THE WAY AND VIEW OF LIFE
RIGHT BY BIRTH – HINDU SUCCESSION ACT 1956, BEFORE AND AFTER

By

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"The old order changeth yielding place to new

Lest one good custom should corrupt the entire world" (Tennyson – "*Morte-de-Arthur*) Dharma Sastras are called Smritis. The ancient Manu Smriti is a medley of religion, law and morality Yagnyavalkya stepped into edit and reform by sifting the chaff from grain to conform to the changed practices of his day. His work contains three chapters, Achara (Religious practice); Vyvahara (Legal Business, procedure, litigation and dispute) – and prayaschitha (penance). His compilation is called a smriti. Narada and Brihaspati carried it further by confining the Smriti to Vyavahara only. Brevity and precision marks Vignaneswara's commentary on Yagnayavalkya Smriti, which for the very reason is called Mitakshara and confines strictly to Vyavahara only with no nonsense approach in separating the civil law from the religious. Again and again the Smritis, declare that customs must be honoured and enforced and that they over rule or supplement – the smriti rules, because the smrities in the main were drawn from actual usages prevalent. (Page 7 Mayne's Hindu Law, *Alladi Kuppuswamy* – Reprint 1998 "Secular Character of Vyavahara Law". Thus the law of Dharma Sastras (Smritis) acclimatised to changing customs called Hindu Law today has been transforming, moving and progressing forward consistently with the changing trends of thinking of ever changing society and thus saving it from their corrupting influence of the old customs and stagnant practices. The old order is changing thus from time to time absorbing and imbibing the refreshing vigour of the changing times. It has never been static. Codification is the instance.

Did the institution of Hindu joint family, with incidents of co-parcenary, right by birth and survivorship corrupt, if not the entire world, Hindu India at least ? Has the institution of joint family become an old order demanding a radical change, which the codification of Hindu Law is supposed to usher in, by enacting The Hindu Succession Act 1956, as thought of by the Honourable Apex Court, *vide* in AIR 1986 SC 1753 (*C.W.T. v. Chandersen*) reaffirmed in AIR 1987 SC 558 (*Yudhishtar v. Ashok Kumar*) and followed as a binding precedent by the Honourable High Court of A.P. in 1995 (1) ALD 456 = (1995) 1 ALT 814, *Muslim Leela Prasad v. Musini Bhavani and others* ?

Before grappling with the legalities raised and answered therein, giving an impression, though not in clear categorical terms, that the joint family as a system with it's incidents of right by birth and survivorship stood abrogated by Section 8 of The Hindu Succession Act, it would be quite helpful, and necessary, to trace back the historical events that transpired during the decades of 40's and 50's of the last century, in the wake of freedom, preceding the emergence of The Republic of India.

"*Noscitur exsocio qui non-cognoscitur ex se*" – He who cannot be known from himself may be known from his associate"

Reading a statute, *de hors* the associate urges and events may not therefore lead to a purposeful understanding or appraisal of the real purport and intent of the aim and object of a legislation, in the process of codification – Hindu Code Bill 1948 and Hindu Succession Act of 1956.

Interim Government was a creature of The Indian Independence Act 1947,

empowered to play the dual role of Governance of the domain of India and framing of a constitution for independent India. Dr. *Ambedkar* as the Law Minister introduced The Hindu Code Bill in 1948 earlier in the constituent assembly (legislative). Dr. *Rajendra Prasad* as the Chairman objected to it on the question of competence (Hindu – dated 1-5-1949). *Ambedkar* introduced The Hindu Code Bill again in September 1951 after the advent of the constitution and before the 1st general election. *Rajendra Prasad* as President maintained, that the provisional parliament was a carry over from The Constituent Assembly and did not have the authority to enact such a major legislation making serious inroads into the personal law of Hindus, without touching the Muslim personal law, because it was indirectly elected and it's members lacked 'public mandate' of a general election.

Ambedkar aimed at achieving a Uniform Civil Code in the ultimate, and as a prelude to it, he tried to unify the various schools of Hindu Law of Dharmasastras (Smritis) in a bid to reconcile various conflicting doctrines. The idea of a Uniform Civil Code, struck at the heart of custom and orthodoxy of Hindu, Muslim and Sikh alike. The firm assertion of *Rajendra Prasad* in a letter addressed to the Prime Minister that the President is elected, though indirectly, unlike the British Monarch and not bound by and the conventions of British constitution do not apply in toto to our system of cabinet Government and he would have to return the Bill with an advice to the cabinet to think over and reconsider again and veto it, if the provisional parliament persisted or insisted and pressed the bill further. The clash of rival contentions regarding the respective powers of the President and the Prime Minister under our constitution reached a flash point.

On 25-9-1951, *Jawaharlal Nehru* wrote back, that President's indirect election makes no difference *vis-a-vis* The British Conventions. Nehru told the cabinet that however he was sending the information by way of such observation, to the President because "the Hindu Code Bill was not likely to come for discussion in the near future".

The reason behind this retreat was not merely the attitude of the President, Dr. *Rajendra Prasad*, as it might first appear, or the wish to avoid clash with Hindu Orthodoxy, but a sensitivity, particularly on Nehru's part to the fears of Muslims and Sikhs, who apprehended serious inroads into their personal laws in the proposed uniform civil code, the precursor of which was The Hindu Code Bill.

Indian inheritance (including Hindus and Others) is tolerant of various faiths, of conflicting and competing views.

One of the Chief supporters of Nehru in the cabinet, *N. Gopalaswamy Ayyengar*, the then Minister of Transport and Railways and formerly a distinguished member of the Constituent Assembly favoured the holding up of the Bill, until after general elections. *Nehru* thus acceded to the wisdom of postponement.

Thus the Bill was shelved for the nonce.

When pressed to act forthwith by M/s. *Renuka Roy*, a long time congress woman; a member of Constituent Assembly and a member of West Bengal Government in mid fifties, Nehru pleaded with her "trust me to pick time – I wished its passage as much as you".

Dr. *Ambedkar*, angered took it as an affront and had resigned in a pique from the Cabinet and left the Government in a hulf, over what he considered, "*Nehru*'s half-hearted efforts" on behalf of the Bill.

The first general elections were held in the year 1952 and *Nehru* redeemed the trust to M/s. *Renuka Roy* and his other like-minded team.

Later The Hindu Code Bill was split, and introduced piece-meal as separate bills and The Hindu Succession Act 1956 *inter-alia* was the third instalment in that process.

The original Hindu Code Bill of 1948, as amended by the Selection Committee, consisted of eight parts – dealing with, in

Part I : Preliminaries, embracing all religious sects such as Lingayats, Veera Saivas, Buddist, sikh and Jania as off-shoots of Hindu and virtually defining a Hindu as a residuary, excluding Muslim, Christian, Parsi or Jew by religion.

Part II : Marriage and Divorce

Part III : Adoption

Part IV : Minority and Guardianship

Part V : Joint Family

Part VI : Woman's Property

Part VII : Succession

Part VIII: Maintenance Act

The above respective parts manifested in and took shape as

(1) Hindu Marriage Act, 1955; (Part II)

(2) The Hindu Adoption and Maintenance Act 1956 (Parts III and VIII);

(3) Hindu Minority and Guardianship Act 1956 (Part IV);

(4) Hindu Succession Act 1956 (Parts VI and VII).

In this process, the subject of 'Joint family' in Part V of The Hindu Code was left untouched from codification in the pattern of the above said enactments—

Section 86 of the Part V, of The Hindu Code was sub-titled as "Birth in family not to give rise to rights in property". The substantive content reads "no right to claim any interest in any property of an ancestor" – "during his lifetime" founded on the mere fact of his "birth in the family".

Ancestor is one who is the male ascendant of three degrees and above *i.e.*, father, grandfather, great grandfather and the above. The property of the ancestor would invariably and always be his self-acquired or individual separate property. In such a case a male descendant (lenial descendant), son, grandson or great grandson would never have any right by birth "during the life time of ancestor".

This Section 86 of Part V of the Hindu Code stressed the obvious only and not a departure from the old Hindu Law (Dharma Sastraic Law).

Section 87, replaced joint tenancy by tenancy in common –

The section Speaks of "interest in joint family based on survivorship" and "holding it as tenants – in common" as if under the old Hindu Law, such persons having interest in the joint family held it as joint tenants, confounding the concepts of English law with the concepts of customary and Sastraic Mitakshara Hindu law. Importing conceptual notions of English law into the indigenous, Sui generis Hindu law led to such confusion.

The Hindu Succession Act 1956 inserted the qualified form of "survivorship" and "Tenancy in common" as distinct from "joint tenancy" and consequent terminology of "percapita" distinct from "per stirpes" in Sections 6 and 19 thereof. "*Right by birth*" was not mentioned any where in the Act. Perhaps and obviously the parliament thought that "survivorship" includes "right by birth". Satisfied with such sly and clever tinkering, underneath, the law relating to joint family was not enacted separately in the series of codifications of the other parts of the Hindu Code. Effect of Sections 6 and 19 will be

discussed hereinafter, at the appropriate stage, in the context of *Chandersen*'s case (AIR 1983 SC 1753) referred to at the very beginning herein before. Right by birth holds relevance in the context of a joint family and its property.

Delving deep, in his researches into the original condition of property, Sir *Henry Maine* in his memorable reference to 'Hindoos' and the form of their ownership arrived at his synthesis that "The village community of India is at once an organized patriarchal society and an assemblage of co-proprietors. The personal relations to each others of the men who compose it are indistinguishably confounded with their proprietary rights, and attempts of English functionaries to separate the two, may be assigned some of the most formidable miscarriages of formidable administration. The village community is known to be of immense antiquity. In whatever direction research has been pushed into Indian history, general or local it has always found the community in existence at the farthest point of its progress. Great number of intelligent and observant writers, most of whom had no theory of any sort to support concerning its nature and origin, agree in considering it the least destructible institution of a society, which never willingly surrenders any one of its usages to innovation. Conquests and revolutions seem to have swept over it without disturbing or displacing it and the most beneficent systems of Government of India have always been those which have recognized it as the basis of administration" (Page 216 of Ancient Law – Sir *Henry Maine* – Oxford University Press – London – 1950 reprint)

The Indian Society was patriarchal and an organized co-proprietorship in essence. Patriarchy is 'praja-patya', 'praja' in Sanskrit connotes 'people' in the larger sense of a territorial sovereign domain – A 'State' and 'Santati' (progeny) in the narrow sense of a family. The village was a commune and the family was a community. The ancient society was formed by communal living. Patriarch was ordinarily a benevolent head, and not a totalitarian dictator or a despot. The progressive transformation of this society of families conceived this system of Joint family as a unique institution (Vilakshana Sthitam).

"In tracing society backwards to the cradle, it would appear that one of the earliest units of the patriarchal family. The patriarchal family may be defined as a group of natural or adoptive holds together by subjection to the eldest living ascendant – father, grandfather and great grandfather. Whatever may be the former prescription of law, the head of such a group is always, in practice, despotic; but he is the object of respect, if not always of affection, which is probably deeper than any positive institution. (Page 507, *John D Mayne* – Hindu Law and usage 14th edition – Justice Sri *Alladi Kuppuswamy*).

Despotic tendency on the part of the 'karta' leads to partition, and there it ends. In the case of a father kartha, it is the sanguine bond of affection and regard that keeps the family together and not fear as observed by *John D Mayne*, quoted above, contrary to Sir *Henry Maine*.

The transition from the patriarchal family to joint family arises at the death of the common ancestor or the head of the house. If the family wishes to continue united, the eldest son would be the natural head; but his position would be very different from the original patriarch. In other words – when the ancestor (patriarch) as absolute owner of his property, being his acquisition, dies, his progeny transforms into a joint family, the eldest male member becoming a karta or manager. The original patriarch or ancestor is known as the propositus in Hindu Law to day.

Thus at a time when schemes of issurance, had not been even conceived or available, a fairly sophisticated and refined form of social insurance to all its members had been provided by the system of The Hindu joint

family since immemorial antiquity, irrespective of possession of property.

The joint family consists of two circles – the larger and the smaller within. The larger is the 'Kutumba Vrutta' (family circle) consisting of male and female members, spouses, daughters' unmarried, widows and divorces *etc.*, and able and disabled males as well. The smaller circle is an inner circle known as 'Swamya Vrutta' (co-proprietors of the family property with fluctuating interests therein depending upon the birth or death of male liniel descendant in the family – loosely called co-parcenary – a borrowed expression from English law, the incidents of which are not at all identical with that of the Hindu Law concept. Lord Dunedin in (1921) 48 IA 195, 211 – *Baijnadh Prasad v. Tej Bali Prasad.* Unlike Hindu Law concept, the English co-parcenary is not that of family members, but strangers and the interest of every co-parcener extinguishes on his death and it does not survive to the other member or his progeny – There is no survivorship – co-parcenary in English law is not by birth, but by a tenure between the Aristocracy and the peasantry. [Pages 409 to 419 – Law of Transfer of Property – 4th Edition, *G.C.V. Subba Rao* – Reprint – Edition 2005 – by *Vepa P. Saradhi*]

Co-parcenors of the smaller circle with in the larger are the joint owners or co-proprietors and manage the property through karta as the head. It is analogus to the parliament and cabinet with the Prime Minister as its head – as primus inter pares *i.e.*, the first among the equals. The cabinet is the Government and legislators are the representatives of the people. Good governance looks to the welfare of the peoplenation. Good karta manages the property and looks after the welfare of the entire family. That is the inter relation of the co-parcenary and the family. Men may come, and go, the institution of joint family and co-parcenary continues until divided, as the nation, and the Government does until dislodged by the people.

For a joint family to come into being, a common ancestor is essential and not property. If the family possessed property, co-parcenary would emerge, incidents of which are right by birth and survivorship. These rights ensure continuation of the family in perpetuity, preventing fragmentation of the family property, the economy of which is more often than not agrarian in character. This is what Section 4(2) of The Hindu Succession Act 1956 envisaged wisely "prevention" of "fragmentation" of agriculture holdings. Thus the joint family with its incidents of co-parcenary, right by birth and survivorship is a unique system evolved by custom, tradition and usage, not found any where in the world or in any society or civilization and which withstood the test of time. Thus the joint family arises by status and not by contract like partnership or tenancy. That is the Hindu way and view of life.

Sections 86 and 87 of the part V of the Hindu Code of 1948 contemplated abolition of right by birth, and survivorship, and there by administering a death blow – a coup-de-grace to the very institution of joint family –

The Parliament in its wisdom left the subject of the "joint family" (Part V of the Hindu Code of 1948) as it is and excluded it from the process of codification of other aspects of Hindu law, (I to VIII of the Code) and stopped further codification, obviously reluctant to meddle or tamper with such a beneficent institution, which formed the basic unit of social and familial administration. On the other hand, the institutional concepts of 'joint family' and 'co-parcenary' and 'right by birth' have been preserved, and conserved in Sections 6, 19 and 30 of The Hindu Succession Act, 1956 in direct negation of Sections 86 and 87 of part V of Hindu Code. Thus the system of joint family has been saved with it's incidents both by positive reiteration and negative exclusion of the provisions of the Hindu Code.

In this back drop of preceding events and the evolution of this unique institution,

the substantive content of the propositions laid down by the Honourable Supreme Court in AIR 1983 SC 1753 (*Commissioner Wealth Tax Cawnpur v. Chandersen and another*), (Bench of *R.S. Pathak* and *Sabyasachi Mukherje,* JJ.,) and the inferences or conclusions likely to be drawn, and drawn by the A.P. High Court indeed, have to be analysed in proper perspective.

The above decision has been rendered under the Wealth Tax Act and Income Tax Act.

To day the terminology of 'Hindu Joint Family' and 'Undivided Hindu Family' is used liberally and synonymously.

Hindu undivided family, called by the acronym 'H.U.F.' is a creature of the laws of taxation, such as the Income and Wealth Tax Acts. The said enactments are meant to assess, levy, impose and collect revenue to the Union Government. Families doing business, or possessing wealth of any kind or description are registered as H.U.F. The Taxman is not concerned with co-parcenary, but only with the joint family with property for a family without property is an empty kit.

Unlike The Hindu Joint family, women and even a minor are liable to file returns of wealth or income, as managers of H.U.F., irrespective of the schools of Mitakshara or Dayabhaga to which they belong. In Assam and Bengal, governed by Dayabhaga School, a son has no right by birth during the lifetime of the father. On the death of the father, sons get right by birth and a co-parcenary comes into being and women are also co-parcenors. So co-parcenary arises on the death of the father in Dayabhaga. In Mitakshara School governing all the other parts of the country, sons become co-parcenors by birth, and women and minors have no right of representation –

These are the essential features of difference between the two schools. In other respects doctrine of representation, degrees of ascent and descent are identical in both the schools.

The concept of H.U.F has been spun out by a legislative astuteness as a measure of unification of the different schools for the purpose of assessing and collection of revenues by way taxes payable and fastening liability on the H.U.F as a unit as such, from persons composing it individually in respect of the property in their hands as the case may be.

H.U.F is therefore a creature of statute.

Partnership is a creature of contract.

Hindu joint Family or Undivided Hindu Family is a creature of status by birth in a family.

The facts in brief of AIR 1983 SC 1753 are

Rangi Lal and his son *Chander Sen* constituted a 'Hindu Undivided Family' (H.U.F) owning immovable properties and joint family business. Effecting a partial partition of the family properties, *Rangi Lal* the father, divided the family business on 10-10-1961, and thereafter, he continued it as a firm along with his son. *After partition with the family properties obtained, Chander Sen constituted a joint Hindu family with his sons and registered it as H.U.F*, with Income and Wealth Tax authorities. *Rangi Lal* died on 17-6-1965, leaving behind his son *Chander Sen* and his grand sons only, as his mother and wife predeceased him – *Chander Sen* succeeded to the family immovable properties remaining after partial partition of the family properties and to the amount lying to the credit of *Rangi Lal* as partner of the firm.

Chander Sen submitted return of his H.U.F including the value of the immovable properties of the family inherited by him, but excluded the amount lying to the credit of his deceased father in the partnership firm and inherited by him. In the next accounting year, he excluded the interest accrued on the said amount, claiming both amounts as his separate property as per Section 8 of the Hindu Succession Act. Both the authorities included both the amounts in H.U.F account in the wealth and income tax returns. On

appeal, it was held that the said amounts devolved on *Chander Sen* in his individual capacity and should not be included as assets of the assesse H.U.F. The appeals of the Revenue were also dismissed by tribunals – On a reference made by The Revenue to the High Court of Allahabad, the High Court agreed with the tribunal and answered that the amount was the individual property of *Sen* and should not be included in H.U.F.

On appeal by the Revenue, the matter came up before the Supreme Court, and the Honourable Supreme Court, dismissed the appeals.

A little pause is necessary at this stage. *Chander Sen*, the son of *Rangi Lal*, after partial partition effected, formed and constituted a joint family with his sons as co-parcenors and his wife and daughters as members of the family, acting himself as Karta, and registered it as H.U.F under the Income Tax and Wealth Tax Acts. The Supreme Court has also recognized and mentioned about the co-parcenary *qua* his sons and the constitution of joint family, with the said property devolved on him.

So, the issue before the Honourable justice *Sabyasachi Mukherje* was about the nature and character of the movable property (*i.e.*) amount lying in the accounts of partnership, and inherited by *Chander Sen*, a sole surviving partner in the firm. In other words, whether it is ancestral property in the hands of *Chander Sen* or separate property *vis-à-vis* his sons constituting H.U.F.

Honourable Justice *Sabyasachi Mukherje* agreeing with and relying on the views of the High Courts of Allahabad, Madras, Madhya Pradesh, Andhra Pradesh and Calcutta, has dissented from Punjab and Haryana and Gujarat and answered the reference that as per Section 8 and other provisions of the Hindu Succession Act, the property in the hands of *Chander Sen* was his separate property, and not the property of his H.U.F.

The entire line of thinking seems to be on the basis of approach of Honourable Justice *H.M. Beg* as he then was, in *C.I.T.V. Ram Rakshapal Ashok Kumar* reported in (1968) 67 I.T.R. 164, which will be referred to at the appropriate context hereunder.

The Honourable Justice *Sabyasachi Mukherje* (in para 19, 20, 21 and 22) posited questions, discussed thread-bare with reference to preamble, provisions of Chapter II of The Hindu Succession Act 1956 *vis-à-vis* the old Hindu Law and laid down that :

(a) it is necessary to bear in mind, the preamble to the Act. The stated object is to modify where necessary and to codify the law relating to intestate succession among Hindus;

(b) Section 8 provides that a property of a male Hindu dying intestate shall devolve upon the heirs, being the relatives specified in Class I of the schedule, which include a son and the son of a predeceased son only among others and not a son's son;

(c) Section 4 of the Act has a overriding effect over Hindu Law, custom and usage and in case of inconsistency between the Hindu Law and the Act, the Act prevails and in case of doubt, one has to look to the provisions of the Act and not to the pre-existing Hindu Law (Relying on A.P. High Court – *C.W.T. v. Mukunda Giriji* – (1983) 144 ITR 18 (AP) rendered by Honourable justice *Punnayya* and *Jeevan Reddy*, JJ.

(d) Or else it would be creating two classes of heirs – males and females in the matter of succession and in view of the above propositions, it would be difficult to hold today that the property which devolved on a Hindu under Section 8 of the Act would be H.U.F. in his hand *vis-a-vis* his son (Para 20).

Elaborating the proposition (b) above, the Honourable Justice thought and held that "it can't be said that when a son inherits the property in the situation contemplated by Section 8, takes it as Karta of his own undivided family, and if a contrary view is taken, it would mean, that regarding excluded son's son, the preexisting Hindu law applies and he gets a right by birth in the inheritance, contrary to the scheme of Section 8". There is no material for such inference of the scheme of the Act.

On this aspect, the Honourable Justice *Mukherje* followed the approach of Honourable Justice *Beg* in *Ram Rakshapal* case.

Honourable Justice *Beg* relied on a passage of Honourabale Justice *B.K. Mukherje* in AIR 1953 SC 495 (*Arunachala v. Muruganadha*), which is a case of a father gifting his self acquired property to his son under a will, wherein it was held that the property thus bequeathed in the hands of the donee son shall not always be treated as ancestral property *vis-a-vis* the sons of the donee simply for the reason that the property was got from his father or ancestor and by reason of his birth.

"The son can assert an equal right with the father only when the grandfather's property has devolved upon his father and has become ancestral property in his hands. The property of the grandfather can normally vest in the father as ancestral property, if and when the father inherits such property on the death of the grandfather, or receives it, by partition made by the grandfather himself during his lifetime. On both these occasions, *the grandfather's property comes to the father by virtue of the latter's legal right as a son or a descendant of the former and consequently it becomes ancestral property in his hands".*

Honourable Justice *Beg* misunderstood the lines under scored in thinking and observed that it could not be inferred that "there is any question of property first vesting in the father, and then vesting again in the father and the son (*i.e.*,) the son and the grandson of the deceased".

In the same tenor, the High Court of Madras in 1978 CTR (Madras) 311 (*Addl. CIT v. Karuppan Chettiar*), approached. *Palaniappa*, *Ananda Valli* and *Karuppan*, as father, mother and son constituted a H.U.F. *Palaniappa* affected partition and formed a H.U.F. with his wife and son and a daughter. *Palaniappa* passed away leaving behind his wife, son *Karuppan* and daughter. *Karuppan* succeeded to the 1/3rd. Whether 1/3rd goes to his H.U.F or devolves on him as his individual separate property? – That was the issue raised.

The Madras High Court posed a right question – How do the heirs in class I take the property under Section 8 of the Act ?

"If the mode of division provided by the section is different from that which obtained before the Hindu Succession Act came into operation in accordance with the principle of Hindu Law, in view of what is categorically stated in Section 4 of the Act, it is Section 8 of the Act that should prevail and not the principles of Hindu Law"

To this extent, none challenges the formulation. The Judges took the view that the old Hindu law of inheritance stood changed.

"When we search for the relatives mentioned Class I of the schedule, which is attracted by virtue of Section 8, we find no son's son mentioned at all though the grandson (son of a predeceased son) of the deceased is mentioned……. But, where the son as well as his son are the persons concerned, by applying Section 8, we have to come to the conclusion, that the son alone namely *Karuppan*, in this case, will inherit the property *to the exclusion of the grandson*. This being the effect of the statutory provision no interest will accrue to the grandson in the property which belonged to palaniappa" (Page 530-31).

In the same way and on the same reasoning Honourable Justices *Punnayya* and *Jeevan Reddy*, held in *Assistant Commissioner of*

Wealth Tax v. Mukundagiriji – (1983) 144 ITR 18 (A.P) answered the reference made to the High Court by the Revenue, that the grandson of the deceased will have no right by birth in the property inherited from his father by and in this hands of his father and the inheritance of the father is his individual absolute property, holding that Section 8 struck a departure from the old Hindu Law of inheritance. The Andhra Pradesh High Court took Sections 4, 6, 8, 19 and 30 of the Act into consideration.

This reasoning of the Allahabad, Madras and Andhra Pradesh prevailed on the Honourable Supreme Court.

The whole argument is based on a fallacious assumption that under the old Hindu Law, son and grandson together inherited the separate property of a Hindu. But under old Hindu Law, like Section 8 of the Act, son and son's son did not succeed simultaneously as thought of. The old Hindu Law said that when a Hindu inherits his father's property, his son gets an interest in it by birth (*i.e.*), if there is a son already, he becomes a co-parcenor with his father; if he is not there but born later, he becomes a co-parcenor from the date of his birth. If he has son at all, he becomes absolute owner as his separate property.

On this fallacious assumption and misconceived logic, the Honourable Supreme Court also thought that the old Hindu Law is inconsistent with Section 8 and as per Section 4, Section 8 prevails over a 'non-existing' concept of Hindu Law in the sense, that so far as son of a predeceased son is concerned Old Hindu Law doctrine of representation – applies and so far as son's son is concerned, the son takes it as his separate but not ancestral property *qua* his son, as the son's son was specifically excluded from the Class I heirs of the schedule of the Act.

The other argument of the Honourable Justice Sri *Sabyasachi Mukherje* is that the Class I heirs of the schedule mentions male and female relatives and if old Hindu Law were to be applied, male heirs inheriting would form a co-parcenary, and the female relatives would not. (Proposition (d) at page enumerated above – while referring to AIR 1986 SC 1753).

Under the old Hindu Law and as well as under the Act, the females do not form a co-parcenary. To illustrate,

Section 6 of the Act, clearly speaks of co-parcenary and survivorship and envisions continuance of the old Hindu Law of the joint family system. The sub-title is *"Devolution of interest in co-parcenary property"*, confirms the hypothesis.

The proviso reads 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 claiming through such female relative, the interest of the deceased in the Mitakshara co-parcenary property shall devolve by testamentary or in testate succession, as the case may be under this Act and not by survivorship. Here the position of a widow of a deceased co-parcener under the Hindu Women's Right to property Act 1937 whose presence intercepts survivorships bears relevance. She was not a co-parcenor, but occupied a special status. The said Act was repealed by the Act, 1956 for the reason that some more female relatives are specified in Class I adding to the loan female heir widow under the Act of 1937. This is in conformity with the Vgnyameswara's liberal view of propinquity of mother *etc.*

The explanation makes it clear that the interest of a Hindu Mitakshara co-parcenor shall be deemed to be the share in the property that would have been allotted to, if a partition had taken place before his death. So much so, notional partition is contemplated and under Section 30 of the Act, and a Hindu is entitled to will out his undivided interest in the joint family co-parcenary. This is a departure from the Old Hindu Law. But

no *modus operendi* or rules for the notional partition are provided under the Act. So the old Hindu Law governs still insofar as partition is concerned. Notional partition or partition presupposes the existence of co-parcenary, and the incident of right by birth under the Act 1956 as well.

Section 19 speaks of Tenants in common, distinct from joint tenants *vis-à-vis* the heirs succeeding and therefore, the Honourable Courts thought that joint family and co-parcenary and right by birth are given a go by and abrogated altogether,

'Joint tenants' and 'Tenants-in common" are borrowed concepts of English law, loosely adopted. Joint tenancy is unkown to Indian jurisprudence, and common tenancy is the rule – In India it is family co-ownership. 'Samashti – Daya' is Apratibandha Daya (unobstructed heritage) and not joint tenancy. The Privy Council observed that "the principle of joint tenancy appears to be unknown to Hindu Law" *Jogeswar Narayana v. Ramachandra Dutt*, 6 MLJ 75 = 23 I.A = (1896) ILR 23, Calcutta 70. "The principle of joint tenancy appears to be unknown to Hindu Law, except in the case of co-parcenary between members of an undivided Hindu family". Referring to this case in a later decision the judicial committee observed.

"In their Lordships opinion, this is clear ruling in the case of joint property of an undivided Hindu family governed by Mitakshara Law, which under law passes by survivorship". (*Mussammat Bahu v. Thakur Rajendra Baksh*) – 64 MLJ 555 = 60 I.A. 95 (PC).

Thus when the sons inheriting together from father by intestate succession, they take it as tenants in common having definite shares (per capita – (*i.e.*,) if a father dies leaving behind four sons and ancestral property, each one of the four will hold the specific ¼ th share). This is exactly what Section 19 of the Act of 1956 by specific clause that "if two are more heirs succeed together …… They shall take per capita", ("save as otherwise provided").

The sons therefore succeed per capita among themselves and as co-owners or co-parcenors with their respective sons constituting a Hindu joint family or H.U.F as the case may be. Per stirpes (Stirpa means branch – Capita means head – branch wise and head wise).

This what exactly was meant by the dictum of The Privy Council, which stood incorporated in Section 19 of the Act.

The expression "save as otherwise provided" in Section 19 refers to Section 6 of the Act which in clear categorical terms mentions 'co-parcenary' interest in co-parcenary' and 'survivorship' of which right by 'birth' is an internal and inextricably inter-connected and inseparable incident- in other words an inherent right 'Janma naina swatwa' meaning 'right by birth'. It is only when a female heir in Class I of the schedule intervenes, survivorship is intercepted. Nothing prevents the other co-parcenors to continue, excluding the family of the deceased co-parcenor per-stirpes (branch wise). The survival and continuance of the co-parcenary is also possible, when a co-parcenor dies a bachelor or issueless and as a widower. Co-parcenary and survivorship have been thus preserved under Section 6 of the Act. Section 10 – Rules 3 and 4 prescribes rules of succession among the branches of widows, and daughters of predeceased sons or daughters. It cannot be therefore construed that succession perstirpes is abrogated altogether.

That is also exactly what Section 4 meant when it commenced saying that "save as otherwise expressly provided under the Act". Sections 6, 10, 19 and 30 are the instances of "otherwise provided". Section 8 prescribes the rule of succession to "the property of a male Hindu" and not to "the interest of a male Hindu in co-parcenary". The expression

"the property of a male Hindu" obviously means his individual or self-acquired property or the property inherited by him either through his mother or maternal grandfather – which is called Sapratibandha Daya (obstructed heritage). In succession to such property, male and female relatives are added in conformity with the precept of *Vijnaneswara's Mitakshara* (word brief to a syllable – a code) based on the principle of propinquity.

It may also be noted at this stage that, most significantly there is nothing to infer in the Hindu Succession Act of 1956, either expressly or by necessary implication that the old Hindu Law relating to the character of inheritance or ancestral property has been changed. No where does it lay down that a Mitakshara Hindu Male, succeeding to his father's separate property will take it as his separate property *qua* his sons and his sons will have no interest in it by birth.

The rulings of the Honourable High Courts and the Supreme Court proceeded on the fallacious premises or pre-supposition that the Act has provided for intestate succession and Section 8 dealt with the succession to the property, ancestral and self acquired of a Hindu as well in view of the over riding effect of Section 4, besides the preamble. There is no basis or foundation in the Act for drawing such a presumption and inference.

If the argument of the Honourable High Courts and the Supreme Court were to continue to operate as binding precedents, and carried to the logical end, there would come into existence no new Mitakshara families or H.U.Fs after coming into force of the Act.

This is therefore not the intendment of the Act or the letter and spirit of the provisions, for the following reasons,

(a) the preamble says "an act to amend and codify the Hindu Law relating to succession among Hindus" and to modify wherever necessary and not 'abrogate' any institution of Hindu Law – *i.e.*, joint family, and co-parcenary *etc.* 'To modify' is not to "abrogate" – but to moderate, or alter slightly or to vary or to differentiate. Thus survivorship and testamentary disposition are modifications brought out in Sections 6 and 30 of the Act.

(b) the framers of the Hindu Succession Act, had not only scrupulously and deliberately avoided incorporating Section 86 of Para V of the Hindu Code of 1948 which prescribed abolition of right by birth, but also preserved it in Sections 6, 10 and 30 of the Act, co-parcenary and survivorship which are founded on right by birth. The rule of Harmonious construction of the provisions of an enactment contemplates giving every word it's due meaning to confirm to the object of the act as a whole and not to defeat it. In this context, the rules of Mimamsa of Jainini are similar to the rule of Harmonious construction.

(1) Each word should have a purposeful meaning (ARDHAIKATVA)

(2) Reconciliation of all ideas with the principle (GUNAPRDHANYA)

(3) Contradiction should not be presumed and on the contrary reconciliation should be attempted (SAMANGASYA)

(4) Interpretation making a word meaningless should be avoided (ANARTHAKEYA).

The elected parliament did not agree with the entire gamut of the provisions of the Hindu Code Bill of 1948; as a whole, and saved the institution of Hindu joint family

with its familial relationship with its members *etc.*, intact in the provisions of the Hindu Succession Act 1956.

Honourable M/s. Justice Maruti of Andhra Pradesh High Court in 1995 (1) ALD 456 = (1995) 1 ALT 814, *Musini Leela Prasad v. Musini Bhavan and others*, relating to a suit for partition of ancestral property *etc.*, field by a wife against her husband, his brother and mother, held relying on AIR 1986 SC 1153, that the ancestral property inherited by the son on the death of his father should be treated as his separate property and his son is not entitled to a share by birth.

Before concluding it is quite apposite to quote Arnold Toyanbee "Hinduism takes it for granted that there is more than one valid approach to truth and salvation and that the different approaches are not only compatible with each other but are complementary" (The present day experiment in western civilization). This elasticity, adopting characteristic, absorptive tendency and imbibing nature is a view and way of life, of which 'Vyavahara' (law) is one of the organic components, which made it's survival possible for thousands of years.

The son's right by birth in the ancestral property is a typical and peculiar concept of Mitakshara and it is not meddled with by the Act of 1956.

This is the humble and firm view of this writer. The Honourable Apex Court may in the light of the above discussion and analysis, reconsider or review its ruling in AIR 1986 SC 1753 (*Chander Sens* Case), clarifying the position, at the earliest occasion if the unique system of joint family, with its incidents of right by birth and co-parcenary, has been abrogated under Hindu Succession Act 1956 altogether and the identity of the ancestral impress of the property wiped out by the device of partition and steer clear the law of the probable polemics in Court Halls and in the minds of people and the society.

May it please your Lordship Supreme !

NEED OF WORKERS' EDUCATION ON CHILD LABOUR — A Legal Perspective

By

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Introduction : Child Labour has been stirring the science of the world community for long. While children must be enjoying their childhood and preparing to enter into adulthood through proper education, many of them are forced to work for long hours in human condition, often in hazardous industries. The notion that the child labour is a social problem, is a relatively recent development. This interpretation of child labour and the accompanying idea that the child should be protected against it, came to the force when paid child labour became common, till date we do not have a common definition of child labour. But the most suitable definition is that "Child labour can be conceived to include children under the age of 15 years in work or employment with the aim of earning a livelihood for themselves or for their families the causes of child labour may be attributed to such factors as illiteracy, ignorance, low wages, unemployment,