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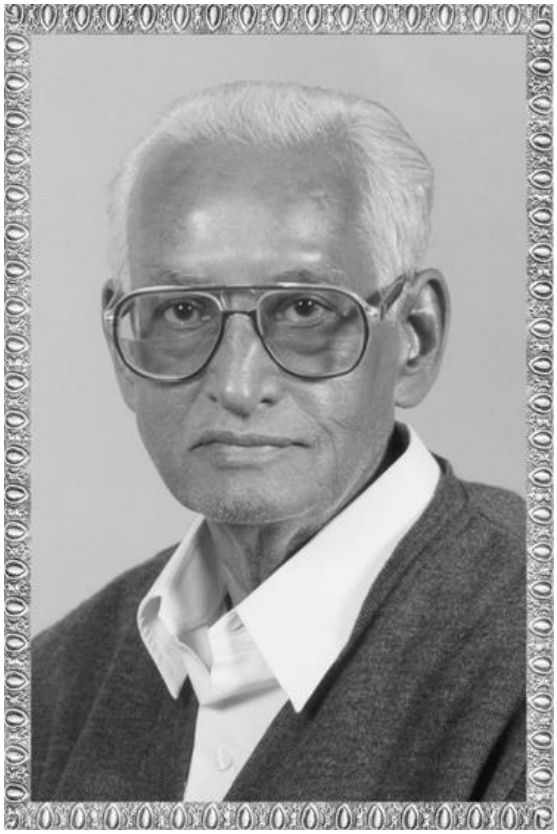

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Shree H.N.Shukla College of Legal Studies *"Sky is the Limit"*

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UNIT -1- JOINT FAMILY

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1.1 MITAKSHARA JOINT FAMILY :

Mitakshara coparcenary is one of the Hindu law schools that governs the succession of property in a Hindu family. The Mitakshara school of thought holds that the son, grandson, and grandson's son have a right to the family property through birth. Where as a combined Hindu family is an inescapable and basic idea in Hindu family law, which is today governed by the Hindu Succession Act of 1956. It is quite frequent in Hindu society. For a Hindu, it is a never-ending process; if it is halted in one generation due to partition, it will re emerge in the next. This rule validates the premise that every Hindu family is a Joint Hindu family.

According to Rukhmabai v. Lala LaxmiNarayan and Rajagopal v Padmini, a family is regarded to be a joint family if it is joint in concerns of food, worship, and estate. Even if a family does not share food and worship, i.e. if they live separately, they are still considered a Joint Hindu family if they share the estate. A Joint Hindu Family, as found in the case of Chhotey Lal and Ors. v. Jhandey Lal and Anr., is neither a business nor a juristic person because it lacks an independent legal entity from its members. It is a unit that is represented in all matters by the family's Karta.

A joint family, according to the Oxford Dictionary, is an extended family made up of two or more generations and their spouses who live together in a single residence. Likewise, the Hindu Joint Family consists of a common ancestor, his lineal male descendants, and their wives, daughters, and so on. So. while a common ancestor is required for the formation of a joint family, this does not imply that a common ancestor is required for its continuation; rather, if a common ancestor dies,

there is always an addition to the lower link of the Family. So, just when an upper connection is lost, the Joint Family is not over.

Mitakshara Copercenery

The term 'Coparcenary' is used in Hindu succession law. It is a smaller division or organisation inside a Joint Hindu Family that only deals with property issues, specifically the coparcenary property of a Joint Hindu Family.

Mitakshara School:

Benaras School,

Mithila School,

Maharashtra School, and

Dravida School are some of the schools in Benaras.

Composition:

Coparcenary, as opposed to Joint Hindu Family, consists of all male lineal descendants of the last holder of the property up to three generations. The coparcenary is made up of up to three generations, namely son, son's son, and son's son's son, with the senior-most member designated as the 'last holder.' There can be any number of male members in a given generation. Every coparcenary member is linked to another via blood or legal adoption.

As stated in Sudarshan v. Narasimhulu, it is a well-established law that no one can become a coparcener through marriage or other arrangement to become a coparcener because coparcenary is a legal formation. The Hindu Succession Act of 1956 prohibited the appointment of any female members.

Who can be coparceners:

To begin a coparcenary, the presence of the senior-most male member is essential, just as it is in a Joint Hindu Family. A coparcenary must have at least two male members in order to establish and even survive. In a coparcenary, top links are removed and lower links are added to the chain, just like in a joint Hindu family, as long as there are at least two male members (coparceners), retaining the status of a joint family.

A male member born within three generations of the property's last holder (for a total of four generations) immediately becomes a coparcener, i.e. it is a right by birth in the family property. When does it comes to end (termination) The death of all male members of the family or the lone surviving coparcener, or the division of the family, terminates the coparcenary.

Essentials:

A coparcenary requires the presence of property. If a son acquires his father's property during his father's lifetime, that property is inherited as Joint family property by his son after his father's death, and this is maintained in perpetuity.

Prior to 2005, only men may be coparceners.

A coparcener's insane son is also a coparcener, although he lacks the right to apply for partition.

Coparcenary property is subject to the rule of survivorship, which means that when a coparcener dies, his part in the joint family property falls to the surviving coparceners rather than following the law of succession. There is a variation in the number of coparceners due to the constant addition and deletion of coparceners during birth and death.

Illustrations:

'A,' for example, has two sons, B and C.

They will each receive one-third of the share in the case of a division.

If 'B' dies, the shares of 'A' and 'C' grow to one-half each, while 'B' is divided among the remaining Coparceners.

If 'A' has two more sons, 'D' and 'E,' and the estate is split among A, C, D, and E, each will receive one-fourth of the estate.

Coparcenary within a coparcenary can exist in the same way as many coparcenaries can exist within various branches of a family.

Coparcenary under Mitakshara school of joint familyThe coparcener obtains a birth right to the property of the Joint Family, however the main issue is that.The rate of interest at which they can be purchased will be erratic and unpredictable. That is, until the divide in the middle is done.

The combined family's property portion will not be formed or determined. The interests of people will ebb and flow, and Because birth and death might happen in the family, each person's share can be unpredictable will have an impact.

Case law:

The court ruled in Moro Vishwanath v. Ganesh Vithal that a partition could be claimed by someone who is one more than four degrees removed from the acquirer, but not by someone who is one more than four degrees removed from the last owner. This is due to the fact that the coparcenary extends four degrees beyond the previous owner. The Court stated the principle using the following examples:

For example, suppose B and C are killed in a car accident. E and F are still unable to ask for partition or sue their father for it.

If A dies, they can request partition as well because they are now coparceners.

Rights of coparceners

Coparceners have the following benefits

Maintenance:

Everyone has the right to maintenance in a shared family property. Female members, those who are disqualified from receiving a share of the family's income, and unmarried daughters will all receive maintenance from the Joint family.

Challenge Allination:

The right to oppose alienation refers to the transfer of property for any legal reason or for the benefit of the estate. The coparcener, Karta, and single living coparcener have the right to alienate the property in order to settle family debts or to meet any other legal requirement of the Joint family.

Partition:

The property will be forfeited if the above-mentioned person alienates it with unlawful intent or without justification.

Classification of Mitakshara:

(1)Apratibandha Daya (unobstructed ancestry)

Is a trait acquired from a direct male ancestor but no more than three generations higher. According to the ruling in Radha v Ram8, the property can be obtained by son and son's son through the interest of birth. According to the notion, survival devolved heritage.

(2)Sapratibandha Daya (Obstructed Heritage)

Property inherited from any other relatives, such as a paternal uncle or brother, nephew, etc., through inheritance.

According to Hindu law, the property is further partitioned as follows:

(1)Joint Family Property:

Is an important aspect of Hindu Joint Families. The majority of these characteristics are passed down from ancestors or ancestresses.

(2)Separate Property:

This property will be handled by individuals.

(3)Hindu joint family:

It covers all family members, including all male relatives descended lineally up to any generation from a common ancestor, as well as their mothers, wives, widows, and unmarried daughters.

Case laws:

As stated in Surjit Lal Chhabda v. CIT. Until she marries, a girl remains a member of her parents' joint family. When she marries, she joins her husband's Joint Hindu family.

If the daughter's husband abandons her or she becomes a widow and returns to her father's home permanently, she rejoins the Joint Hindu family. Her children, on the other hand, stay in their father's Joint Hindu family and do not join the mother's father's Joint Hindu family.

In the case of Gur Narain Das v. Gur Tahal Das, it was decided that even an illegitimate offspring of a male descendant is regarded a part of his Joint Hindu family.

The status of being a member of the Joint Hindu Family may be revoked in the following situations:

(1)By becoming a member of a different religion or faith

Marriage to a non-Hindu (a person who is not Hindu as per Section 2 of the Hindu Marriage Act, 1955 which include a Muslim, Jew, Parsi or Christian by religion).

By capable parents placing their child for adoption with a third party.

Because of a daughter's marriage.

Illustration:

If A and B are brothers, then C and D are A and B's wives. A Joint Hindu household consists of four members. If A and B are murdered in a car accident, C and D can carry on the Joint Hindu family if either of them is pregnant with their husband's child or if they choose to adopt a male child.

(2)Karta

Karta can be any of the following members in the Joint Family:

Most Senior Male Member: According to Shreeama v. Krishavenanama, the Senior Male Member can be Karta and hold the Kartaship without the Coparceners' agreement or consent. Junior Male Members: It was stated in Narendra Kumar v. Commissioner of Income Tax that Junior Male Members With mutual understanding or consent among coparceners, males can become Karta. It was decided in the case of Investments (P) Ltd. v. Santokh Singh that the Junior Karta would not be permitted to file a lawsuit.

Sub division of Mitakshara School

The Mitakshara school is sub-divided into four minor schools; these differ between themselves in some matters of detail, relating particularly to adoption and inheritance. All these schools acknowledge the supreme authority of Mitakshara, but they give preference to certain treatises and to commentaries which control certain passages of Mitakshara. This accounts for the differences between those schools.

They are namely:

(1)Banaras Hindu law school

(2)Mithila law school

(3)Maharashtra law school

(4)Dravida or madras law school

(1)Banaras law school

This law school comes under the authority of the Mitakshara law school and covers Northern India including Orissa. Viramitrodaya Nirnyasindhu vivada are some of its major commentaries. The Benares School is sometimes called the most orthodox of the different schools of Hindu law.

(2)Mithila law school

This law school exercises its authority in the territorial parts of tirhoot and north Bihar. The principles of the law school prevail in the north. The major commentaries of this school are Vivadaratnakar, Vivadachintamani, smritsara. The Kalpataru by Lakshmidhara is a work that is freely cited by the exponents of the Mithila School.

(3)Maharashtra or Bombay law school

The Maharashtra law school has the authority to exercise its jurisdiction over the territorial parts including Gujarat Karana and the parts where there is the Marathi language is proficiently spoken. The main authorities of these schools are Vyavhara Mayukha, Virmitrodaya, etc.

(4)Madras law school

This law school tends to cover the whole southern part of India. It also exercises its authority under Mitakshara law school. The Smriti Chandrika of Devanna Bhatta,233 who flourished at the close of the twelfth century has all along had a commanding influence in South India. It is an exposition on the law of inheritance and was considered by Colebrooke to be a work of uncommon excellence, equal, if not superior, to Parashara Madhaviya which also is a leading authority in the South. The main authorities of this school are Smriti Chandrika, Vaijayanti, etc.

Mitakshara Joint Hindu Family

According to the Mitakshara law school, a joint family refers only to the male member of a family and extends to include his son, grandson, and great-grandson. They collectively have co-ownership/Coparcenary in the Joint Family. Thus a son by birth acquires an interest in the ancestral property of the joint family.

Under the Dayabhaga law school, the son has no automatic ownership right by birth but acquires it on the demise of his father. The Hindu joint family is a normal condition of Hindu society. Its origin can be traced to the ancient patriarchal system where the patriarch or the head of the family was the unquestioned ruler, laying down norms for the members of his family to follow, obeyed by everyone in his family, and having an unparallel control over their lives and properties.

At the root was the general family welfare or promotion of the family as a unit for which the personal interests of the family members could be sacrificed. Under Hindu law therefore the joint family system came first in historical order and the individual recognition of a person distinct from the family came later. The ancient system generally treated the property acquired by the members of the family as family property or the joint property of the family with family members having one or the other right over it.

With the gradual transformation of the society and recognition of the members of the family as independent in their own right, the concept of separate property and rules for its inheritance were developed. This dual property system, though considerably diluted1, has survived the lashes of time, the judicial and legislative onslaught, and the Hindu society still recognises the joint family and joint family property as unique entities having no similar concept alive anywhere else in the world.

1.2 Formation and incidents in mitakshara coparcenary :

formation of mitakshara coparcenary:

A single person cannot form a coparcenary. There should be at least two male members to constitute it.The relationship of father and son is essential for starting a coparcenary.The presence of a senior most male member is a must to start a coparcenary.The senior-most member is called ' the last holder of property' and from him a continuous chain of three generations of male members form the coparcenary.

For eg as shown in above fig, A hindu male obtains his share at theTime of partition from his father and then gets married. Till a son is born he is the sole male in this family and the income in his hands i.e., the share he had received at partition may be assessed as the joint familyincome, but he alone will not form a coparcenary. On the birth of his son, a coparcenary comprising him and his son will come into existence. When this son gets married and a son is born to him, the coparcenary will comprise the father f, his son s and his grandson ss. If the son dies, the coparcenary will

not come to an end and will comprise the father and the son of the deceased son. Where the family consists of the father, f, his son s, his grandson ss, his great grandson sss, all four will be coparceners.On the death of s, the coparcenary will consist of f, ss and sss. If ss dies, it will continue with f and sss. Thus there can be a coparcenary consisting of father and son or father and his grandson or the father and his great grandson or of all of grandson or of all of them together

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

for a partition in court of law. A minor coparcener cannot demand a partition but can file a suit for partition through his next friend in a court of law for partition and specification of his share.Incident no 10: alienation of undivided interest.No alienation of the property is possible without concurrence of the coparcener. A coparcener on his own or individually is not entitled to alienate his undivided interest in the coparcenary property. Only in certain specific situations the father or the karta can alienate the undivided interest or even the whole of the property.In Munni

Lal Mahato And Ors V. Chandeshwar Mailto And Ors (2007 Patna Hc) The patna hc held that if any coparcener of joint hindu family transfers the coparcenary property by way ofgift without the consent of other coparceners then such alienation is void.

Property under Mitakshara law –suppurate property and coparcener property:

Schools of Hindu Laws	
Mitakshara Law School	**Dayabhaga Law School**
The term Mitakshara is derived from the name of a **commentary written by Vijnaneswara**, on the **Yajnavalkya Smriti.**	The term Dayabhaga is derived from a **similarly named text written by Jimutavahana.**
It is **observed in all parts of India** and **subdivided** into the Benares, the Mithila, the Maharashtra and the Dravida schools.	It is observed in **Bengal and Assam.**
A son, by birth acquires an interest in the ancestral property of the joint family.	A son has **no automatic ownership** right by birth but **acquires it on death of his father.**
All the members **enjoy coparcenary rights during the father's lifetime**.	Sons **do not enjoy coparcenary rights when the father is alive.**
A coparcener's **share is not defined** and **cannot be disposed of.**	The share of **each coparcener is defined** and **can be disposed of.**
A **wife cannot demand partition** but has the **right to a share in any partition between her husband and her sons.**	Here, the **same right does not exist for the women** because the **sons cannot demand partition** as the father is the absolute owner.

he word 'property' is derived from the Latin word 'proprietary' and the French comparable 'proprius' which implies a thing owned. The concept of property and ownership is closely associated with one another. There is often no property without possession and no possession without property. The concept of property possesses a significant place in human life since it's impossible to measure the extent of ownership without property.

The property includes an exceptionally more extensive meaning in its real sense. It not only includes the money and only the other tangible things but it also includes intangible rights which are considered as a source of income or wealth. The interest which a person has in lands and chattels to the exclusion of

others and it is proper to enjoy and to lose certain things most supremely as he pleases, provided he makes no utilization of them precluded by law.

The sea and the air, cannot be appropriated; one may appreciate them, but no one has an exclusive right over it. When things are fully our own, or when all others are prohibited from intruding with them, or from interfering around them, no individual other than the proprietor, who has this exclusive right, can have any claim either to use them, or to prevent him from disposing of them as he satisfies.

And the reason behind is that the property, considered as an exclusive right to things, contains not as it were a right to utilize those things, but a right to a range of them, either by exchanging them for other things or by giving them away to any other individual, without any consideration, or even throwing them away.

Classification of Property

Classification of Property means Property is divided into different forms which are known by different names and all the different properties have their own characteristics, features, and way of conducting its property. According to Article 220 of Hindu Law, Property is classified into two types: (1) ***Joint Hindu Family Property*** (2) ***Separate Property.*** Joint-family Property is also known as 'Coparcenary Property and this property consists of (a) Ancestral Property (b) Property jointly acquired by the members of the Joint family. (c) Separate property of a member "thrown into the common stock." (d) Property acquired by all or any of the coparcener with the aid of joint family funds.

There is a lot of division and classification in Property. Before the enactment of Hindu law, there were two principal schools i.e. ***Mitakshara*** and ***Dayabhaga.*** Mitakshara School divides the property into two categories and the first one is Unobstructed Property and the second one is Obstructed Property. Further, after the enactment of Hindu law and the decline of both principal school, the Property is divided into two parts i.e. Joint Family Property and Separate Property under Hindu law.

Obstructed property

The property to which right accrues not by birth but on the passing of the final owner is called obstructed property. It is called obstructed since the accrual of the right to it is obstructed by the existence of the final owner. Hence the property devolving on parents, brothers, nephews, uncles, etc. upon the passing of the last owner, is obstructed property. These relatives are not vested intrigued by birth. Their right to it arises only on the passing of the last owner.

Illustration

An acquired the certain property from his brother who passed on issueless. The acquired property within the hands of A will be a discouraging legacy for the children of A. The children of A will acquire the property from A as it were after his passing.

Unobstructed property

The property in which an individual secures and is intrigued by birth is called unobstructed property. It is called unobstructed since the accrual of the right to it isn't obstructed by the presence of the owner. Hence property inherited by a Hindu from his father, grandfather, and great grandfather is unobstructed heritage as regards his claim male issues, that is, his sons, son's and son's child. These rights arise on account of their birth in the family and the male descendants in whom the property vests, are called coparceners. Thus, the hereditary property in the hands of the final male owner is unobstructed.

Illustration

'A' acquired certain property from his father. Two children born to A, M and N are coparceners with A. M and N will procure an interest by birth within the hereditary property of A. Thus the property within the hands of A is unhindered legacy, as the presence of the father is no obstacle or obstacle to his children procuring an intrigued by birth within the property.

It is seen that the distinction between obstructed and unobstructed property is recognized by the Mitakshara School and according to Dayabhaga School all the properties should be considered as Obstructed property because no one can inherit the property just after the birth or no one can have interest in another's property by birth. This difference of thought of both the school demarcates Obstructed and Unobstructed Property.

Ancestral property

Ancestral Property is also known as Self-acquired Property after the partition in a Joint Hindu family. As the name suggests Ancestral Property this property is automatically inherited to next-generation people. This Ancestral property was inherited till 3 generations or it is also considered as a part of Coparcenary property as it also includes property descended from father, great grandfather. Self-acquired property and the ancestral property is part of Separate property as above discussed.

Separate Property is the second category of property under Hindu law in which the property is inherited by the other members of non-blood relations.

In the case, *Gurdip Kaur vs. Ghamand Singh Dewa Singh, 1965,* the dictionary meaning of Ancestral Property is "Property which has been inherited from the ancestors" was accepted by the Court. It was also held that a property inherited from a father, father's father or great grandfather is ancestral property.

A question arises that 'who can acquire ancestral property?' This was answered in the case of *Arshnoor Singh vs. Harpal Kaur, 2019,* it was held by the Hon'ble Supreme Court that "Under Mitakshara law, whenever a male ancestor inherits any property from any of his paternal ancestors up to three degrees

above him, then his male legal heirs up to three degrees below him, would get an equal right as coparceners in that property."

After the amendment and enforcement of the Hindu Succession Act in 2005, women were also allowed to enjoy the Self-acquired property or Ancestral property with equal rights but this right on the ancestral property was not earlier provided to the Women. Now, women and men have equal rights over their ancestral property. There are some incidents of Ancestral property which are mentioned below:

- The Ancestral Property should be for 4 generations old or we can say that ancestral property should be continued for four generations and should be inherited from generation to generation.
- The Ancestral Property should not be divided by the members and when the division takes place, the property becomes the self-acquired property.
- In the Ancestral Property, the person has the right or interest in the property right from birth.
- The ancestral property rights are controlled by per strip and not through per capita.
- The Shares in the ancestral property is first determined for each generation and then subdivided for the successive generation.

Joint family property

Joint family or coparcenary property is that property in which every coparcener has a joint interest or right and over that property, the coparcener has a joint possession. Or we can also say that the joint family property is the property which is jointly acquired by the member of the family with the aid of ancestral property.

Joint family Property defines as if any member of joint family property acquired in his own name in the presence of an ancestral nucleus. In *V.D. Dhanwatey v. CIT, 1968*, it was held that "The general doctrine of Hindu law is that property acquired by a Karta or a coparcener with the aid or assistance of joint family assets is impressed with the character of joint family property. To put it differently, it is an essential feature of a self-acquired property that it should have been acquired without assistance or aid of the joint family property. It is therefore clear that before an acquisition can be claimed to be separate property, it must be shown that it was made without any aid or assistance from the ancestral or joint family property."

Many times it is believed that property possessed by members of a joint family is a Joint family property. In the case of *Srinivas Krishna Rao Kango vs. Narayan Devji Kango, 1954*, it was held that "The Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that any property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact.

Some considered Coparcenary property and Joint family property as two different things but actually both are same under Hindu law.

The basic difference which is considered and said that both are different is that in joint family property, both males and females are considered as members whereas, In coparcenary, only male members are considered as a member. Female members have no right or interest in the property by birth in a Joint family but In Coparcenary, all members have equal right or interest in the property by birth.

These little differences make people think that both Joint family property and coparcenary are two different concepts otherwise it is considered as the same under Hindu law.

1.3 Dayabhaga Coparcenary :

The Dayabhaga school owes its origin to Jimutavahana's digest on leading Smrities by the name of "Dayabhaga". It prevails in Bengal and Assam. The Dayabhaga is not a commentary on a specific work but a digest of all the Codes. It was part of a larger work titled 'Dharmaratna' and is a valuable work on the laws of inheritance and succession. The Dayabhaga School bases its law of succession on the principle of religious efficacy or spiritual benefit. It means that the one who confers more religious benefit on the deceased is entitled to inheritance in preference to the others who confer less benefit.

Under the Dayabhaga School, the distinction between unobstructed and obstructed heritage does not exist as the principle of son's birth right is not recognized and all properties devolve by succession on the all properties devolve by succession on the demise of the father. So long the father is alive, he is the master of all properties whether ancestral or self acquired. Dayabhaga coparcenary comes into existence for the first time on the death of the father.

When sons inherit their father's property, they constitute a coparcenary. And if son dies leaving behind a widow or daughter without a son, then she will succeed and become a coparcener. Thus under Dayabhaga school a coparcenary could consist of males as well as females. The only difference between a male and a female coparcener was that the property in the hands of a female coparcener was her limited estate and after her death the property passed not to the heirs, but to the next heir of the male from whom she inherited.

The peculiarity of schools of Hindu law is that if a Hindu governed by a school migrates to another religion (where different school has jurisdiction), he will continue to be governed by his own school, unless he gives up his school and adopts the law of the place where he has settled. In the modern Hindu law, schools have relevance only in respect of the uncodified Hindu law; they have lost all their relevance in regard to the codified Hindu law.

Another important aspect of Hindu law is that a person will be governed by custom if he is able to establish a custom applicable to him, even though such a custom is in derogation to Hindu law. Although the codified Hindu law overrides all rules and customs of Hindu law, yet such has been the impact of custom that in certain areas custom has been expressly saved. Distinction Between Mitakshara And Dayabhaga Schools

The distinguishing features of the two principal schools of Hindu law, i.e., Mitakshara and Dayabhaga may be summarized as follows: A Joint Hindu family under the Dayabhaga is, like a Mitakshara family, normally joint in food, worship and estate. In both systems, the property of the joint family may consist of ancestral property, joint acquisitions and of self-acquisitions thrown into the common stock.

In fact, whatever be the school of Hindu law by which a person is governed, the basic concept of a Hindu joint family in the sense of who can be its members is just the same. Mitakshara and Dayabhaga Schools thus remain the primary Schools of law and differ on the following basic aspects: A. Foundation of Coparcenary: According to the Mitakshara law, the foundation of a coparcenary is first laid on the birth of a son.

Thus, if a Hindu governed by the Mitakshara law has a son born to him, the father and the son at once become coparceners. According to the Dayabhaga law, the foundation of a coparcenary is laid on the death of father. So long as the father is alive, there is no coparcenary in the 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. B. Inheritance: The doctrine of sapinda relationship is insisted upon by the Mitakshara whereby community of blood is to be preferred to community in offering of religious oblations and which is the governing factor whereby under the Mitakshara law, the right to inherit arises.

Under the Dayabhaga, the right to inherit arises from spiritual efficiency, i.e., the capacity for conferring spiritual benefit on the names of paternal and maternal ancestors. C. Incidents of Joint family: According to the Mitakshara law, each son acquires at his birth an equal interest with his father, and on the death of the father, the son takes the property, not as his heir but by survivorship. According to the Dayabhaga School, the son's rights arise for the first time on the father's death by which he takes such of the property as is left by the father, whether separate or ancestral, as heir and not by survivorship.

Under the Mitakshara law, there is a presumption that until the contrary is proved, the joint family continues to be joint. There is a very great difference in the legal positions of the members of the Mitakshara and Dayabhaga joint families. The right of a Mitakshara coparcener is like that of a joint-tenant whose interest, until partition, is undefined and passes by survivorship to the other coparcener, except when he leaves male issue. The right of a Dayabhaga coparcener is that of a tenant-in-common.Accordingly, under the Dayabhaga law, where a family consists of the father, son and grandsons, the father is the absolute owner even of the property that has devolved on him from his father and of its income.

None of the sons can interfere with the father's title to or control over the family property or his enjoyment of its income. Thus, though the father and sons may be described as a family, there is little significance in describing such a family as an 'undivided family'. Accordingly, after the death of a Dayabhaga father, his successors may live as a Hindu joint family; they merely own the inherited property as joint property, that is to say, as tenantsin-common but do not form a joint family. A joint family amongst brother, under the Dayabhaga School of law, is a creation not of law but of a desire to live jointly.

The income in Mitakshara family belongs to all the members as a group and no member is entitled to claim absolute right in respect thereof. According to Jimutavahana, his wife or sons or daughters had no ownership in his property during his lifetime for "sons have not ownership while the father is alive and free from defect." Ownership of wealth is however, vested in the heirs "by the death of their father," when they become co-heirs and can claim partition. It is on this basis that "Dayabhaga" (partition of heritage) has been expounded by Jimutavahana. According to him, "since any one coparcener is proprietor of his own wealth, partition at the choice even of a single person is hence deducible."

The heritage does not, therefore, become the joint property of the heirs, or thejoint family, on the demise of the last owner, but becomes the fractional property of the heirs in well defined shares. As a corollary of this doctrine, negating the son's right by birth, is another peculiar doctrine of the Bengal school, that of what is called the 'fractional ownership' of the heirs, contrasted with the doctrine of 'aggregate ownership' expounded by all the other Schools: That is why "partition" in Dayabhaga is defined as an act of particularising ownership and is not the Act of fixing diverse ownerships on particular parts of an aggregate of properties as in Mitakshara. This is why Mitakshara is designated as the school of "aggregate ownership" while Dayabhaga is known as the school of "fractional ownership."

Right to partition: According to Dayabhaga law, sons do not acquire any interest by birth in the ancestral property and they cannot demand a partition of such property from the father as they can do under the Mitakshara law where they take interest in property by birth. Share in property: The essence of a coparcenary under the Mitakshara law is unity of ownership but under the Dayabhaga law it is unity of possession.

Every coparcener takes a defined share in the property, and he is the owner of that share. That share is defined immediately the inheritance falls in. It does not fluctuate with births and deaths in the family. Even before partition, any coparcener can say that he is entitled to particular share, one-third or one-fourth.

1.4 Karta of Joint Family- His position, powers, previlegis and obligations :

The Joint Hindu family is a patriarchal body, and the head of the family is called Karta. Karta is the senior most male member of the family who acts as the representative of the family and acts on behalf of the family. There is a fiduciary relationship between the Karta and the other family members because every family needs a head member who can look after the welfare of minor members and females in a Joint Hindu Family. The position of Karta is unique in a joint Hindu family. Karta takes care of the whole family and its property and the decision given by the Karta is bound to be followed by the members of Hindu Joint Family. No one is equal to Karta in a Hindu Joint Family. The powers and position of a Karta are wider than any of the members of the Hindu Joint Family. No one can be compared with Karta among the other members of the joint family.

Who can be a Karta?

Senior most Male Member

The senior most male member is entitled to become a Karta and it is his right. Karta is always from the members of the family; no outsiders or stranger can become a Karta. If the senior most male member of the family is alive then he will continue as Karta, if he dies then the second senior most member of the family will take the charge of Karta. Karta takes his position by consent or agreement of all the coparceners.

Junior Male Member

If the coparceners agree, then a junior can also become a Karta of the family. By making the agreement with the coparceners, a junior male member can be a Karta of the family.

Female Member as Karta

According to Dharmastra, if there is an absence of the male member in a family then in that situation female can act as a Karta. If in case male members are present but they are minors, at that time also, females can act as a Karta.

Characteristics of Karta

The characteristics of a Karta are:

- Karta's position is unique (sui generis). His position is independent and no one can be compared with him among the family members.

- He had unlimited power but even if he acts on behalf of other members, he can't be treated as a partner or agent.
- He controls all the affairs of the family and has wide powers.
- He is responsible to no one. The only exception to this rule is, in case of fraud, misappropriation or conversion, he is held responsible.
- He is not bound to invest, save or economise. He has the power to use the resources as he likes, unless he is not responsible for the above mentioned charges.
- He is not bound to divide the income generated from the joint property equally among the family members. He can discriminate one with another and is not bound to be impartial. The only thing is he should pay everyone so that they can avail some basic necessities like food, clothing, education, shelter etc.

Powers of a Karta

The powers of Karta are:

Powers of Management

Karta's power of management is absolute. No one can question the duties of the Karta like, he can manage or mismanage the property, family, business any way he likes. Karta cannot deny the maintenance and occupation of property to any member. Karta is not liable for the positive failures.

Rights to Income or Remuneration and Expenditure

The income of the Joint Hindu family property in a whole must be given to the Karta. Then it is the responsibility of the Karta to allot the funds to the members for fulfilment of their needs. Karta controls the expenditure of the funds. The scope of his power is only to spend such funds on family purposes like management, maintenance, marriage, education etc.

Rights to Represent Joint Family

The Karta represents the family in legal, religious and social matters. The acts and decisions of the Karta are binding on the members. Karta can enter into any transaction on behalf of the family.

Right to Compromise

Karta has the power to compromise the disputes relating to management or family property. He can compromise family debts, pending suits and other transactions. The compromises made by the Karta, can be challenged in court by heirs only on the ground of *malafide*.

Power to refer a Dispute to Arbitration

Karta can refer the disputes relating to management, family property to the arbitration. If the award by the arbitration is valid then it will be binding on the members of the joint family.

Power to Contract Debts

The Karta exercises an implied authority to contract debts and pledge the credits and property of the family. Such acts are bound to be followed by the members of the family. Even, Karta when taking a loan for the family purpose or for family businesses then joint family is liable to pay such a loan.

Power to enter into Contracts

The Karta can enter into contracts and where contracts are enforceable against the family. The contracts are binding on the members of the joint family.

Power of Alienation

No one among the family members can alienate joint family property. But Karta has the power to alienate the property under three circumstances.

1. Legal Necessity
2. Benefit of estate
3. Indispensable duties

Legal Necessity

This term has not expressly defined in any judgement or in any law. It includes all the things which are deemed necessary for the members of the family.

Dev Kishan Vs. Ram Kishan AIR 2002

In this case, the plaintiff filed a suit against the defendant. Both plaintiff and defendant are members of the Joint Hindu Family. Defendant 2 is the Karta, who is under the influence of Defendant 1, sold and mortgaged the property for an illegal and immoral purpose which is for the marriage of minor daughters Vimla and Pushpa. The defendant contended that he took the loan for the legal necessity.

The court held that the debt was used for the unlawful purpose. Since it contravened the Child Marriage Restraint Act, 1929, therefore, it can be called as lawful alienation.

Benefit of estate

Benefit of Estate means anything which is done for the benefit of the joint family property. Karta as a manager can do all those things which are helpful for family advancement.

Indispensable Duties

These terms refer to the performance of those acts which are religious, pious or charitable. Examples of indispensable duties are marriage, grihapravesham etc. A Karta can alienate the portion of the property for the charitable purpose. In this case, the power of the Karta is limited i.e he can alienate only a small portion of the family property, whether movable or immovable.

Loan on Promissory Note

When Karta takes any loan for any family purpose or executes a promissory note, then all the members and the members who are not the party to the note will be sued if the loan is not paid. But, Karta is personally liable on the note.

Liabilities of a Karta

Liability to maintain- Karta is to maintain all the members of the Joint Family. If he does not maintain any member then he can be sued for maintenance and also can be asked for compensation.

Liability of render accounts- As far as the family remains joint, Karta is not supposed to keep accounts of the family, but when partition takes place at that time he will be liable to account for family property. If any of the heir is not satisfied with his accounts, then he can constitute a suit against Karta to bring the truth and to know any misappropriation is done by Karta or not.

Liability of recovery debts due to the Family- He has the liability to realize the debts due to the family.

Liability to spend reasonably- He has the liability to spend the joint family funds only for the family purposes.

Liability not to eliminate coparcenary property- It is the liability of the Karta not to alienate the coparcenary property without any legal necessity or benefit to the state.

Liability not to start new Business- It is the liability of the Karta not to start a new business without the consent of other coparceners.

1.5 Alienation of property –Separate and Coparcenary

Coparcenary Property

Before discussing coparcenary property, it is better to have a small conceptual introduction with the term coparcenary. So coparcenary refers to a narrow body of persons within a joint family, consisting of the father's son, the grandson, and the great-grandson.

Illustration: A is the father and B to H are his lineal descendants. Now as per the rule of four degrees, coparcenary exists until D and E, F, G, and H are excluded. Now A, the last property holder demises, this shall rearrange the Coparcenary and include E, and B will become the last property holder. Similarly, if B dies, then C, D, E, and F become the Coparceners with C being the last property holder. This way the four-degree rule continues.

Therefore, any intestate ancestral property acquired by the member of a Hindu joint family in course of coparcenary shall be deemed as Coparcenary property.

Alienation of Coparcenary Property

Alienation refers to the transfer of property. For eg: sales, gifts, mortgages, etc. Property alienations have an added importance in Hindu law, as, usually neither the Karta (the manager of a joint family and the properties of such joint family. He also looks after the regular expenses of the family and also protects the joint family property) nor any other Copercaner has the absolute full power of alienation over the joint family property or over his interest in such property. However, under the Dayabhaga school (in this school of thought the male descendants do not hold any right over the ancestral property after the ancestor's demise), a Coparcener has the alienation right over his right in the alienation property.

The alienations related to coparcenary property under the Hindu law are governed by the Hindu Succession Act, 1956 and the Transfer of Property Act, 1882.

Who may alienate?

The following persons are capable of alienating/transferring a coparcenary property and thus possess the power in this regard:

Father's alteration power

Before the courts used to hold conflicting views regarding the father's power of alteration over his separate immovable properties. This is despite their unanimity the father was fully empowered to dispose of his separate movable property.

The cause of this conflict was a text in Mitakshara, according to which the father "is subject to the control of his sons and the rest, regarding the immovable property", whether self-acquired or ancestral.

In Rao Balwant Singh v. Rani Kishori, 1898,; the Privy Council resolved this controversy and held that the father had the complete power of alienation over his separate property, irrespective of being moveable or immovable.

It has, however, been recognized all along in Dayabhaga that the father has the absolute alteration power over all the properties, whether self-acquired or ancestral.

On one hand, Vijnaneshwara restricted the father's alienation power over his self-acquired immovable properties, contrarily the father was conferred with wider powers over movable ancestral properties. However, it is presently a settled law that a Mitakshara the father is by no means greatly empowered over movable joint family properties compared to the immovable ones.

The sole power a father has been conferred is the power of making "gift of love & affection". Another power that is being held by a father is the power of alienating joint family property for discharging his personal debts.

Gifts of love and affection

According to Mitakshara:

The father is empowered to "make a gift of love and affection" of movable joint family property.

Such gifts may be made by him to his:

(1)Own wife;

(2)Daughter;

(3)Son in law; or

(4)Any other close relation.

These gifts of the moveable property may consist of –

(1)Jewels,

(2)Silver or gold ornaments,

(3)Clothing,

(4)Cash, or

(5)Any other moveable property.

Such gifts are usually made on occasions like marriage, upanayana, mundana, or when the daughter visits her paternal home, or during the daughter's childbirth, etc.

Karta's power of alienation

Usually, an individual Coparcener, including the Karta, lacks the capability to dispose of the joint family property without obtaining the consent of all other Coparceners. However, according to the Dharmashastra, any family member is empowered to alienate the joint family property.

The Mitakshara school is explicit on this matter. According to Vijnaneshwara, under 3 exceptional circumstances, the alienation of the joint family property by an individual is possible:

Apatkale, i.e. during distress;

Kutumbarthe, i.e. for the sake of the family;

Dharmarthe, i.e. for disposing of indispensable duties.

However, with the advent of time, Vijnaneshwara's formulation has undergone modification in two aspects. Firstly, the alienation power is not exercisable by any other family member, except the Karta.

Secondly, the joint family property can be alienated for the following 3 purposes:

(1)Legal necessity;

(2)Benefitting the estate;

(3)Acts involving indispensable duty.

Further discussions on these grounds of alienation shall be discussed afterward.

Coparceners power

Neither the Mitakshara nor the Smritikars conferred any sort of power of alienation to the Coparceners over their undivided interest in the joint family property.

However, the textual authority is very limited in this regard. The law relating to Coparcener's alienation power is a child of judicial legislation. The first inroad emerged when it was held that a personal money decree against a Coparcener could be executed against his undivided interest in the joint family property. Some courts have extended this principle for including voluntary alienations also.

Thus the Coparceners' alienation power can be categorized under the following heads:

(1)Involuntary Alienation – This refers to the alienation of the undivided interest in the execution suits. The Hindu sages greatly emphasized upon the payment of the debts. The courts seized this Hindu legal principle and started its execution on personal money decrees against the joint family interest of the judgment-debtor Coparcener.

In Deen Dayal vs. Jagdeep (1876), the Privy Council settled the law for all the schools of Hindu Law, by holding the purchaser of undivided interest at an execution sale during the lifetime of his separate debt acquires his interest in such property with the power of assessing it and recovering it through the partition.

This rule is, however, as held in Shamughan vs. Ragaswami, limited to the non-execution of the decree, against the Coparceners interest, succeeding his demise.

(2)Voluntary alienation – After accepting the fact that the undivided interest of a Coparcener is attachable and saleable during the execution of a money decree against him, the next step involved, extending the principle to voluntary alienations as well.

Sole surviving coparcener's power

When all the Coparceners die except one, such a coparcener is regarded as the sole surviving Coparcener. When the joint family property passes into the hands of such Coparcener, it turns into separate property, provided that such Coparcener is sonless.

Now based on various judicial decisions there are 3 views in relation to the power of the sole surviving Coparcener in alienating a property of the Hindu joint family:

A sole surviving Coparcener is fully entitled to alienate the joint family property. However, if at the time of such alienation, another Coparcener is present in the womb, then such coparcener can challenge the alienation or ratify it after attaining the age of majority.

The sole surviving Coparcener's power of alienation is unaffected by any subsequent adoption of a son by the widow of another Coparcener. However, the Mysore High Court holds a contrary view in this regard.

The sole surviving Coparcener cannot alienate the interest of any female where such interest has been vested on her by virtue of Section 6 of the Hindu Succession Act, 1956.

Grounds of alienation

According to Vijnaneshwara, a joint family property can be alienated for 3 reasons:

(1)Apatkale: It refers to a situation where the whole family or one of its members meets with an emergency, in regards to their property. The nature of this transaction is meant for combating the danger, or an attempt in avoiding the calamity for which money is needed. When it refers to the property, it indicates the transfer as being necessary for its protection, or conservation, and for which immediate action is to be taken.

This is not a mere profitable transaction, but a transfer which if not affected causes loss to the family, to this property, or any other property owned by the family.

(2)Kutumbarthe: This means "for the benefit of the Kutumb". Kutumb refers to family members. Therefore, this involves the alienation of a property for the sake of subsistence of a family member or relative. For eg: food, clothing, housing, education. Medical expenses, etc.

(3)Dharmarthe: For performing indispensable and pious duties. Usually for religious and charitable purposes.

However, with time Vijnaneshwara's formulation has gone through a rapid transformation and modified pivotally into 2 aspects:

(1)The power of alienation cannot be exercised by anyone but the Karta of the joint family; and

(2)The joint family can be alienated solely for the following three purposes:

Legal necessity

This term "legal necessity" lacks any precise definition due to the impossibility to provide any such definition as the cases of legal necessity can be numerous and varying.

Widely speaking, legal necessity will include all those things which are to be deemed necessary for the family members. Such situations may include famine, epidemic, earthquake, floods, etc.

According to Mayne, it is now established that necessity need not be comprehended in the sense of what is absolutely indispensable but what, according to the notions of a Hindu family, would be regarded as proper and reasonable.

Essentials for a valid transaction under legal necessity are:

(1)Purpose exists, i.e. a situation with respect to family members or their property which requires money.

(2)Such a requirement is lawful, i.e. it must not be for an immoral, illegal purpose.

(3)The family does not have monetary or alternative resources for dealing with the necessity, and

(4)The course of action taken by the Karta is such that a normally prudent person will take with respect to his property.

However, while such alienation, the consideration for the sale of coparcenary property must not be inadequate.

The Benefit of Estate

Pivotally speaking, the benefit of an estate refers to anything that is done which will benefit the joint family property.

The term 'benefit of the estate' in the inception covered purely defensive cases, such as protecting it from a threatened danger or destruction, but gradually it also began including alienations that an ordinarily prudent man would view as appropriate under certain situations.

Indispensable Duties

The term "indispensable duties" refers to performing religious, pious or charitable acts. Such as marriage, grihapravesham, shradha, upanayana, etc.

1.6 Partition and re-union:

Before the codification of the Hindu law with the enactment of the Hindu Succession Act, 1956, the prehistoric schools of law that governed the Hindu law were believed to be:

The Mitakshara School

This school states that division of property means the severance of joint status. This school believes that partition is not just the division of property into particular shares. The existence of joint property is not essential for partition as this school of thought is under the belief that the mere existence of coparcenary is the only vital subject for partition. Therefore under this school, the joint family status terminates and there is an end to coparcenary. Thus, the only essentiality for a partition under this law, is the specific and unambiguous declaration by a coparcener, with the intention to separate himself from the family which means the member of the joint family discharges himself from being a member of the joint family and cuts off all ties for a complete severance of his status as a member.

The Dayabhaga School

This school believes that when a partition occurs, the division of property should be made in such a manner, that there are specified shares of the coparceners and that such a share cannot circulate in the ancestral property, through the birth and death of the coparcener. Therefore, under this school, the shares are ascertained, specific, and fixed in their ordinary course.

Re-union :

Reunion is the process by which families that have been divided after partition, to be united again. However, the term 'reunion' under Hindu Law means a situation when the status of the family which was joint earlier is established again, after its partition. Despite having a complete partition, it is possible to have a reunion under the Hindu law, among the Hindu Undivided Family.

Reunion under the Hindu Law

A text, of Brihaspati, being a leading text states that "He who, being once separated dwells again through affection with father, brother or paternal uncle, is termed reunited with him." According to Mitakshara and Dayabhaga, the reunion cannot take place with any person other than the father, brother or paternal uncle.

Who can Reunite?

Any person who was a coparcener originally in the joint status of the family can be part of the reunion. Reunification takes place by the virtue of Hindu Succession Act, 1956.

Following are the conditions for the parties to reunite:

A partition is an essential condition for a reunion- No reunion can take place if there was no partition in the first place.

The intention to reunite in any case is an essential factor which must not be overlooked. Reunion shall not take place if there is no intention of the parties to reunite. Such intention to reunite must be communicated clearly. Where a person merely live together without having an intention to reunite, it is necessary to note that such a person shall also not constitute to be a part of the reunion.

The reunion can take place only if the person has separated with his father, brother or paternal uncle but not with anyone else other than them, which is the case of Mitakshara but in the Mithila school, it can be with anyone, provided that they are a part of the original partition that had taken place and thus have the shares, individually under their name.

The reunion must be unilateral, i.e. there must be consent of each and every person who is a coparcener. The consent of the parties or the coparceners, shall not constitute to be formal agreements but merely consensual agreements which may be either oral or written or even by their conduct, depicting their agreements which are not mandatory to be registered.

The reunion must be of effect only by the parties, who had been a part of the partition.

There must be a property involved in the case of the reunion; as reunion does not merely mean living together as tenants.

A minor cannot reunite, as he is not a competent party to the contracts. The minor cannot be a party, either on his own or as someone on behalf of him.

The rules which are special for the inheritance will not take place in the reunited property but will only be applicable in case of the separate property which the reunited person holds.

The intention of the reunion is to bring about the amalgamation of the interests of the parties in the Hindu Undivided Family and therefore, it creates a right on all the parties involved. In the case of reunion, it is possible that some of the properties and some of the people involved in the partition may be left out or choose not to be a part of the reunion at all. This means that there is a chance of a partial reunion. Therefore, the interest has to be clearly established.

Effects of Reunion in the Hindu Law

The very first effect of reunion is to give the members of the family the same status as before the partition as a part of the Hindu Undivided Family. The second effect of the reunion is that the property, which had been in separate hands, will now fall back to the single joint Hindu family rather than the individual holders of the property.

Another effect is that, initially when the family was undivided, there was no ascertainment of the individual shares. However, even after reunion, the ascertainment of the shares of an individual remains with him.

Succession in Cases of Reunion

The following are the effects in the succession after a reunion:

Through the reunion, only the exclusive rights of the property which one had acquired of his share; after the partition, such rights get destroyed. He now acquires the position of the joint-tenant before the partition, sole-tenant after the partition, and that of a tenant-in-common after reunion.

Where there has been a reunion amongst persons mentioned expressly under the Brihaspathi text, i.e., the father, the brother or the paternal uncle, it is important to note that the inheritance law is applicable to them as in the case of the death of any one of whom is a part of the reunion.

If the person who now acts in the capacity of the reunited coparcener dies, then the issue he leaves behind or the successor he leaves behind or is in the womb, now becomes the owner of his share.

There is no mention of the survivorship in case of reunion.

The burden of proof that the partition took place, lies upon the person who is pleading for the reunion in the Court of law. It requires compelling evidence to decide what the proof is and to prove that there is a requirement for the reunion of the parties. Not only that, but the evidence needs to be cogent in order to prove that there was a partition and also to prove that there was a meeting of the minds in case of the reunification of the property into a Joint Hindu Family.

The reunion is only possible in case of the parties who were there during the preliminary partition. Therefore, an adopted son cannot be the one to institute a reunion, whether or not he lives with his father and jointly holds the shares of the father.

Points of Distinction between the Mitakshara and the Dayabhaga Laws

Mitakshara-

The birth of a son in the family leads to him getting the property right at his birth from his father. After turning into an adult, he can demand the property from his father even if his father is alive.

He can prevent his father from an unauthorized alienation by having an opinion in the ancestral property.

A coparcener does not have a right to alienate his share and after his death if he does not have a successor, his property gets transferred to his brother.

The widow of the coparcener only has the right to the maintenance and has no right in the partition.

The unity of the ownership is the essence of the coparcenary.

Dayabhaga-

(1)The successor has no right in the family property as long as the father of the successor is alive.

(2)The father being the sole and absolute owner of the property, can deal with it the way he fathoms.

(3)Male or Female adults have the right to demand a partition and can alienate the property.

(4)The widow can demand partition after being a coparcener with her late husband's brother.

(5)Possession is the essence of unity and not ownership.

Landmark Cases related to Reunion under Hindu Law

In the case of Ram Narain v. Pan Kuer, 1935, the decision was held by the Privy Council which stated that in a Hindu family, where the rules are governed by Mitakshara the only valid reunion possible is between a father and a son, a paternal uncle and a nephew and between a brother and brother, that too only in the case of it being parties to the original partition.

But according to the rules of Vyavahara Mayukha, which shows its prominence in the state of Gujarat, Bombay, the Konkan areas, which holds great significance in the Mithila states that the text that is written in Brihaspati is not exhaustive but merely illustrative and inclusive. Therefore, one does not solely have to stick to the wordings given under the text of Brihaspati.

Thus, this is expressly stated in the Vyavahara Mayukha that the reunion can take place between the person and the wife, the paternal grandfather, a brother's grandson, a paternal uncle's son and the rest of the people being originally a part of the partition.

The question that arose was whether a sister can be a party to the reunification? The answer for which the court stated was that there had to be a constitutional nicety. This means that the law of the reunion, pertains to the uncodified Hindu law. Thus, the topic of the reunion does not fall within the ambit of the Hindu Succession Act, 1956 and goes much beyond it.

1.7 Joint Hindu family as a social security institution and impact of Hinuds gains of learning act and various tax laws on it.

Hindu law emphasises the importance of a joint family. It is said that there is no way out of Joint Family for any Hindu. Perhaps in one generation or another, a Hindu will naturally form a Joint Family. According to Hindu law, there is a presumption that each family will be regarded a joint family. Before we get into the details of the Hindu Undivided Family, let's define what a join family is in layman's terms. A joint family, according to the Oxford Dictionary, is a living unit made up of two or more generations of a family and their spouses.

What is a Hindu Joint Family

The Hindu Succession Act of 1956 governs the Hindu Joint Family nowadays. It is a common occurrence in Hindu civilization. As previously said, it is unavoidable for a Hindu to form a combined family. The idea behind this is that if one generation is brought to an end by a partition, it will immediately reappear in the next generation. This lends credence to the notion that every Hindu family is a Joint Hindu Family.

In the cases of Rukhmabai vs. Lala Laxminarayan and Rajagopal vs. Padmini, it was determined that a family remains a joint family if it is united in matters of food, worship, and inheritance. Even though a family does not share food or worship, i.e., if they live apart, they might still be considered a Joint Hindu Family if they share an estate. In the case of Chhotey Lal & Ors. vs. Jhandey Lal & Anr., it was determined that a Joint Hindu Family is neither a company nor a juristic person because it lacks a separate legal entity from its members. A Joint Hindu Family is a unit that is represented in all affairs by the Karta of the family.

All family members make up a Hindu Undivided Family. In other words, all the male members descended from a common ancestor in a straight line up to any generation. Even an illegitimate offspring of a male descendent is a part of his father's Joint Hindu Family, according to the case of Gur Narain Das vs. Gur Tahal Das. Their mothers, wives, widows, and unmarried daughters are all included.

Until she marries, an unmarried daughter stays a member of the joint family. She becomes a member of her husband's Joint Hindu Family once they marry. However, if the daughter is abandoned by her husband or becomes a widow and permanently returns to her father's home, she re-joins the Joint Hindu Family, But her children remain a part of their father's joint family.

It is crucial to remember, however, that a Joint Hindu family cannot exist without a shared ancestor. Even after the death of the common ancestor, the family remains a Joint Hindu Family. Under section 2 of the HMA, a person can leave a joint family if they convert to another faith or marry a non-Hindu. Even when a child is given in adoption to a third party by competent parents or a daughter is married off, one ceases to be a member of a joint family.

Laws Concerning Hindu Undivided Family

The Hindu Undivided Family is inextricably linked to the Hindu Succession Act and the Hindu Marriage Act.

Hindu Succession Act:

The Hindu Succession Act governs Hindu succession regulations. When a Joint Hindu Family is involved, there is usually an ancestral property that the descendants would inherit. The Hindu Succession Act regulates this.

The Hindu Property Act:

Respects the Hindu Undivided Family idea. This means that this legislation governs the ancestral property inherited by a family of people who are lineally descended from a common ancestor and are linked to one another by birth or marriage.

The Hindu Marriage Act, on the other hand, is a law that governs Hindu marriages. That particular joint family includes the wives of the male descendants. Unless they opt to return to their mother home permanently after being widowed, they remain a part of that joint family. Until they marry off, the daughters are also a part of the joint family. As a result, the Hindu Marriage Act is crucial in the Hindu Undivided Family.

Income Tax Act: HUF is treated as a person u/s 2(31) of the Income Tax Act. Individual members of a Joint Hindu Family can file their separate Returns under the Income Tax Act and filing of these Returns is irrespective of the status of the family.

Composition

As stated in Surjit Lal Chhabda v. CIT, it consists of all male family members descended lineally up to any generation from a common ancestor, as well as their mothers, wives, widows, and unmarried daughters. Until she marries, a daughter remains a member of her parents' joint family. She becomes a member of her husband's Joint Hindu family once she marries.

If a daughter's husband abandons her or she becomes a widow and returns to her father's home permanently, she re-joins the Joint Hindu family. Her children, on the other hand, remain in their father's Joint Hindu family and do not join the mother's father's Joint Hindu family. Even an illegitimate offspring of a male descendent shall be a part of his Joint Hindu family, according to the case of Gur Narain Das v. Gur Tahal Das.

Beginning

It is important to note that a Joint Hindu Family cannot be formed without a shared ancestor. The presence of a common ancestor is required for its formation, but not for its continuation, i.e. the death of the common ancestor does not result in the dissolution of the Joint Hindu Family. The marriage, birth, or adoption of the child in the marriage removes upper family relationships and adds lower family links. This cycle will continue as long as the species does not go extinct. The Sapinda relationship (belonging to the same ancestors, up to three and five lines of descent from the mother's and father's sides, respectively) or family relationship binds the members.

Exit

The status of being a part of the Joint Hindu Family can be ceased in the following cases:

(1)By conversion to another religion or faith.

(2)By marriage to a non-Hindu (a person who is not Hindu as per Section 2 of the Hindu Marriage Act, 1955 which include a Muslim, Jew, Parsi or Christian by religion).

(3)By being given in adoption to a third party by the competent parents.

(4)By marriage of a daughter.

What If?

Position when there are only female members (widow)

On the death of the sole male member, a joint Hindu family can continue to exist at the instance of already existing female members of the family. The term 'continuation' is different from starting or forming a joint family for the first time.

Illustration:

If A and B are brothers, C and D are wives of A and B respectively. Four of them together constitute a Joint Hindu family.

Position when there is only one male member in the family

In such a case the Joint Hindu family can still continue to function as the requirement of a male member is essential to start a Joint Hindu family and not for its continuance. It is not necessary to have at least two or more male members in the family to make it a Hindu Undivided family as a taxable entry. In the case of CIT v. Gomedalli Lakshminarayan it was held that even if the coparcenary does not exist in a family still that family continues to be a Hindu Undivided family.

Position when there are only daughters

After the Hindu Adoption and Maintenance Act, 1956

The Act gave power and permission to even a single woman to adopt a child. As per law, the status of an adopted child is the same as that of a child born into the family. Now, the woman could add a male member to her father's Joint Hindu family without getting married. Therefore, an adopted child can be maintained by a single parent also.

After the 2005 amendment in the Hindu Succession Act, 1956

The amendment to the Act gave the right to a daughter to be a coparcener and now she can not only continue the Joint Hindu family but also constitute one with her father and brothers.

Position when there are only husband and wife

Because the couple has the option of adding a male member to the family, or in other words, a coparcener, they can form a Joint Hindu Family. There is a split in court opinion on whether a husband and wife can establish a joint family under revenue statutes in order to qualify for the Hindu Undivided Family tax exemption.

In the case of T. Srinivasan v. CIT, a partition took place in a Joint Hindu Family and the son took his share. For a certain while, he filed his returns as an individual until he got married. The question came into consideration when his wife was pregnant. It was held that only when the son is born, he becomes a member of the joint family.

CASE LAW.

Janakiammal vs. S. K. Kumarasamy & Ors

Facts: In the case of R. Janakiammal vs. Kumarasamy, there was a partition dated 7th November 1960 between three brothers. The Appellant claimed that the said partition agree was entered by the three brothers to save the landed property from Land Ceiling Act and there was no intention of separating each branch and changing the joint family status. The Appellant contended that there was a reunion between the three brothers to revert to the status of Hindu Joint Family which can be proved from the acts and conduct of the parties after 7th November 1960.

Judgment in Brief: The issue before the Hon'ble Apex Court was whether a particular house property purchased in 1979 is a joint family property or not. Considering the facts of the case, the Top Court Bench of Hon'ble Justices Ashok Bhushan and Subhash Reddy found that in 1979, when the residential property was obtained in the name of one brother, all 3 branches were a part of the Hindu joint family.

The Court while giving its judgment referred to the concept of reunion in Hindu Law explained in Mulla on Hindu Law, 22nd edition. According to the concept of reunion in Hindu Law, a reunion in estate property can only take place between the persons who were parties to the original partition. Further, the effect of reunion is to remit the reunited members to their former status as a member of a joint family. To constitute a reunion, there must be the intention of the parties to reunite.

The Hon'ble Supreme Court in its judgment held that Hindu Joint Family, even if partitioned can revert and continue the status of joint family. The Supreme Court Bench observed that acts and conduct of the parties may lead to the inference that the parties reunited after partition. The Court held that the house property purchased in the name of one member of the Hindu joint family was for the benefit of all.

The Hon'ble Court also observed that the individual member of a Joint Hindu Family can file his/her separate returns under Income Tax Act as well as Wealth Tax Act. The Court held that the filing of such returns had nothing to do with the status of the family. The Bench held that all three branches had an equal share in the residential property.

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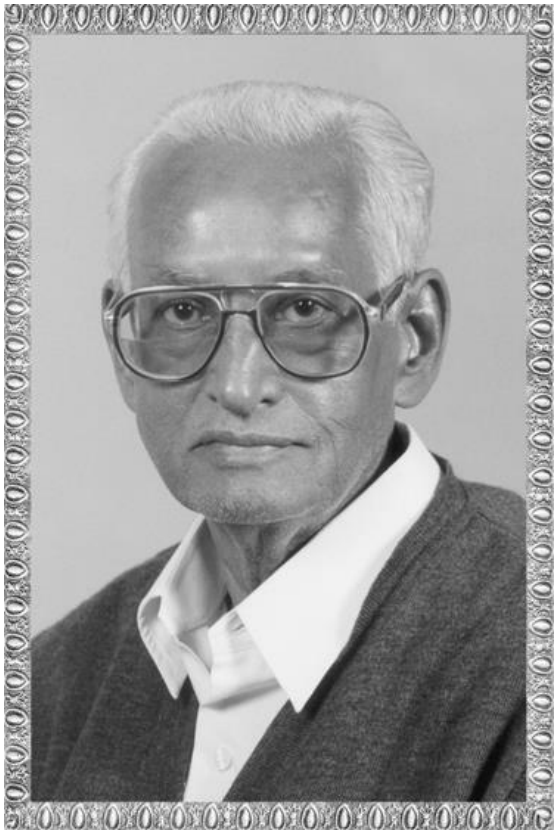

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UNIT -2 –INHERITANCE

SR. NO.	TOPIC NAME
2.1	HINDUS
2.1.1	HISTORICAL PERSPECTIVE OF TRADITIONAL HINDU LAW
2.1.2	SUCCESSION TO A PROPERTY OF A HINDU MALE DYING INESTATE
2.1.3	DEVOLUTION OF INTREST IN MITAKSHARA CO PARCENARY WITH REFERNCE TO HINDU SUCCESSION ACT, 1956
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2.3	CHRISTIANS, PARSI AND JEWS
2.3.1	HEIRS AND THEIRS SHARES AND DISTRIBUTION OF PROPERTY
2.3.2	TESTAMENTARY SUCCESSION UNDER THE INDIAN SUCCESSION ACT
2.3.3	DISTRIBUTION OF PROPERTY OF CHRISTANS , PARSIS AND JEWS DYING INESTATE

2.1 HINDUS :

2.1.1 Historical perspective of traditional Hindu law as a background to the study of the Hindu succession act; 1956:

The traditional Hindu law is one of the oldest of personal laws in the world. Unlike positive law, according to which laws are those which are made by a sovereign (a human), Hindu law looked to Vedas as the most earlier sources of law. According to ancient Hindu jurisprudence, Vedas were the source of "Dharma" which means a person's moral, social and legal duties, which a person is supposed to obey and adhere to.

However, Vedas (also called *shrutis)* were not the formal sources of Hindu law. Smritis were the formal sources which were based on the Vedas. The Smritis enunciate rules of dharma (Mulla). *Shruti*, which strictly means the Vedas, was, in theory, the root and original source of dharma. The traditional Hindu Law, especially in the context of inheritance, was patriarchal and much emphasis was on the male aspect. However, the Hindu Succession Act has fundamentally altered that concept and thus the specific reference to changes under the Hindu Succession Act has also been pointed out.

Schools of Hindu law

Various commentaries and digests have resulted in the emergence of two schools of Hindu law, the Mitakshara and the Dayabhaga, which contained the law of inheritance. These schools had their own operational areas and were recognised in different parts of India. Before the advent of British rule, the major laws of inheritance in India had either their roots in religion or were deeply influenced by personal laws which owed their allegiance to religion and custom. The fundamental difference between these two schools is on the principle based on which the right to inheritance is to be determined.

In the Mitakshara school of inheritance, property is inherited by the successors (coparceners) merely based on the fact that they were born in the family of the property holders and in case of Dayabhaga the property goes to the successors (coparceners) on the death of the father or holder of the property.

The Mitakshara was considered to be more biased against women and gave them the least rights to inherit property. Though Dayabhaga was also biased, it still gave more rights to the women and was thus considered to be a liberal school.

Mitakshara school which was interpreted by Vijaneshwar's commentary and was prevalent all over India except Bengal and Assam, whereas, Dayabhagha, as interpreted by Jeenutavahan, was prevalent only in Bengal and Assam.

Understanding the law of inheritance

Few concepts need to be understood first in order to understand the Hindu law of inheritance.

Joint Hindu family

Joint Hindu families consist of all members who are descendants of common male ancestors and such members include daughters, wives and widows as well. The male ancestor is the head of the Joint Hindu family. Thus, a Joint Hindu family includes the common male ancestor of his wives and unmarried daughters and sons, collaterals and their wives, sons and unmarried daughters. Wife deserted by husband u/s 13 (1)(ib) of Hindu Marriage Act 1955 that is husband left a wife without any cause for more than 1 year. There was no limit to the number of descending generations. This was the joint Hindu family in the traditional context.

An unmarried daughter on marriage ceases to be a part of her father's joint family and joins her husband's joint family as his wife. If a daughter becomes a widow or is deserted by her husband and returns to her father's house permanently, she again becomes a member of her father's joint family. Her children, however, don't become members of her father's joint family and continue being members of their father's joint family. The cord that knits the members of a joint family is not property but the relationship with one another.

In simple words, a joint Hindu family is a group of relatives related by blood and kinship. It consists of common male ancestors, wives of all those people who are related to the common male ancestor, their sons, their unmarried daughters, and people like uncles, aunts, his nephews, nieces etc. The joint and undivided Hindu family is the normal condition of the Hindu society.

Mitakshara School

Coparcenary under Mitakshara is different from a coparcenary under Dayabhaga.

Coparcenary

The unique concept of coparcenary is the product of ancient Hindu jurisprudence which later on became the essential feature of Hindu law in general and Mitakshara school of Hindu law in particular. The concept of coparcenary as understood in the general sense under English law has a different meaning in India or the Hindu legal system. In English law, coparcenary is the creation of the act of parties or the creation of law. In Hindu law, coparcenary cannot be created by acts of parties, however, it can be terminated by acts of parties

As stated earlier there was no limit to the number of generations descending from a common male ancestor in a Joint Hindu family. However, this is not the case in a coparcenary. A coparcenary is a type of relationship which is narrower or smaller than the joint Hindu family, its generations are limited.

Within a joint Hindu family, there is another body of persons called coparcenary which consists of a father, his son, his grandson and his great-grandson. Thus, from a common male ancestor, only males descending up to 3 generations were considered as a coparcenary and only these coparceners had a right to inherit the coparcenary property by birth being the sons, grandsons, and great-grandsons of the holders of the property for the time being.

For instance, if F is a common male ancestor then the coparcenary will consist of 3 generations below him, who are F's lineal descendants i.e. F's son, F's grandson and F's great-grandson. F is common to all three descendants. The three generations are to be counted excluding the last male holder.

Thus, under traditional Hindu law coparcenary consisted only of male members, females were excluded. Only the males (coparceners) had the right to inherit the coparcenary property and only they could demand partition. Therefore, the wife and daughters were not members of the coparcenary. Traditionally, coparceners were those who could perform funeral rites and this was available only to the males.

Coparcenary property or ancestral property is that property which a coparcener has inherited either from his father, grandfather or great grandfather. The said property must be inherited and should not be received either through a will or gift. Further, under a Mitakshra coparcenary, right to such property is available only to the son(s), grandson(s) and great-grandson(s), who formed the coparcenary under Mitakshara school, and no female had a right to such property. Thus, in other words, only agnates had the right to such property and not cognates. Although females were not part of coparcenary, they were entitled to maintenance out of coparcenary property.

It must be noted that the above definition of coparcenary and demand to ask for partition is under the traditional Hindu law, now the meaning and import of coparcenary has been changed after the 2005 amendment to Hindu Succession Act,1956. After the 2005 amendment, even daughters are also included in the coparcenary in the same sense of the son as if she is also a son.

Devolution of property

The right to coparcenary property accrued to a coparcener on his birth itself is a striking feature of Mitakshara coparcenary. Thus, the existence of male owner of the property was not a hindrance to the acquisition of coparcenary property, because the factum of birth was enough to bestow the right to property. Therefore, it is said that a coparcener has an "unobstructed heritage" to coparcenary property i.e. the right to such property is not obstructed by the existence of the male ancestor i.e. father, grandfather and great-grandfather. The allocation of the inherited property was based on the law of possession by birth.

Further, under the Mitakshara school, the property devolved as per survivorship i.e. on the death of the last male holder property will devolve in equal share to those coparceners who are surviving within the coparcenary. This means that if one of the coparceners other than the last male holder dies, then his (deceased) probable share would be distributed among the surviving members of the coparcenary. He leaves nothing behind that can be called his own share in the joint property.

For example, a coparcenary comprises the father and his two sons. Each of them has a probable 1/3rd share in the property until the undivided status is maintained. On the death of one of the sons, his probable 1/3rd in the property is taken by the surviving coparceners ie father and the surviving brother and the deceased will die without any share in the coparcenary property. The share of the father and the surviving son will be increased to a probable half. The right of survivorship is one of the basic rights of a coparcener. Thus, the quantum of interest of an individual coparcener is not fixed as it fluctuates with deaths and births in the family.

This can also be understood as because there is a community of ownership (co-owners) and unity of possession of coparcenary property by the coparceners, their specific share is not fixed or they cannot call a specific portion of coparcenary property as their own until a partition takes place. There is a common enjoyment of coparcenary property by the coparceners.

This concept of survivorship has been removed after the 2005 amendment to Hindu Succession Act, now the only way for devolution of property is either by a will (testamentary) or by the rules of intestate succession given under Hindu Succession Act.

Dayabhaga School

Coparcenary

There is no concept of a joint family under the Dayabhaga school as compared to the Mitakshara. There is no coparcenary consisting of father, son, son's son (grandson), son's son's son(great-grandson). The existence of a Dayabhaga coparcenary comes only after the death of the father, after which the son will inherit the property of him and constitute a coparcenary. In this school, there is no right by birth given to the son. There is also no distinction between separate and coparcenary property and the entire concept is based on inheritance, i.e. that the sons inherit the property of their father after his death.

In a Dayabhaga joint family, the father has absolute powers of management and disposal over the separate as well as the coparcenary property and the sons have only a claim of maintenance. It is because of this reason there is no concept of fluctuating interest of coparceners in Dayabhagha family, as births and deaths of coparceners, does not affect the absolute right to the father to the property.

As stated earlier, although there is no coparcenary between father and his male lineal descendants this does not mean there can be no coparcenary between two brothers. For instance, F is an absolute holder of a certain property. He has 2 sons S1 and S2. Now since this is a Dayabhagha family there is no coparcenary relationship between F and his sons who are his lineal descendants. After the death of F, the property will go to his sons. But now there can be a coparcenary relationship between S1 and S2 for distribution of property. Thus, it is wrong to say that the coparcenary concept is completely absent in a Dayabhagha family.

Further, females can also become a member of a Dayabhagha coparcenary. If a male dies without leaving a son, then his place is taken by his wife (now a widow) or daughters if the widows also die. Thus, Dayabhaga school is more liberal than the Mitakshara school, however, still, male members were predominant. Therefore, there is no concept of survivorship in a Dayabhagha coparcenary.

Devolution of property

Unlike under the Mitakshara school, in which a coparcener has a right to the property since his birth, under Dayabhaga the right to inherit property arises only on the death of the father. Thus, the birth has nothing to do with the right to inherit the property, therefore it is said that under Dayabhaga school, a coparcenary has unobstructed heritage. The property is inherited in the Dayabhaga school after the death of the person who was in possession of it.

Since the coparceners under Dayabhaga have no right to property because of their birth in the family, the father thus has absolute right to dispose of all kinds of property, separate as well as ancestral, by sale, gift or through a will. Thus, there is no unity of possession and common ownership of coparcenary property. In other words on the death of the father, where he is survived by two or more of his sons, all of them inherit his property jointly and hold it as tenants-in-common. Under Dayabhaga the father has an absolute right of alienation of property, whether it is self-acquired or ancestral.

The Hindu Succession Act, 1956:

The Hindu Succession Act, 1956 is an Act relating to the succession and inheritance of property. This Act lays down a comprehensive and uniform system that incorporates both succession and inheritance. This Act also deals with intestate or unwilled (testamentary) succession. Therefore, this Act combines all the aspects of Hindu succession and brings them into its ambit. This article shall further explore the applicability, and the basic terms and definitions and the rules for succession in the case of males and females.

The rules of Hindu personal law are heavily dependent on the two schools popularly known as Mitakshara School and Dayabhaga School. According to the Mitakshara School, there are two modes of devolution of property. These are:

- Devolution by survivorship
- Devolution of succession

The rule of survivorship is only applicable with respect to joint family property or coparcenary property. On the other hand, succession rules apply to separate property held by a person. However, the Dayabhaga school places emphasis on succession as the only mode of devolution of property. The article discusses the rules of succession under the Act and gives an overview of the whole Act. It also describes the devolution of coparcenary property along with the major changes brought by it.

Applicability

Section 2 of this Act lays down the applicability of this Act. This Act is applicable to:

- Any person who is Hindu by religion or any of its forms or developments, including a Virashaiva, Lingayat, or a Brahmo, Prarthna or Arya Samaj follower.
- Any person who is a Buddhist, Sikh, or Jain by religion.
- Any other person who is not a Muslim, Christian, Parsi, Jew, unless it is proved that such person would not be governed by Hindu law or custom.
- This Act shall also extend to the whole of India.

However, this Section shall not apply to any Scheduled Tribes covered under the meaning of Article 366 of the Constitution, unless otherwise directed by the Central Government by notification in the Official Gazette.

Who qualifies as a Hindu, Sikh, Jain or Buddhist

- A legitimate or illegitimate child, where both of his parents are either Hindus, Buddhists, Jains or Sikhs.

- A legitimate or illegitimate child, one of whose parents is a Hindu, Buddhist, Jain or Sikh and is brought up as a member of the tribe, community, group or family to which such parent belongs.
- Any person who is a convert or reconvert to the Hindu, Sikh, Jain or Buddhist religion.

Features of the Act

The importance of the Act lies in the fact that it provides uniform rules for succession and reduces the conflict that arose due to confusion over different rules based on the ideas of two schools. Other features of the Act are:

- It makes a uniform system of inheritance and devolution of property that is equally applicable to areas of Mitakshara and Dayabhaga school. The applicability of the Act is explained thoroughly under Section 2 of the Act. However, it does not apply to people governed by the Special Marriage Act, 1954.
- Another important feature of the Act is its overriding effect given under Section 4. It abrogates all the earlier laws, customs, rules, etc that were applicable to Hindus with respect to succession. Any Act or law that is inconsistent with the provisions of this Act will be ineffective.
- It has also abolished the concept of impartible estate and its succession by special mode.
- Earlier, the rule of survivorship in coparcenary property was only applicable to male heirs. Female heirs were not recognised and given the right to inherit by survivorship. But after the enactment of the Act, there has been a change in this concept. Now, if a male dies intestate, leaving behind a female heir, the property would devolve according to the provisions of this Act and not the rule of survivorship.
- The Act provides order of succession based on the doctrine of propinquity, i.e., nearness or closeness of blood, and gives four different categories that are:
    - Class I heirs
    - Class II heirs
    - Agnates (people related to each other either by blood or adoption only through males)
    - Cognates (people related to each other either by blood or adoption but not through males)
- The rules of succession are different for the property of males and females. In the case of a male who dies intestate, Class I heirs are usually given preference over Class II heirs, and Class II heirs are further preferred over any other heirs.
- The Act further abolished the limited estate of women, and she is now the absolute owner of her property, irrespective of its source. Earlier, she was a limited owner, and the rights to her property were exercised by her husband, but now all the rights are exercised by her, and she can even dispose of her property and take decisions.

- The Act also recognises the right of a child in the property who is in the mother's womb. (Section 20) It states that an unborn child in a woman's womb would have the right to inherit the property, assuming that he has been born before a person dies intestate.
- The Act also clarifies that full-blood relations are preferred over half-blood relations under Section 18. It further explains the concept of shares that are to be divided per capita or per stirpes (division of shares in which share is given to a branch of heirs as a whole) and such heirs inherit property as tenants in common. (Section 19)
- It gives a list of people that are excluded from inheriting a property on different grounds. However, it abolished all the grounds that excluded a person due to his physical deformity or capability under Section 28. It also provides that the right of an illegitimate child to inherit property is confined to the mother's property and not the father's property.

Devolution of interest in Coparcenary property

Coparcenary is a concept that consists of those people in a Hindu joint family who inherit or have a common legal right to their ancestral property. Such people are called coparceners. These are the descendants of a common ancestor, and they acquire their right to joint property by birth. The Act also provides for the devolution of interest in coparcenary property, and there has been a change in the position with respect to coparcenary property due to the Hindu Succession (Amendment) Act, 2005. This is discussed in detail below.

Before Amendment

As mentioned earlier, the Mitakshara school recognises two modes of devolution of property, i.e., by survivorship and by succession. The rule of survivorship applies to coparcenary property, while succession applies to the separate or self-acquired property of a person. Coparcenary property is an ancestral property of a Hindu joint family and consists of:

- Property inherited by a person from their ancestors,
- Any property whose acquisition was done by the coparceners with the help of ancestral property,
- Joint acquisition by coparceners,
- Separate property of coparceners as common stock.

The concept of coparcenary ceases to exist once a partition is done in a Hindu joint family. Section 6 of the Act provides for the devolution of interest in coparcenary property. Before the Amendment of 2005, if a person died intestate, i.e., without making a will, his interest in the coparcenary property would be governed and devolved according to the rule of survivorship and not succession. It further prescribed that if a person who died intestate left female heirs mentioned in Class I, then the rules of succession would be applicable, which means that the rule of survivorship was not applicable to female heirs nor did they inherit property if male heirs were present.

For example, if A person X dies intestate, leaving behind his two sons, B and C, and a daughter, D. His undivided share would devolve on B and C according to the provision before the amendment. In the case of *Satyendra Kumar v. Shakuntala Kumaru Verma (2012)*, the court held that if a person or coparcener gifts his undivided share in a coparcenary property as a gift and there is no evidence to show the completion of partition, such a gift will be void.

After amendment

The position of the law with respect to coparcenary property has changed since the 2005 amendment. It is now a well-established law under Section 6 of the Act that daughters are coparceners by birth and have the same and equal rights as sons. She has all the rights to inherit coparcenary property like a son and would also have to fulfil the liabilities. All of this is applicable after the commencement of the amendment Act. However, there will be no change in any devolution done before 2004.

It also provides that such a property inherited by a female will be her own property, and she will be an absolute owner and not a limited owner. It further states that a coparcenary property will be devolved assuming that a partition has taken place with respect to such property, in which the daughters will receive the same share as given to the sons. The Court, in the case of *Ramesh Verma v. Lajesh Saxena (2017)*, held that the rules of succession will be applicable to separate property acquired by a person on division by notional partition.

The Madras High Court clarified that unmarried daughters are coparceners by birth and must be treated equally with sons and hence be given an equal share like him. The Amendment Act also provides that the right of married girls to seek partition is an absolute right and is not restricted by any limitation (*Nagammal v. N. Desiyappan, 2006*). The Supreme Court in one of the cases held that the rights of daughters as coparceners under the 2005 amendment were not limited to their date of birth. They are entitled to be coparceners irrespective of their birth date (*Prakash v. Phulavati, 2016*).

2.1.2 Succession to property of a Hindu male dying inestate under the provisions of the Hindu Succession Act, 1956.:

Succession (though not defined anywhere in the statutory law) is the transmission of rights and obligation in an estate, of a deceased person to his heir or heirs, The Louisiana civil code defines it as the process by which the heirs take the estate of the deceased, in other words, it is the right of a legal heir to step into the shoes of the deceased, with respect of possession control, enjoyment, administration, and settlement of all the latter's property, rights, obligations, charges, etc. Therefore in a nutshell, succession is a process of devolution of interest in a property (movable or immovable) from a deceased to its legal heirs or representative.

It is important to analyse at this juncture the relationship between succession and inheritance, though both of them may seem to be very similar, there is a fundamental difference between the two. Succession, as explained and stated above, is nothing but the devolution of interest in the property of the deceased, whereas inheritance is an automatic process of devolution of property of the deceased to the people related to the deceased by virtue of blood, marriage or adoption. For instance, a person has acquired the interest in the property by the virtue of a will, the devolution of that interest cannot be said to be an inheritance but a succession, on the other hand, X dies leaving behind a son Y the devolution of interest in a property from X to Y is inheritance. Therefore, it will not be incorrect to say that inheritance is a subset of succession./Therefore, it can be safely stated that inheritance is a subset of succession.

Succession of a property of a Male Intestate

All the heirs either related by blood, marriage or adoption are divided into four classes or categories this categorization is primarily based on propinquity in the relationship of the heir with the deceased, though other factors like natural love and affection are also taken into consideration. Further, the rule of agnate over cognate has been retained from the earlier regime.

Rules for devolution of property of a Male Intestate

On the death of an intestate, the property shall first devolve to class I heirs, as long as a single class I heir is present, the property will not go to heirs in class II category. In the absence of a class II heir category, the property shall devolve upon heirs in class III or agnates which primarily comprises the leftover heir who are blood relatives of the intestate related to him through a whole male chain of relatives. If in case there is no heir present in class III, the interest in the property shall devolve upon any other blood relative of the intestate.

It is significant to note that the provisions of the act or any schedule to that effect does not put a full stop so far as the heirs are concerned, hence in absence of a near relative a person may be eligible to inherit its property. If he can trace his blood relation to the deceased however distant he or she may be. This was a significant change as in the old regime before this act only four generations were recognized but now the limitation on the degree has been removed.

Class I Heirs

Class I heirs comprises people to whom the interest in the property shall devolve in the first instance upon the death of the intestate. The category contains eleven female members and five male members. All the class I heirs take the property absolutely and exclusively as their separate property, further unlike the old joint family regime no person can claim a right by birth in this inherited property.

The following heirs find a place in Class I:

- Mother [M]
- Widow [W]
- Daughter [D]
- Widow of a predeceased son [SW]
- Daughter of a predeceased son [SD]
- Daughter of a predeceased daughter [DD]
- Daughter of a predeceased son of a predeceased son [SSD]
- Widow of a predeceased son of a predeceased son [SSW]
- Son [S]
- Son of a predeceased son [SS]
- Son of a predeceased son of a predeceased son [SSS]
- Son of a predeceased daughter [DS]
- Daughter of a predeceased daughter of a predeceased daughter [DDD]
- Son of a predeceased daughter of a predeceased daughter [DDS]
- Daughter of a predeceased daughter of a predeceased son [SDD]
- Daughter of a predeceased son of a predeceased daughter [DSD]

The below-given figure shows all the class I heirs of the deceased (A) and explains their relationship with the deceased:

Rules governing the distribution of interest among class I heirs

Section 10 elaborately defines the rules pertaining to the division of interest among the class I heirs. Following are the rules governing the division of interest among class I heirs

1. The share of each son and daughter and that of the mother shall be equal.
2. The widow of the deceased shall take one share and if there is more than one widow all of them, collectively take one share i.e., the share equal to the son or daughter and will divide it equally among themselves.
3. A predeceased son survived by a widow or son or daughter shall be allotted a share equal to a living son.
4. Out of the portion allotted to the predeceased son his widow and living sons and daughters will take equal portions with respect to each other. Any branch of the predeceased son of this predeceased son will get an equal portion.
5. The rule applicable to the branch of predeceased son of the predeceased son is the same as of predeceased son wherein son, daughter and widow will get an equal share.

6. A predeceased daughter who is survived by a son or a daughter is to be allotted an equal share to that of a living daughter.
7. The son and daughter of the predeceased daughter shall take an equal portion in the share. The same rule shall apply to any branches of a predeceased daughter of a predeceased daughter.

Class II heirs

In case wherein a male Hindu dies, unmarried, and is not survived by any class I heir, the property shall devolve among class II heirs. The second class of heirs comprises 19 heirs out of which ten are males and nine are females; these heirs are further divided into nine subcategories. The under given table depicts the classification of class II heirs into various subcategories categories:

Subcategory	**List of Heirs**
Subcategory I	**Father**
Subcategory II	**Son's daughter's son** **brother,** **sister**
Subcategory III	**Daughter son's son**
Subcategory IV	**Brother's son** **Sister's son** **Brother's daughter** **Sister's daughter**
Subcategory V	**Father's father** **Father's mother**
Subcategory VI	**Father's widow** **Brother's widow**
Subcategory VII	**Father's brother** **Father's sister**
Subcategory VIII	**Mother's father** **Mother's mother**
Subcategory IX	**Mother's brother** **Mother's sister**

Rules of distribution and Preference of interest among class II heirs

The division of interest among the class II heirs is primarily governed by two rudimentary principles:

1. The heirs in a higher subcategory will exclude the heirs in the lower subcategory. For instance, the heirs in the first subcategory will have preference over the heirs in the second subcategory, the second one will have preference over the third and so on.
2. All the heirs in one category shall take the property equally according to per capita rule of distribution of property, the order in which the name appears in a subcategory is irrelevant.

Class III heirs or agnates

Class III heirs or agnates inherit the property in the absence of class I or class II heirs. An agnate under class III category is a person who is related to the intestate through the line of male relatives only and does not find a place in class I or class II category of heirs, it is also significant to note that an agnate can be male or female as it is the sex of the relative and not the sex of the heir that is material. An agnate can be a direct ascendant or descendant, or a collateral with no limitation of a degree from the deceased.

The rule of preference and division of interest among agnates

For the computation of the degree of relationship and to ascertain the preferences the following rules shall be taken into consideration:

1. Each generation is called a degree, and for computation of degree, the first degrees is the intestate itself.
2. Degree of ascent means upward or ancestral degree and degree of descent means downward or descendant degree.
3. Where an heir has both ascent and descent degree both degrees shall be taken separately, and not cumulatively.
4. An agnate of only descent is preferred over ascent irrespective of the number of degrees (or generation).
5. When two agnants have both ascent and descent degree, the one with fewer no of ascent degrees will be preferred.

Class IV category or cognates

The last category includes the rest of the heirs of the intestate who do not find a place in the above three classes. A cognate is an heir who was related to the heir through a mixed chain of relatives in the term of sex. Further,if a single female intervenes between an heir and the intestate then also it is a cognatic chain.

Cognates inherit when none of the class I or class II or the entire category of agnates are present. The rule pertaining to computation of degree and ascertainment of preferences is the same as in the case of agnates.

2.1.3 Devolution of Interest in Mitakshara Co parcenary with reference to the provisions of Hindu Succession Act, 1956:

Introduction And Evolution

The evolution started from a joint family which is an extended family group formed by persons who are lineally descended from a common ancestor, their wives and their unmarried daughters and on their marriage, daughters get inducted into their husband's joint families. There may be families where a joint family may not be living together and the family may not have or share a common property. But the binding thing is not co-living or property but the relationship by consanguinity, affinity or adoption. The Mitakshara school of Hindu law has its own concept of joint family based on the doctrine of right by birth which means ***janmswatavada.***

The main unit is coparcenary which basically consists of a man and the male descendants of the next three generations in the direct line of descent. Here, all the male in each of the next three generations irrespective of their numbers are the coparceners. The coparcenary unit is nothing but an outgoing unit and it changes time to time with the changes in the family. And on the death of the common ancestor fifth-generation steps into it.

Non-coparcener member of a joint family includes coparcener's wives or widows, daughters until their marriage and even descendants of any degree below the fourth generation at any given pint of time. They do have rights of subsistence in the joint family but they are not co-owners with the coparceners.

One more basic mitakshara doctrine is that once a joint family comes into existence then it remains generation after generation. It is not important to have the presence of a common ancestor or more. It may happen that a single coparcener may be the sole surviving coparcener and he may continue the joint family with its non-coparcener members also.

There is also one thing which has a great significance is that since Hindu law equates adoption with birth so children who are adopted in the family also become its part as coparceners or non-coparceners as the case would be. Here in case of mitakshara family, all properties are inherited from the ancestral who are male ancestors and then it becomes the joint property of the family.

Their ownership remains with the coparcenary with no as such defined interest for any of its members and the principal is famously called as **upramswatvavada**. When there were no statutes which governed or covered mitakshara law of joint family as a whole than in such case judicial precedent has been and

remained a major source. The Law reports of India has many judicial decisions which are both of pre-independence and post era.

Most of the cases lie under taxation laws of India which has a special provision under it for Hindu Undivided Family (HUF). In many cases decided over a period of time it has been held that a joint family may consist of a coparcener and his deceased brother's widow or his wife and unmarried daughter, then it is not necessary for a joint family to have its own property and the law also does not require it to be and neither asks for the ownership on the part of any joint family, where a lease deed is recorded in the name of a member of the joint family but there is no evidence that the lease was granted to him in his individual capacity than in such cases after disruption of the joint family the leased land will belong to the joint family.

It is presumed that the existence of a joint family is getting weaker from descendants because of the separate possession of the property as held in the case of **UR Viruprakashiah v Saarwamma**. Then in case of management of the whole family a Karta must be a coparcener and a non-coparcener member of the joint family cannot in his own right would act as Karta but a junior member could act as Karta with everyone's consent in the family as decided in **Commissioner of Income Tax v Govindram Sugar Mills** and in **Radha Krishan Das v Kaluram.**

Meaning

It is said that the joint family system is the survival of age when in the Ancient communities of Asia and Europe, the family was the primary unit. In those time the Hindu father was the absolute proprietor of the person and the property of the family but now with the changing times, he only represents the family. It was observed in the **Indranarayan case** it was presumed that joint and undivided family is a normal condition of the Hindu society.

Dayabhaga and Mitakshara—the two forms of customary caste- Hindu property holdings and marriage only between two Hindus. Mitakshara are the two faculties of law that govern the law of succession of the Hindu Undivided Family under Indian Law is getting weaker and weaker descendant after descendant because of the evidence of separate possession of property which is getting more prominent over the years especially the post-independence era and also because of other reasons and legislations which are explained below.

In the State of Kerala abolished the doctrine in 1975 under law abolishing the Mitakshara coparcenary in 1975. But different states legal guidelines which have been enacted within the year **1986-1994** in **Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra** did not amend the vintage doctrine of Mitakshara coparcenary that is one of the conventional laws.

Then in 2005 central amendment of the Hindu Succession 1956 Act has abolished the principle of pious obligation with effect from the date of its commencement which is 9 September 2005 and has laid down that after this no court is going to recognize the right of a creditor to seek judicial relief for realizing his debt only on the grounds of this doctrine of Mitakshara coparcenary. But it is not removed totally, the

old principle remains applicable only to those debts which are incurred before 9 September 2005 and that too only against the descendants of those who are born before that date.

Under classical Mitakshara law a son, grandson and great-grandson have a type of **'pious obligation'** to pay the unpaid **vyavaharik** which means incurred for a lawful purpose. It is debts of their father, grandfather or great grandparents as the circumstances of the case may be.

The obligation applies to them if they were joint when the debt was contracted but if they had separated earlier, they will not be bound by it. However, they cannot escape the liability by separating after the debt has been incurred. While in the meantime Supreme Court has explained this Mitakshara doctrine and its implication in a number of judgements pronounced in cases such as **Pannalal v. Naraini, Sidheshwar v Bhubaneshwar, Faqir Chand v Harnam, Prasad v Mudaliar** and many more like this.

In a revolutionary change brought from 1986 onwards as laws were enacted in four different states in India to confer the status of coparceners on daughters on a par with sons and it was beyond the scope of the 1956 Act. And because of this, all the four states introduced it by inserting a new additional provision into the Hindu Succession Act 1956.

The first state which undertook this radical reform was the state of Andhra Pradesh which amended the Hindu Succession Act in 1986 to grant coparcener's status on daughters on a par with the sons. And for doing so the Hindu Succession (Andhra Pradesh Amendment) Act 1986 was into the Act with three new sections and were enforced from 5 September 1985.

Then three years after the reform took place in Andhra Pradesh, the state legislature of Tamil Nadu also enacted the Hindu Succession Act 1988 which is Tamil Nadu's Amendment to insert the same three new **section 29A, 29B** and **29C** written down into the **Hindu Succession Act 1956** in its application to the State with effect from 25 March 1989.

The **third state** to incorporate the new Sections- 29A, 29B and 29C into the Hindu Succession Act 1956 was **Maharashtra** in western India which came into being in the year 1994 and was enforced from 22 June 1994. But, the **fourth state** of **Karnataka** did not add it into a new Chapter but as section 6A, 6B and 6C after section 6 of the central act.

This, in my opinion, was rather more systematic but the assent which was required from the president of India was delayed and so it came into force only after four years on July 30 1994. This way all the four states introduced reforms which were very significant in the Mitakshara law of joint family. Till now all of them remain in force and have not been repealed either by the state or by the central act (Hindu Succession Act) of 2005.

The Changes Which Led to The Devolution of Interest in Mitakshara Family

The presumption is that there is a devolution of interest in Mitakshara Family because the joint family system (Hindu Undivided Family) is getting weaker and weaker from descendant to descendant and this can be rebutted to the evidence of separate possession of the property. Also, this so because its continuance has been greatly curtailed down by **Hindu Succession Act 1956.**

Some of the reasons which could be given are the bill for the succession law which was specifically made to exclude Mitakshara joint families to come under the ambit of the new law. Like, the undivided share of a deceased coparcener is to be governed by the Act and was to be ascertained on the basis of a presumed claim of partition on the part of the deceased on his death.

Coparceners who are separated from the coparcenary before its commencement are to be kept outside the scope of this part. Then the heirs who would attract the application of this part included mother, wife, daughter and others as specified in the 1956 Act.

The act of 1956 also declared that the shares of coparceners which are undivided in a Mitakshara joint family would be their bequeathable property. And because of the provisions of the 1956 Act which had led joint families to the law of inheritance in certain cases had led to the law of wills in all of them and had eventually narrowed down the scope for the continuation of Mitakshara joint families to a large extent.

But till now it is in existence because mitakshara joint families are a great attraction for tax savers and taxation laws call them as Hindu Undivided Family. So, the HUFs enjoy all the deductions and exemptions while paying tax under the Income Tax Act.

Revolutionary Changes Made After Independence

The **1976** Kerala State legislature enacted the **Kerala Joint Hindu Family (Abolition) Act 1975** to abolish wholly the doctrine of the right to property by birth. All Mitakshara coparcenary which was present at the time were converted by this law into tenancy-in-common in which shares are held in common presuming that a partition had taken place between all the coparceners but they were holding it as their respective shares separately as their full owners.

The Act passed by the legislature also had an implication of amending section 6 of the Hindu Succession Act 1956, that is while applying it in each and every case the shares of individual joint family members would be governed by the laws of the act.

Before the commencement of the (Hindu Succession Act) HSA, codifying the policies of succession, the idea of a Hindu family under Mitakshara law become that it was joint not only in estate however in spiritual subjects also. Coparcenary assets, in contradiction with the absolute or separate assets of an

individual coparcener, devolve upon surviving coparceners within the family, in line with the rule of devolution by way of survivorship.

One of the predominant adjustments delivered in by means of the amendment is that during a Hindu joint family, the different prerogative of males to be coparceners has been changed altogether and the proper by means of delivery inside the coparcenary assets has been conferred in favour of a daughter as well. This radical trade has essentially altered the person of a Mitakshara coparcenary.

Before this relevant enactment, four Indian states had delivered in a similar trade, the introduction of daughters as coparceners. A gift, in place of best, the son having a right through birth, any baby born inside the own family or validly adopted can be a coparcener and could have a hobby over the coparcenary assets. Thus, the traditional concept that only males might be members of the coparcenary and no girl may want to ever be a coparcener nor may want to personal coparcenary assets is not the law.

Reforms

The concluding remarks would be that because of the rise in the number of single-member households, break-down of traditional joint family system and increase in the number of divorce cases and especially individual males migrating to the big cities for better work and living standards there has been erosion of authority of patriarch, then erosion of family values and increase in the number of working mothers in cities and especially more single parents.

Then rise in domestic violence and more practice of dowry, children and elders being neglected and disregard to laws made for the preservation of family system are enough indications that show the danger that the family and in the end society are what progressively facing in a country like India.

To combat this situation which is continuous erosion of culture and values attached to it there needs to be a set of strong, consistent policies to strengthen the Indian family system. Otherwise, India would be left with no choice but they will be facing the same problems as being faced by many families around the globe in many of the developed countries. And to tackle this situation there need to be more specific reforms which will help us to transform like increased support in the areas of childcare, social services, income assistance and other health services than it was ever there before.

In fact, in view of problems of various kinds which is being faced in the past as well as now and possible challenges of future there is a need of **Family Policy Council** in each state of India to conduct policy analysis, promote intergenerational solidarity, facilitate strategic leadership involvement and influence public opinion and this method has been adopted by many countries abroad to tackle the difficult situations.

2.1.4 Succession to property of Hindu Female Dying Interstate under the Hindu Succession Act, 1956:

The Hindu Succession Act, 1956 was enacted during the post-independence period, and it was one of the four Acts included in the Hindu Code Bill. This Act outlines the succession plan for Hindus who pass away without creating a Will.

Section 15 of the **Hindu Succession Act, 1956** specifies the scheme of succession of Hindu women dying intestate.

According to section 15 of the Act,

"General rules of succession in the case of female Hindus.—

(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,—

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1),—

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

Property owned by Hindu women can be divided into three categories:

The first category includes property inherited from the woman's husband or father-in-law.

The second category includes property inherited from the woman's father or mother.

The third category includes all other property, including self-acquired property, that the woman has received, earned or gifted, and which does not fall under the previous two categories.

The basic rule for all types of property owned by a Hindu woman is that, in the case of her dying intestate, the property will devolve on her descendants, such as children, grandchildren, or great-grandchildren and the husband.

If the woman is childless and dies intestate, the origin of her property will be determined.

If the property falls under the first category, meaning it was inherited from her husband or father-in-law, it will devolve upon her husband's heir.

If the property falls under the second category, meaning it was inherited from her father or mother, it will devolve upon her father's heir.

If the property falls under the third category, which includes self-acquired or gifted property, if the woman is a childless widow, it will devolve upon her husband's heir preferably.

Only in the absence of the last heir of the husband, the property will devolve upon the women's mother and father.

The Issue:

Consider a situation, where a childless widow who has worked hard to acquire property but dies intestate. According to the Hindu Succession Act, 1956, her property will be inherited by her husband's heir, such as her husband's mother, in the absence of whom, her husband's father and siblings would inherit the property. However, her own parents or siblings would not inherit the property if her husband's parents, siblings, or even distant relatives are still alive.

These inconsistencies in property inheritance under Hindu Succession Act were first highlighted in the case of **Om Prakash v. Radhacharan**, Civil Appeal No. 3241 of 2009. In this case, after the death of Narayani Devi's husband, she was compelled to leave her marital home and return to her parents, who were her sole financial support. Despite this, she managed to acquire a substantial amount of assets but died childless and intestate. Following her death, her mother and her deceased husband's nephews made competing claims to her assets. The Supreme Court on the basis of a plain reading of the provisions of the Hindu Succession Act awarded all of Narayani's self-acquired property to her late husband's heirs.

In the case of **Kamal Anant Khopkar vs Union of India**, WP(C) 1517/2018, the issue of inequitable provisions in the Hindu Succession Act concerning the distribution of property to men and women who die Intestate was before the Supreme Court. The Court directed the Solicitor General to provide the government's view on the matter, and appointed advocate Meenakshi Arora as amicus curiae to assist the Court. Arora highlighted inconsistencies in the Act, such as the provision that when a childless married Hindu male dies, his properties go to his parents, while a childless widow's properties (excluding those inherited from her parents) go to her husband's heirs rather than her own parents. The Court acknowledged the need for judicial or legislative action to address this issue. On January 31, 2022, a Division Bench of Justices DY Chandrachud and Surya Kant suggested that the matter be heard by a three-judge Bench. The matter is currently pending before the Supreme Court.

2.1.5 Disqualification relating to succession , General rules of Succession :

Introduction

Laws are always neutral for everyone. These are embedded in society for the welfare of the people. They have a strong outlook especially in credentials towards family law. Family law is a law dealing with issues related to family matters. The compass of family law is totally subjective in nature. One of the most paramount parts under the family law is the *Hindu Succession Act 1956*. This Act basically came with the intent of providing an all-inclusive and uniform scheme of undevised succession for Hindus. As under the Hindu Succession Act 1956, there are laws related to disqualification which states that what an old Hindu law and a modern Hindu law briefly asseverate about it. There are numerous laws related to disqualification. According to Hindu law, the natural endowment rights of a person were not absolute. In spite of the nearness of the interconnection, a person could still be disqualified from inheriting the property, on the delineation of his certain physical or mental frailty, or specific comportment, this barring from inheritance was not on the basis of a religious ground, but rather depends on moral grounds.

One of the most remarkable ideas behind the evolution of family law was mainly to provide clear sound security to the members. The joint and undivided Hindu family is the basic condition for the Hindu society. Normally here the senior-most male is seen as a guardian member of the family who overlooks the matters related to any issue. However, under the traditional Hindu law women are empowered with fewer rights, and were considered to be acquiescent to the male member of the family.

Valid grounds for disqualification

Widow's remarriage

Section 24 of the Hindu Succession Act, 1956 states that "certain widows remarrying may not inherit as a widow. The person who is in a relationship with an intestate, as the widow of a predeceased son or widow of a brother may not be entitled to inherit the property of the estate as a widow if on the date of succession she has remarried. On such a basis, it was disposed of the inheritance already which was vested on the widows on their remarriage. As in law, remarriage incapacitates a widow of a *gotraja sapinda* from succeeding to the property of a male Hindu on the date the succession arrives Under the law, some of the families state that if they had married before the succession had disqualified them from inheriting the property of the deceased instate. Under the *Widow Remarriage Act, 1856* only three kinds of women are disqualified from inheriting the property if they remarried before death.

Son's widow

- Son's Son's widow
- Brother's widow

In spite of all reasons, women can not be disqualified from inheriting the property. However, intestate women could also be disqualified as in intestate widow women remarriage could not also be disqualified before succession open arises, as if she married a person for the second time, her marriage would be stated as void and in a law void marriage is no marriage. In these sections, she still remains to be a member of the intestate family even if she had married before the intestate death.

Murder disqualified

Section 25 of the Hindu Succession Act, 1956 falls under this criteria. This Section states that any person who commits the murder or assists the murder shall be disqualified from inheriting the property of the person, or any property in the promotion to succession to which he or she committed the murder. So as, If any person found guilty for the murder of the deceased intestate must forfeit his or her rights to come up with the property of the deceased.

The provision of the statue of distribution is paramount and are forbidden any disqualification not containing any statue, was discombobulated by the Judicial Committee of Privy.

As the Section definitely applies to an area where there is the inheritance of a property but this Act also applies to an area where the testator has left behind the will. A murderer who is guilty of murdering the testator cannot take any benefit under the will. The Section applies to succession under the Act. It does not apply to any other enactment under any other statue.

In the case of *Smt. Kasturi Devi v. D.D.C AIR 1976 SC 2105*, it was held by the Privy Council that on the principle of equity and justice the murderer should be disqualified from succeeding to the person whom he had murdered and would not be regarded as the fresh descent as he can be stated as the non-existent. Murder means to kill or assassinate someone which is broadly understood in a popular sense and not just to a technical resolute. This goes beyond the reasonable doubt proof sense of the *Indian Penal Code.* In *State v. Chetan Chauhan*, the wife was accused of murdering her husband abetment to commit murder along with three other people and was clearly denied with the succession certificate as in the view of *Section 25* of The Hindu Succession Act,1956. In the view of the exoneration by the Criminal Court, the Bombay High Court stated that there is nothing that she could be involved in murdering her husband, she could be entitled to succeed to her property.

Abetment of a murder

The Commission of the murder of the intestate or the abetting of the commission of the murder has one or the same result.

- Taking as an example where the entire planning of murder is done by the person A, B, C who are in direct or indirectly in relation with A and helps A in attempting the murder by bringing the intestate by a false pretext where A kills and B, C might not have murdered the intestate, they will be disqualified from succession to the property.

Disqualification of the converted descendants

Section 26 of the Hindu Succession Act, 1956 states about the Converted descendant's disqualification. Before the initiation of this Act, Hindus ceased to be a Hindu by conversion to any other religion, after the conversion of the religion the descendants. Therefore, they will be disqualified from inheriting the property of any of their Hindu relatives in spite of any of those children being Hindu at the time of succession opens. Under the old Hindu law, conversion by a Hindu into some other religion was considered as disqualification which was further removed by the Caste Disability Removal Act,1850. Under this Act as well when a Hindu converted his religion he still might have a right to all the property of his or her relatives but descendants of a covert are disqualified from inheriting the property.

The Hindu Succession Act, 1956 clearly states that a Hindu ceased to be Hindu by converting to any religion whether before or after the implementation of this Act. If the child was born to them before or after the conversion of the religion, the descendants will be disqualified from inheriting the property unless those descendants are Hindu when the succession opens.

Applicability of Section 26

This Section does not apply to testamentary succession where the succession is governed by the testament as it is only applicable to intestate succession so far. This section is prospective in nature as the disqualification only arises when the commencement of the succession opens. It is also retrospective in nature as the Act also applies to a case where the conversion had taken place prior to the commencement of the Act.

Succession when heir disqualified

Section 27 of The Hindu Succession Act 1956 states about the succession when the heir is disqualified. Under this Act, If any person got disqualified from inheriting any of the property, it must be devolved as if such a person died before the intestate.

It relates down to the general relating to the effects of the disability of the disqualification resulting to any of the causes under the Section of 24 to 28 and is according to the Hindu Law that where the heir is disqualified. However, a disqualified person shows no interest in his or her own heir. The Section, therefore, provides the consequences of disqualification incurred by an heir from inheriting under any provision of the Act. Under the statement, if the disqualified heir is still alive then he will be deemed to be not in existence.

Under this Section, a disqualified heir is considered to be dead before the intestate, which states that no person can claim the right to inherit the property of the intestate through him or her.

No disqualification for disease and deformity

Section28 under The Hindu Succession Act, 1956 states that there would be no disqualification for any disease and deformity., which further explains that no person shall be disqualified from inheriting the property on the ground to any disease or defect or any ground respectively. However, certain defects and deformities see notes that exclude an heir from inheritance. As, this was substantially remedied by the *Hindu Inheritance Act, 1928.*

The Section is not retrospective. The section, therefore, applies to both testamentary and intestate succession. It comes into the operation when the succession opens after the commencement of the Act. If the succession opens before the commencement of the Act it states that Section not being retrospective.

In this case of "*Anhia Mandalanin And Anr v. Bajnath Mandal And Anr, (6 November 1973*)", a stepmother of the deceased intestate female remarried prior to the commencement of the Act, though the intestate women died after the commencement of the Act, it was suggested that the mother was not entitled to inherit as she was disqualified.

2.2 Muslims :

2.2.1 General rules of Succession and Exclusions from Successions:

Introduction

Inheritance refers to the transfer of property from a deceased person to a living person who is legally related to him or her. The process of devolution of inheritance for Muslims is governed by various Muslim personal laws, which are based on pre-Islamic customary succession laws and principal scriptural sources like the Holy Quran, the Sunnah, the Ijma, and the Qiyas.

As one might know, there are two kinds of succession – testamentary (where a will was created before the death of the deceased person) and non-testamentary (where the person dies intestate, i.e., without creating a will). Under Muslim laws, non-testamentary succession is governed by the Muslim Personal Law (Shariat) Application Act, 1973, while testamentary succession is governed by separate Shariat laws for the Shia and Sunni sect of Muslims. The Muslim laws of inheritance also have a unique system of classifying the heirs into 'sharers' and 'residuary', derived from the Quran and Hadith.

Concept of inheritance under Muslim law

The concept of inheritance is rooted in the Islamic or Quranic principles enumerated by the Prophet. Islamic laws do not recognise joint tenancy, and the heirs are tenants-in-common, i.e., they can only seek to inherit the shares of the property that is held in common. In the case of *Abdul Raheem v. Land Acquisition Officer (1989)*, the court remarked that Muslims do not follow or recognise the joint family system in matters of inheritance, and after the death of a Muslim person, the rights, title, and interest he held in his estate cease to exist and stand vested in others.

However, inheritance is not guaranteed to every child that is born into the family, i.e inheritance is not at all a birth-right under Muslim law. An heir- apparent must survive the deceased to claim an inheritance. A child in the womb of its mother is also competent to inherit, provided it is born alive. If the child is stillborn, it will be treated as though it never existed, and thus the interest in the share of property that was vested in the child is stripped off.

Under Islamic laws, male and female heirs alike have the right to inherit property. Near female heirs or cognates are recognised in the class of heirs. However, the females get only half of the quantum shares allotted to their male counterparts, since under the Islamic system, females will go on to receive more wealth through mehr and the maintenance provided by their husbands, while males only have inheritance, which contributes to their duty of maintaining their wife and children.

Nevertheless, in a marital setting, the husband and wife are equally entitled to inheritance from their spouse. A widow is also included in the scheme of inheritance. A widow who has children or grandchildren is given 1/8 of the property of her deceased husband, and if she is childless, she gets 1/4 of his property. However, if a woman marries a Muslim man during his illness, which subsequently became the reason for his death, and the marriage has not been consummated for that reason, then as a widow, she would not have the right to inheritance. But if her husband divorced her before dying of illness, then her right to inheritance continues until she remarries.

The Islamic laws also give priority to the ascendants of the deceased over the descendants in the scheme of inheritance by making them the immediate heirs or the first-in-line to inheritance.

The Islamic scheme of inheritance comprises two kinds of heirs – the Sharers, or Quranic heirs, and the customary heirs, called the residuaries.

The Quran amended the customary tribal laws of succession to align them with Islamic philosophy. The major amendment to customary law is the introduction of the class of 'sharers' or 'Quranic heirs' which led to the inclusion of heirs who were previously excluded under the customary succession laws. Therefore, if 'M' a Muslim man, dies leaving behind his widow 'W' and his sons S1 and S2, then W, being the sharer, will take 1/8 (one-eighth) of the property and the remaining 7/8 (seven-eighths) will be allocated to the residuaries – S1 and S2.

However, there is divergence in the application of Quranic principles between the divided sects of Sunni and Shia Muslims, creating slightly different rules of inheritance – the Sunni law of inheritance and the Shia law of inheritance.

Sunni Law of inheritance

The Sunni in India primarily belong to the Hanafi school and are governed by Hanafi school of law. The Hanafi laws attempt to create a more harmonious relationship between the customary law and the Quranic law by which the inclusion of the Quranic class of heirs does not deprive the customary heirs of their share but rather just a portion of the estate is allotted to the Quranic heirs. It is important to note that, even though the new class of heirs created included females, it still retained the preference of agnates over cognate heirs. That is, the Quranic class recognizes the female agnates' right to inherit a share much like their male counterparts.

The position of the Quranic heirs and the customary heirs with respect to inheritance differs in two cases:

- If the Quranic heir is more in proximity to the deceased than to a customary heir, the Quranic heir gets a portion of estate first and then the residuary is given to the customary heir.
- If both the Quranic and customary heirs are equally close, the customary heir gets double of the amount of share given to the Quranic heir.

Even though the agnates are given preference in inheritance over cognates, they're not completely excluded from the scope of succession, as cognates such as uterine brothers and uterine sisters are included.

Under the Hanafi law, the heirs of the deceased are either sharers or residuaries, and in the absence of both of these classes of heirs, the estate is passed down to other relatives of the deceased, who fall under the category of "distant kindred". In case of absence or some inability that restricts the distant kindred from inheriting, the estate is passed on to the state by escheat, meaning that if a Muslim dies heirless, then the property is devolved on to the state.

Further, the distribution of estates under the Sunni law is per capita, according to which the estate of the deceased is distributed equally among the heirs. Thus, the number of shares one gets is proportional to the number of heirs.

Shia Law of inheritance

The Shia law of inheritance is guided by the general principles of the Ithna-Ashari law. The Quranic rules here are interpreted very widely, unlike the strict interpretation followed by the Sunni law. This causes a very significant divergence in the principles and rules of succession under Shia laws, leaving them with an almost independent scheme of succession.

Shia law follows per strip distribution, i.e., the distribution of property among the heirs is based on the strip they belong to.

The Shia law does not prioritise the rights of agnates over cognates or of males over females with respect to inheritance. But there is a certain exception to the rights of husband and wife – the estate of the deceased devolves to the blood relations equally, and the females are allowed only half of the share of the males in each class. Therefore, there is no hierarchy with respect to who inherits the estate first between the descendants, ascendents, and collaterals, as they all inherit side by side.

Thus, the shias right to inheritance is based upon two categories of relations:

1. *Nasab* – blood relationships or consanguinity;
2. *Sabab* – special cause or heirs by affinity, through marriage.

In testamentary succession, if the property in question is an immovable property located in Chennai, West Bengal, or Bombay, then it becomes an exception, where the Muslims will be bound by the Indian Succession Act, 1925, rather than Shariat laws.

The rule of *spes successionis* in Muslim Law

The doctrine of *spes successionis* is an important rule relating to the transfer of property. *Spes successionis* is a Latin maxim that translates to 'expectation of succession'. It means a person who is the apparent heir of another person is expected to succeed to his estate after the death of that person. The rule states that just because a person is expected to inherit a property after the death of another person, it does not mean that it amounts to him having an interest in that property. Thus, mere 'expectation' or 'chance' to succeed to a property does not provide him with any legal right over the property. The transferability of a Spes Successionis is prohibited in Indian law under the provision of Section 6(a) of the Transfer of Property Act, 1882.

However, the rule of *spes successionis* is not recognized in the Muslim law of inheritance.

Thus, the transfer of *spes successionis* is considered the renunciation of the chance of succession. The chance of a Muslim heir – apparent succeeding an estate cannot be the subject of a valid transfer or release.

In the case of *Shehammal v. Hasan Khani Rawther and Ors.(2011),* it was ruled that the doctrine of *spes successionis* need not be considered in a family arrangement. In this case, the respondent was one of the heirs-apparent to inherit a share of the plaintiff's property. But even before inheriting his share, the respondent executed a deed with his father to relinquish his rights over the property in exchange for some consideration. The Apex Court was to decide whether a Mohammedan can relinquish his right to inherit by way of a family arrangement even before acquiring the property. It was ruled that the doctrine of *spes successionis* can be avoided in family arrangements or in cases of relinquishment of inheritance rights over consideration.

2.2.2 Classification of Heirs Under Hanafi and Ithana Ashria school and their share and distribution of property:

Class of heirs under Muslim law

Both the Shia and Sunni schemes of inheritance consist of sharers and residuary classes of heirs. However, there are differences in the arrangement, hierarchy, and distribution of shares between the two.

Class of heirs under Hanafi law

The heirs of a deceased Muslim fall under the following classes –

1. Sharers
2. Residuaries
3. Distant kindred relations

Class – I heirs

The sharers fall under class I heirs, and there are 12 relatives of the deceased on the list of sharers.

1. Wife (Widow) – takes 1/8 (one-eighth) part of share if she has children and ¼ in case of her being childless. She can never be excluded.
2. Husband (widower) – gets 1/8 (one-eighth) shares, but in case he is childless, the share portion increases to 1/2 (one-half). He can never be excluded.
3. Daughter – a single daughter gets 1/2 (one-half) shares. If there are two or more then they take 2/3 (two-thirds) of shares together. In the presence of a son, she becomes a residuary. She can never be excluded.
4. Son's daughter – gets 1/2 (one-half) shares and if two are more then, 2/3 (two-thirds) shares. Share is reduced to 1/4 (one-fourth) when there is only one daughter and to 1/8 (one-eight) in presence of one higher son's daughter. In the equal presence of a son's son, she becomes a residuary. Can be excluded under certain conditions.
5. Full sister – a full sister gets 1/2 (one-half) shares and in case there are two or more in number they together take 2/3 (two-thirds) shares. In the presence of a full brother, she becomes a residuary. Can be excluded under certain conditions.

6. Consanguine sister – gets 1/2 (one-half) shares and 2/3 (two-thirds) together if there are two or more. In presence of a full brother, share gets reduced to 1/6 (one-sixth) and in presence of a consanguine brother, she becomes a residuary. Can be excluded under certain conditions.
7. Uterine sister – gets 1/6 (one-sixth) shares if single and 1/3 (one-third) together if two are more in number. Can be excluded under certain conditions.
8. Uterine brother – gets 1/6 (one-sixth) shares if single and 1/3 (one-third) together if two are more in number. Can be excluded under certain conditions.
9. Mother – gets 1/6 (one-sixth) shares and never excluded. Share increases to 1/3 (one-third) if there is no child or no son's child or if she has a sibling. If the husband or wife of the deceased exists, then she gets 1/3 (one-third) of shares after deducting the shares of the husband or wife.
10. Father – gets 1/6 (one-sixth) shares and is never excluded. When there is no child or son's child then he becomes a residuary.
11. True grandmother – gets 1/6 (one-sixth) shares. Under Certain exceptions she can be excluded.
12. True grandfather – gets 1/6 (one-sixth) shares. Under certain exceptions he is excluded. If there is no child or son's child, he becomes a residuary.

Class – II heirs

The Quranic residuaries and the general residuaries constitute the class – II heirs. Quranic residuaries are those members who were originally sharers who become residuaries due to certain conditions or presence of a higher degree heir.

There are 5 Q uranic residuaries –

1. Daughter – becomes a koranic residuary due to the existence of a son of the deceased.
2. Son's daughter – becomes a residuary due to the presence of a son's son or a male agnatic heir in a lower degree
3. Son's son's daughter – becomes a residuary due to the presence of a son's son's son or a male agnatic heir in lower degree.
4. Full sister – becomes a residuary due to the presence of a full brother
5. Consanguine sister – becomes a residuary due to the presence of a consanguine brother

The residuaries can be classified into three categories –

- the ascendants – the parents, grandparents the other relation who precede or ascent directly to the deceased.
- the descendants – individuals succeeding in the direct biological line of the deceased, like children, grandchildren, and so on.
- the collaterals – individuals who are descendants in parallel lineage of the ancestors of the deceased but are not direct blood relatives. Eg., consanguine brothers, sisters, paternal aunts and uncles. Maternal aunt and uncles etc.

The collaterals can be further divided into the descendants of father and the descendants of grandfather.

- Descendants

1. Son
2. Son's son howsoever low

- Ascendants

3. Father
4. True grandfather

- Collaterals – descendants of the father

5. Full brother
6. Full sister
7. Consanguine brother
8. Consanguine sister
9. Full brother's son
10. Consanguine brother's son
11. Full brother's son's son
12. Consanguine brother's son's son

- Collaterals – descendants of the true grandfather

13. Full paternal uncle
14. Consanguine paternal uncle
15. Full paternal uncle's son
16. Consanguine paternal uncle's son
17. Full paternal uncle's son
18. Consanguine paternal uncle's son's son

Class – III heirs

In the absence of both sharers and residuaries, the estate of the deceased is devolved to the distant kindred. All those blood relations that did not make it to the list of sharers and residuaries are constituted in this class, which includes female agents and the male and female cognates.

The distant kindred can be categorised under descendants, ascendants, and collaterals. The number of collaterals, ascendants, and descendants is limitless, and relations of all degrees are included.

- Descendants

1. Daughter's children and their descendants however low
2. Son's daughter's children and all the succeeding descendants however low

- Ascendants

1. False grandfather how so ever high
2. False grandmother how so ever high

- Collaterals – descendants of parents

1. Full brother's daughters and their descendants
2. Consanguine brother's daughter and her descendants
3. Uterine brother's children and their descendants
4. Full brother's sons' daughters and their descendants
5. daughters of consanguine brother's sons and their descendants
6. Children of sisters (full, consanguine or uterine)

- Collaterals – descendants of immediate grandparents (false or true)

1. Full paternal uncle's daughters and their descendant s
2. Consanguine paternal uncle's daughters and their descendants
3. Uterine paternal uncles and their children and their descendants
4. Daughters of pull paterna; uncle's sons and their descendants
5. Daughter of consanguine paternal uncle 's sons and their descendants

6. Paternal aunt's (full, consanguine or uterine) and her children and their descendants
7. Maternal uncles and aunts and their children and descendants

- Descendants of remote grandparents (true or false) how so ever high.

In the absence of heirs in all three classes, the estate passes onto the state by way of escheat.

Class of heirs under Shia Law

The Shia Muslim heirs fall under two classes –

1. Heirs by marriage – the husband and wife
2. Heirs by consanguinity

Under the Shia scheme of heirs, the husband and wife are never excluded, and thus they always inherit with all other classes of heirs. The class of distant kindred is not recognised under Shia law.

Class – I heirs

Under Shia Law, all Sharers are not Class – I heirs.

1. Husband
2. Wife
3. Father
4. Mother
5. Daughter
6. Son
7. Grandchildren
8. Remote lineal descendants

Class – II heirs

Class – II constitutes heirs by consanguinity, with three sub – categories, say, a, b and c, with priority of heirs decreasing from a to b.

1. Parents
2. Children and succeeding descendants

3. Grandparents (both true and false)
4. Brothers, sisters and their descendants

5. Paternal uncles and aunts of the deceased, the parents and grandparents and their descendants of all degrees
6. Maternal uncles and aunts of the deceased, their parents and grandparents and their descendants of all degrees

If a Muslim dies without leaving any heirs to inherit his or her property, it passes to the state by escheat.

2.3 Christians , Parisi and Jews :

The Laws governing Inheritance among the Christians in India have been discussed in this article. The Indian Succession Act, 1925 provides for the inheritance laws for all other religions, including Christians. Christians have varied laws on succession and familial relations. The rules for succession among the Christians has been codified under the Indian Succession Act, 1925, while on the other hand customary practices also have an influence on the principles of inheritance. The British Indian Government enacted the Indian Succession Act, 1865 which was to apply in the case of Christians. This Act was later replaced by the Indian Succession Act, 1925, which currently governs the inheritance in case of Christians. Certain customary practices also influence the principles of inheritance in case of Christians and have also been considered by the courts in India.

Every law of Succession defines the rules of distribution of property in case a person dies without making a Will. The rules for Succession among the Christians have been codified under the Indian Succession Act, 1925. Kochin Christian Succession Act, 1921 and the Travancore Christian Succession Act, 1916 were repealed and now the Christians following general scheme of inheritance under Indian Succession Act, 1925. Christians in the State of Goa and the Union Territories of Daman and Diu are governed by Portuguese Civil Court 1867, while those in Pondicherry governed by French Civil Court 1804, Customary Hindu Law or Indian Succession Act.

While on the other hand. Customary practices also have an influence on the principles of inheritance, protestant and Tamil Christians (Living in certain talukas) are still governed by their respective customary laws. 2. Despite these variations, the overall law for Indian Christians in effect is Indian Succession Act of 1925. Laws of Successionapplicable to Christians for the intestate the governing law is the Indian Succession Act, 1925 specifically under Section 31 to 49 of the Act.

This Act recognizes three types of heirs for Christians:-

1. Spouse

2. Lineal Descendants

2. Kindred Lineal Descendants: The phrase "Lineal Descendant" means, "a Descendant born out of a lawful marriage". Thus a daughter's illegitimate son or a son's illegitimate daughter or other illegitimate issue cannot be said to be a "Lineal Descendant". An illegitimate child is not a child within the meaning of the act. Therefore, such a child has no share in the property of the parents. But in Jane Anthony Vs. Siyath 2008 (4) KLT 1002 recognized the right of illegitimate child under Indian Succession Act.

3. Kindred or Consanguinity: The term "Kindred" means, relations by blood through a lawful marriage. Therefore, relations by illegitimate birth are not recognized as Kindred under the Act. Kindred does not include relation by affinity such as mother-in-law or step mother or step father. Thus, a step father or a step mother has no legal right of Succession to the property of his or her step children. The position is the same in the case of a father-in-law as well. S. 24 of the Act makes an initial reference to the concept of kindred and consanguinity, defining it as "the connection or relation of persons descended from the same stock or common ancestor."

4. S. 25 qualifies 'lineal consanguinity' with regard to descent in a direct line. Under this head fall those relations who are descendants from one another or both from the same common ancestor. Now, succession can be either 'per capita' (one share to each heir, when they are all of the same degree of relationship) or 'per stirpes' (division according to branches when degrees of relationship are discrete). For Christians, if one were to claim through a relative who was of the same degree as the nearest kindred to the deceased, one would be deemed to stand in the shoes of such relative and claim 'per stirpes.'

5. S. 26 qualifies 'collateral consanguinity' as occurring when persons are descended from the same stock or common ancestor, but not in a direct line (for example, two brothers). It is interesting to note that the law for Christians does not make any distinction between relations through the father or the mother. If the relations from the paternal and maternal sides are equally related to the intestate, they are all entitled to succeed and will take equal share among themselves. Also, no distinction is made between full-blood/half-blood/uterine relations; and a posthumous child is treated as a child who was present when the intestate died, so long as the child has been born alive and was in the womb when the intestate died. Christian law does not recognise children born out of wedlock; it only deals with legitimate marriages. Furthermore it does not recognise polygamous marriages either.

6. However, a decision has been made to the effect that it does recognise adoption and an adopted child is deemed to have all the rights of a child natural-born, although the law does not expressly say so. The law of intestate succession under S. 32 states that: The property of an intestate devolves upon the wife or husband or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter. However, as aforementioned, the Act recognises three types of heirs for Christians: the spouse, the lineal descendants, and the kindred.

The Concept of Succession :

Section 2(d) of the Act defines "Indian Christian" means, a native of India who is or in good faith claims to be, of unmixed Asiatic Descent and who professes any form of the Christian Religion. The religion of the deceased determines the Succession to his estate. Succession, in brief, deals with how the property of a deceased person devolves on his heirs. This property may be ancestral or self acquired and may devolve in two ways. 1. By Testamentary Succession i.e., when the deceased has left a will bequeathing his property to specific heirs.

By Intestate Succession, when the deceased has not left a will whereby the law governing the deceased (according to his religion) steps in, and determines how his estate will devolve. 5. The rules relating to Intestate Succession among Christians governed under Sections 29 to 49 in Part V of Indian Succession Act. But if there is a will executed by the deceased, the General Law as contained in Sections 57 to 391 would apply.

2.3.2 Testamentary Succession under the Indian Succession Act: rule for distribution of property of Christians , Parsi and Jews:

Rules of Distribution:

(1)The Succession Act contemplates only those relations that arise from a lawful marriage. Where an intestate has left a widow and if he has left lineal descendants, i.e., Children and Children's Children, 1/3rd of his property shall belong to the widow, and the remaining two third shall go to the lineal descendants.

(2)If the intestate has no lineal descendants, but has left persons who are of kindred to him, half of his property shall belong to the widow and the other half shall go to those who are of kindred to him.

(3) A husband has no right to inherit the property of a divorced wife. In case of a judicial separation under the Indian Divorce Act, 1869, the property of the wife would devolve upon her legal heirs as if her husband were dead.

(4) A daughter-in-law has no right of succession to the estate of her intestate father-in-law.

(5) Where the intestate has left a widow, and there are no lineal descendants, the widow's share is one half of the estate of the intestate, as is provided under Section 33 (b).

(6) Where an intestate has left no child, but only a grandchild or grandchildren and no other remote descendant, the property shall belong to the grandchild if only one grandchild is left by the intestate and if there are grandchildren, the property shall belong to the surviving grandchildren in equal shares.

(7) As there is no statutory recognition for adoption by Christians in India, an adopted child cannot claim the right to succession unless a custom of adoption can be proved.

(8) A Hindu Converts to Christianity will be bound solely by the Succession laws governing Christians, inclusive of the Indian Succession Act, 1925. The religion of the heirs will not act as estoppel with regard to succession even the Hindu father of a son who had converted to Christianity was held entitled to inherit from him after his death. When a Hindu convert to Christianity dies intestate, it is the father, who succeeds to the property. The religious faith of the father is immaterial for the purpose of succession, it is that the deceased should have belonged to Christian Religion on the date of his death.

(9) In case of a Christian daughter, she has no pre-existing right in the family property and her rights arise when her parents die intestate. As per Section 48, when the intestate has left neither lineal descendant, nor parent, nor sibling, his property shall be divided equally among those of his relatives who are in the nearest degree of kin to him. If there are no heirs, whatsoever to the estate, the Doctrine of Escheat can be invoked by the Government, where upon the estate of the deceased will revert to State.

2.3.3 Distribution of property of Christians , Parsi and Jews dying Intestate:

Testamentary Succession among Christians and Parsis

The testamentary succession of a person can be done by making a Will or Probate. But the Will should be valid and the person making it, should be competent enough to make it or else the Will is considered to be invalid. Some of the important aspects of testamentary succession for the Christian and Parsis are:

Persons who are capable of making a Will:

Every person who is of sound mind and is not a minor can make a Will to dispose of his property. Hence, even a married woman or dumb, deaf or blind person is capable of making a Will, if they have the knowledge of what are doing and have the intention to do so. The competency of a person is the same as mentioned under the Indian Contract Act, for example, a person who is intoxicated or ill might not have the proper state of mind to make a Will.

Concept of Testamentary Guardian:

A father has been given the right to appoint a guardian or even guardians by the Will for his child or children till the child attains the age of majority.

Revocation of Will by Testator's Marriage:

Section 69 of the Succession Act, states that all the Wills shall be considered revoked by the marriage of the Testator that takes place after the making of Will

Privileged and Unprivileged Wills:

All the Wills that fulfil the terms mentioned under section 63 of the Act, are known as the 'Unprivileged Wills' and the wills that are made and executed u/s 66 of the Act are called 'Privileged Wills'.

Section 63 states the essentials for a valid will that is:

Every Will must have the signature of the Testator or his thumb impression could be used as his mark or signed by a person who is directed by the testator and in presence of the Testator.

The Will should also be signed by at least 2 witnesses, who approve that they have seen the testator sign the Will or affix his mark.

Section 66 states about the 'Privileged Wills' which can be made by persons who are in Armed Forces. This privilege has been given to soldiers or airmen or even mariners who are engaged in a war-like situation or an expedition involving actual warfare. These men can give their Will either in writing or orally and it is not necessary to have the signature of the Testator or even attestation by anyone else on that Will.

In the case of Privileged wills, the mode and manner of making and executing a Will shall be under Section 66 and it is comparatively less complicated than the ordinary unprivileged Will.

Bequests to religious and charitable causes:

Section 118 talks about the bequests that are made in favour of religious and charitable causes, but this section applies only to the Christians and not Parsis.

The section states that no man who is having a nephew or niece or any closer relative shall have the power to donate his property to any religious or charitable uses except by a Will that is executed not less than 12 months before his death and is submitted within 6 months from its execution in someplace as stated in the law for the safe custody of the Wills of the living persons. But this section was struck down for being unconstitutional by the Apex Court and thus Christians and Parsis have the right to leave their property for charity without being chained by the above provision.

Probate:

In case of a Parsi person dying, probate is necessary and needs to be issued if the Will is made or the property bequeathed under the Will is located within the jurisdiction of the three presidencies Calcutta, Madras and Bombay. Even if the Will is made outside the limits of these cities but the property attached to the Will comes under the jurisdiction of these three cities then also, probate has to be issued.

In the case of a dying Christian, it is not compulsory to obtain a Probate for his Will. The will alone is sufficient.

Mutual Concepts Shared By Christian And Parsi Succession Law

There are certain common ideas concerning illegitimate children which are shared and followed by both the communities in acquiescence.

The principles shared by both Christian and Parsis are:

Both the communities, Christian and Parsi don't identify the rights of an illegitimate child who is born out of wedlock and they give recognition to only those children who are born from legitimate marriages. This was stated in the case of Raj Kumar Sharma v. Rajinder Nath Diwan AIR 1987 Del 323. Thus, the child who is born out of wedlock cannot claim any rights over the succession from his biological parents into the Christian and Parsi law. The community gives importance to relations running from lawful wedlock only.

The Christian and Parsi succession laws don't make any distinction between the relations through the father or mother. In cases where there are both, paternal and maternal relations found of the intestate person, all the relations shall be liable for an equal share of the estate distributed in an equal manner. Further, Christians and Parsis also don't make any discrimination when it comes to full blood/ half-blood/ uterine relations and even a posthumous child is considered as a child who was present while the person died intestate on the condition that he was already conceived and was in the womb and is born alive.

Intestate Succession among Parsis

The Parsi intestate is administered by the rules mentioned under Part V chapter III of the Act and it states how the estate is distributed among the legal heirs of the deceased. Sections 51 to 56 state about the intestate succession of Parsis, the general rules of Parsi intestate succession are:

There is no share for a lineal descendant of an intestate who has died before the death of the intestate, only if the remote issue of a predeceased child of the intestate has left neither any widow nor widower, child or children nor any widow of any lineal descendant of such predeceased child. If the predeceased child of the intestate has any one of the abovementioned relations alive, then that child's share shall be counted for the distribution of the estate. This is mentioned under section 53 of the Act.

Further, it has been mentioned under section 53(b) of the Act, that if the predeceased child is a daughter, then the widower shall not get any share but the children of the predeceased daughter shall be receiving the share of their mother, which has to distributed equally among them. And in case there is no lineal descendant of a daughter, then her share won't be counted at all.

No share shall be given to any widow or widower of any relative of the intestate if that person has remarried during the lifetime of the intestate. Although, this rule has an exception that if the mother or paternal grandmother of the intestate marries again during the lifetime of the intestate, then also they will be entitled to share in the estate.

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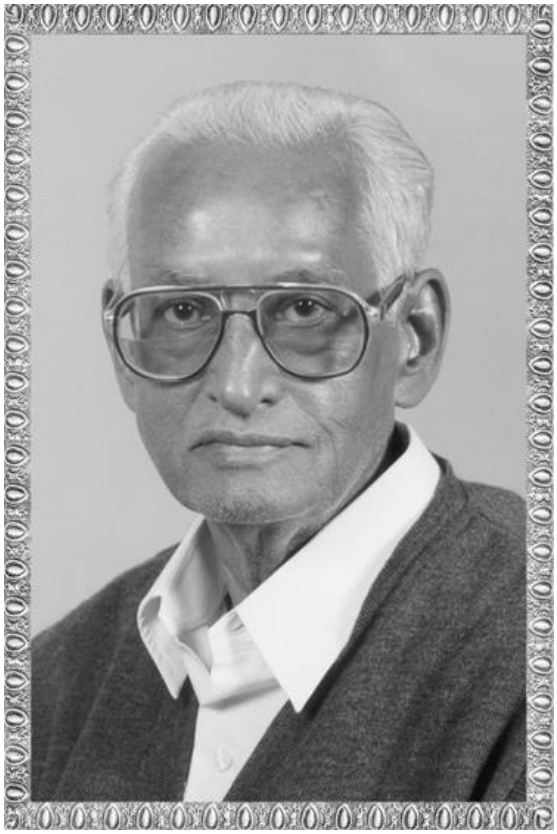

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UNIT -3 GIFTS

SR. NO.	TOPIC
3.1	ESSENTIALS OF VALID GIFTS UNDER DIFFERENT FAMILY LAWS
3.2	KINDS OF GIFT : COMPETENCY OF DONOR AND DONEE, SUBJECT MATTER OF GIFT; PRPERTIES WHICH CAN BE AND CANNOT BE THE SUBJECT MATTER OF GIFT , VOID GIFTS
3.3	ESSENTIALS OF VALID HIBA (GIFT) UNDER MUSLIM LAW , KINDS OF HIBA ,SADQUAH, MARZ-UL-MAUT, REVOCATIONS OF GIFT

3.1 ESSENTIAL OF VALID GIFTS UNDER DIFFERENT FAMILY LAWS :

Concept of Gift under Hindu law :

What is Gift under Hindu Law?

A gift under Hindu Law is a voluntary act where an individual gives up their rights to a property without seeking anything in return, while simultaneously creating rights for another person. The process of gifting is finalised only upon the acceptance of the gift by the recipient.

As per the Mitakshara, a gift in Hindu Law involves renouncing one's property rights without any consideration and establishing rights for someone else. This transference of rights to another person is fully realised only when the recipient agrees to receive the gift and in no other manner.

Essentials of Gift under Hindu Law

The essentials of gift in Hindu law include transferring property from one person to another without compensation, with elements like donor, donee, subject matter and proper acceptance of the parties.

1. Absence of Consideration

One of the fundamental principles of gifts under Hindu law is the absence of consideration. Unlike transactions involving money or compensation, gifts are characterised by their unconditional nature. When a gift is made, the idea of receiving something in return is completely absent. This ensures that the act of gifting is driven solely by the voluntary intention of the donor.

2. Presence of a Donor

In the process of gifting, the person making the gift is known as the "donor." It is important to note that the donor need not necessarily be the legal owner of the property being gifted. However, the donor must be of legal age to execute a gift under Hindu Law. Furthermore, the donor possesses the authority to transfer property, either wholly or subject to certain restrictions. This authority stems from the legal capacity to make such transfers.

3. Presence of a Donee

Conversely, the recipient of the gift is referred to as the "donee." Interestingly, Hindu law allows even minors to receive gifts. However, if the gift imposes any form of burden or responsibility on the minor, such obligations cannot be enforced until the minor reaches adulthood. Upon attaining the age of majority, the donee has the choice to accept the responsibility associated with the gift or return the gifted property.

4. Subject Matter of Gift

The ambit of gifting under Hindu law extends to various types of property:

- **Self-acquired property:** An individual may gift their separate or self-acquired property while ensuring the claims of those individuals they are legally obligated to support.
- **Stridhana:** A female is empowered to donate or bequeath her stridhana, which encompasses her separate property and assets.
- **Widows' Rights:** In specific circumstances, a widow may gift a portion of the assets she inherited from her deceased husband.
- **Parental Authority:** Parents hold the right to gift their belongings, whether inherited or self-acquired. However, this right is subject to the claims of those entitled to maintenance.
- **Coparcenary Interest:** A coparcener possesses the ability to gift their interest in coparcenary property, provided the rights of those entitled to maintenance are respected.
- **Impartible Estate:** The owner of an impartible estate is entitled to gift or bequeath it, unless specific traditions or tenures prevent such actions.

5. Gift of Undivided Interest

The Mitakshara law, which prevails in various states, imposes limitations on co-owners gifting their entire stake in a co-owned property. While there is no personal impediment preventing the donor from reclaiming the gifted property, such transactions are deemed invalid. The donor, however, retains the ability to gift under Hindu Law their stake with the consent of fellow co-owners.

6. Delivery of Possession

A gift under Hindu law is regarded as a disposition in presenti. For a gift to be legally effective, it must be appropriately executed, registered and delivered into the possession of the donee. This process involves the donor relinquishing their ownership rights in the property without expecting any form of compensation.

Simultaneously, the act of gifting creates rights for the recipient. However, the gift under Hindu Law attains its full legal status only upon the acceptance of the donee. This acceptance marks the completion of the gifting process and no other method can accomplish this.

7. Acceptance of Gifts

Crucially, for a gift under Hindu law to be considered legally valid, acceptance is imperative. Interestingly, the Transfer of Property Act does not prescribe a specific method for acceptance. Instead, the circumstances surrounding the transaction, as well as the actions and intentions of the parties involved, play a pivotal role. One mode of acceptance is the physical delivery of the gift document to the donee. This act may signify the donee's acceptance and the possession of the gifted property can also indicate acceptance.

Essential of HIBA (Gifts) Under Muslim law :

Introduction

The concept of Hiba under Muslim law has existed from 600 A.D. Gift is the transfer of a property from one person to another. Under Muslim law, the Gift transfer is not controlled by the Transfer of Property Act, 1882 but is governed by Muslim law itself. Muslims can divide their property in many ways out of which one is "Hiba" which is discussed in the paper. The delivery of gift in Muslim law can be actual or constructive. in actual delivery, the gift which is being made is physically transferred to the donee, and in case of constructive delivery it is just a symbolic transfer of property. Also, there are some instances where the delivery of the possession of the property is not necessary. In this paper, we have discussed about the essentials of Hiba, kinds of gift under Muslim law, how the gift can be revoked and also about the gift of Musha.

Under Muslim law, Muslims can divide their property in many ways. It could be through Gift which is known as Hiba in Muslim law and through a will which is known as Wasiyat in Muslim law. The term gift is known as 'Hiba' in Muslim law. Whereas in English, the word 'gift' has a much wider expression which is applicable to each and every transaction where an individual transfers his or her property to another without any consideration for the same. In contradiction to this, the term 'Hiba' in Muslim law has a much narrower connotation. A Muslim is allowed to give away his whole property in his lifetime but he can only give one-third of his property through a will. Also, the religion of the person to whom the gift is made is irrelevant. The transfer of property through the way of gift is immediate and without consideration. It is an unconditional transfer of property. Although the gift being a property has to be governed by the Transfer of property act, 1882. But Chapter 7 of Transfer of Property Act 1882 does not cover the gift under Muslim law. So, the Muslim Personal law governs the Muslim gift or "Hiba".

Essentials of Hiba

There are mainly three conditions which need to be fulfilled for the successful transfer of property or making of a gift by a Muslim person. These conditions are as follow:

1. Declaration of gift by the donor.
2. Acceptance of gift by the donee.
3. Transfer of possession by the donor and it's acceptance by the donee.

Before proceeding further let us first understand the meaning of terms donor and donee.

The person who signifies his willingness to the other person for transferring his property is known as a Donor. On the other hand, the person who expresses his consent for the acceptance of the gift made by the donor is known as the Donee.

The requisites of the donor are as follow:

- Firstly, the person who is giving the property or making the gift i.e Donor, he/she must be a Muslim. Any other person in place of Muslim cannot make Hiba.
- Secondly, the person should be of the competent age i.e he/she must be major.
- Thirdly, the consent of the donor must be free. If the consent of the person is obtained by force, coercion, undue influence is no consent and such a gift is no gift.
- Fourthly, the person must be of sound mind. Any gift made by a person of unsound mind is not a valid gift.
- And lastly, the donor should be having the ownership of the property which he is going to give away in the form of a gift.

Declaration of gift by the donor

Declaration of gift by the donor represents his/her willingness to make a gift. The declaration made should be clear and not ambiguous. A donor can make the declaration in two ways that are oral or written.

In the famous case of Ilahi Samsuddin v. Jaitunbi Maqbul, it was held by the apex court that under Muslim laws the declaration made by the donor and the acceptance made by the donee can be oral irrespective of the nature of the property. The declaration and acceptance made in the form of writing are through the way of gift-deed. In Muslim law, the gift deed is known as Hibanama. The Hibanama may not be on the stamp paper and is not compulsory to be registered.

The requisites of the donee

- Firstly, religion is no bar for accepting the gift which has to be mandatorily made by a Muslim. The donee can be of any religion, Muslim or non-muslim.
- Secondly, the age is again not a bar for a donee. He/she can be of any age i.e. major or minor.
- Thirdly, a gift can be made to an unborn child, but it must be in the womb of her mother. This is so because of the Transfer of property act, 1882 which talks about the benefit for the unborn person.
- Fourthly, the transfer of property can also be made to a religious entity.

3.2 Kinds of Gift : Competency of Donor and Donee, Subject matter of Gift, properties which can be and cannot be subject matter of gift, void gifts

Modes of making a gift

Section 123 of the Transfer of Property Act deals with the formalities necessary for the completion of a gift. The gift is enforceable by law only when these formalities are observed. This Section lays down two modes for effecting a gift depending upon the nature of the property. For the gift of immovable property, registration is necessary. In case the property is movable, it may be transferred by the delivery of possession. Mode of transfer of various types of properties are discussed below:

Immovable properties

In the case of immovable property, registration of the transfer is necessary irrespective of the value of the property. Registration of a document including gift-deed implies that the transaction is in writing, signed by the executant (donor), attested by two competent persons and duly stamped before the registration formalities are officially completed. In the case of *Gomtibai v. Mattulal*, it was held by the Supreme Court that in the absence of written instrument executed by the donor, attestation by two witnesses, registration of the instrument and acceptance thereof by the donee, the gift of immovable property is incomplete.

The doctrine of part performance is not applicable to gifts, therefore all the conditions must be complied with. A donee who takes possession of the land under unregistered gift-deed cannot defend his possession on being evicted. The following must be kept in mind regarding the requirement of registration:

- Registration of the gift of immovable property is must, however, the gift is not suspended till registration. A gift may be registered and made enforceable by law even after the death of the donor, provided that the essential elements of the gift are all present.
- In case the essential elements of a valid gift are not present, the registration shall not validate the gift.

It has been observed by the courts that under the provisions of the Transfer of Property Act, Section 123, there is no requirement for delivery of possession in case of an immovable gift. The same has been held in the case of *Renikuntla Rajamma v. K. Sarwanamma* that the mere fact that the donor retained the right to use the property during her lifetime did not affect the transfer of ownership of the property from herself to the donee as the gift was registered and accepted by the donee.

Movable properties

In the case of movable properties, it may be completed by the delivery of possession. Registration in such cases is optional. The gift of a movable property effected by delivery of possession is valid, irrespective of the valuation of the property. The mode of delivering the property depends upon the nature of the property. The only things necessary are the transfer of the title and possession in favour of the donee. Anything which the parties agree to consider as delivery may be done to deliver the goods or which has the effect of putting the property in the possession of the transferee may be considered as a delivery.

Actionable claims

Actionable claims are defined under Section 3 of the Transfer of Property Act. It may be unsecured money debts or right to claim movables not in possession of the claimant. Actionable claims are beneficial interests in movable. They are thus intangible movable properties. Transfer of actionable claims comes under the purview of Section 130 of the Act. Actionable claims may be transferred as gift by an instrument in writing signed by the transferor or his duly authorised agent. Registration and delivery of possession are not necessary.

A gift of future property

Gift of future property is merely a promise which is unenforceable by law. Thus, Section 124 of the Transfer of Property Act renders the gift of future property void. If a gift is made which consists of both present as well as future property, i.e., one of the properties is in existence at the time of making the gift and the other is not, the whole gift is not considered void. Only the part relating to the future property is considered void. Gift of future income of a property before it had accrued would also be void under Section 124.

Donor

The expression ‘donor’ means any person who makes a gift. It is not necessary that he should be the owner of the property, but he must be competent to transfer the subject of gift. A person, who is competent to transfer the property in whole or part and absolutely or with attachment of conditions, can be a donor. As per Hindu Law, the karta of the Hindu family has a right to dispose of the property by way of gift under certain circumstances. If circumstances or conditions are satisfied, the karta—donor is competent to transfer.

A coparcener can make a gift of his undivided interest in the coparcenary property to another coparcener or to a stranger with the prior consent of other coparceners. Such a gift will be legal and valid. A gift made by the coparcener to his brother should be construed as renunciation of his undivided interest in the coparcenary in favour of his brother and his sons, who were the remaining coparceners. A gift was, therefore, valid and consent of other coparceners was held immaterial.**Thamma Venkata Subbamma (Dead) vs Thamma Rattamma**

A **father** can make a gift of a small portion of his immovable property to his daughter at or after marriage; such gift being customary and allowed under Hindu Law.**A Basaviah Gowder vs Commissioner of Gift Tax**

A **Hindu widow** in possession of the estate of her deceased husband can make an alienation for religious purposes which are not essential or obligatory, but are still pious observances, contributing to the bliss of the deceased husband's soul.

Gifts by a widow of landed property to her daughter or son in-law on the occasion of the marriage or any ceremonies connected with the marriage are recognized in Hindu Law. Some decisions go to the length of holding that there is a moral or religious obligation of giving a portion of the joint family property for the benefit of the daughter and the son in-law, and a gift made long after the marriage may be supported upon the ground that the gift when made fulfils that moral or religious obligation.**Kamala Devi vs Bachu Lal Gupta**

The position of **stridhana** of a Hindu married woman's property during coverture is absolutely clear and unambiguous. She is the absolute owner of such property and can deal with it in any manner she likes. She may spend the whole of it or give it away at her own pleasure by gift or will without any reference to her husband.**Pratibha Rani vs Suraj Kumar**

Donee

Donee is the person who accepts the gift. A minor may be a donee; but if the gift is onerous, the obligation cannot be enforced against him while he is a minor. When he attains majority, he must either accept the burden or return the gift. The donee must be an ascertainable person.

Subject matter of gift

The property of the following nature may be validly gifted under Hindu Law

1. A Hindu may dispose of by gift his separate or self-acquired property, subject to the claims for maintenance of those he is legally bound to maintain.
2. A female may dispose of her stridhana by gift or will.
3. A widow may in certain cases by gift dispose of a small portion of the property inherited by her from her husband.
4. A father may by gift dispose of the whole of his property, whether ancestral or self-acquired. However, such gift by the father is subject to the claims of those he is entitled maintain. Even under Dayabhaga Law, a father is entitled to dispose of even the whole of his property, whether ancestral or self-acquired, subject to the claims of those who are entitled to be maintained by him.
5. A coparcerner may dispose of his coparcernary interest by gift subject to the claims of those who are entitled to be maintained by him.
6. The owner of an impartible estate may dispose of the estate by gift or will, unless there is a special custom prohibiting alienation or the tenure is of such a nature that it cannot be alienated.

What property may be gifted

- A Hindu may dispose of by gift his separate or self acquired property, subject in certain cases to the claims for maintenance of those he is legally bound to maintain.
- A coparcerner , may dispose of his coparcernary interest by gift subject to the claims of those who are entitled to be maintained by him.
- A father may by gift dispose of the whole of his property, whether ancestral or self acquired, subject the claims of those he is entitled to be maintained by him.
- A female may dispose of her stridhana by gift or will, subject in certain cases to the consent of her husband.
- A widow may in certain cases by gift dispose of a small portion of the property inherited by her from her husband, but she cannot do so by will.
- The owner of an impartible estate may dispose of the estate by gift or will, unless there is a special custom prohibiting alienation or the tenure is of such a nature that it cannot be alienated.

A gift under Hindu law need not be in writing. However, a gift under the law is not valid unless it is accompanied by delivery of possession of the subject of the gift from the donor to the donee. However where physical possession cannot be delivered, it is enough to validate a gift, if the donor has done all that he could do to complete the gift, so as to entitle the donee to obtain possession.

Gifts by Hindus where transfer of property act applies.

A gift under the above act can only be effected in the following manner.

- For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.
- For the purpose of making a gift of a movable property, the transfer may be effected by a registered document signed by the donor or by delivery.

3.3 Kinds of Gifts Under Muslim Law :

Here are several kinds of Hiba:

1.**Hiba-bil-iwaz (with exchange)**

Muslim law also recognizes gifts with an exchange, as it differs from simple gifts. These gifts have two essential elements and are called hiba-bil-iwaz:

the goodwill intention of the donor to give the gift and to divest themselves of their full rights over the property, and to give it to the donee

payment by the donee of the consideration.

There is a donor and a donee relationship in a regular hiba-bil-iwaz. The donor makes the gift, and the donor takes the donor into account, but the donor is the main subject. A real hiba-bil-iwaz is a gift in which iwaz is indeed another self-supporting gift. This second gift is not mentioned in the first gift but is a return instead of the first gift. These, therefore, are two separate and independent gifts in which the parties are identical, but the donor in one is the donee in another.

It is worth noting here that the delivery of the property is not an essential requirement. therefore, hiba-bil-iwaz is an important means to make a present of Mushaa in an estate that can be legally split. Mushaa is an undivided share in the property.

Bona-fide consideration is of utmost importance of Hiba-bil-iwaz, without which, the gift would be simple. It may be in form of money, relinquishment of a claim, etc but not of love, affection, and care. It can also be treated as a sale where the consideration is more than Rs. 100 a hiba-bil-iwaz must be affected with the help of a written, attested, and registered document.

2.**Hiba-ba-shart ul-iwaz**

Gifts made with a stipulation for a return from the side of the donee become irrevocable once the stipulation is fulfilled. A Hiba-ba-shartul-iwaz is a gift that is supposed to be given with a promise of return. This promise that the donee must perform until the gift is revoked but when performed, the gift is irrevocable. Where the gift is of an undivided share in the property, without delivery of property it is invalid.

3.**Sadaqah**

'Sadaqah' is mainly a religious gift. Supply of ownership shall be an obligatory prerequisite for the validity of Sadaqah. A simple gift can be withdrawn, but Sadaqah cannot be withdrawn. In the case of this gift, as it is generally understood, love and affection can prevail towards the donee, or like a return for services provided by the donee in the past, or maybe a simple act of gratuitousness or benevolence, or in the future, it can be expected by favor or reward. In addition to these materialistic or human desires, the purpose may also be religious merits or simply the public benefit. The supply of possession is an obligatory requirement for the validity of the Sadaqah and it admits no exceptions other than a simple gift. Thus, Sadaqah is not valid if the subject of a gift is an indivisible share in the property.

4.**Ariyat**

'Ariyat' is a gift of the right to use the product for a certain period on a particular estate and may be revoked to the grantor's delight. Indeed, it is more like a license. It is personal and neither inherited nor transferable. They are revocable and confer no right on the grantor in the corpus, but only on the revenues derived from the property or profit. For a simple gift, all incidents of ownership of the property will be transferred. It shall be a transfer of property itself.

5.**Waqf**

Waqf is a continuous consecration of the property to God for the property's usufruct to be used for religious, religious, or charitable purposes. The revenues that may be used for the desired purposes only come from the property. The Waqf estate is inherent in a permanent commitment and therefore irrevocable.

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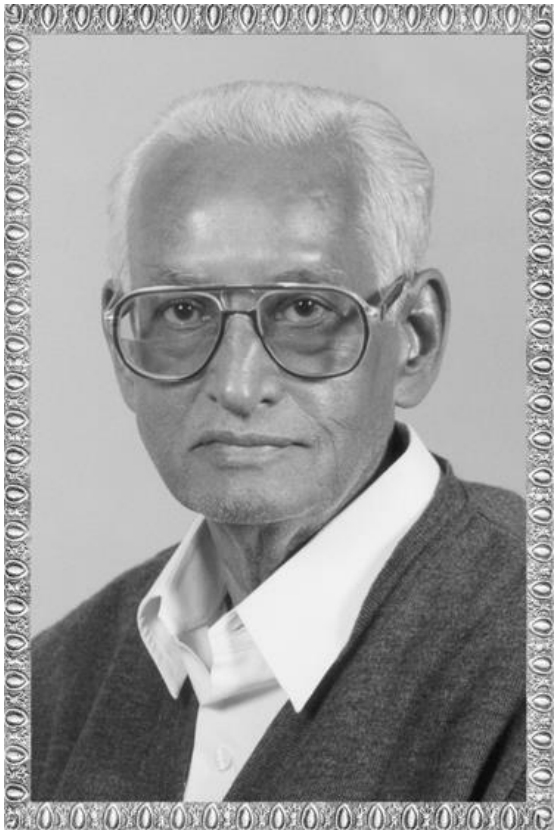

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UNIT -4- FAMILY COURT ACT AND MISCELLANEOUS PROVISIONS

SR. NO.	TOPIC NAME
4.1	FAMILY COURTS : CONCEPT, NEED , LAW COMMISSION REPORTS
4.2	POWERS AND JURISDICTION OF THE FAMILY COURT
4.3	ISSUE TO BE DECIDED BY THE FAMILY COURT, QUALIFICATION OF FAMILY COURT JUDGE
4.4	PROVISIONS REGARDING APPEARS OF ADVOCATES IN FAMILY COURT EXEMPTION FROM COURT FEES
4.5	PROVISIONS OF APPEAL UNDER THE FAMILY COURTS ACT
4.6	SALIENT FEATURES OF THE PROTECTION AGAINST THE DOMESTIC VIOLENCE ACT, 2005

4.1 FAMILY COURTS : CONCEPT, NEED, LAW COMMISSION REPORTS

Introduction

Before 1984, all family matters were heard by the ordinary civil court judges who used to take a long time to provide relief to the parties.

The regular courts are burdened with so many civil matters that no attention was given to the family-related disputes.

The Law Commission in its 59th Report (1974) also emphasised that there is a need to distinguish the family-related disputes from common civil proceedings and reforming efforts should be made to settle the disputes between a family.

Therefore, to provide speedy settlement with fewer expenses and formalities, in disputes relating to marriage and family and to make an agreement between the parties for their conciliation, the Family Courts Act, 1984 was enacted by Parliament on 14, September 1984 to establish family courts in India. This act contains 6 chapters and 23 sections.

Objectives of the Family Court

To provide speedy justice and disposal of family cases at the earliest.

To promote conciliation and mediation in disputes relating to marriage.

To preserve family ties.

To solve the matter of family within a short period.

Establishment of Family Court

Section 3 of the Family Court Act, 1984 provides that, the State government, after consultation with the High Court shall establish the family court in every area of the state where the population is exceeding 1 million or in the area where the State government deem necessary.

Appointment of Judges (Section 4)

Section 4 of the Family Courts Act, 1984 says that the state government has the power to appoint one or more persons as the judges of the family court after consulting with the High Court.

For Appointing a Judge of the Family Court

Following qualifications are required-

He must have worked for a term not less than seven years in a judicial office in India or in the office of a member of a tribunal or any post under the Centre or a State which requires special knowledge of law; or

He must have worked as an advocate of a High Court or two or more courts of succession for a term not less than seven years; or

He must possess such qualifications as prescribed by the Central government after consulting with the Chief Justice of India; or

He must not have attained the age of sixty-two years.

Jurisdiction of the Family Court (Section 7)

Section 7 of this act grants the family courts the same powers and jurisdiction as the District Court or Subordinate Civil Courts in their suits and proceedings.

Section 7 (2) gives the family courts the authority to exercise the same jurisdiction as a Magistrate of the First Class under Chapter IX of the Code of Criminal Procedure, 1973, as well as any other jurisdiction provided by law.

Types of Cases that are heard in Family Courts

Dissolution of marriage

Custody of child

Domestic violence

Maintenance

Property disputes

Dissolution of Marriage

When someone wishes to terminate their marriage, they can file a case in family court and get a court order. Divorce and annulment processes may be used to end a marriage.

The court can also issue a separation in which the parties remain legally married but receive property, alimony, and child custody orders.

Child custody

The explanation (g) in Section 7(1) provides that the family court has jurisdiction to grant the custody of the child to a proper person and to make that right person the guardian of a minor.

Property Disputes

As per the explanation (c) of Section 7(1) of the family courts act, the family court has jurisdiction over the disputes related to the property of the parties to the marriage.

Maintenance

Under the Family Court Act, explanation(f) of Section 7(1) clearly provides that the family courts have jurisdiction over the suits or proceedings for maintenance.

Also under Section 7(2), the family courts have the power to exercise a jurisdiction which is exercised by a Magistrate of the first class under Chapter IX of the Code of Criminal Procedure, 1973, (CrPC), which is related to maintenance of wife, children and parents.

This means the family courts can grant maintenance under Section 125 of CrPC.

Domestic Violence Protection Orders

Domestic abuse victims can obtain protection orders from the family court to keep their assailant at bay.

Procedures followed by the Family Courts

The family court shall be deemed to be a civil court and shall have the powers of such court.

Section 10(1) applies the provisions of the Code of Civil Procedure, 1908, in the suits or proceedings of the family court.

Section 10(2) says that the provisions of the CPC, 1908 are applied on the suits and proceedings of the family court, under chapter IX of the code.

Section 10(3) gives power to the family court to lay down its own procedure according to the circumstances of the suit or proceeding or at the truth of the facts made by one party and refused by another, intending to arrive at a settlement.

Section 11 of the act, the proceedings of the family court may be held in camera, if the court feels so, or any party to the suit wants to do such.

The family courts work with fewer formalities, they don't record the lengthy evidence of witnesses, only that evidence of the witness is recorded which is related to the subject matter.

According to Section 14 of the act any report, statement or document, related to the subject matter is admissible under Indian Evidence Act, 1872 (IEA).

Also, as per Section 15 of the act, it is not necessary for a family court to record the evidence of a witness at length, only that part is sufficient which is related to the suit or proceeding, and it should be signed by the judge and the witness.

Duty of Family Court (Section 9)

Section 9 of this act prescribes the duty of the family court to make reasonable efforts for reconciliation between the parties.

It prescribes the duty of the family court to make efforts to promote reconciliation between the parties.

As per Section 9(1), in the first instance, the family court, in every suit or proceeding, shall make efforts to convince the parties to settle the dispute with an agreement.

According to Section 9(2), if the family court finds that at any stage of the proceeding there is a reasonable probability of settlement between the parties, the court has the power to adjourn the proceedings until the settlement is reached.

Personal Appearance is Mandatory

Personal appearance is mandatory in a family court. Parties must not be entitled to be represented by a lawyer. They must appear themselves and put their case forward.

Records of Oral Evidence and Affidavit

The court shall record what the witness deposes, and the memorandum shall be signed and form a part of a record.

The court may, on the application of any of the parties, summon and examine any such person as to the facts contained in the affidavit.

Judgment

The judgment of a family court shall contain a concise statement of the case, the point for determination, the decision thereon, and the reasons for such decision.

Appeal

An appeal against the judgment passed by the family court can be filed in the High Court within 30 days of the date of judgment.

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Need of Family Court :

The purpose of the 1984 Family Court Act was to establish a fundamentally different methodology for the Family Court than is typically used in regular civil procedures. Late Smt. Durgabai Deshmukh was the first to highlight the importance of setting up Family Courts. Following a 1953 journey to China, where she had the opportunity to see how family courts operated, Smt. Deshmukh spoke with several judges and legal experts about the topic before putting Prime Minister Pt. Jawaharlal Nehru's plan to establish Family Courts in India into action. Not only property disputes but human problems are handled by the Family Court. As a result, rather than being academic, abstract, or dogmatic, its attitude to marriage concerns is far more constructive, affirming, and productive. Matrimonial concerns need to be handled sensitively and from a human perspective. Care must be used while handling delicate matters about marriage, and legal laws must be defined and interpreted while keeping in mind the frailties of human nature. So, concerning this, we will learn about the duties and functions of the family courts, the roles of Family court judges, and case laws with the help of the Family Court Act, of 1984.

The aim that the family court is based on the assistance of smooth and effective disposal of cases relating to family matters. The purpose of the Family Court Act, according to its preamble, is to establish a Family Court and encourage conciliation in the swift resolution of issues about marriage, family matters, and related matters. The Act's Sections 7 and 8 address the Family Court's jurisdiction and the exclusion of jurisdiction in some situations, respectively. The Family Court is required by Section 9 to attempt to settle. As required by section 9(1) of the Act, every effort must be made initially to support and encourage the parties to settle. Under section 9(2) if there is any possibility of any settlement between the parties the court may adjourn the meetings and enable the attempt to settle the same.

The Family Court focuses on enabling settlement to assist in resolving the disputes between the parties relating to the matters based on very crucial cases that need the attentiveness of the judges, therefore, Family Court Judge must be extremely sensitive to the issue at hand, mindful of the need for prompt delineation, and avoid putting off making decisions because doing so can lead to resentment, which erodes feelings over time. A family court judge must also have total control over the case and not let it drift aimlessly down the unpredictably vast river of time, never knowing when it will crash upon the banks or find refuge in a corner tree that appears to be "still" on some unidentified bank of the river as perfectly highlighted in the case of Shamina Farooqui v. Shahid Khan, 2015. Human approach, sensibility, and consistency are the important qualities that family court judges should profess.

Numerous rulings highlight the value of settling and restate the Family Court's responsibilities in facilitating one. The Supreme Court has ruled in the case of Durga Prasad v. Union of India, 1998 that the Family Court is required by Section 9 to attempt to help and urge the parties to settle. Only if it is determined that a settlement is not achievable following the aforementioned exercise should the case be posted for subsequent actions, such as written statement/counter, problems, trial, and so forth.

Law Commission Report :

The immediate reason for setting up of family courts was the mounting pressures from several women's associations, welfare organisations and individuals for establishment of special courts with a view to providing a forum for speedy settlement of family-related disputes.

Emphasis was laid on a non-adversarial method of resolving family disputes and promoting conciliation and securing speedy settlement of disputes relating to marriage and family affairs. In 1975, the Committee on the Status of Women recommended that all matters concerning the 'family' should be dealt with separately.

The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family, the court ought to adopt and approach radical steps distinguished from the existing ordinary civil proceedings and that these courts should make reasonable efforts at settlement before the commencement of the trial. Gender-sensitized personnel including judges, social workers and other trained staff should hear and resolve all the family-related issues through elimination of rigid rules of procedure.

The Code of Civil Procedure was amended to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails.

Hence a great need was felt, in the public interest, to establish family courts for speedy settlement of family disputes. The Family Courts Act which was passed in 1984 was part of the trend of legal reforms concerning women. The President gave his assent to the Family Courts Act on September 14, 1984. The Act provides for a commencement provision which enables the Central Government to bring the Act into force in a State by a notification in the Official Gazette, and different dates may be appointed for different States.

This Act has 6 chapters under various heads such as Preliminary, Family Courts, Jurisdiction, Procedure, Appeals and Revisions and Miscellaneous. Section 3 of the Act empowers the State governments after consultation with the High Court, to establish, for every area in the State comprising a city or town, whose population exceeds one million, a family court.

The criteria for appointment of a Family Court Judge are the same as those for appointment of a District Judge requiring seven years experience in judicial office or seven years practice as an advocate. The Central Government is empowered to make rules prescribing some more qualifications. Apart from prescribing the qualification of the Judges of Family Courts, the Central Government has no role to play in the administration of this Act. Different High Courts have laid down different rules of the procedure. A need for a uniform set of rules has however been felt.

The Act provides that persons who are appointed to the family courts should be committed to the need to protect and preserve the institution of marriage and to promote the settlement of disputes by conciliation and counselling. Preference would also be given for appointment of women as Family Court Judges. Section 5 enables the State Government to associate institutions engaged in promoting welfare of families, especially women and children, or working in the field of social welfare, to associate themselves with the Family Courts in the exercise of its functions. The State Governments are also required to determine the number and categories of counsellors, officers etc. to assist the Family Courts (sec. 6).

Section 7 confers on all the family courts the power and jurisdiction exercisable by any District Court or subordinate civil court in suits and proceedings of the nature referred to in the explanation to section 7(1) of the Act. These, inter-alia relate to suits between parties to a marriage or for a declaration as to the validity of marriage or a dispute with respect to the property of the parties, maintenance, guardianship etc.

In addition, the jurisdiction exercisable by a First Class Magistrate under Chapter IX of the Cr.P.C. i.e. relating to order for maintenance of wife, children or parents, has also been conferred on the family courts. There is also an enabling provision that the family courts may exercise such other jurisdiction as may be conferred on them by any other enactment. Provision has also been made to exclude jurisdiction of other courts in respect of matters for which the family court has been conferred jurisdiction.

Chapter IV of the Act deals with the procedure of the family court in deciding cases before it (sec. 9). It has been made incumbent on these courts to see that the parties are assisted and persuaded to come to a settlement, and for this purpose they have been authorized to follow the procedure specified by the High Court by means of rules to be made by it. If there is a possibility of settlement between the parties and there is some delay in arriving at such a settlement, the family court is empowered to adjourn the proceedings until the settlement is reached.

Under these provisions, different High Courts have specified different rules of procedure for the determination and settlement of disputes by the family courts. In the rules made by the Madhya Pradesh High Court, the family court judge is also involved in the settlement, and if a settlement cannot be reached then a regular trial follows. It is also provided that the proceedings may be held in camera if the family court or if either party so desires.

The family court has also been given the power to obtain assistance of legal and welfare experts. Section 13 provides that the party before a Family Court shall not be entitled as of right to be represented by a legal practitioner. However, the court may, in the interest of justice, provide assistance of a legal expert as amicus curiae.

Evidence may be given by affidavit also and it is open to the family court to summon and examine any person as to the facts contained in the affidavit. The judgement of the family court iin concise and simple containing the point for determination decision and the reason for the same. The decree of the Family Court can be executed in accordance with the provisions of the CPC or Cr.P.C., as the case may be. An appeal against judgement or order of family court lies to the High Court.

4.2 Powers and Jurisdiction of the Family court :

Jurisdiction

Section 7 of this act confers those power and jurisdiction on the family courts which are exercised by the District Court or Subordinate Civil Courts in their suits and proceedings. The Explanation of this section tells about the nature of the suits and proceedings, which are as follows:

- A suit or proceeding for the decree of nullity of marriage, or restitution of conjugal rights, or for the dissolution of the marriage between the parties;
- A suit or proceeding for determining the validity of a marriage or matrimonial status of a person;
- A suit or proceeding in the matter related to the properties between the parties to a marriage;
- A suit or proceeding for an injunction or order arising out of a marriage;
- A suit or proceeding for declaring the legitimacy of a person;
- A suit or proceeding for maintenance;

A suit or proceeding for the guardianship of the person, or custody of any minor.
Under Section 7(2), the family courts have also the power to exercise a jurisdiction which is exercised by a Magistrate of the first class under Chapter IX of the Code of Criminal Procedure, 1973 and such other jurisdiction as provided by any other enactment.

Exclusion of jurisdiction and pending proceedings.—

Where a Family Court has been established for any area,—

(a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974),—

(i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established

Act to have overriding effect.—

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. 21.

Power of High Court to make rules.—

(1) The High Court may, by notification in the Official Gazette, make such rules as it may deem necessary for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) normal working hours of Family Courts and holding of sittings of Family Courts on holidays and outside normal working hours;

(b) holding of sittings of Family Courts at places other than their ordinary places of sitting;

(c) efforts which may be made by, and the procedure which may be followed by, a Family Court for assisting and persuading parties to arrive at a settlement.

Power of the Central Government to make rules.—

(1) The Central Government may, with the concurrence of the Chief Justice of India, by notification, make rules prescribing the other qualifications for appointment of a Judge referred to in clause (c) of sub-section (3) of section 4.

(2) Every rule made under this Act by the Central Government shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Power of the State Government to make rules.—

(1) The State Government may, after consultation with the High Court, by notification, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1) such rules may provide for all or any of the following matters, namely:—

(a) the salary or honorarium and other allowances payable to, and the other terms and conditions of Judges under sub-section (6) of section 4;

(b)the terms and conditions of association of counsellors and the terms and conditions of service of the officers and other employees referred to in section 6;

(c) payment of fees and expenses (including travelling expenses) of medical and other experts and other persons referred to in section 12 out of the revenues of the State Government and the scales of such fees and expenses;

(d) payment of fees and expenses to legal practitioners appointed under section 13 as amicus curiae out of the revenues of the State Government and the scales of such fees and expenses;

(e) any other matter which is required to be, or may be, prescribed or provided for by rules. (3) Every rule made by a State Government under this Act shall be laid, as soon as may be after it is made, before the State Legislature.

4.3 Issues to be decided by the family court , Qualifications of Family court judge :

India has one of the oldest known legal systems and practices. It's legislation and jurisprudence spans many decades, forming a living tradition that has developed and evolved with the lives of its people from different backgrounds. India is endowed with the world's second-largest number of population, so the number of married people is obviously also high. With the large number of married people, marital disputes are also growing due to a variety of factors and most of them are going to court for remedy.

Family courts are made to resolve disputes arising from family issues such termination of marriage or custody of children. One of the family court's key purposes is to resolve legal disputes that might occur within families. Family courts have a very important responsibility to reduce the workload of conflicts over an overloaded judicial system, providing remedy to litigants, who are forced to endure continuous long delays to get justice. Family courts were established under section 3 of the Family courts act, 1984 with the objective to resolve the dispute speedily by adopting simple procedure.

In case of *Lata Pimple v. Union of India* the state government was under an obligation to establish family courts in the first instance in the metropolitan cities having a population of one million and above. This is a rational and intelligible difference made to secure aims and objects of the Act. The metropolitan cities having a population of one million and above is a place for various matrimonial disputes, It was further held that: "It was noticed that the petitions under the Hindu Marriage Act could not be disposed of within a reasonable time and some matters remained pending for years together. It is with this object in mind the family courts have been established in the metropolitan cities where the population exceeds one million. It is clear that what is decipherable and intelligible distinction in each class has been carved out having reasonable nexus with the aims and objects of the Act and in order to achieve these aims and objects in the first instance, family courts were established on the basis of population. The Section cannot be challenged as being discriminatory and violative of Article 14 of constitution."

It is not mysterious that the backlog of cases is a gaping backdoor at the Indian Judiciary. The number of matters being brought before the Supreme Court is steadily on the rise. There are cases dealing with a broad range of issues that persist for decades, such as family matters and land. In such a scenario, the transference of cases to various courts established solely for that purpose not only ensures their speedy disposal, but also ensures that the cases are dealt with more effectively by specialized court experts; it then becomes essential to consider the principle that "justice delayed is justice denied."

Furthermore, it is relevant to note here that marriage as an institution has become the subject of considerable judicial scrutiny. There are a lot of judicial regulations relating to marriage and its different aspects. The outcome is that the privacy of this institution has been threatened, in addition to the various advantages that these legal provisions may offer. There are also instances of abuse of laws such as Indian Penal Code- Section 498A, Protection of Women from Domestic Violence Act, Section 125 Code of Criminal Procedure, Child Custody laws to name a few.

There are issues such as alimony that become the subject of great controversy and cause family harassment. What is also becoming a concern is that personal problems are mixed with legal concerns and contribute to the needless prolongation of the disposal of these proceedings. Because of the ensuing

cultural war between Conservatives and Liberals, the younger generation, being made a scapegoat in the changing times, wastes its useful youth in the precincts of the litigating corridors of family courts, criminal courts, and magistrate courts waiting for justice in long queues.

The purpose of these courts is to create a congenial environment where family disputes are resolved in a friendly manner. Cases are being steered separate from a systematic legal system's trappings. Conciliators are experts appointed by the Tribunal. The aggrieved party has the right of filing an appeal before the High Court once a final order is passed. Such an appeal shall be heard by a two-judge court. The most unique aspect of the proceedings before the Family Court is that they are referred to conciliation for the first time and only when conciliation proceedings fail to successfully resolve the issue is the matter taken up by the Court for trial. The act specifies that a party is not allowed to be assisted by an attorney without the Court's express approval but this approval is usually given by the judge.

Issues in Functioning of Family Courts

The primary function of the Family Courts is to help in the efficient and easy disposition of family cases. However, there are certain issues, like any other system, that become a subject of problem when it comes to the working of these courts. One such problem is continuity. For example, counselors are changed every three months in Tamil Nadu's family courts. Thus, if cases stretch for a longer period of time than this, the female or the aggrieved person has to adjust with new counselors and their narration has to be repeated several times.

A significant limitation of the Family Court Act is that it does not expressly allow courts to issue injunctions for domestic abuse prevention. While progress has been made, viz. the enactment of the 2005 Protection of Women from Domestic Violence Act, which now also extends to punishing women for violent acts; issues of jurisdiction remain to be addressed. It must be comprehended that the Family Courts Act should be read in its entirety, i.e. in accordance with the rules in other laws, such as the Code of Civil Procedure on jurisdictional matters.

Although the Family Court has constrictive authority and has no authority to decide hatred issues, people do not appear to take the court as severely as a magistrate or a civil court in the city would. Additionally, the Family Courts Act stipulated that the majority of judges must be women. That provision, however, was not complied with. During the workshop organized by the National Commission for Women in March 2002, it was noted that there were about 18 female judges out of 84 judges in all the 84 courts that existed previously in the Indian Family Courts.

Government is empowered to establish rules that prescribe a few more qualifications. In addition to prescribing the qualification of Family Court Judges, the Central Government has no role to play in administering this Act. Various High Courts have laid down different procedural rules. The lack of uniformity, however, may also be one of the reasons behind the fact the civil courts often hear family disputes. Family courts also need to associate with feminist organizations and nongovernmental organizations dealing with family, female and child welfare.

A further ambiguity is that the Act provides, by virtue of Section 13, that any individual before a family court is not compelled to be portrayed by a lawyer as a right. The court may, however, provide help and support to a legal expert as amicus curiae, in the interests of justice. This is an instance of which due to the procedural errors the aim behind the family court is vanquished. The fact that the hearings are conciliatory does not alleviate them of the complex legal issues that the family dispute can entail.

Qualification of Family Court Judges :

Appointment of Judges.Previous Next

(1) The State Government may, with the concurrence of the High Court, appoint one or more persons to be the Judge or Judges of a Family Court.

(2) When a Family Court consists of more than one Judge,—

(a) each of the Judges may exercise all or any of the powers conferred on the Court by this Act or any other law for the time being in force;

(b) the State Government may, with the concurrence of the High Court, appoint any of the Judges to be the Principal Judge and any other Judge to be the Additional Principal Judge;

(c) the Principal Judge may, from time to time, make such arrangements as he may deem fit for the distribution of the business of the Court among the various Judges thereof;

(d) the Additional Principal Judge may exercise the powers of the Principal Judge in the event of any vacancy in the office of the Principal Judge or when the Principal Judge is unable to discharge his functions owing to absence, illness or any other cause.

(3) A person shall not be qualified for appointment as a Judge unless he—

(a) has for at least seven years held a judicial office in India or the office of a Member of a Tribunal or any post under the Union or a State requiring special knowledge of law; or

(b) has for at least seven years been an advocate of a High Court or of two or more such Courts in succession; or

(c) possesses such other qualifications as the Central Government may, with the concurrence of the Chief Justice of India, prescribe.

(4) In selecting persons for appointment as Judges,—

(a) every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected; and

(b) preference shall be given to women.

(5) No person shall be appointed as, or hold the office of, a Judge of a Family Court after he has attained the age of sixty-two years.

(6) The salary or honorarium and other allowances payable to, and the other terms and conditions of service of, a Judge shall be such as the State Government may, in consultation with the High Court, prescribe.

4.4 Provisions regarding appearance of advocates in family courts Exemption from court fees:

Family Courts Act, 1984 aims is preserving the family values and in the stabilization of a sacred institution of marriage. Legal provision for Right to legal representation in Family CourtsSection 13 says Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner: PROVIDED that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as amicus curiae.

Right of advocates to practice: Section 30 of the Advocate's Act, 1961 Subject to provisions of this Act, every advocate whose name is entered in the [State roll] shall be entitled as of right to practise throughout the territories to which this Act extends, —

(i) in all courts including the Supreme Court;

(ii) before any tribunal or person legally authorised to take evidence; and

(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice.

Thus Section 30 of the Advocate's Act, 1961 provides a statutory right to a legal practitioner to plead before 'all' courts including the Supreme Court of India or a tribunal. It was introduced by the Parliament of India with an aim to amend and consolidate the law relating to legal practitioners and to provide for the constitution of the Bar Councils and an All-India Bar. Unfortunately, the Act failed to achieve the aim with which it was introduced. This is due to the reason that section 30 of the Act could never come into force from the very inception of the Act.

It was only on June 9, 2011 that this specific provision was made effective by a notification in an official gazette. Consequently, after 23 years of enforcement of the Advocates Act, 1961 the legislature divested the fundamental right of legal practitioners to legal representation before a family court while incorporating section 13 in the Family Courts Act, 1984. As a consequence only the presiding officers of family courts were conferred with the discretionary powers to decide on the requirement of a legal representation before them in a case.

Legislative Intent-- Section 13 was drafted in such a manner so as to minimize the involvement of lawyers before the family courts where emotional considerations outweigh all other considerations.

Pros of Section 13 of the Family Courts ACT----Lawyers are generally presumed to promote delays in the disposal of matters due to obvious reasons of having vested monetary interests in adjournments.

Cons of Section 13 of the Family Courts ACTLast few decades there has been a considerable rise in matrimonial litigations. With complexities in this field the role of advocates has become indispensable where these matters are not just limited to contending a civil matter. The Bar Associations are of the view that fair trial, which is an integral component of article 21 of the Constitution of India, is set to be obliterated due to section 13 of The Family Courts Act, 1984.

Nexus between the Advocates Act and the Family Courts Act Section 7 of the Family Courts Act, 1984 reads as under:

Section 7- Jurisdiction.—

(1) Subject to the other provisions of this Act, a Family Court shall—

a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.—The suits and proceedings referred to in this subsection are suits and proceedings of the following nature, namely:—

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and (b) such other jurisdiction as may be conferred on it by any other enactment. The term 'Courts'clearly accommodates

'Family Courts' within its purview was per section 30

(i) of the Advocates Act, 1961.Such inference may be drawn on the basis of the fact that the family courts are legally authorized to take evidence as the suits or proceedings of the nature mentioned in explanation to section 7(1) of the Family Courts Act, 1984, cannot be decided without taking evidence and conducting a full-fledged trial.

(ii) The words used under section 30 of the 1961 Act "legally authorized to take evidence" are clearly indicative of the indispensable role of a legal practitioner beforesuch courts at the time of recording of evidence. Due to these legal complexities the proceedings cannot be considered as a simple ordinary proceedings between spouses, but they also involve the issues relating to the determination of proprietary rights, declarations as to the validity of marriage, legitimacy of a person, guardianship and also injunctions etc

Thus, the adversarial nature of the suits and proceedings provided in the explanations to section 7(1) of the Act suggest the indispensable role of lawyers before a family court. The reason being that such proceedings require a full-fledged trial involving complex and intricate legal issues which for the obvious reasons cannot be conducted by the parties without assistance of an advocate. Furthermore, these suits and proceedings can't be decided by the court without taking evidence. The suits and proceedings to be decided by the family court are not only be set with complex factual and legal issues, but even affect third party rights. Similarly, section 18 of the Family Courts Act, 1984, empowers the family court to execute its decrees and orders in the Family Courts Act,1984.

4.5 Provisions of appeal under the Family Court :

Appeal.-

(1)Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2)No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991 (59 of 1991).

(3)Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

(4)The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to the regularity of such proceeding.

(5)Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.

(6)An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges.

4.6 Salient Features of protection against the Domestic Violence Act, 2005:

(1)The Act seeks to cover those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or a relationship in the nature of marriage, or adoption; in addition relationship with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with them are entitled to get legal protection under the proposed Act. "Domestic violence" includes actual abuse or the threat of abuse that is physical,

(2) sexual, verbal, emotional and economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition. One of the most important features of the Act is the woman's right to secure

(3) housing. The Act provides for the woman's right to reside in the matrimonial or shared household, whether or not she has any title or rights in the household. This right is secured by a residence order, which is passed by a court. These residence orders cannot be passed against anyone who is a woman. The other relief envisaged under the Act is that of the power of the court to pass

(4)protection orders that prevent the abuser from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented visited by the abused, attempting to communicate with the abused, isolating any assets used by both the parties and causing violence to the abused, her relatives and others who provide her assistance from the domestic violence.

(5)The draft Act provides for appointment of Protection Officers and NGOs to provide assistance to the woman w.r.t medical examination, legal aid, safe shelter, etc. The Act provides for breach of protection order or interim protection order by the respondent as a cognizable and non-bailable offence punishable with imprisonment for a term which may extend to one year or with fine which may extend to twenty thousand rupees or with both.

(6)Similarly, non-compliance or discharge of duties by the Protection Officer is also sought to be made an offence under the Act with similar punishment.

While "economic abuse" includes deprivation of all or any economic or financial resources to which the victim is entitled under any law or custom whether payable under an order of a Court or otherwise or which the victim requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children,

(7)if any, stridhan, property, jointly or separately owned by her, payment of rental related to the shared household and maintenance and disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the victim has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the victim or her children or her stridhan or any other property jointly or separately held by the victim and prohibition restriction to continued access to resources or facilities which the victim is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household, "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm or danger to life, limb, or health or impair the health or development of the victim and includes assault, criminal intimidation and criminal force

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