(*Satish Sitole* v. *Ganga*, AIR 2008 SC 3093). Along with it the Supreme Court has sounded its concern on phenomenal increase in breakdown of marriages and has exhorted that efforts should be made at various levels to strengthen this institution. (*Gaurav Nagpal* v. *Sumedha Nagpal*, AIR 2009 SC).

The Supreme Court has reiterated the need of getting marriages of all citizens of India belonging to various religions compulsorily registrable for two reasons, first, that it falls within the expression 'vital statistics' as provided in Entry 30, List 3, Schedule 7 of the Constitution of India and secondly, it is the only method to curb child marriages (*Seema* v. *Ashwani Kumar*, AIR 2006 SC 1158).

The Prohibition of Child Marriage Act 2006 has repealed the Child Marriage Restraint Act. This Act received assent of the President of India on 10th January, 2007. This Act has brought in significant changes in the area of child marriages. The Act of 1929 has often been criticized as a toothless tiger, as a dog that barks but not bites.

The Act of 2007 would have far-reaching ramifications. It being a secular Act, a piece of uniform civil code would be applicable on all communities in India. The marriage and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes. Sections 9 and 10 prescribe punishments. The former for the adult male marrying a minor girl, it being rigorous imprisonment up to two years or fine up to one lakh rupees or both and latter being for punishment for any person who performs, conducts, directs or abets such marriage.

We have also taken advantage of suggestions and criticism of reviewers and readers. Wherever we found not in agreement with them and yet felt that some clarification in the text is necessary, we have done so. We wish to acknowledge our indebtedness to them.

As we are aware that Christian law of marriage and divorce has been long back amended and made more contemporary.

The purpose of this book continues to be of providing the student, the householder and the practitioner of law with a short yet complete and up-to-date account of the entire grant of family law. In Chapter on Matrimonial Cause, references to English law are still valid and probably inevitable.

As in the first edition, so in this, we have not remained satisfied with the mere exposition of law and jural norms and principles but have approached the subject in the spirit of constructive criticism. We think, as scholars, we owe this duty to society. Some criticism and strictures may seem somewhat strong or harsh, but in all humility we would submit that these will help in the development of law and bringing about the desired social change it is in this spirit that we have ventured to do so.

We take this opportunity of recording our appreciation and thanks to our publishers M/s Allahbad Law Agency who have taken meticulous care in the production of this work.

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PART XII

HINDU JOINT FAMILY SYSTEM

Chapter 30

MITAKSHARA JOINT FAMILY

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

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

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

A Hindu joint family is not a corporation. A Hindu joint family has no legal entity distinct and separate from that of the members who constitute it. It is not a juristic person either.[1] A Hindu joint family is a unit and in all matters it is represented by its *Karta*. Within its fold no outsider, except by adoption, can be admitted by agreement or otherwise. It confers a status on its members which can be acquired only by birth in the family or by marriage to a male member.[2] A Hindu joint family is also different from a composite family. Composite family was unknown to Hindu law. The institution of composite family is a creature of custom and owes its constitution to an agreement. Where two or more families agree to live and work together, pool their resources, throw their gains and labour into the joint stock and shoulder the common risk, there comes into existence a composite family.[3]

A single male or female cannot make a Hindu joint family, even if the

1. *Chotelal* v. *Jhandelal*, AIR 1972 All 424.
2. *Ram Kumar* v. *Commr. Income-Tax*, AIR 1953 All 150.
3. *Anchuru* v. *Gurijala*, AIR 1961 AP 534; *Rajgopal* v. *Padmini*, AIR 1990 Mad 353.

assets are purely ancestral.[1]

Hindu undivided family.—For the purposes of assessment to tax, the revenue statutes use the expression, 'Hindu Undivided Family.' This appears to be slightly different from the definition of a Hindu joint family. For instance, for the purpose of revenue statutes, there can be an undivided family consisting of a man, his wife and daughters or even of two widows of a sole surviving coparcener. This definition is relevant for the purpose of determining in which category the income should be assessed. The Supreme Court said that the expression 'Hindu undivided family' in the Wealth Tax Act is used in the sense in which a Hindu joint family is understood in the personal law of the Hindus and a joint family may consist of a single male member and his wife and daughters and there is nothing in the scheme of the Wealth Tax Act to suggest that a Hindu undivided family as assessable unit must consist of at least two male members.[2] Thus, there can be joint family consisting of a single male coparcener and the widows of coparceners. There can also be a Hindu undivided family where there are only widows. The rule is "that even on the death of sole surviving coparcener, the Hindu joint family does not come to an end so long as it is possible in nature or law to add a male member to it."[3] It is submitted that under the Hindu law, when there is joint family consisting of female members and a male member, the male member can treat the joint family property, almost, as his separate property. As long as another male member does not come into existence, it assumes the character of self-acquired property, subject to the rights of maintenance of female members. But for taxation purposes such a family will be called an undivided family. A Full Bench of the Madras High Court in *Board of Revenue* v. *Muthu Kumar*,[4] held that when a son inherits the separate property of his father under S. 8, Hindu Succession Act, 1956, he takes it as his separate property even though he has a son. It is submitted that this is an erroneous view. The Hindu Succession Act effects only the old Hindu law of succession and not law of joint family; once a Hindu succeeds to the property of his father, his sons acquire an interest in it.[5]

Presumption of jointness.—This has been an accepted proposition from the beginning, that every Hindu family is presumed to be a joint family.[6] The undivided joint family is the normal characteristic of a Hindu family. The presumption is that the members of a Hindu family are living in a state of jointness, unless contrary is proved. The normal state of every Hindu family is that it is a joint family, presumably joint in food, worship and estate. The presumption is also that it continues to be joint.[7] The presumption is stronger among the nearer relations, the remoter we go, the weaker is the presumption.[8] The presumption is the strongest in the case of father and son,

1. *Gowli* v. *Commr. of Income-tax, Mysore*, AIR 1966 SC 1521.
2. *Narendranath* v. *Commr., Wealth Tax*, AIR 1970 SC 14; *Surjeet* v. *W.T. Commr.*, AIR 1976 SC 109.
3. *Sitabai* v. *Ramchandra*, AIR 1970 SC 343; *Gowli* v. *Commr. of Income-tax*, AIR 1966 SC 1523.
4. AIR 1979 Mad 1 (FB).
5. *Commr. of Income-tax* v. *Babubai*, (1977) 108 ITR 417.
6. *Jagannath* v. *Lokanath*, AIR 1981 Ori 52.
7. *Rukhmabai* v. *Laxminarayan*, AIR 1960 SC 335; *Shanker* v. *Vithal*, AIR 1989 SC 579; *Jugal* v. *Govinda*, AIR 1992 Pat 128.
8. *Indranarayan* v. *Roopnarayan*, AIR 1971 SC 1962.

and brothers, and one who alleges that they have separated has to prove it satisfactorily.[1] The initial burden of separation is on the person who sets up the partition.[2]

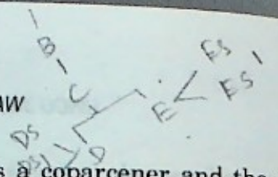
Although normally a joint family is joint in food, worship and estate, yet if it is not joint in food or worship or in estate, in anyone or all of them, it does not necessarily imply that it has ceased to be a joint family. Thus, where three brothers owning a joint family house were working at three different places, it was held that they constituted a joint family; simply because they are not living jointly does not lead to an inference that they do not constitute a joint family.[3]

There is no presumption that joint family possesses joint property.[4] There is no presumption that the property held by a member of joint family or a business conducted by a coparcener is joint family business.[5] In Hindu law, existence of joint property is not a condition precedent to the existence of joint family. The rule is that the one who alleges that a particular item of property held by a member of the joint family is joint family property has to prove that it is so.

When property is purchased in the joint names, it is for the person to prove who alleges it is separate property.[6] Acquisition of property in the name of different members of the family is not inconsistent with the jointness.[7] When property is acquired by the *Karta* in the name of his wife with his own money, there is no presumption that the property is joint family property.[8]

Coparcenary.—Coparcenary is a narrower body of persons within a joint family, and consists of father, son, son's son, son's son's son. Like a joint family, to begin with, it consists of father and his three male lineal descendants; in its continuance the existence of the father-son relationship is not necessary. Thus, a coparcenary can consist of grandfather and grandson, of brothers, of uncle and nephew and so on. The rule is that so long as one is not removed by more than four degrees from the last holder of the property, howsoever removed he may be from the original holder, one will be a coparcener. But if one is removed by more than four degrees, one will not be a coparcener. The last holder means the senior-most living lineal male ancestor. Thus, suppose A is the father and B, C, D, E, F, G, and H are his seven lineal male descendants. It is evident that coparcenary consists of A, B, C and D, and E, F, G, H are not coparceners. A is the last holder. Now if A dies, then coparcenary will consist of B, C, D and E. On the death of A, B becomes the last holder and E comes within the limit of four degrees. F, G and H are still not coparceners. Now if B dies, C becomes the last holder and F comes within four degrees to the last holder and thus coparcenary consists of

1. *Bharat Singh* v. *Bhagirathi*, (1966) 2 SCJ 53; *Raghavamma* v. *Chuchanum*, AIR 1964 SC 136; *Girjanandin* v. *Birendra*, AIR 1967 SC 1124.
2. *Chandreswar* v. *Ramchandra*, AIR 1973 Pat 215.
3. *Kethaperumal* v. *Rajendra*, AIR 1959 Mad 409.
4. *Chander* v. *Godhani*, AIR 1981 Pat 43; *K.O. Reddy* v. *Venkata Narayana Reddy*, AIR 1984 SC 1171; *Pran* v. *Rahendra*, AIR 1986 Del. 121.
5. *Shadilal* v. *Lal Bahadur*, AIR 1933 PC 85; *Satyaraj* v. *Radha*, AIR 1973 Mad 156.
6. *Patram* v. *Bahadur*, AIR 1983 All 346.
7. *Shyamlal* v. *Madhusudan*, AIR 1959 Cal 380; *Prabhalila* v. *Sakuntala*, AIR 1986 Pat. 1.
8. *Kistappa* v. *Elumaial*, AIR 1977 Mad 38.



C, D, E and F. If now C dies, G becomes a coparcener and the coparcenary now consists of D, E, F and G. If D dies, the coparcenary will consist of E, F, G and H, though E is fifth degree, F is sixth degree, G is seventh degree and H is eighth degree from the common ancestor. Now, let us assume that B dies before A, the coparcenary will now consist of A, C and D, as A continues to be the last holder and E continues to be removed from the last holder by five degrees. Now if C dies, then also E will not become a coparcener and his position is not changed and therefore the coparcenary will consist of A and D. With this we reach a very crucial stage in the coparcenary. It will materially affect the coparcenary if D dies before A or A dies before D. Suppose, A dies before D, then D becomes the last holder, with the result that E, F and G at once become coparceners. But if D dies before A, it will be a disaster to E, F and G, as A will continue to be the last holder and E, F, G will continue to be removed by more than four degrees. At this stage, A alone remains the coparcener (who is called sole surviving coparcener) and coparcenary comes to an end; E, F, G, H can never become coparceners of this coparcenary. Now suppose a joint family consists of A, and his son B, grandson C and two great grandsons, D and E, and two sons of D, DS and DS[1] and two sons of E, ES and ES[1]. B dies first, then C dies. At this stage, coparcenary consists of A and his two great grandsons, D and E. Now if at this stage E dies, coparcenary will consist of A and D and at this stage ES and ES[1] get removed by more than four degrees from the last holder of the property and their chance of ever becoming coparceners comes to an end. If at this stage, A dies, coparcenary will consist of D and his two sons DS and DS[1].

The Mitakshara concept of coparcenary is based on the notion of birth right of son, son's son, and son's son's son.[1]

The daughter has also been made a coparcener by virtue of Section 6(1) of the Hindu Succession (Amendment) Act, 2005 but the widow of a son is not a coparcener.[2]

Incidents of coparcenership.—The incidents of coparcenership are : a coparcener has an interest by birth in the joint family property, though until partition takes place, this is an unpredictable and fluctuating interest which may be enlarged by deaths and diminished by births in the family; every coparcener has a right to be in joint possession and enjoyment of joint family property—both these are expressed by saying that there is community of interest and unity of possession. Every coparcener has a right to be maintained including a right of marriage expenses being defrayed out of joint family funds;[3] every coparcener is bound by the alienation made by the *Karta* for the legal necessity or benefit of estate and by the legitimate acts of management of the *Karta*; every coparcener has a right to object and challenge the alienations made without his consent or made without legal necessity; and every coparcener has a right of partition and survivorship.[4] He can establish his right of survivorship by suit.[5] In *Jayalakshmi* v. *R. Gopala*,[6]

1. *Venugopala* v. *Union of India*, AIR 1969 SC 1094.
2. *Subhash Eknathrao Khandekar* v. *Pragyabai Manohar Birader*, 2008 Bom. 46
3. *Rajagopala* v. *Venkataraman*, AIR 1947 PC 122.
4. *State Bank of India* v. *Ghamandi Ram*, AIR 1969 SC 1330; *Narendra Nath* v. *Commr. of Wealth-tax*, AIR 1970 SC 14.
5. *Soam* v. *Kunzang*, AIR 1982 Sikkim 26.
6. AIR 1995 SC 995.

the property was obtained by survivorship by two brothers. The whereabouts of one of them was not known for seven years. It was held that the property devolved on the other brother by survivorship.

A coparcenary cannot be created by agreement. It is a creature of law.[1]

A coparcenary cannot be formed by the female heirs by entering into an agreement.[2]

Unpredictable and fluctuating interest.—The interest that a coparcener acquires at birth is not a specified or fixed interest. At no time before partition can it be predicted that he is entitled to so much share (one-half or one-fourth or one-third) in the joint family property. Nor can he say that such and such items of property belong to him, even if the properties are in his possession or use. The interest fluctuates with the births and deaths in the family.[3] Thus, a coparcenary consists of father F and his son A. If partition takes place at this stage, F and A each will take 1/2 properties. But suppose, no partition takes place and another son B is born to F. The interest of F and A has fluctuated and if partition now takes place, A, B and F will each get 1/3 share. And this will go on. Only by partition the interest can be fixed. Take a converse case. A joint family consists of F and his three sons A, B and C. None of them can say what is their share in the joint family properties. If at this stage partition takes place, each will have one-fourth share. If partition does not take place and A dies, the interest has fluctuated. Now if partition takes place, each will get 1/3.

Community of interest and unity of possession : Interest by birth and survivorship.—The nature of ownership of the Mitakshara coparceners in the joint family property is communal ownership. No individual member can say that, "this is mine" or that "this item of property belongs to me." What he can say is, "this is ours." The moment a person is born in the family, he acquires an interest, in the sense that he has a right of joint ownership and right to common enjoyment and common use of all properties, because by virtue of being born a son, he becomes a member of the community. So long as he is alive, he has an interest and cannot be denied common enjoyment and common use. But once he dies, he goes away and leaves nothing behind. Those who survive him continue to have an interest in the property and continue to have the right of common enjoyment and common use. This phenomenon is expressed by saying that the one who is born in the family has a right to birth and those who are left behind, have a right of survivorship. This is because in our society where concept of individual property dominates, the rights of the person who is born and the rights of the person who survive have to be expressed in terms of individual interests. A coparcener can get his interest in the joint family property "individualised"—this can be done by partition, but the moment a son is born to him, it again becomes a communal property. In that property, the son acquires an equal interest.

The remarkable feature of communal ownership of the Mitakshara joint family system is that one is *born with property*. In no other system of law, one is born with property. A person born as a son in a Mitakshara family acquires

1. *Bhagwan Dayal* v. *Reoti Devi*, AIR 1962 SC 287.
2. *Commissioner, Income tax, Bihar II, Ranchi* v. *Sandhya Rani Datta*, AIR 2001 SC 1155.
3. *Tundra* v. *Tiwari*, 1972 MP LJ 400.

an interest in the joint family property the moment he is born and if he wants to separate or individualize his interest, he can do so by filing a suit for partition. In Hindu way of thinking, a person may be born with property yet when he dies, he leaves behind nothing. In other words, if a Mitakshara coparcener dies, immediately on his death his interest devolves on the surviving coparceners.[1] The nature of this principle may be understood in its actual application : it means that if a coparcener had died with some outstanding personal debts, these debts cannot be enforced against his interest in the joint family property after his death though his interest, had he partitioned before death, would have amounted to a fortune. This is because of the principle of survivorship, which lays down that immediately on the death of a coparcener, his interest passes by survivorship to other coparceners.

The communal nature of ownership in the joint family property is expressed by saying that there is a community of interest in the Mitakshara joint family property. This also means that the interest is unpredictable and unspecified; so long as partition does not take place, no individual coparcener can claim any specific share or any specific property. Another aspect of joint family property is expressed by saying that there is unity of possession. This means that all coparceners have a right of common enjoyment or common use of the property. This may be explained by reference to two of its implications. One, the possession of one coparcener is possession of all coparceners. If one coparcener is in possession of joint family property, through him, other coparceners are also deemed to be in possession. This implies that in the absence of clear proof of ouster, the coparcener in possession of the property cannot claim adverse possession.[2] Secondly, no coparcener has a right of exclusive possession of any portion of joint family property. Thus, if a coparcener who is in possession of a portion of joint family property is ousted from it, he cannot by legal action recover the possession of the same property. He is entitled to a joint possession and not exclusive possession.

Right of maintenance.—Every coparcener and every member of the joint family has a right of maintenance out of the joint family property. The right of maintenance subsists throughout the life of the members so long as family remains joint. Female members and other male members who do not get a share on partition, either because they have no right, such as unmarried daughter or because they are disqualified from getting a share, such as idiot or lunatic coparcener, are entitled to maintenance even after partition. Unmarried daughters have a right to maintenance and right to be married out of the joint family funds. Other members' marriage expenses are also to be defrayed out of joint family funds.

All illegitimate sons, particularly the *dasiputra* (*i.e.*, born to an exclusively and permanently kept concubine) has always been regarded as a member of his putative father's joint family and as such has a right to be maintained out of the joint family funds during his entire life.[3]

Co-parcener's right to restrain and challenge alienation.—This aspect of the matter is discussed in Chapter 32.

1. *Chotelal* v. *Jhandelal*, AIR 1972 All 424.
2. *Laxmi* v. *Laxmi*, AIR 1957 SC 314; *Shambhu* v. *Phool*, AIR 1971 SC 1337.
3. *See* Chapter 32.

Co-parcener's right of partition.—This matter is discussed in Chapter 34.

Coparcenary between a sane and insane person.—There can be a coparcenary between a sane person and an insane person. A coparcener gets his right in the coparcenary property by birth and there is nothing in Hindu law which shows that such a right is irrevocably extinguished on a supervening insanity.[1] Under Hindu law, an insane coparcener has no right to claim partition and has no right to a share if partition takes place, but this does not make him cease to be a coparcener. When he is cured of insanity, both rights revive. In any case, his son is not excluded from taking a share in partition.[2]

Coparcenary between a father and sons born of civil marriage.—If a Hindu performs a marriage under the Special Marriage Act, 1954 with a non-Hindu, his interest in the joint family property is severed. A new coparcenary will come into existence between him and his son provided his son is a Hindu.[3]

Coparcenary within the coparcenary.—It is possible that separate coparcenaries may exist within a coparcenary. For instance, a coparcenary consists of A and his three sons B, C, D and two sons of C, CS and CS^1 and three sons of D, DS, DS^1 and DS^2. C and D acquire separate properties and die. CS and CS^1, sons of C, inherit the separate property of C and between themselves constitute a coparcenary. DS, DS^1 and DS^2, sons of D, inherit D's properties and constitute a coparcenary. In the coparcenary headed by A, two sub-coparcenaries come into existence. If sons are born to CS, CS^1, or DS, DS^1 or DS^2, they will get a birth right not merely in the coparcenary headed by A but also in their respective sub-coparcenaries.[4] This question came for consideration before the Madras High Court in the following circumstances. A and his son B constituted a coparcenary. They partitioned and were assessed separately to income tax. When sons were born to B, he constituted separate coparcenary. Later on, he reunited with his father, A. When he defaulted in income tax in respect of the coparcenary headed by him, he took the plea that with his reunion with A, his coparcenary has come to an end. The court rejected the argument by saying that his coparcenary continued to have a separate existence.[5] The matter was considered by the Supreme Court in *Bhagwan* v. *Reoti*,[6] where it was observed :

> Hindu law recognizes only the entire joint family or one or more branches of that family as a corporate unit or units and that the property acquired by that unit in the manner recognized by law would be considered as joint family property... Coparcenary is a creature of Hindu law...The law also recognizes a branch of the family as a subordinate body.

But if some of the members of the joint family, either some members of a branch or some members of different branches, acquired some property

1. *Amirthamma* v. *Vallimayil*, AIR 1942 Mad 693.
2. *Kumar Rasheshwari Naudan* v. *R.B. Bhagwati Saran*, (1960) SCJ 648.
3. *R. Shridharan* v. *The Commr. of Wealth-Tax*, AIR 1970 Mad 249.
4. *Sudhrsanam* v. *Narainsmbulu*, (1902) 25 Mad 149.
5. *Nachiappah* v. *Commr. of Income Tax*, (1966) 2 Mad 507.
6. *Bhagwan* v. *Reoti*, AIR 1962 SC 287.

jointly, they cannot clothe it with the character of joint family property. The right *inter se* between such members who acquires property would be subject to the terms of the agreement whereunder property was acquired.[1]

Under the Hindu Women's Right to Property Act, 1937, the undivided interest of a coparcener on his death did not go by survivorship to other coparceners, but his widow took it as heir, though she took it as a limited estate. Section 3(3) gives the widow a right of partition also. The quantum of interest to which a Hindu widow is entitled is to be determined as on the date on which she seeks partition. The result is that the right which the other coparceners had under the Mitakshara school of taking that interest by survivorship remains suspended so long as that estate enures. On the death of a coparcener, there is no dissolution of coparcenary, so as to carve out a defined interest in favour of the widow. If she claims partition, she is severed from the other coparceners and her interest becomes a defined interest in the coparcenary property, and the right of the coparceners to take by survivorship is extinguished. But if she does not ask for partition, on her death, this interest will pass by survivorship to other coparceners.[2]

I
CLASSIFICATION OF PROPERTY

Sapratibandha daya and apratibandha daya.—The Mitakshara school classifies property mainly under two heads : First, *apratibandha daya* or unobstructed heritage and secondly, *sapratibandha daya* or obstructed heritage. All properties inherited by a Hindu male from a direct male ancestor, not exceeding three degrees higher to him is called *apratibandha daya*. In this property, his son, and son's son acquire an interest by birth.[3] Therefore, it is called an unobstructed heritage. Thus, properties inherited by a Hindu male from his father's father's father are called unobstructed heritage. On the other hand, when a person inherits property from any other relation, such as father's father's or paternal uncle or brother, nephew, *etc.*, then it is known as *sapratibandha daya*, and his son, or son's son or son's son's son as or for that matter, any other person does not acquire any interest in it. The unobstructed heritage devolves by survivorship and obstructed heritage by inheritance. Coparceners can restrain the holder of *sapratibandha daya* from alienating it, while in case of *sapratibandha daya*, its holder, so long as he is alive, has absolute rights of alienating it; he may gift it *inter vivos* or by will; he may sell it or mortgage it.[4]

Joint family property and separate property.—Under Hindu law, property is also classified into :

(1) Joint family property or coparcenary property, and

(2) Separate property or self-acquired property.

Joint family property

The joint family property is the most important aspect of the Hindu joint family. The Hindu joint family property is like a big reservoir into which

1. *Ibid.*, 304.
2. *Lakshmi* v. *Krishnavenamma*, AIR 1965 SC 828; *Satrughan* v. *Subujpari*, AIR 1967 SC 72.
3. *Radha* v. *Ram*, AIR 1985 Pat 285.
4. *Md. Hussain* v. *Baboo*, ILR (1937) All 655.

property flows in from various sources and from which all members of the joint family draw out to fulfil their multifarious needs. The joint family property may come from various sources.

Ancestral Property.—Broadly speaking, property inherited from any ancestor or ancestress may be called ancestral property. Under Hindu law, it has a technical meaning. Inherited property may be :

(a) Property inherited from father, father's father or father's father's father,

(b) Property inherited from maternal grandfather, and

(c) Property inherited from any other relation.

Property inherited from father, father's father and father's father's father.—This is the same thing as *apratibandha daya*—it is called ancestral property.[1]

Character of property in the hands of the son after he had inherited it from his father under Section 8, Hindu Succession Act.—Under the traditional Hindu law, we have seen earlier, when a son inherits the property from his father, *vis-a-vis* his own sons, he takes it as joint family property. Does it make a difference that now that he inherits it under the Hindu Succession Act? Most of our High Courts and now the Supreme Court hold the view that it does make a difference. They hold that since the Hindu Succession Act has introduced a new set of heirs, when a Hindu inherits the property from his father under Section 8, Hindu Succession Act, he takes it as his separate property and not as joint family property, *vis-a-vis* sons.[2]

The Act lays down new set of heirs, male and female, who succeed to the property simultaneously. But nothing in Section 8 or in any other provision of the Act lays down as to what will be the character of the inherited property.

It is submitted that if we say that when a Hindu inherits his father's property under Section 8, Hindu Succession Act, and he cannot inherit the separate property of his father in any other manner, he holds it as his separate property; we are led to the inevitable conclusion that no new Mitakshara Hindu joint family can come into existence after the coming into force of the Hindu Succession Act, 1956; this amounts to saying that the Hindu Succession Act has abolished the joint family, which obviously is not so.[3]

Property inherited from maternal grandfather.—According to Mitakshara, this head is not necessary, as under the Mitakshara law, property inherited from any person, other than the father, father's father and father's father's father, is obstructed heritage and there is no distinction whether the property is inherited from a paternal uncle or maternal uncle. But two Privy Council decisions have necessitated this classification. In *Venkayamma* v. *Venkatarayanmmamana*,[4] two brothers, members of a joint family, inherited certain properties from their maternal grandfather. One of

1. *Dipo* v. *Wassan Singh*, AIR 1983 S.C. 846.
2. *CWT* v. *Chandra Sen*, AIR 1986 S.C. 1753; *Yudhistar* v. *Ashok*, AIR 1987 SC 558.
3. For a detailed analysis of the High Court case, see, Paras Diwan, *Ancestral Property and separate property—A Muddle after Hindu Succession Act : Joint Family property under Tax cases*, (1983) 25 JILI, 1-17.
4. ILR (1902) 25 Mad 678.

them died without a male issue and his widow claimed his share by inheritance, while the other brother claimed it by survivorship. The Privy Council held that it was joint family property and passed by survivorship to the other brother. However, in *Md. Hussain* v. *Kisheva*,[1] the Privy Council took a contrary view; it was held that when a Hindu inherits property from his maternal grandfather, his son does not acquire any interest in it by birth. Even in the *Venkayamma*, they did not say that it is an unobstructed heritage. In any case the former decision is obviously bad law, even if it is restrictively interpreted to mean that brothers inheriting property from their maternal grandfather take it *inter se* as joint family property. In *Maktul* v. *Manbhari*,[2] a case under the Punjab Customary law, the Supreme Court held that the property inherited by a person from his maternal grandfather is not ancestral *qua* his descendants.

Property inherited from any other relations.—It is a settled law that property inherited by a person from any other relation [i.e., other than those in (a) and (b) above] is not ancestral property. Such property is his separate property.[3] For example, property inherited from a maternal uncle or paternal uncle will constitute separate property.

Property obtained on partition.—When a coparcener partitions from the joint family and obtains his share of property, what will be the character of this property? In respect of his own son, son's son and son's son's son, it will continue to be joint family property, but in respect of all others, it will be his separate property. It may be illustrated thus : A coparcenary consists of A and his two sons B and C and if they partition the properties obtained by each will be his separate property. Even A's share will be his separate property in the sense that his sons B and C have no interest, no birth right in it. But the moment anyone of them gets a son, his share will again become joint family property. This will be so even if A gets another son D; A and D will constitute a new coparcenary. Take another illustration : A coparcenary consists of A, his two sons, B and C and two sons each of B and C, BS, BS[1], CS and CS[1]. A, B and C partition, B and C remaining joint with their sons. Then the position will be that A's share thus obtained will be his separate property, while B's and C's share will continue to be joint family property, though there will be two separate coparcenaries of B and C. In *State of Maharashtra* v. *Narayan Rao*,[4] the Supreme Court held that on the death of the *Karta*, though his widow would take a share by virtue of S. 6, Hindu Succession Act, but that does not mean that family stands divided. Till the widow takes away her share of a member or members effect a partition, the family will remain a joint family.

Character of property after severance of status.—Whenever a coparcener expresses his intention to partition, severance of status takes place, but then does it also mean that the Hindu joint family property loses its character of joint family property? There has been some confusion in this regard. The same has been clarified by the Supreme Court in *Bhagwant* v. *Sulakhe* v. *Digamber Gopal Sulakhe*.[5] A.N. Sen, J. observed :

1. ILR (1937) All 655.
2. (1958) SCJ 1268.
3. *Om Prakash* v. *Servjit*, AIR 1995 HP 92; *Vijai* v. *Kumar*, AIR 1995 Kant 35.
4. (1985) SCC 716.
5. (1986) SCC 79.

> The character of any joint family property does not change with severance of the status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned among the co-sharers. By an unilateral act it is not open to any member of the joint family property to convert any joint family property into his personal property.

In this case under the partnership agreement and the managing agency agreement, two members of the joint family were receiving certain remunerations and commissions as managing agents on behalf of the joint family. A member of the joint family effected severance of status. The question before the Court was whether the amount received thereafter as remuneration and managing agency commission became separate property or continued to remain part of the joint family property. It was in this context that the above observation was made.

Property received in gift.—Under this head, the gift of the following properties may be considered :

(1) gift of his self-acquired property by the father to son; and

(2) gift of joint family property :

(a) by father-*Karta*, or

(b) by father or non-father-*Karta*.

Gift by Father of self-acquired property.—The question is, if a father gives his self-acquired property, movable or immovable, by gift inter vivos or by will to one of his sons, to the exclusion of others, whether the son will take it as his separate property or whether he will take it as ancestral property. The difficulty arises on account of two principles of Hindu law that come into application : (i) Every Hindu has full power of disposal over his separate property. (ii) When self-acquired property of a Hindu devolves on his son by inheritance, the son takes it as ancestral property in which his son has an interest by birth. In accordance with the first principle, the father has the power of giving the property in gift. But, can he, by changing the mode of devolution of property, change the character of property? In other words, had he allowed it to devolve by the natural mode, *i.e.*, intestate succession, the property would have been ancestral property in the hands of his son, but he changes the mode of devolution and makes it to devolve by gift, can he thereby change the character of property? It may be noted that if A who has three sons, B, C and D, makes a gift of his self-acquired property to C to the exclusion of B and D, the question is not whether B or D can challenge it. They obviously cannot. The question is : can C's sons claim an interest in it by birth? Before 1953, there was a difference of opinion among our High Courts and as many as five views existed. But in 1953, the Supreme Court in *Arunachalam* v. *Murugantha*,[1] after considering the texts and the various decisions of the High Courts, said that the answer to the question primarily depends upon the intention of the father. The intention is to be gathered from the terms of the deed and surrounding circumstances. In other words, if the father expressed a clear intention in the deed that the son will take it as his separate property, or joint family property, the son will take it accordingly. In

1. AIR 1953 SC 495.

them died without a male issue and his widow claimed his share by inheritance, while the other brother claimed it by survivorship. The Privy Council held that it was joint family property and passed by survivorship to the other brother. However, in *Md. Hussain* v. *Kisheva*,[1] the Privy Council took a contrary view; it was held that when a Hindu inherits property from his maternal grandfather, his son does not acquire any interest in it by birth. Even in the *Venkayamma*, they did not say that it is an unobstructed heritage. In any case the former decision is obviously bad law, even if it is restrictively interpreted to mean that brothers inheriting property from their maternal grandfather take it *inter se* as joint family property. In *Maktul* v. *Manbhari*,[2] a case under the Punjab Customary law, the Supreme Court held that the property inherited by a person from his maternal grandfather is not ancestral *qua* his descendants.

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1. AIR 1953 SC 495.

case the father has not expressed his intention clearly, then the intention is to be gathered from the language of the deed and the surrounding circumstances. This is not a very satisfactory test. It seems that if it is shown that the so-called gift was not a gift but an integral part of a scheme of partition, then the donee-son will take the property as joint family property. It is submitted that the entire argument is misconceived. It may be argued that had the father allowed it to devolve by inheritance, other sons would have got an interest in it and constituted a coparcenary. But the father did not allow it to devolve that way and made a gift of it. Then why should we talk of donee's son's claim, and why should we also not talk of the claim of other sons of the donor? It is submitted that simple rule should be that the donee son takes it as his separate property, subject to any restrictions that the father might have imposed on the gift.

Gift by Father of a small portion of joint family property.—It has been all along recognized that the father-*Karta* has the power of making a gift of small portion of movable joint family property as a gift of love and affection. A gift of love and affection is made to a person with whom father stands in the relationship of love and affection, such as wife, son, daughter, daughter-in-law or son-in-law. In every case, gift has to be of a small portion of the joint family movable property. What is a small portion will depend upon the total quantum of joint family property.[1] Before 1964, the view was that the father cannot give any portion of immovable property in gift. In 1964, the Supreme Court in *Guramma* v. *Mallappa*,[2] said that the father can make a gift of love and affection to a daughter of a small portion of immovable property, either at the time of marriage or subsequently, as gift to daughter is a modern version of a share in the joint family property to which she was entitled in the ancient law. This view is not correct as there is hardly any textual authority. In later cases, the Supreme Court has confined the ratio of this decision to the gift to the daughter. Thus, it was held that gift of immovable property could not be made to any other relation, not even to one's wife.[3] In the hands of donee, such property is his separate property, unless given with limitations.

Gift of joint family property by the *karta*.—It is an established rule of Hindu law that the *karta* of the joint family, whether father or someone else, has the power to make a gift of ancestral immovable as well as movable property within the reasonable limits in discharge of his religious duties or for pious purposes. Such a gift can be made *inter vivos*, but not by will.[4] In the hands of the donee, the property will be his separate property.

Property jointly acquired by coparceners.—Here the question is whether the property jointly acquired by coparceners with their joint labour and without the aid of the joint family property is joint family property or joint property of the acquirers? It is now settled law that presumption is that the property so acquired will be joint family property in which sons will acquire an interest by birth, unless it is proved that the acquirer intended to own the property as co-owners between themselves, in which case it will be

1. *Amathayee* v. *Kumarshen*, AIR 1967 SC 569.
2. AIR 1964 SC 510.
3. *Tripura Sundri* v. *Kalyanaramana*, AIR 1973 SC 99.
4. *Guramma* v. *Mallappa*, AIR 1964 SC 510.

joint property, as distinguished from joint family property.[1] In case the acquirers can show an agreement that they acquired the property as partners, the property will be partnership property, and will be governed by the Indian Partnership Act, 1932. However, if only some of the coparceners jointly acquire property without the aid of any ancestral nucleus, the presumption will not apply and such property will be presumed to be joint property, unless contrary is proved.[2]

Income of hereditary profession.—The income of the hereditary profession, such as of a priest, constitutes joint family property.[3]

Property exchanged for joint family property.—When some property is acquired in exchange of joint family property, such property will be joint family property.[4]

Property thrown into common stock and blended property.—When a coparcener mixes his separate property with the joint family property, does his separate property become part and parcel of the joint family property? When a coparcener deals with his separate property in a manner that he leaves no doubts that he wants to treat it as part of joint family property, such property becomes joint family property. This is known as throwing into the common stock. If he mixes his property with the joint family property, it is known as blending. The law of blending or throwing into the common stock is well settled through the numerous decisions of the High Courts and the Supreme Court. In *Mallesappa* v. *Mallappa*,[5] Gajendragadkar, J., said that the conduct on which the plea of blending is based must clearly and unequivocally show the intention of the owner of the separate property to convert his property into an item of joint family property. A mere intention to benefit the members of the family by allowing them the use of the income from the separate property may not necessarily be enough to justify an inference of blending. Again, in *Lakkireddi* v. *Lakkireddi*,[6] Shah J., said that separate property or self-acquired property of a coparcener may be impressed with the character of joint family property, if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein. But to establish such abandonment, a clear intention of waiver of separate rights must be established.[7] The mere fact that the income of the separate property was utilized out of generosity to support the persons whom the holder was not bound to support, or from the failure to maintain separate accounts, abandonment cannot be inferred, for an act of generosity or kindness will not ordinarily be regarded as an admission of legal obligation. In *Narayam* v. *Chamaraju*,[8] Ramaswami, J. of the Supreme Court said that the important point to keep in mind is that the separate property of a Hindu

1. *Krishna* v. *Renachari*, AIR 1965 Mad 340; *Vinod* v. *Abdul*, (1974) 1 CWR 572; *Vishwanathan* v. *Ramakutty*, 1975 KLT 434; *Sidha* v. *Jhuma*, AIR 1977 Ori 45; *Chetty* v. *Chetty*, AIR 1991 Ori 3312; *Purna* v. *Ranchhoddas*, AIR 1992 AP 270.
2. *Bhagwan Dayal* v. *Reoti*, AIR 1962 SC 287.
3. *Lakhmi* v. *Ishroo*, AIR 1977 SC 1694.
4. *Gurbachan Singh* v. *Puran Singh*, AIR 1961 SC 1963.
5. AIR 1961 SC 1268.
6. AIR 1963 SC 1601.
7. *Narayanan* v. *Radhakrishna*, AIR 1976 SC 1715; *Madan Lal* v. *Mah*, AIR 1992 SC 1254; *Jupidi* v. *Supidi*, AIR 1994 AP 134.
8. AIR 1968 SC 1276; *Ashutosh* v. *Vysraju*, (1972) 38 CLT 857.

coparcener ceases to be his separate property and acquires the characteristics of joint family property, not by the mere act of physical mixing with the joint family property but by his own volition and intention by waiving or surrendering his rights in it as separate property. Such an intention can be known only by his words or from his acts and conduct. This view was reiterated by the Supreme Court in *Gowli* v. *Commr. of Gift Tax*.[1] Hedge, J. said the act of throwing into the common stock is a unilateral act. When a coparcener throws his separate property in the common stock, he makes no gift and there is no donor or donee, and therefore provisions relating to gift in the Transfer of Property Act do not apply.

In every case of throwing into the common stock or blending with, an intention of abandoning separate claims must be established. If a father effects partition of his separate property, it may mean that he is treating it as joint family property. But it may be a gift deed clothed in the language of partition deed, then in such a case, it will be a gift and sons will take it as their separate property.[2] The legal concept of blending is embedded in the idea that there should be conscious surrender. Mere fact that income of the separate property was spent on members of the joint family is not enough. Separate property can be converted into joint family property by unambiguous and unequivocal declaration.[3] In some cases, the intention of blending may be inferred from conduct. Thus, a *Karta* has income from his separate property as well as from the joint family property. He deposits all the incomes in the same bank account, without keeping separate accounts, then it is a clear case of blending. The doctrine of blending applies in the Dayabhaga school also in the case of brothers living together and forming a joint family.[4]

However, a female member of the joint family has no power to throw her separate property into the common stock; only coparceners possess this power.[5]

If a coparcener builds a house on family land out of his separate funds, the other coparceners will be entitled to compensation for their share of land[6] or a share in the site on partition,[7] unless it is clearly shown that the coparcener wanted to blend his separate property with the joint family property. The onus that house was constructed out of self-acquired property is on the coparcener.[8] Where a coparcener constructs another story on the joint family house and allows others to live into it, it is a clear indication of blending.[9]

Recovered joint family property.—When one coparcener, without any assistance from the joint family funds, or from his fellow coparceners, recovers with the acquiescence of his coparceners, ancestral property which

1. AIR 1970 SC 1722.
2. *Paramasivam* v. *Rama Swami*, (1970) MLJ 492.
3. *Manicha* v. *Thanagavelu*, AIR 1964 Mad 35.
4. *Ragini* v. *Jaga*, (1923) 50 I.A. 173.
5. *Pushpa* v. *Commissioner of Income-tax*, AIR 1977 SC 2230.
6. *Mallesappa* v. *Mallappa*, AIR 1961 SC 1268.
7. *Gyarsibai* v. *Jammalal*, AIR 1973 MP 75. But see *Kashinath* v. *Pravash*, AIR 1978 Cal 509.
8. *Patram* v. *Bahadur*, AIR 1983 All 384.
9. *Neel Kanth* v. *Ramchandra*, AIR 1991 Bom 10.

has been lost to the joint family without any possibility of recovery, the property so recovered will be : (a) the separate property of the recoverer if the recoverer is the *karta* of the family, irrespective of the fact whether the recovered property is movable or immovable. (b) If the recoverer is any other coparcener, and the property is movable, it will be the separate property of the recoverer. (c) In case the recoverer is a coparcener other than the *Karta* and property recovered is immovable property, the recoverer will take one-fourth of it as his separate property and the rest will become joint family property in which all members, including the recovering coparcener, will have an interest.

Accretions.—Here the term 'accretion' has been used in a wider sense including all incomes, accumulations, or acquisitions of property made with the joint family nucleus. In its ordinary meaning, accretions mean : (a) accumulation of income of the joint family property, (b) property purchased or acquired with the income of the joint family, and (c) proceeds of the sale of joint family property or purchased out of such sale proceeds. These have all along, been accepted as part and parcel of joint family property.[1]

But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question might have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property.[2] Thus, in *Mangal* v. *Harkesh*,[3] where it was established that there was some nucleus of the joint family property, but it was not established that yield from the nucleus was sufficient for acquiring the property in question, it was held that the initial burden has not been discharged, and the properties cannot be held to be joint properties. In *Rajmal* v. *Rajmal*,[4] the *Karta* acquired certain properties by pre-emption and it was not proved that the pre-emption price was paid out of the family funds, it was held that property so acquired could not be held to be joint family property. Where it was established that the income of joint family property was very small and inadequate and that the coparcener during his lifetime made substantial earnings on account of his salary and other emoluments in the service of the Maharaja, from whom he has purchased the property in question, the properties were held to be his separate properties.[5]

An undivided coparcener can carry on separate business.[6]

Where it was established that there was sufficient nucleus of joint family fund out of which the property in question could have been acquired by the *Karta* and there was no other personal source from which the *Karta* could have acquired them, it was held that such property constituted joint family property, and burden will shift on the person who alleges that the properties

1. *Sivaji* v. *Rukminiyam*, AIR 1973 Mys 113.
2. *Srinivas* v. *Narayandevji*, AIR 1955 SC 379; *Mudigowda* v. *Ram Chandra*, AIR 1969 SC 1076.
3. AIR 1958 All 42.
4. AIR 1953 MB 28; *See* also *Jugal* v. *Narayan*, AIR 1972 Cal 342.
5. *Anup Singh* v. *Harbans Kaur*, AIR 1958 Punj 116; *Lalbarmani* v. *Bhutnath*, AIR 1974 Cal 109.
6. *Chandrasekhar* v. *Pitambari*, AIR 1960 SC 335; *K.V. Narayana Swami* v. *K.B.R. Iyer*, AIR 1965 SC 289.

are self-acquired.[1] Where the joint family nucleus is nominal or non-existent, the burden that the properties acquired by a coparcener were acquired from the joint family nucleus is not discharged by showing that the *Karta* was carrying on the traditional business of the joint family or in that business he was assisted by his son.[2] The proportion of the nucleus itself in relation to the estate is only one factor, where this is considerable the presumption arises that the acquisition of property made with its aid is joint family property. But the income yielding capacity of the nucleus is an equally important factor.[3] Similarly, any property acquired by the *Karta* out of his own income in the name of his son will not constitute joint family property.[4] Where the joint family property is under separate and convenient enjoyment of members, any property acquired by a coparcener out of the income of such property will be joint family property.[5]

An undivided coparcener can carry on his separate business.[6]

Separate or Self-acquired property

A coparcener can, under Hindu law, make separate acquisition of property.

The key words in the doctrine of self-acquisition are what has been acquired *without any detriment* to the joint family property. The separate property may be obtained from several sources.

Gains of learning.—The gains of learning means those gains which are made on account of some education or training that a coparcener has received. The main question is : if the training or education has been received at the expenses of the joint family property, does it mean that anything acquired by the acquirer on account of training or education is 'to the detriment of the joint family property'? It often happens that of the two physicians who have received their M.D. degree from the same institution and in the same division, one has flourishing practice, while the other languishes. The same is true of the lawyers. Thus, success in a profession depends much more on personal skill than on training one has received. The Hindu Gains of Learning Act, 1930 lays down that whether the training is ordinary or specialized, any gains made on account of training or education will constitute separate property of the acquirer. The Act defines 'learning' as education whether elementary, technical, scientific, special or general, and 'training' as every kind of training which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life. "Gains of learning" are defined as acquisitions of property made substantially by means of learning or training whether such acquisition is made before or after the commencement of the Act and whether such acquisition is made out of ordinary or specialized learning. It is immaterial whether the education or training was wholly or partly imparted to him out of joint family funds or with the aid of the funds of any member of

1. *Chandrasekhar* v. *Pitambari*, AIR 1960 SC 335; *K.V. Narayana Swami* v. *K.B.R. Iyer*, AIR 1965 SC 289.
2. *Ibid.*
3. *Venkatasubramania* v. *Eswara Iyer*, AIR 1966 Mad 266.
4. *Jethariam* v. *Hazarmal*, AIR 1962 Raj 283; *Chodrashwer* v. *Ramchandra*, AIR 1973 Pat 215.
5. *Kumaraswami* v. *Subbha*, AIR 1977 Mad 353.
6. *Prakash* v. *Narendra*, AIR 1976 SC 2456.

the joint family. It is also immaterial that while he was receiving training or education, he or his family was maintained or supported, partly or wholly, out of joint family funds or by the funds of any member of the joint family.[1]

However, if the joint family funds are invested in the avocation or profession which the coparcener takes up after receiving education or training, the acquisitions may not be his separate property. For instance, if a coparcener is trained as an engineer, and the joint family, in view of his training, opens up an industry in which joint family funds are invested, the profits of this industry will not be separate property of the engineer-coparcener, though if he is allowed to draw a salary or allowed to take a part of profit for his skill, that will constitute his separate property.

Salary and remunerations.—If joint family properties are invested in an enterprise, industry or undertaking and by reason of such investment, the *Karta* or any other coparcener, whether on behalf of the family or otherwise, is employed by the concern, industry or undertaking, will any salary, remuneration fee or commission that he receives, be the separate property of the coparcener or *Karta* or will it be part of joint family funds? It may be added that in earning such remuneration, or commission, an element of skill or labour may also be involved. In *Murughuppa* v. *The Commr. of Income tax*,[2] one of the coparceners was the managing agent of a certain mill. The court held that the commission earned by him would *prima facie* be his individual property unless it be shown that the right was acquired by utilizing any portion of the joint family property to its detriment.[3]

The Supreme Court in *Palaniappa* v. *Commr. of Income Tax*,[4] said that if no part of the family funds had been spent to enable the *Karta* to earn the remuneration of managing director but the family funds had been invested to obtain dividends and other advantages of being shareholders, the salary, commission, and sitting fees of the *Karta* as managing director belonged to him personally. Earlier, in *Piyare Lal* v. *Income Tax Commr.*,[5] where the *Karta* was a manager of a business concern and the joint family had given security of its properties for the honesty of the *Karta*, the Supreme Court said that the earnings of the *Karta* as manager were not the result of the family investment, but were the outcome of *Karta's* personal skill and labour. The joint family was earning interest on the fund given as security for *Karta's* honesty.

On the other hand, in *Dhanwantry* v. *Commr. of Income Tax*,[6] the Supreme Court said that the salary which the coparceners earned as partners constituted joint family property. In this case, coparceners, with a view to avoiding the incidence of income tax, invested the joint family assets in a partnership and it was agreed upon that profits of the partnership were to be taken as personal salary by each coparcener. It was argued strenuously that the manager in fact earned his salary on account of his personal skill and labour. But the Supreme Court held that his so-called salary was part of joint

1. See *Venkatasubramania* v. *Eswara Iyer*, AIR 1966 Mad 266.
2. AIR 1952 Mad 828.
3. *Commr. of Income Tax* v. *Kalu Baboo*, AIR 1959 SC 1288.
4. AIR 1968 SC 678.
5. AIR 1960 SC 997.
6. AIR 1968 SC 683.

family property. In this case, the entire joint family assets were invested in the business and it was not difficult for the Supreme Court to establish a complete connection between the earning and the detriment to the joint family property (the dissenting judgment of Hedge, J., makes a very interesting reading). This view has been followed in *Krishna* v. *Commr. of Income Tax*. The Supreme Court said that in such cases, the character of the receipt must be determined by reference to its source, its relation to the assets of the family and the primary object with which the benefit received was disbursed. Where the income was primarily earned by utilizing the joint family assets or funds and the mere fact that in the process of gaining the advantage, an element of personal service, skill or labour was involved, did not alter the character of the income.

In *Kalu Baboo's case*,[1] the joint family furnished almost all the capital of a company of which the *Karta* was appointed as managing director. The Supreme Court said : "The joint family assets were used for acquiring the concern and for financing it and in lieu of all the detriment to the joint family property, the joint family got not only the shares standing in the name of the two members of the family but also, as part and parcel of the same scheme, the managing directorship of the company." On the other hand, in *Commr. of Income Tax* v. *D.C. Shah*,[2] where the partnership deed showed that one of the coparceners as partner was given a salary on account of his rich experience and skill, the court held that the salary constituted his self-acquired property.

In sum : (a) if remuneration, salary, profit or commission is earned by the *Karta* or any other coparcener on account of substantial investments of the joint family funds in the undertaking, business, enterprize, or industry, it will constitute joint family property, even if the personal skill and labour of the *Karta* or the coparcener is an important factor in the earnings.

(b) If no joint family funds or properties are invested or only nominal investment is made or the joint family is, apart from the earnings of the *Karta* or the other coparceners, receiving profits, dividends, interest or some other returns on investments without any detriment to the joint family funds or properties (except the usual risk involved in any business), the earnings will constitute the separate properties of the earner.

(c) The fact that the *Karta* stands in fiduciary relationship with other members of the family is immaterial.[3]

Income of the joint family property allotted to member for his maintenance.—When the *Karta* gives a coparcener the right to use some joint family property for his maintenance, and there is some surplus income remaining after the maintenance, or any property is purchased out of the surplus, will it be joint family property or separate property of the coparcener? The Madras and Andhra Pradesh High Courts take the view that such surplus or property purchased out of surplus will be separate property of the coparcener.[4] Some doubts were cast on this proposition in

1. AIR 1959 SC 1288.
2. AIR 1969 SC 927.
3. *Prem Nath* v. *Commr. of Income Tax*, AIR 1967 Punj 1 (F.B.); *See* also *Bhagwat* v. *Digamber*, AIR 1986 SC 79.
4. *Ramayya* v. *Kolanda*, AIR 1939 Mad 911; *Lalchandra* v. *Channavadu*, AIR 1963 AP 31.

Venkatasubbramania v. *Eshwar*.[1] The question before the court was when joint family property is given to a coparcener for the maintenance of his family without liability to account for any balance, and the member acquires property out of the savings, does it mean that property will be deemed to be his self-acquisition, in the sense that even his son will have no interest in it? The court did not answer the question. However, the Madras High Court reiterated its earlier view in *Nagayasami* v. *Kochadai*.[2] However, where a member of a family decides for the purposes of convenience to take charge of certain properties of the family in his individual charge and administer them, it does not automatically follow that the individual members who have been charged with the responsibility of possessing them is not to account for their income.[3]

Benefit of insurance policy.—If the *Karta* insures himself or a member of the family is insured, and premia are paid out of the joint family funds, then, who would be entitled to the benefits of the policy? The Madras High Court took the view that benefits belong to the insured personally and constitute his separate property.[4] The Supreme Court, in *Prabhavati* v. *Sarangdhar*,[5] made the following observation (*dicta*) : "There is no proposition of law by which the insurance policies must be regarded as the separate property of the coparceners on whose lives the insurance is effected by the coparcenary." The Supreme Court further observed that if the insurance policy were taken with any detriment to the joint family funds, then anything obtained thereby would belong to the joint family. In *Sidrammappa* v. *Babajappa*,[6] the Mysore High Court said that if the father has taken an insurance policy in the name of the son and paid the premia thereof out of love and affection, the benefits of the policy will belong to the son and constitute his separate property.

The Madras High Court considered the aforesaid decision of the Supreme Court in *Karappa* v. *Palaniammal*,[7] and said that those observations should be confined to the fact of the case. Shrinivasan, J. observed : "But where a coparcener has effected insurance upon his own life, though he might have paid the premia out of the funds which he might have received from the joint family, it does not follow that the joint family insured the life of the member or paid the premia in relation thereto. It is undeniable that a member of a coparcenary may, with the moneys which he might receive from the coparcenary, effect an insurance upon his own life for the benefit of the members of his family. His intention to do so and to keep the property as his own separate property would be manifested if he makes a nomination in favour of his wife or children, as the case may be."[8]

All the aforenoted cases were considered by the Andhra Pradesh High

1. AIR 1966 Mad 266.
2. AIR 1869 Mad 329; *Kumaraswami* v. *Subba*, AIR 1977 Mad 353.
3. *Kumaraswami* v. *Subba*, AIR 1977 Mad 353.
4. *Balamba* v. *Krishnayya*, AIR 1914 Mad 595; *Venkata Subbarao* v. *Laxminarayanamma*, AIR 1954 Mad 222.
5. AIR 1960 SC 403.
6. AIR 1962 Mys 38.
7. AIR 1963 Mad 245.
8. This decision and the Supreme Court decision were again considered by the Madras High Court in *Seethalakshmi* v. *Controller of Estate Duty*, (1966) 61 ITR 317.

Court in *Narayanlal* v. *Controller of Estate Duty*.[1] The court said that in every case, where joint family funds are used for payment of premia of a life insurance policy, there is a detriment to the joint family, but that is not the sole criterion. If joint family funds are advanced to members of the coparcenary for their individual benefit, there is, strictly speaking, a detriment to the joint family, nonetheless the intention with which that money was given and the use of it by the individual for his own benefit would determine the character of the income or the amount earned therefrom. It is submitted that this seems to be the correct view.

Government grants.—If property, movable or immovable, is granted to a coparcener by the Government, it will constitute the separate property of the grantee,[2] unless it has been specially given to him as joint family property.[3]

Income from the separate property.—Income from the separate property or property acquired with such income will be the separate property of the coparcener.[4] A coparcener can also carry on separate business.[5]

Separate earnings or earnings by self-exertion.—Separate earning of a coparcener or earnings by self-exertion, without the aid of the joint family property, constitute separate property of the coparcener.

Property held by a sole surviving coparcener.—The property held by a sole surviving coparcener may constitute his separate property and on his death, it will devolve by succession on his heirs.[6]

Rights of coparceners.—In sum, the main rights of coparceners (other than those of the *Karta*) are : (1) Right of joint ownership, (2) Right of joint possession, enjoyment and use of joint family property, (3) Right of survivorship, (4) Right of alienation of undivided interest under certain circumstances, (5) Right to maintenance, (6) Right to challenge an improper alienation made by the *Karta* or any other member, and (7) Right to partition.

II
KARTA

In Hindu joint family, the *Karta* or manager, occupies pivotal position. So unique is his position that there is no comparable office or institution in any other system of the world. His position is *sui generis*. Though he is a person with limited powers, yet within the ambit of his sphere, he possesses such vast powers as are possessed by none else.

Who can be the Karta

Senior most male member.—Ordinarily, the senior most male member is the *Karta* of the joint family.[7] He does not owe his position to the agreement or consent of other coparceners. He is entitled to *Kartaship* because he is the senior-most. So long as he is alive, may be aged, infirm, or

1. AIR 1969 AP 188.
2. *Katama* v. *Raja of Shivaganga*, (1863) 9 MIA 539.
3. *Mahant* v. *Sitaram*, (1899) 21 All 53 (P.C.).
4. *Krishnali* v. *Moro*, (1891) 15 Bom 32 (P.C.); *Jayarama* v. *Thulasi*, AIR 1976 Mad 17.
5. *Prakash* v. *Narendra*, AIR 1976 SC 2456.
6. *Ibid.*
7. *Shreeama* v. *Krishnavenanama*, AIR 1957 AP 434; *Ram* v. *Khira*, AIR 1971 Pat 286; *Abdulla* v. *Ranunny*, 1973 KLR 350.

ailing, he is entitled to *Kartaship*.[1]

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

Junior male member.—It is by understanding or agreement among coparceners that a junior male member can be a *Karta*.[2] A junior member of Hindu Undivided Family (HUF) was realizing rent, he filed a suit for eviction, the tenant cannot question his *locus standi* or capacity to file a suit.[3] Coparceners may withdraw their consent at any time.

More than one Karta.—There can be more than one *Karta*.[4]

Female members as Karta.—At one time, the Nagpur High Court held the view that mother, though not a coparcener, can be the *Karta* in the absence of adult male members. The Supreme Court in *Commr. of Income Tax* v. *Seth Govind Ram*,[5] after reviewing the authorities, took the view that the mother or any other female could not be the *Karta*. This is in accordance with the texts of Hindu law. In *Gangoji* v. *H.K. Channappa*,[6] the Karnataka High Court expressed the view that the mother as natural guardian of her minor sons can manage the joint family property and appointment of a guardian by the court would not be justified.

Position of the Karta

The position of *Karta* is *sui generis*. The relationship between him and other members is not that of principal and agent or of partners. As the head of the family, he acts on behalf of other members, but he is not a partner, as his powers are almost unlimited. He is the master of the grand show of the joint family and manages all its affairs and its business. His powers of management are very wide and almost totalitarian. Though he stands in fiduciary relationship with other members, he is not a trustee. Ordinarily, he is accountable to none. Unless charges of misappropriation, fraud, or conversion are levelled against him, he is the master and no one can question him as to what he received and what he spent. So long as he manages the affairs of the family, he is not bound to save, economise or invest. In short, he is not liable for his positive failures, such as failure to invest, to prepare accounts, or to save money. He is not bound to pay the income of the joint family in any fixed proportion to other members. Even if he enters into an agreement and makes any such arrangement, he can repudiate it with impunity. He is not bound to treat all the members impartially; he may discriminate one against the other.

However despotic his powers may be, despot he cannot be. After all, he is a person of limited powers. He has liabilities towards the members. Any coparcener can, at any time, ask for partition.

He obtains no reward for his services and he discharges manyonerous

1. *Man* v. *Gaini*, ILR (1918) 40 All 77.
2. *Narendrakumar* v. *Commissioner Income Tax*, AIR 1976 1953.
3. *M/s. Nopany Investments (P) Ltd.* v. *Santokh Singh*, AIR 2008 SC 673.
4. *Mudit* v. *Ranglal*, (1902) 29 Cal 797; *Venkatachalan* v. *Venkateswara*, (1943) 2 MLJ 610; *Shankar* v. *Shankar*, AIR 1943 Bom 387; *Darshan* v. *Prabhu*, AIR 1946 All 67.
5. AIR 1966 SC 24.
6. AIR 1983 Kant 222.

responsibilities towards the family and its members. His true legal position can be understood only when we know the ambit of his powers and liabilities.

Karta's Liabilities

Karta's liabilities are numerous and multifarious. He is responsible to maintain all members of the family. If he improperly excludes any member from maintenance or does not properly maintain them, he can be sued for maintenance as well as for arrears of maintenance. He is also responsible for the marriage of all unmarried members. This responsibility has been particularly emphasized in respect of the daughters. If a partition suit is filed, he has to prepare the accounts. He represents the family. He is its sole representative *vis-a-vis* all outsiders and in that capacity, he has to discharge many responsibilities and liabilities on behalf of the family. He has to pay taxes and other dues on behalf of the family and he can be sued for all his dealings on behalf of the family with the outsiders.

Powers of Karta

Karta's powers are vast and limitations are few. The ambit of his powers may be considered under the two heads : (a) power of alienation of joint family property, and (b) other powers.

In the former case, his powers are limited. In the latter case, his powers are very large, almost absolute. Here we would discuss his other powers, and in Chapter 30, his powers of alienation.

Powers of management.—*Karta's* powers of management are almost absolute. He may manage the family affairs and family property and business the way he likes; he may mismanage, no one can question his management. He has no obligation to save or economise, no obligation to invest funds, or to invest them properly. He may discriminate between the members of the family : to some he may give more to spend, to some less; some may be given higher education, while others may be given only primary education. To some he may allot a bigger portion of the house to live in, to some he may allot smaller portion. But he cannot deny maintenance or use and occupation of property to other members. The ever hanging sword of partition is a great check on his absolute powers. The other, and probably more effective, check is the affection and the natural concern that he has for the members of the family and the complete faith and confidence that members repose in him.

Right to income.—It is the natural consequence of joint family system that all the income of joint family property should be brought to the common chest. All incomes of the joint family property, whosoever, may collect them, a coparcener, agent or a servant, must be handed over to the *Karta*, unless the *Karta* has specifically allotted income of a particular property to a member. No member of the joint family is entitled to any definite share of the income of the joint family property or business. It is for the *Karta* to allot funds to the members and to look after their needs and requirements. So long as family remains joint, no member can ask for any specified share in the income.

Right to representation.—The *Karta* represents the family in all matters, legal, social and religious. He acts on behalf of the family and his acts are binding on the entire joint family. The *Karta* can enter into any

transaction on behalf of the family and it will be binding on the joint family.[1] Association of another in the transaction does not alter the position of the *Karta* or the binding character of the transaction. He represents the family in suits and other legal proceedings.[2] The joint family will be bound by a decree or order passed in legal proceedings. Even when the *Karta* has lost a case on account of his gross negligence, it is not open to the other members to have the decree set aside on that ground alone.[3]

Power of compromise.—The *Karta* has power to compromise all disputes relating to the family property or their management. He can also compromise a suit pending in a court and it will be binding on all the members, though a minor coparcener may take advantage of O. 32, Rule 7, C.P.C. which lays down that in case one of the parties to the suit is a minor, the compromise must be approved by the court. He can also compromise family debts and other transactions. However, if his act of compromise is not bona fide, it can be challenged in a petition.[4] The *Karta* has no right to give up a substantial portion of a debt due to the family merely out of charity, or sympathy.[5]

Power to refer a dispute to arbitration.—The *Karta* has power to refer any dispute to arbitration and the award of the arbitration will be binding on the joint family.[6]

Power of acknowledgement.—The *Karta* has power to acknowledge on behalf of the family any debt due to the family. He has also the power to pay interest on a debt or to make part payment of the principal so that a fresh period of limitation may start.[7] The *Karta* has no power to acknowledge a time-barred debt.[8]

Karta's power to contract debts.—The *Karta* has an implied authority to contract debts and pledge the credit and property of the family for ordinary purposes of the family business.[9] Such debts, incurred in the ordinary course of business, are binding on the entire family. The *Karta* of the non-business joint family also has the power to contract debts for family purposes. Such debts are binding on the members of the joint family. When a creditor seeks to make the entire joint family liable for such debts, it is necessary for him to prove that the loan was taken for family purposes, or in the ordinary course of business, or that he made proper and bona fide enquiries as to the existence of need.[10] The expression "family purpose" has almost the same meaning as legal necessity, benefit of estate or performance of indispensable and pious duties.

Loan on promissory note.—When the *Karta* of a joint family takes a loan for family purposes or for family business and executes a promissory note

1. *Radhakrishandas* v. *Kuluram*, AIR 1967 SC 574.
2. *Baskari* v. *Bhasharam*, (1908) 31 Mad 318; *Amrit* v. *Suresh*, AIR 1970 SC 5; *Fathimanissa* v. *Rajgopalcharyulu*, AIR 1977 AP 24.
3. *Lingangowda* v. *Basangowda*, (1927) 54 I.A. 122.
4. *Nathathambi* v. *Vijaya*, (1972) 2 MLJ 535.
5. *Konduru* v. *Indoor*, (1928) 51 Mad 484.
6. *Jagannath* v. *Mannulal*, (1894) 16 All 231.
7. Section 21, Limitation Act.
8. *Dassappa* v. *Vedarathamma*, AIR 1972 Mys 288.
9. *Ram* v. *Ratan*, AIR 1931 PC 136; *Pendala* v. *Pendala*, (1972) 2 An WR 353.
10. *Mauli* v. *Brijlal*, AIR 1943 Lah 345 (F.B.).

for the same, the other members of the family may be sued on the note itself even if they are not parties to the note; their liabilities are limited to their share in the joint family property, though the *Karta* is personally liable on the note. There is a difference of opinion among our High Courts whether the coparceners are liable on the note itself or whether their liability arises out of the debt. The Allahabad, Nagpur and Patna High Courts take the former view,[1] while the Calcutta and Bombay High Courts take the latter view.[2] This distinction between liability on the note and liability on the debt is very material. If liability is on the note, the consideration will be presumed, if liability is on the debt, it would be necessary to prove that the debt was taken for a purpose binding on the family.[3] When a promissory note is in favour of the *Karta* and his sons, the *Karta* alone can sue on the note for the recovery of the debt.[4]

Power to enter into contracts.—The *Karta* has power to enter into contracts and such contracts are binding on the family. It is also now settled that a contract, otherwise specifically enforceable, is also specifically enforceable against the family.[5]

III
TRADING FAMILIES

Trading Hindu families have basically the characteristics of a joint Hindu family. Yet, in some respects, they are distinct from the ordinary non-trading joint family. When a Hindu starts his business independently, it is his separate business and constitutes his separate property. On his death, like any other heritable property into the hands of his sons, it also becomes joint family business. When the business is carried on exclusively by the members of the joint family, it is not a partnership business and the provisions of the Partnership Act, 1932 do not apply.

The Hindu joint family business does not arise out of a contract between the members, but it comes into existence by operation of law.[6] It would be wrong to compare the joint family business with partnership business and it would be incorrect to say that it has many incidents of a partnership.[7] The death of a coparcener or the *Karta* does not mean dissolution of the joint family business, as is the case with partnership business. It devolves by survivorship on the other coparceners. It would be wrong to say that coparceners are partners *vis-a-vis* each other or outsiders. The business, trade or industry and its assets, including the goodwill, constitute the joint family property. A minor coparcener becomes its member by virtue of the fact that he is born in the family : his admission in the joint family business does not

1. *Raghunath* v. *Sri Narayana*, ILR (1923) 45 All 424; *Gandulal* v. *Jangli*, ILR (1947) Nag 604; *Thakur* v. *Ajodhiya*, AIR 1939 Pat 490.
2. *Hari* v. *Sourendra*, AIR 1925 Cal 115; *Vittal* v. *Vittal Rao*, (1923) 25 Bom LR 151. *See* also *Bhagirathi* v. *Gulab*, AIR 1956 Raj 174.
3. *Kakuram* v. *Kurra Subba Rao*, AIR 1949 FC 95; *Maruthamuthu* v. *Kadir*, ILR (1938) Mad 568 (F.B.).
4. *Biloy* v. *Lahor*, AIR 1973 Cal 465 (the entire case law has been discussed).
5. *Bhagirath* v. *Bhagwan*, AIR 1962 Pat 391; *Rama Lingam* v. *Babanammal*, AIR 1951 Mad 431; *Dhapo* v. *Ram Chandra*, AIR 1934 All 1019; *Ram Rao* v. *Sugan Chand*, AIR 1946 Nag 139.
6. *State Bank of India* v. *Ghamandi*, AIR 1969 SC 1339.
7. *Nanchand* v. *Mallappa*, AIR 1976 SC 835.

depend on any agreement. Ordinarily, it is the *Karta* alone who acts on behalf of the family and represents the business, unless some other coparcener is associated with the management of the business, in that case acts of both will bind the joint family.[1]

The *Karta* and other coparceners who take an active part in the business are personally liable, though other coparceners, including minors, are liable only to the extent of their interest in the joint family property.[2] In case a partition takes place, but the business is carried on by some coparceners, it will become an ordinary partnership business; an agreement to carry on business will be implied.

Power of the Karta of the trading joint families.—Apart from having all the power of the *Karta* of a non-trading family, the *Karta* of the trading family has additional powers.[3] He can take debts in the course of business.

The joint family is also liable for the torts of the *Karta* committed in the course of business. In *Ambalal* v. *Bihar Hosiery Mills*,[4] the sons who inherited a mining lease from their father were held liable for damage caused to the overhead building.

New Business

The *Karta* of a joint family cannot impose upon a minor member of the family risk and liability of a new business started by him and adult members. He cannot also impose such risk and liability even on the adult members without their consent.[5]

But sometimes it becomes difficult to say whether the so-called new business is really a new business or extension of the old business. For instance, when persons engaged in a business of one type of goods usually manufacture other types of goods, the extension of business to manufacturing of other goods is not a new business.[6] Similarly, when the family is engaged in a hazardous, speculative business of one kind, extension of another business equally hazardous or speculative would not amount to new business.[7]

Similarly, starting of a floor mill cannot be regarded as extension of an old money-lending business.[8] Whether a particular business is an altogether new business will depend upon the facts and circumstances of each case. In the case of trading families, the so-called new business may, in fact, be an extension of the old business which may be justified on the ground of legal necessity of benefit, and cannot be thus regarded as a new business.[9] The

1. *Chunni Lal* v. *Kalu*, AIR 1966 Raj 298.
2. *Alogammi* v. *Palaniappa*, (1940) 1 MLJ 469.
3. *Gopalakrishna* v. *Balasubramania*, ILR (1968) 3 Mad 565.
4. AIR 1937 Pat 657.
5. *Sanyasi Charan* v. *Krishnadhan*, AIR 1922 PC 238. *Benares Bank* v. *Hari Narayan*, AIR 1932 PC 182.
6. *Bahadur Singh* v. *Girdharilal*, AIR 1937 Nag 237.
7. *Desu* v. *Narayanarao*, (1947) Mad 236; *Prasanjit* v. *U.K. Band*, AIR 1970 Pat 151; *Narayan* v. *Varnasi*, ILR (1947) Mad 236.
8. *Makhan Lal* v. *Harnarayan*, AIR 1960 MP 56.
9. *Ram Nath* v. *Charanji Lal*, ILR (1935) 57 All 605; *Amalal* v. *Bihar Hosiery Mills*, ILR (1937) 16 Pat 545; *Hayat Ali* v. *Namchand*, AIR 1945 Lah 169 (F.B.).

tendency in recent decisions seems to be to widen the powers of the *Karta* of trading families, so that they are able to cope with the challenges of the trade and business of the modern times. The only limitation that may be justified seems to be that the joint family should possess necessary skill for new ventures.

Partnership *inter se* : between the *Karta* and coparcener and between coparceners.—At one time a view was held that there cannot be any partnership business between the *Karta* and a coparcener or between coparceners. But today this view is no longer correct. Such partnership can come into existence. Thus, the *Karta* may invest capital and a coparcener his labour and skill or coparcener invest his separate properties. Similarly, coparceners *inter se* can have partnership business.

Partnership with strangers.—Since a Hindu joint family is not a juristic person, it cannot enter into the partnership with others in its own name. But the *Karta* has the power, on behalf of the joint family to enter into partnership with strangers. In such a case, the *Karta* or any other member, as provided in the agreement, becomes a partner with the stranger and not the family as a unit.[1] The other coparceners are not partners in the partnership and thus cannot interfere in the day to day business of the firm, though the *Karta* is accountable to the family.[2] It is possible for the *Kartas* of two joint families to enter into a partnership business. This does not make other members of the joint families partners, though the *Kartas* will be liable to members of their respective families.[3] Such a partnership is governed by the Partnership Act, 1932, and on the death of the *Karta*, it will stand dissolved.

Where a *Karta* properly enters into a partnership with a stranger pledging the credit of the family, the creditors of the firm can have recourse against the entire assets of the joint family. Similarly, as members of the joint family, they have the same interest in the assets of the business as they have in the other joint family property and have the same remedies against the *Karta*.[4] On dissolution of the firm, the coparceners can participate in the distribution of its assets.[5]

Business in the name of a coparcener.—There is no presumption that business carried on by a member of the joint family is joint family business.[6] A coparcener can carry on his separate business.[7]

IV
FAMILY ARRANGEMENT

Family arrangement is an ancient institution of the Hindus. It has been used since long as an instrumentality to settle, prevent and forestall disputes within the family or between the family and strangers closely connected with

1. *Pichappi* v. *Chokalingam*, AIR 1934 PC 192.
2. *Rattanchand* v. *I.T.C.*, AIR 1985 SC 1572; *Gian Chand* v. *Rabinder Mohan*, AIR 1987 SC 240.
3. *Commr. of Income tax* v. *Seth Govind Das Sugar Mills*, AIR 1966 SC 24.
4. *Gangayya* v. *Venkatamiah*, (1918) 41 Mad 454; *Firm Bhagat Ram* v. *Commr. of E.P.T.*, AIR 1956 SC 374.
5. *Ganga* v. *Rangachari*, AIR 1956 Mad 340.
6. *Ghattannatha* v. *Ram*, AIR 1955 SC 799.
7. *Prakash* v. *Narendra*, AIR 1976 SC 2456.

the family. Though conflict of legal claim *in prasenti* or *in futuro* is generally a condition for the validity of a family arrangement, it is not necessarily so. Even bona fide disputes, present or probable which may not involve legal claims will suffice. Members of a joint family may, to maintain peace, or to bring about harmony in the family, enter into a family arrangement. If such an arrangement is entered into bona fide and the terms thereof are fair in the circumstances of a particular case, the court will more readily give assent to such an arrangement than to avoid it.[1] It is not necessary, that there must exist a dispute, actual or possible in present or in future, in respect of each and every item of property and amongst all members arrayed against each other. It would suffice if it is shown that there were actual or possible claims and counter claims by parties in settlement whereof the arrangement as a whole has been arrived at thereby acknowledging title in one to whom a particular property falls on the assumption that he had anterior title therein.[2] In this context, 'family' is not to be understood in a narrow sense of being a group of persons whom the law recognizes as having a right of succession or having claim to a share in the disputed property.[3] The consideration for a family settlement is the expectation that such a settlement will result in establishing or ensuring amity and goodwill amongst the relations.

Family arrangements can be made in a compromise entered into a suit and embodied in a decree.[4]

A family settlement or arrangement is not a transfer of property. It is also not a creation of an interest. In a family settlement, each party takes a share in the property by virtue of independent title which is admitted to that extent by the other parties. It is not necessary that every party must have claims in law. All that is necessary to show is that the parties are related to each other in some way and have a possible claim to the property or even a semblance of a claim, on some ground, such as, say, affection.[5] But very remote or hypothetical possibility of a dispute will not be a sufficient basis for a family arrangement.[6] A family arrangement can be entered into and gathered from a will, a compromise, a deed, or from a number of deeds read together.[7]

A family arrangement need not be in writing. It may be oral. If it is in writing, it is not necessary that it should be registered.[8] It may be inferred from the conduct of the parties. For instance, where the original parties to an arrangement are dead but the holding of property by the members of a family cannot be explained except by inferring a family arrangement, the court would impute a family arrangement.[9] A family arrangement need not be

1. *Maturi* v. *Maturi*, AIR 1966 SC 1836; *Deputy Director, Consolidation*, AIR 1956 SC 807.
2. *Shambhu* v. *Phool Kumari*, AIR 1971 SC 1337; *see also Kate* v. *Dy. Director*, AIR 1976 SC 807.
3. *Ram Charan* v. *Girja*, AIR 1966 SC 323.
4. *Ibid.*
5. *Ram Charan* v. *Girja*, AIR 1966 SC 323; *Shanmugam* v. *Shanmugam*, AIR 1972 SC 2069.
6. *Potti* v. *Potti*, AIR 1965 SC 825.
7. *Chattannatha* v. *Central Bank*, AIR 1956 SC 1856.
8. *Kala* v. *Deputy Director, Consolidation*, AIR 1976 SC 807.
9. *Sahu* v. *Mukund*, AIR 1955 SC 481.

bilateral or between members of a joint family.[1] It is also not necessary that the parties belong to the same family.[2]

A family arrangement, by its very nature, binds all the members including minors and members in the womb.[3]

Where under a compromise, the presumptive reversioners purported to give up a portion of the suit properties absolutely to the widow in consideration of her giving up her claim in respect of her properties, it was held that they were estopped from contending that they were entitled to succeed to the properties.[4] Where heads of the branches of families enter into family arrangements, all members are bound.

It is essential for the validity of a family arrangement that the entire family should be benefited by it. It should not be a cloak for depriving some members of their rights and it is necessary that all members should give up something to the common advantage of all. In short, by a family arrangement, conflicting claims are settled by the process of give and take.[5]

A family arrangement should not be a fraud; it will not be binding on those who are defrauded.[6] Where the object of an arrangement is to maintain good relations, to preserve the family's property, to convert the expectancy of reversion into a certainty, these are sufficient considerations in law to uphold the arrangement.[7]

A family arrangement may be incorporated in a will but bequest to an unborn person cannot be held valid even as a family arrangement.[8]

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1. *Tek Bahadur* v. *Debi Singh*, AIR 1969 SC 292.
2. *Krishna* v. *Gulab Chand*, AIR 1971 SC 1041.
3. *Sant Bhusan* v. *Brij*, AIR 1967 Del 137.
4. *Krishna* v. *Gulab Chand*, AIR 1971 SC 1041.
5. *Kisto* v. *Anila*, AIR 1968 Pat 487; *Pholl* v. *Prem*, AIR 1952 SC 207.
6. *Kamagati* v. *Dighijai*, (1921) 43 IA 381.
7. *Pullaiah* v. *Narasimham*, AIR 1966 SC 1836; *Kale* v. *Dy. Director, Consolidation*, AIR 1976 SC 807.
8. *Raman* v. *Rassalamma*, AIR 1970 SC 1759.

Chapter 31

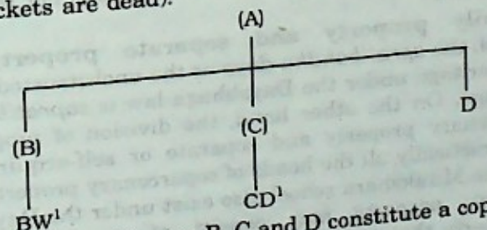
DAYABHAGA JOINT FAMILY

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

Sons have no right by birth.—Strictly speaking, under the Dayabhaga school, there is no joint family between father and son. Sons have no right by birth.[1] Similarly, the sons have no right of survivorship. Under the Dayabhaga school, all properties, self-acquired as well as coparcenary, devolve by succession.

Pondicherry State.—In the State of Pondicherry, a son has no birth right in the ancestral property in the hands of the father.[2]

Coparcenary.—Under the Dayabhaga school, apparently a joint family may come into existence the same way as under the Mitakshara school. But the fact of the matter is that there is no joint family under the Dayabhaga school in the sense in which it exists under the Mitakshara school. Similarly, there is no coparcenary consisting of father, son, son's son and son's son's son. A Dayabhaga coparcenary comes into existence for the first time on the death of the father when the sons inherit their father's property, they constitute a coparcenary. On the death of the father, the succession is *per stirpes*, *i.e.*, branch of each of his son takes an equal share. But this does not mean that the share on succession belongs to each branch. When an heir takes property by succession, his male or female descendants have no right in it and the heir takes it absolutely. When the sons inherit the property jointly and constitute a coparcenary, on the death of anyone of them, his heir will succeed to the property. And if a son dies leaving behind a widow or daughter, then she will succeed and become a coparcener. Thus, under the Dayabhaga school, a female can also be a coparcener. Take the following diagram (the persons within the brackets are dead).



On the death of A, his sons B, C and D constitute a coparcenary. If B dies

1. *Banki* v. *Ayodhya*, (1974) 42 C.C.T. 403.
2. *Pandurangan* v. *Sarangapani*, AIR 1982 Mad 372.

leaving a widow BW and C dies leaving behind a daughter CD, then the coparcenary will consist of BW, CD and D. However, even under the Dayabhaga school, there cannot be a coparcenary consisting exclusively of females. Thus, if D dies leaving behind a daughter DD, then there cannot be a coparcenary consisting of BW, CD and DD. Similarly, under the Dayabhaga school, a coparcenary cannot start with the females. Thus, if a male dies leaving behind two widows or two daughters, they will succeed to his property, but will not constitute a coparcenary.

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

Each coparcener takes a defined share.—Unlike the Mitakshara coparcener, a Dayabhaga coparcener takes a specified and fixed share on the death of his ancestor. It is not a fluctuating and uncertain interest. For instance, A, a father, dies leaving behind three sons, B, C and D. B, C and D each will inherit 1/3 properties. The 1/3 share of each coparcener is a fixed and certain share. It will not fluctuate on the death or birth of any person in the coparcenary. So long as B, C and D are living, neither their sons nor any other person can claim any interest in it.

Unity of possession.—Although in a Dayabhaga coparcenary, there is no community of interest, yet there is unity of possession. We have seen earlier that when the sons succeed to the property of their father and constitute a coparcenary, they take fixed shares, 1/3 or 1/4, as the case may be. But till a partition by *metes* and *bounds, i.e.*, distribution of properties takes place, no coparcener can say which is his 1/3 or 1/4. In other words, none of them can say that such and such property will fall to his share. Each coparcener is in possession of the entire property, even if he has not actual possession, as possession of one is possession of all. No one can claim any exclusive possession of property unless agreed upon by the coparceners.[1]

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

Joint family property and separate property.—Under the Dayabhaga school, the *apratibandha daya* or the unobstructed heritage is not recognized. All heritage under the Dayabhaga law is *sapratibandha daya* or obstructed heritage. On the other hand, the division of property into joint family or coparcenary property and separate or self-acquired property is recognized and practically all the heads of coparcenary property and separate property under the Mitakshara school also exist under the Dayabhaga school. Thus, coparcenary property may consist of ancestral property, joint acquisitions, property thrown into the common stock, accretions, etc.[2] In the same manner, the self-acquired property may consist of self exertions or gains

1. *Balai* v. *Chahilal*, AIR 1974 Pat 147.
2. *Sreemuty Soorjeemoney* v. *Denobundas*, (1856) 6 MIA 526.

of learning, government grants, lost property recovered, income of separate property, share on partition, etc.

Karta.—The eldest male member is ordinarily, the *Karta* of the coparcenary. The *Karta's* powers and liabilities and *Karta's* power of alienation of property under the Dayabhaga school are the same as that of the Mitakshara *Karta*. The main difference between the Mitakshara *Karta's* powers and the Dayabhaga *Karta's* powers is that the latter must render full accounts at all times, whenever required to do so by any coparcener, while the former is required to render accounts only on partition.

Coparcener's power of enjoyment and alienation of his share.—As every Dayabhaga coparcener takes a defined share in the coparcenary property, he is entitled to make any use he likes of his share in the joint family property. Similarly, he has full right of alienation of his share in the coparcenary property. He may dispose it of by gift, sale or mortgage. He may even lease out the property, if he is in its actual possession. He may also dispose of his share by will. Like the Mitakshara coparcener, the Dayabhaga coparcener also has a right of partition.

Chapter 32

ALIENATIONS

Under Hindu law, ordinarily, neither the *Karta* nor any other coparcener singly, possesses power of alienation over the joint family property or over his interest in the joint family property, though under the Dayabhaga school, a coparcener has the right of alienation over his interest in the joint family property. However, under certain circumstances, such alienation can be made under the *Mitakshara* school also.

The subject may be discussed as under :

1. Father's power of alienation,
2. *Karta's* power of alienation,
3. Coparcener's power of alienation,
4. Sole surviving coparcener's power of alienation,
5. Coparcener's right to challenge an improper alienation, and
6. Alienee's rights and remedies.

I
FATHER'S POWER OF ALIENATION

The father has full power of alienation over his separate property, both immovable and movable. The Dayabhaga father has full power of alienation over all the properties, whether self-acquired or ancestral.

Ordinarily, the Mitakshara father has no power of alienation of joint family properties. However, the father has the power of making "gifts out of love and affection," and of alienating joint family property for discharging his personal debts. Thus, the father can alienate joint family property by way of—

1. Gift of love and affection, and
2. For the discharge of his personal debts.

Gifts of Love and Affection

Gift of movable property.—The father has power to make a "gift out of love and affection" of a small portion of movable joint family property.[1] Such gifts may be made by him to his own wife, daughter, son-in-law, son, daughter-in-law or to any other near relation. These may consist of jewels, gold or silver ornaments, clothing, cash or of any movable property. Such gifts are very common among the Hindus and are ordinarily made on some occasion, such as marriage, *upanayana, mundana* or when the daughter, after marriage, visits the house of her father, or when a child is born to her. Two conditions are necessary for the validity of such gifts : (1) It should be a gift of love and affection, *i.e.*, the father should stand in some relationship of

1. *Tejnath* v. *Commr. of Gift Tax*, 1972 I.T.R. 452.

affection to the donee, and (2) the gift should be of a small portion of movable joint family property. What is a small portion, is a relative term and has to be considered in relation to the entire joint property.

Gifts of immovable property.—In *Guramma* v. *Mallappa*,[1] a gift of immovable property to the daughter by the father after her marriage was held valid. The Supreme Court justified such gifts by saying that it was given in lieu of daughter's share in partition which was recognized in ancient law. It is submitted that, despite this particular reasoning, gifts of love and affection of immovable property cannot be made to the daughter or, for that matter, to any member of the joint family. The Supreme Court in a later decision has confined this rule to gifts of daughter.[2]

II
KARTA'S POWER OF ALIENATION

The Shastric law permitted any member of the family to alienate the joint family property, in certain exceptional circumstances.

Thus, Vijnaneshwara recognized three exceptional cases in which alienation of the joint family property could be made :

(i) *Apatkale*,
(ii) *Kutumbarthe*, and
(iii) *Dharamarthe*.

Vijnaneshwara conferred this power on every member of the family in the above circumstances. The formulation of Vijnaneshwara has undergone modification in two respects. First, the power cannot be exercised by any member except the *Karta*. Secondly, the joint family property can be alienated for the following three purposes only :

(a) Legal necessity,
(b) Benefit of estate,
(c) Acts of indispensable duty.

Consent of coparceners.—It is now settled that the *Karta* can alienate the joint family property with the consent of the coparceners even if none of the above exceptional cases exist. If all the coparceners are adult, it is binding on the entire joint family. If only some coparceners consent, in Bombay and Madras, it will be binding on the interest of the consenting coparceners. But in West Bengal and Uttar Pradesh, the alienation will not be valid.

Legal necessity.—The term 'legal necessity' has not been defined precisely and it is submitted that it is not possible to give any precise definition. The cases of legal necessity can be so numerous and varied that it may be impossible to reduce them into water-tight compartments. Broadly speaking, 'legal necessity' will include all those things which are deemed necessary for the members of the family. The term *apatkale* used by Vijnaneshwara may indicate that joint family property can be alienated only in times of distress, such as famine, epidemic, earthquake, floods and the like. An alienation in such circumstances will be undoubtedly valid. It is now established that "necessity" is not to be understood in the sense of what is absolutely indispensable but what, according to the notions of a Hindu family,

1. AIR 1964 SC 510.
2. *Ammathayee* v. *Kumaresan*, AIR 1967 SC 569.

would be regarded as proper and reasonable. Thus, legal necessity does not mean actual compulsion; it means pressure upon the estate which in law may be regarded as serious and sufficient.[1] If it is shown that the family's need was for that thing or that article, and if property was alienated for the satisfaction of that need, it would be enough. Any alienation of the joint family property made without legal necessity is not binding on the family.[2] The term is to be interpreted with due regard to the conditions of modern life.[3] However, where there is no proof that the business is the family business, any loan taken for a business by the *Karta* will not be binding.[4]

Any enumeration of the cases of legal necessity cannot be exhaustive. With this caution, we may note some illustrative cases of legal necessity : (a) food, shelter and clothing for the members of the family; (b) marriage of the members of the family including daughters,[5] but the second marriage of a member is not a legal necessity. Also marriage of a minor cannot be covered under legal necessity;[6] (c) medical care of the members of the family; (d) defence of a member involved in a serious criminal charge, but not for the prosecution of a person accused of murdering of a member of the family; (e) for the payment of debts binding of the family and for the payment of decretal debts; (f) for the payment of government dues, such as land revenue, income-tax, cess and other taxes and duties; (g) for the performance of necessary ceremonies, such as *sradha* and *upnayana*; (h) for the payment of rent; and (i) sale of land to construct a *pakka* house.[7]

Benefit of estate.—Broadly speaking, benefit of estate means anything that is done which will benefit the joint family property. The Privy Council in *Palaniappa* v. *Dasikmony*,[8] observed : "It is impossible...to give a precise definition of its applicability in all cases, and we do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or its portions from injury or deterioration by inundation, these and such like things would obviously be benefits. Following this decision, our High Courts took divergent views. According to one view, only that will be 'benefit of estate' which is of a defensive character, *i.e.*, which is done to avert an imminent danger to the property. Repairs of a house in a dilapidated condition, construction of dikes and bunds to prevent flooding of land, or defence of property involved in hostile litigation, such and the like acts alone would amount to the benefit of estate. This view seems to be no longer valid.[9] The second view is that anything done which is of positive benefit to the estate would amount to the benefit of estate. The test is of a prudent owner. Anything which a prudent person can do in respect of his own property, the *Karta* can do in respect of the joint family property.[10] A Full Bench of the Bombay High Court in *Hemraj*

1. *Rani* v. *Shanta*, (1971) SC 1028.
2. *Bashavraj* v. *Kushal Chand*, AIR 1992 Ker 393.
3. *Ram Vilas* v. *Ramnand*, (1970) PLJ 622.
4. *Arakkal* v. *Arakkal*, AIR 1958 Ker 119 (FB).
5. *Patel* v. *Lakkireddigarh*, (1947) Mad 379.
6. *Dev Kishan* v. *Ram Kishan*, AIR 2002 Raj. 370.
7. *Tarni Prasad* v. *Basudeo*, AIR 1981 Pat 33.
8. AIR 1917 PC 68.
9. *Jagat* v. *Mathuradas*, AIR 1929 All 454 (FB).
10. *Amrej Singh* v. *Shambhu Singh*, (1933) 55 All 1 (FB); *Hapat Ali* v. *Nem Chandra*, AIR 1924 Lah 169 (FB).

v. *Nathu*,[1] took an intermediate view; the property cannot be alienated merely for the purpose of enhancing its value though, at the same, it would not be correct to say that no transaction can be for the benefit of estate which is not of defensive character. The judicial opinion has veered round in favour of the test of "prudent person." The *Karta*, as prudent manager, can do all those things which are in furtherance of the family's advancement, to prevent probable losses, provided his acts are not purely of speculative or visionary character.[2] This implies that the *Karta* cannot convert property into money just because the property does not yield any income, without replacing it with some more advantageous property.[3] The sale of a dilapidated house, the sale proceeds of which were utilized in constructing a second storey on the joint family house, is for the benefit of estate.[4] Sale of property to enable the family to migrate to another place and to purchase more productive lands there, amounts to benefit of estate.[5] Where the *Karta* who was running a hotel business mortgaged the family property with a view to raising funds for renovation and reconstruction of the hotel, it was held to be for the benefit of estate.[6]

Indispensable duties.—The term "indispensable duties" implies performance of those acts which are religious, pious or charitable. This expression includes indispensable duties such as *sradha*, *upanayanama*, and performance of other necessary *samskars*. The performance of marriage particularly of daughters, is an indispensable duty, though, it is also covered under the legal necessity. It will include the performance of ceremonies, such as *grihapravesam*, *rithusanti* and *gauna* ceremonies. Apart from such indispensable ceremonies, a small portion of property can be alienated for a permanent shrine for a family idol or to an idol in a public temple.[7]

There is a distinction between alienation made in the discharge of the indispensable duties and gifts made for charitable or pious purpose. In the former case, the *Karta's* powers are unlimited. He may even alienate the entire property. In the latter case, he can alienate only a small portion of the joint family property, whether movable or immovable.

Burden of Proof

It is an established rule that the burden of proof whether the transaction is for legal necessity, benefit or for indispensable duty is on the alienee.[8] The following five propositions are well settled :

1. The powers of the *Karta* under Hindu law are limited and qualified powers. He can exercise the power of alienation in limited cases such as for legal necessity and benefit of estate.
2. In case *Karta* makes an alienation as a prudent man, in order to benefit the estate or the family, the bona fide lender or alienee is

1. (1935) 59 Bom 525 (FB).
2. *Sengoda* v. *Muttuvellappa*, AIR 1955 Mad 531; *Nirmal* v. *Satnam*, AIR 1960 Raj 313.
3. *Ibid.*
4. *K.C. Kapoor* v. *Radhika Devi*, AIR 1981 SC 2128.
5. *Balmukund* v. *Kamla*, AIR 1964 SC 1385.
6. *Gallamudi* v. *Indian Overseas Bank*, AIR 1978 AP 37.
7. *Audayappa* v. *Muthulokhmi*, AIR 1925 Mad 1281; *Gangi* v. *Tami*, (1927) 54 IA 136.
8. *Hanoomanprasad* v. *Babooee*, (1956) 6 MIA 393; *Bansilal* v. *Kuldeep*, AIR 1981 J & K 35; *Handa* v. *Murlidhar*, AIR 1990 Ori 225; *Jaganath* v. *Hema*, AIR 1990 Ori 164.

not affected by the previous mismanagement of the estate, provided the lender or alienee was not a party to the mismanagement. In other words, the lender or alienee should not have acted mala fide.

3. That alienee is bound to make proper and bona fide enquiries as to the existence of legal necessity.
4. If the alienee acts bona fide and makes proper inquiries, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of alienation, and
5. The alienee is not bound to see as to the actual application of the money for the legal necessity.[1]

In other words, whenever an alienation is challenged, it is for the alienee to show that there was legal necessity.[2] It is because, when one deals with a person whom one knows or is supposed to know to be a person of qualified powers, it is one's duty to satisfy oneself that such a person has the power to make proposed alienation. However, what alienee is required to prove is : either there was actually a need or that he made proper and reasonable enquiries as to the existence of the need and acted honestly. If he does that, he has discharged his burden; it is immaterial if it turns out that actually there was no need for alienation. Similarly, it is not his duty to see that the money is applied to the legal necessity for which it was taken. He is not an administrator of the fund, nor its trustee. In short, the onus may be discharged by the alienee by : (a) proof of actual necessity, or (b) by proof that he made proper and bona fide enquiries about the existence of legal necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity.[3]

Partial necessity.—When the necessity is only partial, *i.e.*, where the money required to meet the necessity is less than the amount raised by alienation, can the alienation be justified for legal necessity? Sometimes it is not possible to alienate the property for the precise amount of the need. In *Krishnadas*,[4] the Privy Council said that the sale will be valid only if the purchaser acts in good faith and after due enquiry and is able to show that the sale itself was justified by the legal necessity. In this case, the alienation was for Rs. 3,500 and the alienee was able to prove the legal necessity for Rs. 3,000. The alienation was held valid.[5] But where the *Karta* decides to raise money by mortgage of family property, he can borrow the precise amount required, and therefore it has been held that the coparceners will not be bound for any excess amount borrowed.[6]

Alienation is voidable.—It may be taken to be a well settled law that alienation by the *Karta* without the legal necessity or benefit of estate or in discharge of indispensable duty is not void but merely voidable at the instance of any coparcener.[7]

1. *Radhakrishnadas* v. *Kaluram*, AIR 1967 SC 574.
2. *Rani* v. *Santa*, AIR 1971 SC 1028; *Faquir* v. *Harnam*, AIR 1967 SC 727; *Ram* v. *Balla*, AIR 1986 SC 193.
3. *Rani* v. *Santa*, AIR 1971 SC 1028.
4. AIR 1927 PC 37.
5. *See* also *Radha* v. *Kaluram*, AIR 1967 SC 547.
6. *Benaras Bank* v. *Hariram*, 59 IA 300.
7. *Raghubanchmani* v. *Ambika Prasad*, AIR 1971 SC 776.

III
COPARCENER'S POWER OF ALIENATION

The *Mitakshara* did not permit individual alienations by the coparceners. The Smritikars also did not seem to confer on a coparcener power of alienation over his undivided interest in the joint family property. However, the textual authority is very scanty. The law of coparcener's power of alienation is the product of judicial legislation. The first inroad was made 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 High Courts extended this principle to voluntary alienations also. We may divide the subject under two heads :

(a) Involuntary alienation, and
(b) Voluntary alienation.

Involuntary Alienation

Involuntary alienation means the alienation of the undivided interest in execution proceedings. The Hindu sages laid great emphasis on the payment of debts. The court seized this principle of Hindu law and held that the purchaser of undivided interest at an execution sale during the life of the debtor of his separate debt acquires his interest in such property with the power of ascertaining and realizing it by partition.[1] The limitation of this rule is that such a decree cannot be executed against the interest of the coparcener after his death. But if his interest has been attached during his lifetime, it can be sold in court sale after his death.[2]

Voluntary Alienation

Once it was accepted that the undivided interest of a coparcener can be attached and sold in execution of a money decree against him, it was the next logical step to extend the principle to voluntary alienations. What a coparcener can be forced to do, he should also be permitted to do himself; and some High Courts extended the principle to voluntary alienations.

Sale and mortgage.—According to the Bombay, Madras and Madhya Pradesh High Courts, a coparcener has power to sell, mortgage or otherwise alienate for value his undivided interest without the consent of other coparceners.[3] In the rest of the Mitakshara jurisdiction, such alienations are not permitted and a coparcener has no power to alienate his undivided interest by sale or mortgage, without the consent of other coparceners.[4]

Gifts.—It is a settled law under the Mitakshara school including its sub-schools that a coparcener cannot dispose of his undivided interest in the joint family property by gift *inter vivos*.[5] Such a transaction is void.[6] However, he can make a gift *inter vivos* with the consent of other coparceners, provided

1. *Deen Dayal* v. *Jagdeep*, (1987) 4 IA 247.
2. *Ibid*. *See* also *Shanmughan* v. *Hagaswami*, (1947) 2 MLJ, 550; *Suraj Bansi* v. *Sheo Pd*. (1880) 6 IA 88.
3. *Pandu* v. *Goma*, AIR 1919 Bom 84; *Permanayakam* v. *Sivaraman*, AIR 1952 Mad 419 (FB); *Panda* v. *Panda*, AIR 1974 Orissa 214; *Laxmi* v. *Kala*, AIR 1977 All 509.
4. *Manna Lala* v. *Karu Singh*, AIR 1919 PC 108; *Laxmi* v. *Kala*, AIR 1977 All 509 (FB); *Tatoba* v. *Torabai*, (1957) 59 Bom LR 633.
5. *Baba* v. *Timma*, (1884) 7 Mad 357 (FB); *Venkappaya* v. *Rangavayya*, AIR 1951 Mad 318; *Rathamma* v. *Venkata*, (1973) 2 AP LJ 936 (for contrary view).

it is in favour of all the coparceners.[1] Under S. 30, Hindu Succession Act, 1956, a coparcener may dispose of his undivided interest by will.

Renunciation.—A coparcener has power to renounce his interest in the joint family property Consent of other coparceners is not necessary. Renunciation is in the nature of self-effacement. It does not affect the interest of other coparceners. It does not result in general partition.[2] Renunciation to be valid must be of the entire interest in favour of the entire body of coparceners. Renunciation extinguishes the interest of the renouncing coparcener in the joint property, and its effect is to reduce the number of persons to whom shares will be allotted if and when a division of estate takes place. Once a coparcener renounces his interest in favour of others, he cannot revoke the renunciation or release.[3] If the renouncing coparcener remains a member of the joint family, his sons including sons born to him after renunication, cannot be deprived of their shares in the joint family property. But if the renouncing coparcener ceases to be the member of the joint family, his after born son cannot claim any right by birth in such property.[4] Renuniciation should not be fraudulent or fictitious.[5]

Renuniciation does not amount to transfer of property and therefore no deed or any other formality is necessary. The expression of an intention is enough.

A widow can also renounce her interest in the joint family property which she gets as an heir of her husband.

IV
SOLE SURVIVING COPARCENER'S RIGHT OF ALIENATION

When all the coparceners die leaving behind one, such a coparcener is known as the sole surviving coparcener. When the joint family property passes into the hands of the sole surviving coparcener, it assumes the character of separate property, so long as he does not have a son. The sole surviving coparcener has full power of alienating the property the way he likes, by sale, mortgage or gift, since at the time of alienation there is no other member who has joint interest in the family property.[6] Such an alienation cannot be challenged by a subsequently born or adopted son.[7] But if another member was in the womb of his mother at the time of alienation, he does not have the power of alienation and the member on his birth can challenge such alienation. The subsequently born member may ratify it on attaining the majority.[8]

In *Mahadevappa* v. *Chanabasappa*,[9] the Mysore High Court said that an alienation made by a sole surviving coparcener, while there was a widow in the joint family is not binding on the son subsequently adopted by the widow if alienation is not made for a purpose binding on the joint estate. The

1. *Bajhawan Singh* v. *Shuma*, AIR 1964 Pat 301.
2. *Raghuban Narain* v. *State of UP*, AIR 1972 SC 2096.
3. *Pannuchami* v. *Balsubramanian*, AIR 1972 Mad 281.
4. *Sarathambal* v. *Suralam*, AIR 1981 Mad 59.
5. *Shri Chand* v. *Om Prakash*, AIR 1977 SC 1823.
6. AIR 1977 SC 394; *Guramma* v. *Mallappa*, AIR 1964 SC 510.
7. *Ibid*.
8. *Ibid* : *See* also *Sant Ram* v. *Mohinder*, AIR 1994 HP 109.
9. AIR 1966 Mys 15.

Bombay High Court takes the contrary view. It held that the doctrine of relating back does not apply to the alienations made before adoption by the sole surviving coparcener.[1] A Full Bench of the Bombay High Court held that if on the death of the last surviving coparcener, the joint family property devolves upon his heir by inheritance, the heir cannot be divested by a subsequently adopted son.[2] In *Babgonda* v. *Anna*,[3] after reviewing practically all the cases, Desai, J., said that it has always been held that the sole surviving coparcener has a right to alienate the joint family property as if it is his own and this power is not fettered by the contingency of an adoption being made by a widow in the family, a contingency which may not operate at all. And if a widow adopts a son subsequent to alienation, such a son cannot challenge the alienation. It is submitted that the Bombay view is correct. After the coming into force of the Hindu Succession Act, the sole surviving coparcener cannot alienate the share of the wife.[4]

We may summarize the position thus :

1. A sole surviving coparcener has full right of alienation of the joint family property, but if at the time of alienation, another coparcener is in the womb, on his birth, he can challenge such an alienation.
2. The sole surviving coparcener's power of alienation is not affected by a subsequent adoption of a son by a coparcener widow (though the Mysore High Court has taken a contrary view).
3. The sole surviving coparcener cannot alienate the interest of any female vested in her by virtue of the operation of Section 6, Hindu Succession Act.
4. He can also alienate the property by will.[5]

V
COPARCENER'S RIGHTS TO CHALLENGE ALIENATION

An improper alienation can be challenged. It can be challenged the moment the person entitled to challenge comes to know of it and till it is not barred by limitation. Whenever an alienation is challenged, the burden of proof is on the alienee to show that it was for a valid purpose. Even when sons challenge an alienation made by the father for discharging his personal debts, it is for the alienee to show that the debt was taken by the father, though if sons assert that the debt was tainted or *avyavaharika* (thereby admitting that their father did take the debt), the burden of proof that the debt was tainted is on the sons. Sometimes a stranger can also challenge an alienation; such as a purchaser of a coparcener's interest may challenge an improper alienation.

Existing Coparcener's Right to Challenge

It is settled law that an improper alienation can be challenged by all or anyone of the coparceners existing at the time of the alienation. But an alienating coparcener cannot challenge his own alienation—this is based on

1. *Bhimji* v. *Hanumant Rao*, AIR 1950 Bom 271; *Vithal* v. *Shivabai*, AIR 1950 Bom 289.
2. *Ram* v. *Balaji*, AIR 1955 Bom 291 (FB).
3. AIR 1968 Bom 8. *See* also *Mahadeo* v. *Rameshwar*, AIR 1968 Bom 323.
4. *Shankaramma* v. *Madappa*, AIR 1977 Kant 188.
5. *Arjun* v. *Pingal*, AIR 1993 HP 34.

the principle that a grantor cannot derogate from his grant.[1] The failure of one branch to challenge an alienation does not prevent another to challenge it.[2]

A suit for injunction also lies for preventing an impending alienation.[3]

In Bombay and Madras, when an alienation is challenged by the coparcener, it will be set aside only to the extent of their interest in the joint family property, as under these schools, a coparcener has power of alienating his undivided interest by sale or mortgage. The Jammu and Kashmir High Court has expressed the view that when the alienee has the possession of the alienated property, the coparcener cannot sue for a mere declaration that alienation is void. He must also sue for the consequential relief of possession.[4]

Coparcener who was in the womb at the time of alienation.—It is also a settled law that a coparcener who is in the womb of his mother at the time of alienation can get the alienation set aside after his birth. Under Hindu law, a son conceived is, in many respects, equal to a son born. This also applies to an alienation made by a sole surviving coparcener.[5]

Afterborn coparcener.—An alienation by a sole surviving coparcener or by the *Karta*, who has no male issue of the joint family property made without any legal necessity is valid. Such an alienation cannot be challenged by a son born subsequently. But if an alienation is made by a father who has sons and before all the sons die, another son is born to him, then even after the death of all the sons existing at the time of alienation, the subsequently born son can challenge the alienation, provided the right is not barred by limitation. The overlapping of lives gives him this right.[6] It is necessary that at the time of his conception, there must have existed an unexpired right among some coparceners (even in one) to challenge the alienation. For instance, on 1.1.40, A, a father, who has two sons, B and C, made an alienation without any justifiable purpose or without the consent of B and C. On 1.6.42, S, another son, is born to A. B and C die on 1.8.42, S can challenge the alienation even after 1.8.42. But if before S was born, B and C consented to the alienation, S has no right to challenge it.[7] In such a case, fresh period of limitation does not start from the date of his birth.[8]

Adopted son.—It is a settled law that a son adopted subsequent to the alienation has no right to challenge the alienation, even if alienation was invalid at the date when it was made.

Mode of Challenge

When alienation is void.—When an alienation is void, such as a gift by a coparcener or a gift by the *Karta* in South India, no specific mode of challenge is required. When a transaction is void, any person can take a stand on it. It is not necessary to take recourse to a court of law for getting it declared void. He may take this stand in collateral proceedings in respect of

1. *Gomti* v. *Rameshwardas*, AIR 1971 Raj 212 (FB).
2. *Murarka Properties (P) Ltd.* v. *Beharilal Murarka*, AIR 1978 SC 300.
3. *Shiv Kumar* v. *Moolchand*, AIR 1972 P & H 147.
4. *Gian Chand* v. *Krishna Singh*, AIR 1978 J & K 16.
5. *Tirupurasundari* v. *Kalyannaraman*, AIR 1973 Mad 9.
6. *Shivaji* v. *Murlidhar*, AIR 1954 Bom 386 (FB); *Vilas* v. *Vasantra*, AIR 1976 Guj 17.
7. *Gurama* v. *Mallappa*, AIR 1964 SC 510.
8. *Ranodeep* v. *Parmeshwar*, AIR 1925 PC 33.

such property. A coparcener may unequivocally repudiate it. He may file a suit to get it declared null and void.[1] He may resist alienee's suit for possession on that basis.

When alienation is voidable.—When an alienation is voidable, such as an alienation by the *Karta* without the legal necessity or benefit of estate,[2] it can be challenged only by a person who has a right to repudiate it. Any coparcener may file a suit to get the alienation set aside. An alienee from a coparcener may also sue. The non-alienating coparceners are also entitled to a declaration that alienation is void in its totality.

Burden of proof that alienation was for legal necessity is on the alienee. The alienee is supposed to make proper and bona fide inquiry about the existence of necessity.[3]

VI
ALIENEE'S RIGHTS AND REMEDIES

Karta's Alienation

When an alienation is valid, no problem arises. The alienee is entitled to the possession of the property alienated. In case alienation is by way of mortgage, he has all the remedies of a mortgage.

But when alienation is invalid, has alienee any remedy, right or equity against the alienating coparcener's interest and the interest of other coparcener? In those States (Bombay, Madhya Pradesh and Madras) where an improper alienation can be set aside only to the extent of the share of non-alienating coparceners, there no equity entitling the alienee to a refund of proportionate part of purchase money in respect of those shares, so also when the alienation is made by the father and sons are not liable under the doctrine of pious obligation as the debt is not antecedent. In States where an alienee is entitled to any equity or charge on the alienor's share for the money paid by the alienee to him? In *Narayan Pd.* v. *Sarnam Singh*,[4] the Privy Council said that he has no such equity.

But if the alienor is the father and the sale has been set aside at the instance of the sons during the father's lifetime, has the alienee any equity or right against the interest of sons? On this there is a controversy among our High Courts. In *Hasmat* v. *Sundar*,[5] the Calcutta High Court said that if the sale is set aside, it is clear that the alienee would be entitled to recover the purchase money from the father. It would be, therefore, their father's debt and unless they showed that it was an *avyavaharika* debt, the whole joint family property would be liable for it. It follows, therefore, that the sons cannot recover the property without refunding the whole of purchase money. The other High Courts do not agree with this view,[6] as the Calcutta view is violative of the antecedency rule.

If the alienee has made improvement in the house sold to him, the sons

1. *Krishnaiah* v. *Gopalkrishna*, AIR 1974 SC 1911.
2. *Raghucanbhmani* v. *Ambica*, AIR 1971 SC 776.
3. *P. Subramania Chettiar* v. *Amritham*, AIR 2003 Mad. 153.
4. AIR 1917 PC 41.
5. (1885) 11 Cal 396.
6. *Shrinivasa* v. *Kappuswami*, AIR 1921 Mad 447; *Dhanurjay* v. *Dhano*, AIR 1968 Ori 179.

should, on the sale being set aside, pay compensation for the improvement.

Coparcener's Alienation

When alienation is made by a coparcener of his undivided interest, what are the rights and remedies of the alienee?

Where the alienation is valid, it is, now, a settled law that the alienee is entitled to the interest of the coparcener as it existed at the time of alienation. In other words, he would be entitled to that share of the coparcener to which he would have been entitled, had a partition taken place at the time of the alienation.[1] The fluctuation of coparcener's interest subsequently and till the alienee's suit of partition does not have any effect on this. For working out the share of the alienating coparcener by the notional partition or the fictitious partition, the Bombay High Court takes the view that shares should be allotted to all those persons who would take a share, if a real partition took place.[2] This is also the rule in Kerala.[3] The rule is different in Madras and Andhra Pradesh.[4]

Right to partition.—It is now settled that an alienee has a right to partition and to carve out his share. It may be that a coparcener alienates his interest in the joint family property as such or he may alienate his interest in some specific property. In the former case, the alienee's remedy is to file a suit for general partition. In the latter case, the question is : can the alienee file a suit for the partition of specific property only, and not for the general partition? According to Bombay, Madras and Allahabad High Courts, the non-alienating coparceners can file a suit against the alienee for the partition of specific property.[5] When the coparceners file such a suit, the alienee has no right in that suit to counter-claim general partition. If he wants a general partition, he must bring a separate suit.

Right to mesne profits.—It is also a settled law that the alienee is not entitled to the mesne profits from the date of his purchase and till the date his partition suit is decreed.[6] In *Sidheshwar* v. *Bhusheshwar*,[7] the Supreme Court said that a purchaser in an auction purchase of coparcener's share in execution of a money decree against him is not entitled to the mesne profits from the date of his rights by a suit of partition and his right of possession will commence only when specific allotment of property is made to him. But if the family is divided in status, though no partition by metes and bounds has taken place, the alienee is entitled to the mesne profits.

Purchaser takes the properties subject to equities.—The alienee of coparcener's interest will take the property subject to all charges, encumbrances and liabilities affecting the joint family property or the interest of the coparcener.

1. *Permanayakam* v. *Sivaraman*, AIR 1952 Mad 419 (FB); *Kumaraswami* v. *Rajamanikkam*, AIR 1966 Ker 266.
2. *Parappa* v. *Mallappa*, AIR 1956 Bom 332.
3. *Saraswathi* v. *Anantha*, AIR 1966 Ker 66.
4. *Kanyalal* v. *Commr. of Estate Duty*, AIR 1961 AP 33.
5. *Hanmandas* v. *Valabhadas*, (1919) 43 Bom 17; *Iburamasa* v. *Thirumala*, (1911) 34 Mad. 269 (FB).
6. *Bhagwati* v. *Usha*, AIR 1995 MP 205.
7. (1954) SCR 177.

Can the purchaser be allotted the alienated property in partition : substituted security.—As a general rule, the alienee in a suit for partition to work out his right cannot claim that the specific properties that were alienated to him should be allotted to his share. But he has an equitable claim and ordinarily the court may assign that very property to his share if it could be done without injustice to the other coparcener.[1] In case the court does not allot him that property, the question arises can he have something else in substitution of the property alienated to him? This is known as "substituted security." The courts have recognized that this can be done.[2] It seems that the principle applies to the court sales also.[3] The doctrine will apply irrespective of the question whether the right of a coparcener is transferred by private sale or by court sale. With this view, the present writers are in respectful agreement.

It seems that an alienee of the alienee is also entitled to claim partition.

Right of Joint Possession

On the question whether the alienee has a right of possession of the specific properties alienated to him before he seeks partition, there is a difference of opinion among the High Courts. We may summarise the law as under :

(a) According to the Madras High Court, both at the private sale and the court sale and according to the Calcutta and Allahabad High Courts, at the court sale only, the alienee does not acquire any right of joint possession with the coparceners.[4] In case the alienee has obtained possession, the other coparceners have the right to sue for the recovery of possession of the entire property. In a suit for recovery of possession, the alienee cannot counter claim the partition.[5] But non-alienating coparcener cannot straight away walk into the property and recover the possession of the property without regard to the right of the purchaser. If they do so, the purchaser can be granted an injunction restraining them from taking possession.[6]

(b) The Bombay High Court takes a different view. According to it, whether alienation is by private sale or court sale :

(i) if the purchaser is a stranger and has not obtained possession, he cannot be given possession and his remedy is a suit for partition.[7]

(ii) If the alienee has obtained possession, the non-alienating coparceners are entitled to joint possession with him.[8] Or, it is also open to them to sue for the recovery of possession of the

1. *Jagdish* v. *Rameshwar*, AIR 1960 Pat 54; *Narasimha* v. *Rama Krishna*, 1973 KLJ 907.
2. *Sitamanalakshmi* v. *Ramchandra Rao*, AIR 1957 AP 572.
3. *Padamanabha* v. *Abraham*, AIR 1971 Ker 154.
4. *Manjaya* v. *Shannuga*, AIR (1915) Mad 440; *Jagdish* v. *Rameshwar*, AIR 1960 Pat 54; *Hardi Narayan* v. *Ruder Prakash*, (1883) 11 I.A. 26; *Bhagwati* v. *Usha*, AIR 1995 MP 205.
5. See also *Peramanayakam* v. *Sivaraman*, AIR 1952 Mad 419 (FB).
6. *Nelli* v. *Vadla*, AIR 1975 AP 250.
7. *Ishrappa* v. *Krishna*, AIR 1922 Bom 413.
8. *Naranbhai* v. *Ranchod*, (1902) 26 Bom 141.

whole of property. But the Bombay High Court, differing from the Madras High Court, takes the view that in such a case, the court is not bound to eject the alienee. It is open to the court to hold that the alienee is entitled to retain possession till the partition.[1]

(c) When the alienee has taken possession and the alienation is valid, the other coparceners can claim proportionate mesne profits.[2]

(d) When two strangers purchase the joint family property from different coparceners, they cannot claim joint possession of the property.[3]

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1. *Bhau* v. *Budha*, ILR (1926) 59 Bom 399; *Ramdayal* v. *Manaklal*, AIR 1973 MP 222.
2. *Mahadeo* v. *Laxman*, 1972 PLJ 822.
3. *Braiah* v. *Basappa*, AIR 1974 Kant 111.

Chapter 33

SON'S PIOUS OBLIGATION TO PAY FATHER'S UNTAINTED DEBTS AND DOCTRINE OF ANTECEDENT DEBTS

This concept has been almost done away with by the Hindu Succession (Amendment) Act, 2005. According to Section 6(4) of the Act, no court shall recognize any right to proceed against a son, grandson, or great grandson for the recovery of any debt due from father, grandfather, great grandfather solely on the ground of pious obligation under the Hindu law though if any debt was contracted before this Act came into force, *i.e.*, before 9th September, 2005 a creditor's right would not be affected to proceed against the son, grandson or great grandson or any alienation would also be not affected which was made in satisfaction thereof.

Nature of the Liability

The debts occupy a very important place in the Hindu system of law. It illustrates one of the fundamental principles of the Hindu jurisprudence, *viz.*, moral obligations take precedence over the legal rights. The Hindu sages have repeatedly enjoined that one must pay one's debts. Brihaspati ordained : one who does not repay his debts will be born hereafter in the creditor's house as a slave, a servant, a woman or a quadruped.[1] The Hindu sages did not stop here. They said that if a Hindu dies indebted, his sons must repay his debts. This is considered to be the religious or pious duty of sons of discharging their father from the sin of his debts. Not merely this, the son's son and son's son's son should also pay the debt of grandfather and great grandfather. Under the modern Hindu law, the liability to pay the debt of the son, the grandson and the great grandson is co-extensive, and they are liable to the extent to which they have joint family property in their hands.[2] They are not liable personally.

Under the doctrine of pious obligation of the son, the entire joint family property is liable. The doctrine of pious obligation is the logical corollary to the son's birth-right. The doctrine is not recognized under the Dayabhaga school. But it is applicable to the Thiyyas of Kerala among whom polyandry prevails.[3]

Debt must not be avyavaharika.—Since the liability of the son is pious, the character of father's debt is material. The sons are liable for the father's debts *ex contractu* or *quasi ex contractu*,[4] provided the debt is not

1. Digest 1, 229.
2. *Peda* v. *Sreenivasa*, (1918) 41 Mad 136 (F.B.); *Jamboo Rao* v. *Annappa*, ILR (1914) Bom 177 (FB).
3. *Arrakai* v. *Aralal*, AIR 1978 Ker 119 (F.B.).
4. *Keshav* v. *Bank of Bihar*, AIR 1977 Pat 185.

avyavaharika. The sons are not liable for the post-partition debts.[1] The debt need not be for any legal necessity. It may be debt taken by the father for his personal need.[2]

The term *avyavaharika* has been variously translated by the writers and judges. Colebrook's rendition of it as those debts which are for "causes repugnant to good morals" has been approved by the Supreme Court in *Jakati* v. *Borkar*.[3] Broadly speaking, it has come to mean those debts that are taken for "illegal or immoral purposes." The unlawful debts are those which arise out of a breach of law, for instance, debts that are incurred in the course of an act punishable by the Penal Code or any other statute imposing penalty. Similarly, debts tainted with illegality such as wagering contracts, or debts arising out of the smuggling activities or debts taken in the furtherance of any crime are debts for unlawful purposes. If "the taking itself" is a criminal offence, the debt is for unlawful purpose such as misappropriation,[4] or criminal breach of trust by the father. But the sons are not liable for the father's chit-fund debts.[5]

The immoral debts are those which are taken in furtherance of an immoral purpose, such as for the prostitution or for keeping a concubine. Thus, the following debts have been held immoral, debts taken by the father to defray the expenses of the marriage of his concubine's granddaughter,[6] or to bribe a Hindu woman so that she may take one of his sons in adoption,[7] or to meet the expenses of civil and criminal litigation against his sons the purpose of which is to deny the sons their legitimate rights to property.[8] The debts arising out of gambling will be for illegal purpose if gambling is prohibited by law.

The debts resulting from the highly tortuous acts which, at their inception, are tainted with an evil purpose are also *avyavaharika*. But if the civil liability of the father arises out of some irregularity, the sons are liable. It has been held that the sons are liable for the decretal debts of the father for damages on account of damage caused to the crops by obstructing an irrigation channel, for the debt taken by the father to defend a suit of defamation, or to defend himself against the charges of forgery and fabrication, or for damages for wrongfully cutting down the trees, or for liability arising out of negligence in the discharge of duties by the father. In *Logannathan* v. *Ponnuswami*,[9] the father dishonestly defrauded certain minors of the money that he had collected on their behalf. Criminal proceedings were launched against him under Ss. 384 and 404, I.P.C. The father borrowed money to stifle the proceedings. The court said that "the sons are not bound to do anything to relieve their father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father

1. *Raghothaman* v. *Kannappan*, AIR 1982 Mad 235.
2. *Himatlal* v. *Ramesh Chandra*, AIR 1983 Guj 7.
3. AIR 1959 SC 282.
4. *Jaganath* v. *Jugal Kishore*, ILR (1926) 48 All. 9.
5. *Muniyandia* v. *Muthusami*, AIR 1939 Mad 70.
6. *Lakshmanswami* v. *Raghavacharul*, AIR 1943 Mad 292.
7. *Sitaram* v. *Harihar*, (1911) 15 Bom, 169.
8. *Veera* v. *China*, AIR 1957 AP 373; *Ramasubramma* v. *Sivaamai*, AIR 1952 Mad 841; *Govinda Pd.* v. *Raghunath*, AIR 1939 Bom 289 (F.B.).
9. AIR 1969 Mad 15.

himself would do were it possible, *viz*., to restore to those lawfully entitled to money he had unlawfully retained." A father who was a partner in a firm utilized the firm money for his own purpose. Then he alienated the joint family property to pay the firm. The consideration for alienation was held not to be tainted.[1] The damages awarded in a suit for malicious prosecution against father is a *vyavaharik* debt.[2]

Time barred debt.—Although under the modern law, no Hindu is bound to pay his time barred debts and consequently, the sons are also not liable to pay the father's time barred debts, yet a promissory note executed by the father for it and an alienation made for its discharge by the father[3] will be binding on the son, since under the Hindu law, a time-barred debt is not an *avyavaharika* debt.

The difficult question that arises is at what stage should a debt be an *avyavaharika* debt? Or, what stage of "taking" will render the debt immoral or unlawful? If "taking" itself is a criminal offence, the debt is tainted. Rao, J., of the Madras High Court formulated the following two propositions :[4]

1. Even if the debt is not immoral at its inception, subsequent dishonesty of the father does not exempt the son, and
2. It is not every impropriety or every lapse from the right conduct that stamps the debt as immoral. The father's conduct must be "utterly repugnant to good morals, or is grossly unjust or flagrantly dishonest."

The Privy Council in *Hem Raj* v. *Khem Chand*,[5] said that if the debt "at its inception" was not tarnished or tainted with immorality or illegality it is binding on the sons. Thus, it is necessary to make out a connection between the debts and the taint at the earliest opportunity. An interesting situation arises in misappropriation cases. A father collects money on behalf of a person and misappropriates it. His liability in cash is assessed by the court and a decree is passed against him which is sought to be executed by the judgment-creditor against the entire joint family property. Can the sons say that the debt was tainted? The courts have taken the view that the original indebtedness and liability were free from the taint and therefore the sons are liable. The vice should be inherent in the debt itself.[6]

Burden of proof that debt is tainted is on sons.—The burden of proof that the debt is tainted is on the sons. The reason is simple. The obligation on the sons to pay off their father's personal debts is a religious obligation and if they want to wriggle out of it, they can do so only if the debt is tainted. Thus, they must establish that the debt is tainted. The sons also have to show that the creditor had the notice or knowledge that the debt was tainted.[7]

1. *Sriram* v. *Parsadi*, AIR 1982 All 62.
2. *Kamalammal* v. *Senthil*, AIR 2003 Mad. 337.
3. *Gujhdhar* v. *Jagannath*, AIR 1924 All 551. (F.B.).
4. *Ramasubramania* v. *Sivakami*, (1925) Mad 841; followed in *Veena* v. *China*, AIR 1975 AP 350.
5. (1943) 71 IA 171.
6. *Jeaata* v. *Brokar*, AIR 1959 SC 282.
7. *Lahar Amrit* v. *Dashi Jayanti*, AIR 1963 SC 964.

Father's Power of Alienation for Antecedent Debts

The *Dharamashastra* imposed the liability to pay the father's untainted debts on the sons only after the death of the father, but by judicial valour this has been extended, and the sons are now liable to pay the father's debts during the father's lifetime.[1]

The doctrine has been further extended by laying down that the father himself can alienate the joint family property for the discharge of his personal debt and the sons can challenge it only if the debt is tainted.[2] This means what the father cannot do directly, he can do indirectly. In the words of Natesan, J. : "The pious obligation of the son to pay the debts of his father exists, whether the father is alive or dead. It is open to the father during his lifetime, to convey the joint family property including the interest of sons, to pay off antecedent debts, not incurred for family necessity or benefit, provided the debt is not tainted with immorality."[3] The father cannot do so after a suit of partition is filed. Moreover, such an alienation will be hit by S. 52 (*Doctrine of lis pendence*) of the Transfer of Property Act.[4]

Antecedent Debt

Lord Dunedin of the Privy Council defined the antecedent debt as "antecedent in fact as well as in time", *i.e.*, not a part of the transaction impeached.[5] Thus, two conditions are necessary :

(a) the debt must be prior in time, and

(b) the debt must be prior in fact.

The first requirement means that in point of time the debt must precede the alienation, both cannot be made simultaneously. Thus, if debt is taken, say on 1.1.90 and properties are alienated on 7.7.90, the debt is prior in time. The second requirement means that the debt and the alienation should be two independent and separate transactions, if debt and alienation are part of the same transaction, even though one (debt) takes place first in point of time and the second (alienation) later on, the debt will not be antecedent. Thus, on 1.1.90, a father, F and A, an alienee, reach an agreement or understanding that on 2.1.90 A will give F a loan of Rs. 10,000/- and on 1.7.90. A will alienate X, a joint family house to A. A pays Rs. 10,000/- to F and F alienates the house X to A accordingly. In this case, though the debt is prior in time, it is not prior in fact, being part and parcel of the same transaction entered into on 1.1.90. What is required is that the debt must stand independently of the alienation and must be prior to it.[6]

In some cases, a view is pronounced that even if the father has mortgaged the joint family properties and that mortgage is not justified for the legal necessity or benefit, the sons are nevertheless bound to pay the debt under the doctrine of pious obligation. The argument runs : for a simple debt

1. *Brij Narayan* v. *Mangla Pd.*, AIR 1924 PC 50.
2. *Girdhari* v. *Kantoo*, (1874) I.A. 321; *Suria Bunsi* v. *Sheo Prasad*, (1879) 7 IA; *Janardhana* v. *Gangadharam*, AIR 1983 Ker 178 (F.B.) where most of the earlier cases have been reviewed.
3. *Iyengur* v. *Pillai*, AIR 1971 Mad 303; *Prasad* v. *Govindaswami*, AIR 1982 SC 84.
4. *Jayaram* v. *Ayyaswami*, AIR 1973 SC 569.
5. *Brij Narayan* v. *Mangala Pd.*, AIR 1924 PC 59.
6. *Virdhachalam* v. *Syrian Bank*, AIR 1964 SC 1425; *see* also *Panna Lal* v. *Naranini*, AIR 1952 SC 544.

the creditor can obtain a decree against the father and then proceed to execute the decree against the joint family property, but it is anomalous that for a secured debt (mortgage debt is a secured debt), he cannot do so. The Madras High Court tried to circumvent the antecedency rule by saying that where the Court sells by auction the joint family property to enforce the mortgage debt, the debts (*i.e.*, the mortgage) is prior to the auction sale and is therefore antecedent.[1]

In *Pathak* v. *Pathak*,[2] the Gujarat High Court said that if the father sells the properties to discharge a mortgage debt which is not *avyavaharika*, though not justified for the legal necessity or benefit, the son can get the sale set aside provided he meets the liabilities arising thereunder. In *Devabhaktuni* v. *Challa*,[3] the Andhra Pradesh High Court rightly took the view that mortgage debt is not an antecedent debt.

Suit by the creditor.—When a decree is obtained by a creditor of the father, the sons are not necessary parties to the suit.[4] But it seems that the sons are necessary parties to execution proceedings.[5]

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1. *Abdul* v. *Provident Investment*, AIR 1954 Mad 961; *Vadla* v. *Vadla*, AIR 1979 AP 36.
2. AIR 1967 Guj 192.
3. AIR 1984 AP 45.
4. *Panna Lal* v. *Narayan*, AIR 1962 SC 170.
5. *Krishnaswami* v. *Thiagaraka*, AIR 1971 Mad 303.

Chapter 34

PARTITION

The partition means bringing the joint status to an end.

Under the Mitakshara school, partition means two things :

(i) Severance of status or interest, and

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

Under Dayabhaga law, partition means only division of property by *metes and bounds*.

The severance of status is quite distinct from the *de facto* divisions into specific shares of the joint property. The former is a matter of individual decision, the desire to sever himself and enjoy his hitherto undefined and unspecified share separately from others, while the latter is a consequence of his declaration of intention to sever but which is essentially a bilateral action. It may be arrived at by agreement, by arbitration or by suit.

We would discuss the subject under the following heads : (a) subject-matter of partition, *i.e.*, the property to be divided; (b) persons who have a right to partition and who are entitled to a share on partition; (c) how partition is effected and mode of partition; (d) rules relating to the allotment of shares; (e) reopening of partition, and (f) reunion.

I
SUBJECT-MATTER OF PARTITION

As a general rule, the entire joint family property is, and the separate property of coparceners is not, subject of partition. If the joint family is in possession of property held by it as a permanent lease, such property is also available for partition, even though lease may be liable to cancellation in certain circumstances.

Properties which are not capable of Division

There may be certain species of joint property which are, by their very nature, incapable of division. Such properties cannot be divided. Thus, as Vijnaneshwara said : "Water or a reservoir of it, as a well or the like not being divisible must not be distributed by means of the value, but is to be used by them in turns." "The common way, road of ingress and egress to and from the house, garden or the like are also indivisible." Thus, wearing apparel, carriages, riding horses, ornaments, cooked-food, water, pastures, road, female slaves, dwelling house, garden, utensils, documents, implements, right to way, staircases, wells, tanks, *etc.* have been considered as indivisible. Some of these items are indivisible by their very nature, such as staircases, right to way, wells, while there are others which are, in certain circumstances, capable

of division or some adjustment among the coparceners. In respect of these properties, three methods of adjustment are available :

(1) Some of these properties may be enjoyed by the coparceners jointly, or by turns, or

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

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

We may discuss some illustrative cases.

Dwelling house.—The Smritikars were of the view that ordinarily the dwelling house should not be partitioned. But the modern law does not consider the rule as sacrosanct.[1] Ordinarily, in a partition, the court will, if possible, try to effect an arranagement which will leave the dwelling house entirely in the hands of one or more coparceners or kept for the common use. In *Ashnula* v. *Kalli*,[2] the court explained the principle thus : "If the property can be partitioned without destroying the intrinsic value of the whole property, or of the shares, such partition ought to be made. If, on the contrary, no partition can be made, without destroying the intrinsic value, a money compensation should be given instead of the share which would fall to the plaintiff by partition.

If no arrangement, which is agreeable to the parties, or which is equitable can be possibly made, the dwelling house may be sold and sale proceeds divided among the coparceners. This alternative is available with respect to any property, the division of which cannot be made equitably and coparceners fail to arrive at a satisfactory arrangement among themselves. This has been facilitated by the Partition Act, 1893.

The Partition Act.—Section 2 of the Partition Act runs : "Whenever in any suit for partition in which...it appears to the court by reason of the nature of the property to which suit [of partition] relates, or of the number of the shareholders therein or for any other special circumstance, a division of the property cannot reasonably or conveniently be made and that a sale of the property and distribution of the proceeds would be more beneficial for all shareholders interested individually or collectively to the extent of one moiety or upward, direct a sale of property and a distribution of the proceeds." The Act, thus empowers the court, in its discretion to order the sale of property instead of dividing it at the request of any coparcener where the former course will be more convenient and beneficial. At such a sale, any coparcener may obtain the leave of the court to buy the property at a valuation ordered by the court. If a coparcener has, where he has a right to do so, sold his interest in the dwelling house, any coparcener may get that interest valued by the court and purchase it at the court valuation. Apart from the Partition Act, 1893, the court has inherent power to divide any property and adopt any other course as may appear equitable and just in the circumstances of a case.

Family shrines, temples and idols.—The family shrines, temples and

1. *Nirupama* v. *Baidyanath*, AIR 1985 Cal 406, where entire law has been reviewed.
2. (1884) 10 Cal 675.

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

(a) The possession of idols or temples or shrine may be given to a coparcener with the liberty to other coparceners to have an access to them for the purpose of worship at all reasonable times.

(b) The coparceners may be required to hold them in turn, for a period of tenure in proportion to their share in the property.

(c) In case the family consists of *pujaris* who make a living out of the offerings, the court may settle a scheme under which each coparcener worships and takes the offerings by turns.[1] The court may also devise a scheme under which it may entrust the worship to one of the coparceners with the direction that offering may be periodically distributed among the coparceners in accordance with their shares.

Staircase, wells, etc.—Staircase,[2] court-yards, wells, tanks, pasture lands, roads, right of way, and the like things are species of property which are by their nature incapable of division or valuation. In respect of them an arrangement has to be devised so that they remain in the common use of all the coparceners.

Deductions and Provisions

Before division can take place, the *Shastrakars* have ordered that out of the joint family properties, provisions should be made for the following liabilities of the family :

(a) Debts, (b) Maintenance, (c) Marriage expenses of daughters, and (d) Performance of certain ceremonies and rites.

Debts.—A provision for the payment of outstanding debts of the father should be made. No person need be made for the individual debts of the coparceners.

Maintenance.—There are certain members of the joint family who do not take a share on partition but have a right to be maintained out of the family funds. A provision is to be made for their maintenance. Such persons are : (a) disqualified coparceners and their immediate dependents such as wife, daughter, son and, in certain circumstances, illegitimate sons; (b) mother, stepmother, grandmother and other females entitled to be maintained out of the joint family property; (c) unmarried sisters till they are married; and (d) widowed daughters of deceased coparceners, when they are entitled to be maintained out of the joint family assets.

Marriage.—When the coparcenary consists of father and sons, a provision should be made for the marriage expenses of the daughters of the father. When a coparcenary consists of brothers, a provision should be made for the marriage of their unmarried sisters. The scale of expenses must be commensurate with the wealth of the family. In case a coparcener dies before

1. *Pramatha* v. *Pradyumma*, 52 IA 245.
2. *Dinnath* v. *Mansaram*, AIR 1973 P & H 253 (common courtyard and staircase).

partition, leaving behind an unmarried daughter and no male issue, provision should also be made for her marriage. No provision has to be made for the marriage of unmarried coparceners or for the daughters of other coparceners, since the marriage of such daughters is the responsibility of their respective fathers.

Performance of ceremonies.—If a partition takes place among the brothers, a provision has to be made for the funeral expenses of their parents. Similarly, provision is to be made for the performance of other family ceremonies.

Persons who have a right to Partition and a share on Partition

As to general rule, both under the Mitakshara and Dayabhaga schools every coparcener has a right to partition and is entitled to share. Existence of a minor coparcener is not a bar to partition.[1] Minor too has power to ask for partition. (See under the title "Minor Coparcener".) Apart from coparceners, no one else has a right to partition. No female has a right to partition, but, if partition takes place, there are certain females who are entitled to a share. These females are father's wife, mother and grandmother. Under the Hindu Women's Right to Property Act, 1937, a Mitakshara coparcener's widow took the same interest which her husband had at the time of his death. She was given the right to partition. Under the Hindu Succession Act, when a coparcener's interest devolves by succession by virtue of the application of Section 6, widow, daughter, mother, predeceased son's daughter and widow, predeceased son of a predeceased son's widow and daughter of predeceased daughter's daughter are the females who are entitled to share if they can get their share demarcated by partition. An alienee of coparcener's interest, wherever such an alienation is valid, has also right to partition. However, when the widow, under the Hindu Women's Right to Property Act, or a female under S. 6, Hindu Succession Act, 1956, or the alienee of coparcener's undivided interest files a suit for partition, such a partition is entirely different than that made at the instance of a coparcener. In such a partition, severance of status does not take place. What happens is : the female or the alienee gets her or his share ascertained, and the property falling to her or his share is separated, while the family continues to be joint in the rest of the property as before.

The general rule that every coparcener has a right to partition is subject to two exceptions : (a) an unqualified coparcener has no right to partition, and in Bombay school, sons cannot ask for partition against their father, if the latter is joint with his own father or a collateral.

Father.—Under the Mitakshara law, the father has not merely a right to partition between himself and his sons but he has also the power to direct partition among the sons *inter se*. This seems to be the last survival of father's absolute powers. No other person has this power. In the exercise of this power, the consent or dissent of the sons is immaterial. The father can impose even a partial partition between his minor sons and himself. However, it is necessary that the father must act bona fide. He should not be unfair to anyone. If the division of property made by the father is unequal, or

1. Raghunath v. *Ramakant*, AIR 1991 Pat 159.
2. Appuva v. *CIT*, AIR 1983 SC 409.

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1. *Raghunath* v. *Ramakant*, AIR 1991 Pat 159.
2. *Approra* v. *CIT*, AIR 1983 SC 409.

fraudulent, or vitiated by favouritism, the partition can be re-opened.[1] An unequal partition made by the father may be binding on the sons as family arrangement if acquiesced in by them.

Son, grandson and great-grandson.—Under the Mitakshara school, son, son's son and son's son's son have a right to partition. However, in Bombay school, the son has no right to partition without the assent of his father, if the father is joint with his own father, brother or other collaterals.[2] If the father is not joint with anyone of the aforesaid relations, sons have a right of partition against their father. The other schools do not recognize this rule, and the son has an unqualified right of partition. Take two examples : (a) a joint family consists of a father, A and his two sons B and C and two grandsons BS and CS; (b) a joint family consists of two brothers, C and B and their sons, BS and CS. Under the Bombay school, BS and CS cannot ask for partition in both examples, because in the former, their fathers, B and C are joint with their own father, A, while in the latter, their fathers B and C are joint with each other.

Son born after partition.—Among the Smritikars, there has been a conflict of view as to the position and rights of a son born after partition. According to Vishnu and Yajnavalkya, the partition should be re-opened to give a share to the after-born son. Gautama, Manu, Narada and Brihaspati took the view that the after-born son could get the share of his father alone. The Mitakshara reconciled the conflict by holding that the latter texts lay down the general rule, while the former texts lay down a particular rule applicable to a son in the womb at the time of the partition. On the basis of the Mitakshara formulation, we have now two rules; one in respect of a son in the womb at the time of partition and the other in respect of a son who comes into the womb after partition.

Son conceived at the time of partition but born after partition.—The texts lay down that if the pregnancy is known, the partition should be postponed till the child is born. But if the coparceners do not agree to this, then a share equal to the share of a son should be reserved for the child in the womb. If the child born is a son, he takes it, but if it is born a daughter, a marriage provision is made for her out of the share and the surplus, if any, is distributed among the coparceners. In case no share is reserved for the son in the womb, he can, after his birth, demand re-opening of the partition. If pregnancy is not known and consequently, no share is reserved, then also the redistribution of the estate should take place after the birth of the son. In other words, in such a case also, the after-born son can get the partition re-opened. This rule applies to a partition between father and sons.[3]

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

(a) When the father has taken or reserved a share for himself, the after born son becomes a coparcener with his father. After the death of father, he takes not only his estate by survivorship, but he also inherits the entire

1. *Venkatasubramania* v. *Eswara*, AIR 1966 Mad 266.
2. *Neelkant* v. *Ramchandra*, AIR 1991 Bom 10 in the latest case.
3. *Bho Bishen* v. *Amaida*, (1884) 2 IA 164; *Appaji* v. *Ravji*, ILR (1892) 16 Bom 29 (FB).

separate property of his father to the exclusion of divided sons. But, now, after the Hindu Succession Act, 1956, the latter rule stands abrogated, as S. 8 of the Act makes no distinction between the separated sons and undivided sons in the matter of succession to the separate property of a Mitakshara Hindu.

(b) When the father has not taken or reserved a share for himself, the after-born son has a right to get the partition re-opened and get the estate redistributed as it then stands.[1] This rule applies, like the former, to a partition between the father and sons.

Yet, another situation may arise. When a coparcener renounces his interest in the joint family property, the question is : has a son conceived and born to him after he has renounced his interest in the joint family property, and can he claim a share if partition takes place? A Full Bench of the Andhra Pradesh High Court considered the question and observed that on the relinquishment of his interest, the coparcener can no longer be regarded as a member of the coparcenary and therefore the son begotten after his renunciation cannot claim the status of a coparcener with the remaining members of the undivided family.[2]

Adopted son.—The *Dharmashastra* has dealt with the position of adopted son in two situations : (a) when there is a subsequently born *aurasa* (natural) son of his father, and (b) when there is no such son. In the latter case, the texts lay down that his position is the same as that of the *aurasa* son. In the former case, though he has the same right to partition, he is not entitled to the same share. In competition with the subsequently born *aurasa* son, he takes a lesser share, which differs from school to school. Among the *Sudras*, except in Bombay, where he is entitled to only 1/5 of the whole estate and in Benares 1/4 of the estate, he shares equally with the after-born *aurasa* son. Among the first three classes, the position is as under :

(a) in Bengal, he takes 1/3 of the estate,

(b) in Benares, he takes 1/4 of the estate, and

(c) in Bombay and Madras, he takes 1/5 of the estate.

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

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

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

(2) Among the *Sudras*, the *dasiputra* has somewhat superior position. The position of a *dasiputra of a sudra* is as under :

(i) A *dasiputra* does not acquire by birth any interest in the joint

1. *Chengama* v. *Munisami*, ILR (1897) 20 Mad 75.
2. *Anjaneyulu* v. *Ramayya*, AIR 1965 AP 177 (FB).

family property. He is, thus, not a coparcener and has no right to partition against his father. However, the father has power to give him a share during his lifetime, and he may even give him a share equal to the share of a legitimate son.

(ii) If his father dies joint with his own father or collaterals, again the *dasiputra* has no right to partition or to share on partition. After his father's death, he is entitled to maintenance out of the joint family estate, in case his father has left no separate property.

(iii) On the death of a *Sudra* male, the *dasiputra* and legitimate sons succeed to his separate property, and hold it as coparcenary property. The *dasiputra* will also share the joint family property obtained by partition with collaterals by the legitimate sons of his putative father. An illegitimate son is also a reversioner to his putative father's widow. As to the *dasiputra*'s right of succession in his father's separate property, the law stands changed by the Hindu Succession Act, 1956, as an illegitimate son is not recognized as his putative father's heir. This rule, therefore, is not valid after the coming into force (June 17, 1956) of the Hindu Succession Act, 1956.

(iv) If the joint family consists of the father, his legitimate sons and *dasiputra*, after the death of the father, the *dasiputra* becomes a coparcener along with the legitimate sons of his putative father and he has a right of partition as well as right of survivorship. However, if partition takes place, either at his instance or at the instance of the legitimate sons of his father, he is not entitled to an equal share. He is entitled to only one-half of what he would have taken, had he been a legitimate son. For instance, if a *Sudra* dies leaving behind an illegitimate son, A and a legitimate son B, the *dasiputra* will take 1/2 of 1/2 (1/2 he would have got had he been a legitimate son), *i.e.*, 1/4. B will take 3/4. Take another example, a *Sudra* dies leaving behind five dasiputra A, B, C, D and E and a legitimate son P. A, B, C, D and E each will take 1/12 and 7/12 will go to P.

Dayabhaga Law.—It should be noted that the general rule of the Dayabhaga school that sons have no right to partition applies to all the categories of sons discussed above.

Under the Dayabhaga school, the illegitimate son of *Sudra* becomes a coparcener with the legitimate sons when they inherit the property after the death of the father.

After the coming into force of the Hindu Succession Act, 1956, an illegitimate son of any Hindu cannot succeed to his property. The *dasiputra*'s right to become a coparcener with the legitimate son of his putative father is lost, both under the Dayabhaga school, and the Mitakshara school. Under the Mitakshara school, this right remains in respect of coparcenary property of a *Sudra* which his sons take by survivorship. In *Rasala* v. *Rasala*,[1] the Andhra

1. AIR 1992 AP 234.

Pradesh High Court has held the view that in view of Section 16, Hindu Marriage Act makes the Sudra's son of a void marriage his legitimate son, and therefore he can become a coparcener. In our submission, it is an erroneous view. A son of a void marriage cannot become a coparcener, be of a *Sudra* or non-*Sudra*.

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

The thorny question in this connection has been as to from which date severance of status takes place : (a) from the date of the institution of the suit, (b) from the date of the court's order finding that the partition is for the welfare of the minor. The Supreme Court in *Kakumanu* v. *Kakumanu*,[1] has resolved the controversy by holding that it takes place from the date of institution of the suit.

It is also now settled that even if a minor dies during the pendency of the suit, and before the court's determination whether the partition will be for the benefit of the minor, the suit can be continued by the legal representative of the minor.[2] If the court comes to the conclusion that partition is not for the benefit of the minor, severance of status does not take place.[3]

It seems that the aforesaid Supreme Court decision lays down that the determination of the question whether a partition is for the benefit of the minor or not, can be made only by the court and not by any other agency. Does the severance of status take place when the guardian gives a notice of partition on behalf of the minor? The Madras and Andhra Pradesh High Courts take the view that it does.[4] It is submitted that this is not good law.

It is also an established rule of Hindu law that the presence of minor coparcener is no bar effecting partition by the adult coparceners. An unfair partition can be reopened by a minor on attaining the majority.

Alience.—A purchaser of a coparcener's interest in a court sale, or in a private sale where the coparcener has such a power (in Bombay, Madras and Madhya Pradesh he has such a power), can demand partition as he steps into

1. *Kakumanu* v. *Kakumanu*, AIR 1958 SC 1042 and *Rangasami* v. *Negaratnamma*, AIR 1933 Mad 890, (FB), where most of the earlier cases have been reviewed.
2. *Ibid.* See also *Lakkireddi* v. *Lakshmamma*, AIR 1963 SC 1609.
3. *Sreeamurthy* v. *Official Receiver*, AIR 1957 AP 692.
4. *Grandhi* v. *Grandhi*, AIR 1953 Mad 146; *Pappay* v. *Vankatakrishna Rao*, (1968) 1 An WR 36.

the shoes of the coparcener for the purpose of working out his equity.

Absent coparcener.—When a coparcener is absent at the time of partition, a share has to be reserved for him. In case no share is reserved for him, he has a right to get the partition re-opened.

Persons who have no right to partition but who are entitled to a share if partition takes place

There is a category of members of the joint family who have no right to partition but if partition takes place, they are entitled to share. (Here the matter is discussed apart from the Hindu female's right to partition under the Hindu Women's Right to Property Act, 1937, or the Hindu Succession Act, 1956, S. 6). In this category fall three females : father's wife, mother and grandmother.

As to the share of females, the following preliminary observations may be made :

(1) In the Dravida school, no female is entitled to a share on partition.[1] But in Kerala, these females are entitled to a share on partition.

(2) Whenever father's wife or widowed mother is given a share on partition and she has also received *stridhan* from her husband or father-in-law, her share is subject to deduction to the extent of the value of her *stridhan* received by her. For instance, she is entitled to properties worth Rs. 10,000 as her share on partition, she has got *stridhan* from her husband worth Rs. 5,000, then she will take only Rs. 5,000 worth of properties as her share in partition. In case her *stridhan* is worth Rs. 10,000 or more, she will take nothing.

(3) Prior to 1956, any share taken by a female on partition was her limited estate or woman's estate. Now Section 14, Hindu Succession Act, 1956, has converted it into her absolute estate. Any property that she may take in partition after the Act came into force will be her absolute estate.

(4) No provision of Hindu Succession Act, 1956, affects, adversely, her right to take a share on partition.

(5) The mother and wife are entitled to maintenance under the Hindu Adoptions and Maintenance Act, 1956. This does not mean that they are not entitled to share on partition.

(6) As soon as a partition is made, the share to which a female is entitled becomes vested in her, even if no share is allotted to her. Such a share becomes her absolute estate by virtue of S. 14, Hindu Succession Act and after her death devolves on her own heirs.

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

Mother.—A widowed mother has a right to take a share equal to the share of a son if a partition takes place among the sons. This right accrues to

1. *Subramanian* v. *Arunachalam*, (1905) 28 Mad 1 (FB); *Adusumilli* v. *Yerneni*, (1974) 1 An WR 440.

only when partition is made by *metes and bounds*.

Under the Mitakshara school, when partition takes place after the death of the father among the sons, the mother, including a stepmother even if she is childless, is entitled to a share. The mother and stepmother each take a share equal to the share of a son. Under the Dayabhaga school, a childless stepmother is not entitled to share on partition.

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

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

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

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

(4) In *Ramdhan* v. *Bala*,[1] the Nagpur High Court has propounded a novel proposition. In a partition suit, between an uncle and nephew, the mother of the uncle, as grandmother and the mother of the nephew as 'mother' were allowed to participate in the distribution of properties, the mother taking 1/6 and the grandmother taking 1/3 share. So far as the decision relates to the uncle's mother, the decision is correct : the case comes under the rule (2). But so far as it relates to the nephew's mother, it is curious since there is no partition among her sons, and the rule being that 'mother' takes a share only when there is partition 'among her sons'. Probably the court was impelled to take the view on equitable basis, for its concern for the nephew's mother who would otherwise get nothing. But it is submitted that there is no authority in support of that view, and it is obviously wrong according to the *Shastras*.

Coparcener's widow.—It, now, seems to be settled law that when two or more widows succeed to the property of their husband (each widow having a right of survivorship), either widow has the right to partition (with or without the consent of the other or others) and put an end to the joint status. Even when a father's widow succeeds along with her sons, she has the right to partition. If a partition takes place among the brothers, after the death of the father, his widow is entitled to a share.[2]

Daughters.—In *Pachi Krishnamma* v. *Kumaram*,[3] a daughter claimed a share equal to the son in a partition. But she failed to prove this custom. It seems that if such a custom is established, she can claim the share, since under the uncodified Hindu law, the custom still overrides the rule of Hindu

1. AIR 1946 Nag 206.
2. *Duddi* v. *Duddi*, AIR 1983 SC 583.
3. AIR 1982 Ker 137.

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1. AIR 1946 Nag 206.
2. *Duddi* v. *Duddi*, AIR 1983 SC 583.
3. AIR 1982 Ker 137.

law.

II
HOW PARTITION IS EFFECTED

It has been seen earlier that under the Mitakshara school, partition means two things : severance of status and division of property by *metes* and *bounds*.

Severance of Joint Status or interest

Expression of intention.—What is necessary to bring about a severance is a clear and unequivocal expression, by words or conduct, of an intention to partition. Once members of the joint family agree or express an intention to partition, severance of status takes place. The law in this respect is well settled. The Privy Council in *Syed* v. *Jorawar*,[1] observed, "It is a settled law that... severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place.." In *Raghvamma* v. *Chenchamma*,[2] the Supreme Court said that there must be intention, indication or representation of an intention to partition though in what form the manifestation of an intention is made will depend upon the circumstances of each case. It is a settled law that any adult coparcener may sever his interest by an unequivocal communication of his intention to partition. Once intention to partition is expressed, it results in partition, share of each coparcener becomes clear and once it is clear, they hold the property as tenants-in-common and not as joint tenants.[3] When father partitions, it does not mean that his minor son's interest also get severed.[4] A coparcener expressing an intention to sever need not assign any reason. Motives are also irrelevant. Nor does it matter, in what form and in what manner communication of an intention is made. However, the expression of intention must be a conscious and informed act; sham documents, or even statements and admissions serving a genuine purpose, but made in ignorance of correct legal position may not be a satisfactory evidence of severance.[5] Mere separation from commonness does not necessarily amount to severance of status if not unaccompanied by unequivocal declaration of intention to partition.[6]

The question of severance of status sometimes gets complicated in the revenue cases, as joint family may make a fake or notional partition to avoid the incidence of taxation. This problem may arise under the Income Tax Act and the Wealth Tax Act. Section 171(2) of the Income Tax Act, 1961 runs as under : "Where at the time of making an assessment under S. 143 or S. 144, it is claimed by or on behalf of any member of a Hindu family assessed as undivided that a partition whether total or partial has taken place among the members of such family that Income-tax Officer shall make an inquiry thereinto after giving notice of the inquiry to all members of the family." The

1. AIR 1922 PC 353.
2. AIR 1964 SC 136.
3. *Hardeo Raj* v. *Shakuntala Devi*, AIR 2008 SC 2484.
4. *Gooty* v. *Gooty*, AIR 1977 Kant 175; *Anandi* v. *Naik*, AIR 1981 Ori 21.
5. *Rukhmaba* v. *Laxminarayan*, AIR 1960 SC 335.
6. *P. Periasami* v. *Periasami*, AIR 1980 Mad 33.

question is : suppose the declaration of an intention to sever is made merely to avoid the incidence of taxation, can it be taken seriously so as to imply a genuine partition? In *Udayan Chinubhai* v. *Commr. of I.T.*,[1] the Supreme Court detected and in *I.T. Officer* v. *Bachoo Lal*,[2] it suspected that the arrangement was fake. In the former case, there was an expression of an intention to sever as well as partition the property in 'definite portions' between the two branches, as required by S. 25A(1) of the Income-tax Act, 1922. Once that was established, the Income Tax Officer and the Supreme Court had to hold that partition had taken place.

Family arrangements are recognized in law. They do not amount to partition. In *Girjanadini* v. *Bijendra*,[3] the Supreme Court said that merely because one member of a family severs his relations, there is no presumption that there is severance between the other members. The question whether there is a severance between the other members is one of fact, to be determined on a review of all the attendant circumstances where there is severance between two different branches of a joint family, severance between the members of the branches *inter se* may not, in the absence of the expression of an unequivocal intention, be inferred. But if, a family consisting of eight brothers and their sons, transfer all its assets to a limited company, and the eight brothers and their sons secure equal number of shares in the company, it amounts to severance of status.[4]

Presumption of non-partition.—It is a well established rule that the one who alleges that partition has taken place has to prove it.[5]

Communication of intention to sever.—It is necessary that intention to sever must be communicated to other coparceners. An uncommunicated expression of intention, at best, can amount to a desire to partition, it cannot amount to severance. What is essential is that the unequivocal communication of intention must be conscious and informed act of the coparcener.[6] The difficult question in this connection is : when should the communication of intention to sever be deemed effective; from the date on which the communication is put into transmission, or from the date on which it reaches the coparceners?

The question came for consideration for the Supreme Court in *Raghvamma* v. *Chenachamma*.[7] Subba Rao, J., after reviewing all the authorities, came to the following conclusions :

(a) The communication of intention to sever must be communicated to all interested parties. (It is submitted that, "interested parties" mean the coparceners alone and not the other members of the joint family).

(b) Although the communication of intention is to be made to all interested parties, which might be received by them on different dates, their receipt will relate back to the date of notice, *i.e.*,

1. (1978) 3 ITR 584.
2. AIR 1966 SC 1148.
3. AIR 1967 SC 1124.
4. *Murarka* v. *Murarka*, AIR 1979 SC 300.
5. *Sachidanand* v. *Ranjan*, AIR 1993 Cal 222.
6. *Babu Ramashray* v. *Radhina*, 53 Mad LW 172.
7. AIR 1964 SC 136.

severance will be effective from the date on which the communication was put into transmission; but this is a subject to the next proposition.

(c) The vested rights that might accrue in the interval, between the date of transmission and receipt are preserved. This was explained thus : "But between two dates, the person expressing his intention may lose his interest in the family property, he may withdraw his intention to divide, he may die before his intention to divide is conveyed to the other members of the family; with the result that his interest survives to the other members. A manager of a joint family may sell away the entire family property for debts binding on the family. There may be similar other instances."

The complications that may arise on account of the above propositions were in the view of the learned judge. He adverted to four of them : (i) mode of service and its efficacy, (ii) whether service of notice on a manager would be enough, (iii) whether service of notice on major members or a substantial body of them would suffice or should it be made on all, and (iv) how notice is to be served on minor members. His Lordship did not provide any answer to these questions.[1]

As to the first question, the mode of service and its efficacy, answer has been provided by the Supreme Court in *Puttrangumma* v. *M.S. Ranganna*.[2] Ramaswami, J., said that the process of communication may vary with the circumstances of each particular case. The proof of formal despatch or receipt of the communication by other members of the family is not essential, nor its absence fatal to the severance of the status. What is necessary is that the declaration to be effective should reach the person or persons affected by some process appropriate to the given situation and circumstances of the particular case. In this case, a coparcener posted a letter communicating his intention to sever, but before the letter could reach the destination it was withdrawn from the post office. But the news of the intention reached the affected parties indirectly. The court held that communication was sufficient and effective and it could not be withdrawn. As to the second question, no direct answer has yet been given, but Subba Rao, J., in *Raghvamma* indicated that communication to the *Karta* alone will not be sufficient. It is submitted that if it is communicated to all the coparceners, it is sufficient, no one else need be communicated. If a notice is given to a coparcener who refuses to accept, the communication is enough and effective. As to the last, the Andhra Pradesh High Court said that notice to the *Karta* is notice to the minor.[3] This, it is submitted, is correct.

It is also well established that once the intention is declared and its communication made, the severance of status takes place, assent or dissent of the other coparcener is immaterial.[4]

Partition under Section 171, Income-tax Act, 1981.—Under the Income-tax law, mere severance of status is not a partition. Unless partition

1. AIR 1968 SC 1018.
2. *Ibid.*
3. *Papayya* v. *Venkata*, (1968) 1 An WR 36.
4. *Puttrangamma* v. *M.S. Ranganna*, AIR 1968 SC 1018; *Madigowda* v. *Ram Chandra*, AIR 1969 SC 1076; *Krishnabai* v. *Appasabibe*, AIR 1979 SC 1880.

by metes and *bounds* takes place, there is no partition under Section 171, Income-tax Act, 1961.[1]

Mode of Partition

A partition can be made by a definite, unambiguous declaration of intention by any member to separate himself from the family. If this is done, it would amount to division of status, whatever mode may be used. Partition may be effected by the institution of a suit,[2] by submitting the dispute as to division of the properties to arbitration by a demand for a share in the properties, or by conduct which evinces an intention to sever the joint family; it may also be effected by an agreement to divide the property.[3] But separate enjoyment for the sake of convenience is not a partition thus deepening a well, laying underground pipes, getting loan on security of portion in one's possession are not adequate proof of partition.[4]

Partition by suit.—When a coparcener files a suit for partition, it amounts to an unequivocal intimation of the intention to sever, and consequently, severance of status takes place from the date the suit is instituted. The decisions taking the view that the partition is effected by a decree of the court are wrong.[5]

Partition by agreement.—A partition may be effected between the parties by an agreement. The Privy Council in *Approvier* v. *Rama*,[6] said that intention being the real test, an agreement between the coparceners to hold and enjoy property in defined shares as separate owners operates as a partition although actual division of properties might not have taken place.

Under Hindu law, an agreement to partition need not be in writing. If it is in writing, it should clearly indicate the parties' intention to partition. The severance of status takes place from the date of signing of the agreement. A written agreement need not be registered if it merely records what had happened.[7] But if properties are divided by the agreement, registration is necessary.

Oral partition.—There is a long line of cases holding the view that oral partition can be validly made. As early as 1846, the Privy Council in *Rewan Prasad* v. *Mst. Radha*,[8] said that it is undisputed that a division of joint property might be effected without an instrument in writing.

Unilateral declaration.—The severance of status can also be brought about by a unilateral exercise of power to partition. This, in other words, means that the consent of the other coparceners is not necessary. But this does not mean that intention need not be communicated. The communication of intention is necessary whatever the mode of partition one may use. An unambiguous and definite expression of intention by a coparcener to partition is sufficient to bring about a division in status, with all the legal consequences

1. *ITO* v. *Sarda*, AIR 1990 SC 205.
2. *Mallappa* v. *Lakshmi*, AIR 1993 Mad 78.
3. *Girajanandhini* v. *Bijendra*, AIR 1967 SC 1124.
4. *P. Kallippa* v. *Muthuswami*, AIR 1987 Mad 24.
5. *Palani* v. *Muthuvenkatacharalu*, AIR 1925 PC 49; *Hari* v. *Padrii*, AIR 1994 Ker 36.
6. *Pooruandachi* v. *Gopalasami*, AIR 1936 PC 281.
7. *Nani* v. *Gita*, AIR 1958 SC 706.
8. (1856) 4 MIA 137.

resulting therefor.[1]

Partition by arbitration.—A partition may be effected by arbitration. If members of a joint family enter into an agreement under which they appoint arbitrators for dividing the joint family property among themselves, the severance of status takes place from the date of the agreement.[2] The mere fact that no award is made, is immaterial. In *Chandra Kant* v. *Balkrishan*,[3] in a previous suit for partition, the court passed a preliminary decree for partition on the basis of an arbitration award made in accordance with an agreement between the parties. A Commissioner was also appointed to divide the properties on the basis of the award. The division of properties did take place in accordance with the award, and the parties obtained separate possession of the same. The suit was later on dismissed as the parties did not pay Commissioner's fees. After sometime a second suit for partition was filed. The Supreme Court held that the second suit was not maintainable as severance of status and partition were affected in the earlier suit on the basis of the award.

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

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

Registration of partition.—Under Hindu law, no registration of partition is necessary. It may be oral partition. An unregistered memorandum of partition is inadmissible in evidence but it can be used for collateral purposes, such as to prove intention to partition.[4]

Parties to partition.—In a suit for partition, the heads of the branches are essential parties. All members of the branch need not be made parties to the suit.[5]

Partial Partition

It is open for the parties to make partial partition. A partial partition is a question of fact. A partial partition must be :

(i) Partial as to property, or

1. *Girja* v. *Sadashiva*, (1916) 43 IA 151.
2. *Syed* v. *Jorawar*, AIR 1923 PC 353; *Kasinatha* v. *Narasingsa*, AIR 1961 SC 1077; *Jawaharlal* v. *Ananda*, AIR 1981 Cal 424.
3. AIR 1970 SC 1536.
4. *Krishna* v. *Shivnath*, AIR 1993 MP 65.
5. *Pran Nath* v. *Rajendra*, AIR 1986 Del 129.

(ii) Partial as to persons.

Partial as to property.—The Privy Council in a case *Ramalinga* v. *Narayan*,[1] said that it is open to the coparceners to sever their interest in respect of some of the properties. As a general rule, no one can impose partition on others. Similarly, no one can impose (except the father) a total partition on others. Thus, if some coparceners want partition, while the others do not, those who want partition may take away their share and the rest will continue to remain joint.

Sometimes a partition may be partial under compulsion of circumstances. Such will be the case when properties are in several districts. A District Court is competent to effect partition only of those properties which are within its jurisdiction. Sometimes partition may be partial because a statute forbids fragmentation of holdings (for instance, the Kerala Agrarian Relations Act, 1960).

Partial as to coparcener.—If one coparcener or a group of coparceners want to separate, they cannot impose separation on others *inter se*. Nor is there any presumption in law to this effect. In *Hari Baksh* v. *Baboo Lal*,[2] the Privy Council held that the fact of a separation having been effected among brothers raises no presumption that there was a separation of the joint family constituted and headed by each brother, *i.e.*, brothers cannot be deemed to be separated from their own sons. In *Palani* v. *Muthuvenkatachala*,[3] the Privy Council said that there is no doubt that a coparcener can separate himself from the others and that the remaining coparceners, without any special agreement among themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. No express agreement to remain joint of the part of the remaining coparcener is necessary. It is a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation among the other coparceners or they remained joint, and the burden is on the party who asserts the existence of a particular state of things on the basis of which he claims the relief.[4] The father has power to effect a partial partition between himself and his minor sons.[5]

Division of Property by *Metes* and *Bounds*

Partition by *metes* and *bounds* : Meaning.—Partition by *metes* and *bounds* means the physical division of joint family property. For the actual division of property, it is not essential that possession of property should be with the coparceners.[6]

Taking of Accounts

The Mitakshara *Karta* is not liable to accounts and no coparcener can even at the time of partition, call upon the *Karta* to account his past dealings with the joint family property unless charges of fraud, misappropriation or conversion are made against him. However, whe[illegible] coparcener suing for

1. (1922) 49 IA 168.
2. AIR 1924 PC 126.
3. AIR 1925 PC 49.
4. *Joti* v. *Banwari Lal*, AIR 1933 [illegible]
5. *Apoora* v. *CIT*, AIR 1983 SC 40[illegible]
6. *Shive Kumar* v. *Pradeep*, AIR 19[illegible]

partition is entirely excluded from the enjoyment of property, he can ask for accounts.

What is meant by taking of accounts is an enquiry into the joint family assets. It means preparing an inventory of all the items of the joint family property. However, all advances made to the coparcener which he would not be entitled as a coparcener, such as money advanced for the payment of his debts, are to be accounted for and would be treated as part of joint family funds. Similarly, any alienation made by a coparcener of his interest in the joint family property (in States where he has power to do so or when his interest is sold in execution of a money-decree against him) has to be taken into account by including such property in the partition and debiting it to the alienating coparcener.

If a coparcener has made improvements in, or has repaired, the joint family property out of his separate earnings, such amount will constitute a debt to him from the rest of the family, unless it amounts to throwing into the common stock or a gift by him to the joint family.

After the severance of status has taken place, the *Karta* is bound to render accounts to all expenditure and income in the same manner as a trustee or agent is bound to render accounts. This means that from the date of the severance of status, the *Karta* is bound to account for all mesne profits. When a coparcener seeks an account of mesne profits, what he is seeking is only an account of the profits of property subsequent to severance of status; profits are appurtenant to his right to a share of the family property is according to the number of wives, it is known as the *patni bhaga*. In modern Hindu law, the *putra bhaga* rule operates and *patni bhaga* rule is obsolete.

The Hindu sages also recognized another practice which came to be known as the *jyeshta bhaga* doctrine. Under this doctrine, the *Karta* or the eldest brother took double share. In modern Hindu law, this doctrine is not recognized. As between brothers or other relations, absolute equality is now the invariable rule in all the States.

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

1. Division between father and son.—When partition takes place between the father and sons, the rule is that each son takes a share equal to the share of the father. For example, A has three sons, B, C and D. Each of them, *i.e.*, A, B, C and D will take 1/4 share in the joint family property.

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

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

A coparcenary consists of three generations—father, sons and grandsons.

If partition takes place among the coparceners, according to Rule (3), partition will be *per stirpes*. This means that in a partition where there are branches, there are two steps in partition : (a) the division of properties will, first, take place between the father and sons, *i.e.*, between the father and the heads of branches. The shares allotted to the heads of branches will be the shares of the respective branches; (b) The next step will be to effect partition between the members of each branch. The second part of Rule (3) lays down that among the members of a branch, the distribution will be *per capita* (per head). For example, a joint family consists of P and his three sons, A, B, C, two grandsons As and As^1 (from A) and one grandson, Bs (from B) and three grandsons, Cs, Cs^1 and Cs^2 (from C). If partition takes place, in the first step division of property will be made among P and his three sons, A, B, and C, each taking one-fourth. In the second step, division of property will take place among A, B and C and their sons. Since A has two sons, taking per capita A, As and As^1, each will take one-twelfth. Since B has only one son, each will take one-eighth, and since C has three sons, his one-fourth will be divided in four shares each taking one-sixteenth.

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

A coparcenary consists of P, his son S^1, his grandsons SS^1 and SS^2, son of a predeceased son S^2, and a great grandson SSS, son of his predeceased son S^3, his predeceased grandson SS^3, and A, a great-grand grandson, whose father, father's father, father's father's father are dead. If partition takes place, A will not take any share, as on the death of his father, his father's father and his father's father's father, he got removed by more than four degrees from the last holder of the property, *i.e.* P, and thus lost his right of ever becoming a coparcener. The share of his branch has gone by survivorship to the other coparceners. Thus, if a partition takes place, in the first step, properties will be divided into four shares, *i.e.*, *per stirpes*, P will take 1/4, S^1 will take 1/4. Since S^2 is dead, his interest will be taken by his two sons SS^1 and SS^2 representing their father. In the second step, they (SS^1 and SS^2) being brothers (or as members of the same branch) will divide it equally, *i.e.*, each will take 1/8. Similarly, since S^3 and SS^3 are dead, SSS^1 will represent them and being the only person in his branch will take 1/4.

Under the Dayabhaga School

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

Under the Dayabhaga school, the coparcenary comes into existence on the death of the father when the sons succeed to his property jointly. A dies leaving behind three sons, B, C and D. The coparcenary will consist of B, C, and D. Subsequently, C dies leaving behind a son CS, and then D dies leaving

behind two sons DS and DS^1. Now the coparcenary consists of B, CS and DS and DS^1. If a partition takes place, the properties will be divided into three shares : B taking 1/3, CS taking 1/3 and DS and DS^1 together taking 1/3. This illustrates both the *per stirpes* and the representation rules. The doctrine of representation in the Dayabhaga school applies with some modifications. For instance, if a Dayabhaga coparcener dies leaving behind a widow, or a daughter or daughter's son, his share will devolve by succession on the widow, daughter or daughter's son, as the case may be, and will not lapse into the shares of other members. The doctrine of representation does not extend beyond the daughters. The daughters of the same class inherit their father *per stirpes*. The daughter's sons do not take as representatives of their mother, but as heirs to their maternal grandfather. This means that no daughter's son can take a share, until all the eligible daughters are dead. When the daughter's sons inherit, they take *per capita* and not *per stirpes*. Thus, if a person has six sons of a predeceased daughter A, and one son from a predeceased daughter B, then on his death, the sons of both daughters will take equally, *i.e.*, 1/7 each.

Successive Partition

In the wake of partial partition, *i.e.*, when some of the coparceners partition and take away their share, leaving the rest joint, a problem relating to the allotment of shares arises when the remaining coparceners effect a partition subsequently. The question is : What shares do they take in the subsequent partition?

Rebus sic stantibus.—Ordinarily, the doctrine of *rebus sic stantibus* applies. The doctrine means that the existing facts are taken into consideration, *i.e.*, state of the family at the time of each partition should be taken into account. Then, does it mean that the state of the family at the time of each partition is to be taken into account ignoring the earlier partition or partitions? The Bombay High Court answers this question affirmatively. For example :

A coparcenary consists of D and C, two brothers, three sons of D, DS^1, DS^2, DS^3. CS^1, son of a predeceased son of C, FS^1 and FS^2, two sons of another predeceased son F, and GS^1 a son of third predeceased son G. Suppose D^1, F^1, F^2, and G^1 institute a suit for partition against D, D^3 and C^1. There are two branches of the family, and the coparcenary consists of D and his sons DS^1, DS^2, and DS^3 and the descendants of his brothers who are dead. The suit is filed by two of his sons and three of his grandnephews. D's branch will take 1/2 and C's branch will take 1/2. Each member in D's branch will get 1/4 of 1/2, *i.e.*, 1/8 each. In C's branch, the three sub-branches are represented by C^1, F^1, and F^2, and G^1. Each of these sub-branches will take 1/3 of 1/2, *i.e.*, 1/6. E^1 will get 1/6 as he is the sole representative of his branch, so is G^1 who too will get 1/6. In F's sub-branch, there are two representatives, each will take 1/2 of 1/6, *i.e.*, 1/12. In the partition, all the five coparceners take away their share and D, DS^3 and C^1 are left with their following shares, as 1/8, 1/8, 1/6 respectively : It comes to 5/12.

Subsequently, D dies, and D^2 files a suit for partition. The Bombay High Court takes the view that the state of the joint family at the time of D^2's suit

is to be taken into account, and what happened at the earlier suit is to be ignored. This means that 5/12 is to be divided into two shares sihce D^3 represents one branch and C^1 represents another branch. This means D^3 takes 5/24, and thus E and his branch are benefited thereby.

Equitable view.—The Madras and Mysore High Courts[1] differ from the Bombay view. These High Courts hold that the former partition too has to be taken into account. This means, in the above example, on the death of D, D^3 represents him and takes his share plus his own 1/8 share, thus taking 1/8+1/8=1/4 and C^1 and E will retain their original 1/6 share.

The Madras and Mysore High Courts' view seem to be more equitable.

III
REOPENING OF PARTITION

A text of Manu runs :

> Once is the partition of inheritance made; once is a damsel given in marriage; and once does a man say, "I give"; these three are by good men done for once and irrevocable.

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

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

The courts have taken the view that though a partition once effected is final, yet it can be re-opened in case of fraud, mistake or subsequent recovery of property. It seems that the matter should be looked at from the two angles. First, if readjustment is possible, partition need not be reopened. But if equities cannot be solved by readjustment, partition may be reopened.

Readjustment of assets.—Some properties may be left out from the partition by mistake or oversight, or some lost properties may be recovered later on, or there may be some property whose distribution has to be postponed because it was in the possession of a third person, such as in the case of usufructuary mortgage. The process of readjustment may also be applied to a case of slight inequities which may be adjusted without disturbing the entire division of properties. Thus, the general rule is that when readjustment can be made, a partition need not be re-opened. But if readjustment is not possible, the partition may be re-opened.

Re-opening of partition.—Generally, a partition can be re-opened if it was obtained by fraud, coercion, misrepresentation or undue influence.

(1) **Fraud.**—When the whole scheme of distribution of properties is fraudulent, it will be ordered to be set aside, unless the person injured has acquiesced in it with full knowledge of all material facts. For instance, when

1. *F.M. Narayana* v. *A. Sankar*, AIR 1929 Mad 865 (FB); *C.D. Dessiah* v. *Karigowda*, AIR 1954 Mys 128.

worthless assets have been given to some coparceners as valuable assets or when a property which does not belong to the family has been allotted to some coparcener, or when it is unjust and unfair or detrimental to the interest of minors.

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

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

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

(5) Son conceived and born after partition.—It has been seen that where the father does not take a share on partition, and a son is begotten and born to him after the partition, the partition can be re-opened.

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

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

In *Venkata Subramania* v. *Eswara*,[1] the Madras High Court held that when in a partition one member gets an excess share, and out of the income of the excess share, he acquires fresh property, he does not hold the fresh property for the benefit of the other sharers when the partition is subsequently re-opened on the ground of unequal partition. However, he will be liable to account for the co-ownership funds used by him.

IV
REUNION

A text of Brihaspati runs :

> He who, being once separated, dwells again through affection, with father, brother or a paternal uncle, is termed reunited with him.

According to the Mitakshara :

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

According to the Dayabhaga :

> A reunion is valid only with a father, brother or paternal uncle.

In the Mitakshara, Dravida, Benares and Dayabhaga schools, these texts have been interpreted restrictively.

1. (1966) 1 Mad 468.

For reunion, two conditions must be satisfied :

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

(2) A reunion can take place only : (a) between father and son, (b) between the paternal uncle and nephew, and (c) between brothers.[1]

A partition took place between a father F and two sons A and B. Subsequently, a son, S, is born to F. A or B can reunite with their father F or with each other but they cannot reunite with S. Or a partition takes place between two brothers, A and B. Subsequently, a son S is born to A. A dies. B cannot reunite with his uncle B. In these examples, S was not a party to the partition, and therefore condition (1) is not satisfied.

A partition takes place between A, his son, S and his grandson, SS. A and SS cannot reunite. A partition takes place between P, his two sons A and B, and his two grandsons, AS and BS. AS and BS cannot reunite. In both examples, condition (2) is not satisfied.

It is implicit in the concept of reunion that there should be an agreement to reunite between the parties. Such an agreement need not be in writing. It may be implied from the conduct. In short, reunion must be proved by cogent, convincing and unimpeachable evidence.[2]

Bombay and Mithila Schools.—The Bombay and the Mithila schools take a different view. According to them, only condition (1) need to be satisfied. Hence, reunion may take place, even with a wife, a paternal grandfather, a brother's grandson, a paternal uncle's son and the rest. Thus, according to these schools, reunion can take place among all the persons who were parties to the partition. But it seems, according to the Bombay school, reunion can be made only among the males.[3]

All the schools agree that reunion is possible only between the parties to partition. However, the Bombay High Court said that a reunion may take place even among the descendants of persons who were parties to the partition but such a reunion will not be a reunion in the sense in which it is understood under the Mitakshara law.[4]

Reunion—How effected

To constitute a reunion, there must be an intention of the parties to reunite in estate and interest. It is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite in estate with an intention to revert to their former status.[5] No writing is necessary for a reunion. The persons who were parties to a registered partition deed may reunite by an oral agreement. Since an agreement to reunite is necessary, coparcener cannot be deemed to be reunited by the mere withdrawal of the

1. *Ram* v. *Pan*, AIR 1935 PC 9.
2. *Palan* v. *Mathuvenkatachala*, AIR 1925 PC 49; *Bhagwan Dayal* v. *Reoti*, AIR 1962 SC 287; *Annappa* v. *Krishna*, AIR 1982 Kant 301.
3. *Nanuram* v. *Radhabai*, AIR 1942 Nag 24.
4. *Vishvanath* v. *Krishnaji*, (1866) 3 Bom HCR 69.
5. *Bhagwan Dayal* v. *Reoti*, AIR 1962 SC 287.

unilateral declaration of the intention to separate which had resulted in the division of status.[1] When a reunion is attempted to be established by an implied agreement, the conduct must be of an incontrovertible character and the burden lies heavily on the person who asserts reunion.[2] The mere fact that the parties who have separated, live together or trade together after the partition, is not enough to establish a reunion. The burden of proof whether a reunion has taken place is on the person who alleges reunion. The possession of joint family property at the time of reunion is not necessary.

Can a minor reunite?—From the Privy Council decision in *Balabux* v. *Rukhmabai*,[3] it seems to be clear that a minor cannot reunite, since a minor has no capacity to contract. Mayne has argued very cogently : "It is open to the father or mother as his guardian to effect a separation on behalf of the minor coparcener, it would be equally open to the father or mother as the guardian, to agree to a reunion on behalf of the minor." The Madras High Court favoured this view in *Babu* v. *Govinddass*.[4]

Effect of Reunion

There has been some controversy whether the effect of reunion is to restore the parties to the original position or whether it merely establishes the unity of possession, the severance of status continuing. It is, now, an established view, both under the Mitakshara and Dayabhaga schools, that after reunion *status quo ante* is fully restored.[5] Under the Mitakshara school, both the community of interest and unity of possession are established. A Full Bench of the Madras High Court held that reunited coparceners are not tenants-in-common, but are coparceners with rights of survivorship, *inter se*, and that their sons shall be deemed to be coparceners with them.[6] The descendants of the reunited coparceners, born after the reunion, are also full-fledged members of the re-united family.[7]

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1. *Puttrangamma* v. *Ranganna*, AIR 1968 SC 1018.
2. AIR 1952 SC 287.
3. (1903) 30 I.A 130.
4. AIR 1928 Mad 1064.
5. *Krishraya* v. *Venkataramiah*, (1909) 19 MLJ 723 (FB); *Abai* v. *Mangal*, (1892) 19 Cal 634.
6. *Krishraya* v. *Venkataramiah* cited above.
7. *Narasinha* v. *Venkata*, (1910) 33 Mad 165; *Nana* v. *Prabhu*, AIR 1924 Pat 647.

Chapter 35

WOMAN'S PROPERTY : STRIDHAN

Before 1956, the property of woman was divided into two heads : (a) *Stridhan*, and (b) woman's estate. Section 14, Hindu Succession Act, 1956 has abolished the woman's estate.

Stridhan and Woman's Estate

Literally, the word *Stridhan* means, woman's property. But in Hindu law it has, all along, been given a technical meaning. The *Smritikars* differ from each other as to what items of property constitute her *stridhan*. Gooroodass Banerjee very aptly said :

> The difficulties besetting an enquiry into the question what constitutes *stridhan*, arise from the fact that majority of sages and commentators give neither an exact definition of *stridhan*, nor an exhaustive enumeration, and if the Mitakshara gives a simple and intelligible definition, that definition has been qualified and restricted in its application by our courts, in consequence of its disagreement with the view of other authorities.[1]

According to the *Smritikars*, the *stridhan* constituted those properties which she received by way of gift from the relations which included mostly movable property (though sometimes a house or a piece of land was also given in gift) such as ornaments, jewellery and dresses. The gifts made to her by strangers at the time of the ceremony of marriage (before the nuptial fire) or at the time of bridal procession also constituted her *stridhan*. Among the Commentators and Digest-writers, there is a divergence of opinion as to what items of property constitute *stridhan* and what do not. Vijnaneshwara commenting on the words, "and the like" in Yajnavalkya's text expanded the meaning of *Stridhan* by including the properties obtained by inheritance, purchase, partition, seizure and finding. (This expansion was not accepted by the Privy Council which resulted in the emergence of the concept of women's estate). Jimutvahana gave a different enumeration of *stridhan*, so did the sub-schools of the Mitakshara.

Enumeration of Stridhan

The following categories of properties have been held to be *stridhan* :

1. Gifts and bequests from relations.
2. Gifts and bequests from strangers.
3. Property acquired by self-exertion and mechanical arts.
4. Property purchased with *stridhan*.
5. Property acquired by compromise.

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1. *Hindu Law of Marriage and Stridhan*, (3rd Ed.) 280.

6. Property obtained by adverse possession.
7. Property obtained in lieu of maintenance.

Woman's estate

The following two categories of property have been considered as woman's estate :

1. Property obtained by inheritance.

In Bombay school, property inherited by a female from another female is *stridhan*.

2. Share obtained on partition.

Without going into details, broadly speaking, the *stridhan* has all the characteristics of the absolute ownership of property. This implies two features : (a) The *stridhan*, being her absolute property, the female has full rights of its disposal or alienation. This means that she can sell, gift, mortgage, lease, exchange or if she chooses, she can put it on fire. (b) On her death, all types of the *stridhan* passed to her own heirs. In other words, she constituted an independent stock of descent.

The old law of succession to *stridhan* has been abrogated by the Hindu Succession Act, 1956. The new law of succession to woman's property has been laid down in Sections 15 and 16 of the Hindu Succession Act, 1956.

Characteristic Features of Woman's Estate

The characteristic features of the woman's estate is that the female takes it as a limited owner. However, she is an owner of this property in the same way as any other individual can be the owner of his or her property, subject to two basic limitations : (a) she cannot ordinarily alienate the corpus, and (b) on her death, it devolves upon the next heir of the last full owner. In *Janki* v. *Narayansami*,[1] the Privy Council very aptly observed : "Her right is of the nature of right of property, her position is that of owner; her powers in that character are, however, limited...So long as she is alive, no one has vested interest in succession."

Her powers of disposal over the property are limited and it is these limitations which go to define the nature of her estate. These limitations are not imposed for the benefit of the reversioner. Even when there are no reversioners, the estate continues to be a limited estate.

The holder of woman's estate has following powers :

(a) *Power of management* : Her position in this respect is somewhat superior to the *Karta*. The *Karta* is merely a co-owner of the joint family, there being other coparceners, but she is the sole owner. She has not to look after or bother about others. Thus, she alone is entitled to the possession of the entire estate and she alone is entitled to its entire income. Her power of spending the income is absolute. She need not save, and if she saves, it will be her *stridhan*. She alone can sue on behalf of the estate, and she alone can be sued in respect of it. She continues to be its owner until the forfeiture of estate, by her remarriage, adoption, death, or surrender.

(b) *Power of alienation* : The female owner being a holder of limited

1. (1916) 43 I.A. 207.

estate has limited powers of alienation.

She can alienate the property for : (a) legal necessity, *i.e.*, for her own need and for the need of the dependants of the last full owner, (b) for the benefit of estate, and (c) for the discharge of indispensable religious duties such as marriage of daughters, funeral rites of her husband, his *shraddha*, and gifts to *Brahmans* for the salvation of his soul. In short, she can alienate her estate for the spiritual benefit of the last full owner, but not for her own spiritual benefit.

An improper alienation made by her is not void but voidable. In any case, an alienation made by her is binding on her during her lifetime, as a grantor cannot derogate from her own grant. As the reversioners have no right to get it set aside until the estate devolved upon them, an improper alienation is valid and binding on her for the duration of her life.

(c) **Surrender.**—Surrender means renunciation of the estate by the female owner.

She has the power of renouncing the estate in favour of the nearest reversioners.

Estate reverts to next heir of the lawful owner.—The second characteristic feature to the woman's estate is that the female owner does not form an independent stock of descent in respect of it. On her death, the estate reverts to the heir or heirs of the last full owner as if the latter died when the limited estate ceased. Such heirs may be male or female. They are known as "reversioners". It should be noted that so long as the estate endures, there are no reversioners, though there is always a "presumptive reversioner."

The reversioner takes the property of the female when her estate terminates.

Right of reversioners.—The reversioners have mainly the following three rights :

(1) They can sue the woman holder for an injunction to restrain the waste.

(2) They can, in a representative capacity, sue for a declaration that an alienation made by the widow is null and void, and will not be binding on them after the death of the widow.

(3) They can, after the death of the woman or after the termination of estate, if earlier, file a suit for declaration (or possession or both) that an alienation made by the widow was improper and did not bind them.

Section 14, Hindu Succession Act, 1956, has abolished the woman's estate, yet reversioners are still relevant in respect of woman's estate alienated by her before June 17, 1956.

Section 14, Hindu Succession Act, 1956

Sub-section (1) of S. 14 of the Hindu Succession Act runs as under :

> Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Sub-section (2) of S. 14 retains the power of any person or the Court to give limited estate to a woman in the same manner as a limited estate may be given to any other person.

Under Section 14 (1), any property acquired by a Hindu female, except that which is covered by sub-section (2), before the Act came into force will become her absolute property, and any property acquired by a Hindu female, except that which is covered by sub-section (2), after the commencement of the Act, will be her absolute property.

Pre-Act Woman's Estate

Section 14 has been given retrospective effect. It converts existing woman's estates into *stridhan* or absolute estates. Two conditions are necessary : (a) ownership of the property must vest in her, and (b) she must be in possession of the estate when the Act came into force.[1] But if she has no right in her deceased husband's property except the right of maintenance, that property cannot become her absolute property.[2]

She must be owner of the property.—It is well settled if a Hindu female has no title to the property, she will not become its absolute owner, even though she is in its possession. The Supreme Court said : "The word 'possessed' in S. 14 is used in broad sense and in the context means the state of owning or having in one's hand or power."[3] The property possessed by a female Hindu, as contemplated in the section, is clearly the property to which she has acquired some kind of title whether before or after the commencement of the Act. Section 14 does not in anyway confer a title on the female Hindu where she did not, in fact, possess any. Thus, Section 14 cannot be interpreted so as to validate the illegal possession of a female Hindu, nor does it confer any title on a mere trespasser.[4]

In the context of Section 14, "woman" does not mean any woman, but that woman who is the owner of woman's estate. If the holder of woman's estate had alienated the estate to a woman, that woman is not the woman whose estate is enlarged to full estate.[5]

Interest acquired under the Act of 1937.—When a Mitakshara coparcener's widow acquired the interest of her husband under the Hindu Women's Right to Property Act, 1937 and she had not exercised her right to partition, does this interest become her absolute estate by virtue of S. 14(1), Hindu Succession Act, 1956? In *Subaram* v. *Gauri Sankar*,[6] in 1952, a widow took the interest of her deceased husband who was a coparcener with his brother. In December, 1956 she sold a portion of joint family property. Shah, J. observed that undoubtedly the coparcener's powers of alienating his interest in the coparcenary property are limited, "but a widow acquiring an interest in that property by virtue of the Hindu Succession Act is not subject to any such restrictions." Again, the question came before the Supreme Court in *Badri Prasad* v. *Kanso Devi*,[7] wherein a partition had taken place between the parties and the widow was allotted her share of properties. She took a limited estate. Since the partition was embodied in a decree of the court, the main argument before the court was that sub-section (1) of S. 14 of the Hindu

1. See *Deendayal* v. *Raja Ram*, AIR 1970 SC 1019.
2. *Suraj Mal* v. *Babu Lal*, AIR 1985 Del 95; *A. Venkataraman* v. *S. Rajalakshmi*, AIR 1985 Mad 248.
3. *Gummalappura* v. *Setra*, AIR 1959 SC 577; *Eramma* v. *Veerupana*, AIR 1966 SC 1879.
4. *Eramma* v. *Veerupana*, AIR 1966 SC 1879.
5. *Kalawati* v. *Suraj*, AIR 1991 SC 1581.
6. AIR 1968 SC 365.
7. AIR 1970 SC 1963.

Succession Act applied, and therefore, her estate did not become her absolute property. It was held that her estate becomes absolute by virtue of sub-section (1) of S. 14, and sub-section (2) did not apply.[1] In *Soltappa* v. *Meenakshi*,[2] it was held that as the interest obtained under S. 3(2) of the Act of 1937 becomes her absolute property, and it will pass, on her death, to her heirs even if partition has not taken place.[3]

Woman's estate and Widow Remarriage Act, 1956.—Section 2 of Hindu Widow's Remarriage Act, 1956 provides that the rights and interests in certain properties which a widow gets from her husband as limited estate, shall cease upon her remarriage and shall devolve as if she had died. Does this property also become her absolute property? And if so, will her remarriage afterwards lead to its forfeiture? It has been held that her estate even as referred to in S. 2 of Hindu Succession Act, 1956, becomes her full estate by virtue of S. 14, Hindu Succession Act, 1956. If there is some inconsistency between the provisions of two enactments, the Act of 1956 will have overriding effect. If she remarried after coming into force of the Act of 1956, she will incur no disqualification and her estate cannot be forfeited as contemplated by S. 2 of the Act of 1856.[4] After the widow becomes absolute owner, subsequent remarriage would not divest her.[5]

The property must be in her possession.—The second condition for the applicability of S. 14(1) is that when the Act came into force, the Hindu female must be in possession of the property. In a series of cases, the High Courts and the Supreme Court have held that both the expressions, 'property' and 'possession' are to be given widest possible interpretation. In the absence of a restrictive definition in the relevant statute, it is not proper to restrict its scope and comprehensiveness.[6]

Where property was given to the woman by way of maintenance over which she had a right, her possession was accepted, it became her absolute property.[7]

The term 'possession' has a very wide connotation. It includes actual as well as constructive possession. Even when she is entitled to the possession of property, such as when the property is in the possession of a trespasser, it has been held that she is in its constructive possession.[8] Similarly, if the property is in the actual possession of a mortgagee, lessee or licensee, the female has the constructive possession. In the broader sense, the term 'possession' is co-extensive with the ownership.[9] Thus, whenever the woman has the

1. *Punithavall* v. *Ramalingam*, (1970) SCC 570; *Balendra* v. *Shivanath*, AIR 1971 All 448; *Bapusahab* v. *Gangabai*, AIR 1972 Bom 16.
2. (1970) 1 MLJ 383.
3. See also *Makhiah* v. *Panavva*, AIR 1973 Mys 1; *M.V. Chockalingam* v. *Alamelu Ammal*, AIR 1982 Mad 29.
4. *Bhuri* v. *Champ*, AIR 1968 Raj 139; *Salunke* v. *Sindhu*, AIR 1971 Bom 413; *Jagdish* v. *Mohammad*, AIR 1973 Pat 170; *Piari* v. *Board of Revenue*, AIR 1972 All 492; *Shankaribala* v. *Asita*, AIR 1977 Cal 289; *Chando Mahtain* v. *Khublu*, AIR 1983 Pat 33; *Punithavalli* v. *Ramlingam*, AIR 1970 SC 1730.
5. *Cherotte Sugathan* v. *Cherotte Bharathe*, AIR 2008 SC 1467.
6. *Mannalal* v. *Raj Kumar*, AIR 1962 SC 1493; *Seth Badri* v. *Karan*, (1969) 2 SCC 586; *Ram Saran* v. *Batta*, AIR 1981 P & H 68.
7. *Santosh* v. *Saraswathibai*, AIR 2008 SC 500.
8. *Mangal* v. *Rattno*, AIR 1967 SC 1786.
9. *Kottuswami* v. *Vierawa*, (1956) SCJ 437.

ownership of property vested in her, she will be deemed to be in its possession.[1] But if her possession over the property is that of a trespasser, or of a licensee, she cannot be said to be in the possession of the property.

If the property is not in possession when the Act came into force.—A Hindu female has no possession over the property when the Act came into force, does that property retain the character of woman's estate or does that also become absolute estate?

Before the Supreme Court decision in *Radha* v. *Hanuman*,[2] there was an acute controversy among the High Courts. The Allahabad High Court and some other High Courts,[3] took a view, which was attractive for its utter simplicity. It was said that S. 14 has been given a retrospective effect with the result that after 17.6.56, there was nothing like woman's estate, and if there was nothing like woman's estate, there was also nothing like reversioner after that date. In its actual application, this view will benefit the alienee and not the Hindu female.

The other High Courts took a different view and it is this view which has been confirmed by the Supreme Court in *Radha* v. *Hanuman*[6]. The basic assumption underlying S. 14 is that the provision is meant to confer a benefit on the Hindu female and not on the alienee.[4] Keeping this in view, the word 'possessed' was deliberately used in S. 14(1). Only that woman's estate stands transformed into *stridhan* over which the Hindu female has possession when the Act came into force. If she has no possession when the Act came into force, S. 14(1) does not apply. If S. 14 does not apply, then the old Hindu law continues to apply. The present position, then, is :

(1) Section 14 has qualified retrospective application. It converts only those women's estates into full estates over which she has possession (possession is used in the widest possible sense, including actual and constructive possession) when the Act came into force.

(2) Section 14 does not apply to those women's estates over which Hindu female has no possession when the Act came into force; in such a case, the old Hindu law continues to apply.

In a case, where a Hindu female alienates the properties before the Act came into force, but the alienation is held invalid consequent to which the possession is reconveyed to her, then S. 14(1) will apply and the property will become *stridhan*.[5]

Who are reversioners after 17.5.56.—Where the reversioners have a right to file a suit, under which law they are to be reckoned with, under the old Hindu law of succession or under the new law, *i.e.*, Hindu Succession Act. The Patna, Madras and Orissa High Courts subscribe to the former view. The

1. *Eramma* v. *Veerupanna*, AIR 1966 SC 1879; *Mangal Singh* v. *Rathno*, AIR 1967 SC 1786; *Narain* v. *Ramo*, AIR 1976 SC 2198; *Dindayal* v. *Rajaram*, AIR 1970 SC 1019; *Mangal* v. *Rathno*, AIR 1967 SC 1786.
2. AIR 1966 SC 216.
3. *Hanuman* v. *Indrawati*, AIR 1958 All 304; *Misser* v. *Raghunath*, AIR 1957 Pat. 480.
4. *Amar Singh* v. *Sewa Ram*, AIR 1960 P & H 503; *Anath* v. *Chanchala*, AIR 1976 Cal 303; *Parmeshwari* v. *Santokhi*, AIR 1977 P & H 141 (FB).
5. *Chinna Kolandi* v. *Thanji*, AIR 1965 Mad 497; *Teja Singh* v. *Jagat*, AIR 1964 Punjab 493; *Bai Champa* v. *Chandrakant*, AIR 1973 Guj 227.

Andhra Pradesh, Himachal Pradesh, Madras and the Punjab High Courts subscribe to the latter view. The settled rule of Hindu law, prior to the Hindu Succession Act was, that wherever a widow succeeded to the property, she succeeded it as representing the husband and the husband was deemed to die when the widow died. In other words, succession opened on the death of the widow and the heir to the husband succeeded to the property left by the limited owner according to the law as it stood when the succession opened. It is submitted that this is a practical view and will work well in most situations.[1]

Post-Act Women's Property

Any property that a Hindu female acquires after the coming into force of the Act will be her absolute property unless given to her with limitations. Thus, the property obtained on succession or on partition is now her absolute property.[2] Sub-section (2) of S. 14, Hindu Succession Act, 1956 lays down the limitations. The sub-section runs : "Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under will or any other instrument or under a decree or order of civil court or award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property." This sub-section enacts a well established principle of law, *viz.*, if the grant is given subject to some restrictions, the grantee will take the grant subject to those restrictions. Section 14(2) lays down that if the gift, will or any instrument, decree or order of a civil court or an award grants only a restricted estate to a Hindu female, she will take property accordingly. In the absence of such an intention, the woman's grant will be her absolute property. The object of S. 14 is to remove the disability of a Hindu woman and not to interfere with the contracts, *etc.* Sub-section (2) is based on the principle of sanctity of contracts and grants.[3] The distinction between sub-section (1) and sub-section (2) of S. 14 is : "If the acquisition of the property by a female Hindu can be related to her antecedent right or interest in the property, in a limited sense, it will confer absolute ownership on the widow on and from the day of coming into force of the Act. If, however, acquisition of property cannot have any connection or relation to any of the antecedent right or interest in the property of the female Hindu and the acquisition is conditioned by a restrictive clause, she will not become absolute owner but will be governed by the restrictive clause mentioned in the gift, will, instrument, decree or order of a civil court or an award.[4]

Property given in lieu of maintenance.—The *Karta* can grant some property to a member of the family for his or her maintenance. The right of a Hindu female to get maintenance out of the joint family property is an indefinite right, yet it is a right under the Hindu law. If she is put in possession of certain properties in satisfaction of that right for her life, she is not a trespasser on property. If there are some restrictive clauses in the

1. *Daya Singh* v. *Dhan Kaur*, AIR 1974 SC 665; *Tulsamma* v. *Sesha*, AIR 1977 SC 1944 (*Narain* v. *Ramrao*, AIR 1970 SC 2198 overruled; *see* also *Rajya* v. *Gopikabai*, AIR 1978 SC 798.
2. *Panchi* v. *Kumaran*, AIR 1982 Ker 137.
3. *Veddeboyina* v. *Veddeboyina*, AIR 1977 SC 1944.
4. *Badri* v. *Kanso*, AIR 1970 SC 1968. *See* also *Jaswant Kaur* v. *Harpal*, AIR 1977 P & H 341 (FB); *Jinappa* v. *Kallavva*, AIR 1983 Kant 67.

instrument conferring limited right on her by virtue of S. 14(1), she becomes its absolute owner.[1] In *Chinnappa* v. *Valliammal*,[2] the question came in a different form before the Madras High Court. A father-in-law gave some properties for the maintenance of his widowed daughter-in-law under a maintenance deed. Subsequently, in 1960, he died. Since he died leaving behind the daughter-in-law, his interest devolved by succession. The daughter-in-law sued for partition so as to get her share of inheritance. Other members said that she could get her share only if she agreed to include the properties given to her for maintenance in the suit for partition. The court held that she need not surrender the properties held by her under the maintenance deed. It is submitted that the judgment is correct. She claimed her inheritance and her claim of maintenance raised separate questions. But in *Kunji* v. *Meenakshi*,[3] under an agreement, a widowed daughter-in-law took a share in the estate of her father-in-law, not as a woman's estate but as an estate for life with a vested remainder in favour of others, and there was no evidence to show that she took these properties for her maintenance. The court said that the case fell under S. 14(2). If a Hindu female is in possession of properties other than as a limited owner, her estate cannot become full estate after the coming into force of the Hindu Succession Act.[4] Therefore, the property given by Will as limited estate and in lieu of maintenance would not enlarge into full estate.[5] Similarly, where in a partition among brothers, the mother was allowed to reside in the house for life, this will not convert the house into absolute property.[6] So also where no property is given in lieu of maintenance and only a sum of money is given, then Section 14 does not apply.[7]

Under an award or decree.—A Hindu female may acquire some property under a decree or award. In *Seth Badri* v. *Kanso*,[8] where in a partition decree, certain properties were allotted to a Hindu female as her share, the Supreme Court said that S. 14(2) did not apply. Section 14 should be read as a whole. It would depend on the facts of each case, whether the same is covered by sub-section (1) or sub-section (2). The crucial words in sub-section are 'possessed' and 'acquired'. The former has been used in the widest possible sense, and in the context of S. 14(1), it means the state of owning or having in one's hand or power. Similarly, the word 'acquired' has also to be given the widest possible meaning. The Supreme Court was of the view that a share obtained by a Hindu female in a partition is a type of property falling under S. 14(1), even though her share is described as a

1. *Santharam* v. *Subramanya*, AIR 1977 SC 2024; *Tulasamma* v. *Sesha*, AIR 1977 SC 1944; *Krishna Dass* v. *Venkayya*, AIR 1978 SC 361; *Vajya* v. *Thakkarbhai*, AIR 1979 SC 993.
2. AIR 1969 Mad 187.
3. AIR 1970 Ker 284.
4. *Sellammal* v. *Nellammal*, AIR 1977 SC 1265; *Kallappa* v. *Shivappa*, AIR 1995 Kant 238.
5. *Sarad Subramanyan* v. *Soumi Mazumdar*, AIR 2006 SC 1993.
6. *Thayyammal* v. *Salammal*, AIR 1972 Mad 83; *Chinnammal* v. *Kannaji*, AIR 1989 Mad 185; *Subba Naidu* v. *Rajammal*, AIR 1977 Mad 64; *Jasjit* v. *Charanjeet*, AIR 1995 P & H 177.
7. *Sulabha* v. *Abhimanyu*, AIR 1983 Ori 71.
8. (1972) 2 SCC 586.

limited estate in the decree or award.[1] Explaining the context of S. 14(2), Palekar, J. of the Bombay High Court said that sub-section (2) of S. 14 covers those cases of grants where the gift, will, instrument, decree, order or award is the source or origin of the interest created, in the grantee.[2] But if the grant is not the source of the interest created, but merely declaratory or definitive of the right to property antecedently enjoyed by the Hindu female, S. 14(2) has no application, whatever be the limitations contained in the grant.

Under an agreement or compromise.—The same test will be applicable when a Hindu female acquires the property under an agreement or compromise. The distinction is clearly brought out by *Mahadevo* v. *Bansraj*,[3] and *Lakshmi* v. *Sukhdevi*.[4] In the former case, a widow inherited some properties from her husband. Subsequently, she entered into a compromise with some reversioners that she would hold the estate as limited owner and not cut the trees on the land. After the Hindu Succession Act came into force, the widow started constructing a house and cutting the trees. The reversioners brought a suit to prevent her from doing so. It was contended on behalf of the reversioners that the case fell under S. 14(2). The court said that the compromise acknowledged what was laid down in law, and therefore it cannot undo the effect of S. 14(1) which converts her woman's estate into full estate as she did not acquire any right under the compromise.[5] In the latter case, a Hindu widow, having no right to any share in the property except her right of maintenance and residence, was allotted some property for her residence and maintenance during her lifetime under an agreement. The agreement specifically prohibited her from alienating the properties during her lifetime. She was in the possession of properties when the Act came into force. It was held that her case was covered under S. 14(2) and not under S. 14(1).

Under a will.—The question whether a limited estate conferred under a will becomes a full estate by virtue of S. 14(1), came for consideration before the Supreme Court in *Karmi* v. *Amru*.[6] A Hindu, under a registered will, conferred a life estate on his wife Nihali, with the direction that after the death of Nihali, the properties would devolve on Bhagtu and Amru, two of his collaterals. Nihali took possession of the properties and died in 1960. On her death, her heirs claimed property on the assertion that after the coming into force of the Hindu Succession Act, Nihali's life estate became her full estate. It was held that where only life estate is conferred under a will, S. 14(2) will apply, and the estate will not become a full estate.[7] But if a will confers on her full estate, she will take absolutely.[8] The properties given under a settlement to the widow which were to revert to the settlor or his brother on her death, do not get enlarged into a full estate.[9]

When a female Hindu sells her property, the right of pre-emption is

1. See also *Munna Lal* v. *Raj Kumar*, AIR 1962 SC 1493.
2. *Rapusalieb* v. *Gangabai*, AIR 1972 Bom 16.
3. AIR 1971 All 515.
4. AIR 1970 Raj 285.
5. See also *Vaddeboyina* v. *Vaddeboyina*, AIR 1977 SC 1944.
6. AIR 1971 SC 745.
7. *Bhawra* v. *Kashi Ram*, AIR 1994 SC 1202.
8. *Lalit Mohan* v. *Prafulla*, AIR 1982 Cal 52.
9. *K. Satyanarayan* v. *G. Sithayya*, AIR 1987 SC 353.

available. Under the Punjab Pre-emption Law, the persons who are entitled to pre-emption are those mentioned in S. 15(1), Punjab Pre-emption Act, 1913-1964.[1]

Dowry.—Dowry and traditional presents made to the wife at the time of the marriage constitute her *stridhan*, and if the husband or her in-laws refuse to give it back to her, on her demand, they would be guilty of criminal breach of trust.[2] Similarly, if any item of *stridhan* is entrusted to them at the time of marriage or thereafter and if they refuse to give it to her on demand, they would be guilty of criminal breach of trust under Section 405, Indian Penal Code.[3]

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1. *Prithipal* v. *Milkha Singh*, AIR 1976 P & H 157 (FB).
2. *Pratibha Rani* v. *Suraj Kumar*, AIR 1985 SC 628 overruling *Vinod Kumar* v. *State*, AIR 1982 P & H 373.
3. *Ibid*.

PART XIII
SUCCESSION

Chapter 36

SUCCESSION UNDER HINDU LAW

I
INTRODUCTORY

Happily, the modern Hindu law of succession is much simpler law than the old Hindu law. The Hindu Succession Act, 1956 lays down uniform law of succession for all the Hindus. Old Hindu law and customary law of succession stand abrogated.

The Hindu Succession Act preserves the dual mode of devolution of property under the Mitakshara school. The joint family property still devolves by survivorship with this important exception that if a Mitakshara coparcener dies leaving behind the mother, widow, daughter, daughter's daughter, son's daughter, son's son's daughter, son's widow, son's son's widow or daughter's son, his interest in the joint family property will devolve by succession.

The Hindu Succession Act, 1956 bases its rule of succession on the principle of propinquity, *i.e.*, preference of heirs on the basis of proximity of relationship.

Intestate and testamentary succession

A person, so long as he is alive, is free to deal with his property in any manner he likes. By making a will, he is free to determine a scheme of distribution of his property after his death. This is known as a testamentary disposition. If he dies without leaving a will, it is the object of the law of inheritance to determine the persons who will take his property. In our contemporary world, someone must be the owner of the property, an individual, corporate person or the State. The law of succession is classified as under :

(1) Testamentary succession, and

(2) Intestate succession.

The law of testamentary succession is concerned how best the effect could be given to the wishes of the testator (*i.e.*, the person who made the will); what are the rules relating to making of a will and allied and subsidiary matters. The testator enjoys full freedom of bequeathing his property. All matters relating to testamentary succession are laid down in the Indian Succession Act, 1925.

The law of intestate succession is concerned with the matters such as who are the persons entitled to take property, *i.e.*, who are the heirs; what are the rules of preference among the various relations; in what manner the property is to be distributed in case a person has more than one heir; what are the disqualifications of the heirs and the allied and subsidiary matters. The law of intestate succession is more properly the law of inheritance. The

law of inheritance consists of rules which determine the mode of devolution of the property of the deceased on heirs solely on the basis of their relationship to the deceased, while the law of testamentary succession deals with the rules relating to devolution of property on relations as well as others. This is the main distinction between the two terms, succession and inheritance.

Apart from S. 30, which confers upon a person a power of testamentary disposition of his property including the undivided interest in the Mitakshara coparcenary property, the Hindu Succession Act, 1956 deals only with intestate succession among the Hindus.

We would discuss the subject under the following heads :

(1) Succession to a Hindu male,

(2) Succession to a Hindu female,

(3) Disqualification of heirs, and

(4) General rules of succession.

The succession opens at the time of the death of the person whose estate is in question and is governed by this law in force at that time.

Definitions

Intestate.—A person who dies without making a will is known as 'intestate". Clause (g) of Section 3 of the Hindu Succession Act, runs : "A person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect."

Heir.—A person who is entitled to inherit property after the death of the intestate is known as heir. Clause (f) of S. 3 of the Hindu Succession Act runs : 'Heir means any person, male or female, who is entitled to succeed to the property intestate under the Act."[1]

Descendants.—Descendants mean the offspring of a person. Immediate descendants of a person are his sons and daughters. The children of sons and daughters and their children and so on, are also descendants. A person may have descendant through his sons or daughters up to any degree of descent.

Ascendants.—Ancestors of a person are known as ascendants. Immediate ascendants of a person are his father and mother. The father and mother of his father and mother are also his ascendants, and so are their parents up to any degree of ascent.

Collaterals.—Collaterals are descendants in parallel lines, from a common ancestor or ancestress. For instance, brother is a collateral, so is sister. Similarly, paternal uncle and paternal aunt and their children, maternal uncle and maternal aunt and their children are collaterals.

Agnates.—When a person traces his relationship with another wholly through males, he or she is an agnate. For instance, brother, brother's son, son's son, son's son's father, father's father, father's mother, father's father's father and mother, son's daughter, son's son's daughter, *etc.* are agnates. The sex of the person who traces his relationship with another is immaterial. What is material is that in between him or her and the common ancestor or ancestress, all persons through whom relationship is traced should be males. Clause (a) of S. 3(1), Hindu Succession Act, runs : "One person is said to be

1. Sometimes expression children, issues, heir carry the same meaning. *M/s. Bay Berry Apartments Ltd.* v. *Shobha*, AIR 2007 SC 226.

an "agnate" of another if the two are related by blood or adoption wholly through males."

Cognates.—Whenever in the relationship of a person with another, a female (or more than one female) intervenes anywhere in the line, one is a cognate to another. For instance, sister's sons and daughters; daughter's sons and daughters; mother's mother and father; father's mother's father and mother; mother's father's son and daughter (*i.e.*, maternal uncles and aunts) are all cognates. Clause (c) of S. 3(1), Hindu Succession Act, runs "one person is said to be a 'cognate' of another if the two are related by blood or adoption but not wholly through males." Cognate may be a descendant, ascendant or collateral.

Full blood.—When the father and mother of two persons are the same, they are related to each other by full blood. According to S. 3(1)(e)(i), Hindu Succession Act, "Two persons are said to be related to each other by full blood when they are descended from the common ancestor by the same wife." Thus, children of the same parents are children by full blood, e.g., brothers and sisters or a brother and a sister.

Half blood.—When two persons have the same father but different mothers, they are related to each other by half blood. According to clause (e)(i) of S. 3(1), Hindu Succession Act, two persons are said to be related to each other by half blood "when they are descended from a common ancestor but by different wives." For instance, A marries Q and a son B is born to him from Q. Q dies and A marries R and a daughter C is born to him from R; A divorces R and marries S. A son D is born to him from S. B, C and D are related to each other as brothers and sister by half blood.

Uterine blood.—When two persons have the same mother but different fathers, they are said to be related to each other by uterine blood. According to clause (e)(ii) of S. 3(1), Hindu Succession Act : "Two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands." For instance, P takes a husband X and from him she gets a son, A. Subsequently, she divorces him and takes another husband Y, and from him she gets another son, B. Y dies. P takes another husband Z, and from him a daughter C is born to her. A, B and C are related to each other as brothers and sister by uterine blood.

Legitimate and illegitimate relationship.—A person who is born within a lawful wedlock is legitimate and he or she is related to him or her parents by legitimate relationship. A person born outside the lawful wedlock is illegitimate, and he or she is related to his or her parents by illegitimate relationship. With father, only legitimate relationship is recognized. The illegitimate relationship is recognized to the mother. Section 3(1)(i) runs : "related means related by legitimate kinship : Provided that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly."

II
SUCCESSION TO THE PROPERTY OF A HINDU MALE

The Hindu Succession Act, 1956 deals with the inheritance to : (a) the

separate properties of a Mitakshara male, (b) to the separate and coparcenary properties of a Dayabhaga male, and (c) to the undivided interest in the joint family property of a Mitakshara coparcener, who dies leaving behind a widow, mother, daughter, daughter's daughter, son's daughter, son's widow, grandson's daughter, grandson's widow, or daughter's son. The Act does not apply to the property of a Hindu who is married under the Special Marriage Act to a non-Hindu. The Act also does not apply to any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactment passed before the commencement of the Hindu Succession Act and to the Valiamma Thampura Kovilagam Estate and the Palace Fund of former Cochin State. (This provision has become redundant after the Kerala Act 16 of 1961).

Heirs of a Hindu Male

The heirs of a Hindu male fall under the following categories :

(1) Class I heirs,
(2) Class II heirs,
(3) Agnates,
(4) Cognates, and
(5) Government.

Class I and Class II heirs are sometimes also called enumerated heirs, since the Act enumerates them. Class I heirs are also called preferential heirs, as presence of anyone of them excludes heirs in all other categories. They are also called simultaneous heirs, as heirs in class I inherit simultaneously—one does not exclude the other. Under the Act, the position of females has been improved substantially, and some cognates of equal propinquity have been brought at par with agnates.

Class I Heirs

Class I heirs are : (1) Mother, (2) Widow, (3) Daughter, (4) Son, (5) Widow of a predeceased son, (6) Son of a predeceased son, (7) Daughter of a predeceased son, (8) Widow of a predeceased son of a predeceased son, (9) Daughter of a predeceased son of a predeceased son, (10) Son of a predeceased son of a predeceased son, (11) Daughter of a predeceased daughter, and (12) Son of a predeceased daughter. Some new heirs are added by the Amending Act of 2005. They are son of a predeceased daughter of a predeceased daughter; daughter of a predeceased daughter of a predeceased daughter; daughter of a predeceased son of a predeceased daughter; daughter of a predeceased daughter of a predeceased son.

Son, Son's son, and Son's son's son.—Son means a legitimate son of a *propositus*. A legitimate son may be an *aurasa* son (natural born) or *dattaka* (adopted) son. The adopted son takes an equal share with the *aurasa* son. An illegitimate child is not entitled to inherit.[1]

A posthumous son is also included. Section 20 of the Act lays down that a child who was in the womb at the time of the death of the intestate and who is subsequently born alive, has the same right of inheritance as if he was

1. *Daddo* v. *Raghunath*, AIR 1979 Bom 176.

already born when the *propositus* died. Under the Hindu Succession Act, 1956, the sons born after the partition and the divided sons inherit with other sons.[1]

A son of a voidable marriage, is a full-fledged legitimate son and will inherit as such. But a son of a void marriage and a son of an annulled voidable marriage will inherit the property of the father alone and of no other relation.[2]

A stepson is not included in the expression son. By stepson, we mean a male child of wife born to her before marriage with the *propositus*.

The above meaning of 'son' applies *mutatis mutandis* to the son of a predeceased son and to the son of a predeceased son of a predeceased son. However, grandson or great grandson will not succeed if the marriage of their father was void or annulled.

Daughter, son's daughter, son's son's daughter.—Just as in the case of a son, daughter also means a legitimate daughter, natural or adopted. If there are both natural born and adopted daughters, they inherit equally. An illegitimate daughter cannot inherit.[3] A daughter also includes a posthumous daughter, but does not include a stepdaughter. The position of daughters of void and voidable marriage is the same as that of the sons. The distinction between married, unmarried and widowed daughters or between indigent and rich daughters is no longer operative. All daughters inherit and inherit equally. Unchastity of a daughter is no bar to inheritance. A divorced daughter is also entitled to inherit.

The above applies to son's daughter and son's son's daughter *mutatis mutandis*. The position of these daughters when marriage of their father is void or voidable is the same as of grandsons and great grandsons.

Daughter's son and daughter's daughter.—Both natural born and adopted children of a predeceased daughter are included. It seems that illegitimate daughters and sons of a daughter are also included. Proviso to clause (j) of S. 3 says that "illegitimate children shall be deemed to be related to their mother and one another." This means that the illegitimate children are related to their mother, *i.e.*, daughter. The daughter's children take the property representing her when she is dead.

Merely because the daughter was given a gift at the time of marriage, her claim to her father's estate as an heir cannot be defeated.[4]

Widow, son's widow, son's son's widow.—The *propositus*' widow means the wife of a valid marriage. If a male dies leaving behind only his widow after coming into force of the Act, she would be the sole heir and would inherit absolutely.[5] Thus, if the propositus' marriage was void, the 'wife' is not his lawfully wedded wife and therefore she will not be his widow. The same is the position of the wife of the annulled voidable marriage. It is submitted that S. 16, Hindu Marriage Act, 1955, confers a status of legitimacy on the children

1. *Ibid*.
2. Section 16, Hindu Marriage Act, 1955; *Laxmibai* v. *Limbabai*, AIR 1983 Bom 222; Also see *Rameshwari Devi* v. *State of Bihar*, AIR 2000 SC 735; *Smt. Nagarathaura* v. *Venkatalasshmamman*, AIR 2000 Kant. 181.
3. *Vithal Bhai* v. *Bhana Bai*, AIR 1994 SC 481.
4. *Meenakshamma* v. *M.C. Nandjunappa*, AIR 1993 Kant 12.
5. *Sadhu Singh* v. *Gurudwara Sahib Narike*, AIR 2006 SC 3282.

of annulled voidable marriage and not on the wife of such marriage. A divorced wife will also not be his widow. The same applies *mutatis mutandis* to son's widow and son's son's widow.

An unchaste widow can inherit.[1] If she remarries, she will not be divested of her husband's inheritance. A son's son's widow who has remarried on the date when succession opens cannot inherit. In the case of son's widow and son's son's widow also, unchastity is no bar. This provision, *i.e.*, section 24 has been deleted by virtue of the Amending Act of 2005.

Mother.—Mother is always a mother. *Propositus* may be her legitimate son or an illegitimate son, she will inherit. She may be unchaste, she might have remarried,[2] she might have been divorced, she remains a mother. It is also immaterial whether her marriage with the *propositus* father was void or voidable. But a stepmother is not included in the expression 'mother',[3] and she does not inherit as a class-I heir, though she does so as Class II, category (I) heir.

Shares of Class I heirs

Section 10, Hindu Succession Act deals with the distribution of the property of the *propositus*, among class I heirs. The rules are :

(a) Sons, daughters and the mother of the *propositus* each takes one share.

For example, if P dies leaving behind his mother M, two sons S^1 and S^2 and two daughters D^1 and D^2, each of the above heirs will take one share, *i.e.*, 1/5; M will take 1/5; D^1 and D^2 each will also take 1/5 and S^1 and S^2 each will take one-fifth.

(b) Widow takes one share. If there are more than one widows, all of them together take one share, and, among themselves, they divide it equally. This visualizes a case of pre-Act polygamous marriages. In case, a Hindu has taken a second wife after the coming into force of the Hindu Marriage Act, the marriage with the second wife is void and if he dies leaving behind her, she will not be his widow and therefore will not be entitled to take any share.[4] For instance, if P dies leaving behind a widow, W, and three daughters D, D^1 and D^2, each will take one share, *i.e.*, 1/4 each. W will take 1/4, D 1/4, D^1 1/4, D^2 1/4.

(c)(i) Among the heirs of the branches of a predeceased son, son of predeceased son of a predeceased son, and predeceased daughter, the doctrine of representation applies. In other words, heirs in each branch would take the same share which their parent (son, grandson or daughter) would have taken had he/she been alive when succession opened.

(ii) The heirs of each branch take *per capita*, (*i.e.*, per head) but if there are more widows than one in the branch of the predeceased son, or a predeceased grandson, all the widows together in each branch will take one share.

The above is the simplified version of Rules 3 and 4 as laid down in S. 10. The relevant rule runs as under :

1. *Jayalakshmi* v. *Ganevesa*, (1972) 2 MLJ 50.
2. *Gurdul Singh* v. *Darshan Singh*, AIR 1973 P & H 362.
3. *Satyanarain* v. *Rameshwar*, AIR 1982 Pat 44.
4. *Shanta Devi* v. *State of Bihar*, AIR 1977 Pat 268.

"Rule 3 : The heirs in the branch of each predeceased daughter of the intestate shall take between them one share."

"Rule 4 : The distribution of the share referred to Rule 3—

(i) among the heirs in the branch of the predeceased son, shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions, and the branch of his predeceased son gets the same portion."

The following example will explain the rules.—P dies leaving behind, son S, widow of a predeceased son S[1], SW, predeceased daughter's son and daughter DS and DD, predeceased son's predeceased son's widow SSW, his daughter SSD and his son SSS. Distribution is first to be made at a place where branches come into existence. There are four branches, each will take 1/4. The result will be that S will take 1/4. In the branch of S[1], there is only one heir, SW, she, representing S[1] will take 1/4. In the branch of predeceased daughter, there are two heirs, they representing her will take 1/4, and between themselves divide it equally, with the result that DS will take 1/8 and DD will take 1/8. In the branch of predeceased grandson, there are three heirs, representing him they will take 1/4 and among themselves share it equally, with the result that SSW will take 1/12, SSD 1/12 and SSS 1/12.

Class II Heirs and their Shares

The class II heirs are divided into nine categories. The rule is that an heir in an earlier category excludes heirs in later categories. All heirs in one category take simultaneously and between them and take per capita. Merely because numerals have been used in some categories, such as in categories II, III and IV, it does not indicate any preference of heirs in an earlier numeral over the heirs in the later numerals. Thus, in category II, son's daughter's son bear numeral (1), it does not mean that son's daughter in numeral (2) brother in numeral (3) and sister in numeral (4) will be excluded.[1]

Category (I)
Father

Father is the only nearest heir who has not found a place in Class I, on the basis of propinquity, he should have figured in Class I, along with the mother. But such has been the Mitakshara notion of propinquity that under the Mitakshara law, mother is considered to have greater propinquity than the father. In the absence of class I heirs, he takes the entire property.

Category (II)

(1) Son's Daughter's son.
(2) Son's Daughter's Daughter.
(3) Brother.
(4) Sister.

Brother and Sister.—'Brother' and 'sister' here include the following :

(a) Brother and sister by full blood, and
(b) Brother and sister by half blood.

1. *Satya* v. *Urmila*, AIR 1970 SC 1714; *M.G.K. Pillai* v. *Kunjulakshmi*, AIR 1972 Ker 66.

The rule is when there is any brother or sister by full blood, the brother or sister, by half blood is excluded. When there is no brother or sister by full blood, the brother or sister by half blood inherits.[1]

The brothers and sisters by uterine blood are excluded.[2] If the *propositus* and his brother and sisters are all illegitimate children of their mother, such brothers and sisters are heirs to him.[3]

All the heirs in this category inherit per capita.[4] We may explain the above stated rule of distribution of property among the heirs of this category by an example. The heirs of the intestate are two sons SDS and SDS[1] and two daughters SDD and SDD[1] of a predeceased daughter of a predeceased son and two sisters FD and FD[1] and a brother FS. Since all heirs in a category share per capita, and all of them are heirs of this category, each will take one share, *i.e.*, SDS will take 1/7; SDS[1] 1/7; SDD 1/7; SDD[1] 1/7; FS 1/7; FD 1/7 and FD[1] 1/7.

Category (III)

(1) Daughter's son's son,
(2) Daughter's son's daughter,
(3) Daughter's daughter's son,
(4) Daughter's daughter's daughter.

This is a simple category. The rule of the distribution of property is the same; all heirs in one category take per capita. This may be illustrated by one example. Intestate P's daughter and daughter's son DS and daughter's daughter DD are dead leaving behind two sons and two daughters (of DS), *i.e.*, DSS, DSS[1], DSD, DSD[1] and two daughters and a son of DD, *i.e.*, DDD, DDD[1] and DDS. All the seven will share equally, each taking one-seventh.

Category (IV)

(1) Brother's son,
(2) Brother's daughter,
(3) Sister's son,
(4) Sister's daughter.

Under this category, brother's sons and daughters and sister's sons and daughters may be children of the brothers and sisters by full blood or half blood. But, children of brothers and sisters by uterine blood are excluded.

If the *propositus* and his brothers and sisters are all illegitimate children of their mother, then children of such brothers and sisters will be entitled to inherit. Children of brothers and sisters by full blood are preferred over children of sisters and brothers by half blood.

All heirs in this category take per capita.

Category (V)

(1) Father's father.
(2) Father's mother.

1. *Waman Govind* v. *Gopal Baburao*, AIR 1984 Bom 208 (FB).
2. *K. Raj* v. *Muthumma*, AIR 2001 SC 1720.
3. *Kumara* v. *Kunjulakshmi*, AIR 1972 Ker 66.
4. Section 3(i), Hindu Succession Act; *T. Naicker* v. *Kappamma*, AIR 1973 Mad 274

Father's father and father's mother do not include paternal step-grandfather or paternal step-grandmother. If they are adoptive parents of father, they will be included. If both of them are heirs, they will take per capita, *i.e.*, 1/2 each.

Category (VI)

(1) Father's widow.

(2) Brother's widow.

Father's widow means stepmother. She is the only step relation that is included among the heirs. Even if she had remarried at the time when succession opens, she will inherit. She succeeds along with the brother's widow.

A brother's widow is not entitled to succeed if she had remarried on the date succession opens.

If there are widows of two brothers, they will take per capita. If there are more than one widow of the same brother, then also they will inherit per capita. Similarly, if there are more than one stepmother, they will take per capita. The rule that if there are more widows than one, they together take one share applies to Class I heirs only. It does not apply to Class II heirs. For example, if intestate dies leaving behind two stepmothers and three widows of his brother, all the five will take equally, each taking one-fifth.

Category (VII)

(1) Father's brother.

(2) Father's sister.

Father's brother and father's sister may be by full blood or by half blood. But a full blood excludes half blood. The latter succeed on the failure of the former. Father's brother or father's sister by uterine blood is not included, but father's sister or father's brother by adoption is included. Thus, if there are father's brother by natural birth and father's sister by adoption, both will inherit and take simultaneously and per capita.

Category (VIII)

(1) Mother's father.

(2) Mother's mother.

Category VIII and category IX contain *propositus*' heir on his maternal side. Paternal grandfather and paternal grandmother are in the V category but maternal grandfather and maternal grandmother come in category VIII, almost at the end. When both MF and MM are heirs, they take *per capita*.

Category (IX)

(1) Mother's brother.

(2) Mother's sister.

The paternal uncle and paternal aunt are in category VII but maternal uncle and maternal aunt are in category IX, the last category of class II heirs.

The maternal uncles and maternal aunts by natural birth as well as by adoption are included. If maternal uncle is by natural birth and maternal aunt is by adoption or vice versa, both inherit simultaneously and take *per capita*. Both maternal uncle and maternal aunt by full blood and half blood

are included but the full blood excludes the half blood.

The distribution of property among them may be illustrated by the following example. The intestate dies leaving behind her two maternal uncles and one maternal aunt, each will take equally, *i.e.*, each will take one-third.

Agnates and Cognates

Agnates and cognates are not enumerated heirs, and no exhaustive enumeration can possibly be made. The rules for determining who are agnates and cognates are the same, so are the rules relating to distribution of property among them. However, agnates are as a rule preferred over cognates, howsoever remote an agnate may be, he will be preferred over cognates. Agnates and cognates as heirs are those agnates and cognates who are not included in class I and class II heirs.

Classification of agnates.—When a person traces his relationship to the *propositus* wholly through males, he is an agnate. His sex or the sex of the *propositus* is immaterial. Agnates fall in three classes : (a) descendant agnates, (b) ascendant agnates, and (c) collateral agnates.

(a) Descendant Agnates.—S, SS, SSS, SSSD, SSSS of a person are all descendant agnates. S, SS and SSS are in class I. We are not concerned with them here. But SSSD and SSSS are the agnates who are not included in class I or class II and with them we are concerned here. For descendant agnates, there is no limit as to degrees, howsoever remote they may be. Thus, all descendants of SSSS through males will also be agnates. Descendants have only degrees of descent.

(b) Ascendant Agnates.—Intestate's F, FF, FFM and FFF are all ascendant agnates. But F and FF are already in Class II (in categories I and V respectively) and therefore we are not concerned with them here. FFM and FFF are the nearest agnate descendants after F and FF. All ascendants through males will also be ascendant agnates, there being no limit of degrees. Ascendants have only degrees of ascent.

(c) Collateral Agnates.—Collaterals are descendants in the parallel lines. They may be on the maternal side or they may be on the paternal side.

Collaterals have both the degrees of ascent and descent. The question in their case is always : "through whom are they related?" In other words, the *propositus* and they, are always related through a common ancestor. For instance, an uncle is a collateral. If he is a paternal uncle, he is related through father's father, *i.e.*, he is father's father's son. If he is maternal uncle, he is related through the mother's father, being mother's brother. In the former case, he is an agnate collateral and in the latter case, he is a cognate collateral. Both are already included in Class II (former in VII category and the latter in IX category). The number of collaterals can be infinite. Here we will take two examples.

Intestate's brother, his brother's son, his brother's son's son are all collaterals on the paternal side. The former two are already in class II (FS is in category II and FSS in category IV). Here we are concerned with FSSS who is the nearest collateral agnate after FS and FSS.

When succession goes to agnates, the most likely heirs will be among the collateral agnates and not among the descendant agnates or ascendant agnates, as they are most unlikely to survive the *propositus*.

Classification of cognates.—The classification of the cognates is on the same basis as of agnates. Thus, cognates are :

(1) Descendant cognates,

(2) Ascendant cognates, and

(3) Collateral cognates.

It should be noted that among the collateral cognates, the uterine brother and uterine sister are nearest collateral cognates.

The rule of preference, and distribution of property among the agnates and cognates.—The rules of preferences and the mode of the distribution of property among agnates and cognates are on the basis of the same rule, with this overriding rule that agnates are always preferred over cognates. Section 12 lays down the following three rules :

Rule 1. Of the two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule 2. Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degree of descent.

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

For the purpose of easy application of these rules, we may convert them into the following four rules :

Rule (i). When the claimants are descendants, ascendants and collaterals, the descendants are preferred over the latter two. When there are no descendants, ascendants are preferred over the collaterals. The collaterals take only in the absence of both descendants and ascendants.

Rule (ii). When all the claimants are descendants, the one having fewer degrees of descent will be preferred; if they have the same degrees of descent, they will take simultaneously and as between themselves will take per capita.

Rule (iii). When all the claimants are ascendants, the one having fewer degrees of ascent will be preferred. If they have the same degrees of ascent, they will inherit simultaneously and as between themselves will take per capita.

Rule (iv). When all the claimants are collaterals, the rules of preference will be (it should be kept in mind that the collaterals have both degrees of ascent and degrees of descent) as under :

Sub-Rule (a).—Among the claimant collaterals, those who have fewer degrees of ascent (irrespective of degrees of descent) will be preferred.

Sub-Rule (b).—Among the claimant collaterals, when degrees of ascent are the same, the one who has fewer degrees of descent will be preferred.

Sub-Rule (c).—Among the claimant collaterals, when degrees of ascent and descent are the same, all of them take simultaneously, and among themselves share per capita.

Government : Escheat

If a Hindu male has no heirs under all the preceding four heads, the Government takes the property as an heir. When the government takes his property as heir, it takes it subject to all the obligations and liabilities of *propositus*. This is known as escheat.

Succession to a Mitakshara Coparcener's Interest

Section 6 of the Act has been extensively amended by the Hindu Succession (Amendment) Act, 2005. This section has been completely reworded and the old section has been deleted. This provision came into force from 9th September, 2005. The old section still favoured the sons due to the concept of notional partition so as to bring the daughters at par with the sons, by virtue of this section the daughters have been made coparceners along with the sons. She becomes a coparcener in her own right in the same manner as son, she would have same rights in the coparcenary property as she would have had if she had been a son and she would obviously be subject to the same liabilities in respect of the said coparcenary property as that of a son. Further, by virtue of this section the interest of a coparcener would go by inheritance-intestate or testamentary, and not by survivorship.

We are retaining the commentary on the old Section 6 as it is still relevant for successions which opened before the relevant date and for academic purposes.

Under the Mitakshara school, the joint family property devolves by the survivorship. This mode of devolution has been retained in the modern law. The Hindu Succession Act, 1956, Section 6 runs :

When a male Hindu dies after the commencement of this Act having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.

Proviso to the section lays down that if a Mitakshara coparcener dies leaving behind a female relative or a male relative claiming through a female in Class I, his undivided interest will not devolve by survivorship but by succession as provided under the Act. The Proviso will not apply if there had been a partition before the death of the coparcener.[1] The proviso affects the Mitakshara coparcenary vitally as it may be that, more often than not, his interest will devolve by inheritance.

The relations falling under the proviso, are, mother, widow, son's widow, son's son's widow, daughter, son's daughter, son's son's son's daughter, daughter's daughter (these are the eight female heirs in Class I), or daughter's son (he is the heir in Class I who claims through a female). The presence of any of these relations of a deceased coparcener will prevent his interest devolving by survivorship to the other coparceners.[2]

The crucial question is : What is the interest of the deceased coparcener when he dies? It is a rule of the Mitakshara school that immediately on the death of a coparcener, his interest passes by survivorship to the other coparceners, with the result that on his death, he leaves behind nothing. It is also a rule of the Mitakshara that a coparcener's interest in the joint family property can be specified and served only by partition. Thus, to know what is the share of a deceased Mitakshara coparcener, Parliament was left with no

1. *Thirupusundari* v. *Annamalai*, (1972) 2 MLJ 79.
2. *Ranganathan* v. *Annamalai*, AIR 1968 Mad 65; *Kanahyalal* v. *Jumma*, AIR 1973 Del 160.

option but to import the fiction of notional partition. This is what explanation 1 to Section 6 says : "For the purpose of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not."

Notional or deemed partition.—Like many other fictions of law, the fiction of notional or deemed partition is meant for specific purpose and it should be confined within the framework of that purpose. The notional partition is not a real partition.[1] It neither effects a severance of status nor does it demarcate the interest of the other coparceners or of those who are entitled to a share on partition. It has to be used to demarcate the interest of the deceased coparcener, once that is done, rest should be forgotten. It should not stick in our minds that in notional partition,[2] what happens to the shares of the coparceners and others who are apparently allotted a share? Nothing happens as no shares are in fact allotted to them; allotment of shares to them is a fiction, though a necessary fiction without the aid of which it would be impossible to demarcate the interest of the deceased coparcener.

On the death of the coparcener, there is no automatic partition under Hindu law but, it seems, in reference to the notional partition, severance of status is deemed from the date of the death of the coparcener who has left an heir in terms of proviso to Section 6.[3]

The demarcation of the interest of the deceased coparcener that has to be made is of his interest of the date of his death, not as it may exist when properties are actually allotted to his share. His share gets fixed on the date of his death, subsequently, changes in the fortunes of the coparcenary do not affect it.[4]

Share in notional partition.—The notional partition is merely a device for demarcating the interest of the deceased coparcener had he got partition effected before he died, what he would have got? In other words, shares are to be allotted (though notionally) to all persons who would have been entitled to a share on a real partition. On the basis of this allotment, we get the share of the deceased coparcener demarcated. It is this share which will go by inheritance.

Illustrations

(i) A Mitakshara joint family consists of A, his two sons B and C and a son BS and a daughter BD of B. Suppose B dies. Since he leaves behind BD, a female in Class I, his interest will devolve by succession. If partition had taken place during B's lifetime, he would have got 1/6 share; on the basis of *per stirpes* rule, A will get 1/3, C will get 1/3 and B's branch will get 1/3. In his branch it will go per capita. Since, the daughter does not take a share, on

1. *State of T.C.* v. *Shanmuga*, AIR 1953 SC 333; *Bengal Immunity* v. *State of Bihar*, AIR 1955 SC 661.
2. *Govindran* v. *Chetumal*, AIR 1970 Bom 231. *See* also *Venkiteswara* v. *Luis*, AIR 1954 Ker 125 (FB) and *Mehta* v. *Madi*, AIR 1959 Bom 289, where the same view is expressed though in a different context; *Chandralata* v. *Samatkumar*, AIR 1973 MP 169.
3. *Shive Honda* v. *Director*, AIR 1992 Bom 72.
4. *Karuppa* v. *Palaniammal*, AIR 1963 Mad 254.

partition B and BS will take 1/2 of 1/3, *i.e.*, 1/6 each. In notional partition, we start with the assumption that B is alive. After demarcating B's share we forget about partition and note that B is dead and his 1/6 interest as demarcated by the notional partition will go by succession, (A, C or BS do not get any share. They continue to remain joint in the remaining 5/6).

The next step is to divide 1/6 among B's heirs in accordance with the Hindu Succession Act, 1956. A is his father who is in Class II, C is his brother who is also in Class II, and BS and BD are his son and daughter who are in Class I. Thus, 1/6 of B will go to BS and BD who will take one share each, *i.e.*, each will take 1/12.

(ii) A joint family consists of A, his three sons B, C and D and two grandsons, BS, BS^1, one granddaughter BD and the wife BW. B dies. Since he leaves behind BW and BD, two females, his interest will devolve by succession. On the basis of notional partition, his shares will come to 1/12 (in a partition his wife and daughter do not take any share). In the remaining 11/12 the family will continue to be joint. His 1/12 will go by succession to his heirs who are BW, BS, BS^1 and BD. Each will take 1/4 of 1/12, *i.e.*, 1/48 share.

(iii) B dies leaving behind a son BS, a predeceased daughter's son, BDS, a father A and a brother C. He is a member of the coparcenary headed by his father. BDS is not a member of A's joint family. Since B dies leaving behind BDS, a male claiming through a female, his interest will devolve by succession. In notional partition, he will get 1/6 share. This 1/6 will go to BS and BDS, each taking 1/12.

Now we would pass on to some examples which give rise to some difficulties. It may be stated once again, even at the risk of repetition, that when a notional partition is made, all rules of partition are applied as if it is a real partition. When that is done, we should keep the track, and remember that notional partition is a fictional partition in which no one gets any share. Actually, its purpose is to demarcate the share of the deceased coparcener. Once we demarcate his share, we have to remember what his share is, and we should forget what was the share of others, as others do not get any share in notional partition.

When a notional partition is effected and there are females entitled to a share, they, too, are to be allotted their shares, though like others, they, too, do not actually get any share in a notional partition. For instance, A dies leaving behind two sons B and C and a widow W. He and his sons constitute a Mitakshara coparcenary; except in the Dravida school where no female gets a share, widow takes equal to son's share. In this illustration, each of them will take 1/4 share. A's one-fourth share thus arrived at will go by succession and in the remaining 3/4, the family will continue to remain joint. In the notional partition neither B nor C takes anything nor does W take anything. Some of the difficulties of interpretation of Section 6 that arise are well illustrated by *Rangubai* v. *Laxman*.[1] The simple facts of the case were that a Hindu A died leaving behind his widow W and an adopted son S. He and his son S constituted a coparcenary. Since A died leaving behind W, his share was to devolve by succession. Then what was his share. On this, two views have emerged.[2]

1. AIR 1966 Bom 160.
2. *Shirambai* v. *Kalgonda*, AIR 1964 Bom 263.

(a) The first view is that the widow, in fact, takes a share when the notional partition takes place, and she will take her 1/3 share (in other words, notional partition becomes a real partition so far as she is concerned), and in addition to this, she will take 1/2 of 1/3, *i.e.*, 1/6 as her share as an heir. Thus, she will take 1/3+1/6=1/2.

(b) The second view is that one is propounded here. In a notional partition, a female, whenever she is entitled to a share in a partition, she is to be allotted a share, so as to demarcate the share of the deceased coparcener, but once that demarcation is done, she, like other co-sharers, does not actually take any share. This means that she takes only 1/6 share by succession.

The first view has been propounded by the Bombay High Court and has been approved by a Full Bench, and has the support of a Bench of the Gujarat High Court,[1] and has also been approved by the Supreme Court. In *Rangubai* v. *Laxman*,[2] Patel, J. propounded the view thus : "when the interest of the deceased coparcener is to be determined, the court should first determine what is the property available for partition...., then partition the coparcenary property setting aside the share of the widow to which she is entitled in her own right and divide the share of the deceased coparcener amongst the heirs; and by decree make proper provision for the maintenance and marriage expenses of the daughters and *award the widow her due share* in the coparcenary property and divide the property of her husband among the heirs.[3] (emphasis author's). One wonders why the learned judge did not add the words, "award the coparceners their shares," as the aforesaid logic of Patel, J. converts what was notional partition into a real partition. The view has been substantially confirmed by Kantawala, C.J. who has given leading judgment in the Full Bench decision in *Sushila* v. *Narayanrao*.[4] The learned judge, after reviewing the entire case law, old and new, has confirmed the view of Patel, J., but adds, referring to the judgment taking contrary view, that in none of these cases, the coparcenary consisted only of two persons, while he was concerned with a coparcenary of that quality. The learned Judge seems to mean thereby that if a coparcenary consists of more than two coparceners, he would be prepared to take a different view. Patel, J's view has been confirmed by the Supreme Court in *Gurupad* v. *Hirabai*.[5] In the leading judgment, Chandrachud, CJ, observed that the fact that it is a mere notional partition should not "boggle" our imagination, and explanation to S. 6 compels the assumption of a fiction that in fact 'a partition of the property had taken place,' immediately before the death of the coparcener. This plainly means that, what was meant to be a 'notional partition' has been converted into an actual partition, and his Lordship has no hesitation in saying that "the assumption which the statute requires to be made that a partition had in fact taken place, must permeate the entire process of ascertainment of the

1. *Rangubai* v. *Laxman*, AIR 1966 Bom 1969; *Sushila* v. *Narayanrao*, AIR 1975 Bom 257; *Vidhyaben* v. *Jagdish*, AIR 1974 Guj 23; *Ananda* v. *Haribandhu*, AIR 1967 Ori 194; *Gurupad* v. *Hirabai*, AIR 1978 SC 1239.
2. AIR 1966 Bom 169.
3. *Ibid*., at 174. Emphasis author's.
4. AIR 1975 Bom 257.
5. AIR 1978 SC 1239. *See* also *Neelawwa* v. *Basappa*, AIR 1982 Kant 126.

ultimate shares of heirs, through all the stages."[1] The learned Chief Justice fortifies his argument by holding that, that S. 6, Hindu Succession Act is nothing but the culmination of a process of social legislation that began with the Hindu Law of Inheritance (Amendment) Act, 1929 with a view to ameliorate the lot of Hindu women. In this process, it is submitted that the learned judge overlooked the fact that the Mitakshara coparcenary has not yet been abolished, and neither a coparcener's wife nor his daughter is a coparcener. In our submission, these decisions virtually lay down that if a coparcener dies leaving behind a female heir in terms of proviso to S. 6, there is automatic statutory partition and the Mitakshara coparcenary comes to an end. It is submitted that the Supreme Court is trying to abolish Mitakshara coparcenary by judicial legislation what the Kerala State has purported to do by a statute. It is most respectfully submitted that the notional partition as contemplated in S. 6 does not amount to an automatic statutory partition; nor does severance of status take place on the death of the coparcener. The fiction of notional partition is used as a device to find out the share of the deceased coparceners, (as by no other method we can do so) and it should be confined to that, and our imagination should not "boggle" under the oppressive feeling that where the legislature stops in taking a measure of social reform to its logical end (for the reasons that we still do not want to abolish the Mitakshara joint family), the judiciary should step in.[2]

In *Rangubai*, W will end at 1/6 as there is no possibility of her getting any share in a real partition. On the death of A, S becomes the sole surviving coparcener and there is no question of anyone asking for partition. This may be hard for W. Had her husband died leaving behind two sons, there was a possibility of her getting share equal to the share of a son whenever her sons partitioned. But let us remember that the *Shastrakars* allowed her a share only in the event of a partition by *metes* and *bounds* taking place, not otherwise. If a family does not partition even if it may consist of A, his ten sons, thirty grandsons and fifty great grandsons, she cannot get a share. She was allowed a life long right of maintenance and, when partition took place, three females (father's wife, mother and grandmother) were allowed a share on account of their special position in the family. If a partition does not take place, no female will ever get a share in the joint property.

It is true that in a provision like S. 6, some anomalies are bound to arise. Section 6 grafts a new rule on an old system which may repell the graft, if left to itself. In some cases, women may be losers and in some gainers. This can happen otherwise also; after all inheritance is an expectancy and what an heir may ultimately get will depend on the various factors.

Rajrani v. *Chief Settlement Commr*.[3] follows *Gurupad*. *P*, a Mitakshara coparcener, died leaving behind his widow W, three sons, A, B and C and three daughters, X, Y, and Z. In notional partition, P would get one-fifth share. This will go in equal shares to W, A, B, C, X, Y and Z, each taking one-thirtyfifth. W's share will be one-fifth plus one-thirtyfifth, *i.e.*, 8/35. In *Neelavva* v.

1. *Ibid* at 1243.
2. *See*, *CED* v. *Anari Devi*, AIR 1972 All 179; *Kanhaya Lal* v. *Jamda Devi*, AIR 1973 Del 160; *Chandra Dutta* v. *Sanatkumar*, AIR 1973 MP 169. These cases were not brought to the notice of the Supreme Court in *Gurupad*.
3. AIR 1984 SC 1234.

Bhimavya,[1] P, a coparcener died leaving behind his mother M and his widow W. Thereafter W adopted X as her son. X sued for partition and claimed one-half share. The court allowed him only one-fourth. The decision is correct. On the death of P, M and W each will take one-half. When W adopted X, he became a member of the joint family with his adoptive mother W in this one-half share, and, therefore, in a partition against his mother, he can claim only one-fourth.

Divided coparceners and their heirs not entitled to succeed under S. 6, Explanation II.—Explanation II runs as under :

Nothing contained in the proviso to this section shall be construed as enabling a person who has separated herself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

This visualizes a case of partition in respect of the coparceners.[2] For instance, a coparcenary consists of A and his two sons, B and C. B partitions and takes away his 1/3 share. In the remaining 2/3, A and C continue to be joint. Subsequently, A dies leaving B and a daughter D. A's share will be half of the remaining 2/3, *i.e.*, 1/3. This one-third will go to C and D, each taking 1/6. B will be totally excluded. We may take another example. A coparcenary consists of P and his three sons, A, B and C. C partitions and takes away his 1/4 share in 1956. He dies in 1958 leaving behind her son CS. In 1962, P dies. In the share of P, which will pass by succession, CS cannot claim any share as a son of a predeceased son, since he is a son of separated son. Similarly, a widow of a predeceased son who had separated before the death of the intestate has no right to a share.[3] But in *Basavalingamma* v. *Sharadamma*,[4] the Karnataka High Court said that the explanation refers to a coparcener and not to a female heir who has separated from the coparcenary, and therefore on her father-in-law's death, the son's widow will be entitled to a share under Section 6.[5]

III
SUCCESSION TO THE PROPERTY OF A HINDU FEMALE

Although Hindu woman's limited estate has been abolished and, so long as the woman is alive, she has absolute power over all types of property (she is also free to dispose it of by will), yet for the purpose of intestate succession, the source of property is still material.

For the purpose of succession, the property of a Hindu female falls under the following three heads :—

I. Property inherited by a female from her father or mother,

II. Property inherited by a female from her husband or father-in-law, and

III. Property obtained by her from any other source, by inheritance or otherwise.

If the Hindu female dies leaving behind her children, the distinction

1. AIR 1982 Kant. 307.
2. *Shivaji* v. *Rukminiamma*, AIR 1973 Mys 113.
3. *Venubai* v. *Saraswati*, (1980) Mad LJ 107.
4. AIR 1994 Kant. 27.
5. *See* also *Raghunath* v. *Rikkaya*, AIR 1985 Pat 79.

between the sources from which she got the property is immaterial.

Heirs to Property under III

Succession to the property of a Hindu female from whatever source, except from father, mother, husband or father-in-law, she might have got it is governed by S. 15(1) and not by S. 15(2). Thus, when a female inherits the property from her brother, inheritance to it is governed by S. 15(1).[1]

Under sub-section (1) of S. 15, heirs of Hindu female are divided into five categories called, 'entries'. If there are no heirs in any of these five entries, the property goes to the government by escheat. The general rule of preference is that heirs in an earlier entry exclude heirs in later entries.

Entry (a).—In entry (a), there are the following heirs : (1) son, (2) daughter, (3) husband, (4) son and daughter of a predeceased son, and (5) son and daughter of a predeceased daughter.

Sons and daughters.—Under this entry, sons and daughters are used in a wide sense. They include son and daughter by natural birth, legitimate or illegitimate,[2] as well as adopted children. Legitimate children may be by one husband or more than one husband. Children of void and voidable marriages are also included. However, stepchildren[3] are not included in the expressions, son and daughter, though it is possible for a stepson or daughter to succeed to her property in entry (b) as an heir of her husband. But stepchildren are not preferential heirs. In the presence of their father who was the husband of deceased female Hindu, they do not succeed.[4]

Grandchildren.—The sons and daughters of a predeceased son will include only legitimate children, by natural birth or by adoption. Illegitimate children or stepchildren of the son are excluded. Children of a son whose marriage is void whether declared void or not are not included. Similarly, children of a son whose marriage is voidable will not be included if the marriage has been annulled. It is because S. 16(3), Hindu Marriage Act, provides that such children can inherit the property of their parents alone. This applies to the children of the predeceased daughter also, with his exception that her illegitimate children will be entitled to inherit, as in S. 3(j), Hindu Succession Act, illegitimate children are related to the mother, i.e., they are the children of the mother. Under this entry, sons and daughters of a predeceased son inherit as the representative of their mother or father, as the case may be.

Husband.—Husband means the husband who was a lawfully wedded husband of the *proposita* at the time of her death. Thus, a divorced husband is not included. Similarly, the husband of a void marriage or of an annulled voidable marriage is also not included.

Shares of heirs in entry (a).—The heirs of Entry (a) are simultaneous heirs. They inherit the property of *proposita* simultaneously. From S. 16, Rule I and Rule II, we may deduce the following three rules relating to the

1. *Balasaheb* v. *Jaimala*, AIR 1978 Bom 44.
2. *Gurbachan* v. *Khichar Singh*, AIR 1971 Punj 240; *Narayani* v. *Govinda*, AIR 1975 Mad 275.
3. *Malappa* v. *Shivappa*, AIR 1962 Mys 122; *Namdeo* v. *State of Mah.*, 1981 Mah LJ 25.
4. *Bhagwan Das* v. *Prabhati Ram*, AIR 2004 Del. 137.

distribution of property among the heirs of entry (a) :

(1) Son, daughter and husband, each takes one share.

(2) Among the heirs of the branches of predeceased son and predeceased daughter, the doctrine of representation applies, i.e., the children of the predeceased daughter and children of predeceased son take the same share which the daughter or son would have taken had she or he been alive.

(3) Among heirs of a branch, they take *per capita*.

We may explain the above rule with the aid of the following example. P leaves behind her husband, H, three sons, S^1, S^2, S^3, and a daughter D. Each will take 1/5 share in the property.

Entry (b).—On the failure of heirs in Entry (a), the property will devolve on the heirs of entry. Entry (b) runs as under :

"Upon the heir of the husband."

This means that, the property will devolve as if it is the property of her husband. In this entry, "husband" means the last husband of the *proposita*, *i.e.*, the one who was her lawful husband when she died. Since the property is deemed to be that of her husband, the inheritance will be determined by the scheme laid down in the Act relating to succession to the property of a Hindu male.[1] In other words, order of succession will be : first to Class I heirs; on their failure to class II heirs; on their failure to agnates; on their failure to cognates.[2] On the failure of cognates, property will devolve on the heirs of Entry (c).

Entry (c).—In this entry, there are only two heirs : father and mother of the *proposita*. The expression, mother, means natural mother as well as adoptive mother. Even if the *proposita* was an illegitimate daughter of the mother, mother will inherit. Mother does not include a stepmother. Father does not include a putative father or stepfather. Natural or adoptive father is included.

When the *proposita* is survived both by father and mother, they inherit simultaneously and between them take *proposita* per capita.

Entry (d).—Upon the failure of heirs in Entry (c), the property of the intestate female devolves upon 'the heirs of father'. The devolution of the property under this Entry will take place assuming that the property is that of the father. This means that heirs will be the heirs of a Hindu male.

Entry (e).—Upon the failure of heirs in Entry (d), the property will devolve upon the heirs of the mother. The devolution of property of the *proposita* will take place here as if it is the property of the mother. This means heirs of a Hindu female.

Property Inherited from Father or Mother

Under Section 15(2), only the inherited property is included. The property which she gets in gift at the time of her marriage from her mother or father is not included. Such a property is her *stridhan* and succession to it

1. *Amer Kaur* v. *Raman Kumari*, AIR 1985 P & H 86; *Roshan Lal* v. *Dalipa*, AIR 1985 HP 8.
2. *Krishna* v. *Nisamani*, AIR 1987 Ori 105.

is governed by Section 15(1).[1] Similarly, if she has converted the property she inherited from her parent into some other property, succession will not be governed under Section 15(2).[2]

If a *proposita* had inherited property from father or mother, the heirs fall in the following two categories :

Category (1).—Sons, daughters, sons and daughters of a predeceased son and sons and daughters of a predeceased daughter.

In this category, it may be noted, husband is not an heir.[3]

The rule of distribution of property among the heirs of this Entry are the same as of Entry (a) discussed above.

Category (2).—Upon heirs of the father.[4] On the failure of heirs in category (1), the property devolves upon the heirs of father, *i.e.*, as if it was property of the father. Where property was inherited by the deceased female Hindu from her mother in the absence of her own children, it would devolve on her sister and not on the brother of her predeceased husband.[5]

Property Inherited from Husband or Father-in-law

In case *proposita* had inherited properties from her husband or the father-in-law, her heirs fall in two categories.[6]

Category (1).—Sons, daughters, sons and daughters of predeceased sons, and sons and daughters of predeceased daughters.

Category (2).—Upon the heirs of the husband.

On the failure of heirs in category (1), the property devolves upon the heirs of the husband, *i.e.*, as if it was the property of the husband, which means heirs of a Hindu male.

Government : Escheat

Just as in the case of a Hindu male, in the case of a Hindu female, if she dies leaving no relation, the government takes her property as an heir, subject to all obligations and liabilities of the intestate. It is essential that a female Hindu should not have any heir under both the sub-sections of Section 15.[7]

IV
DISQUALIFICATION

Before 1956, several disqualifications were recognized which prevented an heir from inheriting property. Not merely the disqualified heir could not take property in inheritance but he or she also did not transmit any interest to his or her own heirs, as a disqualified person was treated as having predeceased the *propositus*. However, if the disqualified heir recovered from his disqualification subsequent to the opening of the inheritance, he could recover his share and divest the estate already vested in other heirs.[8] Section 27, Hindu Succession Act, 1956 lays down that "if any person is disqualified

1. *Meyappa* v. *Kannappa*, AIR 1976 Mad 154.
2. *Emma* v. *Gudiseva*, AIR 1976 AP 337.
3. *Raghuwan* v. *Janki Prasad*, AIR 1981 MP 39.
4. *Mahadevappa* v. *Gauraman*, AIR 1973 Mys 142.
5. *Bhagat Ram* v. *Teja Singh*, AIR 2002 SC 1.
6. *Baiya* v. *Gopikabai*, AIR 1978 SC 793.
7. *State of Punjab* v. *Balwant Singh*, AIR 1991 SC 1581.
8. *Venkatalakeshnammal* v. *Balakrishnachari*, AIR 1960 Mad 270.

from inheriting any property under this Act, it shall devolve as if such person had died before the intestate". This means that no title or right to succeed can be traced through the disqualified person. For instance, P, a Hindu, dies leaving behind a widow W and a widow of a predeceased son, SW, who had remarried before P died. W will take the entire property as if SW was dead. Or suppose P dies leaving behind two brothers, A and B and nephew AS, son of A. A is a disqualified heir. AS will also not inherit anything. B will take the entire property.

Disease, deformity and unchastity.—Disease, deformity and unchastity are no longer disqualifications.[1] Section 28 runs : "No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity save as provided in this Act on any other ground whatsoever".

Remarriage.[2]—The marriage of three widows, before succession opens, disentitles them from inheritance. These widows are son's widow, son's son's widow and brother's widow. The widowed mother and widowed stepmother are not disqualified from inheritance even if they have remarried.[3] The question of the remarriage *propositus*' own widows does not arise. If she has remarried during the lifetime of her husband, her second marriage is void and therefore she would not be considered to have remarried. If she has remarried after divorcing her husband, she has ceased to be his wife and therefore will not be his widow when *propositus* dies. But the subsequent marriage of the widow is no disqualification.

Conversion.—Conversion of an heir is not a bar to succession. But the children of a Hindu, who converts to non-Hindu religion cannot inherit. So also the descendants of the children cannot inherit, unless such children or descendants are Hindus at the time when the succession opens.[4] Succession to the property of a convert is governed by the personal law of the community to which he converted.[5] For instance, succession to the property of a Hindu convert to Islam is governed by Muslim law. Section 26 provides for a converse case. The children and descendants of a convert cannot inherit to the *propositus*, unless they are Hindus. We may illustrate the rule with the following examples :

(i) P died leaving behind three sons, A, B, and C. B had earlier converted to Islam. Even though B had converted to Islam, he will take his 1/3 share as conversion is not a disqualification of the heir.

(ii) P died leaving behind two sons, A and B and three sons CS, CS^1, CS^2 of a predeceased son C who had converted to Islam. All the three sons were born to C after his conversion. CS, CS^1 and CS^2 are disqualified and will not take any property. A and B will take 1/2 each.

(iii) P died leaving behind a son B and four sons, AS, AS^1, AS^2, AS^3 of a predeceased son A who had converted to Christianity. AS and AS^1 were born to him before conversion and AS^2 and AS^3 were born to him after conversion. B, AS and AS^1 will inherit, and AS^2 and AS^3 will be excluded.

1. *Chandi* v. *Bhagyadhar*, AIR 1976 Cal 366; *Ratti Ram* v. *Basanti*, AIR 1986 HP 61.
2. Deleted by Amended Act of 2005.
3. *Kasturi Devi* v. *Deputy Div. Commr.*, AIR 1976 SC 2595.
4. S. 26, Hindu Succession Act, 1956.
5. *P. Patharakah* v. *Subbiah*, AIR 1981 Ker 1980.

Murderer.—Section 25, Hindu Succession Act, disqualifies two sets of murderers : (a) If an heir himself murdered or abetted the murder of the *propositus* in furtherance of succession, and (b) if an heir has murdered or abetted the commission of murder of someone other than the *propositus* in furtherance of the succession. It is a principle of general policy.[1] In such cases, the murderer should be treated as non-existent and not as one who forms the stock for a fresh line of descent. Where husband had murdered his wife, neither he nor his parents were held entitled to inherit her property.[2] This is also what Section 27 of the Act lays down.[3] If an heir is not convicted under S. 302, IPC, but by giving him the benefit of doubt, he is convicted under S. 324, the disqualification attaches.[4] But if he is acquitted of the charge of murder even on the basis of the benefit of doubt, the disqualification does not attach to him.[5]

Under the provision, murder must be "in furtherance of succession". For instance, there was a faction-fight among five brothers, A, B, C, D and E. The father tried to intervene and was killed by an accidental sword blow from A. In this case, A will succeed to the property of his father along with B, C, D and E, as A did not kill his father in furtherance of the succession.

Under S. 25, the murderer as well as the abetter of murder are disqualified. For instance, P has two sons A and B. A himself murders P so that he may inherit his properties. Or, it may be that he abets B to murder P. In both cases, A will not be entitled to inherit. In the second case, B will also not inherit. The murder may be of the *propositus* or of someone else in furtherance of the succession. For instance, P has a daughter D and predeceased daughter's son DS, P is on the death bed. In furtherance of the succession, DS kills D, so that when P dies, he may take the *inherance*. DS will not be entitled to inherit when P dies. The rule is that if murder is committed with a view to accelerate succession, the murderer will not be entitled to reap the harvest of his crime. The section applies to both testamentary and intestate succession.

V
GENERAL RULES OF SUCCESSION ACT

Sections 18 to 23, Hindu Succession Act, lay down general rules of succession.

Half blood and full blood.—Section 18 lays down that heirs related to the *propositus* by full blood shall be preferred to heirs related by half blood, if the nature of relationship is the same in every other respect. We have already discussed this in connection with categories (2) and (4) of Class II heirs, reference may be made to the same.[6]

1. *Biro* v. *Banta Singh*, AIR 1980 P & H 164; *Minoti* v. *Sushil Mohan Singh*, AIR 1982 Bom 68.
2. *Janak Rani Chadha* v. *State*, AIR 2007 Del. 107.
3. *Kenchava* v. *Girimaillappa*, (1924) 51 I.A. 368.
4. *Mannapuneni* v. *Nannapuneni*, AIR 1970 AP 407.
5. *Chamanlal* v. *Mohan Lal*, AIR 1977 Del 97; *Sarita Chawhan* v. *Chetan Chawhan*, AIR 2007 Bom. 133.
6. *Seravanabhana* v. *Sethamal*, (1972) 2 MLJ 49.

Per stirpes and per capita rules.—Section 19 lays down that "if two or more heirs succeed together to the property of an intestate, they shall take the property : (a) save as otherwise expressly provided in this Act, *per capita* and not *per stirpes*,[1'] and (b) as tenants-in-common and not as joint tenants. These rules have been discussed in connection with inheritance to a Hindu male and a reference may be made to the same. The exceptions to the general rule of *per capita* succession are provided in rules (1), (3) and (4) of S. 10 and Rule (2) of S. 16. Thus, when in Class I, heirs in the branches of a predeceased son, predeceased daughter or predeceased grandson, under Section 10, or when the children of a predeceased son or predeceased daughter under S. 16, the succession is *per stirpes* and by representation, though among themselves they take *per capita*. Under the Act, heirs in no case take as joint tenants, but as tenants-in-common. In both cases, (joint tenants and tenants-in-common) property is held jointly, but there are vital differences in the incidence of both. Joint tenancy means that the shares of the joint owners are not specified and in the event of the death of one, the other takes his interest by survivorship. Tenants-in-common means that the share of each co-owner is a specified share and on his death it devolves on his heirs.

Posthumous child.—Section 20, Hindu Succession Act, recognizes posthumous child as an heir. The section lays down : "A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case, with effect from the date of the death of the intestate." Under the section, two conditions must be satisfied : (1) the child must be in the womb at the time of the death of the intestate, (2) the child must be born alive.[2]

Under this provision, a posthumous child shares in the inheritance and in case it dies subsequently, the property that it inherited will go to its heirs.

Presumption in case of simultaneous death.—Section 21 lays down : "Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall be presumed, until contrary is proved, that the younger survived the elder." Suppose, two persons die in an accident, in an air crash, road accident, in a train collision, in a fire, in an earthquake, or in floods, etc., and it cannot be established which of them died first, this section lays down a rule of a presumption : Younger should be deemed to have survived the elder. For instance, a father F and a son S die in an air crash. S will be presumed to have survived F. This means that F's property will pass to S and the property of S and the property of F thus coming by succession to S, will go to S's heirs. By younger we mean younger in relationship. For instance, an uncle A and a nephew N die together in an earthquake. N is aged 20 and A is aged 15. It will be presumed that N survived A. But if the relationship is the same, younger in age will be

1. *M.G.K. Pillai* v. *Kunjulakshmi*, AIR 1972 Ker 66.
2. S. 112, Evidence Act lays down : "The fact that any person was born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

presumed to have survived the elder. If two brothers, A and B (by full blood) die in a road accident, A is aged 25 and B 20 years, B will be presumed to have survived, A.

This section came for interpretation before the Punjab High Court in *Mahabir Singh*.[1] In this case, a testator and his wife (who was younger to him in age) died simultaneously of gunshot wounds. The court held that the wife should be presumed to have survived the testator.[2] The court further said that in respect to succession, intestate or testamentary, to a Hindu this section will apply, and illustration 6 to S. 103, Succession Act[3] will no longer apply.[4]

Preferential right or right of Pre-emption.—Section 22 lays down that when heirs simultaneously succeed to immovable property or business of a Hindu male as Class I heirs and if any of the heirs wants to dispose of his or her share in the immovable property or business, the other heirs will have a preferential right to acquire that share. The price of such property may be agreed upon between the co-heirs. In case they fail to arrive at an agreement, the price may be fixed by the court on the application of any party. If more than one heir wants to purchase the interest, the one who offers highest price will have the right to purchase it. If property is sold without making an offer to co-heirs, the transfer is voidable at the instance of any co-heir. Section 22 introduces right of pre-emption of co-heirs. The section embodies two fold aspect of the right of pre-emption, *viz*., the primary and substantive right to have an offer made, and the secondary or remedial right of the co-heirs, if property is sold without being first offered to them to take it from the purchaser. The right of a person to transfer his interest in property inherited along with other Class I heirs is subject to the preferential right of his co-heirs to take the transfer, and any transfer in derogation of that right would be voidable at the instance of the co-heirs, who are denied their preferential right. Though right conferred by S. 22 is akin to a right of pre-emption, however, that will not permit the adoption of all incidents of pre-emption recognized or provided for in other pre-emption laws, or in the Muslim law of pre-emption.[5] In *Ganesh* v. *Rukmani*,[6] Mishra, J. said that although S. 22 is not happily worded, it leaves no doubt that a preferential right "to acquire the property or business has been conferred on the non-transferee heirs". The right is personal and does not run with the land. It is incumbent on the transferring heir to notify his intention to transfer to other co-heirs.[7] If this is not done, the non-transferring co-heirs can impeach the transaction, even when it has been completely and properly transferred to the transferee. He can do so by filing a suit.[8] A transfer in violation of S. 22 is not void but voidable at the instance of non-alienating co-heirs.[9] Article 97

1. AIR 1963 Punj 66.
2. *See* also *Gayanti* v. *Mehta*, AIR 1968 Guj 212.
3. The illustration runs : "The testator and the legatee perished in the same shipwreck. There is no evidence to show which died first. The legacy lapses."
4. See *Agha Mir* v. *Mudasir*, (1944) 2 MLJ 354 (PC) where Privy Council said that in the absence of clear proof, there is no presumption.
5. *Nagammal* v. *Nanjammal*, (1970) I MLJ 358.
6. AIR 1971 Ori 65.
7. *Khewarwala* v. *Hanuman Prasad*, AIR 1981 MP 250.
8. *Murlidhar* v. *Bansidhar*, AIR 1986 Ori 53.
9. *Vallyil* v. *Subhadhar*, AIR 1976 Ker 19, *P. Srimivasamurthy* v. *P. Leelavathy*, AIR 2000 Mad 516.

of the Limitation Act applies to a suit under this section.[1] The preferential right can be claimed within 1 year of alienation and not after 13 years.[2] The right of co-heir to seek transfer of property proposed to be sold is only a personal right which is neither transferable nor heritable.[3]

This is an altogether new provision. But it is a welcome provision. The Hindu Succession Act, 1956 has been criticized for providing too many heirs in Class I with the natural consequence of strangers being introduced in the joint family business and joint family property and business being fragmented. This provision contemplates to remedy such situations. By exercising the preferential right to purchase the share of a co-heir in the business or estate, the strangers can be prevented from stepping into the joint business or estate. The fragmentation of estate or business may also be avoided thereby.

Partition of dwelling house.—Section 23[4] of the Act makes provision for the dwelling house which is inherited by the heirs of class I. The section lays down : Where a Hindu intestate has left surviving him or her, both male and female heirs specified in Class I of the Schedule and his or her property "includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling houses shall not arise until the male heirs choose to divide their respective shares[5] therein; but the female heirs shall be entitled to a right of residence therein : provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow. So long as there is a male heir, female heir cannot seek partition.[6]

In Hindu law, dwelling house has been given a special position. We have seen (Chapter 30) that *Smritikars* laid down that partition should not ordinarily be made of a dwelling house. Under the old law, since succession, at the first instance, was confined to males (sons and grandsons), the problem could not arise the way it may arise now. In Class I, we have eight females and a cognate (i.e., daughter's son). If all of them are alive, they become co-heirs with males. One of the objections against female heirs of Class I, particularly of daughters (married daughters) was that strangers will be introduced in the family. They may like to partition the dwelling house or other immovable property and business. Section 22 takes care of the last two cases; when a co-heir wants to dispose of his share in the immovable property or family business, the other co-heirs have a preferential right to purchase it. This section takes care of the dwelling house. It lays down that it would be wrong on the part of female heirs to ask for partition of the dwelling house unless the male heirs ask for it. Two safeguards are provided : (a) Dwelling house should be wholly occupied by members of the family of intestate, and (b) female heirs have a right of residence in the dwelling house. However, married daughters have no right of residence in the dwelling house. But if the

1. *Tarak Das* v. *Sunil Kumar*, AIR 1980 Cal 53.
2. *Ashutosh Chaturvedi* v. *Prano Devi*, AIR 2008 SC 2171.
3. *Kamal Goel* v. *Purshottam Das*, AIR 1999 P & H 254.
4. Section deleted by the Amending Act of 2005.
5. *Gomathi Ammal* v. *P. Muthukrishnan*, AIR 2000 NOC 51 Mad.
6. *Patli* v. *Koltia*, AIR 1985 Ori 70; *Punwasi* v. *Sukhadevi*, AIR 1986 All 139.

married daughter becomes a widow, separated from her husband, or is deserted by her husband, her right of residence revives. An unmarried daughter obviously has a right of residence.

The provision will apply only when some heirs are males and some are females.[1] But it will not apply if all heirs are males or females.[2] The Orissa High Court takes the view that the restriction will not apply if there is only one male member and others are females.[3] But the Madras and Andhra Pradesh High Courts take the view that the restriction will apply. The restriction does not apply if there are agnate male heirs and cognate male heirs (daughter's son).[4]

The restriction on partition is imposed only on the female heirs and not on male heirs. If a male heir chooses to partition the dwelling house, female heirs cannot prevent him from doing so.[5]

Escheat

On the failure of heirs, it is a general rule that property passes to the Government by escheat.[6] The Privy Council in *The Collector of Masulipatam* v. *Cavary Vencata Narainah*,[7] said that it is a general principle of law that the property of a person dying heirless escheats to the Crown.[8] The Privy Council further said that the Crown took the property subject to any charge which was validly created on the property.[9] The burden of proof is on the State to show that the deceased died heirless.[10]

This principle has now been incorporated in the Hindu Succession Act, 1956. Section 29 of the Act runs :

If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government; and the Government shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

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1. *Arun* v. *Jnanendra*, (1975) 79 CWN 305.
2. *Parbati* v. *Laxmi Devi*, (1970) 36 Cut LT 415.
3. *Hemlata* v. *Uma*, AIR 1975 Ori 208; *Mahanti* v. *Oliru*, AIR 1993 Ori 36.
4. *Janabai* v. *T.S. Palani*, AIR 1981 Mad 62; *Vemavarapura* v. *Chaturvedula*, AIR 1981 AP 84.
5. See *Mulla's Hindu Law*, (13th Ed) 860.
6. *Mitakshara*, II, 7.6. IX, vi 27.
7. 8 MIA 500.
8. *Cavary Vencata Narainah* v. *The Collector of Masulipatam*, (1863) 11 MIA 61.
9. See Dr. Saravadhikar : *Principles of Hindu Law of Inheritance* 810-13.
10. *State of Bihar* v. *Sri Radha Krishna Singh*, AIR 1983 SC 684.

Chapter 37

SUCCESSION UNDER MARUMAKKATTAYAM AND ALIYASANTANA LAWS

Marumakkattayam law is applicable to a considerable section of the people living in Travancore-Cochin, districts of Malabar and South Kanara.[1] In south Kanara, the system of law applicable is known by the name of Aliyasantana. The Marumakkattayam system is followed by the non-Brahmin castes and Nayar community of Malabar, Cochin and Travancore. It is also the law applicable to the Thyas and other cognate castes and the Payyannur Graman of North Malabar are also governed by this system. The Bunts, the Billawas and the non-priestly class among the Jainas in Kanara are governed by the Aliyasantana law.

The Marumakkattayam and Aliyansantana laws are a body of custom and usage. The outstanding feature of the Marumakkattayam and Aliyasantana law is that the inheritance is through nephews and nieces, in other words, it is based on the matriarchate. Elsewhere in Hindu law, the members of the joint family trace their descent through a common male ancestor, under the Marumakkattayam system, the members trace their descent through a common female ancestress, that is to say, the descent is through the female line.

The Marumakkattayam and Aliyasantana laws are essentially customary laws and there are no sacred writing binding on the followers of these systems. Even prior to the passing to the Hindu Succession Act, the customary law of Marumakkattayam and Aliyasantana has been considerably modified by the statutory law. The main enactments modifying the law are the Malabar Marriage Act, 1896; the Malabar Wills Act, 1896; the Madras Marumakkattayam Act, 1932; the Mappilla Marumakkattayam Act, 1939; the Madras Aliyasantana Act, 1949; and the Regulation of the State of Travancore-Cochin.

Like the joint family and coparcenary of the Mitakshara school, the Marumakkattayam and Aliyasantana systems have their unit, "*tarwad*". The *tarwad* of the Marumakkattayams is equivalent to the Mitakshara joint family though the basic difference is that the Mitakshara joint family is based on patriarchal system, while the "*tarwad*" of the Marumakkattayam is based on matriarchal system. Mayne writes thus about the *tarwad* :[2]

Tarwad is the name given to the joint family consisting of males and females, all descended in the female line from a common ancestress. It is an undivided family governed by the Marumakkattayam law, the customary law

1. *See* Mayne : *Hindu Law and Usage*, 971-994.
2. *Ibid.*, 972-73.

of Malabar. Its outstanding feature is that for the purpose of inheritance, descent is traced through the female line. A *tarwad* may consist of two or more branches known as *tavazhies*; each *tavazhi* or branch consisting of one of the female members of the *tarwad* and her descendants in the female line.

Every *tarwad*, in its initial stage, must have consisted of a mother and all her children, male and female living in commonsality with joint right in property. And as it expands, the *tarwad* is added to by the descendants, both male and female, of the female member thereof.

According to the definition given in the Madras Marumakkattayam Act, "a *tarwad* is defined as a group of persons forming a joint family with community of property governed by the Marumakkattayam law of inheritance."[1] A *tavazhi* used in relation to a male is defined as "the *tavazhi* of the mother of that male."[2]

The senior most male member in the Marumakkattayam *tarwad* known as the *karnavan*, and the senior-most female member is called the *karnavathi*. The *Karnavan* has the right and power to carry the family management, in the absence of male adult members; the *karnavathi* has the power to carry on the family management. In Aliyasantana system, the eldest member is known as *ejaman* and the eldest female member is known as *ejamanthi*. Under the Aliyasantana system, the senior-most member whether male or female is entitled to carry on the family management; this is the vital and the only difference between the two systems.

The *tarwad* differs from the Mitakshara coparcenary in this respect that in the case of the former, every member whether male or female has equal right in *tarwad* by virtue of his being born in that *tarwad*, while in the case of latter only, the son, grandson and great grandson have the right by birth in the joint family property. The *tarwad* resembles the Mitakshara coparcenary in this respect that on the death of anyone of its members, his or her interest devolves on the other members of the *tarwad* by survivorship. Since male and female members of a *tarwad* have equal rights in the property, the woman's estate is unknown to these systems.

It was laid down in the course of judicial decisions that one member of the *tarwad* has no right to claim partition or separate possession of his shares without the concurrence of other members. The law was changed by the Marumakkattayam Act, and by the Aliyasantana Act. A member was given a right to separate himself from the joint family and claim partition. The ascertainment of the share at the partition is *per capita*, not *per stirpes*.

In the Marumakkattayam and Aliyasantana systems, the question of inheritance could arise only in respect of the individual property or in respect of the property of an extinct *tarwad*. The courts held that the self-acquired property of a male member of the *tarwad*, which has not been disposed of in his lifetime, lapses to the *tarwad*, and forms part and parcel of its property. As regards the self-acquired property of a member, it was held that it descended to her *tavazhi*, that is, to her own issues. In default of her issues, it devolved to her mother and her descendants.

Under the Aliyasantana law, there is no distinction as to the devolution

1. Sub-section (i) of S. 3 of the Act.
2. Sub-section (i) & (iii) of S. 3 of the Act.

of property of a female or male member. The self-acquired property of a member goes to the nearest branch, and where there are more branches than one standing in the same degree of relationship, they inherit jointly.

The law of succession of Marumakkattayam and Aliyasantana had been changed by the legislative enactments. The Marumakkattayam Act and the Aliyasantana Act lay down the rule of succession to the property of a member of the *tarwad* dying intestate. Under the Madras Marumakkattayam, the preferential heirs of a male member are : his mother, his widow and his children. The property can be inherited by the *tavazhi* only when the intestate has died without leaving his mother or children or lineal descendants in the female line. The nearest heirs of the female member are : her children and lineal descendants in the female line; next heirs and in default of former, are mother's *tavazhi* and then husband and maternal grandmother's *tavazhi* take in moieties, in default of either the whole is taken by the other.

The testamentary powers of a member of the *tarwad* under both the Marumakkattayam and Aliyasantana systems had also been recognized by the legislative enactments. The Malabar Wills Act provides rules for the execution, attestation, revocation and revival of the wills of persons governed by the Marumakkattayam and Aliyasantana laws. Similar provisions have been enacted in the State of Cochin and Travancore.

The existing law of Marumakkattayam and Aliyasantana was not satisfactory. Along with the reform in the Mitakshara and the Dayabhaga system, a reform in the law of these systems was also necessary. The Hindu Succession Bill contained the provisions reforming the law of succession of Marumakkattayam and Aliyasantana. The rules of succession to the property of a female and to the property of a male were different.

The present Act has changed the scheme of the original Bill. Section 7 of the Act deals with the devolution of interest in the property of *tarwad, etc.* The section runs :

(1) When a Hindu, to whom the Marumakkattayam or Nambudri law would have applied if this Act had not been passed, dies after the commencement of this Act, having at the time of his or her death an interest in the property of *tarwad, tavazhi or illom*, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act, and not according to the Marumakkattayam or Nambudri law.[1]

Explanation.—For the purpose of this sub-section, the interest of a Hindu in the property of a *tarwad, tavazhi*, or *illom*, shall be deemed to be the share in the property of the *tarwad, tavazhi*, or *illom*, as the case may be, that would have fallen to him or her if a partition of that property per capita had been made immediately before his or her death among all the members of the *tarwad, tavazhi* or *illom*, as the case may be, then living, whether he or she was entitled to claim such partition or not under the Marumakkattayam or Nambudri law applicable to him, or her and such share be deemed to have been allotted to him or her absolutely.

(2) When a Hindu to whom the Aliyasantana law would have applied

1. *Devaki* v. *Kumaran*, AIR 1977 Ker 110.

if this Act had not been passed, dies after the commencement of this Act having at the time of his or her death an undivided interest in the property of a *Kutumba* or *Kavaru*, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under that Act and not according to the Aliyasantana law.

Explanation.—For the purpose of the sub-section, the interest of a Hindu in the property of a *Kutumba* or *kavaru* shall be deemed to be the share in the property of the *kutumba*, as the case may be, that would have fallen to him or her if a partition, of that property *per capita* had been made immediately before his or her death among all the members of the *kutumba*, or *kavaru*, as the case may be, then living whether he or she was entitled to claim such partition or not under the Aliyasantana law, and such share shall be deemed to have been allotted to him or her absolutely.

(3) Notwithstanding anything contained in sub-section (1), when a *sthanamdar* dies after the commencement of this Act, the *sthanam* property held by him (or her) shall devolve upon the members of the family to which the *sthanamdar* belonged and the heirs of the *sthanamdar* as if the *sthanam* property had been divided *per capita* immediately before the death of the *sthanamdar* among himself (or herself) and all the members of his family then living and the shares falling to the members of his (her) family and the heirs of the *sthanamdar* shall be held by them as their separate property.[1]

Explanation (1).—For the purpose of this sub-section, the family of a *sthanamdar* shall include every branch of that family, whether divided or undivided, the male members of which would have been entitled by any custom or usage to succeed to the position of *sthanamdar* if this Act had not been passed.[2]

Explanation (2).—The devolution of *sthanam* properties under sub-section (3) and their division among the members of the family and heirs shall not be deemed to have conferred upon them in respect of immovable properties and higher rights, then the *sthanamdar* regarding eviction or otherwise as against the tenants who were holding such properties under the *sthani*.

The rule of succession applicable to the property of a female or male members of the Marumakkattayam and Aliyasantana have been enacted in Section 17 of the Act. The section provides that, with certain modifications, the rules applicable are the same which are applied to a Hindu male or female under the Act.

The general rules of succession to the property of a male belonging to Marumakkattayam and Aliyasantana system are the following :

If a Marumakkattayam or Aliyasantana male dies intestate, his property shall devolve :

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

1. The nature of Sthanam was considered by the Supreme Court in *Kochuni* v. *State of Madras*, AIR 1960 SC 1081.
2. The scope of this section was considered by the Supreme Court in *M.K. Balkrishna Menon* v. *The Assistant Collector of Estate Duty*, AIR 1971 SC 2392; *Assistant Commr. AIT* v. *V.K. Romunni*, AIR 1971 SC 2513.

schedule; and

(b) secondly, if there is no heir of class I, upon heirs in Class II of the schedule; and

(c) thirdly, if there is no heir of any of the two classes, upon his relatives whether agnates or cognates.

The rules applicable for the distribution of property among Class I and Class II heirs are the same as are applicable to other Hindus, *i.e.*, rules contained in Ss. 10 and 11.

The property of a female belonging to Marumakkattayam or Aliyasantana systems, dying intestate, shall devolve on the following :

(a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the mother,

(b) secondly, upon the father and the husband,

(c) thirdly, upon the heirs of the mother,

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

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

Notwithstanding anything contained above, any property inherited by a female from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter), not upon the heirs referred to above, but upon the heirs of the husband.

Chapter 38

SUCCESSION UNDER MUSLIM LAW

I
INTRODUCTORY

The Muslim law of inheritance is a superstructure constructed on the foundation of pre-Islamic customary law of succession. In Islamic law, distinction between the joint family property and the separate property has never existed, and in India, Muslim law does not recognize the joint family property, though among the South Indian Muslims having matrilineal system, the institution of *tarwad* is recognized. Since under Muslim law, all properties devolve by succession, the right of heir-apparent does not come into existence till the death of the ancestor. Succession opens only on the death of the ancestor, and then alone the property vests in the heirs.

II
GENERAL PRINCIPLES

Customary Principles of succession.—In the pre-Islamic Arabia, the law of inheritance was based on, what is called, comradeship-in-arms, and, on this basis, even the wife and the children were excluded from inheritance. The four basic principles of the pre-Islamic law of succession were : first, the nearest male agnates or agnates succeeded to the total exclusion of remoter agnates. Thus, if a Muslim died leaving behind a son, and a son of a predeceased son, then the son inherited the entire property and the grandson was totally excluded. Secondly, females were excluded from inheritance; so were cognates. Thus, a daughter or a sister or a daughter's son or sister's son could never succeed to the property. Thirdly, the descendants were preferred over the ascendants, and ascendants over the collaterals. For instance, in the presence of a son, father could not succeed. Similarly, in the presence of father, brother could not inherit. Fourthly, where there were more than one male agnates of equal degree, all of them inherited the property and shared it equally, taking *per capita*. For example, if a person died leaving behind three brothers, all of them succeeded and each took one-third of the estate.

Islamic Principles of succession.—The Prophet interposed the following new principles on the aforesaid principles of customary law of succession. First, the husband and the wife, being equal, are entitled to inherit to each other. Secondly, some near females and cognates are also recognized and enumerated as heirs. Thirdly, the parents and certain other ascendants are made heirs even when there are descendants. Fourthly, the newly created heirs (those who were not entitled to inherit under customary law) are given specified shares. Fifthly, the newly created heirs inherit the specified shares along with customary heirs, and not to their exclusion. After

allotting the specified share to the newly created heirs, who are called sharers, whatever is left (residue)—and the scheme is so laid down that something is usually left—goes to the customary heirs who are called residuaries.

It is necessary to notice that the *Koran* did not create a new structure of law of succession, but merely amended and modified the customary law of succession so as to bring it in conformity with the Islamic philosophy. What has happened is this that those persons who were not heirs under the customary law have been made heirs (called sharers or the Koranic heirs) and specific shares have been allotted to them. For instance, if A, a Muslim, dies leaving behind a widow, W and two sons S and S^1, then W will take 1/8 as a specified share and S and S^1 will take the residue, *i.e.*, 7/8.

This superimposition of the Koranic principles on the customary law of inheritance has led to divergence of opinion among the Shias and Sunnis, resulting in the propagation of two different rules of inheritance—

(i) The Hanafis allow the framework or principles of the pre-Islamic customs to stand; they develop or alter those rules in the specific manner mentioned in the *Koran*, and by the Prophet.

(ii) The Shias deduce certain principles, which they hold to underlie the amendments expressed in the *Koran* and fuse the principles so deduced with the principles underlying the pre-existing customary law, and thus raise up a completely altered set of principles and rules derived from them.

The Hanafi law : General principles.—The Hanafis interpret the principles of customary law and Islamic law in such a manner as to blend them together in a harmonious manner; the customary heirs are not deprived of their right of inheritance in the estate of the deceased, but only a portion out of the estate is taken out and given to the heirs enumerated in the Koran. This means that the basic structure of customary succession, *i.e.*, the rule of agnatic preference, is retained—the agnates are still preferred over cognates. The Koranic succession takes the agnatic principles further by recognizing the right of female agnates. Thus, if there is a female agnate (as specified in the *Koran*) nearer to a male agnate (as specified under the customary law), then, by virtue of nearness of her claim to take a share in the estate of the deceased, she is allowed to take a share. But thereby, the male agnate is not deprived of a share, and the male agnate takes the residue. Or, where the female agnate and the male agnate are equally near to the deceased, then the male heir takes twice the share of the female heir. It is submitted that this principle implies not only to the female agnates but also to the male agnates (*i.e.*, those heirs who are made heirs by the *Koran*), and it is wrong to generalize that the male heir as such always takes double share of a female heir. Thus, uterine brother and father as sharers do not take more than the uterine sister and mother respectively. It should also be noticed that most of the newly created heirs are the near blood relations of the deceased who were ignored in the customary law.

The Koranic imposition of new heirs does not deprive the male agnates of their inheritance, but their rights are liable to be affected if there exists a Koranic heir. If we examine the rights of the Koranic heirs *vis-a-vis* the customary heirs, we find two situations : (i) the Koranic heir may be nearer

to the customary heir. In such a case, a specified portion of the estate is given to the Koranic heir at the first instance and then whatever is left to be given to the customary heir. If there is more than one Koranic heir, then all of them take their specified portions, and the residue goes to the customary heirs. For instance, when a deceased has left a daughter and a brother, the former will take 1/2 (as specified by the Koran) and the brother will take the residue which is 1/2. If the deceased had left two daughters and a brother, then the daughters together will take 2/3 (as specified by the Koran) and the brother will take the residue which is 1/3. (ii) The Koranic heirs and the customary heirs may be equally near to the deceased. In such a case, double portion is given to the customary heir. In this situation, the Koranic heir is a female of equal proximity with the customary heir, but she was disqualified under the customary law on account of her sex. Now she has been made to rank equally with the customary heirs in respect of the residue of the estate after the prior claim of the Koranic heirs are satisfied. As to the rights of heirs *vis-a-vis* each other, if the heirs of the same class differ from each other in their sex, they inherit equally (here the principle of male taking twice the share of a female does not apply). For instance, if a Muslim dies leaving behind father and mother, then each takes 1/6 of the estate. In this case, neither can claim priority over the other on the basis of greater proximity or on the basis of customary law.

The modifications thus made by the *Koran* as interpreted by the Hanafis are restricted to agnates, with a few exceptions whereunder some cognates, such as uterine brother and uterine sister, are also included. The modifications do not go to any collateral remoter than sisters. Further, these modifications in their application to relations other than descendants are hedged with exceptions. The Hanafis have so interpreted the Koranic rules that the customary heirs' right to inheritance is not affected, though a slice of the estate is taken away for the Koranic heirs. Sometimes the customary heirs are also required to share the residuary estate with the Koranic heirs, and in that process, sometimes, no residue of the estate is left for them. (But this happens in a very few cases).

Under the Hanafi law, the general rule of distribution of the estate is *per capita* and *not per stirpes*.

Ithana Ashari law; general principles.—The basic differences between the Ithana Ashari law and the Hanafi law arise on account of the fact that the latter interpret the Koranic rules strictly and hold that the Koranic rules are nothing but transposition of certain rules on the customary law of succession, while the former interpret the Koranic rules so widely as if they lay down an independent scheme of succession. Thus, the Ithana Ashari interpretation of the Koranic rules does not recognize the prior rights of agnates over cognates, or of males over females. With the exception of the rights of husband and wife, the Shia law lays down that the estate of the deceased devolves on the blood relations equally, though among themselves, they take *per stirpes* : the females are allotted half the share allotted to the males in each grade. This also results in descendants, ascendants and collaterals inheriting side by side.

Doctrine of Representation and Stripital Succession

Under Hindu law, the doctrine of representation is utilized for two purposes : (i) for determining the heirs, and (ii) for determining the quantum of share of an heir or a group of heirs. The *per stirpes* rule means that where there are branches, the division of property takes place according to the stock, *i.e.*, at the places where branches bifurcate. Thus, suppose P dies leaving behind a son S and a grandson SS, who is a son of a predeceased son. By the application of the doctrine of representation, SS, representing his father, will be an heir and will take the same share which his father would have taken had he been alive. This means that S will take 1/2 and SS will 1/2. Under the Hanafi law, no aspect of the doctrine of representation is recognized, with the result that in the above illustration, the son will take the entire property and no grandson will take any share. The result under the Shia law is also the same. But the Shia law recognized the doctrine of representation for the second purpose, *viz.*, for determining the quantum of shares in certain cases. For instance, if P dies leaving behind three grandsons, A, B and C from a son S, and two grandsons, X and Y from a predeceased son S1, and a grandson Q from a predeceased son S2, then the distribution of assets will take place not in accordance with grandsons, but in accordance with sons. In this example, the share of S, S1 and S2 will come to 1/3 each. S's 1/3 will go to A, B and C each taking 1/9; S1's 1/3 will go to X and Y each taking 1/6 and S2's 1/3 will go to Q. Under the Hanafi law, each grandson will take *per capita*, *i.e.*, A, B, C, X, Y and Q, each will take 1/6 share in the assets.

The doctrine of representation and the stripital succession for the purpose of calculating the shares of certain heirs is the basic principle of the Shia law and is applied throughout. This is not confined to the descendants but is also applied to the ascendants. Thus, the descendants for the deceased son, deceased uncle, deceased aunt, deceased daughter, deceased brother, deceased sister, if they are heirs, are all covered by the doctrine of representation. Similarly, the rule is applied to great grandparents who would take the same share which grandparents would have taken had they been alive. The father's uncles and aunts are also covered by the rule.

Definitions

Agnates.—An agnate is a relation who is related to the deceased wholly through males. Thus, the following are the examples of agnates, son, son's son, son's son's son, son's daughter, son's son's daughter, father's father, father's mother, father's father's father, father's father's mother.

Cognates.—A cognate is a relation who is related to the deceased through one or more females. For example, the following are cognates : daughter's son, daughter's daughter, mother's father, father's mother's father.

Collaterals.—Collaterals are descendants in the parallel lines from the common ancestor or ancestress. Collaterals may be agnates or cognates. Thus, consanguine brothers and sisters, paternal aunts and uncles are agnate collaterals. Maternal uncles and aunts, uterine brothers and sisters are cognate collaterals.

Heir.—A person who is entitled to inherit the estate of another after his death is known as an heir.

True grandfather.—A male ancestor between whom and the deceased, no female intervenes is known as the true grandfather. For instance, the father's father, father's father's father and his father how high soever are all the true grandfathers.

False grandfather.—A male ancestor between whom and the deceased, a female intervenes is known as the false grandfather. For instance, mother's father, mother's mother's father, father's mother's father are false grandfathers.

True grandmother.—A female ancestor between whom and the deceased, no false grandfather intervenes is known as the true grandmother. Thus, father's mother, mother's mother, father's mother's mother, father's father's mother, mother's mother's mother are all true grandmothers.

False grandmother.—A female ancestor between whom and the deceased, a false grandfather intervenes. Thus, mother's father's mother is a false grandmother.

Son's son how low soever.—Lineal male descendants are known as son's son how low soever. For instance, son's son, son's son's son and so on, are all son's son how low soever.

Son's daughter how low soever.—The female children of lineal male descendants are known as son's daughter how low soever. Thus, son's daughter, son's son's daughter, and so on, are also son's daughter how low soever.

III
HANAFI LAW OF INHERITANCE

Under any law of intestate succession, two questions that arise are : (i) who are the heirs of the deceased, and (ii) to what share the heirs are entitled. Muslim law-givers have gone into details in laying down the categories of the persons who are entitled to participate in the inheritance, and the respective shares to which each categories of heirs are entitled to receive.

Heirs

We have seen earlier that Islamic law superimposed on the customary structure certain blood relations who are either equally near, or more near, to the deceased than the customary heirs. Among these new heirs are certain females, and some ascendants and collaterals. The spouse of the deceased is allowed to take a share in the inheritance, as a relation by affinity. Looked at in this perspective, apart from the spouse (husband or wife) of the deceased, the other heirs specifically mentioned in the *Koran* are at par with customary heirs. Thus, son, or son's son how low soever, is entitled to inherit under the customary law. The *Koran* superimposed daughter, son's daughter or son's son's daughter how low soever, and gave her a specified share. It should be noted that daughter's daughter, who is a cognate, and therefore remoter than the son or son's son, is not included. Since son and daughter were included, it was logical to include mother and father. Similarly, since son's son and son's daughter were included, it was logical to include true grandfather and true grandmother. It was equally logical to include certain collaterals. Thus, were included full and consanguine sisters, since full and consanguine brothers were heirs under customary law. For the same reason, were included uterine brothers and sisters. To these newly created heirs, the *Koran* allots a specific

share. These new heirs are commonly called "sharers". It is noteworthy that the fractional shares that are specified by the *Koran* are only six, namely 1/2, 1/4, 1/8, 2/3, 1/3 and 1/5.

The sharers are allotted their specified shares. Then whatever is left after allotting share to the sharers, the rest—residue—is divided among the customary heirs. These heirs are commonly called "residuaries". This term came into vogue on the assumption that after giving specified shares to the sharers, whatever is left is given to them.

In the scheme of heirs, certain sharers become residuaries on account of the existence of certain other near relations. Thus, when the deceased has no child or child of a son how low soever, the father and the true grandfather become the residuaries. Similarly, the daughter becomes a residuary when the deceased has left behind a son, and the full sister becomes residuary when the deceased is survived by a full brother. This also applies to consanguine sister, when the deceased is survived by a consanguine brother.

The Hanafi law lays down that in the absence of the sharers and the residuaries, the estate passed to other relations who are called "distant kindred". The distant kindred are those relations of the deceased who are neither sharers nor residuaries.

On the failure of distant kindred, in modern India, the estate of the deceased goes to the State by escheat.

Thus, under the Hanafi law, the heirs of a deceased Muslim, male or female, fall under the following classes :

(I) The sharers,
(II) The residuaries,
(III) The distant kindred, and
(IV) The State by escheat.

The Sharers

The sharers are twelve in number. They are given specific shares.

In the case of some sharers, their shares vary under certain circumstances. Some sharers under certain circumstances do not inherit as sharers, but as residuaries. Both these situations are explained in tabular form in the following two tables :

Table A

The Koranic heirs and their specified shares

Heirs	Shares One two or more		When entirely excluded	When share may be affected	How the share is affected
1	2		3	4	5
1. Wife	1/8	1/8	never	When no child or child of a son h.l.s.	share is increased to 1/4.
2. Husband	1/8	1/8	never	When no child or child of a son h.l.s.	share is increased to 1/2.

1	2		3	4	5
Daughter	1/2	2/3	never	When there is a son.	she becomes a residuary.
Son's daughter	1/2	2/3	in the presence of (i) a son, (ii) more than one daughter, (iii) higher son's son, and (iv) more than one higher son's daughter	(a) When only one daughter. (b) one higher son's daughter (c) equal son's son	(a) share is reduced to 1/4. (b) share is reduced to 1/8. (c) she becomes a residuary.
Full sister	1/2	2/3	In the presence of (i) son, (ii) son's son how low soever, (iii) father, and (iv) true grandfather.	When there is a full brother.	She becomes a residuary.
Consanguine sister	1/2	2/3	In the presence of (i) son, (ii) son's son how low soever, (iii) father, (iv) true grandfather, (v) full brother, and (vi) more than one full sister.	(a) Where there is a full brother (b) When there is a consanguine brother.	(a) Share is reduced to 1/6. (b) She becomes a residuary.
7. Uterine	1/6	1/3	In the presence of (i) child, (ii) child of a son, how low soever, (iii) father and (iv) true grandfather.	—	—
8. Uterine	1/6	1/3	In the presence of (i) child, (ii) child of a son how low soever, (iii) father, and (iv) true grandfather.	—	—
9. Mother	1/6	—	never	(a) Where there is no child or son's child, how low soever. (b) One brother or sister. (c) When husband or wife co-existing with father.	(a) Share is increased to 1/3. (b) Share is increased to 1/3. (c) 1/3 of the residue after deducting the share of husband or wife.

1	2	3	4	5
10. True grand-mother h.h.s. maternal or paternal	1/6	1/6	In the presence of (i) mother, and (ii) nearer maternal or paternal grand-mother. In the presence of (i) mother, (ii) nearer maternal or paternal grand-mother, (iii) father, and (iv) nearer true grandfather.	—	—
11. Father	1/6	—	never	Where there is no child or child of a son how low soever.	He becomes a residuary.
12. True grandfather	1/6	—	In the presence of (i) father and (ii) nearer true grand-father	Where there is no child or child of a son how low soever.	He becomes a residuary.

The Koranic Residuaries

There are certain sharers who do not take their specified shares if a residuary of equal rank co-exists. In such a case they become residuaries. They are called the Koranic residuaries, or residuaries with another. They may be stated in the tabular form as below :

Table B

Koranic Residuaries or residuaries with another

Sharers	Circumstances in which the sharer becomes residuary
1. Daughter	when there co-exists a son of the deceased.
2. Son's daughter	when there co-exists : (a) son's son, or (b) a male agnatic heir in a lower degree
3. Son's son's daughter.	when there co-exists : (a) son's son's son, or (b) a male agnatic heir in a lower degree.
4. Full sister	when there co-exists a full brother.
5. Consanguine sister	when there co-exists a consanguine brother.

The Residuaries

When there are sharers and a residue of estate is left after allotting them their shares or when there are no sharers, then whatever is left in the former case, and the entire estate in the latter case, goes to the residuaries.

The residuaries may be classified into : (i) Descendants, (ii) Ascendants, and (iii) Collaterals. They may be depicted in tabular form as below :

Table C

Residuaries

Heirs	What portion of estate they take
Descendants	
1. Son	(a) when there is a daughter, he takes double portion. (b) where there is no daughter, he takes the entire residue.
2. Son's son how low soever	(a) when there is son's daughter, he takes double portion (when there is equal son's son, but there is a lower son's son's daughter, if she does not inherit as a sharer, inherits as residuary with lower son's son). (b) nearer son's son excludes remoter. (c) two or more son's sons take the estate in equal shares.
Ascendants	
3. Father	As a residuary, he takes the entire estate.
4. True Grandfather	(a) As a residuary, he takes the entire estate. (b) The near true grandfather excludes the remoter.
Collaterals	
Descendants of the father	
5. Full brother	(a) Where there co-exists a full sister, he takes double portion. (b) In the absence of the sister, he takes the entire residue.
6. Full sister	In the absence of the full brother and aforesaid residuaries, she takes the residue, if any, if there is/are daughter/daughters or son's daughter/daughters how low soever or one daughter/daughters, how low soever.
7. Consanguine brother	When there is consanguine sister, he takes double portion.
8. Consanguine sister	In default of a consanguine brother and above-mentioned residuaries she takes the residue, if any, if there be daughter/daughters how low soever or one daughter and a son's daughter/daughters how low soever.
9. Full brother's son	In default of above residuaries, he takes the entire residue.
10. Consanguine brother's son	In default of above residuaries, the son takes the entire residue.
11. Full brother's son's son	In default of the above residuaries, he takes the entire residue.
12. Consanguine brother's son's son	In default of the above residuaries, he takes the entire residue.

Then come the male descendants of brother's son's son, and then the male descendants of consanguine brother's son's son alternatively.

Descendants of the true grandfather		
13. Full paternal uncle	He takes the entire residue.	
14. Consanguine paternal uncle	He takes the entire residue.	

15.	Full paternal uncle's son	He takes the entire residue.
16.	Consanguine paternal uncle's son	He takes the entire residue.
17.	Full paternal uncle's son	He takes the entire residue.
18.	Consanguine paternal uncle's son's son	He takes the entire residue.

After them come the remoter male descendants of full paternal uncle's son's son's son and consanguine paternal uncle's son's son's son alternatively.

Then come the descendants of the remoter true grandfathers, in like order and manner as the deceased paternal uncles and their sons and son's sons.

Distribution of Assets among the Sharers and Residuaries

Among the heirs, the sharers are to be given their share first, then the residue is to be distributed among the residuaries. In the absence of the sharers, the residuaries take the entire estate. In the absence of both the sharers and the residuaries, the estate devolves on the distant kindreds. In their absence, the estate goes to the State.

The peculiarity of the Muslim law of inheritance is that although the sharers are Class I heirs and the residuaries are Class II heirs, they together share the property. After shares have been allotted to the sharers, the remaining property goes to the residuaries. Thus, if a Muslim dies leaving behind a mother, M, a son, S, and a daughter's son, DS, then mother as sharer will take 1/6 and S will take the remaining 5/6 as residuary. DS will be totally excluded from the inheritance, since he is a distant kindred. There is only one case when a distant kindred inherits along with a sharer, *viz.*, when the sharer is a husband or wife and there is neither any other sharer nor a residuary, then the distant kindred inherits along with the husband or the wife. Thus, if a Muslim dies leaving behind a widow, W, and full sister's son FSS (who is distant kindred), then W will take 1/4 as sharer, and the residue of the estate, namely, the 3/4 will go to FSS.

Among the heirs of a class, which one of them will take the estate and in what portion, depends upon the circumstances of each case. The general rule of preference is that a nearer heir excludes a remoter one. Thus, if a Muslim dies leaving a son and a grandson (son's son or a son from a predeceased son), then son alone will inherit, and the grandson will be excluded, though both are residuaries. Similarly, if a Muslim dies leaving behind a father and a true grandfather, then the father alone will inherit and the true grandfather will be excluded, even though both are sharers. Among the residuaries, the descendants are preferred over ascendants and collaterals, and ascendants are preferred over collaterals. Among the collaterals, the descendants of a nearer ancestor are preferred over the descendants of a remoter ancestor. When all the heirs claiming property are equally near, they share equally with this rider that a male heir (generally)

takes double the portion of a female heir.

When one is related to the deceased through another, one does not inherit as long as that another is alive. Thus, father excludes both a brother and a sister. However, brothers and sisters are not excluded by the mother. The reason is that when the mother is alive, she cannot claim to inherit the entire estate. When there is no other heir, she takes part of the estate as a sharer, and the rest by return (see below, under the head "Doctrine of Return").

In the Hanafi scheme of inheritance, the following five heirs are always entitled to a share in the estate, namely, husband, wife, child, father and mother. These heirs are called primary heirs. Next to them are "substitutes" : they are the substitutes of the last three primary heirs. These are child of a son how low soever, true grandfather, and true grandmother.

Husband and Wife

If a Muslim male dies leaving behind a widow and children, then the widow takes 1/8, and the residue (i.e., 7/8) goes to children. If he dies leaving behind a widow and no child, then the widow takes 1/4. If he dies leaving behind more than one widow, then 1/8 (when there are children), or 1/4 (when there are no children), is distributed among them equally.

If a Muslim female dies leaving behind her husband and children, then the husband takes 3/4 as a sharer and the residue of 1/4 goes to the children. If she dies leaving behind no child, then the husband takes 1/2 as a sharer.

Thus, a Muslim female dies leaving behind her husband, H and her father F. H will take 1/2 as a sharer and F will take the remaining 1/2 as residuary.

Father and True Grandfather

The father is always an heir. Under no circumstances can he be excluded from inheritance. The true grandfather, being a substitute, is always excluded by the father. A nearer grandfather always excludes a remoter grandfather.

The position of father as an heir may be discussed under the following circumstances : (a) Where the deceased had left children, the father takes 1/6 share. Thus, when P dies leaving behind his father and a son, the father will take 1/6 and the son will take 5/6, (b) Where there are no children (or child) or agnatic descendants, the father and, in his default, the grandfather, takes as a residuary, (c) Where a Muslim dies leaving behind a mother and a father, the mother takes 1/3 as sharer, and the father takes 2/3 as residuary, (d) In certain circumstances, the father may take in dual capacity, as a sharer and as residuary. Thus, where a Muslim dies leaving behind his father and a daughter, then the daughter takes 1/2 as a sharer, the father takes 1/6 as sharer and the residue of estate, *i.e.*, 1/3, he takes as a residuary. Thus, the father will take 1/6+1/3=1/2. In this situation, the position of the grandfather (in the absence of the father) will be the same, since he is a substitute for the father.

Thus, P, a Muslim dies leaving behind father F, a grandfather FF, a mother, M, a grandmother MM, two daughters D and D1, and a daughter of a predeceased son, SD. FF will be excluded by F and MM will be excluded by M. F will take 1/6, since there are no children of the deceased. M will take 1/6,

for the same reason. In the presence of daughters, SD will not take any share. The remaining 2/3 will go to D and D1, between them they will share equally, *i.e.*, 1/3 each.

Mother and True Grandmother

A mother is never excluded from inheritance. She takes 1/3 where there are no children, and she takes 1/6 where there are children. The true grandmother inherits in certain circumstances : (a) The maternal grandmother is excluded by mother or nearer true grandmother, paternal or maternal. (b) The paternal true grandmother is excluded by the father, the mother and by a nearer true grandmother, paternal or maternal, as well as by a nearer true grandfather.

Thus, P, a Muslim, dies leaving behind his mother M, two sons, S and S_1, and a daughter, D. M will take 1/6 as sharer, and the rest will go to D, S and S_1 as residuaries : D taking 1/6, S taking 2/6 and S_1 taking 2/6.

(c) The mother takes one-sixth share if a Muslim dies leaving behind two sisters, or one brother and a sister (full, consanguine or uterine). In the presence of the father, sisters do not inherit. It is a curious aspect of Muslim law that an heir may be totally or partially excluded from inheritance by another, yet his presence may exclude another heir partially or totally.

Thus, P dies leaving behind his mother, M, father, F, two full sisters, FD and FD_1. M will take 1/6, as on account of two sisters, her share is only 1/6. But FD and FD_1 are excluded on account of the presence of F. F will take the remaining 5/6.

If the deceased dies leaving behind mother and only one sister or one brother and no child, then the mother takes 1/3 share. Thus, P dies leaving behind his mother, M, a sister FD and father F. Mother will take 1/3, D will be excluded because of the father. F will take the remaining 2/3.

(d) When a Muslim dies leaving behind husband/wife, mother and father, the rule is that the mother will take only 1/3 of what is left after allotting the share to the wife/husband. Thus, a Muslim dies leaving behind her father F, her husband H, and her mother M. H, as sharer, will take 1/2 (the rule is that whether there is no child or child of a son how low soever, he takes 1/2 share). The mother will take 1/3 of 1/2, *i.e.*, 1/6. F will take as a residuary heir the remaining 1/3.

P dies leaving behind a widow, W, mother, M, and father, F. W will take 1/3 as a sharer. M will take 1/3 of remaining 3/4, *i.e.*, 1/4. F as a residuary will take the remaining 1/2.

P dies leaving behind his father F, father's mother, FM and mother's mother's mother MMM (mother's mother being dead). Here F will exclude FM. At the same time, FM excludes MMM, since she is the nearer true grandmother. The result is that the entire estate goes to F who takes it as a residuary heir. It should be noted that if there was no FM, then MMM would have taken her share of 1/6 as true maternal grandmother, since F does not exclude her.

This is also an illustration where an heir excludes another, and at the same time, he/she is himself totally excluded from inheritance.

Daughter and Son's Daughter how low soever

The daughter takes a share in the estate of the deceased parent, when there is no son. When once she takes 1/2 : when two or more, all of them together take 2/3. With sons, she takes as a residuary.

When daughter alone is the heir, she takes her half share and the other half goes to her as a residuary.

The son's daughter takes 1/2, when one, 2/3 when two or more, in the absence of son, daughter's higher son's son's son, daughter or equal son's son with equal son's son's son, she takes as a residuary. The son's daughters take *per capita* and not *per stirpes*. This means that the share of son's daughters is divided into as many parts as are son's daughter, irrespective of the number of sons. Under the Hanafi law, the son's daughter inherits in her own right, and not as a representative of the son.

The son's daughter is not excluded when there is only one daughter, but takes 1/6 as a sharer. This principle applies to lower son's daughters also (such as son's daughter how low soever). Thus, P dies leaving behind his father F, mother M, daughter D, and four daughters of a predeceased son, SD, SD^1, SD^2, SD^3. In this case, F will take 1/6 as sharer, M will take 1/6 as sharer, D will take 1/2 as sharer and SD, SD^1, SD^2, SD^3, together will take 1/6, each taking 1/24. Or, P dies leaving behind her father F, mother M, son's daughter SD and son's son's daughter SSD. F will take 1/6, M will take 1/6, SD will take 1/2 and SSD will take 1/6.

Sisters

The sister is a sharer, one sister takes 1/2 share; two or more take 2/3. (a) But she is not a primary heir. She takes only in the absence of a son, son's son, how low soever, father and true grandfather. (b) With full brother (and in certain cases with daughter) she becomes a residuary. (c) If there are more than one full sister, consanguine sister is excluded. But where there is only one sister, then consanguine sister takes 1/6. We may take two examples :

(i) P dies leaving behind a husband, H, and a sister FD. H will take 1/2 and FD will take one-half.

(ii) P dies leaving behind a full sister, FD, three consanguine sisters, CS^1, CS^2, CS^3, one uterine sister US, one uterine brother UB. FD will take one-half, CS^1, CS^2, CS^3 will take 1/6, each taking 1/18. UB and US together will take 1/3 each taking 1/6.

Uterine Brother and Uterine Sister

The uterine brother and uterine sister are not primary heirs. They inherit only in certain circumstances. (a) The uterine brother and uterine sister are excluded by a child, son of a child how low soever, father, true grandfather. (b) A full brother or a full sister do not exclude a uterine brother or a uterine sister. (c) Whenever the uterine brother and sister inherit, they take equal share; the rule of male taking double portion does not apply to them. (d) Uterine brother and uterine sister take 1/6 share. Where there are more than one uterine brother or uterine sister, they together take 1/3, and between them share it equally. We may take two examples :

(i) P dies leaving behind two full sisters and two uterine sisters. The full sisters together will take 2/3, each taking 1/3 and uterine sisters together

will take 1/3 each taking 1/6.

(ii) There is one interesting case, the *Himariyya*, where a Muslim female died leaving behind her husband, H, mother, M, two uterine brothers, UB, UB[1] and one full brother, FS. H took 1/2, M took 1/6, UB and UB[1] took 1/3. In this manner, we find that the entire estate was exhausted, and nothing was left for FS, the full brother. In this case, full brother would have taken as a residuary, had some residue been left.

Residuaries : Distribution of Assets

We would proceed to give a few more examples where the residuaries predominate.

All residuaries are related to the deceased through males. Residuaries may be classified as : (a) descendants of the deceased, (b) ascendants of the deceased, and (c) collaterals of the deceased. The collaterals may be further divided into : (i) descendants of the deceased's father, and (ii) descendants of the deceased's father's father how high soever.

It should be noted that six sharers inherit as residuaries in certain circumstances. These are : (a) the father, (b) true grandfather how high soever, (c) daughter, (d) son's daughter, (e) full sister and (f) consanguine sister. Of these, the father and the true grandfather inherit in certain circumstances, both as sharers and residuaries. No other heir can inherit in double capacity. The other four who are all females, inherit either as sharers or as residuaries. They succeed as residuaries when they co-exist with male heirs of equal proximity. For instance, the daughter inherits as a sharer when there is no son. When there is a son, she inherits as a residuary. The same applies to the other females. These are the only four females who inherit as residuaries, and they inherit in that capacity along with the males of equal proximity. Except the son's daughter how low soever, no one of these females can, as residuary, succeed with a male of lower grade. For instance, daughter can neither succeed as residuary with son's son nor can sister succeed with brother's son. But son's daughter inherits as residuary not only with son's son's son how low soever. For example, when a Muslim dies leaving behind two daughters, D and D[1], a son's son's son, SSS, son's daughter, SD, and son's son's daughter SSD, then D and D[1] together will take 2/3 as sharers, SSS 1/6 as residuary, SD 1/12 as residuary, SSD 1/12 as residuary. We may take two more illustrations.

(i) P dies leaving behind daughter, D, son's daughter, SD, son's son's daughter, SSD, and son's son's son, SSS. D will take 1/2 as sharer, SD will take 1/6 as sharer, SSS and SDD will take the remaining as residuaries, SSD taking 1/9 and SSS taking 2/9.

(ii) P, a Muslim, dies leaving behind two daughters, D and D[1], a son's daughter, SD, and son's son's son, SSS. D and D[1] together will take 2/3, as sharers, and the remaining will go to SD, SSS as residuaries, SSS taking 2/3 and SD taking 1/9 (in accordance with the rule that male takes double portion).

Doctrines of *Aul* (increases) and *Radd* (return)

In a system of law which assigns fixed shares to heirs, two anomalous situations are likely to arise : The sum of shares allotted to various heirs according to their entitlement, (i) may be in access of the unity, or (ii) may be less than the unity. The former situation is solved by the application of the doctrine of *aul* or increase, and the latter by the application of the doctrine of *radd* or return.

Doctrine of *aul* or increase.—When the sum total of the shares allotted to various heirs in accordance with their entitlement exceeds the unity, then the doctrine of *aul* lays down that the share of each heir should be proportionately reduced. This is done by reducing the fractional shares to be the common denominator. Since this is done by increasing the denominator, the doctrine has been the name of increase (*aul*) though, in fact, the shares are proportionately reduced. We may explain the doctrine by an example :

P dies leaving behind her husband, H, two full sisters, FD and FD[1], and mother M. They will be allotted the shares as under :

H.....1/2 or 3/6
FD & FD[1]....2/3 or 4/6.
M.....1/6.

The proportionate reduction of shares is achieved by increasing the denominator from 6 to 8. Thus, the shares of the respective sharers will be : H will take 3/8, FD & FD[1] 4/8 and M 1/8.

We may take another example : P dies leaving a husband, H, full sister, FD, two uterine sisters, MD and MD[1], two uterine brothers, MS and MS[1] and mother, M. All these heirs are sharers. In accordance with their entitlement, their shares will come to : M 1/6, H 1/2, FD 1/9, MD, MD[1], MS and MS[1], 3/4. This will be reduced to 1/9, 3/9, 3/9 and 2/9 respectively.

Doctrine of *radd* or return.—When there is surplus left after allotting the shares to the sharers in accordance with their entitlement, and there are no residuaries to take the surplus, then the doctrine of return lays down that the *surplus* is to be distributed among the sharers in proportion to their respective shares. This doctrine recognizes one exception, *viz.*, neither the husband nor the wife is entitled to the return so long as there is alive another sharer or a distant kindred. But, in India, this is not the law. In the absence of a sharer or a distant kindred, the surplus, returns to the husband or the wife, as the case may be.[1] Thus, under Muslim law of modern India, the doctrine of return lays down : (i) the surplus is distributed among the sharers in proportion to their shares. (ii) But the husband or the wife is not entitled to return, so long as there is a sharer or a distant kindred alive. (iii) If there is no sharer or a distant kindred, then the surplus returns to the wife or husband. We may explain the doctrine with two examples.

(i) P dies leaving behind his mother M, and his daughter D. M takes 1/6 and D takes 1/2. There remains a surplus of 1/3. Since there is no residuary, 1/3 will return to D and M. M's share will be increased to 1/4 and D's share to 3/4.

The formula in the case of return is to reduce the common denominator.

(ii) P dies leaving behind his wife, W, and none else. W will take 1/4 as sharer and 3/4 by return. When there is no other heir, the doctrine of return applies to the spouses.

1. *Md. Arshed* v. *Sajida Bannoo*, (1878) 3 Cal 703; *Batatun* v. *Bilaiti Khanum*, (1903) 39 Cal 683; *Mir Isub* v. *Isub*, (1920) 44 Bom 947.

Distant Kindred

In the absence of the sharers and the residuaries, the estate devolves on the distant kindred. There is only one case in which the distant kindred inherits along with a sharer. When the only surviving sharer is a husband or a wife and there is no residuary, then the husband or wife takes his or her share, and the rest of the estate goes to the distant kindred.

In the class of distant kindred are all those blood relations of the deceased who have not found a place either among the sharers or residuaries, there are : (a) female agnates, and (b) cognates, both males and females. These two classes of relations constitute the distant kindred.

For the purpose of distribution of assets among them, the better classification of distant kindred would be into : (i) descendants, (ii) ascendants, and (iii) collaterals. The classification of the distant kindred may be worked out thus :

I. Descendants of the deceased. Under this category will fall :
   - (i) daughter's children and their descendants how low soever;
   - (ii) son's daughter's children how low soever and their descendants without any limit (*ad infinitum*).

II. Ascendants of the deceased. Under this category will fall :
   - (i) false grandfather how high soever, and
   - (ii) false grandmother how high soever.

III. Collaterals. The collaterals may be further divided as under :
   - (a) Descendants of parents. Under this head will fall :
     - (i) full brother's daughters, and their descendants,
     - (ii) consanguine brother's daughter, and their descendants,
     - (iii) uterine brother's children and their descendants,
     - (iv) daughters of full brother's sons how low soever, and their descendants,
     - (v) daughters of consanguine brother's sons how low soever, and their descendants, and
     - (vi) children of sisters (full, consanguine, and uterine how low soever and their descendants).
   - (b) Descendants of immediate grandparents (true or false). Under this head will fall :
     - (i) full paternal uncle's daughters and their descendants,
     - (ii) consanguine paternal uncle's daughters and their descendants,
     - (iii) uterine paternal uncles and their children and their descendants,
     - (iv) daughters of full paternal uncle's sons how low soever and their descendants,
     - (v) daughters of consanguine paternal uncle's sons how low soever and their descendants,
     - (vi) paternal aunts (full, consanguine or uterine) and their children and their descendants,

   - (vii) maternal uncles and aunts and their children and their descendants,
   - (c) The descendants of remoter grandparents how high soever (true or false), in the same order and like manner as the descendants of all immediate grandparents.

The number of collaterals is limitless, all the descendants or all the ascendants, without any limit as to degrees, are included.

Distribution of Assets among the Distant Kindred

The distant kindred succeed to the estate of the deceased only in the absence of the sharers and residuaries with one exception, *viz.*, when husband or wife is the sole heir, then the distant kindred take the residue. Among the distant kindred, the rules of distribution of assets and of exclusion may be stated thus :

(1) When among the claimants there are descendants, ascendants and collaterals, the descendant distant kindreds are preferred over ascendant distant kindred and collateral distant kindreds. When the claimant distant kindreds are ascendants and collaterals, then ascendants are preferred.

(2)(a) When all claimants are descendants, then the one who has fewer degrees of descent will be preferred.

(b) If all of them have equal degrees of descent, then the children of sharers and residuaries are preferred over the children of distant kindred.

(c) The order of preference among the descendants is as under :
   - (i) daughter's children,
   - (ii) son's daughter's children,
   - (iii) daughter's grandchildren,
   - (iv) son's son's daughter's children,
   - (v) daughter's great grandchildren and son's grandchildren, and
   - (vi) the other descendants of the deceased in the like order.

(d) If the claimants have the degrees of descent and the sexes of intermediate ancestors do not differ, then all the claimants take per capita, male taking double portion. Thus, if P dies leaving behind daughter's daughter, DD, and daughter's son, DS, DD will take 1/3 and DS will take 2/3.

(e) If the intermediate ancestors differ in their sexes, then the following rules apply :

(i) Where there are two claimants, each claiming through his own line of ancestors, the rule requires to stop at the stage of descent, where sexes differ and assign the share at this stage assigning double portion to male and one portion to female ancestor. The shares so assigned will descent to the claimants, irrespective of their sexes.

(ii) Where there are three or more claimants and each is claiming through a different line of ancestors, then the rule lays down to stop at the line where sexes differ and to allot shares there, male getting double portion and female getting one portion. But the shares so allotted to the ancestors do not descend on the claimants. But the shares of all male ancestors on one side and of female ancestors on the other are pooled together, and then divided among their descendants, the male getting double portion and female getting

one portion. For example, P dies leaving behind a daughter's son's daughter, DSD, a daughter's daughter's daughter, DDD, and a daughter's daughter's son, DDS. Since the sex of the ancestors differ at the second line of descent, the shares are to be allotted here, male getting double portion and female getting one portion. DS will get 1/2, DD will get 1/4 and DD[1] will get 1/4. Since there are two females, their shares will be pooled together which will come to 1/2. Since in the line DS there is only one heir, his 1/2 will go to DSD. DD and DD[1]'s 1/2 will go to DDS and DDD, the male taking the double portion. This will mean that DDS will take 1/3 and DDD will take 1/6. This is the rule followed in India.

(iii) Where there are two or more claimants claiming through the same intermediate ancestor, the rule is to count each of such ancestors if male, as many males as there are claimants claiming through him and, if female, as many females as there are claimants claiming through her, irrespective of the sexes of the claimants. When an intestate leaves descendants in the fourth or remoter generations, this process is to be applied as often as there may be occasions to group of the sexes of intermediate ancestors.

Ascendants

On the failure of descendant distant kindreds, the property devolves on the ascendant distant kindreds.

(a) Among the ascendant distant kindreds, the nearest is mother's father. If he exists, he will take the entire estate.

(b) On his failure, estate will devolve on such false grandfather or grandmother who trace their ascend through a sharer, *viz.*, father's mother's father and mother's mother's father. If both co-exist, the FMF being on the paternal side will take double portion, while MMF being on the maternal side will take one portion. This means that FMF will take 2/3 and MMF will take 1/3.

(c) On the failure of father's mother's father and mother's mother's father, the property will devolve on the false ancestors in the third degree, namely, mother's father's father and mother's father's mother. Since both are on maternal side and the sex of the intermediate ancestor is also the same, MF being male will take 2/3 and MFM being female will take 1/3.

The rules of preference among the ascendant distant kindred may be stated thus :

(i) the nearer in degree excludes the remoter,

(ii) among the claimants of the same proximity, those related to the intestate through sharers are preferred to those related through distant kindred, and

(ii) among the claimants of both the paternal side and maternal side of equal degrees, the claimants on the paternal side will get double the portion over the claimants on the maternal side, *i.e.*, 2/3 : 1/3. The next step is to divide the portion assigned to the paternal side among the ancestors of the father and the portion assigned to the maternal side among the ancestors of the mother, in the same manner as among the descendants.

Collaterals

Earlier we have grouped collaterals under three categories. In the first

come nephews and nieces and their descendants. In the second category fall uncles and aunts and their descendants. In the third category are descendants of the remoter ancestors, the great grandparents, how high soever. The collaterals comprise a vast and complicated group of heirs. In actual practice, they succeed seldom. Here, succession of collaterals is discussed very briefly.

Among the collaterals, there are the following rules of exclusion :

(i) A claimant nearer in degree excludes the remoters, and

(ii) Among the claimants of equal proximity, the children of residuaries are preferred to those of distant kindred.

(iii) Among the claimants of the same degree and not excluded by virtue of Rule (ii)(a), the descendants of full brother exclude those of consanguine brother and sister; (b) but the descendants of full sisters do not exclude the descendants of consanguine brother and sister; (c) the descendants of the uterine brother and sister do not exclude the descendants of consanguine brother and sister (after allotting shares to the descendants of full sister and to the descendants of the uterine sister and brother, the residue, if any, goes to the descendants of consanguine brother and sister); and (d) the descendants of uterine brother and sister are not excluded by the descendants of either the full brothers and sisters or by consanguine brother and sister; they inherit along with them.

State : as an Heir by Escheat

In modern India, it is an established rule that the estate of an heirless Muslim devolves on the State.[1] The State takes the property of an heirless person by escheat but takes it subject to any trust, charge or liability affecting it.[2]

IV
THE SHIA LAW OF INHERITANCE

The Shia Scheme of Heirs

The Shias base the right of succession to the property on two principles : (a) *Nasab*, or blood relationship, and (b) *sabab*, or special cause. The *Nasab* is sub-divided into : (i) *dhu fard*, the Koranic heirs or sharers, and (ii) *dhu quarabt*, or blood relations. The *sabab* is also sub-divided into two : (1) *Zawjiyyat* or status of a spouse, and (2) *wala*, special legal relationship. Under *wala* comes right of emancipation, obligation for delicts committed by the deceased, and *wala* of *Immamate*. The first two have become obsolete in India and the third has been replaced by the law of escheat.

Classification of Heirs

In modern India, the heirs of a Shia Muslim fall under the following classes :

I. Heirs by marriage. Under this category are husband and wife.

II. Heirs by consanguinity. These are further sub-divided into the

1. *Sheikh Abdul Rehman* v. *Sheikh Wali Mohamed*, (1922) 2 Pat 75; *Md. Arshad* v. *Sajida*, (1878) 3 Cal 702.
2. *Cavery Vancata* v. *Collector of Masulipatan*, (1863) 11 MIA 61.

following (in accordance with their priority) :

(a) (i) parents,
(ii) children and other lineal descendants, how low soever.

(b) (i) Grandparents (true as well as false) how high soever.
(ii) Brothers and sisters and their descendants, how low soever.

(c) (i) Paternal uncles and aunts of the deceased and of his parents and grandparents how high soever and their descendants how low soever.
(ii) Maternal uncles and aunts of the deceased, and of parents and grandparents how high soever and their descendants, how low soever.

Note.—The heirs in an earlier group exclude heirs in the latter group. Heirs in both the categories of a group inherit simultaneously.

III. State by escheat.

From the point of distribution of assets, the Shia law divides the heirs into two categories :

(i) The sharers and the descendants of the sharers, how low soever, and
(ii) The residuaries and the descendants of the residuaries how low soever.

The Shia law does not recognize distant kindreds as a separate class of heirs. All those blood relations who are not sharers are the residuaries.

Table of Sharers : The Shia Law

HEIRS	SHARES		NORMAL CASE	WHEN SHARE MAY BE AFFECTED
1	2	3	4	5
	One	**Two or more**		
1. Husband	1/4	—	When there is a lineal descendant.	When there is no lineal descendant, he takes 1/2.
2. Wife	1/6	1/8	When there is a lineal descendant.	When there is no lineal descendant, she takes 1/4
3. Father	1/6	—	When there is a lineal descendant.	In the absence of lineal descendants, he takes as residuary.
4. Mother	1/6	—	(a) When there is lineal descendant. (b) When there are (i) Two or more full or consanguine brothers. (ii) One such brother and two such sisters. (iii) Four such sisters with the father.	In other cases, she takes 1/3.

1	2	3	4	5
5. Daughter	1/2	2/3	When no son.	With son, she becomes a residuary.
6. Uterine brother or	1/6	1/3	When no parent, or	
7. Uterine sister	1/6	1/3	lineal descendant.	
8. Full sister	1/2	2/3	When (i) no parent, (ii) lineal descendant, (iii) full brother, or (iv) Father's father.	She takes as residuary, with the full brother and also father's father.
9. Consanguine sister	1/2	2/3	When (i) no parent, (ii) lineal descendant, (iii) full brother, (iv) full sister, (v) consanguine brother, or (vi) father's father.	She takes as residuary with the consanguine brother and also with father's father.

The descendants how low soever of the sharers are also sharers.

Distribution of Assets

It should be noted that under the Shia law, all sharers are not Class I heirs. They are called sharers, since the Koran allots them a specified share. All sharers do not have priority over the residuaries. It should also be noted that the husband and wife always inherit, and inherit with all classes of heirs.

Besides the husband/wife (who always inherit) the heirs for the purpose of determining priority, are placed into three classes :

I.— (i) Parents, and
(ii) Children and other lineal descendants how low soever ; among them the nearer excludes the remoter. Thus, son and daughter exclude son's children and daughter's children.

II.—(i) Grandparents how high soever (true or false), among them nearer grandparents excludes the remoter, and
(ii) Brothers and sisters (among them brothers and sisters of full blood are preferred over brother and sister by consanguinity), and failing them their descendants how low soever, nearer excluding the remoter (children of full brother and sister are preferred over the children of the consanguine brother and sister).

III.—(i) Paternal uncles and aunts of the deceased, and of his or her parents and grandparents how high soever, and their descendants, and
(ii) Maternal uncles and aunts of the deceased, and his or her parents and grandparents how high soever and their descendants.

Distribution of Assets among Class I heirs.—In this class are two groups of heirs, parents, and children and their lineal descendants. Husband and wife take along with them, as they take along with the heirs of the other two classes.

Husband.—Husband takes 1/4 where there is a lineal descendant. Where there is no lineal descendant, he takes 1/2. These shares have been laid down by the *Koran*.

Wife.—Wife takes 1/8 share where there is a lineal descendant. She takes 1/4 where there is no lineal descendant. These shares have been laid down by the *Koran*.

Father.—Father takes 1/6 share (as specified by the *Koran*), if there is a lineal descendant. If there is none, he takes as a residuary.

Mother.—Mother takes 1/6 when there is : (a) lineal descendant, or (b) two or more full or consanguine brothers, or (c) one such brother and two such sisters, or (d) four such sisters with the father. If there are no such relations, she takes 1/3. In her case also, the share has been fixed by the *Koran*.

Daughter.—When there is no son, she takes 1/2; when there are two or more, they together take 2/3, provided there is a son, then she takes as residuary along with him.

Son.—Son is always a residuary.

Grandchildren.—On the failure of children, the grandchildren stand in the shoes of their respective parents and take the same share which their parent would have taken had he or she been alive. This means : (i) children of each son will take the share which the son would have taken as residuary; the children among themselves will divide it on the basis of the rule of double portion to the male child and one portion to the female child; (ii) children of each daughter will take the same share which the daughter would have taken if living, either as a sharer or as a residuary, and will divide it among themselves on the basis of the rule of double portion for a male and one portion for a female.

Remoter Lineal Descendants.—The distribution of assets among the remoter descendants takes on the same basis as among the grandchildren. Thus, P dies leaving behind her husband H, father F and mother M. H will take 1/2 as sharer, M will take 1/3 as sharer, F will take remaining 1/6 as residuary.

Distribution of assets among Class II heirs.—In the absence of Class I heirs, the property devolves on Class II heirs along with the husband or wife, if any.

Among them, the following three situations are likely to arise :

(i) The claimants may be only grandparents, how high soever, *i.e.*, there may not be any brothers and sisters or their descendants. In such a situation, the rules of distribution are : (a) where there exists all the four grandparents, the paternal grandparents will take 2/3 and maternal grandparents will take 1/3. The paternal grandparents divide the 2/3 between themselves on the basis of double portion to males, but maternal grandparents divide it equally between themselves. This may be explained by an example. P dies leaving behind two maternal grandparents, MM, and MF and two paternal grandparents, FF and FM. The combined share of FM and FF will be 12/18, of which FF will take 8/18 and FM will take 4/18. The combined share of MM and MF will be 6/18 and MM will take 3/18 and MF will take 3/18. (b) If there is only one grandparent on the paternal side, he or she will take the entire 1/3; likewise, if there is only one grandparent on the maternal side, he or she will take the entire 1/3. If there are two grandparents on one side and one on the other, they will take their respective shares. (c) Where there are no grandparents, but higher grandparents, then the property will be divided among them in accordance with the aforesaid rules, (a) and (b).

(ii) The claimants may be only brothers and sisters, *i.e.*, there may not be any grandparents. In such a situation, the rules of distribution of assets are : (a) The brothers and sisters of full blood exclude the brothers and sisters by consanguinity, (b) The uterine brothers and sisters are not excluded, either for brothers and sisters of full blood or by consanguine brothers and sisters; they inherit along with them and take their shares specified by the *Koran*. One uterine brother or sister takes 1/6 share, while two or more take 1/3 share, (c) In the absence of the full brother, the full sister takes as sharer; the share is one-half when there is only one sister, 2/3 where there are two or more sisters. When there is a full brother (or brothers), she takes as residuary along with him, (d) In the absence of the consanguine brother, the consanguine sister takes as sharer, taking 1/2 share when one, and 2/3 when two or more. If there is a consanguine brother, then she takes as residuary along with him.

(iii) Where there are grandparents (or remoter grandparents) with brothers and sisters or their descendants in such a situation, after taking out the the shares of husband or wife, if any, the distribution of property will take place according to the following rules :

(a) A maternal grandfather counts for one uterine brother and a maternal grandmother as one uterine sister, (b) A paternal grandfather counts for, one full or consanguine brother, and a paternal grandmother counts as one full or consanguine sister, (c) If there are no grandparents, then remoter grandparents step into the shoes of grandparents, (d) If there are no brothers and sisters, then their descendants step into the shoes of brothers and sisters. Thus, P dies leaving behind a paternal grandfather, FF, and two full sisters, FD and FD[1]. FF will be equal to a full brother. In view of this, FF will take 2/3 and FD and FD[1] together will take 1/3.

Distribution of assets among Class III heirs.—In the absence of heirs of Class I and Class II, the assets of the deceased, after taking out the share of husband or wife, if any, will devolve on Class III heirs. The Class III heirs may be divided into the following categories in accordance with their priority (*i.e.*, heirs in an earlier category will exclude heirs in later categories) :

(a) Paternal and maternal uncles and aunts of the deceased,

(b) The descendants of (a) how low soever, the nearer in degree excluding the remoter,

(c) Paternal and maternal uncles and aunts of the parents,

(d) The descendants of (c) how low soever, the nearer in degree excluding the remoter,

(e) Paternal and maternal uncles and aunts of the grandparents,

Distribution of Assets among Class I heirs.—In this class are two groups of heirs, parents, and children and their lineal descendants. Husband and wife take along with them, as they take along with the heirs of the other two classes.

Husband.—Husband takes 1/4 where there is a lineal descendant. Where there is no lineal descendant, he takes 1/2. These shares have been laid down by the *Koran*.

Wife.—Wife takes 1/8 share where there is a lineal descendant. She takes 1/4 where there is no lineal descendant. These shares have been laid down by the *Koran*.

Father.—Father takes 1/6 share (as specified by the *Koran*), if there is a lineal descendant. If there is none, he takes as a residuary.

Mother.—Mother takes 1/6 when there is : (a) lineal descendant, or (b) two or more full or consanguine brothers, or (c) one such brother and two such sisters, or (d) four such sisters with the father. If there are no such relations, she takes 1/3. In her case also, the share has been fixed by the *Koran*.

Daughter.—When there is no son, she takes 1/2; when there are two or more, they together take 2/3, provided there is a son, then she takes as residuary along with him.

Son.—Son is always a residuary.

Grandchildren.—On the failure of children, the grandchildren stand in the shoes of their respective parents and take the same share which their parent would have taken had he or she been alive. This means : (i) children of each son will take the share which the son would have taken as residuary; the children among themselves will divide it on the basis of the rule of double portion to the male child and one portion to the female child; (ii) children of each daughter will take the same share which the daughter would have taken if living, either as a sharer or as a residuary, and will divide it among themselves on the basis of the rule of double portion for a male and one portion for a female.

Remoter Lineal Descendants.—The distribution of assets among the remoter descendants takes on the same basis as among the grandchildren. Thus, P dies leaving behind her husband H, father F and mother M. H will take 1/2 as sharer, M will take 1/3 as sharer, F will take remaining 1/6 as residuary.

Distribution of assets among Class II heirs.—In the absence of Class I heirs, the property devolves on Class II heirs along with the husband or wife, if any.

Among them, the following three situations are likely to arise :

(i) The claimants may be only grandparents, how high soever, *i.e.*, there may not be any brothers and sisters or their descendants. In such a situation, the rules of distribution are : (a) where there exists all the four grandparents, the paternal grandparents will take 2/3 and maternal grandparents will take 1/3. The paternal grandparents divide the 2/3 between themselves on the basis of double portion to males, but maternal grandparents divide it equally between themselves. This may be explained by an example. P dies leaving behind two maternal grandparents, MM, and MF and two paternal grandparents, FF and FM. The combined share of FM and FF will be 12/18, of which FF will take 8/18 and FM will take 4/18. The combined share of MM and MF will be 6/18 and MM will take 3/18 and MF will take 3/18. (b) If there is only one grandparent on the paternal side, he or she will take the entire 1/3; likewise, if there is only one grandparent on the maternal side, he or she will take the entire 1/3. If there are two grandparents on one side and one on the other, they will take their respective shares. (c) Where there are no grandparents, but higher grandparents, then the property will be divided among them in accordance with the aforesaid rules, (a) and (b).

(ii) The claimants may be only brothers and sisters, *i.e.*, there may not be any grandparents. In such a situation, the rules of distribution of assets are : (a) The brothers and sisters of full blood exclude the brothers and sisters by consanguinity, (b) The uterine brothers and sisters are not excluded, either by brothers and sisters of full blood or by consanguine brothers and sisters; they inherit along with them and take their shares specified by the *Koran*. One uterine brother or sister takes 1/6 share, while two or more take 1/3 share, (c) In the absence of the full brother, the full sister takes as sharer; the share is one-half when there is only one sister, 2/3 where there are two or more sisters. When there is a full brother (or brothers), she takes as residuary along with him, (d) In the absence of the consanguine brother, the consanguine sister takes as sharer, taking 1/2 share when one, and 2/3 when two or more. If there is a consanguine brother, then she takes as residuary along with him.

(iii) Where there are grandparents (or remoter grandparents) with brothers and sisters or their descendants in such a situation, after taking out the shares of husband or wife, if any, the distribution of property will take place according to the following rules :

(a) A maternal grandfather counts for one uterine brother and a maternal grandmother as one uterine sister, (b) A paternal grandfather counts for, one full or consanguine brother, and a paternal grandmother counts as one full or consanguine sister, (c) If there are no grandparents, then remoter grandparents step into the shoes of grandparents, (d) If there are no brothers and sisters, then their descendants step into the shoes of brothers and sisters. Thus, P dies leaving behind a paternal grandfather, FF, and two full sisters, FD and FD[1]. FF will be equal to a full brother. In view of this, FF will take 2/3 and FD and FD[1] together will take 1/3.

Distribution of assets among Class III heirs.—In the absence of heirs of Class I and Class II, the assets of the deceased, after taking out the share of husband or wife, if any, will devolve on Class III heirs. The Class III heirs may be divided into the following categories in accordance with their priority (*i.e.*, heirs in an earlier category will exclude heirs in later categories) :

(a) Paternal and maternal uncles and aunts of the deceased,

(b) The descendants of (a) how low soever, the nearer in degree excluding the remoter,

(c) Paternal and maternal uncles and aunts of the parents,

(d) The descendants of (c) how low soever, the nearer in degree excluding the remoter,

(e) Paternal and maternal uncles and aunts of the grandparents,

(f) The descendant of (e) how low soever, the nearer in degree excluding the remoter, and

(g) Remoter uncles and aunts and their descendants in like order.

To the above order of succession, one exception is recognized, *viz.*, when only claimants are full paternal uncle's son and a consanguine paternal uncle, the former excludes the latter.

Rules of distribution of assets among the uncles and aunts.—The rules of distribution of assets among the uncles and aunts may be stated thus : (i) If there is a husband or wife, then he or she is to be assigned the Koranic share. (ii) Where there co-exist paternal uncles and aunts as well as maternal uncles and aunts, then paternal side is to be assigned 2/3 share (irrespective of the number of aunts and uncles) and maternal side is to be assigned 1/3 (irrespective of the number of uncles and aunts). (iii) The portion falling on the paternal side is to be divided among aunts and uncles if they are brothers and sisters of the deceased. Thus, if there are uterine uncles and uterine aunts and full paternal uncles and full paternal aunts, then 1/3 will go to uterine aunts and uncles, and the residue will go to full paternal uncles and aunts (since in this situation, full brother and sister take as residuaries). While 1/3 share of uterine uncles and aunts will be divided equally between them, the 2/3 falling to the share of full uncles and aunts will be divided on the basis of double portion to males. If instead of full paternal uncles and aunts, there are consanguine uncles and aunts, the residue will go to them in the like manner. However, if there are uterine uncles and aunts, full uncles and aunts, and consanguine uncles and aunts then the last (*i.e.*, consanguine uncles and aunts) will be excluded. (iv) The one-third portion falling to the share of maternal uncles and aunts will be divided thus : if there are uterine maternal uncles and aunts, then 1/3 (1/6 if there is only one) will go to them. The residue will go to full maternal uncles and aunts. In their absence to consanguine maternal uncles and aunts, between them, the residue will be divided equally, since on the maternal side, the rule of double portion to males does not apply. (v) In the absence of one side, the other side takes the whole of the property (Of course, after deducing the shares of husband or, wife, if any).

We may take an illustration.

P dies leaving behind one full paternal uncle, FPU, one full paternal aunt, FPA, four uterine paternal uncles, UPU, UPU[1], UPU[2], UPU[3], two uterine paternal aunts, UTA and UPA[1], one uterine maternal uncle, UMU, one uterine maternal aunt, UMA. Thus, there are eight uncles and aunts on the paternal side, namely, FPU, FPA, UPU[1], UPU[2], UPU[3], UPU and UPA. They together will take 2/3. Of this 2/3, FPU and FPA will together take 4/9 (2/3 of 2/3), FPU taking 8/2, and FPA, taking 4/2, (the rule of double portion to males apply here). UPU, UPU[1], UPU[2], UPA and UPA[1] together will take 2/9 (1/3 of 2/3) each taking 1/6 (among the uterine relation males and females take equally). The 1/6 (among the uterine relation males and females take equally). The 1/3 of UMU and UMA will be divided among them equally, each taking 1/6 (here rules of equality apply).

Distribution of assets among the descendants of uncles and aunts.—In the absence of uncles and aunts, the property devolves on these descendants. In the distribution of assets among the descendants of aunts and uncles, the doctrine of representation applies. The rule of preference among them is that nearer excludes the remoter. This may be explained by an example. P dies leaving behind a full paternal aunt's daughter, FDDD and a uterine maternal uncle's son and a daughter, MSSS and MSSD. In this case, the distribution of assets will first take place at the roots, MS taking 1/6 as sharer and FD taking remaining 5/6 as residuary, MS's 1/6 will go to MSSS and MSSD, between them they will share it equally. FD's 5/6 will go to his daughter FDDD.

Among the remoter descendants of the uncles and nieces, the rules of distribution of assets are the same.

Doctrines of Return and Increase

The same anomalous situations relating to distribution of assets among the heirs are likely to arise under the Shia law as they are likely to arise under the Sunni law. The Shias, like the Sunnis, solve the problem of excess by the application of the doctrine of *radd*, though in the actual application of the doctrine, there are some differences between the two. The Shias do not recognize the doctrine of increase.

Doctrine of *Radd* or return.—If after the distribution of assets among the sharers, some residue is left and there are no residuaries to take it, then the balance is distributed among the sharers in proportion to their shares. However, the doctrine of return under the Shia law is subject to the following three exceptions :

(i) if there are other heirs, howsoever remote, the husband or the wife is not entitled to the return. The Oudh court took the view that in the case of the wife, in the absence of heirs, the balance will go to the wife by return.[1] It is submitted that the Oudh view is equitable, and it may be hoped that other courts will follow it.

(ii) If an intestate Shia dies leaving behind (a) mother, father and one daughter, as well as (b) two or more full or consanguine brothers, or one such brother and two such sisters or four sisters, then the mother is not entitled to a share in the return. The peculiarity of the situation is this that the brothers and sisters, being heir of Class II, are themselves excluded from inheritance, but their presence prevents the mother from taking a share in the return. For instance, if a Shia dies leaving behind his mother M, father F, a daughter D and two full brothers FS and FS[1]. M will take 1/6, F will take 1/6, D will take 1/2. FS and FS[1] being in Class II will be excluded. Since there is a balance left after the distribution of assets among the heirs, it will be distributed between F and D; mother will not get a share in the return. With the result, the share of F will be increased to 5/24 and D to 15/24 and the share of M will remain the same, *i.e.*, 1/6.

(iii) In case a Shia dies leaving behind uterine brothers and sisters as well as full sisters, then the uterine brothers and sisters are not entitled to the return. But this exception does not apply if the uterine brothers and sisters co-exist with the consanguine brothers and sisters. In such a case, all of them share proportionately in the balance.

Doctrine of increase.—The Shias do not recognize the doctrine of *aul* or increase. In case the sum total of shares allotted to the sharers exceed the

1. *Abdul Hamid Khan* v. *Peare Mirza*, AIR 1953 Oudh 78.

unity, then they lay down that the fraction in access is to be deducted from the share of the following : (i) daughter or daughters, (ii) full or consanguine sister or sisters (but not the uterine sister).

DISQUALIFICATIONS

Under Muslim law, just as in any other system of law, there are certain persons who are, though heirs, not entitled to a share in the inheritance on account of their disqualifications.

Non-Muslim.—Under the Islamic law, a non-Muslim was not entitled to inherit the property from a Muslim. In India, this is not so. A Muslim who has renounced Islam, or had in any manner ceased to be a Muslim, will, nonetheless, be entitled to inheritance in the property of his deceased Muslim relation whose heir he is.[1] But his non-Muslim descendants will not be entitled to inherit the property of the deceased Muslim. The inheritance to the property of a convert to Islam is governed by the Muslim law.[2]

Murderer.—Under the Hanafi law, an heir who has caused the death of the deceased intentionally, inadvertently, by accident, mistake, or negligence is excluded from inheritance. Under the Shia law, the heir is disqualified only if the death is caused intentionally. This is a principle of general policy, and is followed in most systems of law that an heir who has caused the murder of the deceased is disqualified from inheritance.

Child in the womb.—Under Muslim law, a child in the womb of her mother is entitled to inherit, if it is born alive. A stillborn child is treated as having been born alive if its mother was treated with violence as a consequence of which she gave birth to it. The law among the Shias and the Sunnis in this regard is the same.

Illegitimate children.—Under the Hanafi law, an illegitimate child is not entitled to inherit from its father, but it is allowed to inherit from its mother. The mother can also inherit the property of her illegitimate children. The illegitimate child inherits not merely the property of its mother but also the property of all other relations with whom it is related through the mother. Thus, when a Hanafi female dies leaving behind her husband and an illegitimate son of her sister, the husband will take 1/2 as sharer and the residue will go to the sister's son. Since the illegitimate child cannot inherit from its father, it cannot inherit from any other relation through the father. Under the Ithana Ashari school, an illegitimate child is treated as *nullius filius*, and cannot inherit the property of any of its parents, or any other person through its parents.

Daughters.—Daughters as a rule are entitled to inheritance. But sometimes they are excluded from inheritance by custom or statute. In such a case, the shares of other heirs are calculated as if daughter did not exist.

Among the Gujars of Punjab and Jammu and Kashmir, daughters are excluded from inheritance by custom. They succeed to the property only in default of agnates.[3] Under the Bombay Watan Act, 1886, if a Muslim *Watandar* died leaving a widow, a daughter and a paternal uncle, then the

1. Section 3, Caste Disabilities Removal Act.
2. *Miler Sen Singh* v. *Moqbul Hassan Khan*, (1930) 37 IA 313; *Chandra Sekhrappa* v. *Government of Mysore*, AIR 1956 Mys 136.
3. *ASCII DAR* v. *Faze*, (1960) J & K 53.

daughter had no right to a share in *watan* land. In such a case, the widow and uncle took the land, as if the daughter did not exist.

Insanity and unchastity.—Insanity and unchastity are not disqualifications under the Muslim law, and, therefore, an insane or unchaste heir is entitled to inherit.

Eldest son.—Under the Ithana Ashari law, the eldest son who is of sound mind is exclusively entitled to wearing apparel of his father, his copy of *Koran*, his sword, and his ring, provided the father had left some other property besides these.

Childless widow.—Under the Ithana Ashari law, a childless widow is not entitled to a share in her husband's land, both agricultural as well as urban. However, she is entitled to her share in the value of trees and buildings standing on the land as well as share in the movable property of her husband. Immovable property includes the debts due to her husband.[1] It has been held that a childless widow, in the absence of other heirs, is entitled to inherit not merely her share but also rest of the property including the land of her husband by the application of the doctrine of return.

Step-Parent.—Since step-parents are not related to their stepchildren, they are not entitled to inherit the property of their stepchildren.

Absent heir.—If an heir is absent at the time of the distribution of assets, then his share has to be kept apart for him until such time as he is presumed to be dead.[2]

Succession to the property to eunuch.—In *Illyas* v. *Badshah*,[3] the question before the court was whether eunuch who are Muslims by religion are governed by the Muslim law or customary law. The court held that they were governed by the customary law.[4]

1. AIR 1935 Oudh 78.
2. Section 107, Evidence Act.
3. AIR 1990 Gau. 70.
4. AIR 1990 Gau. 70.

Chapter 39

ADMINISTRATION OF ESTATES

Strictly speaking, Muslim law did not recognize the concept of the administration of estates. It merely laid down a machinery for the distribution of the estate of the deceased among the legatees and the heirs.

In modern India, the administration of the estate of a deceased Muslim as well as of the members of other communities, is governed by one uniform law, *i.e.*, the Indian Succession Act, 1925. It should be noted that the substantive law that is applicable to the estate of a deceased Muslim is still Muslim law.

Administration.—The administration of estate means that the estate of the deceased is to be applied successively to the payment of funeral expenses (not the amount spent in ceremonies performed for securing the peace of the soul of the deceased),[1] expenses of proceedings for obtaining probate or letters of administration, wages and services rendered to the deceased within three months of his death, debts of the deceased, and legacies. The remaining estate is to be distributed among the heirs.

Legal representative.—As a general rule, the executor or administrator (or in their absence, the heirs) of a deceased Muslim is his legal representative, and all the assets of the deceased vest in him. It is the duty of the executor or the administrator, where there is one, to collect the assets, discharge the debts, pay the legacies, and distribute the balance of assets among the heirs. However, even when a Muslim dies leaving behind a will, it is not necessary for the executor to obtain the probate of the will. But, if the debts, due to the deceased, are to be recovered, the representation is necessary, as no court of law will pass a decree in favour of the estate of the deceased unless the representation, in any form, as laid down in the Succession Act, 1925, is obtained. Thus, when a deceased dies leaving behind a will, the probate may be obtained. In case he dies intestate, the letters of administration may be obtained.

In case the executor is not able to carry out the administration in his lifetime, he can, under the Hanafi law, appoint a successor to himself to carry out the purpose of the will. In case he dies without appointing a successor, it seems, the appointment of another executor by the court will be necessary. Where there are more than one executor, the survivors are competent to continue to act as executors.

After the payment of funeral expenses and debts of the deceased, the executor, under the Muslim law, acts as an active trustee in respect of bequeathable one-third, and as a bare trustee for the heirs in respect of the remaining two-third. The powers and duties of executors and administrators

1. *Sajid* v. *Md. Sayid*, AIR 1954 All 71.

are laid down in the Indian Succession Act. These provisions also apply to the executors and administrators of a Muslim.

According to the strict Muslim law, a non-Muslim cannot be an executor but in modern India, a non-Muslim can be validly appointed as an executor.

Probate or letters of administration with the will annexed may be obtained, whether the will is oral or in writing. Once the probate or letters of administration is granted, it conclusively establishes the claim of the executor or administrator to represent the estate for all purposes. In case an executor appointed under a will does not obtain the probate, the court has power to appoint any person as an administrator with the copy of the will annexed. The letters of administration may be granted to a person who is an heir, legatee or creditor of the deceased.

Any person claiming an interest in the estate of the deceased may bring a suit for administration for the purpose of ascertainment of the estate and of debts and liabilities relating to it, for a proper allocation of debts to the properties to which different rules of descent apply, for accounts, and for the declaration and delivery of the interests therein to those entitled to them.

Vesting of estate.—The estate of the deceased vests in the executor, where there is one, and it vests in him, even if no probate has been obtained by him. In case the letters of administration have been obtained, the estate vests in the administrator. If there is neither an executor nor an administrator, then the property vests in the heirs. The law may be stated thus :

A. When a Muslim dies leaving behind a will whereunder he had appointed an executor, then his estate vests in him, as he is the legal representative of the deceased. In particular, (i) the bequeathable one-third vests in him for the purpose of the will, and (ii) the rest vests in him as a bare trustee for the heirs. An executor is required to do the following :
   (a) to collect all the assets of the deceased, including the debts,
   (b) to pay all charges against the estate such as funeral expenses,
   (c) to pay the debts of the deceased,
   (d) to pay the legacies, and
   (e) to distribute the remaining property among the heirs.

Although it is not necessary for an executor to obtain the probate, but no court will pass a decree against a debtor of the deceased, or allow execution proceedings, unless probate is obtained. For the purpose of realization of the debts of the deceased, an executor who had not obtained the probate might obtain a certificate under the Administrator General's Act, 1963, or a succession certificate under the Indian Succession Act, 1925.

B. In case a Muslim dies intestate and letters of administration have been obtained, the assets of the deceased vest in the administrator. The administrator is the legal representative of the deceased. An administrator is required to do the following :
   (a) to collect the assets and debts of the deceased;
   (b) to pay all the charges against the estate, such as funeral expenses,

(c) to pay the debts, and

(d) to distribute the balance among the heirs.

C. When a Muslim dies without appointing an executor, or dies intestate, and no letters of administration have been obtained, then the property of the deceased vests in the heirs. In such a case, the heirs are also the legal representatives of the deceased. But neither a decree can be passed against debtors of the deceased nor can execution proceedings be launched against the judgment-debtors of the deceased, unless : (i) a certificate is obtained under the Administrator General's Act, or (ii) a succession certificate is obtained under the Indian Succession Act, 1925.

When the estate vests in the heirs, it vests in them not jointly but in severality as from the time of the death of the deceased, in proportion to their respective shares in the estate. They hold it subject to the payment of the charges and debts in proportion to their shares in the estate and also subject to the payment of legacies, if any, up to the bequeathable one-third.

Legal Actions Against and on behalf of the Estate of the Deceased

Under Muslim law, the estate of the deceased devolves on the heirs the moment he dies, and heirs are free to distribute it among themselves at any time thereafter.[1]

Suit by creditors.—When a Muslim dies indebted, the creditors may sue the executor or administrator, and, in the absence of an executor or administrator, the heirs, for the realization of their debts. In case the estate of the deceased has not been distributed among the heirs, a creditor can execute a decree against the entire estate, irrespective of the extent of the liability of each heir. In *Daya Ram* v. *Shyam Sundari*,[2] Ayyangar, J said that though, ordinarily, the court does not regard a decree binding on a person who is not impleaded *ex nominee* in an action, there are certain recognized exceptions to this rule; and one of these is that where certain persons are impleaded after diligent and bona fide enquiry in the genuine belief that they are the only persons interested in the estate, the whole estate of the deceased will be duly represented by the persons who are brought on the record or are impleaded, and the decree will be binding on the entire estate. But, the learned judge said, this rule will not apply to cases where there has been fraud or collusion between the creditors and the heirs impleaded, or where there are other circumstances which indicate that there has not been a fair or real trial, or where the absence of heir had a special defence which was not and could not be taken in the earlier proceedings.[3]

Succession certificate.—A succession certificate may be obtained by a Muslim.[4]

1. *Jafri Begum* v. *Amir Muhammed*, (1885) 7 All 822.
2. AIR 1965 SC 1049.
3. *See* also *Md. Suleman* v. *Md. Ismail*, AIR 1966 SC 749.
4. *Rukmani Bai* v. *Bisni Ilabai*, AIR 1993 MP 45.

Alienations

Alienation by an heir of his share before the payment of debt.—Since the estate of a Muslim vests in the heirs immediately on his demise, an heir has the power of alienating his share and pass a good title to bona fide alienee for value, even if no distribution of assets of the deceased has taken place, and notwithstanding the outstanding debts of the deceased.[1]

Under Muslim law, a sale of his share by an heir in execution of a decree of his creditor amounts to a transfer and passes a good title to the transferee.[2]

Alienation by an heir for payment of debt.—When one of the heirs of a deceased is in possession of the entire estate, he has no power of alienating out of the estate of the deceased more than his share, even for the discharge of the debts of the deceased.[3] If he does so, then such an alienation operates as a transfer of his interest in the estate, and is not binding on the other heirs and creditors of the deceased.[4]

Heirs' liability to pay debts.—The nature of the liability of the heirs to pay the debts is not a joint liability. Each heir is to pay the debts proportional to the estate that he gets. The heirs of a Muslim dying intestate on whom falls the liability to discharge the debt, proportionate to their respective shares in the estate devolved, can hardly be classified as joint contractors, partners, executors or mortgagees. They are by themselves independent debtor; the debt having been split by operation of law. *Inter se* they have no jural relationship as co-debtor or joint debtors so as to fall within the shadow of contractors, partners, executors or mortgagee or in a class akin to them. They succeed to the estate as tenants-in-common in specific shares. Therefore, the acknowledgement of the debts only by one heir can be confined to himself and cannot be extended to the other co-heirs for they are independent debtors, and not as an agent, express or implied, on behalf of other co-heirs could not be said to be a payment on behalf of all so as to extend the period of limitation as against all. The fact that the heir acknowledging the debt by making payment was in the possession of the entire estate and had not parted with it by means of partition to the other co-heirs, would not make him liable for the entire debt.

1. *Land Mortgage Bank* v. *Bilaya Uddin*, (1870) 7 Cal LR 460.
2. *Wahidunissa* v. *Subradin*, (1970) 6 Beng LR 54.
3. *Parsothamadas* v. *Bal Dhabu*, AIR 1973 Guj 88.
4. *Jain Md.* v. *Karam Chand*, AIR 1974 PC 99.

Chapter 40

WILLS UNDER MUSLIM LAW

I

A Muslim may dispose of his entire property by gift *inter vivos*. But his testamentary power is limited to the disposal of only one-third of his property. The reason for bestowing testamentary power on a Muslim, and for its limitation, has been thus stated by M. Sautayra : "A will from the Mussalman's point of view is a divine institution, since its exercise is regulated by the *Koran*. It offers to the testator the means of correcting to a certain extent the law of succession, and of enabling some of those relatives who are excluded from inheritance to obtain a share in his goods, and of recognizing the services rendered to him by a stranger, or the devotion to him in his last moments. At the same time, the Prophet has declared that the power should not be exercised to the injury of the lawful heirs." Thus, the Muslim law of wills is a compromise between two opposite tendencies. It is undesirable for any man to interfere with the divine law. Secondly, it is considered to be a moral duty of every Muslim to make arrangements for the distribution of his property (within the specified limit on one-third) after his death. This seems to be the reasons why the word *Wassaya, wassiyyat* has two meanings; it means a will and it also signifies a moral exhortation.

A Muslim is not allowed to bequeath more than a third of his property with a view to not affecting the shares of those who are enjoined by the *Koran* to inherit the property of the deceased. He is also not allowed to bequeath anything to the heirs. It is because he is allowed to bequeath one-third with a view to fulfilling his duty in respect of those who have served him, who have shown devotion to him in his last moments, and who get nothing. Both these limitations can be made nugatory if the heirs consent to the disposition made in violation of these limitations. Under the Hanafi law, such consent to be valid must be given after the death of the testator.

The will of Muslim is governed by the Muslim law. The provisions of testamentary succession laid down in the Succession Act, 1925 affect the Muslim wills marginally.

The Muslim law of Wills (*wassiyyat*) may be discussed under the following heads : (i) capacity to make a will, (ii) formalities of making a will, (iii) legatees, (iv) construction of the will, and (v) revocation of the will.

Capacity to make a will

Every Muslim who is of sound mind and of the age of majority has the capacity to make a will. As has been seen earlier in this work, with the exception of marriage, dower and divorce, the age of majority of Muslims is regulated by the Indian Majority Act, under which the age of majority is the

completion of eighteenth year in ordinary cases, and completion of twenty-first year in cases where the guardian of a minor is appointed under the Guardians and Wards Act. Muslim law-givers lay down that a will of a minor can be ratified by him on attaining majority, but the will of the person of unsound mind cannot be ratified on his regaining sanity. Not merely this, the Muslim authorities hold that the will made by a sane person will become invalid, if subsequently he becomes an insane.

Under the Shia law, a will made by a person who has taken poison, or has wounded himself with a view to committing suicide, is invalid. But a will made by a person who subsequently commits suicide is valid.

A will made by a person under coercion, undue influence, or fraud is invalid. Similarly, the court will scrutinize the will of a *pardanasheen* lady very carefully before admitting it.

Formalities of a will

No specific formalities for the execution of a will are required. A will may be oral or in writing. When the will is in writing, no specific form is laid down. It may not even be signed by the testator or attested by the witnesses.[1] However, it is necessary that the intention of the testator should be clear and unequivocal. Thus, a letter written by a Muslim shortly before his death, containing directions for the disposition of his property, was held to constitute a valid will.[2] The name of the document is immaterial; whatever name may be given to it. If it possesses the substantial character of a will, then it will be treated as a will. But a document with the following words, "I have no son, and I have adopted my nephew to succeed to my property and title", was held not to constitute a will.[3]

When a will is oral, no form of declaration is necessary. Obviously, the burden of establishing an oral will is very heavy, and an oral will must be proved with utmost precision with every circumstance of time and place. It has been observed, "He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as prove, with utmost precision, the words on which he relies, with every circumstance of time and place."[4]

A will may be made by gestures. The *Fatwai Alamgiri* says, "A sick man makes a bequest, and being unable to speak from weakness gives a nod with his head, and it is known that he comprehends what he is about, if his meaning be understood and if he dies without regaining the power of speech, the bequest is lawful."

Subject-matter of Will

Any type of property, immovable, corporeal or incorporeal which is capable of being transferred, may form the subject-matter of the bequest. It is not necessary that the subject-matter of the will should be in existence when the will is made; it is sufficient if it is in existence at the time of the testator's death. The bequest may consist of the corpus or of the usufruct. A testator

1. *Ramjilal* v. *Ahmed*, AIR 1952 MB 56.
2. *Mazhar* v. *Bodha*, (1898) 21 All 91; *Abdul Hameed* v. *Mohamed Yoonus*, AIR 1940 Mad 153.
3. *Jewunt* v. *Jet*, (1844) 3 MIA 245.
4. *Babboo Ben Pertab* v. *Rajendra*, (1867) 12 MIA 1.

may give corpus to one person and the usufruct to another. Thus, a right to occupy a house during a future period of time, or to take the rents, or future produce, or usufruct for a limited time, or for the lifetime of the legatee may validly constitute the subject-matter of a will.

As has been stated earlier, the testamentary power of a Muslim is limited to the bequeathable one-third.

Bequeathable one-third.—The bequeathable one-third means a third of the estate of a testator as it is left after the payment of his funeral expenses, debts and other charges. The law in this respect may be stated thus :

(i) All schools of Muslim law, except the Ithana Ashari school, hold that the bequest of more than the bequeathable one-third is invalid unless consented to by the heirs after the death of the testator. The consent can be inferred from the conduct.[1]

(ii) According to the Ithana Ashari school, the consent of the heirs, to validate a bequest of more than one-third, may be given even during the lifetime of the testator. The Ithana Asharis also hold that a bequest of any part of the estate even more than bequeathable one-third may be made for the performance of the obligatory religious duties or by way of *muzaribat or queraz* (both words have the same meaning), an enterprise in which one invests his capital and another his labour with mutual participation in profit is known as *muaribat* or *qaraz* on the terms of equal division of profits between the legatee and the heirs.

(iii) Under a valid custom, a Muslim may be allowed to dispose of his entire property under his will. The Shariat Act, 1937 does not apply to wills, and, therefore, a Muslim who has under custom the power to dispose of his entire property under a will can do so even now.

(iv) If a testator has no heirs, he may dispose of his entire property by a will.

(v) A bequest of more than one-third may be validated by the consent of heirs. The rationale behind this rule is that the limitation on the testator's power of disposition is solely for the benefit of the heirs, and, if they want to forego the benefit, they are free to do so. The consent of heirs may be express or implied. The consent once given cannot be rescinded.

(vi) Where a testator dies leaving behind only a wife/husband as the sole heirs and no blood relations, then if the testator is male, he can bequeath 5/6 of his estate, and if the testator is a female, she can bequeath one-half of her properties to her husband. She dies leaving behind her husband and no blood relation. Under Muslim law, bequests to the heir up to 1/3 of property are valid. Thus, the husband will take 1/3 of the estate (the bequeathable 1/3 under the will and 1/2 of the remaining as an heir. In all, he takes 2/3 : 1/3 under the will and 1/3 as an heir). Ordinarily, the remaining 1/3 will go to the estate by escheat, but on account of the bequeath of 1/4 to him (a woman can bequeath up to two-third under these circumstances), he again takes one-sixth of the remaining one-third to complete the one-half estate that is bequeathed to him. In the result, the husband takes 1/3 as heir and 1/3+1/6 as a legatee, *i.e.*, in all, he takes 5/6, the remaining 1/6 goes to the State by

1. *Abdul* v. *Mirtuza*, AIR 1991 Pat 154.

escheat.

(vii) If a Muslim had married or got his marriage registered under the Special Marriage Act, 1954, then the Muslim law of succession does not apply to him. He is governed by the Succession Act, 1925 and, therefore, he can bequeath his entire property by a will.

An heirless Muslim can bequeath his entire property. In case he has only his wife as an heir, he can bequeath all his properties minus the share of his wife.[1]

Custom.—A custom which limits the choice of persons in whose favour will can be made is not against public policy. Among the eunuch community of Madhya Pradesh under Guruchela system, a guru cannot will more than one-third of his property without the consent of the Chela. The custom was held valid.[2]

Bequests in future and contingent bequeaths.—A bequest in future is void; so is a contingent bequest. When a Muslim makes a bequest with a condition, then the condition is void, and the bequest is valid.

Bequest for pious purposes.—A bequest may be made for pious purposes. Such bequests fall under three categories : (i) bequests for *faraiz*, *i.e.*, for purposes expressly ordained by the *Koran*, such as *haj* (pilgrimage), *Zakat* (title) and expiration, (ii) bequests for *wajiwat*, *i.e.*, which are themselves necessary and proper, though not expressly obtained, such as *sadaka, filrat*, clarity given on the day of breaking of the fast, and (iii) bequests for *nawafil*, or the bequests of purely voluntary nature and as bequests for the poor, for building mosque, a bridge or an inn. The one-third rule applies to bequests for pious purposes also. The bequests for *faraiz* have priority over the other two and the bequests for *wajiwat* takes precedence over the bequest for *nawafil*. Among the bequests for *faraiz*, a bequest for *haj* has priority over *zakat* and *zakat* over expiration.

When some heirs consent.—When a bequest violates the one-third rule but some of the heirs consent to it, while others do not, the bequest is payable out of the share of the consenting heirs only.

Abatement of legacies.—When a testator bequeaths in violation of one-third rule and the heirs refuse to give the consent, the bequests under Hanafi law abate rateably.

Under the Shia law, the rule is different. The bequests of prior date take priority over those of later date, unless the later bequest was intended to revoke the earlier.

The Legatee

Under Muslim law a bequest to a person not in existence at the time of the testator's death is void. However, Muslim law permits bequests to be made to a child in the womb, provided it is born within six months of the death of the testator. A legacy made to a person who does not survive the testator lapses and forms part of the estate of the deceased.

A legacy can be made to any person, man or woman, adult or minor, Muslim or non-Muslim. A bequest can also be made for a religious or

1. *Damodar* v. *Sahiyabibi*, AIR 1989 Bom 1.
2. *Illyas* v. *Badshah*, AIR 1990 MP 334.

charitable object which is not opposed to the Islam. Thus, a Muslim cannot lawfully make a bequest for building a Jewish synagogue or a Christian church; or for translating the *taurit*; or *injeel*; or directing that so much of his property should be given to the named person for reading the *Koran* over his grave, or for the construction of a vault or arch over it; or for shrouds to the Muslims; or for aiding a tyrant or an oppressor.[1]

Bequest for heirs.—The Muslim authorities lay down that no bequest can be made to an heir, unless the other heirs consent to it, after the death of the testator under the Hanafi law, or at any time under the Shia law. It is not necessary that all heirs should consent. A single heir may consent so as to bind his share.[2] The determination as to who are the heirs of the testator is not made at the time when the will is made but at the time of the death of the testator. For instance, a Muslim makes a gift of 1/3 of his estate to his paternal grandfather. He dies, and is survived by his paternal grandfather, father and a son. Since paternal grandfather is not an heir, the bequest of one-third estate to him is valid, no consent of the heirs is needed. Or, a Muslim made a bequest to his grandfather of 1/3 of his estate, at the time when he had a father and a son living. Subsequently, his father died. When he died, he was survived by his grandfather and the son. Here both are heirs, and, therefore, the bequest to the grandfather will not be valid unless the son consents.[3]

The consent of the heirs may be express or implied; but silence cannot amount to consent.[4]

The Ithana Asharis take a different view. The *Sharaya-ul-Islam* says, "A bequest in favour of one's kindred is highly proper whether they be his heirs or not." They hold that so long as the one-third rule is not impugned, it is immaterial that the legatee is an heir or a stranger. Thus, if P bequeaths 1/3 of his property to his son, A, and dies leaving behind A and two more sons, B and C. The legacy to A is valid without the consent of B and C. But if the legacy oversteps the one-third limit, then it will not be valid without the consent of other heirs which may be given either during the lifetime of the testator or after his death.

Legacy to a murderer.—In most systems of law, it is a rule that a murderer or a person who abets the murder of the deceased is not entitled to the legacy. Under the Hanafi law, this rule is found in most strict terms. The rule is that the murderer is excluded from taking the legacy, whether the homicide was intentional or accidential. The Ithana Ashari law excludes the man-slayer only when the homicide is intentional. It is immaterial whether the bequest is made before or after the act causing the death.

Construction of Wills

The general rule governing the construction of wills is that a Muslim will is to be construed in accordance with the rules of construction of the will laid down in the Muslim law, the language used by the testator and the surrounding circumstances. It is also a general rule of construction of will

1. *Abdul* v. *Turner*, ILR (1884) 9 Bom 158.
2. *Ghulam Mahommad* v. *Ghulam Hussain*, AIR 1932 PC 81.
3. *Kunhi Avulla* v. *Kunhi Avulla*, AIR 1964 Ker 201.
4. *Izzul* v. *Chairman, District Kuthchery*, (1956) Nag 501.

that unless a different intention appears, a will speaks from the death of the testator, and the bequests, contained in it take effect accordingly. It is a universal rule of construction of wills that the court tries to give effect, as far as possible, to the intention of the testator. Where a testator used such ambiguous language that its construction is not possible by giving usual meaning to the words used, then it is left to the heirs to give it whatever interpretation they want. Thus, where a testator lays down in his will that "something", or some trifle, should be given to P or "I leave a garment or a book to Q," then the heirs may give to P and Q whatever they like, or any garment, such as a new coat or an old one or any book, a copy of the *Koran* or a book of songs. Where a testator bequeaths an article by description without appropriating any specific article, and if the testator does not own any such article at the time of his death, the bequest fails, unless the intention to bequeath the value of the article is indicated. In such a case, the article as described by the testator will be purchased out of the assets and handed over to the legatee.

Revocation of the Will

Just as in other systems of law, so under Muslim law, a testator may revoke his will or any part of it at any time, either expressly or by implication. Similarly, a testator is also free to make any additions to his will. But if the addition to the subject of the bequest is such that the subject of the bequest cannot be delivered with the addition, then the bequest stands revoked.

Express revocation.—If a testator makes a bequest of some property to a person, and by a subsequent will, he bequeaths the same property to another person, the first bequest is revoked. But bequest of the same property to one person in earlier portion of the will and to another person in the later portion of the will does not revoke the earlier bequest, but both the legatees share the property equally. A will may be expressly revoked by tearing it off, or by burning it. It seems that mere denial of a will does not operate as its revocation.

Implied revocation.—Any act inconsistent with the bequest will go to revoke the will. Thus, an act which results in the extinction of the subject-matter of the bequest, or extinction of the proprietary rights of the testator will impliedly revoke the will. For instance, bequest of a plot of land is revoked when the testator builds a house on it; or bequest of a house is revoked when the testator sells or makes a gift of it to another.

II
MARZ-UL-MAUT (DEATH-ILLNESS) GIFTS AND ACKNOWLEDGEMENTS

The death-bed gifts are recognized in many systems of law, though to what extent and in what circumstances, such gifts can be made, the laws differ. *Marz-ul-maut* gifts of Muslim law derive their rules from two branches of Muslim law, the law of gifts and the law of wills. The law relating to the *marz-ul-maut* is a combination of rules derived from both the branches. A *danatio mortis causa*, as a gift of ambiguous nature, not exactly a gift, nor exactly a legacy, but partaking the nature of both.

The different schools of Muslim law take divergent views on the

marz-ul-maut gifts. The Malikis take the view that the *marz-ul-maut* gifts are void. The Hanafis and the Shias hold that such gifts to the extent of one-third are valid.

Marz-ul-maut.—A gift to be valid as *marz-ul-maut* gift must be made during *marz-ul-maut*, or death-illness. The most valid definition of *marz-ul-maut* is that a malady which, it is highly probable, will issue fatally. A gift must be deemed to be made during *marz-ul-maut*, if it was made "under pressure of the sense of the imminence of death." But where the malady is of long duration, such as consumption of albuninuria, and there is no apprehension of death, the malady cannot be called *marz-ul-maut*. The Muslim law-givers hold the view that if a disease continues for a period of more than one year, then it cannot be called *marz-ul-maut*. However, even then the disease may become *marz-ul-maut* if it reaches a stage where the apprehension of death is genuine or death is highly probable. When a person is in imminent fear of death whether from disease or any other cause, so that in case of an illness, the man is so broken by it as to be incapable from conducting his ordinary avocations outside his house; for example, a *fakih* (Jurist) from going to the mosque, a tradesman to his shop, a woman from attending to her indoor occupation, it is *marz-ul-maut*. Another test is that when the malady has become so severe as to make it permissible for the sufferer to offer his prayers without standing up, it must be illness of death. Hectic fever, haemorrhage, bilious, bloody swelling and fetid purgings have been considered to be *marz-ul-maut*. The Shia authorities are to the same effect. *Sharaya-ul-Islam* holds that every malady which is accompanied by a genuine apprehension of death is *marz-ul-maut*. Thus, temporary fever, headache, ophthalmia and tubercle on tongue are not *marz-ul-maut*. It is submitted that all those ailments, whether dangerous or not which result in death, should be regarded as *marz-ul-maut* maladies; and those from which death does not ensue should not be regarded as *marz-ul-maut* maladies.[1] A feeling, a sense of imminent death should be there.

It is now established that in order to constitute a *marz-ul-maut*, the following conditions must be satisfied :

(i) The malady or illness must result in the death.
(ii) The malady or illness must cause a reasonable or genuine apprehension of death in the mind of the sufferer.
(iii) There should be some external indicia of a serious illness or malady, and[2]
(iv) Delivery of possession must be given to the donee.

In every case, whether a malady or illness is *marz-ul-maut* or not, will depend upon its facts. It is an essential ingredient of a *marz-ul-maut* gift that

1. *Fatma Bibee* v. *Ahmed Baksha*, (1908) 35 Cal 271 (PC); *Ibrahim Goolam* v. *Saboo*, (1908) 35 Cal 1; *Zanrao* v. *Sher Mohamed*, AIR 1934 Pesh 91; *Mahommed* v. *Marian*, (1881) 3 All 731; *Sarbai* v. *Rabiabai*, (1906) 30 Bom 537; in these cases, the malady was held not to be *marz-ul-maut*. *Kamalli* v. *Sherbanoo*, (1907) 31 Bom 265; *Fazl* v. *Rahim*, (1819) 40 All 238; *Musi Imran* v. *Ibn Hussain*, AIR 1933 All 341, in these cases the malady was held to be *marz-ul-maut*.
2. *Goodu* v. *Rakiabi*, (1978) 2 MLJ 426.

the donor must die of the malady from which he was suffering at the time when he made the gift. What is required to be proved upon the preponderance of probabilities is whether the gift was made by the ailing person while under the apprehension of the death and further whether while so ailing he died. If he survives the malady—whatever be the nature of malady—the gift cannot be called the *marz-ul-maut* gift. In such an eventuality, the only question will be whether there has been a valid *hiba*. The second requirement of a *marz-ul-maut* gift is that there must be an apprehension of death in the mind of the donor, irrespective of the fact whether there is or there is none, in the mind of others attending on him, including the physician.[1] In short, the requirement is that there must be a subjective apprehension in the mind of the donor that the death was imminent. If there is an apprehension of death in the mind of the sufferer, it is not necessary that he should be confined to the bed.

It is a unique feature of *marz-ul-maut* gift that it must fulfil all the requirements of a valid *hiba*, including the delivery of possession, and, at the same time, it is subject to all the restrictions of a will. It is, therefore, necessary to understand that a gift by a *mariz* (sufferer) is a contract and not a *wasiyat*, and the right of disposition is restricted to a third on account of the right of heirs which attaches to the property of the *mariz*. And as it is an act of bounty, it is effective so far only as the law allows, that is, a third. And being a contractual disposition, it is subject to the conditions relating to gifts, among them taking of possession by the donee before the death of the donor. Thus, a *marz-ul-maut* gift cannot exceed one-third of the properties of the deceased. Under the Hanafi law, a *marz-ul-maut* be made to an heir is not valid, unless other heirs consent to it. Under the Ithana Ashari law, it can be made to an heir also. But among the Ismailya Shias, such a gift cannot be made to an heir without the consent of other heirs.

Acknowledgements of Debts

Like Hindus, Muslims also emphasise the moral and legal obligation of a man to pay his debts. According to a tradition, when the heir of a deceased Muslim was brought to the Prophet, and on his coming to know that the deceased had died in debt, he refused to conduct the funeral service until someone undertook to pay the debt of the deceased.

Under Muslim law, a person may acknowledge his liability or debt whether, in health or ailing. The Muslim authorities take the view that a declaration or admission of liability by a Muslim is binding not only on the person who makes the declaration or admission but also on his heirs.

When the only proof of a debt or liability of the deceased is the death bed acknowledgement of it, then the Muslim law-givers rank it, in respect of priority, midway between other debts and legacies. This means that other debts have priority over the death bed acknowledgement. Such debts have priority over the legacies. Under the Hanafi law, a *marz-ul-maut*

1. *Abdul Hafiz* v. *Sahebbi*, AIR 1975 Bom 165.

acknowledgement of debts or liability in favour of an heir is no proof of debt or liability at all and no effect can be given to it. Under the Ithana Ashari law, such an acknowledgement is valid.

In death illness, acknowledgement of debts and liability, the danger of fictitious acknowledgements is great and a duty is cast on the court that such acknowledgements should not become an engine of fraud and fraudulent preference.

A divorce pronounced by a person who is suffering from a mortal malady cannot deprive the wife of her right of inheritance.

PART XIV
GIFTS

Chapter 41

GIFTS UNDER HINDU LAW

Historical.—From the very beginning, *dan* (gifts) have been an important aspect of Hindu law. The subject has been dealt with by our sages under the title "Resumption of Gifts," which is one of the eighteen titles of law. This is also a unique feature of Hindu law of gifts that, while in other systems of law, a gift is clothed in a garb of sale, here sales are given the appearance of gift. This indicates the importane of, and sanctity attached to the gifts in Hindu law. The Hindu sages gave very large powers to a person to make gifts of property. But only that should be given in gift which has been left after the expenses of maintaining the family have been defrayed.

The Hindus, from the very beginning, have been making gifts for *Istha* and *Purta*, which are recognized religious acts.

In modern Hindu law, a Hindu has full power of alienation over his separate property. He may make a gift *inter vivos* with respect to his undivided interest in the coparcenary property. The *Karta* is allowed to make gifts of small portions of the joint family property for certain purposes, and father-*karta* can make gifts of love and affection. The Hindu female holder of *stridhan* had power to dispose of *stridhan* by gift. A woman holder of woman's estate can also make gifts for certain purposes. The position of females has been substantially modified by S. 14, Hindu Succession Act, 1956. Now she has unfettered power of making gift of all her properties which she holds absolutely.

The modern Hindu law of gifts largely consists of Chapter II and Chapter VII of the Transfer of Property Act, 1882, and partly of the case law under the title of Hindu law of gifts. As to the details of the former, reference should be made to the relevant provisions of the Transfer of Property Act. We would state briefly the law under both the heads.

Definition of gifts and formalities.—Section 122, Transfer of Property Act, 1972 defines a gift as under :

"Gift is the transfer of certain existing movable and immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee."

According to the Mitakshara, a gift is defined as under : "Gift consists in the relinquishment (without consideration) of one's own right (in property) and the creation of another man's right is completed on that other's acceptance of the gift, but not otherwise."[1]

1. *Mitakshara* III, 5-6.

Under Hindu law, no writing was necessary for the validity of a gift. Hindu law insisted on the delivery of possession.[1] No gift could be complete without the delivery of possession and once possession was delivered, there remained nothing else to be done to complete the gift. Mere registration was not enough.[2] However, if from the nature of the subject-matter of the gift, delivery of possession could not be made, it was enough to validate the gift if the donor did all that he could do to complete it.[3] But that law stands abrogated as the provisions of the Transfer of Property Act apply to Hindu gifts. Under modern Hindu law, compliance with the provisions of the Act, irrespective of the fact whether possession has or has not been given, is necessary. Section 123 of the Act provides for the formalities thus :

> For the purpose of making a gift of immovable property, the transfer of immovable property 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 movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

It should be noted that the Transfer of Property Act does not dispense with the requirement that gift must be accepted by the donee. Mere execution of gift deed without the acceptance of the gift by the donee is not enough. However, the requirement of delivery of possession is no longer an indispensable condition.

Gift to an unborn person.—Hindu law did not recognize gift to an unborn person.[4] Now the Hindu Transfers and Bequests Act, 1960, a Union law, has been made applicable to the whole of India, except the State of Jammu and Kashmir, under which a gift to unborn person can be made.

A gift once made and completed in all respects cannot be revoked by the donor unless it was obtained by fraud or undue influence.[5] However, a gift made with the intention to defraud or delay the creditors is voidable at the instance of the creditors.[6]

Under the provisions of Chapter II, Transfer of Property Act, 1882, the following conditions must be satisfied, otherwise the gift will not be valid : (i) if a gift to an unborn person is proceeded by a prior disposition, the gift must be of the whole of the remaining interest of the transferor in the property,[7] (ii) the gift should not offend the rule against perpetuity,[8] (iii) if the gift to a class of persons with regard to some of them is void as offending (i) or (ii), the gift fails in regard to those persons only and not in regard to the whole classes,[9] and (iv) if a gift to an unborn person is void under (i) or (ii), any gift intended

1. *Mukhtar Khan*, v. *Ghalao Khan*, AIR 1977 P & H 257 (Punjab customary law).
2. *Vasudeo* v. *Narayan*, (1883) 7 Bom 131.
3. *Kahpas* v. *Kanhaya Lal*, (1884) 11 Cal 121 (P.C.).
4. This is what the Privy Council thought and laid down, though Hindu law recognized gift to unborn persons.
5. *Manigavri* v. *Narandas*, (1891) 15 Bom 546.
6. *Bishan* v. *Asmaida Koer*, (1884) 6 All 560 (P.C.).
7. S. 13 of the T.P.A.
8. S. 14 of the T.P.A.
9. S. 15 of the T.P.A.

to take effect such gift is also void.[1]

Donatio mortis causa.—Under Hindu law, a *donatio mortis causa* (death bed gifts) is valid.[2] Such a gift must conform with all the requirements of a valid gift under Hindu law, since Hindu law makes no distinction between a gift made in contemplation of death and other gifts. Section 129, Transfer of Property Act, 1882 excludes from its purview gift of movable property made in contemplation of death. Section 190, Succession Act, 1925 deals with *donatio mortis causa*. That section runs : "A man may dispose by gift made in contemplation of death of any movable property which he could dispose of by will. A gift is said to be made in contemplation of death where a man who is ill, and expects to die shortly of his illness, delivers to another the possession of any movable property to keep as a gift in case the donor shall die of that illness. Such a gift may be rescinded by the giver. It does not take effect if he recovers from the illness during which it was made nor if he survives the person to whom it was made." A *donatio mortis causa* may be made orally or in writing, but the intention to pass the property in the thing given must be clear and the property be actually delivered and accepted by the donee in the donor's lifetime.

1. S. 16 of the T.P.A.
2. *Bhaskar* v. *Sarasvati*, (1893) 17 Bom 786.

Chapter 42

HIBA (GIFTS)

I

The gifts in India are generally governed by the Transfer of Property Act, 1872. However, the provision of gifts in the Transfer of Property Act does not apply to the Muslims. In Muslim law, gifts are called '*hiba*'. The English term 'gift' is of a wider connotation and applies to all the transactions where one transfers one's property to another without any consideration. The term '*hiba*' has a narrow meaning. According to the *Durr-ul-Muhtar*, *hiba* is a "transfer of the right of property in substance by one person to another without return." The Hanafi lawyers define *hiba* as an act of bounty by which a right of property is conferred in something specific without an exchange."[1] The Shias hold that a *hiba* is an obligation by which property in a specific object is transferred immediately and unconditionally without any exchange and free from any pious or religious purpose on the part of the donor.[2] Muslim law allows a Muslim to give away his entire property by a gift *inter vivos*, even with the specific object of disinheriting his heirs.[3]

Muslim law recognizes certain institutions which appear to be similar to *hiba*, though they are clearly distinguishable from it. There are, *aariat*, *sadaqa*, *wakf*, *hiba-bil-iwaz* and *hiba-ba-shart-ul-iwaz*.

Essentials of a Hiba

The requisites of a valid *hiba* are :[4]

(i) Capacity to make the *hiba*,
(ii) the subject-matter of the gift,
(iii) the donee, and
(iv) formalities of *hiba*.

Broadly speaking, the ingredients of a valid gift are : (1) Declaration of gift (2) Delivery of subject-matter of gift by the donor to the donee (3) Acceptance thereof.[5]

Capacity to make a Hiba

Mental capacity.—Every Muslim, male or female, married or unmarried, who has attained the age of majority and who is of sound mind has the capacity to make a gift. For the purpose of making a gift, the age of majority is attainment of eighteen years, if he is under a certificated

1. Ameer Ali, I, 40-41.
2. *Ibid*, at 41.
3. *Abdul* v. *Ahmed*, AIR 1973 Del 280.
4. *Abdul* v. *Fifth Addl Mag*, 1978 All LJ 543; *see* also *Jameela* v. *Sheik*, AIR 1979 Mad 193.
5. *Fatimabibi* v. *Abdul Rehman Abdul Karim*, AIR 2001 Guj. 175.

guardian, the age of majority is the completion of twenty-one years. The rule of Muslim law of majority, *i.e.*, attainment of puberty, does not apply to the gifts. A person of unsound mind can make a valid gift during lucid intervals.

The Muslim law recognizes the doctrine of *ikrah* or compulsion, and a gift-deed executed under compulsion is not valid. In such a case, the gift is voidable, and it can be avoided by the donor whose consent was so obtained. On the ground of *ikrah*, a transaction can be avoided if the compellor was in a position to carry out the threat held out by him, and that the threat itself was such as would influence the conduct of a reasonable person. Thus, in *Hussaina Bai* v. *Zohara Bai*,[1] a *pardanasheen* Muslim lady was brought from Nagpur to Burhampur, she had a fit of hysteria, and soon after, she was made to sign the impugned gift-deed without affording her any opportunity of taking independent advice and without informing her as to what were the contents of the documents. The court said that the gift deed was got executed from the lady under compulsion, it was not her voluntary act, and, therefore, the deed was held invalid. In a number of cases, the Indian courts have held that when a gift is made by a *pardanasheen* lady, the proof of independent outside advice is the usual mode of discharging the burden by the donee that the gift was free from compulsion.[2]

Financial capacity.—The Hanafis hold the view that insolvency does not create an incapacity to make a gift, but the *kazi* has the power to render such a gift nugatory, if it is made with a view to defrauding the creditors. The Indian Courts follow the Hanafi view. Thus, in an early case, it was held that mere indebtedness of the donor, or his being in embarrassed financial circumstance is not by itself a ground for avoiding a gift, since from the fact of indebtedness alone fraudulent intention cannot be inferred.[3] However, in every gift there must be a bona fide intention on the part of the donor to transfer property to the donee.[4] Obviously, if a gift is made with an intention to defraud the creditors, the gift is invalid.[5]

Subject-matter of Gift

All forms of *mal* (property), over which dominion could be exercised or anything which would be taken into possession or which could exist as a specific entity, or as an enforceable right, may be the subject-matter of a valid gift. A gift of any property may be made. A *hiba* or *gift inter vivos* can be made of the entire property.

Gift of actionable claims or incorporeal property.—On account of some conflict of opinion amongst the Muslim authorities,[6] a view has been propounded that the delivery of physical possession of the subject-matter of the gift is necessary in all cases for the validity of a *hiba*, and, therefore, those properties whose physical possession cannot be delivered cannot form the subject-matter of a valid gift. In other words, the *hiba* can be made only of corporeal property, and incorporeal property cannot be the subject-matter of a valid gift. It is submitted that this is no longer correct, and, under Muslim law

1. 1960 MP 60.
2. *Pasapini* v. *Moula*, (1956) 2 Cal 570.
3. *Azimanessa* v. *Dale*, (1868) 6 Mad HCR 468.
4. *Sultan Miya* v. *Ajibakhatoon*, (1932) 59 Cal 557.
5. *Abdul* v. *Mir Md.* (1886) 11 IA 10.
6. See *Sharaya-a-ul-Islam* 240-43.

in modern India, the incorporeal property can be as much the subject-matter of gift as the corporeal property.[1] Thus, negotiable instruments, government promissory notes, *Malikana* rights or the *zamindari* rights can be the subject-matter of a valid gift. Similarly, gift can also be made of property on lease,[2] or property under attachment,[3] or right to receive specific share in the offerings that may be made by the pilgrims at a shrine.[4] In short, all actionable claims or any other incorporeal property may constitute the subject-matter of *hiba*. When a gift of an actionable claim is made by an instrument in writing, the acceptance of the gift by the donee is essential.[5]

Gift of equity of redemption.—When the mortgagee is not in possession of the mortgaged property, the gift of the equity of redemption is valid, since the mortgagor can put the donee into possession. But when the mortgagee is in possession of the mortgaged property, there is a difference of opinion among our High Courts. In *Ismail* v. *Ramji*,[6] the Bombay High Court held that the gift of equity of redemption is invalid, since the mortgagor cannot put the donee into possession. On the other hand, the High Courts of Allahabad, Calcutta and Patna,[7] held that even in such a case, gift is valid, since the gift can be preferred by some appropriate steps so as to put the donee into possession constructively.

Gift of property held adversely to the donor.—The property in the possession of a usurper cannot be the subject-matter of the gift. The gift of such property is void, since the donee cannot be put into possession of such property. In *Maqbool Alam* v. *Khadajia*,[8] the Supreme Court said that the gift of the property in the possession of a trespasser cannot be made merely by a declaration on the part of the donor and acceptance on the part of the donee. Such a gift will be valid only when the donor puts the donee into possession or does overt act to put the property within the power of the donee to obtain the possession. It has been held that a gift of immovable property by the purchaser at a sale in execution made before the confirmation of the sale and before the acquisition of possession is valid where the donor authorizes the donee to take the possession of the property.[9]

Gift of a non-existent object.—The Fatwai Alamgiri lays down : "...a gift of something which is not in existence at the time of conduct will not be valid." As to why the gift of butter in milk, flour in wheat, etc. is invalid, the Muslim authorities say that such things change constantly in their character in the process of making, and a new thing altogether comes into being. The gift of such things will be valid only when they are separated and made over to the donee. However, this prohibition does not apply to a subsisting recurring right in something which is neither variable nor uncertain, such as

1. *Mullick Abdool Gaffoor* v. *Muleka*, (1884) 10 Cal 1112.
2. *Ibid.*
3. *Anwari* v. *Nizamuddin*, (1898) 21 All 165.
4. *Iqbal* v. *Controller of Estate Duty*, AIR 1964 Guj 452; *Ahmaddin* v. *Illahi Baksh*, (1912) 34 All 465.
5. *Iqbal* v. *Controller of Estate Duty*, AIR 1964 Guj 452.
6. (1899) 23 Bom 682.
7. *Muhar Bibi* v. *Maharulla*, AIR 1933 Cal 785; *Abdul Kabir* v. *Jamila*, AIR 1951 Pat 315; *Madhi Hussain* v. *Sikandar*, AIR 1933 All 255; *Rahim Bux* v. *Md. Hassan*, (1888) 11 All 1.
8. AIR 1966 SC 1194.
9. *Mirja Abid* v. *Munno Bibi*, AIR 1927 Oudh 61.

assignment of the ascertained rents and issues of any particular property, and, therefore, gift of such a right is valid.

A mere *spes successionis* cannot be made a subject-matter of *hiba*.

Assignment of insurance policy.—The assignment of insurance policy by any person is statutorily permitted in India. Section 38(7) of the Insurance Act, 1938 lays down that notwithstanding any law or custom having the force of law to the contrary, an assignment in favour of a person made with the condition that it shall be inoperative, or that the interest shall pass to some other person on the happening of a specified event during the life of the policy holder, and an assignment in favour of the survivor or survivors of a number of persons shall be valid. This provision applies to the Muslims.[1]

Gift of Musha.—The word "*musha*" means an undivided share or part in a property, movable or immovable. Among the Shafis and the Ithana Asharis, the gift of *musha* is valid, if the donor has withdrawn his dominion and allows the donee to exercise the control.[2] But the rule is otherwise among the Hanafis. The general rule is thus laid down in the *Hedaya*, "A gift of a part of a thing which is capable of division is not valid unless the said part is divided off and separated from the property of the donor; but a gift of an indivisible thing is valid." The reason for the latter rule is that no complete possession of the undivided share or part can be given and, therefore, incomplete possession must suffice. On the other hand, the reason, for the former rule is that when part of share is capable of division, the gift cannot be valid till the delivery of complete possession is made by dividing it from the rest.

Obviously, a share or part in a property may be : (i) by its very nature indivisible, such as a share in a common staircase or a right of bathing in a tank or *hamam*, or (ii) it may be divisible by separating it from the rest. In the former case, the gift of the undivided share is valid. Thus, a share in a staircase,[3] a share in a business of Turkish bath,[4] or a share in the bank of a tank,[5] can be the subject-matter of a valid *hiba*. In the latter case, it is not void, but merely irregular. It is capable of being perfected by dividing the share and handing over its possession to the donee.[6]

The doctrine of *musha* has been subject to much criticism. It has been said that the doctrine is "wholly unadapted to a progressive society." The doctrine has been confined to within the strictest rules by judicial interpretation, and has been cut down considerably. Thus, the following exceptions have been recognized :

(i) The gift by one co-sharer to the other. In *Md. Buksh* v. *Hosseni*,[7] on the death of a Muslim, his widow W, son S and his daughter D succeeded to his property. W made a gift of her undivided share in the inherited property to S and D. The gift was held valid. In such a case it is necessary that the donor divest himself or herself totally of his or her proprietary rights.

(ii) The gift of a share in a *zamindari* or a *taluka*. Thus, in *Ismail* v. *Idrish*,[1] a gift of an undivided share in *Kaimi* was held valid.

(iii) The gift of a share in freehold property in a large town. In *Golam Arif* v. *Saidoo*,[2] one A made a gift of one-third of the house owned by him which was situated in Rangoon. The gift was held valid.

(iv) The gift of a share in a land company. In *Ibrahim* v. *Saiboo*,[3] it was said that it would not be proper to apply the doctrine of *musha* to shares in companies and freehold property, since in its origin, the doctrine applied to very different categories of property.

1. *Sadiq Ali* v. *Zahuda Begum*, AIR 1939 All 744.
2. *Sadik* v. *Hashim*, (1916) 43 IA 212.
3. *Kasim Hussain* v. *Sharifunnisa*, (1883) 5 All 285.
4. *Fayazuddin* v. *Kutubuddin*, (1929) 10 Lah 761.
5. *Ala Baksa* v. *Mahabat Ali*, AIR 1939 Cal 739.
6. *Ibid*; *Hayrtuddin* v. *Abdul Gani*, AIR 1976 Bom 23; *Kunhimoideen Kutty* v. *Abdul Kadar*, (1977) KLT 793.
7. (1988) 15 IA 81.

The Donee

A gift may be made to any person without any distinction of age, sex or religion. Thus, a gift may be made to a minor or an adult, to a man or to a woman, to a married or unmarried person or to a Muslim or a non-Muslim. Under the Hanafi law, the donee must be legally in existence at the time of *hiba*. Thus, gift to an unborn person, one not in *esse*, either actually or presumably, is invalid. Under the Shia law, a gift to an unborn person can be validly made provided the gift commences with a person in *esse*. For instance, if a gift is made to a person A for life, then under the Hanafi law, A will take absolutely, the condition being void, while under the Ithana Ashari law, A will take a life estate, and, on the death of A, the estate will revert to the donor.

Both among the Sunnis and Shias, a gift to A and his children generally, or to his descendants line after line, would take affect to A, the conditions limiting the estate being void. (See under the title "Life Estate"). However, a gift to a child in womb is valid, if the child is born within six months of the gift. In such a case, the Muslim law presumes that the child was actually in existence as a distinct entity in the womb of the mother.

When a gift is made to a minor or a person of unsound mind, the gift will be complete by the delivery of possession to the guardian of the minor or of the person of unsound mind.[4] When a gift is made to a group of persons some of which are minors and some are major, the acceptance of gift must be made by majors themselves, though on behalf of minors acceptance may be made by their guardian.

The Muslim law allows gifts to be made jointly to two or more persons but where the gift of a property capable of division is made to two or more persons without specifying their shares or without dividing them, then the gift is invalid. However, such a gift will be valid if separate possession is taken by each one of the donee by mutual arrangement or in accordance with the deed.[5]

Formalities : Delivery of Possession

A gift may be oral or in writing, irrespective of the fact whether the

1. AIR 1974 Pat 54.
2. (1907) 35 Cal 1.
3. AIR 1967 Ker 130.
4. *Kaniz Fatima* v. *Jai Narayan*, AIR 1944 Pat 334; *Kaly* v. *Gulzarbeg*, AIR 1946 Nag 357; *Azizi* v. *Sona*, AIR 1962 J and K 4.
5. *Hussain Bi* v. *Hussain Sp.*, AIR 1989 Ker 218.

property is movable or immovable.[1] The acceptance of gift is necessary.[2] But in every case the delivery of possession must be made to the donee. The requirements of formalities laid down in Section 123, Transfer of Property Act, are not applicable to the Muslim gifts. The only formality that is essential for the validity of a Muslim gift is "taking possession of the subject-matter of gift by the donee either actually or constructively."[3] The registration of the gift-deed does not cure the defect of want of the delivery of possession, and a gift made under a registered deed is not valid, if delivery of possession has not been made to the donee. Further, if the delivery of possession has not been made, though all the formalities laid down in S. 123, Transfer of Property Act are complied with, such a gift is not valid. Under Muslim law, for the gift of even immovable property, neither the written gift deed nor registration is necessary.

Since clear and unequivocal declaration of intention of making a *hiba* is an essential element, it is essential that the donor should completely divest himself of all ownership and dominion over the subject-matter of the gift and should deliver the possession of property to the donee. The delivery of possession may be actual, constructive or symbolic. For the validity of a gift, relinquishment of control over the subject-matter of the gift by the donor is essential. Any reservation of possession of property by the donor during his lifetime will render the *hiba* invalid. A mere book entry of possession or deposit in the joint names of the donor and donee does not amount to the delivery of possession.

A declaration in a gift deed that the possession has been handed over to the donee binds the heirs of the donor. Similarly, a recital in a gift deed that possession has been handed over to the donee gives rise to a presumption of such delivery of possession. Such a presumption may be rebutted.

The delivery of possession may be constructive. Thus, in a case, where the donor made the gift of corpus though reserved the usufruct to himself, the payment of the government revenue by the donee in respect of the land, the subject-matter of gift, was held to be the constructive delivery of possession by the donor to the donee. In *Noorjahan* v. *Mukhtar*,[4] a donee made a gift of certain property to the donee, but the donor continued to manage the properties and appropriated the profits to himself. Till the death of the donor, no mutation was made in the name of the donee. It was held that since no delivery of possession was made, the gift failed.

When the gift is made to a minor, the delivery of possession may be made to the guardian of the minor, or to the minor himself if he had attained the age of discretion.

Delivery of possession of immovable property.—In the case of immovable property, actual delivery of possession is necessary.[5] However, when the property is in the occupation of the tenants, the delivery of possession may be made by attorning the donee, by delivery of title-deeds or

1. *Ibrahim* v. *Noor Ahmad*, AIR 1984 Guj 126; *Ratan Lal* v. *Md. Nabiuddin*, AIR 1984 AP 344.
2. *Ghulam* v. *Taj Md.*, AIR 1995 All 330.
3. *Mohammed* v. *Fakr*, (1922) 49 IA 195; *Wadi* v. *Faquar*, AIR 1978 J & K 92 (FB).
4. AIR 1970 All 170.
5. *Khajoornissa* v. *Rowshan*, (1976) Ker 319.

by mutation in the revenue records. When a donor reserves the right to receive rents during his lifetime and also undertakes to make payment of municipal dues, a mere recital in gift deed that the delivery of possession has been made will not be enough, and the gift will fail for want of the delivery of possession.[1] Where neither title-deeds are delivered to the donee, nor rents are collected in the name of the donee, and where the donor continues to pay the municipal dues, it was held that the gift was invalid as no delivery of possession has been made to the donee.[2] Similarly, where neither the title-deed was delivered nor attornment by the tenants was made, it was held that the gift was invalid.[3]

Delivery of possession of incorporeal property.—In respect of incorporeal property, or actionable claims, distinction is made between those properties which are capable of delivery of possession and which are not so capable. In the former case, the actual delivery of possession is necessary. Thus, a gift of a government promissory note can be made by endorsement and the delivery of the note to the donee. In the later case, all that is necessary is that the donor should divest himself completely of the ownership of, and dominion over, the property; the delivery of possession may be made in such a manner as the subject-matter of gift is susceptible of. Thus, a gift of *zamindari* right may be completed by mutation of names in the records of right. In *Aga Mohammed* v. *Koolson*,[4] a husband handed over to his wife a receipt of a deposit of money in a bank and said : "After taking the bath, I will go to the bank and transfer the papers in your name." The receipt contained in the margin the words, "not transferable". A died before he could effect the transfer. It was held that the gift was invalid, since the donor's right to receive the money from the bank could not be transferred by the mere delivery of the receipt.

In some cases, the delivery of possession is not necessary, only symbolic delivery of possession is enough. The cases are :

(a) Where the donor and the donee reside in the same house, the subject-matter of gift, the actual delivery of possession is not necessary, though clear and unequivocal manifestation of an intention on the part of the donor to divest himself of the ownership and dominion is necessary.[5] The same is true of a gift by a co-sharer to another.

(b) Where a husband makes a gift to the wife or the wife makes a gift to the husband of property in their joint possession, then the actual delivery of possession is not necessary. Even when the husband continues to live in the house, the subject-matter of the gift, and collects the rent after the date of the gift, the gift will be valid and it will be presumed that he is collecting the rent on behalf of the wife. In *Md. Sadiq* v. *Fakhr*,[6] the Privy Council said that when a person makes a gift of agricultural land to his wife, the gift will be valid even if no mutation of names has been made. In this case, the declaration by the husband that he had made the gift and the handing over

1. *Jayamabibi* v. *Jayarabi*, AIR 1950 Mad 761.
2. *Qamaruddin* v. *Hasan Jan*, AIR 1935 Lah 795.
3. *Hussaina Bai* v. *Zohrabai*, AIR 1960 MP 60.
4. (1897) 25 Cal 9.
5. *Ibraham* v. *Sulema*, (1884) 9 Bom 146; *Aftab* v. *Tavab*, AIR 1973 All 54 (earlier case law has been reviewed); *Md. Salam* v. *Abdul*, AIR 1972 Pat 279.
6. AIR 1932 PC 13.

of the gift deed to the wife by the husband were considered to be sufficient to constitute a valid gift. In *Ahmia* v. *Khatija*,[1] where the donor handed over the keys of the house, the subject-matter of the gift, to his wife, the gift was considered to be valid even though the husband continued to live in that house. The question came up for consideration before the Supreme Court in *Valie* v. *Puthakkalan*,[2] where a husband made a gift of immovable property to his minor wife, under a registered gift deed. The gift deed was handed over to the mother of the wife. The wife had no other legal guardian. The gift was valid.

(c) Where a gift is made by the father or the guardian to a minor, the actual delivery of possession to the minor need not be made.[3] Thus, no delivery of possession, actual or constructive, is necessary when the father or the guardian makes a gift to his minor child or the ward. All that is required is to establish a bona fide and unequivocal intention to make the gift.[4] However, a gift by the father to his minor son will not be invalid because the delivery of possession has been made to the mother who is the guardian of the minor.[5]

Under Muslim law, the mother is not a legal guardian of her minor children, and therefore when she makes a gift to her minor child, the delivery of possession must be made to the father, or in his absence, to the legal guardian; otherwise the gift will be invalid.[6] Where a gift is made by a father or guardian to the minor along with some others (in the sense that a trust for the benefit of the minor comes into existence), then the delivery of possession is necessary.[7]

(d) Where a gift is made to the bailee (in whose possession the subject-matter of the gift is), no delivery of possession is necessary, the gift may be completed by declaration and acceptance. However, the gift of a house to a person who is merely employed to collect the rents will not be valid by mere declaration and acceptance without the delivery of possession, since it cannot be said that the house was in the possession of the donee.[8]

Gift through the medium of a trust.—There has been some controversy as to whether Muslim law recognizes the trusts. In modern India, a Muslim can validly create a trust. Whenever a Muslim makes a gift through the medium of a trust, all formalities of a gift must be complied with. In all those cases where a Muslim can make a valid gift *inter vivos*, he may make such a gift through the medium of a trust.[9] In such cases, the delivery of possession should be made to the trustee.[10] In *Sadak* v. *Hasim*,[11] a Shia

1. (1864) 1 Bom HCR 157.
2. 1964 SC 275.
3. *Ameeronnissa* v. *Abadonnissa*, (1875) IA 87 at 104; *Noohu* v. *Ummthu*, AIR 1980 All 66.
4. There is a series of cases on this matter. *Ameeronnissa* v. *Abadonnissa*, (1975) 2 IA 87 is the oldest case. *Abdul* v. *Abu*, AIR 1977 Cal 132.
5. *Ibrahim* v. *Noor Ahmed*, AIR 1984 Guj 126.
6. *Abdul* v. *Mishrimal*, (1959) 61 Bom LR 761.
7. *Sugrabai* v. *Mahomadali*, AIR 1935 Bom 54.
8. *Valayat Hussein* v. *Miniran*, (1879) 5 CLR 91.
9. *Mirza* v. *Bindaneem*, AIR 1918 Rang 323.
10. *Ram Charan* v. *Fatima*, ILR (1915) 42 Cal 953.
11. (1916) 43 IA 212.

Muslim executed a trust deed under which he purported to transfer certain immovable property to B, C and D, as trustees for the benefit of his wife and children. Neither the trust deed was executed by B, C or D, nor was the property transferred in the name of anyone of them.

The delivery of possession was not given either. The donor continued to be in possession and enjoyment of the property. It was held that no trust came into existence.

Conditional Gift and Gifts with Conditions

Contingent or conditional gifts.—The contingent or conditional gifts are those which are made dependent for their operation upon the occurrence of a contingency. A contingency is a possibility, a chance, an event, which may or may not happen. In Muslim law, contingent or conditional gifts are void. Thus, a gift made by a person in favour of the mother for life, and in the event of his death without leaving a male issue to X. The gift is contingent with respect to X.[1]

In *Zameela Begum* v. *Controller of Estate Duty*, under a settlement deed, the settlor conferred absolute rights, title and interest in the property on his son subject to the obligation of payment of the income of the property to him during his lifetime and after his demise to his widow for her life. The Supreme Court said that the settlement and the condition being valid and the wife of settlor having had a charge on the property for the realization of the income during her lifetime. On her death, the interest ceased and passed on to the beneficiary son. Since under Muslim law, a distinction is made between the corpus and usufruct of the gift, the gift was valid.

Gifts with conditions and life estates.—When one has made a gift for a stipulated condition, the gift is valid and the condition is void. In Muslim law, a gift is not rendered invalid by involving an invalid condition. Hanafi law clearly lays down that in such a case, the gift is valid and the condition is void. Thus, where a gift of promissory notes is made by A to B with the condition that after a month, B would return to him one-fourth of them, or where a gift of his house is made by X to Y with the condition that Y will not sell it to a particular person, then the gift is valid and the condition is void.[2]

Under the Shia law, if the condition attached to a gift is subsidiary, then both the gift and the condition are valid.

On the point as to how far Muslim law recognizes life estates and limited estates, there are several Privy Council decisions. In *Md. Raza* v. *Abbas Bandi*,[3] the Privy Council held that where a restraint on alienation is partial, both the gift and the condition are valid. Thus, where a gift is made to B with the condition that he should not sell the property to anyone but to the members of the donor's or donee's family, both the gift and the condition are valid. In the leading case on the subject, *Nawab Umjad Ali Khan* v. *Muhumadee Begum*,[4] the father made a gift of government promissory notes to his son endorsing and delivering them to the latter with the condition that

1. *Cassamally* v. *Currimbhoy*, ILR (1911) 36 Bom 214; *Asaraf* v. *Mahomed*, AIR 1947 Bom 122; *Nawab* v. *Ali Raza*, AIR 1948 PC 134.
2. *Babbo Lal* v. *Ghanshamdas*, AIR 1922 All 205.
3. AIR 1932 PC 158.
4. (1867) 11 MLA 517.

the son should pay him for his life the recurring income of the promissory notes. The gift and the condition both were held valid. This was a case under the Shia law. This principle was held applicable to the Sunnis also in *Md. Abdul* v. *Fakhr Jahan*.[1] *Mohideen* v. *Madras State*[2] is a good illustration of this rule. A Muslim executed a deed under which she made a gift of her large estate to her two sons, P and Q with the condition that out of the income of the estate, P and Q would pay a sum of Rs. 500 per annum to her for her life, and a sum of Rs. 350 per annum to her daughter D for her life and thereafter to her heirs and successors in perpetuity. The donor died in 1909, D died in 1950. In 1951 the estate was acquired by the government of Madras. The heirs of D filed a claim against the government of Madras under the settlement. The settlement was held valid by the Madras High Court on the ground that Muslim law made a clear-cut distinction between the corpus and the usufruct and the validity of the obligation imposed upon the donee to pay a yearly sum in perpetuity could be supported on the principle of trust.

In *Amjad Khan* v. *Ashraf Khan*,[3] the Privy Council held that the life interest cannot be enlarged into an absolute estate. However, the Privy Council left open the question of the validity of the life estate. Then came *Nawazish Ali Khan* v. *Ali Raza*.[4] In this case, a Muslim belonging to the Ithana Ashari school, disposed of his entire estate by will and created three successive life estates : One in favour of his nephew, A, thereafter in favour of his son B and lastly, in favour of his another nephew C. He also gave a power of appointment to the last surviving donee to nominate his successor from among the descendants of the three life estate holders. After the death of the testator, A succeeded to the estate. After A's death, the estate passed on to B. C died during the lifetime of B. B exercised the power of appointment and nominated C's son D as a successor. D was in existence at the time of his nomination but not at the time of the testator's death. The Privy Council held that the power of appointment was not known to the Muslim law, and, therefore, the appointment of D was void. The estate passed on to B's heirs. In the course of the judgment, the Privy Council observed : "If it is a gift of the *corpus*, then any condition which derogates from absolute dominion over the subject-matter of the gift will be rejected as repugnant; but if upon construction the gift held to be one of a limited interest, the gift can take effect out of usufruct leaving the ownership of the *corpus* unaffected except to the extent to which its enjoyment is postponed for the duration of the limited estate."

All these cases, as well as the cases of the High Courts dealing with the subject, were analysed and discussed by Mukherjee, J. in *Anjuman Ara* v. *Nawab Asif Kadar*.[5] The learned judge very lucidly stated the law thus : To appreciate the true legal position, it is necessary to remember that life estate, that is, life grant of a property which is usually called a life estate is not regarded in Mohammedan law as an estate or interest in the '*corpus*.' That law recognised only one kind of estate, namely, full ownership in the *corpus*. The *corpus* means 'the thing' or 'the substance'. It is distinct from the usufruct

1. (1922) 94 IA 195.
2. AIR 1957 Mad 893.
3. (1929) 56 IA 213.
4. AIR 1948 PC 134.
5. (1955) 2 Cal

which means the 'use' of the article or the produce of the 'thing'. A gift of the *corpus* connotes and comprehends the entire bundle of rights in 'the thing' or 'the substance'. In other words, full rights over the 'article' or complete dominion over the 'substance'. That dominion is absolute and indivisible. It permits no slicing and tolerates no obstacle or restriction. The grant of full dominion over the *corpus*, may, however, be accompanied by a gift of the use or usufruct to another, that is, a condition or limitation as regards the 'usufruct' and both the grant and the condition will be valid. Limited estate-short of complete ownership may also be created but not in the form of the gift of the *corpus* subject to a condition affecting the same-'the thing' or 'the substance'. Any such interest-whether limited 'in point of quality or in point of duration,' is in Mahommedan law, different from '*corpus*' and takes effect out of the usufruct. In the 'usufruct', however, limited interest can be created and the limitation may well be in point of time and duration, *e.g.*, for life or for a fixed period. Limited interests are thus recognized in Mahommedan law, though not in the *corpus* but only in the usufruct and where the grant is of a limited character-but not a grant of the *corpus* subject to condition-it takes effect out of the usufruct and is not regarded as a grant of the *corpus* at all but only as a grant of or in the usufruct. Thus, for the creation of limited interests, it is necessary that the donor must deliver possession of the property to the life tenant (in short, all conditions of *hiba* must be fulfilled), the first grantee must be in existence at the time of the grant, the successive grantees should be in existence when the grant opens out. Any type of property can be the subject-matter of grant, provided the property must admit of use without being consumed.[1]

It is well settled that under the Shia law, the following three types of limited interest can be created : (a) *umra*, a life grant, *i.e.*, a grant of the use or usufruct for life, (b) *sukna*, *i.e.*, the right to reside in a house for life, and (c) *ruqba*, *i.e.*, the right to take the usufruct for a fixed period. Under the Shia law, vested remainders are unlawful and void.[2]

Gift in future.—The Muslim law-givers very clearly lay down that the object of the gift must be in existence at the time the gift is made, and, therefore, a gift of anything to come into existence in future, or anything to be performed in future, is void. Similarly, a gift which is to take effect at any future time, whether definite or indefinite is void.[3] Thus, a gift of fruits "that may be produced in my palm tree this year," is void, being the gift of future property. Similarly, a gift with these words, "so long as I live, I shall enjoy and possess the properties and I shall not sell or make gift to anybody, but after my death, you will be the owner" is void, since it is not to operate until after the death of the owner.[4] However, a gift of the right to receive a specified share in offerings made by the pilgrims at a shrine is valid, since the thing that is gifted is, "the right of the donor to receive a fixed share in the offerings after they have been made." Similarly, a gift of the future revenue of the land is valid, as it is the gift of the usufruct.[5]

1. *Jalmeda* v. *Sheek*, AIR 1979 Mad 193.
2. *Sardar Nazazish Ali's case*, (1948) 75 IA 62.
3. *Chekkonkutti* v. *Ahmed*, ILR (1887) 10 Mad 196.
4. *Aeemed* v. *Illahi*, (1912) 34 All 465.
5. *Dureish* v. *State of Madras*, AIR 1957 Mad 588; a contrary view was taken in *Amtul* v. *Mir*, ILR (1869) 22 Bom 489.

Revocation of Gifts

Although there is a tradition which indicates that the Prophet was against the revocation of gifts, it is a well established rule of Muslim law that all voluntary transactions, including gifts, are revocable. The Muslim law-givers have approached the subject of revocability of gift from several angles. From one aspect, they hold that all gifts except those which are made by one spouse to another, or to a person related to the donor within the degrees of prohibited relationship, are revocable. The texts of Muslim law also lay down a long list of gifts which are irrevocable. The contents of the list differ from school to school, and the Shias and the Sunnis have the usual differences. The Muslim law-givers also classify gifts from the point of view of revocability under the following two heads :

(i) Revocation of gifts before the delivery of possession, and

(ii) Revocation of gifts after the delivery of possession.

Revocation of gifts before the delivery of possession.—Under Muslim law, all gifts are revocable before the delivery of possession is given to the donee. Thus, P makes a gift of his motor car to Q by a gift deed. No delivery of possession has been made to Q. P revokes the gift. The revocation is valid. In this case, it will not make any difference, that the gift is made to a spouse, or to a person related to the donor within the degrees of prohibited relationship. The fact of the matter is that under Muslim law, no gift is complete till the delivery of possession is made, and, therefore, in all those cases where possession has not been transferred, the gift is incomplete, and whether or not it is revoked, it will not be valid till the delivery of possession is made to the donee. The revocation of such a gift, therefore, merely means that the donor has changed his mind and does not want to complete it by the delivery of possession. For the revocation of such gifts, no order of the court is necessary.

Revocation after the delivery of possession.—Mere declaration of revocation by the donor, or institution of a suit, or any other action is not sufficient to revoke a gift. Till a decree of the court is passed revoking the gift, the donee is entitled to use the property in any manner; he can also alienate it.[1]

It seems that : (a) all gifts after the delivery of possession can be revoked with the consent of the donee, and that (b) otherwise in those cases where gifts are revocable, revocation can be made only by a decree of the court.[2]

The revocation of a gift is the personal right of the donor, and, therefore, a gift cannot be revoked by his heirs after his death. A gift can also not be revoked after the death of the donee.

According to the Hanafi school, with the exception of the following cases, a gift can be revoked even after the delivery of possession :

(i) When a gift is made by one spouse to another.

(ii) When the donor and the donee are related within the prohibited degrees.

(iii) When the donee or the donor is dead.

(iv) When the subject-matter of the gift is no longer in the possession

1. *Mahboob* v. *Abdul*, AIR 1964 Raj 250.
2. *Ibid.*

of the donee, *i.e.*, when he had disposed it of by sale, gift or otherwise, or where he had consumed it, or where it had been lost or destroyed.

(v) When the value of the subject-matter has increased.

(vi) When the value of the subject-matter of the gift has been completely lost, just as wheat, the subject-matter or gift, is converted into flour.

(vii) When the donor has received something in return (*iwaz*).

(viii) When the object of gift is to receive religious or spiritual benefit or merit, such as *sadaqa*.

The Shia law of revocation of gifts differs from the Sunni law in the following respects : First, gift can be revoked by a mere declaration of the part of the donor without any proceedings in a court of law; secondly, a gift made to a spouse is revocable; and thirdly, a gift to the relation, whether within the prohibited degrees or not, is revocable.

Who can challenge a gift.—A stranger cannot challenge the validity of a gift on the ground that the gift is bad as no delivery of possession has been made. A gift on this ground can be challenged only when the issue is raised between the donor or those claiming under him on the one side and the donee and those claiming under him on the other. In *Y.S. Chen* v. *Batubai*,[1] gift was made to a person by her mother of a house and tenants were paying rent to her, the court held that the tenants had no *locus standi* to challenge her title on the ground that no possession of the house was given to her.

II

Muslim law recognizes certain institutions which appear to be similar to *hiba* though they are clearly distinct from it. These are :

(a) *Aariat*,

(b) *Sadaqa*,

(c) *Hiba-bil-iwaz*, and

(d) *Hiba-ba-sharat-ul-iwaz*.

We would proceed to review these.

Aariat.—The *Fatwai Alamgiri* defines it as "the giving of the usufruct without any return." The *Durr-ul-Muhtar* defines it as "making another owner of the usufruct without any consideration."[2] In other words, when a person grants another a licence or right of use or enjoyment of a property or a right to the usufruct without any consideration, then the transaction is called *aariat* or *areeat*.[3] In *hiba*, the transferee acquires a right to the property while in *aariat* the transferee obtains its use or beneficial enjoyment for a limited period, and the property does not pass on to him. Thus, *aariat* is not a transfer of ownership, but only transfer of a right to the usufruct or fruits or profit of property, temporarily, depending upon the will of the transferor who may terminate it at any time. Since in *aariat* the ownership is not transferred to the donee, some of the requirements of material validity of *hiba*, such as the age of the donor, or the subject-matter (prohibition of *musa*,

1. AIR 1991 MP 90.
2. *Smoeswar* v *Barkat*, AIR 1964 All 469.
3. *Md. Faiz* v. *Ghulam*, (1881) 8 IA 25.

i.e., of gift of undivided portion of property) do not apply. Thus, when a person says to another, "I have given you the use of this garment or horse" or "My house is in your residence," the transaction is *aariat*.[1] An *aariat* has the following characteristic features : (a) it is a transfer of usufruct, without consideration, (b) it is a temporary transfer of usufruct, and (c) it is revocable at any time at the will of the transfer.

Sadaqa.—Practically, in all essentials, the *hiba* and *sadaqa* are similar. What distinguishes them from each other is their objective. When a person makes a gift of some property with the object of acquiring some religious or spiritual benefit or merit, it is called *sadaqa* or *sadaqah*. Just as a *hiba* so in *sadaqa*, the gift is not valid unless accompanied by the delivery of possession. All requirements of *hiba* regarding capacity and certainty of subject-matter are applicable to *sadaqa*. But, unlike *hiba*, *sadaqa* is irrevocable once it is completed by the delivery of possession. A *sadaqa* can also be made to a rich person provided the object is acquiring religious merit of spiritual benefit.

The *sadaqa* is to be distinguished from *wakf*. Both the *sadaqa* and *wakf* are made with an object of acquiring religious merit or spiritual benefit. When the subject-matter of the gift is to be consumed, it is *sadaqa*; when the *corpus* is made unconsumable and only the usufruct or income is to be used for the purpose, then the transaction is *wakf*. When a *wakf*-deed makes the subject-matter of *wakf* inalienable, an alienation made of the property is void.[2] Thus, when a person makes a gift of, say, Rs. 5000/- for the purchase of copies of the *Koran* for the free distribution to the people, the transaction is *sadaqa*. But, if the donor says that this amount is to be put into a foundation (or put in a fixed deposit) and out of the interest of this amount, copies of the *Koran* are to be purchased every year for the distribution to the people, then the transaction is *wakf*. When the *corpus* of property is permanently dedicated to God and the usufruct of which is directed to be spent for a religious, pious, or spiritual purpose, then the transaction is called *wakf*. In *wakf*, the corpus is immobilized or fixed, while in *hiba*, corpus itself is transferred to the donee who may do anything with it : may use it, consume it, or dispose it of.

Hiba-bil-iwaz.—*Hiba-bil-iwaz* (or *hiba-bil-iwad*), *i.e.*, gift with a return is gift for a consideration. Thus, where a person makes a gift of his property in return for something, the transaction is known as *hiba-bil-iwaz*. In its classical form, *hiba-bil-iwaz* consists of two separate transactions : the original transaction consists of the *hiba*, and must, therefore, conform to all requirements of a *hiba*. This is followed by a return gift (*iwaz*), which constitutes the second transaction. When both the transactions are completed, they are together known as *hiba-bil-iwaz*. It should be emphasized that when the original transaction, *i.e.*, *hiba*, is made, the return gift is not in the contemplation of the parties. It occurs later on to the donee to make a return gift. Thus, A makes a gift of his house to B, without any contemplation that B will make an *iwaz*. But later on, B makes a gift of a plot of land to A by way of *iwaz*. Then, both the transactions together are known as *hiba-bil-iwaz*. In both the transactions, the formalities necessary for a *hiba* must be complied

1. *Ibid.*, where several illustrations of aariat have been given.
2. *Mumtaz Ali* v. *Alli*, AIR 1968 Orissa 208.

with.[1] The classical form of *hiba-bil-iwaz* is not prevalent in India; instead, there prevails an Indian version under which, there is only one transaction, and not two.[2] The *iwaz* is one part of the same transaction of which *hiba* is another. In this type, *iwaz* is the direct consideration for *hiba*. Thus, in the Indian version of *hiba-bil-iwaz*, the delivery of possession is not necessary as it is in *hiba*,[3] nor is there any prohibition for the transfer of *musha*, *i.e.*, undivided part of property. In the Indian version of *hiba-bil-iwaz*, actual payment of consideration is necessary. A bona fide intention on the part of the donor to divest himself *in presenti* of the ownership of the property, the subject-matter of *hiba*, and to confer it on the donee is necessary. The inadequacy of consideration does not affect the transaction. Thus, howsoever small the consideration may be, the *hiba-bil-iwaz* will be valid if consideration has been actually and bona fide paid. A mere promise to pay is not sufficient.[4] A copy of the *Koran* or a prayer carpet, or a rosary, is a valid consideration. But in every case, the intention to transfer must be *in presenti*.

Since the Indian version of *hiba-bil-iwaz* is equated with sale, it has been held that if it is of immovable property worth Rs. 100 or more, it must be effected by a registered instrument as required by S. 54, Transfer of Property Act.[5] The Chief Court of Oudh holds that when a husband transfers immovable property to his wife in lieu of her dower, the transaction is not a sale, and therefore no registration is necessary.[6] This view has been dissented from by the Allahabad High Court.[7] The Bombay and the Hyderabad High Courts hold that where in lieu of dower, land is transferred to the wife at the time of marriage, the transaction is *hiba* and not sale.[8]

A gift by a person in "consideration of your being my cousin" is not a *hiba-bil-iwaz* but *hiba*, and, therefore, delivery of possession is necessary. Similarly, a gift made by a person to his employee who had already been paid wages for his services is not a *hiba-bil-iwaz*, but a *hiba*. On the other hand, when after the death of a person, all his brothers relinquish their share in the property of the deceased in favour of the daughter in consideration of other brother doing so, when on the death of a person, his brother grants by a deed two villages to the widow and the widow executes a deed by which in consideration of the grant of villages, she relinquishes her claim to the share in the property of her deceased husband,[9] the transaction is a *hiba-bil-iwaz*.[10]

Since the Indian version of *hiba-bil-iwaz* is in effect a sale, it gives rise to the right of pre-emption.

Hiba-ba-shart-ul-iwaz.—When a gift is made with a consideration or stipulation (*shart*) for a return (*iwaz*), the transaction is called

1. *Rahim Buksh* v. *Md. Hasan*, ILR (1888) 11 All 1; *Kulsu* v. *Bashir*, AIR 1936 All 285.
2. *Rashid* v. *Batulan Bibi*, AIR 1982 All 111.
3. *Bashiram* v. *Md. Hussain*, AIR 1941 Oudh 284; *Md. Kazium* v. *Nadri Begum*, AIR 1941 Oudh 348.
4. *Md. Yahya Ali* v. *Sardar Ali*, AIR 1939 Lah 292.
5. *Sarifuddin* v. *Mohiuddin*, AIR 1927 Cal 808; *Gulzam Abbas* v. *Razia Begum*, AIR 1951 All 86 (FB).
6. *Bashir Ahmed* v. *Zubeda*, AIR 1926 Oudh 186.
7. *Ghulam Abbad* v. *Razia Begum*, AIR 1951 All 86 (FB).
8. *Jaitun Bi* v. *Fatnubhai*, AIR 1984 Bom 1114; *Md. Hashin* v. *Aminbai*, AIR 1952 Hyd 3.
9. *Md. Fair* v. *Ghulam Ahmad*, (1881) 3 All 490.
10. *See* also *Md. Esuph* v. *Pattamsa*, ILR (1889) 23 Mad 70.

Hiba-ba-shart-ul-iwaz. In the classical form of *hiba-bil-iwaz*, the *iwaz* is not even in the contemplation of the parties at the time of the original gift; *iwaz* is an afterthought, a voluntary act on the part of the donee. In *hiba-ba-iwaz*, *iwaz* is not merely in the contemplation of the parties but it is expressly stipulated for. The former retains the character of gift throughout and does not partake of the character of sale even when *iwaz* is given, while the latter is a gift at the first stage, but the moment the donee gives possession of the subject-matter of *iwaz*, it becomes a sale. The main distinction between the Indian version of *hiba-bil-iwaz* and the *Hiba-bil-shart-ul-iwaz* is that in the former, the delivery of possession is not necessary, while it is so in the latter. A *Hiba-ba-shart-ul-iwaz* is revocable till the delivery of possession of the *iwaz* is made by the donor to the donee. Once the delivery of possession of the *iwaz* is made, the transaction becomes irrevocable.

Like *Hiba-bil-iwaz*, the *Hiba-ba-shart-ul-iwaz* is also subject to the right of pre-emption.

PART XV
ENDOWMENTS AND WAKFS

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PART XV
ENDOWMENTS AND WAKFS

Chapter 43

HINDU ENDOWMENTS

I
INTRODUCTORY

From earliest times, Hindus have been dedicating property for religious and charitable purposes. This has been mainly under the two heads : *Istha* and *Purta*. The former indicates the Vedic sacrifices and rites and gifts associated with such sacrifices. The latter stands for all other religious and charitable acts and purposes unconnected with the Vedic sacrifices. The *Istha-purta* have been considered as means for going to heaven.

Various types of gifts were emphasised. But, merely by making gifts or performing sacrifices, a charitable or religious endowment does not come into existence. An endowment will come into existence only when some property or fund is dedicated for a religious or charitable purpose or object.

II
ESSENTIALS OF A VALID ENDOWMENT

Essentials of a valid endowment are : (1) the dedication must be complete, (2) the subject-matter must be specific, (3) the object must be definite, and (4) the settler must have capacity to make the endowment.

Dedication.—Dedication of property is essential for the creation of an endowment. A dedication consists of the following two elements : (1) *sankalpa*, or formula of resolve, or an intention to dedicate properties, and (2) *utsarga*, or renunciation.

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

According to Kamlakara, gift can be made by the usual libation of water, but if there is no particular recipient, such as when a *Math* is to be used by ascetics in general and not by the head of any particular sect or class, the offering of water is thrown into a pot. According to the Kalka Purana, all *Maths* are required to be dedicated to *Shankara*.

For the consecration of a temple and installation of a deity, the Smritikars have prescribed elaborate rituals. In the case of temples and idols, the *Sankalpa* may be of two types; if the founder has any particular object, for the accomplishment of that object, and the other is for the love of God. The distinction between dedication to deity and temple and to other objects is this that in the former case, the deity is the recipient of the gift, while in the latter, there may not be any specific person who is the recipient of the gift.

Thus, in case of dedication to a temple, the ceremonies of *sankalpa* and *utsarga* mean that the ownership in the properties and funds is divested from the founder and is invested in the deity. In *Deoki Nandan* v. *Murlidhar*,[1] the Supreme Court observed : "The ceremonies relating to dedication are *sankalpa*, *utsarga* and *prathista*. *Sankalpa* means determination, and is really a formal declaration by the settlor of his intention to dedicate the property. *Utsarga* is formal renunciation by the founder of his ownership in the property, the result whereof being that it becomes impressed with trust for which he dedicates it." If *utsarga* is proved to have been performed, the dedication must be held to have been to the public. *Utsarga* has to be performed only for charitable endowments, like construction of tanks, rearing of groves of gardens and the like, and not for religious foundations : *prathista* takes the place of *utsarga* in dedication of the temples. Where *prathista, i.e.*, formal installation of the deity, is proved, the dedication is complete and valid, notwithstanding that *utsarga* has not been performed.

The *sankalpa*, in the dedication of tanks, groves, gardens and trees, is different, since there is no particular recipient of the gift. The formula for the dedication of a tank, according to the *Utsarga Mayukha*, is : "I have given the water to all beings in common, may all beings enjoy bathing, drinking and swimming." The formula for dedication of other things of this nature like *dharmasalas*, hospitals and schools is more or less the same. In all such cases, the dedication is for the benefit of the public in general, or to a section of the public. There is no specific donee who may accept the gift.

Under modern Hindu law, it is not necessary that performance of any particular ceremony should be established, before endowment could become valid and binding. The dedication is complete as soon as it is established that the founder intended to make a gift in favour of a charity and that he had divested himself of the ownership of the property, the subject-matter of the endowment. Actual installation of deity in the temple is not necessary for the completion of the gift. In Hindu law, for the creation of a valid endowment, no trust need be created. Even in the absence of a ceremony such as *sankalpa* or *samarpana* or deed, dedication may be established by other evidence.[2]

A verbal dedication of properties is enough : no writing is necessary. If an endowment is created by a will, will has to be in writing and attested by two witnesses. A dedication of land for a public temple is not a gift requiring a registered deed. But if property is transferred by way of gift to the trustees of a temple, it is a transfer of property and, if it is of immovable property worth Rs. 100 or more, registration will be necessary.

Dedication may be absolute or partial.—A dedication for an endowment may be absolute or partial. It is an absolute dedication when the donor divests himself of all beneficial interest in the property dedicated to the endowment. The dedication is partial when only a charge for an endowment is created on the property.[3] For instance, the donor may lay down that certain portion of income is to be applied for an endowment. In such a case, the property will devolve in an ordinary way, subject to the charge in favour of the

1. AIR 1957 SC 133 at 140.
2. *Vidhyavaruthi* v. *Balusami*, (1921) 48 IA 302.
3. *Dasratha* v. *Subbarao*, AIR 1957 SC 797; *S.S. Pillai* v. *K.S. Pillai*, AIR 1972 SC 2069.

endowment.[1] Whether a *debutter* is partial or absolute depends upon the intention of the settlor. In ascertaining the intention, regard must be had to the deed as a whole and the terms used therein.[2]

Once a valid dedication is created, the founder has no right to revoke it.

Subject-matter must be specified.—The second essential of valid endowment is that property dedicated must be specific. The words of gift used by the testator must be unambiguous and that the subject of the gift must be well defined and certain.[3] Any uncertainty about the subject-matter of the dedication will be fatal to the creation of an endowment. Thus, where the testator gave direction in the will that the money should be spent for a certain charity, but did not specify the amount, it was held that no valid endowment came into existence. On the other hand, if the scope and object of the endowment is well defined and it is stated that out of certain property such sum should be spent as would be necessary, the dedication is valid. In *Jamnabai* v. *Khimji*,[4] a will of a Hindu contained, *inter alia*, the following two clauses : "In my country at the village Shri Anjar, I am at present carrying on *sadavart*. Similarly, out of my funds my trustees are to continue the same. After my death my trustees shall, out of the income, set up a *sadavart* at the town of Nasik." No specific amount was specified or set apart for the second *sadavart*. The second *sadavart* was held valid. The court said the intention of the testator to set up a *sadavart* at Nasik on the line of Shri Anjar was clear and definite. It was not at all difficult to ascertain the nature of *sadavart* at Nasik.

Object must be definite.—What are purely religious purposes and what religious purposes will be charitable, must be entirely decided according to Hindu law and Hindu notions. In *Manorama* v. *Kalicharan*,[5] testator directed his executors, *inter alia*, to set apart a sum not exceeding Rs. 25,000 for distribution "among his poor relations, dependents and servants." As to who would be entitled to the benefit was left to the discretion of the executor. The court held the bequest to be valid. In *Govardhan* v. *Chunilal*,[6] the recital was that the testator has established a Dharmashala at Benares for charitable purposes and carried on charity at a cost of Rs. 500 p.m. For the purpose of making permanent arrangement for this charity, the testator set apart the income of seven villages for the expenses of the *Dharmashala* and also directed that an amount of Rs. 500/- p.m. should be applied for '*pun*' at the *Dharmashala*. He did not specify what type of *pun* was to be done. The bequest was held valid.

Samadhi.—It seems that the building of a *Samadhi* over the remains of a person and the making of provision for the purpose of *gurupooja* and other ceremonies in connection with the same are not recognized as charitable and religious purpose under the Hindu law.[7] But the *Samadhi* of a saint may, in course of time, become a shrine or a temple by reason of long public worship,

1. *Nirmala* v. *Balai*, AIR 1965 SC 1874.
2. *Dasratha* v. *Subba Rao*, 1957 SCR 1122; *Sappani* v. *Pillai*, AIR 1974 SC 407.
3. *Mussory Bank* v. *Raynor*, 91 I.A. 70.
4. 14 Bom 1.
5. 31 Cal 166.
6. 30 All 111.
7. *Saraswathi Ammol* v. *Rajagopal*, AIR 1953 SC 491; *see* also *Malayammal* v. *Malayalam Pillai*, JT (1990) 4 SC 327.

then an endowment for such a *samadhi* will be valid. Thus, in *Ratnavelu* v. *Commr. for H.R. & C.E.*,[1] the court held that an institution which had its origin in a *samadhi* and still retains that character will be a valid endowment if for a considerable time it has been regarded as a place of religious worship and the public is entitled to access to the *samadhi* as a matter of right. An endowment by a son for the installation of his father's statute will be valid only if the father is held in high public esteem. In *Nagu* v. *Banu*,[2] the Supreme Court observed that the prohibition against an endowment for a *samadhi* will not apply when an ancestor is cremated and a memorial is raised for performing *Shradha* ceremonies and conducting periodical worship "for this practice may not offend the Hindu sentiment which does not ordinarily recognize entombing of the remains of a dead."

Gift for Dharma.—There is some controversy in early cases whether a gift for *dharma* is valid. But in *Parthasharth* v. *Thiruvengada*,[3] Subrammania Ayyar, J. in the course of his judgment, singular for erudite learning, observed that "*dharma*" when used in connection with gift of property by a Hindu, has perfectly settled meaning and connotes *Istha* and *Purta* donations. Similar views were expressed by Mookerjee, J. of the Calcutta High Court.[4] In *Vaidhya* v. *Swami Nath*,[5] the Privy Council held that if an existing charity is indicated by the word "*dharma*", the gift is valid. But the position is still not certain.

Settlor must have capacity to settle the endowment.—The fourth requirement for the validity of an endowment is that the settlor must be of sound mind and a major and he should not suffer from any legal disqualification.

Under the Dayabhaga school, the father as well as coparcener have absolute power over all the properties, self-acquired or inherited. Thus, a father or a coparcener under the Dayabhaga school have full power of creating endowments. *Karta* or any other Mitakshara coparcener has no power of making gift or otherwise alienating the joint family property save with the consent of other coparceners. However, the *Karta* can dedicate a small portion of the joint family property for a pious, religious or charitable purpose, beyond this he has no power.[6]

II
MATHS

In its ordinary parlance, *Math* means an abode or residence of ascetics. In its legal connotation, it is a monastic institution presided over by its head, known as *mahant*, a superior ascetic, and established for the use and benefit of ascetics generally or of ascetics belonging to a particular order, ordinarily, the disciples of the *mahant*. The basic purpose of a *Math* is to encourage and foster spiritual learning and knowledge, by maintenance of a competent line of teachers who impart religious instruction to the disciples and followers of

1. AIR 1954 Mad 398.
2. AIR 1978 SC 1174.
3. ILR Mad 340.
4. *Bhupati* v. *Ramlal*, 37 Cal 128 (FB).
5. 58 IA, 282.
6. *Ganga Reddi* v. *Tamm Reddi*, 54 IA 136.

the *Math* and to strengthen the doctrines of the sect or school to which *Math* subscribes. There can be *sudra maths* also.[1]

The presiding element in a *Math* is the *mahant*. Even when a temple is attached with *Math*, the presiding element in the *Math* remains the *mahant*.

A *Math* comes into existence when dedication of properties is made to *Math*. A *Math* may also come into existence as an offshoot of an already existing *Math*. Broadly speaking, *Maths* are of three types : *Mourushi Math* when the office of *Mahant* devolves upon the disciples of the existing *mahant*; *Panchayat Math*, when office of *Mahant* is elective, and *Hakimi Math*, when the founder has reserved the power of nomination of *mahant*.

Property of a Math vests in the Math.—The *mahant* is the head of the *Math*, but the property dedicated to a *Math* does not vest in him. The endowed property of a *Math* vests in the *Math* itself as a juristic person and not in the *mahant*.[2] A *Math* is a juristic person and is capable of acquiring, holding and vindicating the legal rights through the medium of some human agency which is ordinarily the agency of *mahant*.[3]

Legal position of a Mahant

The *mahant* is neither a trustee nor a corporate sole. He is just the manager of the *Math* with wider powers than those possessed by a manager, trustee or *dharmakarta* of a temple. He has dual capacity. He is the manager of properties, and the spiritual head of the *Math*.[4] The *mahant* is the head of the institution. He sits upon the *gaddi*. He initiates the candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spiritual rites; he manages the properties of the institution; he administers its affairs.[5]

Personal property of Mahant.—If under a custom, a *mahant* is allowed to hold the personal property, the personal property can be given and held by a *mahant*.[6]

Management of Math and its properties.—Unless the founder has directed otherwise, the management and possession and properties of a *Math* belong to the *mahant*. In *Arunachalam* v. *Venkatachelapathi*,[7] the Privy Council observed, "there may be varieties of circumstances and tenure, and in respect of these, if the usage and custom are clear, they constitute the law of the *Math*." The *mahant* holds properties of the *Math* for certain specific purpose or purposes as laid down by the founder or by usage. In this regard, the duties of the *mahant* are upkeep of the *math* and the performance of the religious rites, ceremonies and festivals of the religious order to which the *Math* belongs. It is part of the management that the *mahant* should support his disciples and other members of the *math*, which constitute a sort of the household of the *Math*. He should also make arrangements for food, stay and like things for the visiting ascetics. *Mahant*, though not a trustee, occupies a fiduciary position. All the expenses of the *Math* are to be met out of the

1. *Krishna Singh* v *Mathura Ahir*, AIR 1980 SC 707.
2. *Vidhyavaruthu* v. *Baluswami*, (1921) 48 IA 302.
3. *Babji* v. *Laxmandas*, 28 Bom 215; *Shri Krishna* v. *Mathura*, 1972 ALJ 315.
4. *Ram* v. *Anand*, (1966) 13 IA 73; *Vidhyavaruthu* v. *Baluswami*, (1921) 48 IA 302.
5. *Kishna Singh* v. *Mathura Ahir*, AIR 1980 SC 707.
6. *Mahant Amardas* v. *Srimoni Gurudwara*, AIR 1992 P & H 288.
7. (1919) 461 IA 204.

income of the endowed property. In addition to the aforesaid expenditure, *mahant* has to maintain himself in accordance with the dignity of his office and in accordance with the usages of the *Math*. It seems that *mahant's* powers over the income of the endowed properties are fairly large; *mahant* has ample discretion in the application of the funds of the *Math*.

Right of representation.—The *mahant* of an *Akhara* or *Math* represents the *Akhara* or *math* and has both the rights to institute a suit on its behalf as also the duty to defend one brought against. If a *math* is not represented by a *mahant*, the decree passed against it is not binding.[1] It is obvious that it is the *mahant* who represents the Math in all its dealings with the outside world. This means that *mahant* has the power to do everything that may be necessary in the interest and for the benefit of the *Math*. A judgment against *mahant* will bind his successors.[2]

When *Mahant* himself is guilty of mismanagement or misappropriation, a suit can be filed by any person interested in the endowment. A suit can be brought by any person interested in the *Math* and in the administration of the endowment.[3]

Mahant's power to borrow money.—The *mahant* has power to borrow money for the purposes connected with the *Math* and bind the endowed property by his debts taken for justifying the necessity. If the creditor has made bona fide and proper enquiries as to the existence of the necessity, he is protected and can obtain a decree which can be executed against the *Math* properties. If necessity is not established, the creditor may obtain a personal decree against *mahant*; but the *Math* properties are not liable.

Mahant's power of alienation.—*Mahant's* power of alienation of property is the same as that of *shebait*. We will discuss *Mahant's* power of alienation along with *shebait's* power of alienation in the next part of this Chapter.

Mahant is liable to account.—*Mahant* has wider power over the income of the endowed properties than the *shebait*. His powers are almost unfettered. He must discharge all the obligations connected with the *Math* as laid down by the deed or by usage and custom. He can be charged with maladministration of the properties; he occupies a fiduciary position, and, therefore, he should keep proper accounts. The failure to keep accounts may be a ground for his removal. His liability to render accounts is not barred by limitation.[4]

Whether mahantship is property.—There is no direct authority holding that *Mahantship* is property though there is some for *shebaitship*. In view of this, a *fortiori*, *mahantship* may also be considered as property.[5]

Succession to the Office of Mahant

The general rule of the devolution of property or the office of *mahant* is that it will devolve in accordance with the rules of devolution laid down by the

1. *Guranditta* v. *Amar Das*, AIR 1965 SC 707.
2. *Prosanna* v. *Gulab*, (1875) 2 I.A. 145.
3. *Thenappa* v. *Karuppan*, AIR 1968 SC 915.
4. *See* S. 10, Limitation Act, 1963.
5. *Amar Prakash* v. *Parkashanand*, AIR 1979 SC 845.

founder of the endowment. Such rules will be given effect to, if they do not violate the provision of any law.[1]

In a *Mourushi Math*, the *chela* of the last *mahant* succeeds to the office. A *de facto chela* can also succeed to the *gaddi* and can be validly appointed as a successor. In default of the *chela*, the office goes to the *gurubhai* of the last holder. Even in a *Mourushi Math*, customs may differ. In those cases where *mahant* has a right to appoint his successor, he may do so by an act *inter vivos* or by a will. Once he exercises the power of nomination, he cannot revoke it. In a *Mourushi Math*, *mahant* may appoint a successor and may also hand over the office to the latter during his lifetime. However, the right of nomination of successor is a personal right and cannot be delegated. In some cases, it is required by custom that *mahant's* nominees should be confirmed or recognized by the members of the religious fraternity. In a *Panchayati Math*, the succession to *mahantship* is by election. The mode of election is laid down by the custom and usage of the *Math*. It is usually *mahants* of the same sect in a particular locality who exercise this power. This is done usually on the 13th day after the death of *mahant*. In *Hakimi Math*, power of appointing the successor is vested in the family of the founder. Among the *Maths* of *Vaishnabs, Bairagees and Saivaeti Gossain* of the Northern India, *mahants* are married persons. In such *Maths*, the *mahantship* goes to the personal heir of *mahant*.[2]

Personal properties of the Mahant.—The personal property of *mahant* where he is permitted to hold it, does not devolve on his natural heirs, but on his spiritual heirs.

Mahantship is neither partible nor transferable.—The office of *mahant* as well as properties of a *math* are not subject to partition.[3] Similarly, *mahant* has no power to transfer the office or the right of management. *Mahant* cannot also delegate his powers and functions.

Termination of Mahantship

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

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

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

III
DEBUTTER (TEMPLES AND IDOLS)

The *debutter* comes into existence when some property is dedicated to it. It is a fundamental rule of Hindu law that whatever idol may be installed in a temple, or whatever deity or God a Hindu may worship, the idol represents the Supreme God and none else. This implies that dedication of property is not to the image that is installed in the temple, but the *Supreme God*.

1. *M. Manathunatha* v. *Sundaralingam*, AIR 1971 Mad 1 (FB).
2. *Raja Muttu* v. *Perianayagum*, 1 I.A. 290; *Ramalingam* v. *Vythialingam*, 20 I.A. 150; *H.H. Digya Dershan* v. *Devendra*, AIR 1973 SC 168.
3. *Ram Charan* v. *Govinda*, 56 IA 104.

Idol as a Juristic Person

Hindu law recognizes not only corporate bodies with rights of property vested in the corporation apart from its individual members but also judicial subjects or persons called foundations. In the leading case on the subject, *Nath* v. *Pradyumma Kumar*,[1] the Privy Council observed : "A Hindu idol is, according to long established authority, founded upon the religious custom of Hindus, and the recognition thereof by the courts of law, a juristic entity. It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would in such circumstances, on analogy, be given to the manager of the estate of an infant heir." The idol is, thus, considered a sacred entity and an ideal personality possessing proprietary rights. It is treated as a legal entity. However, every idol is not a juristic person. It must be an idol of recognized deity. "Raja" or "Rani" cannot be juristic persons.[2] A "religious book" cannot constitute a deity capable of holding property in the absence of consecration. However, it is in an ideal sense that property can be said to belong to an idol. The possession and management of *debutter* properties in the nature of things is vested in some human agency like the manager, *Shebait* or *dharmakarta*. Thus, two essential ideas are involved in the notion of *debutter* endowments :

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

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

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

An interesting question came before the Supreme Court in *Jogendra Nath* v. *I.T. Commr*. Could the income of the deity be liable to income tax assessment? The Supreme Court answered the question in the affirmative. Delivering the judgment of the court, Ramaswamy, J. said that it should be remembered that the juristic person in the idol is not the material image but the Supreme Being. It is also not correct that the Supreme Being, of which the idol is a symbol or image, is the recipient and owner of the dedicated property. The correct legal position is, the learned judge said, that the idol as representing and embodying the spiritual purpose of the donor is the juristic person recognized by law and in this juristic person, the dedicated property vests. A distinction should be made between the legal and spiritual aspect of the Hindu idol. Neither God, nor any supernatural being, could be a person in law. But so far as the deity stands as the representative and symbol of that particular purpose indicated by the donor, it can figure as a legal person. It is in that capacity alone, that dedicated property vests in it. The Hindu idol is a juristic entity capable of holding property and of being taxed through its *Shebait* who are entrusted with the possession and management of its property. The decision lays down that since the accumulation and exploitation

1. AIR 1969 SC 1089.
2. *Ramjanki* v. *State*, AIR 1992 Pat 135.

of wealth are the secular aspects of the *debutter* endowment, they are liable to taxation. It is submitted that the judgment blends nicely the old concept and the modern social need : idol worship is to be preserved but the income and wealth of such endowment cannot escape the incidence of taxation. Though idol is a juristic person and in the ideal sense the property vests in it, it is not its beneficial owner. The true beneficiaries are the worshippers.[1]

Public and Private Debutter

It is competent for a Hindu to create public and private *debutters*. The distinction between a private and a public trust is that whereas in the former, the beneficiaries are specific individuals, in the latter, they constitute a body which is incapable of ascertainment. Apart from the restrictions laid down for ensuring good order and decency of worship, to regulate the time of public visits and to prevent overcrowding, the right of worship in public temples is a free right.[2]

The distinction between public and private endowment has assumed added importance as the State statutes regulate the public *debutter* and the private *debutters* are not within their purview. In *State of Bihar* v. *Mahant Shri Biseshwar*,[3] the Supreme Court held that, unless the *asthal (math)* itself is a public endowment, properties appertaining thereto would not be the properties of public endowment. Installation of an idol permanently on a pedestal and the fact that the temple is constructed on grounds separate from residential quarters of *mahant* are not conclusive proof that the temple is a public temple. That the public is freely allowed to enter the temple and has been worshipping there for a long period of time may be good evidence to indicate that the temple is a public temple, but it is not conclusive. Merely because a temple has an appearance of a residential house does not in any manner militate against the contention that the temple is a public temple. If a temple proved to have originated as a public temple, nothing more is necessary to prove that temple is public. The courts have held that if a temple has the following features, it may be taken as a public temple : (a) the temple building may be built in such an imposing manner that it may look like a public temple, (b) the members of the public are entitled to worship as a matter of right, (c) the expenses of the temple are met by the contribution made by the public, (d) *sevas* and *utsavas* conducted in the temple are those conducted in a public temple, or (e) the management as well as the devotees have been treating the temple as a public temple. The association of strangers in the management, the conduct of the founder and his descendants are some other facts which may help in determining the character of the temple.[4]

Real or nominal debutter.—The dedication of property should be real and not a colourable device to tie up the property for the benefit of the founder and his descendants. But if the property dedicated to the deity is very large and there is a surplus after spending the income for the *seva-puja* of deity, the surplus will vest as secular property in the heirs of the founder.[5] If the dedication is complete and the founder has completely divested himself from

1. *Deoki* v. *Murlidhar*, AIR 1957 SC 133.
2. *Narhari* v. *Badrinath Temple*, 1953 SCR 849.
3. AIR 1971 SC 2057. *See* also *Profulla* v. *Satya*, AIR 1979 SC 1682.
4. *Maharaja* v. *Ajanta*, AIR 1986 SC 2094; *Goswami* v. *Shah*, AIR 1970 SC 2025.
5. *Jadu Gopal* v. *Pannalal*, AIR 1978 SC 1329.

the dedicated properties, the *debutter* is real, otherwise it is partial.

Dedication may be partial or absolute. Whether a *debutter* is partial or absolute depends upon the intention of the settlor. In ascertaining the intention, regard must be had to the deed as a whole and the terms used therein.[1] After a review of most of the authorities, Krishna Iyer, J. in his expressive language laid down the test thus : where a dedication is made in a will and if on a consideration of the totality of terms, on shifting the more essential from the less essential purpose, on sounding the depth of the donor's wishes to find whether his family or his deity were the principal beneficiaries and on taking note of the language used, if the vesting is in the idol, an absolute dedication can be spelled out. So considered, if the grant is to the heirs with a charge on income for the performance of the *pujas*, the opposite inference is inevitable.[2]

The Shebaitship

The person in whom the management of the debutter is vested is known by various names : the term *shebait* is commonly used in Bengal; he is called the *Dharmakarta* in Tamil Nadu and Andhra Pradesh, and *Panchayatdar* in Tanjore and Malabar. It is only in a very broad sense that he is like a manager. As regards the endowed properties, he is more like a trustee, as regards his functions and duties towards the temple in spiritual sense, he is a holder of an office of dignity. In *Kalanka Devi Sansthan* v. *M.R.T., Nagpur*,[3] the Supreme Court reiterated the well established proposition that the properties in the case of an idol or *Sansthan*, do not vest in the *shebait* but in the idol. It is their possession and management which vest in the *shebait*. There is considerable difference between the position and functions of the *dharmakarta*, whose duties are secular, and *poojaries, archakas, mahants* and *shebait* of North India. The former is a mere manager, his liabilities are that of a trustee but he holds an office. The office may be held by a single member, or by a number of persons, or by a family or by number of families, or sometimes, by the entire village community. In relation to the endowment, the *Shebait* is a holder of an honorary office with duties to discharge. The office may carry some prestige and the *dharmakarta* may receive honours. But such honours have no perquisites attached as such to the office; they are mere marks of respect commonly shown to the religious dignitaries. By custom, a *shebait* may be entitled to appropriate a part of the income of the *debutter*.[4]

Usually at the time of founding of endowment, the founder appoints a *shebait* or himself becomes a *shebait*. But he may appoint a *shebait* later on. Sometimes, the founder also appoints a *pujari* or *archaka* to conduct worship. He is just a servant of the *shebait* and none of the rights, powers or obligations of a *shebait* are transferred to him.[5] A *pujari* can be removed for misconduct or indiscipline. Even when the founder has appointed *purohits*, the mere fact that the appointees have performed worship for several generations does not confer any independent rights on the members of the family to be so appointed. But if the founder has laid down that right to

1. *Dasrath* v. *Subba Rao*, 1957 SCR 1122; *Sappani* v. *Mohideen*, AIR 1974 SC 740.
2. *CIT West Bengal* v. *Jagannath Sew*, AIR 1977 SC 1523.
3. AIR 1970 SC 439.
4. *Sinha* v. *Rangaramanuja*, AIR 1961 SC 1720.
5. *Satyanaranayan* v. *Venkatappayya*, AIR 1958 SC 195.

perform *puja* shall remain in a particular family, he can do so. There may also be hereditary priest on the footing of custom or usage.

Legal position of shebait.—In the words of Mayne, "The *shebait* is one who serves and sustains the deity whose image is installed in the shrine. The duties and privileges of a *shebait* are primarily those of one who fills a sacred office. *Shebaitship*, in its true conception, therefore, involves, two ideas, the ministrant of the deity and its manager; it is not a bare office, but an office together with certain rights attached to it."[1] The legal position of the *shebait* is not that of a trustee of the trust properties. The *shebait* is, of course, a manager, but *shebaitship* is not an office. The *shebait* has not only duties to discharge but he has also beneficial interest in *debutter* properties.[2] *Shebaitship* is heritable like any other property.

It seems that *shebaitship* is not a mere office, it is property as well. Even when no emoluments are attached to the office, he enjoyes some sort of right or interest in the endowed property, which may be called proprietary rights. A Full Bench of the Calcutta High Court in *Manohar* v. *Bhupendra*,[3] after a careful review of most of the authorities, held that *shebaitship* is property.[4] In the concept of *shebaitship*, both the elements of office and property, of duties and personal interest, are mixed up and blended together. Undoubtedly, the duties of a *shebait* are to be regarded as the primary thing whereas the emoluments or beneficial interest enjoyed by him are only appurtenant to the said duties. Neither of these elements however can be detached from the others. The *shebaitship* is property. It is an hereditary and heritable office. But the turn of worship is not property.[5]

A Full Bench in *Manathuninath* v. *Sundaralingam*,[6] said that where no perquisites or emoluments are attached to the office of *dharmakarta*, it is not property. Under Hindu law, the learned judge said, it may carry with it certain powers over property, but the powers can be and are exercised by the *dharmakarta* for and on behalf of the deity or institution.

Even if *shebaitship* is considered property, the *shebait* has no right of sale of the office.[7] Similarly, the office cannot be mortgaged or leased out. The *shebaitship* being an amalgam of office and property, it will not be correct to say that it is absolutely alienable like any other property or that it is not alienable under any circumstances. It can be transferred unless such a transfer is repugnant to the principles of Hindu law.

Presents made to Shebait.—The personal presents made to *Shebait* are his personal property. In *Maharaja Parshotam Lalji* v. *Ajanta Estate Agency*,[8] the question before the Supreme Court was whether *charan seva* and *pradesh seva*, were the personal property of the Guru or belonged to the endowment of Shree Goswami Maharaj. When Shri Goswami Maharaj leads collective and congregational prayers within the *haveli*, it is customary for the devotees to make offering at the feet of the Maharaj and make presents.

1. *Hindu Law and Usage*, 928.
2. *Angur Bala* v. *Devbrata*, AIR 1951 SC 293.
3. (1933) 60 Cal 452.
4. *Ram Ratan* v. *Bajrang*, AIR 1978 SC 1393.
5. *Padna* v. *Vishwanath*, AIR 1976 Cal 344.
6. AIR 1971 Mad 1.
7. *Rajah Vurmah* v. *Ravi Burmah*, 4 IA 76; *Kali* v. *Panna*, AIR 1974 SC 1932.
8. AIR 1986 SC 2094.

These are known as *pradesh seva*. Ranganath Misra, J. disagreed with the High Court that once Bramha Sambandha was established, the Guru as well as devotees of the cult lost their individuality and his (Guru's) very existence merges with the Lord. The learned Judge observed that this was an overstretching of the doctrine. The Guru was not conduit pipe between the devotee at one end and the Lord on the other so as to lead to the conclusion that whatever was offered at the feet of the Guru belonged to the Lord. These gifts belonged to Guru personally.

Powers and Obligations of Shebait

The duties of *shebait* are both spiritual and temporal. In respect of spiritual duties, he must perform *seva* and *puja* of the idol. The custody of the idol belongs to him. Ordinarily, *shebait* cannot remove the deity. But in case removal of deity is necessary, the will of the deity should be given effect to; the will can be expressed through its guardian.

Shebait is entitled to the possession and custody of the endowed properties. He is entitled to management of the *debutter*. If there are more than one *shebait*, all must act in unison. If they are not able to act in unison, only remedy is to get a scheme laid down by the court which may fix the term of *shebaitship*. He is required to use reasonable care. Since *shebait* is like a trustee, he cannot make profit out of the properties or use them for his own private and personal gains, he should keep proper accounts. The *shebaits* are not entitled to any remunerations, unless provided by the founder in the endowment itself. Ordinarily, *shebait* has no right to offerings made to an idol, but again the matter rests on custom or the intention of the founder. The general rule is : if the offerings are of permanent character, they belong to the temple, but if they are of perishable nature, such as food, they may be appropriated by *shebait* or *pujari* or by other persons in accordance with custom. It seems that by custom *shebait* has the right of residence in the *debutter* property, unless there is an express prohibition in the deed of endowment. *Shebait* has the right of management and he represents the deity in all temporal matters. He can bring suits on behalf of the idol or in his own right. A decree in a suit against *shebait* is enforceable against the *debutter* property. It also binds his successors. It is only in exceptional circumstances that any other person, such as devotee or *de facto* manager, can bring a suit on behalf of the deity.

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

Alienation of endowed property.—The power of alienation is a power which *shebait* can exercise only in exceptional circumstances. He may borrow money by simple loans or on some security; he may, if necessary, sell some of the properties. Even if deed of endowment expressly prohibits *shebait* from alienating properties, *shebait* has the power to alienate and the alienation will not be held invalid. This is also the position of *mahant* in respect of the

endowed properties. In respect of *shebait's* or *mahant's* power of alienation, the rule laid down in *Hanuman Prasad* applies. Thus, the burden of proof is on the alienee.

The peculiarity of *shebait's* and *mahant's* alienation like that of Hindu female holder of limited estate is that an alienation without legal necessity is binding on the alienor during his lifetime. An alienation of *shebait* or *mahant* is merely voidable and not void. However, the alienation of the entire endowment is void and the alienee will not get any title whatever.[1] Similarly, if the endowed properties are alienated as personal properties, the alienation is void. *Shebait's* or *Mahant's* powers of giving lease of the endowed property are very limited.

Suit on behalf of the deity.—A suit by the worshipper as next friend of deity for a declaration that an alienation made by the *shebait* is null or void or to restrain him by a permanent injunction from alienating the *debutter* property is maintainable.[2] So is a suit by the *Pujari*. Similarly, in *Shri Thakurji Maharaj* v. *Dankiya*,[3] where a person claiming to be the *de facto shebait* filed a suit praying that a scheme for management of the property of the deity be drawn up to ensure proper management of *debutter* property, it was held that such a suit was maintainable.

Contract is specifically enforceable.—Where a *shebait* enters into a contract for the sale of *debutter* property for legal necessity, the contract is specifically enforceable.

Legal necessity and benefit of estate.—There is a long line of cases on the subject as to what amounts to legal necessity or benefit of estate. Broadly speaking, *shebait* has power to alienate property for carrying out the *seva-puja* of the deity and for repairing the *debutter* property and other possession of the idol or for instituting or defending the suits in respect of endowed properties. *Shebait* has no power of granting permanent leases. When an alienation is challenged, the burden of proof is on the alienee. The rules in respect of alienation of endowed property are more or less the same, as in *Karta's* power of alienation.[4]

Period of limitation.—Under the Indian Limitation Act, 1963, as against *shebait* or *mahant* and his legal representatives or his assigns, if alienation is not for valuable consideration, there is no period of limitation to file a suit for the recovery of property, or its proceeds. For a suit to set aside an alienation for value, the period of limitation is 12 years in respect of immovable property and three years in respect of movable property from the time when the alienation is known to the plaintiff.[5] In case someone claims *shebaitship* by adverse possession, the rightful owner can bring the suit within 12 years.[6]

Devolution of Shebaitship

Founder's rights.—Ordinarily, the *shebaitship* vests in the founder and

1. *Granasamdanda* v. *Valu*, 27 IA 69; *Hemanta* v. *Shri Ishwar*, 50 CWN 629.
2. *Shridav* v. *Jagannath*, AIR 1976 SC 1860; *Bhagwati* v. *Laxminath*, AIR 1985 All 228.
3. AIR 1986 All 243.
4. *Jogindra* v. *Official Receiver*, AIR 1975 Cal 389, 207 (earlier case law reviewed).
5. Articles 94 and 95, Indian Limitation Act, 1963.
6. Article 107, Limitation Act, 1963.

his heirs. The founder can also appoint *shebait* by his will.[1] In the following two cases, the founder's right to act or appoint *shebait* is lost : (a) If he has disposed it of, or (b) if, on account of some practice or usage, the mode of devolution is different.

The founder has power to appoint any person to manage the endowment on his behalf; such a person is under his supervision and control, and he can remove him at any time. But if the founder hands over all his rights to another and divests himself of all rights (virtually amounting to vesting of *shebaitship* in another person), the founder loses all powers and has no say in the matter. In case the founder has framed a scheme of succession, but the scheme fails, the management reverts to the founder. A person who makes a contribution to an endowment subsequent to its foundation cannot claim to be the founder even if his contribution is substantial.

Devolution of the office of shebait.—As a general rule, the devolution of the office of *shebait* is in accordance with the deed of the endowment. If in the deed the founder has not provided for any scheme of devolution of the office, the devolution will be in accordance with any custom or usage applicable to the endowment. If there is no such custom or usage, then ordinary rules of succession will apply, *i.e.*, the office and management will devolve on the heirs of the founder. But the founder cannot lay down a line of succession inconsistent with the general law.[2]

The females have a right of succession to the office as *shebaitship*.[3]

In South India, there are hereditary priests called *archakas* to whom considerable grants are usually made by the founder. At times, they are also the trustees of the temple. Their office and property devolve by ordinary rules of succession. In Northern India, *pujaris* mostly hold office at the pleasure of *shebait* and in most cases, the office is not hereditary, but where it is, the same rules apply. In *Ram Kali* v. *Ram Ratan*,[4] the Supreme Court held that even though a female is personally disqualified from officiating as *pujari* in the temple, she can get the *seva-puja* performed by another person. Therefore, a usage which permits a female to succeed to a priestly office is valid and can be given effect to.

It may happen that the office of *shebait* may, by inheritance, vest in more than one person. In such a case, it is open to the parties to arrange among themselves, for the *seva puja* and management of the properties. They may agree to discharge their duties and functions by turn or they may agree to some other arrangement. In case the parties fail to agree and it may be that the right to worship includes right to offerings, they may sue for partition but, as has been seen earlier, partition in such a case cannot mean partition of the endowed properties, but of the right to worship and right to offerings. The court may fix the term during which each of them will be entitled to do *seva-puja* and take the offering.[5] But if the right to worship does not include a right to offerings, no partition can be made. They must manage jointly. If

1. *Shyam Sunder* v. *Moni Mohan*, AIR 1967 SC 977.
2. *Profulla* v. *Satya*, AIR 1979 S.C. 1682; *Sitesh Kishore* v. *Romesh Kishore*, AIR 1982 Pat 339.
3. *Angullbala* v. *Depobreta*, AIR 1951 SC 293.
4. AIR 1956 SC 493.
5. *Pramatha* v. *Pradyumna*, (1295) 52 I.A. 245.

parties are members of the Mitakshara joint family, *karta* has the right of *seva-puja* and management[1] and other members cannot ask for the exercise of the right by rotation. In case of disputes, or mismanagement, anyone interested in the worship may sue and get a scheme settled by the court.

Where *shebait* has a right to nominate his successor, he may do so by an act *inter vivos* or by will; in case he fails to exercise the power, office reverts to the founder.

In *Rambir Das and anr.* v. *Kalyan Das and anr.*,[2] the question was as to the succession of the *shebaitship*. It was held in the absence of any reservation in the will as to the right of cancellation of nomitation of the next *shebait*, the nomitation would take effect from the date of execution of will. Further, it was laid down that there is no stipulation in Hindu Law which bars a married *shebait* to administer the temple.

Devolution of office contrary to the rule in Tagore's case.—*Tagore* v. *Tagore*[3] lays down the rule that all estates of inheritance created by gift or will so far as they are inconsistent with the general law of inheritance are void. It has been seen that the founder of the endowment has a right to dispose of the *dharmakartaship* or *shebaitship* in any manner. If there is no such disposition, and in the absence of any usage or custom to the contrary, the office, like any other species of heritable property, follows the line of inheritance from the founder. A Full Bench of the Calcutta High Court observed that the *shebaitship* being property, the rule laid down in *Tagore* applies.[4] After an elaborate review of the authorities, Mukherji, J. held : "The founder of a Hindu *debutter* is competent to lay down the rules to govern the succession to the office of *shebait*, subject to the restriction that he cannot create any estate unknown or repugnant to Hindu law."

In an equally elaborate judgment, a Full Bench of the Madras High Court held that, since *dharmakartaship* is not property, the rule in *Tagore's* case does not apply.[5] The founder has a right to lay down any scheme of succession for the office of *dharmakarta*.[6]

Disqualifications.—It seems that all the disqualifications under Hindu law which prevent an heir to succeed to the property will apply in the case of devolution to *shebaitship*. Under the Hindu Succession Act, 1956, change of religion does not disqualify a person from inheriting property, though his descendants are disqualified. It is submitted that the same rule will apply to the office of *shebaitship*. As to the performance of secular duties, there are no difficulties. As to spiritual duties, someone else can perform them on behalf of a *shebait*. However, the intention of the founder has to be looked into and if he clearly indicated that a non-Hindu cannot be a *shebait*, his intention will be given effect to. Similarly, if usage does not allow that the office can be held by a non-Hindu, the office cannot devolve on a non-Hindu. It is submitted that Hindu law of religious endowments is not a secular law. In fact, this is the only aspect of modern Hindu law where religion is still an important

1. *Thandavaraya* v. *Shanmugam*, (1909) 32 Mad 167.
2. JT 1997 (3) SC 356.
3. (1872) I.A. Supp 47.
4. *Manohar* v. *Bhupendra*, AIR 1932 Cal 791.
5. *Manathunalnatha* v. *Sundaralingam*, AIR 1971 Mad I (FB).
6. *See* also *Sambandamurthi* v. *State of Madras*, (1970) 2 SCJ 131.

consideration.

Termination of Office

The office of *shebait* falls vacant on the death, resignation or relinquishment by the *shebait*.

The office also falls vacant on the removal of a *shebait*. A *shebait* who is guilty of misconduct, moral turpitude or abuse of his position, can be removed by the court.

The court also has the power to frame a scheme for the management of the endowed properties. However, *a shebait* cannot be removed merely for some mistakes on his part or on account of laxity of management.[1]

Right to share in offering.—Apart from the *shebait* who has a right to a share in the offering made to the deity, under Hindu law, there are some other persons who have a right to take a share in the offerings by virtue of custom. These fall in two categories : (a) those who perform *seva-puja* in the temple, *i.e.*, perform essentially religious or spiritual functions, and (b) those who perform some secular functions. The former we have already discussed. The instances of the latter are several. One such instance came before the Supreme Court in *Badri Nath* v. *Panna*.[2] Certain families of Thakurs were entitled to take a share in the offerings made in the temples around the temple of Shri Vaishno Devi Ji, in lieu of certain secular services rendered by them. These included food to *Sadhu* who visited the temple, maintenance of cleanliness of the *Gupha* of Shri Vaishno Devi Ji, medical service to pilgrims, etc. These Thakurs were known as *baridars*. The *baridars* held no office. They performed certain secular duties and were entitled to a share in the offering. The right to share in the offering was held to be property. It was heritable, and the provisions of the Hindu Succession Act, 1956 applied. In *Shri Vallabharaya Swami Varu* v. *Devi Hanuman Charyulu*,[3] certain *inam* land was given to the *Archakas* in lieu of the services that they were required to render to the temple. It was held the property in *inam* deed belonged to the *Archakas* and not to the temple and would remain with them so long as they rendered services.

Suit against debutter.—No person can file a suit against the *shebait* as a next friend of the deity unless he has been so appointed by the court. But where a suit is filed on behalf of the deity, to mention the name of the temple as plaintiff is a mere misdescription and the real plaintiff is the idol.

IV
CHARITABLE ENDOWMENTS

Under charitable endowments, are included all the endowments recognized under Hindu law except the *math* and *debutter*. The usual charitable gift or bequest for charitable purposes are : the institution of the *dharmashala, annastrams* (choultries), *sadavarts*, for the establishment or maintenance of educational and medical institution, for construction and maintenance of sources of supply of water, such as tanks and wells, bathing ghats, etc. A Hindu can create a charitable trust or endowment for any of these purposes. Such dedications are made by the usual ceremonies of

1. *Gulzari Lal* v. *The Collector*, 39 CWN 699 (PC).
2. AIR 1979 SC 1314.
3. AIR 1979 SC 1147.

sankalpa and *utsarga*, though no particular ceremonies are obligatory.

Tanks and wells.—The excavation of tanks and wells has been a charitable purpose recognized in Hindu law from the very beginning. It is at the forefront of the *purtta* works. In the *Vishnu Dharmashala*, a passage runs : "As there is no sustaining of life in both worlds without water, the wise man should always construct reservoir of water. A well is equal to *agnistoma* sacrifice, in a desert it equals the *Aswamedha*. The well flowing with drinking water destroys all sins. The well-maker, attaining heaven, enjoys all pleasure."

Elaborate ceremonies are provided for the dedication for tanks and wells. Grant of land for the construction of a water reservoir is also valid. In *Kamaruju* v. *Sub-Collector, Orgole*,[1] certain lands as *Inams* were granted for the repair and maintenance of a tank. The question was : What was the effect on this Inam of the Andhra Inams (Abolition and Conversion into Ryotwari) Act, 1956? The Supreme Court held that grant of land for the maintenance of a tank is a charitable purpose and for the purpose of the Act, the tank is an institution. With the abolition of *Inam*, the property of tank gets converted into Ryotwari land to be managed by its manager, though it will be registered in the name of the Tank. The court left open the question whether tank is a juristic person.

Groves and trees.—The consecration of trees and groves is recognized charitable purpose from the earliest times. According to the Mahabharata : "The trees honour the Gods, with flowers, the manes with fruits, the guests with shade. The planter of trees procures the salvation of his deceased ancestors as well as those of succeeding future generations."

The same is true of groves. Such dedications are valid.[2]

Dharmashalas or rest-houses.—Construction of *dharmashalas*, too, has been a popular object of a charitable endowment from very early times. A *dharmashala* is a rest house. In South India, it is known as *choultry*. In the *choultries*, sometimes food is also provided for the travellers. In the ancient times, they were known as *Pratishtaya Griha*. In the *Bahni Purana*, we find the following passage : "Having caused to be made an auspicious and spacious asylum from burnt brick..... should dedicate it for the benefit of the poor and helpless and travellers."

The property dedicated to the *dharmashala* vests in the *dharmashalas*. In India, cities, towns and even villages have *dharmashalas*. The benefit of a *dharmashala* may be available to the public in general or it may be restricted to the members of a community or to the followers of a particular religion. Once dedication is made absolutely, it is not revocable. The provisions of the Indian Trust Act or the Transfer of Property Act do not apply to the dedication of property to Hindu endowments.[3]

Hospitals, educational institutions and gosalas.—Gifts for education have always been placed on a high pedestal. It is known as *atidan*, supreme gift. Imparting of free education has been the cherished object of Hindus throughout the ages. The same is true of hospitals and dispensaries

1. AIR 1971 SC 563.
2. *Chandra* v. *Jhandra*, 29 CWN 1033.
3. *Shri Ram Krishan Mission* v. *Dogar Singh*, AIR 1984 All 72.

known as *arogashalas*. A passage in *Nandi Purana* runs : "One must establish a hospital furnished with valuable medicines and necessary utensils placed under an experienced physician and having servants and rooms for the shelter of patients." The Hindus hold the view that a person who consecrates a hospital is the giver of everything.

The bequest for hospitals and schools can be validly made. In the *University of Bombay* v. *The Municipal Commissioner*,[1] the question before the Court was whether a University which did not impart any instructions but merely granted degrees to those who attained a certain standard was a valid endowment? The Bombay High Court held that it was an educational institution or school, the object of which is charitable or religious under Hindu law will be regarded as juristic person capable of holding property.[2]

A hostel attached to an educational institution is a valid charitable purpose.[3]

The establishment and maintenance of *goshalas* is a valid charitable purpose.[4]

Sradha and sadabrats.—The *sradha* or oblations to the departed ancestor is considered to be one of the obligatory duties of every Hindu. A Hindu often by an act *inter vivos* or by a bequest creates an endowment for the purpose of the performance of his *sradha* after his death or for the performance of the *sradha* of his ancestors.

Sadabrat is the free distribution of food and alms to the needy and poor. *Langars* and *annasatras* are species of *sadabrat*. An endowment for the *sadabrat* has been all along held valid. An *annacharta* is recognized under Hindu law;[5] it is an institution for the distribution of food to Brahmans and mendicants, and varies from *sadabrat* in a particular caste which is immaterial.

Reading of sacred books and gift to brahmans.—The endowments for reading of sacred books and for gifts to Brahmans have been also very popular among Hindus. Feeding of and paying *dakhathna* to Brahmans are in accordance with Hindu ideas a meritorious act.

1. 16 Bom 217.
2. *D.A.V. College* v. *S.V.A.S. High School*, AIR 1972 P & H 245 (F.B).
3. *Monie* v. *Scott*, ILR 43 Bom 281.
4. *Lalta* v. *Brahmanand*, AIR 1943 All 449.
5. *AG* v. *Strangman*, 6 Bom LR 56.

Chapter 44

MUSLIM WAKFS

Introductory

The origin of *wakfs* is traced to an utterance of the Prophet.[1] However, the rules relating to *wakfs* were developed later on by *ijma* (consensus). The following tradition is considered to be the basis on which the law of *wakfs* has been developed. One Omer Ibnal-Khattab on getting lands in Khyber went to the Prophet and entreating him said, "O Messenger of Allah! I have got land in Khyber than which I have obtained more valuable property; What does thou advise me?" The Prophet whereupon spoke thus, "If thou likest make the property itself inalienable and give the profits from it to the charity." Omer acting accordingly, laid down that the property would not be sold, or given away in gift, or inherited. He directed that out of the income of the property, charity should be given to the needy and the relatives, slaves should be set free, provision should be made for the travellers, and guests should be entertained.

The following utterance of the Prophet is often quoted, and is considered the briefest definition of a *wakf* : "Tie up the substance and give away the fruit". In early days of Islam, the law of *wakfs* suffered from great uncertainty. It was only in the second century after the Flight that a body of rules based on *ijma* were developed.

In the centuries that followed not merely the land but all types of property, movable and immovable, were made the subject-matter of *wakfs*. In the course of time, the Muslim world found that the "dead hand" (as *wakfs* were figuratively called) was trying to strangulate all progress and prosperity. Vast stretches of land, and all other types of properties, were dedicated to *wakfs* all over the Muslim world.

In India, there are about one lakh *wakfs* valued at more than a hundred crores of rupees. Instances of the mismanagement of *wakfs* are numerous; the incompetency and corruption of the *mutawallis* is appalling and abysmal; more often than not, the properties of the *wakfs* are squandered away.

Definition of Wakf

In its primitive sense, literally, the word "*wakf*" means "detention". Up to the time of Abu Hanifa, it was not clear as in whom did the ownership of the *wakf* property vest. Abu Hanifa defined *wakf* as "the tying up of the substance of a property in the ownership of the *wakf* and the devotion of its usufruct, amounting to an *aryia*, or commodate loan, for some charitable purpose." This means, that according to Abu Hanifa, the ownership in the *wakf* property continued to be vested in the owner and its usufruct was spent

1. "Tie up the substance and give away the fruits" the Prophet is reported to have said.

for charitable or pious purpose. According to Abu Yusuf and Imam Muhammed, *wakf* is the tying up the substance of a thing under the rule of the property of Almighty God, so that proprietary right of the *wakf* becomes extinguished and is transferred to Almighty God for any purpose by which its profits may be applied to the benefit of His creatures." The definition of the *wakf* has three essential elements : (i) the ownership of the founder or the *wakif* is extinguished, (ii) the property vests in the ownership of God perpetually and irrevocably, and (iii) the usufruct of the property is used for the benefit of mankind.

The Shia law defines a *wakf* in a different manner. According to the *Sharia-ul-Islam*, "A contract, the fruit or effect of which is to tie up the original of a thing and to leave its usufruct free," is known as *wakf*. This definition has two elements : (i) tying up or immobilization of the corpus, the subject-matter of the *wakf*, and (ii) the use of the usufruct for the benefit of mankind. It is not clear from this definition as to in whom does the property vest.

In modern India, *wakf* property vests in the ownership of God. Under the Shia law also, the usufruct of the corpus is assigned to the benefit of mankind.

The *Wakf* Act, 1913, S. 2, defines a *wakf* thus, "*Wakf* means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by Mussalman law as religious, pious or charitable."[1] Even though the Privy Council has observed that this definition is not exhaustive, it brings out the dominant elements of *wakf*, viz., the purpose of the *wakf* must be religious, pious or charitable, the dedication of property must be permanent, and the usufruct must be utilized for the good of mankind.

Characteristic features of a Wakf

The Muslim institution of *wakf* has several characteristic features some of which are unique. The outstanding features of a *wakf* are that the property vests in the ownership of God, it is permanent dedication, and a *wakf* is irrevocable. In fact, these are two facets of the same thing.

Property vests in God.—The outstanding feature of *wakf* is that the ownership of property dedicated for the *wakf* vests in God. "The tying up of property in the ownership of God, the Almighty, and devotion of the profits for the benefit of human beings." Once the dedication of property is made to the *wakf*, the ownership of the *wakif* is extinguished and it is transferred to God. Or, figuratively speaking, "Property is God's acre."[2] In *Md. Ismalia* v. *Thakur Sabif Ali*,[3] the Supreme Court observed that even in a *wakf* for *alal-aulad* (family *wakf*), there is a transfer in favour of God in whom the *wakf* property vests and not in the *mutawallis* or the beneficiaries.[4]

The creation of a *wakf* is essentially based on a legal fiction, the fiction, being that the property vests in God in perpetuity, but income from the property is permitted to be utilized for certain specified purposes, which

1. *Kani Ammal* v. *Tamilnadu Wakf Board*, AIR 1983 AP 188.
2. Quoted in *Abdul Rahim* v. *Narayan Arora*, AIR 1932 PC 44. *See* also *Abadi Begum* v. *Bibi Kaniz*, AIR 1927 PC 2.
3. AIR 1962 SC 1772.
4. *Moather Raza* v. *Joint Director, Consolidation, UP*, AIR 1970 All 509 (FB).

under the Muslim law are recognized as pious or religious.

In respect of vesting of *wakf* property in God, there is no distinction between a Shia *wakf* and a Sunni *wakf* or a public *wakf* or a private *wakf*.

Wakf must be permanent.—A Muslim *wakf* must be created for an unlimited period. *Wakfs* for limited periods are unknown to and are not recognized by Muslim law. In short, perpetuity is an essential and outstanding feature of *wakf*. Even the case of a family *wakf* (*wakf for alal aulad*), the ultimate benefit must be expressly or impliedly reserved for the poor or for any other purpose recognized by Mussalman law as religious, pious or charitable purpose of a permanent character. Thus, a gift of a usufructuary mortgage by the mortgagee or of a house standing on land leased for a fixed term is void, being of temporary nature. Similarly, a *wakf* will not be permanent if the *wakf-nama* contains a condition that if the properties are mismanaged, then the property should be divided among the descendants of the *wakif*.[1]

There has been some controversy as to whether *wakf* could be implied. The Privy Council in *Ghulam Md.* v. *Ghulam Hussain*,[2] held that there can be an implied *wakf*. After the coming into force of the *Wakf* Validating Act, 1913, this is the accepted view in India.

Wakf must be irrevocable.—The irrevocability is another characteristic feature of a *wakf*. Once constituted validly, a *wakf* cannot be revoked. If in a *wakf-nama* a condition is stipulated that the *wakif* reserves to himself the right of revoking of *wakf*, or that the *wakf* will stand revoked on the happening of any event, then such a *wakf* is void. In *Abdul Sattar* v. *Noorbai*,[3] the *wakf-nama* contained a condition that at any time the *wakf* could be revoked by a deed or a will or a codicil by anyone of the two *wakifs*, the *wakf* was held void. Beumont, CJ observed : "It is impossible to contemplate property transferred to Almighty God subject to a condition enforceable in the temporal courts for recovering that property for the benefit of the settlor." However, a *wakif* has the right at the time of dedication to reserve to himself the power of altering the beneficiaries either by adding to their number or by excluding some of them. Such a condition does not amount to the revocation of the *wakf*. Similarly, the power to amend the *wakf* may be reserved, but not absolute power of changing the objects of the *wakf*.[4] The following condition in a *wakf* deed was held valid : "If during my life, I so desire, I shall be competent to rescind or alter by a fresh *wakf-nama* the provisions as to the appointment of the *mutawallis* and other rules and procedure."

Revocation of testamentary wakf.—The position of testamentary *wakf* is different. A testamentary *wakf* may be revoked by the settler at any time before his death.[5] It is because a testamentary *wakf* is nothing more than a bequest and, therefore, it can be revoked like any other bequest. A testamentary *wakf* comes into existence after the death of the *wakif*. For the

1. *Habib* v. *Syed Wajihuddin*, AIR 1936 Oudh 222.
2. *Ghulam Md.* v. *Ghulam Hussain*, AIR 1922 PC 81.
3. AIR 1933 Bom 87. This case was followed in *Abdeally Hyderabhai* v. *A.G.*, (1942) 48 Bom LR 631.
4. *Rushidunisa* v. *Ata Rasool*, AIR 1958 All 57.
5. *Md. Ahsan* v. *Umardaraz*, ILR (1906) 28 All 633.

same rason, a testamentary *wakf* is not invalid on the ground that the deed contains a clause under which it is stipulated that *wakf* will not come into existence if the *wakif* is blessed with a child.

Wakf properties are inalienable.—It is a natural corollary to the doctrine of permanency of *wakfs* that once the properties are dedicated to God, they cannot be alienated. However, this rule is not absolute, and in certain circumstances, it is permissible that a *mutawalli* may alienate the *wakf* properties. When a *wakf-nama* allows a *mutawalli* to sell *wakf* properties in certain circumstances, then the *mutawalli* has the power to sell *wakf* properties in those circumstances. See, "*Mutawalli's* power of alienation."

Wakfs are of two types :

(a) Public *Wakf*, and

(b) Family *wakfs*.

Family Wakfs or wakfs for Alal-Aulad

The family *wakfs* or *wakfs* for *alal-aulad* are primarily based on *ijma*, though a tradition of the Prophet is also cited in their favour. The Prophet is reported to have said, "when a Muslim bestows on his family any kindred, hoping for reward in the next world, it becomes alms, although he has not given to the poor, but to his family and children."

In 1894, the Privy Council in *Abul Fata Md.* v. *Russomony Dhur Chowdhary*,[1] held the family *wakf* invalid. The family *wakf*, in substance, is an institution under which a Muslim can provide for himself, his family, his descendants, children and kindred for an indefinite period. The Privy Council held such *wakfs* invalid since they go against the public policy of not allowing a person to tie up the corpus of his property in perpetuity and reserve the income of it for his children and descendants indefinitely. But the decision of *Abul Fata* caused great dissatisfaction in the Muslim community, resulting in the passing of the Mussalman *Wakf* Validating Act, 1913 which validated family *wakfs*. By an amendment of 1930 to the Act of 1913, the family *wakfs* were validated retrospectively.

Before the decision in *Abul Fata*, the family *wakfs* of two kinds existed : (a) where the *wakf* was exclusively for the benefit of the settler, his children, descendants and kindred in perpetuity. Such *wakfs* have been invalid in Muslim law from the very beginning and continue to be invalid even today. (b) A *wakf* for the benefit of the settlor, his children and descendants as well as for charity. Such *wakfs* fall under two categories : (i) a *wakf* where there is substantial dedication of property for charitable purposes at some period of time or other, howsoever remote it may be. Prior to 1913, such *wakfs* were valid. (ii) A *wakf* which was the aggrandisement of the family in which the gift for charity was illusory, either on account of amount being too small, or on account of its uncertainty and remoteness, such *wakfs* were invalid before 1913.

The result of the Mussalman *Wakf* Validating Act, 1913 is that both the [illegible] of *wakfs* falling under category (b) are now valid. This means that [illegible] fund.) The illusory the *wakf* for charity may be, if ultimate benefit is given to [illegible] *wakf*-fund. [illegible], the *wakf* is valid. Section 2 of the Act lays down :

pay annually 2 IA 76.

It shall be lawful for any person professing the Mussalman faith to create a *wakf* which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes :

(a) for the maintenance and support, wholly or partially of his family, children or descendants, and

(b) where the person creating a *wakf* is a *Hanafi* Mussalman, also for his own maintenance and support during his lifetime, or for the payment of his debts out of the rents and profits of the property dedicated :

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

Section 4 of the Act runs :

No such *wakf* shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purposes of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the *wakf*.

Thus, under the Act of 1913, the requirements for the creation of a family *wakf* are that : (a) it may be created wholly or partially for the family, children and descendants of the settler, and (b) ultimate benefit must go, expressly or impliedly, to the poor or to a religious, pious or charitable purpose.

***Wakf* for family.**—The *Wakf* Validating Act, 1913, does not define "family". It has been given a fairly wide interpretation. Thus, it has been held that a family includes a daughter-in-law,[1] and an adopted son. Its ambit is wide and it is not confined to those people who are dependent for their maintenance and support on the *wakf*.[2] The son of a half-brother, the son and grandson of a paternal uncle and the son of a half-sister are included within the term "family" for the purpose of creation of a family *wakf*. In *Abdul Qavi* v. *Asraf Ali*,[3] the Allahabad High Court observed that the term "family" has to be given wide and not restricted interpretation, and a person may belong to the family, either because he is from a common progenitor, or if he is living under the same roof and is being supported and maintained by the settler. Thus, a stepdaughter of *wakif*'s sister brought up and maintained by the *wakif* is a member of the family,[4] so is the provision for the maintenance of settler's nephew and his descendants generation after generation is valid. When a *wakf* deed provided that every heir of the settler was entitled to be benefitted by the *wakf* and also heirs of descendants, it was held that heirs of the predeceased son were also entitled to be beneficiary.[5]

It is not necessary that a family *wakf* must be created for all members of the family. It may be created for some members, males or females, to the exclusion of others, generation after generation. A *wakf* can be made specifically to deprive an heir of his inheritance, and, for that reason, it

1. *Musharraf Begum* v. *Sikandar*, AIR 1928 All 516.
2. *Mubarak Ali* v. *Ahmed Ali*, AIR 1935 Lah 414.
3. AIR 1962 All 634.
4. *Abdul Zavi* v. *Ashraf Ali*, AIR 1962 All 564.
5. *Gulam Rassol* v. *Noor Jahan*, AIR 1982 All 511.

cannot be held void.

In *Mohiuddin Ahmed* v. *Sofia Khatun*,[1] the Calcutta High Court opined that if a *wakf* is to take effect on the extinction of the heirs how-low-soever, then the *wakf* will be invalid, though it will be valid if charity is postponed till after the extinction of the family, children and descendants. However, a *wakf* in favour of an utter stranger is void.[2]

A *wakf* for slaves and dependants is not within the terms of the *Wakf* Validating Act, 1913.[3] In *Hashim Ali* v. *Hamidi Begum*,[4] the Calcutta High Court held that where the main purpose of the *wakf* was charity, the *wakf* will not be invalid because of the provision of small pension in favour of three faithful servants. Under the Shia law, a *wakf* for the repair of *wakif*'s property is void. But a *wakf* giving a small portion to servants is valid.

Ultimate benefit for charity.—A family *wakf* is valid only if the ultimate benefit is given to charity. Proviso to S. 3 of the Mussalman *Wakf* Validating Act, 1913 lays down that the ultimate benefit should be given, expressly or impliedly, "for the poor or other religious, pious or charitable purpose of a permanent nature." If the condition of an ultimate dedication to pious and religious purposes be satisfied, *wakf* is not made invalid by an intermediate settlement on the founder's children and their descendants. But according to the Muslim law, that does not vitiate the settlement, provided the ultimate charitable object be clearly designated. The dedication to the poor must be bona fide.

The Act of 1913 does not validate a *wakf* for *alal-aulad* which is void being violative of a statute which constitutes a code in itself. Thus, in *Md. Ismail* v. *Sabir Ali*,[5] a *wakif* made a family *wakf* for the benefit of himself and his descendants in respect of his Talukdari property. The Talukdari property was governed by the Oudh Estates Act, 1899, which contained a rule against perpetuity. The Supreme Court held the *wakf* void.

If it is stated that the ultimate benefit will go to "religious, pious or charitable purposes", the *wakf* will be valid. Under the Act of 1913, the requisite condition for the validity of a *wakf* for *alal-aulad* is that its ultimate benefit should be reserved for the poor, or for any other religious, pious or charitable object of a permanent nature, and not that its benefit should be substantially for any such object. The benefaction may be so negligible or so remote in point of time that the purpose of the *wakf* may not appear to be substantially devoting the income of the dedicated property to any of the aforesaid objects; but that would not impair the validity of the *wakf*, if any such object is to be the ultimate recipient of the benefaction.

A family *wakf* is meritorious and pious, but it cannot be regarded as a *wakf* for religious or charitable purpose.[6]

Wakfs, Hindu Endowments and English Trusts

The motive for creating a *wakf* must be religious. In a *wakf*, the corpus

1. AIR 1940 Cal 524.
2. *Ismail* v. *Umar*, AIR 1942 Bom 155.
3. *Ghulam* v. *Ghulam*, AIR 1932 PC 81.
4. AIR 1942 Cal 182.
5. AIR 1962 SC 1722.
6. *Fazlul Rabbi* v. *State of West Bengal*, (1965) 3 SCR 307.

is tied in the ownership of God, and the usufruct is used for the benefit of mankind. A *wakf* has to be distinguished from the Hindu endowments and public charitable trusts. The fact of the matter is that a trust as it is known under English law, was unknown to both the Hindu and Muslim systems of law. The Hindu piety found expression in gifts to idols and images consecrated and installed in temples, in gifts to *maths*, and dedications to other religious institutions and for pious and charitable purposes. In short, for all those purposes considered meritorious. When properties are dedicated to a temple, the property vests in the idol which is considered to be a juristic person, when properties are dedicated to *math*, the *math* is regarded as a juristic person, and properties vest in the *math* and when dedication is made for a charitable purpose such as for a school or hospital, the properties vest in the institution.[1] The *shebait* of the temple, the *mahant of the math*, or the manager of the institution, is not the person in whom the property vests; he is not even the trustee, although, in view of his duties and obligations that he is required to discharge, he is answerable like a trustee in the general sense for maladministration and mismanagement.[2] Thus, it is obvious that Muslim *wakfs* are based on basically different concepts from those of the Hindu religious and charitable endowments. The Muslim concept of *wakf* also differs fundamentally from the English trust. A trust in the English law sense need not be permanent. The properties of the trust vest in the trustees. In a trust, a settler himself may take benefit. A *wakf* differs from a trust in the following respects, a *wakf* is a permanent dedication of property in which the subject-matter of the *wakf* is permanently tied to be ownership of God. The corpus is immobilized, while the usufruct is used for the benefit of the mankind. A trust need not be permanent. A trust can be terminated as stipulated in the trust deed, but a *wakf* is not revocable. It cannot be terminated under any circumstances. In a trust, the motive may be charitable or temporal, but in a *wakf*, it is essentially religious. In trust, the settler himself is entitled to take the benefit, but under a *wakf* this cannot be done (only under the Hanafi law, a settler may reserve a benefit for himself). The trust property vests in the trustee.

A Muslim is as much free to create a public religious, or charitable trust, as he is to create a *wakf*.[3]

Who can make a wakf : Capacity to make a Wakf

Any Muslim who has attained the age of majority, *i.e.*, eighteen years, and who is of sound mind, may make a *wakf*. A *wakf* cannot be made by a guardian on behalf of the minor, such a *wakf* is void.

The Mussalman *Wakf* Validating Act, 1913, and the Wakf Act, 1954, contemplate that a *wakf* can be made only by a Muslim. The former statute lays down that "*wakf* means the permanent dedication by a person professing the Mussalman faith." Similarly, the *Wakf* Act, 1954 defines a *wakf* as a

1. See Author's Work, *Modern Hindu Law*, (1990) Chapter XVII. *See* also *Pramathanath v. Pradyumma Kumar*, (1925) IA 245; *DAV College* v. *SNS High School*, AIR 1972 P & H 245 (FB).
2. *Vidhyayaruthi* v. *Balusami*, AIR 1922 PC 123; *Zain Yar Zung* v. *Director of Endowments*, AIR 1963 SC 985.
3. *Zain Yar Zung* v. *Director of Endowments*, AIR 1963 SC 285. *See* also *Sheikh Abdul Kayum* v. *Mulla Alibahi*, AIR 1963 SC 309.

permanent dedication by a person professing Islam. It is submitted that in view of the clear provisions in the statutes, and in view of the fact that *wakfs* essentially form part of personal law of Muslims, a non-Muslim cannot create a *wakf*.

Marz-ul-maut-wakfs.—Just as *marz-ul-maut* gifts are valid under Muslim law, so are the *marz-ul-maut wakfs*. If a person makes a *wakf* of his entire property and dies, then it takes effect as a bequest and operates only with respect to one-third of his property. But if the *wakif* recovers from his illness, the *wakf* is valid as to the entire property. The *wakf* of the whole of the property, too, will be valid on the death of the *wakif*, if the heirs consent. If only some heirs consent and the others do not, then the *wakf* will be valid in proportion to the shares of the consenting heirs.

Subject-matter of the Wakf

Originally, the subject-matter of the *wakf* consisted of properties of a permanent nature, such as land, fields, gardens, etc. But gradually all sorts of properties were made the subject-matter of the *wakf*, and there is an instance when even a camel was made the subject-matter of the *wakf*. Working cattle, implements of husbandry, copies of the *Koran* for reading in mosques, war-horses, swords, and chest of money for loan to poor were made the subject-matter of *wakfs*. (a) But in every case the subject-matter of *wakf* must be *mal*, or tangible property, and (b) it must be capable of being used without being consumed. The Mussalman *Wakf* Validating Act, 1913, lays down that a *wakf* may be made of "any property", and the *Wakf* Act, 1954 also lays down that *wakf* may be made of "any immovable or movable property." In *Md. Sadiq* v. *Fakhr Johan Begum*,[1] the question before the Privy Council was whether a valid *wakf* can be made of government promissory notes, and it answered the question affirmatively. It has been held that cash,[2] grove,[3] and offerings made in a shrine,[4] are valid subject-matters of a *wakf*. But it has been held that a *wakf* of money decree is not valid,[5] as the decretal amount may or may not be realized. The same view has been taken in respect of *wakf* of dower debt,[6] or rights of a usufructuary mortgagee.[7]

It is necessary that at the time when a *wakf* of a property is made, it must be under the ownership of the person making it. The criterion to be applied is to see whether the dedicator has the power of disposition over the property. Thus, a person who is in fact the owner of the property but believes that he is only its *mutawalli*, may validly dedicate the property for the *wakf*.[8] In order to create a *wakf*, it is not necessary that the *wakif* should have full proprietary interest in the property. What is necessary, is that the *wakif* must have permanent dominion over the subject-matter of the *wakf*.[9] A *wakf* may

1. AIR 1932 PC 13.
2. *Abdul Sakur* v. *Abubakkar*, ILR (1929) 54 Bom 358.
3. *Amir Ahmed* v. *Muhammad Ezaz*, ILR (1935) 58 All. 468.
4. *AG.* v. *Yusuf Ali*, (1921) 24 Bom 1060; *Zoolekha Bibi* v. *Syed Zunul Abedin*, 1904 6 Bom LR 1658.
5. *Ghulam Mohiuddin* v. *Hafiz Abdul*, AIR 1947 All 127.
6. *Nosh Ali* v. *Shamsunnissa Bibi*, (1938) All 322.
7. *Abdul* v. *Asraf*, AIR 1952 All 364.
8. *Haider Hussain* v. *Sudama Prasad*, AIR 1940 Oudh 18.
9. *Md. Abu Zafar* v. *Israr Ahmed*, (1976) All 366.

validly be made of the property subject to the mortgage or lease.

A *wakf* which forms part of a transaction to play fraud on the heirs is void and totally ineffective.[1]

Wakf of Musa.—A *wakf* of *musa* for the maintenance of a mosque is valid.[2]

Objects of the Wakf

Looked at from the point of view of the objects of *wakf*, Muslim law lays down various objects for which a *wakf* may be created. The Muslim law-givers hold the view that *wakf* may be made : (a) for the rich and the poor, (b) for the rich, and thereafter, for the poor, and (c) for the poor alone. It is submitted that it is proper to approach the subject from the point of view of the objects of the *wakf*.

In the language of a Mussalman *Wakf* Validating Act, 1913, the purpose of the *wakf* must be one recognized by Muslim law "as religious, pious or charitable." The *Wakf* Act, 1954 also uses the same language. It says that a *wakf* may be created for any purpose recognized by Muslim law as pious, religious or charitable and includes : (i) a *wakf* by user, (ii) *Mushrut-ul-khidmat*, and (iii) a *wakf* for *alal-aulad* to the extent to which the property is dedicated for any purpose recognized by Muslim law as pious, religious or charitable.[3] The qualification in the family *wakf* is stated on account of the reason that family *wakfs* are outside the purview of the *Wakf* Act, 1954.

What does religious purpose or object mean in the context of *wakfs*? The Supreme Court said that "a religion is not merely an opinion, doctrine or belief; it has its outward expression in acts as well and religious practices or performances of acts in pursuance of religious belief are as much as a part of religion as faith or belief in particular doctrine."[4] According to the Muslim law-givers, the ultimate object of a *wakf* is the benefit of the poor.

The following have been held to be the valid objects of the *wakfs* : (a) mosques and provisions of Imams to conduct worship there; (b) aquaducts, bridges, and caravan scrals, (c) distribution of alms to the poor and financial assistance to the poor for going to pilgrimage, (d) celebrating the birth of Ali Murtaza, (e) for making and keeping of *tazias*, (f) provision of camels and *duldul* for religious procession during *muharram*, (g) repairs and maintenance of *imambaras*, and *khanakahs*, (h) celebrating the *barsi* (death anniversary) of the settler, or members of his family, (i) performance of ceremonies known as *Kadam Sharif*, burning of a lamp in a mosque, (j) reading of the *Koran*, (k) performance of the annual *fateha* of the settler or members of his family, (l) construction of free boarding house (*rabat*) for pilgrims at Mecca, (m) payment of moneys to *fakirs* or the poor, (n) grant to an *Idgah*, and a *dargah* or shrine of a *pir*.

A *wakf* cannot be created for objects prohibited by Islam. Thus, a *wakf* cannot be created for the maintenance of church or a temple. There is some controversy as to whether celebrating the death anniversary of settler and

1. *Har Prasad* v. *Fayaz Ahmed*, AIR 1933 PC 83.
2. *Md. Ayub Ali* v. *Amir Khan*, AIR 1939 Cal 268.
3. Section 3(1).
4. *Ratilal Panchand* v. *State of Bombay*, (1954) SCR 1055.

members of his family and performance of annual *fateha* of the settler and of the members of his family are valid objects of *wakf*. In *Kunhamutyya* v. *Ahmed Mussallar*,[1] it was held that if there was no distribution of alms, the reading of the *Koran* and the performance of ceremonies for the benefits of the soul of the settler was not a valid object of the *wakf*. However, in *Abdul Sakur* v. *Abubakker*,[2] it was held that the performance of such ceremonies at the grave of an individual or at the tomb of a saint is a valid object of the *wakf*. In *Abdul Karim* v. *Rahimbhai*,[3] it was held that a *wakf* the purpose of which was to spend a certain sum of money for feasting of Cutchi Memons every year on the death anniversary of the settler was not a valid *wakf*. A *wakf* of a house for the use of all travellers Muslim and non-Muslims is not a valid *wakf*.[4]

Wakf void for uncertainty.—It is an accepted doctrine of the English law of trusts that a trust is void if the object of the trust is not certain. This doctrine has been applied by the Indian courts to trust, Hindu endowments and Muslim *wakfs*. The Bombay High Court held that a bequest by a *Khoja* Muslim for "dharma" was void for uncertainty. In *Mariambi* v. *Fatmabi*,[5] a bequest for *dharma-kherat* was held void. But in a will using English language the words, "to be disposed of in charity as my executors think right" were construed to create a valid trust.[6] In *Abdul Sakur* v. *Abubakker*,[7] a Cutchi Memon used the words, "Dharmakriya" (religious ceremonies in connection with death). It was held that the purpose of the *wakf* was certain. Similarly, in a Punjab case, a *wakf* for such charitable object as the trustees should think proper and for such purposes as the settlor should obtain certain bliss therefrom has been held valid.[8]

In *Md. Yusuf* v. *Azimuddin*,[9] it was opined that a *wakf* for *Khairat* or for *Khairat kam* was valid and no specification of the object of charity was necessary. However, the court said that whether a *wakf* for *Unure Khair* or *Khare Khair* was valid depended upon the construction of these words as to in what sense these have been used, and if these words were used to denote benevolent purposes or good purposes, then the *wakf* would be void for uncertainty.[10] Similarly, a *wakf* for *kar khair* which means any good act is void for uncertainty, unless a *wakf* for *kar khair* is construed to mean "purpose recognized by Muslim law as religious, pious or charitable." The latter construction has been accepted in *Sheik Ramzan* v. *Rahmani*.[11] But this decision has been overruled by a Full Bench where it was held that the words "charitable purpose highly commendable according to the Hanafi school of Muslim law" were not sufficient to constitute a valid *wakf*.[12]

1. AIR 1935 Mad 29.
2. AIR 1930 Bom 191.
3. AIR 1948 Bom 342.
4. *Karnataka Board of Wakfs* v. *Md. Bazeer Ahmed*, AIR 1982 Kant 309.
5. AIR 1979 Bom 127.
6. *Ganga Bai* v. *Thavar*, (1863) 1 Bom ILR 71.
7. (1929) 54 Bom 358.
8. *Shahab-uddin* v. *Sohanlal*, (1907) PR 75.
9. AIR 1941 All 235.
10. *Fakir Md.* v. *Abda Khatoon*, AIR 1952 All 127.
11. AIR 1932 Oudh 71.
12. *Ahmadi Begum* v. *Badrunnissa*, AIR 1940 Oudh 324 (FB).

In *Hashim Ali* v. *Iffat Ara Hamidi*,[1] the Calcutta High Court held that the use of general words such as 'religious, pious or charitable' (as used in the proviso to S. 3 of the Wakf Validating Act, 1913) without specifying the object of charity did not invalidate a *wakf* as these words contemplated an ultimate gift to charity effective in law. These words mean that impliedly the ultimate benefit is reserved for the benefit of the poor, even though these purposes are not clearly expressed in the *wakf-nama*. In this case, the ultimate gift on the failure of the descendants of the *wakif*, was given to "proper acts of charity." The *wakf* was held valid. Similarly, a dedication of property for the benefit of the Muslim community on the occasion of rejoicings and mournings was held to be valid; it was, considering the congested conditions of settler's town, construed to mean the provision for buildings for accommodating marriage and funeral parties.[2]

In *Garib Das* v. *M.A. Hamid*,[3] the Supreme Court considered this question. In this case, under a *wakf-nama*, a Muslim settled his "whole and entire property to the *mosque* and *madrasa* at *Mohalla* Nathanagar" and the surplus of usufruct thereof was to be spent on the same. It was established that there were two mosques at Nathanagar. The Supreme Court observed that if the matter stood at that, there was a scope for holding that the *wakf* was void for uncertainty, but there was another document in which the *wakif* had clarified by identifying the mosque that he meant out of the two. In view of this, the Supreme Court held that the *wakf* was not invalid for uncertainty. In *Abdul Karim* v. *Rahimat Bai*,[4] a Muslim created a *wakf* with the declaration that the usufruct should be used for the benefit of the descendants of the Prophet. The *wakf* was held void for uncertainty, as the court observed it was well nigh impossible to ascertain who were the descendants of the Prophet.

When the object of a *wakf* is partly valid and partly invalid, then the *wakf* may be valid as to the former and void as to the latter. In such a case, the property dedicated for invalid purpose will revert back to the *wakif*. However, where no demarcation of property is made, *i.e.*, it is not stated as to how much is to be spent for a valid purpose and how much for an invalid purpose, then the entire amount may be applied for the valid purpose.[5]

Doctrine of Cy-pres.—The English doctrine of cy-pres applies to *wakf*. Literally meaning "as near as possible", the doctrine lays down that if a charitable intention has been expressed by the dedicator, a *wakf* (or trust) will not be allowed to fail because the object specified by the settler has failed; in such a case, the income will be applied for the benefit of the poor or to objects as near as possible to the object that had failed. The doctrine applies only if the original *wakf* is valid. A *wakf* which is already void for uncertainty cannot be validated by the application of the doctrine.[6]

Formalities of a Wakf

Muslim law prescribes no specific form in which a *wakf* may be created.

1. AIR 1942 Cal 180.
2. *Fazl Din* v. *Karam Hussain*, AIR 1936 Lah 81.
3. AIR 1970 SC 1035.
4. AIR 1946 Bom 342.
5. *Mazhar Hussain* v. *Abdul*, (1911) 34 All 400.
6. *Bugia Begum* v. *Surajmal*, AIR 1936 All 404.

It may be in writing or it may be oral. Nor is it necessary that any specific word or specific formula should be used. Even the word "*wakf*" may not be used. What is essential is that language of the dedication should be clear and unambiguous from which an intention to create a *wakf* is discernible. Even when it is not clear as to whether a grant constitutes a *wakf*, the conduct of the grantor and his statements, the surrounding circumstances, and the manner in which the property is treated will be looked into to find out whether the intention of the grantor was to create a *wakf*.[1]

A *wakf inter vivos* comes into existence on a mere declaration of endowment by the owner of the property. The Shia law is different. Under the Shia law, a *wakf* cannot come into existence unless the declaration of *wakf* is accompanied by the delivery of possession. Under the Shafi law, no delivery of possession is necessary.

Under both the Sunni and the Shia law, the *wakif* can constitute himself as the first *mutawalli*. When this is done, no delivery of possession is necessary even under the Shia law, though under Shia law, it is essential that the character of possession should change from that of the owner to that of the *mutawalli*. But no specific transfer of property from the name of the founder to the name of the *mutawalli* is necessary in such a case.[2]

When a *wakf* has been validly created by a document or otherwise, it is not open to the settler or his descendants to assert that it was not intended to be acted upon. An apparent transaction must be presumed to be real and the onus to prove the contrary is on the person who alleges it. The settler and those claiming under him are however not precluded from showing that no *wakf* had been created and that the deed was not intended to operate as a *wakf* but was illusory and fictitious. This is a question of intention evidenced by the fact and circumstances showing that it was not acted upon. For the purpose of such inquiry, subsequent conduct, if it is merely a continuation of conduct at the time of execution, is relevant.[3] In *Md. Ali* v. *Bismillah Begum*,[4] the Privy Council said that where a person executes a deed of *wakf* without any intention of divesting himself of his ownership of the property, the real intention being to utilize the document should it become necessary as a shield against any claim that any person might have against him either then or at any future time, the deed cannot be given effect as a *wakf*. A *wakf* cannot be created by mere dedication of property.[5]

Mere intention to create a *wakf* is not enough, either. On the other hand, when a *wakf* is created by a document and is completed by the delivery of possession, it is not open for the settler to say that he never intended to create a *wakf*.[6]

Registration.—If a *wakf* of immovable property worth rupees one hundred or more is created by a deed, the deed requires registration under S. 17(i)(b) of the Registration Act. In *Md. Rustom Ali* v. *Mustaq Hussain*,[7] a

1. *Md. Raza* v. *Yadgar*, AIR 1924 PC 109.
2. *Garibdas* v. *Munshi Abdul Hameed*, AIR 1970 SC 1035; *Beliram* v. *Md. Afzal*, AIR 1948 PC 168.
3. *Ibid.*
4. AIR 1930 PC 255.
5. *Dwarkadas* v. *Punjab Wakf Board*, AIR 1991 P & H 89.
6. *Beliram* v. *Md. Afzal*, AIR 1948 PC 1961.
7. 47 IA 224.

Muslim executed a deed and got it registered by which he created a *wakf* and constituted himself as the first *mutawalli*. He also reserved to himself the power of appointment of additional *mutawallis*. In the deed, he clearly laid down the powers and duties of *mutawallis*. Later on, he executed another deed by which he appointed additional *mutawallis*, some were required to act jointly with him and some were required to act after his death. This deed was not registered. Subsequently, he died. The *mutawallis* brought a suit for the recovery of property from the possession of the heirs. The heirs, *inter alia*, took the defence that since the second deed was not registered, the *mutawallis* had no *locus standi* to file the suit. Repelling the contention, the Privy Council said that since the second deed did not purport to assign the property to the *mutawallis*, it did not require registration.

The Mutawalli

The Founder's Power of Appointment.—The founder of a *wakf* enjoys full power of appointment of a *mutawalli*. He may constitute himself as the first *mutawalli*. He may lay down a scheme for succession to the office of *mutawalli*. In short, he has the freedom to lay down any scheme of *mutawalliship*. In *Shahar Banno* v. *Aga Md.*,[1] a *wakf* was created by a Shia Muslim. The *mutawalliship* of the *wakf* was claimed by a female who was his lineal descendant but belonged to Babi sect. The trial court appointed her as *mutawalli*. But, on appeal, this order was set aside on the ground that she being a Babi, might not take much interest in carrying out the religious observances of the Shia sect for which the *wakf* was founded. This view was upheld by the Privy Council. In *Md. Esque* v. *Md. Amin*,[2] the settler appointed his son as *mutawalli* and laid down that *ba farzandan perzandan* (descendants) should succeed as *mutawallis*. It was held that the use of the words "*ba-farzandan*" did not exclude the daughters of male descendants, but excluded the children of daughters. In *Md. Zainulauddin* v. *Moideen*,[3] the Supreme Court held that there was no bar in appointing a female as *mutawalli*. In *Ali Asghar* v. *Fariuddin*,[4] a settler constituted himself as the first *mutawalli*, and laid down that after his death, P would be the *mutawalli*. The settler resigned from the office of *mutawalli* and respondent R as *mutawalli*. P disputed his appointment. The court held that P was entitled to *mutawalliship* only after the death of the settler, and if the settler resigned during his lifetime, he could fill the vacancy by nominating any person as *mutawalli*. But such an appointment would be valid only during his lifetime. On the death of the settler, P would be entitled to *mutawalliship*. Similarly, where a *wakif* has reserved to himself the power of appointment of a *mutawalli*, he can appoint any person as a *mutawalli*, but the power of appointment does not confer on him the power of dismissal. He can dismiss a *mutawalli* only if he had reserved such a power.

The founder of a Shia *wakf* becomes *functus officio* after he had transferred the possession. If he has not appointed a *mutawalli*, or has settled no scheme, then after the delivery of possession, he has no such power. Undoubtedly, he can make an appointment, or settle a scheme, at any time

1. (1907) 34 IA 46
2. AIR 1948 Cal 312.
3. (1989) JT (11) SC 563.
4. AIR 1947 All 261.

before the delivery of possession.

Mutawalli's power of Appointment.—In case the founder and his executor both are dead and the *wakf* deed does not lay down any scheme of succession, then the outgoing *mutawalli* may appoint his successor on his death bed. But he has no such power in health. When two or more *mutawallis* are appointed as joint *mutawallis*, and the *wakf-nama* is silent as to what is to be done in the event of death of one of them, then the office will pass on by survivorship to the surviving *mutawallis*.[1]

Court's power of appointment.—In respect of public *wakf*, the courts exercise very wide discretion. Ordinarily, the courts will not interfere with the intention of the founder as regards the subjects of the *wakf*, but as regards the management, it has complete discretion. The court will try to give effect to the wishes of the settler so far as they are conformable to the changed conditions and circumstances, but its primary concern and foremost duty is to take into consideration the interest of the general public for whose benefit the *wakf* is created. And, if the court deems it necessary, it may vary or alter any rules of management which it considers to be neither practicable nor in the best interest of the *wakf*. This applies to the appointment of *mutawallis* as well.

In all those cases where the founder has not appointed a *mutawalli* or his appointment cannot be given effect to, then the court has the power of appointing *mutawalli*. When the court appoints a *mutawalli*, it will take into consideration : (a) the direction, if any, given by the founder (the court has the discretion to disregard any direction of the *wakif* if it feels that to do so will be to the manifest advantage of the *wakf*; (b) if there is any member of the founder's family, who is qualified and available (but if no qualified member of the founder's family is available, then a stranger may be appointed); and (c) among the relations of the settler who are available for appointment, the court will appoint the most appropriate person irrespective of the nearness of kin to the settler (when the choice is between lineal descendant and remoter relations, the court is not bound to appoint the former).

Where there are more than one *mutawalli* and one of them dies, resigns or is removed, then the court has power to fill in the vacancy by making an appointment. In such a case it is not necessary to file a regular suit under S. 92, C.P.C. It can be done by an application to the court. However, before making the appointment, the court should issue notices to all persons who are interested in the appointment.

The power of appointment of a *mutawalli* is vested in the district court.

Appointment by congregation.—Where a *wakf* is a purely local *wakf*, such as a graveyard or a mosque, then the appointment of a *mutawalli* may be made by the congregation of the locality.

Who may be Mutawalli

It is an established rule of Muslim law that neither a minor nor a person of unsound mind can be a *mutawalli*. But a minor may be a *mutawalli* where the office of *mutawalli* is hereditary or where the line of succession is laid down in the *wakf-nama* and the office falls on a minor.

1. *Commr. of Wakf* v. *Asraf Alam*, AIR 1975 Cal 162; *Hali Abdul Razak* v. *Sheik Ali Baksha*, AIR 1948 PC 163.

Female as Mutawalli.—There is no legal prohibition against a woman holding the office of *mutawalli*, particularly when a *wakf* by its very nature does not require the performance of any spiritual duties or functions. The duties of a manager of a graveyard are secular, and, therefore, a woman can be appointed as *mutawalli*. A woman can also be appointed as head *mujawar*. The general rule is that in all those cases where the spiritual or religious functions can be discharged by a deputy, there cannot be any objection to the appointment of a woman as *mutawalli*. Thus, a woman cannot be *sajjadanashin* (spiritual head), *khatib* (one who reads sermons), an *imam* of a mosque (one who leads congregation) or a *mulla*. In *Syed Mahoamed Ghose* v. *Sayabiran*,[1] the Madras High Court observed that where the court is required to appoint a *mutawalli*, whether the duties are secular or religious, it must prefer to appoint a male *mutawalli* since the Muslim women observe *pardah*. However, in *Md. Zainubuddin* v. *Moideen*,[2] the Supreme Court had held that a woman can be appointed a *mutawalli*.

Nature of the office of Mutawalli.—The *mutawalli* is not a trustee in the English law sense, since no properties of the *wakf* vest in him. He is more like a manager, or superintendent, though he enjoys a slightly better position than that of a mere manager or superintendent. The *mutawalliship* or a public *wakf* is in the nature of a public office. The right of management or superintendence of a *mutawalli* are, nonetheless, the same as the rights of management of an individual owner. He is not bound, nor can he be compelled, to allow the use of *wakf* properties for the objects which may be laudable but are not the objects of the *wakf*. Thus, the Muslim community of the locality where the mosque is situated cannot compel the *mutawalli* of the mosque to allow a school building to be constructed on the site attached.[3] In a case pertaining to a private *wakf*, a *mutawalli* is not a mere manager or superintendent but is "practically speaking its owner."[4]

The *mutawalli*, though not a trustee, yet has duties similar to those of a trustee. Thus, if a *mutawalli* wrongfully deprives a beneficiary of the profits of the *wakf* property, he is liable to pay interest on the amount in the same way as a trustee is bound to pay it under S. 23 of the Trust Act.[5] Under Muslim law, the trusteeship of the *mutawalli* is known as *tawliyat*.

Remuneration of mutawalli, officers and servants of the wakf.—A *mutawalli* is not entitled to any remuneration as a right. The *wakif* may provide for remuneration for the *mutawalli*. Where no provision is made in the *wakf-nama* or where the *wakf-deed* provides for too small a remuneration, the court has the power to allow remuneration to the *mutawalli*. But in no case, a court can fix an amount of remuneration exceeding one-tenth of the total income of the *wakf*.[6] However, it may be emphasised that a *mutawalli* cannot claim remuneration as a matter of right. The office conceived is honorary.

A *wakf-deed* usually provides for the salary and remuneration and allowances of the officers and servants of the *wakf*. The *mutawalli* has no

1. AIR 1935 Mad 638.
2. (1989) JT (11) SC 563.
3. *Syed Ahmed* v. *Hafiz Zahid*, AIR 1934 All 732.
4. *Md. Qamer* v. *Salamat Ali*, AIR 1933 All 407.
5. *Kishwar* v. *Zafar*, AIR 1933 All 186.
6. *Mohiuddin* v. *Sayiddin*, ILR (1893) 20 Cal 810; *Mumtaz* v. *AG*, AIR 1936 Oudh 244.

power to enhance the salary and allowances of the officers and servants of the *wakf*, where the *wakf*-deed does not empower him to do so. However, the court has the power to fix or increase the salaries and allowances of the officers and servants of *wakf*.

Power of Mutawalli

A *mutawalli* has the power of management and administration of *wakf* properties. Where they are not in his possession, he can sue for possession.[1] He has full power of utilizing of *wakf* property for the purpose for which the *wakf* has been created. But he has no power of alienating the *wakf* property unless the *wakf*-deed specifically authorizes him to do so. In *Md. Usaf* v. *Md. Sadiq*,[2] a *wakf*-deed provided for the sale of the *wakf* properties and to construct and maintain a rest house from the sale proceeds at Mecca. It was held that this authorized the *mutawalli* to sell the properties. The *mutawalli* cannot alienate them, unless the *wakf-nama* specifically provides for these.

Alienation with the permission of the court.—A *mutawalli* can alienate the *wakf* properties with the prior sanction of the court. There is some controversy among the High Courts as to whether for obtaining permission of the Court for alienating the property, a suit has to be filed or whether this can be done by putting in an application under the Trustees Act, 1866.

An alienation made by a *mutawalli* without the prior permission of the court is not void *ab initio*. It is merely voidable. Acting on this principle, the Calcutta, Madras and Allahabad High Courts and the Chief Court of Oudh have held that a mortgage made without the prior permission of that court may be retrospectively confirmed by the Court.[3] It should be noted that these courts proceeded on the assumption that alienation was necessary for carrying out the object of the *wakf*.

An unauthorized alienation can be challenged by any beneficiary, it is not necessary to bring a representative suit.

Mutawalli's power of granting lease.—Ordinarily, a *mutawalli* cannot grant a lease of the *wakf* property for more than three years if it is agricultural land, and more than one year if it is non-agricultural property. A lease for longer duration may be granted if the *wakf*-deed specifically permits him to do so. Leases for longer periods may be given with the prior permission of the court. The court has power to sanction leases in the interest of *wakf*, even if the *wakf* deed specifically prohibits a *mutawalli* to do so. In *Zafarbhai* v. *Chaganlal*,[4] the Bombay High Court and in *Sundaramurthi* v. *Choti Bibi*,[5] the Madras High Court held that unauthorized lease can be confirmed retrospectively. Since an unauthorized lease is not void but merely voidable, it is binding on the *mutawalli* personally, and during his lifetime, he cannot repudiate it or evict the lessee. In *Shah Md.* v. *Manzoor Ali*,[6] a *mutawalli*

1. *Abdur Rahim* v. *Narayandas*. AIR 1923 PC 44.
2. AIR 1933 Lah 501
3. *Nimai Chand* v. *Hassein Gulam*, ILR (1909) 31 Cal 129; *Afzal Hussain* v. *Chhedilal*. AIR 1935 All 792; *Abdul Kadir* v. *Kadir Sabha*, AIR 1953 Mad 143; *Saheb Khan* v. *Madar Sahab*, AIR 1954 Ori 239.
4. AIR 1942 Bom 21.
5. AIR 1942 Mad 641.
6. AIR 1961 Pat 45.

granted a permanent lease of agricultural land. The Patna High Court held that the lease was valid for the first three years, and since nothing was done to avoid it thereafter, the lessee's possession continued to be lawful and was not that of a trespasser.

Power of taking debt.—A *mutawalli* has no power of incurring a debt. A person who advances a loan to a *mutawalli* for carrying out the purposes of the *wakf*, has no remedy against the *wakf* properties. He cannot claim to be indemnified out of the *wakf* funds. A decree passed against the *mutawalli* will not be binding against the *wakf* properties, unless it specifically says so.

Power to file a suit.—Before the coming into force of the Wakf Act, 1954, the *mutawalli* could file a suit relating to a *wakf*, but after the coming into force of the Act, the power to file a suit is vested in the *Wakf* Board under whose supervision *mutawallis* have to work.

Removal of Mutawalli

Once a *wakf* comes into existence and a *mutawalli* is appointed, the founder has no power of removing him unless such a power has been specifically reserved in the *wakf*-deed.

The court has power to remove a *mutawalli*. A court may remove a *mutawalli* on the ground of misfeasance, breach of trust or for his unfitness, or for any other valid reason. The court's power of removal is unfettered, and it can remove a *mutawalli* even if the settler has specifically laid down that the *mutawalli* should not be removed. It is because the foremost duty of the court is to consider the interest of the *wakf*. Thus, a *mutawalli* who is insolvent, or who neglects to perform his duties as laid down in the *wakf* deed, or who claims adversely to *wakf* properties can be removed by the court.

The procedure for removing a *mutawalli* is by way of a suit in the district court.

The Central Government passed the *Wakf* Act, 1923 with a view to making provision for the better management of *wakf* properties and for ensuring the proper accounts of *wakf* funds and for the proper maintenance of income. There are several general statutes (passed by the Central and State legislatures), under which is the administration of charitable and religious institutions including *wakf*, may be regulated. These are : (i) the Bengal Charitable Endowments Public Buildings and Escheats Regulation, 1810, (ii) the Religious Endowments Act, 1863, (iii) the Charitable Endowment Act, 1890, (iv) the Charitable and Religious Trust Act, 1920, (v) the Bihar Wakfs Act, 1947, (vi) the Bombay Mussalman Wakfs Act, 1935 (which modified the application of the Wakf Act, 1923 as regards its application to Gujarat and Maharashtra, (vii) the Uttar Pradesh Muslim Wakf's Act, 1960, (viii) the Bengal Wakfs Act, 1934, (ix) the Bombay Public Trust Act, 1930. The Wakf Act, 1923 has now been further amended by the Wakfs Act, 1954. The first four statutes listed above do not apply to those *wakfs* which are governed by the Wakf Act, 1954.

The Wakf Act, 1954 is not in force in Bihar, Gujarat, Maharashtra, Uttar Pradesh and West Bengal where *wakfs* continue to be governed by the State statutes (listed above.) In Gujarat and Maharashtra, all public endowments including *wakf* are governed by the Bombay Public Trust Act, 1950. In Kutch and Aurangabad, the Wakf Act, 1954 is in force. The dargah of Ajmer is governed by the Dargah Khwaja Sahib Act, 1955.

The Wakf Act, 1954 has been passed with a view to providing better administration and supervision of *wakf*. The Union Government has from 1958 a separate *wakf* section headed by a deputy secretary allotted to the Ministry of Law. The functions of the *wakf* section are to look after the *wakf* affairs and to supervise the *wakf* administration. The officer-in-charge of the *wakf* section, an IAS officer, undertakes extensive tours for the purposes of inspecting *wakf* boards and for making on the spot studies of problems facing the *wakf* administration.

The two main organs created by the Wakf Act for the supervision of *wakf* administration are : (a) the Central Wakf Council, and (b) the State *Wakf* Boards.

The Central Wakf Council.—The Wakf Acts stipulate for the constitution of the Central *Wakf* Council for the purpose of advising the Central Government on matters "concerning the working of Boards and the due administration of *wakfs*." It consists of twenty members with the Union Minister-in-Charge of *wakfs* as its Chairman. The members of the Board are appointed by the Union Government. The council's funds consist of one per cent of the aggregate of the net annual income of the *wakfs* which every Wakf Board is required to pay to the council out of its Wakf Funds. The Wakf Council is merely an advisory body, and has not proved to be effective.

The Wakf Boards.—The Wakf Act provides for the constitution of a *Wakf* Board, in every State. In the State where the Wakf Act is not in force, the *wakf* Boards have been constituted under the State statutes. The *Wakf* Boards under the Wakf Act, 1954 are nominated Boards (the members are nominated by the State Governments), consisting of members of Parliament, members of State Legislatures, persons having special knowledge of Muslim law and representing the State Jamiat-ut-Ulema (for Sunni *Wakfs*) and of State Shia Conference (for Shia *Wakfs*), persons having special knowledge of administration, finance and law, and *mutawallis* of *wakfs* situated in the State. The *Wakf* Board of a State and of the Union Territory of Delhi consists of eleven members, while in the case of Union territories (other than Delhi), it consists of five members. The Chairman of the Board is elected by the members. The members hold office for a term of five years, but they continue in office till their successors are appointed. The Act lays down that in those States where the Shia *wakfs* are more than 15% in number or their income is in excess of 15% of all the *wakfs* in the State, the State Government may establish separate Boards for the Shia *wakfs*.

Under the State statutes (Uttar Pradesh, Bihar and West Bengal), all the *Wakf* Boards are partly nominated and partly elected.

The *Wakf* Boards under the Wakf Act, 1954 are a body corporate having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property. It is competent to sue and be sued in its own name.

The *Wakf* Boards have a *Wakf* Fund (each *Wakf* Board having separate fund.) The *mutawallis* are required to make statutory contribution to the *wakf*-fund. Section 46 requires the *mutawallis* of every *wakf* in the State to pay annually to the Board such contribution not exceeding 6% of the net

annual income accruing to the *wakf* which the Board may, subject to the sanction of the State Government, determine from time to time. A *wakf*, the net annual income of which does not exceed Rs. 100 is not required to make any contribution. The *Wakf* Board has also the power to reduce or remit any portion of contribution made by a *Wakf*. The *Wakf* Board may also raise moneys by donations and grants. The *wakf* Board has power to appoint a *mutawalli*.

Functions of Wakf Boards.—The functions of the *Wakf* Boards are laid down in S. 15, Wakf Act. The general supervision of all *wakfs* situated in the State vests in the State *Wakf* Board concerned. It is the duty of the *Wakf* Board so to exercise its powers as to ensure that the *wakfs* are properly maintained and administered and controlled, and the income thereof is duly applied to the objects and purposes of the *wakf*. Sub-section (2) of S. 15, Wakf Act, 1954 specifies the following functions of the State *Wakf* Board :

(a) to maintain a record containing information relating to the origin, income, object and beneficiaries of every *wakf*;

(b) to ensure that the income and other property of *wakfs* are applied to the objects and for the purpose for which the *wakfs* are created or intended;

(c) to give directions for the administration of the *wakfs*;

(d) to settle schemes of management for a *wakf*, provided that no such settlement shall be made without giving the parties affected an opportunity of being heard;

(e) to direct—

(i) the utilization of the surplus income of a *wakf*, consistent with the object of the *wakf*;

(ii) in what manner the income of a *wakf* the objects of which are not evident from any written instrument, shall be utilized;

(iii) in any case where any object of a *wakf* has ceased to exist, or has become incapable of achievement, that so much of the income of the *wakf* as was previously applied to that object shall be applied to any other object which shall be similar, or as nearly as practicable, similar to the original object :

Provided no direction shall be given in regard to any of the above three matters, without giving the parties affected an opportunity of being heard;

(f) to scrutinize and approve the budget submitted by the *mutawallis* and to arrange for the auditing of the accounts of the *wakfs*;

(g) to appoint and remove the *mutawallis* in accordance with the provisions of this Act;

(h) to take measures for the recovery of lost properties of any *wakf*;

(i) to institute and defend suits and proceedings in a court of law relating to *wakfs*;

(j) to sanction in accordance with Muslim law, any transfer of immovable property of a *wakf* by way of sale, gift, mortgage, exchange or lease, provided that no such sanction shall be given unless at least two-thirds of the members of the Board vote in favour of such transactions;

(k) to administer the *Wakf* fund;

(l) to call for such returns, statistics, accounts and other information from the *mutawallis* with respect to *wakf* properties as the Board may from time to time, require;

(m) to inspect, or cause inspection of, *wakf* properties, accounts or records or deeds and documents relating thereto; and

(n) generally do all such acts as may be necessary for the due control, maintenance and administration of *wakfs*.

In Karnataka, Andhra Pradesh, Tamil Nadu, Madhya Pradesh, Bihar and Kerala, the *Wakf* Boards have set up District Committees in order to maintain a close check on *mutawallis* and to ensure proper management.

Registration of wakfs.—The Wakf Act requires that every *wakf* in a State has to be registered with the Wakf Board of that State. The application for registration is to be made by *mutawallis*. The Wakf Board maintains a register of *wakfs* which contains details of each *wakf*, such as the class of the *wakf*, name of *mutawalli*, the rule of succession to the office of *mutawalli* under the *wakf*-deed or by custom, or usage, particulars of *wakf* properties and all title-deeds and documents relating thereto, particulars of the scheme of administration and the scheme of expenditure at the time of registration, and such other particulars as may be prescribed under the rule.

The Wakf Board has the power of investigation and surveying the functioning of *wakfs*.

Control over mutawallis and wakfs.—The Wakf Board exercises control over the *mutawallis* and *wakfs* in several ways. The *mutawallis* are required to propose a budget for every financial year. They are required to keep regular accounts and to submit the copies of audited accounts to the Wakf Board. Section 86 of the Wakf Act lays down :

It shall be the duty of every *mutawalli* :

(a) to carry out the directions of the Board;

(b) to furnish such returns and supply such information, or particulars as may, from time to time, be required by the Board;

(c) to allow inspection of *wakf* properties, accounts, deeds and documents relating thereto;

(d) to discharge all public dues; and

(e) to do any other act which he is lawfully required to do by or under this Act.

Section 36A and 36B contemplates to control the power of *mutawallis* of alienation of *wakf* properties. Section 36A lays down that "notwithstanding anything contained in the *wakf*-deed, no transfer of any immovable property of a *wakf* by way of : (i) sale, gift, mortgage or exchange, or (ii) lease for a period exceeding three years in the case of agricultural land, or for a period exceeding one year in the case of non-agricultural land, or building, shall be valid without the previous sanction of the Board." Section 36B provides for the recovery of property where a *mutawalli* had made unauthorised alienation of *wakf* property. In such a case, the Wakf Board, may send requisition to the Collector within whose jurisdiction the property is situated

to obtain and deliver possession of the property to it.

Section 41 lays down that the following penalties may be imposed on a *mutawalli* who fails :

(a) to apply for the registration of a *wakf*;

(b) to furnish statements or particulars of accounts of returns as required by the Act;

(c) to supply information or particulars as required by the Board;

(d) to allow inspection of *wakf* properties, accounts or deeds and documents relating thereto;

(e) to deliver possession of any *wakf* property, if ordered by the Board or the court;

(f) to carry out the directions of the Board;

(g) (*omitted*);

(h) to discharge any public dues; or

(i) to do any other act which he is lawfully required to do by or under this Act;

and he shall, unless he satisfies the court that there was a reasonable cause for his failure, be punishable with fine which may extend to one thousand rupees.

The Wakf Board has also the power of removing a *mutawalli*. Section 43 lays down that in the following cases, a *mutawalli* may be removed by the Board : (i) when he has been convicted more than once of an offence under S. 41; (ii) when he has been convicted of an offence of criminal breach of trust or any other offence involving moral turpitude; (iii) when he misappropriates or deals improperly with the properties of *wakf*; (iv) when he is of unsound mind or is suffering from any other moral or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a *mutawalli*; or (v) when he has failed to pay, without reasonable excuse, for two consecutive years, the contribution payable by him to the *Wakf*-fund under Section 46.

The Wakf Board has the power to make the rules and regulations, and to institute suits to obtain any of the reliefs mentioned in S. 92, C.P.C.

Suit against Wakf Board : Two months' notice.—Section 56 lays down no suit can be filed against the Wakf Board unless a notice of two months is given to the Board.[1]

Muslim Religious Institutions

The religious institutions can also be subject of *wakfs*. Some of them may be discussed here.

Mosques

Dedication for mosque.—A mosque is a place for offering prayers in congregation or individually. To consecrate a mosque, dedication is essential, mere construction of its building is not enough. In *Md. S. Labha* v. *Md. Hanifa*,[2] *Fazl Ali, J.* after a review of authorities, views of textbook writers and judicial decisions, said that for a valid dedication for a public mosque (or

1. *Syed Abdul* v. *Wakf Board*, AIR 1992 Kant 43.
2. AIR 1976 SC 1569.

of any other institution of a public nature), the following conditions must be satisfied : (a) the founder must declare his intention to dedicate property for the purpose of a mosque, though no specific form of declaration is necessary, such a declaration may also be inferred from the conduct of the founder. (b) The founder must divest himself completely of the ownership of the property. The divestment may be inferred from the fact that he had delivered possession to the *mutawalli* or the *imam* of the mosque. Where members of public are permitted to offer prayers with *azan* and *ikmat*, a complete and irrevocable *wakf* for mosque comes into existence. (c) The founder must make a separate entrance (of any sort) to the mosque for the public. Under the Ithana Ashari law, dedication is complete by a formal declaration coupled with the fact that the members of public are permitted to offer prayers.

Any adjuncts to a mosque also belong to the mosque.[1] Thus, the properties attached to a mosque or any additions or alterations (either structural or otherwise) made to it which are incidental to the offering of prayers, or for other religious purposes are part of the mosque, and constitute one single unit so as to be the part of the mosque. Any money given for the repair of the mosque, or for its maintenance or for its benefit, operates as a gift to the mosque and becomes part of the *wakf* of the mosque, but no separate *wakf* comes into existence.

Where a mosque has been in existence for a long time and prayers have been offered therein, it will be inferred that dedication for mosque is complete and property no longer belongs to the owner. Where there has been mosque for a long time, and the terms of the original grant of the land cannot be ascertained, there will be a fair presumption that the site on which the mosque stands is *wakf* property.[2]

Public and private mosque and right to worship.—When a public mosque comes into existence, then a Muslim belonging to any sect or school is entitled to offer prayer according to the ritual of his own sect or school. Under Muslim law, there is nothing like a Shia mosque or a Sunni mosque or a Hanafi mosque or a Shafi mosque. It appears to be settled that when a mosque is dedicated to the God, then it is open to Muslims of all sects and schools, and no particular sect of Muslim can claim it for its exclusive use.[3] For instance, a Shafi may join a congregational worship in a congregation where majority of the worshippers are Hanafis and he cannot be prevented from participating in the service because the Shafis pronounce *amin* in a loud voice, while the Hanafis pronounce it softly. But this does not give rise to a right of new sect to pray as a separate congregation.

The right to pray in a mosque is a legal right and it can be enforced in a court of law.[4] However, a distinction has to be drawn between religious faith and religious practices. The State protects the religious faith, but it need not protect all religious practices. Thus, no congregation in a mosque has an inherent right to use the loudspeakers, and the Government has the right to stop their use in a mosque.[5]

1. *Md. Shah* v. *Fasibuddin*, AIR 1956 SC 713.
2. *Masid Sehid Ganj* v. *Shiromani Gurdwara Parbandhak Committee*, AIR 1940 PC 176.
3. *Fazi Karim* v. *Maula Baksh*, (1891) 18 IA 59.
4. *Majilisae Islamia* v. *Sheikh Md.* (1955) Ker. 49; *Shah Abdul* v. *State*, AIR 1988 All 1; *Ali Akbar* v. *Paattakottai*, AIR 1993 Mad 51.
5. *Maud Alam* v. *Commr. of Police*, (1955) 59 CWN 293.

In *Md. Wasi* v. *Bachchan Sahib*,[1] certain Muslims belonging to the *Hanafi* sect sought to prevent the Shias from offering their prayers in accordance with their rites and ceremonies in a mosque built by a Hanafi, and where the service was performed in accordance with the rites and ceremonies of the *Hanafis*. Dismissing the suit, the court observed that a public mosque is dedicated for the purpose that any Muslim belonging to any sect may go there and say his prayers, and it cannot be reserved for any sect or school. Even though the congregational prayers in a mosque are said in accordance with the rites and ceremonies of a particular sect, any Muslim belonging to any other sect can go there and say his prayers at the back of the congregation in the manner followed by him so long as he does not do any thing *mala fide* to disturb the others. However, no Muslim can claim to have the form of congregational prayers usually said in the mosque altered to suit him. Once a public mosque is dedicated, its objects or beneficiaries cannot be changed. A Muslim has a cause of action if he is deprived of his right to say prayers in a mosque.

A mosque was constructed by the Government for the inmates of police lines. The mosque was situated within the enclosed compound of the police lines, Azamgarh, and all the entrances leading to it passed through the police line area. Even though the gates of the mosque were seldom closed, only those persons could enter it who were permitted to enter the police compound. Whenever the police authorities chose to impose restrictions on persons entering the compound of the police lines, they could prevent them from entering the mosque. This implied, the court said, that only those persons could enter the mosque who were within the police lines. The affairs of the mosque were conducted by the inmates of the police lines. The mosque had no *mutawalli* and its upkeep was not the responsibility of any outsider. It was argued that the mosque had become a public mosque because the Friday prayers were allowed to be held there. In a well considered judgment, Katju, J. rejected the contention and held that even if the proper Friday prayers with *azan* and *ikamat* had been held in the mosque, that alone could not change the character of the mosque from a private to a public mosque.[2] Muslim law allows the creation of *wakf* for a private mosque. A mosque which has no entrance opening outside it, is considered to be a private mosque.

Is mosque a juristic person.—In *Maula Bux* v. *Hafizuddin*,[3] the Lahore High Court held that a mosque is a juristic person. But in *Masjid Shahid Ganj case*,[4] the Privy Council held that a suit cannot be brought by or against a mosque in its name, as it is not an artificial person in the eyes of law. However, the question whether a mosque may be regarded as a "juristic person" was left open. In *Md. Shafuddin* v. *Chaturbhuj*,[5] the Rajasthan High Court held that a mosque is not a juristic person.

Acquisition of Property of Mosque

In *M. Ismail Faruqui* v. *Union of India*,[6] (The Ram Janmabhumi Babri

1. AIR 1955 All 68.
2. *Abdul Bagi* v. *Chairnya*, AIR 1971 All 328.
3. AIR 192 Lah 372.
4. AIR (1940) 67 IA 251.
5. AIR (1958) Raj LW 461.
6. AIR 1995 SC 605.

Masjid case), the Supreme Court said that a mosque does not have a unique or special status, higher than that of the places of worship of other religions in secular India to make it immune from acquisition by exercise of the sovereign or prerogative power of the State. A mosque is not an essential part of the practice of the religion of Islam and *Namaaz* (prayer) by Muslims can be offered anywhere, even in open. Accordingly, its acquisition is not prohibited by the provisions in the Constituton of India. Irrespective of the status of a mosque in an Islamic country for the purpose of immunity from acquisition by the State in exercise of the sovereign power, its status and immunity from acquisition in the secular ethos of India under the Constitution is the same and equal to that of the places of worship of the other religions, namely, church, temple, etc. It is neither more nor less than that of the places of worship of the other religions. Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations for a larger national purpose keeping in view that such acquisition should not result in extinction of the right to practise the religion, if the significance of that place be such. Subject to this condition, the power of acquisition is available for a mosque like any other place of worship or any religion.

Graveyards

Public and Private graveyards.—Dedication of property may be made for a *qubristan*. If dedication is complete, a *wakf* will come into existence. Like mosque, a graveyard may be : (i) a public graveyard, or (ii) private graveyard. A graveyard is private when its use is confined to the burial of corpses of the founder, his children, descendants and relatives.

A public graveyard is one which is open for the burial of any Muslim.

If a private burial place has been used as a public graveyard for a long period, it will become a public graveyard. In *Md. S. Labhia* v. *Md. Hanifa*,[1] the Supreme Court observed : "Once a *qubristan* has been held to be a public graveyard, then it vests in the public and constitutes a *wakf*, and it cannot be divested by non-user but will always continue to be so." Similarly, if a burial ground is mentioned either in the revenue records or historical papers as a public graveyard, then it will be a conclusive proof of that fact. A graveyard once created continues to be so even when there remains no trace of dead, not even the bones.

A *wakf* for graveyard does not come into existence merely because the owner of the land had given the licence for the burial of the dead, as it is no more than a licence and a licence can be revoked at any time.[2]

Shifting of graves.—Can the graves be shifted? This question came before the Supreme Court in *Abdul Jalil* v. *State of U.P.*[3] The Court observed that the shifting of graves was not un-Islamic. There are two historical instances of shifting of graves, one of *Mumtaj Mahal* which was shifted from Burhampur to Agra, and the other of Jahangir which was shifted from Kashmir to Lahore. In this case, certain graves were constant source of riots between the Shias and the Sunnis. Tullapurkar, J. said that the fundamental

1. AIR 1976 SC 1569.
2. *Dwarkadas* v. *Punjab Wakf Board*, AIR 1991 P & H 89.
3. AIR 1984 SC 882.

rights conferred on all persons and every religious denomination under Articles 25 and 26 of the Constitution are not absolute but the exercise thereof must yield to maintenance of public order and thus the direction given by the court to shift the controversial graves is in the larger interest of society for the purpose of maintaining public order.

Dargah

"Dargah" means a shrine, *i.e.*, tomb of a Muslim saint. It is used as a place of religious prayers. In Persian, the term "*dargah*" means "the way out, a court before a place or great houses; a large bench or place for reclining upon, a mosque." In India, it is an established meaning of *dargah* that it is a shrine or tomb of a saint; such a tomb is respectfully referred to as the portal to the spiritual place of the saint. It generally includes a group of buildings of which the tomb is the nucleus. The Prophet was against the erection of an elaborate mausoleum, or excessive outlay for a tomb. This is the reason why Mughal Emperor, Aurangzeb chose a simple grave of earth even without bricks and mortar. However, in India, a belief has grown that great religious reverence may be shown to the burial place of a saint, and, so much so that it has come to be established that dedication of property can be made to a *dargah* and a wakf can be constituted.[1]

A *mehrab* which points the direction towards which the faithful must turn and pray is an essential part of a mosque, while a *dargah* does not have a *mehrab*. In a mosque there is a call for prayer (*azan*), but there is no such thing in a *dargah*. The term "*dargah*" is used in two senses : (i) it may refer to the tomb itself (this is the strict view), or (ii) it may include the whole group of buildings of which the tomb is the nucleus. A *dargah* in the former sense is an institution in a very different sense from a mosque or *Khangah*. Sometimes, institutions like a *khangah* or a mosque spring up in the vicinity of a *dargah* and dedication of property is made for their maintenance and upkeep. In such a case, the question of administration arises. Sometimes a *mutawalli* may be appointed. But in a *dargah*, there is usually a *mujawar*, i.e., a servant of the shrine, who also looks after its administration and management. His duties are to sit by the tomb, to read *fatwa* to devotees, to invoke blessings of the *pir* for the devotees, to keep lights burning in the shrine, to put up incense and place flowers on the tomb, to weigh children, to put *ghilaf* (covering on the tomb) and to act generally as intermediary between the devotees and their *pir* (which is opposed to the basic tenets of Islam, but nonethless has become a well established practice).

Sometimes a *dargah* may also have a *sajjadanashin*.

The famous *dargah* of *Khwaja Muin-ud-din Chisti* at Ajmer is governed by a statute, the Dargah Khwaja Saheb Acts, 1955-1964. The Wakf Acts, 1955-1964 do not apply to it.

Takia

The word "*takia*" literally means a "resting place". A burial ground is sometimes called a *takia*. Sometimes a *takia* is only a place of assembly in a village and is devoid of all religious connotation. Sometimes it is a platform in a Muslim graveyard where prayers are offered. Sometimes a *fakir* builds

1. AIR 1938 PC 71.

his hut near a *takia* in a graveyard and takes up his residence there. In course of time, he starts imparting religious instructions there, and starts calling it a *khangah*.

Takia itself is an institution recognized by law and a grant of endowment to it will be valid. In *Maula Shah* v. *Gul Md. Maula Shah*,[1] the Privy Council said that a *takia* is recognized by law as a religious institution and endowment to it is a valid *wakf*, or as a public trust for a religious purpose.

However, every *takia* is not a *wakf*. A *takia* may become a *wakf* by long use.

Khangah

A *Khangah* is a religious institution analogous to *math*. A *Khangah* is a Muslim monastery where *dervishes* and other seekers after truth congregate for religious instructions and devotional exercise.

A *Khangah* is founded by a holyman in a place where esoteric teaching acquire a certain fame and sanctity. A *Khangah* may come into existence by long usage or by dedication. Then it becomes a *wakf*. A typical case of *wakf* by long usage is the Multan shrine of *Mai Pak Daman*.

Sajjadanashin.—The religious head of a *khangah* is called *Sajjadanashin*. Literally the word means the one who sits at the head of a prayer-carpet. The *Sajjadanashin* is not only a *mutawalli* but also a spiritual preceptor. He is the curator of the *dargah* where his ancestors are buried, and in him is supposed to continue the spiritual line.

Sometimes the office of *mutawalli* and *Sajjadanashin* are combined. The office of *mutawalli* is a secular office, while that of a *Sajjadanashin* is essentially a religious office. The *Sajjadanashin* performs certain religious functions. In some *dargah* and *khangah*, the *Sajjadanashin* is entitled to a share in the offering made at the tomb. This is a right attached to the office and each successive incumbent is entitled to receive his share as long as he holds the office. An alienation of his share in the offerings made by a *Sajjadanashin* of *Khawaja Moi-ud-din Chisti* at Ajmer, the Privy Council held that both the *Sajjadanashin* and *khadims* (servitors) were entitled to a share in the offerings made at the tomb. But the offering of *qaber pashes* belonging to the *dargah* were its property and as such must be kept by the *Sajjadanashin* as trustee.

The founder of a *khangah* is usually its first *Sajjadanashin* and after his death, the spiritual line is continued by a succession of *Sajjadanashins*. In the absence of a scheme of succession in the *wakf-nama*, the succession to the office of *Sajjadanashin* is regulated by the custom. One such custom is that an electoral body consisting of *fakirs* and *murids* elects a competent person (usually a son or nominee of the late *Sajjadanashin*). Sometimes by usage or custom, a *Sajjadanashin* has the power to nominate his successor. In the absence of any instructions in the *wakf-nama* or custom, the court has power to appoint a *Sajjadanashin*. In appointing a *Sajjadanashin*, the court should take into consideration the spiritual traditions of the *khangah*.

The status of *Sajjadanashin* is higher than that of a *mutawalli*. He is

1. (1939) 40 Bom LR 1071 (PC).

the head of the institution and as such exercises supervision over the *mutawalli's* management. But when he is also a *mutawalli*, he, in that capacity, cannot exercise any power better than that of a *mutawalli*.

The court has power of removing a *Sajjadanashin* for misconduct, and has also the power to separate the office of the *Sajjadanashin* from that of the *mutawalli*.

Imambara

The *imambara* is essentially a Shia religious institution. It is a private apartment set apart for the performance of certain ceremonies at Moharram and other occasions. It is a private apartment, and not a place for public worship, like a mosque. It is meant to be used by the owner and members of his family, though public may be admitted with the permission of the owner. It may be an object of a valid private *wakf*. It may be established by evidence that a particular *imambara* is a public *wakf*.
