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FAMILY LAW – 2

HINDU JOINT FAMILY SYSTEM

MITAKSHARA JOINT FAMILY

The Mitakshara joint family is a unique contribution of Hindu jurisprudence which has no parallel in any ancient or modern system of law. It has been a fundamental aspect of the life of Hindus. It is an integral part and the most characteristic way of Hindu life. For a Hindu, there is no escape from the joint family. May be in one generation it comes into existence automatically, and there is no way in which one can escape from it. This is why it is said that Hindu Law, there is a presumption that every family is a joint Hindu Family.

A Hindu Joint Family consists of a common ancestor and all his lineal male descendants up to any generation together with the wife or wives and unmarried daughters of the common ancestor and of male descendants. The Common ancestor is necessary for bringing a joint family into existence; for its continuance common ancestor is not a necessity. The death of the common ancestor does not mean that the joint family comes to an end. Upper links are removed and lower are added and so long as the line does bot become extinct, the joint family continues and can continue indefinitely almost till perpetuity.

A remarkable feature of Hindu Law is that even an illegitimate son is a member of his father's joint family. Sometimes even widowed daughters may return to their fathers family and may lay claim on the bounty of the joint family. The ancient Hindu law recognized their right of maintenance.

A Hindu joint family is not a corporation. A Hindu joint family has no legal entity distinct and separate from that of the members who constitute it. It is not a juristic person either, same was held in **Chotelal v Jhandelal (AIR 1972 ALL 424).** A Hindu Joint family is a unit and in all matters it is represented by a Karta. Within its fold no outsider, except by adoption, can be admitted by agreement or otherwise. It confers a status on its members which can be acquired only by birth in the family or by marriage to a male member. A Hindu joint Family is also different from a composite family. Composite family was unknown to Hindu Law. The institution of composite family is a creature of custom and owes its constitution to an agreement. Where two or more families agree to live and work together, pool their resources, throw their gains and labour into the joint stock and shoulder the common risk, there comes into existence a composite family.

A single male or female member cannot make a HJF, even if the assets are purely ancestral.

HINDU UNDIVIDED FAMILY

For the purposes of assessment of tax, the revenue statutes use the expression, **'Hindu Undivided Family'.** This appears to be slightly different from the definition of a HJF. For instance, for the purpose of revenue statutes, there can be an undivided family consisting a man, his wife and daughters or even of two widows of a sole surviving coparcener. This definition is relevant for the purpose of determining in which category the income should be assessed. The Supreme Court said that the expression **'Hindu Undivided Family'** in the Wealth Tax Act is used in the sense in which a HJF is understood in the personal law of the Hindus and a joint family may consist of a single male member and his wife and daughters and there is nothing in the scheme of the Wealth Tax Act to suggest that a HUF as assessable unit must consist of at least two male members. Thus, there can be JF consisting of a single male coparcener and the widows of coparceners. There can also be a HUF where there are only widows.

The rule is that even on the death of sole surviving coparcener, the HJF does not come to an end so long as it is possible in nature or law to add a male member to it. It was submitted that under Hindu Law, when there is joint family consisting of female members and a male member, the male member can treat the joint family property, almost as his separate property. As long as another male member does not come into existence, it assumes the character of self acquired property, subject to the rights of maintenance of female members. But for taxation purpose such a family will be called an undivided family.

In **Board of Revenue v Muthu Kumar (AIR 1979 Mad 1)** it was held that when a son inherits the separate property of his father under Sec.8 of the Hindu Succession Act, 1956, he takes it as his separate property even though he has a son. It was submitted that this is an erroneous view. The Hindu Succession Act effects only the old Hindu Law of succession and not law of joint family; once a Hindu succeds to the property of his father, his sons acquire an interest in it.

COPARCENARY UNDER MITAKSHARA

It is important to note the distinction between ancestral property and separate property. Property inherited by a Hindu from his father, father's father, or father's father's father, is ancestral property. Property inherited by him from other relations is his separate property. The essential feature of ancestral property is that if the person inheriting it has sons, grandsons, or great grandsons, they become coparceners with him and become entitled to it by reason of their birth.

Thus, if A, who has a son B, inherits property from his father, it becomes ancestral in his hands, and though A, the head of the family, is entitled to hold and manage the property, B is entitled to an equal interest in the property with his father, A and to enjoy it in common with him, B can, therefore, restrain his father from alienating it except in the exceptional circumstances, viz., apatkale, kutumbharte, dharmarte or legal necessity. Such alienation

is allowed by law and he can enforce partition of it against his father. On his father's death, he takes the property by survivorship and not by succession.[1]

However, as to separate property, a man is the absolute owner of the property inherited by him from his brother, uncle, etc. His son does not acquire an interest in it by birth and on his death, it passes to the son not by survivorship but by succession.[2]

Thus, if A inherits from his brother, it is his separate property and it is absolutely at his disposal. His son B acquires no interest in it by birth and he cannot claim partition of it nor can he restrain A from alienating it. The same rule applies to the self acquired property of a male Hindu. But it is of the utmost importance to remember that separate or self-acquired property, once it descends to the male issue of the owner becomes ancestral property in the hands of the male issue who inherits it. Thus, if A owns separate or self-acquired property it will pass on his death to his son B as his heir. But in the hands of B it is ancestral property as regards his sons. The result is that if B has a son C, C takes an interest in it by reason of his birth and he can restrain B from alienating it, and can enforce a partition of it as against B.

Ancestral property is species of coparcenary property. As stated before, if a Hindu inherits property from his father, it becomes ancestral in his hands as regards his son. In such a case, it is said that the son becomes a coparcener with his father as regards the property so inherited and the coparcenary consists of the father and the son. But this does not mean that a coparcenary can consist

only of a father and his sons. It is not only the sons but also the grandsons and great grandsons who acquire an interest by birth in the coparcenary property.

Thus, if A inherits property from his father and he has two sons B and C, they both become coparceners with him as regards the ancestral property. A, as the head of the family, is entitled to hold the property and to manage it and hence is called the manager of the property. If B has a son D and C has a son E, the coparcenary will consist of the father, sons and grandsons, namely, A,B,C,D, and E. Further, if D has a son F, and E has a son G, the coparcenary will consist of the father, sons, grandsons, and great grandsons, in all, it will consist of seven members. But if F has a son H, H does not become a coparcener, for

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[1] Section 6 of the Hindu Succession Act, 1956: 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:

[2] Section 8 of the Hindu Succession Act, 1956: 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

a coparcenary which is limited to the head of each stock and his sons, grandsons, and great grandsons. H being the great great-grandson of A cannot be a member of the coparcenary so long A is alive.

KARTA

Meaning

A Hindu joint family consists of the common ancestor and all his lineal male descendants upto any generation together with the wife/ wives (or widows) and unmarried daughters of the common ancestor and of the lineal male descendants. Whatever the skeptic may say about the future of the Hindu joint family, it has been and is still the fundamental aspect of the life of Hindus.

A co-parcenery is a narrow body of persons within a joint family. It exclusively consists of male members. A Hindu coparcenery is a corporate entity, though not incorporated. A coparcenery consists of four successive generations including the last male holder of the property. The last male holder of the property is the senior most member of the family.

In the entire Hindu joint family, the karta or manager (the English word manager is wholly inadequate in understanding his unique position) occupies a very important position. Karta is the eldest male member of the family. He is the Hindu patriarch. Only a coparcener can become Karta. Such unique is his position that there is no office or any institution or any other system of the world, which can be compared with it. His position is sui generis i.e. of his own kind or peculiar to himself. Peculiarity lies in the fact that in terms of his share/interest, the Karta is not superior and has no superior interests in the coparcenery. If partition takes place he is entitled to take his share. He is a person with limited powers, but, within the ambit of his sphere, he possesses such vast powers as are possessed by none else. His position is recognized /conferred by law. No stranger can ever be qualified to be a karta, but an adopted son who is the eldest in the family can be qualified.

Article 236 of the Mulla Hindu Law defines "Karta" as follows:

Manager - Property belonging to a joint family is ordinarily managed by the father or other senior member for the time being of the family: The Manager of a joint family is called Karta.

In a HUF, the responsibility of Karta is to manage the HUF property. He is the custodian of the income and assets of the HUF. He is liable to make good to other family members with their shares of all sums which he has misappropriated or which he spent for purposes other than those in which the joint family was interested. His role is crucial. He is entrusted not only with the management of land/assets of the family but also is entrusted to do the general welfare of the family.

His position is different from the manager of a company or a partnership. The reason behind it is that though the coparcenery deals with lands, assets/property but in an entirely different

fashion. When a Karta is bestowed with such a position it is something, which takes place under the operation of law.

Who Can Be A Karta?

Senior Most Male Member: - It is a presumption of Hindu law, that ordinarily the senior most male member is the Karta of the joint family.

Jandhayala Sreeamma v. Krishnavenamma AIR 1957 A.P.434

In the case of Hindu Joint Family a suit to set aside on alienation filed by the younger of the two brothers within three years of his attaining majority would be barred by limitation if the elder brother, who was the manager and an adult has failed to sue within three years of his attaining majority.

The senior most male member is Karta by virtue of the fact that he is senior most male member. He does not owe his position to agreement or consent of other coparceners. So long as he is alive, may be aged, infirm, or ailing, he will continue to be Karta. Even a leper may continue to be the Karta1. However, in cases of insanity or any other disqualifications, the next senior male member generally takes over the Kartaship. Once this is done the former will cease to be a karta.

So long as the father is alive, he is the karta. After his death it passes to the senior most male member, who may be the uncle, if coparcenery consists of uncles and nephews, or who may be the eldest brother, if coparcenery consists of brothers.

Junior Male Member

In the presence of a senior male member, a junior male member cannot be the Karta. But if all the coparceners agree, a junior male member can be a Karta. Coparceners may withdraw their consent at any time.

"So long as the members of a family remain undivided the senior member is entitled to manage the family properties including even charitable property and is presumed to be the manager until the contrary is shown. But the senior most member may give up his right of management and a junior member may be appointed as manager."

Narendrakumar J Modi v. CIT 1976 S.C. 1953

Facts: - Baplal Purushottamdas Modi was the head of the HUF. Joint family possesses many immovable properties and carried business of various types such as money lending, etc. He executed a general power of attorney in favor of his 3rd son, Gulabchand on Oct 5, 1948. On Oct 22, 1954 Baplal relinquished his share. On Oct 24, 1954 the existing members of the family executed a memo of partition. However, the order accepting partition was not passed, the contention of the appellant was that Gulabchand couldn't be a karta because he is a junior member and other members of the family did not accept him as a karta.

Judgment: - It was held that Gulabchand was given the power to manage by Baplal because Gulabchand's elder brother was an aged man of 70 years. And also the father of appellant died in 1957. So, under such circumstances, Gulabchand appears to have acted as the Karta with the consent of all the other members and hence the appeal was dismissed.

Female Members As Karta

The concept of a "manager" of a Joint Hindu Family has been in existence for more than two thousand years or more. Courts in India have given diverse views: -

C.P. Berai v. Laxmi Narayan AIR 1949 Nag 128

It was held that a widow could be a karta in the absence of adult male members in the family. It was said that the true test is not who transferred/incurred the liability, but whether the transaction was justified by necessity.

Sushila Devi Rampura v. Income tax Officer AIR 1959 Cal

It was held that where the male members are minors, their natural guardian is their mother. The mother can represent the HUF for the purpose of assessment and recovery of income tax.

Radha Ammal v. Commissioner of Income Tax AIR 1950 Mad 588

It was held that since a widow is not admittedly a coparcener, she has no legal qualification to become a manger of a JHF.

Commissioner of Income Tax v. Seth Govind Ram AIR 1966 S.C. 2

After reviving the authorities it was held that the mother or any other female could not be the Karta of the Joint Family. According to the Hindu sages, only a coparcener can be a karta and since females cannot be coparceners, they cannot be the Karta of a Joint Hindu Family.

The above views seem to be rigid. Rigidity in law is a fatal flaw. Since it is depended upon an ill directed question whether the transferor was a coparcener.

Dharmashastra is one and only sure guide. According to Dharmashastras, in absence of male members female members can act as karta, or in case where male members if present are minors, she can act as karta. Debts incurred even by female members under such circumstances will be binding upon the family and must be paid out of the joint family funds whether at the time of partition or earlier. Often the question is raised as to whether her acts are for the benefit of the family. Dharmashastra answers it by saying that she might act as manager by doing acts of positive benefit and not merely conservative/negative acts.

"The position according to the Mitakshara theory as developed by Vijnaneshwara seems to be this, that a wife gets rights of ownership of her husband's separate and joint family property from the moment of her marriage and a daughter from the moment of her birth.

But Vijnaneshwara does make a distinction between males and females and says that females are asvatantra or unfree. If we are to translate his notion into the language of the coparcenary, I think we can state that women are coparceners but 'unfree' coparceners."

Prior to 1956, Hindus were governed by property laws, which had no coherence and varied from region to region and in some cases within the same region, from caste to caste.

The Mitakshara School of succession, which was prevalent in most of North India, believed in the exclusive domain of male heirs. Mitakshara is one of the two schools of Hindu Law but it prevails in a large part of the country. Under this, a son, son's son, great grandson and great grandson have a right by birth to ancestral property or properties in the hands of the father and their interest is equal to that of the father. The group having this right is termed a coparcenary. The coparcenary is at present confined to male members of the joint family.

In contrast, the Dayabhaga system did not recognize inheritance rights by birth and both sons and daughters did not have rights to the property during their father's lifetime. At the other extreme was the Marumakkattayam law, prevalent in Kerala, which traced the lineage of succession through the female line.

According to Hindu Minority and Guardianship Act, 1956 woman can take only a conservative action. It is certain that guardian acting under the act cannot undertake every class of proceeding that would be open to a manager. Act does not purport to confer upon the guardian the power of manager.

Former Prime Minister Jawaharlal Nehru championed the cause of women's right to inherit property and the Hindu Succession Act was enacted and came into force on June 17, 1956.

Many changes were brought about that gave women greater rights but they were still denied the important coparcenary rights. Subsequently, a few States enacted their own laws for division of ancestral property.

In what is known as the Kerala model, the concept of coparcenary was abolished and according to the Kerala Joint Family System (Abolition) Act, 1975, the heirs (male and female) do not acquire property by birth but only hold it as tenants as if a partition has taken place. Andhra Pradesh (1986), Tamil Nadu (1989), Karnataka (1994) and Maharashtra (1994) also enacted laws, where daughters were granted 'coparcener' rights or a claim on ancestral property by birth as the sons.

In 2000, the 174th report of the 15th Law Commission suggested amendments to correct the discrimination against women, and this report forms the basis of the present Act. Discrimination against women was the key issue before the Law Commission.

The amendment made in 2005 gives women equal rights in the inheritance of ancestral wealth, something reserved only for male heirs earlier. It indeed, is a significant step in bringing the Hindu Law of inheritance in accord with the constitutional principle of equality. Now, as per the amendment, Section 6 of the Hindu Succession Act, 1956 gives

equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. The amendment was made because there was an urgent need for certainty in law.

Though the 2005 amendment gives equal rights to daughters in the coparcenery. An important question is still unanswered whether women or daughters can be allowed to become managers or karta of the joint family. The objection to this issue of managing a joint family as visualized is that daughters may live away from the joint family after their marriage but it is well appreciated that women are fully capable of managing a business, taking up public life as well as manage large families as mothers. Another doubt being considered is that as managers of their fathers' joint family they could be susceptible to the influence of their husbands or husbands' families.

Position Of Karta

The position of karta is sui generis. The relationship between him and other members are not that of principal/agent/partners. He is not like a manger of a commercial firm. Needless to say he is the head of the family and acts on behalf of other members, but he is not like a partner, as his powers are almost unlimited. Undoubtedly, he is the master of the grand show of the joint family and manages all its affairs and its business. His power of management is so wide and almost sovereign that any manager of business firm pales into insignificance. The karta stands in a fiduciary relationship with the other members but he is not a trustee.

Ordinarily a Karta is accountable to none. Unless charges of fraud, misrepresentation or conversion are leveled against him. He is the master and none can question as to what he received and what he spent. He is not bound for positive failures such as failure to invest, to prepare accounts, to save money.

Karta may discriminate i.e. he is not bound to treat all members impartially. He is not bound to pay income in a fixed proportion to other members. Even if he enters such an agreement /arrangement, he can repudiate the same with impunity.

However large powers a karta might have, he cannot be a despot. He has blood ties with other members of the family. After all he is a person of limited powers. He has liabilities towards members. Any coparcener can at any time ask for partition. He obtains no reward for his services and he discharges many onerous responsibilities towards the family and its members. His true legal position can be understood only when we know the ambit of his powers and liabilities.

Karta’s Liabilities

Karta’s liabilities are numerous and multifarious.

Maintenance: - In a joint Hindu family, the right of maintenance of all the coparceners out of the joint family funds is an inherent right and an essential quality of the coparcenery. As Mayne puts it: Those who would be entitled to share the bulk of property are entitled to have all their necessary expenses paid out of its income. Every coparcener, from the head of the family to the junior most members, is entitled to maintenance. A Karta is responsible to maintain all members of the family, coparceners and others. If he improperly excludes any member from maintenance or does not properly maintain them, he can be sued for maintenance as well as for arrears of maintenance.

Marriage: - He is also responsible for the marriage of all unmarried members. This responsibility is particularly emphasized in respect of daughters. Marriage of a daughter is considered as a sacrosanct duty under Hindu law. Marriage expenses are defrayed out of joint family funds.

Chandra Kishore v. Nanak Chand AIR 1975 Del 175

In this case it was held that Karta is responsible for managing the expenses of the marriage of the daughter from the joint family estate. And in case marriage expenses are met from outside they are to be reimbursed from the joint family funds.

Accounts at the time of Partition: - Partition means bringing the joint status to an end. On partition, the family ceases to be a joint family. Under the Mitakshara law, partition means two things: -

(a) Severance of status /interest, and

(b) Actual division of property in accordance with the shares so specified, known as partition by metes and bounds.

The former is a matter of individual decision, the desire to sever himself and enjoy the unspecified and undefined share separately from others while the latter is a resultant consequent of his declaration of intention to sever but which is essentially a bilateral action.

Taking of accounts means an enquiry into the joint family assets. It means preparing an inventory of all the items of the joint family property.

The Mitakshara Karta is not liable to accounts and no coparcener can even at the time of partition, call upon the karta to account his past dealings with the joint family property unless charges of fraud, misappropriation/conversion are made against him.

Ghuia Devi v. Shyamlal Mandal AIR 1974 Pat 68

Facts: - Gokul Mandal was the common ancestor of the family, he had 2 sons: - Gobardhan and Ghoghan. After Gokul's death Gobardhan was the karta of the family. Shyamlal and Kisan are the sons of Gobardhan. Shyamlal, defendant no.1 is the husband of the plaintiff. In 1951, partition took place between two branches: Shyamlal and Ghoghan. After partition, Shyamlal began to act as karta of the family consisting of the members of

Gobardhan's branch. Appellant is a pardanashin lady. Shyamlal took advantage of her position and misappropriation of property and its income and as a result of it a suit was filed. Plea of appellant was that their client was entitled to a decree for accounts. Their plea was rejected because they could adduce no evidence.

Judgment: - In the suits for partition of a Joint Hindu Family property the manager/karta can only be made liable for revaluation of account if there is a proof of misappropriation /fraud and improper conversion of joint family assets and property. It was said that in the absence of such a proof a coparcener seeking partition is not entitled to require the manager to account for his past dealings with the joint family property.

However, when a coparcener suing for partition is entirely excluded from the enjoyment of property he can ask for accounts.

After the severance of status has taken place, the karta is bound to render accounts of all expenditure and income in the same manner as a trustee or agent is bound to render accounts. This means that from the date of severance of status, the karta is bound to account for all mesne profits.

Representation: - The karta represents the family. He is its sole representative vis-a vis the government and all outsiders and in that capacity he has to discharge many responsibilities and liabilities on behalf of the family. He has to pay taxes and other dues on behalf of the family and he can be sued for all his dealings on behalf of the family with the outsiders.

Powers Of Karta

When we enumerate the powers of karta, the real importance of his legal position comes into clear relief. His powers are vast and limitations are few. The ambit of his powers can be considered under two heads: - (a) power of alienation of joint family property, (b) other powers. In the former case, his powers are limited since a karta can alienate in exceptional cases. In the latter case his powers are large, almost absolute.

Other powers

Powers of management: - As the head of the family, karta's powers of management are almost absolute. He may mange the property of the family, the family affairs, the business the way he likes, he may mismanage also, nobody can question his mismanagement. He is not liable for positive failures. He may discriminate between the members of the family. But he cannot deny maintenance /use/occupation of property to any coparcener. The ever-hanging sword of partition is a great check on his absolute powers. Probably, the more effective check is the affection and the natural concern that he has for the members of the family and the complete faith and confidence that members repose in him.

Right to income: - It is the natural consequence of the joint family system that the whole of the income of the joint family property, whosoever may collect them, a coparcener, agent or a servant, must be handled over to the karta .It is for the karta to allot funds to the members and look after their needs and requirements.

The income given to the karta is an expenditure incurred in the interest of the family.

Jugal Kishore Baldeo Sahai v. CIT (1967) 63 ITR 238

In the present case, both the members of the Hindu undivided family, who were the only persons competent to enter into an agreement on its behalf, considered it appropriate that the karta should be paid salary at the rate of Rs. 500/- per month for looking after its interest in the partnership in which it had a substantial interest because its karta was a partner therein as its representative, and entered into an agreement to pay salary to him for the services rendered to the family. The ratio of the above decision is, therefore, applicable to the present case. Accordingly, the salary paid to him has to be held to be an expenditure incurred in the interest of the family .The expenditure having been incurred under a valid agreement, bonafide, and in the interest of and wholly and exclusively for the purpose of the business of the Hindu undivided family, is allowable as a deductible expenditure under section 37(1) of the Indian Income Tax Act, 1922 in computing the income of the Hindu undivided family.

Right to representation: - The karta of a joint family represents the family in all matters-legal, social, religious. He acts on behalf of the family and such acts are binding on the family. The joint family has no corporate existence; it acts in all matters through its karta. The karta can enter into any transaction on behalf of the family and that would be binding on the joint family.

Dr. Gopal v. Trimbak AIR 1953 Nag 195

In this case, it was held that a manager/karta can contract debts for carrying on a family business/ thereby render the whole family property including the shares of the other family members liable for the debt. Merely because one of the members of the joint family also joins him, it does not alter his position as a karta.

Power of Compromise: - The karta has power to compromise all disputes relating to family property or their management. He can also compromise family debts and other transactions. However, if his act of compromise is not bonafide, it can be challenged in a partition. He can also compromise a suit pending in the court and will be binding on all the members, though a minor coparcener may take advantage of O.32, Rule 7 C.P.C., which lays down that in case one of the parties to the suit is a minor the compromise must be approved by the court.

Power to refer a dispute to arbitration: - The karta has power to refer any dispute to arbitration and the award of the arbitrators will be binding on the joint family if valid in other respects.

Karta's power to contract debts: - The karta has an implied authority to contract debts and pledge the credit of the family for ordinary purpose of family business. Such debts incurred in the ordinary course of business are binding on the entire family. The karta of a non-business joint family also has the power to contract debts for family purposes. When a creditor seeks to make the entire joint family liable for such debts, it is necessary for him to prove that the loan was taken for family purposes, or in the ordinary course of business or that he made proper and bona fide enquiries as to the existence of need. The expression family purpose has almost the same meaning as legal necessity, benefit of estate, or performance of indispensable and pious duties.

Loan on Promissory note: - When the karta of a joint family takes a loan or executes a promissory note for family purposes or for family business, the other members of the family may be sued on the note itself even if they are not parties to the note. Their liability is limited to the share in the joint family property, though the karta is personally liable on the note.

Power to enter into contracts: - The karta has the power to enter into contracts and such contracts are binding on the family. It is also now settled that a contract, otherwise specifically enforceable, is also specifically enforceable against the family.

Power of alienation

Although no individual coparcener, including the karta has any power to dispose of the joint family property without the consent of all others, the Dharma Shastra recognizes it. That in certain circumstances any member has the power to alienate the joint family property. The Mitakshara is explicit on the matter. According to Vijnaneshwara: -

....even one person who is capable may conclude a gift, hypothecation or sale of immovable property, if a calamity (apatkale) affecting the whole family requires it, or the support of the family (kutumbarthe) render it necessary, or indispensable duties (dharmamarthe), such as obsequies of the father or the like, made it unavoidable.

The formulation of Vijnaneshwara has undergone modification in two respects: -

The power cannot be exercised by any member except the karta.

The joint family property can only be alienated for three purposes: -

(a) Apatkale (Legal Necessity)

(b) Kutumbarthe (Benefit of Estate)

(c) Dharmamarthe (Religious obligations)

(a) Legal Necessity: - It cannot be defined precisely. The cases of legal necessity can be so numerous and varied that it is impossible to reduce them into water –tight compartments. Loosely speaking it includes all those things, which are deemed necessary for the members of the family. What need to be shown is that the property was alienated for the satisfaction of a need. The term is to be interpreted with due regard to the modern life. Where the necessity is partial, i.e. where the money required to meet the necessity is less than the amount raised by the alienation, then also it is justified for legal necessity.

Dev Kishan v. Ram Kishan AIR 2002 Raj 370

Facts:- Ram Kishan , the plaintiff filed a suit against appellants, defendants. Plaintiffs and defendants are members of a Joint Hindu Family. Defendant no.2 is the karta, who is under the influence of defendant no.1 has sold and mortgaged the property for illegal and immoral purposes as it was for the marriage of minor daughters Vimla and Pushpa. The defendants contention was that he took the loan for legal necessity.

Judgment: - The debt was used for an unlawful purpose. Since it was in contravention of Child Marriage Restraint Act, 1929, therefore it cannot be called as lawful alienation.

(b) Benefit of Estate: - Broadly speaking, benefit of estate means anything, which is done for the benefit of the joint family property. There are two views as to it. One view is that only construction, which is of defensive character, can be a benefit of estate. This view seems to be no longer valid. The other view is that anything done which is of positive benefit, will amount to benefit of estate. The test is that anything which a prudent person can do in respect of his own property.

(c) Indispensable Duties: - This term implies performance of those acts, which are religious, pious, or charitable.

Vijnaneshwara gave one instance of Dharmamarthe, viz., obsequies of the father and added “or the like”. It is clear that this expression includes all other indispensable duties such as sradha, upananyana, and performance of other necessary sanskars. For the discharge of indispensable duties the karta may even alienate the entire property.

A karta can even alienate a portion of the family property for charitable/pious purposes. However, in this case, the powers of the karta are limited i.e. he can alienate a small portion of the joint family property, whether movable/immovable.

Alienation Is Voidable

It may be taken as a well-settled law, that alienation made by karta without legal necessity / benefit of estate/ discharge of indispensable duties is not void but merely voidable at the instance of any coparcener.

In CIT v Gangadhar Sikaria Family Trust (1983) 142 ITR 677, the Gauhati High Court was called upon to decide whether the Income-tax Officer can challenge the validity of an alienation by the karta of a Hindu undivided family. The High Court held that under the Hindu Law, the karta of a Hindu undivided family has an unfettered right to alienate the joint family property for legal necessity and for the benefit of the estate or the family. It was further held that even if a transfer by the karta were not for legal necessity or for the benefit of the estate, but if it is done with the consent of the coparceners, it would be only voidable and not void ab-initio. It is clear that alienation by the karta or manager of a joint family is voidable, but not void. Hence, a third party cannot repudiate it, except in cases where there is a suggestion that it was in fraud on creditors.

Separate Property

It is now settled that the karta can alienate the joint family property with the consent of the coparceners even if none of the above exceptional cases exist. Alienation without the consent of the coparcener, which is not for legal necessity, is void.

It is well established that there is no presumption under Hindu Law that a business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family. Unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blender with the joint family estate, the business remains free and separate.

Law as enumerated under Article 222 of Mulla Hindu Law is well settled that a Hindu, even if be joint, may possess separate property. Such property belongs exclusively to him. No other member of the coparcenary, not even his male issue, acquires any interest in it by birth, and on his death intestate, it passes by succession to his heirs, and not by survivorship to the surviving coparceners.

P.S. Sairam v. P.S. Ramarao Pisey AIR 2004 SC 1619

Facts: - P. Eswar Rao had 3 marriages. From his second marriage he had 2 sons: - P. Sadashiv Rao (defendant no.1 he is the karta of the family) and P.E. Panduranga Rao. Sadashiv Rao had 2 wives. Godavari Bai was his first wife. She had 2 sons one of them is the plaintiff, P.S. Ramarao Pissey. Plaintiffs case is that defendant no.1 started a business from the income and property of joint family in the name of M/s Pissey and sons. The contention of the defendants is that the property was his self-acquisition, which he acquired by raising loans from the market.

Judgment: - It was held that it was defendant no.1's separate property.

The karta's powers and liabilities and the karta's power of alienation of property under the Dayabhaga school are same as that of the Mitakshara karta. The main difference between the two schools is that in case of Dayabhaga the karta must render full accounts at all times, whenever required to do so by the coparcener, while in case of Mitakshara the karta is required to render accounts only at the time of partition or unless there are charges against him for fraud/misappropriation.

DAYABHAGA JOINT FAMILY

The joint family is one of the areas where the Mitakshara and the Dayabhaga differ from each other fundamentally. In modern Hindu law, the joint family is the only major area where two schools of Hindu law still have significance.

Sons have no right by birth- Under the Dayabhaga school, there is no joint family between father and son. Sons have no right by birth. Similarly, the sons have no right of survivorship. Under the Dayabhaga School, all properties, self acquired as well as coparcenary, devolve by succession.

Coparcenary

The conception of coparcenary and coparcenary property according to the Dayabhaga School is entirely distinct from that of the Mitakshara School.

According to Mitakshara School, a son acquires at birth an interest with his father in ancestral property held by the father and on the death of the father the son takes the property, not as his heir, but by survivorship. According to Dayabhaga School, the son does not acquire an interest by birth in ancestral property. Son's right arises only on the death of his father. On the death of the father he takes such property as is left by him whether separate or ancestral, as heir and not by survivorship.

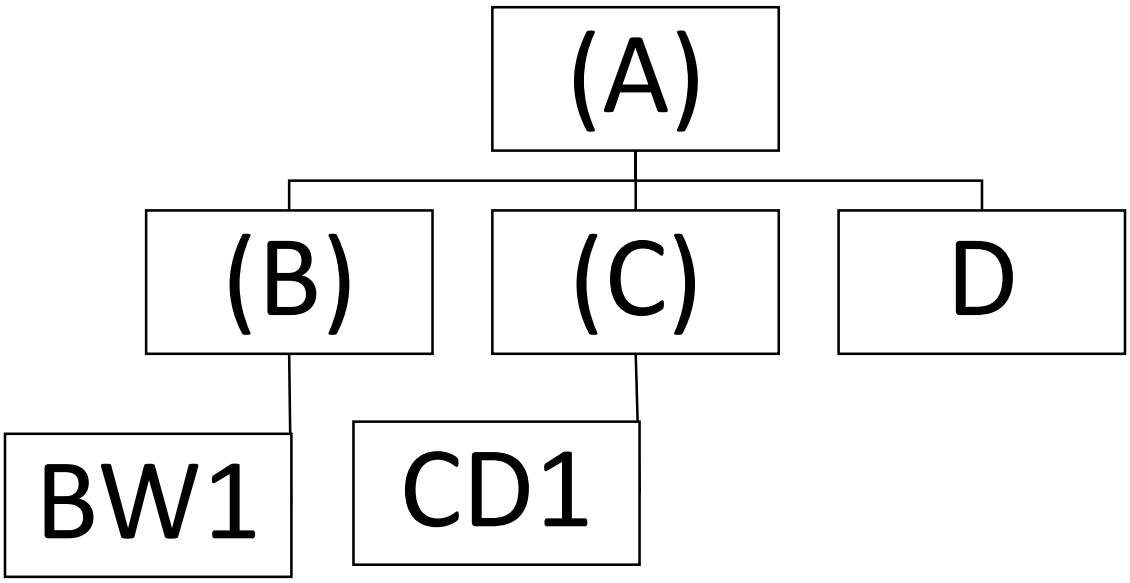
According to the Mitakshara School, the foundation of coparcenary is first laid on the birth of a son. The son's birth is the starting point of a coparcenary according to Mitakshara School. Thus, if a Hindu governed by the Mitakshara School has a son born to him, the father and the son at once become coparceners.

According to Dayabhaga School, the foundation of a coparcenary is laid on the death of the father. So long as the father is alive, there is no coparcenary in its strict sense of the word between him and his male issue. It is only on his death leaving two or more male issues that a coparcenary is first formed. Thus, it would be correct to say that the formation of a coparcenary does not depend upon any act of the parties. It is a creation of the law. It is formed spontaneously on the death of the ancestor. It may be dissolved immediately afterwards by partition but until then the heirs hold the property as coparceners. These observations must obviously be read in the context of a father dying leaving two or more male issues who would constitute a coparcenary, though of course, in their case, there would be only unity of possession and not unity of ownership.

Thus, till a partition by metes and bounds, that is, actual and final distribution of properties takes place, each coparcener can say what his share will be. In other words, none of them can say such and such property will fall to his share.

Each coparcener is in possession of the entire property, even if he has no actual possession, as possession of one is possession of all. No one can claim any exclusive possession of property unless agreed upon by coparceners.

In Sudarsana Maistri v. Narasimhulu, it was held that a joint family and its coparcenary with all its incidents are purely a creature of Hindu law and cannot be created by act of parties, as the fundamental principle of the joint family is the tie of sapindaship arising by birth, marriage and adoption.



Take the following diagram (the persons within the brackets are dead). In the death of A, his sons B,C and D constitute coparcenary. If B dies leaving a widow BW and C dies leaving behind daughter CD, then the coparcenary will consist of BW,CD and D. However, even under the Dayabhaga School, there cannot be a coparcenary consisting exclusively of females. Thus, if D dies leaving behind a daughter DD, then there cannot be a coparcenary consisting of BW,CD and DD. Similarly, under the Dayabhaga school, a coparcenary cannot start with the females. Thus, if a male dies leaving behind two widows or two daughters, they will succeed to his property, but will not constitute a coparcenary.

It is important to note that under the Dayabhaga school, there cannot be a coparcenary of father and son, or grandfather and great grandson, though it can be of uncles and nephews. If A dies leaving behind S, a son SS, a grandson (whose father has predeceased) and SSS, a great grandson (a father and grandfather have predeceased), S,SS and SSS will constitute coparcenary.

In Dayabhaga **each coparcenary takes defined share**, unlike Mitakshara coparcener, a Dayabhaga coparcener takes a specified and fixed share on the death of his ancestor. It is not a fluctuating and uncertain interest. For instance, A a father dies leaving behind three sons, B, C and D. B,C and D each will inherit 1/3 properties.

The 1/3 share of each coparcener is a fixed and certain share. It will not fluctuate on the death or birth of any person in the coparcenary. So long as B,C and D are living, neither their sons nor any other person can claim any interest in it.

Although in a Dayabhaga coparcenary, there is no community of interest, yet there is unity of possession. We have seen earlier that when the sons succeed to the property of their father and constitute a coparcenary, they take fixed shares, 1/3 or ¼ as the case may be. But till a partition by metes and bounds, i.e. distribution of properties takes place, no coparcener can say which his 1/3 is or ¼. In other words none of them can say that such property will fall to his share. Each coparcener is in possession of the entire property, even if he has not actual possession, as possession of one is possession of all. No one can claim any exclusive possession of property unless agreed upon by the coparceners.

Under the Dayabhaga school, all properties devolve by succession. Therefore, if a coparcener dies, his share does not pass by survivorship to other coparcener but devolves by inheritance to his heirs. The doctrine of survivorship is not recognized under the Dayabhaga School.

Joint Family Property and Separate Property.

Under the Dayabhaga school, the apartibandha daya or the unobstructed heritage is not recognized. All heritage under the dayabhaga law is sapratibandha daya or obstructed heritage. On the other hand, the division of property into joint family or coparcenary property and separate or self-acquired property is recognized and practically all the heads of coparcenary property and separate property under the Mitakshara School also exist under the Dayabhaga.

Thus coparcenary property may consist of ancestral property, joint acquisitions, property thrown into the common stock, accretions etc. In the same manner the self acquired property may consist of self exertions or gain of learning, government, grants, lost property recovered, income of separate property, share on partition, etc.

ALIENATIONS

Alienation can be defined as “it includes as any disposal by the father, karta, coparcener or the sole surviving coparcener of a part or the whole of the joint family property by any act or omission, voluntary or involuntary, intended to take part in present or future”

Thus it can be said that alienation has a very wide scope and application. The distinguishing feature of this power is that it was traditionally given only to the father or the karta and that, but the power itself is near autocratic as it allows them to sell, gift or mortgage the

whole joint family property without the consent of any coparcener, this is why the ancient texts have specified several conditions which alone would justify such acts of the manager. These conditions have changed over the centuries to keep in pace with the changing conditions and the ancient rules have been modified by the Privy Council in accordance with the principles of equity, justice and good conscience. The lack of any codified law as well the changing face of the commercial transactions a joint family enters into these days have created many situations where even the jurists have still not agreed upon the settled law and this constant situation of flux makes alienation a very interesting study. The effort has been made to list all the varying viewpoint and critically analyse them in the light of old traditions and newfound legal principles. Alienation is of vast practical utility as it gives a way of using the joint family property for the common use of the family and it is a classic example of the unique position of the hindu joint family which is always ready to help its members in times of need and who work together for common benefit.

1. Aliention under Dayabhaga School

Under *Dayabhaga* school, father is provided with the absolute powers regarding alienation, i.e. he can alienate separate as well as ancestral property, including movable and immovable on his wish. As the sons don't get a right over the property by birth under *Dayabhaga* school, father doesn't need the consent of his sons for the purpose of alienation.

Father enjoys an absolute power, which empowers him to alienate the property even when there is no moral justifications. In ***Ramkoomar*** v. ***Kishenkunkar,***[3] the Sudder court held that the gift by a father of his whole estate to a younger son, during the life of the elder was valid though immoral, however the gift of whole ancestral landed property was forbidden. Later in 1831, the Supreme Court of Bengal referring to the judges of Sudder Dewanny returned the following certificate,

> *On mature consideration of the points referred to us, we are unanimously of opinion that the only doctrine that can be held by the Sudder Dewanny Adalat, consistently with the decisions of the court, and the customs and usages of the people, is that a Hindu, who has sons, can sell, give or pledge, without their consent immovable ancestral property, situated in the*

[3]. (1812) 2 SD 42 (52).

province of Bengal, and that the consent of the sons, he can, by will, prevent, alter or affect their succession to such property.[4]

[4]. Jugomohan v. Neemoo, Morton, 90; Motee Lal Mitterjeet 6 SD 73 (85)

2. Father as an Alienator

A father possesses more power even than karta as there are situations in which only the father has the authority to make alienation.The two cases are dealt with below-

Gifts of love and affection –

The father can make a gift of reasonable amount of the ancestral movable property out of love and affection[5] to the family members who are not entitled to any share at the time of the partition. Even in the case of the coparcener, however the rule in this case is that the value of the property gifted must be very small in comparison to the entire movable property.[6] Thus the gift of affection may be made to the daughter, wife or even the son.

In the case of ***Subbarami*** v. ***Rammamma***[7] an important principle was laid down that such gifts cannot be made by a will, since as soon as a coparcener dies, he loses his interest in the joint property which he cannot subsequently alienate.

A classic example of such a gift came up before the Privy Council in the case of ***Bachoo*** v. ***Mankore Bai***[8] - In this a gift made to the daughter of Rs.20000 was held to be valid as the total value of the estate was 10-15 lakhs.

Father's Debt-Father can alienate family property to pay his personal debts if the following two conditions are fulfilled-

1 The debt is antecedent .

2 The debt should not be *Avyavaharik* i.e. for unethical or immoral purposes.

The above two rules though derived from ancient *Mitakshara* text was also laid down in the case of ***Brij Narain*** v. ***Mangla Prasad.***[9]

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5. Mayne,HINDU LAW AND USAGE,15th ed. 2003,p.797.
6. Mulla,HINDU LAW,17th ed.2000,p.331.
7. (1920)43 Mad 824;supra n. 2 p.332.
8. (1907)34 IA 107;supra n. 1 p.636.
9. (1924) 51 IA 129;supra n. 3 p.318.

3. Karta's powers of Alienation

The modern law of alienation is completely based on the ancient texts with little or no deviation from the basic rules given there. The modern law of alienation was settled to a large extent in the landmark judgment of Hindu Succession Act, 1956.

4.1. *Hunooman Persaud* v. *Mussmat Babooee*[10]

In this case the alienation made by a widow for the interest of her minor son was challenged, here the case was that of a mortgage but the lordships made it clear that the same principles would be applicable even in the case of sale or gift and that too by any member, father or karta. Here three conditions were stated in which the alienation would be valid:-

1. In the case of a legal necessity. Corresponding to the ancient condition of *Apatkale*

2. For the benefit of the estate, similar to the concept of *Kutumbharthe*

3. For religious purposes i.e. *Dharmarthe.*

The Privy Council in its decision went on to lay many other principles which are still relevant in deciding cases on invalid alienation:

> *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 rightly in the case of need or for the benefit of the estate. However where in particular instance, the charge is one that a prudent owner would make in order to benefit the estate,the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance is the thing to be regarded .... Their lordships think that the lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the manager is acting in a particular instance for the benefit of the estate. However they think that if he does so inquire and acts honestly,*

[10]. (1856)6 MIA313;supra n. 3 p.370.

the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge and they do not think that under the circumstances, he is bound to set the application of money.[11]

The above given text gives the boundaries of karta's power inside which he can alienate the joint property even without the consent of all the coparceners. Literally translated it means "he has special powers of disposition (by mortgage, sale or gift) of family property in a season of distress (for debt), for the purposes and benefit of the family (maintenance, education and marriages of members and other dependents) and particularly for religious purposes(*Shraddhas* and the like)"

Therefore under the *Mitakshara* law the manager can validly make an alienation only in three circumstances i.e. *Apatkale*(in times of distress),*Kutumbarthe*(benefit of the family) and dharmarthe(religious purposes).Under *Dayabhaga*, the powers of the karta are similar to that of the *Mitakshara*. However it differs in the powers of the father are much wider as *Dayabhaga* says that the father has absolute power to dispose off all kinds of ancestral property by sale, mortgage, gift, will or otherwise in the same way as he can dispose off his separate property.[12]

4. Benefit to Estate

The courts have not given a set definition of this concept, undoubtedly so that it can be suitably modified and expanded to include every act which might benefit the family.

In the modern law the first exposition of the expression "for the benefit of the estate" was found in the case of ***Palaniappa*** v. ***Deivasikamony.***[13]

In this case the judges observed " No indication is to be found in any of them(ancient texts) as to what is, in this connection, the precise nature of things to be included under the descriptions 'benefit to the estate' …. The preservation however of the estate from

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[11]. *Ibid.*
[12]. Daya. II 28-31;supra n.7 p.594.
[13]. (1917)44 IA 147;supra n. 3 p. 373.

extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundations, there and such like things would obviously be benefits"

The Supreme Court later added its own observation as to what constitutes benefit, in the case of ***Balmukund*** v. ***Kamla Wati.***[14]

> *for the transaction to be regarded as for the benefit of the family it need not be of a defensive character. Instead in each case the court must be satisfied from the material before it, that it was in fact conferred or was expected to confer benefit on family.*

The below given illustrations will give an idea as to the cases where the courts have held the alienation to be for benefit of the estate:-

In ***Hari Singh*** v. ***Umrao Singh***[15], when a land yielding no profit was sold and a land yielding profit was purchased the transaction was held to be for benefit.

In ***Gallamudi*** v. ***Indian Overseas Bank***[16], when a alienation was made to carry out renovations in the hotel which was a family business, it was held to be for benefit.

[14]. AIR 1964 SC 1385.
[15]. AIR 1979 All. 65.
[16]. AIR 1978 A.P. 3.

5. Legal Necessity

Again as in the case of benefit of the estate, the courts have refrained from giving a set definition to the concept of legal necessity so as not to reduce it onto watertight compartment[17]. The concept of legal necessity is essentially one which may change and is thus in a state of flux .

It can basically mean all acts done to fulfill the essential needs of the family members and only those acts which are deemed necessary.[18]

The shastric condition on which the concept of legal necessity i.e. *Apatkale* essentially means situations of distress and emergency like floods, famines, fire, wars etc. however it has been recognized under the modern law that necessity may extend beyond that. Thus it is now established that necessity should not be understood in the sense of what is absolutely indispensable but what according to the notions of the joint hindu family would be regarded as proper and reasonable.[19]

The following example would suitably illustrate the above stated principle-

Food shelter and clothing of the family members, marriage of the members of the family including daughters(special duty), medical care of the members of the family, defence of a family member involved in a serious criminal case, for the payment of debts binding on the family, payment of government dues etc.

6. Indispensable Duties

The third ground upon which the authority of the managing member whether father or any other karta to make an alienation of family property rests is where the indispensable duties such as the obsequies of father and the like require it.

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[17]. Dr Paras Diwan,MODERN HINDU LAW,15th ed. 2003, p.302.
[18]. Supra n. 2, p. 801.
[19]. Supra n. 16.

"and the like" may include many rituals and religious duties like sradha, upanayana, and performance of necessary *Sanskara*[20]. In the case of the marriage of the members of the family members it would come under the purview of both legal necessity as well as pious obligation as it is the most essential sanskara.[21]

The major case in this regards is that of ***Gangi Reddi*** v. ***Tammi Reddi***[22]

In this the Judicial Committee held that a dedication of a portion of the family purpose of a religious charity may be validly by the karta without the consent of all the coparceners, if the property allotted be small as compared to the total means of the family. It also lays down the principle that the alienation should be made by the manager inter vivos and not de futuro by will.

7. Right of Coparcener to Alienate his Share

Sole Surviving Coparceners right to alienate-When joint family property passes into the hands of the sole surviving coparcener,it assumes the character nearly of his separate property, with the only duty on him being that of maintenance of the female members (the widows) of the family.

Thus barring the share of the widows he can alienate the other property as his separate property. However this is not valid if another coparcener is present in the womb at the time of the alienation. but if the son is born subsequent to the transaction then he cannot challenge the alienation.[23]

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[20]. Supra n. 16, p. 302.

[21].T.V. Subbarao and Vijender Kumar, (rev.), GCV Subba Rao, FAMILY LAW IN INDIA,9th ed.2006,p.77.

[22]. (1927)54 IA 136 ;supra n. 2 p. 803.

[23]. Supra n. 16 p. 306.

In case a widow adopts a child after the death of her husband, will such a child challenge the alienation, i.e. can the doctrine of relation back be applied in such cases

The Mysore High Court in the case of ***Mahadevappa*** v. ***Chandabasappa*** [24]held that such a child can actually challenge the alienation made by the sole surviving coparcener as he'll have an interest in the joint family property

This is in contrast with the stance taken by the Bombay High Court in the cases of ***Bhimji*** v. ***Hanumant Rao*** [25] and ***Babronda*** v. ***Anna*** [26]where it was held that a subsequently adopted son cannot divest a sole surviving coparcener of his right over the joint property and hence cannot challenge any alienation made by him.

Coparceners Right to Alienate His Undivided Share – Under the shastric law no coparcener can dispose off his share without the express consent of the other coparceners. Br (S.B.E.33p. 384 verse 94) says "whether kinsmen are joint or separate they are equal as regards immovable property. Since a single one of them has no power in any case to make a gift, sale or mortgage of it"[27]

Since the hindu sages laid great emphasis on payment of debts, the courts seized this principle and started executing personal money decrees against the joint family property.[28]

The law was settled in the case of **Deen Dayal** v. **Jaidep**[29] where it was held that "purchaser of an undivided interest at an execution sale during the life of the debtor of his separate debt acquires his interest in such property with the power of ascertaining it and realizing it by partition". The limitation to this rule is that such a decree should be passed or has interest attached during his lifetime.[30]

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[24]. AIR 1965 Mys. 15.
[25]. AIR 1950 Bom. 271.
[26]. AIR 1968 Bom. 8.
[27]. Supra n.7 p.595.
[28]. Supra n. 2,p. 820.
[29]. (1877)4 IA 247;supra n. 2 p. 821
[30]. Supra n .16 p. 277

As far as voluntary alienation is concerned there are several rules pertaining to different states-Under all the sub schools of *Mitakshara*, alienation of undivided share is not allowed unless it is consented upon by every coparcener.[31]

In the states of Maharashtra, Madhya Pradesh and Madras,a coparcener can alienate his share even without the consent of the coparceners.[32]

But in the states of Uttar Pradesh and West Bengal, such alienation cannot take place unless it is for legal necessity or benefit of the coparcener.[33]

Under *Dayabhaga* school of law coparcener is entitled to alienate his property inter vivos or by will.

Under the codified law, section 30 of the Hindu Succession Act 1956 a coparcener may dispose of his share in the family property by will.

8. Legal Recourse in case of Invalid Alienation

If the father, karta, coparcener or sole surviving coparcener overstep their power in making the alienation, it can be set aside by any other coparcener who has an interest in the property, from the time he comes to know of it till the time the suit is barred due to limitation

Art 126 of the Indian Limitation Act 1908 sets the period of limitation for a suit by son challenging alienation made by the father as 12 years, Art 144 gives the period for alienation made by karta as 12 years, in case of mere declaration the period is 6 years.

Only those coparceners who had been conceived at the time of the transaction are competent to challenge the alienation, any person born afterwards is barred from doing the same. The rules regarding adopted son are corresponding.

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[31]. Supra n .3 p 397
[32]. Supra n. 1 p. 315
[33]. *Ibid*

The debate about whether alienation without necessity is void or voidable was put to rest by the Supreme Court in the case of ***R. Raghubanshi Narain Singh*** v. ***Ambica Prasad***[34] where it was held that such alienations are merely voidable.

If the suit is filed by the alienee, then he can neither enforce it against the coparcener who is entitled to make such alienation, nor can he get a conditional decree that alienation wont be set aside until he is compensated.

In case of suits filed by the coparceners, Madras High Court has given some vital rules in the case of ***Permanayakam*** v. ***Sivaramma***[35] where it was held that

1 If the alienation is made only for partial necessity, it may be set aside.

2 If alienation is only a device for distinguishing a gift, the other coparceners don't lose interest in the property or survivorship rights.

Finally it was laid down in the case of ***Sunil Kumar*** v. ***Ram Prakash***[36]that a coparcener cannot ask for an injunction against alienation on the ground that it is not for legal necessity.

9. Burden of Proof

It has been laid down that in the case the alienation is made by the father for the payment of his debts, then the burden of proof is on the alienation to prove that he had taken sufficient care to determine that it was for the payment of debt. The sons can rebut this assumption only by proving that the debt was *Avyavharik* i.e. immoral

In the case the alienation was made by the karta it is again for the alienee to prove that he took sufficient care in finding out if the transaction was for necessity or no, however once it was proved that he had taken due care, the actual presence or absence of such a necessity is irrelevant. These principles were given in the case of Hunooman Persaud's case.[37]

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[34]. AIR 1971 SC 776.
[35]. AIR 1952 Mad 435.
[36]. AIR 1988 SC 576.
[37]. Supra n. 10.h.

It is immaterial that there was earlier mismanagement of the estate if it can be proved that there was sufficient cause for the alienee to believe that there was an actual necessity which made it imperative that the alienation be made[38]

A lapse of time between the transaction and the filing of suit does not make any difference in the procedure,other than that the standard of proof may be lowered if the courts feel that the hard evidence has been lost because of the time difference, in this case the presumptions will also be accepted as evidence.[39]

If the interest rate is unusually high then the burden of proof becomes twofold i.e. it has to be proved that there was a necessity to take a loan and then to prove that it was imperative to take the loan at such high rate. If the court is not satisfied as to the need to take such high interest then it may decrease the rate of interest.[40]

10. Alienee's Rights and Remedies

In case the alienation is valid then there would be no problem as the alienee would automatically get all the rights of a mortgagee against the mortgager.

However if the alienation is pronounced as invalid his situation is very unclear-

In the states of Maharashtra, Madhya Pradesh and Madras where the alienation is set aside only to the extent of non alienating member's share, in such cases, the alienee has no equity for the share of that member.[41]

In the case of ***Narayan Pd*** v. ***Sarmam Singh***[42]the Privy Council held that in states where alienation can be totally set aside, the alienee would have no equity against his

[38]. Supra n . 16 p. 320.
[39]. Supra n. 2 p. 815.
[40]. Supra n. 2 p. 817.
[41]. Supra n. 2 p. 819.
[42]. 1917 PC 41; supra n. 16 p.327.

purchasing amount. In the case ***Hasmat*** v. ***Sundar*** [43]the Calcutta High Court said that if the alienation made by the father was set aside, then the sum becomes the debt of the father which has to be paid by the sons, hence they cannot set aside the alienation without refunding the purchasing price, however this decision has been criticized as this principle is violative of the antecedent rule.

The case of ***Sideshwar* v . *Bubheshwar***[44] it was held that the alienee was not entitled to the mesne profit on the property from the day of the purchase till the day of the partition.

In the states of Maharshtra, Madhya Pradesh and Madras the ailenee can only file for specific property and not for a general partition.

Even after this, the alienee maybe allotted a share different from what he purchased, this principle was laid down in the case of ***Padmanabh*** v. ***Abraham***[45] which said that though it would be in all fairness kept in mind that the alienee be given the share he has purchased but he could be given other share if it causes injustice to the other coparceners. It must be noted that this is in accordance with the *Mitakshara* principle that "no member has a right without express agreement to claim a specific portion as his, same applies to the alienee as he steps into the shoes of the coparceners.

[43]. (1885)11 Cal 396; supra n. 3 p. 565.
[44]. Supra n .16 p 330.
[45]. AIR 1954 SC 177.

11. Conclusion and Suggestions

Alienation is one of the concepts which evolved during the basic construction of Hindu laws and it maintained its importance right throughout. The rules regarding conditions in which a valid alienation can be made are very practical and pragmatic for example the condition of *Apatkale* i.e. in the time of distress gives actual utility of the joint family property because the share of all the members can be used to avert distress to any one of them, this is a safety net which saves people from utter ruin and gives them a chance to start afresh, a chance which is never given to the people in the supposedly highly civilized and progressive western nations. Secondly coming to the condition of *Kutumbarthe* or 'for the benefit of estate', it provides the joint family members a chance to improve their standard of living by pooling their resources and utilizing them for their own benefit. This can be put to practical use for family benefit also in the shape of family business which is a common Indian occurrence. Lastly we come to *Dharmarthe* i.e. alienations made for religious purposes, this gives us an insight into the traditional Indian thinking where religion is a way of life. Hence religious purposes are as important as times of distress as they lead to deliverance.

The new changes made by the case law mostly by the Privy Council and the High Courts have been equally empowering and given the joint family members the power to use the property for their upliftment.

PARTITION

Meaning of partition.— Partition means bringing the joint status to an end. On partition joint family ceases to be joint, and nuclear families or different joint fan come into existence. For instance, if a partition takes place in a joint family consisting of A and his two sons, B and C, there will come into existE three separate families of A, B and C. Or, suppose, a joint family consists three brothers, A, B and C and their three sons, AS, BS and CS. If f

brothers partition, their sons not partitioning from them, there will come into existence three joint families, consisting of A and his son AS, B and his son BS, and C and his son CS.

The Mitakshara says that "Partition is the adjustment of diverse rights regarding the whole, by distributing them or particular portions of the aggregate." Thus, according to Mitakshara Law partition has two distinct meanings.

In the first place it means "the adjustment into specific shares the diverse rights of different members according to the whole of family property".

In the second place, it means "the severance of the joint status with the legal consequences resulting therefrom".

Partition under Mitakshara law may be defined as, "the crystalization of the fluctuating interest of a coparcenary into a specific share in the joint-family estate". It, therefore, follows that each co-owner is deemed to be the owner of the whole, in the same manner as other co-owners are also owners of the whole, the ownership of the one without excluding the co-ownership of the others. This doctrine is known as the doctrine of ownership in the whole of estate.

Partition is a matter of individual volition, and reduces the members to the position of tenant-in-common requiring only a definite, unequivocal intention on the part of member to separate and enjoy his share in absolute severalty. As soon the shares of the coparceners are defined, the partition is deemed effected. It is not necessary that there should be an actual division of the property by metes and bounds. Once the shares are defined, there is severance of the joint status. The parties may then make a physical division of the property or they may decide to live together and enjoy the property in common. But the property ceases to be joint immediately the shares are defined, and henceforth the parties hold as tenants-in-common.

It was held by the Supreme Court in Sarin v. Ajit Kumar, AIR 1966 SC 435. that having regard to the basic character of the joint Hindu family property, each coparcener has an antecedent title to the said property, though its extent is not determined until partition takes place. That being so, partition really means that whereas initially all the coparceners had subsisting title to the totality of the property of the family jointly, that title is transformed by partition into separate titles of the

individual coparceners in respect of several items of properties allotted to them respectively. As this is the true nature of partition, the contention that partition of an undivided Hindu family necessarily means transfer of the property to the individual coparceners, cannot be accepted. In the case of a property' which was enjoyed by the members of a coparcenary and which they divided among themselves in a partition there is no transfer of the property from coparcener as a unit to individual coparceners who divide it.8 It is only a case of converting what had been enjoyed by them with separate rights. There is no element of transfer in such a division.

The Supreme Court in Kalyani v. Narayanan AIR 1980 SC 1173 has laid down in detail the essential ingredients of partition. It says that the first requirement of partition is that any of the male members of the joint Hindu family should express his clear and definite will about partition. The medium of expressing the desire to this effect may be according to the circumstances. The desire of this effect must be known to all other members of joint family who are likely to be affected by it. This could be done by notice or by filing a suit. Partition is the severance of the joint status. Every coparcener has the right of claiming partition. In such circumstances a clear declaration to this effect would be sufficient. By partition the joint status comes to an end resulting in putting the coparcenary to an end.

Partition and Family Arrangement—Distinguished.—A partition must be distinguished from a family arrangement, setting the mode of enjoyment of the family property, as such, an arrangement does not put an end to the joint status. It is possible for members of a joint family to divide property among themselves for the purposes of convenient enjoyment or management without the intention of making a partition.

A family settlement can be made orally also and the court will not ignore such oral settlement on the ground that it is not permissible in law. A family settlement among Hindus is a well-known and recognized mode of division of joint-family property.'

The following may be mentioned as the points of difference between the two

(i) A family arrangement is concluded with the object of settling a 'bona fide dispute arising out of conflicting claims to property. Partition is not necessarily a compromise of conflicting claims.

(ii) A widow or a limited owner or a manager can enter into a family arrangement with persons who are not coparceners: whereas coparceners alone can effect partition.

(iii) Family arrangement can never be an unilateral act. Partition may be effected by an unilateral declaration.

Agreement not to Partition.—Agreement between coparceners not to partition coparenary property does not bind even the parties thereto, according to the Bombay High Court, any party may, notwithstanding the agreement, sue the other parties for partition. The High Court of Calcutta, Allahabad and Nagpur have held that such an agreement does bind the actual parties

though it cannot bind their assigns or the persons to whom they transfer their shares,'9 unless there is a stipulation not to assign.

the Partition as a subject under the following heads :

(a) subject-matter of partition, i.e., the property to be divided;

(b) persons who have a right to partition, and who are entitled to a share on partition;

(c) how partition is effected and mode of partition;

(d) rules relating to the allotment of shares;

(e) reopening of partition; and reunion.

Subject-matter of Partition :- As a general rule, the entire joint family property is, and the separate property of coparceners is not, subject of partition. A plaintiff seeking partition must prove the existence of joint family property. But where existence of joint family is not disputed, every coparcener is entitled to equal share.2 However, some properties may be held jointly by two or more coparceners, such as when there exists a coparcenary within a coparcenaries', and if a general partition takes place, these properties may also be divided among such coparceners, though other coparceners might claim a share in them. If the joint family is in possession of property held by it as a permanent lease, such property is also available for partition even though lease may be liable to cancellation in certain circumstances. The impartibly estates which constitute joint family property are not liable to partition.

Properties which are not capable of division by their very nature :- Although the general rule is that the entire joint family property is available for partition, yet there may be certain species of joint family property which are, by their very nature, incapable of division, then such properties cannot be divided. Manu ordained : "A dress, a vehicle, ornaments, cooked food, water and female slaves, property destined for pious use and sacrifices, and a pasture ground, they declare to be indivisible."3

In respect of those properties, three methods of adjustment are available

(1) Some of these properties may be enjoyed by coparceners jointly, or by turns, (under this head will fall properties like wells and bridges, temples and idols),

(2) Some of these properties may be allotted to the share of coparcener and its value adjusted with the other property allotted to other coparceners, or

(3) Some of these properties may be sold and sale proceeds distributed among the coparceners.

We may discuss the subject with particular reference to :

(a) the dwelling house, and

(b) the family temples and idols, and

(c) the staircases and wells.

Dwelling house.—The Smritikars were of the view that the dwelling house should not be partitioned. It was understandable in a predominantly agricultural society. It is understandable even in our modern times when the dwelling house is too small. But the modern law does not consider the rule as sacrosanct.' Ordinarily, in a partition, the court will, if possible, try to effect an arrangement which will leave the dwelling house entirely in the hands of one or more coparceners. If no arrangement which is agreeable to the parties, or which is equitable can be possibly made, the dwelling house may be sold and sale proceeds divided among the coparceners. This alternative is available with respect to any property, the division of which cannot be made equitably and coparceners fail to arrive at a satisfactory arrangement among themselves. This has been facilitated by the Partition Act, 1893.

Family shrines, temples and idols.—The family shrines, temples and idols constitute such species of joint family property which can neither be divided nor sold. The same may apply to certain sentimental and rare items of property which the family cherishes and which may not be easily subject to any valuation, The courts have adopted the following courses in respect of family shrines, temples and idols

(a) The possession of idols or temples or shrines may be given to the senior coparcener (or to a junior member, if he happens to be the most religious and suitable among the others ,with the liberty to other coparcensors to have an access to them for the purpose of worship at all reasonable times.

(b) In case the family consists of pujaris who make a living out of the offerings, the court may settle a scheme under which each coparcener worships and takes the offerings by turns.3 The court may also devise a scheme under which it may entrust the worship to one of the coparceners with the direction that offering may periodically be distributed among the coparceners in accordance with their shares.

Staircases, wells, etc.—Staircases,4 courtyards, wells, tanks, pastures, roads, right of way and the like things are species of property which are, by their nature, incapable of division or valuation. In respect of them, an arrangement has to be devised so that they remain in the common use of all coparceners. Yajmans cannot be said to be property much less movable property, hence it cannot be partitioned.

Deductions and Provisions :- Ordinarily, the joint family property existing at the date when severance of status occurs, subject to what has been said under the preceding head, are available for division. However, before division can take place, the Shastrakars have ordained that out of the joint family properties, provisions should be made for certain liabilities of the family. These liabilities fall under the following heads

(1)Debts,

(2) Maintenance,

(3) Marriage expenses of daughters, and

(4) Performance of certain ceremonies and rites.

Debts.—A provision for the payment of outstanding debts binding on the joint family should be made. This will include :

(a) debts taken by the Karta for a purpose binding on the joint family, and

(b) untainted personal debts of the father, in case joint family consists of the father and sons. No provision is to be made for the individual debts of the coparceners.

Maintenance.—There are certain members of the joint family who do not take a share on partition but have a right to be maintained out of the joint family funds. A provision is to be made for their maintenance. Such persons are
(a) disqualified coparceners and their immediate dependants such as wife, daughter, son, and, in certain circumstances, illegitimate Sons;

(b) mother, stepmother, grandmother and other females entitled to be maintained out of the joint family property; (c)unmarried sisters till they are married; and
(d) widowed daughters of deceased coparceners, when they are entitled to be maintained out of the joint family assets.

Marriage.—When the coparcenary consists of father and sons, a provision should be made Tor the marriage expenses of the daughters of the father.' When a coparcenary consists of brothers, they should make provision for the marriage of their unmarried sisters. The scale of expenses must be commensurate with the wealth of the family. In case a coparcener dies before partition, leaving behind an unmarried daughter and no male issue, then a provision should also be made for her marriage. No provision has to be made for the marriage of unmarried coparceners, or for the daughters of other coparceners, since the marriage of such daughters is the responsibility of their respective fathers.

Performance of ceremonies.—If a partition takes place among the brothers, a provision has to be made for the funeral expenses of their mother. Similarly, provision is to be made for the performance of other essential ceremonies, such as upanayana (sacred thread) ceremony.

II Persons Who have a Right to Partition and Who are Entitled to a Share on Partition :- After the Amendment Act of 2005 a daughter since would be a coparcener shall have a right to ask for partition.

As a general rule, both under the Mitakshara and the Dayabhaga schools, every coparcener has a right to partition and every coparcener is entitled to a share on partition. Apart from the coparceners, no one else has a right to partition. No female except the daughter has a right to partition, but, if partition takes place, there are certain females who are entitled to a share. These

females are Father's wife, mother and grandmother (see, infra under the title, Persons Who are Entitled to a Share if Partition takes place). Under the Hindu Succession Act, when a coparcener's interest devolves by succession by virtue of the application of Section 6, widow, daughter, mother, predeceased son's daughters, and widow, predeceased son of a predeceased son's widow and daughter, pre-deceased daughter's daughter are the females who are entitled to a share, and they can get their share demarcated by partition. An alienee of coparcener's interest, wherever such an alienation is valid, has also a right to partition. However, when the widow, under the Hindu Women's Right to Property Act, or a female under S. 6, Hindu Succession Act, 1956, or the alienee of coparcener's undivided interest files a suit for partition, such a partition is entirely different than that made at the instance of a coparcener. In such a partition, severance of status does not take place. What happens is this the female or the alienee gets her or his share ascertained, and the property falling to her or his share is separated, while the family continues to be joint in the rest of the property as before.

Persons who have a right to partition and entitled to a share

Father.—The father has not merely a right to partition between himself and his sons but he has also the power to effect a partition among the sons inter Se, This seems to be the last survival of father's absolute powers. The Mitakshara expressly confers this power on the father in respect of not only father's separate property (every person has the power to distribute or give away one's own property as one wishes to do) but also in respect of joint family property.1 No other person has this power. In the exercise of this power, the consent or dissent of sons is immaterial. The father can impose even a partition, partial or total, between his minor sons and himself. However, it is necessary that the father must act bona fide. He should not be unfair to anyone. If the division of property made by the father is unequal, or fraudulent, or vitiated by favouritism, the partition can be re-opened. The father cannot exercise this power by will except with the consent of his sons. An unequal partition made by the father may be binding on sons as family arrangement if A acquiesced in by them,

Son, grandson and great-grandson.— Under the Dayabhaga school, there is no coparcenary consisting of the father and his lineal male descendants and, therefore, sons, grandsons or great-grandsons have no right to partition. On the other hand, under the Mitakshara school, son, son's son and son's son's son have a right to partition. If the father is not joint with anyone of the aforesaid relations, sons have a right of partition against their father.

Son born after partition. —the after born son could get the share of his father alone. The Mitakshara reconciled the conflict by holding that the latter texts lay down the general rule, while the former texts lay down a particular rule applicable to a son in the womb at the time of the partition. On the basis of the Mitakshara formulation, we have now two rules; one in respect of a son in the womb at the time of partition, and the other in respect of a son who comes into the womb after partition.

Son conceived at the time of partition but born after partition.—The Hindu law has for many purposes equated person in the womb to a person in existence. The texts lay down that if the

pregnancy is known, the partition should be postponed till the child is born. But if the coparceners do not agree to this, then a share equal to the share of a son should be reserved for the child in the womb. If the child is born a son, he takes it, but if it is born a female, a marriage provision should be made for her out of the share reserved and the surplus, if any, should be distributed among the coparceners. In case no share is reserved for the son in the womb, he can, after his birth, demand reopening of the partition. If pregnancy is not known and consequently no share is reserved, then also the redistribution of the estate should take place after the birth of the son. In other words, in such a case also the after-born son can get partition re-opened. This rule applies to partition between father and sons.

Son begotten and born after partition.—In this case, the Mitakshara's general rule applies. Two situations may arise (a) when the father has taken his share in a partition, and (b) when the father has not taken any share.

(a) When the father has taken or reserved a share for himself, the after born son becomes a coparcener with his father. After the death of the father he takes not only this estate by survivorship but he also inherits the entire separate property of his father to the exclusion of divided sons. But now, after the Hindu Succession Act, 1956, the latter rule stands abrogated, as S. 8 of the Act makes no distinction between separated sons and undivided sons in the matter of succession to the separate property of a Mitakshara Hindu.

(b) When the father has not taken or reserved a share for himself, the after-born son has a right to get the partition re-opened and get the estate redistributed as it then stood. This rule applies, like the former, to a partition between father and sons. For example, a coparcenary consists of a father A and his two sons B and C. Partition takes place. Subsequent to partition, another son D is born to A and a son BS, born to B. If A has not taken the share, D can get the partition reopened. But BS has no such right.

Adopted son.— The Hindu Adoptions and Maintenance Act, 1956, has codified and reformed Hindu law of adoption. Section 12 of the Act lays down that "an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes...." It is submitted that this provision could be marshalled to establish equality between the adopted son and the aurasa son in partition also.

Son of void marriage or annulled voidable marriage.—Since son of a void marriage or annulled voidable marriage is not a coparcener, he cannot sue for partition. The contrary view is not correct.

Illegitimate son,—Illegitimate sons fall under two categories : (a) The Dasiputra, or a son born to a concubine (avarudha dasi) exclusively and permanently kept by a Hindu, and (b) an illegitimate son born of a woman who is not a dasi. Their position is as under

(1) An illegitimate son of both categories is not entitled to partition or to a share on partition among the first three classes as he is not a coparcener. He is entitled to maintenance .

(2) Among the Sudras, the dasiputra has a somewhat superior position. The Mitakshara states the position thus : "A dasiputra obtains a share by the father's choice or at his pleasure, but after (the

death of) the father, if there be sons of wedded wife, let these brothers allow dasiputra to participate for half a share, that is let them give him half [as much as is the amount of one brother's allotment.

Minor coparcener.—Hindu law makes no distinction between a major coparcener and a minor coparcener in respect of their rights in the joint family property. As in other matters so in partition, the right of the minor coparceners is precisely the same as those of major coparceners. The minor coparcener has also a right of partition. A suit for partition may be filed on behalf of the minor by his next friend or guardian. It is here that some distinction is made. A minor is a person of immature intellect, and the court acting as parens patriae has the duty to protect a minor's interest. Thus, if a Karta is squandering the joint family property to the prejudice of the minor coparcener, if he is ill-treating him or discriminating him, or is, on the whole, unfavourably disposed towards the minor, the minor's guardian may deem it proper to effect a partition on behalf of the minor. When the guardian or the next friend files a suit for partition on behalf of the minor, the court has to be satisfied that the partition will be for the benefit of the minor. If the court comes to the finding that the proposed partition is not for the benefit of the minor, the partition will not be allowed.

Alienee.—A purchaser of a coparcener's interest in a court sale, or in a private sale where the coparcener has such a power (In Bombay, Madras and Madhya Pra4esh he has such a power), can demand partition as he steps into the shoes of the coparcener for the purpose of working out his equity. But an alienee's suit for partition does not necessarily mean that the alienating coparcener's interest or other coparcener's interest is severed.

Absent-Coparcener.—When the coparcener is absent at the time of partition, a share has to be allotted to him. In case no share is allotted to him, he has a right to get the partition re-opened. A coparcener who had already taken a share by way of partition, is not entitled to another share when the rest of the coparceners partition.

Persons who are entitled to a share if partition takes place :- All the persons discussed under the previous head are those who have a right to partition and who are also entitled to a share if partition takes place either at their instance or at the instance of some other person, There is another category of members of the joint family who have no right to partition but, if partition takes place, they are entitled to share. In this category fall three females : father's wife, mother and grandmother.

Father's wife.—If a partition takes place between her husband and his son, the father's wife is entitled to a share equal to the share of a son. She can hold it and enjoy it separately from her husband. If there are more than one wife, each wife is entitled to a share equal to the share of a son. It is immaterial that a wife has no son of her own.' If no share is allotted to her she can get the partition re-opened, Under the Dayabhaga school, she has no such right.

Mother.—A widowed mother has a right to take a share equal to the share of a son if a partition takes place among the sons. This right accrues to her only when partition by metes and bounds is made.

Under the Mitakshara school, when partition takes place after the death of the father among the sons, the mother, including a stepmother even if she is childless, is entitled to a share. Mother and stepmother each take a share equal to the share of a son.' Under the Dayabhaga school, a childless stepmother is not entitled to a share on partition.6 In Mulla's Hindu Law the law is stated thus : 'On a partition between sons by different mothers when more than one mother is alive, the rule is first divide the property in as many shares as there are sons, and then to allot to each surviving mother a share equal to that of each of her sons in the aggregate portion allotted to them,"8 It is submitted that this view is not correct so far as it relates to the Mitakshara law. This proposition should be confined to the Dayabhaga school.

Grandmother.—In the Mitakshra school, the paternal grandmother and step-grandmother are entitled to a share on partition in the following situations

(1) When partition takes place between her grandsons (son's sons), her son being dead, she is entitled to a share equal to the share of a grandson.'

(2) When partition takes place between her son and sons of a predeceased son, she is entitled to a share equal to the share of a grandson."

(3) When partition takes place between her sons and their sons, according to the Allahabad and Bombay High Courts,'2 she is not entitled to a share, but according to the Calcutta and Patna High Courts," she is entitled to the share equal to the share of a grandson.

Coparcener's widow.—It, now seems to be settled law that when two or more widows succeed to the property of their husband (each widow having a right of survivorship), either widow has the right to partition (with or without the consent of the other or others), and put an end to joint status. Even when a father's widow succeeds along with her sons, she has the right to partition. If a partition takes place among the brothers, after the death of the brother, his widow is entitled to a share.

Daughter—In Pachi Krishnamma v. Kunaram, the daughter claimed a share equal to the son in a partition. But she failed to prove this custom. It seems that if such a custom is established she can claim the share, since under the uncodified Hindu Law, custom still overrides the rules of the Hindu Law.

Partition by daughter.—The daughter was not in possession of any property, her father had died leaving behind his self acquired property which was in possession of other heirs. Daughter should be presumed notionally that she was in possession and enjoyment of Joint family property.

MODES OF PARTITION (PARTITION HOW EFFECTED)

(1) Partition by mere declaration to separate.—Partition under the Mitakhara Law is a severance of joint status and as such it is a matter of individual volition. All that is necessary to constitute

partition is a definite and unequivocal indication of his 'intention' by a member of joint-family to separate himself from the joint family and enjoy his share in severalty. A division in status takes place when he expresses his intention to become separate unequivocally and unambiguously and the tiling of a suit for partition is a clear expression of such an intention.

The Supreme Court laid down in, Puitorangamma v. Rangamma, AIR 1968 SC 1018 that it is now well-settled doctrine of Hindu law that a member of joint family can bring about his separation in status by a definite, unequivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severalty. It is not necessary that there be an agreement between all the coparceners for the disruption of the joint status. It is immaterial whether the other coparceners in such a case give their assent to the separation or not.

(2) Partition by notice.—A severance of joint status may be effected by serving a notice by a coparcener on the other coparceners, including his intention to separate and enjoy the property in severalty or demanding partition of the property. The notice may be subsequently withdrawn with the consent of the other coparceners and if it is withdrawn, there will be no partition.

(3) Partition by will.—Partition may be effected by a coparcener by making a will containing a clear and unequivocal intimation to his coparceners of his desire to sever himself from the joint family or containing an assertion of his right to separate. But where there is nothing in the will executed by a member of Hindu coparcenary to unmistakably show that the intention of the testator was to separate from the joint family the will does not affect severance of status. The father in joint family cannot impose any family settlement by saying that he is exercising the right of partition. Although he does possess the right. But a will to the above effect could be effective only if all other adult members have given their consent to it.

(4) Conversion to another faith.—Conversion of a coparcener to any other religion operates as partition of the joint status as between him and other members of the family. Such a convert takes his share in the family property as it stood at the date of his conversion. Reconversion of the convert to Hinduism does not ipso facto bring about his coparcenary relationship in the absence of subsequent act or transactions pointing to a re-union.

(5) Marriage under Special Marriage Act, 1954.—Marriage of a Hindu under the Special Marriage Act causes severance between him and the other members of the family.

(6) Partition by agreement.—The true test of partition being the intention of the member of the joint family to become separate owners, it follows that an agreement between the members of a joint family to hold and enjoy the property in certain defined shares as separate owner operates as partition, although the property itself has not been actually divided by metes and bounds. The two ideas—the severance of joint status and a defacto division of property must be kept distinct. As partition under the Mitakshara Law is effected on the severance of joint status, the allotment of shares may be done later. Even it may be by an unregistered partition deed which may be looked into established severance of status, though it cannot be looked into for terms of partition.

Once the members of the joint family or heads of the different branches of the coparcenary agree to specification of shares, the same can be treated to result in severance of joint status, though the division by metes and bounds may take place later on.

(7) Partition by arbitration.—An agreement between the members of a joint family whereby they appoint an arbitrator to arbitrate and divide the property operates as a partition from the date thereof. The mere fact that no award has been made is no evidence of a renunciation of the intention to separate. Where an award has been made, the question whether it divided all the members from one another or only some of them from the others is to be determined by a construction of the award, and the subsequent conduct of parties is irrelevent.59 Though a division by the arbitrators of only part of the joint property under their award is open to question on the ground that the award is uncertain in its terms and incomplete, yet it is competent to the parties to agree to the division being made by the arbitrators' step and that each should be final in itself.

(8) Partition by father.—The father may also cause the severance of the sons without their consent. It is remnant of the ancient doctrine of 'Patria Potestas' (Paternal power). The topic will be dealt with in detail under separate heading. Hindu father under Mitakshara law can demand for partition along with his sons even in presence of the karta of the family, and thus can bind the Sons by partition. By this he can get the shares of his Sons fixed and also get them separated. But he does not have the right to get the Joint family property partitioned through the will. Although he could do the same with their consent.

(9) Partition by suits.—The institution of a suit for partition ipso facto effects severance of the joint-family status and as such the mere institution of such a suit effects immediate severance of joint status. A decree may be necessary for working out the resultant severance and for allotting definite shares but the status of the plaintiff as separate in estate is brought about on his assertion of his right to separate whether he obtains a consequential judgment or not.61 So even if such a suit was to be dismissed, that would not effect the division in status which must be held to have taken place when the action was instituted.

Their Lordships of the Supreme Court held in Girjanandini v. Brijendra, AIR 1967 SC 1124 that partition may ordinarily be effected by the institution of suit. In case of suit for partition in joint status, father's consent to the suit for partition is no longer necessary. Thus the son is fully eligible to file a suit for partition even during the life time of his father.

Modes not exhaustive.—The nine modes of partition given above are not exhaustive. There may be other circumstances as well which if indicated unequivocal intention for partition will be admissible. Partition is a severance of the joint staus. It consists in defining the shares of the coparceners. Until partition a coparcener cannot say that he has definite share, e.g. one— half or one-third. Partition is a matter of individual volition and all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member to separate himself from the family and enjoy the share in severalty. It is immaterial in such a case whether the other members assent or not. The intention to separate may be evidenced in different ways either by express

declaration or by conduct. Thus, it may be expressed by institution of a suit for partition o by serving a notice on the coparceners.

The institution of a suit is a sufficient unequivocal indication of the intention of the plaintiff coparcener to separate and there consequently is a severance of the joint status from the date when it is instituted. A decree may, however, be necessary for working out the result of the severance in status which is brought about by the assertion of his right to separate whether he obtains a consequential judgment or not. Partition may ordinarily be effected by institution of a suit, or by submitting the dispute as to division of the properties to arbitrators, or by a demand for a share in the properties or by conduct which evinces an intention to sever from the family: it may also be effected by agreement to divide the property. But in each case the conduct must evince unequivocally the intention to sever joint-family status. Merely because one member of a family severs his relation, there is no presumption that there is severance between the other members, the question whether there is severance between the other members is one of fact to be determined on a review of all the 4lttendant circumstances. Where there is severance between different branches of a joint-family, severance between the members of the branches inter se may not in absence of an expression of unequivocal intention be inferred. It is the intention to sever followed by conduct which seeks to effectuate the intention that partition results, mere specification of shares without intention to sever does not result in partition.

Effect of Partition.—On partition of joint family, the joint status comes to an end and also the coparcenary is put to an end. The share of every branch of coparceners is also determined.

(a) Where the partition is general, the undivided family as a unit comes to an end; where it is partial, the members of the family who severed themselves from the unit lose the joint status which they had previously enjoyed as members of that particular group.

(b) Where partition takes place by conversion, severance is effected between the convert on one hand and the rest of the family on the other; similarly where partition takes place by marriage (under the Civil Marriage Act); severance is effected between the persons marrying on the one hand and the rest of the family on the other.

(c) Partition automatically alters the character of the property of the family, the coparcenary of the family, the particular joint tenancy known to Hindu Law—gives place to tenancy-in-common of the dividing or separating members.

(d) But partition does not annul the family or other relation and does not disturb the rights incidental to such relation, such as, the right to inherit.

Burden of proof.—The general principle underlying the burden of proof is that a Hindu family is presumed to be joint unless the contrary is proved but where it is admitted that one of the

coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no

Mode of partition :- A partition can be made by a definite, unambiguous declaration of intention by any coparcener to separate himself from the family. If this is done, it would amount to division of status, whatever mode may be used, partition may be effected by institution of a suit, by submitting the dispute as to division of the properties to arbitration, by a demand for a share in the properties, or by conduct which evinces an intention to sever the joint family; it may also be effected by agreement to divide the property. But separate enjoyment for the sake of convenience is not a partition. Thus, deepening a well, laying underground pipes, getting loan on security of portion in one's possession are not adequate proof of partition.

Partition by conduct.—The severance of status may also take place by conduct. The conduct, like a declaration of intention, must be unequivocal, explicit and definite. From what conduct severance of status may he deduced, will vary from case to case. There can be numerous circumstances from which such an inference can be drawn. For instance, separation of food, worship, dwelling, separate enjoyment of the property, separate income and expenditure, separate business transaction, and the like are instances of conduct from which inference of severance may be drawn.

Automatic severance of status.—Conversion of a coparcener to a : non-Hindu religion (i.e., Islam, Christianity, etc.) operates as an automatic 4 severance of status of that member from others, but it does not amount to severance of status among the other members inter Se. From the date of conversion, he ceases to be a coparcener, and, therefore, loses his .right of survivorship. He is entitled to receive a share in the joint family property as it stood at the date of conversion. Exactly, the same result follows if a coparcener marries a non-Hindu under the Special Marriage Act, 1954.

Parties to partition. —In a suit for partition, the heads of the branches are essential parties. All members of the branch need not be made parties to the suit.

Registration of partition deed.—It is a well established proposition of Hindu law and when partition is effected by a deed of immovable property worth Rs. 100 or more, registration is compulsory But it can be used to show factum of partition.

Partial partition :- There is a presumption that every partition is a total partition. The burden of proof that the partition is partial,' or that there has been a prior partition is on the party who asserts that it is so. On partial partition, the family does not cease to be joint family and the joint business continues to be joint. It is open for parties to make partial partition. A partition is a question of fact. A partial partition may be

(i) Partial as to property, or

(ii) Partial as to persons,

Partial as to property,—The Privy Council in Romalinga v. Narayan, said that it is open to the coparceners to sever their interest in respect of part of joint estate, while retaining their status of a joint family in respect of the rest of the properties. As a general rule, no one can impose on others a partial partition. Similarly, no one can impose (except the father) a total partition on others. Thus, if some coparceners want partition, while the others do not, those who want partition may take away their share and the rest will continue to remain joint.

Sometimes a partition may be partial under compulsion of circumstances. Such will be the case when properties are in several districts. A District Court is competent to effect partition only of those properties which are within its jurisdiction.

Partial as to cop arcener—If one coparcener or a group of coparceners want to separate, they cannot impose separation on others inter Se. Nor is there any presumption in law to this effect. No express agreement to remain joint on the part of the remaining coparceners is necessary. That they remained joint may be inferred from conduct, such as the way they carried on their joint business after the separation of the other coparceners. lb is a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation among the other coparceners or they remained joint, and the burden is on the party who asserts the existance of a partcular state of things, on the basis of which lie claims the relief. Father has power to effect a partial partition between himself and his minor sons.

Division of Property by Metes and Bounds :- Partition by metes and bounds.—Partition in its larger sense consists in a division by which the share of each coparcener with respect to all or any of the joint property is fixed, and once shares are defined, the partition in the sense of severance of status or disruption of joint status is complete, but after the shares are so ascertained, the parties might elect either to have a partition of their status by metes and bounds, i.e., actual division of property or continue to live together and enjoy their property in common as before. Whether they did one or the other will effect the mode of enjoyment, but not the tenure of the property or their interest in it. This is a situation where joint ownership has been turned into joint possession and enjoyment until the physical partition, take place according to the shares standing in the name of shares at the date of severance of status. In short, partition by metes and bounds means the physical division of joint family property.

Taking of Accounts :- The Mitakshara Karta is not liable to accounts and no coparcener can even at the time of partition, call upon the Karta to account his past dealings with the joint family property unless charges of fraud, misappropriation or conversion are made against him. However, when a coparcener suing for partition is entirely excluded from the enjoyment of property, he can ask for accounts, It is also an established rule that no coparcener is entitled to any credit on accourt of his having smaller family less amount was spent on him. In the reverse case, the share of a coparcener cannot be debited.

What is meant by taking of accounts is an enquiry into the joint family assets. It means preparing an inventory of all the items of the joint family property. However, all advances made to a coparcener which he would not be entitled as a coparcener, such as money advanced for the

payment of his debts are to be accounted for and would be treated as part of joint family funds. Similarly, an alienation made by a coparcener of his interest in the joint family property (in States where he has power to do so or when his interest is sold in execution of a money-decree against him) has to be taken into account by including such property in the partition and debiting it to the alienating coparcener.

If a coparcener has made improvements in, or has repaired, the joint family property out of his separate earning, such amount will constitute a debt to him from the rest of the family, unless it amounts to throwing into the common stock or a gift by him to the joint family.After the severance of status has taken place, the Karta is bound to render accounts of all expenditure and income in the same manner as a trustee or an agent is bound to render accounts. This means that from the date of the severance of status, the Karta is bound to account for all mesne profits.2 For instance, when severance of status is brought about by filing a suit, the Karta is liable to account for mesne profits from the date of the filing of the suit. When a coparcerer seeks an account of mesne profits, what he is seeking is only an account of the profits of property subsequent to severance of status; profits are appurtenant to his right to a share of the family property.

Rules relating to division of property—In the old Hindu law, two modes of division of property were recognized Putra bhaga and patni bhaga. When a division of property is by the number of sons, it is known as the putra bhaga. When a division of property is according to the number of wives, it is known as the patni bhaga. For example, if a Hindu has two wives, P and Q and from P he has three sons, A, B and C and from Q he has two sons E and F. If property is divided in accordance with the former rule, each son will take 1,4i. If the property is divided in accordance with the Patni bhaga rule, sons of P together will take ½ and sons of Q together will take ½. In modern Hindu law, the putra bhaga rule operates and patni bhaga rule is obsolete.

The Hindu sages also recognised another practice which came to be known as the jyeshta bhaga doctrine. Under this doctrine, the Karta or the eldest brother took double share. The rule was propounded by the Smritikars, but the Commentators and Digest writers took the view that unequal partition is forbidden in the Kali age. In modern Hindu law, this doctrine is not recognized. ‘As between brothers or other relations, absolute equality is now the invariable rule in all States, unless perhaps, where some special family custom to the contrary is made out.”

In a partition by metes and bounds, the shares are allotted to coparceners on the basis of the following rules

1. Division between father and son.—-When partition takes place between father and sons, the rule is that each son takes a share equal to the share of the father. For example, A has three sons, B, C and D, Each of them, i.e., A, B, C and D will take ¼ share in the joint family property.

2. Division between brothers.—When a coparcenary consists of brothers and a partition takes place between them, the rule is that they take equal shares in the joint family property. For instance, a coparcenary consists of five brothers A, B, C, D and E, each of them on partition, will take 1/5 share.

3. When division takes place among branches.—When a coparcenary consists of several branches and a partition takes place, the rule is that each branch takes per stirpes (i.e., according to the stock) as regards every other branch, and the members of each branch take per capita (i.e., per head) as regards each other.

4. Doctrine of representation.—Under the Mitakshara school, coparcener's interest devolves by survivorship. This is subject to the rule that where a deceased coparcener leaves male issues, the latter represent their ancestor in a partition, and take his share, provided that such issues are within the limit of coparcenary.

Under the Dayabhaga school :- The aforesaid Rules apply to the partition under the Dayabhaga school with some modifications. Under the Dayabhaga school, there is no room of Rule (1) as there cannot be a partition between father and sons. Rule (2) applies as it is. The share of a brother who is dead, is taken by his heir, devisee or assignee. Rules (3) and (4) apply with some modifications.

DOCTRINE OF RELATION BACK AND ITS LIMITATIONS :- Once the intention is communicated to Karta or in the absence of Karta, to other coparceners, it relates back to the date on which the intention was so declared. This is also referred to as 'Doctrine of Relation Back'. But if a coparcener dies between the date of declaration and the date of communication, partition is not affected. Court evolved the doctrine of relation back in **A. Raghavamma v. A. Chenchamma A.I.R. 1964 S.C. 136**. In this case after the death of a person A, his properties had devolved upon his minor son and after his death, upon his guardian, namely Chenchamma, the defendant. Plaintiff alleged that A had left a Will declaring his intention to separate. According to the terms of the Will, the plaintiff became entitled to all the properties which devolved upon the minor son of A and the cousin sister of minor son of A. The Court held that the terms of the Will in this case did not communicate the intention to separate. Further the Court said that even if the Will had communicated such an intention, the intention was not communicated to the coparceners even after death of A. Knowledge of the intention to separate is essential to affect partition. In between the date of making of the Will and the filing of the suit of the plaintiff (taking it to be the date of communication), the property had already vested in the defendant. If the property, for which the declaration of partition is made, vests in a third person in between the date of declaration and the date of communication, such vesting is not affected by partition.

Court observed, 'There are two ingredients of a declaration of a member's intention to separate. One is the expression of the intention and the other is bringing that expression to the knowledge of the person or persons affected. When once that knowledge is brought home that depends upon the facts of each case, it relates back to the date when the intention is formed and expressed. But between the two dates, the person expressing the intention may lose his interest in the family property; he may withdraw his intention to divide; he may die before his intention to divide is conveyed to the other members of the family with the result, his interest survives to the other members. A manager of a joint Hindu family may sell away the entire family property for debts binding on the family. There may be similar other instances. If the doctrine of relation back is invoked without any limitation thereon, vested rights so created will be affected and settled titles

may be disturbed. Principles of equity require and commonsense demands that a limitation which avoids the confusion of titles must be placed on it. What would be more equitable and reasonable than to suggest that the doctrine should not affect vested rights? By imposing such a limitation we are not curtailing the scope of any well established Hindu law doctrine, but we are invoking only a principle by analogy subject to a limitation to meet a contingency. Further, the principle of retroactivity, unless a legislative intention is clearly to the contrary, saves vested rights. As the doctrine of relation back involves retroactivity by parity of reasoning, it cannot affect vested rights. It would follow that, though the date of severance is that of manifestation of the intention to separate, the right accrued to others in the joint family property between the said manifestation and the knowledge of it by the other members would be saved.'

Thus, if between the date of declaring the intention and communication of the declaration, vested rights are created in anybody's favour which are otherwise valid, such vesting shall not be disturbed and will take effect despite the doctrine of relation back.

V Reopening of Partition :- A text of Manu runs "Once is the partition of inheritance made; once is a damsel given in marriage; and once does a man say, "I give"; these three are by good men done once and irrevocably."

On the basis of this text, a view has been propounded that if partition is once made, it is final and irrevocable; it cannot be re-opened. Another text of Manu runs "If, after all the debts and assets have been distributed according to the rule, any property is afterwards discovered, one must divide it equally." This text does not explicitly talk of re-opening of partition, but of distribution of the discovered property. Yajnavalkya seems to be more explicit when he declared

"The settled rule is that co-heir should again divide on equal terms wealth which being concealed by one co-heir from another is discovered after partition."

Katyayana also ordained that the property of which an unequal distribution has been made contrary to law, or the property recovered after being seized or lost, should be redistributed. The courts have taken the view that though a partition once effected is final, yet it can be re-opened in case of fraud, mistake or subsequent recovery of property.' The matter may be looked at from two angles

(a) Readjustment of properties, and

(b) Re-opening of partition.

Readjustment of assets.—The second text of Manu quoted above talks of one case of re-adjustment of the properties which are discovered after the

distribution of assets had taken place. There may be other cases of this nature. For instance, some properties may be left out from the partition by mistake or oversight, or some lost properties may be recovered later on, or there may be some items of property whose distribution has to be postponed because they were in the possession of a third person, such as in the case of usufructuary mortgage. The process of readjustment may also be applied to a case of slight

inequities which may be adjusted without disturbing the entire division of properties. Thus, the general rule is that when readjustment can be made, a partition need not be re-opened.

Re-opening of partition.—Where readjustment of properties is not possible, the entire partition has to be re-opened. Generally, a partition can be re-opened if it was obtained by fraud, coercion, misrepresentation or undue influence.

(1) Fraud.—When the whole scheme of distribution of properties is fraudulent,' it will be ordered to be set aside, unless the person injured has acquiesced in it with full knowledge of all material facts. For instance, when worthless assets have been given to some coparceners as valuable assets or when a property which does not belong to the family has been allotted to some coparcener.' Or when it is unjust and unfair or detrimental to the interest of minors, partition will be re-opened.

(2) Son in womb.—It has been seen earlier that if at the time of partition a son is in the womb and no share is reserved for him, he can get the partition re-opened.'

(3) Adopted son.—A son adopted to a deceased coparcener by his widow after the partition, is entitled to re-open the partition if he occupies, in law, the same position as a posthumous son. In such a case he should be awarded his share in the property, existing at the date of his adoptive father's death. He is also entitled to a share in accretions to the family property which remained with the surviving coparceners.'

(4) Disqualified coparceners. —A disqualified coparcener, who recovers from his disqualification after the partition, can get the partition re-opened, if he was an after born son.

(5) Son conceived and born after partition.—It has been seen earlier in the work'that where the father does not take a share on partition, and a son

is begotten and born to him after partition, the partition can be re-opened.

(6) Absentee coparcener.—If at the time of partition a coparcener is absent and no share is allotted to him, he can get the partition re-opened.

(7) Minor coparcener.—When a partition is effected during the minority of a coparcener, he can get the partition re-opened if he can show

that partition was unfair, prejudicial or unjust.'°

VI Reunion :- A text of Brihaspati runs "He who, being once separated, dwells again, through affection, with

father, brother or a paternal uncle, is termed reunited with him."

According to the Mitakshara “Effects, which have been divided and which’ are again mixed together, are termed reunited. He, to whom such appertain, is a reunited coparcener.” That cannot take place with any person indifferently but with father a brother or a paternal uncle.

According to the Dayabhaga “A reunion is valid only with a father, brother or paternal uncle.”

In the Mitakshara, Dravida, Benares and Dayabhaga schools these texts have been interpreted restrictively. For reunion, two conditions must be satisfied

(1) A reunion can be made only between the parties to partition,

(2) A reunion can take place only

(a) between father and son,

(b) between the paternal uncle and nephew, and

(c) between brothers.

Take a few examples A partition took place between a father F and two sons A and B. Subsequently, a son , is born of F. A or B can reunite with their father F or with each other but they cannot reunite with S. Take another example, a partition takes place between two brothers, A and B. Subsequently, a son S is born to A. A dies. S cannot reunite with his uncle B. In these examples, S was not a party to partition, and therefore condition (1) is not satisfied. A partition takes place between A, his son, S, and his grandson, SS. A and SS cannot reunite. A partition takes place between F, his two sons A and B, and his two grandsons AS and BS. AS and BS cannot unite. In both examples condition (2) is not satisfied.

It is now well settled that a reunion can take place. But whenever a reunion takes place, it must be strictly proved as any other disputed fact is proved. It is also well settled that to constitute a reunion there must be an intention of the parties to reunite in estate and interest. It is implicit in the concept of reunion that there should be an agreement to reunite between the parties. Such an agreement need not be in writing. It may be implied from the conduct. But the conduct must be of such an incontrovertible character that an agreement of reunion must necessarily be implied therefrom. In short, reunion must be proved by cogent, convincing and unimpeachable evidence .

Reunion how effected :- To constitute a reunion, there must be an intention of the parties to reunite in estate and interest. It is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite in estate with an intention to revert to their former status. No writing is necessary for a reunion. Persons who were parties to a registered partition deed may reunite by an oral agreement.’ Since an agreement to reunite is necessary, coparcener cannot be deemed to be reunited by the mere withdrawal of the unilateral declaration of the intention to separate which had resulted in the division of status. When a reunion is attempted to be established by implied agreement, the conduct must be of an incontrovertible character and the burden lies heavily on the person who asserts reunion.’° The mere fact that parties who have separated, live together or trade together after the partition, is not enough to establish reunion.’ The burden of proof whether

reunion has taken place is on the person who alleges reunion. Possession of joint family property at the time of reunion is not necessary.'

Minor's Right to Demand Partition :- A minor coparcener has an equal right with the adult coparceners to demand partition of a JFP But since a minor lacks legal capacity, he has to exercise this right through a next friend/ guardian. When the guardian, etc. files a suit for partition on behalf of the minor, the court has to be satisfied that the partition will be for the minor's benefit.

Partition takes effect from the date of institution of the suit and not from the date of the court's order finding that the partition is for the welfare of the minor. In Pedasubhajya v Akanamma (AIR 1958 SC 1042) the court observed: "The true effect of a court's decision that the action is beneficial to the minor is not to create in the minor proprio vzgore ('by its own force') a right which he did not possess before but to recognize the right which had accrued to him, when the person acting on his behalf instituted the action. Thus, what brings about the severance in status is the action of the next friend in instituting the suit. Therefore, if minor dies during pendency of the suit, which was so in the present case, the same can be continued by legal representative of minor (mother of the plaintiff)."

It is not necessary that the minor can claim partition only by instituting a suit. He can do so by giving a notice through his friend or guardian. In other words, the partition can be effected out of the court. The suit becomes necessary when the adult coparceners are not willing to effect a partition. It may also be noted that when father partitions, it does not mean that his minor son's interest also gets severed.

Effect of reunion :- There has been some controversy whether the effect of reunion is to restore the parties to the original position or whether it merely establishes unity of possession, the severance of status continuing. It is, now, an established view both under the Mitakshara and Dayabhaga schools that after reunion status quo ante is fully restored. Under the Mitakshara school, both the community of interest and unity of possession are established. A Full Bench of the Madras High Court held that reunited coparceners are not tenants-in-common, but are coparceners with rights of survivorship, inter Se, and that their sons shall be deemed to be coparceners with them. The descendants of the reunited coparceners, born after reunion, are also full fledged members of the re-united family.

Problem — Mohan, a coparcener, writes a letter on March 10, 1945 addressed to the karta expressing his intention to separate from the joint family and also informs Kumar (a common friend of the family) of his intention. Intending to post the letter, while on his way to office, his pocket gets picked in a bus and he loses the letter. In the meantime, on March 13, 1945, Kumar conveys to the family of Mohan's desire to separate. However, on March 12, 1945, a portion of the family property was attached in furtherance of a court decree. Is Mohan still supposed to be joint with his family or severance of status has taken place? How does the court decree affect his share in JFP? Decide.

Answer — The partition, in the present case, become complete when on March 13, 1945 Kumar conveyed Mohans intention to the family. But the partition will be effective from the date when Mohan expressed his intention to separate i.e. March 10, 1945 (Doctrine of Relation Back, Rsighavamrna v Chenchamma). But vested rights (which occurred between March 10 and March 13) are not affected by this doctrine. Therefore, even though Mohan has been separated from joint family, his share in the JFP is reduced proportionately to the property attached by the court decree. The attachment of a part of family property by a court decree on March 12, 1945 tantamount to the creation of a vested right, and it is binding on all undivided coparceners.

Problem — A JHF based in Delhi comprises of karta X, his brother Y, two sons of X, wife of Y On 1-1-90, Y went to Haridwar and from there he wrote a letter to X seeking partition of JHF property. The said letter was received by X on 8-1-90. On 4-1-90, X had sold the entire property of the JHF to meet out the medical expenses of his older son who was suffering from cancer. Y files a suit for separate possession of his share and challenged the sale. Decide.

Answer— In the present case, the partition became complete on 8-1-90, when Y's letter was received by X. But the partition will be effective from the date when Y sent his letter i.e. 1-1-90 (doctrine of relation back). However, the vested rights which accrued between these two dates will be preserved (Raghavamma v Chenchamma). X the karta, can alienate the JFP to meet out the medical expenses of his elder son (on account of 'legal necessity'). Therefore, Y cannot challenge the alienation made by X.

WOMAN'S PROPERTY: STRIDHAN

Section 14 provides that any property possessed by a Hindu female, whether acquired before or after the commencement of this Act shall be held by her as full owner thereof and not as limited owner sub-section (1) explains further that 'property' in this sub- section includes both movable and immovable property acquired by her by inheritance, partition, gift or will or acquired in lieu of maintenance or arrears of maintenance or acquired by her own skill or exertion or by purchase or by prescription or any other manner whatsoever , and also any property held by her as *stridhana* immediately before the commencement of the said Act. It is immaterial whether it be obtained by inheritance of the deceased husband's separate property or of his share in coparcenary property by virtue of the proviso to section 6of the Act, or by devise of her deceased husband or gift from a relative or any other person, and whether before, at or after her marriage. But, as expressly provided by sub section (2) of this section , a Hindu female shall not be entitled to hold any property as an absolute owner if she has acquired the same 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 .

Thus Section 14 has abolished women's estate by converting it into stridhan and woman's estate and has converted existing woman's estates into full estates. It has introduced fundamental changes in the traditional Hindu law of property of woman. The objects of this section are:

- To remove all disability of Hindu woman to acquire and deal with property, that is, all the property that she acquires will be her absolute property.
- To convert existing woman's estate into full estate.

It incorporates the following propositions.

(A)

- Any property acquired by a Hindu female after the commencement of the Act will be held by her as her absolute property.
- . Any property held by a Hindu female as woman's estate and is in her possession will also become her property.

- But, if any property is covered by the provision of subsection (2) neither (a) nor (b) above will apply. In other words, if any property is acquired by a Hindu female by way of gift or under a will or any other instrument under a decree or order of a civil court or under an award, and the terms of the gift, will or other instrument or the decree order or award prescribe a restricted estate in such property, she will take it accordingly.

(B) The requirement of being possessed in subsection (1) applies only to the woman's estate existing at the time of the commencement of the Act; this obviously cannot apply to the properties acquired by her after the commencement of the Act.

(C) The definition of the term property contained in the explanation applies to both types covered under (a) and (b) of (A).

(D) This section has qualified retrospective application. It applies retrospectively to those woman's estates which were in the possession of the Hindu female when the Act came into force. It does not apply to those woman's estate over which she had no possession when the Act came into force. To such estates old Hindu law continues to apply.

Stridhan And Woman's Estate

Stridhan means woman's property[1]. In the entire history of Hindu Law, woman's rights to hold and dispose of property has been recognized.

Kinds of Woman's Property

What is the character of property that is whether it is stridhan or woman's estate, depends on the source from which it has been obtained. They are:

Gifts and bequests from relations- Such gifts may be made to woman during maidenhood, coverture or widowhood by her parents and their relations or by the husband and his relation. Such gifts may be inter vivos or by will. The Dayabhaga School doesn't recognize gifts of immovable property by husband as stridhan.[2]

Gifts and bequests from non-relations- Property received by way of gift inter vivos or under a will of strangers that is, other than relations, to a woman, during maidenhood or widowhood constitutes her stridhan. The same is the position of gifts given to a woman by strangers before the nuptial fire or at the bridal procession. Property given to a woman by a gift *inter vivos* or bequeathed to her by her strangers during coverture is stridhan according to Bombay, Benaras and Madras schools.

Property acquired by self exertion, science and arts-A woman may acquire property at any stage of her life by her own self exertion such as by manual labour, by employment, by singing, dancing

etc., or by any mechanical art. According to all schools of Hindu Law, the property thus acquired during widowhood or maidenhood is her stridhan. But, the property thus acquired during coverture does not constitute her stridhan according to Mithila and Bengal Schools, but according to the rest of the schools it is stridhan. During husband's lifetime it is subject to his control.

Property purchased with the income of stridhan- In all schools of Hindu Law it is a well settled law that the properties purchased with stridhan or with the savings of stridhan as well as all accumulations and savings of the income of stridhan, constitute stridhan.

Property purchased under a compromise- When a person acquires property under a compromise; what estate he will take in it, depends upon the compromise deed. In Hindu Law there is no presumption that a woman who obtains property under a compromise takes it as a limited estate. Property obtained by a woman under a compromise where under she gives up her rights, will be her stridhan. When she obtains some property under a family arrangement, whether she gets a stridhan or woman's estate will depend upon the terms of the family arrangement.

Property obtained by adverse possession- Any property acquired by a woman at any stage of her life by adverse possession is her stridhan.

Property obtained in lieu of maintenance- Under all the schools of Hindu Law payments made to a Hindu female in lump sum or periodically for her maintenance and all the arrears of such maintenance constitute stridhan. Similarly, all movable or immovable properties transferred to her by way of an absolute gift in lieu of maintenance constitute her stridhan.

Property received in inheritance- A Hindu female may inherit property from a male or a

female; from her parent's side or from husband's side. The Mitakshara constituted all inherited property a stidhan, while the Privy Council held such property as woman's estate.

Property obtained on partition- When a partition takes place except in Madras, father's

wife mother and grandmother take a share in the joint family property. In the Mitakshara jurisdiction, including Bombay and the Dayabhaga school it is an established view that the share obtained on partition is not stridhan but woman's estate.

Stridhan has all the characteristics of absolute ownership of property. The stridhan being her absolute property, the female has full rights of its alienation. This means that she can sell, gift, mortgage, lease, and exchange her property. This is entirely true when she is a maiden or a widow. Some restrictions were recognised on her power of alienation, if she were a married woman. For a married woman stridhan falls under two heads:

- the ***sauadayika*** (gifts of love and affection)- gifts received by a woman from relations on both sides (parents and husband).
- the ***non-saudayika***- all other types of stridhan such as gifts from stranger, peoperty acquired by self-exertion or mechanical art.

Over the former she has full rights of disposal but over the latter she has no right of alienation without the consent of her husband. The husband also had the power to use it.

On her death all types of stridhan passed to her own heirs. In other words, she constituted an independent stock of descent. In ***Janki*** *v.* ***Narayansami***, the **Privy Council** aptly observed, "her right is of the nature of right of property, her position is that of the owner, her powers in that character are, however limited… So long as she is alive, no one has vested interest in the succession."

Powers Of A Hindu Female Over Her Woman's Estate

(a) **Power of Management**- like the *Karta* of a Hindu joint family she has full power of management. The *Karta* is merely a co-owner of the joint family, there being other coparceners, but she is the sole owner. She alone is entitled to the possession of the entire estate and its income. Her power of spending the income is absolute. She need not save and if she saves, it will be her stridhan. She alone can sue on behalf of the estate and she alone can be sued in respect of it.[4] Any alienation made by her proper or improper is valid and binding so long as she lives. She continues to be its owner until the forfeiture of estate by her re-marriage, adoption, death or surrender.

(b) **Power of Alienation**- She has limited powers of alienation, Like Karta her powers are limited and she can alienate property only in exceptional cases. She can alienate the property for the following:

- **Legal necessity** (that is, for her own need and for the need of the dependants of the last owner)
- **For the benefit of estate,** and
- **For the discharge of indispensable duties** (such as marriage of daughters, funeral rites of her husband, his shrada and gifts to brahmans for the salvation of his soul; that is, she can alienate her estate for the spiritual benefit of the last owner, but not for her own spiritual benefit.)

Under the first two heads her powers are more or less the same as that of the Karta. Restrictions on her powers of alienation are an incident of the estate and not for the benefit of the reversioners.[5]

As to the power of alienation under the third head, a distinction is made between the indispensable duties for which the entire property could be alienated, and the pious and charitable purposes for which only small portion of property can be alienated. She can make alienation for religious acts, which are not essential or obligatory but are still pious observances which conduce to the bliss of her deceased husbands soul.[6]

(c) **Surrender**- means renunciation of estate by the female owner.[7] She has the power of renouncing the estate in favour of the nearest reversioner. This means that by a voluntary act she can accelerate the estate of the reversioner by conveying absolutely the estate thereby destroying her own estate. This is an act of self-effacement on her part and operates as her civil death.

For a valid surrender, the first condition is that it must be of the entire estate[8], though she may retain a small portion of her maintenance[9]. The second condition is that it must be in favour of the nearest reversioner or reversioners, in case there are more than one of the same category. Surrender can be made in favour of female reversioners also. The third condition is that the surrender must be bonafide and not a device of dividing the estate with the reversioners.[10]

(d) **Reversioners**- On the death of the female owner the estate reverts to the heir or the heirs of the last owner as if the latter died when the limited estate ceased. Such heirs may be male or female known as reversioners. So long as the estate endures there are no reversioners though there is

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always a presumptive reversioner who has only a *spes successionis*[11] (an exception). The property of the female devolves on the reversioners when her estate terminates on her death, but it can terminate even during her lifetime by surrender.

(e) **Right of Reversioners**- the reversioners have a right to prevent the female owner from using the property wastefully or alienating it improperly. It is this context that the expression "**presumptive reversioner**" came into vogue[12]. The reversioners have the following three rights:

- They can sue the woman holder for an injunction to restrain waste.

- They can in a representative capacity sue for a declaration that alienation made by the widow is null and void and will not be binding on them after the death of the widow. However by such a declaration the property does not revert to the woman nor do the reversioners become entitled to it. The alienee can still retain the property so long as the widow is alive.[13]

- They can after the death of the woman or after the termination of estate, if earlier, file a suit for declaration that an alienation made by the widow was improper and did not bind them. The **Supreme Court**, observed that when a Hindu female holder of woman's estate improper makes alienation, the reversioners are not bound to institute a declaratory suit during the lifetime of the female holder. After the death of the woman, they can sue the alienee for possession of the estate treating alienation as a nullity.[14]

SOURCES OF WOMAN'S PROPERTY PROPERTY

RECEIVED IN LIEU OF PARTITION

The Karta can grant some property to a member of the family for his or her maintenance. A Hindu female can also be granted property for her maintenance under a family arrangement or a partition. In ***Chinnappa Govinda*** v. ***Valliammal***, [15] a father-in-law gave some properties for the maintenance of his widowed daughter-in-law under a maintenance deed. Subsequently, in 1960 he died. Since he died leaving behind the daughter-in-law his interest devolved by succession. The daughter-in-law

sued for partition so as to get her share of inheritance. Other members said that she could get her share only if she agreed to include the properties given to her for maintenance in the suit properties. The Court held that she need not surrender the properties held by her under the maintenance deed.

Section 14 lays down that any property which a Hindu female gets on partition after the commencement of the Act will be her absolute property and any property which she got at a partition before the commencement of the Act will also become her absolute property provided it was in her possession at the commencement of the Act. The **Kerela High Court** in ***Pachi***

Krishnamma *v.* ***Kumaran Krishnan*** observed that the share a woman got on partition would be her absolute property on account of her pre-existing right to maintenance enlarged to an absolute title to property by virtue of **section 14(1)**."

PROPERTY GIVEN UNDER AN AWARD OR DECREE

In ***Badri Prasad*** *v.* ***Kanso Devi***,where a partition under an award was subsequently embodied in a decree, certain properties were allotted to a Hindu female as her share, the Supreme Court said that

section 14(2) did not apply. Their Lordships said that section 14 should be read as a whole. It would depend on the facts of each case whether the same is covered by sub-section (1) or sub-section (2). The crucial words in the subsection are 'possessed' and 'acquired'. The former has been used in the widest possible sense and in the context of section 14(1) it means the state of owning or having in one's hand or power. Similarly the word acquired has also been given widest possible meaning. The **Supreme Court** was of the view that a share obtained by a Hindu female in a partition under section 14(1) even though her share is described as a limited estate in the decree or award.

PROPERTY UNDER AN AGREEMENT OR COMPROMISE

The test that if the decree or award is the recognition of pre-existing right then sub-section (1) will apply and if property is given to the Hindu female for the first time under an award or decree sub-section (2) will apply. It has been applied to the acquisition of property under an agreement or compromise. This distinction has been clearly brought out by ***Mahadeo*** v. ***Bansraji*** and ***Lakshmichand*** v. ***Sukhdevi.***

PROPERTY RECEIVED IN INHERITANCE

Any property that a Hindu female inherited from a male or female relation was taken by her as limited estate except in the Bombay school. Section 14 lays down that any property that a Hindu female inherits from any relation after the commencement of the Act will be her absolute property. On her

death it will devolve on her heirs under the provisions of section 15 and 16. If any property has been inherited by her before the commencement of the Act and if it is in her possession then that property also became her absolute property.

PROPERTY RECEIVED IN GIFT

Under the Act, there is no distinction between the gifts received by her from relatives or strangers and at any stage of her life, and all gifts that she receives will be her absolute property. Ornaments received by her at the time of her marriage are ordinarily her stridhan property. A full bench in ***Vinod Kumar Sethi*** *v.* ***State of Punjab***[0] held that dowry and traditional presents made to a wife at the time of the marriage constitute her stridhan. In ***Gopal Singh*** *v.* ***Dile Ram***, a widow having a life estate purported to make a gift of the property before the **Hindu Succession Act 1956** came into force.

PROPERTY RECEIVED UNDER A WILL

In ***Karmi*** v. ***Amru*** A Hindu , under a registered will , conferred a life estate on his wife Nihali , with the direction that after the death of Nihali , properties would devolve on Bhagtu and Amru ,

two of his collaterals Nihali took possession and died in 196. On her death her heirs claimed property on the assertion that after the coming into force of the Hindu Succession Act , Nihali's life estate became her full estate . It was held that where only life estate is conferred under a will , Section 14(2) will apply , and the estate will not become full estate .But if a will confers on her full estate , she will take absolutely . Properties given under a settlement to the widow which were to revert to the settlor on his brother on her death , do not get enlarged into full estate .

CONCLUSION

Section 14 of **The Hindu Succession Act 1956** has abolished certain women's estate and in respect of woman's estate which are outside the purview of section 14, a reversioner's right under old Hindu Law still endures.

Section 14(1) has qualified retrospective application, it converts only those woman's estates into full estates over which she has possession when the Act came into force. It does not apply to those woman's estates over which the Hindu female has no possession when the Act came into force; in such a case old Hindu Law continues to apply.

Section 14(2) uses the words "any other instrument". Applying the principle of ejusdem generis, these words should be read along with the preceding words, "acquired by way of gift or under a will" and would thus, mean the instruments under which title to property has been conveyed to the Hindu female.

SUCCESSION UNDER HINDU LAW

INTERSTATE SUCCESSION

Intestate Succession: Devolution Of Property After The Death Of A Hindu Without A Will

Succession implies the act of succeeding or following, as of events, objects, places in a series. In the eyes of law however, it holds a different and particular meaning. It implies the transmission or passing of rights from one to another. In every system of law provision has to be made for a readjustment of things or goods on the death of the human beings who owned and enjoyed them.

Succession, in the sense of the partition or redistribution of the property of a former owner is, in modern systems of law, subject to many rules. Such rules may be based on the will of a deceased person. However, there are cases in which a will cannot be expressed and eventually, there needs to be some broadly accepted rules upon which the property shall devolve upon those succeeding him. There can be no doubt, however, that these rules primarily are the characteristics of the social conditions in which that individual lived. They represent the view of society at large as to what ought to be the normal course of succession in the readjustment of property after the death of a citizen.

Succession Of A Hindu Male Dying Intestate Under The Hindu Succession Act:

Sections 8 to 13 of the Hindu Succession Act, 1956 lay down the general rules as to the order of succession when a Hindu male dies intestate. Section 8 lays down certain rules of succession of property of a Hindu male who dies intestate after the commencement of the Act. These rules are

to be read along with the Schedule as well as other Sections pertaining to the same (Sections 9 to 13). Section 8 lays down as follows:

Section 8: General rules of succession in the case of males. - The property of a male Hindu dying intestate shall devolve according to the rules set out in this chapter:

(a) firstly, upon the preferential heirs, being the relatives specified in Class I of the Schedule;

(b) secondly, if there is no preferential heir of Class I, then upon the preferential heirs being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no preferential heir of any of the two classes, then upon his relatives being the agnates specified in Section 12; and

(d) lastly, if there is no agnate, then upon his relatives being the cognates specified in Section 13.

Thus, Section 8 groups the heirs of a male intestate into four groups and lays down that the property first devolves upon the heirs of Class I of the Schedule. They are the son, daughter, widow, mother, son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter, widow of a predeceased son, son of a predeceased son of a predeceased son, daughter of a predeceased son of a predeceased son and widow of a predeceased son of a predeceased son. All these heirs inherit simultaneously. If heirs of Class I are not available, the property goes to the enumerated heirs specified in Class II of the Schedule, wherein an heir in a higher entry is preferred over an heir in a lower entry.

In the absence of heirs of Class I and Class II, the property devolves on the agnates and cognates of the deceased in succession. Now, one person is said to be the agnate of the other if the two of them are related by blood or adoption wholly through the males. Similarly, one person is said to be the cognate of the other if the two of them are related by blood or adoption, but not totally through males, i.e. there has to be some intervention by a female ancestor somewhere.

Now, the term ‘property’ includes all those properties of the deceased intestate that is heritable under the Act. It includes his self-earned property as also his share in the Mitakshara coparcenary if he is survived by any of the female heirs or daughter’s son as mentioned in Class I of the Schedule. It also includes the property that he might have inherited from his grandfather or father after the Act came into force.

(A) Heirs In Class I:

i. The adopted children (sons or daughters) are also to be counted as heirs.

ii. The children born out of void or voidable marriages are considered to be legitimate by virtue of Section 16, and hence they are entitled to succession.

iii. The widow is also entitled to property along with the other heirs and in case there is more than one widow, they will inherit jointly one share of the deceased's property, which is to be divided equally among them.

iv. The widow is entitled to inherit from her deceased husband's property even if she remarries after his death.

v. The widow of the predeceased son will inherit with the other heirs. However, her right along with rights of the children of the predeceased son will exist to the extent of the share of the predeceased son, had he been alive. However, if she remarries before the death of the intestate, then she is not entitled to the property.

vi. The daughter inherits simultaneously along with the other heirs in her individual capacity. Moreover, even if she is married, she is entitled to such property.

vii. The mother also succeeds to her share along with other heirs by virtue of Section 14. It has been held in Jayalakshmi v. Ganesh Iyer that the unchastity of the mother is no bar as to her inheriting from her son. Even if she is divorced or remarried, she is entitled to inherit from her son. Here the term mother also includes an adoptive mother. Moreover, if there is an adoptive mother, the natural mother has no right to succeed to the property of the intestate. A mother is also entitled to inherit the property of her illegitimate son by virtue of Section 3(i)(j).

(B) Heirs In Class II:

i. All heirs in Class II take cumulatively and not simultaneously, i.e. they succeed in the order of Entries I to IX, as held in the case of Kumuraswami v. Nanjappa . An heir in the higher entry excludes all the heirs in the lower entries.

ii. The father in Entry I includes an adoptive father. However, a father is not entitled to any property from the illegitimate son as opposed to the mother. However, he is entitled to share from children born out of void or voidable marriage under Section 16. Also, a step mother is not entitled to inherit from the step son.

iii. All brothers and sisters inherit simultaneously. Here the term 'brother' includes both a full and a half brother. However, a full brother is always preferred to a half brother (according to Section 18). Uterine brother is not entitled to the intestate's property. However, when the intestate and his brother are illegitimate children of their mother, they are related to each other as brothers under this entry.

(C) Agnates:

A person is said to be the agnate of another if the two of them are related by blood or adoption entirely or wholly through males [Section 3(1)(a)]. What is to be noted is that agnates of the intestate do not include widows of lineal male descendants because the definition of agnates does not include relatives by marriage but only relatives by blood or adoption. Since these widows would be relatives by marriage hence they will not fall under the definition of agnates and hence, they will not be entitled to inherit in this capacity.

Moreover, there is no limit to the degree of relationship by which an agnate is recognized. Hence, an agnate however remotely related to the intestate may succeed as an heir. Also, this relationship does not distinguish between male and female heirs. There is also no distinction between those related by full and half blood. However, uterine relationship is not recognized.

(D) Cognates:

A person is said to be the cognate of another if the two of them are related by blood or adoption, but not entirely through males [Section 3(1) (c)]. It does not matter if the intervention in the line of succession is by one or more females. As long as there is at least one female intervening, it is a cognate relationship. As in agnate relationship, cognate relationship is also not based on marriage and only on blood or adoption. Hence widow or widowers of those related by cognate relationship do not fall under this category and hence they are not entitled to succeed on this ground.

Section 9. Orders 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.

Section 9 explicitly points out the order of succession between the Class I and the Class II heirs and also among the Class II heirs interse.

According to this Section, Class I heirs may be termed as preferential heirs of the intestate because the property first devolves upon them on the death of the intestate. All the Class I heirs succeed simultaneously and there is no question of any preference or any priority among them. However, when there is no Class I heir, the property devolves upon the Class II heirs enumerated in the Schedule in the nine Entries.

However, there is one basic distinction between the Class I and the Class II heirs. While all the heirs in Class I inherit the property simultaneously, each of the entries in Class II constitute distinct

and separate groups of heirs. Heirs in higher entries inherit in priority, but there I no such concept of priority among the heirs in Class I. For example, if a Hindu male dies intestate leaving behind his widow, two sons, son of a predeceased son, widow of another predeceased son, two daughters and son of a predeceased daughter, all of them will inherit simultaneously because all of them are heirs in the Class I of the Schedule. However, if another Hindu male dies intestate leaving behind his sister and his brother's son, the sister being an heir in Entry II of Class II will get preference over his brother's son who is an heir in Entry IV of Class II.

Section 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 pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions.

Sections 8 and 9 explicitly declare the law that the preferential heirs enumerated in Class I take simultaneously and to the exclusion of all other heirs in Class II or otherwise. The Sections do not mention any priority among them, but it nowhere follows that every individual heir who succeeds as a heir in Class I is entitled to an equal share of the property along with other heirs of the Class. The computation of the share of each is done in accordance with Section 10 which may constitute the Statute of Distribution applicable to heirs in Class I. It should also be noted that the Act tries to put the males and the females on equal footing. So it allots the shares to the males and the females pari passu.

The object of Section 10 is to deal with the amount of shares each person will be entitled to when there are more than one to inherit simultaneously. The widow, the son, the daughter and the mother will inherit to the property. However, this does not mean that each one of them will get 1/4th of

the property. The four rules given in this Section are explanatory to the extent of understanding how much share each one will get.

The rules are:

1) The widows, if there are more than one, shall take together only one share and [read with Section 19(b)] inherit that share equally as tenants-in-common and not joint tenants.

2) When there are more than one son, each son will get a share and similarly each daughter will get a share and mother will also get a share. Thus this is based on the Principle of Equalization.

3) If there are sons and daughters of a predeceased son or a predeceased daughter, they shall be entitled to take together a share of the property of their father or mother as the case maybe, and divide them equally among themselves. The family of the predeceased son would be entitled to one part that the predeceased son would have been entitled to, had he been alive. Same thing applies to a predeceased daughter. Thus these heirs succeed to the intestate's property not as per capita but as per stripe.

4) Rule 4 is in the nature of a corollary to Rule 3. It states that if there is a widow of a predeceased son of a propositus, she will take the share of the predeceased son equally with her sons and daughters.

The four rules in Section 10 are to be read in consonance with Section 19 which gives the two basic rules in case there is more than one heir succeeding to the property of the intestate. The rules are:

(a) save as otherwise expressly provided in the Act, per capita and not per strip.

(b) as tenants-in-common and not as joint tenants. This is subject to any express provision to the contrary.

Section 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.

This Section provides that when there are more than one heirs in one entry of Class II, they shall inherit equally. For example, Entry III contains four heirs:

(a) the daughter's son's son

(b) the daughter's son's daughter

(c) the daughter's daughter's son

(d) the daughter's daughter's daughter. Thus according to this Section, they all share equally. It should be noted that the legislation does not lay down any rule of discrimination between any male or female. If two heirs are enlisted in the same entry, then irrespective of their sex, they share equally. All the heirs in each one of the entries stand aequali jura and take per capita subject to the only exception that full blood is preferred over half-blood.

In the case of Arunachalathammal v. Ramachandran , it was contended that the different heirs mentioned in one entry (in this case Entry I of Class II) are subdivisions of that particular entry and they do not inherit simultaneously but here again there is a question of preference i.e. the first subdivision inherits and then in its absence, the later. The question arose because there were, in his case, one brother and five sisters of the intestate and no other heir and the brother contended that in a brother being in subcategory (3) of entry I, was to be preferred over sister who was in subcategory (4) of entry I and thus he was entitled to the full property. However the same was negated and it was held that all heirs in an entry inherit simultaneously and there is no preference to an heir in a higher subcategory within an entry to an heir in a lower subcategory in the same entry. Thus we find that the equality is between every individual heir of the intestate and not between the sub-division in any particular entry. In fact, the court went on to say that there were no subdivisions in any entry in Class II. They were just roman numerals representing the heirs in the entry.

Section 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 degree of descent.

Rule 3- Where neither heir is entitled to be preferred to the other under Rule 1 or 2, they take simultaneously.

This Section deals with the order of succession among agnates and cognates. Agnates come within the scope of Section 8(c) whereas cognates come within the scope of Section 8(d). The question of succession of cognates come only when there are no cognates and the question of succession of agnates and cognates come only when there are no heirs in Class I and Class II.

Rule 1 lays down that out of two agnates or two cognates as the case maybe, the one with the fewer or no degree of ascent shall be preferred. Rule 2 lays down that where the degree of ascent is the same or none, the one with fewer or no degree of descent shall be preferred. Rule 3 lays down that in case of a tie even after applying Rules 1 and 2, they shall take simultaneously. In accordance with the above three rules, the agnate and cognate relationship maybe categorized as follows:

Agnates:

(a) agnates who are descendants, for example, son's son's son's son and son's son's daughter.

(b) agnates who are ascendants, for example, father's father's father and father's father's mother.

(c) agnates who are collaterals, i.e. who are related to the intestate by degrees of both ascent and descent, for example, father's brother's son and father's brother's daughter.

Cognates:

(a) cognates who are descendants, for example, son's daughter's son's son and daughter's son's son's son.

(b) cognates who are ascendants, for example, father's mother's father and mother's father's father.

(c) cognates who are collaterals, i.e. who are related to the intestate by degrees of both ascent and descent, for example, father's sister's son and mother's brother's son.

In both the cases, relatives (both agnates and cognates) falling in a higher subcategory shall be preferred to a lower subcategory i.e. descendants shall be preferred over ascendants who in turn shall be preferred over collaterals.

Section 13. Computation of degrees.-

1) For the purpose 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.

Section 13 lays down the rules for computation of relationship between the intestate and his agnate and cognate heirs. This relationship is traced from the intestate to the heir in terms of degrees of

relationship with the intestate as the starting point. There is no discrimination or preference between male and female heirs.

The second rule states that the computation of the degrees of ascent and descent are to be made inclusive of the intestate. The relationship is to be traced from the propositus on terms of degrees with a propositus as terminus a quo, i.e. the first degree.

However, the order of succession among agnates and cognates is not determined merely by the total number of degrees of ascent and descent. It is subject to and regulated by Section 12 of the Act. The following are examples of rules of computation of degrees:

(a) The heir to be considered is the father's mother's father of the intestate. Hence there is no degree of descent but there are four degrees of ascent represented by (i) the intestate, (ii) the intestate's father, (iii) that father's mother and (iv) that mother's father.

(b) The heir to be considered is the son's daughter's son's daughter of the intestate. Hence there is no degree of ascent but there are five degrees of descent represented by (i) the intestate, (ii) the intestate's son, (iii) that son's daughter, (iv) that daughter's son and (v) that son's daughter.

(c) The heir to be considered is the mother's father's sister's son (i.e. the mother's father's father's daughter's son) of the intestate. He has four degrees of ascent represented in order by (i) the intestate, (ii) the intestate's mother, (iii) that mother's father and (iv) that father's father and two degrees of descent i.e. (i) the daughter of the common ancestor and (ii) her son (the heir).

What is to be remembered is that when degrees, both of ascent and descent, are to be computed in case of collateral, the degrees of ascent computed from the intestate are inclusive of him, but in counting the degrees of descent from the ancestor, only generations of descent are computed, that is, the ancestor does not constitute a degree of descent.

Succession Of A Hindu Female Dying Intestate Under The Hindu Succession Act

The great ancient lawgivers Manu and Baudhyana had described the good woman as a profoundly non-autonomous self, ruled by father in childhood, by husband in youth, by son in old age. In the 19th century debates, on the contrary, she came to be re-envisaged as a person with a core of inviolate autonomy, possessing a cluster of entitlements and immunities, even when the family, the community or religion refused to accept them. The demand for the new laws stemmed from an understanding about Indian a necessary, autonomous core of female personhood that the state must underwrite.

Under the Hindu law in operation prior to the coming into force of the Act, a woman's ownership of property was hedged in by certain delimitations on her right of disposal and also on her testamentary power in respect of that property. Doctrinal diversity existed on that subject. Divergent authorities only added to the difficulties surrounding the meaning of a term to which it sought to give technical significance. Women were supposed to, it was held and believed, not have power of absolute alienation of property. The restrictions imposed by the Hindu law on the proprietary rights of women depended upon her status as a maiden, as a married woman and as a widow. They also depended upon the source and nature of property. Thought there were some fragmented legislation upon the subject (regard being made to the Hindu Woman's Right to Property Act, 1937), the settled law was still short of granting a status to woman where she could acquire, retain and dispose off the property as similar to a Hindu male. The Hindu Succession Act, 1956 and particularly Section 14 brought substantial change, thus, upon the aspect of a right of a Hindu female over her property and thereby settled the conflict.

Section 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 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.

This Section propounds a definite and uniform scheme of succession in the property of a female Hindu who dies intestate after the commencement of the Act. The rules laid down under this

Section are to be read with Section 16. This Section groups the heirs of a female intestate into five categories as laid in sub-Section (1).

However sub-Section (2), similar to the scheme of Section 14, is in the nature of an exception to the general rule as laid in sub-Section (1). The two exceptions are, if a female dies without leaving any issue then,

(i) in respect of property inherited by her from her father or mother, that property will devolve not according to the order laid down as in sub-Section (1) but upon the heirs of her father, and

(ii) in respect of the property inherited by her from her husband or father-in-law, that property will not devolve according to the order laid down in sub-Section (1) but upon the heirs of her husband.

It is important to note that the two exceptions herein referred are confined to only the property inherited from the father, mother, husband and father-in-law of the female and does not affect the property acquired by her by gift or other by other device. The Section has changed the entire concept of stridhana and the mode and manner of acquisition of property by the female, which earlier determined how the property would be inherited, has been changed and amended by the Section. Considering Section 17, it is important to note that Section 16 does not apply to persons governed by Marumakkattayam and Aliyasantana laws.

As specified in the beginning of the sub-Section (1), in the devolution of heritable property of a female intestate, those in a higher entry are preferred to those in a lower entry.

The order of succession, as by the effect of rules under Section 15 can be summarized as follows:

(1) the general order of succession laid down in entries (a) to (e) in sub-Section (1) applies to all property of a female intestate however acquired except in case of property inherited by her from her father, mother, husband or father-in-law.

(2) In case of a female intestate leaving a son or a daughter or a child of a predeceased son or of a predeceased daughter, that is leaving any issue, all her property, howsoever acquired, devolves on such issue regardless of the source of acquisition of the property and such issue takes the property simultaneously; and if the husband of the intestate is alive they take simultaneously with him in accordance with entry (a). In such a case, sub-Section (2) does not apply.

(3) In case of a female intestate dying without issue but leaving her husband, the husband will take her property, except property inherited by her from her father or mother which will revert to the heirs of the father in existence at the time of her death.

(4) In case of female intestate dying without issue property inherited by her from her husband or father-in-law (the husband being dead), will go the heirs of the husband and not in accordance with the general order of succession laid in sub-Section (1).

(5) In case of a female intestate dying without issue property inherited by her from her father or mother will revert to the heirs of the father in existence at the time of her death and not in accordance with the general order of succession laid down in sub-Section (1).

Section 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 predeceased 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) to Section 15 shall be in the same order and according to the same rules as would have applied if the property would have been the father's, the mother's or the husband's as the case maybe, and such person had died intestate in respect thereof immediately after the intestate's death.

Rule 1 explicitly declares that among the heirs enumerated in entries (a) to (e) of Section 15, those heirs referred to in prior entry are to be preferred to those in any subsequent entry and those included in the same entry are to succeed simultaneously.

Rule 2 states that in case of the children of a predeceased son or daughter, they shall not take per capita with the son and daughter of the intestate but shall take per stripes i.e. the children and the predeceased son or daughter shall succeed to the property of the intestate as if the predeceased son or daughter was alive at the time of inheritance.

Rule 3 is applicable only when succession is in terms of entry (b), (d) or (e) of Section 15(1). This rule 3 is to be invoked when under rule 1 the heirs of the husband or the father or the mother are to be ascertained for purpose of distribution of property.

TESTAMENTARY SUCCESSION

Everybody likes to make sure that the life he has led has been meaningful and is concerned about his property after his death. A person can ensure as to how his property should devolve and to whom it shall devolve, after his death, through a Will. If a person dies without leaving behind his Will, his property would devolve by way of law of intestate succession and not testamentary succession (i.e. in accordance to the Will) Hence, it is preferable that one should make a Will to ensure that one's actual intension is followed and the property is devolved accordingly. Will is an important testamentary instrument through which a testator can give away his property in accordance to his wishes. The importance and impact of a will can be seen through the controversy that arose with regards to the will of Priyamwada Birla, widow of M.P.Birla, which decided the fate of the Birla group of Industries.

The origin and growth of Will amongst the Hindus is unknown. However Wills were well known to the Mohammedans and contact with them during the Mohammedan rule, and later on with the European countries, was probably responsible for the practice of substituting informal written or oral testamentary instruments with formal testamentary instruments. The Indian Succession Act, 1925, consolidating the laws of intestate (with certain exceptions) and testamentary succession supersedes the earlier Acts, and is applicable to all the Wills and codicils of Hindus, Buddhists,

Sikhs and Jainas throughout India. The Indian Succession Act, 1925, does not govern Mohammedans and they can dispose their property according to Muslim Law

Definition of Will & other Related Terms

Will: A Will is a solemn document by which a dead man entrusts to the living to the carrying out of his wishes. S. S.2(h) of Indian Succession Act, 1925 provides that Will means the legal declaration of the intention of a person with respect to his property, which he desires to take effect after his death Will has been defined in Corpus Juris Secundum as A 'Will' is the legal declaration of a man's intention, which he wills to be performed after his death, or an instrument by which a person makes a disposition of his property to take effect after his death.

Codicil: Codicil is an instrument made in relation to a Will, explaining, altering or adding to its dispositions and is deemed to be a part of the Will. The purpose of codicil is to make some small changes in the Will, which has already been executed. If the testator wants to change the names of the executors by adding some other names, or wants to change certain bequests by adding to the names of the legatees or subtracting some of them, a Codicil in addition to the Will can be made to do so. The codicil must be reduced to writing and has to be signed by the testator and attested by two witnesses. It is also the duty of the court to arrive at the intention of the testator by reading the Will and all the codicils.

Executor: An executor is appointed by the testator, as distinguished from an administrator who is appointed by the court. Where the Will confers the powers to collect the outstanding, pay debts and manage the properties, the person can be said to be appointed as an executor by implication.

Probate: Probate is an evidence of the appointment of the executor and unless revoked, is conclusive as to the power of the executor. The grant of probate to the executor however does not confer upon him any title to the property.

Letter of Administration: Letter of Administration is a certificate granted by the competent court to an administrator where there exists a Will authorizing him to administer the estate of the deceased in accordance with the Will. If the Will does not name any executor, an application can be filed in the court for grant of Letter of Administration for the property

Attestation of Will: Attesting means signing a document for the purpose of testifying the signature of the executants. Therefore an attesting witness signing before the executants has put his mark on the Will, cannot be said to be a valid attestation. It is necessary that both the witnesses must sign in the presence of the testator but it is not necessary that the testator have to sign in their presence.

Further it is not necessary that both the witnesses have to sign at the same time. It is also not necessary that the attesting witnesses should know the contents of the Will.

Essential Features of a Will

A Will can be made at any time in the life of a person. A Will can be changed a number of times and there are no legal restrictions as to the number of times it can be changed. It can be withdrawn at anytime during the lifetime of the person making the Will. A Will has to be attested by two or more witnesses, each of who should have seen the testator signing the Will.

The essential features are:

1. Legal declaration: The documents purporting to be a Will or a testament must be legal, i.e. in conformity with the law and must be executed by a person legally competent to make it. Further the declaration of intention must be with respect to the testator's property It is a legal document, which has a binding force upon the family.

2. Disposition of property: In a Will, the testator bequeaths or leaves his property to the person or people he chooses to leave his assets/belongings. A Hindu person by way of his Will can bequeath all his property. However, a member of an undivided family cannot bequeath his coparcenery interest in the family property

3. Takes effect after death: The Will is enforceable only after the death of the testator

Under section 18 of the Registration Act the registration of a Will is not compulsory. Also, the SC in Narain Singh v. Kamla Devi has held that mere non-registration of the Will an inference cannot be drawn against the genuines of the Will. However it is advisable to register it as it provides strong legal evidence about the validity of the Will. Once a Will is registered, it is placed in the safe custody of the Registrar and therefore cannot be tampered with, destroyed, mutilated or stolen. It is to be released only to the testator himself or, after his death, to an authorized person who produces the Death Certificate

Since a testamentary disposition always speaks from the grave of the testator, the required standard of proof is very high. The initial burden of proof is always on the person who propounds the Will.

Kinds of Wills

Conditional Wills: A Will maybe made to take effect on happening of a condition. In Rajeshwar v. Sukhdeo the operation of the Will was postponed till after the death of the testator's wife. However if it is ambiguous whether the testator intended to make a Will conditional, the language of the documents as well as the circumstances are to be taken into consideration.

Joint Wills: Two or more persons can make a joint Will. If the joint Will is joint and is intended to take effect after the death of both, it will not be admitted to probate during the life time of either and are revocable at any time by either during the joint lives or after the death of the survivor.

Mutual Wills: Two or more persons may agree to make mutual Wills i.e. to confer on each other reciprocal benefits. In mutual Wills the testators confer benefit on each other but if the legatees and testators are distinct, it is not a mutual Will. Mutual Wills are also known as reciprocal Wills and its revocation is possible during the lifetime of either testator. But if a testator has obtained benefit then the claim against his property will lie. Where joint Will is a single document containing the Wills of two persons, mutual Wills are separate Wills of two persons.

Privileged Wills: Privileged Wills are a special category of Wills and other general Wills are known as unprivileged Wills. S.65 of ISA provides that a Will made by a soldier or a airman or a mariner, when he is in actual service and is engaged in actual warfare, would be a privileged Will. S.66 provides for the mode of making and rules for executing privileged Wills. Ss. 65 and 66 are special provisions applicable to privileged Wills whereas other sections relating to Wills are general provisions which will be supplementary to Sections 65 and 66 in case of privileged Wills.

Who Can Make A Will

S.59 of Indian Succession Act provides that every person who is of sound mind and is not a minor can make a Will.

Persons of Unsound Mind

U/s. 59 of ISA the existence of a sound mind is a sine quo non for the validity of the Will. Most of the Wills are not made by young persons who are fully fit but are made by persons who are aged and bed ridden Hence, law does not expect that the testator should be in a perfect state of health , or that he should be able to give complicated instructions as to how his property was to be distributed. A sound disposing mind implies sufficient capacity to deal with and understand the disposition of property in his Will -

1) the testator must understand that he is giving away his property to one or more objects

2) he must understand and recollect the extent of his property 3) he must also understand the persons and the extent of claims included as well as those who are excluded from the Will. In Swifen v. Swifen it was held that the testator must retain a degree of understanding to comprehend what he is doing, and have a volition or power of choice.

Minors: A minor who has not completed the age of 18 years is not capable of making Wills. The onus of proof on determining whether the person was a minor at the time of making a Will is on the person who has relied upon the Will. S.12 of the Indian Contract Act also provides that a minor is incompetent to contract.

Other Persons Incapable Of Making A Will:

Explanation I to S.59 of ISA provides that a Hindu married woman is capable of disposing by Will only that property which she can alienate during her lifetime. Explanation II provides that the persons who are deaf, dumb or blind can prepare a Will if they are able to prove that they were aware of what they were doing. Explanation III provides for persons who are mentally ill and insane. However subsequent insanity does not make the Will invalid i.e. if a person makes a Will while he is of sound mind and then subsequently becomes insane the Will is valid and is not rendered invalid by subsequent insanity. Further a person of unsound mind can make a Will during his lucid interval. A Will made by a person who is intoxicated or is suffering from any other illness, which renders him incapable of knowing what he is doing, is invalid.

Though the burden of proof to prove that the Will was made out of free volition is on the person who propounds the Will , a Will that has been proved to be duly signed and attested Will be presumed to have been made by a person of sound mind, unless proved otherwise. Further, a bequest can be made to an infant, an idiot, a lunatic or other disqualified person as it is not necessary that the legatee should be capable of assenting it.

Revocability

S.62 of the Indian Succession Act deals with the characteristic of a Will being revocable or altered anytime during the lifetime of the testator. S. 70 of ISA provides the manner in which it can be revoked

A mere intention to revoke is not an effective revocation. The revocation of the Will should be in writing and an express revocation clause would revoke all the prior Wills and codicils. If there is no express clause to the effect then the former Will would become invalid to the extent of its inconsistency with the latest Will, this is known as an implied revocation (however it should be shown that the differences are irreconcilable). However if there is no inconsistency between the Wills then they cannot be considered as two separate Wills but the two must be read together to indicate the testamentary intention of the testator.

Revocation can also be made in writing through declaring an intention to revoke and the writing must be signed by the testator and attested by two witnesses. The deed of revocation has to be executed in the same way as the Will itself.

The Will maybe burnt or torn by the testator or by some other person in his presence and by his direction with the intention of revoking the same. The burning of the Will must be actual and not symbolic. The burning must destroy the Will atleast to the extent of his entirety. Further the Will need not be torn into pieces. It would be sufficient if it is slightly torn with the intent of revocation.

The Will can be revoked expressly by another Will or codicil, by implied revocation, by some writing, by burning or tearing or by destroying otherwise. Cancellation of a Will by drawing lines across it is not a mode of revocation. Under the Hindu Law the Will is not revoked by marriage or by subsequent birth.

Alterations

S.71 of ISA is applicable to alterations if they are made after the execution of the Will but not before it. The said section provides that any obliteration, interlineations or any other alteration in a Will made after its execution is inoperative unless the alteration is accompanied by the signatures of the testator and the attesting witnesses or it is accompanied by a memorandum signed by the testator and by the attesting witnesses at the end of the Will or some other part referring to the alterations. the alterations if executed as required by the section would be read as a part of the Will itself. However, if these requirements are not fulfilled then the alterations would be considered to be invalid and the probate will be issued omitting the alterations. The signatures of the testator and the attesting witnesses must be with regards to the alteration and must be in proximity of the alteration. Further they should be in the Will itself and not in a separate distinct paper. But if the obliteration is such that the words cannot be deciphered then the Will would be considered as destroyed to that extent.

Wording of The Will

S.74 of ISA provides that a Will maybe made in any form and in any language. No technical words need to be used in making a Will but if technical words are used it is presumed that they are in used in their legal sense unless the context indicates otherwise. Any want of technical words or accuracy in grammar is immaterial as long as the intention is clear.

Another general principle applied is that the Will is to be so read as to lead to a testacy and not intestacy i.e if two constructions are possible then the construction that avoids instestacy should be followed.

Further there is another principle, which says that the construction that postpones the vesting of legacy in the property disposed should be avoided. The intention of the testator should be decided after construing the Will as a whole and not the clauses in isolation. In Gnanambal Ammal v. T.

Raju Aiyar the Supreme Court held that the cardinal maxim to be observed by the Court in construing a Will is the intention of the testator. This intention is primarily to be gathered from the language of the document, which is to be read as a whole.

The primary duty of the court is to determine the intention of the testator from the Will itself by reading of the Will. The SC in Bhura v Kashi Ram held that a construction which would advance the intention of the testator has be favoured and as far as possible effect is to be given to the testator's intention unless it is contrary to law. The court should put itself in the armchair of the testator. In Navneet Lal v. Gokul & Ors the SC held that the court should consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense. However it also held that these factors are merely an aid in ascertaining the intention of the testator. The Court cannot speculate what the testator might have intended to write. The Court can only interprete in accordance with the express or implied intention of the testator expressed in the Will. It cannot recreate or make a Will for the testator.

Execution of a Will

On the death of the testator, an executor of the Will (executor is the legal representative for all purposes of a deceased person and all the property of a testator vests in him. Whereas a trustee becomes a legal owner of the trust and his office and the property are blended together) or an heir of the deceased testator can apply for probate. The court will ask the other heirs of the deceased if they have any objections to the Will. If there are no objections, the court grants probate. A probate is a copy of a Will, certified by the court. A probate is to be treated as conclusive evidence of the genuineness of a Will. It is only after this that the Will comes into effect.

Signature of The Testator

S.63(a) of ISA provides that the testator shall sign or affix his mark. If the testator is unable to write his signature then he may execute the Will by a mark and by doing so his hand maybe guided by another person. In another words a thumb impression has been held as valid.

Restrictions on A Will

1. Transfer to unborn persons is invalid.

Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers that description, the bequest is void. S.113 of Indian Succession Act, 1925 provides that for a transfer to an unborn person, a prior interest for life has to be created in another person and the bequest must comprise of whole of the remaining interest of the testator. In Sopher v. Administrator-General of Bengal a grandfather made the bequest to his grandson who was yet to be born, by creating a prior interest in his son and daughter in law. The Court upheld the transfer to an unborn person and the Court held that since the vested interest was transferred

when the grandsons were born and only the enjoyment of possession was postponed till they achieved the age of twenty one the transfer was held to be valid.

In Girish Dutt v. Datadin , the Will stated that the property was to be transferred to a female descendant (who was unborn) only if the person did not have any male descendant. The Court held that since the transfer of property was dependent on the condition that there has to be no male descendant, the transfer of interest was limited and not absolute and thereby the transfer was void. For a transfer to a unborn person to be held valid, absolute interest needs to be transferred and it cannot be a limited interest.

2. Transfer made to create perpetuity

S.114 of the Indian Succession Act, 1925 provides that no bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

The rule against perpetuity provides that the property cannot be tied for an indefinite period. The property cannot be transferred in an unending way. The rule is based on the considerations of public policy since property cannot be made inalienable unless it is in the interest of the community. The rule against perpetuity invalidates any bequest which delays vesting beyond the life or lives-in-being and the minority of the donee who must be living at the close of the last life. Hence property can be transferred to a unborn person who has to be born at the expiration of the interest created and the maximum permissible remoteness is of 18 years i.e the age of minority in India.

In Stanely v. Leigh it was laid down that for the rule of perpetuity to be not applicable there has to be 1)a transfer 2)an interest in an unborn person must be created 3)takes effect after the life time of one or more persons and during his minority 4)unborn person should be in existence at the expiration of the interest

3. Transfer to a class some of whom may come under above rules

S.115 of ISA provides that if a bequest is made to a class of persons with regard to some of whom it is inoperative by reasons of the fact that the person is not in existence at the testator's death or to create perpetuity, such bequest shall be void in regard to those persons only and not in regard to the whole class.

A number of persons are said to be a class when they can be designated by some general name as grandchildren, children and nephews. In Pearks v. Mosesley defined gift to a class as a gift to all those who shall come within a certain category or description defined by a general or collective formula and who if they take at all are to take one divisible subject in certain proportionate shares.

4 Transfer to take effect on failure of prior Transfer

S.116 of ISA provides that where by reason of any of the rules contained in sections 113 and 114 and bequest in favour of a person of a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same Will and intended to take effect after or upon failure of such prior bequest is also void.

he principle of this section is based upon the presumed intention of the testator that the person entitled at the subsequent limitation is not intended to be benefited except at the exhaustion of the prior limitation. In Girish Dutt case one S gave property to B for life and after her death if there be any male descendants whether born as son or daughter to them absolutely. In the absence of any issue, whether male or female, living at the time of B's death, the gifted property was to go to C. it was held that the gift in favour of C was dependent upon the failure of the prior interest in the favour of daughter and hence the gift in favour of C was also invalid. However alternative bequests are valid.

Invalid Wills

Wills invalid due to fraud, coercion or undue influence

S.61 of ISA provides that a Will, or any part of Will made, which has been caused by fraud or coercion, basically not by free will, will be void and the Will would be set aside.

Fraud: S.17 of the Indian Contract Act provides for fraud. Actual fraud can be committed through 1) misrepresentation 2) concealment . Fraud in all cases implies a willful act on the part of anyone whereby, another is sought to be deprived by illegal or inequitable means, of which he is entitled to

Coercion: S.15 of Indian Contract Act defines coercion. Any force or fear of death, or of bodily hurt or imprisonment would invalidate a Will. In Ammi Razu v. Seshamma , a man threatening to commit suicide induced his wife and son to give him a release deed. It was held that even though suicide was not punishable by the Indian Penal Code yet it was forbidden by law and hence the release deed must be set aside as having been obtained by coercion.

Undue influence: Undue influence u/s.16 of Indian Contract Act is said to be exercised when the relations existing between the two parties are such that one of the parties is in the position to

dominate the will of the other and uses that position to obtain an unfair advantage over the other. However neither fiduciary relationship nor a dominating position would raise a presumption of undue influence in case of Wills as all influences are not unlawful. Persuasion on the basis of affection or ties is lawful. The influence of a person in fiduciary relationship would be lawful so long as the testator understands what he is doing. Thus it can be said that a testator maybe led but cannot be driven.

Wills Void Due To Uncertainty

S.89 of ISA states that if the Will were uncertain as regards either to the object or subject of the Will then it would be invalid. The Will may express some intention but if it is vague and not definite then it will be void for the reason of uncertainty. The Will may depose of the property absurdly or irrationally i.e the intention maybe irrational or unreasonable, but that does not make it uncertain. For uncertainty to be proved it has to be proved that the intention declared by the testator in the Will is not clear as to what is he giving or whom is he giving. Only if the uncertainty goes to the very root of the matter, then only the Will has to be held void on the grounds of uncertainty.

Will Void Due To Impossibility Of Condition

S. 124 of ISA provides that a contingent legacy can take effect only on happening of that contingency. A conditional Will is that Will which is dependent on the happening of a specific condition the non-happening of which would make the Will inoperative. S.126 of ISA provides that a bequest upon an impossible condition is void. The condition maybe condition precedent or condition subsequent.

Will void due to illegal or immoral condition

S.127 of ISA provides that a bequest, which is based upon illegal or immoral condition, is void. The condition which is contrary, forbidden, or defeats any provision of law or is opposed to public policy, then the bequest would be invalid. A condition absolutely restraining marriage would also make the bequest void. S.138 of ISA provides that the direction provided in the Will as to the manner in which the property bequeathed is to be enjoyed then the direction would be void though the Will would be valid.

SUCCESSION UNDER MUSLIM LAW

In Islamic law **distinction between the joint family property and the separate property never existed.** Since under Muslim Law all properties devolve by succession,**the right of heir-apparent does not come into existence till the death of the ancestor**,and then alone the property vests in the heirs.

Customary Principles of Succession

The four basic principles of the pre-islamic law of succession were:

The nearest male agnates succeeded to the total exclusion of remoter agnates. Eg, if a Muslim died leaving behind a son and a son of a predeceased son, then the son inherited the entire property and the grand son was totally excluded.

Females were excluded from inheritance; so were cognates.

The descendants were preferred over ascendants, and ascendants over collaterals. Eg,in the presence of a son father could not succeed. Similarly in the presence of father, brother could not inherit.

Where there were more than one agnates of equal degree, all of them inherited the property and shared it equally.

Islamic or Koranic Principles of Succession

The Prophet interposed the following new principles on theafore said principles of customary law of succession:

the husband or wife was made an heir

females and cognates were made competent to inherit

parents and ascendants were given the right to inherit even when there were male descendants and

The newly created heirs are given specific shares.

The newly created heirs inherit the specified share along with customary heirs and not to their exclusion.

It is necessary notice that **Koran did not create new structure of law of succession but merely amended** and modified customary law of succession as to bring it in conformity with the Islamic philosophy.

Those heirs **who were not included earlier were now included** and given specified share.

Koranic principles of customary law of inheritance has led to **divergence of opinions among the shias and the sunnis**.

Sunnis or Hanafis have developed or altered the pre-islamic customs in specific manner mentioned in the Koran.

Shias on the other hand have raised up a completely altered set of principles in-builting both principles of pre-islamic customs and principles expressed in Koran.

Sunni and Sias Relationship

- Sunni and Shia are the **two major denominations of Islam**.

- The **demographic breakdown between the two denominations is difficult to assess** and varies by source, but a good approximation is that greater than **75% of the world's Muslims are Sunni and 10–20% are Shia**
- Sunnis are a **majority in most Muslim communities:** in Southeast Asia, China, South Asia, Africa, and some of the Arab world. **Shia make up the majority of the citizen population in** Iran, Iraq and Bahrain. Pakistan has the largest Sunni and second-largest Shia Muslim population in the world.

Doctrine of Representation

- **Under Hindu law** the doctrine of representation determines the quantum of share of an heir or a group of heirs.
- **The per stirpes rule** means that where there are branches; division of property takes place according to the each branch and then the branches bifurcate the share according to **per capita rule.**
- **Hanafi law or sunni law** does not recognize the doctrine of representation.
- **Shia law** also does not recognize this doctrine. But it recognizes this doctrine for a second purpose i.e. for determining quantum of shares in certain cases.

Sunni law

- Sunnis interpreted the principles of customary laws and principles of Koran in such a manner to **blend them harmoniously.**
- The **customary heirs were not depraved of their right** of inheritance in the estate of the deceased as only a portion of the estate was given to the heirs enumerated in the Koran.
- The basic structure of the customary succession that is the rule of **agnatic preference was retained.**
- The Koranic succession takes the agnatic principles further by recognizing the **right of female agnates.**
- The rule was that the **male agnate takes twice a share of the female agnate.**
- That most of the newly created heirs are **the near blood relations of the deceased who were ignored in the customary law.**
- The **Koranic imposition of new heirs does not deprive the male agnates of their inheritance**, but their rights are liable to be affected if there exists a Koranic heir.
- **Under the Hanafi law** the general rule of distribution of the estate **is per capita and not per stirpes.**
- **Under the Sunni law when an intestate succession arises there are two questions:**

1. **Who are the heirs of the deceased?**

2. **What share are the heirs entitled to?**

Categories of Heirs

- **Under the sunni law the heirs of the deceased Muslim male or female falls under the same category i.e.**

1. **The sharers**
2. **The residuaries**
3. **The distant kindered**
4. **The State by escheat.**

Distribution of Assets among Sharers and Residuaries

- Among the heirs, **the sharers are to be given share first.**
- The **residue is then is to be distributed among the residuaries.**
- In the **absence of sharers the residuaries take the entire estate.**
- In the **absence of both the estate will go to the distant kindered.**
- Further, in **absence of all of them the estate goes to the State.**
- The **general rule of preference is that nearer heir excludes the remoter one.**
- In sunni inheritance law there are **five heirs** who are always entitled to a share they are **husband, wife, child, father and mother.** They are called **primary heirs**.

Distribution of Assets among Distant Kindred

- **When among the claimants there are descendants, ascendants and collaterals** then descendants distant kindred are preferred over ascendants and collateral.
- When only descendants are claimants then **one having fewer degrees of descent will be preferred**.

Shia law

Classification of Heirs under Shia Law

1. **Heirs by marriage**
2. **Heir by consanguinity**
3. **State by escheat**

Categories of Heirs

1. **The Sharers and the descendants of Sharers how low so ever.**
2. **The Residuaries and the descendants of Residuaries how low so ever.**

Disqualifications

- Non-Muslim
- Murderer
- Illegitimate children
- Daughters
- Childless widow
- Step parent

MUSLIM WILL

When a Muslim dies there are four duties which need to be performed. These are:

1. payment of funeral expenses
2. payment of his/her debts
3. execution his/her will
4. distribution of the remaining estate amongst the heirs
5. The Islamic will is called ***al-wasiyya***.
6. A will is a transaction which **comes into operation after the testator's death**. The will is executed **after payment of funeral expenses and any outstanding debts**.
7. The one who makes a will (***wasiyya***) is called a **testator** (***al-musi***).
8. The one on who gets some property in a will is made is generally referred to as a **legatee** (***al-musa lahu***). Technically speaking the term "testatee" is perhaps a more accurate translation of *al-musa lahu.*
9. A document embodying the will is called the ***wassiyatnama***.
10. Under **Section 2(h) of the Indian Succession Act, 1925**, a will has been defined as: "A will is the legal declaration of the intention of the testator, with respect to his property which he desires to be carried into effect after his death".
11. **A will from a Muslim's point of view** is a divine institution, since its exercise is regulated by Quran. It offers to the testator the means of correcting to certain extend the law of succession, and of enabling some of those relatives who are excluded from inheritance to obtain a share in his goods and of recognizing the services to him by a stranger, or the devotion to him in his last moments.

12. Under Muslim Law a will may be made **either orally or in writing.** It is not necessary that a testamentary disposition should be in writing. If it is made orally, no particular form of words are required, so long as the intention of the testator is clear.

13. **Muslim Law of will and the Indian Succession Act, 1925**

14. The provisions of the Indian Succession Act, 1925 are not applicable to Muslims. However, a Muslim cannot claim immunity if his marriage was held under the Special Marriage Act,1954. in such a case the provisions of **the Indian Succession Act, 1925** shall be applicable even though the will was made before or after the marriage. Where a will is governed by Muslim Law it will be subject to the provisions of the **Shariat Act, 1937**.

Importance of the Wassiyat

The importance of the Islamic will (*wasiyya*) is clear from the following two *hadith*:

"It is the duty of a Muslim who has anything to bequest not to let two nights pass without writing a will about it." (Sahih al-Bukhari)

"A man may do good deeds for seventy years but if he acts unjustly when he leaves his last testament, the wickedness of his deed will be sealed upon him, and he will enter the Fire. If, on the other hand, a man acts wickedly for seventy years but is just in his last will and testament, the goodness of his deed will be sealed upon him, and he will enter the Garden." (Ahmad and Ibn Majah)

REQUISITES OF A VALID WILL

The essential requisites of a valid Will under Mohammedan Law are as follows:-

1. The testator must **be competent to make the will**.
2. The **legatee must be competent to take the legacy** or bequeath.
3. The **subject of the bequeath must be a valid** one.
4. The bequeath must **be within the limits imposed** on the testamentary power of a Muslim.
5. **Appointment of the Executer** of the Will.

Testator & his competence

- Every adult Muslim of **sound mind** can make a Will.
- A **minor or a lunatic** are not competent to execute a will.
- But a will is made by a minor it may be **subsequently be validated by his ratification** on attaining majority.

- A **bequeath made by a person of unsound mind cannot be deemed valid,** if he becomes of sound mind subsequently**. Also in the converse case**, a bequeath made by a person, while of sound mind, becomes invalid if the testator is permanently disabled by unsoundness of mind.
- According to Muslim Law the **age of majority is 15 years** and minority terminated at that age. But this rule is **not applicable to wills in India** since the age of majority, in case of will is governed by the Indian Majority Act and not by personal Laws.
- According to the **Indian Majority Act** the minority terminates at the age of **18 years**, but **if the minor is one whose guardian has been appointed by the court,** the minority will terminate at the age of **21 years**. Thus a person of 18 years or 21 years, as the case may be, is competent to make a will.
- Under **Sunni Law the will of a person committing suicide is valid.** Under **Shia Law** a will made by a person who has done any act towards the commission of suicide **is not valid**, but if the will is made before the doing of any act towards the commission of suicide, it is valid.

Legatee & his competence

- Any **person capable of holding property**, may be the legatee under a will. Thus **sex, age, creed or religion are no bar** to the taking of a legacy.
- The legatee must be **capable of owning the bequeath**.
- No one can be made the beneficiary owner of the estate against his will. Therefore, the title to the subject of the bequeath can only be completed **with the express or implied assent of the legatee** after the death of the testator.
- **Acceptance or rejection of a bequeath by the legatee is only relevant after the death of the testator** and not before. Generally speaking once a legatee has accepted or rejected a bequeath he cannot change his mind subsequently.

<u>Types of bequeath</u>

- Bequeath may be made **for the benefit of an Institution**.
- Bequeath can be made **in favor of a non-muslim.**
- According to **Sunni Law** a bequeath to a person who has **caused the death of the testator** whether intentionally or unintentionally is **invalid.** According to **Shia Law** it is valid if the death is unintentionally caused or accidently caused.
- Under **Sunni law** a child who is **in womb but born within 6 months** of the date of making the will is treated as a legatee in existence and hence is competent to take the legacy. But under the **Shia law** a bequeath to a child in womb is valid if it is born in the longest period of gestation i.e 10 months.
- A bequeath **for the benefit of a religious or charitable object** is also valid.

Subject of Will & its validity

The following are the requisites of a valid will:-

1. The property must be **capable of being transferred**
2. The property **must be in existence at the time of the testator's death**. It is not necessary that it should be in existence at the time of the making of the will
3. The **testator must be the owner of the property** to be disposed by will.

Testamentary Power and its limitations

Under the Testamentary Capacity the power of the Muslim testator is limited in two ways:

- **Limitation as regards the person**

The testator **cannot make a bequest in favour of a legal heir under traditional Sunni Muslim law.** However, some Islamic countries do allow a bequest in favour of a legal heir providing the bequest does not exceed one-third.

According to **Shia Law** a testator may give a legacy to an heir so long as it dose not exceed 1/3 of his estate. Such a legacy is valid without the consent of the other heirs.

- **Limitation as regards the property**

The general rule with regard to extend of property that may be disposed of by will is that **no Muslim can bequeath more than 1/3 of his net estate unless the other heirs consent to the bequeath or there are no legal heirs at all**. A Muslim can bequeath 1/3 of his estate only after payment of the funeral charges and debts.

Appointment of the Executor of the Will

The executor **(*al-wasi Al- mukhtar*)** of the will is the manager of the estate appointed by the testator. The executor has to carry out the wishes of the testator according to Islamic law, to watch the interests of the children and of the estate. The authority of the executor should be specified. **Hanafi Law** state that the executor should be trustworthy, truthful and must be just. The Hanafi Law considers the appointment of a **non-Muslim executor to be valid**. The testator may appoint **more than one executor**, **male or female**. The testator should state if each executor can act independently of the other executor(s). If one starts acting as an executor, one will be regarded as having accepted the appointment, both in Islamic and in English law.

REVOCATION OF WILL

Muslim Law confers on a testator unfettered right to revoke his will. He may revoke it any time. The revocation may be either:-

1. Express revocation; or
2. Implied revocation

HIBA

Gift is a generic term that includes all transfers of property without consideration. In India, Gift is considered equivalent to Hiba but technically, Gift has a much wider scope than Hiba. The word Hiba literally means, the donation of a thing from which the donee may derive a benefit. It must be immediate and complete. The most essential element of Hiba is the declaration, "I have given".

As per Hedaya, Hiba is defined technically as, "unconditional transfer of property, made immediately and without any exchange or consideration, by one person to another and accepted by or on behalf of the latter".

According to Fyzee, Hiba is the immediate and unqualified transfer of the corpus of the property without any return.

The gift of the corpus of a thing is called Hiba and the gift of only the usufructs of a property is called Ariya.

Essential Elements of a Gift

Since muslim law views the law of Gift as a part of law of contract, there must be an offer (izab), an acceptance (qabul), and transfer (qabza). In Smt Hussenabi vs Husensab Hasan AIR 1989 Kar, a grandfather made an offer of gift to his grandchildren. He also accepted the offer on behalf of minor grandchildren. However, no express of implied acceptance was made by a major grandson. Karnataka HC held that since the three elements of the gift were not present in the case of the major grandchild, the gift was not valid. It was valid in regards to the minor grandchildren.

Thus, the following are the essentials of a valid gift -

A declaration by the donor - There must be a clear and unambiguous intention of the donor to make a gift.

Acceptance by the donee - A gift is void if the donee has not given his acceptance. Legal guardian may accept on behalf of a minor.

Delivery of possession by the donor and taking of the possession by the donee. In Muslim law the term possession means only such possession as the nature of the subject is capable of. Thus, the real test of the delivery of possession is to see who - whether the donor or the donee - reaps the

benefits of the property. If the donor is reaping the benefit then the delivery is not done and the gift is invalid.

The following are the conditions which must be satisfied for a valid gift.

1. Parties - There must be two parties to a gift transaction - the donor and the donee.

Conditions for Donor - (Who can give)

Must have attained the age of majority - Governed by Indian Majority Act 1875.

Must be of sound mind and have understanding of the transaction.

Must be free of any fraudulent or coercive advice as well as undue influence.

Must have ownership over the property to be transfered by way of gift.

A gift by a married woman is valid and is subjected to same legal rules and consequences. A gift by a pardanashin woman is also valid but in case of a dispute the burden of proof that the transaction was not conducted by coercion or undue influence is on the donee.

Gift by a person in insolvent circumstances is valid provided that it is bona fide and not merely intended to defraud the creditors.

Conditions for Donee (who can receive)

Any person capable of holding property, which includes a juristic person, may be the donee of a gift. A muslim may also make a lawful gift to a non-muslim.

Donee must be in existence at the time of giving the gift. In case of a minor or lunatic, the possession must be given to the legal guardian otherwise the gift is void.

Gift to an unborn person is void. However, gift of future usufructs to an unborn person is valid provided that the donee is in being when the interest opens out for heirs.

2. Conditions for Gift (What can be gifted) -

It must be designable under the term mal.

It must be in existence at the time when the gift is made. Thus, gift of anything that is to be made in future is void.

The donor must possess the gift.

Muslim law recognizes the difference between the corpus and the usufructs of a property. Corpus, or Ayn, means the absolute right of ownership of the property which is heritable and is unlimited in point of time, while, usufructs, or Manafi, means the right to use and enjoy the property. It is limited and is not heritable. The gift of the corpus of a thing is called Hiba and the gift of only the usufructs of a property is called Ariya.

In Nawazish Ali Khan vs Ali Raza Khan AIR 1984, it was held that gift of usufructs is valid in Muslim law and that the gift of corpus is subject to any such limitations imposed due to usufructs being gifted to someone else. It further held that gift of life interest is valid and it doesn't automatically enlarge into gift of corpus. This ruling is applicable to both Shia and Sunni.

Subject of Gift - The general principle is that the subject of a gift can be -

anything over which dominion or right of property may be exercised.

anything which may be reduced to possession.

anything which exists either as a specific entity or as an enforceable right.

anything which comes within the meaning of the word mal.

In Rahim Bux vs Mohd. Hasen 1883, it was held that gift of services is not valid because it does not exist at the time of making the gift.

Gift of an indivisible property can be made to more than one persons.

3. Extent of Donors right to gift - General rule is that a donors right to gift is unrestricted. In Ranee Khajoorunissa vs Mst Roushan Jahan 1876, it was recognized by the privy council that a donor may gift all or any portion of his property even if it adversely affects the expectant heirs. However, there is one exception that the right of gift of a person on death bed (Marz ul maut) is restricted in following ways - He cannot gift more than one third of his property and he cannot gift it to any of his heirs.

Kinds of Gift

There are several variations of Hiba. For example, Hiba bil Iwaz, Hiba ba Shart ul Iwaz, Sadkah, and Ariyat.

Hiba Bil Iwaz - Hiba means gift and Iwaz means consideration. Hiba Bil Iwaz means gift for consideration already received. It is thus a transaction made up of two mutual or reciprocal gifts between two persons. One gift from donor to donee and one from donee to donor. The gift and return gift are independent transactions which together make up Hiba bil Iwaz.

In India, it was introduced as a device for effecting a gift of Mushaa in a property capable of division. So a Hiba Bil Iwaz is a gift for consideration and in reality it is a sale. Thus, registration of the gift is necessary and the delivery of possession is not essential and prohibition against Mushaa does not exist. The following are requisites of Hiba bil Iwaz -

Actual payment of consideration on the part of the donee is necessary. In Khajoorunissa vs Raushan Begam 1876, held that adequacy of the consideration is not the question. As long is the consideration is bona fide, it is valid no matter even if it is insufficient.

A bona fide intention on the part of the donor to divest himself of the property is essential.

Gift in lieu of dower debt - In Gulam Abbas vs Razia AIR 1951, All HC held that an oral transfer of immovable property worth more than 100/- cannot be validly made by a muslim husband to his wife by way of gift in lieu of dower debt which is also more than 100/-. It is neither Hiba nor Hiba bil Iwaz. It is a sale and must done through a registered instrument.

Hiba ba Shartul Iwaz - Shart means stipulation and Hiba ba Shart ul Iwaz means a gift made with a stipulation for return. Unlike in Hiba bil Iwaz, the payment of consideration is postponed. Since the payment of consideration is not immediate the delivery of possession is essential. The transaction becomes final immediately upon delivery. When the consideration is paid, it assumes the character of a sale and is subject to presumption (Shufa). As in sale, either party can return the subject of the sale in case of a defect. It has the following requisites -

Delivery of possession is necessary.

It is revocable until the Iwaz is paid.

It becomes irrevocable after the payment of Iwaz.

Transaction when completed by payment of Iwaz, assumes the character of a sale.

In general, Hiba bil Iwaz and Hiba ba Shart ul Iwaz are similar in the sense that they are both gifts for a return and the gifts must be made in compliance with all the rules relating to simple gifts.

Differences between Hiba, Hiba bil Iwaz, and Hiba ba Shart ul Iwaz -

Hiba Hiba bil Iwaz Hiba ba Shart ul Iwaz

Ownership in property is transfered without consideration. Ownership in property is transferred for consideration called iwaz. But there is no express agreement for a return. Iwaz is voluntary. Ownership in property is transferred for consideration called iwaz, with an express agreement for a return.

Delivery of possession is essential. Delivery of possession is NOT essential. Delivery of possession is essential.

Gift of mushaa where a property is divisible is invalid. Gift of mushaa even where a property is divisible is valid. Gift of mushaa where a property is divisible is invalid.

Barring a few exceptions it is revocable. It is irrevocable. It is revocable until the iwaz is paid. Irrevocable after that.

It is a pure gift. It is like a contract of sale. In its inception it is a gift but becomes a sale after the iwaz is paid.

Exceptions in delivery of possesssion

The following are the cases where deliver of possession by the donor to the donee is not required -

Gift by a father to his minor or lunatic son. In Mohd Hesabuddin vs Mohd. Hesaruddin AIR 1984, the donee was looking after the donor, his mother while other sons were neglecting her. The donor gifted the land to the donee and the donee subsequently changed the name on the land records. It was held that it was a valid gift even though there was no delivery of land.

When the donor and the donee reside in the same house which is to be gifted. In such a case, departure of the donor from the house is not required.

Gift by husband to wife or vice versa. The delivery of possession is not required if the donor had a real and bona fide intention of making the gift.

Gift by one co-sharer to other. Bona fide intention to gift is required.

Part delivery - Where there is evidence that some of the properties in a gift were delivered, the delivery of the rest may be inferred.

Zamindari villages - Delivery is not required where the gift includes parcels of land in zamindari if the physical possession is immpossible. Such gift may be completed by mutation of names and transfer of rents and incomes.

Subject matter in occupation of tenant - If a tenant is occupying the property the gift may be affected by change in ownership records and by a request to the tenant to attorn the donee.

Incorporeal rights - The gift may be completed by any appropriate method of transfering all the control that the nature of the gift admits from the donor to the donee. Thus, a gift of govt. promissory note may be affected by endorsement and delivery to the donee.

Where the donee is in possession - Where the donee is already in possession of the property, delivery is not required. However, if the property is in adverse possession of the donee, the gift is not valid unless either the donor recovers the possession and delivers it to donee or does all that is in his power to let the donee take the possession.

Void Gifts

The following gifts are void -

Gift to unborn person. But a gift of life interest in favor on a unborn person is valid if he comes into existence when such interest opens out.

Gifts in future - A thing that is to come into existence in future cannot be made. Thus, a gift of a crop that will come up in future, is void.

Contingent gift - A gift that takes affect after the happening of a contingency is void. Thus a gift by A to B if A does not get a male heir is void.

Gift with a condition

A gift must always be unconditional. When a gift is made with a condition that obstructs its completeness, the gift is valid but the condition becomes void. Thus, if A gifts B his house on a condition that B will not sell it or B will sell it only to C, the condition is void and B takes full rights of the house.

Mushaa (Hiba bil mushaa)

Mushaa means undivided share in a property. The gift of undivided share in an indivisible property is valid under all schools but there is no unanimity of opinion amongst different schools about gift of undivided share in a property that is divisible. In Shafai and Ithna Asharia laws it is valid if the donor withdraws his control over the property in favor of the donee. But under Hanafi law, such a gift is invalid unless it is separated and delivered to the donee.

Illustration -

A, B, and C are the co-owners of a house. Since a house cannot be divided, A can give his undivided share of the house to D in gift.

A, B, and C are the co-owners of 3 Tons of Wheat, under Shafai and Ithna Ahsharia law, A can give his undivided share of the wheat to D if he withdraws control over it but under Hanafi law, A cannot do so unless the wheat is divided and the A delivers the possession of 1 ton of wheat to D.

In case of Kashim Hussain vs Sharif Unnisa 1883, A gifted his house to B along with the right to use a staircase, which was being used by C as well. This gift was held valid because staircase is indivisible.

Revocation of a Gift

Under muslim law, all volutary transactions are revocable and so under Hanafi law a gift is also generally revocable, though it is held to be abominable. In Shia law, a gift can be revoked by mere declaration while in Sunni law, it can be revoked only by the intervention of the court of law or by the consent of the donee.

The following gifts, however, are absolutely irrevocable -

When the donor is dead.

When the donee is dead.

When the donee is related to the donor in prohibited degrees on consanguinity. However, in Shia law, a gift to any blood relative is irrevocable.

When donor and the donee stand in marital relationship. However, in Shia law, a gift to husband by wife or vice versa is revocable.

when the subject of the gift has been transfered by the donee through a sale or gift.

when the subject of the gift is lost or destroyed, or so changed as to lose its identity.

when the subject of the gift has increased in value and the increment is inseparable.

when the gift is a sadqa.

when anything as been accepted in return.

WAKF

Literal meaning of Wakf is detention, stoppage, or tying up as observed in M Kazim vs A Asghar Ali AIR 1932. Technically, it means a dedication of some specific property for a pious purpose or secession of pious purposes. As defined by Muslim jurists such as Abu Hanifa, Wakf is the detention of a specific thing that is in the ownership of the waqif or appropriator, and the devotion of its profits or usufructs to charity, the poor, or other good objects, in the manner of areeat or commodate loan.

Wakf Act 1954 defines Wakf as, "Wakf means the permanent dedication by a person professing the Islam, of any movable or immovable property for any purpose recognized by Muslim Law as religious, pious, or charitable."

Essentials of a valid Wakf

1. Permanent Dedication of any property - There are actually three aspects in this requirement. There must be a dedication, the dedication must be permanent, and the dedication can be of the property. There is no prescribed form of dedication. It can be written or oral but it must be clear to convey the intention of dedication. According to Abu Yusuf, whose word is followed in India, mere declaration of dedication is sufficient for completion of Wakf. Neither delivery of possession or appointment of Mutawalli is necessary.

The dedication must be permanent . A temporary dedication such as for a period of 10 yrs or until death of someone is invalid.

The subject of Wakf can be any tangible property (mal) which can used without being consumed. In Abdul Sakur vs Abu Bakkar 1930, it was held that there are no restrictions as long as the property can be used without being consumed and thus, a valid Wakf can be created not only of immovable property but also of movable property such as shares of a company or even money. Some subjects that Hanafi law recognizes are immovable property, accessories to immovable property, or books.

The subject of the Wakf must be in the ownership of the dedicator, wakif. One cannot dedicate someone else's property.

2. By a Muslim - A Wakf can only be created by a Muslim. Further, the person must have attained the age of majority as per Indian Majority Act and should be of sound mind.

3. For any purpose recognized by Muslim Law - The purpose is also called the object of Wakf and it can be any purpose recognized as religious, pious, or charitable, as per Muslim Law. It is not necessary that a person must name a specific purpose. He can also declare that the property may be used for any welfare works permitted by Shariat.

In Zulfiqar Ali vs Nabi Bux, the settlers of a Wakf provided that the income of certain shops was to be applied firstly to the upkeep of the mosque and then the residue, if any, to the remuneration of the mutawalli. It was held to be valid however, it was also pointed out that if a provision of remuneration was created before the upkeep of the mosque, it would have been invalid.

The following are some of the objects that have been held valid in several cases - Mosques and provisions of Imam to conduct worship, celebrating birth of Ali Murtaza, repairs of Imambaras, maintenance of Khanqahs, burning lamps in mosques, payment of money to fakirs, grant to an idgah, grant to colleges and professors to teach in colleges, bridges and caravan sarais.

In Kunhamutty vs Ahman Musaliar AIR 1935, Madras HC held that if there are no alms, the performing of ceremonies for the benefit of the departed soul is not a valid object.

Some other invalid objects are - building or maintaining temple or church, providing for the rich exclusively, objects which are uncertain.

Shia Law - Besides the above requirements, Shia law imposes some more requirements for a valid Wakf. There are -

Delivery of possession to the first person in whose favour the Wakf has been created is essential.

Dedication must be absolute and unconditional.

The property must be completely taken away from the wakif. It means that the wakif cannot keep or reserve any benefit or interest, or even the usufructs of the dedicated property.

Creation of Wakf

Muslim law does not prescribe any specific way of creating a Wakf. If the essential elements as described above are fulfilled, a Wakf is created. Though it can be said that a Wakf is usually created in the following ways -

By an act of a living person (inter vivos) - when a person declares his dedication of his property for Wakf. This can also be done while the person is on death bed (marj ul maut), in which case, he cannot dedicate more than 1/3 of his property for Wakf.

By will - when a person leaves a will in which he dedicates his property after his death. Earlier it was thought that Shia cannot create Wakf by will but now it has been approved.

By Usage - when a property has been in use for charitable or religious purpose for time immemorial, it is deemed to belong to Wakf. No declaration is necessary and Wakf is inferred.

Kinds of Wakfs

A Wakf can be classified into two types - Public and Private. As the name suggests, a public Wakf is for the general religious and charitable purposes while a private Wakf is for the creators own family and descendants and is technically calledWakf alal aulad. It was earlier considered that to constitute a valid wakf there must be a complete dedication of the property to God and thus private wakf was not at all possible. However, this view is not tenable now and a private wakf can be created subject to certain limitation after Wakf Validating Act 1913. This acts allows a private wakf to be created for one's descendants provided that the ultimate benefits are reserved for charity. Muslim Law treats both public and private wakfs alike. Both types of wakf are created in perpetuity and the property becomes inalienable.

Wakf alal aulad (can a wakf be created for one's family?)

Wakf on one's children and thereafter on the poor is a valid wakf according to all the Muslim Schools of Jurisprudence. This is because, under the Mohammedan Law, the word charity has a much wider meaning and includes provisions made for one's own children and descendants. Charity to one's kith and kin is a high act of merit and a provision for one's family or descendants, to prevent their falling into indigence, is also an act of charity. The special features of wakf-alal-aulad is that only the members of the wakif's family should be supported out of the income and revenue of the wakf property. Like other wakfs, wakf alal-aulad is governed by Muhammadan Law, which makes no distinction between the wakfs either in point of sanctity or the legal incidents that follow on their creation. Wakf alal aulad is, in the eye of the law, Divine property and when the rights of the wakif are extinguished, it becomes the property of God and the advantage accrues to His creatures. Like the public wakf, a wakf-alal-aulad can under no circumstances fail, and when the line of descendant becomes extinct, the entire corpus goes to charity.

The institution of private wakf is traced to the prophet himself who created a benefaction for the support of his daughter and her descendants and, in fact, placed it in the same category as a dedication to a mosque.

Thus, it is clear that a wakf can be created for one's own family. However, the ultimate benefit must be for some purpose which is recognized as pious, religious or charitable by Islam.

Quasi public Wakf

Some times a third kind of wakf is also identified. In a Quasi public wakf, the primary object of which is partly to provide for the benefit of particular individuals or class of individuals which may be the settler's family, and partly to public, so they are partly public and partly private.

Contingent Wakf

A wakf, the creation of which depends on some event happening is called a contingent wakf and is invalid. For example, if a person creates a wakf saying that his property should be dedicated to god if he dies childless is an invalid wakf. Under shia law also, a wakf depending on certain contingencies is invalid.

In Khaliluddin vs Shri Ram 1934, a muslim executed a deed for creating a wakf, which contained a direction that until payment of specified debt by him, no proceeding under the wakfnama shall be enforceable. It was held that it does not impose any condition on the creation of the wakf and so it is valid.

Conditional Wakf

If a condition is imposed that when the property dedicated is mismanaged, it should be divided amongst the heirs of the wakf, or that the wakif has a right to revoke the wakf in future, such a wakf would be invalid. But a direction to pay debts, or to pay for improvements, repairs or expansion of the wakf property or conditions relating to the appointment of Mutawalli would not invalidate the wakf. In case of a conditional wakf, it depends upon the wakif to revoke the illegal condition and to make the wakf valid, otherwise it would remain invalid.

Completion of wakf

The formation of a wakf is complete when a mutawalli is first appointed for the wakf. The mutalwalli can be a third person or the wakif himself. When a third person is appointed as mutawalli, mere declaration of the appointment and endowment by the wakif is enough. If the wakif appoints himself as the first mutawalli, the only requirement is that the transaction should be bona fide. There is no need for physical possession or transfer of property from his name as owner to his name as mutawalli.

In both the cases, however, mere intention of setting aside the property for wakf is not enough. A declaration to that effect is also required.

In Garib Das vs M A Hamid AIR 1970, it was held that in cases where founder of the wakf himself is the first mutawalli, it is not necessary that the property should be transferred from the name of the donor as the owner in his own name as mutawalli.

Shia law -

Delivery of possession to the mutawalli is required for completion when the first mutawalli is a third person.

Even when the owner himself is the first mutawalli, the character of the ownership must be changed from owner to mutawalli in public register.

Legal Consequences (Legal Incidents) of Wakf

Once a wakf is complete, the following are the consequences -

Dedication to God - The property vests in God in the sense that no body can claim ownership of it. In Md. Ismail vs Thakur Sabir Ali AIR 1962, SC held that even in wakf alal aulad, the property is dedicated to God and only the usufructs are used by the descendants.

Irrevocable - In India, a wakf once declared and complete, cannot be revoked. The wakif cannot get his property back in his name or in any other's name.

Permanent or Perpetual - Perpetuality is an essential element of wakf. Once the property is given to wakf, it remains for the wakf for ever. Wakf cannot be of a specified time duration. In Mst Peeran vs Hafiz Mohammad, it was held by Allahbad HC that the wakf of a house built on a land leased for a fixed term was invalid.

Inalienable - Since Wakf property belongs to God, no human being can alienate it for himself or any other person. It cannot be sold or given away to anybody.

Pious or charitable use - The usufructs of the wakf property can only be used for pious and charitable purpose. It can also be used for descendants in case of a private wakf.

Extinction of the right of wakif - The wakif loses all rights, even to the usufructs, of the property. He cannot claim any benefits from that property.

Power of court's inspection - The courts have the power to inspect the functioning or management of the wakf property. Misuse of the property of usufructs is a criminal offence as per Wakf Act.1995.

Revocation of Wakf

In India, once a valid wakf is created it cannot be revoked because no body has the power to divest God of His ownership of a property. It can neither be given back to the wakif nor can it be sold to someone else, without court's permission.

A wakf created inter vivos is irrevocable. If the wakif puts a condition of revocability, the wakf is invalid. However, if the wakf has not yet come into existence, it can be canceled. Thus, a testamentary wakf can be canceled by the owner himself before his death by making a new will. Further, wakf created on death bed is valid only up till 1/3 of the wakif's property. Beyond that, it is invalid and the property does not go to wakf but goes to heirs instead.

Mutawalli

Mutawalli is nothing but the manager of a wakf. He is not the owner or even a trustee of the property. He is only a superintendent whose job is the see that the usufructs of the property are being utilized for valid purpose as desired by the wakif. He has to see that the intended beneficiaries are indeed getting the benefits. Thus, he only has a limited control over the usufructs.

In Ahmad Arif vs Wealth Tax Commissioner AIR 1971, SC held that a mutawalli has no power to sell, mortgage, or lease wakf property without prior permission of the court or unless that power is explicitly provided to the mutawalli in wakfnama.

Who can be a mutawalli - A person who is a major, of sound mind, and who is capable of performing the functions of the wakf as desired by the wakif can be appointed as a mutawalli. A male or female of any religion can be appointed. If religious duties are a part of the wakf, then a female or a non-muslim cannot be appointed.

In Shahar Bano vs Aga Mohammad 1907, Privy council held that there is no legal restriction on a woman becoming a mutawalli if the duties of the wakf do not involve religious activities.

Who can appoint a mutawalli - Generally, the wakif appoints a mutawalli. He can also appoint himself as a mutawalli. If a wakf is created without appointing a mutawalli, in India, the wakf is considered valid and the wakif becomes the first mutawalli in Sunni law but according to Shia law, even though the wakf remains valid, it has to be administered by the beneficiaries. The wakif also has the power to lay down the rules to appoint a mutawalli. The following is the order in which the power to nominate the mutawalli transfers if the earlier one fails -

founder

executor of founder

mutawalli on his death bed

the court, which should follow the guidelines -

it should not disregard the directions of the settler but public interest must be given more importance.

preference should be given to the family member of the wakif instead of utter stranger.

Powers of a mutawalli - Being the manager of the wakf, he is in charge of the usufructs of the property. He has the following rights -

He has the power to utilize the usufructs as he may deem fit in the best interest of the purpose of the wakf. He can take all reasonable actions in good faith to ensure that the intended beneficiaries are benefited by the wakf. Unlike a trustee, he is not an owner of the property so he cannot sell the property. However, the wakif may give such rights to the mutawalli by explicitly mentioning them in wakfnama.

He can get a right to sell or borrow money by taking permission from the court upon appropriate grounds or if there is an urgent necessity.

He is competent to file a suit to protect the interests of the wakf.

He can lease the property for agricultural purpose for less than three years and for non-agricultural purpose for less than one year. He can exceed the term by permission of the court.

He is entitled to remuneration as provided by the wakif. If the remuneration is too small, he can apply to the court to get an increase.

Removal of a mutawalli -

Generally, once a mutawalli is duly appointed, he cannot be removed by the wakif. However, a mutawalli can be removed in the following situations -

By court -

if he misappropriates wakf property.

even after having sufficient funds, does not repair wakf premises and wakf falls into disrepair.

knowingly or intentionally causes damage or loss to wakf property. In Bibi Sadique Fatima vs Mahmood Hasan AIR 1978, SC held that using wakf money to buy property in wife's name is such breach of trust as is sufficient ground for removal of mutawalli.

he becomes insolvent.

By wakf board - Under section 64 of Wakf Act 1995, the Wakf board can remove mutawalli from his office under the conditions mentioned therein.

By the wakif - As per Abu Yusuf, whose view is followed in India, even if the wakif has not reserved the right to remove the mutawalli in wakf deed, he can still remove the mutawalli.

Hindu Endowment

Indian Democracy is governed by a written constitution. The majority population of this sub continent is Hindus. The Hindu religion is considered to be one of the oldest religions in the world. Hindu religion encompasses itself several castes/sub castes of different shape and different colour. The caste and sub caste also varies from State to State or from region to region. The practice also varies to a large extent. The Hindu religion at best can be considered to be a case of unity in diversity. From the earliest times, Hindus have been dedicating property for religious and charitable purposes. This has been mainly under two heads: Istha, which indicates the vedic sacrifices and rites and gifts associated with such sacrifices and Purta, stands for all other religious and charitable acts purposes unconnected with the Vedic sacrifices. The Istha-Purta have been considered as means for going to heaven. An endowment will come into existence only when some property or fund is dedicated for a religious or charitable purpose or object.

The management and control of the temples and the administration of their endowments is one of the primary responsibilities of the State. A number of measures have been undertaken prior to the year 1925 for efficient control and supervision of the administration of the Hindu Religious and Charitable Endowments HRCE. In the Act 1 of 1925, the Government constituted "the Hindu Religious and Charitable Endowments Board" consisting of a President and two to four Commissioners nominated by the Government to function as a statutory body. Subsequently, Act 1 of 1925 was repealed by the Act 2 of 1927, which was followed by several modifications up to the year 1951. In order to streamline the Hindu Religious and Charitable Endowments Board, a Special Officer (Thiru. R.V. Krishna Iyer) was appointed in the year 1940.

The Special Officer recommended that the Government may administer the Hindu Religious and Charitable Endowments instead of the Board. The non-official committee appointed in the year 1942 under the Chairmans Thiru. P. Venkataramana Rao Naidu, a Retired Judge of High Court of Judicature, Madras recommended among other things that it would be advantageous to convert Hindu Religious and Charitable Endowments Board into a Government administration. Accepting the above recommendation, the Hindu Religious and Charitable Endowments Act, 1951 was enacted provincialising the administration of the Hindu Religious Institutions. Comprehensive amendments have been made to this Act and Tamilnadu Hindu Religious and Charitable Endowments Act XXII of 1959 came into force with effect from 1st January 1960.

With a view to oversee the administration of the Hindu Religious and Charitable Endowments in a proper manner, it was decided in the year 1991, that Religious and spiritual leaders should be involved in the proper maintenance and administration of the Hindu and Jain Temples and Charitable Endowments adding that their suggestions and guidance should be obtained regarding

the administration of Charitable Endowments. Accordingly, many amendments were brought into the Hindu Religious and Charitable Endowments Act, 1959.

The Hindu Endowments can be majorly classified into 3 types:

1. Maths
2. Debutter (TEMPLES and IDOLS)
3. Charitable Endowments

In order to understand these endowments, there are certain essential elements which must be taken into account:

ESSENTIALS OF A VALID ENDOWMENT:

Five essentials of a valid endowment are:-

1. Dedication
2. Dedication may be absolute or partial
3. Subject matter must be specified
4. Object must be definite
5. Settlor must have capacity to settle the endowment

1. DEDICATION

Dedication of property is essential for the creation of an endowment. A dedication consists of the following two elements:

1) sankalpa, or formula of resolve, or an intention to dedicate properties

2) utsarga, or renunciation

The ceremonies of dedication begin with the sankalpa, i.e., the intention to dedicate, manifested by performing certain ceremonies, which include the recitation of time, date, year of dedication, and of the object the founder has in his mind. The utsarga completes the gift. It implies renunciation of the ownership by the giver in the thing given.

Under modern Hindu Law, it is not necessary that performance of any particular ceremony should be established, before endowment could become valid and binding. The dedication is complete as soon as it established that the founder intended to make a gift in favour of a charity and that he had divested himself of the ownership of the property, the subject-matter of the endowment. Actual installation of deity in the temple is not necessary for the completion of the gift. In Hindu law, for the creation of a valid endowment, no trust need be created. Even in the absence of a ceremony such as sankalpa or samarpana or deed, dedication may be established by other evidence.

2. DEDICATION MAY BE ABSOLUTE OR PARTIAL

A dedication for an endowment may be absolute or partial. It is an absolute dedication when the donor diverts himself of all beneficial interest in the property dedicated to the endowment. The dedication is partial when only a charge for an endowment is created on the property. For instance, the donor may lay down that certain portion of income is to be applied for an endowment. In such a case, the property will devolve in an ordinary way, subject to the charge in favour of the endowment.

3. SUBJECT-MATTER MUST BE SPECIFIED

The third essential of valid endowment is that property dedicated must be specified. The words of gift used by the testator must be unambiguous and that the subject of the gifts must be well defined

and certain. Where the testator gave the direction in the will that the money should be spent for a certain charity, but did not specify the amount, it was held that no valid endowment came into existence. On the other hand, if the scope and object of the endowment is well defined and it is stated that out of certain property such sum should be spent as would be necessary, the dedication is valid.

4. OBJECT MUST BE DIFINITE

What are purely religious purposes and what religious purposes will be charitable must be entirely decided according to Hindu law and Hindu notions.It seems that the building of a Samadhi over the remains of a person and the making provision for the purpose of gurupooja and the other ceremonies in connection with the same are not recognized as charitable religious purpose under the Hindu law. But the Samadhi of a saint may, in course of time, become a shrine or a temple by reason of long public worship, and then an endowment for such a Samadhi will be valid. An endowment by a son for the installation of his father's statute will be valid only if the father is held in public esteem.

5.SETTLOR MUST HAVE CAPACITY TO SETTLE TH ENDOWMENT

The fifth requirement for the validity of an endowment is that the settlor must be of sound mind and major and he should not suffer from any legal disqualification.

I. MATHS:

In its ordinary parlance, Math means an abode or residence of ascetics. In its legal connotation, it is a monastic institution presided over by its head, known as Mahant, a superior ascetic, and established for the use and benefit of ascetics generally or of ascetics belongings to a particular order, ordinarily, the disciples of the Mahant. The basic purpose of a Math is to encourage and foster spiritual learning and knowledge, by maintenance of a competent line of teachers who impart religious instruction to the disciples and followers of the Math and to strenghthen the doctrines of the sect or school to which Math subscribes. The presiding element in a Math is the Mahant. Even when a temple is attached with Math, the presiding element in the Math remains the Mahant.

Property of a Math vests in the Math

The Mahant is the head of the Math, but the property dedicated to the Math does not vest in him. The endowed property of a Math vests in the Math itself as juristic person and not in the mahant.

Legal Position of Mahant

Mahant is the manager of properties, and the spiritual head of the Math. The mahant is the head of the institution. He sits upon the gaddi. He initiates the candidates into the mysteries of the cult, he superintends the worship of the idol and the accustomed spiritual rites, he manages the properties of the institution, he administers its affairs.

Personal property of Mahant

If under accustom, a mahant is allowed to hold the personal property, the personal property can be given and held by a mahant.

Management of Math and its properties:

The Mahant holds the properties of the Math for certain specific purpose or purposes as laid down by the founder or by usage. In this regard, the duties of the mahant are up keep of the math and the performance of the religious rites, ceremonies and festivals of the religious order to which the Math belongs. It is part of the management that the mahant should support his disciples and other members of the math, which constitutes a sort of the household of the Math. He should also make arrangements for food, stay and like things for the visiting ascetics. Mahant, though not a trustee, occupies a fiduciary position. All the expenses of the Math are to be meet out of the income of the endowed property. In addition to the aforesaid expenditure, mahant has to maintain himself in accordance with the dignity of his office over the income of the endowed properties are fairly large, mahant has ample discretion in the application of the funds of the Math.

Right of Representation:

The mahant of an Akhara or Math represents the Akhara or math and has both the rights to institute a suit on its behalf as also the duty to defend one brought against. If a math is not represented by a mahant, the decree passed against it is not binding. It is obvious that it is the mahant who represents the Math in all its dealings with the outside world. This means that mahant has power to do everything that may be necessary in the interest and for the benefit of the Math.

Mahant is liable to account:

Mahant has wider powr over the income of the endowed properties that the shebait. His power is almost unfettered. He must discharge all the obligations cconnected with the Math as laid down by the dead or by usage and custom. He can be charged with maladministration of the properties,

he occupies a fiduciary position, and therefore, he should keep proper accounts. The failure to keep accounts may be a ground for his removal.

Succession to the Office of Mahant

The general rule of the devolution of property or the office of mahant is that it will devolve in accordance with the rules of devolution laid down by the founder of the endowment. Such rules will be given effect to, if they do not violate the provision of any law . In those cases where mahant has a right to appoint his successor, he may do so by an act inter vivos or by a will. Once he exercises the power of nomination, he cannot revoke it. In a Mourushi Math, mahant may appoint a successor and may also hand over the office to the latter during his lifetime. However, the right of nomination of successor is a personal right and cannot be delegated. In some cases, it is required by custom that mahant's nominees should be confirmed or recognized by the members of the religious fraternity. In a Panchayati Math, The succession to mahantship is by election. The mode of election is laid down by the custom and usage of the Math. It is usually mahants of the same sect in a particular locality who exercise this power. This is done usually on the 13th day after the death of the mahant.

Termination of Mahantship

Apart from the termination of mahantship on the death of the holder of the office, there are other ways also which may terminate the mahantship. The mahantship may be terminated:

1) By relinquishment of the office by mahant during his lifetime.

2) By removal: A mahant may be removed from the office on account of his mental infirmity, bodily disease or an account of mismanagement or waste. He may also be removed, if he is leading an immoral life, or is acting contrary to the tenets or usage of the Math.

II. DEBUTTER (TEMPLES AND IDOLS)

The Debutter comes into existence when some property is dedicated to it. It is a fundamental rule of Hindu law that whatever idol maybe installed in a temple, or whatever deity or God a Hindu

may worship, the idol represents the Supreme God and none else. This implies that dedication of property is not to the image that is installed in the temple, but the Supreme God.

Idol as Juristic Person:

A Hindu idol is, according to long established authority, founded upon the religious custom of Hindus, and the recognition thereof by the courts of law, a juristic entity. It has juristical status with the power of sueing and being sued. It interests are to be attended by the person who has the deity in his charge and who is in law its manager with all the powers which would in such circumstances be given to the manager of the estate of an infant heir. The idol is, thus, considered a sacred entity and an ideal personality possessing proprietary rights. It is treated as legal entity. However every idol is not a juristic person. It must be an idol or recognized deity. However, it is an ideal sense that property can be said to belong to an idol. The possession and management of the debutter properties in the nature of things is vested in some human agency like the manager, Shebait or dharmakarta.

Thus, two essential ideas are involved in the notion of debutter endowments:

(1) It is in an ideal sense that the endowed property vests in the deity as juristic person, and

(2) The ideal personality of the idol is linked up with the natural personality of dharmakarta, shebait or manager.

The title of the endowed properties vests in the idol and not in the shebait or manager. The shebait holds the properties to give effect the purpose of the endowment, to carry out wishes of the founder as to the worship of deity, for looking after other matters associated with the deity and for managing the endowed property. The idol can sue in its own name.

Public Debutter:

The courts have held that if a temple has the following features, it may be taken as a public temple:

(a) The temple building may be built in such an imposing manner that it may look like a public temple,

(b) The members of the public are entitled to worship as matter of right,

(c) The expenses of the temple are met by the contribution made by the public,

(d) Sevas and utsavas conducted in the temples are those conducted in a public temple, or

(e) The management as well as the devotees have been treating the temple as public temple.

The Shebaitship

The person in whom the management of the debutter is vested is known by various means: the term shebait is commonly used in Bengal; he is called the dharmakarta in Tamil Nadu and Andhra Pradesh, and Panchayatdar in Tanjore and Malabar. It is only in broad sense that he is like a manager. As regards the endowed properties, he is more like a trustee, as regards his functions and duties towards the temple in spiritual sense, he is holder of an office of dignity. In Kalanka Devi Sansthan v. M.R.T. Nagpur the Supreme Court reiterated the well established proposition that the properties in the case of an idol or Sansthan, do not vest in the shebait but the idol. It is their possession and management which vest in the shebait. By custom, a shebait may be entitled to appropriate a part of the income of the debutter. Usually at the time of founding of endowment, the founder appoints a shebait or himself becomes a shebait. But he may appoint a shebait later on. The legal position of the shebait is not that of a trustee of the trust properties. The shebait is, of course, a discharge but he has also beneficial interest in debutter properties. Shebaitship is heritable like any other property.

Powers and Obligations of Shebait:

The duties of shebait are both spiritual and temporal. In respect of spiritual duties, he must perform seva and puja of the idol. The custody of the idol belongs to him. Shebait is entitled to the possession and custody of the endowed properties. He is entitled to management of debutter. He is required to use reasonable care. Since shebait is like a trustee, he cannot make profit out of properties or use them for his own private and personal gains, he should keep proper accounts. The shebaits are not entitled to any remuneration, unless provided by the founder in the endowment itself. Ordinarily, shebait has no right to offering made to the idol, but again the matter rests on custom or the intention of the founder. The general rule is: if offerings are of permanent character, they belong to the temple, but if they are of perishable nature, such as food they may be appropriated by shebait or pujari or by other persons in accordance with the debutter property, unless there is express prohibition in the deed of endowment. Shebait has the right of management and he represents the deity in all temporal matters. He can bring suits and behalf of the idol or in his own right. A decree in a suit against the shebait is enforceable against the debutter property. It also binds his successors.

Since the management and possession of the property vest in shebait, he is bound to do whatever is necessary for the benefit or preservation of the debutter properties. If necessary, he can borrow money, file legal proceeding, and take all those steps which may be necessary and proper. He may renovate an old temple. He cannot delegate his functions, duties and powers.

Devolution of Shebaitship:

As a general rule, the devolution of the office of shebait is in accordance with the deed of the endowment. If in the deed of the founder has not provided for any scheme of devolution of office, the devolution will be in accordance with any custom or usage applicable to the endowment. If there is no such custom or usage, then ordinary rules of succession will apply i.e. the office and management will devolve on the heirs of the founder.

The females have a right of succession to the office of shebaitship.

Where Shebait has a right to nominate his successor, he may do so by an act inter vivos or by will; in case he fails to exercise the power, office reverts to the founder.

Right to Share in Offering:

Apart from shebait who has a right to a share in offering made to the deity, under Hindu law, there are some other person who have a right to take a share in the offerings by virtue of custom. These fall in two categories

(a) Those who perform seva-puja in the temple i.e. perform essentially religious or spiritual functions, and

(b) Those who perform some secular functions

Termination of Office:

The office of shebait falls vacant on the death, resignation or relinquishment by the shebait. It also falls vacant om the removal of shebait. A shebait who is guilty of misconduct, moral turpitude or abuse of position, can be removed by the court.

III. CHARITABLE ENDOWMENTS

Under charitable endowment are included all the endowments recognized under Hindu law expect the math and debutter. The usual charitable gift or bequest for charitable purposes are : the institutions of the dharamshala, annastrams (choultries), sadavarts for the establishment or maintenance of educational and medical institution, for construction and maintenance of sources of supply water, such as tanks and wells, bathing ghats, etc. A Hindu can create a charitable trust or endowment for any of these purposes.

Tanks and Wells

The excavation of tanks and wells has been a charitable purpose recognized in Hindu law from the very beginning. It is at the forefront of the purtta works.

Groves and Trees

The consecration of trees and groves is recognized charitable purpose from the earliest times.

Dharamshalas or Rest Houses

Construction of dharamshala too has been a popular object of a charitable endowment from very early times. A dharamshala is a rest house. In South India, it is also known as choultry. In the choultries, sometimes food is also provided fot the travelers. In he times, they were known as Pratishtaya Griha.

The property dedicated to the Dharamashala vests in the Dharamashalas. In India, cities, towns and even villages have Dharamashalas. The benefit of a dharamashala may be available to the public in general or it may be restricted to the members of a community or to the followers of a particular religion. Once dedication is made absolutely, it is not revocable. The provisions of the Indian Trust Act or the transfer of Property Act do not apply to the dedication of property to Hindu endowments.

Hospitals, Educational Institutions and Gosalas

Gifts for education have always been placed on a high pedestal. It is known as atidan, supreme gift. Imparting of free education has been the cherished object of hindu throughout the ages. The same is true of hospitals and dispensaries know as arogashalas. The Hindu hold the view that a person who consecrates a hospital is the giver of everything. The bequest for hospitals and schools can be validly made. In he University of Bombay v. The Municipal Commissioner the Bombay high court held that it was an educational institution or school, the object of which is charitable pr religious under Hindu law will be regarded as juristic person capable of holding property. A hostel attached to an educational institution is a valid charitable purpose. The establishment and maintenance of goshalas is a valid charitable purpose.

Sradha and Sadabrats:

The sradha or oblations to the departed ancestor is considered to be one of the obligatory duties of every Hindu. Sadabrat is the free distribution of food and alms to the needy and poor. Langars and annasatras are species of sadabrat. An endownment for the sadabrat has ben all along held valid.

Reading of Books and Gifts to Brahmans:

The endowments for reading of sacred books and for gifts to Brahmans have been also very popular among Hindus. Feeding of and paying dakhathna to Brahmans are in accordance with Hindu ideas a meritorious act.