLE TO THE ABSOLUTE PROPERTY OF A FEMALE

The section applies to:

(i) Property that a woman holds as an absolute owner, irrespective of the mode of its acquisition. It would include movable or immovable properties, but would not include any property to which the Act does not apply.50 [44]

(ii) The term 'property' would include an undivided interest in a Mitakshara coparcenary in which a female was a coparcener who dies leaving behind her son, daughter, or children of a predeceased son and/or daughter.51 [45]

This section and the scheme of succession are not applicable to any property that is held by a Hindu woman as a limited owner either under s. 14(2) of the Act, or even otherwise.52 [46]The property in which she acquired a limited ownership to begin with, which matured into an absolute ownership due to s. 14(1), will be governed by the provisions of this Act.53 [47] The rule is that only that property will be subject to the application of these sections, which are heritable and over which a woman had full powers of disposal.54 [48]

SEPARATE SCHEMES OF SUCCESSION FOR MALE AND FEMALE INTESTATES

A unique feature of the Hindu Succession Act, 1956, though not a happy one, is that it provides for two entirely

different schemes of succession, based on the sex of the intestate. No other major succession law in vogue in India, has a provision parallel to this and they lay down one scheme and one set of heirs for all intestates. The reason for not providing a uniform scheme under Hindu law, is linked closely to the emphasis on the conservation and protection of the property in the family of a male Hindu. The old concept of stridhan is still very evident if we look at the content of ss. 15 and 16. A woman under the patriarchal setup is visualised as having no permanent family of her own. She is born in her father's family, and remains there till she gets married, whereupon, she joins her husband's family. Her stay in none of these families is permanent. Even in her husband's family, in the event of a marital breakup due to the death of the husband or even divorce, she can remarry and move out of this family and join the second husband. In contrast, the husband's family does not change with his marriage or remarriage or death of wife or divorce. The ability of the woman to move and carry the property with her, away from the family from whose members she had inherited it, is given primary importance under Hindu law, but is not treated as of any consequence under the inheritance laws applicable to women belonging to the other religious communities. It appears surprising that the patriarchal set up is followed by all Indian families (excepting the matrilineal societies), irrespective of their religion, yet none of the other succession laws provide for separate schemes for male and female intestates. A closer look at ss. 15 and 16 also reveals that not only is a separate scheme of succession provided in case of a female intestate, there is further divergence linked with the source of acquisition of the property and on considerations of her marital status, and factors like whether she died leaving behind children or issueless. With respect to the categorisation of heirs, in case of a married woman, her blood relations are relegated to a very inferior placement in comparison to the entire category of the heirs of her husband.

SCHEME OF SUCCESSION

The Act provides for three different sets of heirs depending upon the source of acquisition of the property of a female that is available for succession. Her property is divided into:

(i) property that a female Hindu had inherited from her parents;

(ii) property that a female Hindu had inherited from her husband or her father-in-law; or

(iii) any other property or general property.

Succession to General Property

The term 'general property' refers to the property of a woman other than that which was inherited by her from her parents, husband or her father-in-law. The term used is 'inherited' and 'general property' will include the property that she might have received from these relations through any other device, such as a gift, Will or a settlement, or even through a transfer for consideration. It will also cover properties that were her self-acquisitions or were received from any other source whatsoever, including a gift received from a friend or a relative, or property inherited from any other relation. Property that a woman inherits from her brother, in the capacity of his sister, or from her husband's brother as his brother's widow, would be her general property and would go under this section.

Section 15 provides:

General rules of succession in the case of female Hindus.— (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16 —

(a) firstly upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;

(b) secondly, upon the heirs of her husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother.

The heirs are grouped into these five categories, the former excluding the later. So long as a single heir in the prior category is present, the property will not go to the next category.

The original Hindu Succession Bill (Bill No 13) of 1954, provided for six separate categories.55 [49] The husband's turn to inherit under it, came after the children and grandchildren of the intestate and her parents were preferred to her husband's heirs. The amended bill (Bill No. 13B) of 1954, placed the husband along with the children, in the first

category, but still preferred the parents of a woman to her husband's heirs,56 [50] whose turn to inherit came only when no other heir was present.

(a) The scheme under the Hindu Succession Bill (Bill 13) of 1954 was as follows:

(i) firstly upon the children, including the children of any predeceased son;

(ii) secondly, upon the husband;

(iii) thirdly, upon the mother and father;

(iv) fourthly, upon the heirs of the husband;

(v) fifthly, upon the heirs of the mother; and

(vi) lastly, upon the heirs of the father.

(b) The scheme under the Hindu Succession Bill (Bill 13B) of 1954 was as follows:

(i) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(ii) secondly, upon the mother and the father;

(iii) thirdly, upon the heirs of the father;

(iv) fourthly, upon the heirs of the mother; and

(v) lastly, upon the heirs of the husband.

These categories followed the principles of natural love and affection and treated the blood relatives as closer to the intestate in comparison to the relations of the husband. However, the enactment of 1956 promoted the heirs of her husband to category (b) and relegated her blood relations to an inferior placement.

Clause (a)

This clause specifies seven heirs, *viz.* , the sons, daughters, including children of any predeceased son and daughter, and husband.

Son and Daughter **:** The terms 'son' and 'daughter' would include a woman's biological or adopted, legitimate or even illegitimate children, but would not include a step-son or a step-daughter. The marital status of the mother or the validity of her marriage is of no consequence. The son and daughter may have been born to an unwed mother, or adopted by a single woman, or born from different husbands, yet they would still, inherit together. Where the mother was a party to a void or voidable marriage that was subsequently annulled, her children born to her from this relationship would be legitimate and entitled to inherit from her. The son and daughter inherit together and take the property in equal shares.

For example, as shown in Fig. 12.34, a Hindu woman *W* dies leaving behind a son *S* , born to her from her first marriage, which ended in a divorce. Thereupon, she had a relationship with a married man, *H* 2 as a result of which she gave birth to a daughter *D* . Upon her death, *S* and *D* both, will inherit the property in equal shares.

Fig. 12.34

Children of Predeceased Son and Daughter **:** Where a son or a daughter dies during the lifetime of their mother, leaving behind a child, such child will be the primary heir and would inherit along with the living son or daughter of the intestate, if any. However, in order to be eligible for inheritance, such grandchildren must be the legitimate

offsprings of their parents, and born out of a valid marriage between them.57 [51] Similarly, their deceased parents should also be legitimate and born out of a valid marriage. For example, as illustrated in Fig. 12.35, a Hindu woman *W* , gets married to an already married man *H* . This marriage is void as per the provisions of the Hindu Marriage Act, 1955. Two sons S1 and S2 are born to her. During the lifetime of *W* , S2 dies, leaving behind a daughter S2 *D* .

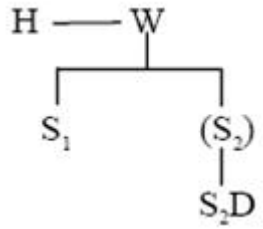


Fig. 12.35

Here, S1 alone will inherit her property, as S2 *D* will not be deemed to be related to *W* . The relationship in case of children born of a void and voidable marriage, is purely personal between the parents and children and they are not deemed to be related to any other relative of either. Similarly, where the grandchildren were born of a void or a voidable marriage annulled by the court, there again, they would not be eligible to inherit the property of the intestate. For example, as shown in Fig. 12.36, a Hindu woman *A* dies, leaving behind a son S1 and a granddaughter *D* . Her second son S2 had got married to *W* 2, but had later discovered that his consent had been obtained by fraud. He filed a petition in a court of law, for obtaining a decree of nullity. Meanwhile a daughter, *D* was born, who had been conceived before the discovery of the fraud by S2. The court declared the marriage null and void. S2 died and *D* was brought up by *A* , her grandmother. Now, *A* also dies. *D* will not be entitled to inherit the property of *A* as children born of void and voidable marriages that are annulled by the court, do not inherit the property of any relative of their parents.

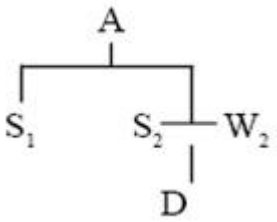
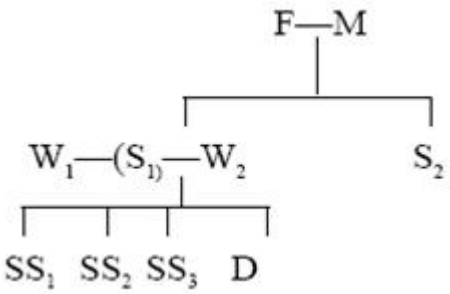


Fig. 12.36

In *Shahaji Kisan Asme v. Sitaram Kondi Asme58* [52], four children were born of the marriage of a Hindu man S1, with a second woman W2, while the first marriage was subsisting. He later died and was survived by his parents, F and M, a brother S2, both of his wives and these four children, SS1, SS2, SS3 and D. The children, mother, M and the first wife W1 inherited his property. The children could do so in light of Sec. section 16 of the Hindu Marriage Act, 1955. However when the grandmother of these children *i.e.,* M died, it was held that S2 and F, only would get the property and the children of her predeceased son would not inherit as they were illegitimate. Even Sec. 16 could not protect their inheritance rights as they are deemed to be related only to their parents and not to any of the relations of the parents.



(Fig. 12.36a)

Children of a predeceased son or daughter will also be disqualified from inheriting the property of the intestate, if before their birth, their parent (child of *A*), had ceased to be a Hindu by converting to any other religion.

***Husband* :** The term 'husband' refers to the spouse of a valid marriage, which had come to an end with the death of the intestate. It does not include a divorced husband, but would include a husband who had deserted the intestate or was deserted by her or was living apart from her under a decree of judicial separation. The husband's immoral or even criminal conduct, does not stand in his way of inheriting the property, unless he commits her murder. The husband, who had been a party to a void marriage between himself and the intestate, does not inherit from his wife, but where the marriage is voidable, he inherits even if a petition praying for a decree of nullity might be pending in the court. But if the marriage is declared a nullity, and the woman dies after such pronouncement, then he cannot inherit from her.

***Widow of Male Descendants not a Primary Heir* :** It is interesting to note that while under s. 8, widow of a predeceased son and widow of the predeceased son of predeceased son are class-I heirs of a male intestate, these relations do not inherit the property of a female intestate as her primary heirs, but can inherit under cl. (b), as heirs of her husband.

Rules for Calculation of Shares

On the death of a female intestate, her property devolves on her primary heirs, in accordance with the following rules:

(i) Each surviving son and daughter and the husband takes one share.

(ii) Where a son or daughter had predeceased the intestate, but is survived by a child, his/her branch has to be allotted a share.

(iii) Such surviving grandchild takes the share of the deceased parent and if there are more than one, they will divide the property equally among themselves.

Illustration (i)

A Hindu female *W* , dies and is survived by her husband *H* , two sons S1 and S2 and a daughter *D* [See Fig. 12.37].

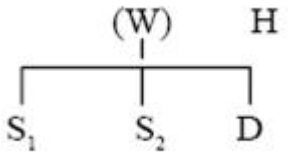


Fig. 12.37

The property will be divided into four equal parts, one each going to *H* , S1, S2 and *D* .

Illustration (ii)

A Hindu female *W* , dies and is survived by her husband *H* , a living son *S* , an unmarried daughter *D* , two children S1 and S2, of a predeceased daughter *D* 2 and an illegitimate son S3. [See Fig. 12.38].

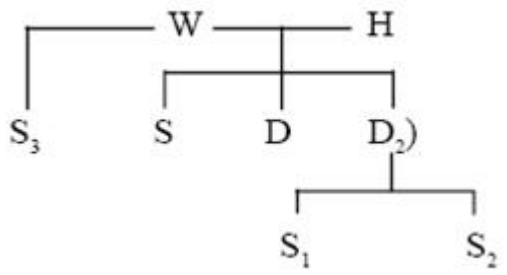


Fig. 12.38

The property will be divided into five equal parts, one each going to *H* , *S* , *D* and S3. The branch of the deceased daughter *D* 2, will be given one-fifth (1/5th) of the property, out of which S1 and S2 will take one-tenth (1/10th) each. The final shares will be as follows:

S = 1/5

(*S* 1 + *S2*) = 1/5

D = 1/5

S 1 = 1/5 1/2 = 1/10

S 3 = 1/5

S 1 = 1/5 1/2 = 1/10

H = 1/5

Clause (b): Heirs of Husband

The second category comprises the entire group of heirs of the husband of an intestate, howsoever remote they may be. This group is preferred to the intestate's own parents, whose turn to inherit comes only when none of the heirs of the husband is present.

They inherit in absence of the children, grandchildren and the husband of the deceased.59 [53]In such cases, it is presumed that the property available for succession belonged not to the deceased female, but to her husband, and the property is distributed in accordance with the rules laid down in the Act under ss. 8–13, for succession to the property of a male intestate. However, the date of the opening of the succession is not the date of the death of the husband, but that of the deceased.60 [54] Thus, we have to presume that on the death of the intestate, it was her husband who had died and the property also belonged to him. For example, a Hindu woman *W* , dies intestate, leaving behind her step-son *S* (son of the husband born to him from a previous marriage) and her brother *Br* . [See Fig. 12.39.

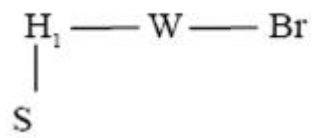


Fig. 12.39

Since the brother is an heir under cl. (iv), the step-son alone, will succeed to her property. As none of the cl. (a) heirs is present, it would be presumed that the property belonged to her husband and instead of her, it is he who has died. His son would be his primary heir and would inherit his property.

When a woman marries more than once, the expression ‘heirs of husband’ refers to the heirs of her last husband.

Heirs of the husband were placed next to the parents, in the fourth category, under the original Hindu Succession Bill (Bill 13) of 1954. From there, they were relegated to the last category in the amended Bill, but are placed even before the parents in the present Act.

Clause Impractical **:** It is noteworthy that the rules of inheritance are based on the principles of nearness in relationship and love and affection and they are no longer based on religious efficacy or spiritual benefit of the intestate. The legislative presumption that the entire group of heirs of husband is ‘near in relation’ to a childless widow, in comparison to her parents and brothers and sisters, is surprising and impractical. The entire scheme of succession and the rule of preference appear unnatural and laden heavily with a patriarchal and orthodox outlook. It is against practical reality and also the rule of reciprocity due to the following reasons:

(i) It excludes her great grandchildren, born to her from a previous marriage, from inheriting her property.

(ii) A married woman inherits from only four relations of her husband, *viz.* , the husband’s father, the paternal grandfather and his brother. Here, in order to be eligible for inheritance, she has to be a widow and she should not have remarried on the date of opening of the succession. The fourth relation of the husband from whom a married woman inherits, is his son (step-son of the woman), and she inherits as his father’s widow (class II). She inherits from no other relation of the husband, but if she dies, the entire group of ‘heirs of husband’ would be eligible to succeed to her property, even in preference to her own parents.

(iii) The provision also does not appear to be in tune with practical reality. A childless widow may not find her deceased husband’s residence a fit place to live in and may come back to her parent’s house. This fact has also been recognised by the legislature, as they had created an exception in the case of a widowed daughter in s. 23 (presently deleted), and she had a right of residence in the dwelling house of the deceased father, which she might inherit even when it was in the occupation of her brothers. In these situations also, whatever little income she may possess, it will, on her death, go to the heirs of her husband and not to her blood relatives, who are nearer in blood to her. For example, a distant relative, who is the fourth or fifth cousin of the husband, is preferred to the woman’s parents or brothers and sisters.

(iv) In none of the other succession laws in vogue in India, are the blood relatives given an inferior placement, in comparison to the relations by marriage. An issueless widow having property, is made very vulnerable by making the entire group of heirs of her husband, her preferential heirs, a provision that is a unique feature of Hindu law.

Important cases

In *Debrata Mondal v. State of West Bengal61* [55], a Hindu woman was granted a heritable lease for a period of 999 years. She married a widower H and then died issueless in 2002. She had made an express representation to the government during her lifetime that her stepsons should not get the land even after her death. Despite the representation, it was held that step sons are the heirs to Hindu women and are covered in the category of "Heirs of the husband". Similarly, the widow of a predeceased son62 [56], widow of the deceased brother of the husband63 [57] or the sister of the husband64 [58] would fit the description of heirs of the husband and would inherit the property. In *Om Prakash v. Radha Charan* 65 [59], a fifteen years old Hindu girl was thrown out of the matrimonial home after her husband died of snake bite after three months of the marriage. She took shelter with her parents, was educated by them and then took a job. Her in laws never bothered to inquire for her, let alone look after her, and there was a complete snapping of relations. She died intestate 42 years later, leaving behind huge sums in various bank accounts, besides her provident fund and a substantial property. Ironically the claim of her mother and then the brother was negatived by the Supreme Court in favour of her late husband’s brothers, *i.e.,* the same in-laws who had kicked her out at the time of her becoming a widow on the ground that as per the provision of the Hindu Succession Act, 1956, it is the heirs of the husband who have a legal right to inherit the property of an issueless married Hindu woman and her parents cannot inherit in their presence.

The case and the verdict both are unfortunate on two counts: the law itself and its implementation in the present case.

Amongst the disparate succession laws that apply to the various religious communities, except Hindus66 [60] the general rule of inheritance goes in favour of blood relations only. Secondly, no other succession law including Muslim law gives statutory preference to the in-laws over a woman’s blood relatives. All succession laws (with

limited exception) provide a uniform scheme irrespective of the sex of the intestate and in which primacy is always given to the intestate's blood relatives. For example, if a Muslim, Christian or a Parsi woman dies leaving behind property, it is her blood relatives, her mother, her father who inherit her property even in presence of her husband, or her husband's relatives. The deceased woman's husband's relatives can never be her heirs. The same rule applies for a Hindu man. When a Hindu man dies, none of his wife's relatives can ever inherit his property but if a Hindu married woman dies issueless, the property can never be taken by her parents or her blood relatives in presence of even a remote relative of the husband.

None of the inheritance laws anywhere in the world confer inheritance rights in favour of the relatives of the spouse of any female intestate, even where leaving the natal place and joining the husband and the matrimonial home by a woman is a general phenomenon all over the world and more specifically in the Asian patriarchal families irrespective of the religion. This unique feature of Hindu laws of giving preference to in-laws over blood relations of the deceased woman therefore is devoid of any rationality and logic and rather than questioning it, a confirmation of the same by the judiciary is extremely unfortunate.

The law of inheritance is not merely about entitlements but also about disentitling a person who in accordance with rules of equity, justice, good conscience and public policy should not inherit the property of the intestate in the specific set of situations. In the present case the in-laws abandoned her and abdicated from their duty of looking after her. They were morally guilty of a severe nature and thus should not have been allowed to satisfy their opportunism based greed and unjust enrichments. It was a case where the relations were snapped by the in-laws themselves only to legally claim the same when an opportunity arose to gain from her. The atrocious situation in which they first threw her out and were rewarded later bares insensitivity on part of the highest pillars of Indian judiciary.

The actual effect of the judicial approval of these laws is far reaching as it is directly linked with son-preference among Hindus. If from a son only his blood relatives can inherit but from a daughter the blood relatives would inherit only till she remains unmarried as different rules would prevail upon her marriage, it is discrimination linked to marriage of a Hindu female. Legislation/judicial stand should never reflect a gender biased scheme in light of its sincerity about curbing female foeticide. Parents of a girl (her marital status notwithstanding) should have the same security as the parents of a man. If the marital status of a Hindu man has no relevance in determining who his heirs would be, the same rule should apply to a married Hindu female. Leaving of the natal home upon marriage and joining of the matrimonial home should not result in substitution of relations. The legislature or the judiciary cannot choose or impose relatives on a married woman alone. It is determined by blood or through the ties of marriage but only as between the spouses and cannot extend to the relatives of the spouse. The proclamations of unity of spouses, and the merger of the wife into that of the husband or her becoming a member of his family are outdated concepts that can be referred to as the cherished ideals of the bygone era and even in the name of preserving Hindu society cannot and should not be enforced by the Indian judiciary in the 21st century.

Justice SB Sinha and Justice Mukundakam Sharma while dismissing the contention that her late husband's brothers were not entitled to her property, observed67 [61],

> "It is now a well-settled principle of law that sentiment or sympathy alone would not be a guiding factor in determining the rights of the parties which are otherwise clear and unambiguous under the Hindu Succession Act".

The apex court also cautioned that any other interpretation based on sympathy would be contrary to the intent of Parliament, which has bestowed equality upon married and unmarried Hindu women in the matter of property.

The apex court's caution of sympathies having no place in law is absolutely correct yet at the same time even elements of inequity and injustice can never find a foothold in law thus necessitating the application of rules of estopple. The courts can never be a medium for doing injustice and the judicial mechanism should not be used to accord rewards to the one deserving punishment. The judiciary is expected to come down heavily on those who first kick a fifteen year old girl out of the matrimonial home for no fault of hers and then lay claim over her hard earned property. The requirement here was of a judicial reprimand and a firm reminder to the greedy and unethical in-laws of their moral and legal duty to support a child, as their *locus standi* to claim her property was questionable. The courts first of all are courts of equity, justice and good conscience and the present judgment unfortunately fails to come up to expectations on all the three counts. It regrettably appears to be an unhealthy judgement that may result in shaking the confidence of an average Hindu woman, who needs to be treated as an independent individual capable to transmit her property to her blood relations rather than have her persona merged into that of her husband with the sole objective of stripping her of her true identity and a judicial imposition of superiority of her

husband's entire clan over her own blood relatives in matters of succession to her property.

Clause (c): Mother and Father

The mother and father of the female intestate are placed on an equal footing here and inherit together when none of the children, grandchildren, widower or the entire group of husband's heirs of their daughter, is present. 'Mother and father' would include the biological or adoptive parents. Where the marriage of the parents was a void marriage or a voidable marriage that was subsequently annulled by a court's decree, the parents inherit from such children. However, where the intestate was an illegitimate child, only the mother would inherit, and not the putative father. The term 'mother and father' does not include a stepmother or a stepfather,68 [62] but they would nevertheless be entitled to succeed, the former as an heir of the father and the latter, as an heir of the mother.

Clause (d): Heirs of the Father

On the failure of the heirs specified in the first three clauses, the property will go to the heirs of the father of the intestate. In such cases, it will be presumed that the property belonged to her father and it is he who had died on the date of her death. It will include her brothers and sisters, including half-blood brothers and sisters, and their descendants, grandparents and other natal relations.

Clause (e): Heirs of the Mother

Where none of the abovementioned heirs is present, the property will go to the heirs of the mother of the intestate. This category would include the uterine brother or sister of the deceased and their descendants. It would be presumed that the property belonged to the mother of the intestate and her heirs will be ascertained as if it was she who had died.

Property Inherited from the Father

Section 15(2) provides:

> Notwithstanding anything contained in sub-section (1), any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein but upon the heirs of her father.

So, the property 'inherited' by a female from her parents, in absence of her issue or their children, will revert to her father's heirs.69 [63] Two things are important here, *viz.* ,

(i) The term used by the legislature is 'inherited' and not property 'received' from the parents. 'Inherit' means to inherit as an heir.70 [64] Property received by the daughter from her mother, through a Will71 [65] or a gift,72 [66] would be treated as her general property and not one that is 'inherited'. If she inherits property from her father, sells it, and out of the sale proceeds, purchases another property, this property again would be her general property.73 [67]

(ii) Where she dies issueless, *viz.* , she is not survived by a child or the child of such child, but her husband is alive, even in the presence of the husband, the property will revert to her father's heirs.74 [68] A step-son is not an issue, and cannot inherit the property of a woman that she inherited from her parents.75 [69]

In such cases, it is presumed that upon the death of the woman, her father had died, and his heirs will be ascertained accordingly. But there appears to be an anomaly here, which has been noticed and explained by all the writers on Hindu law. If a woman inherits the property from her mother and dies issueless and her father is alive, would the property go to her father or his heirs? The unanimous opinion seems to be that the property would be taken by the father, and it is only in his absence, that it would go to his heirs. Where an unmarried woman inherits the property of her father and dies, her father's sister will succeed to the property as the father's heir.76 [70] In *Bhagat Singh v . Teja Singh* ,77 [71] two sisters inherited the property from their mother. On the death of one, who died as an issueless widow, the other sister took the property as her 'father's heir' and entered into an agreement to sell the same to a person *X* . The deceased sister's husband's brother challenged the validity of this sale and claimed the property as her heir under s. 15(1)(b). The Supreme Court held that since both the conditions were fulfilled, *viz.* , she had inherited the property from one of her parents (mother) and had died issueless, the property would revert to

her father's heirs *i.e.,* the sister in this case and the brother of her deceased husband would not be entitled to succeed. In another case from Delhi,78 [72] an unmarried female inherited the property from her mother and died leaving her brother and a widow of another brother. The brother claimed the total property on the ground that he was the sole heir. The court held that as the property is to revert to her father and will devolve as if it belonged to the father, on his heirs, the deceased brother would be the son of the father, and another brother's widow would be related to the father as the widow of a predeceased son. Thus, both of them will inherit the property as class I heirs of the father, in equal shares. In another case,79 [73] a Hindu female died leaving behind her daughter from a previous marriage and the second husband, and property that she had inherited from her father. The husband claimed half of the property, as his deceased wife's heir, but the daughter contended that since the property was inherited by her mother from the father, it would be inherited only by her issue (that is herself) and not by the husband. The lower court decreed in favour of the husband, but the Supreme Court said that property inherited by a female Hindu from 'her father or mother, in other words, the female's paternal side', in the absence of her issue, goes back to the heirs of her father and not to her husband. The Court held that since the deceased had inherited the property from her parents, her daughter alone will be entitled to succeed and the husband here, cannot inherit.

An Anomaly

The section provides that the property inherited from the father, would revert to the heirs of the father in case the female Hindu dies issueless. It also provides that where she inherits property from her mother, it would also revert to her father's heirs and not to her mother's heirs.

If the legislature wanted to conserve the property within the family from where it had come, the appropriate provision should have been that where the property was inherited from the father, it would revert to the father's heirs and where it was inherited from the mother, it would revert to her mother's heirs, as both categories are distinct from each other.

Property Inherited from Husband or Father-in-law

A woman inherits the property of her husband on his demise, as his widow. She also inherits from his father as the widow of his predeceased son, but provided she does not remarry before the date of the opening of the succession. Where she 'inherits' the property of her husband or father-in-law and dies issueless, the property reverts to her husband's heirs from whom or from whose father, she had inherited the property. Section 15(2) (b) provides:

> Any property inherited by a female Hindu from her husband or from her father-in-law, shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

Thus the property so inherited, will go to the husband's heirs. If she remarried after inheriting the property from her deceased husband and died leaving behind issues from her second husband, she has not died issueless and her children and second husband will succeed to the property. But if she dies issueless, the second husband will not get anything and the property will revert to the first husband's heirs. Similarly, where a woman inherited property from her second husband and died leaving behind a son from the first husband, the son would take the property.80 [74] Similarly, where a Hindu widow inherited a limited estate from her husband and died after 1956, when it had matured into an absolute estate, it was held that the sister of her deceased husband would take the property.81 [75]

Analysing the *Decision of Dhanistha Kalita v. Ramakanta Kalita8276* AIR 2003 Gau 92 [LNIND 2002 GAU 243].

In a recent judgment, the Gauhati High Court has ruled that for the purposes of inheriting the property of the mother, which was inherited by her from her deceased husband, 'son and daughter' would mean the son and daughter of that husband from whom or from whose father, she had inherited the property. Here, a woman died leaving behind a son and a daughter, born to her from the husband whose property she had inherited. She also had a son from a previous marriage. The court held that the son born of the previous marriage was not entitled to get the property and will be excluded from inheritance, as it was the property that was inherited by the woman from her second husband and he was not the progeny of that husband. The court observed:

> The object of section 15(2) is to ensure that the property left by a Hindu female, does not lose the real source from where the deceased female had inherited the propertyif such property is allowed to be drifted away from the source through which

the deceased female has actually inherited the property, the object of section 15 (2) would be defeated, *i.e.,* if such property is allowed to be inherited by a son or a daughter whom the female had begotten not from the husband whose property she inherits, but from some other husband (whose property it was not), then section 15(2) (b) will become meaningless and redundant.

It must be remembered that the expression that the legislature has used in s. 15(2)(b) is, in absence of 'any son or daughter of the deceased'. The son and daughter of the deceased mentioned in the section are without any qualification and the words 'any son or daughter' means any son or daughter and not the son and daughter of a particular husband. It would include all kinds of sons and daughters, whether legitimate, illegitimate, from one husband or from another husband. These are the only relations that are described with reference to her and not with reference to her father or husband or mother. Her children would include all of her children. All children have equal rights over the property of their mother and it is only in case of their absence, that the question of the source of the property becomes relevant. The court is creating a contradiction between cl. (a) and (b) of s. 15(2). Where the property that a female inherits from the parents, goes to her children, it also drifts away from the source from where it came. A distinction like this and an attempt to conserve the property in the family from where it came, would make a woman incapable of transmitting the property to her heirs and would create unnecessary confusion, frustrating the very object of making her an absolute owner of the property.

Preventing the Property from Going by Doctrine of Escheat

Property inherited by a female from her husband or father-in-law, reverts to the husband's heirs in the absence of her issue and does not go to any other heir. Where the property is to revert to the heirs of the husband, but no such heir is present, rather an heir specified in the general category is present, should the property go to the government under the application of doctrine of escheat, *i.e.,* failure of heirs, or should the property go to any other heir of the deceased woman? The apex court has held that in such cases the property would be treated as the general property. Here a Hindu widow died issueless and her only surviving relative was her brother's grandson.83 [77] The property available for succession was inherited by her, from her deceased husband. As no heir of the husband was present, the government claimed the property on the ground that the grandson of the brother of the deceased was not covered under the expression 'heirs of her husband', and there being no other heir of her husband present, there was a complete failure of the heirs. The Supreme Court held that the object behind s. 15(2) was not to eliminate the other heirs specified in s. 15(1), but to give an order of preference. Since there was no other heir present, the brother's grandson was allowed to succeed to the property. Similarly where a Hindu died leaving behind property that she had inherited from her husband, but no heir of the husband it was held that the doctrine of escheat would not apply and her brother would inherit the property84 [78].

CONSTITUTIONAL VALIDITY OF SECTION 15

In a case before the Bombay High Court85 [79] the constitutional validity of s. 15(2) was challenged on the ground of hostile discrimination on grounds of sex. The court ruled in favour of the impugned legislation and held that the rule of reversion, *i.e.,* property reverting to the family from where it was inherited, was in furtherance of the clear objective of continuing the family unity. The petition was rejected and the court held that it is not discriminatory. As aforesaid, it is only under Hindu law that not only separate schemes have been provided for male and female intestates, but also different sets of heirs and rules have been specified, linked with the source of acquisition of the property. The argument that family unity can be protected by providing different sets of heirs, appears strange. Are communities that are governed by a single scheme of succession, unable to protect family unity? This whole scheme of s. 15 and the nomenclature or description of heirs as heirs of her husband, of her father or of her mother, shows that the legislature does not treat a woman as an independent individual, and does not define her relationship with her heirs, in terms of her own blood, but ascertained them with respect to the heads of the family in which she was a member. If she received something from a family, 'let it not go to another family' in the absence of her issue, seems to be the dominant purpose behind providing the exception in s. 15(2). Her brother is not her heir in the capacity of her brother, but can succeed as her father's heir. This whole exercise is meaningless and there is no reason why it should not be scrapped and a uniform scheme governing all Hindu intestates, irrespective of their sex, framed.

SPECIAL RULES FOR FEMALES GOVERNED BY MARUMAKKATTAYAM AND ALIYASANTANA LAWS

Communities that were earlier adhering to the matrilineal systems, are also subject to the provisions of this Act, which is largely based on the Mitakshara patriarchal pattern. However, the Act itself provides for a deviation in the case of female intestates who were earlier governed by the Marumakkattayam and Aliyasantana laws. The heirs of

a female intestate here, are similar to the ones provided under the general scheme, but the order of preference isdifferent.

The property of a female is categorised into two, instead of three categories and the classification is as follows:

(i) general property of a woman; and

(ii) property inherited from her husband and father-in-law.

For succession to the general property, the heirs are grouped into the following classes:

(i) sons and daughters (including the children of any predeceased son or daughter); and the mother

(ii) father and husband;

(iii) heirs of mother;

(iv) heirs of father; and

(v) heirs of husband.

Here, in keeping with the principles of the matrilineal systems, the mother is preferred to both the father, as well as the husband. Similarly, the heirs of the mother are preferred to both, the heirs of the father and the heirs of the husband.

V.DEVOLUTION OF INTEREST IN MITAKSHARA COPARCENARY PROPERTY

INTRODUCTION

The Hindu Succession Act, 1956, besides containing rules of inheritance for the separate property of an intestate, also contains provisions affecting the devolution of coparcenary property by survivorship and testamentary succession.

The Act has retained the concept of the joint family system and recognises both separate and coparcenary property. It is pertinent to note that the Hindu Code Bill, 1948, had abolished the Hindu Joint family and the pious obligations of the son, and had provided for a uniform scheme of inheritance of the property held by a Hindu male, but stiff resistance from traditionalists enabled its revival. Besides others, the two main arguments in favour of its abolition were that it has outlived its usefulness in the modern, changing times and its continuation would only perpetuate gender inequalities, but those in favour of its retention described it as beneficial to each and every member of the family, as it accorded an insurance against unemployment and provided old age security. Viewed as an integral part of Hindu religion, its protagonists feared that its abolition would lead to disintegration of the family and would give rise to unpleasantness and endless litigations. The members of the Report of the Hindu Law Committee, 1944 had observed: 86 [80]

> My conclusion on the evidence on this point is that the Mitakshara doctrine of the sons taking a share in ancestral property on the birth, equal to their father, should be retained in Mitakshara jurisdictions and that the doctrine of the survivorship in coparcenary property should remain as it is. The evidence on this head, both oral and documentary, is almost one-sided and is in favour of no change in the existing rule.

Even at the time of the introduction of the first Hindu Succession Bill, 1954,87 [81] there was no provision recommending the retention of Mitakshara coparcenary. Another aspect in its application by this time was that the devolution of the undivided share in a Mitakshara coparcenary had already been modified by a spate of legislations. All these legislations passed by the British Indian Parliament, were women friendly, and as a natural corollary to that, the Hindu Succession Act, 1956, was anticipated to usher in gender parity, rather than reverting to a system of son-preference and perpetuation of patriarchal ideologies.

The concept of notional partition was therefore coined and adopted as a compromise between two extreme positions, *i.e.,* a total abolition of the joint family and coparcenary system and its retention in the form as was

applicable at that time. It enabled the legislature to allow the continuation of the Mitakshara coparcenary and at the same time, it enabled the near female and cognate relations to participate in the ownership of the coparcenary property, in certain contingencies. The amendment of 2005 has made further changes into the devolution of coparcenary property.

DEVOLUTION OF INTEREST IN COPARCENARY PROPERTY

Law as it stood prior to the Hindu Succession (Amendment) Act, 2005

The Hindu Succession Act, 1956, expressly retained the concept of Mitakshara coparcenary and a right by birth in favour of the son, son of a son and son of a son of a son. The traditional concept of the joint family, and preferential rights to the son, remained intact, rather they got a statutory stamp for continued application. The first part of s. 6, reads as under: 88 [82]

> When a male Hindu dies after the commencement of this Act, having at the time of his death, an interest in a Mitakshara coparcenary, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.

The Act expressly recognised application of the doctrine of survivorship in case a Hindu male dies as an undivided member of a Mitakshara coparcenary and it was this statutory recognition of coparcenary that made the study of the whole of the classical Hindu law of joint family, joint family property, its alienation, partition and of the theory of pious obligation, relevant.

SURVIVORSHIP REPLACED BY TESTAMENTARY AND INTESTATE SUCCESSION

The abovementioned rule is general in application. While recognising the application of the doctrine of survivorship, the Act simply mentions that the undivided interest of the coparcener in a Mitakshara coparcenary, shall devolve by survivorship, upon the surviving members of the coparcenary. It does not refer to the presence or absence of other members in the joint family. ‘Members of coparcenary’, in relation to the deceased, will be only the male relations, under the traditional concept, and no female can be included in that category. However, the proviso to this section makes a fundamental departure in the application of this doctrine of survivorship. It says: 89 [83]

> *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.

The above proviso has four parts:

(i) A Hindu male dies as an undivided member of a Mitakshara coparcenary.

(ii) He had an interest in the undivided coparcenary property.

(iii) The deceased leaves behind him, a class-I female heir, or a class-I male heir claiming through a female.

(iv) His undivided interest in the Mitakshara coparcenary will devolve by testamentary or intestate succession and not by the doctrine of survivorship.90 [84]

NOTIONAL PARTITION

The provision alters the devolution of the undivided interest by an automatic devolution by survivorship, to a conscious testamentary devolution or by inheritance law. However, the question arises, that if a person dies as an undivided member of a coparcenary, what will be his interest which would be available for succession? Explanation I, appended to the proviso, provides an answer to that. It says:

> 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 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.

The proviso incorporates the concept of a legal or fictional partition. The undivided interest that the deceased has left behind will be divided by effecting a partition. This partition had not actually taken place. He had died as an undivided member, but the legal presumption is that he died after asking for partition, *viz.* , a partition had taken place in the joint family, at his instance. Law will presume that before his death, he had demanded it and therefore, a severance of status, as far as the deceased was concerned, had taken place. The fact that this coparcener might not be competent to claim partition is irrelevant. It must be remembered that every major coparcener, who is of sound mind, is competent to demand a partition at his pleasure. It is a minor coparcener who cannot demand a partition from the Karta himself, but has to take the help of a next friend and file a suit for partition in a court of law. Section 6 clearly says that the presumption, that before the death of a coparcener, a partition had taken place, will be applicable in the case of all coparceners, irrespective of whether they were entitled to ask for a partition or not. This presumption will also be applicable in the case of minor coparceners.

Heirs, Presence of whom will Alter the Devolution

For the application of notional partition and for defeating the doctrine of survivorship, the first and the foremost condition is that the deceased has left behind him, either a class-I female heir or a male class-I heir claiming through a female heir. In the class-I category, there were a total of twelve heirs of which eight were females before 2005. The presence of any of these eight female heirs will defeat the application of the doctrine of survivorship. The ninth heir, whose presence will also have the effect of application of a fictional partition, is a male claiming through a female. This heir is the son of a predeceased daughter. The nine heirs, the presence of whom will change the mode of devolution of the undivided interest in the Mitakshara coparcenary, from survivorship to succession preceded by a notional partition, are: the mother, widow, daughter, son of a predeceased daughter, daughter of a predeceased daughter, daughter of a predeceased son, widow of a predeceased son, widow of a predeceased son of a predeceased son and daughter of a predeceased son of a predeceased son. It must be noted here that the only three heirs in the class-I category, who have been left out, are the coparceners themselves, *viz.* , the son, son of a predeceased son and the son of a predeceased son of a pre deceased son. The reason why their presence will not change the devolution of the undivided coparcenary interest of the deceased from survivorship to succession is that they themselves are coparceners and will take the interest by survivorship. Their interest is well protected.

The presence of disqualified class-I heirs will not result in the presumption of a notional partition.

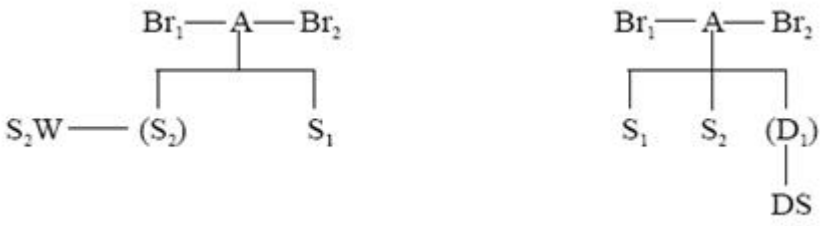


Fig. 12.40

For example, as illustrated in Fig. 12.40, *A* was, at the time of his death, an undivided member of a Mitakshara coparcenary. He is survived by his two brothers *Br* 1 and *Br* 2, one son S1, and a widow of his predeceased son, S2 *W* , who remarried a day before *A* died. It is inappropriate to call her a widow of a predeceased son, as she is disqualified and no longer a class-I heir. The interest of *A* will devolve by survivorship, on the surviving coparceners. Similarly, in another example, *A* dies and is survived by his two brothers *Br* 1 and *Br* 2, two sons S1 and S2, and a son of a predeceased daughter, *DS* . The daughter had converted to Christianity and *DS* was born to her after such conversion. He is a disqualified heir. His presence therefore, would not have any effect on the devolution of the property and it will pass to the surviving coparceners. Again, where a son has separated from his father by seeking a partition and has taken his share during the lifetime of the father, but has subsequently passed away, the presence of his widow and his daughter at the time of the death of the father will not alter the devolution, and the property will go by survivorship to the remaining coparceners.

Scope of Notional Partition

This legal presumption of a deemed partition prior to the death of an undivided coparcener, is also called a notional partition, a legal partition or a fictional partition. As has been earlier explained, introduction of the concept of notional partition was in the nature of a compromise by the legislature, when faced with two extreme positions, *viz.* ,

the abolition of joint family and coparcenary and its retention in the traditional form. The basic purpose of the inclusion of the concept of notional partition in the Act, was to give a better deal to the near female heirs and cognates of the intestate, and to prevent the passing of the interest in the coparcenary property to the coparceners to the exclusion of such female and cognate relations. In order to find out the exact entitlement of the survivors of a deceased who died as an undivided member, we have to proceed in two stages:

(a) first, to calculate his interest in the coparcenary property, we have to effect a partition in accordance with the rules of Hindu Law; and

(b) then, this interest so calculated, would constitute his separate property. The law of inheritance will apply to this share and it will be distributed among the class-I heirs (in the absence of a Will).

The effecting of a notional partition is primarily to find out the exact share of the deceased, which will then go by intestate or testamentary succession, as the case may be. For example, in Fig. 12.41, *A* , a Hindu male, who was an undivided member of a Mitakshara coparcenary consisting of his father *F* and brother *Br* , dies leaving behind a daughter *D* . Since the daughter is a class-I heir we have to presume that before his death he had asked for a partition. His interest in the coparcenary property will be demarcated and such interest will go by intestate succession.

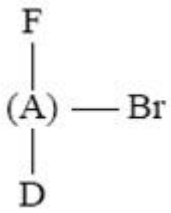


Fig. 12.41

Stage(i): Effect a partition between *F* , *A* and *Br* . We have to presume that *A* was alive at the time of this partition. The share of A will be one-third of the total property.

Stage(ii): This one-third property will now devolve by intestate succession. Since the property in the first instance goes to class-I heirs, *D* will take the total property (*i.e.* one-third) as the father and the brother are class-II heirs.

A comparison with the pre-1956 position will show that had it not been for notional partition, the daughter would not have received any share out of the property, as under the doctrine of survivorship, the undivided interest would have been taken by the surviving coparceners, *viz.* , the father and the brother and she would only have the right to claim maintenance.

Extent of Notional Partition

The concept of notional partition has been coined by the legislature primarily to ascertain the share of the deceased in the coparcenary property that would devolve by testamentary or intestate succession. The legislature does not use the term notional partition anywhere in the Act, and the terms, *viz.* , 'notional', 'fictional' or 'presumptive' partition, have been used by the judiciary and the jurists, to explain it. However, it leaves open some vital questions, *viz.* , what exactly is the scope and what are the consequences of notional partition? Are they the same as those of a real partition? These questions become very important from the point of view of a woman who is entitled to get a share at the time of the partition. To put it differently, is the purpose of effecting a notional partition only to ascertain the share of the deceased coparcener and to stop at that or would it mean that a partition had in fact taken place, and all those, including the females who would have been entitled to get a share if a real partition had taken place would also be allotted a share? It must be remembered that except under the Dravida or Madras school, all the sub-schools of Mitakshara give certain categories of females a share, if and when an actual partition takes place, *i.e.,* the father's wife is entitled to get a share that is equal to the share of the son if a partition takes place between the father and the son. For example, a Hindu family consists of the father *F* , his wife *W* and his son *S* . The son dies. Now, according to s. 6, even though the son was an undivided member of the Mitakshara coparcenary, his interest will go not by survivorship to the father, but will go by inheritance, as he has left behind a classi female heir surviving him, *viz.* , the mother. To calculate his interest in the coparcenary property at the time of his death, we will

presume that a partition had taken place before his death. Now, two approaches are possible:

Narrow Approach

The presumption that a partition had taken place is for a specific purpose only, and that is to find out the interest of the deceased coparcener, which now is available for succession. Once that is calculated there is no need to go any further, *i.e.,* there is no need to give shares to others in the family, whether male or female. The basis for this approach is that in accordance with the general rules of partition, if a partition takes place at the instance of one member of the family, there is no presumption that the rest of the members are also divided, and if the rest of the family members are together, as part of the joint family, there is no need to demarcate the share of anyone else, let alone give it to them.91 [85]

Wider Approach

The wider approach gives prominence to the intention of the legislature in incorporating s. 6 in the statute book. According to the wider approach, when the share of the deceased is ascertained, the consequences of a real partition follow, and if there are female members who would have been entitled to get a share if a real partition had taken place, they must be given such a share, irrespective of whether the primary purpose of presuming this partition was only to find the share of the deceased coparcener. As the intention of the legislature was to give a fair deal to women, the adoption of the wider approach will be in keeping with this intention.92 [86]

Taking the above example of the father, wife and son, if the son dies and calculation of his interest is done by adopting the narrow approach, the division will be as follows:

If a partition had taken place before the death of the son, except in the Dravida School where no share is given to females, in all other sub-schools, the property would have been divided into three parts, as the father's wife is entitled to get a share. But no share will be given to her, as the purpose of effecting the partition is to demarcate the share of the deceased only. The deceased's share will be one-third of the property, while the rest of the property (two-third) will be taken by the father. This one-third share of the son will be taken by the mother on inheritance and the final shares will be:

$$F = 2/3\text{rd}$$

$$W = 1/3\text{rd}$$

As the father is now the sole surviving coparcener, there is no hope of any partition and the share of his wife, which could have been allotted to her in case of a real partition, will be taken by him. Hence, adopting the narrow approach will be disadvantageous to the interests of those females who are entitled to get a share at the time of a partition but are not given it.

If the wider approach is taken, then at the time of presuming a partition not only is the share of the deceased demarcated, but the females are also given a share that is due to them in case of a real partition. Therefore, at the time of calculating the interest of the deceased, the father will take one-third, his wife will take another one-third, and the share of the deceased son will be one-third. This share of the son will go by inheritance to the mother, and the final shares will be:

$$F = 1/3$$

$$W = 1/3 + 1/3 = 2/3$$

The above is exactly the opposite of what would have happened if the narrow approach had been adopted.

To find the intention of the legislature, let us look at Explanationi again which says:

The interest of a Hindu Mitakshara coparcener 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.

At a glance, it is to be noted that the purpose of the explanation is to ascertain the interest of the deceased coparcener, and for this two deviations are contemplated by the legislature:

(a) there was no partition but it is to be presumed that he died after asking for partition, and

(b) he might not have been capable to ask for partition, but a partition has to be effected as if he was entitled to do so and in fact, had claimed the partition.

It is not merely a method of calculation of his share, but it indicates an ascertainment of his share after partition, which suggests that the consequences of a real partition cannot be avoided.

Judicial Approach

The controversy as to which is the proper approach to be followed in case of effecting a notional partition started soon after the promulgation of the Act itself. In *Srirambai v . Kalgonda Bhimgonda* ,93 [87]where both s. 6 and s. 4 of the Act were discussed, the court held that the reason why certain females were given a share at the time of partition and why a provision for marriage expenses was made for the daughters, was their inability to succeed to the property by inheritance, and now, under the Act, as they are made primary heirs and take a share by intestate succession, the earlier rule of granting them a share at the time of partition has been abrogated. It was an erroneous judgment and was later overruled by the same judge, Patilj, in *Rangu Bai v . Laxman* .94 [88] In this case, the family consisted of the father, his wife and an adopted son, and before his death, the father and this son constituted the coparcenary. On his death, a dispute arose with respect to the share that the widow would be entitled to. She claimed a half share, *i.e.,* one-third of the property, at the time of effecting a notional partition, and another one-sixth out of the one-third of the father, divided equally between her and the adopted son. The son contended that, as the purpose of the notional partition was to demarcate the share of the deceased only and not to allocate the share to each and every person, the share of the deceased father would be one-third, while the rest of the property (two-thirds) would remain undivided and with him. Out of the one-third share of the father, his widow will take one-sixth, the other one-sixth going to him. He would take five-sixths of the property while the widow will get only one-sixth. The court rejected the contention of the son and held that at the time of effecting a partition, the widow has to be given a share, as that is her entitlement. Not only that, at the time of this partition, a proper provision for the maintenance and marriage expenses of the daughters, has also to be made, and then only the share of the deceased is to be distributed among the class-I heirs. This interpretation according to the court was in tune with the intention of the legislature and in conformity with the purpose for which s. 6 was introduced in the Act. The court observed:

> The intention of the legislature is to be found from the words used, giving them their ordinary meaning. The explanation enacts in effect, that there shall be deemed to have been a partition before his death and such property as would have come to his share would be divisible amongst his heirs. It introduced a legal fiction of a partition before his death, since without such fictional partition, his share cannot be possibly determined.

The court held that the object of the provision was to quantify the share of the deceased coparcener and the point of time at which such quantification has to be made is a moment before his death when there were only two coparceners, *viz.* , the father and the son. When such a partition takes place, even though notionally, a female, who under the Shastric Hindu Law is entitled to a share, will be entitled to claim such share, not by reasons of the provisions of the Act, but under pure Hindu Law, and there was nothing in the provisions of the Act that denied her this right. This issue was again raised in *Sushila Bai v . Narayan* Rao,95 [89] where the family consisted of the father *F* , his wife *W* , his son *S* and his wife *SW* and a daughter *D* [see Fig. 12.42]. The son died in 1957, leaving behind his widow and a year later his mother also died.

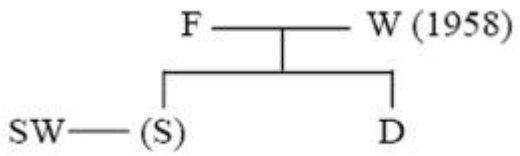


Fig. 12.42

The daughter Sushila Bai, filed a suit against her father (Narayan Rao), claiming a one-fourth share in the property. The share was calculated by adopting the wider approach, *viz.* , on the death of the son, as he had left behind his widow and mother, *i.e.,* classI female heirs, it will be presumed that before his death a partition had been effected at

his instance. In such a partition, the property would have been divided into three equal parts, one each going to the father, the mother and the son. Out of the one-third share of the son, his widow and mother would have taken one-sixth each. So the mother's share would be (one-sixth plus one-third) half of the property. This half, on her death, would be distributed between her husband and her daughter, and the daughter's share would be (one-half of one-half) one-fourth, the other one-fourth going to the father. During the pendency of the litigation, the father died, bequeathing his share to a charitable society.

The trial court proceeded on the assumption that the share of the deceased son was half at the time of the notional partition, the mother getting nothing, and therefore the mother would have received one-fourth of the property by way of inheritance from her son, and on her death, this one-fourth will be divided into two parts, one-eighth going to the daughter and one-eighth going to the father.

The father had contended that at the time of the notional partition, the son would have received one-third of the property and the rest two-thirds would have remained undivided with him, as the mother was not entitled to get a share at the time of partition. The son's one-third share would go to his widow and the mother in equal shares, the mother thus taking one-sixth of the total property. On her death, the father would take one-twelfth and the daughter's share would also have been one-twelfth.

The court here created a distinction between the situations where there were to begin with two coparceners or more than two coparceners. In case there were more than two coparceners, on the death of one coparcener, at least two other coparceners will be left with a possibility that a partition may take place between the two in future and in such a partition, the females may get a share. But if, to begin with, only two coparceners are present, and one of them dies, the other will be called a sole-surviving coparcener. There cannot be a partition when there is only one coparcener and if on the death of one out of the two coparceners, the females are not given their share through a notional partition, they will not get their share at all. The court said that in cases where only two coparceners are present and on the death of one, a notional partition is effected, a share must be given to the female who is so entitled to get it. Here, only two coparceners were present, *viz.* , the father and the son, and the son had died. Since the father had now become the sole surviving coparcener, there was no possibility of a partition taking place in the future, and if the mother had not been granted her share at the time of the notional partition, there was no chance that she would ever get it. The court held that the mother should have been allotted a share at the time of the notional partition, and after inheritance her share would have been equal to half of the property. In that case, on her death, the daughter's share would have been one-fourth. The court here, adopted the wider approach, but confined its application to only those cases where out of the two, one coparcener dies leaving behind a classi female heir and this approach, according to the court, would not apply to a situation where there were more than two coparceners.

The matter went to the Apex Court in *Gurupad v . Hirabai* .96 [90] The joint family consisted of the father, his wife, two sons and three daughters [see Fig. 12.43].

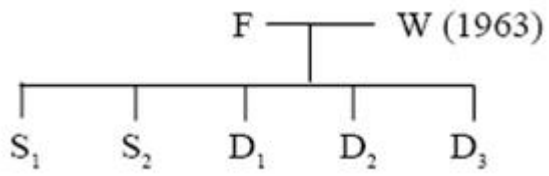


Fig. 12.43

The father died in 1960 as an undivided member of Mitakshara coparcenary and three years later his wife (Hirabai) filed a suit for a partition and separate possession of her seven-twenty fourth share in the property. She claimed a one-fourth share at the time of partition and a one-twenty fourth share by inheritance. On the other hand, the sons contended that, the mother was not entitled to get a share at the time of effecting the notional partition and therefore all that she should get is a one-twenty fourth share.

The honourable judge, YV Chandrachud CJ (as he then was), adopted the wider approach and observed that s. 6 contains a formula for determining the share of the deceased, creating a fiction of a notional partition. He said that one must therefore imagine a state of affairs in which a little prior to the (father's) death, a partition of the coparcenary property was effected between him and the other members of the family, and the wife, though not entitled to demand a partition, was nevertheless entitled to get a share if the partition took place between her

husband and her sons. So in the first partition, she will get one-fourth of the property in her own right and out of the one-fourth share of the husband, she will get a one-twenty fourth share by inheritance, a total of a seven-twenty fourth share. Dismissing the contention of the sons, the court said that ignoring her right to get a share at the time of partition would mean that:

> One unwittingly permits one's imagination to boggle under the oppression of the reality that there was in fact no partition between the plaintiff's husband and his sons. The fiction created by Explanation I has to be given its due and full effect.

He quoted the following passage by Lord Asquith: 97 [91]

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

In relation to the interpretation of s. 6, the court said that what is required to be assumed is that a partition had in fact taken place between the deceased and the coparceners immediately before his death. That assumption once made is irrevocable. The assumption which the statute requires to be made, that a partition had in fact taken place, must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage, for the limited purpose of ascertaining the share of the deceased and then to ignore it while calculating the quantum of the share of the heirs, is truly to permit one's imagination to boggle. All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled, just as a share allotted to a coparcener cannot generally be recalled. Thus, the heir will get her share at the time of the notional partition and will also take a share at the time of inheritance, if entitled.

The court noted that all the reforms that had taken place earlier were with a view to improving the property rights of women and a narrow approach would mean taking a retrograde step. It would put back the clock of social reform that enabled Hindu women to acquire an equal status with men. Even assuming that two approaches are possible, while interpreting a particular provision that interpretation should be preferred which furthers the intention of the legislature and remedies the injustice from which Hindu women have suffered over the years.

The above decision of the court, taking the wider approach, has been reaffirmed by the Supreme Court in *State of Maharashtra v . Narayan Rao Sham Rao Deshmukh* ,98 [92] but the Court said that even after effecting the notional partition, there is no presumption that all family members also divide and therefore, the coparcenary shall continue.

***Analysis of Kanna Gounder's case* :** On the death of a coparcener, a notional partition is effected, if at the time of his death, he is survived by a class-I female heir or the son of a predeceased daughter. A female is to be given her share if she was entitled to get it at the time of a real partition, but this does not mean a disruption of the entire family and the coparcenary continues. However, continuation of the coparcenary does not mean that the share allotted to the widow would maintain the character of coparcenary property. It will be the separate property of the widow over which she would have full powers of disposal. In a recent decision of the Madras High Court in *C . Kanna Gounder and Sagadeva Gounder v . Arjuna Gounder* ,99 [93] a coparcenary consisted of three brothers, one of whom died issueless, leaving behind a widow. The widow executed a gift of a one-third share of the property in favour of her husband's nephews. The court held that the gift was invalid, as coparcenary property could not be gifted. It appears to be an incorrect judgment, the reason being that the moment the coparcener here, died, leaving behind his widow, the presumption of a notional partition would apply, and his one-third share, calculated after this partition will go by intestate succession to his widow. As his widow is the only class-I heir present, she will take the property as an absolute owner and the gift executed by her would be perfectly valid.

Position in South India

Females are to be given a share at the time of notional partition only when they are otherwise entitled to receive it. For example, in South India, including Andhra Pradesh, females do not receive a share and consequently will not

be given a share. Section 6 does not enlarge their entitlement to get a share, but only changes the mode of devolution of the interest of the deceased in their presence.1 [94] In states where females do not receive a share at the time of partition they will not be awarded any share.

It is interesting to note that the entire Dravida zone where females were not given any share at the time of partition has made revolutionary changes in the law relating to joint family and coparcenary property. Daughters have been made coparceners in Andhra Pradesh, Karnataka and Tamil Nadu and in Kerala the concept of joint family itself has been abolished.

The position can be summed up as follows:

Where a coparcener dies as an undivided member of a Mitakshara coparcenary, leaving behind a class-I female heir or the son of his predeceased daughter, it will be presumed that before his death a partition had been effected in the family and his share was demarcated. While calculating his share, the female members who would have been entitled to get their share if an actual partition had taken place would receive their share, since the consequences of a notional partition and those of an actual partition are the same. The share of the deceased coparcener will go by intestate or testamentary succession. The death of one coparcener would not mean a disruption of the entire joint family as the other coparceners can maintain a joint status.

Illustration

A , a Hindu male, dies as an undivided member of a Mitakshara coparcenary, leaving behind his father *F* , a widow *W* , a son *S* and a daughter *D* . [See Fig. 12.44]

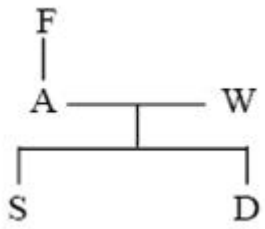


Fig. 12.44

To calculate how his interest in the coparcenary will devolve, the first thing to see is whether he has left behind him, a class-I female heir or a class-I male heir claming through a female. In this case, the widow and the daughter are such class-I heirs. Then we have to presume that before his death, a partition had been effected. The partition will be effected in two stages:

(a) At the first stage, a partition will be effected between *F* and *A* and each of them will take one-half of the property. The half that is taken by *A* is not his separate property, but he takes it as the Karta of his family comprising his wife and the children, *viz.* , the coparcenary consisting of him and his son.

(b) The second partition will be between *A* and his son. If the family follows the Dravida School, in this partition, the widow will not get a share at the time of partition and the property will be partitioned between *A* and his son only, each taking one-fourth of the property. This one-fourth is the separate property of *A* , which will go by inheritance to his classi heirs, in this case, the widow, the son and the daughter. Thus, each will take one-twelfth of the property.

(c) Where the family is adhering to a school where females get a share at the time of partition, then the second partition will be between *A* and the son, but *A* 's wife, *i.e., W* , will be entitled to get a share equal to that of the son. This half share taken by *A* , as the Karta of his family, will be divided among *A* , *W* and *S* , each taking a one-sixth share. This one-sixth share is the separate property of *A* and would now devolve by succession, on the class-I heirs. *W* , *S* and *D* will take one-eighteenth each.

The final shares will be as follows:

$$F = 1/2$$

$$W = 1/6 + 1/18$$

S = 1/6 + 1/18

D = 1/18.

If the Dravida School is followed the shares will be as follows:

F = 1/2

S = 1/4 + 1/12

W = 1/12

D = 1/12

State Amendments

Section 6 has been amended in four states, Andhra Pradesh in 1985,2 [95] Tamil Nadu in 1989,3 [96] Maharashtra in 19944 [97] and Karnataka in 1994.5 [98] In these states, daughters in a joint family, who were unmarried on the date of the passing of the Act, were made coparceners in the same manner as the sons, which means that they would be entitled to get shares if a partition of the coparcenary property takes place, in the same manner as the sons. The amendments also provide that if at the time of partition, such a daughter is dead, but has left behind a child, the share that would have been allotted to the daughter would be given to the child.6 [99] If there is no child, but there is a grandchild of a predeceased daughter, the share that would have gone to the daughter, would be given to the grandchild of the predeceased daughter.7 [100]

Rules for Calculation of Shares in Mitakshara Coparcenary Property after Effecting a Notional Partition, where a Coparcener Dies leaving behind an Undivided Interest in the Mitakshara Coparcenary

The following factors need to be remembered while effecting a notional partition:

(a) The coparcener dies as an undivided member in a Mitakshara coparcenary.

(b) His death occurs after 1956 *i.e.,* after the passing of the Hindu Succession Act, 1956.

(c) He is survived by a class-I female heir or the son of a predeceased daughter.

(d) The share of the deceased is to be calculated after effecting a partition.

(e) Such share is to be distributed in accordance with the provisions of intestate succession under this Act.

(f) The states where daughters have been introduced as coparceners, they have to be allotted a share at the time of effecting a notional partition.

Illustration

A dies in 1960 as an undivided member of a Mitakshara coparcenary having an interest in the coparcenary property. He is survived by his parents, *F* and *M* and his two children, son *S* and daughter *D* [see Fig. 12.45].

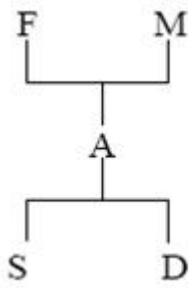


Fig. 12.45

To calculate his share we have to first effect a notional partition. The rules for all the sub-Schools of Mitakshara are different from those adhering to the Dravida School where the females do not get a share at the time of partition.

Dravida School **:** Here, we will first have to effect a partition among *F* and *A* , so that each of them will take half of the property. Since this half share of *A* is not his separate property, but includes the share of his male issue also, this half will be divided into two parts. *S* will take one-fourth and *A* 's share, which will go by intestate succession, will also be one-fourth. This one-fourth will be divided among *A* 's classi heirs, *viz.* , mother, son and daughter who will take one-twelfth each. Thus,

After first partition: *F* , *A* = 1/2 each

After second partition: *A* , *S* = 1/2 1/2 = 1/4 each

Share of *A* = 1/4

After devolution of property by inheritance:

M , *S* , *D* = 1/4 1/3 = 1/12 each

The final shares will be as follows:

F = 1/2

M = 1/12

S = 1/4 + 1/12

= 1/3

D = 1/12

General Rule (for other Sub-schools) **:** First, we will effect a partition between *F* and *A* , but here the mother also gets a share. So each of them will take a one-third share. The second partition will be between *A* and *S* with each taking a (1/3 1/2) one-sixth share. This one-third will now be divided among the class-I heirs, *viz.* , the mother, son and daughter who will each take a (1/6 1/3) one-eighteenth share. Thus,

After first partition: *F* , *M* , *A* = 1/3rd each

After second partition: *A* , *S* = 1/3 1/2 = 1/6th each

Share of *A* : 1/6

After third division (intestate succession) of 1/6th of *A* :

M , *D* , *S* = 1/6 1/3 = 1/18th each

Therefore, the final shares will be as follows:

F = 1/3

M = 1/3 + 1/18

S = 1/6 + 1/18

D = 1/18

When Daughter is also a Coparcener **:** In states where the Act has been amended, the daughter also gets a share, provided the death has occurred after the amendment has come into force.

Here, assuming that the deceased died in 1995 and the family came from Maharashtra.

After first partition, among *F* , *M* and *A* , *F* , *M* and *A* = 1/3 each

After second partition, among *A* , *S* and *D* , *A* , *S* and *D* = 1/3 1/3 = 1/9 each.

Share of *A* = 1/9

After third division (intestate succession):

M , *S* and *D* = 1/9 1/3 = 1/27 each

Therefore, the final shares will be as follows:

F = 1/3

M = 1/3 + 1/27 = 10/27

S = 1/9 + 1/27 = 4/27

D = 1/9 + 1/27 = 4/27

Illustration

A dies as an undivided coparcener in a Mitakshara coparcenary leaving behind his parents *M* and *F* , two widows *W* 1 and *W* 2, (both marriages were solemnised prior to 1955 and were valid) a son *S* and a daughter *D* [see Fig. 12.46].

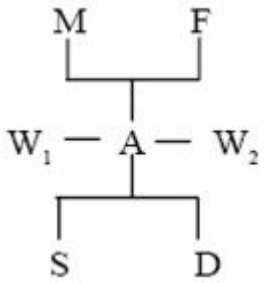


Fig. 12.46

General Rule **:** After first partition: *F* , *M* and *A* = 1/3 each;

After second partition (among *A* , *W* 1, *W* 2 and *S*):

A , *W* 1, *W* 2 and *S* = 1/3 1/4

= 1/12 each.

Here, the father's wife or wives will take a share equal to that of the son.

Share of *A* = 1/12

After third division (intestate succession), the share of *A i.e.,* 1/12, will go by intestate succession and will be taken by *W* 1 and *W* 2 together,

S and *D* = 1/12 1/4 = 1/48.

Therefore, the final shares will be as follows:

F = 1/3

M = 1/3 + 1/48 = 17/48

W 1 and *W* 2 = 1/12 + 1/48 1/2

= 1/12 + 1/96 = 3/32 each

S = 1/12 + 1/48 = 5/48

D = 1/12 + 1/48 = 5/48

Maharashtra: After first partition among *F* , *M* and *A* . *F* , *M* and *A* = 1/3 each.

After second partition among *A* , *W* 1, *W* 2, *S* and *D* ,

A , *W* 1, *W* 2, *S* and *D* = 1/3 1/5 = 1/15 each

Share of *A* = 1/15

After third division (intestate succession): This 1/15th share of *A* will go to his class-I heirs. Therefore,

W 1 and *W* 2 together with *M* , *D* and *S* = 1/15 1/4 = 1/60.

Thus, the final shares will be as follows:

F = 1/3

M = 1/3 + 1/60

W 1 and *W* 2 = 1/5 + 1/120 each

S = 1/5 + 1/60

D = 1/5 + 1/60

***Tamil Nadu* :** After first partition between *F* and *A* : *F* and *A* = 1/2 each.

After second partition between *A* , *S* and *D* : *A* , *S* and *D* = 1/3 1/2 = 1/6 each.

Share of *A* = 1/6

After third division (intestate succession): *A* 's 1/6th will go to his class-I heirs. So, *W* 1 and *W* 2, *M* , *D* and *S* = 1/6 1/4= 1/24 each.

Therefore, the final shares will be as follows:

F = 1/2

M = 1/24

W 1 = 1/24 1/2 = 1/48

W 2 = 1/24 1/2 = 1/48

S = 1/6 + 1/24 = 5/24

D = 1/6 + 1/24 = 5/24

Illustration

A dies as an undivided member of a Mitakshara coparcenary leaving behind his widow *W* , a mother *M* , two brothers *Br* 1 and *Br* 2 and a daughter *D* [See Fig. 12.47].

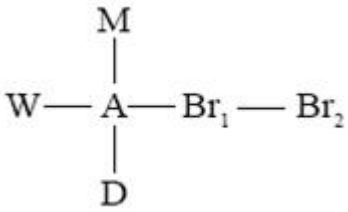


Fig. 12.47

***General* :** A notional partition will be effected among all the three brothers, with the mother also getting a share. So, the property will be divided into four parts, *M* , *Br* 1, *Br* 2 and *A* taking a one-fourth share each. This one-fourth share of *A* will go in equal shares to *M* , *W* and *D* , his class-I heirs. The final shares will be as follows:

Br 1 = 1/4

Br 2 = 1/4

M = 1/4 + 1/12

D = 1/12

W = 1/12

***Maharashtra* :** Here, the first partition will be the same as above, *i.e., Br* 1, *Br* 2 and *A* will take one-fourth each. However, as the daughter is also a coparcener, this one-fourth will include the undivided share of the daughter as well. This will be partitioned in three, with *A* , *D* and *W* , each taking a one-twelfth part. This one-twelfth share of *A* will be taken by *M* , *W* and *D* in equal shares. The final shares will be as follows:

Br 1 and *Br* 2 = 1/4 each

D = 1/12 + 1/36

M = 1/4 + 1/36

W = 1/12 + 1/36

***Tamil Nadu (Dravida)* :** After the first partition (among three brothers only as the mother will not get a share): *A* , *Br* 1, *Br* 2 = 1/3 each.

After the second partition (between *A* and *D* , as the daughter is a coparcener, though *W* will not get a share): *A* , *D* = 1/3 1/2 = 1/6 each.

A 's 1/6th will be divided among *M* , *W* and *D* as they are the classi heirs, who will take equal shares, *i.e.,* (1/6 1/3) one-eighteenth each. The final shares will be as follows:

M = 1/18

W = 1/18

Br 1 = 1/3

Br 2 = 1/3

D = 1/6 + 1/18 = 2/9

Separated Son

Explanation II , appended to s. 6 provides:

> Nothing in the provision 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.

It refers to a situation where, one coparcener, after claiming partition, goes out of the family, and becomes a separate member, while the rest of the family members remain a part of the joint family. On the death of one of the coparceners in the joint family, neither the separated member nor any of his heirs would be entitled to claim any share at the time of effecting the notional partition, even from the share of the deceased coparcener that goes by intestacy. For example, as shown in Fig. 12.48, a joint family consists of the father *F* , his wife *W* and two sons S1 and S2. One son S1, is married to *SW* , and has a daughter *SD* . He demands a partition, takes his share and goes out of the family along with his wife and daughter. The rest of the family remains a joint family. S1 now becomes a separated son.

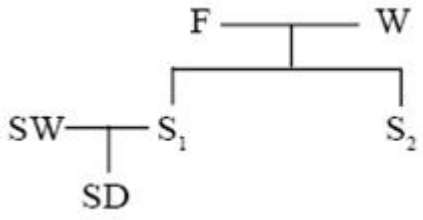


Fig. 12.48

If *F* dies now, he was an undivided coparcener in the coparcenary consisting of himself and S2, and as he is survived by his widow (a class-I heir) it will be presumed that just before his death a partition had been effected between him and S2. In this notional partition, S1 will not be entitled to get a share as he is a separated son, and the property will be divided into three parts, one-third each going to *F* , *W* and S2. Out of the one-third of *F* , S2 and *W* will take one-sixth each. Thus, each of them will take half of the property. The reason for the exclusion of S1, the separated son is that once he claims a partition he is given his due share and he ceases to be a member of this joint family. He is still a son, but not a coparcener with the father and he no longer has any claim over the coparcenary property. Not only he, but his heirs, *i.e., SW* and *SD* , will also not have the effect of altering the process of devolution of the property, nor will they have any share in it. For example, in the same illustration [see Fig. 12.49], if S1 dies after seeking a partition, his share will be taken by his widow *SW* and daughter *SD* . Now, even though *SW* and *SD* are class-I heirs of *F* , on his death, they will not inherit any share in the property that constituted his interest in the coparcenary property. Similarly, if *W* dies during the lifetime of *F* , the family will consist of *F* and S2. *SW* and *SD* would be *F* 's heirs, but they will not be members of his joint family.

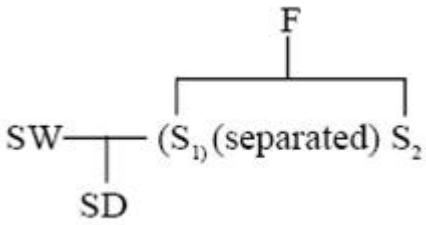


Fig. 12.49

If *F* dies, his interest in the coparcenary property will go to S2, under the doctrine of survivorship, even though *SW*

and *SD* are class-I female heirs, as the heirs of a separated son do not effect the devolution of property nor do they get a share out of it.

However, where no share was given to the separated son, and on his death, his widow files a suit for claiming his share, and during the pendency of this suit, the father dies, then the presence of the widow will lead to not only effecting a notional partition, but will also enable her to claim a share in his property.

Separate Son's Inheritance to Self-acquisitions of Father

A separated son or his heirs do not get a share at the time of notional partition nor do they get a share out of the deceased coparcener's share, even if it goes by intestacy.8 [101] However, they are not prohibited from inheriting the other self-acquisitions of the father, under s. 8. The separate property of the father goes in equal shares, to a divided as well as an undivided son. For example, *A* , a Hindu male, dies in 1990 as an undivided member of a Mitakshara coparcenary and he is survived by two sons, *S1* and S2. He leaves behind joint family assets worth Rs. 10 lakh and a land that he had inherited from his maternal grandfather. S2 had separated from the joint family in 1985 and had received his share. Here, the father had two distinct interests. The first one, which was in the joint family property, is worth Rs. 5 lakh. This will devolve on S1 (the undivided son), who will now be the sole surviving coparcener of the total joint family property worth Rs. 10 lakh. In this, S2 will not have a share as he is no longer a member of his family. However. the father's second interest, *i.e.,* the land that he had inherited from his maternal grandfather, was his separate property and on his death, it will go to his classi heirs, in accordance with s. 8. Here, S2 and S1 both, will inherit this property, as there is no distinction between the rights of a divided and an undivided son.9 [102]

Position in Case of a Sole Surviving Coparcener

Where the father, or any male Hindu, becomes a sole surviving coparcener because a partition was effected in the family, he becomes a separate member as regards the erstwhile coparceners. For example, in Fig. 12.50, a joint family consists of the father *F* , his wife *W* , two sons S1 and S2 and their wives *SW* and *W* 2, respectively, a daughter *D* and two grandsons S3 and S4.

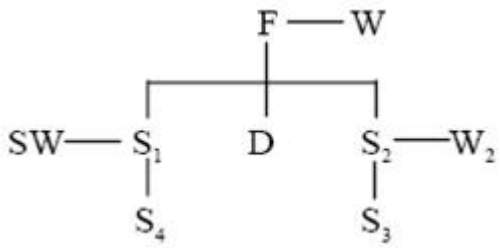


Fig. 12.50

A partition is effected and S1, along with *SW* and S4, separates. Similarly, S2, with S3 and *W2* , forms another smaller joint family. The father is now the sole surviving coparcener in the family consisting of his wife *W* and the daughter *D* . On his death, his share, which he had obtained at the time of the partition, will go by intestate succession under s. 8 and the divided sons will inherit the property along with the mother and the daughter in equal shares. The concept of a notional partition is not applicable in case of properties of a sole surviving coparcener.10 [103]

Illustrations

A dies as a member of a Mitakshara joint family and is survived by his father *F* , mother *M* , brothers *B* 1 and *B* 2, widow *AW* , a son S1, a separated son S2, and a daughter *D* [see Fig. 12.51]. *A* leaves behind, separate property worth Rs. 10 lakh and the total joint family assets are worth Rs. 30 lakh. For the calculation of the shares of all those persons who are entitled to inherit these properties, let us take the self-acquired property and the share in the undivided coparcenary property separately.

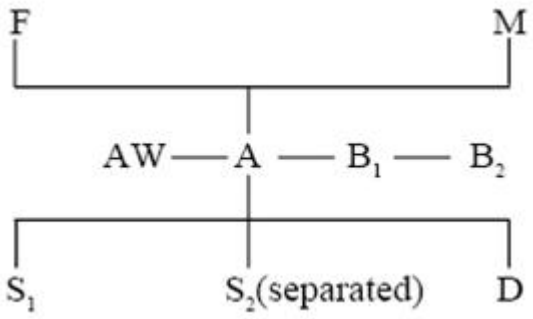


Fig. 12.51

Separate Property

The separate property of *A* will go by intestate succession, among all class-I heirs. As in intestacy there is no distinction between the rights of a separated son and those of an undivided son, S2 is also entitled to inherit. The property will be divided into five equal parts, one each going to *M* , *AW* , S1, S2 and *D* . Each will take Rs. 2 lakh. The father and two brothers are class-II heirs and will not inherit in the presence of class-I heirs.

Undivided Interest in Mitakshara coparcenary

General Rule : Since S2 separated during the lifetime of the deceased, he will not be taken into account at all. As *A* is survived by two class-I female heirs, *viz.* , the mother and daughter, it will be presumed that before his death, a partition had been effected in the family. The first step will be to effect a partition among *F* , *A* , *B* 1 and *B* 2. Since the partition is between a father and his sons, the mother will also be entitled to take a share. So, Rs. 30 lakh will be divided into five parts, with *F* , *A* , *B* 1, *B* 2 and *M* each taking one-fifth, *i.e.,* Rs. 6 lakh. This one-fifth share in the hands of *A* , is the undivided share of *A* and S2. Thus, this will be further partitioned between *A* and S1. Here again, *A* 's wife *AW* , will take a share equal to that of S1. S2 will not be given any share. This amount of Rs. 6 lakh (one-fifth) will be divided into three equal parts, *i.e.,* a one-fifteenth share going to S1, *A* and *AW* each. This one-fifteenth or Rs. 2 lakh, is the interest of *A* in the coparcenary property that will now go by succession. For ascertaining the class-I heirs, again, S2 will not be taken into account, and this Rs. 2 lakh will be divided equally amongst *M* , *AW* , S1 and *D* , which will be a one-sixtieth share or Rs. 50000 each. The final shares will be as follows:

F = 1/5 (6 lakh)

B 1 = 1/5 (6 lakh)

B 2 = 1/5 (6 lakh)

M = 1/5 + 1/60 (6 lakh + Rs. 50,000)

AW = 1/15 + 1/60 (2 lakh + Rs. 50,000)

S 1 = 1/15 + 1/60 (2 lakh + Rs. 50,000)

D = 1/60 (Rs. 50,000)

S 2 = Nil

Maharashtra School: Where *A* dies after 1994, a share has to given to the daughter also.

After the first partition among *F* , *A* , *B* 1, *B* 2 and *M* :

F , *A* , *B* 1, *B* 2 and *M* = 1/5th of the property.

After the second partition in which the daughter will also be given a share:

A , *AW* , *S1* and *D* = 1/5 1/4 = 1/20th of the property each.

This 1/20th share of *A* will go to his class I heirs.

M , *AW* , *S* and *D* = 1/80th each.

Therefore, the final shares will be as follows:

F = 1/5 (6 lakh)

B 1 = 1/5 (6 lakh)

B 2 = 1/5(6 lakh)

M = 1/5 + 1/80 (6 lakh + Rs. 37,500)

***Dravida School* :** In the first partition among *A* , *B* 1, *B* 2 and *F* , the mother will not get a share. So, the property will be divided into four parts (Rs. 7.5 lakh). This one-fourth share will be partitioned among *A* , *S* and *D* , as *AW* will not get a share. *A* , *S* and *D* will take a (1/4 x 1/3) one-twelfth share (Rs 2.5 lakhs) each. The share of *A* (2.5 lakh =1/12) will go by intestate succession, among *M* , *AW* , *S* and *D* , who will each take a (1/12 1/4) one-forty eighth share *i.e.,* Rs. 62500.

Therefore the final shares will be as follows:

F = 1/4 (7.5 lakh)

B 1 = 1/4 (7.5 lakh)

B 2 = 1/4 (7.5 lakh)

M = 1/48 (Rs. 62500)

AW = 1/48 (Rs. 62500)

S 1 = 1/12 + 1/48 (2.5 lakh + 62500 = 312500)

D = 1/12 + 1/48 (2.5 lakh + 62500 = 312500)

In *Krishna Murari Mangal v. Prakash Narain.* 11 [104] a Hindu joint family comprised the father and his eight children, five sons and three daughters. Two sons had separated from the father during his lifetime. On the death of the father, the question was with respect to the distribution of his undivided share in the property. The court effected a notional partition and gave one-fourth of the property each to the father and to the three sons who were joint with him. At the time of effecting a notional partition, the court rightly did not take into account the separated sons who had already taken their share out of the joint family property during the lifetime of the father. However, when it came to the distribution of the share of the father that was calculated after having effected the notional partition (one-fourth), the court distributed the share among all the children, including the separated sons, *i.e.,* among all the eight children. This second distribution was incorrect and directly in contradiction with Explanation II, which says:

> Nothing in the provision 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 explanation clearly says that a separated son cannot claim on intestacy a share in the interest that is calculated after effecting a notional partition of the property. The decision of the court in giving a share to the separated sons out of the interest of the deceased in the coparcenary property here does not appear to be correct.

LAW AFTER THE ENFORCEMENT OF THE HINDU SUCCESSION (AMENDMENT) ACT, 2005

The amending Act has made major changes into the devolution of coparcenary interest held by a *Mitakshara*

coparcener, at the time of his death. It has made the law simple but not necessarily equitable by abolishing the very concept of doctrine of survivorship in case of male intestate. Section 6(3) provides

Section 6 (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.

It thus retains the concept of notional partition, for calculating the share of the deceased coparcener in the *Mitakshara* coparcenary. Once the share has been so ascertained, such share will go as per the intestate or testamentary succession, as the case may be, and not in accordance with the doctrine of survivorship. Under the old law, intestate and testamentary succession principles applied only where a class-I female heir or a male class-I heir claiming through a female was present *i.e.,* son of a predeceased daughter. In their absence and in presence of a son, son of a predeceased son or son of a predeceased son of a predeceased son, the interest of a *Mitakshara* coparcener devolved as per doctrine of survivorship. Presently it is immaterial as to who the survivors are. In all cases where a male coparcener dies as an undivided member of a *Mitakshara* coparcenary, his interest calculated after effecting a notional partition must go by intestate or testamentary succession.

Thus presently the following factors have to be remembered while effecting a distribution of the share of a coparcener dying as an undivided member of Mitakshara coparcenary

(a) the coparcener dies as a member of Mitakshara coparcenary;

(b) his death occurs after 9th September, 2005;

(c) his share is to be calculated after effecting a notional partition.

(d) If he has made a Will capable of taking effect in law with respect to this share, such share will go as per the instructions given in the Will;

(e) In absence of a Will capable of taking effect in law, such share is to be distributed in accordance with the provisions of the intestate succession under this Act;

(f) If there is a daughter in the family, she must be allotted a share as she is now a coparcener in the same manner as a son.

Illustrations

A dies in 2006 as an undivided member of a Mitakshara coparcenary. He is survived by his father, F, two sons, S1 and *S2* and a daughter D. (See Fig. 12.52 below)

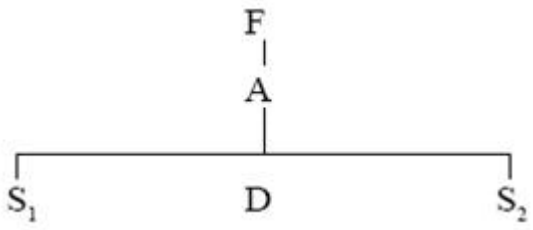


Fig. 12.52

To calculate the share we have to effect a notional partition between the father F and A so that each of them gets a half of the property. The second partition would be among A and S1, *S2* and D so that each of them would get 1/4th of *i.e.,* 1/8th. The separate share of A would be 1/8th. This 1/8th share would go as per the rules of intestate succession. Out of this share the father will not get anything as he is a class-II heir. This 1/8th share of A would thus be distributed equally among the three class I heirs present *i.e., S1* , *S2* and D, each taking 1/3 1/8th *i.e.,* 1/24th. Thus

After first partition: *F* , *A* = each

After second partition: *A* , S1, *S2* and D = 1/4 = 1/8th each.

Share of A = 1/8th

After devolution of property by intestate succession

S 1, *S2* and D = 1/8 1/3 = 1/24 each.

The final shares would be as follows.

F =

S 1 = 1/8 + 1/24th = 4/24 = 1/6

S 2 = 1/8 + 1/24th = 4/24 = 1/6

D = 1/8 + 1/24th = 4/24 = 1/6

Illustration

A dies as an undivided member of Mitakshara coparcenary in December, 2005 and is survived by his parents F and M, two of his wives W1 and W2 (he was married prior to 1955 and both the marriages were valid); two sons S1, *S2* , a grandson SS, a brother Br and a sister Si.

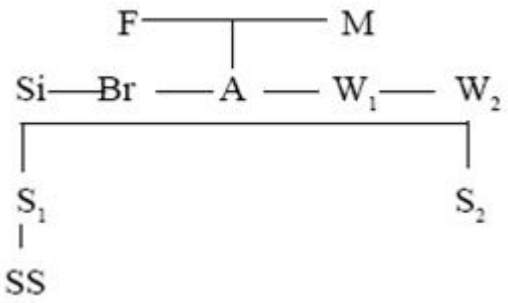


Fig. 12.53

Here the first partition will be among F, M, A, Si, and Br, each of them will take 1/5th of the property. The second partition will be among A, W *1* , W *2* , *S1* and S2 and each of them will take 1/5 1/5 *i.e.* , 1/25 each. The third partition will be between S1 and SS and each of them will take 1/25 = 1/50 each

F, M, A, Si, and Br=1/5th each

A, W1, W2, *S1* and S2 = 1/5 1/5 = 1/25

S 1 and SS= 1/25 = 1/50 each

Separate Share of A = 1/25

After devolution of property by intestate succession

M, W1, W2, *S1* and S2 = 1/25 = 1/100 each.

The final shares would be as follows

F = 1/5th

M = 1/5th + 1/100

Si = 1/5th

Br = 1/5th

W1 = 1/25th+1/200

W2 = 1/25th+1/200

S 1 = 1/50th+ 1/100

S 2 = 1/25th+ 1/100

SS = 1/50

In Dravida School, the mother and the widows of the intestate will not take any share at the time of the partition.

Separated son

The law as it stood prior to 2005, excluded by an express legislative provision a son (as also his representatives) who had taken his share from Mitakshara coparcenary and had separated from the joint family during the life time of the father. He was neither entitled to a share at the time of affecting a notional partition, where the father died, nor at the time of distribution of the property in accordance with the rules of intestate succession. Presently the disabling provision imposing a double disability on such separated son has been deleted. However, it has only enabled a separated son to take a share at the time of distribution of the property in accordance with the rules of intestate succession and not at the time of effecting a notional partition. This interpretation is in accordance with the rule that a person who has already separated from the joint family after taking his share cannot get a share again if a partition takes place subsequent to his separation, but since the share of the deceased father goes by intestate succession, the rules applicable with respect to separate property will govern such share. As for succession to separate property there is no difference between a separate son and the son who was living with the father, both of them would inherit the property on an equal basis.

VI. Devolution of Coparcenary Interest held by a Female Coparcener

Introduction

Under traditional Hindu law only males could be coparceners. To being with, four states made changes to the Hindu Succession Act, 1956 and allowed unmarried daughters to become coparceners. It was then followed by the Hindu Succession (Amendment) Act, 2005 wherein all daughters were made coparceners. The introduction of females as coparceners has made certain fundamental changes to the concept of coparcenary and its devolution. Now a female also gets the benefit of a right by birth in the coparcenary property and incurs the liability to pay the father's debts contracted prior to the passing of the Amending Act. On her death, her interest in the Mitakshara coparcenary goes by survivorship on the surviving coparceners, with the application of the doctrine of survivorship. Similar to the text of s. 6, here also, where an undivided female coparcener dies and is survived by her children and grandchildren, her interest in the Mitakshara coparcenary will not devolve by survivorship, but will go by intestate and testamentary succession, as the case may be.12 [105] For calculating her interest in the Mitakshara coparcenary at the time of her death, we have to presume that a partition had taken place immediately before her death, irrespective of whether she was entitled to claim a partition or not.13 [106] However, this notional partition will not be presumed in the case of a daughter who had separated from the family after taking her share. For the application of the concept of notional partition in the case of the death of a female coparcener, the following conditions must be present:

(a) such female, at the time of her death, was an undivided coparcener, having an interest in the coparcenary property;

(b) her death occurred after the amending Act had been passed; and

(c) she is survived by her child or a child of a predeceased child.

Illustration (i)

A Hindu joint family, consists of the father *F* , his wife *W* , his son *S* and an unmarried daughter *D* . *D* dies in 2006. [See Fig. 12.54]

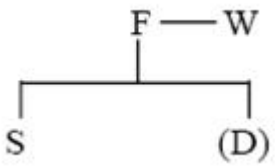


Fig. 12.54

Her interest in the Mitakshara coparcenary will be taken by the surviving coparceners, in this case, the father and the brother. No notional partition will be effected as such partition can be effected only when she is survived by a child or a child of a predeceased child.

Illustration (ii)

A Mitakshara coparcenary consists of two brothers and a sister. The sister gets married in 1996 and dies in 2007 leaving behind a son and a daughter. [See Fig. 12.55]

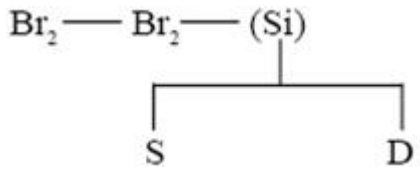


Fig. 12.55

Since no partition was effected during her lifetime, she died as an undivided member of this coparcenary. On her death, it will be presumed that just before her death a partition had been effected, as she has died leaving behind her children. Her share, *i.e.,* one-third of the property, will not go to her brothers under the doctrine of survivorship, but will go by intestate succession, to her children *S* and *D* , who will take a one-sixth share each.

Illustration (iii)

A Hindu joint family consists of the father *F* , a son *S* , three daughters *D* 1, *D* 2 and *D* 3. [See Fig. 12.56]

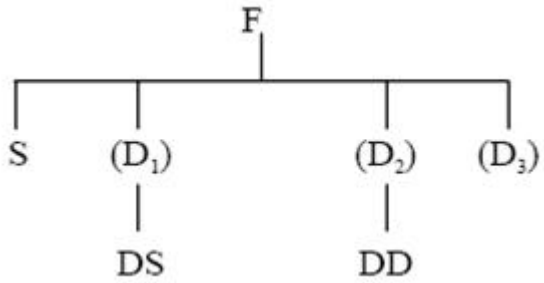


Fig. 12.56

D 1 has a son *DS* , *D* 2 has a daughter *DD* , and D3 is childless. *D* 1, *D* 2 and *D* 3 die one after another.

Heirs presence of Whom will Alter the Devolution Introduction

Unlike in the case of a male coparcener, where a notional partition has to be effected in all cases on his death, in

case a female coparcener dies, it is the presence of her son and daughter and son and daughter of such predeceased son and daughter, a total of six heirs, *i.e.,* son *S* , daughter *D* , son and daughter of a predeceased son, *SS* 1 and *SD* 1 and son and daughter of a predeceased daughter, *DS* 1 and *DS* 2, which will change the devolution of the undivided interest [see Fig. 12.57].

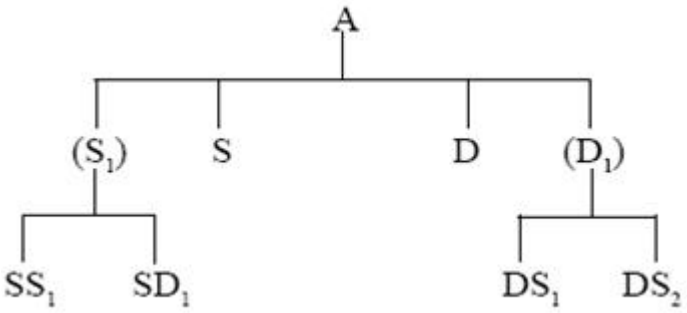


Fig. 12.57

The legislature had kept in view the different schemes laid down in the Act, for succession to the property of a female intestate, which are linked to the source of acquisition of the property by her. If the property was her separate property, then the primary heirs would include the widower, children and children of predeceased children. It is apparent that the legislature did not want the widower of the predeceased daughter to inherit her share in her natal joint family property, in the absence of her children, and therefore, only those heirs who are entitled to succeed to the property that a female intestate had inherited from her parents, are the ones whose presence will change the devolution of her interest in the coparcenary property. Under the Act, if during her lifetime, a woman inherits property from either of her parents, and then dies, her children, or children of predeceased children, inherit this property. However, if she dies issueless, her widower does not inherit the property and the property reverts to her father's heirs. The same analogy has been adopted here as well. A female coparcener acquires an interest by birth, in the coparcenary property of the joint family of her father. If she dies issueless, but is survived by her husband, her interest in the coparcenary property is taken by the surviving coparceners, who are members of her father's family, and the husband does not get anything. So, in a way, it still goes back to her father's family, though it cannot be said that it reverts. However, where the children or grandchildren are present, the property will devolve on the clause (a) heirs of the female intestate, the category includes the husband since this will be called the general property which also of the female and not the one inherited from her parents.

VII.GENERAL PRINCIPLES OF INHERITANCE

INTRODUCTION

The general principles of inheritance that are applicable in case of both male and female intestates, are specified in ss. 18 to 28 of the Act. These principles give statutory form to certain well-established Hindu law norms, which are deeply entrenched in the society.

FULL-BLOOD PREFERRED TO HALF-BLOOD

As a general rule, heirs of the intestate related to him by full-blood, are preferred to those related by half-blood, if they stand in the same degree of propinquity. These terms, 'full-blood' and 'half-blood relationships', are used to explain how brothers and sisters, to begin with, can be related to each other. When brothers and sisters share both the parents, *i.e.,* their father and mother are the same, they are called full-blood brothers and sisters. When they are from the same father, but are from different mothers, they are called half-blood brothers and sisters, and when they are from the same mother but are from different fathers, they are called uterine brothers and sisters. Relationship by adoption is called a full-blood relationship. For example, a couple having a daughter, adopts a son. This son will be related to the daughter by full-blood relationship.

Section 18 expressly provides a preference to relations by full-blood over half-blood. It says:

> Heirs related to an intestate by full-blood shall be preferred to heirs related by half-blood, if the nature of relationship is the same in every other respect.

It does not refer to the sex of the heir, but speaks of the kind of relationship that two heirs may have with respect to the intestate. Where a brother and a sister have the same relationship with the intestate in every other respect, a full-blood sister would exclude a half-blood brother and a half-sister.14 [107] The earlier view expressed by the Bombay High Court,15 [108] that a full-blood sister could not exclude a half-blood brother, has expressly been overruled by the Full Bench of the same High Court, in a later decision.16 [109] The Supreme Court has also held that there can be no distinction on grounds of the sex of the heir.17 [110] Thus, the heirs of a full-blood brother, would exclude the heirs of a half-blood sister, not because of the sex of the sister, but because of the preference to full-blood relationships.18 [111] The rule is applicable to class-II heirs, agnates and cognates of a male intestate,19 [112] as also to the heirs of a female intestate, who are described more with reference to her husband and her father's heirs, than her own self.

The rule of preference of heirs applies only in cases of conflict between the heirs of same degree of propinquity or proximity to the deceased and does not apply if the claimants of the full blood and half blood stand in different degrees in relation to the deceased20 [113].

MODE OF SUCCESSION OF TWO OR MORE HEIRS

If two or more heirs succeed together to the property of an intestate, they shall take the property,

(i) save as otherwise expressly provided in this Act, per capita and not per stirpes; and

(ii) as tenants in common and not as joint tenants.21 [114]

The general rule of distribution of property under Hindu law, was the per capita rule. Joint tenancy rule was applicable in the case of an undivided interest in a Mitakshara coparcenary only. The rule presently is, that if two or more heirs succeed together, such as a son, daughter and mother of a male intestate, they take the property per capita (a share each) and not per stirpes, and as tenants-in-common and not as joint tenants. Tenants-in-common means that two or more heirs together take the property, but they take it individually, in their own right. Their shares are specified and if before the demarcation, one of them dies, his share passes to his own heirs and does not go by survivorship to the co-heir. For example, two widows succeeding together to their husband's property, will take their husband's property as tenants-in-common.22 [115] Similar would be the position of two daughters inheriting the property of their father,23 [116] or a daughter and a widow.24 [117] Joint tenancy means that where two or more heirs succeed together and hold the property as joint tenants, if one of them dies, the other takes the share of the deceased by survivorship and prevents it from going to his legal heirs.

RIGHTS OF A CHILD IN WOMB

A child who was in the womb of his mother at the time of the death of an intestate and who is subsequently born alive, shall have the same right to inherit to the intestate, as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a child with effect from the date of the death of the intestate.25 [118]

This provision protects the rights of a posthumous child. Two conditions that need to be satisfied here are that:

(i) the child should be in the womb of the mother at the time of the death of the intestate, and

(ii) it should be born alive.

If the child was conceived at the time of the death of the intestate, but was not born alive, no share can be given to him. However, if he was born alive, but died later, the property will be deemed to vest in him from the date of the death of the intestate. This right comes in force at the birth of the child but has a retrospective effect, *viz.* , from the date of the death of the intestate.26 [119] It is immaterial whether other heirs were aware of the fact of the pregnancy ornot.

PRESUMPTION IN CASE OF SIMULTANEOUS DEATHS

When two persons die in circumstances that render it uncertain as to whether either of them and if so, which survived the other, then, for all purposes affecting succession to property, it shall be presumed, until contrary is proved, that the younger survived the earlier.27 [120]

Where in cases of calamity or accidents or other sudden events like earthquakes, devastating fires, floods, road, train or airplane accidents, etc., two or more relations die together and it is difficult to figure out as to who died first, the presumption that applies is that the older person died first and the younger later. For example, both the father and the son died in an air crash. It will be presumed that the father died first and the son died a little later. It is only a presumption and can be rebutted by concrete evidence. Where a mother and her daughters are murdered,28 [121] or they die together in a fire accident,29 [122] it would be presumed that the mother died first. The presumption is applied in order to avoid the confusion that may arise with respect to the distribution of the property of the deceased among their heirs.

PREFERENTIAL RIGHT TO ACQUIRE PROPERTY IN CERTAIN CASES

Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class-I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.30 [123]

The basic objective of this provision is to prevent the fragmentation of the estate and to avoid the introduction of strangers into the family business. The rule applies where a male intestate dies and the property is inherited by his class-I heirs. As per the language used in s. 22, it does not apply when the property of a female intestate is inherited by her cl. (a) heirs, although the opening words indicate that a male or a female may carry on the business.

The basic requirements for exercising the right of pre-emption are:

(i) the property inherited is an interest in an immovable property or in any business;

(ii) property is inherited by two or more heirs specified in the class-I category;

(iii) one of such heirs proposes to sell or otherwise transfer it;

(iv) the consideration is based on mutual agreement and in absence of any agreement, it can be decided by the court.31 [124]

In such cases, the other heirs have a preferential right to purchase the interest themselves. If two or more heirs are keen to purchase the share, then the one who offers the highest consideration will be preferred.32 [125] This right of the heirs to acquire the property of a co-heir, is called a right of pre-emption. It is not a preferential right to obtain the share of a co-heir, but is a preferential right to purchase the interest of an heir who wants to sell it at a price. It implies willingness on both sides and the consideration plays a predominant role, as no person, even for the sake of preventing a fragmentation of estates, can be compelled to sell his property or a share in the property, at below the market price or for free. At the same time, he is not permitted to be unusually greedy or unreasonable. If he demands an unreasonable or an exorbitant sum of money, the court can settle the dispute with respect to consideration.

An alienation by a co-heir in violation of this rule, is not void but voidable at the instance of the non-alienating co-heirs,33 [126] and they can enforce their rights of pre-emption by filing a suit to this effect in a court of law.34 [127]

This provision is not applicable in cases where the property in question is capable of being partitioned and of enjoyment separately.35 [128] Property that is capable of being partitioned or fragmented easily, can be sold separately, to different individuals, and does not require its protection as a unit.

The right of pre-emption is also not available if the property has already been partitioned. Thus where joint family property was partitioned by way of a compromise in 1926, a suit claiming pre-emption after 40 years was dismissed. The court observed,

Partition clothes the respective parties with authority to hold their shares independently and absolutely as their

separate properties and it could not be the intention of the legislature to put a clog on the powers of alienation of independent owners of the properties36 [129].

In *Benirani Ray v. Ashok Kumar Ghose,37* [130] the property that was in the nature of a residential house and courtyard was inherited by two sons of the intestate. The brothers continued to enjoy it together without affecting any formal partition by metes and bounds. One of the sons executed a sale deed of his half undivided share in favour of three strangers to the family of his who sued for partition and separate possession of the property. The court held that the other brother could by filing a regular suit work out his remedy in consonance with the provisions of Sec. 22 and these strangers to the family cannot be given possession of the property in light of Sec. 44 of the Transfer of Property Act, 1882 and observed that as per Mitakshara law every co sharer has a right on every inch of land belonging to joint family. It is also no more *res integra* that in consonance with law one of co-sharers cannot alienate any specific portion of the property of the joint family lands without the consent of the other. That apart sec. section 22 of the Hindu Succession Act, 1956, creates an embargo with regard to alienation of joint family property by a co-sharer without the consent of the other. This provision was brought into the Act as an antidote to mitigate inconvenience resulting from transfer to an outsider by a co-heir of his or her interest in the property inherited along with other co-heirs. The provisions of the this section are analogous to the right of pre-emption which tends to raise clogs and fetters on the full sale and purchase of property and is in general regarded as opposed to equity and good conscience. Law requires that in case any heir desires to transfer his or her interest in the property inherited under the provisions of this Act, the right of pre-emption should be given to other co-heirs. In *Haven Sharma v. Renu Bahadur* 38 [131], four sons inherited the land on the death of their father. They affected an informal partition and started enjoying their respective shares separately. One of the brothers A sold his portion to a total stranger X ignoring the claim of the other brother who then claimed preferential right to buy it under s. 22. The court held that since the property after an amicable partition did not retain the character of the joint property enabling the parties to enjoy their respective share, s. 22 would have no application.

Inapt Drafting

The language of s. 22 suffers from a contradiction. The opening words indicate that the rule applies when the property or business that is inherited, was possessed by a male or a female, by the use of the words ‘him or her’. This means that the rule would apply where the property is inherited, irrespective of the sex of the intestate, but when it comes to ‘heirs’ who together succeed to the interest in the immovable property or the business, it is provided that the rule applies amongst class-I heirs only. A female intestate does not have heirs grouped in classes, and the term ‘class-I heirs’, refers to the sixteen heirs who succeed to the property of a male intestate. Thus, the rule applies only among the class-I heirs of a male intestate and does not apply when heirs of a female intestate inherit her property together. The term ‘her’ in the section, appears superfluous as a result of faulty drafting.

Right Personal in Character

The purpose behind this provision is to ensure that the property remains in the hands of the co-heirs, rather than passing on to strangers to the family. As the right has been confined only to the class-I heirs of the male intestate, it is personal in character, available only to the co-heirs, and is neither transferable, nor heritable. Transferability or heritability of this right of pre-emption, would frustrate the very object of prevention of fragmentation of the property. Thus, where all the class-I heirs sell their respective shares to one person, except one heir, and such heir dies before a decree was passed in her favour, her legal representatives cannot be substituted in her place, for the continuation of the suit or for the exercise of this right. The suit will abate, and the right of pre-emption would come to an end. [132]

VIII.DISQUALIFICATIONS

INTRODUCTION

Under Hindu Law, the inheritance rights of a person were not absolute. Despite the nearness of relationship, a person could still be disqualified from inheriting property on account of his certain physical or mental infirmities, or a specific conduct. This exclusion from inheritance was not merely on religious grounds,40 [133]*viz.* , an incapability to perform religious rites, but depended upon social and moral grounds and bodily defects as well. An heir under the classical law, could be excluded from inheritance on the following grounds: 41 [134]

(i) *Mental infirmities* : These included congenital idiocy42 [135] and insanity.43 [136]

(ii) *Physical defects* : Absolute and complete lameness,44 [137] a person born blind,45 [138] deaf,46 [139] dumb,47 [140] an impotent or a eunuch.

(iii) *Diseases* : Virulent form of leprosy48 [141] and other incurable and chronic diseases.

(iv) *Conduct:* An outcaste49 [142] and his issue, a person entering a religious order by becoming a hermit or a sanyasi,50 [143] a murderer disqualified on grounds of public policy,51 [144] and in case of a woman, on grounds of her unchastity.52 [145]

HINDU INHERITANCE (REMOVAL OF DISABILITIES) ACT, 1928

The Act was enacted to remove the large number of grounds on the basis of which heirs could earlier be disqualified from inheritance or from seeking partition. Section 2 of this Act provided:

> Notwithstanding any rule of Hindu law or custom to the contrary, no person governed by the Hindu law, other than a person who is and has been from birth, a lunatic or idiot, shall be excluded from any right or share in joint family property by reason only of any disease, deformity or physical or mental defect.

The Act removed several disqualifications attached to the affliction of various diseases and physical and mental defects, but did not apply to Hindus governed by the Dayabhaga law.53 [146]

The disqualification on grounds of change of religion, loss of caste or excommunication, had already been removed by the Caste Disabilities Removal Act, 1850, and therefore, it was only congenital idiocy54[147] and lunacy, that disqualified an heir from inheriting. Yet, at the same time, a murderer continued to be disqualified on the grounds of public policy. As the Act was silent on the aspect of disqualification based on the unchastity of females, it continued despite the passing of the Act.55 [148]

DISQUALIFICATIONS UNDER THE HINDU SUCCESSION ACT, 1956

The present Act provides for three types of disqualifications only, which are based on a violation of the fundamental principles of inheritance.

A—Remarriage of Widow

Under Hindu law, heirs need not be related to the intestate by blood or a valid adoption only, but can be relatives introduced in the family by marriage to a male member. For succession to the property of a male intestate, five widows, namely, the intestate's own widow, his father's widow and brother's widow, (class-II heirs), widow of a predeceased son and widow of a predeceased son of a predeceased son, are, with respect to the intestate, his heirs introduced in his family by marriage to male members, who can be ascendants, *i.e.,* father; collaterals, *i.e.,* brothers; or descendants, *i.e.,* son and son of a predeceased son. For succession to the property of a female intestate, the entire category of 'heirs of husband' are relations by marriage.

Certain Widows Disqualified on Remarriage

Law prior to the Hindu Succession (Amendment) Act, 2005.

For a male intestate, his own 'widow' will become a widow when he dies and therefore, there is no question of her being married at the time of the opening of the succession. With respect to the father's widow, the term would include both the intestate's own mother as well as a stepmother. The intestate's own mother is related to her son by blood, and not by marriage to the father only. She inherits in her own right and she does not cease to be the mother by her remarriage,56 [149] and so, her rights are not affected by her marital status.

The stepmother on the other hand, is a relation introduced in the family by her marriage to the father of the intestate, and upon her remarriage, she ceases to be a member of this family and her position should not be any different from that of the other three widows, whose remarriage before the opening of succession, disqualifies them from inheriting the property of the deceased. In the original Hindu Succession Bill, 1954 (Bill No. 13), the father's widow was in fact, included in this category, along with the other three widows, whose remarriage disqualified them from inheritance. But there was no differentiation between a biological or adoptive mother and any other widow of

the father (stepmother) of the intestate. Rather than differentiating between the two, the legislature removed this category from the disqualification clause and created an anomalous situation. Now a stepmother can remarry after the death of the father of the intestate, and still retain her rights of succession in the property of her step-son. They could have retained the expression ‘father’s widow’ along with the brother’s, son’s and son’s son’s widows, with an explanation, ‘that the expression "father’s widow" does not include the mother of the intestate’. By not doing this, it has created a distinction between her and the widows of the other deceased male members, which is not based on any logical explanation.

Under s. 24, three widows, who have been specified by their relationships, namely, the widow of a predeceased son, the widow of a predeceased son of a predeceased son or the widow of a brother, shall not be entitled to succeed to the property of the intestate as such widows, if on the date the succession opens, they have remarried.57 [150]

These three widows had become members of the intestate’s family by getting married to his male relations and they become his heirs on the death of these relations. In fact, the claim of any of such widow is through the male relation only, *viz.* , a brother’s widow claims through the brother because she was married to the brother of the intestate. It was only because of her marriage that she had become a member of this family, and if, upon the death of the brother, she remarries, she ceases to be a member of his family. She is not an heir in her own right, but is so in the capacity of the widow of a male relation. When she ceases to be a widow by getting married, she also loses both the membership of this family, as well as her succession rights.

In *Baliram Atmaram Dhake v. Rahubai* ,58 [151]a Hindu widow was a member of the joint family comprising of her father-in-law, her husband and his brother. On the death of her husband his one third share was inherited by her after effecting a notional partition. Soon thereafter she remarried and sued for partition and handing over of this one third share in the property. During the litigation her former father in law died and she claimed half of his share as well under the inheritance laws. The Bombay High Court held that in light of s. 24 of the Act, the widow was precluded from inheriting the share of the property of the former father in law as she had remarried before his death and had ceased to be a member of his family.

Marital Status Relevant on the Date of Opening of the Succession

The date of opening of the succession is the date when the intestate dies, and therefore, the marital status of the widows is material as on that date. If on that date, the widows fit the description of widows of the respective male relations, they will be entitled to inherit and their subsequent remarriage will not divest them of the property already vested in them.

Illustration

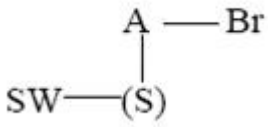


Fig. 12.61

Let us examine three situations here again [see Fig. 12.61]:

(i) *A* dies and is survived by his brother *Br* , and a widow of his predeceased son. As the widow of the son is a class-I heir, she will inherit the property and the brother will not get anything.

(ii) *A* dies in 1990 and is survived by his brother *Br* , and the widow of his predeceased son *SW* , who remarries after two days of *A* ’s death. Here again, as *SW* did fit the description of a ‘widow of a predeceased son’ on the date of opening of the succession, *i.e.,* the date of the death of the intestate, the property vests in her the moment the succession opens. A day or two days later, when she remarries, she will not be divested of the property already vested in her.

(iii) A dies on 31 January, 1990, and is survived by his brother *Br* , and the former ‘widow’ of his predeceased son, *SW* , who remarries on 30 January, 1990. It is inappropriate to describe her here, as a widow of the

predeceased son, as she has already married one day prior to the demise of the intestate. On the date on which the succession opens, she is not a widow anymore and has already remarried, hence, she would be disqualified and the whole property will be taken by the brother.

'Such Widow'

The disqualification on the ground of remarriage applies in case any of these three widows remarry and yet, claim to inherit as 'widows'. For example, the widow of a predeceased son, remarrying before the death of the intestate, cannot succeed to his property as his son's widow, but if she claims to inherit in some other capacity, then the fact that she was once his son's widow will not disqualify her if she is otherwise entitled to inherit. Under Hindu law, the prohibited degrees of relationship are so contemplated, that ordinarily, the widow of a male relation, who is an heir to the intestate, cannot marry another male relation, on whose death, she could still be an heir of the intestate, unless there is a custom to the contrary in the community to which both the parties belong. The widow of a lineal descendant and the widow of a predeceased brother, are under the prohibited degrees of relationship under the Hindu Marriage Act, 1955, and a marriage solemnised in violation of this degree, will be a void marriage in the eyes of law, conferring no benefits unless the parties establish a contrary custom.

Illustration (i)

In Punjab, a custom prevails that enables an elder brother's widow, to marry the younger brother. For instance, a family consists of three brothers, *Br* 1, *Br* 2 and *Br* 3, and the wife of *Br* 1, *W* . *Br* 1 dies and *W* takes the label of a brother's widow with respect to his two brothers, *Br* 2 and *Br* 3. She remarries *Br* 2, but *Br* 2 also dies a year later. On the death of *Br* 3, *W* will inherit his property as his brother *Br* 2's widow, and not as *Br* 1's widow.

Illustration (ii)

In South India, a marriage between a maternal uncle and his niece can be validly solemnised. A family comprises two brothers, *Br* 1 and *Br* 1, one sister *S* i and her daughter *D* . [See Fig. 12.62]

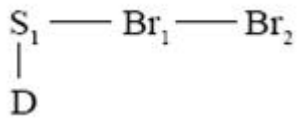


Fig. 12.62

D gets married to *Br* 1. The sister *S* i, and *Br* 1 die and only the brother *Br* 2, is living. *D* , who is now the brother's widow as regards *Br* 2, gets remarried to *H* . On the death of *Br* 2, she would not be entitled to inherit as his brother's widow because she has remarried, but nevertheless, she would be entitled to inherit his property as his class-II heir, *viz.* , as the daughter of a predeceasedsister.

LAW AFTER THE ENFORCEMNT OF THE HINDU SUCCESSION (AMENDMENT) ACT, 2005

Section section 24 has been deleted by the amending Act. However, it does not mean that the situation and the eligibility criteria have changed. Even without s. 24 being on paper, the situation with respect to these widows has remained the same. Section 24 was superfluous and its deletion therefore would not alter the situation at all.

Under the Hindu Succession Act, 1956, two categories of relatives are recognised as heirs to the intestate. One, who were related to the deceased through blood and second who were related to the deceased through marriage, *i.e.,* who entered the family of the deceased through marriage to the male members. The disqualification of remarriage is attached to those heirs who entered the family by marriage, became widows on the death of the respective male members to whom they were married, and went out of the family again by a remarriage. Marriage or remarriage of blood relatives such as daughters, sisters, mother is of no consequence, but remarriage of son's widow, son's son's widow, or brother's widow would mean that they cease to be members of the intestate's family, and their inheritance rights would be created in the family they are married into. After remarriage, they would be related to the intestate neither as blood relatives nor by marriage and therefore would not be eligible to be his heirs.

B—Murderer

Section 25 provides that if a person commits the murder of the intestate he cannot succeed to his property. This section incorporates the principle of " *Nemo ex suo delicto meliorem suam conditionem facere potest"* and is based on public policy,59 [152] equity, justice and good conscience. A person who commits the murder of the intestate or abets its commission, cannot inherit his property. If he commits the murder, not of the intestate, but of an intermediary between the intestate and him, and on whose death, he would become eligible to inherit, it would be a murder in furtherance of succession, and would again disqualify him from inheriting the property of the intestate. Section 25 says: 60 [153]

> A person who commits murder or abets the commission of murder, shall be disqualified from inheriting the property of the person murdered or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

Commission of Murder

Murder means to kill or to assassinate and it is to be understood in its popular sense,61 [154]and not in the technical, rigid, and beyond reasonable doubt proof oriented sense of the Indian Penal Code.62[155] An acquittal from the criminal courts on the basis of benefit of doubt,63 [156] or because the prosecution could not prove the case beyond reasonable doubt, may still disentitle a person from inheriting the property of the intestate whom he killed. but where an heir is charged with the murder of an intestate but is acquitted by the criminal court as her involvement in the murder is not established at all, such an heir is not disqualified and her inheritance rights would be intact. In *Sarita Chauwhan v. Chetan Chauwhan* 64 [157] the wife was accused of murdering her husband/abetment to commit murder along with three persons and was denied succession certificates in view of sec. section 25 of the Hindu Succession Act, 1956. In light of clear acquittal by the criminal courts, the Bombay High Court held that as there was nothing to suggest that she could have been involved in any way with the murder of her husband, she was entitled to succeed to his property.

A murder committed under grave and sudden provocation, or even to save one's own life or the life of some other person, might be looked upon sympathetically under criminal law, but it would not place the heir differently from a case where he kills the intestate through meticulous planning and a well-executed murder. The civil courts are not bound, normally, by the verdict of the criminal courts,65 [158] and they can assess the case independently. In *Janak Rani Chadha v. State of NCT of Delhi66* [159], the husband was held guilty of committing the murder of his wife within a few year of the marriage. She had left behind property including a flat that she had purchased before her marriage. In accordance with the provisions of the Hindu Succession Act, 1956, the property constituted her general property and as she had died issueless, her husband would normally have succeeded to her property, but in accordance with the provisions of Sec. 25, as he was the one who had murdered her, it was held that he was disqualified from inheriting her property. Similarly, in *Vellikannu v. R. Singaperumal67* [160], the son murdered his father and was convicted by the court. As he was disqualified from inheriting the property of the deceased, his wife claimed the same on the ground that since the murderer would be deemed to be dead she would be regarded as the widow of the predeceased son and eligible to inherit the property as the intestate's class-I heir. It was held that neither the son nor his wife was eligible to claim inheritance. However, if there is a finding of the criminal court that the claimant is not the murderer and the deceased had committed suicide, then there is no bar to the claimant being granted a share in the property of the deceased.68 [161]

The term murder is not to be equated with being 'responsible for death'. For example, a son, due to his deviant and obnoxious behaviour, brings shame to the family, and his upright father is unable to take the humiliation and commits suicide, or where, due to mismanagement by the son, the father suffers a huge loss and dies of a heart attack, the son is responsible for the death of the father, yet he is not a 'murderer' and would not be disqualified under this section.

Abets the Commission of Murder

The commission of murder of the intestate or the abetting of the commission of murder, has the same consequences. Where, for example, the whole planning of the murder of the intestate is done by *A* , and *B* and *C* , who are the nephews of the intestate, help *A* in the commission of the murder, by bringing the intestate on a false pretext to the spot where *A* kills him, *B* and *C* might not have murdered the intestate, but because they abetted the commission of the murder, they will be disqualified from inheriting the property of the intestate.

Murder Committed in Furtherance of Succession

Where a persons commits the murder, not of the intestate, but of his heir, the removal of whom will accelerate the succession in his favour, such murderer is again disqualified from inheriting the property of the deceased. For example, a family consists of a Hindu male *A* , his father *F* , and a son of his predeceased brother *BS* . [See Fig. 12.63]

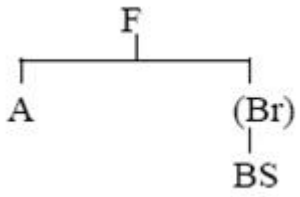


Fig. 12.63

In terms of priority, on the death of *A* , it is the father who would inherit his property and not *BS* , as the son of a predeceased brother has an inferior placement in comparison to the father. In apprehension of *A* 's death, if *BS* commits the murder of the father of *A* , on the death of *A* , despite being the closest relation, he (*BS*) would be disqualified from inheriting the property of the intestate. Here again, he may personally kill the father or take somebody's help in its commission or abet its commission, the consequences will be the same.

The rule of disqualification on ground of commission of murder or abetting it, is applicable to both intestate as well as testamentary succession.

C—Difference of Religion

Convert's Descendants

The Hindu Succession Act, 1956, applies to Hindus. Therefore, not only the intestate, but the heir must also be a Hindu. If the heir is of a different religion, he or she is not eligible for inheriting the property of the Hindu relative under the Hindu Succession Act, 1956. Under Hindu law, a person who was excommunicated or who ceased to be a Hindu by converting to another religion, lost the right to inherit the property of his Hindu relatives, despite the closeness of blood relationship. For example, if a son has converted, he will lose the right to inherit his father's property. This general rule, which was applied strictly, was modified by the enactment of the Caste Disabilities (Removal) Act, 1850. This Act was also known as the Freedom of Religion Act, 1850, and it removed the disabilities that a person suffered from, on his conversion to another religion or on his excommunication, and one of the disabilities that it removed was the 'inability to inherit the property of a relative of the former religion.' This Act was general in application and was not confined to only Hindus or Muslims. Though directed primarily at protecting the inheritance rights of the convert, it enabled a non-Hindu to inherit from a Hindu, thereby making an inroad into the basic principle of succession of this religion based law, *viz.* , the sameness of religion of the intestate and the convert. But beyond protecting the convert personally, it did not extend the protection any further, *i.e.,* to his descendants,69 [162]nor did it affect the rule of similarity of religion of the intestate and the heir, in any other manner. Therefore, a convert, irrespective of his/her religion, inherits from the Hindu intestate, not because Hindu law permits it, but because of the statutory protection conferred on him by the Caste Disabilities Removal Act, 1850. Hindu law did not permit a convert to inherit, but this rule was expressly abolished by this legislation. Where the son converted to Muslim faith and claimed property of his Hindu father on his death as his heir; it was held that his conversion would not adversely affect his rights to inherit the property of his Hindu father70[163]. A convert's descendants, born to him after such conversion, if not Hindus, will be disqualified from inheriting the property of the intestate.71 [164] So, for the descendants to be disqualified, two things should co-exist. First, they should be born after the conversion; and second, they should not be Hindus. For example, as illustrated in Fig. 12.58, out of two brothers *Br* 1 and *Br* 2, one brother, *Br* 2, converts to the Christian faith and gets married to a non-Hindu. On the death of *Br* 1, *Br* 2 would inherit the property, as despite being a non-Hindu, his rights are protected by the Caste Disabilities Removal Act, 1850. But suppose,*Br* 2 dies during the lifetime of *Br* 1 and then *Br* 1 also dies. In that case, *S* , the son of *Br* 2, who was born after *Br* 2's conversion, will be a 'convert's descendant born to him after conversion' and would be disqualified from inheriting the property of the Hindu intestate.

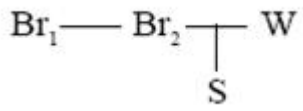


Fig. 12.58

In the present example, let us suppose that after the conversion, *Br* 2 gets married to a Hindu girl, *W* . He can do it either under the Special Marriage Act, 1954, or even under the Indian Christian Marriage Act, 1872, where the marriage of a Christian and a non-Christian is permissible. After a son,*S* , is born to him, he dies. *W* , being a Hindu, goes back to her parent's family and the child is brought up as a member of her Hindu parent's community. The child will be a Hindu. If *Br* 1 dies, then *S* , even though he was a convert's descendant born to him after conversion, will be entitled to inherit the property of *Br* 1, because he is a Hindu.

Born after Conversion Convert's Descendants

In order to be disqualified, the descendants must have been born after the conversion of their parents and not before it. For example, in Fig. 12.59, a family consists of the father *F* , and a son *S* . *S* gets married to *SW* and a son *SS* , is born to him.

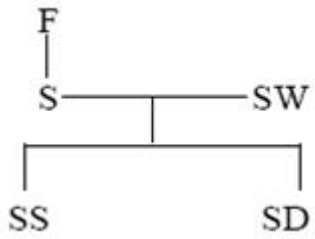


Fig. 12.59

After the birth of *SS* , *S* and *SW* convert to the Muslim faith and a daughter *SD* is born to them. Shortly thereafter, *S* dies. Now, on the death of the father *F* , *SW* will retain her inheritance rights as she is a convert and her rights are statutorily protected. *SS* will inherit as he is the son of a predeceased son, born to him before conversion, but *SD* will be disqualified as even though she is a class-I heir, she was born to the Hindu father after his conversion to Muslim faith, and since, at the time of her birth, both parents were Muslims, she is a Muslim by birth, and not a Hindu.

Illustration

A Hindu male *H* , gets married to a Hindu female *W* 1 and a son *S* , is born to him. On the death of *W* 1, *H* converts to the Muslim faith and gets married to a Muslim girl *W* 2, and a son S1, is born to him from her. [See Fig. 12.60]

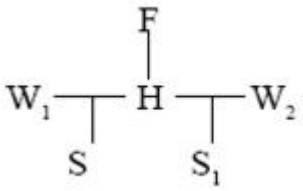


Fig. 12.60

Let us consider three situations:

(i) If *S* dies, *H* is a convert and a Muslim, but is still entitled to inherit the property of his Hindu son, because of the removal of his disability to inherit due to difference of religion, by the Caste Disabilities (Removal) Act, 1850.

(ii) If instead of *S* , *H* dies, because *H* was a Muslim at the time of his death, the Muslim law of succession will govern succession to his property and *S* being a non-Muslim, will not inherit from his Muslim father.

(iii) If, after the death of *H* , *H* 's father, *F* dies. *S* will be the son of his predeceased son, born to him before conversion and would inherit the property, but S1, who was born after the conversion, would be disqualified from inheritance.

A convert's descendants should be Hindus in order to inherit the property of the intestate, at the time when the succession opens. It is the time of the death of the intestate that is material for determining whether the convert's descendant is eligible to inherit the property or not. If the descendant was not a Hindu at the time of opening of the succession, but converts to the Hindu faith subsequently, he would still not be entitled to succeed.

CONSEQUENCES OF DISQUALIFICATION

The heir who is disqualified is presumed to be dead, and the succession passes to the next heir in line, who is eligible to inherit the property. Section 27 provides, 'if any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.'

The disqualified heir is presumed to be dead, and the next eligible heir takes the property. However, if the next heir is a representative of the disqualified heir, such heir would also be disqualified. For example, *A* , a Hindu male, is murdered by his son *S* . The son is a disqualified heir and will be presumed to be dead. His wife according to the literal interpretation of Sec. 27 should have been treated as the widow of the predeceased son and could have taken the property as the class-I heir of the intestate, but since the disqualification is based on the rule of public policy, equity and good conscience, neither the murderer nor any of his representative, in this case his wife would be entitled to succeed to the property of the intestate whom the heir had murdered. In *Janak Rani Chadha v. State of NCT of Delhi72* [165], the husband was disqualified from inheriting the general property of the wife as he had murdered her. The next category of heirs was "heirs of the husband" The court held that if the heir is disqualified he is presumed to be dead and the succession passes to the heirs in the next category. However, in this case the next category was in fact a representative of the disqualified heir. Thus neither the disqualified heir nor any of his representatives are entitled to succeed. The parents of the husband were also disqualified from inheriting the property of the deceased daughter in law that they otherwise would have inherited had it not been for the disqualification rule. The property in this case it was held, would be taken by the heirs in the next category, *i.e.,* parents of the deceased. The Supreme court in *Vellikannu v. R Singaperumal73* [166], made the following observations:

> The son cannot inherit any property of his father on the principles of justice, equity and good conscience as he has murdered him and the fresh stock of his line of descent ceased to exist in that case. Once the son is totally disinherited then his whole stock stands disinherited *i.e.,* the wife and the son. The son himself is totally disqualified by virtue of sections section 25 and 27 of the Hindu Succession Act and as such the wife can have no better claim in the property of the deceased.

DISEASE AND DEFECT NOT TO DISQUALIFY

Section section 28 of the Hindu Succession Act, 1956 provides:

> No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever.

The Act provides for only two types of disqualifications. It categorically specifies that no disease, whether curable or incurable, or defect, whether congenital or acquired later, would disqualify a person from inheriting the property of the intestate. Insanity, any other kind of mental or physical abnormality, or handicap, including blindness or diseases like cancer, HIV AIDS or any other deadly disease, will not have any effect on the succession rights of a person.

IX.SPECIAL RULES RELATING TO DWELLING HOUSE

Law Prior to the Hindu Succession (Amendment) Act, 2005

Under the Hindu Succession Act, the general provision is that the rights of a son and a daughter are equal. It is without reference to the type of property available for succession. An impression is created therefore, that whatever may be the type of property, be it a house, cash, clothes, vehicle, shop or even household goods, a daughter has an equal claim over it, not merely of ownership, but also of a right to possess, enjoy and alienate it in the same manner as a son. But where the inherited property comprised a dwelling house that was in the occupation of the male members of the family of the intestate, special rules were provided prior to 2005 for its devolution.

Section section 23 of the Hindu Succession Act, 1956 reads:

> **Special provisions respecting dwelling house.—** Where a Hindu intestate has left surviving him or her, both male and female heirs specified in class-I of the Schedule and his property includes a dwelling house wholly occupied by members of his or her family, then notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein, but the female heir should be entitled to a right of residence therein, provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

By virtue of this provision, ownership of all class-I female heirs in a dwelling house, is narrowed down to a right of residence only. What they are denied is a right to have their shares partitioned and specified, till the male heirs choose to divide their respective shares among themselves. There are twelve class-I heirs, eight of them being females and four males. These eight female heirs, *viz.* , the widow of an intestate, his mother, daughter, daughter of a predeceased daughter, daughter of a predeceased son, widow of a predeceased son, daughter of a predeceased son of a predeceased son and widow of a predeceased son of a predeceased son, cannot partition or specify their shares in the dwelling house if, at the time of the death of the intestate, his house was wholly occupied by his son, son of a predeceased son, son of a predeceased son of a predeceased son or son of a predeceased daughter. But if these male heirs decide to divide their shares among themselves, the female heirs can also be given their shares. For example, two sons and the widow of an intestate inherit his house. Each of them is the owner of a third of the house, but the right of the widow to partition and demarcation of her share would arise only if the sons decide to do so and not otherwise, at her option. Where the female heir happens to be a daughter, her ownership is without a right of residence and demarcation of her share unless she is unmarried, a widow, or has been deserted by or is separated from her husband. For example, a son and a daughter inherit a house. The daughter is married. Though she owns half of the house, she cannot possess it or live in it without the permission of her brother, even though he owns only half of it.

The non-existence of the right to demarcate their respective shares of the class-I female heirs does not adversely affect their ownership in the property and if they are unable to do it in their lifetime, their legal heirs inherit their shares with the same disability of incapability of affecting a partition and demarcation of their shares.

ESSENTIAL CONDITIONS FOR APPLICATION OF SECTION 23

(i) The section applies in case of both male as well as female intestates.

(ii) It does not apply in case of testamentary succession, where the property goes under a Will.74 [167]

(iii) This section has no application where the intestate was governed by the Marumakkattayyam or Aliyasantana laws before the passing of the Act.

(iv) The restriction applies only in case of a dwelling house and not to any other kind of property. A ‘dwelling house’ means a house which is used for residential purposes. It does not refer to any house, but the expression is ‘dwelling house’. If there are several houses, but only one or two are used for the purposes of residence by the family members, these houses alone, will be called ‘dwelling houses’. A guest house owned by the family and used for commercial purpose, is not a dwelling house and though controlled by the male members, will not be subject to this provision.

(v) Such dwelling house should have been wholly occupied by members of the intestate's family. The term 'wholly' means that not even some portion of the house should be in possession of non-family members. Where the whole house,75 [168] or a portion of it,76 [169] is let out to tenants, who are total strangers, the house is not 'wholly occupied' and the section is not applicable. Servants and relatives are not family members and if the house is occupied by them, the restriction on female members would not apply. Similarly, 'wholly occupied' does not mean that only the covered area should be occupied. If there is plenty of space around the house, which even exceeds the share of the female, the dwelling house is not wholly occupied and can be partitioned.77 [170]

(vi) The restriction applies on the females to ascertain their shares till 'The male heirs do not destruct their joint status', which means that they divide by a formal partition and specification of their shares. If they choose to enter into an informal arrangement and occupy different portions of the house, they have not destructed their joint status formally and s. 23 continues to apply. Even if one of the male heirs remains ex parte in a suit for partition the joint status is maintained and is not divided.78 [171] But where the sole male heir sells his half share in the property, it indicates his desire to effect a partition and the female heirs can claim partition.79 [172]

RESTRICTION APPLICABLE IN CASE OF MALE HEIRS OR EVEN A SINGLE MALE HEIR

The section provides that the class-I female heirs cannot ascertain their shares by a partition, till the 'male heirs' choose to divide their respective shares. It uses the term 'male heirs', and a literal interpretation would suggest that there have to be more than one male heir in order that the restriction applies. Secondly, a 'division of respective shares' is possible only when more than one male heir is present. Further, the term is 'male heirs' and not male members, and would not include a living son's son. For example, if the co-heirs to an intestate are a son and a daughter, the son is a single male heir. In such a case, there is no possibility of a partition ever taking place in the future. Does it mean that the daughter will not be able to ascertain her share at all, or does it mean that the legislature intended that the restriction should apply only in the presence of two or more male heirs? A conflict of judicial opinion prevailed on this issue.80 [173]

The Orissa High Court, in *Mahanti Matyulu v . Oluru Appanawa* ,81 [174] observed:

> In case of a single male heir, there is no possibility of that male heir claiming partition against another male heir, as there is none and if in such a case, the right to claim partition by the female heir is restricted, it would practically destroy and deny that right forever.

Discussing the practical implication of the denial of such right, the High Court further observed:

> [The] legislature having given the female heirs absolute rights of inheritance in one hand, could not have taken away the same by the other. In case of property descending on more than one male heir, along with one or more female heirs, the female heir or heirs would get her or their share partitioned as and when the male heirs chose to divide their respective shares in the dwelling house, whereas in case of a single male heir inheriting the dwelling house, with one or more female heirs, the latter would remain owners in pen and paper, but cannot exercise any act of ownership except residing therein, which right in rare cases can be rarely exercised.

However, in *Janabai Ammal Gunabooshni v . TAS Palani Mudaliar* ,82 [175] a Division Bench comprising Ratnavel Pandial J., and Venugopal J., held:

> Even in cases where there is only one male heir of the intestate in a Hindu joint family, the female heirs cannot claim partition of the dwelling house until the male heirs choose to divide their respective shares therein. Section 23 cannot be deemed to have intended that the restriction is to operate only if there are two or more male members (heirs) in the family. Acceptance of contrary view will cause gross injustice to the single male heir and the very object with which the section has been enacted would be completely nullified. In such cases, the hardship that would be caused to the female heir in not being able to claim partition is certainly relatively less than the injustice that could be done to the single male member.

The matter went to the Supreme Court,83 [176] which held that 'the expression "male heirs" includes even a "single male heir".'

Thus, even where the intestate has left behind a single male heir, and though the fact of a partition would never arise, the female heirs cannot partition their shares. This decision, it is respectfully submitted, does not appear to be correct. The use of the expression, 'male heirs choosing to divide their respective shares', unmistakably shows that a minimum of two male heirs must be present before the restriction applies, otherwise how else will they divide their respective shares. It may be argued that male heirs may include a single male heir, but if the legislature in fact, had wanted it to be applicable in case of a single male heir also, it would not have used the expression 'their respective shares'. The entire phrase has been used in plural and to hold that it includes a case, where no partition is ever possible, is to give it a twisted interpretation, the one that was never intended by the legislature.

INFORMAL ADJUSTMENT PERMISSIBLE

Though a suit for partition and separate possession in a dwelling house is not maintainable until the male heirs themselves destruct their joint status, there is no bar on any adjustment of interests of the parties in the house or in other properties, without destroying the dwelling house as a unit,84 [177] and where the male heir expresses his inclination or desire to have a division in the written statement, it is sufficient to enable the female heir to ascertain her share.85 [178]

IMPLICATION OF SECTION 23

Till the male heir or heirs are occupying the house and they do not wish to demarcate their shares formally, all class-I female heirs suffer from a disability to ascertain their shares. For example, a Hindu male dies, leaving behind a widow and a son, and a house that was being used for residential purposes by his these family members. The son has the ownership of half of this house and this ownership gives him all the rights of an owner, *viz.* , of its possession, enjoyment, demarcation and alienation at his pleasure. He can let it out to anyone, sell it, gift it or simply live in it. He does not have to seek the permission of anyone to do it. But if we look at it from the point of view of the widow, she is the owner of half of the house as well, but her ownership is limited to only a right of residence in it. She cannot ascertain which half belongs to hers, and accordingly, in which corner of the house she would live, will be decided by the son. She cannot let out her portion as it cannot be ascertained. If she sells her probable half, the transferee would stand in her shoes and would also be incapable of ascertaining the share.86 [179] Take another example: an intestate dies, leaving behind a son and a married daughter and a dwelling house which was in occupation of the son. The son is the owner of half of it, and the daughter is the owner of the other half. If we look at the ownership of the daughter, she is an owner on paper, but as she is married, she has no right even to live in it, unless she is a widow, or is deserted by the husband or is divorced. If she does not fit into the description of a widow, divorcee or a deserted woman, she is not empowered to even step inside her portion of the house, without the permission of her brother. If her husband is transferred out of station for reasons of his employment, and she, having no other place to live, looks for an accommodation, she may be forced to live in a tenanted premises, but she cannot live in her own property, because she is married. The present set-up is vastly different and it may not be feasible for a married woman to follow her husband wherever he is transferred. With a growing number of women taking up employment, and the education of children at a particular place becoming a predominant consideration, spouses without a marital break-up, may have two different places of residences. The daughter owns property but because it is a share in the house which is occupied by her brother and his family, she cannot live in it. This ownership is therefore, merely a paper ownership. If we take a look at the entitlement of the son, he is the owner of half of the property, the other half belonging to the married daughter, but as the expression used in s. 23, indicates that the house should be 'wholly occupied' by male heirs, the son has a legal right to possess and enjoy the share of the sister against her wishes and without any monetary return. He owns only half of the house, but s. 23 gives him a right to enjoy the whole house. An equitable division of property is what the legislature expects sharers to give effect to, but here, there are no rules requiring the brother, who now has a legal permission to enjoy the share of the sister, to give her something in return. This 'free for life use' of the share of a female by a male heir, without her consent, is in the nature of deprivation of one for the unjust enrichment of another. This deprivation is of the right of the female, so that the male heirs can live comfortably in her share. The legislature has not fixed even a time frame within which the brothers should demarcate their shares and therefore, the law has made it very convenient for them to appropriate the share of their married sisters. The only thing that they cannot do is to sell her share, but s. 23 gives physical possession and enjoyment of her share, to the male heirs.

MAXIMUM HARDSHIP TO A MARRIED DAUGHTER

The acquisition of property as an owner, carries with it, all the basic incidences of ownership, *i.e.,* a right to the title, a right to possess and enjoy the property and a right to sell it at the owner's pleasure. Section 23 gives a married daughter a title, but no right to possess and enjoy the property and consequently, even though in theory, the right to

sell the property is not denied, it is inconceivable that this interest, which is without the right of possession, will be purchased by anyone. The practical implication of this statutory interdict on a married daughter to claim partition of the house, till the male heirs decide otherwise, results in the denial of any claim of enjoyment of the dwelling house.

RELEVANCE OF SECTION 23

No provision similar to s. 23 had been included either in the Hindu Code Bill, 1948 or even in the original Hindu Succession Bill (Bill 13) of 1954. It was introduced later in the amended Bill, at the instance of the conservatives, who were vehemently opposed to the idea of a house being partitioned at the instance of female members. The reasons given by the parliamentarian for its inclusion, centred around a presumption of its applicability only to a daughter and ignored the fact that it is one provision that restricts the manner of enjoyment of eight heirs, for the convenience of four heirs.

REASONS ADVOCATED FOR JUSTIFYING THE RETENTION OF SECTION 23

The protagonists of retention of s. 23 are the parliamentarians, and even the judiciary. Let us analyse the basic reasons for the denial to the females, of a right to demarcate their share and a total denial to the married daughter, to even possess her own property.

Introduction of Strangers

One of the basic arguments put forward for denying to the females, a right to ascertain their shares and with respect to a married daughter, a denial of a right of residence is that it would result in the introduction of strangers in the house. A few observations of the parliamentarians at the time of the discussion of the Hindu Succession Bill, 1954, are noteworthy here:

> The brother-in-law and the persons who belong to the family wherein our daughters are given, will pounce upon the property of the father-in-law. There are litigations because the daughter is given the property. Females are not educated and they have not had the experience of litigation. It is but natural that the husbands of such females would like to have the loaf of the property of the family from which the female has come to the other family. This would cause a great nuisance and great unhappiness and trouble to the society.87 [180]

> If the daughter and the daughter's daughter etc., are given share in the immovable property (house), it will result in new elements coming into the family, the family system would be disrupted, there will be disorder in the family, and it will breed ill will, hatred etc.88 [181]

> It will have a very disturbing effect on the agrarian set-up in this country. If you give the share to the married daughter, are you not making the son-in-law a co-sharer in the family property? It will have a very disastrous effect.89 [182]

> The brothers, two or three, may stay together for some time, but the difficulty will arise when there are two daughters and two sons and only one house. How can the property of a man be divided among two sons and two daughters, if he dies leaving one house? How can the house be divided?90 [183]

All the arguments are confined to the basic presumption that if the share is given to the daughter, it would mean the introduction of strangers into the family. But it should be noted that the denial of a right of demarcation is for all the class-I female heirs, which includes the mother and the widow of the intestate as well. Secondly, it has been held91 [184] that females have a right to sell their shares without demarcating it, but the transferee stands in her shoes. This would mean that unless he purchases the share of a married daughter, he also acquires a right of residence in it, along with the male members. If that is permissible, then the whole purpose of keeping the restriction is frustrated, as he would be a total stranger to the family. For example, a son and the daughter of the intestate, inherit the property. The daughter is incapable of ascertaining her share and the reason advanced is that it would mean an introduction of strangers into the family. As she is the owner of half of the property, she can sell it in favour of anyone. If she sells it to a stranger, not because she wants to do it, but because she needs the money, the stranger would step into her shoes and would take what exactly was her entitlement in the property. If what she had was a right of residence, the stranger would also take the right of residence along with the male heir and thus, this

provision fails to prevent the introduction of strangers in the house and its retention is meaningless.

Arguments of Dissension in the Family

One of the favorite arguments advanced to support this provision is, that a denial to the married daughter, of a right of residence in her own property is necessary, otherwise, there will be dissensions in the family. Parliamentarians had cautioned:

> Don't proceed on equality, otherwise you would be in trouble. It is not a question of equality, it is a question of giving the rights according to the social pattern. If you proceed on equality, everything would be spoiled. If you give the same rights to the daughters as to a son, there will be uneasiness and tensions in the country and every family will be ruined with litigation.92 [185]

It is apparent at whose instance there would be tensions in the family. They could only be at the instance of a person who is denied a right to unjust enrichment and is deprived of a possession far in excess of his entitlement. If the brother obeys the laws of inheritance and parts with the share of the sister and does not insist on possessing her share without her consent, there will be no litigation. Litigations and dissensions will be there only when either the behaviour and attitude of the brother is unjust or the sister tries to take something that is not her entitlement in law. Maintaining love and sibling affectation is the duty of the sister as well as of the brother and an insistence that a female must keep love and affection above her entitlement, is a heavy price for her to pay. The deprivation of her just claims should not be only to avoid the male member's displeasure.

Married Daughter does not Belong to the Father's Family

One of the social phenomenons prevalent in the society (not necessarily only among Hindus) is that the son continues to live in the house of the parents, with them, even after his marriage. His separation ordinarily, is due to reasons of his employment in a different city or if he wants to explore better options and life outside his parental home. It stems from the practical convenience of the arrangement that a common residence would enable the son and his family to look after the parents in their old age, which is also seen as one of the duties of the son, but has now been recognised by the judiciary as the duty of a daughter as well, including that of a married daughter. In contrast, it is advocated that a daughter, on marriage, leaves the house of the parents and joins the husband's household. Her residence changes on marriage and till she is unmarried, her residence in her father's house is seen as merely temporary.

This social phenomenon cannot be made the basis of a denial to the daughter, of the right to claim partition or a right of residence. If it is a fact that the daughter leaves the house of her parents on marriage and goes somewhere else, the disability should not have been imposed on the mother of the intestate or the widow of the intestate, who not only live in the same house, but have spent a longer time period in it, in comparison to the son, and with no likelihood of leaving it in future. Secondly, the restriction is not operative on a son who separates from his parents during their lifetime, lives elsewhere with his family members and does not look after them in their old age. Thirdly, the court recognises the duty of the daughters (including married daughters) and imposes it on her when it comes to maintaining her parents, on exactly the same lines as on the son, but it adopts a differential treatment when it comes to giving her the inheritance rights in the property of these very parents, by making it subject to the rights of a son.

Dwelling House is an Impartible Asset

One of the arguments for denying to the females, a right to partition the house is that it is an impartible asset and should not be fragmented at the instance of the female members. The Madras High Court, in *Mookkammal v . Chitravadivammal* ,93 [186] explained it in the following words:

> Section section 23 of the Hindu Succession Act, appearing in the chain of sections of the codified Hindu law, is intended to respect one of the ancient Hindu tenets which treasured the dwelling house of the family as an impartible asset as between a female member and a male member. In order to perpetuate those memorable intentions of Hindu families, Parliament took that auspicious aspect into consideration while codifying the Hindulaw.

The Supreme Court has observed: 94 [187]

> The reverence to preserve the ancestral house in the memory of the father or the mother is not the exclusive preserve of the son alone. Daughters too would be anxious and more reverential to preserve the dwelling house, to perpetuate the parental memory.

The approving tone of the language by using the words, 'memorable intentions of the Hindu families' and 'reverence to preserve the ancestral house in the memory of the father or the mother', indicates a justification of this provision by the judiciary. However, it should be noted that it is based on an ancient tenet, and its impartibility is to be preserved only between a male and a female and not between males only. Out of many respected ancient tenets, this selective inclusion in a modern legislative enactment, of this one, is in itself questionable. Secondly, reverence can never be enforced by the legislature or the judiciary, by imposing upon one sex only, a disability to ascertain the share in this manner. It is expressed and exercised voluntarily. The section and the reasoning smacks of a presumption that reverence on the part of the sons to preserve the house is implied and does not need any interference, but as far as the females are concerned, it needs to be enforced by the legal machinery.

Denial of a Right to Enjoy the Property is Necessary, Otherwise there will be Gross Injustice to the Brother

A glaringly incongruous reason put forward is that if the brother is denied the use of his sister's share for free, it will cause gross injustice to him. What is unfortunate is, that it is the Indian judiciary, including the Supreme Court, which is advocating it.95 [188] The basic reasoning is that if a married daughter is permitted to partition her share and live in it, the brother would be thrown out on the streets and it will cause gross injustice to him. K Ramaswamy J., in *Narasimhamoorthy v . Sushilabai* ,96 [189] gave various examples to show how the application of s. 23 would prevent the brother from being thrown on the roads. He observed:

> Take a case of a Hindu male or female, owning a flat in a metropolis or in a major city, like Bombay etc., with a two room tenement, left behind by a Hindu intestate. It may not be feasible to be partitioned for convenient use and occupation by both the son and the daughter and to be sold out. In that event, the son and his family will be thrown out on streets and the daughter would coolly walk away with her share to her matrimonial home, causing great injustice to the son and rendering him homeless/shelterless. With passage of time, the female members, having lost their moorings in the parental family after marriage, may choose to seek partition, though not voluntarily, but by inescapable compulsions and constrained to seek partition and allotment of her share in the dwelling house of intestate father or mother. But the son, with his share of money, may be incapable to purchase a dwelling house for his family and the decree of partition would make them shelter less.

> Take yet another instance, where a two room tenement flat was left by the deceased father or mother, apart from other properties. There is no love lost between the brother and sister. The latter demands her pound of flesh at an unacceptable price and the male heir would be unable to buy off her share, forcing the brother to sell the dwelling flat or its leasehold rights interest, to see that the brother and his family are thrown into the streets to satisfy her ego. If the right to partition is acceded to, the son will be left high and dry, causing greatest humiliation and injustice.

In both the cases, the sister had not demanded the share of the brother, but her own share, which the legislature had given her. Regrettably, the above observation of the Supreme Court, it is respectfully submitted, also appears to suffer from a bias against the sister from the language used in the examples, *i.e.* , 'the daughter would coolly walk away with her share to the matrimonial home' and 'to see that the brother and family are thrown on the streets to satisfy her ego.' These are prejudiced assumptions, which show a woman (sister) as unconcerning and deliberately vindictive. Further, in all these examples, the judiciary failed to visualise one situation. What would be the outcome of the two instances, if instead of there being one brother and one sister, there were only two brothers, as even in that case, it would be inconvenient for them to partition it, or bring about a solution if one demands his pound of flesh at an unacceptable price?

In the second example, the court presumes that there is no love lost between the brother and the sister and the sister would demand her pound of flesh. When the relations are strained, it need not always be the sister's fault, but perhaps the basis for strained relations is her demand of her share and a denial on the part of the brother, to hand it over to her. The court painted a pathetic picture of the brother who all along, wanted to enjoy the share of the sister, which appeared to be one-sided and unrealistic. The reasoning and examples appear to have been viewed only from the brother's side, rather than being based on rational judgement. According to the reasoning, as the sister demands an unacceptable price, the brother would be unable to buy her share, which indicates that if she had

demanded the market price, it would have been possible for him to buy her share. Or even if that does not happen, being the owner of half of the flat, he should be content to live in that half. He should be satisfied with what rightfully belongs to him. Neither the court, nor anyone else for that matter, should help people grab the share of somebody else, without her consent, for free. There was not even a remote chance of the brother being thrown on the road in any case. Even by demanding her pound of flesh or by asking for her share, the sister is not trying to even touch the share of the brother, rather, it seems to be the brother who is insisting upon possessing her share, in reality.

What is noteworthy here is, that the judiciary was concerned that if the brother (who is the owner of half of the property only) is not allowed to use and occupy the share of his sister (who is the owner of the other half), it would cause gross injustice to him. But where the sister is not allowed at all to use, or even occupy her own share, the hardship to her is less than the hardship of the brother. Such reasoning appears to be incorrect on the face of it. For the sister, it is a total denial of the use of her property and what the brother wants is, a free use of her share. Unfortunately, even the judiciary perceives men as the rightful successors to the father's property, and women, who have statutorily been conferred a right to inherit the property, are visualised as intruders or share-snatchers. Rather than victims, they are seen as vindictive and opportunists. It is despite the fact that Indian females as a rule, voluntarily or even half-heartedly, relinquish their shares in favour of their brothers so as to keep the bond of love and affection intact, but there is no reason for the judiciary to impose upon them, a mandatory surrender of their inheritance rights.

When it comes to acquiring a roof over one's head, the trend of the judiciary is very surprising. A married daughter has no right of residence, let alone of demanding a partition and possession of the inherited dwelling house, in the presence of her brothers. A married woman has also, no right of residence in the matrimonial home owned by the husband, without his consent. In a Bombay case,97 [190] the husband threw the wife out of the house and prevented her from re-entering it. She sought the help of the court to obtain an ad interim order, restraining her husband and in-laws from turning her out or trying to prevent her re-entry. The husband's appeal against the order of the trial court was granted in his favour. Rejecting the wife's claim that she should be entitled to live in the house, the court observed:

> If this argument is accepted in all its implications, it would be impossible to prevent public disorder on a very wide scale. Today, it is a case of the wife entering her alleged matrimonial home. Next, it will be others, including persons with all sorts of claims, existing, *bona fide* , dubious and dishonest. A state, subject to the rule of law, cannot permit this to happen—nay not in the name of feminism, nor for the protection of the deserving.

The decision is extremely relevant in the Indian context as women have been dependent on men for a roof over their heads, even in situations where they own the property.

It is ironical that the judiciary, in one case, while justifying the denial to the married daughters, a right of residence in her property, occupied by the brothers, came up with a very strange argument. The Karnataka High Court held: 98 [191]

> The object of this proviso would be defeated and it will encourage the married daughters to desert their husbands or live separately from their husbands, if it is held that the daughter living on her own accord, separately from her husband, is entitled to a residence.

Succession rights of a woman and her marital relations with the husband, have no connection with each other. A woman cannot be denied her rights to enjoy the inherited property on grounds of marital discords with her husband. Only one question can be put to the court in such cases, *viz.* , would they like to impose some impediments on the inheritance rights of a man who deserts his wife?

In the present social set-up, which has vastly changed over time, the apprehensions of the parliamentarians also need to be examined in a different light. Noteworthy is the fact that presently, more sons are separating from their parents, along with their families, for a variety of reasons ranging from considerations of employment, a desire of settling abroad, or even a desire to lead an independent life. A married daughter's status is exactly equal to that of a separated son, and she has not separated voluntarily, but due to social custom. Yet, while the legislature chose to restrict the right of the daughter, it has not put any impediments on the rights of a separated son from partitioning the parental house. From the coparcenary property, a son is handed the share immediately on his separation and his rights in the separate property are also well protected. Further, if the basic reason for the denial of this right to

married daughters was only that the property would go out of the family, it is strange that this prohibition is not extended to a married daughter's son. Under the Act, a deceased daughter's (marital status irrelevant) son and daughter are class-I heirs. The prohibition to ascertain her share and a denial of the right of residence in this property is appended to a daughter, and also to a daughter's daughter, but a daughter's son does not suffer from any such disability. For example, a man having a son and a married daughter dies and leaves behind, a dwelling house. The daughter being married, has no claim of residence and partition of the house, even though she is the owner of half of it, but if she predeceases the intestate and is survived by a son and a daughter, both these children would be class-I heirs along with the intestate's own son. Her son, belonging to a different family and definitely having the capability to take the property out of the family, is capable of not merely effecting a partition of the dwelling house, but also of residing in it or alienating it if he so desires, yet the daughter's daughter, who along with him, inherits exactly the same portion of property, is incapable of partitioning it.

Thus, this common belief, that after 1956, a daughter is treated on par with the son and that Hindus, being progressive in nature and amenable to social change with ease, place their women in a better position in comparison with their sisters under other personal laws, does not appear to be true. With the deletion of s. 23, differential treatment in property acquisition and ownership and its manner of enjoyment, only on grounds of sex, has been abolished. It is a welcome step and was indeed the need of the hour.Present position with respect to s. 23 on pending litigations

Legislative sponsored discrimination against daughters was clearly evident as with this express provision a daughter was denied a right to claim partition of her own share in the inherited property against the wishes of her brother on whom the legislature conferred a legal right to use and occupy the share of the sister against her wishes. It has been now close to six years that this provision was aptly deleted from the statute books, but the issue as to the applicability of the amended provision to the pending suits wherein daughters claimed partition and specification of their shares out of the family dwelling house still keeps on surfacing. In *Santosh Kumar v. Baby1* [192] the prayer of the sister for a partition of the dwelling house was contested by the brother on two grounds, firstly that the daughter does not have a right to have her share ascertained under the Act and secondly, that since he had made substantial improvements in the house at his own costs the same should be reserved for him. The High Court held that if one co-sharer makes improvements or modifications in the common property without the consent of the other co-owner, he does it at his own peril and at best can claim only an equitable consideration for the allotment of the house to him after its valuation. During the pendency of the appeal the Hindu Succession Act, was amended and Sec. 23 was deleted, the brother contended that the petition should be considered in light of the facts and the legal position as it stood and existed on the day of the filing of the petition and not in light of the subsequently changed legal and factual scenario. The court concluded that this right of the brother or any male heir under sec. 23 was personal in character and was neither transferable nor heritable and if it was held that the situation and the legal position existing on the date of the presentation of the petition only should be considered and regard should not be had to subsequent events then it would mean that this right could become heritable, *i.e.,* a defeasible right of a male heir would get defeated the moment his personal right ceases. Such personal right of a male heir is taken away by the omission of Sec. 23. The effect of such omission would be retroactive. The court rejected the claim of the brother and allowed the plea of the sister for ascertaining her share in the property. Again, in *Prabhu dayal v. Ramsiya2* [193] and *M. Revathi v. R. Alamelu,3* [194] sisters proceeded against their brothers to enforce partition and ascertain their holdings in the dwelling house. In both cases the courts held that the effect of deletion of Sec. 23 on the cases pending in courts awaiting disposal would be to remove this statutory disability imposed on the daughters. The court observed:4 [195]

> No doubt Amendment shall have a prospective effect, but practically if the matter is viewed it is clear that as per the Hindu Succession (Amendment) Act, 2005, the plaintiff is entitled to a partition of the dwelling house property also and such an amendment has come into vogue during the pendency of the appeal. The appeal is deemed to be in continuation of the suit proceedings. It would be a mere hyper technicality if the plaintiff is driven to the extent of filing a fresh suit involving the said recent Hindu Succession (Amendment) Act, 2005 and in such a case, I have no hesitation in construing that the erstwhile Sec. 23 had no application and accordingly partition could be ordered in respect of one eighth share of the daughter.

The court ordered a preliminary decree to be passed permitting the daughter to enforce partition and specify her share in the dwelling house.

In *Kalipada Kirtan v. Bijoy Bag5* [196] after the death of the father the property was inherited by his son, widow and the daughter in equal shares. The property included a house whose possession was with the brother. She filed a suit for partition of her one third share as against her brother in this house, who contested her claim on the ground that—

(i) the title of the sister had extinguished due to adverse possession by the brother of her share; and

(ii) she being a female heir was not competent to sue for partition and specification of her share of the dwelling house in light of Sec. section 23 of the Hindu succession Act, 1956.

The son maintained that the sister had not been in possession of the property for the past 20 years as she had been married and was living with her husband at the matrimonial home. Also as Section 23 (as it was then) puts statutory restriction on the right of all Class-I heirs to claim partition of the dwelling house, a daughter and that too a married one, could not claim a partition and specification of her share in it. During the pendency of this litigation, the Act was amended and Sec. 23 was deleted from the statute books. The Court held that merely because the married sister generally resided with her husband at the matrimonial home, it could not be said that her title to the property had been extinguished for want of actual possession. She was still shown as the co-owner of the property in the records. With respect to the contention of the brother that in view of Sec. 23 of the Act, she cannot claim partition or possession of her share, the court held that in view of the deletion of the provision from the Act, *via* the Hindu Succession (Amendment) Act, 2005, the restriction on the class-I female heirs to demarcate their shares in the dwelling house if the same was in occupation of the male heirs has been removed and the deletion would be applicable as against the pending suits as well. As the bar of partition of family dwelling house at the instance of a female heir is lifted, consequently such defence is no longer available to male heirs to oppose partition as in the amending Act even the pending proceedings for partition have not been saved.

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1. For further details, see Chapter I, *infra* .

2. *Pushpalatha N V v. V. Padma,* AIR 2010 Karn 124 .

3. *Sumathi v. Sengottaiyan,* AIR 2010 Mad 145 .

4. AIR 2010 Karn 27 .

5. *AIR 2007 Del 254* [*LNIND 2007 DEL 892*].

1. The Hindu Succession Act, 1956, s. 2.

2. *Rani Bhagwan Koer v . JC Bose* , (1903) 30 IA 249.

3. See *Krishnakumari Thampuran v. Palace Administration Board, Kalikotta Port, AIR 2009 Ker 122* [*LNIND 2009 KER 176*], wherein it was held that the children of a Hindu mother and a Muslim father would not be Hindus in absence of proof that they were brought up as Hindus.

4. The presumption is that a child takes the religion of father. See *Commissioner of Wealth Tax v . Sridharan* , (1976) SCC 489. However, this is not always the case. See *Maneka Gandhi v . Indira Gandhi* , *AIR 1985 Del 114* [*LNIND 1984 DEL 219*]; *Sridharan v . Commissioner of Wealth Tax* , *AIR 1970 Mad 249* [*LNIND 1968 MAD 207*].

5. *Devabalan v . Vijaya Kumari* , *AIR 1991 Ker 175* [*LNIND 1990 KER 253*]; *Rose Mary v . Commissioner of Wealth Tax* , (1976) 4 SCC 489.

6. *Balasubramanian v . Vidya Mohan* , (1996) 1 LW 524.

12. Section 2(1), Explanation (b).

13. *Vishvanath v . Doraiswami* , *AIR 1926 Mad 1* [*LNIND 1925 MAD 58*]; *Gangamma v . Kuppammal* , (1938) ILR Mad 789; *Myna Boyee v . Ootoram* , 8 MIA 400; *Charanjit v . Amir Ali* , 2 Lah 243; *Lingappa v . Esudasan* , 27 Mad 13; *Bhaiya Sher Bahadur v . Ganga* , 12 All LJ 188; *Kokilam Bal v . Sundarammal* , *AIR 1925 Mad 902* [*LNIND 1924 MAD 199*].

9. *Krishnakumari Thampuran v. Palace Administration Board, Kalikotta Port, AIR 2009 Ker 122* [*LNIND 2009 KER 176*].

10. *Komawatai v . Digbijai* , AIR 1922 PC 14 ; *Sundar Devi v . Thaboo Lal* , *AIR 1957 All 215* [*LNIND 1956 ALL 186*]; *Seethalakshmi Ammal v . Ponnuswami Nadar* , (1966) ILR 2 Mad 373; *Morarji v . Administrator General* , *AIR 1928 Mad 1279* [*LNIND 1928 MAD 187*].

11. *Re Jnenendranath Ray's Goods* , (1922) ILR 49 Cal 1069; *Commissioner of Income Tax v . Pratap Chand* , AIR 1959 Punj 415 .

12. *Narasaiah v . Jogi* , (1969) 2 Andh WR 118.

13. *Punjab Rao v . Mehsa Ram* , *AIR 1965 SC 1179* [*LNIND 1964 SC 280*].

14. *Sapna Jacob v . State of Kereala* , *AIR 1993 Ker 75* [*LNIND 1992 KER 284*].

15. *Guruswamy v . Irulappa* , *AIR 1934 Mad 630* [*LNIND 1934 MAD 108*]; *Kusum Kumari v . Satya Ranjan* , (1903) ILR 30 Cal 999; *Perumal Nadar v . Ponnuswami Nadar* , *(1971) 1 SCR 49* [*LNIND 1970 SC 146*]; *Ambalangan v . Deva Rajan* , *AIR 1984 SC 411* [*LNIND 1983 SC 363*]; *Alphosa v . Paul Sanker* , (1978) Mad LJ (Cr) 452.

16. See *Administrator General v . Anandachari* , (1886) ILR 9 Mad 466; *Guruswamy v . Irulappa* , *AIR 1934 Mad 630* [*LNIND 1934 MAD 108*].

17. *Michels v . Venkateshwaran* , AIR 1952 Mad 474 [*LNIND 1951 MAD 383*].

18. *Muthusami v . Masilamani* , (1903) ILR 33 Mad 342.

19. *Ramayya v . J . Elizabeth* , *AIR 1937 Mad 172* [*LNIND 1936 MAD 418*]; *RD Morarji v . Administrator General of Madras* , (1929) ILR 52 Mad 160.

20. *Rakheya Bibi v . Anil Kumar Mukherji* , (1948) ILR 2 Cal 119; *Sapna Jacob v . State of Kerala* , *AIR 1993 Ker 75* [*LNIND 1992 KER 284*].

21. *Kailash v . Maya Devi* , AIR 1984 SC 600 ; *Perumal Nadar v . Ponnuswamy Nadar* , ILR 25 Cal 537.

22. *Rajgopal v . Arumgam* , *AIR 1969 SC 101* [*LNIND 1968 SC 153*](wherein it was held that a Hindu convert to Christianity, would lose his Adidravida caste). See also *Sapna Jacob v . State of Kerala* , AIR 1991 Ker 75 (wherein it was held that a Hindu woman belonging to a scheduled caste, would lose her caste upon her conversion to Christianity).

23. *VV Giri v . Suri Dora* , AIR 1959 SC 318 .

24. *Jasani v . Moreswar* , *AIR 1954 SC 236* [*LNIND 1954 SC 27*]; *Shyam Sunder v . Shanker Dev* , *AIR 1960 Mys 27* .

25. *Arumugam v . Rajagopal* , *AIR 1976 SC 939* [*LNIND 1975 SC 534*]; *Kailash v . Maya Devi* , AIR 1984 SC 600 .

26. *Ambalayan v . Devarajan* , *AIR 1984 SC 411* [*LNIND 1983 SC 363*].

27. *Ameena Shapir v . State of Tamil Nadu* , (1984) 1 Mad LJ 237.

28. See the Special Marriage Act, 1954, s. 18.

29. *Ibid* ., s. 21 (inserted by Act No. 68 of 1976).

30. The Hindu Succession Act, 1956, s. 2.

31. Jammu and Kashmir Hindu Succession Act, 1958.

32. Decree of the Government of Portugal, dated 18 November 1867, in pursuance of the Portuguese Civil Code, 1867, Article 9.

33. The Portuguese Civil Code, 1867, Article 8.

34. PMS Usgaocar, ‘Family laws in force in Goa, Daman and Diu: Are they Uniform’, *Family Laws of Goa* , (ed. Sarjee Desai), 1982.

The Decree of Usages and Customs of the Hindus of Goa, dated 16 December, 1880, confirmed the earlier decree dated 14 October, 1880; Order dated October, 1894, with respect to Hindus of Diu confirming earlier decrees dated 31 August, 1953; and 4 December, 1865; Order dated 19 April, 1912 with respect to Hindus of Daman.

35. The Twelfth Amendment to the Constitution of India, 1962.

36. See s. 5(1). In the area of family laws, the Child Marriage Restraint Act, 1929, Births, Deaths and Marriages Registration Act, 1886, and the Registration of Births and Deaths Act, 1969, have been extended to Goa, Daman and Diu.

37. This was reiterated by the French Constitution of 1946, as well as by the French Constitution of 1958, which provided that the French nationals, if they were not subject to the common law of the country, namely the French personal law, as embodied in the civil code, would continue to be governed by their own personal law.

38. David Annouswamy, ‘Pondicherry: A Babel of Personal Laws’, Vol. 14, 1972, JILI, p. 421.

39. This offer was coupled with the attraction of granting full political rights and preferential appointment in the Metropolitan cadre in the French Army, at attractive posts.

40. ‘Renocants’ are those Indians who have renounced their personal law and have embraced the French personal law, as embodied in the code.

41. See the Hindu Succession Act, 1956, s. 2(2).

42. The Article 366 (25)Constitution of India, 1950,.

43. *Kandan v . Jitan* , AIR 1973 Pat 206 ; *Dasarath v . Guru* , *AIR 1972 Ori 78* [*LNIND 1971 ORI 42*].

44. *Satish Chandra Brahma v . Bagrank* , AIR 1973 Gau 76 .

45. *Nalinaksha v . Rajani* , (1931) 58 Cal 1392.

46. *Sohan Singh v . Kalla* , 10 Lah 372.

47. *Sugan Chand v . Mangibai* , AIR 1942 Bom 467 .

48. *Sri Raghava Das v . Sarju* , *AIR 1942 Mad 413* [*LNIND 1941 MAD 284*].

49. *Raj Chattiar Singh v . Roshan Singh* , AIR 1946 Nag 277 .

50. *Chukma v . Bhabani* , (1945) 24 Pat 727; *Labishwar Manjhi v . Pran Manjhi* , (2000) 2 HLR 395 (SC); *Dhenai Majhi v . Ranga Majhi* , (1999) 2 HLR 402 (Pat).

51. *Maharaja Prataj Singh v . Sarojini Devi* , (1994) Supp 1 SCC 734; *Rebutimal Varma v . HS Padmana Bhadasa* , (1993) Supp 1 SCC 233; *Dattatraya v . Krishna Rao* , *AIR 1981 SC 1972* [*LNIND 1981 SC 384*].

52. *Anna Sahib v . Balwant* , *AIR 1995 SC 895* [*LNIND 1995 SC 16*]; *Bhairamanuj v . Maheshanuj* , *AIR 1981 SC 1937* [*LNIND 1981 SC 361*]; *KB Patil v . BK Patil* , AIR 1989 SC 1042 ; *Nagesh Bisto v . Tandeo Tirmal* , *AIR 1982 SC 887* [*LNIND 1982 SC 56*].

53. See The Hindu Succession Act, 1956, s. 4(1)(a).

54. *Ibid* ., s. 5.

55. *Bhaiya Ramanuj v . Lalu Maheshanuj* , *AIR 1981 SC 1937* [*LNIND 1981 SC 361*].

56. *AIR 2010 Raj 15* [*LNIND 2009 RAJ 218*].

57. The Hindu Succession Act, 1956, s. 4(2).

58. *Raman Khanna v. Sham Kishore Khanna,* AIR 2009 HP 42 .

59. *AIR 2007 Del 27* [*LNIND 2006 DEL 678*] court held that the laws of inheritance would not apply to the present case and the money was equally divided between the two survivors.

60. Subject to the provisions of the Indian Succession Act, 1925.

61. For a detailed discussion, see Chapter 4, *supra* .

62. *Laisram Aber Singh v . Yumnan Ningol Khangam Bam* , *AIR 1986 Gau 66* [*LNIND 1984 GAU 31*].

63. *Eramma v . Veerupana* , *AIR 1966 SC 1879* [*LNIND 1965 SC 318*]; *Arunachalathammal v . Rama Chandran Pillai* , *AIR 1963 Mad 255* [*LNIND 1962 MAD 220*].

64. The Hindu Succession Act, 1956, s. 6, Proviso, Explanation I.

65. The Hindu Succession Act, 1956, ss. 7(1) and (2).

66. *Fateh Bibi v . Charan Das* , *AIR 1970 SC 789* [*LNIND 1970 SC 120*]; *Harjesa v . Laxman* , AIR 1979 Guj 45 ; *Moniram Kolita v . Keri Kolitani* , (1880) 7 IA 115 (PC); *Ramchandra v . Sridevamma* , AIR 1974 Kant 68 [*LNIND 1973 KANT 323*](FB); *Lakshmi v . Anantharama* , *AIR 1937 Mad 699* [*LNIND 1937 MAD 45*](FB); *Lala Dunichand v . Anarkali* , AIR 1946 PC 173 .

67. Hindu Succession Act, 1956, s. 8.

68. Under Mitakshara law, the heirs were classified into:

(i) Sapindas;

(ii) Samanodakas (agnates); and

(iii) Bandhus (cognates).

Under Dayabhaga, the three categories were:

(i) Sapindas;

(ii) Sakulyas; and

(iii) Samanodakas.

69. An agnate is an heir who is related to the intestate through a chain of only male relatives.

70. A cognate is an heir who is related to the intestate through a chain of male and female relatives.

71. *Padmavati Mishra v . Sumitra Devi* , 2002 (1) HLR 114 (Pat).

72. See the Hindu Adoptions and Maintenance Act, 1956, s. 12.

73. See The Hindu Succession Act, 1956, s. 3 (i)(j).

74. See The Hindu Adoptions and Maintenance Act, 1956, s. 12.

75. *Kasturi Devi v . Deputy Director , Consolidation* , *AIR 1976 SC 2595* [*LNIND 1976 SC 420*]; *Ratnabai v . Mankuwar* , 1978 HLR 573 (HP).

76. The Hindu Code Bill, 1948, Schedule VII, Class II.

77. The Hindu Succession Bill, Bill 13 of 1954, the Schedule.

78. The Hindu Succession Bill, Bill 13B of 1954, the Schedule.

79. *Leela Prasad Bhubani* , (1955) 1 Andh. LT 8 M.

80. The Indian Succession Act, 1925, s. 51.

81. The Hindu Succession Act, 1956, s. 10, Rule 1.

82. *Ibid* ., s. 14.

83. *Ramabai Padmakar v . Rukminibai Vishnu Vekhande* , *AIR 2003 SC 3109* [*LNIND 2003 SC 668*].

84. *Gulaba v. Sitabiya,* AIR 2006 (NOC) 1379 (All); *Daveerawwa v. Gangawa,* AIR 2006 (NOC) 535 (Kant); *Rajesh v . Bai Shanta Bai* , *AIR 1982 Bom 281* [*LNIND 1982 BOM 44*].

85. *Margaret Palai v. Savitri Palai, AIR 2010 Ori 45* [*LNIND 2009 ORI 116*].

86. *Margabandhu v . Kothandarama* , (1983) 2 Mad LJ 445; *Lakshmi Bai v . Limbabai* , 1983 HLR 208.

87. *Thankan v. Rajan,* AIR 1999 Ker 62 .

88. AIR 2009 P&H 118.

89. AIR 2008 (NOC) 482 (AP).

90. *Ramkali v . Mahila Shyamwati* , *AIR 2000 MP 288* [*LNIND 2000 MP 192*].

91. Under the old law, unchastity of a widow was a disqualification. See *Animuthu v . Gandhiammal* , *AIR 1977 Mad 372* [*LNIND 1976 MAD 301*]; *Chandicharan v . Bhagyadhar* , AIR 1976 Cal 356 .

92. *Gajodharidevi v. Gokul,* AIR 1990 SC 46 ; *Udham Kaur v. Harbans,* 1983 HLR 579 (P&H); *Buribai v. Champibai,* AIR 1968 Raj 139 .

93 The Hindu Marriage Act, 1955, s. 16; *Rameshwari Devi v. State of Bihar, AIR 2000 SC 735* [*LNIND 2000 SC 171*]; *Nagarthnamma v. Venkatalakshmamma, AIR 2000 Kant 181* [*LNIND 2000 KANT 3*]; see also *Thankan v. Rajan,* AIR 1999 Ker 62 . *Gurnan Singh v . Puran Singh* , (1996) 1 HLR 446 (SC); *Baghyavathi v . Lakshmikanthammal* , AIR 1993 Mad 350 .

94 The Hindu Succession Act, 1956, s. 23.

95 *Dodo Atmaram Patel v . Raghunath Atmaram Patil* , *AIR 1979 Bom 176* [*LNIND 1978 BOM 15*]; *Ramkali v . Mahila Shyamwati* , *AIR 2000 MP 288* [*LNIND 2000 MP 192*]; *Chodan Puthiyoth Shyamalavati Amma v. Kovalam Jisha, AIR 2007 Ker 246* [*LNIND 2007 KER 296*].

96 See *Anasuya Bai v . Jagdish Prasad* , 1977 MPLJ 7 (wherein it was held that an illegitimate child was entitled to inherit. The decision appears to be incorrect and in contradiction with the definition of the term 'related' under s. 3(1)(j) of the Hindu Successions Act, 1956).

97 *Kanagavalli v . Saroja* , *AIR 2002 Mad 73* [*LNIND 2001 MAD 687*]; *Rameshwari Devi v . State of Bihar* , AIR 2000 SC 753 ; *SPS Balasubramaniam v . Suru Hayam* , AIR 1992 SC 756 ; *Kishori Hari Singh v . Prakash Nar Singh Shah* , 2001 AIHC 777 (Bom); *Lakshmi Bai v . Limbabai* , 1983 HLR 208; *Margabandhu v . Kothandarama* , (1983) 2 Mad LJ 445.

98 *Muhammad Hussain Khan v . Babu Kishvanandan Sahai* , AIR 1937 PC 233 .

99 *Commissioner of Income Tax v . Babubhai Mansukhbhai* , (1977) 108 ITR 417 (Guj); *CWT v . Chander Sen* , (1986) 161 ITR 370, *AIR 1986 SC 1753* [*LNIND 1986 SC 214*]; *Commissioner of Income Tax v . Ram Rakshpal Ashok Kumar* , (1968) 67 ITR 164; *Shri Vallabhdas Madani v . Commissioner of Income Tax* , (1982) 138 ITR 673, (1983) Tax LR 559 ; *Addl Commissioner of Income Tax v . PL Karuppan Chettiar* , *(1978) 114 ITR 523* [*LNIND 1978 MAD 34*]; *CWT v . Mukundgiriji* , *(1983) 144 ITR 18* [*LNIND 1983 AP 47*]; *Commissioner of Income Tax v . Virender Kumar* , (2001) 252 ITR 539 (Delhi).

100 *Harbans Singh v . Takamani Devi* , AIR 1990 Pat 26 ; *Leela Prasad v . Bhavani* , 1995(1) All LT 814.

101 Civil Appeal No. 6466 of 2004, decided on August 13, 2010 see also *Parmanand v. Jagrani, AIR 2007 MP 242* [*LNIND 2007 MP 368*].

102 The Hindu Succession Act, 1956, s. 10, rule 3.

103 The Hindu Marriage Act, 1955, s. 16(3).

104 The Hindu Succession Act, 1956, s. 24.

105 The Hindu Succession Act, 1956, s. 24.

106 *Kalyan Kumar Bhattacharjee v. Pratibha Chakraborty* , AIR 2010 (NOC) 646 (Gau).

107 *Hari Singh v. Joginder Singh* , AIR 2010 (NOC) 915 (P&H).

108 *Madhavi Amma v . Velu Pillai* , (2001) 1 HLR 358 (Ker).

109 *Kumaraswamy v . Nanjappa* , *AIR 1978 Mad 285* [*LNIND 1977 MAD 211*]; *Ramachandra v . Arunachalammal* , (1971) 3 SCC 847.

110 *Sarada v . Chakkunny* , AIR 1992 Ker 249 .

111 The Hindu Adoptions and Maintenance Act, 1956, s. 12.

112 *Co-operative Insurance Society v . Bhansilal* , AIR 1979 Guj 121 .

113 General scheme of succession.

114 See The Hindu Succession Act, 1956, s. 18.

115 *Jhugli Tekam v . Assistant Commissioner* , *AIR 2004 MP 52* [*LNIND 2003 MP 340*]; *Sarwan Singh v . Dhan Kaur* , (1971) ILR 1 [*LNIND 1971 DEL 9*] Punj 158 ; *Yellawa Gounder v . Lakshmi* , *AIR 1975 Mad 253* [*LNIND 1974 MAD 146*]; *Purushottam v . Sripad* , AIR 1976 Bom 375 [*LNIND 1976 BOM 23*]; *Waman Govind v . Gopal Baburao* , *AIR 1984 Bom 208* [*LNIND 1983 BOM 165*](FB). See also *Deep Narayan Singh v . Sarjan Singh* , (2002) 2 HLR 497 (Cal); *Satya Charan v . Urmila* , *AIR 1970 SC 1714* [*LNIND 1969 SC 319*]; *Ujjal Kumar v . Laxman Chandra* , 87 CWN 441; *Sajjan Singh v . Gurdial Singh* , 1973 Cur LJ 51.

116 See The Hindu Succession Act, 1956, the Schedule, Explanation.

117 *C S Muniappa v. Pillaiah,* AIR 2010 (NOC) 250 (Karn).

118 See The Hindu Succession Act, 1956, s. 18.

119 *Pushpatti Nath v . Ravi Prakash Gaur* , AIR 2003 P&H 372.

120 The Hindu Succession Act, 1956, s. 24.

121 *Jayalakshmi v . Ganesha Iyer* , *AIR 1972 Mad 357* [*LNIND 1971 MAD 242*].

122 *Prabhu Dayal v . Suwa Lal* , AIR 1994 Raj 149 .

123 *Bai Vijaya v . Thakuribai Chelabai* , *AIR 1979 SC 993* [*LNIND 1979 SC 134*], 1003.

124 See Rig Veda, x, 27, 12 (where there is a reference to a maiden having a separate property); Rig Veda 1, 124, 7 (refers to an issue-less widow, seeking repossession of her property and spinsters in their father's home, getting a share); Atharva Veda, xix, 1,2.

125 A text of Manu stated, a wife, a son and a slave could have no property and that the wealth which they earn, was acquired for him to whom it belonged. See Manu Smriti, viii, 416.

126 Commentators on the Manu Smriti interpret the dictate as meaning a restriction on their powers of disposal of this property and not on an incapability to own the property. See Medhatithi, Vol. v. & iv, 434–35; See also Gautam, xxviii, 24–26. A text of Manu, according to Medhatithi and Kallupa, enjoins a righteous King to punish as thieves, such relatives who appropriate the property of women during their lifetime. See Medhatithi, Vol. iv, 434–35; Kallupa on Manu, Vol. viii, 416. Apasthamba says, 'the share of the wife consists of her ornaments and the wealth which she might have received from her relations.'

127 Katayana and Vyasa cited in the Smriti Chandrika, ix, 1, 6–9, refer to the usage providing that property up to the limit of two thousand panas, should be given annually to the wife, by the father, mother, husband, brother or kindred.

128 *Muthukaruppa v . Sellethanmal* , (1916) 39 Mad 298.

129 Narada, 1–2, 26–27.

130 *Gandhi Maganlal v . Bai Jadab* , (1900) ILR 24 Bom 192 (FB). See also *Sheo Shankar v . Devi Sahai* , (1903) ILR 25 All 468.

131 *Damodar v . Parmananda Das* , (1883) ILR 7 Bom 155; *Muthukaruppa v . Sellethammal* , (1916) ILR 39 Mad 298.

132 *Subramanian v . Arunachelam* , (1905) ILR 28 Mad 1.

133 *Court of Wards v . Mohessur* , (1871) 16 WR 76.

134 *Venkata Prasad v . Venkata Surya* , (1880) ILR 2 Mad 333 (PC).

135 *Kamaladevi v . Panchlal Gupta* , *(1957) SCR 452* [*LNIND 1957 SC 5*].

136 *Keerat Singh v . Kooluhulul Singh* , (1939) 2 MIA 331; *Bhagwan Deen v . Mayna Bai* , (1867) MIA 487; *Debi Mangal Prasad v . Mahadev Prasad* , (1912) ILR 34 All 234; *Shiv Shankar v . Devi Sahai* , (1903) ILR 25 All 468.

137 *Jaishri Sahu v . Raj Dharam Dubey* , (1962) 1 Mad LJ 258 (SC).

138 *Collector of Mashlipatnam v . Cavaly Vencata* , (1861) 8 MIA 529.

139 The Hindu Widow's Remarriage Act (15 of 1856), legalised the remarriage of Hindu widows, but upon such marriage, her rights in her husband's and his relation's property, came to an end. Section 2 of the Act provided: All rights and interests which any widow may have in her deceased husband's property by way of maintenance or by inheritance to her husband or to his lineal successors, or by virtue of any Will or testamentary disposition conferring upon her, without express permission to remarry, only limited interest in such property, with no power of alienating the same, shall, upon her remarriage, cease and determine as if she had then died; and the next heirs of her deceased husband or other persons entitled to the property on her death, shall thereupon, succeed to the same. Her then existing rights of inheritance, though not enlarged, were protected with respect to her second marriage. This Act became redundant after the passing of the Hindu Marriage Act, 1955, and was repealed by the Hindu Widows (Remarriage Repeal) Act, 1983 (Act 24 of 1983).

140 *Krishtappa v . Ananta Kalappa Jarathakhane* , AIR 2001 Kant 322 [*LNIND 2001 KANT 185*]; *Vidhyavati Devi v . Commissioner of Gift Tax* , (1986) 169 ITR 708 (Raj).

141 *Kotaya v . Annapurnamma* , (1945) ILR Mad 777; *Udham Kaur v . Parkash Kaur* , AIR 1945 Lah 282 ; *Sarojini v . Subramaniam* , (1945) ILR Mad 61; *Nil Govind Mishra v . Rukmini Deby* , AIR 1944 Bom. 421 . See also *Umayal Achi v . Lakshmi Achi* , (1945) 1 Mad LJ 108; *Angurbala v . Debabrata* , AIR 1951 SC 60 ; *Dhanam v . Varadarajan* , AIR 1952 Mad 557 .

142 *Sham Lal v . Amar Nath* , *AIR 1970 SC 1643* [*LNIND 1969 SC 347*].

143 *Bhiwra v . Renuka* , (1949) ILR Nag 400; *Umayal Achi v . Lakshmi Achi* , (1945) 1 Mad LJ 108.

144 *MP Obanna v . KB Anjaneyulu* , 2000 (1) HLR 52 (AP).

145 *Lakshminarayan v . Tarabai* , (1988) 1 Mad LJ 153; *Dulhin Nandakumari v . Balkan Das* , AIR 1985 Pat 87 ; *Shankar v . Gangaram* , AIR 1942 Bom 127 .

146 *Debi Mangal Prasad v . Mahadeo Prasad* , (1911) 39 IA 121.

147 *Beni Prasad v . Puranchand* , (1896) ILR 23 Cal 262.

148 *Kallian Rai v . Kashinath* , (1943) ILR All 307; *Kunj Sahu v . Bhagavan Mahanty* , AIR 1951 Ori 35 ; *Seethamma v . Veeranna* , *AIR 1950 Mad 785* [*LNIND 1949 MAD 317*].

149 *Radha Ammal v . Commissioner of Income Tax , Madras* , *AIR 1950 Mad 385* [*LNIND 1949 MAD 329*].

150 *Commissioner of Income Tax , Madras v . Lakshmanan Chettair* , (1941) ILR Mad 104.

151 *Rosamma v . Chenchiah* , (1943) 2 Mad LJ 172.

152 *Seethamma v . Veeranna* , *AIR 1950 Mad 785* [*LNIND 1949 MAD 317*]; *Commissioner of Income Tax , Madras v . Lakshmanan Chettiar* , (1941) ILR Mad 104.

153 *Rosamma v . Chenchiah* , (1943) 2 Mad LJ 172.

154 See *Kallian Rai v . Kashi Nath* , (1943) ILR All 307. See also *Visvesvara Rao v . Varahanarasimham* , *AIR 1937 Mad 631* [*LNIND 1936 MAD 286*].

155 See *Natarajan v . Perumal* , (1942) 2 Mad LJ 668; *Satyanarayana Charlu v . Narasamma* , (1943) 2 Mad LJ 282. See also *Baijnath v . Tej Bali* , (1921) 48 IA 195. But see *Katama Nachiar v . Rajah of Shivaganga* , (1863) 9 MIA 539.

156 *Jadaobai v . Puranmal* , AIR 1944 Nag 243 ; *Sideshwar Prasad v . Lala Har Narain* , (1944) 23 Pat 760.

157 *Akoba Laxshman v . Sai Genu* , AIR 1941 Bom 204 .

158 *Suraj Kumar Sardar v . Manmadhanath* , *AIR 1953 Cal 200* [*LNIND 1952 CAL 129*]; In a later judgment the same High Court has taken a different view, see *Kanai Lal Mitra v . Pannasashi Mitra* , *AIR 1954 Cal 588* [*LNIND 1954 CAL 98*].

159 *Kuppu v . Kuppuswamy* , 1984 (2) Mad LJ 224; *Ramayya v . Mottayya* , *AIR 1951 Mad 954* [*LNIND 1951 MAD 27*].

160 *Ram Lubhaya v. Lachhmi,* AIR 2010 P&H 137 ; *Sri Ramakrishna Mutt v. M Maheshwaran,* (dt 8 Oct 2010) JT 2010 (11) SC 118 [*LNIND 2010 SC 982*]; *see also Mangal Singh v. Kehar Singh,* AIR 2007 (NOC) 212 (P&H); *Kamireddy Venkata Narasamma v. Kamireddy Narasimha Murhty, AIR 2006 AP 40* [*LNIND 2005 AP 863*]; *Sharad Subramanaya v. Soumi Mazumdar, AIR 2006 SC 1993* [*LNIND 2006 SC 329*]; *Jamuna Bai v . Bhola Ram* , AIR 2003 MP 40 ; *P . Rameshwara Rao v . I . Sanjeeva Rao* , AIR 2003 P&H 372 ; *Anoop Kumar v . Anup Singh Grewal* , AIR 2003 P&H 241 ; *Yemanappa Dudappa Marve v . Yellubai* , AIR 2003 Kant 396 [*LNIND 2003 KANT 335*].

161 *Munna Lal v . Raj Kumar* , *AIR 1962 SC 1493* [*LNIND 1962 SC 86*].

162 *Ram Ayodhya v . Raghunath* , AIR 1957 Pat 480 .

163 *Kotturu Swami v . Veeravva* , *AIR 1959 SC 577* [*LNIND 1958 SC 172*]; *Marudakkal v . Arumugha Gounder* , *AIR 1958 Mad 255* [*LNIND 1957 MAD 257*]; *Gostha Behari v . Haridas Samantha* , *AIR 1957 Cal 557* [*LNIND 1956 CAL 176*]; *Jamuna Bai v . Bhola Ram* , AIR 2003 MP 40 ; *P . Rameshwara Rao v . I . Sanjeeva Rao* , AIR 2003 P&H 372 ; *Anoop Kumar v . Anup Singh Grewal* , AIR 2003 P&H 241 ; *Yemanappa Dudappa Marve v . Yellubai* , AIR 2003 Kant 396 [*LNIND 2003 KANT 335*].

164 *Lata Bewa v . Bhuyan Jena* , (1997) 2 HLR 72 (Ori).

165 *Ramchandra Sitharam v . Sakharam* , *AIR 1958 Bom 244* [*LNIND 1957 BOM 121*]; *Dharmarajan v . Narayanan* , (2001) 1 HLR 126 (Ker); *Andal Ammal v . Siva Prakasa* , *AIR 1963 Mad 452* [*LNIND 1962 MAD 138*].

166 *Mangal Singh v . Rattno* , *AIR 1967 SC 1786* [*LNIND 1967 SC 119*].

167 *Mahesh Chand Sharma v . Raj Kumari Sharma* , *AIR 1996 SC 869* [*LNIND 1995 SC 1223*].

168 *AIR 1959 SC 577* [*LNIND 1958 SC 172*].

169 *Mangal Singh v . Rattno* , *AIR 1967 SC 1786* [*LNIND 1967 SC 119*].

170 *Eramma v . Veerupanna* , *AIR 1966 SC 1879* [*LNIND 1965 SC 318*].

171 *Vengiyamma v . Veerayya* , AIR 1957 AP 280 [*LNIND 1956 AP 145*].

172 *Chandrayya v . Chandrayya* , AIR 1992 Kant 153 [*LNIND 1991 KANT 261*].

173 *Gostha Behari v . Haridas Samantha* , *AIR 1957 Cal 557* [*LNIND 1956 CAL 176*]; *Marudakkal v . Arumuga Gounder* , *AIR 1958 Mad 255* [*LNIND 1957 MAD 257*]; *Harak Singh v . Kailash Singh* , AIR 1958 Pat 581 (FB); *Gummalapura Taggina v . Setra Veeravva* , *AIR 1959 SC 577* [*LNIND 1958 SC 172*].

174 *Venkatrathnam v . Palamal* , (1970) 2 Andh WR 264; *Ganesh Mahanta v . Sukria Bewa* , AIR 1963 Ori 167 [*LNIND 1963 ORI 35*]; *Gummalapura v . Setra Veerana* , *AIR 1959 SC 577* [*LNIND 1958 SC 172*]; *Maragathavalli Ammal v . Mookan Chettair* , (1969) 82 LW 667; *Nalayakeerimuthan v . Vellayam Kudumban* , *AIR 2001 Mad 6* [*LNIND 2000 MAD 403*]; *Naresh Kumari v . Shashi Lal* , *AIR 1999 SC 928* [*LNIND 1999 SC 109*]; *Munshi Singh v . Sohan Bhai* , *AIR 1989 SC 1179* [*LNIND 1989 SC 149*].

175 *Kanthimathinatha Pillai v . Vyapuri Mudaliar* , *AIR 1963 Mad 37* [*LNIND 1962 MAD 54*].

176 *AIR 1991 SC 1581* [*LNIND 1991 SC 254*].

177 *Chandradip Rai v . Mahip Rai* , AIR 1960 Pat 112 ; *Kothuruswami v . Veeravva* , *AIR 1959 SC 577* [*LNIND 1958 SC 172*]; *Ramsarup v . Patto* , AIR 1981 P&H 68.

178 *Gopal Singh v . Dile Ram* , *AIR 1987 SC 2394* [*LNIND 1987 SC 679*].

179 *Jagannathan Pillai v . Kunjithapadam Pillai* , *AIR 1987 SC 1493* [*LNIND 1987 SC 406*]: *(1987) 2 SCC 572* [*LNIND 1987 SC 406*].

180 *AIR 1974 SC 665* [*LNIND 1974 SC 90*]: *(1974) 1 SCC 700* [*LNIND 1974 SC 90*].

181 AIR 1970 P&H 309.

182 *Chinnakolandi Kondan v . Thanji Kondan* , *AIR 1965 Mad 497* [*LNIND 1964 MAD 218*].

183 *Bhagwan Dattatreya Budukh v . Viswanath* , AIR 1979 Bom 1 .

184 *AIR 1987 SC 1493* [*LNIND 1987 SC 406*] *(1987) 2 SCC 572* [*LNIND 1987 SC 406*].

185 *Ganesh Mahanta v . Sukria Bewa* , AIR 1963 Ori 167 [*LNIND 1963 ORI 35*].

186 *Venkatarathnam v . Palamma* , (1970) 2 Andh WR 264.

187 *Teja Singh v . Jagat Singh* , AIR 1964 Punj 403 .

188 *Chinnakolandai Goundan v . Thanji Gounder* , *AIR 1965 Mad 497* [*LNIND 1964 MAD 218*].

189 *Ramgowda Aunagowda v . Bhausaheb* , AIR 1927 PC 227 .

190 *Bai Champa v . Chandrakanta Hiralal Dahyabhai Sodagar* , *AIR 1973 Guj 227* [*LNIND 1973 GUJ 35*].

191 *Velamuri Venkata Sivaprasad v . Kothuri Venkateswarlu* , *AIR 2000 SC 434* [*LNIND 1999 SC 1047*].

192 *Bhaurao Shankar Lokhande v . State of Maharashtra* , *AIR 1965 SC 1564* [*LNIND 1965 SC 20*]: *(1965) 2 SCR 837* [*LNIND 1965 SC 20*].

193 *Ibid* ., para 2.

194 AIR 2007 Pat 70 .

195 *Partap Singh v . Union of India* , *AIR 1985 SC 1695* [*LNIND 1985 SC 275*]: *(1985) 4 SCC 197* [*LNIND 1985 SC 275*].

196 See *V . Tulsamma v . V . Sesha Reddi* , *AIR 1977 SC 1944* [*LNIND 1977 SC 136*]: *(1977) 3 SCC 99* [*LNIND 1977 SC 136*].

1 The Mysore Hindu Law Women's Right Act, 1933 (Act 10 of 1933).

2 *Atava Akulamma v . Gajjelapappa* , *AIR 1995 AP 166* [*LNIND 1994 AP 469*]; *Narasimhan v . Ponnammal* , (1995) 2 HLR 95.

3 *Bhikabai v . Mamtabai* , *AIR 2000 Bom 172* [*LNIND 1999 NGP 24*].

4 *Kesharbai v . State of Maharashtra* , *AIR 1981 Bom 115* [*LNIND 1980 BOM 235*](FB).

5 *Agasti Karuna v . Cherukuri Krishaiah* , 2000 AIHC 85 (AP). See also *Nazar Singh v . Jagjit Kaur* , *AIR 1996 SC 855* [*LNIND 1995 SC 1101*].

6 *AIR 2001 Kant 123* [*LNIND 2000 KANT 512*].

7 AIR 1971 SC 745 .

8 *Inguagi Kuer v . Maya Devi* , 1999 AIHC 3165 (Pat). See also *Karmi v . Amru* , AIR 1971 SC 745 .

9 *Beni Bai v . Raghubir Prasad* , *AIR 1999 SC 1147* [*LNIND 1999 SC 196*]. See also *Naresh Kumari v . Sakshi Lal* , *AIR 1999 SC 928* [*LNIND 1999 SC 109*]; *C. Magilamani Mudaliar v . Idol of Shri Soaminatha Swami* , *AIR 1996 SC 1697* [*LNIND 1996 SC 226*]; *V . Tulsamma v . V . Sesha Reddi* , *AIR 1977 SC 1944* [*LNIND 1977 SC 136*].

10 *Jinnappa v . Kallavva* , 1982 HLR 437.

11 *Karmi v . Amru* , AIR 1971 SC 745 : (1972) 4 SCC 86.

12 *Appaswami Chettiar v . Sarangapani Chettiar* , *AIR 1978 SC 1051* [*LNIND 1978 SC 112*].

13 *(1994) 2 SCC 511* [*LNIND 1994 SC 206*].

14 *Lachhaia v . Ramsankar* , AIR 1966 Pat 191 .

15 *Saraswathi v . Krishna Iyer* , AIR 1965 Ker 226 .

16 *Karan Pershad v . Kunwar Rani* , (1970) 3 SCC 947.

17 *Munnalal v . Raj Kumar* , *AIR 1962 SC 1493* [*LNIND 1962 SC 86*].

18 *Cockalingam v. Alamelu,* 1981 HLR 714.

19 *Gulab v . Vithal* , 2000 AIHC 913 (Bom).

20 *Kuthala Kannu Ammal v . Lakshmana Nadar* , *AIR 2001 Mad 320* [*LNIND 2000 MAD 497*].

21 *(1977) 3 SCC 99* [*LNIND 1977 SC 136*] *AIR 1977 SC 1944* [*LNIND 1977 SC 136*].

22 *Mahesh Kumar Pate v . Mahesh Kumar Vyas* , 2000 AIHC 485 (MP); *Bhola Ram v . Madan Lal* , AIR 2000 P&H 55.

23 *Beni Bai v . Raghubir Prasad* , *AIR 1999 SC 1147* [*LNIND 1999 SC 196*]; *Naresh Kumari v . Sakshi Lal* , *AIR 1999 SC 928* [*LNIND 1999 SC 109*]; *Henumayamma v . Todikamalla Kotilingam* , *AIR 2001 SC 3062* [*LNIND 2001 SC 1985*]; *A.K. Lakshmanagounda v . A.K. Jayaram* , *AIR 2001 Kant 123* [*LNIND 2000 KANT 512*].

24 *V . Tulasamma v . V . Sesha Reddy* , *AIR 1977 SC 1944* [*LNIND 1977 SC 136*].

25 *Kuthala Kannu Ammal v . L . Nadar* , *AIR 2001 Mad 320* [*LNIND 2000 MAD 497*].

26 *Yemanappa Dudappa Marve v . Yellubai* , AIR 2003 Kant 396 [*LNIND 2003 KANT 335*].

27 *AIR 2002 SC 1279* [*LNIND 2002 SC 145*].

28 *Gorachand Mukherjee v. Malabika Dutta, AIR 2002 Cal 26* [*LNIND 2001 CAL 341*].

29 *AIR 2003 SC 160* [*LNIND 2002 SC 692*].

30 AIR 2009 Bom 35 .

31 *Banu Sahib v . Gayathri* , *AIR 1972 Bom 16* [*LNIND 1970 BOM 75*](DB).

32 *Gulab Chand v . Sevo Karan* , AIR 1961 Pat 45 .

33 *S.P. Saigal v . Sunil Saigal* , 2001 AIHC 3620 (Del).

34 *AIR 1977 SC 1944* [*LNIND 1977 SC 136*].

35 *AIR 2008 SC 500* [*LNIND 2007 SC 1348*].

36 AIR 2009 All 85 .

37 *Somthim Veerabhadra Rao v . Bussi Vala Lakshmi Devi* , AIR 1965 AP 307 .

38 *K.S. Subramania Pillai v . E.S.R. Pakkiri Samy Pillai* , AIR 1989 Mad 69 [LNIND 1988 MAD 18]; *Vankamamidi Venkata Subba Rao v . Chatlapalli Seetharama Ratna* , AIR 1997 SC 3082 [LNIND 1997 SC 592].

39 *Kothi Sathyanarayana v . Galla Sithaiah* , AIR 1987 SC 353 [LNIND 1986 SC 473].

40 *Bhura v . Kashimram* , AIR 1994 SC 1202 ; *Muninanjappa v . Manual* , AIR 2001 SC 1754 [LNIND 2001 SC 940]; *Anoop Kaur v . Anoop Singh Grewal* , AIR 2003 P&H 241 ; *J . Narasimhan v . K . Rajagopal* , (2002) 3 LW 720.

41 *Gorachand v . Malabika* , AIR 2002 Cal 26 [LNIND 2001 CAL 341].

42 AIR 2006 SC 1993 [LNIND 2006 SC 329].

49 With respect to the stridhan property of a female hindu, separate rules of succession were provided under different schools of Hindu law. Succession also varied depending upon thecharacter of the stridhan, her marital status and the form of marriage. All these different rules are abrogated now and if the property, whatever may be the character, is held by a woman absolutely, is subject to the rules of ss. 15 and 16 of the Act

44 See the Hindu Succession Act, 1956, ss. 4(2) and 5.

45 See the Hindu Succession (Amendment) Act, 2005; the Andhra Pradesh (Hindu Succession Amendment Act, 1986), s. 29A(ii); the Tamil Nadu Hindu Succession Amendment Act, 1990, s. 29A(ii); the Karnataka Hindu Succession Amendment Act, 1994, s. 29A(ii); and the Maharashtra Hindu Succession Amendment Act, 1994, s. 29A(ii).

46 *Somaiah v . Rattamma* , AIR 1959 AP 244 [LNIND 1958 AP 124]; *Indu Bai v . Vyankati* , AIR 1966 Bom 64 [LNIND 1965 BOM 20]; *Renuka Bala v . Aswin Kumar* , AIR 1961 Pat 498 ; *Bai Kamla v . Chagan Lal* , AIR 1965 Guj 84 [LNIND 1962 GUJ 145].

47 *Munuswami v . Rajammal* , AIR 1977 Mad. 228 [LNIND 1976 MAD 287]; *Manikyamma v . Venkatasubba Rao* , (1978) 1 Andh LT 274; *Pasmani v . Patra Bala* , AIR 1981 Gau 42 ; *Mahadevappa v . Guramma* , AIR 1973 Mys 142 ; *Harjesa v . Laxman* , AIR 1979 Guj 45 .

48 *Ajib Singh v . Ram Singh* , AIR 1959 J&K 92 (FB).

49 *Gurbachan Singh v . Khichar Singh* , AIR 1971 P&H 240.

50 *Rajeshwari Devi v . Laxmi Devi* , (1997) 1 HLR 590 (All); *Lachman Singh v . Kirpa Singh* , AIR 1987 SC 1616 [LNIND 1987 SC 388]; *Gurnam Singh v . Ays Kaur* , AIR 1977 P&H 103 ; *Mallappa Fakirappa v . Shippa* , AIR 1962 Mys 140 ; *Rama Ananda Patil v . Appa Bhima* , AIR 1969 Bom 205 [LNIND 1968 BOM 81]. See also *Ram Katori v . Prakashvathi* , 1968 All LJ 484 (wherein it was held that since the section uses the term ‘son and daughter’ and not ‘son and daughter of the deceased’, it would include the children of her husband also. The decision, which does not lay down a correct proposition of law, was overruled by the Supreme Court in *Lachman Singh* ’s case, cited above.)

51 *Shahaji Kisan Asme v. Sitaram Kondi Asme* , AIR 2010 Bom 24 [LNIND 2009 BOM 878].

52 AIR 2010 Bom 24 [LNIND 2009 BOM 878].

53 See *Devinder Kaur v . Ajit Kumar Sandhu* , (1995) 1 HLR 147 (P&H); *Satyacharan v . Urmila* , AIR 1970 SC 1714 [LNIND 1969 SC 319].

54 *Seetha Lakshmiammal v . Muthuvenkatarama Iyengar* , AIR 1998 SC 1692 [LNIND 1998 SC 417]. See also *Gangamma v. Maheswaraiah,* AIR 2010 (NOC) 1116 (Karn); *Chowtapalli Pratap Reddy v. Dasari Pullamma,* AIR 2010 (NOC) 912 (AP).

55 AIR 2008 Cal 13 [LNIND 2007 CAL 562].

56 *Onkar Prashad v. Bhoodhar Prashad,* AIR 2007 (NOC) 524 (Chh).

57 *Gangamma v. Maheswaraiah,* AIR 2010 (NOC) 1116 (Karn).

58 *Chowtapalli Pratap Reddy v. Dasari Pullamma,* AIR 2010 (NOC) 912 (AP).

59 2009 (7) SCALE 51 [LNIND 2009 SC 1111].

60 Parsi Law permits an intestate’s lineal descendants spouses (widows and widowers) to inherit the property as well, but even here husband’s heirs cannot inherit the property of a deceased woman.

61 P. 54.

62 *Antua v. Baijnath,* AIR 1974 Pat. 177 .

63 *Bhagat Ram v . Teja Singh* , (2002) 1 HLR 17 (SC); *Anandilala Jhariya v. Ramlal Jhariya,* AIR 2010 MP 21 [LNIND 2009 MP 719].

64 *Ayiammal v . Subramania Asari* , AIR 1966 Mad 369 [LNIND 1965 MAD 274]; *Kamneshwara Rao v . Vasudeva Rao* , AIR 1972 AP 189 [LNIND 1971 AP 81].

65 *Komalavalli Ammal v . TAN Krishnamachari* , (1990) 106 Mad LW 598.

66 *Ajit Singh v . State of Punjab* , 1983 HLR 433 (P&H); *Jai Singh v . Mughla* , (1967) ILR 2 Punj 658.

67 *Veera Raghavamma v . G . Subbarao* , AIR 1976 AP 377 .

68 *Radhika v . Ahgnu* , (1996) 2 HLR 344 (SC).

69 *Lachman Singh v . Kirpa Singh* , AIR 1987 SC 1616 [LNIND 1987 SC 388]; *Janardhan Badrinarayan Patel v . Ambalal Himatlal* , AIR 1999 Guj 162 [LNIND 1998 GUJ 623].

70 *Apurti v . Suna Stree* , AIR 1963 Ori 166 .

71 AIR 2002 SC 1 [LNIND 2001 SC 2518].

72 *Yoginder Parkash Duggal v . Om Prakash Duggal* , 2000 AIHC 2905 (Del).

73 *Radhika v . Anguram* , (1994) 5 SCC 761 [LNIND 1994 SC 805].

74 *Chintaram v . Rushibai* , 2000 AIHC 1308 (MP). See also *Roshan Lal v . Dalipa* , AIR 1985 HP 8 ; *KP Lodhi v . Har Prasad* , AIR 1971 MP 129 ; *R.A. Patil v. A.B. Redekar,* AIR 1969 Bom 205 [LNIND 1968 BOM 81].

75 *Mahesh Kumar Pate v . Mahesh Kumar Vyas* , 2000 AIHC 485 (MP).

77 *State of Punjab v . Balwant Singh* , AIR 1991 SC 2301 [LNIND 1991 SC 525].

78 *S. Krishnamurthy v. Aswathaiah,* AIR 2006 Kant 44 [LNIND 2005 KANT 521].

79 *Somu Bai Yashwant Jadeav v . Balagovinda Yadav* , AIR 1983 Bom 156 [LNIND 1983 BOM 2].

80 Report of the Hindu Law Committee, 1944, p. 113.

81 The Hindu Succession Bill, Bill No. 13 of 1954.

82 The Hindu Succession Act, 1956, s. 6.

83 The Hindu Succession Act, 1956, s. 6.

84 *Captain Arminder Singh Bedi v. Guru Nanak Dev University* , AIR 2010 HP 76 ; *Arun Kumar v. Birkhi* , AIR 2010 NOC 1016 (P&H).

85 *Yethirejulu Neelaya v . Mudummuru Ramaswami* , AIR 1973 AP 58 [LNIND 1972 AP 85]; *Sriram Bai v . Kalgonda Bhimgonda* , (1964) 66 Bom LR 351; *P . Govinda Reddy v . Golla Obulamma* , AIR 1971 AP 363 [LNIND 1970 AP 206].

86 *Rangubai Lalji Patil v . Laxman Patil* , (1966) 68 Bom LR 74; *Govindram Mithamal Sindhi v . Chetumel Villardas* , AIR 1970 Bom 251 [LNIND 1969 BOM 41]; *Ananda v . Haribandhu* , AIR 1967 Ori 194 ; *Vidyaben v . J.N. Bhatt* , AIR 1974 Guj 23 [LNIND 1972 GUJ 5]; *Chandradata v . Sarat Kumar* , AIR 1973 MP 169 [LNIND 1971 MP 14]; *Kanahaya Lal v . Jamna Devi* , AIR 1973 Del 160 ; *Karuppa Gounder v . Palaniammai* , AIR 1963 Mad 245 [LNIND 1962 MAD 179]; *Controller of Estate UP v . Anari Devi Halwasiya* , AIR 1972 All 179 ; *Pratapmull v . Dhanbeti Bibi* , AIR 1936 PC 20 ; *Commissioner of Income Tax , Mysore v . Nagarthamma* , (1970) 76 ITR 352 (Mys).

87 (1964) 66 Bom LR 351.

88 (1966) 68 Bom LR 74.

89 AIR 1975 Bom 257 [LNIND 1974 BOM 60].

90 AIR 1978 SC 1239 [LNIND 1978 SC 142].

91 *East End Dwellings Co . Ltd . v . Finsbury Borough Council* , (1952) AC 109, 132.

92 AIR 1985 SC 716 [LNIND 1985 SC 96].

93 (2003) 1 LW 408.

94 *Kishta Bai v . Ratna Bai* , (1979) 1 APLJ 318; *Fathimunnisa v . T . Rajagopalacharilu* , AIR 1977 AP 24 ; *Appaih v . Sp. Tahsildar* , (1988) 1 ALT 289; *Seetha Mahalakshmamma v . Chalamaiah* , AIR 1974 AP 239 . For a contrary opinion, see *Krishna Rao v . State of Andhra Pradesh* , AIR 1987 AP 239 [LNIND 1987 AP 108].

95 Andhra Pradesh Hindu Succession (Amendment) Act, Act 13 of 1986.

96 Tamil Nadu Hindu Succession (Amendment) Act, Act 1 of 1990.

97 Maharashtra Hindu Succession (Amendment) Act, Act 40 of 1994.

98 Karnataka Hindu Succession (Amendment) Act, Act 23 of 1994.

99 Andhra Pradesh Hindu Succession (Amendment) Act, Act 13 of 1986, s. 29A(i).

100 *Ibid* ., s. 29A(ii)(a).

101 *Venubai v . Saraswati Bai* , 1980 Mah LJ 907; *Shivaji Rao v . Rukmini* , AIR 1973 Mys 113 .

102 *C . Tripura Sundari v . Sriniwasan* , *AIR 1972 Mad 264* [*LNIND 1972 MAD 12*]; *Appala Naidu v . Narayanamma* , *AIR 1972 AP 258* [*LNIND 1971 AP 74*].

103 *Satyanarayana v . Rameshwar* , AIR 1982 Pat 44 ; *Medai Dalavoi v . MDT Kumaraswami* , AIR 1959 Mad 298 .

104 AIR 2003 NOC 37 (MP) : 2002 AIHC 2931.

105 Andhra Pradesh Hindu Succession (Amendment) Act, 1986, s. section 29B, Hindu Succession Act, s. 6 (3).

106 *Ibid* ., Explanation.

107 *Jhugli Tekam v . Assistant Commissioner* , *AIR 2004 MP 52* [*LNIND 2003 MP 340*]; *Sarwan Singh v . Dhan Kaur* , (1971) ILR 1 [*LNIND 1971 DEL 9*] Punj 158; *Yellawa Gounder v . Lakshmi* , *AIR 1975 Mad 253* [*LNIND 1974 MAD 146*].

108 *Purushottam v . Sripad* , AIR 1976 Bom 375 [*LNIND 1976 BOM 23*].

109 *Waman Govind v . Gopal Baburao* , *AIR 1984 Bom 208* [*LNIND 1983 BOM 165*](FB). See also *Deep Narayan Singh v . Sarjan Singh* , (2002) 2 HLR 497 (Cal).

110 *Satya Charan v . Urmila* , *AIR 1970 SC 1714* [*LNIND 1969 SC 319*].

111 *Ujjal Kumar v . Laxman Chandra* , 87 CWN 441.

112 *Sajjan Singh v . Gurdial Singh* , 1973 Cur LJ 51.

113 *Ram Singari Devi v. Govind Thakur* , AIR 2006 Pat 169 ; see also *Chunnulal v. Dullar* , AIR 2007 All 202 .

114 See the Hindu Succession Act, 1956, s. 19.

115 *Nagamma Naicker v . Ponnu Chinnayyan* , (1970) 1 Mad LJ 437 (It overrules the earlier view that widows succeed as joint tenants and the same is no longer good law); see *Sundarammal v . Sadasiva Reddiar* , *AIR 1959 Mad 349* [*LNIND 1958 MAD 108*].

116 *Tirumallayya Swamy Gounder v . Parvathi Ammal* , *AIR 1977 Mad 40* [*LNIND 1976 MAD 19*].

117 *Usha Singh v . Veerendra Kumar* , (1981) 7 All LR 364; *Kastura Sohnani v . Das Seth* , *AIR 1979 Ori 60* [*LNIND 1978 ORI 34*]; *Govinda Reddy v . Obulamma* , *AIR 1971 AP 363* [*LNIND 1970 AP 206*](FB).

118 See the Hindu Succession Act, 1956, s. 20.

119 *Anasuya Bai v . Jagadish* , 1977 MPLJ 7. See also *Lokanayaki v . Pullathal* , (1990) 1 LW 376.

120 See the Hindu Succession Act, 1956, s. 21. *Raman Khanna v. Sham Kishore Khanna* , AIR 2009 HP 42 .

121 *Padmaraja Setty v . Gyan Chandrappa* , AIR 1970 Mys 87 .

122 *Jayantilal v . Mehta* , *AIR 1968 Guj 212* [*LNIND 1966 GUJ 120*].

123 See the Hindu Succession Act, 1956, s. 22.

124 *Ibid* ., s. 22(2).

125 *Ibid* ., s. 22(3).

126 *Srinivasamurthy v . Leelavathy* , *AIR 2000 Mad 516* [*LNIND 2000 MAD 242*](DB).

127 *Sridevi v . Subadra* , AIR 1976 Ker 19 .

128 *Bhagirathi v . Adikara* , *AIR 1988 Ori 285* [*LNIND 1988 ORI 14*].

129 *Krishnappa Roy v. Parimal Chandra Saha* , *AIR 2000 Gau 117* [*LNIND 2000 GAU 345*].

130 *AIR 2010 Ori 7* [*LNIND 2009 ORI 88*],

131 AIR 2007 Gau 70 .

132 *Kamal Goel v . Purshottam Das* , AIR 1999 P&H 254.

133 *Surayya v . Sabbamma* , (1920) ILR 43 Mad 4.

134 According to Yajnavalkya, ‘an impotent person, an outcaste and his issue, one lame, a madman, an idiot, a blind man and a person afflicted with an incurable disease, are persons not entitled to a share and are to be maintained.’ Vijananeswara says that the abovementioned persons must be supported by an allowance of food and raiment only. Manu says, ‘Impotent persons and outcastes, persons born blind or deaf, the insane, idiot and the dumb, as well as those deficient in any organ (action or sensation), receive no share.’ See Yajnavalkya, Vol. II, p.

140; Mitakshara, II, X, pp. 5, 10; Manu, Vol. IX, p. 201.

135 *Parameswaran v . Parameswaran* , AIR 1961 Mad 345 [*LNIND 1960 MAD 111*].

136 *Bapuji v . Dattu* , (1923) 47 Bom 707; *Braja Bhukan v . Buchan* , (1870) 9 Bom LR 204*; Surti v . Narain Das* , (1890) ILR 12 All 530; *Dwarkanath v . Mahendranath* , (1870) ILR 9 BLR 198; *Baboo Badhnarain v . Omrao* , (1870) 13 MIA 519; *Koer Goolab v . Rao Kurun* , (1871) 14 MIA 176.

137 *Murarji v . Parvatibai* , (1876) ILR 1 Bom 177; *Venkata Subba Rao v . Purushottam* , (1903) ILR 26 Mad 133.

138 *Pudiava v . Pavanasa* , (1922) ILR 45 Mad 949 (FB); *Gunjeshwar Kunwar v . Durga Prashad Singh* , (1917) 44 IA 229; *Mahesh Chunder v . Chunder Mohan* , (1875) 14 Bom LR 273; *Umabai v . Bhavu* , (1876) ILR 1 Bom 557.

139 *Pareshmani v . Dinanath* , (1862) I Bom LR (ACJ) 117; *Anukul Chandra v . Surendra Nath* , (1939) ILR Cal 592.

140 *Mara v . Bettaswamy* , (1942) 46 Mys HCR 706; *Bhai Pratapgavri v . Mulshankar* , AIR 1924 Bom 353 ; *Pakir Nath v . Krishna Chandranath* , *AIR 1954 Ori 176* [*LNIND 1954 ORI 56*]; *Savitri Bai v . Bhabat* , (1927) ILR 51 Bom 50.

141 *Kayarohana Pathan v . Subbaraya Thevan* , (1915) ILR 38 Mad 250.

142 Since the passing of the Caste Disabilities Removal Act, 1850, this disqualification has been removed.

143 *Pandit Parmanand v . Nihal Chand* , (1938) ILR Lah 453.

144 *Kenchava v . Girimallappa* , (1924) 51 IA 368; *Chandra Singh v . Chambeli* , AIR 1962 Punj 162 ; *Adiveppababu v . Veerabhadrappa* , AIR 1948 Bom 111 . See also *Vedammal v . Vedanayaga* , (1908) ILR 31 Mad 100; *Sanveerangouda v . Basangouda* , AIR 1939 Bom 313 .

145 *Kannailal Mitra v . Penna Sahi Mitra* , *AIR 1954 Cal 558* [*LNIND 1953 CAL 150*]; *Kuppu v . Kuppuswamy* , 1984 (2) Mad LJ 224; *Ramayya v . Mottaiah* , *AIR 1951 Mad 954* [*LNIND 1951 MAD 27*](FB); *Baldeo v . Mattura Kunwar* , (1911) ILR 33 All 702; *Charu Priya v . Rama Kantha* , AIR 1964 Assam 106 .

146 See the Hindu Inheritance (Removal of Disabilities) Act, 1928, s. 3.

147 *Parmeswaran v . Parmeswaran* , AIR 1961 Mad 345 [*LNIND 1960 MAD 111*].

148 *Kannailal Mitra v . Penna Sahi Mitra* , *AIR 1954 Cal 558* [*LNIND 1953 CAL 150*]; *Ramayya v . Mottaiah* , *AIR 1951 Mad 954* [*LNIND 1951 MAD 27*](FB).

149 *Bhuri Bai v . Champa Bai* , AIR 1968 Raj 139 ; *Kishan Lal v . Gindori* , (2002) 1 HLR 375 (P&H); *Ratnabai v . Mankunwad* , 1978 HLR 573; *Gurdit Singh v . Darshan Singh* , AIR 1973 Punj 362 ; *Mantorabai v . Paretan Bai* , AIR 1972 MP 145 [*LNIND 1969 MP 98*]. Once the property vests in the widow, she will not be divested of the property subsequently, upon her remarriage see *Kasturi Devi v . Deputy Director of Consolidation* , AIR 1976 SC 2295 .

150 *Balvinder Kaur v. Gurnam Singh,* AIR 2010 (NOC) 1017 (P&H).

151 *AIR 2009 Bom 57* [*LNIND 2009 AUG 9*].

152 *Kenchava v . Gurmallappa* , AIR 1924 PC 209 .

153 *Chinnapappal v . Rajammal* , 2002 AIHC 643 (Mad). See also *Jamunadas v . Board of Revenue* , AIR 1973 All 397 ; *Radheshyam v . Deputy Director , Consolidation* , 1980 All LJ 980.For a contrary opinion, see *Chamanlal v . Mohanlal* , *AIR 1977 Del 97* [*LNIND 1976 DEL 168*].

154 *Minoti v . Sushal Mohan Singh* , *AIR 1982 Bom 68* [*LNIND 1981 BOM 117*].

155 *Ram Chatterjee v . Dabathi Mukherjee* , (2002) 2 SCC 193.

156 *Sitaramaiah v . Rama Krishnayya* , *AIR 1970 AP 407* [*LNIND 1969 AP 31*].

157 *AIR 2007 Bom 133* [*LNIND 2007 NGP 241*].

158 *Kenchawa v . Girimallappa* , AIR 1924 PC 209 .

159 *AIR 2007 Del 107* [*LNIND 2006 DEL 1321*]; see also *Nannepuneni Seetharamaiah v. Nannepuneni Ramakrishnaiah* , *AIR 1970 AP 407* [*LNIND 1969 AP 31*].

160 *(2005) 6 SCC 622* [*LNIND 2005 SC 482*].

161 *G.S. Sadashiva v . M.C. Srinivasan* , AIR 2001 Kant 453 [*LNIND 2001 KANT 406*].

162 *Chidambara v . Ma Nyein Me* , (1928) ILR 6 Rang 243; *Mohamed Ismail v . Abdul Hameed* , (1948) 2 Mad LJ 87; *Mitter Sen v . Maqbul Hasan Khan* , AIR 1930 PC 251 .

163 *Suresh Darvada v. Arjun Ram Pandey* , AIR 2010 Chh 40 .

164 *G.S. Sadashiva v . M. Srinivasan* , AIR 2001 Kant 453 [*LNIND 2001 KANT 406*]; *E . Ramesh v . P . Rajini* , *(2002) 4 LW 192*; *Subramanian v . Vijayarani* , (2001) 2 Mad LJ 444. See also *Srinivas Kumar Moule v . Chandrashekhar Moule* , (1996) 2 HLR 234.

165 *AIR 2007 Del 107* [*LNIND 2006 DEL 1321*].

166 *(2005) 6 SCC 622* [*LNIND 2005 SC 482*].

167 *Dharam Singh v . ASO* , AIR 1990 SC 1880 ; *Rajeshwari Devi v . Laxmi Devi* , (1997) 1 HLR590 (All.)

168 *Moti Chand v . Lakhanbai* , (1995) 2 HLR 459 (MP); *Vidya Ben v . Jagdish Chandra* , *AIR 1974 Guj 23* [*LNIND 1972 GUJ 5*].

169 *Hari Singh v . Sireh Kunwar* , *AIR 1974 Raj 197* [*LNIND 1974 RAJ 84*]; *Sivagani v . Thangavel* , *(2002) 4 LW 255*; *Mariappan v . Kasiammal* , (2002) 2 HLR 261 (Mad).

170 *Ramesh v . Ranjani* , (2002) 1 LW. 10. Where the male heir sold a portion of the disputed property,

remained *ex parte* and no question of whether the dwelling house was wholly occupied by the members of the family was raised by anyone, the restriction cannot be applied and the female heir can seek partition of her share even in presence of a male heir. See *Purushottam Behera v . Rangabati Barik* , 1999 AIHC 4760 (Ori).

171 *Bhumidi Goverdhan v . Subhadramma* , *AIR 1994 AP 87* [*LNIND 1993 AP 346*].

172 *Mooka Ammal v . Chitravedava Ammal* , *AIR 1980 Mad 243* [*LNIND 1979 MAD 231*].

173 *Hemalata Devi v . Umashanker* , AIR 1975 Ori 208 [*LNIND 1975 ORI 6*]; *Kariyavva v . Hanumanthappa* , (1984) 1 Kant LJ 273; *Vanita Ben v . Divaliben* , AIR 1979 Guj 116 ; *Anant Gopal Rao v . Janakibai* , AIR 1984 Bom 319 ; *Mahanti Matyulu v . Oluru Appawa* , AIR 1993 Ori 36 (it was held that the restriction does not apply in case of a single male heir). But see *Janakiammal v . TAS Palani Mudaliar* , *AIR 1981 Mad 62* [*LNIND 1980 MAD 79*]; *Panwasi v . Sukhadevi* , *AIR 1986 All 139* [*LNIND 1985 ALL 269*]; *Surjya Kumari v . Maya Datta* , *AIR 1982 Cal 222* [*LNIND 1981 CAL 339*]; *Usha v . Simri Basu* , *AIR 1988 Cal 115* [*LNIND 1987 CAL 233*]; *Arun Kumar v . Janendra* , *AIR 1975 Cal 232* [*LNIND 1975 CAL 14*](the courts held that the restriction applies in case of even a single male heir).

174 *Mahanti Matyulu v . Oluru Appanawa* , AIR 1993 Ori 36 .

175 *Janakiammal v . TAS Palani Mudaliar* , *AIR 1981 Mad 62* [*LNIND 1980 MAD 79*].

176 *Narasimhamoorthy v . Sushilabai* , AIR 1996 SC 1826 .

177 *D.M. Jayamma v . Muniyamma* , 2000 AIHC 4013 (Kant).

178 *L . Geetha v . G . Sekar* , 2001 AIHC 3264 (Mad).

179 *Saroj Kumari v . Anil Kumar* , 1979 HLR 237.

180 Sh. Bogawat, 'Lok Sabha Debates', Part II, 1955, pp. 8211–12.

181 *Ibid* ., Sh. Lakshmayya, p. 8209.

182 *Ibid* ., Sh. Sadhan Gupta, p. 8139.

183 *Ibid* ., Sh. Dabhi, p. 8322.

184 *Saroj Kumari v . Anil Kumar* , 1979 HLR 237.

185 Sh. Thakur Das Bhargava, 'Lok Sabha Debates', Part II, 1955, p. 8045.

186 AIR 1980 Mad 241 .

187 *Narasimhamoorthy v . Sushilabai* , AIR 1996 SC 1826 .

188 *Narasimhamoorthy v . Sushilabai* , AIR 1996 SC 1826 .

189 *Ibid* .

190 *S.P. Jain v . N.I. Jain* , 1987 Bombay (unreported).

191 *Kalamma v . Veeramma* , AIR 1992 Kant 362 .

192 *AIR 2007 Ker 214* [*LNIND 2006 KER 871*]; see also *Kaushalya Bai Biharilal Pateriya v. Hiralal Bhagwandas Gupta* , AIR 2007 NOC 136 (Bom); *Ratnakar Rao Shinde v. Leela Ashwath* , AIR 2007 NOC 941 (Karn); *S Narayanan v. Meenakshi,* *AIR 2006 Ker 143* [*LNIND 2005 KER 784*].

193 AIR 2009 MP 52 .

194 *AIR 2009 Mad 86* [*LNIND 2009 MAD 339*].

195 *M. Revathi v. R. Alamelu* , *AIR 2009 Mad 86* [*LNIND 2009 MAD 339*] at p. 87.

196 *AIR 2008 Cal 63* [*LNIND 2008 CAL 1394*].

CHAPTER 13 MUSLIM LAW

INTRODUCTION

Muslim law is divine in nature as against man made laws that are passed by competent legislatures, and are guided by the principles of western systems of law.

Two basic beliefs of Muslims are the existence and oneness of God, and the belief in the truth of Prophet Mohammed's mission.[1] Muslims believe that there is one and only one God, 'Allah', as opposed to the belief of Hindus, in the plurality of God, and that the Holy Prophet was the last prophet sent by God on earth. Subsequent to him, no other prophet was sent, and post Prophet Mohammed, all other religious preachers were great religious and spiritual leaders, but they cannot be called prophets. Muslims also believe that the Quran is the only revealed book of Allah, and that there is a day of judgment (*Qayamat*), followed by life after death (*Akhirat*).

Islam in the religious sense, connotes a submission to the will of God, and in literal sense, it means peace, greeting, safety and salvation. Unlike Hindu law, Islam preaches brotherhood and equality of all human beings. Islamic society is not based on caste distinctions or accident of birth in a particular family. All men are equal in the eyes of God, who is their creator, and he looks at them with equal affection in his eyes. Religion here, is a straight natural law, with no ambiguity, and men are enjoined to follow its path. Under Islam, excellence consists only in deeds and here, worship of God means service of fellow men and good of humanity. The duties of a man are more important than his rights. It is said:

'God will not be merciful to him who is not merciful to men'[2] and 'All creation is the family of God, and of all creation, the most beloved of God is he who does most good to his family.'[3]

HISTORICAL BACKGROUND

Contrary to popular misconceptions, revelations were not the starting point of Muslim law, as the society then was governed by the customs and usages prevalent in Arabia of the 7th century of Christian era. These customs and usages varied with each tribe and disputed matters were referred to the chief or decided by an appeal to the sword. However, the laws were distorted in their observance and implementation and the corruption and degeneration caused thereby, necessitated a complete overhauling of the laws and of the legal system. Female infanticide, gambling, barbarism and usury were rampant. The status of women was very low. Reforms introduced by Islam did not abrogate the customs that were worth retention, but did bring about substantial changes, resulting in an improvement in the society. The Arabs, who were conscious of the near complete transformation of the society from barbarism to civilised behaviour, termed the period prior to the Prophet Mohammed, as the *Aiyyam-il-jahiliya*, *i.e.*, the period of ignorance or rather, wilderness or savagery, in contrast to the moral reasonableness of a civilised man.

The Prophet

Prophet Mohammed was born at Mecca, in 571 AD. He was a posthumous child. His father Abdullah, died at Medina while coming back from Syria, shortly before his birth. Brought up by his mother till the age of six, his

grandfather Abdul Muttalib, took care of him after his mother's death. Abdul Mutallib had ten sons, and on his death, one of his sons, Abu Talib, brought up the Prophet. At the age of thirty-five, the Prophet married Kadija. He had six children, two sons and four daughters. The sons died during their infancy. One of his daughters, Fatima, was married to Ali, who was also his closest companion and cousin.

Prophet Mohammed was a serious minded person and spent his days in meditation and prayers, and would often retire to a cave 'Hira', for this purpose. When he was forty years old, he received the first revelation (Wahi), or message from the God. The first ones to believe him were his wife Kadija, Waraqa (a blind scholar), Abu Bakr, (his father-in-law) and Ali. They were followed by Usman and Umar, the third and the second Caliphs respectively.

After receiving the first message from God, or Wahi, he devoted himself in spreading the true religion and this endeavour of his, met with bitter opposition and persecution from those whose faith he challenged. Meccans, whose ire he had attracted, led by Abu Lahab, (the Prophet's paternal uncle and son of Abdul Muttalib), persecuted him and humiliated him. It is said that he was covered with dust, abused and was dragged from the temple of Mecca, by his hair,[4] but he assiduously pursued his mission. The Prophet, along with his companions, fled to Medina, where his message was very well received. This passage from Mecca to Medina, in 622 AD, marked the beginning of a new era called 'Hijira'. The Prophet, at Medina, enjoined the people to join him in his faith. Till then, he was known as a religious preacher, but now, he formed a political group, 'Umma'. The Meccans, later joined by the Jews, followed him in their zeal to persecute him to Medina and after a number of battles, which included the Bedouins and also the Christians, at both Mecca and Medina, the Prophet emerged triumphant, defeating the army of enemies and forcing them to surrender. 'Hijirat', in fact, denotes the advent of a new Muslim era, as from here, from being a preacher, the Prophet also became the ruler of the state, which grew to be the empire of Arabia in ten years. His message was spread over a great portion of the Roman empire, converting the people of Persia, upto the banks of the Indus, and ultimately, covered a large civilisation. Gradually, several tribes joined his faith. He systematised and organised the numerous tribes and established a huge empire of Arabia, of which he was the supreme ruler till his death at the age of 63 years.

Caliphate and the Shia and Sunni Division

The Prophet was the religious as well as the political leader, and on his death as the ruler of the empire of Arabia, the question arose as to who would be his successor. He did not leave behind an heir and the one closest to him was Ali, his son-in-law, his friend and his cousin. On the question of his succession, the disagreement visibly surfaced in the community and two groups became very evident. One group favoured the nomination of Ali as the rightful successor, while the other advocated for a leader chosen by an election. The former group, which supported the nomination of Ali, was called the Shias and those who favoured an election were called the Sunnis. In fact, the Sunnis held the elections, and Abu Bakr, the father-in-law of the Prophet, was elected as the first Caliph (Khalifa). It is said that the elections took place when the Prophet's household was engaged in the obsequies. This Shia and Sunni division is therefore, more political rather than religious in nature, and this original political and dynastic difference, soon gave way to doctrinal and legal differences between the two and assumed the type and proportions that have been retained till the present time.

Abu Bakr, the first Caliph so elected, was 60 years old when he ascended the throne. Regardless of his claims, Ali immediately swore allegiance to Abu Bakr. Abu Bakr was the father-in-law of the Prophet (father of his wife, Ayesha). He ruled Arabia for two years and was then assassinated. After his death, Umar, who it is said was the real power behind Abu Bakr, was elected as the next Caliph. He was the Caliph for ten years, after which he was also assassinated. The third Caliph was Usman, who was assassinated after twelve years. It was then that Ali was elected as the fourth Caliph, and he ruled for five years, when he was also murdered after the battle in 661 AD. None of the first four Caliphs died a natural death and this period was marked with a lot of bloodshed and differences between the Shias and the Sunnis. The Shias maintained all along, that the Caliphate was hereditary and was rightfully vested in Ali, and the direct male line of the Prophet by divine will. Therefore, they regard the first three Caliphs as usurpers. The Sunnis however, claimed that ascendancy to the throne depended upon the sanctity of the faithful, as decided by their votes, expressed through an election. According to them, those Caliphs were the beloved of the Prophet as well as of his subjects. Ali, the fourth Caliph, had two sons, Hasan and Hussain. After Ali's assassination, his elder son Hasan, became the fifth Caliph, but he resigned in favour of Mouvia. However, even then, he was assassinated.

On Hasan's murder, Hussain, the second son of Ali, was regarded as the religious, (not the political) head by the Shias. In spite of not being a Caliph, he was still very powerful. This was due to this distinction created between a

religious head and a political ruler, by the Shias. Hussain was murdered by Yazid's (son of Mouvia) forces at Karbala. The rift between the Shias and the Sunnis became very wide and rather irreparable, and this incident is remembered with solemn grief by the Shias, as 'Muharram'. With political power now firmly in the hands of the Sunnis, Mouvia, introduced the hereditary succession rule and founded the Umayyad dynasty. The Caliphate now became a regular kingship and the humility and brotherhood practised by the first four Caliphs, due to their scrupulously following the traditions of the Prophet, was practically lost. During this dynastic rule, Mecca, Medina and Kufa became the centers of learning and its Caliphate stretched from the Atlantic to the Indian Ocean and to Abyssinia in the south. The Umayyad dynasty was overthrown by the Abbasids (who were the descendants of the paternal uncle of Prophet, Abbas.). The Abbasids ruled from Baghdad for around five centuries, and proclaimed their spiritual succession. With the death of the thirty-seventh Abbasid Caliph, with his family, in an attack on Baghdad in 1258 AD, the Sunnis were left without a Caliph or an Imam. The Caliphate of Abul Kasim Ahmed, who ruled from Cairo for two and half centuries, finally passed to the Ottoman Sultans, who ruled from Constantinople. Mustafa Kemal Ataturk abolished the Sultanate of Turkey in 1922, and the Caliphate was formally abolished in 1924, by the National Assembly of Ankara (Angola).

SOURCES OF MUSLIM LAW

The primary sources of Muslim law are the Quran, the Sunnat (traditions of the Prophet), the Ijma and the Qiyas. Other sources of relevance are the legislations, judicial decisions and customs.

Quran

The Quran is divine in nature and is of supreme authority for the Muslims. The term 'Quran' is derived from an Arabic word 'Quarra', which means 'to read'. It was revealed by God to Prophet Mohammad, through the agency of angel Gabriel. It was not revealed at one go or in a single instance, but the revelation was in the form of messages spread over a period of 23 years. The first message or Wahi, was received by the Prophet at the age of forty years, and the last, a little before his death. The Quran is not a book of law, but it is concerned with the conduct of life. It distinguishes truth from falsehood and right from wrong. It is divided into 'Sura' or Chapters, each having a separate sub-heading, and is composed of around 6000 verses. Around 200 verses deal with legal principles relating to marriage, matrimonial remedies, maintenance, acknowledgement of paternity, transfer of property, gifts, Wills, pre-emption, inheritance, etc., and the subject on which it is most detailed is, succession. It also deals with rules for establishing peace and order and questions that actually came up for decision. The Quran did not abolish all the then existing rules, based on customs and usages, but it did abrogate or repeal objectionable customs, such as female infanticide, gambling, usury, unlimited polygamy, etc. The legal portion can be compared to an amending act, rather than to a Code. It also contains provisions for safeguarding the interests of minors and the disabled, for raising the general status of women and for settling questions of inheritance and succession, on equitable grounds. Women were granted inheritance rights and were considered independent individuals, capable of holding property and disposing it of as full owners.

The Quran was not collected, systematised or compiled during the lifetime of the Prophet. It was available as recorded on palm leaves or skin, and was preserved by people by rote. After the death of the Prophet, the first Caliph, Abu Bakr, ordered the collection of the Quran. He put together the messages and arranged the chapters in order of their bulk, the longest first, without any regard to the order of time. Abu Bakr was the Caliph for only two years, and was assassinated in 634 AD. After around sixteen years, the third Caliph, Usman, ordered a second collection and eighteen years after the death of the Prophet, the Quran took the present form. All the previous copies were ordered to be burned and the present edition is Usman's edition. As it is divine in character, it cannot be altered, amended or modified by any human agency, or even by an institution.[5] Therefore, it has remained without any change in its content, till date. This holy book has been translated into the maximum number of languages.

The Sunnat

The Sunnat, as also the traditions of the Prophet, are the primary source of Muslim law, second in point of time and authority, to the Quran. 'Sunna' means the model behaviour of the Prophet, and the narration of what the Prophet said, did or allowed tacitly, is called 'Hadis' or traditions. As the Prophet was the religious and later, the political leader as well, people came to him with their questions and problems and looked up to him to get his opinion. The

Prophet sometimes, gave his own opinion, and sometimes, he gave it after consultations with his companions, but his verdicts were inspired by divine authority. All that he enjoined by words, were collectively, called the 'Sunnat-ul-qaul'. He himself was a role model, and whatever he did, became an example for others to follow. This was called 'Sunnat-ul-fail', *i.e.*, 'what he did himself'. There were many occasions when people in his presence and within his knowledge, did things in accordance with the injunctions of the Quran. What he allowed to be done without actually saying it in words, was perceived as having his tacit approval. This was called 'Sunnat-ul-tuqrir'.

It was only during the period of the Umayyad dynasty, that the full potential of the traditions of the Prophet was realised. Like the Quran, there was no compilation of the Sunnat, during the lifetime of the Prophet, but the difference between the two sources was that the Sunnat were authoritative as far as their content was concerned, while the Quran was a force in itself. Therefore, these two sources differed from each other as written and unwritten law, but in terms of authority, the Sunnat's importance was recognised in the Quran itself, in the following words:[6]

> Whatever the Prophet gives, accept it and whatever he forbids, you abstain from it.

However, it led to one difficulty. With no authentic compilation, there emerged the possibility of its manipulation in order to support a particular conduct or to give it a legitimacy. This problem surfaced during the reign of the Umayyad dynasty, and soon, forging a tradition became virtually a recognised political and religious weapon, in the hands of unscrupulous people. To stop this forgery, steps had been taken earlier, to collect the Sunnat. At the special request of Umar, Abu, in 'Shuhab az Zuhri', made the first known collection of the traditions. At more or less the same time, Abdul Malik ibn Juraji made another collection. These collections were arranged according to the names of the companions of the Prophet and were called 'Musnads', that indicates not direct authority but on the authority of others. These were not arranged in the order of the subjects. Subsequently, Malik ibn Abas brought out a 'Musannaf', a collection of traditions arranged and classified according to subjects. This book was called 'The first great corpus of Muhammedan law.'

Ijma

The third source of law, both in point of time and in importance, is the Ijma. This term denotes the consensus of opinion of the companions of the Prophet, or even of highly qualified legal scholars. Law is primarily used for the betterment of the society, and hence, as the society can never be static, law also has to respond to the changing needs of the society. New problems and new questions emerge and throw new challenges before the judicial authorities, and therefore, the Ijma assumes an importance of its own. The binding authority or validity of the Ijma is traced to a verse in Quran 'the way is by counsel in their affairs.' and to a (Sunnat) hadis of the Prophet that says that, 'God will not allow his people to agree on an error.'

Since the Ijma derives its authority from both the Quran and the Sunnat, it can never be contrary to any of them. It supplements them, but can never amend or modify them. The Ijma of the companions of the Prophet is of a higher authority than the Ijma of jurists other than the Prophet's companions, or of the immediate descendants, during the reign of the first four Caliphs. It is unrepealable, but the question of the binding force of the Ijma of the jurists had led to some divergence of opinion among the various schools. This happened due to the fact that there is an absolute absence of guidelines with respect to the minimum and maximum number of jurists required to arrive at a consensus; there is no guideline to determine as to whether the consensus has to be by a unanimity or by a majority, etc. Therefore, three variations of the Ijma were apparent. On the top was the Ijma of the companions of the Prophet and at the bottom was the 'Muqualadoo', *i.e.*, learned men, not deducing rules, but merely applying them. In between the two, was the consensus of opinion of the highly qualified legal scholars or jurists.

Where the Quran and Hadis were silent on an individual problem, the legal scholars of great learning, called 'Mujtahids',[7] were enjoined to deduce a valid conclusion from the Quran and the Sunnat. This was differentiated from a free opinion or advice and was called 'Ijtihad'. This deduction of the right principles from the Quran and the Hadis, was not a task that any person of calibre could be allowed to do and was therefore, quite restricted and confined to only a few eminent legal scholars. With time, this liberty was further reduced and by the 10th century, it was felt that all the principles had been settled and it was no longer open to anyone to deduce these principles. This marked the closure of the gates of Ijtihad.

Qiyas

Qiyas means reasoning by analogy or analogical deductions from the above three sources of law, with the exercise of reason. It applies in cases where although one particular factual situation is not covered by the language used in the primary sources, it is nevertheless covered by applying the rule of reason. It does not lay down a proposition of law and is more in the nature of an application of law, as it is contained or obtained from the above three sources. The Qiyas is not universally recognised as a source of law. Shias do not accept it, as for them, if the scope of the law needs to be widened, it should be at the behest of the Imam, and no one else. Even some Sunni jurists do not recognise the Qiyas.[8]

LEGISLATION

With the active intervention of the British in the judicial system, to begin with, the personal laws of the Indians were not affected. Hindu law was applied to Hindus and Muslim law governed the personal relations of the Muslims. Warren Hastings, who took charge as the governor of Bengal in 1772, framed Regulation II of 1772, and it was adopted as the Regulation of April 17, 1780. Section 27 of this Regulation read:[9]

> In all suits regarding inheritance, succession, marriage, caste and other religious usages or institutions, the laws of Quran with respect to Mohammedans and those of the Shastras with respect to Gentoos (Hindus), shall be invariably adhered to.

This regulation forms the basis of most Acts under which Muslim law was administered by the Indian courts. Later, several legislations were passed by the British Indian Legislature, directly and indirectly affecting the Muslims in India. Predominant among them were the Caste Disabilities Removal Act, 1850; the Indian Evidence Act, 1872;[10]the Married Women's Right to Property Act, 1874, the Majority Act, 1875;[11]the Transfer of Property Act, 1882;[12]the Guardians and Wards Act, 1890;[13]the Indian Succession Act, 1925;[14]and the Child Marriage Restraint Act 1929. Three extremely important legislations, directly affecting the Muslims, are the Muslim Personal Law (Shariat Application) Act, 1937; the Dissolution of Muslim Marriages Act, 1939 and the Muslim Women (Protection of Rights on Divorce) Act, 1985. Besides these, several legislations were passed, to modify and codify the law, amongst others, relating to Waqfs[15] and laws relating to pre-emption.[16]

Judicial Decisions

Muslim law has been explained and clarified in several judicial decisions. The courts have extensively quoted the Quranic verses and the Hadis, to substantiate their decisions. The rulings of the Privy Council, and now the Supreme Court, are binding on all the courts in India.

CUSTOMS

The groundwork of Muslim law was the customs and usages of the inhabitants of Arabia, which were not expressly abrogated by the Quran and the Hadis. Even though custom does not have a divine authority, it is validly operative, unless it is opposed to a principle contained in the Quran or the Hadis. In fact, the pre-islamic customs and traditions, which were not expressly repealed by the Quran and Hadis, and were also not contradictory to it, along with the Quran, Hadis and Ijma, collectively form the source of Muslim law.

By 1937, in India, there was a sizeable population of Muslims, who were converts from the Hindu religion. Despite being Muslims, they were following the Hindu law with respect to marriage, succession and all related personal matters, in the name of their customs. These laws varied with the sub-communities and also on the basis of the regions they came from. Some of these Muslims followed the matriarchal system, while others claimed to be governed by the Hindu law of joint family and coparcenary, yet they called themselves Muslims. In order to bring about a uniformity these customs were abrogated, in all personal matters, they were made subject to Muslim law, and the Muslim Personal Law (Shariat Application) Act, 1937, was passed. Section 2 of the Act provided:

> Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including 'Talaq', 'Ila', 'Zihar', 'Lian', 'Khula' and 'Mubarat', maintenance, dower, guardianship, gifts, trust and trust properties and Waqfs (other than charities and charitable institutions and charitable and religious endowments), the rule of decision in cases where the parties are Muslims, shall be the Muslim Personal Law (Shariat).

Its application was optional and an Indian Muslim, of sound mind and of the age of majority, could, by a declaration in the prescribed form, filed before the competent authority, could opt for the application of this Act over him. His declaration was binding on his minor children and on their descendants as well.

SCHOOLS OF MUSLIM LAW

Muslims are divided into two sects—Sunnis and Shias. This division was political in origin, as it centered around the question of who the successor of Prophet should be and the method of his appointment. Later on, jurisprudential differences also surfaced. However, for both the Shias and the Sunnis, the Quran and the Sunnat are the primary and foremost sources of Muslim law.

The Sunnis are further divided into four sub-schools, and the Shias are divided into three sub-schools. Both of them have their own books and authorities. The propounders of the Sunni schools, produced their own allegiance, but did it without antagonism to the other schools. They showed respect for the ability and knowledge of their predecessors and contemporaries, and the work of one, refers occasionally, to the opinion of the writers of the other schools as well.

Sunni Schools

The Sunnis are divided into the following four schools:

Hanafi School

The Hanafi school was founded by Abu Hanifa, the great Imam, in his native city Kufa, in 8th century AD, and is also called the Kufa school. This system of law is called Hanafi law and was favoured by the Abbasid Caliphs. In India, a sizeable population of Sunni Muslims is that of Hanafis and often, Sunni law is referred to as Hanafi law. Two great disciples of Abu Hanifa, Abu Yasuf, the chief Qazi at Baghdad, and Imam Mohammed, the great jurist, acquired great reputation and authority. The well-known legal textbook of this school is Hedaya, while other important works are Durr-ul-Mukhtar, Radd-ul-Mukhtar and Al-Mukhtasar. In addition to it, in the 17th century, the Fatwa-I-Alamgiri, compiled at the command of the Mughal emperor, Aurangzeb, also includes the Hanafi doctrines. The followers of the Hanafi school are found in north India, Pakistan, Bangladesh, Afghanistan, Syria, Turkey, Lebanon, China, and the erstwhile Soviet Union.

Maliki School

Maliki school was founded in 8th century AD, at Medina in Saudi Arabia, by Malik ibn Anas. He expounded the traditions and perfected the doctrine of judicial practice of Medina. He followed the traditions of only the Prophet and in case of any conflicts in these traditions, relied on the Ijma of the Mujtahids of Medina. The doctrines of the Maliki school are contained in the Kitab-ul-Muwatta. Followers of the Maliki school are found in Spain, Morocco and North and East Africa.

Shafei School

Shafei school was founded by Muhammad ibn Idris ash Shafei, in the early 9th century. A pupil of Malik ibn Anas, he was the founder of the doctrine of Qiyas and established Ijma as a source of law. The important books of this

school are the Minhaj-al-Talibin and the commentaries on it, *viz.*, Nihajat-al-Muhtaj and Tuhfat-al-Muhtaj. In India, Sunni Muslims of the Southern region, adhere to the Shafei school. The followers of this school are primarily found in Egypt, Malaysia, Cairo, Indonesia, and also in western and southern India.

Hanbali School

Founded in the 9th century by Ahmad ibn Hanbal at Baghdad, Iraq, this school relied on the traditions and perfected the doctrine of 'usul'. Ahmad ibn Hanbal, who was a pupil of Imam Shafei, is said to have collected over 80,000 Hadis in 'Musnad al Imam Hanbal'. The followers of this school are found in Central Arabia and in a few places in Syria and Central Asia. The authoritative books of this school are the Taat-ur-Rasul and the Kitab-ul-Alal.

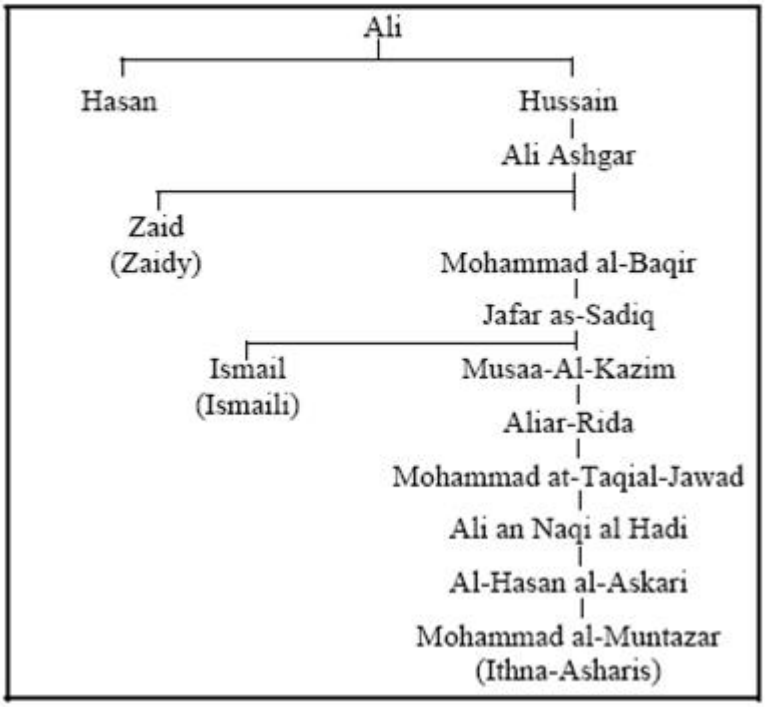
Shia Schools

For understanding the division of the Shias into different schools, a brief understanding of the concept of 'imamate' is necessary.

***Imamate* :** The term 'Imam' has several meanings. It is understood as the one leading the prayers, or the high priest at a mosque. For Sunnis, it means the supreme leader, Imam-al-Kabir, and for Shias, he is the supreme law giver. According to the Shias, Imamate descends in the Prophet's direct male line, by divine will. So Ali was the first rightful Imam, as well as the Caliph, and this is also the reason why Shias treat the first three Caliphs as usurpers. For them, Imams have to be nominated, and once the nomination is done, it cannot be undone. There is a general agreement with respect to that. However, even while tracing the direct male line, in the case of an Imam having multiple sons, there is a disagreement. (See Table 13.1).

Table 13.1

IMAMS OF SHIA MUSLIMS



The split is evident at the stage of the fourth and the seventh Imam. The fourth Imam, Ali Asghar, had two sons, Zaid and Mohammad al-Baqir. The followers of Zaid are the Zaidis, and for the others, the line continued Similarly, the 6th Imam, Jafar, had two sons and this split led to two different schools of Shias. Those who follow Ismail are called Ismailis or seveners, and the followers of the Ithna Ashari schools believe Mohammad al-Muntazar to be the twelfth Imam. It is said that he disappeared at the age of five, when he entered a cave in search of his father, who

had died after his imprisonment by the Abbasid Caliph Mutawakkil and his successors. The Ithna Asharis believe that he will reappear. This is the reason why he is called Mohammad al Muntazar.

Thus, Shias are divided into three schools:

Zaidya School

The followers of the Zaidya school recognise Zaid as their fifth Imam. For them, the Imamate went from Ali to Hasan, then to Hussain, then to Ali Asghar (Ali II), and then to Zaid. They follow the principles of elective and not nominated Imamate, but the Imam must come from the family of the Prophet. Zaidy Imams are the rulers of northern Yemen in south Arabia. India does not have followers of this school.

Ismailya School

The followers of the Ismailya school regard Ismail as the seventh Imam and are also called the seveners (sabiyan). According to them, on the death of Jafar, the sixth Imam, the Imamate descended to Ismail. The followers of Ismail kept him hidden from the Abbasids and he was also called Ismail-al-Muktum (hidden). Ismaili Imamate passed to the Fatimid Caliphs, but there was a split after the eighth Imam. One group followed the ninth Fatimid Caliph Al-Musta'lib'illah, while the other sect followed the Nizar and their 49th Imam is the present Aga Khan. Ismaili Muslims are found in India, Pakistan, Syria and Central Asia.

Ithna Ashari

The Ithna Asharis are also called the twelvers. The twelfth Imam disappeared between 873 and 877 AD, to return on the day of the judgment. The authoritative book of the Ithna Ashari school is the Shari-ul-Islam. The followers of this school are found in India, Pakistan, Iraq, Iran and Lebanon. Law governing the Shia community is popularly, though incorrectly, called the Ithna-Ashari law.

APPLICATION OF MUSLIM LAW

Muslim law applies to a born Muslim as well as to a convert Muslim.[17] Where both the parents are Muslims, the child born to them will be a Muslim.[18] Where only one parent, is a Muslim, the presumption will that the child is a Muslim, unless the contrary can be proved. For example, the child of a Muslim woman from a Hindu man, and brought up as a Hindu, would be called a Hindu.[19] A child of a Muslim couple would be a Muslim, irrespective of the fact that he may go to a Hindu temple. Unless and until he renounces the Muslim faith and converts to another religion, he would continue to be a Muslim.[20] Muslim law applies to Khojas, Cutchi Memons,[21] Halai Memons,[22] Daoodi and Sulaimani Bohras, Sunni Bohras of Gujarat[23] and to Molesalam Girasias of Broach.[24]

CONVERSION TO MUSLIM FAITH

Article 25 of the Constitution of India, guarantees to every citizen of India, a freedom to profess, practise and propagate one's religion. All Indians have a freedom to convert to another religion, provided he/she is a major and of sound mind and the religion that he/she wants to embrace, permits conversion into its fold. Islamic law allows people to join their faith and does not require elaborate ceremonies. It can be done in two simple ways. From the point of religion, any person who adopts the two basic beliefs of Muslims, *i.e.*, the belief in the oneness or unity of God, *viz.*, that there is only one God, Allah, and in the truth of the Prophet's mission, would be a Muslim. If he does so by a declaration, and also renounces his former religion, it is sufficient for his embracing Islam.[25] The second way is to go to a mosque and to a person who is well versed in Islamic theology, where the person intending to convert, would recite the Kalma before the Imam, after which the Imam would give him a Muslim name. A register is kept usually, in which the name of the convert is entered into and he signs it.[26]

A formal declaration is necessary to embrace Islam. It is also necessary that to convert to the Muslim faith, and for

that matter, to any religion, the conversion should be voluntary and bona fide. It should not be done to defeat the provisions of law or to play a fraud.[27] Amongst the multiplicity of personal laws in vogue in India, it is a fact, that due to the permission to practise limited polygamy under Muslim law, married men intending to get married for a second time, which they cannot do under their respective family laws, misuse the conversion procedure and embrace Islam only to escape the punishment of bigamy, that they would attract otherwise. The Supreme Court, in *Sarla Mudgal v. Union of India*,[28] and later, in *Lily Thomas v. Union of India*,[29]has reaffirmed that a bigamous marriage of a Hindu married man, after his conversion to the Muslim faith, only so that he can marry a second time, would be void and he would also be guilty of committing bigamy under s. 494 of the Indian Penal Code, 1860.

The conversion therefore, must be honest and bona fide. Though the sincerity of a conversion is difficult to determine, it should not be a sham conversion, yet, at the same time, it is not necessary that a person must actually practise Islam religiously. If he adopts the Muslim way of life, that would be sufficient.

CONSEQUENCES OF CONVERSION

A person who converts to the Muslim faith, is then governed by the provisions of the Muslim law of succession.[30]Since from a Muslim, a non-Muslim cannot inherit, upon conversion, the relatives of a convert of his former religion, would not be entitled to inherit from him, though the convert himself, will be protected under the provisions of the Caste Disabilities Removal Act, 1850, and despite his conversion, he would still be entitled to inherit the property of his relatives of his former religion. For example, a Hindu man, having a son and a wife, embraces Islam and then dies. Since, at the time of his death, he was a Muslim, it is the Muslim law of succession that would govern the succession to his property. Since a non-Muslim cannot inherit his properties, his Hindu wife and Hindu son would not succeed to his properties.

EFFECT OF RENUNCIATION OF ISLAM

As aforesaid, under Muslim law, only a Muslim can succeed to the property of a Muslim, and a person who converted and thereby ceased to be a Muslim, was not permitted to inherit the property of his Muslim relatives earlier. However, the convert now enjoys the statutory protection of his rights to inherit under the Caste Disabilities Removal Act, 1850. For example, a family comprises a father and his son. The son converts to the Christian faith and gets married to a Christian girl. On the death of the father, the son would inherit his property, despite being a Christian.

Under Muslim law, if a married man renounces Islam, his marriage ends immediately, but if a Muslim woman converts, her marriage, that was solemnised under Muslim law, would not come to an end unless she was a convert Muslim and re-embraces her faith. If a Muslim couple together, renounce Islam and convert to another religion, the status of their marriage solemnised under Muslim law, is not affected at all, and it remains intact. Where a Muslim gets married, either to a non-Muslim or even to a Muslim, under the Special Marriage Act, 1954, renunciation of Islam will have no adverse effect on his marriage.

EFFECT OF FORM OF MARRIAGE ON LAWS OF SUCCESSION

The Muslim law of succession applies to the property of a Muslim. However, if a Muslim marries under the Special Marriage Act, 1954, or gets his marriage registered under that Act, the law of succession changes.[31]Succession to the property of the parties to the marriage and to the property of the issue of such marriage. would be governed by the general scheme of succession laid down under the Indian Succession Act, 1925 and not by the Muslim law of succession. It is irrespective of the fact that all the parties are Muslims. For example, a Muslim man gets married to a Muslim woman under the Muslim law. If he dies, succession to his property would be governed by the Muslim law of succession. Suppose, before his death, he gets this marriage registered under the Special Marriage Act, 1954, then, the relevant law of succession on the death of the husband, or of the wife, or even of a child born of this marriage, would be the provisions of the Indian Succession Act, 1925. Similar would be the position if a Muslim marries a non-Muslim, under the Special Marriage Act, 1954. Succession to the property of this Muslim, his non-

Muslim spouse and an issue of this marriage, irrespective of their religion, would be governed by the general provisions of the Indian Succession Act, 1925, and not by the Muslim law.

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1. *Narantakath v. Prakkal*, (1922) ILR 45 Mad 986 .
2. Sayings 269, quoted in Aqil Ahmed, *Mohammadan Law*, 17th edn., (ed. IA Khan), 1995, p. 3.
3. *Ibid*., Sayings 511.
4. Aqil Ahmed, *Mohammadan Law*, 17th edn., (ed. IA Khan), 1995, p. 2.
5. Other editions of Quran also existed, but there were some divergences among them and it is only Usman's edition that remained of supreme authority. Shias do express some reservations with respect to the suppression of certain passages relating to Ali, their first Imam and Caliph, even in Usman's edition.
6. Quran, 49.7.
7. In order to be recognised as a Mujtahid, it was necessary that besides being men of great legal scholarship and learning, the scholar must possess the complete knowledge of Arabic, the Quran, Hadis and practice of the companions of the Prophet and drew regard and respect of the people.
8. Muslims adhering to Hanbali school do not recognise Qiyas as a source of law.
9. This rule was reiterated in s. Section 37 of the Bengal, Agra and Assam Civil Courts Act XII of 1887, s. Section 112 of the Government of India Act, 1935, s. Section 16 of the Madras Civil Courts Act III of 1873 and ss. 5 and 6 of the Punjab Laws Act IV of 1872.
10. Sections 107 and 108 modified the Muslim law of presumption of death.
11. The Act modified the rules under the Muslim law, relating to the age of majority.
12. Some provisions relating to transfer of property are applicable to Muslims.
13. Law relating to guardianship under Muslim law, as modified by this Act.
14. Provisions relating to administration of estates, apply to Muslims.
15. See for instance, Mussalman Wakf Validating Act 1913–1930; Wakf Act, 1954; Wakf Act of Bengal (1934); Bihar (1947); Uttar Pradesh (1960) and Jammu and Kashmir (1959).
16. See the Rajasthan Pre-emption Act, 1956; The Agra Pre-emption Act, 1922.
17. *John Jiban Chandra v. Abinash*, (1939) ILR 2 Cal 12 ; *Mitter Sen v. Maqbul Hasan*, (1930) 57 IA 313; *Chedambaram v. Ma Nyein Me*, (1928) ILR 6 Rang 243; *Jowala Buksh v. Dharun Singh*, (1866) 10 MIA 511.
18. *Bhagwan Bakhsh v. Drigbijai*, (1931) ILR 6 Luck 487.
19. *Bhaiya Sher Babadur v. Bhaiya Ganga Bakhsh Singh*, (1914) 41 IA 1.
20. *Azima Bibi v. Munshi Samalanand*, (1912) 17 CWN 121.
21. Khojas and Cutchi Memons were originally Hindus but they converted to the Muslim faith around four centuries back. Despite their conversions, they continued adhering to their pre-conversion laws of joint family inheritance and succession. The Cutchi Memons Act of 1938 (Act 10 of 1938), expressly provided that Cutchi Memons would henceforth, be governed in matters of inheritance and succession, by the provisions of the Muslim law. See *Bayabai v. Bayabai*, (1942) 44 Bom LR 792; *Abdul Hameed v. Mahomed Yoonus*, (1940) 1 Mad LJ 273; *Ashraf Ali v. Mohomed Ali*, (1946) 48 Bom LR 642; *Controller of Estate Duty*, *Mysore v. Haji Adul Sattar Sait*, MANU/ SC/0403/1972, decided on 19 April, 1972.
22. *Khatubai v. Mahomed Haji Abu*, (1923) 1 IA 108.
23. *Bai Baiji v. Bai Santok*, (1894) 20 Bom 53.
24. *Fatesangji v. Hari Sangji*, (1894) ILR 20 Bom 181.
25. *Syed v. Rajamma*, *AIR 1977 AP 152* [*LNIND 1976 AP 148*].
26. *Rakeya Bibi v. Anil Kumar*, (1948) ILR 2 Cal 119; see also *Lily Thomas v. Union of India*, *AIR 2000 SC 1650* [*LNIND 2000 SC 827*].
27. *Resham Bibi v. Khuda Baksh*, AIR 1938 Lah 277 ; *xe "Skinner v Skinner" Skinner v. Skinner*, (1897) ILR 28 Cal 537.
28. *AIR 1995 SC 1531* [*LNIND 1995 SC 661*].
29. *AIR 2000 SC 1650* [*LNIND 2000 SC 827*].

30. *Mitter Sen v. Maqbul Hasan Khan*, (1930) 57 IA 313.

31. See the Special Marriage Act, 1954, s. 19.

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INTRODUCTION

The Transfer of Property Act, 1882[1] deals with transfer of property by way of gifts. These provisions however do not apply to gifts made by Muslims, who are consequently governed by the provisions of Muslim law.[2]

The rights of a person to dispose of his separate or self-acquired property inter vivos and at his pleasure are universally recognised. Under Muslim law also, a person is competent to make a gift of his total property during his lifetime and unlike the situation under the Transfer of Property Act, 1882, the gift here is operative with immediate effect and divests him of his control and ownership over the property.

Gifts can be made with a specific purpose or simply out of love and affection. A gift made to one son so as to strengthen his financial position in comparison to other sons who are financially better placed than him is perfectly valid. A gift can be made even with the object of disinheriting an heir.[3] Though the purpose behind a gift is immaterial, yet, if it is to defeat the provisions of a law such as with an intention to defraud the creditors,[4] such gifts are not valid and are voidable at the option of the creditors, though the mere fact that a person owed some debts at the time of making the gift[5] or was even insolvent, is immaterial and does not affect the validity of the gift.

CONCEPT OF GIFT

Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee, followed by immediate delivery of possession of the subject matter of the gift.

Gift therefore is a transfer of property. All the rights of the donor vest in the transferee with the help of this conveyance. The donor gets the title, a right to possess and enjoy the property and a right to sell it at his pleasure if he is otherwise competent to do it.

The term ‘Gift’ is often understood as a synonym of ‘Hiba’ or an English equivalent of Hiba, but has a wider connotation than Hiba. Hiba is defined as ‘the donation of a thing from which the donee may derive a benefit’.[6] It is also explained as an unconditional transfer of property made immediately without any exchange or consideration by one person to another and accepted by or on behalf of the later. Fyzee defines[7] it as an immediate and unqualified transfer of the corpus of the property without a return. Baillie defines it as the conferring of a right of something specific without an exchange.[8]

REQUIREMENTS OF A VALID GIFT

There are three basic requirements for the validity of a gift:

(i) Parties to the gift:

(ii) The donor

(iii) The donee

(ii) Subject matter of gift

(iii) Essential ingredients of making of a gift:

(a) Declaration (Ijab) by the donor

(b) Acceptance (Qubool) by the donee

(c) Immediate delivery of possession (Qabza)

The Donor

Any Muslim, who is major and of sound mind ie competent to contract can make a gift of his property. The age of majority for determining the competency of gift is eighteen years in ordinary cases, and is twenty-one years where a guardian has been appointed by the court.

Gift by a Woman

There is no discrimination on grounds of sex, and a female is also competent to make a gift. It is irrespective of the fact of her marital status. She may be married, unmarried, widow or a divorced. She may be very active socially, an outgoing person or a Pardanashin woman. In case a gift is alleged to have been made by a Pardanashin woman and it is disputed, the burden of proving that she understood the full implication of the nature of her actions is on the donee.[9] The rule is in tune with the equitable principle that persons who have less or practically negligible interaction with strangers due to social customs, need special protection for their own benefit. The Madras High Court[10] in relation to a gift executed by a Pardanashin woman has observed:

> A gift deed executed by a Pardanashin lady stands in a peculiar position. The disposition made must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it... They (donees) must satisfy the court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension.

The Madhya Pradesh High Court[11] also held that where the gift is made by a Pardanashin woman the donees must establish that she understood the full nature and implication of the transaction. The duty is also on the court to scrutinise the document very closely and inspect it thoroughly to judge its fairness. The requirement of a closer scrutiny is all the more imperative in cases where the gift deed is executed in a language that is not the mother tongue of the Pardanashin woman. In these cases the donee has to satisfy the court that not merely was the document read over to her, but she actually understood it ie its contents and implications were told to her in the language she was familiar with.

Donor must have Ownership in the Property

In order that the donor can make a valid gift, he must be the owner of the property. A trespasser cannot make a valid gift of the property in his possession.[12]

Financial Obligations of Donor Immaterial

Donor can make a gift of his property and as aforesaid, he must have ownership in this property. If he has a *bona fide*, genuine intention to make a gift of his property, his financial obligations would not stand in his way of making a valid gift. A person who has contracted debts can make a valid gift except when it is with an objective to defraud his creditors. In those cases it would be voidable at the option of such creditors. The gift can be to the extent of a part of the property or even the total property.

Donee

For a donee, competency to contract is not an essential requirement. A donee can be a minor or even a person of unsound mind. The only requirement is that he should be a juristic person, capable of holding property. A mosque is

a juristic person and competent to be a donee. The donee can be of any sex, any age and even of any religion. He can be a relative or even a stranger. Property can validly be gifted to a female irrespective of her marital status.

Gift to Unborn Person

The donee can be a minor or a major but he must be in existence. A gift to an unborn person is void. However, a gift to a person by way of a maintenance allowance for life and to his male heirs not in existence on the date of making the gift will be valid provided they are born by the time the interest in favour of the living person comes to an end. Under the Transfer of Property Act, 1882, property can be settled for the benefit of a person not in existence on the date the settlement is created.[13] The mode of settlement is that the life interest should be created in favour of a living person and the absolute interest in this property on the death of this life estate holder should vest in the person who was unborn on the date of execution of settlement and is born subsequently but before the life interest comes to an end. The moment such a child is born he takes a vested interest in the property. This settlement should not offend the rule against perpetuity.

Gift to a Child in Womb

A valid gift can be made to a child in the womb of his mother, provided it is born within six months of the date of the making of gift. In such cases the child is treated as a separate entity.

Gift to a Non-Muslim

The religion of the donee is immaterial. The donee may be Muslim or even a non-Muslim. A Muslim can make a valid gift in favour of a Hindu or a Christian.

Subject-matter of Gift

The subject-matter of gift can be property that is capable of being owned. It can be movable as well as immovable property, ancestral or self-acquired, corporeal or even incorporeal property.

Corporeal property is one that has actual physical existence. It is tangible, such as land, a house etc. Incorporeal property on the other hand, has no physical existence but it can be owned, such as a copyright or a goodwill. Its actual physical possession cannot be delivered but it can be assigned. There was some confusion regarding whether interests in property, which are not capable of actual physical possession but are chose in action can be gifted validly or not. It has been held that a gift can be made of incorporeal property such as Zamindari rights, right to receive a specific or a specified share in the offerings made by pilgrims at a specific shrine,[14] negotiable instruments, debts, promissory notes etc.[15]Gift can also be made of a property on lease or property that is subject to a mortgage or is under an attachment or other actionable claims. In cases where actual physical possession cannot be delivered, the gift can be completed by an overt act, that shows clearly an intention of the donor to divest himself completely of the ownership and vest it in the donee. Any property that can be described as ‘mal’ can be the subject matter of gift.[16]

Property must be in Existence

The subject-matter of a gift must be in existence. A gift cannot be made of property that would come in existence in future.

Gift of Future Property **:** The subject-matter of the gift must be in existence on the date of making the gift. If the subject-matter itself will come into existence at a future date, the gift would be void. For example, the donor makes a gift to the donee in March, 2000, of all the eggs that his hens will lay in the month of May, or a farmer makes a gift of the crops that would grow on his fields in the next season. These gifts would be void, the reason being that the benefit conferred should be certain and immediate, of what is existing and is available. Similarly, a gift of spes successionis would be void. But a gift of a specific share in rents that would arise in future is valid as they are ascertainable in specific property.[17] Similarly, a gift of specified share in offerings made by pilgrims at a specific shrine is valid.[18]

Gift to take Effect on a Future Date

Under Muslim law, a gift of existing property but operative on a future date would be void. The reason is that immediate delivery of possession of the property is one of the essential conditions for its validity. Where the donor

makes a gift to the donee that is to be operative only after his death or on the death of another person it would be void as it is contradictory to the immediate delivery of possession.

For example, the donor has a daughter. He makes a gift to the donee that is to take effect on the death of his daughter. The death of the daughter is a certain event, but is uncertain in point of time. The gift, therefore, would be invalid.

Corpus and Usufruct

Muslim law makes a distinction between the gift of a corpus and that of a usufruct. A corpus is the thing itself. It denotes transfer of absolute ownership, but usufruct refers to the produce of the thing, or the income or profits of the thing (corpus). For example, land is the corpus and the crops would constitute the usufruct. Where the gift is of the corpus, it is absolute, and confers ownership rights in favour of the donee that are both transferable and heritable. It is called 'Hiba'. It cannot be subject to a condition that deviates from the absolute nature of the grant. If the condition limits absolute ownership in any manner, the donee is entitled to ignore the condition and the grant will be valid. But, where the gift is of the usufruct only and not of the corpus, it is not absolute, but limited in point of time and enjoyment. It is personal in character and is neither transferable nor heritable. It is called Ariyat. Under Muslim law, a life interest cannot be created in the corpus but can be created in the 'Manafi' ie the usufruct.[19] A gift of the corpus where the donor reserves the usufruct for himself for life, and with the authority to collect the rents and profits as the agent of the donee is valid.[20]

Gift of a Life Interest

A gift of a life interest is valid. In such gifts the donee does not get an absolute title. This right is neither heritable nor transferable, but personal in character and lasts during the life of the donee. On his death it devolves in accordance with the terms of the grant and does not pass to his heirs. A life interest does not automatically mature into an absolute estate.[21]

Gift of Property Held Adversely to Donor

Where the donor does not have the actual physical possession of the property as the same is held by another person adversely to the donor, the donor cannot make a valid gift of it unless:

(i) he actually obtains and delivers possession to the donee; a mere declaration is not sufficient,[22] or

(ii) does all that can be done by him to complete the gift thereby enabling the donee to be in a position, from where he can obtain possession.

Illustration **:** A gifts his land to *B*, that was held by *C* adversely against *A*, after filing a suit against *C*. He obtains possession and delivers the possession to *B*. The gift is valid.[23] Similarly, if the donor files a suit against a trespasser after executing a gift in favour of the donee and the donee joins in the suit, it is not open to the trespasser to challenge the validity of the gift on the ground that since no possession was delivered the gift was void. This is because the moment the donor admits the claim of the donee before the court and pursues the suit to enable the donee to take possession, the gift is valid and complete.[24] The rule, therefore, is that if the donor has done what all he/she could do to put the donee in possession, by filing a suit, and for executing a 'hibanama' authorising the donee to take possession and there was nothing more that she could do, the gift would be valid as constructive possession would be deemed to be delivered.[25]

Gift of an Equity of Redemption

The right of a mortgagor to repay the loan and redeem or reclaim the mortgaged property is called his equity of redemption. This equity of redemption is an interest in the immovable property and is transferable. A gift of equity of redemption by the donor is valid if the possession of the mortgaged property is with him and he completes the gift by delivery of possession of the mortgaged property. In some kinds of mortgages such as usufructory or even an anomalous mortgage, the possession is with the mortgagee and in such cases it may not be possible for the mortgagor to deliver the possession of the property to the donee. With respect to the validity of such gifts where the possession is with the mortgagee, there is conflict of judicial opinion. The predominant view is that in such cases even delivery of constructive possession is sufficient or it must be shown that some appropriate action was taken by the donor to complete the gift.[26] In an earlier decision of the Bombay High Court[27] it was held that delivery of possession is essential for the valid completion of a gift and since the possession of the property was with the

mortgagee under a valid contract, the gift of equity of redemption would not be valid for want of delivery of possession. It is submitted that the view, upholding the validity of the gifts after delivery of constructive possession in these cases appears to be correct.

Essential Ingredients of a Valid Gift

There are three essentials of a valid gift:

(i) Declaration by the donor

(ii) Acceptance by donee

(iii) Delivery of possession of property

The first important essential for the completion of a valid gift is that the donor must make an offer (ijab) to make a gift, the second is that this offer should be accepted (qubool) by the donee and if he is incompetent to accept it personally for want of capacity, then the acceptance should be given by a competent person on his behalf. The third essential ingredient is that offer and acceptance must be followed by an immediate delivery of possession of the property (qabza). If these three conditions are fulfilled, the gift is valid and complete.[28]

Declaration

The offer to make a gift must be 'declared' voluntarily and with free consent. It must be clearly manifested without any ambiguity. A mere permission to live in house so long as a person is employed would not make him the donee or a recipient of gift of the house as a permission is not the same as a declaration and according to the Supreme Court, declaration is a pre-condition for the validity of a gift.[29]

It is very important that the declaration should not be tainted with a fraudulent motive on the part of a donor, such as to defraud the just claims of creditors. In such cases the gift would be voidable at the option of the creditors,[30] but as explained above, mere indebtedness would not stand in the way of the competency of a donor to make a gift.[31] The intention should be real and *bona fide*.[32]

A declaration cannot be made in isolation and has to be made in the presence of some witnesses or by way of a public statement, that the donor was gifting the property to the donee and thereby divesting himself of the complete control over it, and has either delivered or was completing the gift by such delivery of possession as the property was capable of. A declaration cannot be made unilaterally without making a public statement to that effect.[33]

In a case before the Supreme Court,[34] the owner of three pharmacies entrusted the management of one pharmacy each to his three sons. That continued even after his death. As each brother was looking after a separate pharmacy, the profits were not distributed under this arrangement till a suit for partition was filed by one brother. On the point of gift, the court said that a convenient arrangement of management of an establishment was not a gift under Muslim law in absence of a declaration to that effect. As aforesaid, the declaration should not be induced by fraud or undue influence or by the use of force or even under compulsion. Where a woman was brought to another city on a false pretext and was made to sign the gift deed, before she could consult anyone, the court held that her consent was not free and the gift was void.[35]

Acceptance

The second essential requirement for the validity of a gift is that it must be accepted by the donee, if he is competent to accept it himself or by a competent person on his behalf if he lacks capacity to accept it himself.[36] Under Muslim law, acceptance on behalf of a minor or a person of unsound mind can be given by the guardian of his property. The guardians of the property of a minor are the following in the same order viz., father, his executor appointed under his Will, paternal grandfather, his executor appointed under his Will. Father if alive, is the sole guardian of the property of the minor. He can appoint an appropriate person, either a relative or even a friend to act as a guardian of the property of a minor as an executor in his Will. Next to him is the paternal grandfather, who also has a similar power to appoint a guardian of the minor as an executor under his Will. No other relative of the minor including the mother, brother, maternal grandfather etc are stipulated as legal guardians. However, they can be so appointed under a Will by the father or the paternal grandfather. Thus, where the father appoints the mother as an executor under his Will, she is competent to give an acceptance for the gift offered to her minor child. Where the father is alive, he alone is the legal guardian and no one else can even act as a guardian of the property of his minor sons. If through a declaration, the offer of a gift is made to the minor sons, the acceptance must come from

the father failing which the gift would be incomplete and therefore void.[37] In *Musa Miya v*. *Kadar Bux* [38] there was a declaration by the donor in presence of his assembled friends that he had made a gift of his property to his grandsons. This was expressed in the following words by means of a letter sent to the father of these minor children by their maternal grandfather.

> Now both the children, Essen Mian and Moosa Mian, are the owners of my property.

However, there was no evidence of either an acceptance given by the father or of the delivery of possession of this property to the father of these minors. The gift was therefore held incomplete and invalid. Similarly in another case before the Supreme Court,[39] both the father and the paternal grandfather of the minors were present. The paternal grandfather executed a gift in favour of his son's sons in presence of their father. This gift was accepted by the mother of the children. On a challenge to the validity of the gift, the Court held that the gift was invalid as it was not accepted on behalf of the donee by a guardian of the children's property, but was accepted by a person who was not a guardian of the property and hence incompetent to accept it.

***Acceptance by a Person*, *who is not the Guardian of Property* :** The natural guardians of the property of a minor are only his father and failing him the paternal grandfather. The testamentary guardians are father's executor appointed under his Will, and the paternal grandfather's executors again, appointed under his Will. The mother of a minor child, son or daughter is not his/her legal guardian but can be a testamentary guardian, if she was so appointed by either the father or the paternal grandfather under their Wills. In case of a minor married woman, where she has attained puberty and after marriage has lived with the husband, such husband is competent to accept the gift on behalf of his minor wife even though her father might be living.[40]

A question arises, whether an acceptance given by a person on behalf of a minor, who is not a guardian of his/her property, would be a valid acceptance. In *Katheessa Umma's* case,[41] the husband and the wife were living with the wife's mother in her house. The husband was ill and was being taken care of by them. He executed a registered gift deed in favour of his wife and her mother accepted it on her behalf. On his death, his brother and two sisters claimed his property (3/4th share) by inheritance, while the wife claimed the total property under the gift. The brother of the deceased contended that the mother was not a guardian of the property of the minor wife and therefore not competent to accept it on her behalf, so the gift must fail. The question before the court was, when the husband makes a gift to his minor wife in absence of her father and father's father can he give its possession to her mother, without affecting its validity? Was it absolutely necessary that possession of the property must be given to a guardian specifically to be appointed by the civil court in such cases? The court quoted with approval the following rule:[42]

> If a fatherless child be under charge of his mother and she takes possession of a gift made to him it is valid... The same rule holds with respect to a stranger who has charge of the Orphan.

The court also quoted[43] the following passage with approval with respect to relaxation of the rules in certain cases.

> It is lawful for a husband to take possession of anything given to his wife, being an infant, provided she has been sent from her father's house to his and this although the father be present, because he is held, by implication, to have resigned the management of her concerns to the husband. It is otherwise when she has not been sent from her father's house, because then the father is not held to have resigned the management of her concerns. It is also otherwise with respect to a mother or any other having charge of her, because they are not entitled to possess themselves of a gift in her behalf, unless the father be dead, or absent, and his place of residence unknown; for their power is in virtue of necessity, and not from any supposed authority, and this necessity cannot exist when the father is present.

Therefore, if the minor is under the care and protection of a person other than his guardian, only because there is no guardian, such person can validly accept the gift on behalf of the minor.[44] But in case of a minor girl who is married and has lived with her husband after obtaining puberty, the husband can validly accept the gift on her behalf even in presence of her father.

Delivery of Possession

The declaration and its acceptance must be followed by delivery of possession. It is this aspect of gift under Muslim

law, that differentiates it from a gift under the Transfer of Property Act, 1882. Under the Transfer of Property Act, 1882, there is no emphasis on immediate delivery of possession and the physical possession may be delivered at a later stage depending upon the terms and conditions agreed upon by the parties, without affecting the validity of the gift.

Under Muslim law, a gift is not valid unless it is accompanied by delivery of possession of the gifted property.[45] It does not have any legal effect, till possession is given.[46]

There is a Hadis of the prophet to the effect, that 'a gift is not valid unless possessed'.[47]

Therefore it is absolutely essential that the owner must completely divest himself of the ownership and the complete control over the property and vest it in the donee. It is said that the donor must vacate the premises and should not leave even a straw belonging to him in the property, signifying complete relinquishment of control, ownership and possession, in favour of the donee.[48]

The term possession means, 'only such possession as the nature of subject is capable of', and therefore it can be actual, constructive or even symbolic.

Where the gift is in writing and the gift deed embodies a declaration that the possession of the property has been delivered, it would amount to delivery of possession of the property if it is given and accepted by the donee,[49] but a mere admission in the deed without any other evidence that the possession has been delivered is not conclusive establishing the delivery of possession.[50]

Actual Delivery of Possession **:** Where the donor makes a gift of his movable or immovable properties that were in his possession, in order to validly complete the gift he must deliver the possession of the movable property, and in case it was immovable, he should:

(i) vacate the possession along with all his belongings that would signify his relinquishment of total control; and

(ii) put the donor in possession.

Thus both physical departure of the donor and the formal entry by the donee must be shown. Where the donor makes a gift of immovable property that is not in his possession at the time of making the gift he can complete the gift by some overt act which shows the *bona fide* intention and is the appropriate action in such situation.[51] For example, where the property is in possession of a tenant, the gift can be completed by delivery of title deeds to the donor, mutation of names in the office of the relevant authority and a direction to the tenants to pay rent to the donee.[52]

The donor may lawfully make a gift of a property in the possession of a lessee or a mortgagee. For affecting a valid gift the delivery of constructive possession of the property to the donee would serve the purpose. Even a gift of property in possession of a trespasser is permissible in law provided the donor either obtains possession and gives it to the donee or does all that he can to put it within the powers of the donee to obtain possession.

In *Abdul Rahim v. Sk Abdul Zabar* [53], a Muslim father who was about 85 years old executed a gift deed of his properties (land) that he had purchased in favour of his son in 1973. In 1975, he filed an application before the Tehsildar for mutation of his son's name in his place as the owner. His other son challenged the validity of this gift on the ground that since the possession of the property was not handed over to the younger son (donee) by the father, the gift was illegal, void and inoperative. During the pendency of the litigation, the donee died and his legal heirs were substituted in his place. The main argument of the donee was that as he was collecting rent from the tenants of the land in his own capacity and not as an agent of the original owner of the property, and an order of mutation was passed in his favour at the behest of the donor, the requirement of delivery of possession of the property was met with for completion of the gift. The high court held that as the son was collecting rent from the tenants even before the death of the donor, there was no material to show that the father had divested himself of the title of the said property and had put the son in possession of the property. The apex court overruled the decision of the High Court, accepted the claim of the son and held that the gift was valid as the essential requirement of delivery of possession of the property was adequately met with in this case. The Supreme court laid down six criterions for the validity of a gift under Muslim law[54]:

(i) Donor should be sane and major and must be the owner of the property which he is gifting;

(ii) The thing gifted should be in existence at the time of Hiba;

(iii) If the thing gifted is divisible, it should be separated and made distinct;

(iv) The thing gifted should be such property to benefit from which is lawful under the shariat;

(v) The thing gifted should not be accompanied by things not gifted, i.e., should be free from things which have not been gifted;

(vi) The thing gifted should come in possession of the donee himself or of his representatives, guardian or executor.

The court held that the gift was registered and contained a clear and unambiguous declaration of total divestment of property. It further said that a registered document carries with it a presumption of its valid execution and a party questioning it has to show that it was not a valid transaction. The agency of collecting rent by donee during the lifetime of the father came to an end and he started doing it for his own self after the gift.

Exceptions to the Rule of Delivery of Physical Possession **:** There are three exceptions to the rule that in order to be complete and valid, the offer and acceptance must be followed by immediate delivery of physical possession of the property ie physical departure of donor and formal entry of donee. These exceptions are:

(i) where the gift is by the husband to the wife or vice versa;

(ii) where the gift is by the father to the minor child or by guardian to the ward; or

(iii) where the donor and donee reside in the same property which is the subject matter of gift.

Gift by Husband to the Wife of Immovable Property **:** Where the husband makes a gift to the wife of either the matrimonial home occupied by both of them or any other property belonging to him there is no need for an actual physical departure by the donor. The reason is that the relationship of husband and wife is different from any other relationship. Joint residence is an integral aspect of this relationship and the fact that the husband manages and looks after the property of the wife is backed by an implied presumption that he does it on behalf of his wife. In *Fatmabibi v*. *Abdul Rehman Abdul Karim*,[55] the husband made an oral gift of a house to his wife. On a challenge to the validity of the gift the trial court held that the gift fulfilled only one condition *i.e.* of declaration and as the rest of the two conditions *i.e.* acceptance and delivery of possession were not present, the gift was invalid. The matter went in appeal to the Gujarat High Court which reiterated the established principle of law, that in case of gift by the husband to his wife, of the house that they were occupying, there is constructive delivery of possession and acceptance and the gift was valid. Even where the property is let out to tenants and the husband collects the rent, it is presumed that he does it on behalf of his wife.[56] Thus where the husband gifts agricultural land to his wife by a declaration and hands over the deed to her then, despite the fact that no mutation of names was done, the gift is valid.[57] Similarly, where the husband gifts the matrimonial home and a chawl next to this home, which was occupied by tenants, to his wife and continued receiving rents from the tenants in the chawl, the gift is complete and valid and the presumption that the husband is managing the property that now belongs to the wife, arises.[58] A mutation of names will be a clear proof of the genuineness of the intention, but it does not mean that mutation of names is essential, more so in cases where the gift is properly declared and the gift deed is handed over to the wife.[59]

Where there is no need of a formal and physical delivery can the delivery of gift deed be made to the mother of a minor wife, in absence of any guardian? In *Katheesa Umma's* case,[60] a gift was made by the ailing husband in favour of his minor wife, who was around 17 years old. The gift deed was registered and was handed over to the mother of the wife, in whose house the couple was living at that time. There was no guardian of property of the wife, either natural or testamentary. The brother and sister of the deceased husband claimed his property and refuted the claim of the wife on the grounds that since the mother of the wife was not the guardian of her property, the gift is invalid for want of delivery of possession. Here, the gift deed was registered. Upholding the validity of the gift the Supreme Court observed:[61]

> The rules on the subject may first be recapitulated. It is only actual or constructive possession that completes the gift and registration does not cure the defect nor is any bare declaration in the deed that possession was given to a minor of an avail without the intervention of the guardian of the property unless the minor has reached the years of discretion. If the property is with the donor he must depart from it and the donee must enter upon possession. The strict view was that the donor must not leave behind even a straw belonging to him to show his ownership and possession. Exceptions to these strict rules which are well recognised are gifts by the wife to the husband and by the father to his minor child. Later it was held that where the donor and donee reside together an overt act is necessary and this rule applies between husband and

wife.

Here there was a declaration and a tender by the donor and as the gift was by a registered deed there was no ambiguity with respect to the intention of the donor. The deed recorded that the possession of the property was given to the mother and she had taken it on behalf of the wife. The court noted that the husband could have taken the possession on behalf of his wife himself, as a husband is competent to accept the gift on behalf of his minor wife, who has obtained puberty and who has lived with him, even where her father is alive. The court held here that the gift was valid as the wife had attained the age of discretion, and they both were living in the house of the mother of the wife. The intention to make the gift was clear and manifest because it was made by a registered deed. There was complete intention to divest ownership on part of the donor and to transfer the property to his wife. The mere fact that he handed the deed to the mother would not make the gift invalid. Rather, the court held, the mother was capable to accept the gift on behalf of the minor wife in absence of any guardian.

Gift by Father to Minor Child or by Guardian to the Ward **:** Where the father makes a gift in favour of his minor child, or a guardian gifts the property to his ward, delivery of possession of property is not essential and all that needs to be established is that there was a *bona fide* intention on the part of the father or guardian to make a gift.[62] This rule recognises the fact that here the donor is a person, who only is competent to accept the delivery of possession of the property. Where the giver and accepter is one and the same person, to insist on a formal delivery of possession would not be meaningful. It would be for all purposes a delivery by the right hand to the left hand.[63] But where the property is gifted by the father to his minor child and also to another person along with her, delivery of possession is necessary, e.g. a gift to a minor daughter and her major husband.[64]

'Guardian' refers to the guardian of property that includes the father, his executor, paternal grandfather and his executor in this order. If the father is alive he alone is the guardian of the property and the gift made by the mother or maternal grandfather[65] would require delivery of possession of the property.

In *Musa Miya v. Kadar Bux*,[66] a declaration was made by the maternal grandfather of two minor boys on the 26th day of Ramzan before several persons whom he had invited for dinner, that he was going to Mecca for a pilgrimage and he had made a gift of his properties to his two grandsons and made them the owners thereof. The declaration was also communicated to the women of the household at his request. The donor's daughter, her husband and these two minor boys were all living in the donee's house with him and were also maintained by him, but at the time when this declaration was made, the father was away. He was informed about the gift with the help of a letter sent by the grandfather to him. Soon after the declaration, the donor went to Mecca and returned three months later. He resumed the charge of this property and managed it as before till he died around 9 years after he had made the declaration. Three years subsequent to the offer of gift, the donor received some land in his name which were earlier purchased in the name of his brothers but were bought for him. No steps were taken by him to effect a mutation of names or give any indication of conferring ownership or control of the property in favour of the minors. The minor boys and their father were all along living with the donor, but they never participated in the management of the property. On the death of the donor, his brother claimed 3/8th share of the total property and the minor boys claimed the entire property under the gift. The counsel for the minor boys argued that in view of the facts of this case, and the special relationship of the grandfather and the grandson, there was no need for delivery of possession of the property and it could be validly presumed that the donor was managing the properties on behalf of the minor grandsons. Rejecting this contention, the court said that the gift in this case was incomplete for want of delivery of possession. The maternal grandfather was not the guardian as the father of minor children was alive. Despite the fact that the children and their parents were living with the grandfather and he willingly maintained them, these facts alone would not be sufficient to dispense away with the requirement of delivery of possession. The gift was held to be incomplete and without any effect in law.

Gift to a Minor by a Person other than the Father or Guardian **:** The exception that formal delivery of possession of property is not required is applicable only where the donor is a person who himself is also competent to accept the gift on behalf of the donee ie he is either the father or any other guardian of property of the donee. But where any other person makes a gift and the donee is a minor, delivery of possession is a mandatory requirement.[67] Such gifts will be complete when the possession is delivered to the father of the minor or to his guardian and in their absence to a person under whose care and protection, the minor at the relevant time is.[68] Where the minor has attained the age of discretion, he himself is capable of accepting the delivery of possession of the property.[69]

Where Donor and Donee Live Together in the Same Property that is the Subject Matter of Gift **:** The third exception to the rule of complete departure of the donor and a formal entry of the donee in the gifted property is

where the donor and donee were living together in the property that is the subject-matter of the gift. The donor in such cases need not depart from the property and as the donee is already residing in the property, the need for a formal entry does not exist.[70]However, despite the fact that the law does not require the donor to vacate the premises, there has to be some cogent evidence, by way of a declaration on part of the owner and some overt act that can lend a touch of *bona fide* intention on part of the donor to complete the gift, and divest himself of the total control over the property.[71]

Law does not require that the donor and the donee should stand in some kind of family relationship. They can be family members or even friends. The requirement for the application of this rule is:

(i) both the donor and the donee should reside together;

(ii) the place of residence is the subject-matter of gift; and

(iii) there is, besides a declaration, some overt act done by the donor that shows the relinquishment of control by him and vesting of ownership in the donee.

If these three conditions are fulfilled then there is no need for a physical departure from the premises by the donor and a formal taking over by the donee. For example, a Muslim donor makes a gift in favour of the donee living with him with the help of a gift deed containing a declaration that he was transferring the property in favour of the donee. After the execution of the gift, if the donor

(i) makes a declaration in presence of a number of friends, and entrusts the management of the property to the donee; or

(ii) hands over the papers of the property to him and authorises him to effect a mutation of names; or

(iii) authorises the donee to take possession of the property;[72] or

(iv) the donor and the donee apply for mutation of names at the office of the relevant authority;[73] or

(v) the donee starts paying municipal taxes in his name;[74] or

(vi) the property is transferred in favour of the donee and he starts collecting rent in his name;[75]

the gift would be complete despite no physical delivery of possession. Thus where a sister executes a gift in favour of her brother when they were living together in this house, the gift was held valid irrespective of the fact that there was no delivery of possession,[76] but where there is a declaration or even execution of a gift deed, but without any recital, with respect to delivery of possession of property,[77] and no handing over of management of property;[78] or the donor continues to pay the taxes himself,[79] receives rent and there is no direction to the tenants to pay the rent to the donee, the gift is incomplete and therefore invalid.[80]

FORMALITIES FOR EFFECTING A VALID GIFT

A gift can be oral or in writing. If it fulfills all the essentials of a valid gift ie there is a declaration, valid acceptance followed by immediate delivery of possession, then it is perfectly valid even though none of the aspects has been reduced to writing.[81] An oral gift by the father-in-law to the daughter-in-law when possession is handed over to the latter is perfectly valid.[82] In another case before the Supreme Court, the deceased made an oral gift in favour of her daughter and grandson in her lifetime dividing the house in two parts and giving the possession to these two donees. Moreover, a mutation of property was sanctioned in their favour; it was held that the gift though oral was perfectly valid.[83]

A gift may be in writing or even registered, but if it does not fulfill the basic requirements, it would nevertheless be invalid. Mere writing or even registration would not cure the defect of an otherwise invalid gift.[84]

Thus, a gift can be validly effected orally or it can be reduced to writing and when it is in writing it would be valid despite the fact that it was neither attested[85] nor registered.[86] If the gift is otherwise valid, even a mutation of names is not necessary.[87]

A gift of immovable property made by a non-Muslim under the Transfer of Property Act, 1882, must be in writing, properly attested by at least two competent witnesses and registered.[88]

An oral gift must be strictly proved in case of a dispute. What is required to be proved here is that the three basic ingredients of a valid gift were complied with ie declaration, acceptance and delivery of possession and other factors will be of little relevance. It is not the possession by the donee on the date of the dispute but the immediate delivery of possession of the gifted property on the date of making of the gift that has to be proved. The fact, that the alleged donee took possession of the property, looked after it during the lifetime of the donor, discharged the debts of the owner, performed his last rites and was allowed possession for full one year after his death would not be of importance if the making of gift is not proved. Even a notice served on him by the Panchayat to pay house tax is not sufficient and what he has to prove is, when and how the gift was made in his favour.[89]

Thus where the alleged donee could neither disclose any details of the oral gift nor the date on which it was made, the property at the time of the litigation stood in the name of the donor only and the subsequent conduct of the parties was inconsistent with alleged execution, the court held that the gift was not proved.[90] But an oral gift made by a man in favour of his wife by a declaration, acceptance and a constructive delivery of possession is perfectly valid.[91]

Gift deed executed simultaneously with an oral gift

As aforesaid an oral gift under Muslim law is perfectly valid so long as it is validly declared by the donor, validly accepted by the donee and is followed by delivery of possession of the property. It must be proved properly or may be reduced to writing later. Though there is no requirement under Muslim law for a gift to be in writing yet according to the judicial opinion, if the gift deed was executed either prior to or simultaneously with it than in order to be valid it must be registered in accordance with the provisions of the Transfer of Property Act, 1882. If the gift deed accompanies or follows an oral gift such gift deed must be registered and its non-registration would adversely affect the validity of the gift. In *Faridsaheb v. Ahmedsaheb,1*[92] along with an oral gift deed the donor executed a gift deed giving his complete property to one of his sons that was also followed by delivery of the possession of the property. The Bombay High Court held that as the deed was executed prior to or simultaneously with the oral gift it required registration and the gift would be invalid as it was not registered in the present case.

MUSHAA

'Mushaa' is an Arabic word derived from 'saayu' that signifies confusion. It refers to an undivided share in the property.2[93] Property may be in the nature of independent unit, that can be ascertained, specified and identified independently or it may be part of an independent unit, which is yet to be specified. The term 'property' includes an undivided share in a property which can be the subject matter of a valid gift.

For example, a person *A* is the owner of a land *X*. This piece of land is ascertainable as an independent unit, and is capable of delivery of possession by itself without effecting the rights of anyone else. Suppose *A* had three sons *B*, *C* and *D*. On the death of *A* all these sons together inherit the property. The share of each of them will be one-third, but which one-third of the land will go to the share of which son can be ascertained or specified only by a formal demarcation or partition or actual division of the property. Till that is done, each will have an undivided share in the land. With respect of Mushaa or undivided share, two situations are possible:

(i) undivided share can be in a property, which is capable of division without effecting its value or character substantially; and

(ii) undivided share is in a property that is incapable of being divided. In trying to divide it, either the property will be destroyed or its intrinsic value will be lost or it will be rendered useless, e.g. two brothers inherit a house that has a common entrance, staircase or a right of way, a utensil, a carriage, tapestries, artefacts, well, clothes, ornaments etc.

Gift of Mushaa

In order to effect a valid gift of Mushaa, the compliance of all the three conditions is necessary, ie, declaration, acceptance followed by delivery of possession, but problem may arise in some cases in complying with the third

essential viz., delivery of possession. For that the rules are as follows:

Where the Undivided Share is Incapable of Division

Where the property (the undivided share) is not capable of division and admits only common enjoyment such as a staircase,3[94] well, the banks of a tank,4[95] a right of way, a share in business in Turkish bath,5[96] the property can be validly gifted without effecting a division of the property. In such cases the donor should by some act clearly demonstrate his intention to put the donee in possession of the property as the nature of the property admits.

Where the Property is Capable of Division

Where the property is capable of division, it should be divided and its possession handed over to the donee. However, even if it is not partitioned and delivered to the donee it is merely irregular and not void and can be validated subsequently, by effecting its division and delivery of possession.

Under Shia law, the gift of an undivided share in a property capable of division is valid.6[97]

Under Sunni law, the gift of Mushaa in a property capable of division is valid from the date of its inception, despite the fact that no division is effected in certain specific situations. These are as follows:

(a) where the gift is made by one co-heir to another co-heir;

(b) where the gift is of a share in a Zamindari or Taluka;

(c) where the gift is of a share in freehold property in a large commercial town;

(d) where the gift is of shares in a land company.

Gift by One Co-heir to Another Co-heir **:** Co-heirs are persons who succeed to the estate of a deceased together. They take their shares as tenants-in-common, and the extent of the share is well-defined, but the property may not be formally divided. The only condition is that their inheritance should be from the same intestate. For example, two sons succeeding to the estate of their father are co-heirs, wife and children inheriting the property of a 'Muslim man', a brother and a sister, two sisters, or a grandmother and a granddaughter would be co-heirs. In *Mahommad Buksh v. Hossenni Bibi*,7[98] a Muslim woman died leaving behind her children and her mother. The mother succeeded to one-sixth of her property that consisted of around 22 villages, the other five-sixth going to her husband and her children. She executed a gift of her one-sixth share in favour of the children of her deceased daughter. She and the children were the co-heirs of the deceased female, and therefore, the contention that the gift was invalid for want of demarcation of the shares and delivery of possession, was rejected by the court, and it was held that the gift was valid.

Constructive Possession **:** If the gift is by a co-sharer to another sharer and the co-sharer is in possession, the possession is deemed to be on behalf of the other.8[99]

Gift of a Share in Zamindari or Taluka **:** This exception is of little importance after the Zamindari were abolished by the Government of India. Undivided share in a Zamindari9[100] or in Kaimi land10[101] or the land that is statutorily impartible is valid without its actual division.

Gift of a Share in a Freehold Property in a Large Commercial Town **:** There are two requisites of this clause viz., the share should be in a freehold property and secondly, the property should be in a large commercial town. Such a share can be gifted validly without effecting its division.11[102]

Gift of a share in a land company is valid.12[103]

Gift of Mushaa and its Subsequent Validity

Where the property is capable of division, but is not divided and is gifted the gift is valid under Shia law and merely irregular under Sunni law where it can be validated by effecting a division subsequent to the making of the gift. In *Hyatuddin v. Abdul Gani*,13[104] a Muslim man died in 1948, leaving behind one sister, two widows and a boy who was brought up in his house since childhood. The share of each widow was one-eighth and of the sister was three-fourth. The sister and one of the widows executed a gift in favour of this boy, Hyatuddin in 1952, of their respective shares 3/4 + 1/8 = 7/8th of the property. The gift deed stated that the donee had the possession of the gifted

property and he was empowered to use them in any manner that he liked. The gift deed further stated that the share of the other widow was separated and none of their (donor's) heirs would have any interest in the property. In 1955, both the donors and also the donee filed a suit for a declaration that the donee was the owner of the property and in the alternative, of partition and separate possession of the property in his favour. During the pendency of the litigation, the sister died, and her heirs claimed that the gift being void had no legal effect and accordingly, they were entitled to inherit her three-fourth share in the property. The court proceeded on the assumption that no formal division of the property was effected. However, the tenants were given a direction to pay the rent to the donee and the tenants were complying with these directions. The court held that the gift was merely irregular at the time of its inception and the moment a suit for partition and separate possession was filed, it was perfected. Similarly, in *Hamid Ullah v*. *Ahmad Ullah*,14[105] the property consisted of six houses and three lands, and the donor who was not in physical but constructive possession of the property executed a registered gift deed. The document recited that the donor was in possession of the property and was conveying the same to the donee. She had given up all her rights in the property and the donee was at liberty to deal with the property in any manner he chose. The court held that the gift was valid as the donor had done practically all that she was able to do in the way of divesting herself of possession and giving to the donees the same possession as she had.

Gift to Two or More Donees

Where a donor makes a gift of the property that is capable of division to two or more donees together, without specifying their shares and without dividing the property, the gift will be irregular under Sunni law and can be validated by a subsequent partition and occupation of their separate shares.15[106]

As the primary reason for the rule against the gift of Mushaa is to avoid confusion in ascertaining what exactly is the property given to the donee, the confusion can be further compounded if the donees are two or more persons who do not know, to what extent the property is given to them. In absence of specification of their shares the gift would be irregular, but it can be regularised or perfected later. Under Shia law, a gift of property to two or more donees, without specification of their shares or effecting a division of the property is valid.16[107]

Gift to Two or More Donees with Specification of Shares but as Joint Tenants

Where a gift is made in favour of two or more donees in specified shares but with a stipulation that they hold it as joint tenants, so that if one dies, his share would not go to his legal heirs but will be taken by the other, it is valid according to Shia law,17[108] but under Sunni law, this condition would be void, and the gift would be valid. Each donee under Sunni law will take his specific share absolutely and on the death of either of them, the respective share would go to their legal heirs and not to the surviving donee.

CONTINGENT GIFTS

A gift must be certain and should take effect immediately. If the gift is to take effect on the happening of a contingency which may or may not happen it would be invalid. Contingency refers to a future uncertain event.

For example, *A* makes a gift to *B*, that is to take effect only if *A* dies issueless, or if *A*'s wife dies before *B*. These are contingencies which may or may not happen, and a gift depended upon these uncertain conditions is invalid. Similarly, where *A* makes a gift to *B* for life and then to *C*, provided he was living on *B*'s death, the gift to *C* will be a contingent gift.18[109]

CONDITIONAL GIFTS

A gift is an absolute transfer of property whereby the donor divests himself of all the rights in the property and these rights with the help of this gift are vested in the donee. What the donee acquires is the basic incidence of ownership of the property viz., he acquires a title to the property, a right to possess and enjoy it and a right to alienate it at his pleasure. These are the rights that are conveyed with the ownership. Where the donor makes the gift subject to a condition or limitation, which restricts or limits the enjoyment of any of these three rights by the owner (donee), the gift is called a conditional gift. If the condition is inconsistent with the incidence of absolute ownership, the condition

will be void but the gift would be valid. The donee would be entitled to ignore the condition as if it does not exist on paper, without affecting the validity of the gift.19[110]

For example, *A* makes a gift of his house to *B*, and attaches a condition to the gift that *B* can only live in it and cannot let it out to tenants. The gift conveys an absolute ownership, but the condition restricts the right of the owner to possess and enjoy and alienate it at his pleasure. As an owner he can live in it, rent it out, grant a licence to another to use it, and therefore, this condition can be ignored by the donee but the gift will be valid. Similarly, where the donor makes an absolute gift to the donee and imposes a condition that so long as the donor or his wife is living the donee cannot sell the property, this condition is repugnant to the grant created and would be void, and the gift will be valid as an absolute gift.

No condition attached to a gift that restricts or prevents the donee from alienating the property, or restricting his manner of enjoyment of property will be valid. For example, *A* makes a gift of his house to *B* with a condition that *B* cannot sell it, or can use it only for a specific purpose. Such a condition would be void and the gifts would be absolute and valid. Where the gift comprises agricultural land, and the donor puts a condition that the donee would grow only wheat in it and no other crop, or would not use it for any other purpose except for agricultural purposes, the gift is valid, and the donee is entitled to ignore both these conditions. He has the option and full rights as the absolute owner of this land to grow whatever he finds suitable on it or to use it for whatever purpose he thinks fit.

The rule is applicable only where the gift is intended to be an absolute gift ie a gift of the corpus, and not merely of a usufruct. Gifts creating a life interest in the usufruct stand on a different footing altogether. What is conveyed in a gift of usufruct is not the ownership in the corpus or the thing itself, but an enjoyment of the produce of the corpus or the thing without the title or a right of alienation of the corpus.20[111] For example, a right conferred on the donee to appropriate the crops of the land gives him a right to the enjoyment of the usufruct or the crops but not in the thing ie the land. But if the donor makes a gift to the donee of a house with a condition that the donee is to enjoy the house or live in it for his lifetime and then this house will revert to the donor, the condition of reversion is bad in the eyes of law as it derogates from the absoluteness of the grant of the corpus, the house itself. This condition would be void but the gift is valid and the donee would take an absolute interest in the house. In construing whether a gift creates an absolute interest in the corpus or a right in only the usufruct with corpus going to a specific individual mentioned by name, the substance of the gift has to be preferred to the form.21[112] Thus where the donor makes a gift of a house to *A* for his life and after the death of *A* to *B* for life, the condition of gift over to *B* derogates from the absoluteness of the grant in favour of *A*. Since the gift is in the corpus (house) and not in the usufruct, the gift has to be absolute. The result would be that it would be valid and absolute in favour of *A* and *B* will not get anything.

Shia Law

The grant of a life estate in the corpus is recognised under the Shia law.22[113] Thus a gift of a house by the donor for life to *A*, with a condition, that after the death of *A*, the house will revert to the donor, is valid. The condition of reversion is operative and will bind the donee. Similarly, where the donor makes a gift of a house to *A* for his life, and on his death to *B* for life and then to *C* absolutely, the gift in favour of *A*, *B* and *C* is valid.23[114]

Gifts with a Condition in the Nature of a Trust

Both under the Sunni and the Shia law, conditions which are in the nature of a trust are valid if the donor does not keep any rights with him over the corpus and the condition is in the nature of a direction with respect to utilisation of the usufruct in favour of specific individuals named in the deed with their entitlement clearly specified.24[115] It can include a right to have the recurring income out of the usufruct even in favour of him self (donor). The condition in these cases is in the nature of a trust and is enforceable that way. The most important thing is that the donor does not have a right in the corpus, nor reserves the same in favour of anyone else, but only in part of the usufruct. For example, A makes a gift of his property in favour of B, with a condition, that out of the income of the property, he would pay Rs. 400 to him and an equal amount to his wife till their lifetime. Here the corpus is given without any limitation to the donee, and the donor or his wife have no rights over it. It is only the usufruct, whose utilisation is specified in favour of specific individuals with their entitlements clearly outlined.25[116] Take another example, *A* makes a gift of his property to *B* who has a wife *W* and two sons S1 and S2. The gift is with a condition that out of the income coming out of the property, *B* is to pay 50% of this income to *W* for her maintenance and out of the rest half S1, S2 and *B* will take in equal shares. This arrangement will continue till the life of *B*. The condition is perfectly valid. As the condition is valid, the donee is under an obligation to honour it and abide by it. If he fails to do it, the gift will not become invalid, but a cause of action will arise against him, that can be recovered with the help of law. In the alternative the donor may also file a suit for revocation of gift provided other conditions are satisfied.26[117]

Whatever is the payment, or income, it must come out of the usufruct of the gifted property, otherwise it would not be a condition in the nature of a trust. For example, the donor makes a gift of house in favour of the donee with a stipulation that the donee was to pay him Rs. 1000 per month. The house was not yielding any income. This would not be a condition in the nature of a trust as the income is not to be paid out of the usufruct coming out of the property27[118] and it is in the nature of an obligation that must be paid in all cases by the donee. Similarly if the donor reserves the benefit of the corpus in his favour, then the condition would be invalid. For example, a donor *A* makes a gift to *B* with the condition, that *A* would be entitled to reside in part of the gifted house for his life, the condition is void, as the donor is not empowered to keep any dominion over the corpus. Similarly, where the donor puts a condition, that during his lifetime, the donee has to pay his debts out of the usufruct of the property, the condition is valid,28[119] but if he puts a condition that should the need arise, the donee will have to return part of the property back to the donor, so that he can repay his debts, the condition is void, as the donor is still keeping a dominion over the gifted property (corpus).

GIFT WITH EXCHANGE (HIBA-BIL-IWAZ)

As distinguished from simple gifts, Muslim law also recognises gifts with an exchange. These gifts are called 'hiba-bil-iwaz' and have two basic essentials:

(i) a *bona fide* and voluntary intention on part of the donor to make the gift and to divest himself of the complete rights over the property and vest it in the donee;29[120] and

(ii) payment of consideration by the donee.

What is noteworthy here is that the delivery of possession of the property is not one of the essential requirements. Hiba-bil-iwaz is therefore an important device to effect a gift of Mushaa in a property capable of being divided, which can be lawfully done in this manner.

Consideration

Payment of consideration is one of the most important aspects of Hiba-bil-iwaz. Without consideration it will be a gift simpliciter and would have to fulfill all the essentials of a simple gift including immediate delivery of possession. Consideration must be actually and *bona fide* paid.30[121] It may be in the form of money or performance of an obligation, in the form of return of a favour, or relinquishment of the claim to an estate or even a promise to marry, or in lieu of payment of dower. However, considerations of love and affection, or consideration of donee being a relative is not a valid consideration. For example, *A* makes a gift to *B* of his house or a portion of it in return of Rs. 10,000 or a gift of his land to *W*, in return of her promise to marry him,31[122] or *A* makes a gift of his house to *W*, in return of or in lieu of her unpaid dower.32[123] In these cases even if the possession is not delivered the gift is valid. In *Sarifuddin v*. *Mohiuddin*,33[124] a Muslim woman made a gift of her undivided share in the property in favour of her nephews in consideration of the latter paying her Rs. 900 for her maintenance every year. The gift was a hiba bil-iwaz and was valid despite the fact that the possession was not delivered to them. Similarly, where the donee in consideration of proper arrangement made for her maintenance, relinquishes her claim of estate in favour of the donor, it is a valid hiba-bil-iwaz.34[125]

Hiba-bil-iwaz Treated as a Sale

Hiba-bil-iwaz has all the elements of a contract of sale, as the parties must be competent to contract, there should be an offer and an acceptance and presence of consideration is a must. Judiciary has also treated it as a sale35[126]and therefore the basic formalities of effecting a sale specified in the Transfer of Property Act, 1882, are applicable here. Where the consideration is more than Rs. 100 a hiba-bil-iwaz has to be effected with the help of a written, attested and registered document.36[127]

Adequacy of Consideration

Consideration can be in cash or kind, but there is no requirement of law that it should be equivalent to the market value of the object of the gift. If the intention is *bona fide* it can be grossly inadequate, yet perfectly valid.37[128] Though considerations of love and affection or nearness of relationship by itself is not a valid consideration yet these factors may influence the adequacy of consideration. A copy of the Quran38[129] or a prayer carpet is also a

valid consideration. A gift of land at one-third its market value is valid. Similarly where property of considerable value is gifted in consideration of the donee agreeing to maintain the donor for the rest of his life, it would be a valid hiba-bil-iwaz.

True Hiba-bil-iwaz

In an ordinary hiba-bil-iwaz, there is a donor and the donee relationship. The donor makes the gift and the consideration comes from the donee, but the primary subject-matter of the gift comes from the donor. A true hiba-bil-iwaz is a gift where the iwaz is in fact another independent gift in return of the first gift. This second gift is not specified in the first gift as its consideration, but it is in fact a return in lieu of the first gift. These are therefore two distinct and independent gifts, where the parties are same, but the donor in one is the donee in another. For example, the husband makes a gift of a necklace to his wife and hands it over to her. She accepts it and makes a gift of a watch to him, making it clear that this was in return to his gift to her. The differences between a hiba-bil-iwaz and a true hiba-bil-iwaz are that firstly, in the former delivery of possession is not necessary, but in the latter, delivery of possession is necessary. Secondly, the former is revocable, but the latter, on furnishing of the second iwaz, is irrevocable.

Hiba-ba-shart ul-iwaz

Where a gift is made with a stipulation for a return from the side of the donee, it is a simple gift to begin with, and all the three essentials of a valid gift including the delivery of possession is necessary. However, where the stipulation in the gift is fulfilled by the donee, it takes the character of a Hiba-ba-shartul-iwaz. This stipulation or promise that the donee is supposed to perform, till its performance makes the gift revocable, but once it is performed, the gift becomes irrevocable. Where the gift is of an undivided share in the property it would be invalid without delivery of possession.

REVOCATION OF GIFTS

Ordinarily, till the gift is complete, it is revocable. In other words till all the essentials of gift are complied with, it is open to the donor to withdraw his offer. Where the possession of the property has been delivered, the gift becomes complete, but because it is purely a voluntary transaction it can be revoked even after its completion.

Revocation of gift can be with the consent of the donee or in the absence of his consent, by a decree of the court. The right of revocation is only with the donor and can never be exercised by his heirs.39[130]

A gift which has been completed in the manner specified by law would be absolutely irrevocable in the following cases:

(i) when either the donor or the donee is dead;

(ii) where the donor and the donee are husband and wife or vice versa;

(iii) where the donor and donee are within prohibited degrees of relationship.

(iv) where the donor has received a return for the gift;

(v) where the subject-matter of the gift has been lost, destroyed or has been converted in such a manner that it has lost its identity;40[131]

(vi) where the subject-matter has passed out of the hands of the donee by a transfer such as by way of a sale,41[132] gift etc.;

(vii) where the gift has substantially increased in value;

(viii) where the gift was for obtaining religious merit (Sadaqah).42[133]

Accordingly, a gift made by a man to his wife, by a brother to his sister, by the father to the daughter would be irrevocable. Similarly where after the gift, the donee sells the property or dies, the gift cannot be revoked.

Shia Law

Under Shia law, a gift to any blood relation whether they stand in the prohibited degrees of relationship or not is irrevocable. However, where the donor and the donee stand in the relationship of husband and wife, the gift is revocable. Thus a gift by a Muslim to his father's sister's daughter (first cousin) is irrevocable under Shia law but revocable under Sunni law. On the contrary, a gift by a man to his wife is irrevocable under Sunni law and revocable under Shia law.

Mode of Revocation

A mere declaration or cancellation of gift deed will not effect a revocation of gift unless it is so consented to by the donee, and a decree by the court is essential for a valid revocation.43[134] However under Shia law, even a mere declaration of revocation by the donor would be sufficient to effect a valid revocation and there is no necessity of going to the court.

CHALLENGE TO THE VALIDITY OF THE GIFT

Only a person whose rights are affected by the gift can challenge its validity. For example, donor's legal heirs can challenge its validity. Even if the possession of the property is not delivered, a stranger or a trespasser cannot challenge its validity.44[135]

GIFTS DISTINGUISHED FROM OTHER GRANTS

Sadaqah

In case of gift as it is generally understood, it can be the predominant purpose may be love and affection towards the donee, or in the nature of a return for the services rendered by the donee in the past or it can be a simple act of gratuity or benevolence or it may be in expectation of a return by way of a favour or reward in future. Besides these materialistic or human wants, the purpose can also be to obtain religious merit or simply to confer a benefit on the public at large.

'Sadaqah' is a gift primarily with religious motive. It is this specific religious purpose, that makes it different from a simple gift. Secondly, a simple gift may be revoked under certain specific circumstances, but Sadaqah is irrevocable. The consent or express acceptance of the donees in a Sadaqah is not a mandatory condition for its validity.

Delivery of possession is a mandatory requirement for the validity of the Sadaqah and it does not admit of any exceptions unlike a simple gift, and therefore Sadaqah is not valid if the subject-matter of gift is an undivided share in the property, that is capable of division. Sadaqah can be made to two or more persons jointly with the incidence of joint tenancy provided they are poor.

Waqf

In case of an ordinary gift, the donees are mortals or humans. 'Waqf' is a permanent dedication of the property to God, with the intention that the usufruct of the property may be utilised for a religious, pious or charitable purpose. The corpus belongs to God and therefore cannot be consumed, it is only the income coming out of the property that can be used for the desired purposes. In case of Sadaqah, though the predominant motive is religious, the complete property including the corpus and the income if any, can be used for achieving the desired purpose but property settled by way of Waqf is in the nature of permanent dedication and therefore is irrevocable.

Ariyat

'Ariyat' is a gift of the right to enjoy the usufruct in a specific property for a specific time period and is revocable at the pleasure of the granter. In fact it is more in the nature of a licence. It is personal in character and is neither heritable nor transferable. It is revocable and does not confer on the grantee any right in the corpus, but only in the

income coming out of the property or the profits. In case of a simple gift, it is the transfer of property itself with all incidents of ownership of property that is transferred.

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1. Sections 122–126.
2. *Ghulam Ahmed Sufi v. Mohammad Sadiq*, AIR 1974 J&K 59 .
3. *Hafiz Abdul Basit v. Hafiz Ahmed Mian*, *AIR 1973 Del 280* [*LNIND 1972 DEL 224*]; *Khajooroonissa v. Rowshan Jehan*, (1876) 2 Cal 184; *Sadik Hussain v. Hashim Ali*, (1916) 43 IA 212.
4. *Sultan Miya v. Ajibakhatoon Bibi*, (1932) 59 Cal 557.
5. *Abdul Hye v. Mir Mohamed*, (1868) 10 Cal 616.
6. *Hedaya*, Hamilton Translation, Gracy London, 1870, p. 482; Baillie, *Digest of Moohummudan Law*, Part I, 1875, 515.
7. Fyzee, *Outlines of Muhammadan Law*, 218.
8. Baillie, *Digest of Moohummudan Law*, Part I, 1875, p. 515.
9. See *Kulsumunisssa v. Ahmadi Begum*, AIR 1972 All 219 . The case related to succession. See also *Imam Sahib v. Ameer Sahib*, 1955 Mad 621 .
10. *Kaireem Bi v. Mariam Bi*, 1960 Mad 447 ; *Faridunnissa v. Mukhtar Ahmed*, AIR 1925 PC 204 .
11. *Hussaina Bai v. Zohra Bai*, *AIR 1960 MP 60* [*LNIND 1959 MP 24*].
12. *Raja Bai v. Ismail Ahmed*, 7 BHCR 27.
13. See the Transfer of Property Act, 1882, s. 13**.**
14. *Ahmad-ud-din v. Illahi Bakhsh*, (1912) 34 All 465; *Iqbal v. Controller of Estate Duty*, AIR 1964 Guj 452 .
15. *Mullick Abdul Gaffoor v. Mulcka*, (1884) 10 Cal 112.
16. *Mirza Abid v. Munno Bibi*, AIR 1927 Oudh 261 .
17. There is a conflict of judicial opinion on whether a gift of a portion of future revenue would be valid or not. Bombay and Calcutta High Courts held them as void, while Madras High Court in a later case held these gifts to be valid as they are in the nature of a usufruct. See *Amtul Nissa v. Mir Nurudin*, (1896) 22 Bom 489; *Anwar Reza v. Hachinur Reza*, (1944) 1 Cal 680; Duriesh *Mohindeen v. State of Madras*, 1957 Mad 577 .
18. *Yusuf Ali v. Collector of Tipperah*, (1882) 9 Cal 138; *Chekkone Kutti v. Ahmed*, (1886) 10 Mad 196.
19. See *Nawazish Ali Khan v. Ali Raza Khan*, (1948) 75 IA 62; wherein it was held that a power given to a legatee to appoint a successor is invalid under Muslim law.
20. *MT Khalid v. PM Sainabi*, AIR 1981 Ker 230 .
21. *Amjad Khan v. Ashraf Khan*, AIR 1929 PC 149 .
22. *Moqbool Alam v. Khodajia*, *AIR 1966 SC 1194* [*LNIND 1966 SC 37*].
23. *Mohammad Ayisha Beevi v. Samankatha*, (1944) 2 Mad LJ 267.
24. *Kalidas Mullick v. Kanhaya Lal Pundit*, (1884) 11 Cal 121; *Mahomed Buksh v. Hosseni Bibi*, (1888) 15 Cal 684.
25. *Mahomed Buksh v. Hosseni Bibi*, (1888) 15 Cal 684. This case dealt not with adverse possession but of lack of delivery of possession of undivided share in the property.
26. *Fathima Bibi v. Bhavasa Maracair*, *(1979) 1 MLJ 409* [*LNIND 1978 MAD 509*]; *Tara Prasana v. Shandi Bibi*, (1922) 49 Cal 68; *Abdul Kabir v. Jamila Khatoon*, AIR 1951 AP 315 ; *Muhar Bibi v. Maharulla Mondol*, (1933) 57 Cal LJ 375.
27. *Ismail v. Ramji*, (1899) 23 Bom 682.
28. *Tateef Khan v. Abdul Basifh Khan*, (1984) Andh WR 72; *Sultan Begum v. Ara Begum*, (1933) 57 Cal LJ 459; *Amjad Khan v. Ashraf Khan*, (1929) 56 IA 213; *Mohamed Abdul Ghani v. Fakhr Jahan Begum*, (1922) 49 IA 195.
29. *State of Uttar Pradesh v. Sayed Abdul Jalil*, MANU/SC/0402/1972, decided on 1 Feb., 1972.
30. *Sultan Miya v. Ajibakhatoon Bibi*, (1932) 59 Cal 557.
31. *Azim-un-Nissa v. Dale*, (1871) 6 Mad HC 455.
32. *Watson & Co. v. Ramichand Dutt*, 28 Cal 10.

33. *Ratan Lal Bora v. Mohd. Nabiuddin*, AIR 1984 AP 344 [LNIND 1984 AP 103], (1984) 2 Andh WR 201. See also *Mahboob Sahab v. Syed Ismail*, AIR 1995 SC 1205 [LNIND 1995 SC 404].

34. *Hussaina Bai v. Zohara Bai*, AIR 1960 MP 60 [LNIND 1959 MP 24].

35. *Mohammad Mustafa v. Abu Bakr*, MANU/SC/0357/1970, decided on 8 Dec., 1970.

36. *Wali Mohd v. Faqir Mohd.*, AIR 1978 J&K 92 ; *Md Hesabuddin v. Md Hesaruddin*, AIR 1984 Gau 41 .

37. *Ghulam Hussain Kututubuddin Maner v. Abdul Rashid Abdulrajak Maner*, MANU /SC/2742/2000, decided on 19 July, 2000.

38. AIR 1928 PC 108 .

39. *Ghulam Hussain Kututubuddin Maner v. Abdul Rashid Abdulrajak Maner*, MANU/SC/2742/2000, decided on 19 July, 2000; see also *Valia Pedikakkandi Kathesa Umma v. Pathakkalan Narayanath Kunhamu*, AIR 1964 SC 275 [LNIND 1963 SC 198]; *Suna Meah v. SAS Pillai*, AIR 1933 Rang 155 .

40. *Durr-ul-Mukhtar*, Vol. 3, p. 104; *Fatwai-I-Alamgiri*, Vol. 5, pp. 239–400, quoted in *Valia Pedikakkandi Kathesa Umma v. Pathakkalan Narayanath Kunhamu*, AIR 1964 SC 275 [LNIND 1963 SC 198].

41. *Ibid*.

42. *Hedaya*, Hamilton's Translation, Gracy London, 1870, p. 484; Baillie, *Digest of Mohammedan Law*, 1875, p. 539.

43. *Durrul Mukhtar*, Vol. 4, p. 512, quoted in *Katheesa Umma's* case.

44. *Hedaya*, Hamilton's Translation, Gracy London, 1870, p. 484.

45. *Saira Bai v. SS Joshi*, AIR 1960 MP 260 [LNIND 1960 MP 108]; *Abu Khan v. Morian Bibi*, (1974) 40 CLT 1306; *Hyatuddin v. Abdul Gani*, 1975 Mah LJ 345 [LNIND 1974 BOM 102].

46. Baillie, *Digest of Mohammedan Law*, 1875, pp. 520–522.

47. Baillie, *Digest of Mohammedan Law*, 1875, p. 508; *Mulla's Principles of Mahomedan Law*, 19th edn., (ed. M. Hidayatullah and Arshad Hidayatullah), 1990, p. 118.

48. *Valia Pedikakkandi Kathesa Umma v. Pathakkalan Narayanath Kunhamu*, AIR 1964 SC 275 [LNIND 1963 SC 198].

49. *Abu Khan v. Moriam Bibi*, (1974) 40 CLT 1306.

50. *Atmaram v. Girdhari Lal*, 1972 Andh WR 125. See also *Muhammad Mumtaz v. Zubaida Jan*, (1889) 16 IA 205.

51. *Hafiz Abdul Basit v. Hafiz Ahmad Mian*, AIR 1973 Del 280 [LNIND 1972 DEL 224].

52. *Maqbool Alam v. Khodaija*, AIR 1966 SC 1194 [LNIND 1966 SC 37]. See also *YS Chen v. Batulbai*, AIR 1991 MP 90 .

53. AIR 2010 SC 211 [LNIND 2009 SC 559].

54. *Ibid*, p. 214.

55. AIR 2001 Guj 175 [LNIND 2000 GUJ 273]. See also *Noorbibi v. Ayesha Bibi*, AIR 1999 Guj 27 [LNIND 1998 GUJ 153].

56. *Noohu Pathummal v. Ummathu Amma*, 1980 Mad 66 ; *Emnabai v. Aajirabai*, (1888) 13 Bom 352.

57. *Mohammad Sadiq v. Fakhr Jahan*, AIR 1932 PC 13 .

58. *Amina Bibi v. Khatiji Bibi*, (1864) 1 Bom HC 157.

59. *Ma Mi v. Kallander Ammal*, AIR 1927 PC 22 ; *Mohammad Sadiq v. Fakhr Jahan*, AIR 1932 PC 13 .

60. *Katheesa Umma v. N. Kunhamu*, AIR 1964 SC 275 [LNIND 1963 SC 198].

61. *Ibid*., para 11.

62. Baillie, *Digest of Mohammedan Law*, 1875, p. 538; *Kadderanbi v. Fatimabi*, AIR 1981 Bom 406 [LNIND 1980 BOM 155]; *Abdul Sattar v. Abu Bakkar*, AIR 1977 Cal 132 [LNIND 1976 CAL 249]; *Ameeroonissa v. Abodonissa*, (1875) 15 Beng LR 67; *Mohammad Sadiq v. Fakhr Jahan*, AIR 1932 PC 13 . See also *Khaliq Bux v. Mahabir Prasad*, AIR 1931 Oudh 19 ; *Munni Bai v. Abdul Gani*, AIR 1959 MP 225 [LNIND 1958 MP 11]; *Sultan Miya v. Ajiba Khaton Bibi*, AIR 1932 Cal 497 .

63. *Kadderanbi v. Fatimabi*, AIR 1981 Bom 406 [LNIND 1980 BOM 155].

64. *Sugrabai v. Mahomedali*, (1934) 36 Bom LR 1151.

65. *Musa Miya v. Kadar Bux*, AIR 1928 PC 108 .

66. *Ibid*.

67. *SN Usman Ali v. OBV Kubendra Bai*, 1973 Mad 280 .

68. *Katheesa Umma v. P. Narayanath*, AIR 1964 SC 273 .

69. *Muni Bai v. Abdul Gani*, AIR 1959 MP 225 [LNIND 1958 MP 11]; *Assan Kutty v. Mohd Kurikkal*, 1961 Ker LT 959.

70. *Abdul Sattar Ostagar v. Abu Bakkar Ostagar*, AIR 1977 Cal 132 [LNIND 1976 CAL 249]; *Ayeeshee Biwi v. Mohammad Alim*, 1964 Mad 309 ; *Shaikh Ibrahim v. Shaikh Suleman*, (1884) 9 Bom 146.

71. *SMS Saleem Hashmi v. Syed Abdul Fateh*, AIR 1972 Pat 279 ; *Ibrahim Biwi v. KMM Pakkir Rowther*, 1970 Mad 17 .

72. *Baldeo Prasad Balgovind v. Shubratan*, (1936) All LJ 590.

73. *Ibrahim Haji Musa v. Sugra Bibi*, (1978) 19 GLR 1136.

74. *Abdul Razak v. Zainabi*, 1933 Mad 86 .

75. *Hurema Bibi v. Najm-un-nissa*, (1905) 28 All 17.

76. *Takkadi Syed Mohamed v. Ahmed Fathummal*, 1973 Mad 302 .

77. *Qamar-ud-din v. Hassan Jan*, AIR 1935 Lah 795 .

78. *Musa Miya v. Kadar Bux*, AIR 1928 PC 108 .

79. *Qamar-ud-din v. Hassan Jan*, AIR 1935 Lah 795 .

80. *Hussaina Bai v. Zohra Bai*, AIR 1960 MP 60 [LNIND 1959 MP 24]; *Maithee Bibi Umma v. Ithappiri Varkey*, AIR 1956 Tr&Coch 292 .

81. *Abdul Sattar v. Additional District Judge*, 1978 All LJ 543.

82. *Ram Niwas Todi v. Bibi Jabrunnissa*, MANU/SC/1274/1996 decided on 6 Aug., 1996.

83. *Illahi Shamsuddin Nadaf v. Jalunbi Makbul Nadaf*, MANU/SC/0812/1994, decided on 14 July, 1994.

84. *Gulam Hussain Kutubuddin Maner v. Abdul Rashid Abdulrajak Maner*, MANU/ SC/2742/2000, decided on 19 July, 2000.

85. *Abdul Hamid v. M. Abdul Ghani*, AIR 1934 Oudh 163 ; *Karam Ilahi v. Sharf-ud-din*, (1916) 38 All 212.

86. See the Indian Registration Act, 1908, s. 17(a); *Abdul Rahman v. Gaya Prasad*, AIR 1929 Oudh 435 ; *Nasib Ali v. Wajed Ali,* AIR 1927 Cal 197 ; *Mohammad Hesabuddin v. Mohammad Hesaruddin*, AIR 1984 Gau 41 .

87. *Mohammad Azim v. Saadat Ali*, AIR 1931 Oudh 177 ; *Mohammad Sadiq v. Fakr Jahan*, AIR 1932 PC 13 .

88. See the Transfer of Property Act, 1882, s. 123.

89. *Chhota Uddandu Sahib v. Masthan Bi*, AIR 1975 AP 271 [LNIND 1974 AP 202].

90. *AMK Mariam Bibi v. MA Abdul Rahim*, AIR 2000 NOC 21 (Mad).

91. *Fatmabibi v. Abdul Rehman Abdul Karim*, AIR 2001 Guj 175 [LNIND 2000 GUJ 273].

92 *Faridsaheb Husseinsaheb Sharikmaslat v. Ahmedsaheb Husseinsaheb Sharikmaslat*, AIR 2010 Bom 100 [LNIND 2010 BOM 319]; see also *Gulam Ahmad Safi v. Mohd Sidiq Dareel,* AIR 1974 J&K 59 ; *Imbichimoideenkutty v. Pathumunni Umma,* AIR 1989 Ker 148 [LNIND 1988 KER 60].

93 Aqil Ahmad, *Mohammadan Law*, 17th edn., (ed. IA Khan) 1995, p. 179; *Mulla's Principles of Mahomedan Law*, 19th edn. (ed. M. Hidayatullah and A. Hidayatullah), 1990, p. 128.

94 *Kasim Husain v. Sharif-un-Nissa*, (1883) 5 All 285.

95 *Ala Baksa v. Mahabat Ali*, AIR 1935 Cal 739 .

96 *Fayyaz-ud-din v. Kutab-ud-din*, AIR 1929 Lah 309 .

97 Baillie, *Digest of Moohummedan Law*, Part II, 1869, p. 204.

98 (1888) ILR 15 Cal 689 (PC).

99 *Aftab Hussain v. Tayebba Begum*, AIR 1973 All 54 ; see also *Said Hasan v. Shah Hasan*, AIR 1947 Lah 272 .

100 *Ameerroonnissa v. Abadoonnissa*, (1875) 15 Bom LR 67; *Kairam Bi v. Mariam Bi*, 1960 Mad 447 ; *Aziz v. Sona Mir*, AIR 1962 J&K 4 .

101 *Ismail v. Idrish*, AIR 1974 Pat 54 .

102 *Natho v. Hadayat Begum*, AIR 1949 Lah 238, wherein a gift of one-third share in a house in Rangoon was effected validly.

103 *Ibrahim Goolam Arif v. Saiboo*, (1907) 35 Cal 1.

104 AIR 1976 Bom 23 [LNIND 1974 BOM 102].

105 AIR 1936 All 473 .

106 *Ebrahim Alibhai v. Bai Asi*, AIR 1934 Bom 21 ; *Asan Kutty v. Mohammad Kuri Kal*, 1961 Ker LT 959; *Mohammad Yusuf v. Hasina Yusuf*, AIR 1948 Bom 61 ; *Kaniz Fatima v. Jai Narain*, AIR 1944 Pat 334 ; *Azizi v. Sona Mir*, AIR 1962 J&K 4 ; *Kalu Beg v. Gulzarbeg*, AIR 1946 Nag 375 .

107 Baillie, *Digest of Moohummedan Law*, Part II, 1869, p. 205.

108 *Wahibunnisa v. Mushaj Hussain*, AIR 1927 Oudh 328 ; however see also *Nawozish Ali Khan v. Ali Raza Khan*, AIR 1948 PC 134, which indicates that this condition of survivorship would be void.

109 *Sadik Hussain v. Hashim Ali*, (1916) 43 IA 212; *Ashraf Ali v. Mahomed Ali*, AIR 1947 Bom 122 ; *Cassamally v. Currimbhoy*, (1911) 36 Bom 214.

110 *Mohammed Ibrahim v. Abdul Latif*, (1913) 37 Bom 447; *Abdul Gafur v. Nizamuddin*, (1892) 17 Bom 1; *Ma Hmyin v. Chettyar*, AIR 1935 Rang 318 .

111 *Jameela Beeviu v. Sheik Ismail*, 1979 Mad 193 .

112 *Hazara Bai v. Mohamed Adam Sait*, (1977) 1 MJL 291. See also *Mundayat Vedake v. Chiru Kandan*, 1971 KLJ 796; *M. Ali v. State of Uttar Pradesh*, (1975) 2 SCWR 511.

113 Even among the Shafe' is, (of Sunni sect) the gift of a life estate is valid. See *Mohammed Ibrahim v. Abdul Latif*, (1913) 37 Bom 447.

114 *Siraj Husain v. Mustaf Hussain*, (1921) OC 321; *Bano Begum v. Mir Abed Ali*, (1908) 32 Bom 172. See also *Nisar Ali Khan v. Mahomed Ali Khan*, AIR 1932 PC 172 .

115 *Mohammed v. Fakhr Jahan*, AIR 1922 PC 281 ; *Nawab Umjad Ally v. Mohumdee Begum*, (1867) 11 MIA 517; *Lali Jan v. Muhammad*, (1912) 34 All 478; *Zohara Khatun v. Mahaboob Bi*, 1943 Mad 677 ; *Anjumanara Begum v. Asif Kadar*, (1955) 2 Cal 109; *Tavakalbhai v. Imtiyaj Begam*, (1916) 41 Bom 372.

116 See *C. Duriesh Mohideen v. State of Madras*, 1957 Mad 577 .

117 See 'Revocation of gifts', *infra*.

118 *Sarifuddin v. Mohiuddin*, AIR 1927 Cal 808 .

119 *Krishna Behari v. Ahmadi*, AIR 1935 Oudh 432 .

120 *Bashiran v. Mohammad Hussain*, AIR 1941 Oudh 284 ; *Khairunnissa v. Karamtulla*, AIR 1933 Oudh 99 .

121 *Mehdi Hasan v. Muhammad Hasan*, (1906) 28 All 439; *Mohan Lal v. Mahmud*, AIR 1922 All 347 ; *Muhammad Faiz v. Ghulam Ahmad*, (1881) 3 All 490.

122 *Tajunnissa Bibi v. Rahmath Bibi*, 1959 Mad 630 ; *Ismail Beevi v. Sulaikkal Beevi*, 1967 Mad 630 .

123 *Mohammad Esuph v. Pattamsa Ammal*, (1889) 23 Mad 70.

124 AIR 1927 Cal 808 .

125 *Mohammad Faiz v. Ghulam Ahmad*, (1881) 3 All 490.

126 *Mahabir Prasad v. Mustafa Hussain*, AIR 1937 PC 174 ; *Ghulam Abbas v. Razia Begum*, AIR 1951 All 86 [*LNIND 1950 ALL 300*]; *Mohammad Hashim v. Amina Bai*, AIR 1952 Hyd 3 .

127 *Gopal Das v. Sakina Bibi*, AIR 1936 Lah 307 ; *Ghulam Abbas v. Razia Begum*, AIR 1951 All 86 [*LNIND 1950 ALL 300*]; *Mohammad Usman v. Amir Mian*, AIR 1949 Pat 237 ; *Saburannessa v. Sabdu Shaikh*, AIR 1934 Cal 693 .

128 *Khajooroonissa v. Rowshan Jahan*, (1876) 2 Cal 184.

129 *Abbas Ali v. Karam Baskh*, (1909) 13 CWN 160.

130 *Mahmood Khan v. Abdul Rahim*, *AIR 1964 Raj 250* [*LNIND 1964 RAJ 66*].

131 *Maqbool v. Ghafur-un-nissa*, (1914) 36 All 333.

132 *Mulani v. Maula Baksh*, AIR 1924 All 307 .

133 See *infra* under 'Sadaqah'.

134 *Abu Khan v. Mariam Bibi*, (1974) 40 CLT 1306.

135 *Karim Bi v. Mariam Bi*, 1960 Mad 447 ; *Masoon Sab v. Madan*, (1973) 1 APLJ 97.

CHAPTER 15 WILLS (WASIYAT)

INTRODUCTION

A Will is a device or an instrument with the help of which an owner of the property makes a disposition, that is to take effect after his death, and which by its very nature is revocable. A Will under the Indian Succession Act, 1925, which is the general law of testamentary succession for Indians is defined as:[1]

> Will is the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

The distinguishing features of a Will from other depositions of the property by its owner are:

(i) its taking effect after the death of the testator; and

(ii) its revocability.

Unlike any other disposition, such as a sale or a gift, a Will takes effect from the date of the death of the testator. Till he is alive he is the owner of the property and empowered to exercise full control over it. The legatee or the beneficiary under the Will cannot interfere in any manner whatsoever in his power of enjoyment of the property including its disposal. Executing a Will does not adversely affect the power of the owner to transfer the property in favour of any person including the legatee either inter vivos or even through another testamentary disposition.

A Will by its very nature is revocable. It can be revoked by a formal cancellation or destruction or can be automatically revoked by the testator executing another Will of the same property. It can also be rendered meaningless if the testator after executing the Will transfers the property or nothing is left that can be the subject-matter of the Will, due to an involuntary disposition such as in execution of a money decree for the payment of the debts of the testator.

A Will executed by a person will also be revoked if he loses his sanity and becomes of unsound mind subsequent to its execution.

MARRIAGE UNDER SPECIAL MARRIAGE ACT, 1954 TO OUST THE APPLICATION OF MUSLIM LAW OF WILLS

Where a Muslim gets married under the Special Marriage Act, 1954, either to a Muslim or to a non-Muslim he along with his spouse and the children born of this marriage would no longer be governed by the Muslim law of succession but will be governed by the provisions of the Indian Succession Act, 1925. The same consequences will follow, if two Muslims get married under Muslim law and subsequently get this marriage registered under the Special Marriage Act, 1954.[2]This marriage will be deemed to be a marriage solemnised under this Act, and the same consequences will follow, viz., the parties to the marriage and the issue of such marriage will, in matters of succession, be governed by the provisions of the Indian Succession Act, 1925 and not by Muslim law. There is no minimum and maximum time limit specified within which a marriage contracted under Muslim law can be registered

under the Special Marriage Act, 1954.[3]For example, a Muslim man aged 22 years gets married to a Muslim girl of the same age, under Muslim law. Sixty years later, when they are of around 82 years, they get their marriage registered under Special Marriage Act, 1954. The law of succession will now change both with respect to their property and the property of the issue of such marriage. Even if they had executed a Will of their properties prior to such registration, it will be subject to the rules of the Indian Succession Act, 1925. The primary difference between the rules governing the disposition of the property by a Will under Muslim law and under Indian Succession Act, 1925 is that under the former generally speaking a testator cannot make a will of more than one-third of his property but under the Indian Succession Act, 1925, a person can make a testamentary disposition of 100% of his property. Secondly, under Muslims law, there are restrictions on the powers of a testator if he wants to make a bequest in favour of an heir, but under the Indian Succession Act, 1925, the testator has complete freedom to choose the beneficiaries under the Will. He can bequeath the total property to an heir or to a stranger or for a religious or even a charitable purpose. A Muslim either by getting married under the Special Marriage Act, 1954, or getting his marriage (contracted under Muslim law) registered under this Act, can acquire full freedom to dispose of his total property with the help of a Will in favour of anyone at his pleasure.

OBJECT OF A 'WILL' UNDER MUSLIM LAW

Law relating to Wills or testamentary disposition for Muslims is divine in nature ie regulated by the Quran and is supplemented by the traditions of the prophet. There is a permissibility of making a Will to the extent of only one-third of the property. The object of the Will is therefore twofold. First, it prevents a person from interfering and defeating the claims of his lawful heirs. So the restriction ensures that at least two-thirds of the property must go by succession. It is applicable only in those cases, where the testator enjoys his property during his lifetime and does not dispose of his assets inter vivos. In such cases he is prevented in controlling the distribution of his property from his grave, and the rules of intestate succession apply for effecting its devolution. Secondly, by permitting the testator to bequeath one-third of his property, he is empowered to settle just claims of people, at his pleasure, who might not figure in the 'heirs' category. These persons might be relatives other than heirs or even strangers to the family. The Will to the extent of one-third can be made for a charitable, pious,[4] or a religious purpose. However, if there is a custom to the contrary which limits the choice of the testator in choosing a beneficiary with respect to this one-third property, such a customary practice would be upheld by the law.[5]

It is not necessary that something must have been done or is required to be shown as a contribution by the beneficiary for the testator. The testator can make a Will in favour of even a stranger although usually property is bequeathed for returning the favour of another person such as services rendered by a friend or a servant or to help financially a relative by marriage, a friend etc. If he is inclined to do so, he can make a bequest for general public welfare, for a specific pious purpose or even for a religious institution.

ORIGIN OF LAW RELATING TO WILLS

Wills are declared as lawful in Quran,[6] though it does not provide for the testamentary restriction of one-third. The permissibility of bequests upto one-third is traced to a Hadis of the Prophet, which has been stated by Sad-ibn Abi Waqqas and reported by Bukhari.[7] The incident is of the year of conquest of Mecca when he had become very ill and the Prophet had visited him to console him. He told the Prophet that by God's grace he had enough property and had no heirs except a daughter and sought his advice on whether he could dispose of his total property under a Will. The Prophet replied in the negative. He was persistent and asked whether he could do so with respect to two-third, or even half of it, the prophet again replied in the negative, but when he said if he might leave one-third, by Will, the Prophet said yes, and cautioned, that he could leave one-third by a Will, and it was better that he left his heirs rich than in a state of poverty, which might oblige them to beg from others. The law therefore is that there should be minimum disturbance as far as the laws of inheritance are concerned, and if at all the testator wants to make a bequest, he should not exceed the one-third limit.[8]

EXCEPTION TO THE ONE-THIRD RULE

The general rule that testamentary disposition should not exceed one-third of the property is primarily for the benefit of the heirs as is apparent from the Hadith which is treated as the source or origin of the laws relating to Wills. Their rightful claim to the property should not be disturbed. This rule has two exceptions. These exceptions however do not deviate from the basic principle behind the restriction. These exceptions are:

(i) When the testator does not have any heir.[9] In such cases, if the restriction of permissible one-third is applied to him, then the beneficiary will be the government, who will take the property by doctrine of escheat, while the primary purpose of applying the bequeathable permissibility to the extent of one-third is to protect the rights of the heirs, and not that of the government. An heirless person, can thus make a bequest of his total property.

(ii) Where the heirs themselves consent to the bequest in excess of one-third. As the chief objective of the restriction is to safeguard the interests of the heirs, if these heirs whose shares are likely to be adversely affected by the excess bequest themselves give them consent (that should be voluntarily given), the excess bequest will be validated.[10]

FORMALITIES FOR MAKING A WILL

There are no specific formalities for making a Will.[11] There is neither any format that is laid down, nor is there any requirement that it should be in writing. A Will under Muslim law can even be oral. If it is in writing it need not be signed.[12] It does not require attestation,[13] and if it is attested there is no need to get it registered. Instructions of the testator written on a plain paper, or in the form of a letter, that in clear cut terms provide for distribution of his property after his death, would constitute a valid Will.[14] A Will executed under Muslim law does not require a probate. Where the Will is reduced to writing it is called a 'Wasiyatnama'. Although no formalities are required to be complied with, a Will in order to be valid and effective must display a bona fide intention on part of the testator to bequeath his property.

ORAL WILL

Under Muslim law, a Will can be in writing or even oral.[15] In case it is oral, the intention of the testator should be sufficiently ascertained, and in comparison to a Will in writing which is easier to prove, the burden to prove an oral Will is heavy. The court may require the beneficiary to prove with utmost precision, the exact words of the testator, where and when they were declared,[16] and whether from the contents, an intention to make a Will and the distribution effected, could be ascertained clearly.[17]

ESSENTIALS OF A VALID WILL

For a Will to be valid and capable of taking effect in law, the following requirements must be satisfied:

(i) competency of the testator;

(ii) competency of the legatee;

(iii) valid subject-matter of bequest; and

(iv) bequest to be within permissible limits.

Competency of the Testator

Every Muslim (man or woman) who is of sound mind and has attained the age of majority can dispose of his/her property under a Will.[18] Only two conditions should be satisfied here:

(i) that the testator should be of sound mind; and

(ii) should be major.

Sound Mind

A Muslim who is of unsound mind cannot execute a valid Will, and if he does execute a Will or declares a Will and subsequently is cured of insanity, the Will, would still be invalid. A person of sound mind and a major, if makes a Will and subsequently becomes insane, the Will made by him would become invalid, provided the insanity is permanent.

Age of Majority

Under Muslim law, a person becomes major on the completion of the age of fifteen years, and till 1875, a fifteen-year-old Muslim was competent to make a valid Will of his/her property. In 1875, The Indian Majority Act (Act IX of 1875) was passed under which the age of majority was prescribed as eighteen years ordinarily and in case a guardian was appointed by the court for a minor, such person attained the age of majority on the completion of twenty-one years. Since this Act applies to all Indians who are domiciled in India,[19]including Indian Muslims, in conformity with the provisions of this Act, a Muslim must be eighteen years old before he can make a valid Will. However, where the court has appointed a guardian for the person or property of a minor or where the Court of Wards has assumed the superintendence of the property of the minor, such minor will attain majority on the completion of twenty-one years.

Will of a Person who Later Commits Suicide

A Will that is executed in apprehension of death is valid, but a Will made by a person who takes his own life by committing suicide stands on a different footing. Under Shia law, a Will made by a person who commits suicide or does an act towards commission of suicide is invalid. Under Sunni law, the Will by a person who commits suicide is valid. Where a person made a Will and then in contemplation of suicide took poison, the Will was held by the Allahabad High Court as valid.[20]

Competency of Legatee

The legatee or the beneficiary under a Will must be a person competent to hold property. Under Muslim law, sex or the sect of the beneficiary is immaterial. Even a non-Muslim can be a beneficiary under the Will, but he should not be against Islam. Therefore, a person who renounces Islam and embraces another religion is not a competent legatee, but a person who was born into another religion can be a competent legatee provided he is not hostile towards Islam.

Will in Favour of an Institution

A Will in favour of an institution is valid, as an institution is a competent legatee. However, here also, the institution should not have been set up to promote anti-Islamic activity or promote any anti-Islamic campaign. It should not be an institution that promotes a religion other than the Muslim religion. A Will made in favour of a Hindu temple, or a society that propagates Hindu or Christian religion is invalid and would not take effect under Muslim law. But an institution engaged actively in promoting charity or public benefit is a competent legatee. A society or an institution engaged in promoting education and self-reliance among poor, taking care of leprosy, and AIDS patients, looking after orphans or old persons would be a competent legatee.

A Muslim cannot make a valid bequest in favour of another for building a Church, or a Jewish synagogue, or a Hindu shrine.

An Unborn Person

The general rule is that the legatee should be in existence on the date of making of the Will. The effective date is the date on which the Will is declared or executed and not the date of operation of the Will or date of the death of the testator.

A child who is in the womb of his mother is treated as in existence if it is born within six months from the date of the making of the Will under Sunni law and within ten months under Shia law. But a bequest to a person not in existence is void.

Bequest for a Religious or Charitable Purpose

The purposes of making a Will may be to benefit specific individuals or in general, those who, because of a disability or poverty, need financial help. The purpose can also be to obtain religious merit or to propagate one's religion or religious beliefs. A Will made in furtherance of a religious, charitable or a pious purpose[21] is valid but the purpose should not be against Islam.

Legatee Guilty of causing Death of Testator

Where a legatee under a Will is responsible for committing murder or causing death of the testator, the Will made in his favour would be invalid under Sunni law. It is irrespective of the fact that the death might have been caused accidentally or intentionally. It is also immaterial whether he knew about him being a beneficiary under the Will or not. Under Shia law, the legatee will be incompetent to receive the benefit under a Will if the death was caused intentionally. The time of making the Will is of no consequence. It might have been made before the act causing death of the testator was committed or it might have been made in between the time of committing the act which led to his death and the actual death of the testator.

Bequest to an Heir

An heir is a person who is competent to take the property of a deceased on his death in accordance with the rules of inheritance applicable under the relevant law. The eligibility to succeed is to be seen at the time of the death of the testator and not at the time of the making of the Will except in case of primary heirs, who succeed generally speaking without any obstruction. The reason is that because a Will takes effect from the date of the death of the testator, in between the time of making the Will and the death of the testator, the births and deaths in the family may include or exclude potential heirs.

For example, a Muslim man having a wife, a son and a son's daughter makes a Will in favour of his wife. The son's daughter is not an heir in presence of the son of the testator; so her consent is not required to validate this bequest. The son gives his consent. Suppose after executing this Will, the testator's son dies. Now if the testator dies, the son's daughter is an heir, and the bequest in favour of the wife would be subject to her consent. Under Shia law, the bequest in favour of an heir is valid, without the consent of other heirs provided it does not exceed the bequeathable one-third limit. If it is in excess of one-third, then the consent of those heirs is necessary, whose share is likely to be adversely affected, by this bequest. Such consent can be given either at the time of making the Will by the testator or even after his death, when the Will becomes operational.[22]

Under Sunni law, a bequest cannot be made to an heir at all, not even to the extent of one-third of the property except when the other heirs give their consent.[23] Here, consent must be given at the time of the operation of the Will, ie, after the death of the testator when the rights and claims of the heirs are specific and clear without any ambiguity or confusion with respect to possible or unforeseen events taking place. The rule of prohibiting an heir to take under a legacy as well as in accordance with succession is applied strictly under Sunni law, as it would otherwise enable an heir to take a greater portion of the wealth of the testator, then what was ordained for him under the Quran, and this may upset the ties of kindred,[24] except of course when the heirs, themselves voluntarily give their consent to it.

Consent of Heirs

Consent Must be of Heirs and Not of Presumptive Heirs

Under Shia law, the consent can also be given before the death of the testator. These persons who apparently were heirs on such date may not be heirs on the date of the death of the testator due to deaths and births in the family. For example, a Muslim man has a wife and a brother, but no issue. He makes a bequest in favour of his wife and the brother who on that date was an heir, gives his consent. Subsequent to the making of this Will, a son is born to the testator. With the birth of the son, the brother is excluded from the inheritance and would no longer be called an heir. If at the time of testator's death, his wife, son and the brother are present and the bequest is in favour of the wife, it is the consent of the son that is necessary and not of the brother who was a presumptive heir.

Consent May be Express or Implied

The consent may be given expressly, orally or in writing or it may be implied from conduct.[25] Mere silence or inaction[26] would not be taken as consent even if the heirs were present at the time of the proceedings for effecting

mutation of names.[27]Where a Will is executed in writing and is attested by the testator's heirs, it is sufficient proof of their consenting to the act of the testator. Similarly, where the testator makes a bequest in favour of an heir and on his death, the other heirs help the legatee in effecting a mutation in his name or allow the heir to take exclusive possession of the property including recovery of rents from the tenants for a long time period, it is ample proof of the heirs giving their consent.

Consent Once given Cannot be Rescinded

Under Shia law, the consent of the heirs whose shares are adversely affected can be given before or after the death of the testator[28] and under Sunni law, it must be given after the testator's death.[29] But once the consent is given, it cannot be rescinded subsequently and the heirs are bound by it. Similarly consent cannot be given after an heir has previously repudiated it.[30]

Consent Can be of One Heir or Even All Heirs

The legacy in favour of an heir can be validated by obtaining the consent of one or some of the heirs or even all of them collectively. Where all the heirs give their consent, the legacy is valid to the extent of the shares of all. Where only one or some of them give their consent, the legacy would be valid only to the extent of the consenting heirs' shares.

Legacy in Favour of One Heir of the Total Property

Under Shia law, a legacy can be given to an heir to the extent of one-third of the property of the testator and the consent of the heirs is not necessary. Under Sunni law, even to the extent of one-third, heirs must give the consent. But where the legacy exceeds the bequeathable one-third, then it will not be valid even under Shia law unless the other heirs by giving their consent either before or after the death of the testator validate it. Such a bequest would be valid then.[31] However, even the consent of the heirs cannot validate a bequest where only one heir has been given the entire property to the complete exclusion of all the other heirs.[32]

Subject Matter of Will

The testator is competent to make a valid Will of the property that he owns and which is capable of being transferred. Property must be in existence at the time of his death, as a bequest of something that is not in existence, and would be produced in future is void.

Alternative Bequest

Where under a Will, the legacy is given to the beneficiary who is named therein and an alternative is provided in the same Will, if the primary beneficiary is incompetent to take the legacy, the bequest would be called an alternative bequest and would be valid.[33] For example, a testator makes a Will in favour of his friend *X* and provides specifically that if *X* was dead by the time of the operation of the Will, the property should be taken by another person *Y*. *X* died during the life time of the testator. The bequest in favour of *Y* would be valid.

Conditional Bequest

In order to be a valid bequest the grant in the bequeathed property must be complete. In other words, the ownership in the property must carry all the basic incidents of ownership. Muslim law insists upon the distinction between the corpus of the property and its usufruct.[34] Similar to the law relating to gifts, the grant with respect to the corpus of a property must be an absolute grant and therefore no life estate can be created in the or of the corpus, or the thing or the subject-matter of the grant. If the bequest is subject to a condition that derogates from the absoluteness of the grant the condition would be void but the bequest would be valid.[35] For example, *A* makes a Will of his house in favour of *B*, but the Will is subject to the condition that *B* cannot sell the property or that he has to use the property in a particular manner. These are conditions that interfere with his absolute ownership and would be void, but the bequest would be valid.

Bequest of Life Estate

Creating of life estate is not permissible under Sunni law if it is of the corpus of the property, and the bequest of a life estate in favour of a person would operate as if it is an absolute grant. For example, *A* makes a bequest in

favour of *X* of his house for life and after him to *B* absolutely. The bequest in favour of *X* would operate absolutely and *Y* will not get anything.

Under Shia law however, the bequest of a life estate in favour of one and a vested remainder to another after his death is valid.[36]

Contingent Bequest

A bequest that is to operate or take effect on the happening of a particular contingency that may or may not happen, is void and incapable of taking effect in law. A makes a Will of his house in favour of *X*, subject to the condition that it would operate in his favour provided on the date of his death, *X* has a son. On the date of making the Will, *X* was unmarried. The bequest is void, as the contingency of *X* getting a son on the date of the death of the testator is a mere possibility that may or not happen.

Limitation on Testamentary Powers

In contrast to the general permissibility of disposal of property inter vivos, where a Muslim wants to make a Will of his property, he can do it only to the extent of one-third of his property. The extent of one-third is ascertained after payment of his funeral expenses and debts etc. A bequest that is in excess of this one-third of the estate would not take effect unless the heirs whose shares will be adversely affected give their consent to the excess bequest after the death of the testator under Sunni law, and before or after his death under Shia law. Where the heirs refuse to give their consent, the bequest would be valid only to the extent of one-third of the property and the rest of the two-thirds would go by intestate succession.[37]

Two Types of Restrictions

The restrictions on the testamentary powers under Muslim law are of two types, viz.

(i) restrictions with respect to legatees, and

(ii) restrictions with respect to the extent of property that can be bequeathed.

Restrictions with respect to legatees have been explained above. Bequest in favour of an heir to the extent of one-third of the property is valid under the Shia law but invalid under Sunni law unless the other heirs give their consent. In *Sajathi Bi v. Fathima Bi*,[38] a Muslim man made a Will of his property in favour of one of his sisters. He had a mother, two brothers and two sisters at the time of making of this Will, but none of them gave their consent to this bequest. The Will was declared incapable of taking effect in law.

Bequest to Heirs and Non-heirs

Where the testator makes a bequest in favour of an heir and also a non-heir by the same legacy, in absence of the consent given to it by the heirs, the legacy will not be invalid in its entirety but will take effect with respect to non-heirs. The rule is that as far as possible, the Will, will be given the maximum effect that it is capable of. For example, if the testator bequeaths his total property to an heir and a non-heir, without the heirs giving the consent, the non-heir will take one-third of the property and the rest of the two-thirds will go to the heirs of the testator by inheritance.[39]

Abatement of Legacies

A Muslim testator can make a Will of only one-third of his property without the consent of the heirs. If the bequest is in excess of one-third, and the heirs refuse to give their consent, the totality of the Will does not become operative or invalid but it abates rateably and is valid to the extent of one-third of the property.[40]

Sunni Law **:** The general rule is that a bequest in excess of one-third of the estate of the deceased would take effect with respect to one-third, with the excess going by inheritance. Where there are more than one legatees and the property given to them exceeds one-third, the shares of each of the legatees would be reduced proportionately.

Illustration (i) A Muslim man executes a Will giving Rs. 30,000 to *A* and Rs. 20,000 to *B*. He leaves behind property that comes to Rs. 75,000 after payment of his funeral expenses. Here, the bequeathable limit would be one-third *i.e.* Rs. 25,000 while the bequest is for Rs. 50,000. The bequest in favour of *A* and *B* will be

proportionately reduced. The ratio of the bequest will be the same, but both the bequests will be reduced to half *i.e.* the bequest due to *A* would become Rs. 15,000 and that of *B* would become 10,000. The sum total of these bequests would be Rs. 25,000 and would be valid.

A	***B***
30,000	20,000
15,000	10,000

Total assets : Rs. 75,000

Bequeathable one-third = Rs. 75,000 1/3 = Rs. 25,000

Amount given under the bequest = Rs. 50,000

After rateable deduction

Amount to be given to *A* = Rs. 15,000

Amount to be given to *B* = Rs. 10,000

Illustration (ii) A testator bequeaths Rs. 15,000 to *A*, Rs. 30,000 to *B* and Rs. 45,000 to *C* by the same Will. The net value of his assets is Rs. 90,000 after payment of his funeral expenses and debts etc. Out of Rs. 90,000, the bequeathable limit is Rs. 30,000. The legacies would be proportionately reduced so that the total amount comes within the bequeathable one-third. Thus *A* would take Rs. 5,000, *B* would get Rs. 10,000 and *C* will be given Rs. 15,000.

A	***B***	***C***
15,000	30,000	45,000
5,000	10,000	15,000

Total assets: Rs. 90,000

Bequeathable one-third = Rs. 90,000 1/3 = Rs. 30,000

Amount given under the bequest = Rs. 90,000

After rateable deduction

Amount to be given to *A* = Rs. 5,000

Amount to be given to *B* = Rs. 10,000

Amount to be given to *C* = Rs. 15,000

Illustration (iii) *A* dies leaving behind assets worth Rs. One and a half lakh. He had made a Will giving Rs. 50,000 to his daughter, and Rs. 50,000 to a friend. His wife and son, the other two heirs refuse to confirm the bequest. Here the bequeathable limit is Rs. 50,000. As under Sunni law the bequest in favour of the heir is not valid unless consented to by the heirs, the bequest in favour of the daughter would be inoperative. The Will in favour of the friend would be valid. The widow, son and daughter would inherit from Rs. One lakh, as per the laws of inheritance.

Daughter	***Friend***
50,000	50,000

Nil	50,000

Total assets: Rs. 150,000

Bequeathable one-third = Rs. 150,000 1/3 = Rs. 50,000

Amount given under the bequest = Rs. 100,000

Amount to be given to Daughter = Nil

Amount to be given to Friend = Rs. 50,000

Illustration (iv) A Sunni Muslim has assets worth Rs. One lakh, eighty thousand. He makes a bequest in favour of three persons *X*, *Y* and *Z* giving them Rs. 60,000 each. Here the amount bequeathed under the bequest is an exact one-third to three legates by the same Will. Sunnis apply the rule of rateable or proportionate deduction irrespective of whether the amount given to each of the legatees is an identical one-third or is different vis-a-vis each other. The bequeathable one-third is Rs. 60,000, and Rs. 60,000 each is the amount given to the beneficiaries under the Will. The legacy of each will be reduced to one-third viz., Rs. 60,000 1/3 = Rs. 20,000.

X	***Y***	***Z***
60,000	60,000	60,000
20,000	20,000	20,000

Total assets: Rs. 1,80,000

Bequeathable one-thirds = Rs. 1,80,000 1/3 = Rs. 60,000

Amount given under the bequest = Rs. 1,80,000

After rateable deduction

Amount to be given to each= Rs. 60,000 1/3 = Rs. 20,000

***Shia Law* :**Under Shia law if the legacy is given to two or more legatees under the same Will, and it exceeds the bequeathable one-third, with heirs refusing to consent to the bequest, the rule of chronological priority is followed. The legatee whose name appears first in the Will is to be given his share, followed by the second legatee and then the third and so on. The moment the bequeathable one-third is exhausted, full effect has been given to the Will. Any other legatee whose name follows, after one-third of the assets have been distributed, will not be given anything.

Illustration (i) A testator dies leaving behind assets worth Rs. One lakh twenty thousand. He leaves a Will under which he gives Rs. 20,000 to *A*, Rs. 30,000 to *B* and Rs. 40,000 to C. As the total assets of the testator are to the tune of Rs. 1,20,000 bequeathable one-third is 1,20,000 1/3 = Rs. 40,000. Following the rule of chronological priority, as A's name appears first he will be given Rs. 20,000. The rest of Rs. 20,000 will be given to *B*. *C* will not get anything as the one-third ie Rs. 40,000 is already exhausted.

A	***B***	***C***
20,000	30,000	40,000
20,000	20,000	–

Total assets: Rs. 1,20,000

Bequeathable one-third = Rs. 1,20,000 1/3 = 40,000

Amount given under the bequest = Rs. 90,000

Applying the rule of chronological priority

Amount to be given to *A* = Rs. 20,000

Amount to be given to *B* = Rs. 20,000

Amount to be given to *C* = Nil

Illustration (ii) A testator makes a Will in favour of his wife, giving her Rs. 30,000 and his friend, giving him Rs. 50,000. His total assets amounted to Rs. 2 lakh. After deducting the funeral expenses and payment of debts, the net assets came to Rs. One lakh eighty thousand. The heirs did not confirm the bequest.

Wife	***Friend***
30,000	50,000
30,000	30,000

A wife is an heir, but under Shia law, to the extent of one-third, property can be bequeathed to anyone. The bequeathable one-third limit here is Rs. 60,000. Applying the rule of chronological priority, Rs. 30,000 will be given to the wife, and the rest Rs. 30,000 will be taken by the friend.

Total assets: Rs. 1,80,000

Bequeathable one-third = Rs1,80,000 1/3 = Rs. 60,000

Amount given under the bequest = Rs. 80,000

Applying the rule of chronological priority

Amount to be given to Wife = Rs. 30,000

Amount to be given to Friend = Rs. 30,000

Bequest of Exact One-third

The rule of chronological priority is not applicable in cases where under one legacy two or more persons have been given an exact one-third of the total assets. In such cases, the legatee whose name appears last gets the one-third given to him under the Will, and the legatees whose names appear prior to him will not get anything.

Illustration A testator dies leaving behind net assets worth Rs. 1,20,000 and a legacy under which he gives Rs. 40,000 each to *A*, *B* and *C* in that order.

A	***B***	***C***
40,000	40,000	40,000
Nil	Nil	40,000

As the bequest is of an exact one-third, *C* whose name appears last, gets the total property while *A* and *B* will not get anything. The bequest here in favour of each of them, *A*, *B* and *C*, is treated as an independent bequest, with the subsequent revoking the former. The first bequest was in favour of *A*, the second in favour of *B* and the last in favour of *C*. Legacy in favour of *B* revokes the one in favour of *A*, and the legacy of *C* revokes the Will in favour of *B*. Hence *C* alone will take the legacy.

Total assets: Rs. 1,20,000

Bequeathable one-third = Rs. 1,20,000 1/3 = Rs. 40,000

Amount given under the bequest = Rs. 1,20,000

Applying the rule of later legacy revoking the former

Amount to be given to *A* = Nil

Amount to be given to *B* = Nil

Amount to be given to *C* = Rs. 40,000.

Bequests for Pious Purposes

A bequest made for pious purposes is valid to the extent of one-third of the property, both under Sunni as well as Shia law. Pious purposes in terms of their importance and preference are divided into the following three categories:

(i) Bequest for faraiz, *i.e.* purposes ordained in the Quran such as Haj (pilgrimage); Zakat (Poor's rate) and expiation for prayers missed by a Muslim.

(ii) Bequest for wajibat, *i.e.* purposes not expressly ordained, but are in themselves proper such as, charities given on the day of breaking fast.

(iii) Bequest for nawafil *i.e.* bequest of purely voluntary nature, such as a bequest for the poor, for building a mosque, or a school, or a rest house for travellers.

As among these three kinds of bequests, the first takes preference over the second and the second over the third for the purposes of rateable abatement of legacies. But bequest for pious purposes does not have any preference over other bequests, that may be described as bequest for secular purposes.[41]

DEATH OF LEGATEE BEFORE THE OPERATION OF WILL

Under Sunni law where before the Will can operate, the legatee dies, the bequest will lapse and the property bequeathed would remain with the testator and on his death will go to his heirs in absence of any other disposition by him.

Under Shia law, the legacy will lapse only if the legatee dies without leaving an heir[42] or if the testator, after the death of the legatee, revokes the Will. However, if the testator even after the death of the legatee does not revoke the Will, on the date of operation of the Will, the benefit under it will pass to the heirs of the legatee.[43]

PROBATE AND LETTERS OF ADMINISTRATION

A Will made or executed under Muslim law does not require a probate and can be admitted in evidence if proved duly.[44] Even for establishing any rights in the property of a Muslim intestate, the heirs need not obtain the letters of administration except when they have to deal with the debts due to the estate of the intestate. Thus where a suit is brought to recover a debt due to the deceased, the court will not pass a decree except on production of a probate or letters of administration or a succession certificate. These rules are applicable only in cases where the recovery of the debts is sought with the help of the court and not otherwise.[45]

REVOCATION OF WILL

A Will by its nature is revocable. A testator is not bound by the testamentary disposition that he makes and he can always either change it or cancel it either expressly or even impliedly by his conduct.[46]

Express Revocation

A testator can expressly revoke his Will. It can be done either orally or even in writing. The intention to revoke the Will must be clear and unequivocal. Where the testator makes a second Will of the property that he had earlier given to a legatee and gives it to another person expressly stating in the Will, that this property that he had given the legatee *X* will now go instead to legatee *Y* with the help of this Will the earlier Will be revoked. If the legatee gives one property to two or more persons in the same Will, it does not mean that the Will executed in favour of the prior legatee is revoked unless it is of exact one-third of the net assets, and both the legatees will take the property together.

It is not necessary that for revoking an earlier Will, another Will must be made. A Will can be revoked by a simple and clear declaration to that effect or by a formal deed of cancellation or revocation of Will.

Implied Revocation

Without expressly declaring so, a Will can either be revoked by some conduct of the testator or can be rendered meaningless. For example, the testator bequeaths Rs. 10 lakh cash to *X*. After one month he purchases a house with this amount. The bequest in favour of *X* is automatically revoked. Similarly where the testator gives land to his friend under a Will but an year later gifts the same to his daughter, the bequest in favour of the friend is automatically revoked.[47]

DIFFERENCE BETWEEN SUNNI AND SHIA LAW

Sunni Law	***Shia Law***
Bequest to an heir is invalid even to the extent of one-third of the property.	Bequest to heirs is valid up to the extent of one-third of the property.
Consent of the heirs must be given after the death of the testator.	Consent of heirs can be given before or after the death of the testator.
Bequest in favour of a child in the womb of his mother is valid provided he is born within six months of the making of the Will.	Bequest in favour of a child in womb is valid if it is born within ten months of making of Will.
A Will by the testator who later commits suicide is valid.	A Will by a person, who later commits suicide is invalid. It is only when the Will is made before taking any step towards commission of the act of suicide that it is valid.
Legacy has to be accepted after the death of the testator.	Legacy can be accepted before or after the death of the testator.
Legatee committing murder or causing death of testator cannot take his property under a Will.	Legatee causing death of the testator cannot take his property if the death was caused intentionally but not where it was caused accidentally or by negligence.
If the legatee dies before the testator the legacy lapses.	If the legatee dies before the testator, the legacy will lapse only when either the legatee dies without leaving an heir or where the testator himself revokes the Will.
Where the bequest is to more than one person in excess of one-third of the property by the same Will, the rule of proportional deduction applies.	The rule of chronological priority applies in cases of bequest in excess of one-third to two or more persons.
Where the bequest is of exact one-third of total property, but given to two or more persons under the same Will the rule of	Where the bequest is of exact one-third of total property given to two or more legatees under the same Will, the last

proportional deduction will apply.	mentioned legatee only will get the one-third of the property.

1. See the Indian Succession Act, 1925 s. 2(h).
2. The Special Marriage Act, 1954, s. 21, reads as follows:

Notwithstanding any restrictions contained in the Indian Succession Act, 1925 (39 of 1925), with respect to its application to members of certain communities, succession to the property of any person whose marriage has been solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this Act shall have effect as if Chapter III of Part V (Special Rules for Parsi Intestates) has been omitted therefrom.

3. *Ibid*., s. 15.
4. Baillie, *Digest of Moohummudan Law*, Part I, 1875, pp. 653–54; *Badrul Islam Ali Khan v. Ali Begum*, AIR 1935 Lah 251 .
5. *Illyas v. Badshah*, *AIR 1990 MP 334* [*LNIND 1989 MP 155*].
6. *Hedaya*, Hamilton's Translation, Gracy, 1870, p. 671.
7. Mohammad Ali, *Manual of Hadith*, 1944, pp. 334–35, No. 2 (Lahore Edition) quoted in Aquil Ahmed, *Mohammeden Law*, 17 edn. (ed. IA Khan), 1995, pp. 188, 194; Baillie, *Digest of Moohummudan Law*, Part I, 1875, p. 625; *Mulla's Principles of Mahomedan Law*, 19 edn. (ed. M. Hidayatullah and A. Hidayatullah), 1990, p. 104.
8. Baillie, *Digest of Moohummudan Law*, Part I, 1875, p. 625.
9. *Ibid*.
10. For the difference under the Shia and Sunni law, see the discussion *infra*.
11. *Abdul Manan Khan v. Mirtuza Khan*, AIR 1991 Pat 155 .
12. *Aulia Bibi v. Alauddin*, (1906) 28 All 715.
13. *Ramji Lal v. Ahmed Ali*, AIR 1952 MB 56 ; *Sarabai v. Mahomed*, (1919) 43 Bom 641.
14. *Abdul Hameed v. Mahomed Yoonus*, 1940 Mad 153 ; *Mazar Husen v. Bodha Bibi*, (1898) 21 All 91.
15. *Mohomed Altaf v. Ahmed Buksh*, (1876) 25 WR 121 (PC).
16. *Venkat Rao v. Namdeo*, AIR 1931 PC 285 .
17. *Izhar Fatma Bibi v. Ansar Bibi*, AIR 1939 All 348 ; *Mahabir Prasad v. Mustafa*, AIR 1937 PC 174 .
18. *Hedaya*, Hamilton's Translation, Gracy, 1870, p. 673; Baillie, *Digest of Moohummudan Law*, Part I, 1875, p. 627; *Mulla's Principles of Mahomedan Law*, 19 edn., (ed. M. Hidayatullah and A. Hidayatullah), 1990, p. 100; Aquil Ahmed, *Mohammeden Law*, 17 edn. (ed. IA Khan), 1995, p. 190.
19. See the Indian Majority Act, 1875, ss. 1 and 3.
20. *Mazhar Husen v. Bodha Bibi*, (1898) 21 All 91.
21. *Badrul Islam Ali Khan v. Ali Begun*, AIR 1935 Lah 251 .
22. Baillie, *Digest of Moohummudan Law*, Part II, 1869, p. 233.
23. *Sajathi Bi v. Fathima Bi*, 2002 Mad 484 ; xe "Anarali v Omar Ali"*Anarali v. Omar Ali*, AIR 1951 Cal 7 ; xe "Fahmida v Jafri"*Fahmida v. Jafri*, (1908) 30 All 153.
24. *Hedaya*, Hamilton's Translation, Gracy, 1870, p. 671.
25. *Mohamed Husain v. Aishabai*, AIR 1935 Bom 84 .
26. *Narunissa v. Sheikh Adl Hamid*, AIR 1987 Kant 22 .
27. *Izzul Jabbar Khan v. Chairman, District Kutchery*, (1956) Nag 501.
28. Baillie, Digest of Moohumuddan Law, Part I, 1875, p. 625.
29. *Sajathi Bi v. Fathima Bi*, 2002 Mad 484 ; xe "Yasmin Imam Bhai Sheikh v Hajarabi"*Yasmin Imam Bhai Sheikh v. Hajarabi*, *AIR 1986 Bom 357* [*LNIND 1985 BOM 285*].
30. *Mahabir Prasad v. Mustafa*, AIR 1937 PC 174 .

31. See for example, the decision of Allahabad High Court in xe "Fahmida v Jafri"*Fahmida v. Jafri*, (1908) 30 All 153 and xe "Amrit Bibi v Mustafa"*Amrit Bibi v. Mustafa* AIR 1924 All 20 wherein the court held that where the bequest is in excess of one-third of the property and is in favour of an heir, the entire bequest is void. Later in xe "Hussaini Begum v Muhammad Mehndi"*Hussaini Begum v. Muhammad Mehndi*, AIR 1927 All 340, the bequest though in excess of one-third in favour of one of the daughters of the testator was held valid.

32. The principle is taken from Sharaya-ul-Islam, wherein it is said, 'If a person makes a Will excluding some of his children from their shares in his succession, the exclusion is not valid.' See Baillie, *Digest of Moohumudan Law*, Part II, 1869, 238.

33. See for instance *Advocate General v. Jimbabai*, (1917) 41 Bom 181, a case involving the Will of a Cutchi Memon.

34. See Chapter 14 *infra*.

35. *Ma Hmyin v. PL Chettyar*, AIR 1935 Rang 318 .

36. See *Jainabai v. Sethna*, (1901) 34 Bom 604 wherein it was held by Beaman J., that the estate for life and a vested remainder were known to Shia law as much as to Sunni Law.

37. *Jeewa v. Yacoob Ally*, AIR 1928 Rang 307 .

38. 2002 Mad 484 .

39. *Muhammad v. Aulia Bibi*, (1920) 42 All 497; *Mohammad Ata Husain v. Husain Ali*, AIR 1944 Oudh 139 ; *Ghulam Jannat v. Ramat Din*, AIR 1934 Lah 427 .

40. *Hedaya*, Hamilton's Translation, Gracy, 1870, p. 766; Baillie, *Digest of Moohummudan Law*, Part I, 1875, pp. 636–637; *Mulla's Principles of Mahomedan Law*, 19 edn., (ed. M Hidayatullah and A Hidayatullah), 1990, p. 106; Aquil Ahmed, *Mohammeden Law*, 17 edn., (ed. IA Khan), 1995, p. 196.

41. *Hedaya*, Hamilton's Translation, Gracy, 1870, p. 688; Baillie, *Digest of Moohummudan Law*, Part I, 1875 pp. 653–54; *Mulla's Principles of Mahomedan Law*, 19 edn., (ed. M. Hidayatullah and A. Hidayatullah, 1990, p. 106; Aquil Ahmed, *Mohammeden law*, 17 edn., (ed. IA Khan), 1995, p. 196.

42. *Husaini Begum v. Muhammad Mehdi*, AIR 1927 All. 340 .

43. See *Baillie*, *Digest of Moohumudan Law*, Part II, 1869, p. 247.

44. See the Indian Succession Act, 1925, s. 213 (2);*Shaik Moosa v. Shaik Essa*, (1884) 8 Bom 241; *Venkata Subamma v. Ramayya*, AIR 1932 PC 92 .

45. *Chandra Kishore v. Prasanna Kumari*, (1910) 38 Cal 327; *Veerabhadrappa v. Shekabai*, AIR 1939 Bom 188 .

46. *Hedaya*, Hamilton's Translation, Gracy, 1870, p. 674; Baillie, *Digest of Moohummudan Law*, Part I, 1875, p. 624; *Mulla's Principles of Mahomedan Law*, 19 edn., (ed. M. Hidayatullah and Arshad Hidayatullah), 1990, p. 107; Aquil Ahmed, *Mohammeden Law*, 17 edn., (ed. IA Khan), 1995, p. 196.

47. *Hedaya*, Hamilton's Translation, Gracy, 1870, p. 674; Baillie, *Digest of Moohummudan Law*, Part I, 1875, pp. 628–29; *Mulla's Principles of Mahomedan Law*, 19 edn., (ed. M. Hidayatullah and A. Hidayatullah), 1990, p. 107; Aquil Ahmed, *Mohammeden Law*, 17 edn., (ed. IA Khan), 1995, pp. 195–96.

CHAPTER 16 GIFTS MADE DURING MARZ-UL-MAUT

INTRODUCTION

A person during his lifetime enjoys full powers of disposal of his property. When the transfer is to take effect immediately he is competent to make a disposition of the entire property such as by sale or gift etc, but if the transfer is to take effect after the death of the person such as through a Will, under Muslim law, his powers of disposing of the property are limited and do not extend generally beyond one-third of his net assets, calculated after his death. The latter is due to the reason, that the just claims of the rightful heirs should not be unreasonably interfered with. If the owner genuinely feels that either his heirs do not deserve to have his property or somebody else or even one heir has a better claim over it for whatsoever reason, he can always make a gift of his property in his favour. Since the gift takes effect immediately, the owner has to relinquish his control over the property and as a person can make a gift of his total property, the divesting would extend to the whole of his estate. If he wants to enjoy the property during his lifetime and relinquish its control only after his death, then he is not allowed to disturb the devolution of the total property by the laws of inheritance. Therefore, in a gift the ability of transferring the total property in favour of anyone comes with a condition of immediate divesting of ownership in the property.

One of the primary requirements in case of a gift is that it should be a voluntary or conscious act of the donor who must be free from any mental infirmity, either natural or induced by pressure, undue influence or fraud etc. However, there may be cases where the gift is executed under pressure or an apprehension, that is real and grave, but is not the result of a fraud or undue influence exercised by somebody else, rather it comes from within oneself, due to sickness or disease and is in the nature of a realisation that death is very close. In fact, the real nature of pressure is the awareness of a stark reality that the person may die any moment. Such gifts executed by a person under an immediate apprehension of death, stand on a different footing than ordinary gifts executed by a person under no such apprehensions, and which are a result of a well thought out act with the ability to comprehend the consequences of his action. An ordinary gift does not indicate haste, but a gift under an apprehension of death is made with a sense of urgency. These gifts are made at a time where it is doubtful whether the mental faculties were functioning properly or were absolutely normal due to the apprehension of immediate death and have a separate status. Law treats them differently and terms them as gifts made during ‘death bed illness’[1] or made by a person suffering from ‘marz-ul-maut’.[2]

CONCEPT OF MARZ-UL-MAUT

‘Marz’ means illness, disease or a malady and ‘maut’ means death. Thus ‘marz-ul-maut’ means an illness that results in death.[3] Illnesses or diseases can be of several types even if they are termed incurable or one which would eventually result in the death of the patient. Illnesses or diseases may prove fatal immediately or within a very short span of time or may drag a person slowly, eating him away gradually leading to an eventual death viz., the time frame of which is uncertain and longer than what could be covered under the term ‘imminent or ‘immediate’, or ‘very near in point of time’. Baillie defines marz-ul-maut as an illness, which it is highly probable will issue fatally.[4] It is an illness dangerous to life ie, which mostly ends in death, provided the patient actually dies of it. Mulla defines it as a malady which induces an apprehension of death in the person suffering from it and which eventually results in his death.[5] According to Abdul Rahim,[6] it is an illness from which death is ordinarily apprehended in most cases and in particular cases it has actually ended in death.

He observes:

> The compilers of All-Maiallah lay it down that death illness is that from which death is to be apprehended in most cases and which disables the patient from looking after his affairs outside his house, if he be a male, and if a female the affairs within her house provided the patient dies in that condition before a year has expired whether he has been bed-ridden or not. If the illness protracts itself into a chronic condition that lasts like that for a year, the patient would be regarded as if he was in health and his dispositions will be treated like those of a healthy person.

It is therefore an illness that causes an apprehension in the mind of the patient, that he is going to die soon, and he actually dies due to it.

Marz-ul-maut Distinguished from other Illnesses

The distinguishing feature of marz-ul-maut is its highly probable character and apprehension and death ensuing within a very short span of time. If it is a disease that is of long continuance, or it is incurable or even if it cripples a person for life, that would not be called marz-ul-maut. Though the rule is that the person suffering from the disease dies within a time period of one year, the disease can be called a death bed illness, but this does not constitute a hard and fast rule. Long and lingering illnesses, make a person familiar with it, which dilutes the apprehension of death to some extent and would not be called marz-ul-maut.[7] Chronic asthma,[8] paralysis,[9] lingering consumption,[10] albuminuria for more than a year,[11] sudden bursting of blood vessel in the stomach[12] are not cases of marz-ul-maut,[13] but rapid[14] or galloping consumption[15] or pneumonia may be covered under marz-ul-maut. Where a disease that is lingering to begin with becomes grave and reaches a point where imminent death becomes evident to the sufferer and in fact happens, it would be called marz-ul-maut.[16] An apprehension on the part of an old man when he is not afflicted by any disease is not the one that is contemplated here. ‘Old age’ is not a disease, for the purposes of understanding this doctrine, and even if an old man nurses an apprehension of death, and dies later, it is not sufficient to answer that description. Therefore, the English phrase ‘death illness’ is not an appropriate equivalent and does not exactly connote the meaning of this term ‘marz-ul-maut’.

Essential Conditions for Marz-ul-maut

The first and foremost condition is that the person must be suffering from an illness; second, that there must be an apprehension of death in the mind of the patient; and the third, that he actually dies.[17] The Supreme Court[18] has given three tests to determine whether an illness is to be regarded as marz-ul-maut or not. According to the court, there must be:

(i) proximate danger of death;

(ii) some degree of subjective apprehension of death in the mind of the sick person; and

(iii) some external indicia chief among which would be the inability to attend to ordinary avocations.

The Calcutta High Court[19] while considering the doctrine of marz-ul-maut found three things necessary to constitute the same viz.,

(i) illness;

(ii) expectation of fatal issue; and

(iii) certain physical incapacities which indicate the degree of illness. The second condition connot be presumed to exist from the existence of the first and the third as the incapacities indicate, with perhaps the single exception of the case in which a man cannot stand up to say his prayers are not infallible signs of death-illness.

The Bombay High Court[20] has held that the crucial test is the proof of subjective apprehension of death in the mind of the donor, that is to say, the apprehension derived from his own consciousness, as distinguished from the apprehension caused in the mind of others and other symptoms like physical incapacities are only the indicia but not infallible signs or a sine qua non of marz-ul-maut. While laying down the principles on which the law of marz-ul-maut is based, the Supreme Court of Pakistan, has stated[21] the following necessary questions that must be raised:

(i) was the donor suffering at the time of the gift from a disease which was the immediate cause of his death?

(ii) was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby, or to engage in him the apprehension of death?

(iii) was the illness such as to incapacitate him from the pursuit of his ordinary avocations, a circumstance which might create in the mind of the sufferer an apprehension of death?

(iv) had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady?

Thus what is required to be proved upon the preponderance of probabilities is whether the gift was made by the ailing person while under the apprehension of the death and further whether in such ailing he met his death.[22]

Gift made during Marz-ul-maut

A gift made by a person during marz-ul-maut is treated as a combination of both a gift as well as a Will (Wasiyat). All the three essential ingredients of a valid gift must be complied with, namely, a declaration by the donor, its acceptance by the donee himself or on his behalf by a competent person followed by immediate delivery of possession of gifted property during the lifetime of the donor. In addition to this, as it is also treated as a Will, it cannot be made of more than one-third of the total property unless the heirs whose share would be adversely affected give their consent for the validity of the excess bequest after the death of the donor. The legal position on this point is the same under Sunni and Shia law. However, the rule that one-third of the property can be bequeathed even to an heir is one of the primary distinctions between Shia and Sunni law and is applicable here as well.[23]

Position where Donor Recovers from Illness

Even though one of the essential ingredients of a marz-ul-maut is that death actually happens, yet, where a gift is made during an apprehension of death, and the donor recovers from the illness, this would not be called a gift made during marz-ul-maut and would operate as an ordinary gift. In such a case this gift would not require the application of testamentary restrictions of disposal of only one-third of the property, and the gift can validly be operative even if it extends to the whole of the property.

Reasons for Combining Gifts with Will

The principle that a gift made under marz-ul-maut involves the compliance of the mandatory formalities of a gift and the testamentary restrictions of a Will, is based on the reason that where a person makes a gift during an apprehension of death, his mental faculties, and state of mind is not on par with that of a person who is not under such an apprehension. Illness coupled with apprehension of death may weaken a man’s physical and mental powers and he is likely to make a disposition, which may harm him spiritually and which may be to the detriment of his heirs.

These gifts are executed with a sense of urgency or haste and are not a result of well-contemplated actions of a reasonable man. The Bombay High Court explained[24] the reasons for putting these gifts in a different class altogether:

> Death is the certain and central fact. Proximate danger of death in an illness, it is common experience, casts ominous elongated shadows discernible along the lines of conduct of the person who is subject to the process of dissolution of life. In that there is all the apprehension of withering away of human faculties and rational capacities. Mind under such condition would get seized by the fright of a final full stop and all winged and animated spirits involving free will, clarity and reasonable and purposeful action may be clipped and caught in the mesh of progressing paralysis. The apprehension that the curtain is wringing down on the life in such a state would easily grasp all the consciousness as the physical malady surely affects every faculty clouding the will and reason of human being. It is no doubt that when such preponderance of an onset of physical and psychological atrophy operating over the field of free and balanced will can be inferred, the disposition cannot be validated. The light of reason at such moment is not expected to burn bright as the flame of life itself flickers drawing ghastly shadows on the cold deadly wall of the inevitable. It is conceivable therefore that the pragmatic philosophy of Mohammedan law thought it wise to put under eclipse the acts and dispositions done upon the prompting of a psychosis indicating apprehension or clear fear of death either induced by or during the last suffering or illness of the person dying. Law assumes that apart from the dominant danger of loss of free will, such person may clearly lose touch with his spiritual dictates and may hasten even against the need of his clear obligations and interests to do the things which he might not have normally and in times of health done. Once the subjective apprehension of death, its possibility or preponderance is established and there is evidence of accelerated dissipation of life itself leading unto death due to malady

or affliction the dispositions made by such person are treated as if it were an outcry against the demonic fear of death itself and thus basically a non-juristic action.

Thus gifts made during marz-ul-maut *i.e.*, made under pressure and a sense of imminence of death[25] are operative to the extent of one-third of his property only and divests the donor of the property with immediate effect.

Validity of Gifts made during Marz-ul-maut

Under Muslim law, gift made where a person is suffering from marz-ul-maut is subject to very strict scrutiny for its validity. In a case before the Supreme Court[26]a Muslim executed a document styled as 'settlement Will' gifting certain movables to the donee. The gift was made by the donor when he was seriously ill and apprehending his death. There was nothing to show that it was made under such circumstances that the gifted property would revert to the donor. The donor died within six weeks and possession of the property was delivered to the donee before his death. The question of the character and validity of the gift arose because the donee claimed an exemption from paying gift tax, under s. 5(1) (xi) of the Gift Tax Act 1958, which provides that gift tax shall not be charged in respect of gifts made by a person in contemplation of death. The Supreme Court held that in view of the serious sickness of the donor and state of mind at the time of making of gift, it can be concluded that the gift was not absolute, on the contrary it will be legitimate to infer that the gift was in contemplation of death and if this gift was recognised as valid under the personal law of the parties and also satisfied, the conditions of donation mortis causa as incorporated under the Indian Succession Act, 1925, then notwithstanding the fact that the Act did not apply to the Muslim deceased, the donee would be granted an exemption under the Gift Tax Act. In another case[27] an 80 year old donor was taken seriously ill, and never recovered from the illness. During this illness he was unable to look after himself and had reached a mental low of such a kind that he would ask for his near and dear ones to be by his side. However, when his daughters came by his side he was unable to express himself. His sense of helplessness was evident as he would make signs and shed tears while looking at his relatives. He made a gift of his property barely 24 hours before he died and at a time when he was seized by the subjective and imminent apprehension of his death. The court held that the gift was made by him during marz-ul-maut. In another case from Pakistan[28] a 65 year old woman made a gift when she was suffering from pneumonia, and died within two hours. The court held that the gift was made during marz-ul-maut.

Burden of Proof

The court is required to assess the validity of gifts made during marz-ul-maut by a complete and thorough scrutinisation.[29] The initial burden to prove the requirements of marz-ul-maut is on the person who sets up such a plea as affecting the disposition of a dead person, that can be discharged by the proof of the facts and circumstances in which such person met his death and the attendant events preceding and succeeding the disposition itself. Once the possibility of a subjective apprehension of death in the mind of the suffering person who made the gift is raised clearly, the burden shifts to the party who takes under the disposition or sets up the title on its basis. Such party may prove the facts and circumstances which would enable the court to hold that the disposition itself was not made while the sufferer was under the apprehension of death. Mere accident of death of a person making the disposition would not be enough. It is necessary for the party setting up the disposition to rebut the proof that may indicate that the disposition is within the mischief of marz-ul-maut.[30]

Distinction between Gifts made during Marz-ul-maut and Donatio Mortis Causa

The Indian Succession Act, 1925, enables an Indian not being a Muslim or a Hindu to make gifts in contemplation of death.[31]These gifts are called 'donatio mortis causa'. This Act deals primarily with the principles relating to intestate and testamentary succession. Section 191 of the Act provides that a man may dispose of, by gift made in contemplation of death, any movable property which he could dispose of by Will.[32] A gift is said to be made in contemplation of death where a man who is ill and expects to die shortly of his illness, delivers to another the possession of any movable property to keep as a gift in case the donor shall die of that illness. Such a gift maybe resumed by the giver, and shall not take effect if he recovers from the illness during which it was made, nor if he survives the person to whom it was made. According to the Supreme Court,[33] there are five essential features of donatio mortis causa, namely:

(i) gift must be of movable property;

(ii) it must be made in contemplation of death;

(iii) the donor must be ill and he expects to die shortly of illness;

(iv) possession of the property should be delivered to the donee; and

(v) the gift does not take effect if the donor recovers from the illness or if the donee predeceases the donor.

Therefore, donatio mortis causa differs from gifts made during marz-ul-maut in three important aspects, first, it permits the transfer of only movable property, but the subject-matter of a gift made during marz-ul-maut can be either movable or immovable property. Secondly, in donatio mortis causa, there is no impediment to the powers of the donor to make a gift with respect to the extent of property or even the class of donees. The entire property can be gifted, and it can be given to anyone including the heirs. It is a unilateral action on part of the donor in the sense that it does not require validation from the heirs whose shares are likely to be adversely affected by the operation of this gift. In case of gifts made under Muslim law where a person is suffering from marz-ul-maut, the donor can make a gift of only one-third of his property, and that too in favour of a non-heir unless the excess is validated by the heirs. Under Shia law, a gift can be valid to the extent of one-third of the property in favour of an heir also. Thirdly, in case of donatio mortis causa, if the donor recovers from the illness and escapes death, the gift fails in its entirety. The donor regains possession of the subject-matter of the gift, but a gift made during marz-ul-maut is subject to different rules. Here, if the donor recovers from the illness and comes out of the apprehension of imminent death, the gift is called an ordinary gift and would take effect validly.

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1. 'Donation Mortis Causa' under the Indian Succession Act, 1925, s. 191.
2. Gifts made during marz-ul-maut under Muslim law.
3. *Sakina Begum v. Khalifa Hafiz-ud-din,* AIR 1941 Lah 58 .
4. Baillie, *Digest of Moohummudan Law*, Part I, 1865, p. 552.
5. *Mulla's Principles of Mahomedan Law*, 19 edn., (ed. M. Hidayatullah and Arshad Hidayatullah), 1990, p. 109.
6. Quoted by Masodkar J in *Abdul Hafiz Beg v. Sahebbi*, *AIR 1975 Bom 165* [*LNIND 1974 BOM 52*].
7. *Mohammad Gulshere Khan v. Mariam Begum*, (1881) 3 All 731.
8. *Zanrao v. Sher Mohamad*, AIR 1934 Pesh 91 ; *Hassarat Bibi v. Golam Jaffar*, (1898) 3 CWN 57.
9. *Sarabai v. Rabiabai*, (1906) 37 Bom 264.
10. *Jahar Ali Khan v. Nasimanissa Bibi*, AIR 1937 Cal 500 .
11. *Fatima Bibee v. Ahmad Buksh*, (1903) 31 Cal 319.
12. *Ibrahim Goolam Arif v. Saiboo*, (1908) 35 Cal 1.
13. *Janjira v. Mohammad*, AIR 1922 Cal 429 .
14. *Rashid Kannalli v. Sherbanoo*, (1907) 31 Bom 264.
15. *Musi Imran v. Ibn Hussain*, AIR 1933 All 341 .
16. *Masood Ali v. Mohammad Khan*, *AIR 1957 All 395* [*LNIND 1957 ALL 54*].
17. *Fazal Ahmed v. Rahim Bibi*, (1918) 40 All 238.
18. *Commissioner of Gift Tax*, *Ernakulam v. Abdul Karim Mohammad*, Manu/SC/0417/1991, decided on 10 July, 1991; see also *Sarabai v. Rabia Bai*, (1906) ILR 30 Bom 537; *Rashid v. Sherbanoo*, (1907) ILR 31 Bom 264.
19. *Fatima Bibee v. Ahammad Baksh*, (1903) 31 Cal 319.
20. *Safia Begum v. Abdul Razak*, AIR 1945 Bom 438 .
21. *Shamshad Ali Shah v. Syed Hassan Shah*, 1964 All Pakistan Legal Decisions p. 143.
22. *Abdul Hafiz Beg v. Sahebbi*, *AIR 1975 Bom 165* [*LNIND 1974 BOM 52*].
23. *Khurshed v. Faiyaz*, (1914) 36 All 289; *Sajjad Hussain v. Mohammed Sayid Hasan*, AIR 1934 All 71 . See also *Sharif Ali v. Abdul Ali Safiaboo*, 1936 Mad 432, a case involving anismaili Muslim. The court said that the rule of validity of bequest in favour of an heir to the extent of one-third is valid under Ithna Ashari school only and a gift made by an Ismailimuslim under marz-ul-maut without the consent of his other heirs was altogether invalid.
24. *Abdul Hafiz Beg v. Sahebbi*, *AIR 1975 Bom 165* [*LNIND 1974 BOM 52*].
25. *Mumtaz Ahmed v. Wasi-un-nesa*, AIR 1948 Oudh 301 .

26. *Commissioner of Gift Tax*, *Ernakulam v*. *Abdul Karim*, MANU/SC/0417/1991. The case related to Donatio Mortis Causa under the Indian Succession Act, 1925.

27. *Abdul Hafiz Beg v*. *Sahebbi*, *AIR 1975 Bom 165* [*LNIND 1974 BOM 52*].

28. *Shamshad Ali Shah v*. *Hassan Shah*, PLD 1964 SC 143 (Pakistan).

29. *Commissioner of Gift Tax*, *Ernakulam v*. *Abdul Karim*, MANU/SC/0417/1991.

30. *Abdul Hafiz Beg v*. *Sahebbi*, *AIR 1975 Bom 165* [*LNIND 1974 BOM 52*].

31. The Indian Succession Act, 1925, s. 191.

32. *Ibid*.

33. *Commissioner of Gift Tax*, *Ernakulam v*. *Abdul Karim*, MANU/SC/0417/1991.

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CHAPTER 17 INHERITANCE

INTRODUCTION

Laws of inheritance under Muslim law are derived from the customs and usages prevalent among the tribes of Arabia before the revelations of the Quran, as supplemented and modified by the Quranic principles and the Hadis of the Prophet. Contrary to popular belief, Quranic revelations were not the starting point of Muslim law. It was in existence even prior to that, but it was systematised, concretised and modified by the revelations and the traditions of the Prophet.

The customary laws of Arabia gave predominance to comradeship in arms and blood tie had assumed a secondary role. Male agnates were given paramount importance and the nearest male agnate/s succeeded to the entire estate. With respect to other agnates, descendants were preferred to ascendants, who in turn were preferred to collaterals. Females and cognates were excluded from inheritance. With the revelation of the Holy Quran, the basic principle of comradeship in arms was substituted for blood ties. 'There is no bond stronger than the blood tie' became the guiding principle and succession rights were extended to all the blood relations of the intestate, irrespective of their sex or the sex of the line of the relatives through whom they were related to the deceased. Consequently, blood relatives (primarily females and cognates) who were earlier excluded were called Quranic sharers and in competition with the already established agnates, were awarded half of the share of the later. The rule therefore is not that every female heir takes half of the share of her male counterpart, but that the newly introduced heirs irrespective of their sex shall take half of the established heirs. So, if the newly introduced heir is a male, he stands in no better position than the female counterpart e. g., uterine brother and sister share equally. [1] Similarly, a father who earlier was excluded in presence of male descendants takes the same share as the mother. The newly introduced heirs included the wife, females related by blood and other cognate relations, and the rigid rule of exclusion of ascendants in presence of descendants was relaxed.

DISTINCT RULES OF INHERITANCE UNDER SHIA AND SUNNI LAWS

Laws relating to Shias and Sunnis with respect to inheritance are different in many respects. This difference is primarily due to the interpretation of the Quranic provisions and their incorporation in the already existing system. It must be remembered that the Quranic revelations did not abrogate the then existing customs and usages, which provided the basic framework for laws of inheritance. Quran provided their modifications by adding to and amending the then existing rules.

The Sunnis kept the old framework intact, such as preference to agnates over cognates, and superimposed the Quranic principles on this old set-up. The Shias on the other hand, blended the old rules and the newly laid down rules. They revised the law prevalent under the Arabian customs and usages, in the light of the newly laid down principles and came out with a scheme widely different from the one propounded by the Sunnis.

NO CONCEPT OF JOINT FAMILY

Muslims do not recognise the concept of joint family as a separate entity[2] or the distinction between the separate property or the joint family property, irrespective of whether the property was inherited from the father or any other paternal ancestor. Where two sons inherit the property of their father, they take the property as tenants-in-common and not as joint tenants. [3] Their shares are fixed and even if for convenience sake they stay together, they do not form a joint family. [4] The son does not have a right by birth in the father's property. Exclusive ownership with full powers of alienation is an essential feature of property ownership under Muslim law.

NO CONCEPT OF TRADING FAMILIES

For the purposes of carrying on a trade or business, the family members may together own property and may entrust its management to one family member as its manager, but he does not take the label of 'Karta' as is understood under Hindu law, rather he stands in a fiduciary relationship towards the members. There is no concept of trading families or family business under Muslim law in the sense as it is understood under Hindu law. There is no prohibition at all if the family members, whether all, or some of them under Muslim law come together and conduct a business either by floating a firm or otherwise. If they conduct a business through a firm in partnership, an agreement of partnership would be necessary. [5] Where only one family member, even though he may be the father, conducts a business and others assist him, they are neither automatically included in the firm, nor do they acquire any ownership in the assets by virtue of they being either the proprietor's sons or close relatives. Where the father using the property of other members starts a business and conducts it on behalf of the family members including minors, in absence of an express authorisation his actions cannot bind the shares of other members. [6] However, in course of the business or trade, where the managing member acquires property, it would not be his personal property but of the family and the shares of each member will be specified clearly. He is liable to account for the profits that he had made while conducting the business,[7] and the liability to account is passed to the children or other heirs, who step into his shoes after his death. [8]

SINGLE SCHEME OF SUCCESSION

Muslim law provides a single scheme of succession irrespective of the sex of the intestate. Blood relation or consanguinity is the primary principle on which succession is based[9] and relations introduced in the family by marriage do not succeed. [10] Under Muslim law a woman acquires an absolute right in the property that she inherits, whether as a daughter, sister or mother, with full powers of alienation. Even after her marriage, neither the succession rights nor her control over the inherited property is adversely affected. She is permitted to keep her identity and individuality even after her marriage, and her relations are defined and ascertained in terms of her own self and not with respect to her husband or parents like under Hindu law. The source of acquisition of property of a male as well as a female is of no consequence here, and a woman's blood relations are her heirs and the heirs of her husbands are not given any preference. For example, if a woman inherits property from her husband and dies issueless, her parents would succeed to her property and not the heirs of her husband.

HERITABLE PROPERTY

A Muslim is not permitted to bequeath more than one-third (1/3 rd) of his estate without the consent of his heirs, so generally even if he makes a Will, two-thirds (2/3 rd) of the property would go by intestate succession, provided of course that the heirs should not have confirmed the excess bequest. Where the deceased does not make a Will, the entire property would go by intestate succession.

Before the net assets of an intestate are calculated, the estate is liable for payment of certain expenses and liabilities. These expenses would include the funeral expenses, his unpaid debts, amount of unpaid dower to be paid to his widow if any, incidental expenses and expenses incurred in obtaining letters of administration from the court. All these expenses are to be deducted from the estate before it is distributed among the heirs. The rules of inheritance do not create any distinction between movable and immovable property or separate and ancestral property.

NO RECOGNITION OF RIGHT BY BIRTH

Muslim law does not recognise the concept of ancestral or coparcenary property and hence no right by birth in the property of the father is recognised in favour of the son during his lifetime. So long as the father is alive, he enjoys full powers of alienation over the property inter vivos such as by way of gift or sale etc, and the son has a mere *spes successionis*, a hope or a chance to succeed to the property, depending upon two conditions, one that he survives the father and second that there is property available for succession. [11] If the father disposes of the property, there would be nothing left for the son to succeed to. Thus if the father makes a gift of his property during his lifetime, the validity of the same cannot be challenged by his son on the ground that he is the future owner of the property, as, so long as the father is alive, he alone is the owner, and the son has a hope or a chance to be the owner in future and not a concrete vested right of ownership with respect to this property. [12] When the father dies, the son can challenge the validity of the gift as now, it is not a mere chance of inheritance but he has a vested interest in the property.[13]

RENUNCIATION OF RIGHT TO SUCCEED OR TRANSFER OF SPES SUCCESSIONIS

A bare chance of inheritance can neither be transferred nor renounced in favour of anyone. [14]Although Chapter II of the Transfer of Property Act 1882 that lays down the prohibition on transfer of *spes successionis* is not applicable to Muslims,[15] yet the effect of Muslim law itself expressly prohibits it. The chance of an heir apparent succeeding to the estate cannot be the subject of a valid transfer. However if the expectant heir receives consideration and misleads the owner he can be debarred from claiming the inheritance at the time when succession opens. In *Ghulam Abas v. Haji Kayyum Ali*,[16] a Muslim man had a wife, five sons and two daughters. During his lifetime he contracted debts, the repayment of which could have exhausted his estate. His three sons who were financially comfortable came to his rescue and offered to pay his debts. An arrangement was entered into by all the sons where in consideration of the payment of the debts and payment of some additional amount the other two sons relinquished their claims of inheritance in favour of these three brothers. Each of them executed a document to the following effect:

> I have accordingly taken the things mentioned above as the equivalent of my share and have out of free will written this. I have no claim in the properties hereafter and if I put up a claim in future to any of the properties I shall be proved false by this document. I shall have no objection to my father giving any of the properties to my brothers

During the lifetime of the father they did not set up any claim at all and after his death wanted to exercise their inheritance rights. The Supreme Court held that they had received consideration and had misled the owner and therefore were prevented from setting up the claims now.

Illustration

A, a Muslim man has a wife *W* and a daughter *D*. *D* in consideration of Rs 50,000 paid to her by the father agrees to relinquish her share in his property in favour of *W*. *A* dies, and when the succession opens, *D* would be entitled to claim her share. What she had relinquished was a mere *spes successionis*, the relinquishment or transfer of which was void. At the same time, as she had received Rs 50,000 from the father, that was not in the nature of a gift, she would be liable to account for the same.

VESTED INTEREST UPON INHERITANCE

The heirs take a vested interest in the estate of the intestate the moment succession opens, and their ownership in their respective shares is not dependent upon its actual distribution by metes and bounds. [17] On the death of the intestate, the shares of each heir, who is competent to receive the property, is vested in him and if between the

death of the deceased and actual physical division of the property an heir dies, his share does not pass to the other heirs, but goes to his legal representatives or heirs. [18] For example, *A*, a Muslim man has two sons S1 and S2. *A* dies leaving behind a house and some other property. Both sons are married having wives and one son each. Before the property could be divided, S1 dies. His share in the property was fixed at one-half the moment he died and as the heirs take as tenants-in-common and not as joint tenants, it will not go to the surviving brother but would go to his own widow and son.[19]

The vesting of property cannot be suspended only because out of the estate, the unpaid debts and expenses have to be paid. Once the estate vests in a person, he can validly transfer or even renounce the share in favour of anyone.[20]

SUCCESSION WHERE MARRIAGE OF THE DECEASED WAS PERFORMED OR REGISTERED UNDER THE SPECIAL MARRIAGE ACT, 1954

The Muslim law of inheritance and succession does not apply to the property of a Muslim intestate, if he gets married to a Muslim or even a non-Muslim under the Special Marriage Act, 1954. [21] If his marriage was contracted under Muslim law but he gets this marriage registered under the Special Marriage Act, 1954, then again, upon such registration, the law of succession changes,[22]and succession to the property of the parties to the marriage and also to the issue of such marriage, would be governed by the general provisions of inheritance available under the Indian Succession Act, 1925,[23] and not in accordance with the provisions of Muslim law. The Special Marriage Act, 1954, was enacted after repealing the earlier Special Marriage Act, 1872, which also had an identical provision.

DISQUALIFICATIONS

INTRODUCTION

In accordance with the rules of exclusion, certain persons who otherwise would be heirs are disqualified from inheriting the property of an intestate. These grounds of exclusion are as follows:

Difference of Religion

One of the fundamental principles of inheritance is that only a Muslim can inherit from a Muslim. A non-Muslim cannot inherit from a Muslim intestate. This strict rule was modified to some extent by the Caste Disabilities Removal Act, 1850, which provided among others that the inheritance rights of a convert would be protected.[24]A convert who is a non-Muslim can inherit from a Muslim. For example, a Muslim man has a son, who converts to Christian faith. Under classical Muslim law, this convert son being a non-Muslim could not have inherited the property of his father. But due to the protection of rights under the Caste Disabilities Removal Act, 1850, he would be entitled to inherit his property. Similarly, a Hindu married man having a son converts to Muslim faith, and then dies. Since he at the time of his death was a Muslim, Muslim law of succession would apply to his property[25] and his Hindu son being a non-Muslim cannot inherit his property.[26]

Homicide

A person causing the death of another cannot inherit his property by inheritance or even through testamentary succession. Under Sunni law, the rule is applied very strictly, irrespective of whether the death was caused intentionally or even accidentally. Under Shia law, the disqualification is operative only where death was caused intentionally.

Illegitimate Child

A legitimate child is one that is born of a lawful wedlock. [27] Legitimacy under Muslim law is closely linked to the establishment of paternity of the child, which can be done by a direct or indirect proof of marriage between the parents, by presumption or by acknowledgement of paternity by the father in cases of uncertainty of legitimacy of child. Acknowledgement by the father cannot make an illegitimate child legitimate, but is used to clear the confusion

with respect to the time of the marriage or even the fact of marriage. [28] In cases where a marriage between the natural father and mother of the child could not have taken place *viz.* , in cases where the mother at the time of conception was married to somebody else or the father and the mother were within prohibited degrees of relationship and could not have married each other validly, an acknowledgement by the father cannot make the child legitimate.[29]

Rule of legitimacy under Muslim law30.Baillie, Digest of Moohummudan Law, Part I, 1875, pp. 391–397.

Under Muslim law, a child who is born after six months from the date of contracting a marriage is presumed to be a legitimate child unless it is not a pre-mature child[31] and provided that the father does not disclaim the paternity by 'lian' (accusation of adultery). Where it is born within six months of marriage, it is an illegitimate child but if there is a confusion with respect to the date or time of Nikah, it can be cleared by an acknowledgement of paternity by the father. [32] There is a consensus on this issue under Sunni and Shia law. Upon the dissolution of marriage, Shias regard the child as legitimate if it was born within ten lunar months; for Hanafis if it was born within two years; and for Shafe'iis and Maliki if it was born within four lunar years.

Legitimacy of a Child under the Indian Evidence Act, 1872

Section 112 of the Indian Evidence Act, 1872 provides:

> The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Under Indian Evidence Act, 1872, it is the time of the birth and not the time of conception of the child that would decide its legitimacy, and the only way in which the husband can disclaim paternity is by proving that he had no access to the wife at the time of the possible conception of the child.

Comparison between the Rule under Indian Evidence Act, 1872, and Muslim Law

There are three basic differences between the rule under the Indian Evidence Act, 1872 and that under Muslim law:

(i) Although the birth of the child within a lawful wedlock is specified under both the laws, under Muslim law, a child should be born after six months of the marriage, but according to the Evidence Act, a child born soon after the solemnisation of marriage would be a legitimate child, with the paternity fixed on the husband of the mother, unless the father proves non-access to mother.

(ii) Where a child is born after the dissolution of marriage, according to Evidence Act, two conditions must be satisfied for according legitimacy to the child, first that it should be born within 280 days from the dissolution, and second that the mother should remain unmarried. However, under Muslim law the time is ten months under Shia law, two years under Hanafi law and four years under Maliki and Shafei'i law. A child born after one year of the date of dissolution of marriage between the parents would be illegitimate as per Shia law and the Evidence Act, but would be legitimate as per Sunni law.

(iii) Under the Evidence Act, an allegation or charge of adultery is not sufficient to disclaim paternity and the husband must prove non-access[33] to the mother. Under Muslim law, if the putative father disclaims it by lian, it is sufficient.

There is a conflict of judicial opinion on the issue whether s. 112 of the Evidence Act, supersedes the Muslim law relating to legitimacy of a child.[34]

Inheritance Rights of Illegitimate Children

Under Sunni law an illegitimate child is deemed to be related to its mother, and inherits from her and her relations[35] but does not inherit from the father or any of his relations. Under Shia law, an illegitimate child does not inherit from any of the parents nor from any of their relatives.[36]

Exclusion of Daughter

Under Muslim law, both Sunni as well as Shia, a daughter is entitled to succeed to the property of the parents, yet there are customs[37] and statutes,[38] the operation of which excludes her from inheritance. Such customs and statutes though at variance with the Quranic principles are valid, and treat daughters as non-existent at the time of opening of the succession. In Jammu and Kashmir, in some communities a daughter can succeed only in absence of all male agnates of the deceased,[39] while in others she can inherit only if she is a 'Khananashin'. [40]A daughter is also not entitled to inherit the watan land under the Watan Act, 1886 (Bombay). The Oudh Estates Act, 1869 that follows the rules of primogeniture for devolution of taluqdari properties also exclude daughters and her heirs.[41]

LAW OF INHERITANCE: SUNNI LAW

INTRODUCTION

Under Sunni law, the heirs are divided into two broad categories:

(i) related heirs, and

(ii) unrelated heirs.

Related heirs are further sub-divided into three groups *viz.* , sharers, residuaries and distant kindred, that comprise only blood relatives with the exception of surviving spouse of the deceased. The second category of unrelated heirs comprises three heirs *viz.* , successor by contract, acknowledged kinsmen and universal legatee, the first gets the property under a contract, the second is a person of unknown descent, but the deceased makes an acknowledgement of kinship in his favour, through any other person, while the last is the recipient of the whole property of the deceased by a Will. [42] The property in the first instance is to be distributed among those sharers who are entitled to get the property. Sharers are the heirs who were earlier excluded but were introduced as heirs by the Quranic revelations. Their shares are fixed. Once the property is distributed among the sharers, and anything is left, this surplus called the residue goes to the next category called residuaries. When there is no residuary present, the property passes to the third category which comprises cognates. So long as any heir in the former two categories is present, the property does not pass to the third category of distant kindred. The rule has one exception, *viz.* , in absence of the residuaries, if either of the spouses is present *i. e.* widow or the widower, then the spouse will take his/her fixed share as a sharer and the rest of the property would be taken by the distant kindred.

GENERAL PRINCIPLES

Rules of Exclusion

Muslim law in general does not recognise the principle of representation and provides for the rule of nearer in degree excluding the remoter. This rule is applicable to sharers, residuaries and also distant kindred. Thus, the father would exclude the paternal grandfather, and a son would exclude a son's son. Secondly, an heir who is related to the deceased through another person, would be excluded in presence of the one through whom he or she is related to the deceased. For example, a sister or a brother is related to the deceased through the father, and if the father is present, they would be excluded in his presence. However, the mother does not exclude the uterine brother or sister as the mother even if she alone is present, is not entitled to the complete inheritance as a sharer or a residuary, but can take the property under doctrine of return.

Return (Radd)

In accordance with the rules of inheritance the eligible sharers are given their fixed shares first and the residue left passes to the residuaries. If there is no residuary, the residue in presence of the sharers does not pass to the distant kindred but comes back or returns to the sharers and they are entitled to take it in proportion to their shares. This coming back of the property to the sharers is called doctrine of 'return' or 'radd'. The rule is subject to one exception, *viz.* , the surviving spouse whether the husband or the wife is not entitled to take a share from the 'return' or 'radd', so long as any other sharer or even a distant kindred is present.

If only the husband and a distant kindred are present *e. g.* , son of a predeceased daughter is present, then the husband will take half as there is no child or child of a son, as a sharer and the remaining half will go to the son of a predeceased daughter who is a distant kindred. But if no heir is present and deceased dies leaving behind only a

widow, she would take one-fourth (1/4th) of the property as a sharer and three-fourths (3/4th) as return, or 'radd'.

Doctrine of Increase (AUL)

The sharers are entitled to the property in fixed shares. It may happen sometimes that the sum total of the shares that the sharers are entitled to inherit may exceed unity. In such cases where the shares exceed the heritable property, the shares of each of them are proportionately deducted.

Illustration (i): A Muslim woman *W* dies leaving behind her parents *M* and *F*, her husband *H* and three daughters *D* 1, *D* 2 and *D* 3. [See Fig. 17. 1]

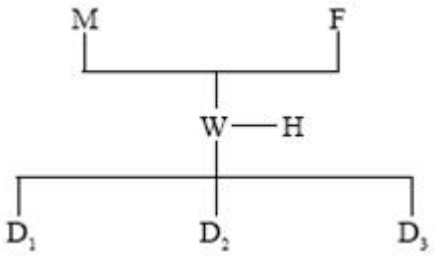

Fig. 17. 1

Here the share of *H* is one-fourth (1/4th), of *M* and *F* is one-sixth (1/6th) each and three daughters collectively will take two-thirds (2/3rd). The sum total would be (1/4 + 1/6 + 1/6 + 2/3 = 15/12).

Since the shares exceed unity, they have to be proportionately reduced. For that the steps will be as follows:

We take a common denominator, and then the shares would be:

H = 1/4 = 3/12

F = 1/6 = 2/12

M = 1/6 = 2/12

D 1 + *D* 2 + *D* 3 = 2/3 = 8/12

The sum total would be 15/12.

To apply the doctrine of 'Aul', the denominator is increased to the numerator so that the shares of all together equal unity or the heritable property.

Heirs	***Shares***	***Total***	***Reduced to***
H	= 1/4= 3/12		3/15
F	= 1/6= 2/12	15/12	2/15
M	= 1/6= 2/12		2/15
D1 + D2 + D3	= 2/3= 8/12	8/15	

Illustration (ii): A Muslim man dies and leaves behind his widow *W*, two full sisters S1 and S2 and parents *M* and *F*.

Heirs	***Shares***	***Total***	***Reduced to***

W	= 1/8= 3/24		3/27
S1+S2	= 2/3= 16/24	27/24	16/27
M	= 1/6= 4/24		4/27
F	= 1/6= 4/24		4/27

Illustration (iii): A Sunni Muslim woman dies and is survived by her husband *H*, mother *M* and a full sister S1 .

Heirs	***Shares***	***Total***	***Reduced to***
H	= 1/2= 3/6		3/7
M	= 1/6= 1/6	7/6	1/7
S1	= 1/2= 3/6		3/7

Illustration (iv): A Muslim woman dies and is survived by her husband *H*, and two full sisters S1 and S2 .

Heirs	***Shares***	***Total***	***Reduced to***
H	= 1/2= 3/6	7/6	3/7
S1+S2	= 2/3= 4/6		4/7

SHARERS

The heritable property in the first instance is given to the sharers. There are twelve sharers, eight females, and four males. The sharers include widow or widows,[43] mother, true grandmother,[44] daughter's son's daughter howsoever low, full,[45] consanguine[46] and uterine[47] sisters, husband, father, true grandfather[48] and a uterine brother. Though the shares of each is fixed, it may change again to another fixed share depending upon the presence or absence of other heirs. Secondly, some of the sharers can also inherit as residuaries [see Table of Sharers].

Table of Sharers

Sharers	***Normal Share***	***Conditions under which the normal share is inherited***	***Variation of shares***	
	When only one heir is present			***When two or more heirs are present***
Husband	1/4		In presence of a child or child of a son howsoever low.	1/2, in absence of a child or child of a son how low so ever
Wife	1/8	1/8	In presence of a child or child of a son how low so ever.	1/4, in absence of a child or child of a son how low so ever.
Daughter	1/2	2/3	In absence of a son.	In presence of a son she becomes a residuary.
Father	1/6		In presence of a child or child of a son how low so ever.	In absence of a child or child of a son how low so ever, the father inherits as a residuary.

Mother	1/6		In presence of a child or child of a son how low so ever, or two or more brothers or sisters, or even one full, consanguine or uterine brother and one such sister.	1/3 in absence of a child or child of a son how low so ever and not more than one brother or sister (if any); but if the wife or husband and the father, is also present then only 1/3 of what remains after deducting the share of the spouse.
True Grandfather	1/6		In presence of a child or child of a son how low so ever, and in absence of the father or a nearer true grandfather.	In absence of a child or child of a son how low so ever, the true grandfather inherits as a residuary, provided there is no father or nearer true grandfather.
True Grandmother	1/6	1/6	A maternal true grandmother takes in absence of a mother, and a nearer true grandmother and a paternal true grandmother takes in absence of a mother, father, a nearer true grandmother and an intermediate true grandfather.	
Son’s Daughter how low so ever	1/2	2/3	In absence of a son, daughter, a higher son’s son, higher son’s daughter, or an equal son’s son.	In absence of a son, higher son’s son, or an equal son ‘s son and when there is only one daughter, or higher son’s daughter the daughter or higher son’s daughter will take 1/2 and the son’s daughter how low so ever (whether one or more) will take 1/6.
(i) Son’s Daughter	1/2	2/3	In absence of a son, daughter, or son’s son.	In absence of a son or son’s son and in presence of a only one daughter the son’s daughter (whether one or more) will take 1/6. (In presence of a son’s son she becomes a residuary).
(ii) Son’s Son’s Daughter	1/2	2/3	In absence of a son, daughter, son’s son, son’s daughter, or a son’s son ‘s son.	In absence of a son, son’s son or son’s son’s son and in presence of only one

				daughter or son's daughter, the son's son's daughter (whether one or more) will take 1/6. (In presence of a son's son's son she becomes a residuary).
Uterine Brother Uterine Sister	1/6	1/3	In absence of a child, child of a son how low so ever, father or true grandfather.	
Full Sister	1/2	2/3	In absence of a child, child of a son how low so ever, father, true grandfather, or full brother.	In presence of a full brother she becomes a residuary.
Consanguine Sister	1/2	2/3	In absence of a child, child of a son how low so ever, father, true grandfather, full brother, full sister, or consanguine brother.	When there is only one full sister and she succeeds as a sharer, the consanguine sister (whether one or more) will take 1/6, if she is not otherwise excluded. (With the consanguine brother she becomes a residuary).

PRIMARY HEIRS

There are five primary heirs, who if present would not be excluded and would invariably inherit the property. They are: surviving spouse (husband/wife), son, daughter, mother and father. The son is a residuary but the rules of inheritance are so designed that he would always inherit the property. Parents also are the primary heirs and inherit along with the children and the spouse of the deceased taking their fixed shares. In the absence of primary heirs, their place is taken by their substitutes. The substitutes do not inherit in presence of primary heirs, but do so only in their absence. All heirs who are excluded by the primary heirs are also excluded by their substitutes. These substitutes are, for the father, a true grandfather, for a child, the child of a son, and for the mother, a true grandmother. The surviving spouse by the very nature of relationship cannot have a substitute.

Surviving Spouse

The share of the surviving spouse varies depending upon the presence of a child or child of a son. Where the surviving spouse is the widower or the husband of the deceased woman, he takes one-fourth (1/4th) of her property in presence of a child or the child of a son, and in their absence it is half of the total property. In case a man dies, his widow takes one-fourth (1/4th) of his property in absence of a child or child of a son, and in their presence it is one-eighth (1/8th) share. Where more than one widow is present all of them collectively will take one-fourth (1/4th) or one-eighth (1/8th) as the case may be and will divide it equally among them.

Illustration (i): A Muslim man *A* dies and is survived by his widow *W* and a son *S*.

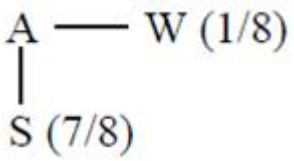

Fig. 17. 2

Here the widow will take one-eighth (1/8th) and the son as a residuary will take seven-eighth (7/8th) of the property.

Illustration (ii): A Muslim man *A* dies and is survived by two widows, *W* 1 and *W* 2, two sons S1 and S2 and one daughter *D* [see Fig. 17. 3].

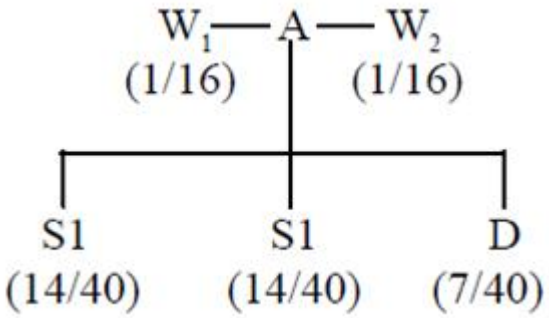

Fig. 17. 3

The two widows together would take one-eighth (1/8th) collectively and would divide it equally between them taking one-sixteenth (1/16th) each. Rest of seven-eighth (7/8th) will be so divided that the share of the daughter is half of the share of each of the son. Thus each son would take fourteen-fortieth (14/40th) and the daughter would take seven-fortieth (7/40th) of the property.

Illustration (iii): A Muslim woman dies and is survived by the husband *H* and a son and a daughter *S* and *D* [see Fig. 17. 4].

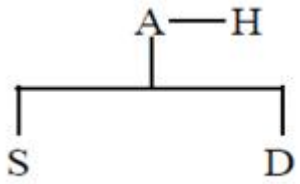

Fig. 17. 4

The husband would take one-fourth (1/4th) and three-fourth 3/4th would be divided between the son and daughter so that the share of *D* would be half of the share of the son. *D* will take one-fourth (1/4th) and *S* will get half (1/2) of the total property.

Daughter

A daughter inherits as a sharer only in absence of a son. An only daughter takes one-half share in the property, and if there are two or more daughters they would together take two-third (2/3rd) of the property. In the presence of the son she does not inherit as a sharer but becomes a residuary along with him and takes a share equal to half of his share.

Illustration (i): A Muslim woman dies and is survived by her husband *H*, and two daughters *D* 1 and *D* 2. The husband will take a fixed one-fourth (1/4th) and the two daughters together would get two-third (2/3rd) as sharers. These shares will add upto eleven-twelfth (11/12) *viz.* , 1/4 + 2/3 = 11/12. The extra one-twelfth (1/12th), in absence of any residuary would come back to the sharers under the doctrine of return or 'radd'. Since the surviving spouse is not entitled to return or radd in presence of the other sharers, this one-twelfth (1/12th) will be taken by the daughters together, and their shares would be increased to three-fourth (3/4th). Each daughter will take three-eighth (3/8th) of the property. The shares of each will be as follows:

H = 1/4

D 1= 3/8

D 2 = 3/8

Illustration (ii): A Muslim woman *A* dies and is survived by her husband *H*, two daughters *D* 1 and *D* 2 and two sons S1 and S2 [see Fig. 17. 5].

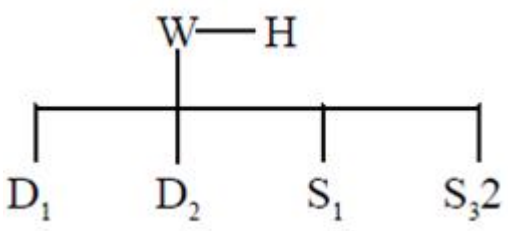

Fig. 17. 5

The husband would take a fixed one-fourth (1/4th) share as a sharer. The daughters in presence of the sons would inherit as residuaries and share of each daughter would be half of the share of each son. *D* 1 and *D* 2 will take one-eight (1/8th) each and S1 and S2 's. share would be one-fourth (1/4th) each.

The shares of each will be as follows:

H = 1/4

S 1 = 1/4

S 2 = 1/4

D 1 = 1/8

D 2 = 1/8

Father

Father is a primary heir and has a fixed one-sixth (1/6th) share as a sharer which he inherits along with a child or the child of a son. In their absence he inherits as a residuary and can take to the extent of total property in absence of any other sharer. The presence of the father excludes the brothers and sisters whether full, consanguine or uterine and a true grandfather from inheriting the property. This exclusion is based on the principle that where a person is related to the intestate through another person, he is excluded in presence of the relative, who is the connection. Brothers and sisters are father's children and would be excluded in his presence.

Illustration (i): A Muslim man, *A* dies leaving behind his father *F*, widow *W*, a brother *Br*, a son *S* and a daughter *D* [see Fig. 17. 6].

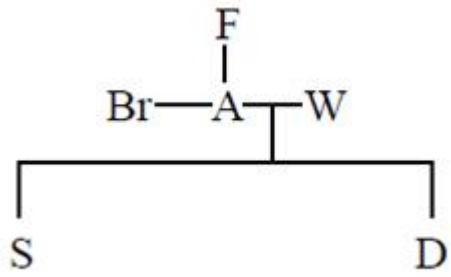

Fig. 17. 6

The presence of father here would exclude the brother from inheritance. *F* will take one-sixth (1/6th) as sharer, the widow would take one-eight (1/8th) and the residue will be divided between *S* and *D* so that *D* takes half of what *S* takes. The shares of each will be as follows:

F = 1/6

W = 1/8

S = 17/36

D = 17/72

Br = Nil

Illustration (ii): A Muslim man *A* dies leaving behind two widows, *W* 1 and *W* 2 a full sister S1 and the father *F* [see Fig. 17. 7].

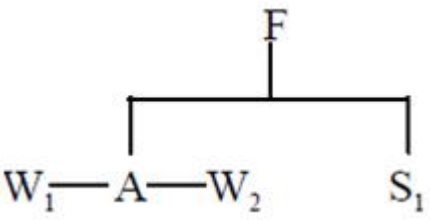

Fig. 17. 7

The two widows collectively would take one-fourth (1/4th) as there is no child or child of a son, and would divide it equally between them taking one-eighth (1/8th) each. The sister would be excluded in presence of the father, who as residuary will take 3/4th of the property. The shares of each will be as follows:

F = 3/4

W 1 = 1/8

W 2 = 1/8

S 1 = Nil

Mother

The mother's share varies considerably depending upon the presence or absence of other heirs of the deceased.

(i) Her share is a fixed one-sixth (1/6th) in presence of a child or child of a son or when there are two or more brothers or sisters or even one brother and one sister, irrespective of whether they were related to the deceased by full blood, consanguine or uterine relationship.

(ii) Her share is enhanced to one-third (1/3rd) in absence of a child or child of a son and where only one brother or sister may or may not be present.

(iii) The third situation in which her share changes is in absence of a child or child of a son, presence and absence of only one brother or sister, but presence of the spouse and the father of the deceased. Then the mother takes (1/3rd) of what remains after deducting the spouse's share. The presence of the mother excludes a true grandmother from inheriting under the rule of nearer in blood excluding the remoter.

Illustration (i): A Muslim woman *A* dies leaving behind a mother, *M* and two sons S1 and S2 [see Fig. 17. 8].

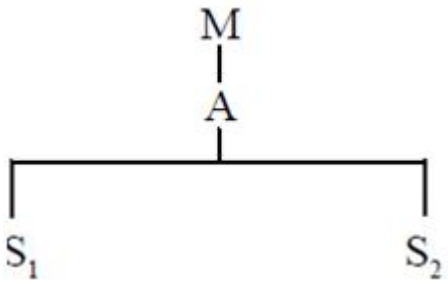

Fig. 17. 8

The mother will take one-sixth (1/6th) and the rest of five-sixth (5/6th) will be taken by the sons as residuaries, which they will divide equally between them. The shares of each will be as follows:

M = 1/6

S 1 = 5/12

S 2 = 5/12

Illustration (ii): A Muslim man *A* dies leaving behind the mother *M*, father *F*, a true grandmother *FM*, and two daughters *D* 1 and *D* 2 [see Fig. 17. 9].

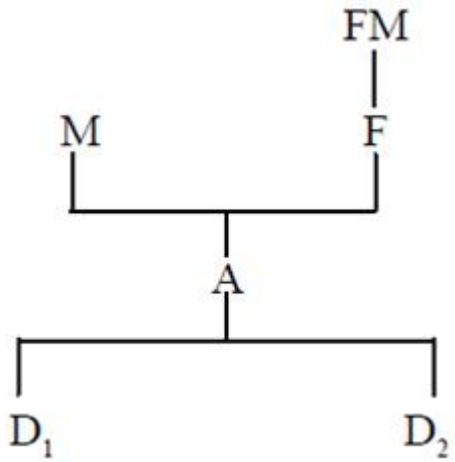

Fig. 17. 9

The mother would get one-sixth (1/6th) and would exclude the true grandmother from inheriting the property. The father would take one-sixth (1/6th) as a sharer, and the two daughters would together take two-thirds (2/3rd) and divide it equally between them each taking one-third (1/3rd).. The shares of each will be as follows:

M = 1/6

F = 1/6

D 1 = 1/3

D 2 = 1/3

FM = Nil

Illustration (iii): A Muslim woman *A* dies unmarried leaving behind her parents *M* and *F*, and two sisters *Si* 1 and *Si* 2 [see Fig. 17. 10].

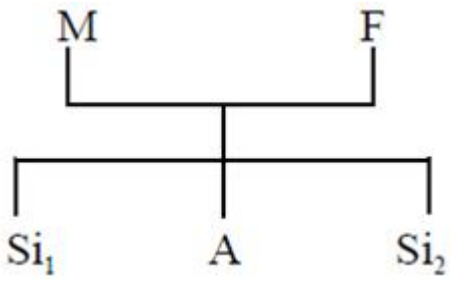

Fig. 17. 10

Here the sisters would be excluded due to the presence of the father. The mother will take one-sixth (1/6th) as the presence of two sisters would affect her share. The father would take the remaining five-sixth (5/6th) as residuary. The shares of each will be as follows:

M = 1/6

F = 5/6

Si 1 = Nil

Si 2 = Nil

Illustration (iv): A Muslim man, *A* dies and is survived by one brother *Br* and his parents *M* and *F* [see Fig. 17. 11].

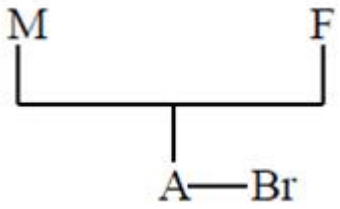

Fig. 17. 11

Here the brother would be excluded in presence of the father, but his presence and the absence of a child and the child of a son would enhance the share of the mother as one-third (1/3rd). The father would take the remaining two-third (2/3rd) as residuary. The shares of each will be as follows:

M = 1/3

F = 2/3

Br = Nil

Illustration (v): A Muslim man *A*, dies and is survived by his parents *M* and *F* and the widow *W*. [see Fig. 17. 12]

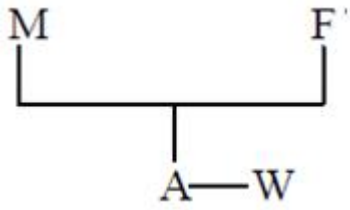

Fig. 17. 12

Here, there is no child or child of a son or brother and sisters of the deceased, so the mother might have taken one-third (1/3rd). But, due to the presence of the surviving spouse and the father of the deceased, her share would be one-third (1/3rd) of what remains after deducting the share of the spouse. The share of the spouse here is one-fourth (1/4). The remaining share is 3/4th and 1/3rd of 3/4th is 1/4th. The remaining property would be taken by the father as residuary. The shares of each will be as follows:

M = 1/4

W = 1/4

F = 1/2

Illustration (vi): A Muslim woman *W* dies and is survived by her husband *H*, mother and father *M* and *F* and a full brother *Br*. [see Fig. 17. 13]

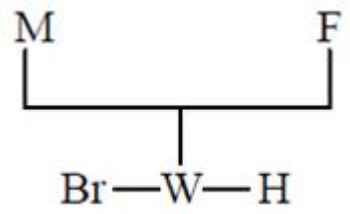

Fig. 17. 13

There is no child or child of a son and only one brother, so the share of mother would have been one-third (1/3rd). However, as the father and husband of the deceased is also present, the mother will take one-third (1/3rd) of what remains after deducting the share of the husband. His share is half as there is no child or child of a son. One-third (1/3rd) of half is one-sixth (1/6th). So the share of mother would be one-sixth (1/6th). The remaining one-third (1/3rd) will be taken by the father. The brother would be excluded in presence of the father. The shares of each will be as follows:

M = 1/6

H = 1/2

F = 1/3

Br = Nil

True Grandfather and True Grandmother How High So Ever

A true grandfather is a male ancestor between whom and the intestate no female intervenes. Following the principle of nearer in blood excluding the remoter, a true grandfather can inherit only in absence of the father or a nearer true

grandfather. For example, father's father would inherit in absence of father and father's father's father would inherit in absence of the father and also a father's father. A true grandfather has a fixed one-sixth (1/6th) share in presence of a child or the child of a son. But in absence of a father or a nearer true grandfather he inherits as a residuary in absence of a child or the child of a son.

A true grandmother is a female ancestor, between whom and the intestate no false grandfather intervenes. A true grandmother can be maternal (mother's mother) or paternal (father's mother, father's father's mother). A maternal true grandmother inherits a fixed one-sixth (1/6th) share in absence of the mother and a nearer true grandmother either maternal or paternal. A paternal true grandmother can inherit a fixed one-sixth (1/6th) share is in absence of both the mother and father and a nearer true grandmother either paternal or maternal and no intermediate true grandfather. Where two true grandmothers are present, they collectively take one-sixth (1/6th) and divide it equally amongst them.

Illustration (i): A Muslim man *A*, dies and is survived by his father's father *FF*, and father's mother *FM*. His father had predeceased him. [see Fig. 17. 14]

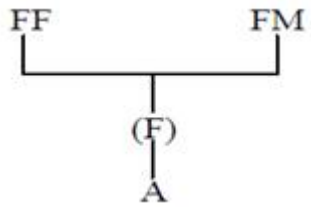

Fig. 17. 14

The true grandmother would take one-sixth (1/6th) and the father's father would take five-sixth (5/6th) as a residuary.

Illustration (ii): A Muslim woman *W* dies leaving behind her mother's mother *MM*, her father's mother *FM*, and her mother's father's mother, *MFM*, and her father's father *FF*. Her own parents *M* and *F* had predeceased her. Here *MFM*, is a false grandmother. She is not a sharer but a distant kindred. *MM* and *FM* would together would take one-sixth (1/6th) of the property taking one-twelfth (1/12th) each.

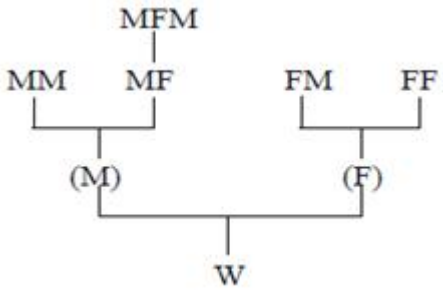

Fig. 17. 15

FF would take five-sixth (5/6th) as a residuary. The shares of each will be as follows:

MM = 1/12

FM = 1/12

FF = 5/6

MFM = Nil

Sons' Daughter (How Low So Ever

The sharer category does not include all grandchildren but includes only the daughter of a son. Children of a

predeceased daughter are distant kindred and can inherit only in absence of sharers (other than spouse of the deceased) and the residuaries. Even a daughter of a predeceased son of a predeceased son is included as a sharer. A son's daughter inherits as a sharer only in absence of a son, a daughter or a son's son. Her share is half (1/2) if she is alone, and it is two-third (2/3rd) where there are two or more daughters of the son. If a son's son is also present then she inherits as a residuary with him taking a share that equals half of what he takes. Under the rules of inheritance, the rule of nearer in blood excluding the remoter is followed strictly. Here, however, if only one daughter of the intestate is alive but no son or a son's son, a son's daughter would take one-sixth (1/6th) of the property.

Son's Son's Daughter

A son's son's daughter inherits as a sharer in absence of a son, daughter, son's son or son's daughter and son's son's son. Her share is when she is alone and two-third (2/3rd) when there are more than one, which they divide equally amongst themselves. With a son's son's son, she would become a residuary taking a share that is equal to half of his share. Here also though the rule of nearer excluding the remoter applies, in presence of only one daughter or one son's daughter, son's son's daughter (whether one or more) would take one-sixth (1/6th) of the property.

Illustration (i): A Muslim male *A*, dies and is survived by his widow *W*, a daughter *D*, a son S and a son's daughter *SD* [see Fig. 17. 16].

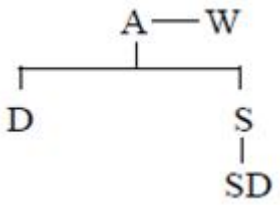

Fig. 17. 16

Here son's daughter would be excluded by the son. *W* will take one-eighth (1/8th) as children are present and the remaining seven-eighth (7/8th) would be so divided that *D* takes half of what *S* takes. The shares of each will be as follows:

W = 1/8

D = 7/24

S = 7/12

Illustration (ii): A Muslim female *W* dies leaving behind her father *F*, mother *M* and two son's daughters *D* 1 and *D* 2 [see Fig. 17. 17].

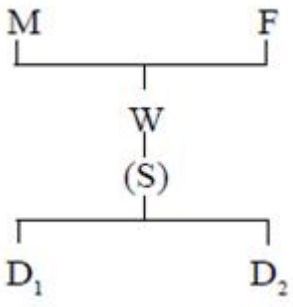

Fig. 17. 17

The mother and the father would take one-sixth (1/6th) each, and both the daughters of the son will take two-third (2/3rd) and would divide it equally *i. e.* , one-third (1/3rd) each. The shares of each will be as follows:

M = 1/6

F = 1/6

D 1 = 1/3

D 2 = 1/3

Illustration (iii): A Muslim man *A* dies and is survived by his parents *M* and *F*, one daughter *D* and a son's daughter *SD* [see Fig. 17. 18].

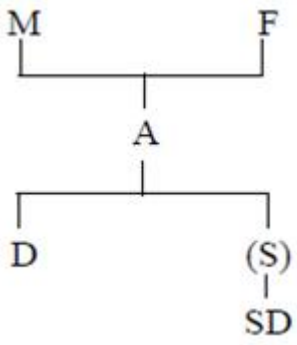

Fig. 17. 18

The mother and father would take one-sixth (1/6th) each as sharers. The daughter as she is alone will take half (1/2) and in presence of only one daughter, the son's daughter would take one-sixth (1/6th). The shares of each will be as follows:

M = 1/6

F = 1/6

D = 1/2

SD = 1/6

Illustration (iv): A Muslim woman *W*, dies and is survived by her parents *M* and *F* and two son's daughters, *SD* 1 and *SD* 2 and son's son's daughter *SSD* [see Fig. 17. 19].

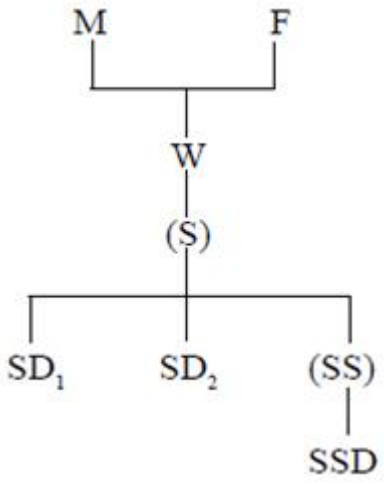

Fig. 17. 19

Here *M* and *F* will take one-sixth (1/6th) each, and *SD* 1 and *SD* 2 will get a collective two-thirds (2/3rd), that they would divide equally. Since two of them are present, *SSD* would be excluded in their presence.

Uterine Brother and Sister

Uterine brothers and sisters share a common mother with the deceased but they are from different fathers. The shares of both *vis-a-vis* the other is same. The share of one is one-sixth (1/6th) and if more than one is present, then they together take one-sixth (1/3rd). Their turn to inherit comes in absence of a child, child of a son how low so ever, father or a true grandfather.

Illustration (i): A Muslim man *A* dies and is survived by his mother *M*, two full sisters *Si* 1 and *Si* 2 and a uterine brother *UBr*.

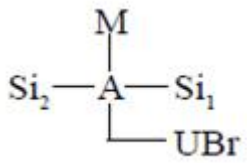

Fig. 17. 20

Both the sisters would take two-third (2/3rd) collectively and would get one-third (1/3rd) each; their presence will restrict the share of the mother to one-sixth (1/6th), and *UBr* would take one-sixth (1/6th) of the property. The final shares will be:

M = 1/6

Si 1 = 1/3

Si 2 = 1/3

UBr = 1/6

Illustration (ii): A Muslim woman *W*, dies and is survived by a uterine brother *UBr*, a uterine sister *USi* and two full sisters *Si* 1 and *Si* 2.

UBr — USI – (W) – Si1 – Si2

Uterine brother and sister together will take one-third (1/3rd), taking one-sixth (1/6th) each, and the two sisters would take two-third (2/3rd), each taking 1/3rd. The shares of each will be as follows:

UBr = 1/6

USi = 1/6

Si = 1/3

Si 2 = 1/3

Sisters

A full sister takes half share in the property when she is alone and if there are more than one, they together take two-third (2/3rd). She inherits this share as a sharer only in absence of a child, child of a son, father, true grandfather or a full brother. With a full brother she becomes a residuary taking half of what is his share. Her presence also affects the share of the mother.

A consanguine sister is excluded in presence of all the above mentioned relations whose presence excludes a full sister from inheriting the property. In addition, a consanguine sister is also excluded by a full brother and sister or even a consanguine brother. In presence of a consanguine brother she inherits as a residuary taking half of what is his share. Where there is only one full sister and she inherits as a sharer, the consanguine sister (whether one or more) would not be excluded in her presence but will take one-sixth (1/6th) (alone or collectively as the case may be) provided she is otherwise eligible to inherit.

Illustration (i): A Muslim man *H*, dies leaving behind two consanguine sisters and two uterine sisters. The consanguine sisters will together take two-third (2/3rd), taking one-third (1/3rd) each and the uterine sisters will take one-sixth (1/6th) each, a collective of one-third (1/3rd).

Illustration (ii): A Muslim man dies leaving behind a full sister, a full brother, and a consanguine sister. Here the consanguine sister would be excluded in presence of the former two. Only one full sister is present but because she in presence of the full brother would inherit as a residuary and not as a sharer, the consanguine sister will not get anything. The full sister will take one-third (1/3rd) and the full brother would take two-third (2/3rd) of the property.

RESIDUARIES

The second category comprises the residuaries, who are primarily male agnates of the deceased. Certain females who are sharers can also inherit as residuaries in some cases.

Residuaries take from the residue that is left after the sharer's claim is satisfied. If no sharer is present then the entire property will be taken by the residuaries and so long as a single residuary is present the property does not go to the third category of heirs namely 'Distant kindred'. The shares of residuaries are not fixed and its quantum is dependent upon the residue left in each case. Residuaries are divided into four groups *viz.* , descendants, ascendants, descendants of father and descendants of true grandfather how high so ever.

Descendants

Residuary descendants are son and after him son's son how low so ever. The rules governing inheritance, the placement and entitlement of the sharers and the quantum of their shares is such that although the son takes as a residuary he would always inherit. In presence of the son, the daughter does not inherit as a sharer, but becomes a residuary along with him taking a share that is equal to half of his share.

Illustration (i): A Muslim male dies leaving behind a son *S,* a daughter *D* and the widow *W*.

Here *W* is a sharer, and in the first place she would be given one-eighth (1/8th) share. The residue *i. e.* , 1–1/8 = 7/8 will pass to the residuaries. The daughter in presence of the son will take as a residuary. This seven-eighth (7/8th) would be so divided that the son takes a double portion than the daughter.

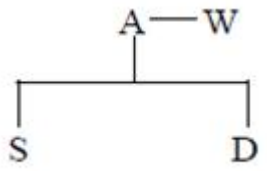

Fig. 17. 21

Final shares will be:

W = 1/8

S = 14/24

D = 7/24

Illustration (ii): A Muslim female *W* dies and is survived by her father *F*, husband *H*, a daughter *D* and a son *S* [see Fig. 17. 22].

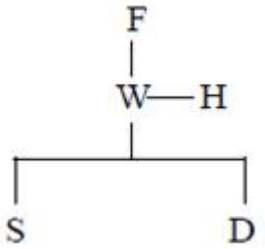

Fig. 17. 22

F will take one-sixth (1/6th) as a sharer, and *H* will be given one-fourth (1/4th). The residue will be 1–(1/6+1/4) = 7/12. As the daughter would also inherit as a residuary, this seven-twelfth (7/12th) would be divided between *S* and *D*, *S* taking a double share than that of D. Final shares would be:

F = 1/6

H = 1/4

S = 14/36

D = 7/36

Son's Son How Low So Ever

In absence of a son, a son's son inherits as a residuary. As the principle of representation is not recognised, and the rule of nearer in blood excluding the remoter applies, a lower son's son cannot inherit in presence of a higher son's son *viz.* , a great-grandson cannot inherit if the grandson is alive. If a daughter and a son's son are present, daughter would inherit as a sharer and the son's son as a residuary. The same rule is applicable in case of a higher son's daughter and a lower son's son. If only a son's daughter and a son's son are present, son's daughter would become a residuary with him taking a share that equals to half of his share.

Illustration (i): A Muslim male *A* dies and is survived by two daughters, *D* 1 and *D* 2 a son's son *SS* and a son's daughter *SD*. His son had predeceased him [see Fig. 17. 23].

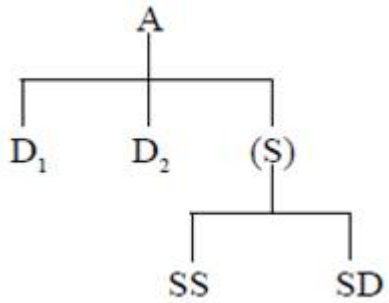

Fig. 17. 23

D 1 and *D* 2 will together take two-thirds (2/3rd) as sharers. The residue will be 1–2/3 = 1/3. This one-third (1/3rd) would be divided between *SS* and *SD* so that *SS* gets a double share than *SD*. The shares of each would be:

D 1 = 1/3

D 2 = 1/3

SS = 2/9

SD = 1/9

Illustration (ii): A Muslim female *A* dies and is survived by a son's daughter *SD* and a son's son's son *SSS* [see Fig. 17. 24].

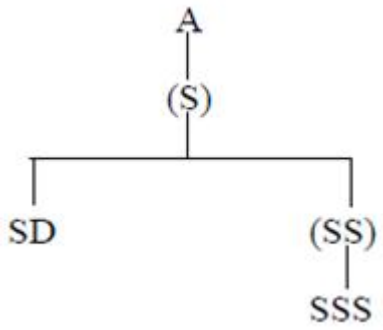

Fig. 17. 24

SD will take half of the property as a sharer and *SSS* will take the other half as a residuary.

Illustration (iii): A Muslim man *A* dies leaving behind a daughter *D*, a son's daughter *SD*, a son's son's daughter *SSD* and a son's son's son *SSS* [see Fig. 17. 25]. Even though the principle of nearer in degree excluding the remoter applies, here *D* and *SD* would inherit as sharers. *D* will take half as a sharer. In presence of only one daughter, *SD* will take one-sixth (1/6th). The residue therefore would be 1–(1/2–1/6) = 1/3. Out of this one-third (1/3rd), *SSS* and *SSD* will inherit as residuaries, *SSS* will take two-ninth (2/9th) and *SSD* will take one-ninth (1/9th).

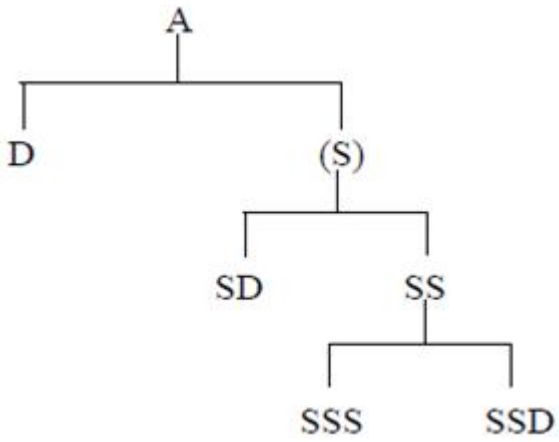

Fig. 17. 25

Ascendant Residuaries

The father's, and in his absence the true grandfather's position is unique as they can inherit both as a sharer as well as a residuary at the same time. In presence of a child and child of a son, the father inherits as a sharer taking one-sixth (1/6th) and in their absence as a residuary. In presence of only daughters or son's daughters, but no son or son's son, he would inherit both as a sharer as well as a residuary. A true grandfather can inherit only in absence of the father.

Illustration (i): A Muslim male *A* dies and is survived by his father *F*, a son *S* and a daughter *D* [see Fig. 17. 26].

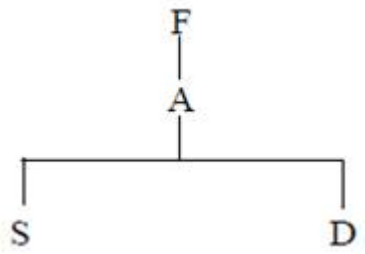

Fig. 17. 26

Here as the son is present, the father would take one-sixth (1/6th) as a sharer and the son and daughter will inherit as residuaries. The shares would as follows:

F = 1/6

S = 10/18

D = 5/18

Illustration (ii): A Muslim woman *W*, dies leaving behind two daughters *D* 1 and *D* 2 and a father *F* [see Fig. 17. 27]. *D* 1 and *D* 2 will take two-third (2/3rd) as sharers and the father would take one-sixth (1/6th) as a sharer.

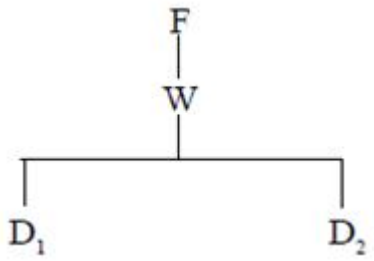

Fig. 17. 27

The residue of 1–(2/3+1/6) = 1/6 would again be taken by the father as a residuary. The shares of each heir would be as follows:

D 1 = 1/3

D 2 = 1/3

F = 1/6 + 1/6

= 1/3

Illustration (iii): A Muslim man *A* dies leaving behind his widow *W*, and his father *F* [see Fig. 17. 28].

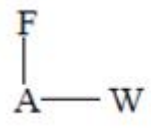

Fig. 17. 28

The widow would take one-fourth (1/4th) as there is no child or child of a son and the father would take three-fourth (3/4th) as a residuary.

The true grandfather inherits in the same manner as a father, but can do so only in his absence.

Descendants of Father

In default of a son, son's son how low so ever, the father and the true grandfather, the residue would pass to the descendants of the father in the following order:

(i) ***Full brother and with him a full sister*** *:* A full brother inherits in absence of a son, the father and a true grandfather. A full sister ordinarily inherits as a sharer, but in presence of a full brother becomes a residuary with him, taking half of what his share is. In absence of a full brother and all the preceding residuaries, a full sister would take the residue if there are daughter/s or son's daughter/s how low so ever and even if there is only one daughter and one son's daughter how low so ever.

(ii) ***Consanguine brother:*** A consanguine brother takes the residue in absence of all the preceding male residuaries. With him, a consanguine sister also becomes a residuary taking a share that equals to half of his share. A consanguine sister is entitled to the residue as well if there are only daughter/s and son's daughter/s how low so ever or even one daughter and one son's daughter how low so ever.

(iii) ***Sons of full and consanguine brother:*** In absence of a full and consanguine brother in this category, the son of a full brother would inherit as a residuary, followed by the son of a consanguine brother and then their son's son in the same order how low so ever.

Illustration (i): A Muslim man *A* dies leaving behind his widow *W*, a brother *Br* and a sister S1 .

Br (1/2) – Si(1/4) – A – W (1/4)

Here the widow *W*, takes one-fourth (1/4th) as a sharer. The residue of three-fourth (3/4th) would be taken by the full brother and full sister in the ratio of 2:1.

Illustration (ii): A Muslim woman *W* dies leaving behind a full sister *Si*, a daughter *D*, and a son's daughter *SD* [see Fig. 17. 29].

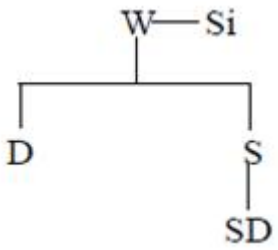

Fig. 17. 29

Here *D* would take half (1/2) as a sharer, *SD* would again take one-sixth (1/6th) as a sharer and the residue of one-third (1/3rd) would be taken by the full sister.

The residuaries are entitled to the residue only when some residue is left after the satisfaction of the claims of the sharers. If no residue is left, then the residuaries would not inherit anything.

Illustration (iii): The survivors of a Muslim woman *W* are her husband *H*, mother *M*, a daughter *D*, a son's daughter *SD* and a full sister *Si* [see Fig. 17. 30]. Here if we add the shares of all sharers, *H* getting one-fourth (1/4th), *M* taking one-sixth (1/6th) while *D* and *SD* will take half and one-sixth (1/6th) respectively, the shares exceed unity *i. e.* , 13/12

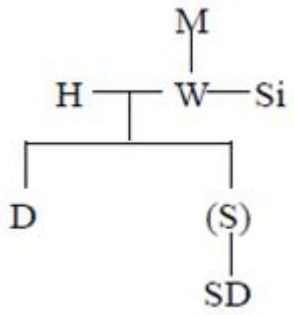

Fig. 17. 30

They will be proportionately reduced, but as there is no residue the sister would not get anything. The shares of each would be as follows:

M = 2/13

H = 3/13

D = 6/13

SD = 2/13

Si = Nil

Illustration (iv): A Muslim dies and is survived by his consanguine brother *Br*, and a full brother's son *BrS*. Here *BrS* would be excluded by the consanguine brother as he is a higher residuary, who alone will take the whole property.

Descendants of True Grandfather How High So Ever

In absence of the higher residuaries, the descendants of the true grandfather in the following order would inherit the residue, if any *viz.* , full paternal uncle, consanguine paternal uncle, full paternal uncle's son, consanguine paternal uncle's son, full paternal uncle's son's son, consanguine paternal uncle's son's son and so on in the same order. They would be followed by the male descendants of the remoter true grandfathers.

Classification of Residuaries according to the Sirajiyyah

An authority on Sunni law of inheritance the Sirajiyyah classifies residuaries into three categories namely, residuaries in their own right, comprising male agnates; residuaries in the right of another, that includes those females who become residuaries in presence of their male counterpart, a daughter with a son, a sister with the brother; and residuaries with others, such as a full and consanguine sister with daughter and son's daughters.

DISTANT KINDRED

The third category of heirs are called distant kindred. It comprises all cognates of the deceased, except those who are included in the sharer category. The turn of distant kindred to inherit comes only when none of the sharers (except the surviving spouse) or the residuaries is present. In presence of the surviving spouse of the deceased, the property that is left after allotting the share to him/her passes to the distant kindred, if any. If none of the distant kindred is present, then alone the property reverts to the spouse who takes it under the doctrine of radd or return. The distant kindred are divided into four classes *viz.* descendants, ascendants, descendants of parents and descendants of immediate grandparents and descendants of remoter ancestors how high so ever. Similar to Hindu law under Muslim law also, there is no limitation on the number of degrees or generations an heir may be removed from the deceased.

Descendants of the Deceased

Some of the descendants of the deceased are included under the category of sharers and residuaries. They are sons and daughters and son's sons how low so ever and son's daughters how low so ever. It should be noted here that while the descendants of sons or son's sons how low so ever are in the first two categories, daughter's descendants are distant kindred and can inherit only in absence of all residuaries. The order of distribution of property among descendant distant kindred is subject to six rules *viz*.

Rule 1

The nearer in degree excludes the remoter.

Rule 2

Amongst claimants in the same degree descendants of sharers and residuaries are preferred to the descendants of distant kindred; and therefore the order of succession would be as follows: daughter's children, son's daughter's children, daughter's grandchildren and son's daughter's grandchildren and so on.

Illustration (i) : A Muslim male *A* dies leaving behind a son of a predeceased daughter *DS* and a paternal true grandfather's son's son's son's son (*SSSS*) [see Fig. 17. 31]. Here *SSSS* is a residuary while *DS* is a distant kindred.

SSSS would take the total property to the complete exclusion of *DS*.

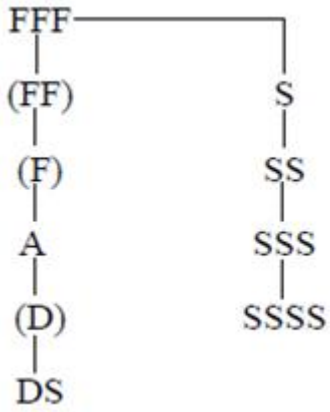

Fig. 17. 31

Illustration (ii): A Muslim male *A* dies and is survived by a daughter's son *DS* and a son's daughter's son *SDS* [see Fig. 17. 32].

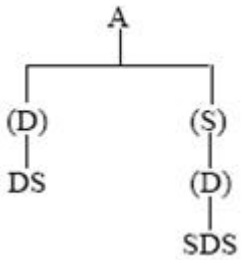

Fig. 17. 32

DS who is nearer in degree would exclude *SDS* who is remoter and take the total property.

Illustration (iii): A Muslim male *A* dies and is survived by a son's daughter's son *SDS* and a daughter's daughter's

son *DDS* [see Fig. 17. 33]. Here *SDS* would be preferred to daughter's daughter's son even though both of them are in the same degree as the former is a descendant of a sharer and the later a descendant of a distant kindred.

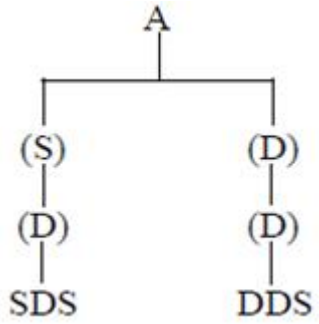

Fig. 17. 33

Rule 3

Where all the heirs are in the same degree and the sex of their ancestors through whom they are connected to the deceased is same, the heirs take per capita, with males and females taking in the ratio of 2:1.

Illustration: *A* dies leaving behind a daughter's daughter's son *DDS* and two daughter's daughter's daughters, *DDD* 1 and *DDD* 2 [see Fig. 17. 34].

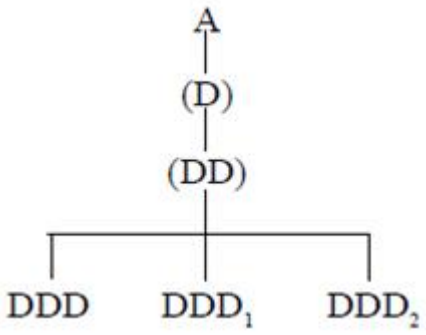

Fig. 17. 34

Here *DDS* will take half (1/2), and the share of *DDD* 1 and *DDD* 2 would be one-fourth (1/4th) each.

Rule 4

Where the sex of the ancestors through whom the descendant heirs are related to the deceased is different, at the stage of difference, the property is to be divided in the ratio of 2:1 *i. e.* , the double portion going to the male descendant's line, and these shares will then be taken by the descendants irrespective of their sexes.

Illustration: *A* dies and is survived by his daughter's daughter's son, *DDS* and a daughter's son's daughter *DSD* [see Fig. 17. 35].

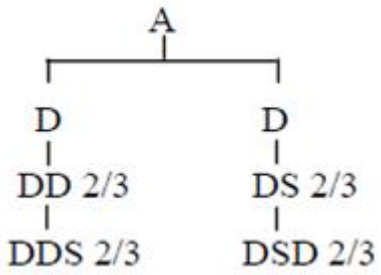

Fig. 17. 35

Here the property would be divided in the ratio of 2:1 at the stage of grandchildren-giving to daughter's son's line a double portion in comparison to the daughter's daughter's line. Thus the daughter of daughter's son will take two-third (2/3rd) and son of daughter's daughter will take one-third (1/3rd).

Rule 5

Where there are three or more heirs, each in a different line of descent, and the sex of the ancestors through whom they are related to the intestate also differs, then the rule is to stop at the first stage of difference in the sex and to divide the property in the ratio of 2:1 in favour of a male. The next step is to allot the shares of such male ancestors in one pool and of female ancestors in another pool. These pooled shares descend to the descendants, and if the sex of the descendants differ, then again, this share is divided in 2:1 ratio, male descendants getting a double portion.

Illustration (i): *A* dies and is survived by one daughter of a daughter's son *DS* 1*D*, one daughter of a daughter's daughter *DD* 1*D* 1, one son of a daughter's son *DS* 2*S*, and a son of a daughter's daughter *DD* 2*S* [see Fig. 17. 36].

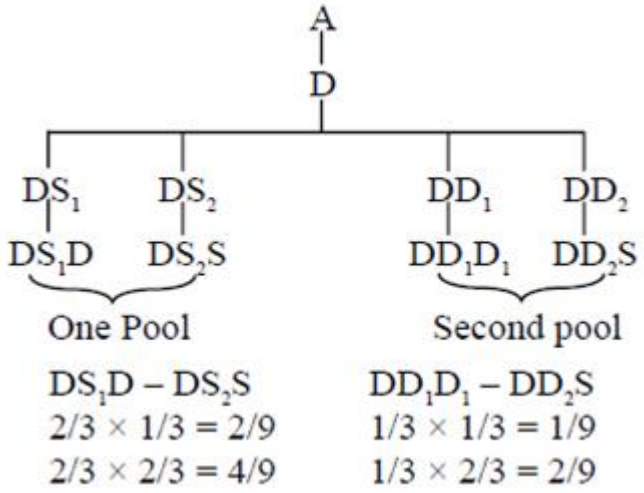

Fig. 17. 36

Here the property would be divided in 2:1 ratio at the stage of grandchildren, where the sex of the ancestors of the heirs is different. The two sons of daughters would together constitute one pool and will be allotted two-third (2/3rd), and the two daughters of daughters would form another pool and will be allotted one-third (1/3rd).

Out of this two-third (2/3rd), *DS* 1*D* and *DS* 2*S* will take the property again in 1:2 ratio, the male taking a double portion. Similarly out of the one-third (1/3rd) coming to *DD* 1*D* 1 and *DD* 2*S*, the shares would be so allocated that the female gets half of the share of the male. The final shares would be as follows:

DS 1*D* = 2/9

DS 2*S* = 4/9

DD 1*D* 1 = 1/9

DD 2*S* = 2/9

Rule 6

Where two or more heirs claim through the same immediate ancestors, and these ancestors are two or more and of different sexes, then the rule is to count one ancestor as not one but corresponding to the number of descendants, and allot the shares in the ratio of 2:1 at this stage. The shares so allotted will be distributed among the heirs again, males taking a double share than females.

Illustration (i): *A* dies and is survived by a son and a daughter of his daughter's daughter and two daughters and one son of his daughter's son [see Fig. 17. 37].

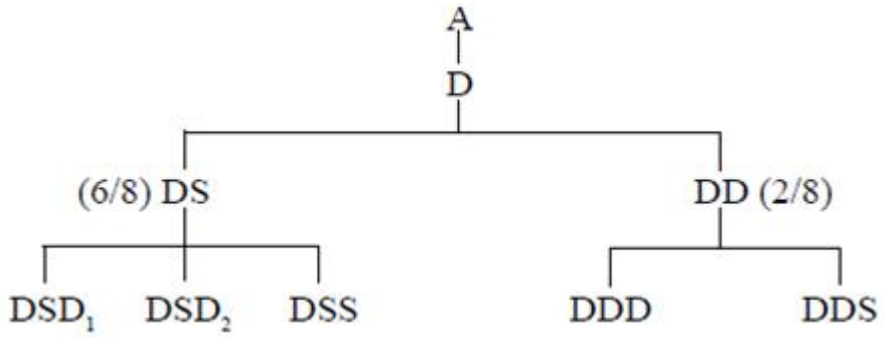

Fig. 17. 37

Here the second generation *i. e.* , at the stage of *DD* and *DS* the property will be divided. *DS* a male, will be counted as three males, which is equal to the number of his descendants, and *DD*, a female would be counted as two females. The property will be divided as if there are two females and three males *i. e.* , *DD*'s branch will be allotted two-eighth (2/8th) and *DS*'s branch would be given six-eight (6/8th). The two-eight (2/8th) given to the branch of *DD* would be divided in such a manner, so that *DDD* (daughter) would get half of the share of *DDS* (son). They would take two-twentyfourth (2/24th) and four-twentyfourth (4/24th) respectively. The six-eighth (6/8th) allotted to the branch of *DS* would be divided in such a manner so that the males take a double portion than females. Out of this six-eighth (6/8th), *DSD* 1 will get three-sixteenth (3/16th), *DSS* will take three-eight (3/8th) and *DSD* 2 will get three-sixteenth (3/16th).

Ascendants

Ascendants of the deceased other than those who are included in the sharer and residuaries categories *i. e.* , true grandmother and true grandfather inherit as distant kindred. This category covers all false grandmothers and all false grandfathers. The property passes to this class in absence of the descendant's distant kindred. The nearest ancestor in this group is the mother's father, and if he is present, he takes the entire property. Failing him the property would go to the ancestors in the third degree and here those claiming through the sharers are preferred to those who claim through the distant kindred. Ancestors claiming through sharers would be father's mother's father (*FMF* and mother's mother's father *MMF*. As between the two of them, *FMF* is an ancestor on the paternal side and *MMF* is an ancestor on the maternal side. Therefore *FMF* will take double than the share of *MMF*.

In absence of the above ancestors the property will be taken by the other ancestors, namely father of mother's mother and mother of mother's father. Here the former being a male will take two-third (2/3rd) and the later being a female will get (1/3rd) one-third.

Descendants of Parents other than Sharers and Residuaries

This class comprises daughters of full and consanguine brothers and sisters and their descendants how low so ever

and descendants of uterine brothers and sisters how low so ever. The heirs take the property in accordance with the following rules:

(i) The heir who is nearer in degree would exclude the remoter heir.

(ii) When the heirs are in the same degree of relationship, the one who is related to the deceased through a residuary would be preferred to the one related to the deceased through a distant kindred.

(iii) Where the heirs are in the same degree and are related through a residuary or when both or all are related through distant kindred, descendants of full brother would exclude the consanguine brother's and sister's descendants, but would not exclude the descendants of uterine brothers or sisters.

These descendants of parents would be grouped in the following order, each prior category excluding the remoter:

(a) Daughters of full brothers; children of full sisters, of uterine brothers and of uterine sisters.

(b) Children of full, consanguine and uterine sisters, and of uterine brothers and consanguine brother's daughter.

(c) Children of uterine brothers and sisters, and of consanguine sister and daughters of consanguine brothers.

(d) Daughters of full brother's sons.

(e) Daughters of consanguine brother's sons.

(f) Grandchildren of full sisters, of uterine brothers and sisters and children of full brother's daughter.

(g) Grandchildren of full, consanguine or uterine sisters and of uterine brothers and children of consanguine brother's daughters.

(h) Grandchildren of consanguine, of uterine sisters, of uterine brother and children of consanguine brother's daughters.

(i) Remoter descendants of brothers and sisters in similar order.

In class (b) and (g) the consanguine group takes the residue, if any.

RULES FOR ALLOTMENT OF SHARES

For distributing the shares of descendants of brothers and sisters, the following three rules are adhered to:

(i) As the heirs are descendants of brothers and sisters, these brothers and sisters are treated as the origin or the roots of the heirs. The first step is to divide the property among roots. Each brother and sister is counted by the number of his descendants. For example, a brother having three descendants would be counted as three brothers, and a sister having four descendants would be equal to four sisters. If there is no full or consanguine brother among the roots, (*i. e.* , there is no residuary) then the doctrine of return or radd is applied.

(ii) Once the shares of the roots are determined, the uterine group is then assigned the shares. Uterine brothers and sisters would also be counted in terms of the number of their descendants. But here since the share is fixed, if there is one descendant only he/she will get one-sixth (1/6th) and two or more collectively will be given one-third (1/3rd).

(iii) These shares of the roots are divided among their descendants.

Descendants of Grandparents (True or False)

Where the higher distant kindred mentioned in the first three classes are not present the estate passes to the descendants of grandparents. This group contains the paternal and maternal uncles and aunts of the deceased and their descendants (other than those already included under the residuaries category), paternal and maternal uncles and aunts of the grandparents of the deceased and their descendants and other relations in similar order.

RULES FOR DISTRIBUTION OF PROPERTY AMONG UNCLES AND AUNTS

(1) The paternal side, even if only one heir is present, is given two-third (2/3rd) and the maternal side is given one-third (1/3rd) of the property.

(2) On the paternal side,

(3) full paternal aunts are to be allotted the property in equal shares. In their presence the consanguine and uterine relations are excluded;

(4) consanguine paternal aunts take in absence of full paternal aunts, and share equally;

(5) if no aunts in (a) and (b) category are present the property will pass to uterine uncles and aunts, and here the rule of males taking a portion double of females would apply.

(6) On the maternal side the one-third (1/3rd) is to be divided among maternal uncles and aunts, so that each uncle takes a double share than each aunt. Here again full maternal uncles and aunts would exclude consanguine uncles and aunts, who in turn would exclude the uterine uncles and aunts.

(7) The rule of the paternal side taking two-third (2/3rd) and maternal side taking one-third (1/3rd) applies only in those cases where uncles and aunts on both sides are present. If the uncles and aunts of only one side are present, that side would take the whole property.

RULES FOR DISTRIBUTION OF PROPERTY AMONG DESCENDANTS OF UNCLES AND AUNTS

The rules for distribution of property among the descendants of uncles and aunts are similar to the one specified above for uncles and aunts. Here also paternal side is allotted two-third (2/3rd) and maternal side gets one-third (1/3rd) of the property. However, as sons and son's sons how low so ever of full paternal uncles are residuaries the order of preference is as follows:

(a) Paternal side (2/3rd)

(b) daughters of full paternal uncle;

(ii) children of full paternal aunt;

(iii) daughter of consanguine paternal uncle;

(iv) children of consanguine paternal aunt; and

(v) children of uterine paternal uncles and aunts.

(b) Maternal side (1/3rd)

(i) children of full maternal uncles and aunts;

(ii) children of consanguine maternal uncles and aunts.

(iii) children of uterine maternal uncles and aunts.

In the absence of children of uncles and aunts, their grandchildren will take the property in accordance with the same rules.

If there are no descendants of uncles and aunts, the property would devolve on remoter or higher uncles and aunts and then their descendants.

SUCCESSORS NOT RELATED BY BLOOD

Heirs who are not related to the deceased by blood are grouped in three categories and inherit in default of sharers, residuaries and distant kindred. They are as follows:

(i) ***Successor by contract*** **:** A person may derive his right of succession under a special kind of contract with the deceased by the successor, such as payment of a monetary liability of the deceased.

(ii) ***Acknowledged kinsman*** **:** If there is no successor by contract, the property can be taken by an acknowledged kinsman, but subject to the bequeathable limit of one-third (1/3rd). An acknowledged kinsman is a person of unknown descent, in whose favour the deceased makes an acknowledgement of kinship through another person such as his father *viz.* , a person may acknowledge another to be his brother. However, the acknowledgement cannot be made to him personally.

(iii) ***Universal legatee*** **:** A person to whom the whole of the property has been bequeathed under a Will is called a universal legatee. A universal legatee takes the whole of the property on failure of all the heirs.

DOCTRINE OF ESCHEAT

On failure of all the heirs and in absence of the bequest, the property of the deceased would pass to the government under the doctrine of escheat.

SHIA LAW OF INHERITANCE

INTRODUCTION

The Shias group the heirs of a Muslim deceased in two categories:

(i) consanguine heirs *viz.* related to the deceased by blood; and

(ii) relations by marriage *i. e.* , husband and wife.

Consanguine Heirs

These heirs are divided into three groups, the former excluding the later and each of these groups is sub-divided into two sub-groups. Within each group, heirs mentioned in the sub-groups inherit together and do not exclude each other. These groups and sub-groups are as follows:

I.(i)Parents

(ii)Children and other lineal descendants how low so ever

II.(i)All grandparents how high so ever

(ii)Brothers and sisters and their descendants how low so ever

III.(i)Paternal and

(ii)Maternal uncles and aunts of the deceased, and of his parents and grandparents how high so ever, and their descendants how low so ever

CLASSIFICATION OF HEIRS

Shias divide the entire group of heirs into sharers and residuaries. There is no corresponding category to distant kindred under Shia law.

SHARERS

There are nine sharers three of them are males and six are females and include the parents, surviving spouse (husband or wife as the case may be), daughter, full and consanguine sister and uterine brothers and sisters.

The descendants of daughter, full, consanguine and uterine sister and uterine brother are also sharers.

Table of Sharers

Sharers	***Normal Share***	***Conditions under which the normal share is inherited***	***Variation of shares***	
	When only one heir is present			***When two or more heirs are present***
Husband	1/4		In presence of a lineal	1/2 in absence of a

			descendant.	descendant.
Wife	1/8	1/8	In presence of a lineal descendant.	1/4 in absence of a descendant.
Father	1/6		In presence of a lineal descendant.	In absence of a descendant the father inherits as a residuary.
Mother	1/6		In presence of a lineal descendantor two or more full or consanguine brothers, or one such brother and two such sisters, or four such sisters, with the father.	1/3 in other cases.
Daughter	1/2	2/3	In absence of a son.	With the son she takes as a residuary.
Uterine brother or sister	1/6	1/3	In absence of a parent, or lineal descendant.	The full sister takes as a residuary, with the full brother and also with the father's father.
Full sister	1/2	2/3	In absence of a parent, or lineal descendant, or full brother, or father's father.	The consanguine sister takes as a residuary with the consanguine brother and also with the father's father.
Consanguine sister	1/2	2/3	In absence of a parent, or lineal descendant, or full brother or sister, or consanguine brother or father's father.	

Surviving Spouse (Husband and Wife)

On the death of a Shia female, her husband has a fixed one-fourth (1/4th) share in presence of the lineal descendants and half (1/2) share in their absence. Under Sunni law, the variation depends upon the presence or absence of children or any child of a son, but under Shia law, a child or lineal descendant (including that of the daughter) would affect the share of the surviving spouse. Where the deceased is a male, the widow takes one-eighth (1/8th) as a sharer in presence of lineal descendants and one-fourth (1/4th) in their absence.

Childless Widow

A childless widow inherits only the movable property of the deceased husband. She does not inherit the land or immovable property but is entitled to one-fourth share in the value of the trees or buildings standing upon it.[49]

Right of Spouse to the Residue

Where a Shia female dies and the only heir present is her husband, he takes half (1/2) as a sharer and the remaining half goes under the doctrine of return or radd. However where the surviving spouse is a widow, the older view was that she was entitled only to one-fourth (1/4th) share as a Quranic heir and the rest of the property would pass to the government under doctrine of escheat. The later view that has also been upheld by the courts is that a widow is entitled to one-fourth (1/4th) share as also to the rest of the property under doctrine of return.[50]

Parents

Both the father and the mother inherit along with the spouse and descendants. Father inherits as a sharer taking a fixed one-sixth (1/6th) share in presence of lineal descendants and in their absence inherits as a residuary. Mother's share is one-sixth (1/6th), in presence of lineal descendants or in presence of two or more full or consanguine brothers, or one such brother and two such sisters or four such sisters with the father. In other cases it is one-third (1/3rd).

Lineal Descendants

All lineal descendants are grouped in one category and are not spread over all the three categories of sharers, residuaries and distant kindred like under the Sunni law. Under Shia law, a daughter in absence of a son inherits as a sharer. If there is only one daughter or only one descendant of such daughter, she will take half (1/2) of the property and if there are more than two daughters or their descendants they take two-third (2/3rd) of the property. With the son, a daughter inherits as a residuary and takes a share that is equal to half of his share. The son inherits as a residuary. With respect to other lineal descendants, the following rules are applicable:

(i) Lineal descendants inherit subject to the rule of exclusion. Rule of exclusion means, nearer in degree excluding the remoter. For example, if the deceased leaves behind a son and son of another predeceased son, the son who is nearer in degree to the deceased would exclude the grandson who in his comparison is a remoter lineal descendant.

(ii) Where the heirs are the descendants of two or more children but are in the same degree of relationship to the deceased, for the purposes of calculating their shares, the rule of representation is applicable. The lineal descendants of one child would take the share that would have been inherited by their respective parent and would divide it amongst themselves, males taking a double portion than females.

(iii) Succession among the lineal descendants is per stirpes and not per capita.

Illustration (i): A Shia Muslim *A* dies and is survived by his parents, *M* and *F,* a son *S*, and two daughters *D* 1 and *D* 2 [see Fig. 17. 38].

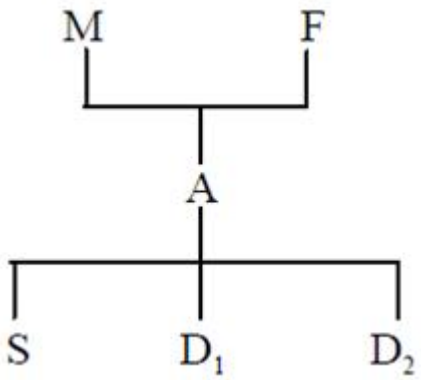

Fig. 17. 38

M and F will take one-sixth (1/6th) each as sharers. D1 and D2 will inherit as residuaries with S, and their shares would be as follows:

M = 1/6

F = 1/6

S = 1/3

D 1 = 1/6

D 2 = 1/6

Under Sunni law also the distribution would be identical.

Illustration (ii): A Shia Muslim *A* dies and is survived by his parents *M* and *F* and two sons of his daughter *DS* 1 and *DS* 2 [see Fig. 17. 39].

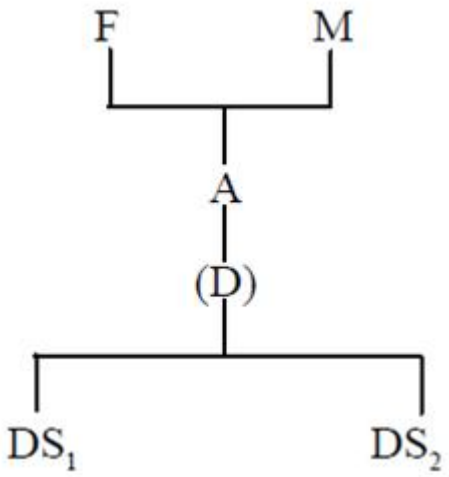

Fig. 17. 39

Here in presence of the lineal descendants, the father would take one-sixth (1/6th) as a sharer, *M* will also take one-sixth (1/6th). *DS* 1 and *DS* 2 would represent their mother and would take two-third (2/3rd) together and would divide it equally between them. The shares would be as follows:

F = 1/6

M = 1/6

DS 1 = 1/3

DS 2 = 1/3

Under Sunni law, in this case, mother would have taken one-third (1/3rd) and father would have taken two-third (2/3rd) as a residuary. Daughter's sons under Sunni law are distant kindred and would not have been entitled to inherit in presence of the sharers.

Illustration (iii): A Shia Muslim *A* dies and is survived by two daughters of a predeceased son *SD* 1 and *SD* 2 and three sons of a predeceased daughter *DS* 1, *DS* 2 and *DS* 3 [see Fig. 17. 40].

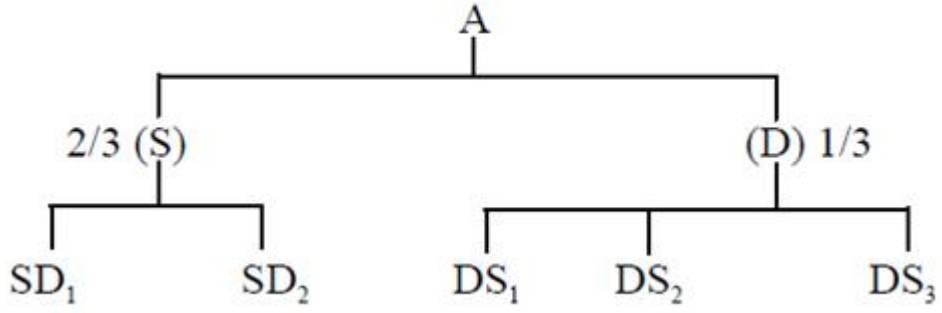

Fig. 17. 40

Here all the descendants are in the same degree of relationship with the deceased.

For the purposes of calculation of their shares we would apply the doctrine of representation. The property would be divided in such a manner that the branch of deceased son takes two-third (2/3rd) and the branch of the daughter takes one-third (1/3rd). This two-third (2/3rd) would be divided equally between *SD* 1 and *SD* 2 who would take one-third (1/3rd) each. One-third (1/3rd) would be divided equally among *DS* 1, *DS* 2 and *DS* 3, each taking one-ninth (1/9th) of the property. The shares of all the heirs will be as follows:

SD 1 = 1/3

SD 2 = 1/3

DS 1 = 1/9

DS 2 = 1/9

DS 3 = 1/9

If the deceased was a Sunni male, the three sons of the daughter would have been excluded as they would be called distant kindred. The two daughters of the son would have taken two-third (2/3rd) as sharers, and the surplus of one-third (1/3rd) under the doctrine of return.

Illustration (iv): A Shia male *A* dies and is survived by two sons of one predeceased son *SS* 1 and *SS* 2 and three sons of another predeceased son S1 S1, S1 S2 and S1 S3 [see Fig. 17. 41].

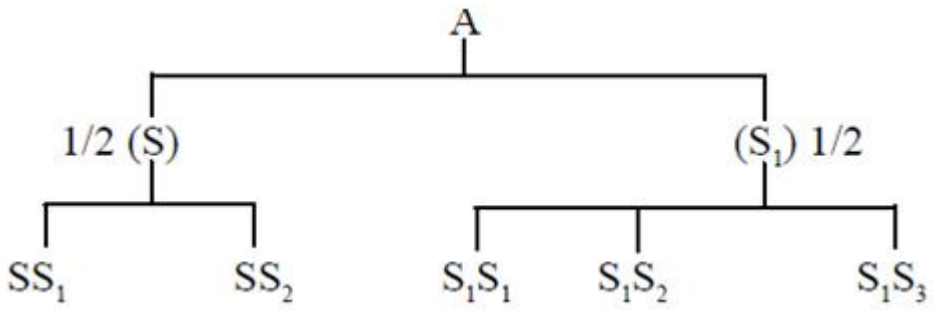

Fig. 17. 41

The property here would be divided into two equal parts, one each going to the branch of *S* and S1. Out of this half given to the branch of *S*, his two sons will share equally taking one-fourth (1/4th) each. The half going to the branch of S1 will be taken by his three sons who would take one –sixth (1/6th) each.

The shares of each heir would be as follows:

SS 1 = 1/4

SS 2 = 1/4

S 1*S* 1 = 1/6

S 1*S* 2 = 1/6

S 1*S* 3 = 1/6

If the deceased was a Sunni Muslim all grandsons would have taken one-fifth (1/5th) each following the per capita succession.

Illustration (v): A Shia Muslim *A* dies leaving behind two sons S1 and S2 and two sons of a predeceased son, *SS* 1 and *SS* 2 [see Fig. 17. 42].

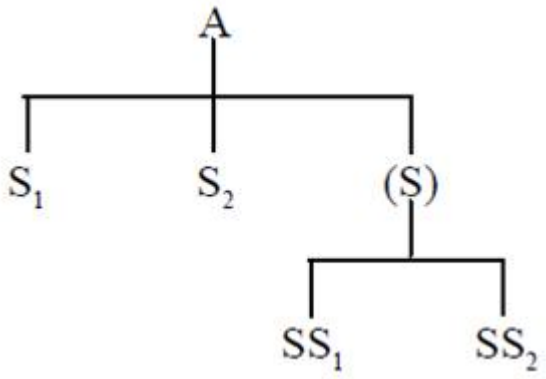

Fig. 17. 42

Due to the application of the principle of nearer in blood excluding the remoter, in presence of these two sons, grandsons would be excluded. S1 and S2 will divide the property between them taking one-half of the property.

HEIRS OF SECOND CLASS

In absence of heirs of first class namely parents, children and other lineal descendants, the heirs of second class take the property. This class comprises grandparents, brothers and sisters and their descendants. They inherit along with the surviving spouse of the deceased if any and from the share that is left after the spouse has been allotted his/her share.

Grandparents

Grandparents can be paternal or maternal and take the property in accordance with the following rules:

(i) The grandparents take the share which would have been allotted to the parents, through whom they are related to the deceased and divide it in the ratio of 2:1, males taking a twice the portion of females if on paternal side and equal portion if on maternal side.

(ii) A nearer grandparent would exclude a remoter grandparent.

(iii) On failure of nearer grandparents the remoter grandparents would stand in their shoes and will take the property in accordance with the same rule.

(iv) Where the grandparents inherit with the brothers and sisters of the deceased or their descendants, a paternal grandfather is counted as a full or consanguine brother and a paternal grandmother is counted as a full or consanguine sister. A maternal grandfather is counted as a uterine brother and a maternal grandmother is counted as a uterine sister.

Illustration (i): A Shia Muslim *A* dies and is survived by one paternal grandfather (*FF*) and one maternal grandfather *MF* [see Fig. 17. 43].

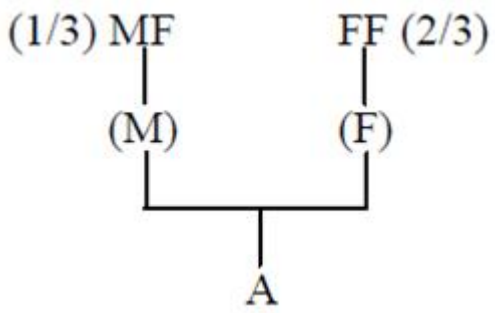

Fig. 17. 43

Here, the share of the mother and the father would have been one-third (1/3rd) and two-third (2/3rd) respectively. *MF* (mother's father) would take the share that mother would have taken had she been alive, and *FF* would take two-third (2/3rd) i. e., the share of father if he had been alive. The shares would be:

MF = 1/3rd

FF = 2/3rd

Illustration (ii): The survivors of a Shia Muslim *A* are maternal grandmother *MM*, father's mother *FM* and father' father *FF* [see Fig. 17. 44].

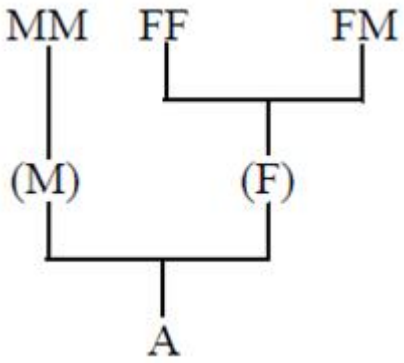

Fig. 17. 44

Here again *MM* will take one-third (1/3rd) and *FF* and *FM*, together will take two-thirds (2/3rd) of the property and divide it between them in the ratio of 2:1, father taking a twice the share of the mother. The share of each of them will be as follows:

MM = 1/3

FF = 4/9

FM = 2/9

Illustration (iii): The survivors of a Shia male *A* are his mother' mother *MM*, mother's father *MF*, father's mother *FM* and father's father *FF* [see Fig. 17. 45].

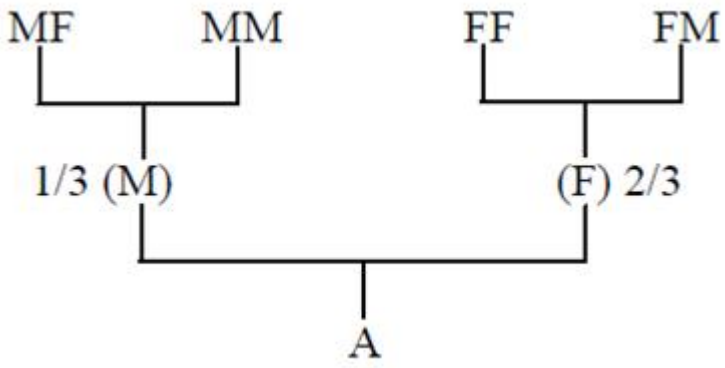

Fig. 17. 45

The maternal side will get one-third (1/3rd) and the paternal side would take two-third (2/3rd) of the property. The important fact to note here is that on the maternal side MF and MM will share equally from this one-third (1/3rd) share taking one-sixth (1/6th) each, but on the paternal side, the rule of males taking double share in comparison to

this female counterpart would apply. *FF* would take four-ninth (4/9th) and *FM* will get two-ninth (2/9). The shares of each will be as follows:

MM = 1/6

MF = 1/6

FF = 4/9

FM = 2/9

Brothers, Sisters and their Descendants

Brothers, sisters and their descendants inherit with the grandparents of the deceased, how high so ever if present. In their absence, brothers and sisters inherit in accordance with the following rules:

(i) A full sister is a sharer in absence of a full brother, parents, father's father, children or lineal descendents. She takes half (1/2) of the property alone and two-third (2/3rd) if more than one full sister is present.

(ii) Full and consanguine brothers inherit as residuaries.

(iii) With a full brother, a full sister does not inherit as a sharer, but becomes a residuary with him taking a share that is equal to half of his share.

(iv) Full blood brothers and sisters exclude consanguine brothers and sisters.

(v) A consanguine sister inherits as a sharer taking a fixed half (1/2) share if she is alone and two-third (2/3rd) if there are two or more than two consanguine sisters. With a consanguine brother she inherits as a residuary taking a share that is equal to half of his share

(vi) Uterine brothers and sisters inherit as sharers and are not excluded by either the full brothers and sisters or consanguine brothers and sisters. The share of one such uterine brother or sister is one-sixth (1/6) and if there are more than one such brother or sister they collectively take one-third (1/3rd).

Illustration (i): The survivors of a Shia Muslim *H* are his widow, *W*, one full brother, *FB*, a full sister, *FS* and one consanguine brother *CB*.

FB — FS — CB—H — W

Here the widow would take one-fourth (1/4th) as there are no children or any lineal descendant. The consanguine brother would be excluded in presence of a full brother. The full sister would take the property as a residuary and not as a sharer due to the presence of the full brother. The residue of three-fourth (3/4th) after deducting the share of the widow will be divided between the full brother and sister in the ratio of 2:1. The shares of each will be as follows:

W = 1/4

FB = 1/2

FS = 1/4

Illustration (ii): The survivors of a Shia Muslim woman, *W* are her two full brothers, *FB* 1 and *FB* 2, one full sister, *FS*, and her husband *H*.

FB1 — FB2 — FS — W — H

Here, *H* will take half (1/2) of the property and the residue of half (1/2) will be taken by the brothers and sisters in the ratio of 2:1. The shares of each will be:

H = 1/2

FB 1 = 1/5

FB 2 = 1/5

FS = 1/10

Illustration (iii): The survivors of a Shia Muslim *H* are his full brother *FB*, a uterine brother *UB*, a uterine sister *US* and the widow *W*. Here the widow would take one-fourth (1/4th).

FB — UB — US — H — W

Uterine brother and sister will take one-third (1/3rd) and would divide it equally between them and the residue would be taken by the full brothers. The shares of each will be:

W = 1/4

UB = 1/6

US = 1/6

FB = 5/12

Descendants of Brothers and Sisters How Low So ever

The descendants of brothers and sisters of the deceased take the property in accordance with the following rules:

(a) A descendant nearer in degree excludes the remoter descendant.

(b) The shares of the children and other descendants of brothers and sisters are calculated on the basis of rule of representation.

(c) The children of a brother or a sister would collectively take the share of the respective parent through whom they are related to the deceased, viz,

(d) Children of full or consanguine brother would take the share, which their father would have taken if alive and would divide it in accordance with the rule of a male taking a double portion than the female counterpart.

(ii) Children of a full or consanguine sister would take the share that their respective mother would have taken if she was alive and would divide it among themselves, female descendants taking half of the corresponding male counterpart.

(iii) Children of uterine brother or uterine sister will take such a share which their respective parent would have taken as a sharer, but here they would divide such share equally among themselves irrespective of their sex.

(iv) When no child of a brother or a sister is present, the property would pass to the grandchildren of such brother or sister who will take it in accordance with the above mentioned rules.

Illustration (i): The survivors of a Shia male *A* are his full brother's son, *FBS*, two daughters of a full sister *FSD* 1 and *FSD* 2 and a uterine brother's son *UBS* [see Fig. 17. 46].

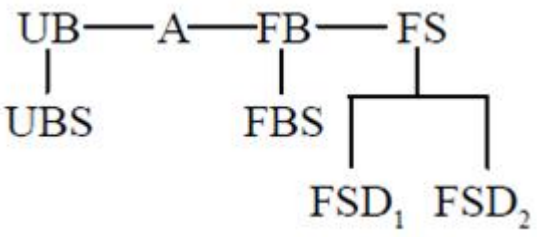

Fig. 17. 46

The son of a uterine brother would take the share that his father would have taken as a sharer if he was alive i. e., one/sixth (1/6th). The residue of five-sixth (5/6th) will be divided between the branches of full brother and full sister in 2:1 ratio. The five-ninth (5/9th) share of full brother will be taken by his son and the five-eighteenth (5/18th) share that would have gone to the full sister will be taken by her daughters in equal shares. The shares of each will be:

UBS = 1/6

FBS = 5/9

FSD 1 = 5/36

FSD 2 = 5/36

Illustration (ii): The survivors of a Shia Muslim are two sons of his consanguine brother *CBS* 1 and *CBS* 2 [see Fig. 17. 47], One daughter of a full sister *FSD*, one daughter and one son of a uterine sister, *USD* and *USS*, one son of a uterine brother *UBS* and one son of a full brother *FBS*.

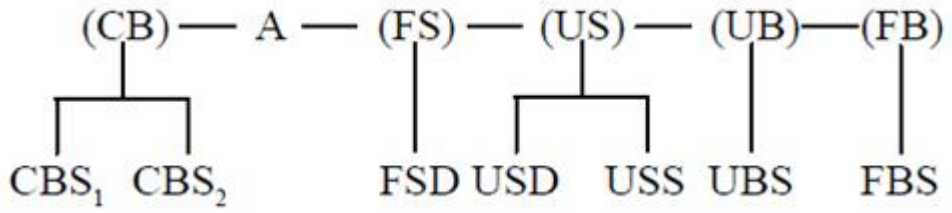

Fig. 17. 47

Children of full brother and sister would exclude the sons of a consanguine brother. Uterine sister's children would collectively take one-sixth (1/6th) and divide it equally among them i. e., one-twelfth (1/12th) each. Uterine brother's son will take one-sixth (1/6th). The residue of two-third (2/3rd) will be taken by the son of the full brother, four-ninth (4/9th) and daughter of a full sister two-ninth (2/9th). The shares of each will be as follows:

FBS = 4/9

FSD = 2/9

USD = 1/12

USS = 1/12

UBS = 1/6

CBS 1 = Nil

CBS 2 = Nil

Illustration (iii): The survivors of a Shia Muslim are his father's father, *FF*, and one sister *Si*. Here the father's father would be treated as a full brother and the sister would take a share as a residuary with him. *FF* will take two-third (2/3rd) and sister will take one-third (1/3rd) of the property.

Illustration (iv): The survivors of a Shia male are his uterine sister *US*, mother's mother *MM*, a consanguine brother *CB* and father's mother *FM* [see Fig. 17. 48].

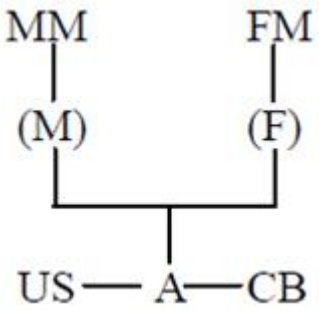

Fig. 17. 48

Here mother's mother would take as a uterine sister and father's mother as a consanguine sister. *US* and *MM* will together take one-third (1/3rd) and *CB* and *FM* will take the residue of two-third (2/3rd) in 2:1 ratio. The shares of each of them will be as follows:

US = 1/6

MM = 1/6

CB =4/9

FM =2/9

THIRD CLASS HEIRS

Where none of the heirs in the preceding two classes is present, the property passes to the heirs in the third class. This class comprises uncles and aunts of the deceased, their parents and grandparents how high so ever and their descendants how low so ever. The order of succession is as follows:

(i) Paternal and maternal uncles and aunts of the deceased.

(ii) Their descendants, nearer in degree excluding the remoter.

(iii) Paternal and maternal uncles and aunts of the parents of the deceased.

(iv) Their descendants, how low so ever, nearer in degree excluding the remoter.

(v) Paternal and maternal uncles and aunts of the grandparents of the deceased.

(vi) Their descendants, how low so ever, nearer in degree excluding the remoter.

(vii) Remoter uncles and aunts and their descendants in the same order.

In the above categories as among the descendants of uncles and aunts the nearer in degree would exclude the remoter. Secondly, if the only survivors of the deceased are a son of a full paternal uncle and a consanguine paternal uncle the former would exclude the later.

Uncles and aunts take the property in accordance with the following rules:

(a) The first step is to divide the uncles and aunts into paternal and maternal sides.

(b) Assign two-third (2/3rd) of the property to the paternal side and one-third (1/3rd) to the maternal side.

(c) Divide the paternal side into two:

(d) Uterine paternal uncles and aunts would take one-sixth (1/6th) if only one is present and one-third (1/3rd) if more than one is present and divide it equally among them.

(ii) Divide the residue among full paternal uncles and aunts who will take the property in 2:1 ratio respectively.

(iii) If full paternal uncles and aunts are not present the property would go to consanguine paternal uncles and aunts and they would take it in 2:1 ratio.

(d) Divide the maternal side into two, viz:

(i) Uterine maternal uncles and aunts who if one would take one-sixth and if two or more are present, they will take one-third (1/3rd) and divide it equally among them.

(ii) full maternal uncles and aunts who will share equally, and failing them,

consanguine maternal uncles and aunts who would again share equally.

If none of the uncles and aunts is present, their descendants would take the property in accordance with the rules of representation.

Illustration (i): The survivors of a Shia male are his full paternal uncle and a maternal aunt. Here the full paternal uncle would take two-third (2/3rd) and the maternal aunt will take one-third (1/3rd).

Illustration (ii): A Shia male dies and is survived by his full paternal uncle and a full paternal aunt and a full maternal uncle. The full paternal uncle and aunt will together take two-third (2/3rd) uncle taking four-ninth (4/9th) and aunt taking two-ninth (2/9th). The full maternal uncle will take one-third (1/3rd).

Illustration (iii): A Shia male dies and is survived by a son of his full paternal uncle and a daughter of a full maternal aunt. Here the former will take two-third (2/3rd) and later one-third (1/3rd) of the property.

DOCTRINE OF RETURN

If after the satisfaction of the claim of the sharers some residue is left but there is no residuary this excess share comes back to the sharers. Under Shia law, the return is subject to the following rules:

(i) The surviving spouse is not entitled to any return if any other heir is present. Presently, the husband and also his wife can take the return when no other sharer is present.

(ii) Mother of the deceased cannot claim the return in presence of the father, daughter and:

(a) two or more full or consanguine brothers; or

(b) one such brother and two such sisters; or

(c) four such sisters.

In such cases the surplus is taken by the father and the daughter in proportion to their shares.

(iii) In presence of the full sister the uterine brother or uterine sister cannot take the surplus by return.

DOCTRINE OF INCREASE (AUL)

Shias do not recognise the doctrine of increase or Aul and the consequent proportional deduction of shares by increasing the denominator of the sum total of the shares of all the heirs. Here, if the sum total exceeds unity the excess share is deducted from the share of the daughters or full or consanguine sisters.

Illustration: The survivors of a Shia female are her parents *F* and *M*, two daughters *D* 1 and *D* 2 and her husband *H* [see Fig. 17. 49].

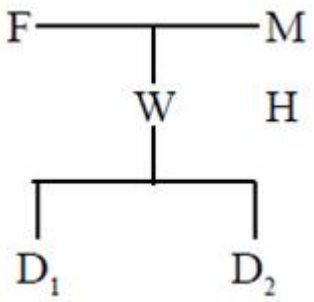

Fig. 17. 49

Here the shares of *F* and *M* would be one-sixth (1/6th) each, of *H* will be one-fourth (1/4th) and *D* 1 and *D* 2 together are entitled to two-third (2/3rd). The sum total of these shares would be + 1/6 + 1/6 +2/3 = 15/12. Here the excess share is 3/12 or. This one-fourth (1/4th) would be deducted from the share of the daughter *viz.* , 2/3-1/4 = 5/12. Each daughter will take five-twentyfourth (5/24th).

ESCHEAT

On failure of all the heirs, the property of a Shia Muslim escheats to the government.

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1. Tyabji, *Muslim Law*, 4th edn., 1968, p. 826.
2. *D. Raja Ahmed v. Pacha Bai*, (1969) 1 Andh WR 255 *Haliman v. Munir*, AIR 1971 Pat 385 ; *Syed Sah Gulam Ghouse v. Syed Shah Ahmad*, AIR 1971 SC 2184 [LNIND 1971 SC 130]; *Sahul Hamid v. Sulthan*, 1947 Mad 287 ; *Abdul Rashid v. Sirajuddin*, AIR 1933 All 206 ; *Abdul Samad v. Bibijan*, 1925 Mad 1149 .
3. *Hakim Rehman v. Mohammad Mohmood Hassan*, AIR 1957 Pat 559 .
4. *Syed Sah Gulam Ghouse v. Syed Shah Ahmad*, AIR 1971 SC 2184 [LNIND 1971 SC 130]; *Haliman v. Munir*, AIR 1971 Pat 385 ; *Ahmad Ibrahim Saheb v. Mayyappa Chettiar*, 1940 Mad 285 .
5. *Tarachand v. Mohideen*, AIR 1935 Bom 401 .
6. *Abdul Rhim v. Abdul Hakim*, 1932 Mad 553 ; *Ahmed Ibrahim Saheb v. Meyyappa Chettiar*, 1940 Mad 285 .
7. *Soudagar v. Soudagar*, 1931 Mad 553 .
8. *Shukrull v. Zuhra*, AIR 1932 All 512 .
9. For limited exceptions to it under Sunni law, see the discussion *infra*.
10. With the exception of the spouse of the deceased intestate, *viz.* widow or a widower.
11. *Abdool v. Goolam*, (1905) 30 Bom 304.
12. *Hasan Ali v. Nazo*, (1889) 11 All 456.
13. *Kurrutulain v. Nuzhat-ul-dowla*, (1905) 33 Cal 116.
14. *Asa Beevi v. Karuppan*, (1918) 41 Mad 365; *Sunsuddin v. Adbul Husein*, (1906) 31 Bom 165; *Bano Begum v. Mir Abed Ali*, (1908) 32 Bom 172.
15. See the Transfer of Property Act 1882, s. 6(a) that reads as follows:

The chance of an heir apparent to succeed to the property of a intestate, the change of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred.

16. AIR 1973 SC 554 [LNIND 1972 SC 442]; *Abdul Khaffar v. Abdul Razak*, 1959 Mad 131 ; *Kunhi Avulla v. Kunhi Avulla*, AIR 1964 Ker 201 . For a contrary opinion see *Kochunni v. Kunju Pillai*, AIR 1956 Tr & Coch 276; *Latafat Hussaiin v. Hidayet Hussaiin*, AIR 1936 All 573 wherein it was held that the relinquishment would be valid as against an heir apparent, if it was a part of a compromise or family settlement and such heir had taken a benefit from it. See also *Nasir-ul-Haq v. Faiyaz-ul-Rahman*, (1911) 33 All 457.

17. *Jawai v. Hussain Baksh*, AIR 1922 Lah 298 .

18. *Imamul Hasan v. State of Bihar*, AIR 1982 Pat 89 .

19. *Haliman v. Manir*, AIR 1971 Pat 386 (DB); *Mohammad Sohail v. Ghulam Rasul*, AIR 1941 Lah 152 (FB); *Khatun Bai v. Abdul Wahab Sahib*, 1939 Mad 306 ; *Mohammad Ally v. Sofiabai*, AIR 1940 PC 215 ; *Nurdin v. Umrao*, AIR 1921 Bom 56 ; *Mussammat Jano v. Narasingh Das*, AIR 1929 Lah 549 ; *Ahmad Dar v. Mukhti*, AIR 1951 J&K 21 ; *Bai Jivi v. Bai Bibanboo*, AIR 1929 Bom 141 ; *Ghulam Mohammad v. Ghulam Hussain*, AIR 1932 PC 81 ; *Rustam Khan v. Janki*, AIR 1928 All 467 ; *Ma Bi v. Ma Khatoon*, AIR 1930 Rang 72 ; *Abdul Majeeth v. Krishnamchariar*, (1917) 40 Mad 273.

20. *Ebrahim Aboobaker v. Tek Chand*, *AIR 1953 SC 298* [*LNIND 1953 SC 45*]; *Faizulla Khan v. Abdul Jabbar*, AIR 1943 Pesh 65 .

21. See the Special Marriage Act, s. 18.

22. *Ibid*., s. 15.

23. See the Indian Succession Act, 1925, ss. 33–49.

24. See the Caste Disabilities Removal Act, 1850, s. 3.

25. *Chedambaram v. Ma Nyein Me*, AIR 1928 Rang 179 ; *Mitter Sen v. Maqbool Hasan Khan*, AIR 1930 PC 251 ; *John Jiban Candra v. Abinash*, AIR 1939 Cal 417 .

26. See *Poniah Nadar v. Essaki Devania*, AIR 1955 Tr&Coch 180 .

27. *Habibur Rahman Chowdhari v. Altaf Ali Chowdhary*, AIR 1922 PC 159 .

28. *Razia Begum v. Sahebzadi Anwar Begum*, AIR 1958 AP 195 [*LNIND 1957 AP 56*]; *Roshanbai v. Suleman*, AIR 1944 Bom 213 ; *Rafiqa Begum v. Aisha Begum*, AIR 1944 All 598 ; *Tyebhoy v. Collector of Ahmedabad*, AIR 1944 Bom 91 ; *Dhan Bibi v. Lalon Bibis*, (1900) 27 Cal 801.

29. See *Mohammad Khan Sahib v. Ali Khan Saheb*, (1981) MLJ 402. See also *Syed Amanullah Hussain v. Rajamma*, (1976) 2 APLJ 323.

31. *Dukhtar Jahan v. Mohammad Farooq*, (1987) SCC 624.

32. *Mahomed Banker v. Shurfoon Nissa*, (1860) 8 MIA 136; *Ma Khatoon v. Ma Mya*, AIR 1936 Rang 448 .

33. *Mohammad Haneefa v. Pathummal Beevi*, 1972 KLT 512.

34. The Allahabad and Oudh High Courts have held that it supersedes the principles of legitimacy under Muslim law; *Sibt Mohammad v. Mohammad*, AIR 1926 All 589 ; *Ismail Ahmed v. Momin Bibi*, AIR 1941 PC 11 ; *Rahim Bibi v. Chirag Din*, AIR 1930 Lah 97 ; *Ghulam Mohy ud-din v. Khizar*, AIR 1929 Lah 6 ; *Kaniza v. Hasan*, AIR 1926 Oudh 231 . See also *Abdul Rahemankutty v. Aisha Beevi*, *AIR 1960 Ker 101* [*LNIND 1959 KER 254*], wherein it was held by the court that paternity was not proved, as the child was not treated as a legitimate child when it was born within 4 months of the marriage after the husband had driven the wife out of his home on the allegation of concealed pregnancy at the time of marriage.

35. See however *Rehmat Ulllah v. Maqsood Ahmad*, *AIR 1952 All 640* [*LNIND 1949 ALL 38*], wherein it was held that an illegitimate child does not inherit from the legitimate son of the mother.

36. *Sahebzadee Begum v. Himmut Bahadur*, (1870) 14 WR 125.

37. *Muhammad Kamil v. Imtiaz Fatima*, (1908) 36 IA 210.

38. *Aminabi v. Abasaheb*, AIR 1931 Bom 266 .

39. *Aziz Dar v. Fazli*, AIR 1960 J&K 53 .

40. *Ghulam Hassan v. Saja*, AIR 1984 J&K 26 .

41. *Mohammad Zia-ullah v. Rafiq*, AIR 1939 Oudh 213 ; *Abdul Lalif v. Abadi Begum*, AIR 1934 PC 188 .

42. For details, see *infra* **.**

43. Under Muslim law, a man can legally have four wives at a time.

44. A true grandmother is one, when in between her and the intestate no false grandfather intervenes, *e.g.* father's mother, mother's mother. A false grandmother is a female ancestor between whom and the deceased a false grandfather intervenes *e.g.*, mother's father's mother.

45. A brother and sister are related to each other as full blood brother and sister when they are descendants of common parents.

46. Brother and sister are related to each other as consanguine brothers and sisters when they are from the same father but are from different mothers.

47. Brothers and sisters are related to each other as uterine brothers and sisters when they share the same mother but are from different fathers.

48. A true grandfather is a male ancestor between whom and the deceased no female intervenes *e.g.*, father's father and father's father's father. A false grandfather is a male ancestor between whom and the deceased a female intervenes, *e.g.*, mother's father, mother's father's father, mother's mother's father.

49. *Syed Ali v*. *Syed Muhammad*, AIR 1928 Pat 441 ; *Durga Das v*. *Nawab Ali*, AIR 1926 All 522 .

50. *Abdul Hamid v*. *Peare Mirza*, AIR 1935 Oudh 78 .

ANNEXURE I THE CASTE DISABILITIES REMOVAL ACT, 1850

(Act No 21 of 1850)

[11 April 1850][11 April 1850]

An Act for extending the principle of Section 9, Regulation VII, 1832, of the Bengal Code throughout (India).

PREAMBLE

Whereas it is enacted by Section 9, Regulation VII, 1832, of the Bengal Code, that 'whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled'; and whereas it will be beneficial to extend the principle of that enactment throughout (India); it is enacted as follows:

1. Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of caste to cease to be enforced.—

So much of any law or usage now in force within (India) as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law (in any court).

2. Short title and extent.—

(i) This Act may be called the Caste Disabilities Removal Act, 1850.

(ii) It extends to the whole of India except the State of Jammu and Kashmir.]

ANNEXURE II THE HINDU INHERITANCE (REMOVAL OF DISABILITIES) ACT, 1928

(Act No 12 of 1928)

[20 September 1928][20 September 1928]

1. Short title, extent and application.—

(a) This Act may be called the Hindu Inheritance (Removal of Disabilities) Act, 1928.

(b) [It extends to the whole of India except the State of Jammu and Kashmir.]

(c) It shall not apply to any person governed by the Dayabhaga School of Hindu Law.

2. Persons not to be excluded from inheritance or rights in joint family property.—

Notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by the Hindu Law, other than a person who is and has been from which a lunatic or idiot, shall be excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity, or physical or mental defect.

3. Saving and exception.—

Nothing contained in this Act shall affect any right which has accrued or any liability which has been incurred before the commencement thereof, or shall be deemed to confer upon any person any right in respect of any religious office or service or of the management of any religious or charitable trust which he would not have had if this Act had not been passed.

ANNEXURE III THE HINDU GAINS OF LEARNING ACT, 1930

(Act No 30 of 1930)

[25 July 1930][25 July 1930]

1. Short title and extent.—

(a) This Act may be called the Hindu Gains of Learning Act, 1930.

(b) It extends to the whole of India except the State of Jammu and Kashmir.

2. Definitions.—

In this Act, unless there is anything repugnant in the subject or context,

‘acquirer’ means a member of a Hindu undivided family, who acquires gains of learning;

‘gains of learning’ means all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of this Act and whether such acquisitions be the ordinary or the extraordinary result of such learning; and

'learning' means education, whether elementary, technical, scientific, special or general, and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life.

3. Gains of learning not to be held, not to be separate property of acquirer merely for certain reasons.—

Notwithstanding any custom, rule or interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of:

(a) his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of the joint funds of his family, or with the aid of the funds of any member thereof, or

(b) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.

4. Savings.—

This Act shall not be deemed in any way to affect:

(a) the terms or incidents of any transfer of property made or affected before the commencement of this Act;

(b) the validity, invalidity, effect or consequences of anything already suffered or done before the commencement of this Act;

(c) any right or liability created under a partition, or an agreement for a partition, of joint family property made before the commencement of this Act, or

(d) any remedy or proceeding in respect of such right or liability; or to render invalid or in any way affect anything done before the commencement of this Act in any proceeding pending in a Court at such commencement; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

ANNEXURE IV THE HINDU SUCCESSION ACT, 1956

(Act No 30 of 1956)

[17 June 1956][17 June 1956]

An Act to amend and codify the law relating to intestate succession among Hindus.

Be it enacted by the Parliament in the Seventh Year of the Republic of India as follows:

1. Short title and extent.—

(a) This Act may be called the Hindu Succession Act, 1956.

(b) It extends to the whole of India except the State of Jammu and Kashmir.

2. Application of Act.—

(1) This Act applies:

(a) to any person, who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;

(b) to any person who is Buddhist, Jaina or Sikh by religion; and

(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.— The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case

may be:

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. Definitions and interpretations.—

(1) In this Act, unless the context otherwise requires—

(a) 'agnate'—one person is said to be an 'agnate' of another if the two are related by blood or adoption wholly through males;

(b) 'Aliyasantana law' means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Aliyasantana Act, 1949, or by the customary Aliyasantana law with respect to the matters for which provision is made in this Act;

(c) 'cognate'—one person is said to be a cognate of another if the two are related by blood or adoption but not wholly through males;

(d) the expressions 'custom' and 'usage' signify any rule which having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that, in the case of a rule applicable only to a family it has not been discontinued by the family;

(e) 'full blood', 'half blood' and 'uterine blood'—

(i) two persons said to be related to each other by full blood when they are descended from a common ancestor by the same wife, and by half blood when they are descended from a common ancestor but by different wives;

(ii) two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

Explanation: In this clause 'ancestor' includes the father and 'ancestress' the mother;

(f) 'heir' means any person, male or female, who is entitled to succeed to the property of an intestate under this Act;

(g) 'intestate'—a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect;

(h) 'Marumakkattayam law' means the system of law applicable to persons—

(a) who, if this Act had not been passed, would have been governed by the Madras Marumakkattayam Act, 1932; the Travancore Nayar Act; the Travancore Ezhava Act; the Travancore Nanjinad Vellala Act; the Travancore Kshatriya Act; the Travancore Krishnanvaka Marumakkathayyee Act; the Cochin Marumakkathayam Act; or the Cochin Nayar Act with respect to the matters for which provision is made in this Act; or

(b) who belong to any community, the members of which are largely domiciled in the State of Travancore-Cochin or Madras as it existed immediately before lst November, 1956, and who, if this Act had not been passed, would have been governed with respect to the matters for which provision is made in this Act by any system of inheritance in which descent is traced through the female line; but does not include the Aliyasantana law;

(i) 'Nambudri law' means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Nambudri Act, 1932; the Cochin Nambudri Act; or the Travancore Malayala Brahmin Act with respect to the matters for which provision is made in this Act;

(j) 'related' means related by legitimate kinship:

(2) In this Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females.

4. Overriding effect of Act.—

(1) Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act.

(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.

5. Act not to apply to certain properties.—

This Act shall not apply to—

(i) any property succession to which is regulated by the Indian Succession Act, 1925, by reason of the provisions contained in section 21 of the Special Marriage Act, 1954;

(ii) any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactment passed before the commencement of this Act;

(iii) the Valiamma Thampuran Kovilagam Estate and the Palace Fund administered by the Palace Administration Board by reason of the powers conferred by Proclamation (IX of 1124) dated 29th June, 1949, promulgated by the Maharaja of Cochin.

6. Devolution of interest of 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 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.

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.

7. Devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru or illom.—

(1) When a Hindu to whom the Marumakkattayam or Nambudri law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an interest in the property of a tarwad, tavazhi or illom, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the Marumakkattayam or Nambudri law.

Explanation. —For the purposes of this sub-section, the interest of a Hindu in the property of a tarwad, tavazhi or illom shall be deemed to be the share in the property of the *tarwad* , *tavazhi* or *illom* , as the case may be, that would have fallen to him or her if a partition of that property per capita had been made immediately before his or her death among all the members of *tarwad* , *tavazhi* or *illom* , as the case may be, then living, whether he or she was entitled to claim such partition or not under the Marumakkattayam or Nambudri law applicable to him or her, and such share shall be deemed to have been allotted to him or her absolutely.

(2) When a Hindu to whom the Aliyasantana law would have applied if this Act had not been passed, dies after the commencement of this Act, having at the time of his or her death an undivided interest in the property of a *kutumba* or *kavaru* , as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the Aliyasantana law.

Explanation.— For the purposes of this sub-section, the interest of a Hindu in the property of *kutumba* or *kavaru* shall be deemed to be the share in the property of the *kutumba* or *kavaru* as the case may be, that would have fallen to him or her if a partition of that property per capita had been made immediately before his or her death among all the members of the *kutumba* or *kavaru* , as the case may be, then living, whether he or she was entitled to claim such partition or not under the Aliyasantana law, and such share shall be deemed to have been allotted to him or her absolutely.

(3) Notwithstanding anything contained in sub-section (1), when a *sthanamdar* dies after the commencement of this Act, *sthanam* property held by him shall devolve upon the members of the family to which the *sthanamdar* belonged and the heirs of the *sthanamdar* as if the *sthanam* property had been divided per capita immediately before the death of the *sthanamdar* among himself and all the members of his family then living, and the shares falling to the members of his family and the heirs of the *sthanamdar* shall be held by them as their separate property.

Explanation.— For the purposes of this sub-section, the family of a *sthanamdar* shall include every branch of that family, whether divided or undivided, the male members of which would have been entitled by any custom or usage to succeed to the position of *sthanamdar* if this Act had not been passed.

8. General rules of succession in the case of males.—

The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter—

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

9. Order of succession among heirs in the Schedule.—

Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.

10. Distribution of property among heirs in class I of the Schedule.—

The property of an intestate shall be divided among the heirs in class I of the Schedule in accordance with the following rules:

Rule 1 : The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2 : The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3 : The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

Rule 4 : The distribution of the share referred to in Rule 3—

(i) among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his predeceased sons gets the same portion;

(ii) among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions.

11. Distribution of property among heirs in class II of the Schedule.—

The property of an intestate shall be divided between the heirs specified in any one entry in class II of the Schedule so that they share equally.

12. Order of succession among agnates and cognates.—

The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder:

Rule 1 : Of two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule 2 : Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3 : Where neither heirs is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

13. Computation of degrees.—

(1) For the purposes of determining the order of succession among agnates or cognates, relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent or both, as the case may be.

(2) Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.

(3) Every generation constitutes a degree either ascending or descending.

14. Property of a female Hindu to be her absolute property.—

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.— In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.

(2) Nothing contained in sub-section(1) shall apply to any property acquired by way of gift or under a Will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, Will or other instrument or the decree, order or award prescribe a restricted estate in such property.

15. General rules of succession in the case of female Hindus.—

(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,—

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1),—

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

16. Order of succession and manner of distribution among heirs of a female Hindu.—

The order of succession among the heirs referred to in section 15 shall be, and the distribution of the intestate's property among those heirs shall take place, according to the following rules, namely:

Rule 1 : Among the heirs specified in sub-section (1) of section 15, those in one entry shall be preferred to those in any succeeding entry and those including in the same entry shall take simultaneously.

Rule 2 : If any son or daughter of the intestate had pre-deceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3 : The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

17. Special provisions respecting persons governed by Marumakkattayam and Aliyasantana laws.—

The provisions of sections 8, 10, 15 and 23 shall have effect in relation to persons who would have been governed by the Marumakkattayam law or Aliyasantana law if this Act had not been passed as if—

(i) for sub-clauses (c) and (d) of section 8, the following had been substituted, namely:—

'(c) thirdly, if there is no heir of any of the two classes, then upon his relatives, whether agnates or

cognates.';

(ii) for clauses (a) to (e) of sub-section (1) of section 15, the following had been substituted, namely:—

'(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the mother;

(b) secondly, upon the father and the husband.

(c) thirdly, upon the heirs of the mother;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the husband.';

(iii) clause (a) of sub-section (2) of section 15 had been omitted;

(iv) section 23 had been omitted.

GENERAL PROVISIONS RELATING TO SUCCESSION

18. Full blood preferred to half blood.—

Heirs related to an intestate by full blood shall be preferred to heirs related by half blood, if the nature of the relationship is the same in every other respect.

19. Mode of succession of two or more heirs.—

If two or more heirs succeed together to the property of an intestate, they shall take the property,—

(a) save as otherwise expressly provided in this Act, per capita and not per stirpes; and

(b) as tenants-in-common and not as joint tenants.

20. Right of child in womb.—

A child who was in the womb at the time of death of an intestate and who is subsequently born alive has the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.

21. Presumption in cases of simultaneous deaths.—

Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

22. Preferential right to acquire property in certain cases.—

(1) Where, after the commencement of this Act, interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolve upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.— In this section, 'court' means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf.

23. Special provision respecting dwelling houses.—

Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

24. Certain widows re-marrying may not inherit as widows.—

Any heir who is related to an intestate as the widow of a pre-deceased son, the widow of a pre-deceased son of a pre-deceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has re-married.

25. Murderer disqualified.—

A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

26. Convert's descendants disqualified.—

Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

27. Succession when heir disqualified.—

If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.

28. Disease, defect, etc not to disqualify.—

No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever.

ESCHEAT

29. Failure of heirs.—

If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the government; and the government shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

30. Testamentary succession.—

1 [* * *] Any Hindu may dispose of by Will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

Explanation.— The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a *tarwad, tavazhi, illom, kutumba* or *kavaru* in the property of the *tarwad, tavazhi, illom, kutumba* or *kavaru* shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this 2 [section.]

3 [* * *]

31. Repeal.—

Repealed by Repealing and Amending Act, 1960 (58 of 1960) section 2 and Schedule I.

Heirs in Class I and Class II

CLASS I

Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son.

CLASS II

I. Father.

II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister.

III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter.

IV. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter.

V. Father's father; father's mother.

VI. Father's widow; brother's widow.

VII. Father's brother; father's sister.

VIII. Mother's father; mother's mother

IX. Mother's brother; mother's sister.

Explanation. —In this Schedule, references to a brother or sister do not include references to a brother or sister by uterine blood.

ANNEXURE V THE HINDU SUCCESSION AMENDMENT ACT, 2005

An Act further to amend the Hindu Succession Act, 1956.

Be it enacted by Parliament in the fifty–sixth year of the Republic of India as follows:—

1. Short title and commencement.—

(1) This Act may be called the Hindu Succession (Amendment) Act, 2005.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette appoint.

2. Amendment of section 4 .—

In section 4 of the Hindu Succession Act, 1956 (hereinafter called the principal Act); sub-section (2) shall be omitted.

3. Substitution of new section for section 6 .—

For section 6 of the principal Act, the following section shall be substituted, namely:—

DEVOLUTION OF INTEREST IN COPARCENARY PROPERTY

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 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 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, 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 purpose of this sub-section, the interest of a Hindu Mitakshara coparcener 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 recognize 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 suchdebt:

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 purpose 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 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 shall 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 or partition affected by a decree of court.

4. Omission of section 23 .—

Section 23 of the principal Act shall be omitted.

5. Omission of section 24 .—

Section 24 of the principal Act shall be omitted.

6. Amendment of section 30 .—

In section 30 of the principal Act, for the words "disposed of by him", the words "disposed of by him or by her" shall be substituted.

7. Amendment of the schedule.—

In the schedule to the principal Act, under the sub-heading "class-1", after the words "widow of a pre-deceased son of a pre-deceased son", the words, son of a pre-deceased daughter of a pre-deceased daughter, daughter

of a pre-deceased daughter of a pre-deceased daughter, daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son" shall be added.

End of Document

ANNEXURE VI THE KERALA JOINT HINDU FAMILY SYSTEM (ABOLITION) ACT, 1975

(Act 30 of 1976 amended by Act 15 of 1978)

An Act to abolish the joint family system among Hindus in the State of Kerala.

PREAMBLE

Whereas it is expedient to abolish the joint family system among Hindus in the state of Kerala.

Be it enacted in the Twenty-Sixth Year of the Republic of India as follows:

1. Short title, extent and commencement.—

(1) The Act may be called the Kerala Joint Hindu Family System (Abolition)Act, 1975.

(2) It extends to the whole State of Kerala.

(3) It shall come into force on such date as the Government may, by notification in the Gazette, appoint.2

2. Definition.—

In this Act, 'joint Hindu family' means any Hindu family with community of property and includes—

(1) a *tarward* or *tavazhi* governed by the Madras Marumakkattayam Act, 1932, the Travancore Nayar Act, II of 1100, the Travancore Ezhava Act III of 1100, the Nanjinad Vellala Act of 1101, the Travancore Kshatriya Act of 1108, the Travancore Krishnavaka Marumakkattayam Act, VII of 1115, the Cochin Nayar Act XXXIX of 1113, or the Cochin Marumakkattayam Act, XXXIII of 1113;

(2) a kutumba or kavaru governed by Madras Aliyasantana Act, 1949;

(3) an illom governed by the Kerala Nambudiri Act, 1958; and

(4) an undivided Hindu family governed by the Mitakshara law.

3. Birth in family not to give rise to right in property.—

On and after the commencement of this Act no right to claim any interest in any property of an ancestor during his or her lifetime which is founded on the mere fact that the claimant was born in the family of the ancestor shall be recognized in any court.

4. Joint tenancy to be replaced by tenancy-in-common.—

(1) All members of an undivided Hindu family governed by the Mitakshara law holding any coparcenary property on the day this Act comes into force shall with effect from that day, be deemed to hold it as tenants-in-common as if a partition had taken place among all the members of that undivided Hindu family as respects such property and as if each one of them is holding his or her share separately as full owner thereof;

Provided that nothing in this sub-section shall affect the right to maintenance or the right to marriage or funeral expenses out of the coparcenary property or the right to residence, if any, of the members of an undivided Hindu family, other than persons who have become entitled to hold their shares separately, and any such right can be enforced as if this Act had not been passed.

(2) All members of a joint Hindu family, other than an undivided Hindu family referred to in sub-section(1), holding any joint family property on the day of this Act comes into force, shall, with effect from that day be deemed to hold it as tenants-in-common, as if a partition of such property per capita had taken place among all the members of the family living on the day aforesaid, whether such members were entitled to claim such partition or not under the law applicable to them, and as if each one of the members is holding his or her share separately as full owner thereof.

Note: By virtue of this Act the joint family system of the Marumakkattayam Tarwad stood abolished by the operation of law and the properties of the joint family are held thereafter by the members of the joint family as tenants-in-common as if there was a partition.3 If under the custom, a female is entitled to ask for partition or is granted a share in the property in lieu of her right to maintenance, or marriage expenses, then only she is entitled to a share in the property.4 Where there was a partition in a joint family consisting of the assessee, his wife and son prior to the coming into force of this Act, it was held that the property held by the assessee was his individual property and the wife is not entitled to any share in it. Therefore, the entire income from the property in the hands of the assessee is to be assessed in his hand as an individual.5

After passing of Joint Family Abolition Act, 1975, section 17 of the Hindu Succession Act does not become inoperative in respect of persons living on 18.6.1956 (Date of coming into force of Hindu Succession Act) and who died after the passing of Joint Family Abolition Act on 1.12.1976. It also does not become inoperative in respect of persons who were born on or after 18.6.1956 but before 1.12.1976 and who died on or after that date.

5. Rule of pious obligations of Hindu son abrogated.—

(1) After the commencement of this Act, no court shall, save as provided in sub-sections (2) recognize 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 or any alienation of property in respect of or in satisfaction of any such debt on the ground of pious obligation under the Hindu law, of the son, grandson or great grandson to discharge any such debt.

(2) In the case of any debt contracted before the commencement of this Act, nothing contained in sub-section (1) shall affect—

(3) the right of any creditor to proceed against the son, grandson or great grandson, as the case may be; or

(4) 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 if this Act had not been passed.

Explanation.—For the purposes of sub-section(2), the expressions ‘son’, ‘grandson’ or ‘great grandson’ shall be deemed to refer to the son, grandson or great grandson, as the case may be, who was born or adopted prior to the commencement of this Act.

Note: The expression ‘Hindu Law’ in this section has to be understood in a broad sense as including Marumakkattayam Law which is also part of Hindu Law.6

6. Liability of members of joint Hindu family for debts contracted before Act not affected.—

Where a debt binding on a joint Hindu family has been contracted before the commencement of this Act by Karnavan, Yejman, Manager or Karta, as the case may be, of the family, nothing herein contained shall affect the liability of any member of the family to discharge any such debt and any such liability may be enforced against all or any of the members liable therefor, in the same manner and to the same extent as it would have been enforceable if this Act had not been passed.

7. Repeal.—

(1) Save as otherwise expressly provided in this Act, any text, rule or interpretation of Hindu law or any custom or usage part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act.

(2) The Acts mentioned in the Schedule, in so far as they apply to the whole or any part of the State of Kerala, are hereby repealed.

8. Proclamation IX of 1124 and Act XVI 1961 to continue in force.

Notwithstanding anything contained in this Act or in any other law for the time being in force, Proclamation (IX of 1124) dated 29th June, 1949, promulgated by the Maharaja of Cochin, as amended by the Valiamma Thampuran Kovilakam Estate and the Palace Fund (Partition) and the Kerala Joint Hindu Family System

(Abolition) Amendment Act 1978 and the Valiamma Thampuran Kovilakam Estate and Palace Fund (Partition) 1961 (16 of 1961), as amended by the said Act, shall continue to be in force and shall apply to the Valiamma Thampuran Kovilakam Estate and the Palace Fund administered by the Board of Trustees appointed under section 3 of the said Proclamation.

Acts repealed

1. The Madras Marumakkathayam Act, 1932 (XXII of 1933);
2. The Madras Aliyasantana Act, 1949 (IX of 1949);
3. The Travancore Nayar Act, II of 1100;
4. The Travancore Ezhava Act, III of 1100;
5. The Nanjinad Vallala Act of 1101 (VI of 1101);
6. The Travancore Kshatriya Act of 1108, (VII of 1108);
7. The Travancore Krishnavaka Marumakkathayee Act, (VII of 1115);
8. The Cochin Thiyya Act, VII of 1107;
9. The Cochin Makkathayam Thiyya Act, XVII of 1115;
10. The Cochin Nayar Act, XXIX of 1113;
11. The Cochin Marumakkathayam Act, XXXIII of 1113;
12. The Kerala Nambudiri Act, 1958 (27 of 1958)

ANNEXURE VII THE HINDU SUCCESSION (ANDHRA PRADESH AMENDMENT) ACT, 1986

(Act No 13 of 1986)

An Act to amend the Hindu Succession Act, 1956 in its application to the State of Andhra Pradesh.

Whereas the Constitution of India has proclaimed equality before the law as a Fundamental Right;

And Whereas the exclusion of the daughter from participation in coparcenary ownership merely by reason of her sex is contrary thereto;

And Whereas such exclusion of the daughter has led to the creation of the socially pernicious dowry system with its attendant social ills;

And Whereas this baneful system of dowry has to be eradicated by positive measures which will simultaneously ameliorate the condition of women in the Hindu society;

Be it enacted by Legislative Assembly of the State of Andhra Pradesh in the Thirty-Sixth Year of the Republic of India as follows:

1. Short Title, Extent and Commencement.—

(1) This Act may be called the Hindu Succession(Andhra Pradesh Amendment) Act, 1986.

(2) It extends to the whole of the State of Andhra Pradesh.

(3) It shall be deemed to have come into force on 5th September, 1985.

2. Insertion of a new Chapter II-A in Central Act 30 of 1956.—

In the Hindu Succession Act, 1956 (hereinafter referred to as this Act) after Chapter-II, the following chapter shall be inserted, namely:

29A. Equal rights to daughter in coparcenary property.—

Notwithstanding anything contained in Section 6 of this Act—

(i) in a Joint Hindu family governed by Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship, and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(ii) at a partition in such a joint Hindu Family the coparcenary property shall be so divided as to allot to a daughter the same share as is allotable to a son.

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such predeceased son or of such pre-deceased daughter;

Provided further that the share allotable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had 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 of the pre-deceased daughter as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (i) 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, as property capable of being disposed of by her by Will or other testamentary disposition;

(iv) nothing in clause (ii) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

29B. Interest to devolve by survivorship on death.—

When a female Hindu dies after the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986 having at the time of her death an interest in a Mitakshara coparcenary property, her 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 any child or child of a pre-deceased child 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 female Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to her if a partition of the property had taken place immediately before her death irrespective of whether she 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, before the death of deceased, had separated himself or herself from the coparcenary or any of his or her heirs to claim on intestacy a share in the interest referred to therein.

29C. Preferential right to acquire property in certain cases.—

(1) Where, after the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986 an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others devolves, under section 29A or section 29 -B upon two or more heirs and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have

preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall in the absence of any agreement between the parties, be determined by the court, on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incidental to the application.

(3) If there are two or more heirs, proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.— In this section 'court' means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf.

ANNEXURE VIII THE HINDU SUCCESSION (TAMIL NADU AMENDMENT) ACT, 1989

(Act No 1 of 1990)

An Act to further amend the Hindu Succession Act, 1956, in its application to the State of Tamil Nadu.

WHEREAS the Constitution of India has proclaimed equality before the law as a Fundamental Right;

AND WHEREAS the exclusion of the daughter from participation in coparcenary ownership merely by reason of her sex is contrary thereto;

AND WHEREAS such exclusion of the daughter has led to the creation of the socially pernicious dowry system with its attendant social evils;

AND WHEREAS this baneful system of dowry has to be eradicated by positive measures which will simultaneously ameliorate the conditions of women in the Hindu society;

Be it enacted by Legislative Assembly of the State of Tamil Nadu in the Fortieth Year of the Republic of India as follows:

1. Short Title, Extent and Commencement.—

(1) This Act may be called the Hindu Succession (Tamil Nadu Amendment) Act, 1989.

(2) It extends to the whole of the State of Tamil Nadu.

(3) It shall be deemed to have come into force on the 25th day of March, 1989.

2. Insertion of new Chapter II-A.—

In the Hindu Succession Act, 1956 (hereinafter referred to as the Principal Act), after Chapter-II, the following chapter shall be inserted, namely:

29A. Equal rights to daughter in coparcenary property.—

Notwithstanding anything contained in Section 6 of this Act,—

(i) in a Joint Hindu family governed by Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship; and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(ii) at a partition in such a joint Hindu Family the coparcenary property shall be so divided as to allot to a daughter the same share as is allottable to a son:

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such predeceased son or of such pre-deceased daughter;

Provided further that the share allottable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had 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 of the pre-deceased daughter as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of clause(i) 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, as property capable of being disposed of by her by Will or other testamentary disposition;

(iv) nothing in this chapter shall apply to a daughter married before the commencement of Hindu Succession (Tamil Nadu Amendment) Act, 1986;

(v) nothing in clause (ii) shall apply to a partition which had been effected before the date of commencement of the Hindu Succession (Tamil Nadu Amendment) Act 1989.

29B. Interest to devolve by survivorship on death.—

When a female Hindu dies after the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989 having at the time of her death, an interest in a Mitakshara coparcenary property by virtue of the provisions of Section 29 -A, her 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 any child or child of a pre-deceased child, 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 I.— For the purposes of this section, the interest of a female Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to her if a partition of the property had taken place immediately before her death, irrespective of whether she was entitled to claim partition or not.

Explanation II.— Nothing contained in the proviso to this section shall be construed as enabling a person who, before the death of deceased, had separated himself or herself from the coparcenary, or any of his or her heir to claim on intestacy a share in the interest referred to therein.

29C. Preferential right to acquire property in certain cases.—

(1) Where, after the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989, an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others, devolves under section 29A or section 29B upon two or more heirs and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of, or incidental to, the application.

(3) If there are two or more heirs proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.— In this section 'court' means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Tamil Nadu Government Gazette specify in this behalf.

3. Certain partitions to be null and void.—

Notwithstanding anything contained in the principal Act or in any other law for the time being in force, where on or after the 25th day of March 1989 and before the date of publication of the Act in the Tamil Nadu Government Gazette, any partition in respect of coparcenary property of a Joint Hindu Family has been effected and such partition is not in accordance with the provisions of the principal Act, as amended by this Act, such partition shall be deemed to be, and to have always been, null and void.

ANNEXURE IX THE HINDU SUCCESSION (KARNATAKA AMENDMENT) ACT, 1990

(Act No 23 of 1994)

An Act to amend the Hindu Succession Act, 1956, in its application to the State of Karnataka.

WHEREAS the Constitution of India has proclaimed equality before law as a Fundamental Right;

AND WHEREAS the exclusion of the daughter from participation in coparcenary ownership merely by reason of her sex is contrary thereto;

AND WHEREAS this baneful system of dowry has to be eradicated by positive measures which will simultaneously ameliorate the conditions of women in the Hindu society;

Be it enacted by the Karnataka State Legislature in the Forty-first Year of the Republic of India as follows:

1. Short Title, Extent and Commencement.—

(1) This Act may be called the Hindu Succession (Karnataka Amendment) Act, 1990.

(2) It shall come into force at once.

2. Insertion of new sections in Central Act XXX of 1956.—

In the Hindu Succession Act, 1956 (Central Act XXX of 1956), after section 6, the following sections shall be inserted, namely:

6A. Equal rights to daughter in coparcenary property.—

Notwithstanding anything contained in Section 6 of this Act,—

(a) in a Joint Hindu family governed by Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the

coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship; and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(b) at a partition in such a joint Hindu Family the coparcenary property shall be so divided as to allot to a daughter the same share as is allotable to a son;

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such predeceased son or of such pre-deceased daughter;

Provided further that the share allotable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had 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 of the pre-deceased daughter as the case may be;

(c) any property to which a female Hindu becomes entitled by virtue of the provisions of clause(a) 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, as property capable of being disposed of by her by Will or other testamentary disposition;

(d) nothing in clause (b) shall apply to a daughter married before the commencement of Hindu Succession (Karnataka Amendment) Act, 1990.

6B. Interest to devolve by survivorship on death.—

When a female Hindu dies after the commencement of the Hindu Succession (Karnataka Amendment) Act, 1990 having at the time of her death, an interest in a Mitakshara coparcenary property by virtue of the provisions of Section 6 -A, her 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 any child or child of a pre-deceased child, 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 I.— For the purposes of this section, the interest of a female Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to her if a partition of the property had taken place immediately before her death, irrespective of whether she was entitled to claim partition or not.

Explanation II.— Nothing contained in the proviso to this section shall be construed as enabling a person who, before the death of deceased, had separated himself or herself from the coparcenary, or any of his or her heir to claim on intestacy a share in the interest referred to therein.

6C. Preferential right to acquire property in certain cases.—

(1) Where, after the commencement of the Hindu Succession (Karnataka Amendment) Act, 1994, an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others, devolves under section 6A or section 6B upon two or more heirs and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incidental to, the application.

(3) If there are two or more heirs proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.— In this section 'court' means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette specify in this behalf.

ANNEXURE X THE HINDU SUCCESSION (MAHARASHTRA AMENDMENT) ACT, 1994

(Act No 40 of 1994)

An Act further to amend the Hindu Succession Act, 1956, in its application to the State of Maharashtra.

Whereas the Constitution of India has proclaimed equality before the law as a Fundamental Right;

And Whereas the exclusion of the daughter from participation in coparcenary ownership merely by reason of her sex is contrary to the Constitutional mandate;

And Whereas such exclusion of the daughter has led to the creation of the socially pernicious dowry system with its attendant social evils;

And Whereas this baneful system of dowry has to be eradicated by positive measures which will simultaneously ameliorate the conditions of women in the Hindu society;

And Whereas the government of Maharashtra has recently announced a policy with a view to promote welfare of the women;

And Whereas the said policy for women inter alia provides for the conferment of coparcenary rights on the daughter of a coparcener in a joint Hindu family governed by the Mitakshara law;

And Whereas it is considered necessary further to amend the Hindu Succession Act 1956, in its application to the State of Maharashtra.

For the purposes aforesaid. it is hereby enacted in the Forty fifth Year of the Republic of India as follows:

1. Short Title, Extent and Commencement.—

(1) This Act may be called the Hindu Succession (Maharashtra Amendment) Act, 1994.

(2) It shall be deemed to have come into force on the 22nd day of June, 1994.

2. Insertion of Chapter II-A in Act 30 of 1956.—

After section 29 of the Hindu Succession Act, 1956, in is application to the State of Maharashtra (hereinafter referred to as the Principal Act), the following chapter shall be inserted, namely:

29A. Equal rights to daughter in coparcenary property.—

Notwithstanding anything contained in Section 6 of this Act,—

(i) in a Joint Hindu family governed by Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship; and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(ii) at a partition in such a joint Hindu Family the coparcenary property shall be so divided as to allot to a daughter the same share as is allottable to a son.

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such predeceased son or of such pre-deceased daughter;

Provided further that the share allottable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had 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 of the pre-deceased daughter as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of clause(i) 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, as property capable of being disposed of by her by Will or other testamentary disposition;

(iv) nothing in this chapter shall apply to a daughter married before the commencement of Hindu Succession (Maharashtra Amendment) Act, 1986.

(v) Nothing in clause (ii) shall apply to a partition which had been effected before the date of commencement of the Hindu Succession (Maharashtra Amendment) Act, 1989.

29-B. Interest to devolve by survivorship on death.—

When a female Hindu dies after the commencement of the Hindu Succession (Maharashtra Amendment) Act, 1994 having at the time of her death, an interest in a Mitakshara coparcenary property by virtue of the provisions of Section 29 -A, her 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 any child or child of a pre-deceased child, 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 I.— For the purposes of this section, the interest of a female Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to her if a partition of the property had taken place immediately before her death, irrespective of whether she was entitled to claim partition or not.

Explanation II.— Nothing contained in the proviso to this section shall be construed as enabling a person who, before the death of deceased, had separated himself or herself from the coparcenary, or any of his or her heir to claim on intestacy a share in the interest referred to therein.

29C. Preferential right to acquire property in certain cases.—

(1) Where, after the commencement of the Hindu Succession (Maharashtra Amendment) Act, 1989, an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others, devolves under section 29A or section 29B upon two or more heirs and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incidental, to the application.

(3) If there are two or more heirs proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.— In this section 'court' means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette specify in this behalf.

3. Certain Partitions to be null and void.—

Notwithstanding anything contained in the principal Act or in any other law for the time being in force, where on or after the 22nd June 1994 and before the date of publication of the Act in the Official Gazette, any partition in respect of coparcenary property of a Joint Hindu Family has been effected and such partition is not in accordance with the provisions of the principal Act, as amended by this Act, such partition shall be deemed, to be, and to have always been, null and void.

ANNEXURE XI THE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT,1937

(Act No 26 of 1937)

[7th October, 1937][7th October, 1937]

Short title and extent.—

(1) This Act may be called the Muslim Personal Law (Shariat) Application Act, 1937.

(2) It extends to the whole of India [except the State of Jammu and Kashmir] [* * * * *]

Application of Personal law to Muslims.—

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal properly inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

Power to make a declaration.—

(1) Any person who satisfies the prescribed authority—

(a) that he is a Muslim, and

(b) that he is competent to contract within the meaning of section II of the Indian Contract Act, 1872 (9 of 1872), and

(c) that he is a resident of [the territories to which this Act extends], may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the

benefit of [the provisions of this section], and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, Wills and legacies were also specified.

(2) Where the prescribed authority refuses to accept a declaration under subsection (1), the person desiring to make the same may appeal to such office as the State Government may, by general or special order, appoint in this behalf, and such office may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.

Rule-making power.—

(1) The State Government may make rules to carry into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:

(a) for prescribing the authority before whom and the form in which declarations under this Act shall be made;

(b) for prescribing the fees to be paid for the filing of declarations and for the attendance at private residences of any person in the discharge of his duties under this Act; and for prescribing the times at which such fees shall be payable and the manner in which they shall be levied.

(3) Rules made under the provisions of this section shall be published, in the Official Gazette and shall thereupon have effect as if enacted in this Act.

[(4) Every rule made by the State Government under this Act shall be laid, as soon as it is made, before the State Legislature.]

Dissolution of marriage by Court in certain circumstances.—

[Repealed by the Dissolution of Muslim Marriages Act, 1939 (8 of 1939), section 6.

Repeals.—

[(The under mentioned provisions] of the Acts and Regulations mentioned below shall be repealed in so far as they are inconsistent with the provisions of this Act, namely:

(1) Section 26 of the Bombay Regulation IV of 1827;.

(2) Section section 16 of the Madras Civil Courts Act, 1873 (3 of 1873);

(3) [* * * * *]

(4) Section section 3 of the Oudh Laws Act, 1876 (18 of 1876);

(5) Section section 5 of the Punjab Laws Act, 1872 (4 of 1872);

(6) Section section 5 of the Central Provinces Laws Act, 1875 (20 of 1875); and

(7) Section 4 of the Ajmer Laws Regulation, 1877 (Reg 3 of 1877).

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