

PRINCIPLES OF HINDU LAW ON PROPERTIES

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SRIDHARA BABU.N

**THIS WORK IS DEDICATED TO
MY PARENTS**



Smt Gowramma & Sri H.R. Nagarajachar

MY GURU



**THE CONTENTS ARE HARD
WORK OF EACH JUDGES
OF HINDUSTAN COURTS**



**USE IT SPREAD IT AND BRING GREATEST
CHANGE IN OUR LEGAL FIELD.**

**LET YOUR CLIENTS BE AWARE OF LAW,
AWARENESS DOES NOT CUT OUR POCKETS,
IT BRINGS ELITE CIVILISATION TO BRING
UP NATION AND SOCIETY**

SRIDHARA BABU.N

MY FEW WORDS

This book is released during Carona lockdown period. This does not mean, all is researched and collected during this period. My effort of research started in 2007 and continuing. Daily i use all my spare time for this work.

Why advocates profession turns towards dangers.? You all know advocates are approached by many clients for verification of documents of a property which they want to buy. Here advocates with care summon further documents to know exactly the flow of title from long years in order to assure that their client may not be endangered with government land/ trust land/ public land record manipulations. Clients collect the documents and give us. In many cases source of title goes to roots of Land Mafia elements. Maybe we in majority advice our clients honestly and drop the idea of his purchase. Our clients in turn give reasons for his broker and even warn him not to bring such fraud layouts. Brokers in turn respond to land owners and in that way each previous vendor encounters with litigative clashes. At the base land mafia looters search how this info leaked. Ultimately Advocate who has done his honest service will suffer at the hands of land looters. There is unity among land

looters, they unite to destroy old documents, they unite to destroy advocates, who knows such accurate story. They keep vigil on advocates office through junior advocates.

Usually many advocates won't go in-depth to verify records once land is converted to non-agricultural purpose. But experience of litigations makes some advocates to go in-depth. In cases of Trust property manipulations there is no time limit to file suit under section 10 of limitation act. Municipality and government authorities are holding properties in trust of public. Under such principles of law and its consequence many take at most care. This care is creating enmity among land looters and advocates.

Who are these land looters.? As i have seen many politicians past and present has done such land loot/ encroachments/ creation of records/ for government and public lands. There was huge creation of public trust by allotting land to many Philanthropists during Mysore Maharaja Period. These public trusts are misused for private purposes. These politicians has not expected transparency and RTI implications when they made the land loot. Now all information is transparent and advocates document verification has also become easy through getting such

documents. This has made blood pressure high of almost all land looters. As a result we can see at the outset politicians never encourage prompt advocates to grow. They suppress in all modes. Many RTI activists and advocates have seen their death. Many officers who has taken strict actions repeatedly get transfers and in some cases suicide dramas may have been enacted.

I will give one example how people at all level work together to save their illegally earned properties. In Karnataka there was one law until recently that a person having Rs 2 Lakhs annual non-agricultural income cannot purchase agricultural lands. By violating this aspect many from various fields (including people in Judiciary) acquired land illegally. Such aspect was exposed by RTI activists. Sensing such danger politicians raised the income limit to 25 Lakhs. In one case before Karnataka High court this ceiling limit was given retrospective effect from 1974. Under such situation many survived with such illegal histroy. Now a days even time limit to take action is also fixed. So all who violated law floated to safe corner. These type of developments encouraging land looters to find solutions for their past misdeeds.

These land looters must know that nothing can be hidden in future, for exposing such fraud destroying advocate and his life is of no use. May be many Judges are selected by these politicians may shield them in legal field. But before shielding these land looters, Judges should think at once how his brother advocate and his family is in danger for his only fault 'honest service'. The vicious circle should be carefully analysed by all legal fraternity. For no fault of advocate he suffers. For shielding land looters many Judges and advocates working day and night must also think and guide advocates what shall we do at such situation. If we advice wrongly it will kill our sub-conscious mind daily for having shown dishonest intention. To escape we go to all vicious habits. Ultimately our health will be destroyed. Suppose a hard earning teacher client who come before us for legal guidance cannot be left by us to possible destruction in future, if we do so we will suffer with guilt. At one side he is the Guru for having knowledge, on the other side he trusts us with great respect. If he goes to trouble in future, his curse will destroy us. Even our basic religious Dharma teaches to do no wrong. By all such environment we stick to Dharma.

For doing such Dharmic practice, we are labelled as people who does not know how to live in society. Strangely we are accused of not making money with current trend in profession. We are treated as "Naxalvadis". Present Naxals and Communists are on the verge of destroying basic values of society, they want to destroy basic Dharma concept of religion. But still for following our Dharmic concept we were treated as Naxals. To tag a person as naxal is the conspiracy of land loot mafia and politicians. To come out from such tag and survive in society and to attract paying clients an advocate suffers a lot with more testing times.

In my experience i have seen records relating to manipulations of government land, municipal land, acquired land, granted land, tank land, Mutt land, Forest land, Inam land etc. Creation of revenue records by changing extent from hectares to acres and reducing forest reserve is the major land loot done by revenue officials. These group does not want our survival for knowing their modus operandi. The land which is not granted by tribunals, were made katha by manipulating records and orders. Even members of Tribunals after 1974 to 2000 are prominent politicians. Here in the name of tenants a lot of

land mafia has taken place. The tenancy court is being used as play ground to make money in lands. Many buffer zone of acquired lands by railways are under encroachment. Many health camp places which was acquired during Mysore Maharaja period and subsequently changed to larger places. The places which was previously used fell to land mafia elements possession and records were created. Filth collecting sites were acquired by municipalities in each area. Those sites fell to land looters pocket. Many layouts formed during Maharaja period are well planned with parks and CA sites and commercial hubs. But in those layouts the parks have been vanished CA sites vanished, this is the work of greedy politicians turned to land looters. In one case a prominent person has encroached road and built a house in it, because it is dead end road and he has sites on both sides of road.

For sale of Mutt properties District court permission is needed, since it is a public trust. Many mutt properties were sold to land looters mafia without following such procedure. Politicians and land looters are clever persons. In the sites formed out of such land loot they make all prominent persons of city to have assets in such layout based on caste lines. Then anyone

poking his nose to such mafia will be first targeted by his own caste people, relatives and friends. There ends the matter.

You should know how they target advocate and bring bad name, they through some of their RTI activists poke their nose to all land mafia activity, and show fingers towards advocate. The Advocate who has done his job in one case entangles all land looters through tactful ideas of his one enemy. All land looters unite in such aspect and begin their game plan either to destroy peaceful mind of advocate. Advocates personal litigations and friendships are blown to pieces. Advocates clients will get mis-information, Advocates juniors, friends and relatives may be bribed to destroy his integrity and peace. The stress and anxiety will result in many disease. All this trouble advocate, if he is confused on whats happening around him, once he realises who, what, why, where all is evolved, there advocate plans in better way than foolish Mafia. So beware of these aspects in your practice.

Thank You

With Regards

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SRIDHARA BABU.N

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	A PERSON NOT PARTY TO CONTRACT CANNOT ENFORCE ITS COVENANTS
	SUIT TO SET ASIDE SALE DEED BY MINOR TO BE FILED WITHIN LIMITATION
	JOINT FAMILY PARTITION AND REUNION EXPLAINED
	PROPERTY OF GOD
	LIABILITY OF ANIMAL TRANSPORTERS
	ANIMALS ARE NOT PROPERTIES
	MITAKSHARA CO-PARCENARY PROPERTY
	FEMALE HINDU RIGHTS ON PROPERTY
	JOINT FAMILY AND SUFFICIENT NUCLEUS

	CHAPTER-9
	SEPARATE PROPERTY
	SHIFTING OF BURDEN - PARTY ALLEGING SELF-ACQUISITION TO ESTABLISH AFFIRMATIVELY THAT THE PROPERTY WAS ACQUIRED WITHOUT THE AID OF THE JOINT FAMILY FUNDS
	IT IS FOR HIM TO PROVE BY CLEAR AND SATISFACTORY EVIDENCE HIS PLEA THAT THE PURCHASE MONEY PROCEEDED FROM HIS SEPARATE FUND
	IF THE PROPERTIES ARE PURCHASED BY A FEMALE MEMBER OF THE FAMILY WITHOUT THE AID OR NUCLEUS FROM OUT OF THE JOINT FAMILY NUCLEUS, SAID PROPERTY MAY BE PRESUMED TO BE THE SELF-ACQUIRED PROPERTY OF SUCH LADY AND CANNOT BE TREATED AS A JOINT FAMILY PROPERTY
	IT MUST BE ESTABLISHED THAT THERE WAS A CLEAR INTENTION ON THE PART OF THE COPARCENER TO WAIVE HIS SEPARATE PROPERTY
	BURDEN LIES ON KARTHA WHEN HE IS IN POSSESSION OF JOINT NUCLEUS TO SHOW IT IS HIS SEPARATE ACQUISITION
	HINDU GAINS OF LEARNING ACT - SELF ACQUIRED PROPERTY
	SELF ACQUIRED PROPERTY IN MITAKSHARA LAW
	INDIVIDUAL PROPERTY AND JOINT FAMILY PROPERTY DIFFERENTIATED
	IMPARTIBLE ESTATE WHEN BECOMES SEPARATE PROPERTY

	CHAPTER-10
	EVIDENCE AND DOCUMENTS

	AWARD PASSED BY ARBITRATORS REGARDING DIVISION OF PROPERTIES NEEDS NO REGISTRATION
	WHEN PLAINTIFFS CASE WAS DAMAGED BY THEIR OWN ADMISSIONS
	ADMISSION OF KARTHA IS BINDING IN THE ABSENCE OF OTHER INTENTION
	BURDEN TO PROVE PREVIOUS PARTITION ON DEFENDANT
	ONE WHO ASSERTS HAS TO PROVE THAT THE PROPERTY IS A JOINT FAMILY PROPERTY
	THERE IS NO PRESUMPTION OF A PROPERTY BEING JOINT FAMILY PROPERTY ONLY ON ACCOUNT OF EXISTENCE OF A JOINT HINDU FAMILY
	WHEN INITIAL BURDEN TO PROVE JOINT FAMILY IS FAILED BY PLAINTIFF
	IN THE ABSENCE OF DISCHARGE OF THE INITIAL BURDEN, THE QUESTION OF CALLING UPON THE DEFENDANT TO PROVE TO THE CONTRARY THAT IT IS SELF-ACQUIRED PROPERTY IS NOT PERMISSIBLE
	ALLEGATIONS BASED ON MERE SURMISES WITHOUT LEGAL EVIDENCE CANNOT BE ACCEPTED
	IF PROPERTY STANDS IN THE NAME OF MEMBER OF JOINT FAMILY, THERE IS NO PRESUMPTION IT IS A JOINT FAMILY PROPERTY. PRESUMPTION IS ONLY FAMILY IS JOINT
	MERE CONTENDING IT AS JOINT FAMILY WITHOUT SUFFICIENT MATERIAL TO PROVE INITIAL BURDEN IN PARTITION SUIT
	NECESSARY PLEADINGS AS TO WHEN AND IN WHAT DATE AND JOINT FAMILY ACQUISITIONS MADE IS NOT THERE - EXCEPT SELF SERVING STATEMENT OF PLAINTIFF AND CONTRADICTORY VERSIONS NO SUFFICIENT MATERIALS PLACED
	WHEN THE PROPERTY STANDS IN THE NAME OF A FEMALE MEMBER WITHOUT THE AID OF PRESUMPTION THE PARTY ALLEGING HAS TO CONVINCINGLY PROVE THAT HAS BEEN PURCHASED OUT OF THE JOINT FAMILY FUNDS
	BURDEN LIES UPON THE PERSON WHO ASSERTS THAT A PARTICULAR PROPERTY IS JOINT FAMILY PROPERTY TO ESTABLISH THAT FACT
	HOW BURDEN SHIFTS AFTER PROOF OF INITIAL BURDEN
	THERE WAS NO DOCUMENTARY EVIDENCE TO SHOW THAT THE PROPERTIES WERE INHERITED BY HIM, OR THAT THE PROPERTIES ORIGINALLY BELONGED TO HIS FATHER
	THE ADMISSIONS MADE BY ONE OR OTHER MEMBERS OF THE FAMILY TO MEET PARTICULAR CONTINGENCIES OR TO GET AN ADVANTAGE WERE NOT OF MUCH VALUE IN DETERMINING THE QUESTION WHETHER SOME OF THE MEMBERS OF THE JOINT HINDU FAMILY HAD SEPARATED
	CONTENTS OF DOCUMENT SHALL PREVAIL OVER ORAL EVIDENCE
	PRESUMPTION REGARDING THE DOCUMENTS OF THIRTY YEARS OLD IS NOT APPLICABLE TO WILL
	RELEVANCY OF ADMISSION OF A PARTY IN A SUIT
	SHAM TRANSACTION AND BURDEN OF PROOF

	PLAINTIFF HAS TO ESTABLISH TITLE OF PROPERTY TO THE JOINT FAMILY
	PLAINTIFF CANNOT RELY ON WEAKNESS OF DEFENCE TO DISCHARGE ONUS
	THE BURDEN WOULD UNDOUBTEDLY LIE ON THE PARTY WHO ASSERTS THE EXISTENCE OF A PARTICULAR STATE OF THINGS ON THE BASIS OF WHICH HE CLAIMS RELIEF
	DEED OF PARTITION OR MEMORANDUM OF PARTITION? ONLY MEMORANDUM OF PAST EVENT IS ADMISSIBLE?
	BURDEN LAY ON THE PLAINTIFF TO PROVE THAT THE PROPERTY HAD NOT BEEN PARTITIONED IN THE PAST EVEN IF THERE WAS NO WRITTEN STATEMENT TO THE CONTRARY OR ANY EVIDENCE OF REBUTTAL 2012 SC
	GENEROSITY OR KINDNESS CANNOT ORDINARILY BE REGARDED AS AN ADMISSION OF A LEGAL OBLIGATION
	IN THE ABSENCE OF PROOF OF MISAPPROPRIATION OR FRAUDULENT OR IMPROPER CONVERSION MANAGER CANNOT BE ASKED ACCOUNTS FOR PAST DEALINGS
	PERSONS CLAIMING JOINT ACQUISITION TO PROVE BY COGENT AND STRONG EVIDENCE THAT THE PROPERTY IN DISPUTE WAS ACQUIRED WITH THEIR CONTRIBUTIONS AND ALSO TO FURNISH SUFFICIENT GOOD EVIDENCE TO PROVE THAT THERE WERE OTHER JOINT PROPERTIES CREATED BY THEM
	PRINCIPLES DEDUCIBLE REGARDING UN-REGISTERED DOCUMENTS
	PROOF OF RELATIONSHIP - ONLY VOTER LIST IS NOT ENOUGH
	PARTY ALLEGING THAT PROPERTY IS NOT PURCHASED BY HIM ON OWN BUT FOR OTHERS HAVE TO PROVE IT
	ONLY PUBLIC DOCUMENT CAN BE PRODUCED AND PROVED IN CERTIFIED FORM - NOT PRIVATE DOCUMENTS
	PRESUMPTION ABOUT OLD DOCUMENTS - NOT AVAILABLE TO CERTIFIED COPIES
	RELEASE DEED INTENTION OF PARTIES TO BE DEDUCED FROM DEED
	IF THE REPRESENTATION TO THE RESPONDENTS' FATHER WAS INCORRECT, THE APPELLANT SHOULD HAVE EXAMINED HIS BROTHERS.
	ADMISSION OF SEPARATE POSSESSION RAISES PRESUMPTION OF PARTITION
	WHERE THERE IS A DOCUMENT THE LEGAL EFFECT OF WHICH CAN ONLY BE TAKEN AWAY BY SETTING IT ASIDE OR ITS CANCELLATION
	IN INDIA, IT IS NOT EXPRESSLY LAID DOWN IN ANY STATUTE THAT A PERSON WHO COMES IN AS PLAINTIFF CLAIMING RELIEF AGAINST THE EFFECT OF A DEED VOIDABLE AT HIS INSTANCE SHOULD HAVE IT JUDICIALLY RESCINDED BEFORE OR AT THE TIME OF HIS GETTING THE RELIEF
	THE INDIAN STAMP ACT IS NOT ENACTED TO ARM A LITIGANT WITH A WEAPON OF TECHNICALITY TO MEET THE CASE OF HIS OPPONENT
	SCRIBE OF THE ADOPTION DEED GIVING DIFFERENT VERSION OF THE TIMINGS THAN THOSE OF THE WITNESSES
	INTERPRETING DOCUMENT

	BURDEN OF PROOF
	ADMISSIONS IN WRITTEN STATEMENT CANNOT BE WITHDRAWN BUT CAN BE CLARIFIED IN EVIDENCE
	QUEST FOR TRUTH IS DUTY OF COURT
	FRAUD AND BURDEN OF PROOF
	PERSON WHO HAS TAKEN BENEFIT CANNOT CHALLENGE
	EVIDENTIARY VALUE OF ENTRY OF BIRTH DATE AFTER MAGISTRATE DIRECTION
	SETTING ASIDE SALE DEED IN SPECIFIC PERFORMANCE SUIT

	CHAPTER-11
	WOMENS ABSOLUTE ESTATE
	SECTION 14 (1) OF THE 1956 ACT MEANS THAT SHE MUST HAVE A PRE EXISTING RIGHT FOR CONFERMENT OF A FULL OWNERSHIP
	LIMITED OWNER BECOMES ABSOLUTE OWNER AFTER SECTION 14 BROUGHT
	HINDU WOMENS ABSOLUTE PROPERTY - SHALL NOT BE TREATED AS A PART OF THE JOINT HINDU FAMILY PROPERTY
	ALIENATION BY GIFT OF ENTIRE WIDOW'S ESTATE BEING CONTRARY TO LAW DID NOT BIND THE REVERSIONER WHO COULD FILE A SUIT AFTER THE DEATH OF THE WIDOW
	TO APPLY SECTION 14 POSSESSION OF WOMEN AS ON THE DATE OF COMMENCEMENT OF HINDU SUCCESSION ACT IS IMPORTANT
	FEMALE RIGHTS UNDER SECTION 14 OF HINDU SUCCESSION ACT

	CHAPTER-12
	KARTHA AND MANAGER
	PERMANENT INJUNCTION CANNOT BE GRANTED AGAINST KARTHA OF JF - BUT TEMPORARY INJUNCTION CAN BE GRANTED UPON MERITS 1988 SC
	WITH THE CONSENT OF OTHERS EVEN A JUNIOR MEMBER OF THE FAMILY CAN ACT AS KARTA
	POWER OF KARTA OF JOINT FAMILY
	KARTA'S RIGHT TO SELL JOINT FAMILY PROPERTY
	A SALE OR MORTGAGE OF FAMILY PROPERTY BY THE MANAGING MEMBER AND ITS VALIDITY
	RIGHT ON THE COPARCENER TO CHALLENGE THE ALIENATION MADE BY KARTA, BUT THAT RIGHT IS NOT INCLUSIVE OF THE RIGHT TO OBSTRUCT ALIENATION
	COPARCENOR CANNOT OBJECT TO ALIENATIONS VALIDLY MADE BY HIS FATHER OR OTHER MANAGING MEMBER BEFORE HE WAS BORN
	JOINT FAMILY PROPERTY COULD NOT AGREE TO BE PARTED WITH BY THE MANAGER ON THE GROUND OF BENEFIT TO THE

	FAMILY WHEN IT IS OPPOSED BY THE ADULT MEMBERS OF THE FAMILY
	GIFT BY A MANAGER EVEN OF A SMALL EXTENT OF JOINT FAMILY PROPERTY TO A RELATIVE OUT OF LOVE AND AFFECTION IS VOID AS IT IS NOT A GIFT FOR PIOUS PURPOSES
	JOINT FAMILY PROPERTY SALE BY KARTA -POWERS-PROCEDURE TO BE FOLLOWED BY OPPOSING CO-PARCENER 2007 SC
	KARTHA ALONE COULD REPRESENT THE MINOR MEMBER AND, IN FACT, HE ALONE COULD REPRESENT BY HIMSELF THE ENTIRE FAMILY
	VOID AND VOIDABLE ACTS
	KARTAS COMPETENCY TO ALIENATE COPARCENARY PROPERTY
	KARTA RIGHTS TO CARRY ON BUSINESS AND PLEDGE JOINT FAMILY PROPERTY
	THERE CAN BE A VALID PARTNERSHIP BETWEEN A KARTA AND A COPARCENER WHEN THE COPARCENER PUTS INTO THE PARTNERSHIP HIS SEPARATE PROPERTY
	MINOR SHARE IN CO-PARCENARY CAN BE SOLD BY KARTA
	SUIT ON BEHALF OF JOINT FAMILY CAN BE FILED BY INDIVIDUAL
	KARTHA AND MINOR

	CHAPTER-13
	WOMENS RIGHTS TO SHARE
	MYSORE HINDU WOMEN'S RIGHT TO PROPERTY ACT, 1933 AND THE PROVISIONS OF HINDU SUCCESSION ACT, 1956
	SHARE OF THE FEMALE MEMBER ON SUCH PARTITION WAS IN ADDITION TO ANY SHARE WHICH SHE MAY GET AS AN HEIR OF THE DECEASED COPARCENER
	DAUGHTERS BORN PRIOR TO 1956 ARE NOT CO-PARCENERS
	DAUGHTER OF A CO-PARCENAR WHO IS BORN AFTER THE ACT CAME INTO FORCE ALONE WILL BE ENTITLED TO A RIGHT IN THE CO-PARCENARY PROPERTY AND NOT A DAUGHTER WHO WAS BORN PRIOR TO 17.6.1956
	IF SUCCESSION OPENED PRIOR TO THE AMENDMENT ACT OF 2005 THE PROVISIONS OF THE AMENDMENT ACT WOULD HAVE NO APPLICATION
	RETROSPECTIVE OPERATION OF AMENDMENT ACT MAY PROMOTE THE MISCHIEF OF DISHONEST LITIGATIONS BY CLAIMING AN INTEREST IN A COPARCENARY PROPERTY HITHERTO NEVER CLAIMED
	THE HINDU WOMEN'S RIGHT TO PROPERTY ACT 1937 WAS NOT APPLICABLE IN RELATION TO AGRICULTURAL LAND
	HINDU WOMENS RIGHT TO PROPERTY AFTER STATE AND CENTRAL AMENDMENTS
	REPUGNANCY OF THE PROVISION OF SECTION 6-A(D) OF THE KARNATAKA ACT WILL TAKE EFFECT FROM THE DATE ON WHICH THE CENTRAL AMENDMENT ACT OF 2005 CAME INTO FORCE 9.9.2005

	2005 AMENDMENT BRINGS GENDER EQUALITY
	WOMEN WHO DIED BEFORE 2005 AND BEFORE HER FATHERS DEATH WHEN THERE IS ONLY SON, SUCCESSION THROUGH SURVIVORSHIP
	PUSPHALATHA CASE BEFORE HIGH COURT
	HINDU WOMEN RIGHT TO PROPERTY AS CO-PARCENER
	WOMENS RIGHT TO PROPERTY OF HER HUSBAND
	WOMENS RIGHT TO MAINTENANCE
	BEFORE NOTIONAL PARTITION ALL THE CONSEQUENCES WHICH FLOW FROM A REAL PARTITION HAVE TO BE LOGICALLY WORKED OUT
	HINDU WIDOWS RIGHT TO GET SHARE IN HINDU JOINT FAMILY
	TRANSFERS EFFECTED BEFORE 20-12-2004 CANNOT BE INVALIDATED

	CHAPTER-14
	LIMITATION AND ESTOPEL
	WHEN PLAINTIFF WAS EXCLUDED FROM THE FAMILY PROPERTIES AND CONSEQUENTLY THE EXCLUSION IS RIGHTLY HELD TO BE PROVED – SUIT IS BARRED
	IT IS ONLY IN THE EVENT OF OUSTER OF A SHARER FROM THE JOINT FAMILY PROPERTIES, THE LIMITATION STARTS RUNNING
	PARTITION SUIT FILED AFTER LAPSE OF 27 YEARS FROM THE DATE OF REGISTERED RELEASE DEED
	ALIENATIONS MADE PRIOR TO 20-12-2004 CANNOT BE RE-OPENED
	PLEA OF INVALIDATING THE AWARD ON THE GROUND OF NON-REGISTRATION MAY NOT BE OPEN AFTER THE LAPSE OF THE PRESCRIBED PERIOD
	SKILLFULLY MENTIONING IN THE PLEADINGS THAT THE PLAINTIFFS CAME TO KNOW ABOUT THE RELINQUISHMENT DEED ONLY ABOUT TWO MONTHS PRIOR TO THE FILING OF THE SUIT, THEY CANNOT AVOID THE LIMITATION PERIOD
	WHEN THE DONEE WAS AWARE OF THE CHARACTER OF THE TRANSACTION WHEN HE EXECUTED THE DEED, LIMITATION FOR SETTING ASIDE THE DEED OF GIFT WOULD RUN FROM THE DATE OF THE GIFT
	PARTY WHO HAD TAKEN BENEFIT UNDER THE TRANSACTION WAS NOT NOW ENTITLED TO TURN ROUND AND SAY THAT THE TRANSACTION WAS OF A KIND WHICH THE OTHER PARTY COULD NOT ENTER INTO AND WAS THEREFORE INVALID
	APPLICABILITY OF THE RELEVANT ARTICLE OF THE LIMITATION ACT, 1963 WILL HAVE TO BE DECIDED ON THE BASIS OF THE PLEADINGS
	LIMITATION STARTS FROM THE DATE OF DECREE AND NOT FROM THE DATE OF ENGROSSMENT ON STAMP PAPER
	SUIT FOR SHARE IN PROPERTIES WHICH ARE NOT JOINT FAMILY PROPERTIES
	FOR FILING PARTITION SUIT THERE IS NO TIME LIMIT
	CANCELLATION OF DOCUMENT AND LIMITATION

	CHAPTER-15
	WILL, GIFT AND ADOPTION
	NOMINEE IS AN AGENT TO RECEIVE ON BEHELF OF DECEASED LRS
	NOMINATION IN CO-OPERATIVE SOCIETY IS HERITABLE BUT NOT DIVISIBLE
	CONSEQUENTIAL DIRECTION FOR DELIVERY OF POSSESSION CAN BE GIVEN IN FAVOUR OF THE PERSON HAVING VALID NOMINATION
	NOMINEE HOLDS BENEFITS AND SUCCESSION STARTS AS PER PERSONAL LAW
	GIFT OF UN-DIVIDED SHARE BY CO-PARCENER
	HINDU RIGHT TO MAKE WILL OF UNDIVIDED CO-PARCENARY PROPERTY
	A FATHER IN A MITAKSHARA FAMILY HAS A VERY LIMITED RIGHT TO MAKE A WILL
	GIFT OF UNDIVIDED CO-PARCENARY PROPERTY VOID
	COPARCENAR CAN MAKE A GIFT OF HIS UNDIVIDED INTEREST IN THE COPARCENARY PROPERTY TO ANOTHER COPARCENER OR TO A STRANGER WITH THE PRIOR CONSENT OF ALL OTHER COPARCENERS
	NOMINATION IN INSURANCE POLICY AND SUCCESSION MATTERS
	GIFT OF ANCESTRAL PROPERTY BY KARTA - UNDER REASONABLE LIMITS
	ESSENTIALS OF VALID ADOPTION
	FATHER RIGHT TO GIFT JOINT FAMILY PROPERTY TO THE DAUGHTER - LIMITATIONS
	CONSEQUENCES OF ADOPTION BY A WIDOW
	UNTIL UNIFORM CIVIL CODE BROUGHT PERSONAL LAW AS TO ADOPTION APPLY
	ACCEPTANCE OF GIFT
	RELATIONSHIP OF ADOPTED CHILD WITH OTHERS EXPLAINED
	THE RIGHTS OF AN ADOPTED SON CANNOT BE MORE THAN THAT OF HIS ADOPTIVE FATHER
	SON INCLUDES ADOPTED SON UNDER GENERAL CLAUSES ACT
	MALE HAS A WIFE LIVING, HE SHALL NOT ADOPT EXCEPT WITH THE CONSENT OF HIS WIFE
	DWYAMUSHYAYANA FORM OF ADOPTION
	REVERSIONERS CONSENT NOT REQUIRED AFTER AMENDMENTS IN HINDU LAW
	INTERPRETATION OF WILL
	ESSENTIALS OF VALID GIFT
	GIFT OR TRANSFER WITH CONDITION
	ADOPTED PERSONS RIGHTS TO INHERIT HIS NATURAL PARENTS PROPERTY
	PROOF OF WILL
	JUDICIAL VERDICT ON WILL BE BASED ON CONSIDERATION OF GIFT AND POSSESSION
	CANCELLATION OR REVOCATION OF GIFT

	CHAPTER-16
	PARTNERSHIP AND FAMILY BUSINESS
	THERE IS NO PRESUMPTION AS TO JOINT FAMILY BUSINESS EVEN IF IT IS STARTED BY KARTHA OR MEMBER
	BURDEN OF PROOF LIES UPON THE PLAINTIFF WHO CLAIMS A SHARE IN THE BUSINESS
	THERE IS NO PRESUMPTION THAT A BUSINESS COMMENCED OR CARRIED ON BY A MEMBER OF A HINDU JOINT FAMILY IS A JOINT FAMILY BUSINESS
	IT CANNOT BE THE SKILL OR THE LABOUR OF THE INDIVIDUAL MEMBERS CONSTITUTING THE FAMILY TRADE
	PARTNERSHIP ACT DOES NOT APPLY TO HINDU TRADING FAMILIES
	THERE IS NO PRESUMPTION IN HINDU LAW THAT A BUSINESS STANDING IN THE NAME OF A MEMBER OF THE HINDU JOINT FAMILY IS JOINT FAMILY BUSINESS
	WHAT CONSTITUTE FAMILY TRADE OR JOINT FAMILY BUSINESS- IT DOES NOT INCLUDE SKILL CRAFT
	COMMENCING NEW TRADE WITH FAMILY FUNDS IS IMPORTANT
	BUSINESS STARTED BY KARTHA AND LIABILITY OF CO-PARCENERS, MINORS AND SUBSEQUENT BORN
	MERE USE OF JOINT FAMILY PREMISES FOR BUSINESS

	CHAPTER-17
	GRANTED LAND
	UNLESS THE GRANTED LAND IS INTENDED TO BE FOR THE BENEFIT OF THE FAMILY, OR A CONTRARY INTENTION APPEARS FROM THE GRANT, OR IT WAS TREATED AS JOINT FAMILY PROPERTY BY THE DONEE AND THE MEMBERS OF THE FAMILY – IT IS SELF ACQUIRED PROPERTY
	THE REGRANT OF THE LANDS IN THE NAME OF ONE OF THE MEMBERS OF THE FAMILY REVIVED THE RIGHT OF THE SUCCESSORS OF THE ORIGINAL HOLDER OF THE VILLAGE OFFICE TO SUCCEED TO THE LANDS.
	ABOLITION OF THE VILLAGE OFFICE DOES NOT AFFECT THE PERSONAL LAW OF THE OFFICER
	GRANT ENURES TO ENTIRE BENEFIT OF FAMILY
	INTEREST IN VILLAGE OFFICE INCLUDES RIGHT TO SURVIVORSHIP OF MEMBERS OF THE JOINT HINDU FAMILY
	SUIT LAND WAS NOT AVAILABLE FOR PARTITION TILL REGRANT AS IT WAS IMPARTIBLE ESTATE
	PARTY ALLEGATING HAS TO PROVE REGRANT ENURES TO ENTIRE BENEFIT OF THE FAMILY
	REGRANT OF WATAN LANDS IS JOINT FAMILY PROPERTY FOR BOTH HINDU AND MUSLIM

	CHAPTER-18
	COMPROMISE - SETTLEMENT - ARRANGEMENT
	COMPROMISE IN THE SUIT REGARDING FAMILY SETTLEMENT NEED NOT BE REGISTERED 1976 SC
	ORDINARY COMPROMISE BETWEEN STRANGERS, DO NOT EQUALLY APPLY TO THE CASE OF COMPROMISES IN THE NATURE OF FAMILY ARRANGEMENT
	FAMILY SETTLEMENT EXPLAINED
	IF A PARTY TO THE SETTLEMENT HAS NO TITLE OTHER PARTIES RELINQUISHED ALL ITS CLAIM OR TITLE IN FAVOUR OF SUCH PERSON AND ACKNOWLEDGES HIM TO BE THE SOLE OWNER THEN THE FAMILY ARRANGEMENT WILL BE UPHELD
	FAMILY SETTLEMENTS TO BE VIEWED DIFFERENTLY FROM ORDINARY CONTRACTS AND THEIR INTERNAL MECHANISM FOR WORKING OUT THE SETTLEMENT SHOULD NOT BE LIGHTLY DISTURBED
	WHAT COULD BE THE BINDING EFFECT AND ESSENTIALS FOR A FAMILY SETTLEMENT
	THE RULE OF ESTOPPEL IS PRESSED INTO SERVICE AND IS APPLIED TO SHUT OUT PLEA OF THE PERSON WHO BEING A PARTY TO FAMILY ARRANGEMENT SEEKS TO UNSETTLE A SETTLED DISPUTE AND CLAIMS TO REVOKE THE FAMILY ARRANGEMENT
	WHEN ONE OF THE SONS OF THE FAMILY SHOWN TO HAVE NOT ACCEPTED OR PARTICIPATED IN THE FAMILY ARRANGEMENT, THE FAMILY ARRANGEMENT IS NOT BINDING
	THE OBJECT OF THE ARRANGEMENT IS TO PROTECT FAMILY FROM FILING LONG DRAWN LITIGATION OR PERPETUAL STRIFES WHICH MAR THE UNITY AND SOLIDARITY OF THE FAMILY AND CREATE HATRED AND BAD BLOOD BETWEEN THE VARIOUS MEMBERS OF THE FAMILY
	COURTS TO LEAN STRONGLY IN FAVOUR OF FAMILY ARRANGEMENTS TO BRING ABOUT HARMONY IN A FAMILY AND DO JUSTICE
	FAMILY ARRANGEMENT IS BASED ON THE ASSUMPTION THAT THERE IS AN ANTECEDENT TITLE OF SOME SORT IN THE PARTIES
	FAMILY SETTLEMENT SEEKING TO PARTITION JOINT FAMILY PROPERTIES, THE SAME CANNOT BE RELIED UPON UNLESS SIGNED BY ALL THE CO-SHARERS
	LIFE INTEREST WITH MOTHER IN CASE OF SETTLEMENT
	COMPROMISE DECREE IS A CONTRACT
	FAMILY SETTLEMENT AND MINOR
	CONDITION FOR THE VALIDITY OF FAMILY ARRANGEMENTS

	CHAPTER-19
	BLENDING OF PROPERTY AND INCOME
	MERE FACT THAT MEMBERS OF JF ARE ALLOWED TO USE SEPARATE PROPERTY – BLENDING CANNOT BE INFERRED 2003 SC
	UNLESS SPECIFIC PLEA IS RAISED AND AN ISSUE IS FRAMED AND TRIED, IT IS NOT POSSIBLE FOR THE PARTIES TO KNOW THE CASE OF BLENDING
	ABSENCE OF A PLEA OF BLENDING – ALLOWING OTHERS TO ENJOY SELF ACQUIRED PROPERTY – NOT SUFFICIENT TO HOLD IT IS BLENDED
	LAW OF BLENDING OF INCOME IN COMMON HOTCHPOTCH
	BLENDING OF SELF ACQUIRED PROPERTY INTO JOINT FAMILY PROPERTY
	CAN IMPRESS SELF ACQUIRED PROPERTY WITH CHARACTER OF JOINT FAMILY PROPERTY
	BLENDING OF SEPARATE PROPERTY INTO JOINT FAMILY
	BLENDING OF INCOME AND BLENDING OF PROPERTY
	CLEAR INTENTION TO ABANDON THE SEPARATE RIGHTS IN THE PROPERTY MUST BE PROVED
	HINDU FEMALE CANNOT BLEND HER SEPARATE PROPERTY
	BLENDING AND NUCLEUS
	BLENDING DOES NOT AMOUNT TO TRANSFER OR GIFT

	CHAPTER-20
	PARTITION SUIT AND MESNE PROFITS
	JOINER OF NECESSARY PARTY IN PARTITION SUIT
	DECLARATORY SUIT CAN GRANT PARTITION WHEN ALL THE MEMBERS OF FAMILY ARE PARTIES TO THE SUIT
	AVERRMENT OF DEPRIVATION OF ENJOYMENT IS NECESSARY TO HAVE MESNE PROFITS
	SUIT FOR PARTITION OF THE JOINT FAMILY PROPERTY FILED BY MINOR CAN BE CONTINUED BY HIS MOTHER AFTER HIS DEATH
	PLAINTIFF OR DEFENDANT IN A SUIT FOR PARTITION, IS ENTITLED TO CLAIM A SEPARATE ALLOTMENT AT ANY STAGE BEFORE THE FINAL DECREE
	A PETITION OR APPLICATION TO DRAW FINAL DECREE IS NOT A PLAINT AND NEED NOT CONTAIN THE MATERIAL FACTS
	SCOPE OF PARTITION SUIT WHEN PROPERTY IS INDIVISIBLE
	A SUIT FOR PARTITION COULD BE FILED AS LONG AS THE PROPERTY IS JOINT
	WHETHER PROPERTY AVAILABLE FOR PARTITION OR NOT CANNOT BE GONE UNDER ORDER 7 RULE 11
	JOINT PROPERTY UNDER SALE AGREEMENT BY ONE CO-SHARER – PARTY TO CONTRACT TO EXECUTE SALE DEED – ONLY AFTER THAT PURCHASER CAN SEEK PARTITION
	CO-SHARER SELLING HIS SHARE IN DWELLING HOUSE AND PARTITION OF DWELLING HOUSE

	WHENEVER A SHARE IN THE PROPERTY IS SOLD THE VENDEE HAS A RIGHT TO APPLY FOR THE PARTITION OF THE PROPERTY AND GET THE SHARE DEMARCATED
	IN THE ABSENCE OF PLEADING AS TO DEPRIVED POSSESSION MESNE PROFITS CANNOT BE AWARDED
	PARTITION SUIT AND NECESSARY PARTIES
	PROCEDURE TO BE ADOPTED BY COURTS IN A PARTITION SUIT WHEN A PLAINTIFF WANTS TO WITHDRAW THE SUIT
	COURT FEE IN CASE OF PARTITION SUIT
	PARTITION SUIT SHALL CONTAIN ALL THE PROPERTIES
	PARTIAL PARTITION AS TO PROPERTIES IS PERMISSIBLE
	SECOND SUIT FOR PARTITION - ACCEPTABLE EXPLANATION SHOULD BE GIVEN IN THE SECOND SUIT ABOUT THE INCOMPLETENESS OF THE FIRST SUIT
	WHO ARE NECESSARY PARTIES AND PROPER PARTIES IN A PARTITION SUIT
	PURCHASER OF UNDIVIDED SHARE - HIS ONLY RIGHT IS TO SUE FOR PARTITION OF THE PROPERTY
	PURCHASER OF UNDIVIDED SHARE - NOT ENTITLED TO PARTITION
	PARTITION SUIT NOT NECESSARY TO SEEK A DECLARATION FOR SETTING ASIDE THE ALIENATION BUT IT IS SUFFICIENT TO SEEK ALIENATION NOT BINDING UPON HIS SHARE
	PARTIAL PARTITION SUIT WHEN UNDER SEVERAL CIRCUMSTANCES MAINTAINABLE
	NECESSARY PARTIES OF PARTITION SUIT
	PURCHASERS IN PARTITION SUIT NECESSARY
	IMPLEADING AS PARTY

	CHAPTER-21
	JUDGEMENT AND DECREE
	COURTS BELOW OUGHT TO HAVE DECLARED THE EXACT SHARE OF THE PLAINTIFF AND PASSED A PRELIMINARY DECREE
	WITHDRAWL OF SUIT WITHOUT LIBERTY TO FILE FRESH SUIT - DOES NOT AMOUNT TO DECREE
	COURT CAN PASS MORE THAN ONE PRELIMINARY DECREE IN PARTITION SUIT
	CHANGE OF LAW AFTER THE PRELIMINARY DECREE IS PASSED BEFORE PASSING OF THE FINAL DECREE
	COURT HAS JURISDICTION TO DIRECT A PARTITION INTERSE AMONGST THE PLAINTIFFS
	FINAL DECREE PROCEEDINGS AND ROLE OF PARTITION ACT
	WHETHER IT IS FINAL DECREE OR PRELIMINARY DECREE
	THE ENGROSSMENT OF THE DECREE ON STAMP PAPER WOULD RELATE BACK TO THE DATE OF THE DECREE
	PRINCIPLES OF PROCEDURE IN PARTITION SUIT AND COURTS DUTY TO CONTINUE FINAL DECREE PROCEEDINGS 2009 SC
	PASSING OF FINAL DECREE AT FIRST INSTANCE ITSELF
	THE PROCEEDINGS SHOULD BE CONTINUED BY FIXING DATES FOR FURTHER PROCEEDINGS TILL A FINAL DECREE IS PASSED

	WHERE THE PRELIMINARY DECREE HAD BEEN PASSED PRIOR TO THE COMMENCEMENT OF THE AMENDING ACT, THE FINAL DECREE PASSED AFTER SUCH COMMENCEMENT, DAUGHTER WOULD BE ENTITLED TO A SHARE IN THE COPARCENARY PROPERTY
	APPOINTMENT OF RECEIVER OF JOINT FAMILY PROPERTIES
	FRAUD COMPROMISE DECREE CAN BE RE-OPENED
	PROPERTY CAN BE ADDED IN THE LIST OF PROPERTIES AFTER PRELIMINARY DECREE
	RECTIFICATION OF ERRORS IN DECREE

	CHAPTER-22
	LEGAL NECESSITY AND MINOR
	ALIENATION MADE BY THE FATHER FOR DISCHARGING ANTECEDENT DEBTS WOULD BE BINDING ON THE SONS
	WHEN AN ALIENATION IS CHALLENGED AS BEING UNJUSTIFIED OR ILLEGAL IT WOULD BE FOR THE ALIENEE TO PROVE THAT THERE WAS LEGAL NECESSITY IN FACT OR THAT HE MADE PROPER AND BONA FIDE ENQUIRY AS TO THE EXISTENCE OF SUCH NECESSITY
	SALE OF MINOR PROPERTY COURT PERMISSION NEEDED
	WHEN THE FATHER WAS ALIVE HE WAS THE NATURAL GUARDIAN AND IT WAS ONLY AFTER HIM THAT THE MOTHER BECAME THE NATURAL GUARDIAN
	LEGAL NECESSITY SHALL BE ESTABLISHED BY PURCHASER
	CHILD IN THE WOMB AND HINDU LAW

	CHAPTER-23
	PARTITION AND REGISTRATION
	MERE MEMORANDUM PREPARED AFTER THE FAMILY ARRANGEMENT HAD ALREADY BEEN MADE NOT COMPULSORILY REGISTRABLE
	MEMORANDUM OF WHAT HAD TAKEN PLACE IS NOT A DOCUMENT WHICH WOULD REQUIRE COMPULSORY REGISTRATION UNDER SECTION 17 OF THE REGISTRATION ACT.
	MERE LIST OF PROPERTIES ALLOTTED AT A PARTITION IS NOT AN INSTRUMENT OF PARTITION AND DOES NOT REQUIRE REGISTRATION
	THERE WAS NEITHER A DIVISION IN STATUS NOR A DIVISION BY METES AND BOUNDS ITS TERMS RELATING TO SHARES WOULD COME INTO EFFECT ONLY IN THE FUTURE IF AND WHEN DIVISION TOOK PLACE - THIS DOES NOT REQUIRE REGISTRATION
	PARTITION DEED WHICH WAS MUTUALLY ACTED UPON CANNOT BE QUESTIONED FOR ITS NON-REGISTRATION 2005 SC
	PARTITION AMOUNTS TO TRANSFER FOR THE PURPOSE OF REGISTRATION ACT
	UNREGISTERED PARTITION DEED - NOT ADMISSIBLE - SC
	ADMISSIBILITY OF UNREGISTERED PARTITION DEED

	IF THE RIGHTS ARE CREATED OR EXTINGUISHED BY THE SAID DOCUMENT, THE DOCUMENT REQUIRES REGISTRATION
	FAMILY ARRANGEMENT MAY BE ORAL NO REGISTRATION IS NECESSARY
	UNDER HINDU LAW PARTITION NEED NOT BE EFFECTED ONLY BY REGISTRATION DEED
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CHAPTER-1

HINDU LAW INTRODUCTION

WHO IS HINDU

The Constitution Bench of the Apex Court in the judgment reported in **MANU/SC/0040/1966 : [1966] 3 SCR 242 , Sastri Yagnapunushadji v. Muldas Bhudardas Vaishya**, relevant part of which is being quoted below: The, Encyclopedia of Religion and Ethics, Vol VI, has described 'Hinduism' as the title applied to that form of religion which prevails among the vast majority of the present population of the Indian Empire (p.686). As Dr. Radhakrishnan has observed, "The Hindu civilization is so called, since its original founders earliest followers occupied the territory drained by the Sindhu (the Indus) river system corresponding to the North West Frontier Province and the Punjab. This is recorded in the Rig which give their name to this period Indian history. The people on the Indian side of the Sindhu were called Hindu by the Persian and the later western invaders." (The Hindu view of Life" by Dr. Radhakrishnan. P. 12). That is the genesis of the world "Hindu".

When we think of the Hindu religion, we find it difficult, if not, impossible to define Hindu religion or even adequately describe it. Unlike other religion in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional feature of any religion or creed. It may broadly be described as a way of life and nothing more.

...The term 'Hindu', according to Dr. Radhakrishnan, had originally a territorial and not a credal significance. It implied residence in a well-defined geographical area. Aboriginal tribes, savage and half-civilized people, the cultured Dravidians and the Vedic Aryans were all Hindus as they were the sons of the same mother. The Hindu thinkers reckoned with the striking fact that the men and women dwelling in India belonged, to different communities, worshipped different gods, and practised different rites (Kurma Purana) (Ibid p. 12)

Monier Williams has observed that "it must be borne in mind that Hinduism is far more than a mere form of theism vesting on Brahmanism. It

presents for our investigation a complex congeries of creeds and doctrines which in its gradual accumulation may be compared to the gathering together of the mighty volume of the Ganges, swollen by a continual influx of tributary fivers and rivulets, spreading itself over an every-increasing area of country and finally resolving itself into an intricate Delta of tortuous streams and jungly marshes.... The Hindu religion is reflection of the composite character of the Hindus, who are not people but many. It is based on the idea of universal receptivity. It has ever aimed to accommodating itself circumstances, and has carried on the process of adaptation through more than three thousand years. It has first borne with and them, so to speak, swallowed, digested, and assimilated something from all creed" (Religious Thought & Life in India" by Monier Williams, P. 57).

We have already indicated that the usual tests which can be applied in relation to any recognised religion or religious creed in the world turn out to be inadequate in dealing with the problem of Hindu religion. Normally, any recognised religion or religious creed subscribes to body of set philosophic concepts and theological beliefs. Does this test apply to the

Hindu religion? In answering this question, we would base ourselves mainly on the exposition of the problem by Dr. Radhakrishnan in his work on Indian Philosophy ("Indian-Philosophy" by Dr. Radhakrishnan. Vol. I, pp.22-23). Unlike other countries, India can claim that philosophy in ancient India was not an auxiliary to any other science or art, but always held a prominent position of independence "In all the fleeting centuries of history," says Dr. Radhakrishnan, "in all the vicissitudes through which India has passed, a certain marked identity is visible. It has held fast to certain marked identity is visible. It has held fast to certain psychological traits which constitute its special heritage and they will be the characteristic marks of the Indian people so long as they are privileged to have a separate existence". The history of Indian thought emphatically brings out the fact that the development of Hindu religion has always been inspired by an endless quest of the mind for truth based on the consciousness that truth has many facts. Truth is one, but wise men describe it differently. The Indian mind has, consistently through the ages, been exercised over the problem of the nature of godhead the problem that faces the spirit at the end of life, and the

interrelation between the individual and the universal soul. "If we can abstract from the variety of opinion, says Dr. Radhakrishnan, "and observe the general spirit of Indian thought, we shall find that it has a disposition to interpret life and nature in the way of monastic idealism, though this tendency is so plastic, living and manifold that it takes many forms and expresses itself in even mutually hostile teachings."

Naturally enough, it was realised by Hindu religion from/ the very beginning of its career that truth was many-sided and different views contained different aspects of truth which no one could fully express. This knowledge inevitably bred a spirit of tolerance and willingness to understand and appreciate the opponent's point of view. That is how "the several views set forth in India in regard to the vital philosophic concepts are considered to be the branches of the self-same tree. The short cuts and blind alleys are somehow reconciled with the main road of advance to the truth." (...) When we consider this broad sweep of the Hindu philosophic concepts, it would be realised that under Hindu philosophy, there is no cope for ex-communicating any notion or principle as heretical and rejecting it as such.....

The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought and practices element of corruption and superstition and that led to the formation of different sects. Buddha started Buddhism; Mahavir founded Jainism; Basava became the founder of Lingayat religion; Dnyaneshwar and Tukaram initiated the Varakari cult; Guru Nanak inspired Sikhism Dayananda founded Arya Samaj, and Chaitanya began, Bhakti cult; and as a result of the teachings of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive, progressive and dynamic form. If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective views; but underneath that divergence, there is a kind of subtle indescribable unity which keeps them within the sweep of the broad and progressive Hindu religion.

It is somewhat remarkable that this broad sweep of Hindu religion has been eloquently described by Toynbee. Says Tonbee; "When we pass from the plane of social practice to the plane of intellectual outlook, Hinduism too comes out well by comparison with the religions and

ideologies of the South-West Asian group. In contrast to these Hinduism has the same outlook ,as the pre-Christian and pre-Muslim religions and philosophies of the Western half of the old world. Like them, Hinduism takes it for granted that there is more than one valid approach to truth and to salvation and that these different approaches are not only compatible with each other...but are not only compatible with Day Experiment in Western Civilisation" by Toynbee, pp. 48-49).

The Constitution-makers were fully conscious of this broad and comprehensive character of Hindu religion; and so, while guaranteeing the fundamental right to freedom of religion, Explanation II to Article 25 has made it clear that in Sub-clause (b) of Clause (2) the reference to Hindus shall be construed as including reference to persons professing the Sikh, Jains or Buddhist religion, and the reference to Hindu religious institutions shall be constructed accordingly.

In order to consider what is the Hinduism, the judgment of the Apex Court reported in **MANU/SC/0982/1996 : AIR1996SC1113 , Dr. Ramesh Yeshwant Prabhoo v. Prabhakar**

Kashinath Kunte and Ors. is very relevant Paragraphs 38, 39 and 40 of the judgment are being quoted below:

38. These Constitution Bench decisions, after a detailed discussion, indicate that no precise meaning can be ascribed to the terms 'Hindu', 'Hindutva' and 'Hinduism'; and no meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage. It is also indicated that the term 'Hindutva' is related more to the way of life of the people in the sub-continent. It is difficult to appreciate how in the face of these decisions the term 'Hindutva' or 'Hinduism' per se, in the abstract, can be assumed to mean and be equated with narrow fundamentalist Hindu religious bigotry, or to be construed to fall within the prohibition in Sub-section 3 and/or (3A) of Section 123 of the R.P. Act.

39. Bharucha, J. in *Dr. M. Ismaili Faruqui v. Union* MANU/SC/0860/1994 : AIR1995SC605 (Ayodhya case), in the separate opinion for himself and Ahmadi, J. (as he then was), observed as under: Hinduism is a tolerant faith. It is that tolerance- that has enabled Islam, Christianity, Zoroastrianism, Judaism, Buddhism, Jainism,

and Sikhism to find shelter and support upon this land....

40. Ordinarily, the Hindutva is understood as a way of life or a state of mind and it is not to be equated with, or understood as religious Hindu fundamentalism. In "Indian Muslims - The Need For A Positive Outlook" by Maulana Wahiduddin Khan (1994), it is said: The strategy worked out to solve the minorities problem was, although differently worded, that of Hindutva or Indianisation. This strategy, briefly stated, aims at developing a uniform culture by obliterating the differences between all the cultures co-existing in the country. This was felt to be the way of communal harmony and national unity. It was though that this would put an end once and for all to the minorities problem.

The above, opinion indicate that the word 'Hindutva' is used and understood as a synonym of 'Indianisation', i.e., Development of uniform culture by obliterating the differences between all the cultures co-existing in the country.

A judgment reported in **1993 ALL.L.J. 1379 Smt. Indumatee Koorichh v. The Family Court, Lucknow and Anr.** of the learned Single Judge of Court has also 'Hindu' religion. Relevant

party of Paragraph 27 of the judgment is being reproduced below: 27...expression 'Hindu' under the acts has been taken to mean and include in itself every person man or woman or child who is not a Muslim, Christian, Parsi or Jew and also such person, who being Muslim, Christian, Parsi or Jew when, he gets himself converted into the Hindu way of life either as a Vaishnavait, Shivait, Buddhist, Sikh or the like cults of Hindu faith and religion. Those religions, as have got their origination in foreign land or lands other than mother India, the great Hindustan, and, as such, their followers are not included in phrase Hindu. Thus considered in wider horizon or sense of connotation a person born in India or Hindustan or whose parents have taken birth in India or hindustan the land surrounded by Himalayan range on the north and Sindhu the Sea known as Indu sarovar in the south and having faith and allegiance with this land and its culture may be called a Hindu irrespective of difference of a approach towards one truth and one goal.

This definition of Hindu has further been defined by a Constitution Bench judgment of the **Apex Court reported in AIR 1971, 1737** D.A. V. College, Jullundur etc. v. The State of Punjab and

Ors. Paragraphs 12, 13 and 16 of the said judgment are being reproduced below: 12. For the purposes of Article 29(1) even though it may not be necessary to enquire whether all the Hindus of Punjab as also the Arya Samajis speak Hindi as a spoken language, nonetheless there can be no doubt that the script of the Arya Samajis is distinct from that of Sikhs who form the majority. It is claimed that while the Sikhs have Gurumukhi as their script the Arya Samajis have their own script which is the Devnagri script. Their Claim to be a religious minority with distinct script of their own seems to us to be justified as would appear from the following:

13. The Arya Samaj is a reformist movement, believes in one God and in the Vedas as the books of true knowledge. It holds that it is the duty of every Arya Samaji to read the Vedas and have them read, to teach or preach them to others. It has a distinct organization, the membership of which is open to all those who subscribe to its aims and objects. The Arya Samajis worship before the vedic fire and it begins with the burning of incense (the homa 'sacrifice') accompanied by the chanting of Vedic verses.

16. The passage read above show beyond doubt that the Arya Samaj by "rejecting the

manifold absurdities, found in Smriti and in tradition and in seeking a basis in the early literature for a purer and more rational faith" can be considered to be a religious minority, at any rate as part of the Hindu religious minority in the State of Punjab.

R.M.A. Metropolitan v. Moran Mar Marthoma AIR 1995 SC 200, the Apex Court in Paragraph-31 of the judgment has observed about religion as follows: 'Religion is the belief which binds spiritual nature of men to, super-natural being.' It includes worship, belief, faith, devotion etc. and extends to rituals. Religious right is the right of a person believing in a particular faith to practice it, preach it and profess it.

HINDU IS NOT RELIGION ITS DHARMA WAY OF LIFE

Religion and Dharma are two different words. The first case of the Apex Court in which religion has been defined is reported in **MANU/SC/0455/1996 : [1996]3SCR543 , A.S. Nariayana Deekshitulu v. State of Andhra Pradesh and Ors.** Relevant Paragraphs of the judgment; are being reproduced below:

142...The same is the difference between "religion", a word used in Articles 25 and 26, and "dharma" known to our psyche. I wish to put on record the difference in my own way and to say that our constitution makers had used the word "religion" in these two articles in the sense conveyed by the word "dharma".

143. Very often the words "religion" and "dharma" are used to signify one and the same concept or notion; to put it differently, they are used inter-changeably. This, however, is not so, as would become apparent from what is being stated later, regarding our concept of dharma. I am of the considered view that the word religion in the two articles has really been used, not as colloquially understood by the word religion, but in the sense of it comprehending our concept of dharma. The English language having had no parallel word to dharma, the word religion was used in these two articles. It is a different matter that the word dharma has now been accepted even in English language, as would appear from Webster's New Collegiate Dictionary which has defined it to mean : "Dharma : n. (Skt. fr. Dharayati he holds;) akin to L firmus firm : custom or law regarded as duty : the basic principles of cosmic or individual existence :

nature : conformity to one's duty and nature." The Oxford Dictionary defines dharma as : "Right behaviour, virtue; the law (Skt. A decree, custom)."

144. The difference between religion and dharma is eloquently manifested when it is remembered that this Court's precept is. It is apparent that the word dharma in this canon or, for that matter, in our saying, does not mean religion, but the same has been used in the sense defined in the aforesaid two dictionaries. This is how the President of India, Dr. Shanker Dayal Sharma, understood the word dharma in his address at the First Convocation of the National Law School of India University delivered on 25th September, 1993 at Bangalore.

145. Our dharma is said to be 'Sanatan' i.e. one which has eternal values; one which is neither time bound nor space-bound. It is because of this that Rigveda has referred to the existence 'Sanatan Dharmani'. the concept of 'dharma', therefore, has been with us for time immemorial. The word is derived from the root Dh. R' - which denotes : 'upholding', 'supporting', 'nourishing' and 'sustaining'. It is because of this that in Kama Parva of the Mahabharat, Verse-58 in Chapter 69 says: Dharma is for the stability of

the society, the maintenance of social order and the general well-being and progress of humankind. Whatever conduces to the fulfillment of these objects is Dharma; that is definite.

146. The Brhadaranyakopanisad identified Dharma with Truth, and declared its supreme status thus: There is nothing higher than dharma. Even a very weak man hopes to prevail over a very strong man on the strength of dharma, just as (he prevails over a wrong-doer) with the help of the Kind. So what is called Dharma is really Truth. Therefore people say about a man who declares the truth that he is declaring dharma and about one who declares dharma they say he speaks the truth. These two (dharma and truth) are this.

147. The essential aspect of our ancient thought concerning law was the clear recognition of the supremacy of dharma and the clear articulation of the status of 'dharma' which is somewhat akin to the modern concept of the rule of law, i.e. of all being sustained and regulated by it.

148. In Verse-9 of Chapter-5 in the Ashrama Vasika Parva of the Mahabharata, Dhritrashtra states to Yudhisthira : "the State

can only be preserved by dharma - under the rule of law."

149. Ashoka mentioned about victory of dharma in his rock edict at Kalsi which proclaimed his achievement in terms of the moral and ethical imperatives of dharma, and exemplified the ancient dictum : "Yato Dharmstato Jai:" (where there is Law, there is Victory).

152. Swami Rama in his book 'A Call to Humanity', published; by the Himalayan International Institute of Yoga Science and Philosophy of the U.S.A. In 1988 has taken pains to demonstrate the difference between religion and dharma. It would be profitable to note what this great saint has said in this regard. The word religion, as presently understood, is comprised to rituals, customs, and dogmas surviving on the basis of fear and blind faith; whereas dharma encapsulates those great laws and disciplines that uphold, sustain, and ultimately lead humanity to the sublime heights of worldly and spiritual glory. Dharma shines in the form of truth, nonviolence, love, compassion, forbearance, forgiveness, and mutual sharing.

153. Swami Rama mentioned in this connection what the great master, Krishna,

stated to Arjuna about the essence of the Upnishads. He introduced a healthy lifestyle through which people could attain the state of peace here and now. But with the passage of time, people formed a cult around Krishna, giving birth to new religion with the various branches.

154. The distinction between religion and dharma has also been explained by saying that religion is enriched by visionary methodology and theology, whereas dharma blooms in the realm of direct experience. Religion contributes to the changing phases of a culture; dharma enhances the beauty of spirituality. Religion may Inspire, one to build a fragile, moral home for God; dharma helps one to recognise the immortal shrine in the heart.

155. The author goes on to say that the perennial truths, rules, and laws that help maintain peace and harmony in one's individual and in the community life constitute dharma. It applies for all times and in all places. Social laws and even national constitutions devoid of such a dharma will lead a society towards an inevitable decline.

156. Thus, having love for all human beings is dharma. Helping others ahead of one's personal gain is the dharma of those who follow the path

of selfless service. Defending one's nation and society is the dharma of soldiers and warriors. In other words, any action, big or small, that is free from selfishness is part of dharma.

158. It is because of the above that if one were to ask "What are the signs and symptoms of dharma?", the answer is : that which has no room for narrow-mindedness, sectarianism, blind faith, and dogma. The purity of dharma, therefore, cannot be compromised with sectarianism. A sectarian religion is open to a limited group of people whereas dharma embraces all and excludes none. This is the core of our dharma, our psyche.

Dr. Sarvapalli kauna Krishnan in his Book 'Indian Religion' has observed as follows:

The complex of institutions and influences, which shape the moral feeling, and character of the people is called the dharma which is a fundamental feature of the Hindu religion. Hinduism does not believe in enforcing creeds, but calls upon all Hindus to conform to the discipline. It is a culture more than a creed. If ye do the will of the dharma, ye shall know of the doctrine or the truth. The dharma helps the

smoldering fire, which is in every individual to burst into flame.

The dharma is a code of conduct supported by the general conscience of the people. It is not subjective in the sense that the conscience of the individual imposes it, nor external in the sense that the law enforces it. It is the system of conduct, which the general opinion or the spirit of the people supports, that the Germans call Sittlichkeit. Fichte defines the latter as those principles of conduct which regulate people in their relations to each other, and have become a matter of habit and second nature at the stage of culture reached and of which therefore we are not explicitly conscious.

Shyamal Ranjan Mukerjee vs. Nirmal Ranjan Mukerjee and Ors.: MANU/UP/0996/2007

103. Dharma is that which holds together all living beings in a harmonious order. Virtue is conduct contributing to social welfare, and vice is its opposite. It is frequently insisted that the highest virtue consists in doing to others as we would be done by. Both the individual and the social virtues are included in that are called nitya karmas, or obligatory duties, which are cleanness or saucm good manners or acharam, social

service or panchamahyajnas, and paryer and worship or sandhyavandanam....

104. Dharma is inherent as law in the very nature of all existing phenomena, that which supports and holds universe together. It is not merely a set of beliefs having no connection with the living, but rather a set of principles for a harmonious and beneficent life. It is practical doctrine. The etymological meaning of Dharma is also "that which binds together".

105. The goal of world unity is to be achieved by ahinsa which is insisted on by Hinduism/ Buddhism and Jainism and other religions within the fold of Hinduism.

106. The great philosopher, S. Radhakrishnan in the book 'Indian Religions', Indian Religious Thought has described the fundamental concepts of the Indian religion. Religion reflects both God and man. As religion is a life to be lived, not a theory to be accepted or a belief to be adhered to it allows scope and validity to varied approached to the Divine. There may be different revelations of the Divine but they are all forms of the Supreme. If we surround our souls with a shell, national pride, racial superiority, frozen articles of faith and empty presumption of

castes and classes, we stifle and suppress the breath of the spirit.

ORIGIN OF HINDU LAW

Rayani Appaiah vs. Spl. Tahsildar, L.R.

Addanki: MANU/AP/0340/1987 (FB) - The

Hindu law is the spin-off of Vedas, Smritis, commentaries and digests legislative enactments and judicial decisions. Several commentaries and digests were compiled as to the essence of Shastric law expounded in Vedas and Smrithis and the commentaries and digests of Mitakshara and Viramitrodaya and Jimuta Vahanas are accepted with solemnity and reverence by people. The commentaries are the amalgam of distillation of ancient Sutras and preponderance usage and custom in the community and it is a happy blend ironing out the inconsistencies and angularities. The origin and development of schools of Hindu Law is traced by the Privy Council in Collector of Madura v. Mootto Ramalinga 12 MIA 397 as follows: The remoter sources of Hindu Law are common to all the different schools The process by which those schools have been developed seems to have been of this kind. Works universally or generally viewed became the

subject of subsequent commentaries. The commentator put his own gloss on the ancient text and his authority having been received in one and rejected in another part of India, schools with conflicting doctrine arose.

The commentaries of Mitakshara in general and particularly the commentary on Yajnavalkya are followed through out India except Bengal. In Bangala area the chief commentary is that of Jimutavahana and it is called Dayabegha. By efflux of time diverse interpretations rendered by commentators as to subtle and complex dimensions and also bowing to usage the Mitakshara doctrine sprouted off-shoots with slightly different shades of opinion designated as Madras, Bombay, Benaras and Mithila schools of Hindu law. The essence of Mitakshara doctrine permeated through all these schools and there are slight variations as a result of different approaches and accent by certain treatises and commentaries influenced by local custom and usage. Smriti Chandrika and Saraswati Vilas considered to be the prominent exponents of Mitakshara supplement but not supersede Mitakshara. The commentators endeavoured to string shades and hues in Shastras. As pointed out by the Privy Council in Budha Singh v. Lalithi

Singh (37 All 604) these treatises can be called upon to "explain a dubious or in terminate phase of term in the Mitakshara". The difference between Mitakshara and Dayabhaga schools are vital. In Mitakshara school, the son gets a right to the joint family property by birth and can demand partition during the father's life-time. But in Dayabhaga school the son is precluded from demanding partition during the life time of the father and the father is considered as absolute owner of the property. Under Mitakshara law, the widow of a deceased coparcener cannot enforce partition of her husband's share against his brothers but under the Dayabhaga school she is entitled to demand partition.

It is not out of context to refer to Kautilya's Arthasastra translated for the first time by Shama Sastry. By caption this compilation is popularly understood as treatise or articulation of financial set up. But, however, it embraces all aspects of law, viz., state-craft, administration of justice, legal procedure woman's rights, marriage, divorce, fiscal measures, sociology, philosophy etc. But, however it is considered as a king-made law and not on parity with Dharmasastra.

On the question of Shastric law it is necessary to remember that the original text of

Mitakshara composed by Vijnaneshwara on the institutes of Yejnavalkya is not followed in any part of the country without modification. S.S. Setlur, an Advocate of Bombay and Madras in his introduction to 'Hindu Law Books of Inheritance' gave a list of different works in support of each sub-school that have influenced the law in those areas. The following table shows at glance the number of works which has influenced each sub-school.

1. Benares School

1. Mitakshara, 2. Viramitrodaya, 3. Dattaka Mimamsa, 4. Nirnaya Sindhu, 5. Madana Parijata

2. Dravida School

1. Mitakshara, 2. Parasara Madhaviya, 3. Sarasvati Vilasa, 4. Smriti Chandrika, 5. Dattaka Chandrika, 6. Vatdyanatha Dikshitiya

3. Mithila School

1. Mitakshara, 2. Vivadachintamani, 3. Vivada Ratnakara, 4. Dattaka Mimamsa,

4. Bengal School

1. Dayabhaga, 2. Dayatatwa, 3. Dayakrama Sangraha, 4. Dattaka Chandrika,

5. Maharashtra School

1 Mitakshara, 2. Vyavahara Mayukha, 3. Nirnaya Sindhu, 4. Dattaka Mimamsa, 5. Samskara Kaustubha

6. Gujarat School

1. Vyavahara Mayukha, 2. Mitakshara

Further the text of Mitakshara is not a statement of principles enunciated by the author. It is a digest of collection of principles given by the authors of different Smritis. As opined by Mulla in his 'Hindu Law' it is a brief compendium being a running commentary on the Code of Yagnavalkya and a veritable digest of Smriti law. The author of Mitakshara himself gave a list of ancient authors of Smritis relied on by him. (See Colebrooke, preface p. II) Manu; Atri; Vishnu; Harita; Yajnyawalkya; Ushana; Angira; Yama; Apastamba; Samvarta; Katyayana; Vrihaspati Parasara; Vyasa; Sancha; Lic'hita; Dacsha. Gautama; Satatappa; Vasishtha, are the promulgators of the Dharma Shastras.

This gave a clue to the subsequent commentators of Mitakshara. While accepting the principle given by Mitakshara, they deduced a principle apparently akin to the same, but slightly in a modified form based upon the original text on which Vijaneshwara himself rested his placitums, They tried to evolve some principle based upon the original text given by Vijaneshwara himself to support the customs prevailing in the provinces' This is clearly noticed

by S.S. Setlur in his admirable introduction to "A Complete Collection of Hindu Law Books on Inheritance" stating that. We may, then, safely conclude that the schools originated in different authors of commentaries and digests putting glosses on the ancient texts, in order to squeeze out from them rules and principles supporting the next customs prevailing in the provinces governed by them at the time of their composition. It follows from this, further that the authoritativeness of a given work depends on the success achieved by it in assimilating the customary law of the province. So also the authoritativeness of a given rule would depend on its being in consonance with or at least not against recognised customs.

It is seen that these two authors who have influenced the Dravida school have also accepted the share of a mother. They developed the theory consistent with the original text of Mitakshara stating that she has no right to demand partition, and if she was already provided, she need not be given a share, and she was provided with some property, she may be allowed to some portion of the property. This is the very view expressed even in the original text of Mitakshara. The only principle evolved by them is that the property

given to her is not a share but only a provision. This juridical principle follows irresistibly even from the text of Mitakshara. In fact this is only way in which even Vijnaneswara formulated his placitums while compiling his work. For instance, the text of Narada says: Let the father, making a partition, reserve two shares for himself.

Vijnaneswara evolved the theory of self-acquired property and joint family property and formulated the principle that son must acquiesce in the father's disposal of his self-acquired property; but since both have equally a right in the grand father's estate, the son has a power of interdiction (if the father by dissipating the property). (Vide Page 18 Sloka 10 of Kalyanararna Iyer's publication) Similarly Vijnaneswara toned down the rule of Jyestabagha enunciated by Baudhayana (ibid p. 221) which declares, "Let the eldest take one most excellent chattel (dhane) it being declared in the Sruti: It is necessary to gratify the eldest son with wealth (dhana) by introducing an element of discretion to the father instead of allowing it to be a right. Thus we see the study of attempt of the commentators to assimilate the customary law with the original texts. This historic fact was very rightly noticed by Setlur.

In fact the original text of Mitakshara is not followed even in Maharashtra, the birth place of Vijnaneshwara. It is seen that the original text of Mitakshara, the father has got absolute discretion to permit partition. But it is no longer in vogue in any part of the country. Every son has a right to demand partition by birth. However, in Mitakshara some remanent of this principle is left-That is, without the assent of the father the son is not entitled to partition if the father is joint with his brothers and other coparceners.

So we should remember that it is very much the custom or usage that governs personal law as held by the Privy Council in the Collector of Madura v. Moottoo Ramalinga Sethupathy 12 MIA 397 and subsequently accepted by the Supreme Court in Shyam Sunder Prasad Singh v. State of Bihar MANU/SC/0385/1980 : AIR 1981 SC 178. It is necessary to recall the dicta of the Privy Council in the above case wherein, it was held, that "under the Hindu system of law clear proof of usage will outweigh the written text of the law".

Even in Madras where a share was denied to a female during the life time of her husband on a proof of custom among Chetti community, such a claim what is described as Patnibhaga, was

allowed. In *Palaniappa Chettiar v. Alavan Chetti* MANU/PR/0042/1921 : 48 (1921) Indian Appeals 539 reversing the judgment of the High Court and restoring the judgment of the trial Court the Privy Council upheld the claim of the plaintiff for Patnibhaga. In that case, a custom was found to exist among Hindus of the Chetti sub-caste in habiting seven villages in Madura district of the Madras Presidency, whereby when a husband during the life of his wife married another wife, he set aside out of his property a portion, called moopu, for the first wife's maintenance, that portion descending to her son if she had one, and the rest of the property was nationally divided, one moiety going to the son or sons by the first wife, and the other moiety to the son or sons by the second wife in a suit for partition brought by the only son of a first wife (deceased) against his father and the sons by the second wife the custom was applied by the Judicial Committee by giving the plaintiff the moopu and a third share of the remaining property. Thus the personal law of Hindus is based upon custom and usage which is nothing but consent of the community.

Colebrooke in his translation of Mitakshara made a pertinent remark in this regard: The rules

of succession to property, being in their nature arbitrary, are in all systems of law merely conventional. Admitting even that the succession of the offspring to the parent is so obvious as almost to present a natural and universal law: yet this very first rule is so variously modified by the usage of different nations, that its application at least must be acknowledged to be founded on consent rather than on reasoning

It is seen, thus, that it is not very much that the commentaries of Smritichandrika and Sarasvati Vilasa prevented a share to a female in a joint family property during the life time of her husband, but it is the custom and usage prevalent in this part of the country that prevented a share to a female. So it is difficult for us to assume that the Hindu Succession Act wanted to restore the original text of Mitakshara unmodified and unsullied by any local text or usage. Such a position cannot be conveyed as the Legislature cannot think of restoring the original Sastric law of Mitakshara which is never followed in its original form in any part of the country.

What is now referred Dayabaga law of Hindu law followed in Bengal is earlier to Mitakshara school of Hindu law. Dayabaga is of the year 1090. Mitakshara was practiced down

the Vindhya in Maharashtra, Andhra Desa the present Tamil Nadu and Karnataka since the year 1125. Neelakanta's "Vyavaharamayukha" is practiced in Maharashtra. This compilation is of 1635, whereas Devannabhata's Smruti Chandrika, which is of the thirteenth century is followed in Andhra Desa and Tamil Nadu. These compilations of Mitakshara derived principles from sources like Vedas, Smrutis Srutis. The authors of these compilations were also influenced by ancient jurists--Vyasa, Manu, Yagnavalkya, Katyayena, Viswarupa, Narada, Aparka. Jurists of later days Nanda Pandita, Nilkanta--Jaganmatha expounded the texts of ancient jurists in Mogul era of the Indian history. Manu among the ancient jurists occupies the pride of place and is the Prima Inter Pares. He is attributed authorship of 2694 couplets, now found in twelve volumes. He analysed the social norms of Hindus from cradle to the grave. His precepts were practiced without demur over the centuries. He laid a rigid code of conduct touching Varnasrama and conduct relevant to Dharma. Many of, his precepts to-day are termed to be "against women". He considered women: "Na Stree Swatantram arhasi" (The woman does not deserve independence). On the contrary,

Yagnavalkya was liberal. He recognised women can inherit property. He accorded "legal" personality to her. He endowed her the legal competence to own Stridhana. Arnold Toynbee, who enumerated twenty one civilisations, is of the view only in two among the twenty one in which women were competent to hold property. One among the two is Indus Civilisation. He was fond of Greek civilisation and not an admirer of Romans. Even in Greek Civilisation woman was not competent to manage property, not even her property. In common law a woman is not recognised competent enough to manage her own property till recently. It is her spouse who was entrusted the management of her property.

When East India Company settled its rule in India, Warren Hastings was the second Governor General of the Company in the years 1772-1785. He applied what is then called "Calcutta Presidency" to include the present Orissa and Bihar and the territory upto Oudh, the principles of Dharmasastras whenever the disputants were Hindus, on questions of marriage, adoption, succession, gifts, wills, partition of coparcenary, maintenance, debts and religious endowments in Courts. In later years in Bombay Presidency and Madras Presidency the

Courts followed similar methods during the company rule of the country. In South India Dravida school of Mitakshara thus came to be entrenched. Smruti Chandrika which is a digest of cases; Saraswati Vilas a compilation of working rules were followed in Andhra Desa, Tamil Nadu and Karnataka, where Mitakshara school of thought reigned. Between the two when in conflict the rule of interpretation was former (Smruti Chandrika) was to be disregarded. The slokas relevant to inheritance of females are elucidated in the Full Bench case of this Court in (1) supra. That was the law till June 17, 1956 in South India. The decision in that is unexceptionable.

What is referred as Hindu law is a compilation of various schools of thought practiced in various parts of India. British jurists helped this law to formulate the principles. The Privy Council restated the principles, applied the principles of shastras some times in the light of common law and equity. The principles of Hindu law always evoked skepticism in Englishmen and British jurists.....

Adverting to Act 30 of 1956, what is called a Central enactment, the Act is a federal statute. In our view there is no reason if Hirabai a widow in Maharashtra can get a share in her husband's

property under Act 30 of 1956, her counterpart in Andhra Desa Veeramma why should she be not allotted share in her family, especially when Article 14 of the Constitution leads the equity. This is one part of our answer. The other part is founded on what the Supreme Court said in Hirabai's case "The Hindu law of inheritance (Amendment) Act, 1929 conferred heirship rights on the son's daughter daughter's daughter and sister in all areas where the Mitakshara law prevailed. Section 3 of the Hindu Women's Rights to Property Act 1937 conferred right to a share in the joint family property to a widow in the family like a male member of the family. The Hindu Succession Act, 1956 provides by Section 14(1) that any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as a full owner thereof and not as a limited owner." The reforms were overdue in all parts of the country. The status of females was reformed in piecemeal in enactments, which have application all over the country including South India. The Act 30 of 1956 is one such reformatory measure.

Since prior to independence there have been moves to codify the Hindu Family law and

also improve the status and rights of women. After the commencement of the Constitution, Parliament has made important legislations in 1955 and 1956 making wide ranging statutory changes in Hindu Law which are: The Hindu Marriage Act, 1955; The Hindu Succession Act, 1956; The Hindu Minority and Guardianship Act 1956 and the Hindu Adoptions and Maintenance Act, 1956. The salient features of these four Acts for the purposes of our discussion are: the definition of a 'Hindu' has been enlarged to include Sikhs and Jains, over-riding effect is given to the statutory provisions over the pre-existing law with respect to any matter for which provision is made in the Acts, and any other pre-existing law inconsistent with the provisions of the Act ceases to apply. There is a uniformity in the applicability of statutory provisions regarding Marriage, Adoption, Succession, Guardianship, Maintenance etc, to the Hindus without reference to the different Schools of Mitakshara or other customary laws, except to the extent mentioned in the Acts. The status and rights of women are improved by enlarging the limited estate into an absolute right, by including the widow and daughter as Class I heirs of a deceased male and giving them a share equal to that of a son by

enabling the woman to adopt in certain cases without the need for authority of husband or his kinsmen, by giving them better rights in matrimonial matters like seeking divorce etc. The Hindu Women's Right to Property Act, 1937 is repealed by the Hindu Succession Act. The uniformity in personal law of the Hindus and improving the status and rights of women may also be seen as a step towards an uniform Civil Code contemplated by the Directive Principles of State Policy in the Constitution.¹

Adusmilli Seethalakshamma vs. Yerneni Chalamaiah and Ors.: MANU/AP/0109/1974 -

Shri K. P. Jayaswal in his Tagore Law Lectures, 1930 at page six said : "The former (Manu) is supposed to be the foundation of the whole orthodox system of Hindu Law. Its authority is regarded as Supreme by the unanimous verdict of both the law and legal literatures of Hindu India, and as such it occupies a unique position in the legal history of the land. The latter (Yajnavalkya) is the present-day binding law of the majority of the Hindus. It is enough to say for its introduction, that the Mitakshara is a

¹ Entire Hindu law origin discussion quoted from - Rayani Appaiah vs. Spl. Tahsildar, : MANU/AP/0340/1987

commentary on the Code Yajnavalkyan. It has, in effect, though not in name, superseded the Code of Manu. It seems clear that it was with the object of superseding the orthodox but unworkable provisions of the earlier Code that Yajnavalkya's Code was promulgated. It became the accepted code of law of the Hindus not only on account of its revealing virtue but also for its advanced and liberal juridical norms." Then at page XXI, he goes on to say : "The Code of Manu practically ignores woman, because that was the view of the old common law. The Code of Yajnavalkya treats her as a full legal persona; it allows her to inherit property."

Bhagwan Singh and Ors. vs. Bhagwan Singh :
MANU/UP/0032/1895 - The sources of Hindu law, I need hardly point out, are the Srutis or Vedas, the Smritis or the institutes of the sages, and the commentaries and digests. The commentaries and digests were written or compiled by later writers with the object of reconciling discrepancies in the sayings of the sages, and laying down complete and consistent codes of rules on different branches of law. The commentaries and digests, therefore, form an important part of the authorities on Hindu law....

A commentator on Hindu law is not a lawgiver and has no more authority to alter the test of the Hindu law or to prescribe limitations of the Hindu law of adoption than has any other member of the public. I think in that, proposition every orthodox Hindu will agree. The commentary may or may not be intrinsically valuable as a guide to the true construction of the sacred texts of the Hindu law, but it is not itself a sacred text. The opinion propounded in the commentary may lead to the growth and establishment of a usage in accordance with the views so expressed, although such views -limit the right under the ancient text, and in such case "clear proof of usage will outweigh the written text of the law." The Hindu law contains admonition against the doing of some acts, and positive prohibitions against the doing of other acts. Acts which are positively prohibited are illegal in Hindu law and do not in these provinces effect their object. An act contrary to what is an admonition and is not a positive prohibition may be sinful, but it is neither illegal nor ineffective. The ancient texts of the Hindu law were written according to a system. If they had not been so written it would be frequently impossible to decide whether the doing of a particular act was positively prohibited or

was merely admonished against in the text as being a moral sin. The Mimansa of Jaimini, to which I shall have to refer later on, tells us what are the rules in this respect for the construing of ancient sacred texts of the Hindus.

Amongst the earliest of those Rishis to whom the Dharmasutras are attributed was Vasishtha. The holy Yama and Saunaka were of the Sutra period as was also Narada. Whether Manu preceded Vasishtha or came after him, the Code of Manu, as we now have it, contains quotations from Vasishtha. Next in authority and order of date to Manu came Yajnyavalkya. According to Mr. Mayne, the work of Yajnyavalkya "is more than 1,400 years old, but how much older it is impossible to say." Sitting here as a Judge to decide a question of Hindu law between Hindus it is not for me to express an opinion as to the personality of Manu. It is sufficient to say that orthodox Hindus accept the laws of Manu as having been divinely inspired, and that Manu states that he received the code from Brahma and communicated it to the sages. That in its present form it is not as it originally was is probable. Sir W. Jones places the Code of Manu in its present form as early as 1280 B.C. Mr. Mayne, in paragraph 20 of his Hindu Law and Usage, 5th

edition, says correctly: "The Code of Manu has always been treated by Hindu sages and commentators from the earliest times, as being of paramount authority; an opinion however, which does not prevent them from treating it as obsolete whenever occasion requires." There can be no doubt that in the Benares School of Hindu law the Code of Manu always was and still is of paramount authority.

The two most celebrated translators from Sanskrit into English of works on Hindu law and the two most celebrated writers on subjects of the Hindu law in the early years of this century were Mr. Colebrooke and his nephew Mr. Sutherland. Mr. Colebrooke was Judge of Mirzapur in 1796 and was in 1801 a Judge of the Sudder Court at Calcutta. In 1796 Mr. Colebrooke published his translation of the Digest of Hindu Law, which is generally known as Colebrooke's Digest. In 1810 Mr. Colebrooke published his translation of the Mitakshara. In Mirzapur Mr. Colebrooke was in the midst of Hindus who are subject to the School of Benares. Mr. Sutherland was in 1815 a Judge at Bhagalpur in Bengal.

**Gangaben Motiji Thakor and Ors. vs. Maneklal
Ishwarlal Patel and Ors.:
MANU/GJ/1521/2018 - (2019) 2 GLR 898**

The term "School of law" as applied to different legal schools prevalent in different parts of India, seems to have been first used by Mr. Colebrooke. An account of the origin and development of the schools of Hindu law was given by the judicial committee of the Privy Council in the case of Collector of Madura v. Mootto Ramalinga: The remoter sources of the Hindu Law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own glosses on the ancient text, and his authority having been received in one and rejected in another part of India, schools with conflicting doctrine arose. Mitakshara - a very modest title meaning a brief compendium - is a running commentary on the Code of Yajnavalkya and a veritable digest of Smriti Law. It was written in the latter part of the eleventh century by Vijananeshwara, an ascetic. In Mitakshara which is more of a digest than a mere commentary on a particular Smriti, we find

the quintessence of the Smriti law and its precepts and injunctions. The chief merit of the work consists in its comprehensive treatment of almost all important topics of the law and the synthesizing of various Smriti texts.

CUSTOMS UNDER HINDU LAW

The case reported in **Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik** **MANU/TN/0094 /1894 : (1894) I.L.R., 17 Mad., 422.**, which relates to the Sattur Zamindari where the parties were Sudras also shows that it was the custom in certain families in Southern India to perform what was known as sword or dagger marriage, the wife being known as the sword or dagger wife. It appears from the judgment that all the usual ceremonies in connexion with a marriage were gone through--the dagger being placed as a symbol to show that the status of the wife was inferior. This case does not help us much. Mr. Ganapathi Ayyar in his work on Hindu law refers to a sword marriage and at page 491 observes: "Among the Kshatriya castes there is a form of marriage known as the sword or dagger marriage (kadga vivaha) and this prevails even now among some zamindar families.

In the Jyotirvidabharanam which is supposed to be the work of Kalidasa, it is said that in the Kaliyuga even a marriage without Panigrahanam is good as in the case of kings who celebrate marriages in the sword or dagger form (kadga vivaha)."

Baba Narayan -v.- Saboosa
MANU/PR/0009/1943 -AIR 1943 PC 111

wherein it has been laid down as follows : "Where the existence of a custom may be regarded as a question of the proper interpretation of the specific facts proved it is a question of law which is open in second appeal."

Supreme Court in **Harihar Prasad -v.- Balmiki Prasad, MANU/SC/0008/1974 : [1975] 2 SCR 932** would be clearly attracted. Two principles have been propounded; one is in regard to assessment of oral evidence and the other is on the question of burden of proof. In regard to assessment of oral evidence, the Supreme Court has held as follows : "When oral evidence is sought to be given about what happened some generations ago, it has to be assessed with a great deal of care." In regard to burden of proof, the Supreme Court has categorically laid down that

the burden is on the party who asserts such custom and if that party fails to discharge that burden, he cannot succeed on the basis that the other party did not succeed in proving that the custom did not exist. In the said case 52 instances were relied upon by the party who set up a custom in the family. For reasons recorded by the Supreme Court, 49 out of 52 instances were held inadmissible in evidence.

Supreme Court in **Kaliamma -v.- Janardhanan, MANU/SC/0424/1973 : [1973] 3 SCR 503** wherein it has been held as follows in paragraph 10. "While it is true that this community is a very small community found within a small local area and the cases that are likely to arise in that community, which wilt reach the courts may not be many, we cannot merely on that ground ignore the well established principle that before a custom can be held as having been proved merely on the basis of earlier decisions, those decisions, should have been based on evidence adduced in respect of the cases."

Ujagar Singh v. Mst. Jeo reported in MANU/SC/0187/1959 : AIR 1959 SC 1041, Court has held that the ordinary rule is that all

customs general or otherwise have to be proved, but under Section 57 of the Evidence Act, 1872 nothing need to be proved of which the Court can take judicial notice. It was also held that when a custom has been repeatedly recognized by Courts, it is blended into the law of land and proof of the same would become unnecessary under Section 57 of Evidence Act, 1872.

Rayani Appaiah vs. Spl. Tahsildar, L.R. Addanki: MANU/AP/0340/1987 (FB)

The Hindu Succession Act brought about radical and far-reaching changes in the law of succession and the overriding effect at the provision is that any precept of Hindu Law or custom or usage wither away in the event of express provision in the Act relating to the same. Similarly all the existing laws to the extent of inconsistency are repealed. The provisions in Hindu Law, custom or usage at variance with the provisions in this Act are totally eclipsed and the enactments inconsistent with the provisions of the Act are nullified and this Act prevails. The hitherto provisions are saved in the absence of coverage under the Act with respect to the same. Section 6 is concerned with the succession on the death of a coparcener and Explanation I is

confined to consideration of partition in the coparcenary for modulating the succession and the shares of the coparceners in the partition of the joint family are not touched. Mulla on Hindu Law 15th edition at page 919 says as follows: The Act does not touch or affect the law relating to joint family and partition--except the limited extent to which sections 6 and 7 have such effect--and the previous law continues to operate in such matters.

To the same effect is the commentary in Raghavachariar's Hindu Law (eighth edition) at page 20: The Act has not interfered with the Hindu Law relating to Mitakshara coparcenary except in so far as it is modified by section 30 and the proviso to section 6 of the Act. As no rules of partition are provided in the Act the general Hindu Law has to be resorted to find out what would have been the share of the deceased if the partition had taken place immediately before his death.

The Hindu Succession Act is silent as to the existing provision with reference to the wife's share under Bombay school and the reincarnation of such provision or abrogation of the existing provision under Madras school is not discernible from the Act. The Act carried with it

the impress of the past traditions fused with reflection of present social strata.

So we should remember that it is very much the custom or usage that governs personal law as held by the Privy Council in the Collector of Madura v. Moottoo Ramalinga Sethupathy 12 MIA 397 and subsequently accepted by the Supreme Court in Shyam Sunder Prasad Singh v. State of Bihar MANU/SC/0385/1980 : AIR 1981 SC 178. It is necessary to recall the dicta of the Privy Council in the above case wherein, it was held, that "under the Hindu system of law clear proof of usage will outweigh the written text of the law".

Even in Madras where a share was denied to a female during the life time of her husband on a proof of custom among Chetti community, such a claim what is described as Patnibhaga, was allowed. In Palaniappa Chettiar v. Alavan Chetti MANU/PR/0042/1921 : 48 (1921) Indian Appeals 539 reversing the judgment of the High Court and restoring the judgment of the trial Court the Privy Council upheld the claim of the plaintiff for Patnibhaga. In that case, a custom was found to exist among Hindus of the Chetti sub-caste in habiting seven villages in Madura district of the Madras Presidency, whereby when

a husband during the life of his wife married another wife, he set aside out of his property a portion, called moopu, for the first wife's maintenance, that portion descending to her son if she had one, and the rest of the property was nationally divided, one moiety going to the son or sons by the first wife, and the other moiety to the son or sons by the second wife in a suit for partition brought by the only son of a first wife (deceased) against his father and the sons by the second wife the custom was applied by the Judicial Committee by giving the plaintiff the moopu and a third share of the remaining property. Thus the personal law of Hindus is based upon custom and usage which is nothing but consent of the community.

It is seen, thus, that it is not very much that the commentaries of Smritichandrika and Sarasvati Vilasa prevented a share to a female in a joint family property during the life time of her husband, but it is the custom and usage prevalent in this part of the country that prevented a share to a female. So it is difficult for us to assume that the Hindu Succession Act wanted to restore the original text of Mitakshara unmodified and unsullied by any local text or usage. Such a position cannot be conveyed as the

Legislature cannot think of restoring the original Sastric law of Mitakshara which is never followed in its original form in any part of the country.

Trijugi Narain (Dead) through Legal Representatives and Ors. vs. Sankoo (Dead) through Legal Representatives and Ors.:

MANU/SC/1742/2019 - Preamble of the Succession Act states that, it is an Act to amend and codify the law relating to intestate succession amongst Hindus and as originally enacted did not profess to amend and codify the law relating to the nature of all the properties held by Hindus, with the exception of Section 14 of the Succession Act. Section 4 of the Succession Act provides that the text, rule, interpretation, custom or usage of Hindu law will cease to have effect with respect to any matter for which provision is made in the Act and further any other law in force, which is inconsistent with the provisions of the Act, will cease to apply.

Thus, as per the custom relating to impartible estates and the Rule of primogeniture, the Raja or Ruler of a princely state would not hold the estate as the karta or coparcener, but as the absolute owner and the estate would be impartible. The son(s) would not acquire any

interest in the impartible estate by birth nor could they seek partition or restrain alienation. On the death of the Ruler, the succession to the rulership, as also the impartible estate, was not under the Mitakshara law of survivorship but governed by the Rule of primogeniture. There was, however, moral liability for providing maintenance to others, be it the younger brothers or family members, which later on, by way of custom, virtually became an obligation.

Shiba Prasad Singh v. Rani Prayag Kumari Debi and Ors. MANU/PR/0028/1932 : AIR 1932 PC 216 in the following words: Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have: (1) the right of partition; (2) the right to restrain alienations by the head of the family except for necessity; (3) the right of maintenance; and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in Sartaj Kuari's case and Rama Krishnan v. Venkata Kumara, and so also the third as held in Gangadhara v. Rajah of Pittapur. To this extent

the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right therefore still remains, and this is what was held in Baijnath's case. To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birthright of the senior member to take by survivorship still remains. Nor is this right a mere spes successionis similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate.

Thakore Shri Vinayasinhji (Dead) By L.Rs. v. Kumar Shri Natwarsinhji and Ors. MANU/SC/0424/1987 : (1988) Supp. SCC 133, wherein it has been observed as under: The impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property, except as regards the right of

survivorship which is not inconsistent with the custom of impartibility...

Bhimashya and Ors. vs. Janabi : MANU/SC/5563/2006 - 2006 (13) SCC 627 Custom is an established practice at variance with the general law. Custom must be ancient, certain and reasonable as is generally said. It will be noticed that in the definition in Clause (a) of Section 3 of the Hindu Adoptions and Maintenance Act, 1956, the expression 'ancient' is not used, but what is intended is observance of custom or usage for a long time. "A custom is local Common Law. It is Common Law because it is not Statute Law ; it is Local Law because it is the law of a particular place, as distinguished from the general Common Law. Local Common Law is the law of the country (i.e., particular place) as it existed before the time of legal memory". "Custom has the effect of overriding law which is purely personal, it cannot prevail against a statutory law, unless it is thereby saved expressly or by necessary implication."

Custom must be ancient, certain and reasonable as is generally said. It will be noticed that in the definition in Cl. (a) of Section 3 of the Act, the expression 'ancient' is not used, but what

is intended is observance of custom or usage for a long time. The English rule that a 'custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary' has not been strictly applied to Indian conditions. All that is necessary to prove is that the custom or usage has been acted upon in practice for such a long period and with such invariability and continuity as to show that it has by common consent been submitted to as the established governing rule in any local area, tribe, community, group of family. Certainty and reasonableness are indispensable elements of the rule. For determination of the question whether there is a valid custom or not, it has been emphasized that it must not be opposed to public policy.

Though it cannot be disputed as a general proposition that a custom may be in derogation of Smriti law and may supersede that law where it is proved to exist, yet it is subject to the exception that it must not be immoral or opposed to public policy and cannot derogate from any statute unless the statute saves any such custom or generally makes exception in favour of rules of customs. Nothing has been shown to me that an exception of this nature existed in the old

Hindu Law. The ancient texts provide for a custom, but imperate it not to be opposed to Dharma, that means as already pointed out it should not be immoral and opposed to public interest.

It is well established principle of law that though custom has the effect of overriding law which is purely personal, it cannot prevail against a statutory law, unless it is thereby saved expressly or by necessary implication. A custom may not be illegal or immoral; but it may, nevertheless, be invalid on the ground of its unreasonableness. A custom which any honest or right-minded man would deem to be unrighteous is bad as unreasonable.

In *Mookka Kone v. Ammakutti Ammal* MANU/TN/0603/1927, it was held that where custom is set up to prove that it is at variance with the ordinary law, it has to be proved that it is opposed to public policy and that it is ancient, invariable, continuous, notorious, not expressly forbidden by the legislature and not opposed to morality or public policy.

A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not

consistent with the general common law of the realm. A custom to be valid must have four essential attributes. First, it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its immemorial origin, and, fourthly, it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.

Is a law not written, established by long usage, and the consent of our ancestors? No law can oblige a free people without their consent: so wherever they consent and use a certain rule or method as a law, such rule etc., gives it the power of a law and if it is universal, then it is common law: if particular to this or that place, then it is custom. Custom is one of the main triangles of the laws of England; those laws being divided into Common Law - Statute Law, and Custom. India is a land where there are very many customs appropriate to certain areas of territory; families or castes.

A "custom", in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom in order that it may be legal and

binding, must have been used so long that the memory of man runneth not to the contrary" should not be strictly applied to Indian Conditions.

A custom is local Common Law. It is Common Law because it is not Statute Law; it is Local Law because it is the law of a particular place, as distinguished from the general Common Law. Local Common Law is the law of the country (i.e., particular place) as it existed before the time of legal memory"

Custom implies, not that in a given contingency a certain course would probably be followed, but that contingency has arisen in the past and that a certain course has been followed, and it is not at all within the province of Courts to extend custom by the process of deduction from the principles which seem to underline customs which have been definitely established.

Custom is authoritative, it stands in the place of law, and regulates the conduct of men in the most important concerns of life: fashion is arbitrary and capricious, it decides in matters of trifling import: manners are rational; they are the expressions of moral feelings. Customs have more force in a simple state of society. Both practice and custom are general or particular but the

former is absolute, the latter relative; a practice may be adopted by a number of persons without reference to each other; but a custom is always followed either by limitation or prescription: the practice of gaming has always been followed by the vicious part of society; but it is to be hoped for the honour of man that it will never become a custom.

There was no specific plea relating to custom though some vague and indefinite statements have been made in the plaint and that too in a casual manner. No issue was framed and no evidence was laid to prove custom.

"12. "Custom defined:- Custom is an established practice at variance with the general law.

Nature of custom - A custom varying the general law may be a general, local, tribal or family custom.

Explanation 1.- A general custom includes a custom common to any considerable class of persons.

Explanation 2.- A custom which is applicable to a locality, tribe, sect or a family called a special custom.

Custom cannot override express law.

(1) Custom has the effect of modifying the general personal law, but it does not override the statute law, unless it is expressly saved by it.

(2) Such custom must be ancient, uniform, certain, peaceable, continuous and compulsory.

Invalid custom - No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy.

Pleading and proof of custom (1) He who relies upon custom varying the general law must plead and prove it.

(2) Custom must be established by clear and unambiguous evidence."

Bhaiya Ramanuj Pratap Deo v. Lalu Maheshanuj Pratap Deo MANU/SC/0313/1981 : (1981) 4 SCC 613 held that a bare perusal of Section 4 would indicate that any custom or usage as part of Hindu law in force will cease to have effect after the enforcement of Hindu Succession Act with respect to any matter for which provision is made in the Act.

Bhanwar Singh v. Puran and Ors. MANU/SC/7141/2008 : (2008) 3 SCC 87, wherein this Court held that the Act brought about a sea of

change in the matter of inheritance and succession amongst Hindus. Section 4 of the Act contains a non-obstante provision in terms whereof any text, Rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act, ceased to have effect with respect to any matter for which provision is made therein save as otherwise expressly provided..... Since there is no provision of denying the rights of succession to the natural born son of an adoptee father, therefore, the succession will be in terms of the provisions of the Act alone.

Salekh Chand (Dead) by LRs v. Satya Gupta and Ors. MANU/SC/7400/2008 : (2008) 13 SCC 119 while dealing with the claim of adoption under the Hindu Adoption and Maintenance Act, 1966, held as under: 21. In *Mookka Kone v. Ammakutti Ammal* [MANU/TN/0198/1927 : AIR 1928 Mad 299] it was held that where custom is set up to prove that it is at variance with the ordinary law, it has to be proved that it is not opposed to public policy and that it is ancient, invariable, continuous, notorious, not expressly forbidden by the legislature and not opposed to morality or public policy. It is not disputed that

even under the old Hindu Law, adoption during the lifetime of a male issue was specifically prohibited. In addition, I have observed that such an adoption even if made would be contrary to the concept of adoption and the purpose thereof, and unreasonable. Without entering into the arena of controversy whether there was such a custom, it can be said that even if there was such a custom, the same was not a valid custom.

22. It is incumbent on party setting up a custom to allege and prove the custom on which he relies. Custom cannot be extended by analogy. It must be established inductively and not by a priori methods. Custom cannot be a matter of theory but must always be a matter of fact and one custom cannot be deduced from another. It is a well-established law that custom cannot be enlarged by parity of reasoning.

23. Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them; but the decision would not in that case be a satisfactory precedent if in any future suit between other parties fuller evidence with regard to the alleged custom should be forthcoming. A judgment

relating to the existence of a custom is admissible to corroborate the evidence adduced to prove such custom in another case. Where, however a custom is repeatedly brought to the notice of the courts, the courts, may hold that the custom was introduced into law without the necessity of proof in each individual case.

24. Custom is a Rule which in a particular family or a particular class or community or in a particular district has from long use, obtained the force of law. Coming to the facts of the case PW 1 did not speak anything on the position either of a local custom or of a custom or usage by the community; PW 2, Murari Lal claimed to be witness of the ceremony of adoption, he was brother-in-law of Jagannath, son of Pares Ram who is said to have adopted Chandra Bhan. This witness was 83 years old at the time of deposition in the court. He did not speak a word either with regard to the local custom or the custom of the community. PW 3 as observed by the lower appellate court was only 43 years old at the time of his deposition whereas the adoption had taken place around 60 years back. He has, of course, spoken about the custom but that is not on his personal knowledge and this is only on the information given by PW 2 Murari Lal. He himself

did not speak of such a custom. The evidence of the Plaintiff was thus insufficient to prove the usage or custom prevalent either in the township of Hapur and around it or in the community of Vaish.

In Bhanwar Singh v. Puran
MANU/SC/7141/2008 : (2008) 3 SCC 87,
Court followed Chander Sen's case and the various judgments following Chander Sen's case. This Court held:

The Act brought about a sea change in the matter of inheritance and succession amongst Hindus. Section 4 of the Act contains a non obstante provision in terms whereof any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act, ceased to have effect with respect to any matter for which provision is made therein save as otherwise expressly provided.

Section 6 of the Act, as it stood at the relevant time, provided for devolution of interest in the coparcenary property. Section 8 lays down the general rules of succession that the property of a male dying intestate devolves according to the provisions of the Chapter as specified in Clause

(1) of the Schedule. In the Schedule appended to the Act, natural sons and daughters are placed as Class I heirs but a grandson, so long as father is alive, has not been included. Section 19 of the Act provides that in the event of succession by two or more heirs, they will take the property per capita and not per stirpes, as also tenants-in-common and not as joint tenants.

Indisputably, Bhima left behind Sant Ram and three daughters. In terms of Section 8 of the Act, therefore, the properties of Bhima devolved upon Sant Ram and his three sisters. Each had 1/4th share in the property. Apart from the legal position, factually the same was also reflected in the record-of-rights. A partition had taken place amongst the heirs of Bhima.

Although the learned first appellate court proceeded to consider the effect of Section 6 of the Act, in our opinion, the same was not applicable in the facts and circumstances of the case. In any event, it had rightly been held that even in such a case, having regard to Section 8 as also Section 19 of the Act, the properties ceased to be joint family property and all the heirs and legal representatives of Bhima would succeed to his interest as tenants-in-common and not as joint

tenants. In a case of this nature, the joint coparcenary did not continue.

In **N. Adithayan v. Travancore Devaswom Board and Ors.**, MANU/SC/0862/2002 : (2002) 8 SCC 106, Any custom or usage irrespective of even any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by courts in the country.

In the case of **Alturi Brahmanandam (dead) through L.Rs. v. Anne Sai Bapuji**, MANU/SC/0957/2010 : (2010) 14 SCC 466 : AIR 2011 SC 545 : Hon'ble Apex Court with respect to proof of custom was pleased to observe that, normally all customs must be proved, exception to it is where High Court recognises that a custom is prevailing in the State and is legal and valid and decision to such effect remaining unchallenged and binding, custom

gets blended into law and proof thereof would become unnecessary under Section 57 of the Evidence Act. In the said case, the question was about the validity of adoption of a person who was above the age of 15 years in Kamma community in Andhra Pradesh. The Hon'ble Apex Court observing that the respondent before it had laid the said prevalence of custom by leading cogent and reliable evidence, however, the appellant had failed to challenge the said evidence and also to disprove the adoption. Moreover, in view of a decision of the Division Bench of Andhra Pradesh High Court in a case reported in 1964, recognising such a custom in Andhra Pradesh as legal and valid, having remained binding till date, the Court observed that such a custom gets blended into law and proof thereof becomes unnecessary under Section 17 of the Evidence Act.

MANU/SC/0072/2013 : 2013 AIR SCW 949 between Laxmibai (dead) through LRs. & another Vs. Bhagwantbuva (Dead) through LRs. & Others, a similar view has been taken by the court stating that-"the custom must be established which is in practice at variance with general law in order to prove the adoption of a

child aged more than 15 years. Custom is a rule which in a particular family, a particular class, community or in a particular district has owing to prolonged use, obtained the force of law. Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it. Such custom must be ancient, uniform, certain, continuous and compulsory. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy. He who relies upon custom varying general law, must plead and prove it. Custom must be established by clear and unambiguous evidence." Custom is an established practice at variance with the general law. A custom varying general law may be a general, local, tribal or family custom. A general custom includes a custom common to any considerable class of persons. A custom which is applicable to a locality, tribe, sect or a family is called a special custom. Custom is a rule, which in a particular family, a particular class, community, or in a particular district, has owing to prolonged use, obtained the force of law. Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it. Such custom must be

ancient, uniform, certain, continuous and compulsory. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy. He who relies upon custom varying general law, must plead and prove it. Custom must be established by clear and unambiguous evidence.

High Court of Bombay reported in **MANU/MH/0588/1983 : LAWS (BOM)-1983-1-13 between Anirudh Jagdeprao Vs. Babarao Irbaji** wherein, the court has defined the words 'Custom' or 'Usage' under the Hindu Adoptions and Maintenance Act, 1956 and held that- "The Words "Custom" and "Usage" under "Hindu Law" meaning of - Held that, the expressions custom and usage as defined in Clause (A) of Section 3 included not only customs and usages in the ordinary sense which have obtained by the force of law among Hindus in any local area, Tribe, community, group or family, but also texts, rules and interpretation of Hindu Law which have been continuously and uniformly observed and have obtained the force of law among Hindus in any local area, tribe, community, group or family."

H. Ganapathi R. Prabhu vs. Bhaskar Pai and Ors.: MANU/KA/2576/2016 - Article 97 of the

Act states that when a right of pre-emption has to be enforced then the period of limitation is one year when the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or, where the subject-matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered. Under Article 97 the right must be founded in law or general usage or on special contract. But under Article 54 of the Act when specific performance of a contract is to be enforced, then the period of limitation is three years from the time fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. While Article 97 refers to enforcement of a right of pre-emption only when it is founded in law i.e., under a statute or when it is of general usage as by way of a custom or on special contract, whereas Article 54 speaks about specific performance of a contract generally. There is a consensus on both sides that the compromise is indeed a contract. The right of pre-emption available to a person is in order to ensure that a stranger is not introduced

in the family. The right can arise through custom or by the statute or under a contract. In India the right of pre-emption existed amongst the Muslims as part of their personal law. In certain areas of Punjab, it was recognized by statute such as the Punjab Pre-emption Act, 1915. In certain other areas such as Bihar, Sylhet and parts of Gujarat pre-emption was recognized by custom. In addition, the right of pre-emption can also be created by contract amongst the sharers of immovable property.

Saraswathi Ammal v. Jagadambal and Another MANU/SC/0087/1953 : AIR 1953 SC 201 may be noticed herein profitably in which Their Lordships have clearly held that it is incumbent on a party setting up a custom to allege and prove the custom on which he relies and custom cannot be extended by analogy and it must be established inductively, not deductively. It was observed as under:- "11. The correct approach to a case where a party seeks to prove a custom is the one pointed out by their Lordships of the Privy Council in Abdul Hussein Khan v. Soma Dero, (I.L.R. 45 Cal. 450: PC). It was there said that it is incumbent on a party setting up a custom to allege and prove the custom on which he relies

and it is not any theory of custom or deductions from other customs which can be made a rule of decision but only any custom applicable to the parties concerned that can be the rule of decision in a particular case. It is well settled that custom cannot be extended by analogy. It must be established inductively, not deductively and it cannot be established by a priori methods. Theory and custom are antitheses, custom cannot be a matter of mere theory but must always be a matter of fact and one custom cannot be deduced from another. A community living in one particular district may have evolved a particular custom but from that it does not follow that the community living in another district is necessarily following the same-custom."

Babulal Bapurao Kodape and another v. Sau. Resmabai Narayanrao Kaurati and another MANU/MH/0004/2019 : AIR 2019 Bombay 94

has held that if a female tribal who is a natural legal heir seeks equal share in the property of her father or mother, it would be impermissible for the Court to start with the assumption that the customary law governing the tribe excludes the females from inheritance and to then insist that the female tribal must plead and prove a custom

that she is not so excluded. It would be burden of the person who asserts such exclusion from inheritance under the customary law to so plead and prove. Such view would further be in consonance with the principles of justice, equity and good conscience.

Supreme Court in the matter of **Mohammad Baqar and Ors. v. Naimun Nisha Bibi & Ors. MANU/SC/0125/1955 : AIR 1956 SC 548** has held that the burden of proving a custom in derogation of the general law being heavily on the party who sets it up, it was incumbent on the appellants to prove by clear and cogent evidence that there was such a custom as was pleaded by them.

Catholic Diocese, Muvattupuzha and Ors. vs. Muthaiah P. and Ors.: MANU/KE/3539/2019 - ILR 2019 (4) Kerala 691 - The Catholic diocese under which the deceased priest was working and the siblings of the deceased priest, together preferred the application for compensation. Rs. 15,00,000/- was the claim made in the proceedings. The Tribunal, placing reliance on the decision of this court in Varghese v. Krishnan Nair, MANU/KE/0109/2004 : 2004 (2) KLT 783

found that the siblings of the deceased priest are not entitled to compensation. In Varghese, in the context of a motor accident claim raised in respect of the death of a Christian priest, placing reliance on the proposition that a person would be deemed to be dead to the world, when he enters a religious order after renouncing the worldly pleasures, a bench of this court held that his heirs are not entitled to stake a claim for compensation. Later, in Msgr. Xavier Chullickal, following the decisions of the Apex Court in Molly Joseph v. George Sebastian, MANU/SC/0035/1997 : (1996) 6 SCC 337 and Mary Roy v. State of Kerala, MANU/SC/0716/1986 : (1986) 2 SCC 209, another bench of this court held that after the introduction of the Indian Succession Act, 1925, the proposition laid down in Varghese is no longer good law and inheritance and succession thereafter in the case of all Christians shall only be in terms of the said Act. A perusal of the judgment in Msgr. Xavier Chullickal, and the judgments of the Apex Court referred to therein would indicate that the view taken in all the cases is that the provisions of Part V of the Indian Succession Act, 1925 are of universal application and the same would prevail and override all

personal laws, usage or custom prevailing before the coming into force of the Act. In the light of the discussions contained in the foregoing paragraphs, there cannot be any doubt to the fact that the siblings of the deceased priest alone can be regarded as his legal representatives for raising the claim for compensation. The siblings of the deceased priest have no case that they were financially dependent on the deceased. They are, therefore, not entitled to claim compensation for loss of dependency. Of course, they are entitled to compensation under the pecuniary heads like, transportation expenses, damage to clothing and articles, funeral expenses, and under the non-pecuniary heads like loss of estate, pain and suffering, and loss of love and affection. It is seen that the Tribunal has granted compensation under all the aforesaid pecuniary heads and under the non-pecuniary heads of loss of estate and pain and suffering to the Catholic diocese. The only head under which compensation was not granted by the Tribunal to the Catholic diocese is "loss of love and affection". The siblings of the deceased being persons aged 62, 55, 47, and 42, I do not think that they are entitled to compensation under that head, for, compensation for loss of love and affection is

normally granted to the tender aged children and siblings of the deceased..... in so far as there is no conflict of interest between the Catholic diocese and the siblings of the deceased, and compensation has been granted in a joint petition preferred by the Catholic diocese along with the siblings, compensation under the aforesaid heads need not be given again to the siblings of the deceased.

Subimal Kumar Maity and Ors. vs. Jhareswar Maity and Ors.: MANU/WB/1050/2019 - 32.

Well settled is the law that where a Hindu family migrates from one state to another, the presumption is that it carries with it, its personal law, that is, the laws and the customs as to succession and family relations prevailing in the state from which it came. However, this presumption may be rebutted by showing that the family has adopted the law and usage of the province to which it has migrated. The principle is illustrated in Mulla's Hindu Law, 22nd Edition at page 95 in following words:- A Hindu family migrates from north eastern provinces, where Mitakshara Law prevails, to Bengal, where Dayabhaga law prevails. The presumption is that it continues to be governed by Mitakshara Law,

and this presumption may be supported by previous instance of succession in the family according to Mitakshara Law after its migration and by evidence relating to ceremonies performed in the family at marriages, births and Shraddhs, showing that the family continued to be governed by Mitakshara Law after its migration. If the migration is proved, and it is also proved that the family followed the customs of the Mitakshara Law, it is not necessary to prove also that the family immigrated to Bengal after the establishment of Dayabhaga system of Law."

33. Thus, the issue as to whether a particular person or a family is governed by Mitakshara Law or not can be proved. (1) By proving instances of succession in the family according to Mitakshara Law after its migration and (2) By evidence relating to ceremonies performed in the family at marriages, births and Shraddha.

Sanmet Bai vs. Rasekeliya Bai and Ors.:

MANU/CG/0164/2019 - Thus, the custom must have been observed for a long time and must be ancient. In pages 49 and 50 of the Mayne's Hindu Law & Usage, it is observed that, "The beginnings of law were in Customs. Law and usage act, and

react upon each other. A brief in the propriety, or the imperative nature of a particular course of conduct, produces a uniformity of behaviour in following it; and an uniformity of behaviour in following a particular course of conduct produces a belief that it is imperative, or proper, to do so. When from either cause, or from both causes, a uniform and persistent usage has moulded the life, and regulated the dealings, of a particular class of community, it becomes a custom, which is a part of their personal law."

Customs will have to be always strictly proved and in relation to matrimonial matters particularly to existence of customs. In this connection, the decision of the Supreme Court rendered in the matter of **Gurdit Singh v. Mst. Angrez Kaur and Others MANU/SC/0202/1967 : AIR 1968 SC 142** is more relevant and in that case, there was an entry recorded in riwaj-i-am which had entered custom of divorce amongst Hindu Jats of Jullundur District. The Court, while holding dissolution of marriage by custom was still valid and the divorced wife was entitled to enter into a second marriage, held that riwaj-i-am was not reliable to prove custom of divorce. The Supreme Court held

so, even in a situation where there was an entry regarding a so-called divorce.

In the matter of **Gokal Chand v. Parvin Kumari MANU/SC/0077/1952 : AIR 1952 SC 231**, the Supreme Court laid down the principles to be kept in view in dealing with questions of customary law which state as under:-

"1. It should be recognized that many of the agricultural tribes in the Punjab are governed by a variety of customs, which depart from the ordinary rules of Hindu and Muhammadan law, in regard to inheritance and other matters mentioned in Section 5 of the Punjab Laws Act, 1872.

2. In spite of the above fact, there is no presumption that a particular person or class of persons is governed by custom, and a party who is alleged to be governed by customary law must prove that he is so governed and must also prove the existence of the custom set up by him.

3. A custom, in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary"

should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality.

The Supreme Court in the matter of **Yamanaji H. Jadhav v. Nirmala MANU/SC/0073/2002 : (2002) 2 SCC 637** has held that custom being an exception, the general rule of divorce ought to have been specifically pleaded and established by leading cogent evidence by the person propounding such custom and observed as under:- "The courts below have erroneously proceeded on the basis that the divorce deed relied upon by the parties in question was a document which is acceptable in law. It is to be noted that the deed in question is purported to be a document which is claimed to be in conformity with the customs applicable to divorce in the community to which the parties belong. As per the Hindu law administered by courts in India divorce was not recognized as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is

recognized by custom. Public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. Thus such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such a custom since the said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Therefore, there was an obligation on the trial court to have framed an issue whether there was proper pleading by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the court."

Supreme Court in the matter of **Subramani and others v. M. Chandralekha MANU/SC/0996/2004 : (2005) 9 SCC 407** by holding that as per Hindu law, divorce was not recognised as a means to put an end to marriage which was always considered to be a sacrament,

only exception being where it was recognised by custom. It was further held that for getting customary divorce in the community, it must be specifically pleaded and established by the person propounding such custom. Paragraphs 10 and 14 of the report state as follows:- "10. It is well established by a long chain of authorities that prevalence of customary divorce in the community to which parties belong, contrary to general law of divorce must be specifically pleaded and established by the person propounding such custom. The High Court came to the conclusion that the appellants failed to either plead the existence of a custom in their community to dissolve the marriage by mutual consent or to prove the same by leading cogent evidence.

14. From a perusal of the above averments in the pleadings, it is clear that the defendant-appellants did not plead that in their community, marriage could be dissolved under custom. They even failed to respond to the averments made in the plaint that no custom was prevalent in their community to dissolve the marriage under custom. In the absence of such pleadings the trial Court rightly did not frame an issue as to whether the marriage in the community to which the

parties belong could be dissolved under the custom prevalent in their community."

**Mangyang Lima vs. State of Nagaland and Ors.:
2019 (1) GLT 409 - MANU/GH/0240/2019** - It

is now well settled that custom in order to be valid should not be opposed to morality, public policy, express enactments of legislature and must be strictly proved. There is another constitutional mandate which requires that all laws which includes custom or usage having the force of law in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part III of the Constitution shall, to the extent of such inconsistency, be void. Article 13 of the Constitution provides that,

"13. Laws inconsistent with or in derogation of the fundamental rights:

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part

and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,- (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law; (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368."

Thus, any custom, having the force of law, if found to be inconsistent with any of the provisions of Part III of the Constitution, shall to that extent be void.

The Supreme Court in **N. Adithayan Vs. Travancore Devaswom Board, MANU/SC/0862/2002 : (2002) 8 SCC 106** held that any custom which is opposed to the law of the land cannot be upheld by the Court. "18. Any custom or usage irrespective

of even any proof of. their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by courts in the country."

Similarly, it was held in **State of Bihar Vs. Subodh Gopal Bose, MANU/SC/0292/1967 : (1968) 1 SCR 313 : AIR 1968 SC 281** that a custom to be valid must be reasonable and reasonableness is an 'essential attribute of Article 14 of the Constitution, part of Part III of the Constitution. "18. A custom is a usage by virtue of which a class of persons belonging to a defined section in a locality are entitled to exercise specific rights against certain other persons or property in the same locality. To the extent to which it is inconsistent with the general law, undoubtedly the custom prevails. But to be valid, a custom must be ancient, certain and reasonable, and being in derogation of the general rules of law must be construed strictly."

Riju Prasad Sarma Vs. State of Assam, MANU/SC/0722/2015 : (2015) 9 SCC 461 that: "Article 13(1) applies only to such pre-Constitution laws including customs which are inconsistent with the provisions of Part III of the Constitution and not to such religious customs and personal laws which are protected by the fundamental rights such as Articles 25 and 26. In other words, religious beliefs, customs and practices based upon religious faith and scriptures cannot be treated to be void. Religious freedoms protected by Articles 25 and 26 can be curtailed only by law made by a competent legislature to the permissible extent."

Himachal Pradesh High Court in **Bahadur ..vs.. Bratiya and Ors. reported in MANU/HP/0530 /2015 : AIR 2016 H.P. 58**, after holding that the material placed on record did not prove the custom in the Gaddi tribe of exclusion of daughters from right in property, has observed in paragraph 39 of the report that even if it is assumed *arguendo*, that such custom does exist, the same would be in derogation of section 4 of the Succession Act. The learned Single Judge of the Himachal Pradesh High Court then invoked

the Constitutional philosophy underlying Articles 15, 38, 39 and 46 of the Constitution of India to hold that gender discrimination violates fundamental rights and daughters are entitled to equal share in the properties. The ultimate conclusion reached by the learned Single Judge is that the daughters in the tribal areas in the State of Himachal Pradesh shall inherit the property in accordance with the Hindu Succession Act, 1956 and not as per customs and usages.

Indian Young Lawyers Association & Ors. ..vs.. The State of Kerala & Ors. reported in MANU/SC/1094 /2018 : 2018(13) SCALE 75 (Sabarimala Temple Case): "276(99). Custom, usages and personal law have a significant impact on the civil status of individuals. Those activities that are inherently connected with the civil status of individuals cannot be granted constitutional immunity merely because they may have some associational features which have a religious nature. To immunize them from constitutional scrutiny, is to deny the primacy of the Constitution.

Our Constitution marks a vision of social transformation. It marks a break from the past-

one characterized by a deeply divided society resting on social prejudices, stereotypes, subordination and discrimination destructive of the dignity of the individual. It speaks to the future of a vision which is truly emancipatory in nature. In the context of the transformative vision of the South African Constitution, it has been observed that such a vision would: "require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships."

"277(100). The Indian Constitution is marked by a transformative vision. Its transformative potential lies in recognizing its supremacy over all bodies of law and practices that claim the continuation of a past which militates against its vision of a just society. At the heart of transformative constitutionalism, is a recognition of change. What transformation in

social relations did the Constitution seek to achieve? What vision of society does the Constitution envisage? The answer to these questions lies in the recognition of the individual as the basic unit of the Constitution. This view demands that existing structures and laws be viewed from the prism of individual dignity.

Did the Constitution intend to exclude any practice from its scrutiny? Did it intend that practices that speak against its vision of dignity, equality and liberty of the individual be granted immunity from scrutiny? Was it intended that practices that detract from the transformative vision of the Constitution be granted supremacy over it? To my mind, the answer to all these, is in the negative.

The individual, as the basic unit, is at the heart of the Constitution. All rights and guarantees of the Constitution are operationalized and are aimed towards the self-realization of the individual. This makes the anti-exclusion principle firmly rooted in the transformative vision of the Constitution, and at the heart of judicial enquiry. Irrespective of the source from which a practice claims legitimacy, this principle enjoins the Court to deny protection

to practices that detract from the constitutional vision of an equal citizenship."

Supreme Court in G. Narayanappa v. Government of Andhra Pradesh (1) MANU/SC/0028/1992 : (1992) 1 SCC 197, an

illatom son-in-law is a creature of custom. The Supreme Court quoted in the said decision, a passage from Mayne's Hindu Law, which records the fact that the custom of taking a person in illatom adoption prevailed among Reddy and Kamma castes in the Madras Presidency. But the rules that govern the rights of an illatom son-in-law, as culled out from various judicial decisions both by Mayne and by N.R. Raghavachariar are as follows:

- (i) to constitute a person as illatom, a specific agreement is necessary,
- (ii) after the death of the adopter, such a son-in-law is entitled to the full rights of a son even as against natural sons subsequently born or a son subsequently adopted in the usual manner,
- (iii) an illatom son-in-law has no right to claim partition with his father-in-law unless there is an express agreement or custom to that effect,
- (iv) an illatom son-in-law cannot be taken to be an adopted son,

(v) an illatom son-in-law will not lose the rights of inheritance in his natural family and similarly the property that he takes in the adoptive family is taken by his own relations to the exclusion of those of his adoptive father,

(vi) neither he nor his descendants become coparceners in the family of adoption though on the death of the adopter he is entitled to the same rights and same share as against any subsequently born natural son or an adopted son,

(vii) the rights of an illatom son-in-law are not identical to those conferred by law on a son or an adopted son, and

(viii) an illatom son-in-law does not succeed to the properties of his father-in-law by survivorship, but only on account of custom or an agreement giving him a share in the property of his father-in-law.

In G. Narayanappa and Others V. Govt. of Andhra Pradesh, MANU/SC/0028/1992 the Hon'ble Supreme Court held as follows:

5. It has also been stated by Mayne that an illatom son-in-law has no right to claim partition with his father-in-law unless there is an express agreement or custom to that effect. An illatom

son-in-law is not an adopted son in any sense. In N.R. Raghavachariar's Hindu Law, 8th Edition, in paragraph 176, it is stated that an illatom son-in-law loses no rights of inheritance in his natural family and the property he takes in the adoptive family is taken by his own relations to the exclusion of those of his adoptive father. The position, as set out in Mulla's Hindu law, 16th Edition is no different. Regarding the position of an illatom son-in-law it has been inter alia observed by Mulla at para 515 (page 534) as follows: He does not lose his right of inheritance in his natural family. Neither he nor his descendants become coparceners in the family of adoption though on the death of the adopter he is entitled to the same rights and the same share as against any subsequently born natural son or a son subsequently adopted in accordance with the ordinary law. He cannot claim a partition with the father-in-law and the incidence of a joint family, such for instance as right to take by survivorship, do not apply. In respect of the property or share that he may get he takes it as if it were his separate and self-acquired property.

13. Coming to the position in law, the discussion in the text books, which we have referred to in some detail earlier, makes it clear

that although an illatom son-in-law has some rights similar to those of a natural son born after the adoption of the illatom son-in-law, his rights are not identical to those of conferred by law on a son or an adopted son. To cite two main differences, he does not succeed to the properties of his father-in-law by survivorship, but only on account of custom or an agreement giving him a share in the property of his father-in-law. His position is not identical to that of an adopted son because he does not lose his rights in his natural family on being taken as an illatom son-in-law and continues to be entitled to a share in the property of his natural father. It is, therefore, difficult to regard an illatom son-in-law who has attained majority as a major son for the purposes of Section 4A of the Ceiling Act.

In Harihar Prasad Singh and Others V. Balmiki Prasad Singh and Others, AIR 1975 SC 733 the Hon'ble Supreme Court of India held as follows:

6. Now on whom does the burden rest and what is the scope of the evidence that is admissible? The earliest decision on the question regarding proof of custom in variance of the general law is found in *Ramalakshmi Ammal v. Sivanatha Perumal Sethuraya*

MANU/PR/0027/1872 to the effect: it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends. This passage was quoted by this Court with approval in its decision in Pushpavathi Vijayaram v. P. Visweswar (MANU/SC/0141/1953 : AIR 1964 SC 118) and this Court went on further to observe: In dealing with a family custom, the same principle will have to be applied, though, of course, in the case of a family custom, instances in support of the custom may not be as many or as frequent as in the case of customs pertaining to a territory or to the community or to the character of any estate. In dealing with family customs, the consensus of opinion amongst the members of the family, the traditional belief entertained by them and acted upon by them their statements, and their conduct would all be relevant and it is only where the relevant evidence of such a character appears to the Court to be

sufficient that a specific family custom pleaded in a particular case would be held to be proved, vide *Abdul Hussein Khan v. Bibil Sana* MANU/PR/0125/1917.

Supreme Court of India reported in **Ratanlal @ Babulal Chunilal Samsuka v. Sundarabai Govardhandas Samsuka, AIR 2017 SC 5797** wherein his Lordship Sri N.V. Ramana, speaking for the Bench held as follows: As customs, when pleaded are mostly at variance with the general law, they should be strictly proved. Generally, there is a presumption that law prevails and when the claim of custom is against such general presumption, then, whoever sets up the plea of existence of any custom has to discharge the onus of proving it, with all its requisites to the satisfaction of the Court in a most clear and unambiguous manner. It should be noted that, there are many types of customs to name a few- general customs, local customs and tribal customs etc. and the burden of proof for establishing a type of custom depend on the type and the extent of usage. It must be shown that the alleged custom has the characteristics of a genuine custom viz., that it is accepted willfully as having force of law, and is not a mere practice

more or less common. The acts required for the establishment of customary law ought to be plural, uniform and constant.

Hem Singh and Anr. v. Hakim Singh and Anr.
MANU/SC/0105/1954 : [1955] 1 SCR 44,
 Court observed that the custom recorded in the 'Riwaj-i-am' is in derogation of the general custom and those who set up such a custom must prove it by clear and unequivocal language. Similarly, when a custom is against the written texts of the Hindu Law then, one who sets up such a custom must prove it by a clear and unequivocal language.

Justice Krishna Murari and Justice Bhanot of Allahabad High Court in case of **Rao Shiv Nath Singh Memorial Khadi Gramodyog Samiti and Ors. vs. State of U.P. and Ors.:** Reported in **2018 (129) ALR 130 - MANU/UP/2712/2018 (DB) -**

12. Customary laws have held the field as legitimate sources of law over centuries. Their origins are shrouded in antiquity. But they represent standards of conduct accepted by the society over the centuries. The sources of customary laws are held in reverence and authors

of commentaries on customary laws command wide respect. Customary laws have imparted stability to society and contributed to the evolution of rule by law. In modern times some customary laws have been formalized and written in the form of statute. This is called statutorization. Customary laws became part of the formal legal system in British India and continue to be so in independent India. Customary laws owe their existence to the sanctity of the scripture and not the sovereignty of the legislature.

13. Systems of law realize their purpose by being agents of change and anchors of stability. Change without continuity is a recipe for instability and stability without change is the cause of stagnation. Failure of any legal system to understand the importance of stability and to achieve the imperative of change, would call into question the legitimacy of the system.

14. Customary laws have not been immune to change but often reluctant to adapt. Like scriptures of their origin they exist as fixed revelations, unlike the evolving tradition of case laws or the adapting method of legislation. An institutional mechanism of change is virtually non-existent.

15. Though it must be conceded that incremental changes have come about in customary laws by the commentators interpretations.

16. In Mayne's Treatise on Hindu Law and Usage (16th Edition) (hereinafter Mayne's Treatise), the learned author commented as under: "The Smritis were in part based upon contemporary or anterior usages, and, in part, on rules framed by the Hindu jurists and rulers of the country. They did not however purport to be exhaustive and therefore provided for the recognition of the usages which they had not incorporated. Later Commentaries and Digests were equally the exponents of the usages of their times in those parts of India where they were composed. And in the guise of commenting, they developed and expounded the rules in greater detail, differentiated between the Smriti rules which continued to be in force and those which had become obsolete; and in the process, incorporated also new usages which had sprung up."

17. The judgement of the Calcutta High Court in Jagdamba Koer v. Secretary of State for India in Council, (1889) 16 Cal 367, as cited in Mayne's Treatise: "The truth is that

Commentaries and Digests, like the Mitakshara and Viramitrodaya, owe their binding force not to their promulgation by any sovereign authority, but to the respect due to their authors, and still more to the fact of their being in accordance with prevailing popular sentiment and practice. Their doctrines may often have moulded usage, but still more frequently they have themselves been moulded according to prevailing usage of which they are only the recorded expression."

18. Inability to change and failure to adapt to changed circumstances, poses a challenge to the legitimacy of customary laws.

19. It is for a fact that many customary laws have remained impervious to change and over the years have become archaic or even oppressive. To insist on implementation of such customary laws without regard to the socio economic conditions and the legal system of the day would be fatal to governance by law.

20. The pace and the face of change in modern times also needs a deeper look. Pace of socio economic change hastened after the 18th century. In the age of IT, AI and globalization the pace of socio economic change has accelerated even more. A fundamental challenge to any legal system is the ability to cope with the fruits of

technological advance and manage socio economic change. Today's world and socio economic conditions are substantially different from the times of the origin of many customary laws. The purpose sought to be achieved by such customary laws may not exist in current times. Or the purpose of such customary law may provoke a result it is trying to prevent.

21. Some of the constituent elements of our legal systems are the Constitution, legislation and Courts of law: This framework legitimizes customary law by recognition and limits it by oversight.

22. In today's age legal relations often exist between parties which have not adopted the same customary law. Another facet of contemporary times are legal compacts between a person professing a religion and a juristic entity like and incorporated company or bank or statutory body which is entirely secular and has no religious affiliation.

23. Customary laws cannot be invoked as a matter of rule and cannot be implemented as a matter of right against all individuals irrespective of their religious denomination and against all entities irrespective of their legal purpose.

Supreme Court in Ujagar Singh v. Mst. Jeo, MANU/SC/0187/1959 : AIR 1959 Supreme Court 1041.

The following observations may be read with advantage:- "It therefore, appears to us that the ordinary rule is that all custom, general or otherwise, have to be proved. Under section 57 of the Evidence Act, however, nothing need be proved of which Courts can take judicial notice. Therefore, it is said that if there is a custom of which the Courts can take judicial notice, it need not be proved. Now the circumstances in which the Courts can take judicial notice of a custom were stated by Lord Dunedin in Raja Ram Rao v. Raja of Pittapur, 45 Ind. App. 148 at pp. 154, 155, (AIR 1918 PC 81 at p. 83) in the following words, 'when a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without necessity of proof in each individual case, When a custom has been so recognised by the Courts, it passes into the law of the land and the proof of it then becomes unnecessary under section 57(1) of the Evidence Act. It appears to us that in the Courts in the Punjab the expression 'general custom' has really been used in this sense,

namely, that a custom has by repeated recognition by Courts, become entitled to judicial notice as was said in *Bawa Singh v. Mt. Taro*, MANU/PH/0202/1950 : AIR 1951 Punjab 239 and *Sukhwant Kaur v. Bal-want Singh*, MANU/PH/0182/1950 : AIR 1951 Punjab 242."

Mohar Ram vs. Bhim Singh and Ors.:

MANU/PH/2787/2017 - 22. The customs may be classified into two categories i.e. general and special. A general custom includes a custom common to any considerable class of persons or applicable in a particular area or province. A custom which is applicable to a locality, tribe, sect or a family is called a special custom.

23. Some agricultural tribes in certain places have been found to be governed by a special custom under which adoption does not amount to mere appointment of an "heir, but has attached to it all the consequences which flow from a full and formal adoption of Hindu Law. Where such a special custom is found to exist, it is not necessary for the adoption that it should have taken place in conformity with the rules of Hindu Law in the matter of ritual or otherwise, because in such cases, it is not the rule of Hindu Law which operates to attach such consequences

to the adoption, but it is the custom governing the adoption, that does so, and therefore in order to attract all such consequences it is quite enough if the adoption conforms to that custom in the matter of form etc.

24. Such an adoption effects a complete transplantation of the adoptee from one family to the other and confers the right of collateral succession in the adoptive family and takes away the right of such succession in the natural family. In the case of such adoption the property devolving on the adopted son continues to be ancestral in his hands.

25. Custom has the effect of altering general personal law to some extent, but it does not override statutory law, unless the custom is expressly saved by it. It is well settled that a custom cannot be extended by analogy or logical process and it also cannot be established by hypothesis. The principle that he who relies upon custom modifying general law, must plead and prove it. A custom must be established by clear and unambiguous evidence, albeit, when a custom has been judicially recognised by the Courts, it passes into the law of the land and proof of it becomes unnecessary under Section 57(1) of the Evidence Act, 1872.

26. In *Dr. Surajmani Stella Kujur v. Durga Charan Hansdah*, **MANU/SC/0099/2001 : AIR 2001 SC 938** Hon'ble Supreme Court held that custom, being in derogation of a general rule, is required to be construed strictly.

27. In *Bhimashya & Ors. v. Smt. Janabi @ Janawwa*, **MANU/SC/5563/2006 : (2006) 13 SCC 627** it was held: "A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm.....it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect."

Custom is authoritative, it stands in the place of law, and regulates the conduct of men in the most important concerns of life; fashion is arbitrary and capricious, it decides in matters of trifling import; manners are rational, they are the expressions of moral feelings. Customs have more force in a simple state of society. Both practice and custom are general or particular but the former is absolute, the latter relative; a practice may be adopted by a number of persons without

reference to each other; but a custom is always followed either by limitation or prescription; the practice of gaming has always been followed by the vicious part of society, but it is to be hoped for the honour of man that it will never become a custom."

28. In the modern era of codification, the customs play minimum role in the matter of adoption unless it has been specifically so provided. The Act has provided detailed procedure, qualifications and other requisite conditions of adoption. Section 4 gives overriding application to the provisions of the Act and in fact, lays down that in respect of any matters dealt with, the Act, it seeks to repeal all existing laws, customs or usages, whether in the shape of enactment or otherwise which are inconsistent with this Act.

Ratanlal vs. Sundarabai Govardhandas Samsuka (D) th. L.Rs. and Ors.:
MANU/SC/1502/2017 - The following ingredients are necessary for establishing a valid custom-

- a. Continuity.
- b. Certainty.
- c. Long usage.

d. And reasonability.

As customs, when pleaded are mostly at variance with the general law, they should be strictly proved. Generally, there is a presumption that law prevails and when the claim of custom is against such general presumption, then, whoever sets up the plea of existence of any custom has to discharge the onus of proving it, with all its requisites to the satisfaction of the Court in a most clear and unambiguous manner. It should be noted that, there are many types of customs to name a few-general customs, local customs and tribal customs etc. and the burden of proof for establishing a type of custom depend on the type and the extent of usage. It must be shown that the alleged custom has the characteristics of a genuine custom viz., that it is accepted willfully as having force of law, and is not a mere practice more or less common. The acts required for the establishment of customary law ought to be plural, uniform and constant.

Custom evolves by conduct, and it is therefore a mistake to measure its validity solely by the element of express sanction accorded by courts of law. The characteristic of the great majority of customs is that they are essentially non-litigious in origin. They arise not from any

conflict of rights adjusted, but from practices prompted by the convenience of society. A judicial decision recognizing a custom may be relevant, but these are not indispensable for its establishment. When a custom is to be proved by judicial notice, the relevant test would be to see if the custom has been acted upon by a court of superior or coordinate jurisdiction in the same jurisdiction to the extent that justifies the court, which is asked to apply it, in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration. In this case at hand there was no pleading or proof which could justify that the above standards were met.

Court in **Mahant Sital Das v. Sant Ram** **MANU/SC/0156/1954 : AIR 1954 SC 606**, rendered by Justice B K Mukherjea, speaking for a Bench of four judges: 10. In the appeal before us the contentions raised by the parties primarily centre round the point as to whether after the death of Kishore Das, the Plaintiff or Defendant 3 acquired the rights of Mahant in regard to the Thakardwara in dispute. The law is well settled that succession to Mahantship of a Math or

religious institution is regulated by custom or usage of the particular institution, except where a Rule of succession is laid down by the founder himself who created the endowment. As the Judicial Committee laid down [Vide Genda Puri v. Chhatar Puri, MANU/PR/0040/1886 : 13 IA 100, 105] in one of the many cases on this point; "in determining who is entitled to succeed as Mohunt, the only law to be observed is to be found in the custom and practice, which must be proved by testimony, and the claimant must show that he is entitled according to the custom to recover the office and the land and property belonging to it.... Mere infirmity of the title of the Defendant, who is in possession, will not help the Plaintiff.

PERSONAL LAW

Abbaya M. Subba Reddy vs. Padmamma: MANU/AP/0720/1998 - It is not in dispute that the parties to the proceedings are Hindus and they are being governed by their personal laws. The Hindu Marriage Act, 1955. The Hindu Adoption and Maintenance Act, 1956. The Hindu Minority and Guardianship Act, 1956 and The Hindu Succession Act, 1956 are package of enactments being part of socio-legal scheme applicable to Hindus. In view of the divergent

schools governing the personal laws of the Hindus, the Parliament codified the personal law relating to the Hindus and enacted the said four Acts. Hindu Marriage Act codifies the law relating to marriages, and the Hindu Adoption and Maintenance Act, 1956 codifies the law of maintenance applicable to Hindus. While the personal law governing the parties prohibits bigamous marriage, on a parity of reasoning, it can also be stated that the expression 'Hindu wife' in Section 18 means only a legally wedded wife and not a wife whose marriage is void under the provisions of the Hindu Marriage Act. The second marriage/bigamous marriage being void cannot create a legal statute of "husband" and "wife" between the parties. That marriage is void ab initio and the woman cannot get the status of a wife nor the male gets the status of husband to her.

B.Y. Narasimha Prasad vs. H.S. Saraswathi: MANU/KA/0717/2010 - The law is fairly well settled that "Custom cannot override express law. Custom has the effect of modifying the general personal law, but it does not override the statute law, unless it is expressly saved by it. Such custom must be ancient, uniform, peaceable

continuous and compulsory in practice. Custom is not valid if it is illegal, immoral unreasonable or opposed to public policy. He who relies upon custom varying the general law must plead and prove it. Custom must be established by clear and unambiguous evidence.

Thilliammal and Ors. vs. Thandavamurthy and Ors.: MANU/KA/1963/2007 - Mayne, in his Hindu Law and Usage has observed as under: Prima facie any Hindu residing in a particular province of India is held to be subject to the particular Doctrine of Hindu Law recognised in that province. But this law is not merely a local law. It becomes personal law, and a part of the status of every family which is governed by it. Consequently, where any such family migrates to another province, it carries its own law with it, including any custom having the force of law.

This Court in the case of Duggamma and Anr. v. Ganeshayya and Ors. AIR 1968 MYS 97 observed that the argument that the rights to immovable property should be decided according to the law of the land in which such property is situate, has little practical value in India in respect of persons who are governed by the Hindu Law. The Succession Act, which is the law of the

country, does not apply to Hindus and the right to succession is governed by the Hindu law which is the law of domicile.

The word 'domicile' finds place in Indian Succession Act, 1925. Section 5 of the Act, 1925, declares that succession to the immovable property in India of a person deceased shall be regulated by the law of India, wherever such person may have had his domicile at the time of his death. Whereas the succession to the movable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death. Therefore, the word Domicile in the said Act is to be understood in that context. The Indian Succession Act, 1925, has no application to Hindus in the matter of succession and inheritance, as they are governed by their personal law, Hindu Law. In the light of personal law, the word Domicile has to be construed in the context of a person migrating from one region of India which is governed by a particular school of Hindu Law, to another region which is governed by another school of Hindu Law. However, if a person shifts his residence from a place which is governed by the law of mitakshara to another place which is also governed by the law of mitakshara, there is no

change of domicile or migration, as understood in the context of law of succession. In such circumstances the question of finding out the intention of the person, who changed his residence, whether he wanted to give up the law which was applicable to him at the place of his original residence and he wanted to embrace and have the benefit of the law which was applicable to the province to which he migrated would not arise. However, in the Act which is a subsequent legislation, there is no reference to the word 'domicile' anywhere in the Act.

Anupam Agarwal vs. Mickey Agarwal and Ors.:

MANU/KA/2966/2016 - The statute can always extinguish the customary law and the customary right. As a general rule, if the provisions of an Act of Parliament are repugnant to the continued existence of the custom, the custom will be treated as abrogated and destroyed, although the Act does not actually extinguish the custom by express words. An operative Act is the expression of the will of the sovereign legislature; it overrides the consistent provisions of the existing personal law. The personal law cannot be repugnant, contrariant or derogatory to the statute.

MANU/SC/0072/2013 : 2013 AIR SCW 949
between Laxmibai (dead) through LRs. &
another Vs. Bhagwantbuva (Dead) through
LRs. & Others, - "the custom must be established which is in practice at variance with general law in order to prove the adoption of a child aged more than 15 years. Custom is a rule which in a particular family, a particular class, community or in a particular district has owing to prolonged use, obtained the force of law. Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it. Such custom must be ancient, uniform, certain, continuous and compulsory. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy. He who relies upon custom varying general law, must plead and prove it. Custom must be established by clear and unambiguous evidence."

Irappa vs. Gurusiddappa and Ors. :
MANU/KA/0729/2000 - The uncodified personal law relating to Partition and Succession was not rather uniform to all the places in India. It is only after the passing of the Hindu

Succession Act, to a very great extent, the uniformity in principles and practice has been achieved. In uncodified law, there are two major schools of thought - one is Dayabhaga School followed in Bengal Area and the other Mitakshara School followed in the rest of India.

In Sidrappa alias Shidramappa Bhagappa Patil v. Laxmi Bai and Ors. 1965 (1) MLJ 625, a question arose before this Court about the right of a mother entitled to a share equal to that of a son at a partition, when the parties are governed by Bombay School of thought. The said custom was analysed in the context of the provision of Sections 4 and 6 of the Hindu Succession Act and was held that, Section 4 does not abrogate the said rule of Hindu Law which was in force in the State of Bombay, entitling the mother to a share equal to that of a son at a partition.

In the State of Karnataka, except the Bombay-Karnataka area, old Mysore Area, Hyderabad-Karnataka Area follow the Madras School of Hindu Law, where, a mother is not entitled to receive a share equal to that of a son at a partition (1988) 2 KLJ 155 para 29, unlike in the Bombay-Karnataka Area where Bombay School of thought prevails.

The case in **Gurupad Khadappa Magdum v. Hirabai Khadappa Magdum and Ors.**
MANU/SC/0407/1978 : AIR 1978 SC 1239

also pertaining to the parties governed by Bombay School of Law. The Supreme Court interpreting the effect of Explanation-I of Section 6 has explained the formula for working out a share of a mother or wife at a partition thus: The next step, equally important though not equally easy to work out, is to find out the share which the deceased had in the coparcenary property because after all, the Plaintiff has a 1/6th interest in that share. Explanation 1 which contains the formula for determining the share of the deceased creates a fiction by providing that the interest of a Hindu mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death. One must, therefore, imagine a state of affairs in which a little prior to Khandappa's death, a partition of the coparcenary property was effected between him and other members of the coparcenary. Though the Plaintiff, not being a coparcener, was not entitled to demand partition yet, if a partition were to take place between her husband and his two sons, she would be entitled

to receive, a share equal to that of a son. (see Mulla's Hindu Law, Fourteenth Edition, page 403, para 315). In a partition between Khandappa and his two sons, there would be four sharers in the co-parcenary property, the fourth being Khandappa's wife, the Plaintiff. Khandappa would have therefore got a $\frac{1}{4}$ th share in the coparcenary property on the hypothesis of a partition between himself and his sons.

Two things are thus clear: One, that in a partition of the coparcenary property Khandappa would have obtained a $\frac{1}{4}$ th share and two, that the share of the Plaintiff in the $\frac{1}{4}$ th share is $\frac{1}{6}$ th, that is to say, $\frac{1}{24}$ th. So far there is no difficulty. The question which poses some-what difficult problem is whether the Plaintiff's share in the coparcenary property is only $\frac{1}{24}$ th or whether it is $\frac{1}{4}$ th plus $\frac{1}{24}$ th, that is to say, $\frac{1}{6}$ th. The learned trial Judge, relying upon the decision in Shiramabai (MANU/MH/0050/1964 : AIR 1964 Bom 263) which was later overruled by the Bombay High Court, accepted the former contention while the High Court accepted the latter. The question is which of these two views is to be preferred.

We see no justification for limiting the Plaintiff share to $\frac{1}{24}$ th by ignoring the $\frac{1}{4}$ th

share which she would have obtained had there been a partition during her husband's lifetime between him and his two sons. We think that in overlooking that 1/4th share, one unwittingly permits one's imagination to boggle under the oppression of the reality that there was in fact no partition between the Plaintiff's husband and his sons. Whether a partition had actually taken place between the Plaintiff's husband and his sons is besides the point for the purpose of Explanation 1. That Explanation compels the assumption of a fiction that in fact "a partition of the property had taken place", the point of time of the partition being the one immediately before the death of the person in whose property the heirs claim a share.

In view of the aforesaid position of Law, it is not open to the Appellant to contend that the second Plaintiff is not entitled to a share equal to that of a son at a partition by virtue of the provision contained under Section 6 of the Hindu Succession Act and that she is only entitled to a share in the notional share allotted to her husband. In fact, the second Plaintiff, in the instant case, would be entitled to a share, independently, equal to that of her son and further would be entitled to an equal share in the

share allotted to her husband, thereby, as there are only three heirs entitled to inherit the properties, they would get 1/3rd each. Accordingly, the trial Court has properly granted the share.

Badshah vs. Urmila Badshah Godse and Ors.:

MANU/SC/1084/2013 - The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both Constitutional and statutory interpretation, the Court is supposed to exercise direction in determining the proper

relationship between the subjective and objective purpose of the law.....

The Court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision-"libre recherche scientifique" i.e. "free Scientific research". We are of the opinion that there is a non-rebuttable presumption that the Legislature while making a provision like Section 125 Code of Criminal Procedure, to fulfill its Constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances.

Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in Heydon's Case (1854) 3 Co. Rep. 7a, 7b which became the historical source of purposive interpretation. The court would also invoke the legal maxim construction *ut res magis valeat quam pereat*, in such cases i.e. where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather

than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125, Code of Criminal Procedure, such a woman is to be treated as the legally wedded wife.

The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against destitution. The manifest purpose is to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social groups. Its foundation spring is humanistic. In its operation field all though, it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy or because of the need to

subserve the social and individual morality measured for maintenance.

Parayankandiyal Eravath Kanapravan Kalliani

Amma and Ors. vs. K. Devi and Ors. : MANU/

SC/0487/1996 - The personal law by which he

was governed was the Marumakattayam Law of Malabar comprising of a body of judicially recognised customs and usages, which prevailed among a considerable section of the people inhabiting the West Coast of South India. The essential difference between Marumakattayam and other schools of Hindu law was that the Marumakattayam school was founded on the matriarchate while others are founded upon the agnatic family. In the Mitakshara joint family the members claim through descent from a common ancestor, but in a Marumakattayam family, which is known as the Tarwad, the descent is from a common ancestress. Mr. Sundara Ayyar, who was a Judge of the Madras High Court, has already written an excellent treatise on the customary laws of Malabar which has been recognised as an authoritative work by the Privy Council in Kochunni v. Kuttanunni MANU/PR/0015/1947, this Court had also had an occasion to refer to broad aspects of this law

in a few decisions (See: Balakrishna Menon v. Asstt. Controller of Estate Duty AIR (1971) SC 2390 and Venugopala Ravi Verma v. Union of India MANU/SC/0349/1969 : [1969]74ITR49(SC) , Achuttan Nair v. C. Amma MANU/SC/0361/1965 : [1966]1SCR454 . In a recent decision in Padmavathy Amma v. Ammunni Panicket MANU/SC/0424/1995 : [1995]3SCR1056 , it was indicated that : In the Marumakkathayam system of law succession to property is traced through females, though the expression Marumakkathayam strictly means inheritance by sister's children. It is because of this that a man's heirs are not his sons and daughter, but his sisters and their children - the mother forming the stock of descent and inheritance being traced through mother to daughter, daughter's daughter and so on. A Marumakkathayam family is known as a Tarwad and consists of a group of persons, males and females, all tracing descent from a common ancestress. An ordinary Tarwad consists of the mother, her children, male and female, the children of such females and their descendants in the female line, how-low-soever, living under the control and direction of the Karnavan, who is the eldest male member. The junior male members

are also proprietors and have equal rights. The Tarwad is thus a typical matriarchal family.

Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhav and Ors.:

MANU/SC/0579/1988 - The attempt to exclude altogether the personal law applicable to the parties from consideration-also has to be repelled. The section has been enacted in the interest of a wife, and one who intends to take benefit under Sub-section (1)(a) has to establish the necessary condition, namely, that she is the wife of the person concerned. This issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes her status on relationship with reference to the personal law that an application for maintenance can be maintained. Once the right under the section is established by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the personal law. The issue whether the section is attracted or not cannot be answered except by the reference to the appropriate law governing the parties.

Jose Paulo Coutinho vs. Maria Luiza Valentina Pereira and Ors.: MANU/SC/1257/2019 - It is

interesting to note that whereas the founders of the Constitution in Article 44 in Part IV dealing with the Directive Principles of State Policy had hoped and expected that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territories of India, till date no action has been taken in this regard. Though Hindu laws were codified in the year 1956, there has been no attempt to frame a Uniform Civil Code applicable to all citizens of the country despite exhortations of this Court in the case of Mohd. Ahmed Khan v. Shah Bano MANU/SC/0194/1985 : (1985) 2 SCC 556 and Sarla Mudgal and Ors. v. Union of India and Ors. MANU/SC/0290/1995 : (1995) 3 SCC 635.

However, Goa is a shining example of an Indian State which has a uniform civil code applicable to all, regardless of religion except while protecting certain limited rights. It would also not be out of place to mention that with effect from 22.12.2016 certain portions of the Portuguese Civil Code have been repealed and replaced by the Goa Succession, Special Notaries and Inventory Proceedings Act, 2012 which, by and large, is in line with the Portuguese Civil

Code. The salient features with regard to family properties are that a married couple jointly holds the ownership of all the assets owned before marriage or acquired after marriage by each spouse. Therefore, in case of divorce, each spouse is entitled to half share of the assets. The law, however, permits pre-nuptial agreements which may have a different system of division of assets. Another important aspect, as pointed out earlier, is that at least half of the property has to pass to the legal heirs as legitime. This, in some ways, is akin to the concept of 'coparcenary' in Hindu law. However, as far as Goa is concerned, this legitime will also apply to the self-acquired properties. Muslim men whose marriages are registered in Goa cannot practice polygamy. Further, even for followers of Islam there is no provision for verbal divorce.

Article 1766 provides that a married person shall not on the penalty of nullity dispose of certain and specific properties of the couple except if the said properties have been allotted to the said person. The basis of this Article is that both spouses are equal owners of the entire property of the couple - acquired before or after marriage. Therefore, the disposition of some part of the property without the consent of the other

spouse can be termed a nullity. We are referring to this Article only to highlight the fact that in case the Civil Code is to apply this would also be a factor to be taken into consideration because can it be said that this Article will only apply to the properties within the territory of Goa and not to properties in other parts of the country i.e. India?

Succession is governed normally by the personal laws and where there is a uniform civil code, as in Goa, by the Civil Code. Once Article 24 is not to be taken into consideration then it is but obvious that all the properties whether within Goa or outside Goa, must be governed by the Civil Code of Goa. If we were to hold otherwise, the consequences could be disastrous, to say the least. There would be no certainty of succession. It would be virtually impossible to determine the legitime which is an inherent part of the law of succession. The rights of the spouses to have 50% of the property could easily be defeated by buying properties outside the State of Goa. In the case of a Hindu Goan domicile it would lead to further complications because if we were to accept the judgment of the learned Single Judge and the arguments of the Respondents, for the properties in Goa, the Civil Code would apply but for the

properties outside the territory of Goa, the Hindu Succession Act will apply. Similarly, for Muslims within the State of Goa, Civil Code would apply and outside Goa, the Muslim Personal Law (Shariat) Application Act, 1937 would apply. This would lead to many uncalled for disputes and total uncertainty with regard to succession.

There is a conflict between the Indian Succession Act, the Hindu Succession Act, the Muslim Personal Law (Shariat) Application Act, 1937, etc. and the Portuguese Civil Code with regard to the laws of inheritance but this conflict has to be resolved. In our view, the Parliament of India, after conquest of Goa, by adopting the Portuguese Civil Code accepted that the Goan domiciles were to be governed by that law in matters covered under the Code and specifically included in the laws which were made applicable. The Indian Parliament did not make applicable all Portuguese laws but the laws which were applied would apply with full force. The Goa, Daman and Diu (Administration) Act, 1962 is a special law dealing with the domiciles of Goa alone. This special law making the Portuguese Civil Code applicable is an exception carved out of the general laws of succession namely Indian Succession Act, Hindu Succession Act, 1956,

Muslim Personal Law (Shariat) Application Act, 1937 and other laws.

In view of the aforesaid, we are clearly of the view that the Portuguese Civil Code being a special Act, applicable only to the domiciles of Goa, will be applicable to the Goan domiciles in respect to all the properties wherever they be situated in India whether within Goa or outside Goa and Section 5 of the Indian Succession Act or the laws of succession would not be applicable to such Goan domiciles.

The jurisdiction of a probate court is limited to decide whether the Will is genuine or not. The Will may be genuine but the grant of probate does not mean that the Will is valid even if it violates the laws of inheritance. To give an example, supposing a Hindu bequeathes his ancestral property by a Will and probate of the Will is granted, such grant of probate cannot adversely affect the rights of those members of the coparcenary who had a right in the property since birth. Similar is the case in Goa. The legitime is the right of the heirs by birth. When both the spouses are alive, they own half of the property. Mere grant of probate will not mean that the husband can Will away more than half of the property even if that be in his name.

..... it will be the Portuguese Civil Code, 1867 as applicable in the State of Goa, which shall govern the rights of succession and inheritance even in respect of properties of a Goan domicile situated outside Goa, anywhere in India.

CASTE UNDER HINDU LAW

Maharaja of Kolhapur vs. S. Sundaram Ayyar and Ors.: MANU/TN/0487/1924

173. Manu, Yagnavalkya and the other Smriti writers expressly state that there are only four castes, namely, Brahmana, Kshatriya, Vaisya and Sudra. The first three are called Dvijas or twice-born (from dvi, two, and jayate, is born, the second birth being on the performance of the upanayana or the investing of sacred thread) and all the religious rites enjoined for them are performed with Vedic mantras. Manu says the three twice-born classes are the Brahma, Kshatriya and Vaisya but the fourth or servile (Sudra) is once born, that is, has no second birth from the Gayatri and wears no thread. Nor is there any fifth class--Chapter X, verse 4.

174. Yagnavalkya in verse 10 of the Acharadhyaya says: "The castes are the Brahmanas, the Kshatriyas, the Vaisyas and the Sudras. Only the first three of these are twice-born, the performance of the ceremonies beginning with the rite of impregnation and ending with the funeral rites in the cremation ground of these only is prescribed with the sacred formulas."

175. In Balambhatta's Gloss on the Sloka, the commentator says: "The word Dvija (twice-born) is a technical term retaining also its etymological meaning, namely, they are twice-born or regenerate for the investiture with the sacred thread is the second birth. All ceremonies of the higher castes are performed by reciting the sacred formulas, those of the Sudras are performed in silence and without such recitation."

176. It is clear that so far as the Sudra is concerned there is no Upanayana or investiture with the sacred thread and in fact the non-investiture is the main ground of differentiation between the three higher castes and the Sudras.

177. The ceremony whereby the Brahmana, Kshatriya and Vaisya become initiated into the Gayatri or the sacred mantra and become twice-born is called Upanayana, which literally means

bringing near, i.e., student near the teacher who instructs him in the sacred Gayatri verse and makes him fit to receive instructions in the Vedas. According to Manu, Chapter II, verse 38, the maximum age for the performance of the Upanayana or the investiture of sacred thread is the sixteenth year for the Brahmanas, 22nd for the Kshatriyas and 24th for the Vaisyas and in verse 39 Manu states that all the youths of these three classes who have not been invested with the sacred thread at the proper time become "Vratyas or out-castes, degraded from the Gayatri, and condemned by the virtuous" and he prohibits a Brahman even when he is in distress for subsistence from having any connexion with such a Vratya or impure man. Yagnavalkya in verse 39 of the Acharadhyaya also gives the same age and in verse 38 states that after the age is passed the youths of the three classes, namely, the Brahman as, Kshatriyas, and Vaisyas, for whom no Upanayana has been performed, fall out-castes from religion, degraded from the Gayatri, and become Vratyas, unless the ceremony which is called Vratya-stoma is performed.

178. In the Grihya Sutra of Asvalayana he describes Vratyas as being impure and unfit for

Upanayana, for receiving the Vedas, and for intercourse as to food, worship, etc. But he nowhere expressly provides expiation for them (see Mandlik, page 165).

179. All the text-writers and commentators are agreed that in the case of Sudras there is not only no Upanayana or the investiture of sacred thread which is the exclusive privilege of the three higher classes but there is also no recitation of the Vedic mantras in respect of any rites which they are enjoined to perform by the Shastras.

HINDU LAW AND SAMSKARAS

**Deivanai Achi and Ors. vs. R.M. Al. Ct.
Chidambaram Chettiar and Ors. :
MANU/TN/0310/1954**

The Hindu conception of a marriage is that it is a 'samskara', a purificatory ceremony prescribed by religion. The English word "sacrament", which is very often used as interchangeable with 'samskara', may not accurately bring out the import of the Sanskrit word. "The word Sacrament has had a varied history and is full of associations likely to mislead. The Sanskrit word simply means a purificatory ceremony prescribed by religion. It

suggests no idea of obligation or indissolubility. Whether the marriage relationship can be annulled or not would depend not upon its falling within the denotation of the word 'Samskara' but upon express texts". (Per Sir P. S. Sivaswami Iyer at p. 630 1 M. L. J. 491). Marriage is a necessary 'Samskara' for all Hindus who do not choose to remain perpetual Brahmacharis or Sannyasins.

The Dharmasastras divide the life of a Hindu into four asramas, Brahmacharya, Gruhastha, Vanaprastha and Sannyasa. A Hindu cannot but be in one of the four asramas during his life. He cannot be outside them. Gruhasthasrama' the life of a householder, however, is praised by the Dharmasastras. For women and Sudras, marriage is considered as an important, if not the only 'samskara', which is obligatory. The 'samskaras' are sixteen in number beginning with 'Garbhadhana' and ending with funeral rites.

There is however a divergence of opinion among the Smriti writers and commentators as to how many of these are allowed to women and Sudras. The better opinion seems to be that most of them including marriage should be allowed to women and Sudras. In the case of the latter however, the 'samskaras' should be performed

without the utterance of the mantra or sacred text.

Marriage is a Samskara for the man as well as the woman of the Sudra caste also. Marriage in Hindu law is not a mere contract. It is the rite of marriage which creates the indissoluble religious tie between the husband and wife. It is necessary to examine whether to constitute a valid marriage under Hindu law, ceremonies are essential and, if so, whether it is obligatory for the Sudras to observe such ceremonies. It was maintained at one stage of the arguments by learned counsel for the plaintiffs that even in the case of regenerate classes, i.e., 'dwijas' (Brahmana, Kshatriya and Vaisya), the observance of ceremonies is not essential to bring about a valid union between a man and a woman and that the ceremonies were utmost only of evidentiary value.

Smrithi writers describe eight modes, which are usually described as 'forms' of acquiring a wife. They are Brahma, Daiva, Arsha, Prajapatya, Asura, Gandharva, Rakshasa and Paisacha. In the first four, the essence of the marriage is the transfer of dominion by gift (Kanyadana) by the proper guardian for the marriage. The transference therefore of the

dominion over the girl is by the parent to the bridegroom by gift. In the 'Arsha' rite, no doubt, there is a small consideration for the giving of the girl but it is so insignificant that it may be ignored and may be treated as not forming the consideration for the transfer of the dominion over the girl.

In the 'Asura' form, the dominion is acquired by purchase, while in the 'Gandharva' form it is the mutual agreement of the maiden with her lover. In the 'Rakshasa' form, the dominion is obtained by force, while in the 'Paisacha' form, it is obtained by stealth. There is a well-known division of these eight into approved and unapproved forms. Manu prohibited the 'Asura' and 'Paisacha' forms of marriage, for all Varnas including Sudras. The first six in the order enumerated by Manu are lawful for a Brahmana, the four last for a Kshatriya and the same four except the Rakshasa for a Vaisya and a Sudra.

The 'Srauthasutras' prescribe the procedure for performing 'ishti' while the 'Grihyasutras' relate to the procedure for performing ceremonies relating to domestic life. Dr. Jolly in his Hindu Law and Custom, Tagore Law Lectures (1928 Edn) at p. 118 points out

that, "The Smritis do not deal with the actual nuptial ceremonies because these things properly belong to the sphere of the Grihyasutras, which deal with the particular usages of the different Vedic schools. Thus in Kainas 228, too it is said that the sacrifice into the fire on the occasion of the marriage ceremony should be performed 'yathasmriti' what is explained In the commentary by 'Svagrhyaproktaavidhina'. Yet occasional notices of marriage ceremonies in the smritis as well as in the Ramayana and Mahabharatha and elsewhere prove that there was a wide consensus of opinion regarding them. Thus the giving away of the bride in the midst of festivities to the bridegroom (kanyadhana, Sampradhana), the 'dextrarum junctio' (Panigrahana) the Vedic Mantras accompanying these ceremonies (Panigrahanikamantra), the sacrifice into the fire and the three courses round the nuptial fire, the seven steps together of the young couple (saptapadi), taking the bride home (vivaha) after which the whole ceremony has been named and other usages were universally observed and may be traced to the vedic age and in some parts even to the hoary past of the Indo-Carnatic period and even at the present day they are very widely observed."

In Commissioner of Police v. Acharya Jagadishwarananda Avadhuta MANU/SC/0218 /2004 the Supreme Court observed (vide paragraph - 9):- "The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion. What constitutes an integral or essential part of religion has to be determined with reference to its doctrine, practices, tenets, historical background, etc. of the given religion."

Abhilasha vs. Devender Kumar : MANU/DE/3878 /2015 - In the ancient times, the basal thought was that marriage was a prime necessity for that alone could enable a person to discharge properly his religious and secular obligations. The earliest records show that rules of inheritance depended on the rules of marriage and it was obligatory on the father to give the daughter in marriage as gift is given. Marriage a Sacrament: Marriage is necessarily the basis of social organization and foundation of some

important legal rights and obligations. The importance and imperative character of the institution of marriage needs no comment. In Hindu Law marriage is treated as a *samskara* or a sacrament. It is the last of ten sacraments, enjoyed by the Hindu religion for regeneration of men and obligatory in case of every Hindu who does not desire to adopt the life of *sanyaasi*. From the very commencement of Rig-Vedic age, marriage was a well established institution, and the Aryan ideal of marriage was very high. The high value placed on marriage is shown by the long and striking hymn of Rig-Veda, X, 85; "Be, thou, mother of heroic children, devoted to the Gods, Be, thou, Queen in thy father-in-law's household. May all the Gods unite the hearts of us two into one". As the old writers put it, "a woman is half her husband and completes him".

Ajay Lavania vs. Shobhna Dubey : MANU/UP /1647/2011 - Marriage is necessarily the basis of social organization and foundation of some important legal rights and obligations. The importance and imperative character of the institution of marriage needs no comment. In Hindu Law marriage is treated as a *samskara* or a sacrament. It is the last of ten sacraments,

enjoyed by the Hindu religion for regeneration of men and obligatory in case of every Hindu who does not desire to adopt the life of sanyasi. From the very commencement of Rig-Vedic age, marriage was a well established institution, and the Aryan ideal of marriage was very high. Monogamy was the rule and the approved rule, though polygamy existed to some extent. In Vedic period, the sacredness of the marriage tie was repeatedly declared; the family ideal was decidedly high and it was often realized.

The wife on her marriage was at once given an honoured position in the house. She was mistress in her husband's home and where she was the wife of the eldest son of the family, she exercised authority over her husband's brothers and his unmarried sisters. She was associated in all the religious offerings and rituals with her husband. As the old writers put it, "a woman is half her husband and completes him".

Manu in impressive verses, exhorted men to honour and respect woman. Woman must be honoured and adorned by their fathers, brothers, husbands, and brothers- in-law who desire their own welfare. Where women are honoured, there gods are pleased; but where they are not honoured, no sacred rite yield rewards." The

husband receives wife from gods, he must always support her while she is faithful". "Let mutual fidelity continue until death. This may be considered as the summary of the highest law for husband and wife."

Dispute between husband and wife not allowed to be litigated either in the customary tribunals or in the king's courts. Neither bailment nor contracting of debt, neither bearing testimony for one another nor partition of property was allowed between them.

According to Hinduism, marriage between two souls is a very sacred affair that stretches beyond one lifetime and may continue to at least seven lives. The relationship between the two does not necessarily have to begin only when they have attained birth as human beings. The gender of the two partners also does not have to be the same in all the births. As the stories in purans confirm, two individual souls may come together any time during their existence upon earth, even when they assume a lower life form, such as that of any animal or bird, and carry forward their relationship further into higher life forms such as that of human beings. Once married, a couple is expected to uphold their family names by remaining faithful and truthful to each other and

by enacting their respective roles as laid out in the Hindu law books.

As the epic Ramayana and Mahabharata illustrate, a couple ought to stick together through the ups and downs of life, however challenging and arduous the situation may be, taking care of each other and keeping in each other. According to beliefs of Hinduism, marriage is a sacred institution devised by gods for the welfare of human beings. Its primary purpose is procreation and continuation of life upon earth. Sexual union is intended solely for this purpose and should be used as such. Its secondary purpose is upholding of the social order and the Hindu dharma, while its ultimate aim is spiritual union with the inmost self, which is possible when a couple perform their obligatory duties and earn the grace of god through their good karma. A man and woman are believed to come together as husband and wife primarily for spiritual reasons rather than sexual or material, although they may not be mentally aware of the fact. Once married, the couple is expected to carry out their respective traditional duties as house holders and upholders of family traditions and work for the material and spiritual welfare of each other, the members of their family and also society.

The concept of divorce is alien to Hinduism, as marriages are meant to last for a life time. Neither men nor women can throw away their martial relationships on some flimsy or selfish or whimsical grounds. Remarriage is permitted only under exceptional circumstances. Polygamy to some extent also was the practice among the Hindus just a few centuries ago.

PRINCIPLES OF THE UNCODIFIED HINDU LAW

THE HON'BLE **JUSTICE MRS. ROSHAN DALVI**, of Bombay High Court in the case of Shalini Sumant Raut & Ors vs Milind Sumant Raut & Ors Decided on 14 December, 2012 - Reported in **2013 (5) BomCR 430 - 2013 (3) MhLJ 364 - MANU/MH/2017/2012** Quoted following

The seminal aspect for adjudication is whether a son or a grandson of a coparcener claiming an interest in the joint family properties/coparcenary properties would be entitled to claim such interest by virtue of his birth and hence prosecute or defend any litigation in respect of the joint family properties instituted by other coparceners who are his family members but who are of a generation or two generations prior to him. The test of the claim is in the right

of the coparcener to apply for and obtain partition of the coparcenary property by virtue of his very birth. If that be so, the applicants as coparceners would be entitled to separately maintain a suit for partition to claim their share therein. If they can maintain a suit for partition they may also be joined as defendants in this suit and claim partition and other consequential reliefs in the suit, of course, subject to payment of court fees upon valuation of all the suit properties by them as per new and different shares of all coparceners.

In Mulla's Hindu Law, Twentieth Edition, Volume-I, Chapter XII relating to joint Hindu family-coparceners and coparcenary property-Mitakshara Law the principles of the ancient settled uncodified Hindu Law are succinctly enunciated. The principles may be enumerated thus:

- (i) The property inherited by a Hindu from his father, father's father or father's father's father is ancestral property (unobstructed heritage as regards his own male issue). -page 357
- (ii) His male issues acquire an interest in it from the moment of their birth. -page 357

(iii) They become coparceners with their paternal ancestor upon their birth. -page 357

(iv) The joint and undivided family is a normal condition of Hindu society. Undivided Hindu family is ordinarily joint in estate, food and worship. Page 358

(v) A Hindu coparcenary is a narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. (Hence joint property and coparcenary property or joint Hindu family property or coparcenary property are synonymous). -page 359

(vi) The persons who acquire an interest by birth in a joint family property or coparcenary property are sons, grand sons and great grand sons of the holder of the joint property. Sons, grandsons or great grandsons are joint owners/coparceners. They become entitled to joint property/coparcenary property upon their birth. -page 359

(vii) Ancestral property and separate property are distinct. The property inherited by a Hindu from his father, father's father, father's father's father is ancestral property. The property inherited by him from other relations is his separate property.

(viii) Ancestral property is a species of coparcenary property. If a Hindu acquires coparcenary property from his father, it becomes ancestral in his hands as regards his sons. The sons become coparceners with the father as regards such property. The coparcenary would then consist of the father and the son. -page 361

(ix) The coparcenary may consist also of the grandson and the great-grandson, who acquire an interest by birth in coparcenary property.

Illustration: If A inherits property from his father, his two sons B & C, would become coparceners with him as regards such ancestral property. If B has a son D and C has a son E, the coparcenary will consist of the father, sons and grandsons. - page 361

(x) A joint Hindu family has a common male ancestor with his lineal descendants in the male line within four degrees counting from and inclusive from such ancestor (propositus). {After the amendment of 2005 to Section 6 of the Hindu Succession Act (HSA) (2005 Amendments) which shall be presently considered, the line within four degrees may be male or female}. -pages 361, 362

(xi) No coparcenary can commence without a common male ancestor. {After 2005 Amendment

a coparcenary may well commence with a common female ancestor}. -page 362

(xii) After the death of common ancestor it may consist of collaterals, such as brothers, uncles, nephews and cousins. (These illustrations show two generations of coparceners). -page 362

(xiii) A coparcenary is a creature of law; it cannot be created by parties. -page 362

(xiv) No female can be a coparcener, although she may be a member of joint Hindu family. (This position has changed upon the 2005 Amendment.) -page 362

(xv) When a Hindu inherits the self acquired property of his father the sons take a vested interest in the property by reason of their birth and the property inherited by their father would become ancestral property in the hands of the son. The sons are coparceners as regards the property. When a son is born to either of them that son would also become a coparcener by the mere fact of his birth. -page 363

(xvi) The property inherited by a person from his father is ancestral in his hands. He is not the owner of the property, he is entitled merely to hold and manage the property as the head of the family for and on behalf of the family. The ownership of the property is in the joint family

consisting of himself and his sons. They are all co-owners or coparceners. (Hence the expression co-owners and coparceners are synonymous). - page 364

(xvii) The essence of a coparcenary is unity of ownership. -page 366. (xviii)The ownership of a coparcenary is in the whole body of the coparceners. -page 366

(xix) No coparcener or member of a joint Hindu family has a definite share in the property. His interest is a fluctuating interest. It is enlarged by the deaths in the family; it is diminished by the births in the family. Hence his interest is called "undivided coparcenary interest". -page 366

(xx) He becomes entitled to a definite share only on partition. -page 366.

(xxi) The members of a joint family who are within 3 degrees from the last holder of the property have a right to demand partition. (xxii)Until partition he would have a common possession and common enjoyment of coparcenary property.

The well known expression of HUF is that there is a "community of interest and unity of possession between all the members of the family which has been enunciated since the Privy Council case of Katama Natchiar Vs. Rajab of Shivagunga (1863) 9 MIA 539 @ 543 & 611. -page 366

(xxiii) Hence the interest of a coparcener in coparcenary property/joint Hindu family property is undivided and indefinite. It fluctuates on the birth or death of a member. So long as the family remains joint no individual member can have a definite share. When it is partitioned the share of the member in the joint family becomes definite.

(xxiv) On the death of one coparcener, the others take by survivorship the share which he had in common earlier. -page 366

(xxv) Coparcenary property is, therefore, held in collective ownership by all the coparceners in a quasi-corporate capacity. -page 366

(xxvi) The incidents of a coparcenary are that the lineal male descendants upto the third generation, acquire by birth, the ownership in ancestral properties of their ancestor. -page 366

(xxvii) Their descendants can ask for partition. - page 366

(xxviii) Till partition, each member or coparcener would have ownership extended over the entire property jointly with the rest. -page 366

(xxix) As a result of the co-ownership the possession and enjoyment of the property is common. Hence the coparceners cannot alienate

the property except for necessity without concurrence of all coparceners.- page 366

(xxx) The interest of the deceased members passes on his death to the surviving coparceners.
- page 366

(xxxi) The surviving coparceners are not only his brothers and sisters but also their children - each being entitled to his own specific equal share. [See. State Bank of India Vs. Ghamandi Ram AIR 1969 SC 1330]

(xxxii) The interest of a coparcener in an undivided Mitakshra property is not individual property. -page 367

(xxxiii) Coparcenary property is of two types; apratibandha daya or unobstructed heritage, and sapratibandha daya or obstructed heritage. -page 368

(xxxiv) When a person acquires an interest in the property by birth, it is unobstructed heritage, because the accrual of the right to the property is not obstructed by the existence of the owner. The property inherited by a Hindu from his father or father's father or father's father's father is unobstructed heritage as regards his own male issue i.e. his son, grandson or great-grandson. His sons would acquire an interest in it from the moment of their birth. They become coparceners

with their paternal ancestor in such property immediately upon their birth. {After the 2005 Amendment a daughter also would acquire an interest in the unobstructed heritage from the moment of her birth.} -page 369 (xxxv) A property acquired from others e.g. maternal grand-father is obstructed heritage. No right accrues by birth in such property. The right would accrue on the death of the last owner without leaving a male issue. Hence the accrual of the right is obstructed by the existence of the owner. The property devolving upon parents, brothers, nephews, uncles etc. upon the death of the last owner, is obstructed heritage. These relations do not get a vested interest in the property by birth. Until the death of the owner they only have a spes successionis or a bare chance of succession which is contingent upon surviving the owner. - page 369

(xxxvi) Unobstructed heritage devolves by survivorship; obstructed heritage devolves by succession. -page 369

(xxxvii) Property jointly acquired by the members of the joint family, with the aid of ancestral property, is also joint family property. Property acquired by them without the aid of ancestral

property may or may not be joint family property.

-page 370

(xxxviii) The term joint family property is synonymous with coparcenary property. -page 370 (Separate property would be synonymous with self acquired property.) -page 370

(xxxix) A coparcener has joint interest or joint possession in joint family property or coparcenary property. -page 370

(XL) Property inherited by a male Hindu from his father, father's father or father's father's father, is ancestral property. His son, grandson and great-grandson would acquire an interest in it by virtue of their birth, if they have a male issue. (Hence ancestral property is inherited and not self acquired property.) -page 372

(XLI) If a person who acquired a property by birth has no male issue, he would hold that property as absolute owner thereof and he would be able to deal with it as he pleased. However if he had a male issue in existence at the time he inherited the property or if he had a male issue subsequently, they would become entitled to the interest in the property by virtue of their birth. - page 372

(xlii) A father cannot change the character of the joint family property into absolute property of his

son by bequeathing it to him as if it was the self acquired property of the father. It would be ancestral property only in the hands of the son. His son would acquire it by survivorship since he would acquire an interest in it by his birth. -page 372 (Hence since the father cannot bequeath the property after his death, he cannot also transfer such property during his lifetime inter vivos.)

(xliii) A person inheriting property from his three immediate paternal ancestors (father, father's father and father's father's father) must hold it in coparcenary with his son, son's son and son's son's sons. Such property is ancestral as regards his male issue. -page 373

(xliv) A son takes an interest equal to that of the father in ancestral property upon his birth. -page 377

(xlv) This right is wholly independent of his father. He does not claim through his father. -page 377
 "under the Mitakshara law each son upon his birth takes an interest equal to that of his father in ancestral property, whether it be movable or immovable. It is very important to note that the right which the son takes at his birth in the ancestral property is wholly independent of his father. He does not claim through the father." (see mulla's Hindu Law,

Thirteenth Edition, p. 251, para 224). (See. Valliammai Achi Vs. Nagappa Chettiar & Anr. AIR 1967 SC 1153)

Hence the transfer of such property would affect the interest of the son in the ancestral property.

(xlvii) There is no distinction between the rights of a father and his sons as regards ancestral property. -page 377

(xlviii) A father can, however, dispose of the ancestral property only for payment of his debts (legal necessity). -page 377-378

(xlix) A father has no greater interest in the joint property than any of his sons. Each son acquires an interest equal to that of the father upon his birth. His grandson and great-grandsons similarly acquire an equal interest upon their birth. -page 378

(l) On the death of a coparcener, his interest in the coparcenary property does not pass by succession to his heirs. It passes by survivorship to the other coparceners. {This position of old uncodified Hindu law has been materially altered by Section 6 of the HSA as enacted in 1956 and later as amended in 2005.}

(L) There is a presumption that every Hindu family is joint in food, worship and estate. -page 393

(li) There is a presumption that a joint family continues joint. -page 393

(lii) The presumption of union is the greatest in the case of father and sons. -page 393

(liii) After the coparceners separate, there is no presumption as to joint family property. -page 393

(liv) There is no presumption that the joint family possessed joint family property; the party who claims partition must prove that it is joint family property. (If it is admitted to be joint family property or ancestral property, that fact would not have to be proved.) -page 394

(lv) There may be a joint Hindu family which does not have any joint property or any estate. [See. Ram Narain Chand Vs. Purnea Banking Corporation Ltd. AIR 1953 Pat 110

(lvi) The plaintiff must prove (or it may be admitted) that the family possessed some property with the income of which some other property was acquired. Such property would become joint family property since it would be purchased with joint family funds. -page 395

(lvii) Where it is admitted that the family possessed some joint family property, it would form the nucleus from which another property could have been acquired. -page 395

(lviii)Such acquisition would carry a presumption that that was joint property. The presumption that properties in the hands of individual coparceners is coparcenary property (or joint property or ancestral property) would arise if the family nucleus is proved. -page 395

(lix)If no nucleus is shown the members alone would be co-sharers but the property would not be taken to be joint family property and hence would not devolve by survivorship. -page 395

(lx)Coparceners have community of interest and unity of possession. No coparcener is entitled to any any special interest in coparcenary property. No coparcener is entitled to exclusive possession of any part of the property. (No coparcener can, therefore, sell or alienate any ancestral property or joint family property except with the consent of the other coparceners.) -page 409

(lxi)No coparcener can predicate at any given moment what his share in joint family property is. No member would be entitled to a definite share in joint family property or in its income. The income would be brought into a common chest or purse. His share would become defined only when the partition takes place. -page 409

(lxii) Each coparcener is entitled to joint possession and enjoyment of family property. - page 410

(lxiii) If a coparcener is excluded from joint possession or enjoyment, he is entitled to enforce his right by a suit. He is not bound to sue for partition. (He may sue for joint possession or enjoyment or for separate possession upon partition. However he would have to value his share in the coparcenary property on the date of filing of the suit and pay court fees thereon). -page 410

(lxiv) The right to enforce a partition and the right survivorship go hand in hand. "It is the right to partition which determines the right to take by survivorship" as held by the Privy Council in Anant Vs. Gopal (1895) 19 Bom 269.

From Case Laws:-

These rules and incidents of coparcenary or joint family properties are enumerated in the case of **State Bank of India Vs. Ghamandi Ram AIR 1969 SC 1330** thus: "the incidents of coparcenership under the Mitakshara law are : first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly that such descendants can at any time work out

their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors."

Further in the case of **Surjit Lal Chhabda Vs. Commissioner of Income Tax, Bombay AIR 1976 SC 109** the conclusion derived from the position of uncodified Hindu Law is set out thus: "the expression 'Hindu undivided family' must be construed in the sense in which it is understood under the Hindu Law. The presumption therefore is that the members of a Hindu family are living in a state of union, unless the contrary is established. generally speaking, the normal state of every Hindu family is joint and in the absence of proof of division, such is the legal presumption. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property and these are the

sons, grandsons and great-grandsons of the holder of the joint property for the time being, that is to say, the three generations next to the holder in unbroken male descent. Since under the Mitakshara Law, the right to joint family property by birth is vested in the male issue only, females who come in only as heirs to obstructed heritage (sapratibandha daya), cannot be coparceners. Outside the limits of coparcenary, there is a fringe of persons, males and females, who constitute an undivided or joint family. There is no limit to the number of persons who can compose it nor to their remoteness from the common ancestor and to their relationship with one another. A joint Hindu family consists of persons lineally descended from a common ancestor and includes their wives and unmarried daughters. The daughter, on marriage, ceases to be a member of her father's family and becomes a member of her husband's family. The joint Hindu family is thus a larger body consisting of a group of persons who are united by the tie of sapindaship arising by birth, marriage or adoption.

That it does not take more than one male to form a joint Hindu family with females is well established. In *Gowli Buddanna v. Commissioner*

of Income-tax, Mysore, Bangalore, (1966) 3 SCR 224 = (AIR 1966 SC 1523).

What are the changes brought by hindu succession act, 1956:-

The purpose and object of the Act as shown in the statement of the objects and reasons was to amend and codify the law relating to the intestate succession amongst Hindus.

It amended and codified the law relating to intestate succession amongst Hindus.

It brought about changes with regard to women's property and provided rules for devolution of interest of a deceased male in certain cases.

It laid down a uniform and comprehensive system of inheritance applying to the persons governed inter alia by Mitakshara Law.

Section 4 overrides any text, rule or interpretation of Hindu law or any custom or usage and any other law in force prior to the commencement of the Act. Under Section 4(1)(b) any of these would cease to apply to Hindus so far as it was inconsistent with any of the provisions of the Act.

The above rules of devolution of interest in coparcenary property would, therefore be, to the extent stated in Section 6 of the HSA, overridden and would cease to apply as inconsistent with the provisions of the HSA. Consequently in case of ancestral property consisting of a father and his sons and grandsons only the rules of coparcenary property under the uncodified law would still prevail. But if the father has e.g. not only sons but also daughters and not only grandsons but also granddaughters his interest in coparcenary property would not survive to the other members of the coparcenary but would succeed to his heirs so that not only his sons and grandsons would get an increased share upon his death, but his successors being his sons, daughters as also his widow and his mother would succeed to his interest in the coparcenary property under the provisions of the HSA.

Hence there is a notional partition which is deemed to have been effected upon the death of a coparcener under Section 6 of the HSA 1956. The share so separated devolves upon the heirs of the deceased instead of vesting in the other coparceners by survivorship. Such partition does not bring about disruption in the coparcenary. It is only the interest of the deceased which is

separated. The coparcenary minus the interest of the deceased continues with its incidents. The surviving coparceners continue as such.

The concept of notional partition is a legal device for demarcating the interest of the deceased when the explanation (I) of Section 6 is attracted. Like any other legal fiction, it is meant for a specific purpose. It is not a real partition by metes and bounds. It neither effects a severance of status, nor does it demarcate the interest of the surviving coparceners or any of the females who are entitled to a share on a partition.

The joint status of the family is not impaired by Section 6 of the HSA. The family is not disrupted.

There would be a notional partition under Section 6 of HSA, 1956 if a female relative (heir) or a person claiming through female relative (heir) was left by the deceased male Hindu coparcener.

There shall be a deemed partition under the statutory provisions contained in Section 6(3) of the Act as amended in 2005. That would be a partition of the interest in Mitakshara property of a Hindu dying intestate.

Consequently after 2005 upon the death of a coparcener, leaving any child, his son and his daughter would share equally in his interest in

coparcenary property. They would share as if there was a partition. For all the Hindus dying after the commencement of the Amendment Act, leaving any child, the interest in the joint family property which he had would not survive at all. It would only succeed - either by testamentary or intestate succession. This has brought about a total departure from the law relating to the coparcenary property. After 2005 for all Hindus leaving any child there could be no case of survivorship at all; after 1956 but before 2005 there would be survivorship of interest in coparcenary property but only in a family having no female relatives (heirs). Even during that period in a family having female relatives (heirs) there would be no survivorship but only succession of the interest of a Hindu male in Mitakshara coparcenary property.

The Schedule annexed to Section 8 showing Class I and Class II heirs show the son, daughter, widow and mother of a Hindu male dying intestate as his first heirs. Along with them are included the sons and daughters of predeceased sons and daughter; a grandson is not included anywhere in Class I or Class II of the schedule to Section 8 of the HSA. The grandson never succeeds to the property of the Hindu male

dying intestate. That includes also the interest in the joint family property which that Hindu male had and which would constitute his property or his estate.

The act also deals with the property of a female Hindu which would be her absolute property under Section 14 and the rules of succession of female Hindus under Sections 15 & 16.

Section 19 deals with the mode of succession of 2 or more heirs. Hence if there are two or more heirs when they succeed to a property, the property would devolve upon them per capita each one taking for that branch and as tenants in common so that the heirs of any deceased successor would claim the share of such successor. This is a further departure from the uncodified Hindu Law of survivorship of a coparcenary property in which the shares would fluctuate on the birth and death of any male member so that the other surviving male members would get a decreased or increased share upon the birth and death respectively thus augmenting the shares of all the survivors. The shares of the successors under the Hindu Succession Act would not so augment. Each branch would take its share; the increase and

decrease would be within that branch. The successors of those successors alone would get that share.

Under Section 30 of the HSA, a Hindu, male or a female, would be entitled to make a testamentary disposition as per the provisions of Indian Succession Act, 1925. The interest of a Hindu in a coparcenary part which would otherwise survive to other coparceners equally can, therefore, be disposed of by will. Consequently the interest of a Hindu in Mitakshara coparcenary property would not per se survive upon coming into force of the HSA. If the Hindu does not leave behind any will it would only succeed to his/her heirs under Section 8/15 of the Act as applicable.

This position would be governed by when the succession opened. The succession would open upon the death of a Hindu. Hence if a Hindu died after 1956, the provisions of the old Section 6 as enacted in 1956 and as analyzed above would prevail. If he died after 2005, the provisions of new Section 6 as amended by the Amendment Act, 2005 and analyzed above would prevail.

The true effect of the uncodified Hindu law relating to the Hindu coparcenary, therefore, applied only so long as there were only male heirs

in that HUF after 1956. It would continue as before until any one coparcener died. The devolution of interest in the coparcenary got changed as per Section 6 of the HSA. It continued as before if he had only sons. It came to an end in effect if he had a single daughter or even a predeceased son having a single daughter such that he had a female relative (heir) or a male heir claiming through a female relative (heir).

Upon the death of any coparcener, there is a notional partition after 1956 and a deemed statutory partition after 2005 and the share which devolves upon any coparcener in case of a family having female relative (heir) would be only upon succession and would devolve only as their individual property incapable of being partitioned and in which their own heirs would have no interest by their birth or by their continuance.

Hence any property which devolves under Section 8 of the HSA upon the death of a Hindu male would be his own individual property incapable of partition. It would be his own property in which his son or grandson would have no interest during his lifetime. The properties which devolve under Section 8 of the HSA are self acquired properties or partitioned HUF properties. They are not ancestral HUF properties

which are not partitioned. The law which as laid down by the Supreme Court considering the aforesaid judgments of various High Courts was in respect of separate or partitioned properties. The law is the same also with regard to the interest of a coparcener in ancestral properties in case where the ancestor had female relatives (heirs).

It must be appreciated that when a joint Hindu family consists only of a father and a son both have an equal interest in the joint family property. On the death of the father, the father's interest would survive to the son if he has no child. It would succeed to the son if he has a female child (heir) after 1956, by way of notional partition. And if he has either a female or a male child (heir) after 2005, the son and daughter will get equal share and there is deemed partition.

Where, however, there are more coparceners in a joint Hindu family, the entire estate of the father would be less than the entire coparcenary properties. In such a case interest of the father would succeed to his heirs under Section 8 of the HSA and the remainder of the coparcenary properties would remain in the coparcenary and the other coparceners would continue to be such. Since the coparcenary would

then remain, their interest would be diminished by the birth of any member in the coparcenary (either male or female after 2005) and would be augmented upon the death of any coparcener (who does not leave behind any heir).

NOTIONAL PARTITION In the case of Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum & Ors. **AIR 1978 SC 1239** it is held that the share of the deceased in the coparcenary property must be ascertained to ascertain the share of the heirs in the property of the deceased coparcener. The share that will succeed to them is only the share in the property that would have been allotted to the deceased coparcener if a partition of that property had taken place immediately before his death. It must, therefore, be assumed that the partition had so taken place. The share of the other heirs cannot be ascertained without reference to such share which would devolve by succession. All the consequences which flow from a real partition have to be logically worked out so that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. Hence

the heirs of such deceased coparcener will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death in addition to the share which he or she would receive in the notional partition. Similarly the share of the widow in the coparcenary property would be ascertained by adding the share to which she is entitled upon the notional partition during her husband's lifetime to the share which she would get in the husband's interest upon his death.

Alienation can be made for the benefit of the estate, for legal necessity or for meeting any antecedent debts, for management of the joint property by the Karta or pious obligation of a son to discharge his father's debts subject to Section 6(4) of the has as amended in 2005 which runs thus. (4). After the commencement of the Hindu Succession (Amendment) Act, 2005, no Court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the

Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect-
 (a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Supreme Court in a recent decision in **Sheela Devi and others V. Lal Chand and another, 2007(1) M.L.J. 797 (SC)** considered the above question and has laid down the law as follows:
 “19. The Act indisputably would prevail over the old Hindu Law. We may notice that the Parliament, with a view to confer right upon the female heirs, even in relation to the joint family property, enacted Hindu Succession Act, 2005. Such a provision was enacted as far back in 1987 by the State of Andhra Pradesh. The succession having opened in 1989, evidently, the provisions of Amendment Act, 2005 would have no application.” In view of the above statement

of law by the Apex Court, the contention of the appellant is devoid of merit. The succession having opened in the year 1968, the Amendment Act 39 of 2005 would have no application to the facts of the present case. No other contention was advanced by the counsel for the appellant."

Supreme Court has held in **Sheela Devi v. Lal Chand [(2007) 1 MLJ 797 (SC)]**, if succession has opened prior to Hindu Succession (Amendment) Act, 2005, the provisions of Amendment Act would have no application.

Supreme Court in **Narashimaha Murthy v. Smt. Susheelabai and Others AIR 1996 SC 1826: (1996) 3 SCC 644: JT 1996 (4) SC 300** and therefore if Section 23 would be applicable, daughters cannot claim partition of the dwelling house, which was admittedly in the occupation of Sekar. However, it is to be noticed that Section 23 has been omitted by the Hindu Succession (Amendment) Act, 2005 (Act 39 of 2005) with effect from 9.9.2005.

LAW PRIOR TO 1956

**Gangaben Motiji Thakor and Ors. vs. Maneklal
Ishwarlal Patel and Ors.:
MANU/GJ/1521/2018 - (2019) 2 GLR 898**

29. Prior to the Act of 1956, the Hindus were governed by the Shastric and Customary laws which varied from region to region and sometimes it varied in the same region on a caste basis. As the country is vast and communications and social interactions in the past were difficult, it led to a diversity in the law. Consequently, in the matters of succession also, there were different schools, like Dayabhaga in Bengal and the adjoining areas; Mayukha in Bombay, Konkan and Gujarat and Marumakkattayam or Nambudri in Kerala and Mitakshara in other parts of India with slight variations. The multiplicity of succession laws in India, diverse in their nature, owing to their varied origin made the property laws even more complex.

30. The two systems of inheritance which is predominant amongst the Hindus in India are : Mitakshara system and Dayabhaga system. Dayabhaga system prevails in Bengal, Mitakshara system in other parts of India. The difference between the two systems arises from the fact that, while the doctrine of religious efficacy is the guiding principle under Dayabhaga

School, there is no such definite guiding principle under Mitakshara School. Sometimes, consanguinity has been regarded as the guiding principle and at other times, religious efficacy.

31. Mitakshara recognises two modes of devolution of property, namely, survivorship and succession. The rule of survivorship applies to joint family property, the rule of succession apply to property held in absolute severally by the last owner. Dayabhaga recognises only one mode of devolution, namely, succession. It does not recognise the rule of survivorship even in the case of joint family property. The reason is that while every member of a Mitakshara joint family has only an undivided interest in the joint property, a member of a Dayabhaga joint family holds his share in quasi-severally, so that it passes on his death to his heirs as if he was absolutely seized thereof, and not to the surviving co-parceners as under Mitakshara Law.

32. Under the Mitakshara Law, on birth, the son acquires a right and interest in the family property. According to this school, a son, grandson and a great grandson constitute a class of co-parceners, based on birth in the family. No female is a member of the co-parcenary in Mitakshara Law. Under the Mitakshara system,

joint family property devolves by survivorship within the co-parcenary. This means that with every birth or death of a male in the family, the share of every other surviving male either gets diminished or enlarged. If a co-parcenary consists of a father and his two sons, each would own one-third of the property. If another son is born in the family, automatically the share of each male is reduced to one-fourth.

33. The rule of inheritance laid down in Mitakshara are followed by the Bombay, Madras, Benares and Mithila schools, all the schools being subdivisions of Mitakshara School. However, the rules of inheritance in force in the several States represented by these schools are not entirely the same. They differ in certain aspects namely, the order of inheritance as laid down in Mitakshara is not strictly followed in Bombay, Gujarat and the North Konkon. The order of succession to males in the Bombay State is different from that in other parts of India where Mitakshara law prevails. The reason is that in those places preference is given to the Vyavahara Mayukha of Nilkanta Bhatta on few points, where it differs from Mitakshara. The difference arises from the fact that the Bombay school recognises as heirs certain females who are not recognised as heirs

in other parts of India. In the Bombay State itself, there is a difference between the order of succession in cases governed by the Mayukha. In the Bombay State, daughters do not take as joint tenants with benefits of survivorship, but they take as tenants-in-common. Further, a daughter in that State does not take a limited estate in her father's property, but takes the property absolutely. Thus if a Hindu governed by the Bombay School dies leaving two daughters, each daughter takes an absolute interest in a moiety of her father's estate, and holds it as her separate property, and on her death her share will pass to her own heirs as her stridhana.

34. The Dayabhaga school neither accords a right by birth nor by survivorship though a joint family and joint property is recognised. Neither sons nor daughters become co-parceners at birth nor do they have rights in the family property during their father's lifetime. However, on his death, they inherit as tenants-in-common. It is a notable feature of the Dayabhaga school that the daughters also get equal shares along with their brothers.

35. In the Marumakkattayam Law, which prevailed in Kerala wherein the family was joint, a household consisted of the mother and her

children with joint rights in property. The lineage was traced through the female line. Daughters and their children were thus an integral part of the household and of the property ownership as the family was matrilineal.

36. The earliest legislation bringing females into the scheme of inheritance is the Hindu Law of Inheritance Amendment Act, 1929. This Act, conferred inheritance rights on three female heirs i.e. son's daughter, daughter's daughter and sister, thereby creating a limited restriction on the rule of survivorship. Another landmark legislation conferring ownership rights on women was the Hindu Women's Right to Property Act (18 of 1937). This Act brought about revolutionary changes in the Hindu Law of all schools, and brought changes not only in the law of co-parcenary but also in the law of partition, alienation of property, inheritance and adoption. The Act of 1937 enabled the widow to succeed along with the son and to take a share equal to that of the son. But, the widow did not become a co-parcener even though she possessed a right akin to a co-parcenary interest in the property and was a member of the joint family. The widow was entitled only to a limited estate in the property of the deceased with a right to claim

partition. A daughter had virtually no inheritance rights.

37. The framers of the Indian Constitution took note of the adverse and discriminatory position of women in society and took special care to ensure that the State took positive steps to give her equal status. Articles 14, 15(2) and (3) and 16 of the Constitution of India, thus not only inhibit discrimination against women, but in appropriate circumstances provide a free hand to the State to provide protective discrimination in favour of women. These provisions are part of the Fundamental Rights guaranteed by the Constitution. Part IV of the Constitution contains the Directive Principles which are no less fundamental in the governance of the State and inter-alia also provide that the State shall endeavour to ensure equality between man and woman.

PRINCIPLES OF THE HINDU LAW AFTER 1956

The Hindu Succession Act, 1956 dealing with intestate succession among Hindus came into force on 17th June, 1956. This Act brought about changes in the law of succession and gave rights which were hitherto unknown, in relation to a woman's property. However, it did not

interfere with the special rights of those who are members of a Mitakshara coparcenary except to provide rules for devolution of the interest of a deceased in certain cases. The Act lays down a uniform and comprehensive system of inheritance and applies, inter alia, to persons governed by Mitakshara and Dayabhaga Schools as also to those in certain parts of southern India who were previously governed by the Murumakkattayam, Aliyasantana and Nambudri Systems. The Act applies to any person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo Prarthana or Arya Samaj; or to any person who is Buddhist, Jain or Sikh by religion; to any other person who is not a Muslim, Christian, Parsi or Jew by religion as per section 2. In the case of a testamentary disposition this Act does not apply and the interest of the deceased is governed by the Indian Succession Act, 1925.

Section 4 of the Act is of importance and gives overriding effect to the provisions of the Act abrogating thereby all the rules of the Law of succession hitherto applicable to Hindus whether by virtue of any text or rule of Hindu law or any custom or usage having the force of laws, in

respect of all matters dealt with in the Act. The HSA reformed the Hindu personal law and gave a woman greater property rights, allowing her full ownership rights instead of limited rights in the property she inherits under Section 14 with a fresh stock of heirs under sections 15 and 16 of the Act. The daughters were also granted property rights in their father's estate. In the matter of succession to the property of a Hindu male dying intestate, the Act lays down a set of general rules in Sections 8 to 13.

Before the commencement of the HSA, codifying the rules of succession, the concept of a Hindu family under Mitakshara school of law was that it was ordinarily joint not only in estate but in religious matters as well. Coparcenary property, in contradistinction with the absolute or separate property of an individual coparcenar, devolved upon surviving coparceners in the family, according to the rule of devolution by survivorship.

Section 6 dealing with the devolution of the interest of a male Hindu in coparcenary property and while recognising the rule of devolution by survivorship among the members of the coparcenary, makes an exception to the rule in the proviso. According to the proviso, if the

deceased has left him surviving a female relative specified in Class I of Schedule I, or a male relative specified in that Class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession under this Act and not by survivorship. Further, under section 30 a coparcener may make a testamentary disposition of his undivided interest in the Joint family property.

The rule of survivorship comes into operation only:- (1) where the deceased does not leave him surviving a female relative specified in Class I, or a male relative specified in that Class who claims through such female relative and , (ii) when the deceased has not made a testamentary disposition of his undivided share in the coparcenary property. The Schedule to the Act read with Section 8 provides the following twelve relations as Class I heirs son; daughter; widow; mother; son of a predeceased son; daughter of a pre-deceased son; son of pre-deceased daughter; daughter of a pre-deceased daughter, widow of a pre-deceased son; son of predeceased son of a pre-deceased son; daughter of pre-deceased son

of a predeceased son; widow of pre-deceased son
of a pre-deceased son.

Section 6 contemplates the existence of coparcenary property and more than one coparcener for the application of the rule of devolution by survivorship. The head note of the section reads "Devolution of interest in coparcenary property". The language of the main provision to the effect that "his interest in the property shall devolve by survivorship upon the surviving members" indicates that the devolution by survivorship is with reference to the deceased coparcener's interest alone; this coupled with the notional partition contemplated in Explanation 1 in this section for the ascertainment of the interest of the deceased coparcener in a Mitakshara coparcenary property indicates that there is no disruption of the entire coparcenary. It follows that the other coparceners, would continue to be joint in respect of the other coparcenary property till a partition is effected.

It has already been pointed out above that the main provision of this section deals with the devolution of the interest of a coparcener dying intestate by the rule of survivorship and the proviso speaks of the interest of the deceased in the Mitakshara Coparcenary Property. Now, in

order to ascertain what is the interest of the deceased coparcener, one necessarily needs to keep in mind the two Explanations under the proviso. These two Explanations give the necessary assistance for ascertaining the interest of the deceased coparcener in the Mitakshara Coparcenary Property. Explanation I provides for ascertaining the interest on the basis of a notional partition by applying a fiction as if the partition had taken place immediately before the death of the deceased coparcener. Explanation II lays down that a person who has separated himself from the coparcenary before the death of the deceased or any of the heirs of such divided coparcener is not entitled to claim on intestacy a share in the interest referred to in the section.

Under the proviso if a female relative in class I of the schedule or a male relative in that class claiming through such female relative survives the deceased, then only would the question of claiming his interest by succession arise. Explanation I to section 6 was interpreted differently by the High Courts of Bombay, Delhi, Orissa and Gujarat in the cases¹ where the female relative happened to be a wife or the

mother living at the time of the death of the coparcener.¹

In 1956 the Hindu Law underwent extensive reforms inter alia in the law of inheritance and succession. The enactment of the Hindu Succession Act, 1956 dealt with coparcenary property which survived upon any of the coparceners having female heirs. This brought about a departure from the old Hindu Law such that upon the death of any coparcener the incidents of coparcenary property and its survivorship was largely diluted.

The above rules of devolution of interest in coparcenary property would, therefore be, to the extent stated in Section 6 of the HSA, overridden and would cease to apply as inconsistent with the provisions of the HSA. Consequently in case of ancestral property consisting of a father and his sons and grandsons only the rules of coparcenary property under the uncodified law would still prevail. But if the father has e.g. not only sons but also daughters and not only grandsons but also granddaughters his interest in coparcenary property would not survive to the other members of the coparcenary but would succeed to his heirs

¹ Law Commissions 174th Report

so that not only his sons and grandsons would get an increased share upon his death, but his successors being his sons, daughters as also his widow and his mother would succeed to his interest in the coparcenary property under the provisions of the HSA. Hence there is a notional partition which is deemed to have been effected upon the death of a coparcener under Section 6 of the HSA 1956. The share so separated devolves upon the heirs of the deceased instead of vesting in the other coparceners by survivorship. Such partition does not bring about disruption in the coparcenary. It is only the interest of the deceased which is separated. The coparcenary minus the interest of the deceased continues with its incidents. The surviving coparceners continue as such. Further amendment to Section 6 by the Amendment Act 39 of 2005 which came into effect from 09.09.2005 brought about further changes in devolution of interest of a Hindu male in coparcenary property. There would be a notional partition under Section 6 of HSA, 1956 if a female relative (heir) or a person claiming through female relative (heir) was left by the deceased male Hindu coparcener. There shall be a deemed partition under the statutory provisions

contained in Section 6(3) of the Act as amended in 2005. That would be a partition of the interest in Mitakshara property of a Hindu dying intestate. Consequently after 2005 upon the death of a coparcener, leaving any child, his son and his daughter would share equally in his interest in coparcenary property. They would share as if there was a partition. For all the Hindus dying after the commencement of the Amendment Act, leaving any child, the interest in the joint family property which he had would not survive at all. It would only succeed - either by testamentary or intestate succession. This has brought about a total departure from the law relating to the coparcenary property. After 2005 for all Hindus leaving any child there could be no case of survivorship at all; after 1956 but before 2005 there would be survivorship of interest in coparcenary property but only in a family having no female relatives (heirs). Even during that period in a family having female relatives (heirs) there would be no survivorship but only succession of the interest of a Hindu male in Mitakshara coparcenary property.

The Schedule annexed to Section 8 showing Class I and Class II heirs show the son, daughter, widow and mother of a Hindu male

dying intestate as his first heirs. Along with them are included the sons and daughters of predeceased sons and daughter; a grandson is not included anywhere in Class I or Class II of the schedule to Section 8 of the HSA. The grandson never succeeds to the property of the Hindu male dying intestate. That includes also the interest in the joint family property which that Hindu male had and which would constitute his property or his estate. The act also deals with the property of a female Hindu which would be her absolute property under Section 14 and the rules of succession of female Hindus under Sections 15 & 16 but with which the dispute in this case is not concerned and hence which shall not be dealt with.

Hence if there are two or more heirs when they succeed to a property, the property would devolve upon them per capita each one taking for that branch and as tenants in common so that the heirs of any deceased successor would claim the share of such successor. This is a further departure from the uncodified Hindu Law of survivorship of a coparcenary property in which the shares would fluctuate on the birth and death of any male member so that the other surviving male members would get a decreased or

increased share upon the birth and death respectively thus augmenting the shares of all the survivors. The shares of the successors under the Hindu Succession Act would not so augment. Each branch would take its share; the increase and decrease would be within that branch. The successors of those successors alone would get that share.

The interest of a Hindu in a coparcenary part which would otherwise survive to other coparceners equally can, therefore, be disposed of by will. Consequently the interest of a Hindu in Mitakshara coparcenary property would not per se survive upon coming into force of the HSA. If the Hindu does not leave behind any will it would only succeed to his/her heirs under Section 8/15 of the Act as applicable.

Consequently the general rules of jointness of a Hindu family, being community of interest and unity of possession, the incidents of a joint family property, the coparcener surviving to the interest of a deceased coparcener, the share of a coparcener diminishing or augmenting upon the death or birth of another coparcener, the joint ownership of a coparcener, the undivided share of coparcenary etc. stand diluted upon any

coparceners having any female heir since 1956 in respect of such interest.

The true effect of the uncodified Hindu law relating to the Hindu coparcenery, therefore, applied only so long as there were only male heirs in that HUF after 1956. It would continue as before until any one coparcener died. The devolution of interest in the coparcenary got changed as per Section 6 of the HSA. It continued as before if he had only sons. It came to an end in effect if he had a single daughter or even a predeceased son having a single daughter such that he had a female relative (heir) or a male heir claiming through a female relative (heir).

Supreme Court in the case of **Commissioner of Wealth-tax, Kanpur Vs. Chander Sen AIR 1986 SC 1753** relating to partition of joint family business. In that case there was a partition of joint family business between the father and his only son. The father and son continued the business in partnership. The son formed the joint family with his own sons. The father died leaving behind amounts standing to the credit of the father in the partnership account. That amount was held to have devolved upon his son by succession. The son was his only heir. The son

was, therefore, held to have inherited that property as an individual and not as Karta as his own joint family. That judgment relates to the account of property which an heir succeeds to. It does not deal with succession of a deceased Hindu male alone. It deals with how the property is to be assessed. In that case there was a partition. Upon partition the share coming to the coparceners would be their separate individual property acquired by them on partition. The property would no longer be coparcenery. That property would have to succeed; it can never survive to the other coparceners, because there are no coparceners upon the partition. The joint Hindu family comes to an end upon the partition. That property being the self acquired property of a given coparcener, who no longer is a coparcener because the joint Hindu family no longer continues joint, would succeed under Section 8 to Class I heirs initially.

Hence any property which devolves under Section 8 of the HSA upon the death of a Hindu male would be his own individual property incapable of partition. It would be his own property in which his son or grandson would have no interest during his lifetime. The properties which devolve under Section 8 of the HSA are self

acquired properties or partitioned HUF properties. They are not ancestral HUF properties which are not partitioned. The law which as laid down by the Supreme Court considering the aforesaid judgments of various High Courts was in respect of separate or partitioned properties. The law is the same also with regard to the interest of a coparcener in ancestral properties in case where the ancestor had female relatives (heirs).

It must be appreciated that when a joint Hindu family consists only of a father and a son both have an equal interest in the joint family property. On the death of the father, the father's interest would survive to the son if he has no child. It would succeed to the son if he has a female child (heir) after 1956 and if he has either a female or a male child (heir) after 2005. In such a case the entire estate of the father would devolve upon the son by succession or survivorship. Where, however, there are more coparceners in a joint Hindu family, the entire estate of the father would be less than the entire coparcenary properties. In such a case interest of the father would succeed to his heirs under Section 8 of the HSA and the remainder of the coparcenary properties would remain in the coparcenary and

the other coparceners would continue to be such. Since the coparcenary would then remain, their interest would be diminished by the birth of any member in the coparcenary (either male or female after 2005) and would be augmented upon the death of any coparcener (who does not leave behind any heir).

In the case of **Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum & Ors. AIR 1978 SC 1239** it is held that the share of the deceased in the coparcenary property must be ascertained to ascertain the share of the heirs in the property of the deceased coparcener. The share that will succeed to them is only the share in the property that would have been allotted to the deceased coparcener if a partition of that property had taken place immediately before his death. It must, therefore, be assumed that the partition had so taken place. The share of the other heirs cannot be ascertained without reference to such share which would devolve by succession. All the consequences which flow from a real partition have to be logically worked out so that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition

which had taken place during the lifetime of the deceased. Hence the heirs of such deceased coparcener will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death in addition to the share which he or she would receive in the notional partition. Similarly the share of the widow in the coparcenary property would be ascertained by adding the share to which she is entitled upon the notional partition during her husband's lifetime to the share which she would get in the husband's interest upon his death.

It can be seen that the plaintiffs have not understood the concept of joint ownership and co-ownership of ancestral properties. Ancestral properties cannot be jointly owned. Joint properties survive to the joint holders entirely upon the death of one joint holder. Ancestral properties survive to all the members of the coparcenary. Ancestral properties can be co-owned by community of interest and unity of possession such that each party is an owner of an undivided share. Upon the incidents of joint family property or coparcenary property, this interest is augmented by the death of any coparcener (co-owner) and is diminished by the birth of any coparcener in the HUF. The fact

remains that the properties in Exhibit A stated to be the co- owned or jointly owned are unmistakably and repeatedly stated to be ancestral properties. The ancestral properties would survive to the coparceners in a Hindu coparcenary owning such joint family properties. The only exceptions to that would be the interest of the deceased Hindu in such coparcenary.

Alienation can be made for the benefit of the estate, for legal necessity or for meeting any antecedent debts, for management of the joint property by the Karta or pious obligation of a son to discharge his father's debts subject to Section 6(4) of the has as amended in 2005 which runs thus. (4). After the commencement of the Hindu Succession (Amendment) Act, 2005, no Court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect-

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Apex Court in its judgment in the case of Bhagwati Prasad Sah and others v. Dulhin Rameshwari Kuer and another, reported in AIR 1952 SC 72. The relevant portion contained in para 13 is reproduced below : "13. ... We think, however, that the statements could be admitted under Section 32(3) of the Evidence Act. The statements of a particular person that he is separated from a joint family, of which he was a coparcener, and that he has no further interest in the joint property or claim to any assets left by his father, would be statements made against the interest of such person, and, after such person is dead, they would be relevant under Section 32(3) of the Evidence Act. The assertion that there was separation not only in respect of himself but

between all the coparceners would be admissible as a connected matter and an integral part of the same statement (vide Blackburn, J. in Smith v. Blakey). It is not merely the precise fact which is against interest that is admissible but all matters that are "involved in it and knit up with the statement. ..."

Uttam vs. Saubhag Singh and Ors.:

MANU/SC/0256/2016 - The law, therefore, insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, could therefore be summarized as follows:

(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

(ii) To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be

disposed of by him by will or other testamentary disposition.

(iii) A second exception engrafted on proposition (i) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

(iv) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

(v) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy and not survivorship.

(vi) On a conjoint reading of Sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with Section 8 on

principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants.

INSIDE VARIATIONS IN MITAKSHARA SCHOOL OF HINDU LAW

Justice T.S. Thakur and Justice K. Sreedhar Rao of Karnataka High court in the case of *Irappa vs. Gurusiddappa and Ors.* **2000 (4) KCCR 2786 (DB) : MANU/KA/0729/2000** clarified the law, The uncoded personal law relating to Partition and Succession was not rather uniform to all the places in India. It is only after the passing of the Hindu Succession Act, to a very great extent, the uniformity in principles and practice has been achieved. In uncoded law, there are two major schools of thought - one is Dayabhaga School followed in Bengal Area and the other Mitakshara School followed in the rest of India. The Mitakshara is sub-divided into four minor schools: Benares School; Mithila School; Maharashtra or Bombay School (Western India); and Dravida or Madras School (Southern India); The Maharashtra or Bombay School, also

known as the School of Western India, claims in respect of certain matters to be the most liberal of the different schools of Hindu Law. In Western India, sometimes mentioned as the Bombay Presidency, the pre-eminence of the Mitakshara is generally admitted. The relative position of the Mitakshara and the Vyavahara Mayukha which are proximate authorities as well as of the other works accepted as authorities in the old Bombay Presidency and in other parts of Western India is discussed in several cases decided by the Bombay High Court. While the parental authority of the Mitakshara is never questioned; some of the rules there stated have not been accepted and preference has been given to those put forward in the Vyavahara Mayukha in certain parts of Western India. The Mitakshara ranks first and paramount in the Maharashtra, Northern Kanara and the Ratnagiri District. But in Gujarat, the Island of Bombay and the North Konkan, the Mayukha is considered as the overruling authority where there is a difference of opinion between it and the Mitakshara. The principle, however, adopted by the High Court of Bombay, and sanctioned by the Privy Council, is to construe the two works so as to harmonize

them with each other wherever and so far as that is reasonably possible.

Obviously, the litigation pertains to the area which is a part of Bombay Presidency governed by Bombay School of thought.

In Sidrappa alias Shidramappa Bhagappa Patil v. Laxmi Bai and Ors. 1965 (1) MLJ 625, a question arose before this Court about the right of a mother entitled to a share equal to that of a son at a partition, when the parties are governed by Bombay School of thought. The said custom was analysed in the context of the provision of Sections 4 and 6 of the Hindu Succession Act and was held that, Section 4 does not abrogate the said rule of Hindu Law which was in force in the State of Bombay, entitling the mother to a share equal to that of a son at a partition.

In the State of Karnataka, except the Bombay-Karnataka area, old Mysore Area, Hyderabad-Karnataka Area follow the Madras School of Hindu Law, where, a mother is not entitled to receive a share equal to that of a son at a partition (1988) 2 KLJ 155 para 29, unlike in the Bombay-Karnataka Area where Bombay School of thought prevails.

The case in **Gurupad Khadappa Magdum v. Hirabai Khadappa Magdum and Ors.**

MANU/SC/0407/1978 : AIR 1978 SC 1239

also pertaining to the parties governed by Bombay School of Law. The Supreme Court interpreting the effect of Explanation-I of Section 6 has explained the formula for working out a share of a mother or wife at a partition thus: 9. The next step, equally important though not equally easy to work out, is to find out the share which the deceased had in the coparcenary property because after all, the Plaintiff has a 1/6th interest in that share. Explanation 1 which contains the formula for determining the share of the deceased creates a fiction by providing that the interest of a Hindu mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death. One must, therefore, imagine a state of affairs in which a little prior to Khandappa's death, a partition of the coparcenary property was effected between him and other members of the coparcenary. Though the Plaintiff, not being a coparcener, was not entitled to demand partition yet, if a partition were to take place between her husband and his

two sons, she would be entitled to receive, a share equal to that of a son. (see Mulla's Hindu Law, Fourteenth Edition, page 403, para 315). In a partition between Khandappa and his two sons, there would be four sharers in the co-parcenary property, the fourth being Khandappa's wife, the Plaintiff. Khandappa would have therefore got a $\frac{1}{4}$ th share in the coparcenary property on the hypothesis of a partition between himself and his sons. 10. Two things are thus clear: One, that in a partition of the coparcenary property Khandappa would have obtained a $\frac{1}{4}$ th share and two, that the share of the Plaintiff in the $\frac{1}{4}$ th share is $\frac{1}{6}$ th, that is to say, $\frac{1}{24}$ th. So far there is no difficulty. The question which poses some-what difficult problem is whether the Plaintiff's share in the coparcenary property is only $\frac{1}{24}$ th or whether it is $\frac{1}{4}$ th plus $\frac{1}{24}$ th, that is to say, $\frac{1}{24}$ th. The learned trial Judge, relying upon the decision in Shiramabai (MANU/MH/0050/1964 : AIR 1964 Bom 263) which was later overruled by the Bombay High Court, accepted the former contention while the High Court accepted the latter. The question is which of these two views is to be preferred.

11. We see no justification for limiting the Plaintiff share to $\frac{1}{24}$ th by ignoring the $\frac{1}{4}$ th share

which she would have obtained had there been a partition during her husband's lifetime between him and his two sons. We think that in overlooking that 1/4th share, one unwittingly permits one's imagination to boggle under the oppression of the reality that there was in fact no partition between the Plaintiff's husband and his sons. Whether a partition had actually taken place between the Plaintiff's husband and his sons is besides the point for the purpose of Explanation 1. That Explanation compels the assumption of a fiction that in fact "a partition of the property had taken place", the point of time of the partition being the one immediately before the death of the person in whose property the heirs claim a share.

EVEN OLD HINDU LAW APPLY TO WHAT EXTENT EXPLAINED

The Additional Commissioner Of ... vs P.L. Karuppan Chettiar AIR 1979 Mad 1 (FB) - Approved by Supreme court in Commissioner Of Wealth Tax. ... vs Chander Sen Etc AIR 1986 SC 1753

Referring to the preamble to the statute, it is clear that what was intended by enacting the statute was to provide for intestate succession among Hindus. The preamble reads-

"An Act to amend and codify the law relating to intestate succession among Hindus." Now, turning to Section 4 of the Act, we find that only a limited overriding is intended by the passing of the Act. Section 4(1)(a) says-

"(1) save as otherwise expressly provided in this Act-

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act."

It is seen from Section 4(1)(a) that the same limitation is contained in Section 4(1)(b) as well. From this, it is possible to conclude that the statute has no intention whatever of abrogating the principles of Hindu Law in toto or in a comprehensive manner and that it intends only to affect those principles to the extent to which provision had been made in the Act which abrogates or strikes a discordant note to the principles of the established Hindu Mitakshara law. When we look at Section 6 of the Act, we find

that the main body of the section in specific terms refers to the principles of survivorship obtaining in Hindu Law and serves it. But to this section engrafted a provision which clearly makes an inroad into the principle of survivorship in certain circumstances. It is unnecessary to deal with those circumstances because we are not concerned with that provision. The section with which we are concerned in this case is Section 8 and we shall extract that section in toto:

"The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter-

- (a) firstly, upon the heirs being the relatives specified in class 1 of the schedule;
- (b) secondly, if there is no heir of class 1, then upon the heirs, being the relatives specified in class II of the schedule;
- (c) thirdly, there is no heir of any of the two classes, then upon the agnates of the deceased; and
- (d) lastly, if there is no agnate, then upon the cognates of the deceased".

From this section, it is clear that when a male Hindu dies intestate, his property shall first develop upon his heirs, being the relatives specified in class I of the schedule and what is

said in this section and in Section. 9 will show that among the heirs specified in the schedule, those in class 1 shall take simultaneously and to the exclusion of all other heirs; those in the first entry is Class II shall be preferred to those in the second entry; those in the second entry shall preferred to those in the third entry; and so on in succession. The relatives specified in Class II will get a chance only if there is no heir of class I, and if there is no heir of any of the two classes, the agnates of the deceased will get the chance and lastly, if there is no agnates, the cognates of the deceased will take the property. We are not concerned in this case with the effect of succession opening to relatives specified in class II, or to agnates or cognates. There are heirs under class I and this is clear from the facts as already stated. The question is only, therefore as to how those heirs take the property under Section 8. If the mode of division provided by the section is different from that which obtained before the Hindu Succession Act came into operation, in accordance with the principles of Hindu Law in view of what is categorically stated in Section 4 of the Act, it is Section 8 of the Act that should prevail and not the principles of Hindu Law. If there is difference in the scope and

effect regarding the mode of method of devolution that is provided in Section 8. It is Section 8 which should be applied and not the principles of Hindu Law. We should, therefore, try to formulate what are the principles of Hindu Law applicable in the circumstances of this case.

5. That is a case where a person who had obtained the property under partition died. His name was Palaniappa. When he died, his son Karuppan was alive. We are concerned with the property which Palaniappa had obtained in the partition. In that partition, Karuppan was also a party. We are concerned with the question of devolution of the property of Palaniappa which he obtained in the partition and which had devolved on some persons, after his death. Not only was Karuppan alive at the time of the death of Palaniappa, but at the time of his death, Karuppan's son was also alive. In such circumstances, under the Hindu Law, the property will devolve on the son and the grandson will also have an interest in the property; and the two together will form a Hindu undivided family (we are of course assuming that there were no female).

6. The question is whether when succession opens under Section 8, Karuppan and

his son will take the property in the same manner. Clearly, this is not so. When we search for the relatives mentioned in class I of the schedule, which is attracted by virtue of Section 8, we find no sons are mentioned at all. though the grandson of a deceased son is mentioned. What would be the effect when such a grandson comes into the picture need not be dealt with in this case. But where the son as well as his son are the persons concerned, by applying Section 8, we have to come to the conclusion that the father along, namely Karuppan in this case would inherit the property to the exclusion of the grandson. This being the effect of the statutory provision, no interest would accrue to the grandson in the property which belonged to Palaniappa. Even assuming Palaniappa's property was ancestral property in the hands of Karuppan, still because of the effect of the statute, Karuppan's son would not have an interest in the property. This was directly derogatory of the law established according to the principles of the Hindu Law and this provision in the statute must prevail in view of unequivocal expression of the intention in the statute itself which said that to the extent to which provisions had been made in the statute, those provisions

should override the established provisions in the texts of Hindu Law.

HOW HINDU LAW IS INTERPRETED BY COURTS IN ENGLISH ERA

Madras High court in 1925 reported case of **Viswanatha Mudali And Anr. vs Doraiswami Mudali And Anr. (1925) 49 MLJ 684** has quoted one Patna High Court facts and said "In a recent case the Patna High Court held that the sons of the daughters of Hindus of the Naick caste who were converted to Muhammadanism but who lived with their Hindu grand parents and were brought up as Hindus are governed by the Hindu Law even though they have adopted the profession of dancing and have become prostitutes. Jwala Prasad, J., after an exhaustive consideration of the texts contained in the Srutis and Smrithis relating to the point and the decided cases bearing on the point has come to the conclusion that the sons of the prostitutes converted to Muhammadanism who were brought up by the Hindu grand parents as Hindus are governed by the Hindu Law. It follows from this decision that the Hindu Law is the proper law which governs the relations and the inheritance

of persons who are Hindus in faith and customs and manners. Though it is stated that a Hindu is born and not made yet when the question is what is the law applicable to persons who are Hindus in fact, the only answer is that the ordinary Hindu Law is applicable and if the ordinary Hindu Law is applicable, unless there is some prohibition, statutory or otherwise, the whole of that law is applicable."

Another quoted case:-

In **Mayna Bai v. Utlaram (1861) 8 M IA 400** the facts briefly are: One Hughes kept two married women as his concubines. One of them was a Gowda Brahmin. Two sons were born to the Brahmin woman and he bequeathed his property to the sons. One of the sons died and the other son claimed to succeed him. The Privy Council held that the illegitimate children of a Brahmin married woman born to a European father were to be considered as Hindus and their rights governed by that law. On the remand the Madras High Court held in *Mayna Bai v. Uttaram* (1864) 2 M HCR 196 that the sons of an English man by a Brahmin woman living apart from her husband were Hindus and their rights were to be determined by the rights of the class of Hindus to

which they belonged ; and they also held that they were to be regarded as Sudras or a class still lower, and in the absence of preferable heirs the two sons inherit the property of the mother and of one another. It was not possible to plead any custom in support of the claim. The learned Judges observed at page 203: Our reasoning, therefore, is that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring. Taukuram and his brother are decided to be Hindus. They are the Hindu sons of a woman who was either a woman of a class lower than the fourth of Manu's classes, and in this case sons are cognate to her and to one another, as the children of a class not twice-born out of wedlock, and entitled to inherit to their mother, and only not capable of inheriting to their father, because he is not a Hindu at all. If not so, she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever."

UNCHASTITY A GROUND OF ATTACK ON WOMENS INHERITANCE TO PROPERTY

Ramkrishna Kuppuswami vs. Tripurabai Kuppuswami: MANU/MH/0118/1908 - 1908

(10) BomLR 1029 - But the learned Judges in the Madras judgment rely on certain observations of the Privy Council in the well-known case of *Moniram Kolita v. Kerry Kolutany* MANU/PR/0007/1880 as having "an important bearing on the question now under consideration" and as lending support to their view. The observations are :- But, further, the widow has a right to sell or mortgage her own interest in the estate.... If the estate ceases by an act of unchastity, the purchaser or mortgagee might be deprived of the estate, if the surviving brother of the husband should prove that the widow's estate has ceased in consequence of an act of unchastity committed by her prior to the sale or mortgage. 7. Laying emphasis on the word " prior," the learned Judges in their judgment remark:-. It will be noted that in this passage the Privy Council distinctly assume that even if the widow's estate should cease by her committing an act of unchastity and the succession of her husband's heirs should thereby be accelerated, the purchaser or mortgagee, from her, of her own life interest in the estate, would not be divested of it, if the sale or mortgage had taken place prior to her act of unchastity, but only if it has been subsequent thereto.

8. The observations of the Privy Council must be read by the light of the context in which they occur. The question in Moniram Koltas case was whether unchastity in a widow causes forfeiture of the property which she has inherited from her husband, where such unchastity is subsequent to the inheritance. After dealing with the texts in the Hindu law books on the subject, and concluding on the strength of those texts that such unchastity does not cause forfeiture, their Lordships proceed to refer to Mr. Justice Jackson's judgment as pointing out " the mischief, uncertainty and confusion that might follow upon the affirmance of the doctrine that a widow's estate is forfeited for unchastity, particularly, in the present constitution of Hindu society and the relaxation of so many of the precepts relating to Hindu widows." It is in this latter connection that the observations in question occur in the judgment of the Privy Council. First, their Lordships point out that if unchastity in a widow were held to involve the consequence of forfeiture of her estate, the reversionary heir of her husband, if he happened to be her husband's brother, might lead her into temptation and thus accelerate the succession in his own favour. That is one mischief. Next it is

pointed out that a person who had taken a purchase or mortgage from her after her unchastity might suffer. The hardship, uncertainty and confusion, in such a case is obvious. The purchaser or mortgagee might not know of the unchastity at the time of the alienation in his favour, and to be deprived of the estate because the unchastity is subsequently, proved is hard upon the alienee because, in that event he must be treated as a trespasser *ah initio*, having taken the transfer without any title. These considerations do not exist in the case of a purchase or mortgage before the act of unchastity. There the purchaser or mortgagee takes a good title, subject to the condition that it will last until the widow's estate as heir is terminated in any of the modes recognised by Hindu law. Upon the hypothesis that unchastity is one of those modes, the purchaser or mortgagee, who takes the property subject to that condition, cannot complain of hardship if subsequently the widow turns out to be unchaste because till then he has the right to the estate. It is in this light that the Privy Council would seem to have made the observations above cited.

In case of Smt. Chandrama Biswal Vs. Banchhanidhi Biswal reported in MANU/OR/0249/2010 : (2011) 48 Orissa Criminal Reports 688, it has been held that expression "living in adultery" does not connote either a single act of adultery or even several such isolated acts. It denotes a course of continuous adulterous conduct. Unsuccessful bid by the husband to castigate the wife as a person living in adultery entitles her to live separately from her husband and claim maintenance from him. The very allegation by the husband and members of his family that the wife is having extra-marital relationship with a person other than her husband is insulting and humiliating her amounting to cruelty.

In case of Srikanta Padhy Vs. Prabasini Dixit reported in MANU/OR/0105/1996 : 1997 (I) Orissa Law Reviews 156, it is held as follows:-
 "9. Genarally speaking any intentional and malicious infliction of physical or mental suffering, or the wanton, malicious and unnecessary infliction or pain upon body or the feelings and emotions would amount to cruelty. In matrimonial relation, cruelty includes mental as well as physical injury. A deliberate false

imputation with intent to wound and humiliate the other spouse and to make his or her life miserable amounts to cruelty."

In case of Apsar Alli Khan Vs. Saida Begum reported in MANU/OR/0264/2012 : 2012 (II) OLR 633, it is held that the petitioner had made allegations against the wife regarding her character. However, he has not substantiated those pleas by specifying the name of the person and the detailed facts. When a husband makes allegations against the wife regarding her character, he has to prove those allegations with sufficient materials.

In case of Nirmala Chandra Dash Vs. Smt. Janaki Dash reported in MANU/OR/0314/2012 : 2013 (I) Current Legal Reports 792, a Division Bench Court held that since the appellant's husband has brought a serious charge against the wife that she was an unchaste woman and living in adultery which charge he has failed to establish, relying upon the observation made in Smt. Pramila Dei @ Kuni Vs. Sanatan Jena reported in MANU/OR/0290/1989 : Vol. 67 (1989) Cuttack Law Times 393, maintenance was awarded in favour of the wife.

In case of Smt. Kuni Dei Vs. Pabitra Mohan Behadi reported in MANU/OR/0173/2013 : 2013 (II) OLR 599, it is held that it is the person, who makes the allegation of adultery, has to establish the same. 'Adultery' being a serious allegation, which affects the chastity of a woman, should not be dealt casually, rather great care and caution should be taken while considering such allegations.

In case of Vijay Kumar Vs. Neela Vijay Kumar reported in MANU/SC/0316/2003 : A.I.R. 2003 S.C. 2462, it was held that leveling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extra marital relationship is a grave assault on the character, honour, reputation, status as well as health of the wife. Such aspersions of perfidiousness attributed to the wife, viewed in the context of an educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult and cruelty, sufficient by itself to substantiate cruelty in law, warranting the claim of the wife being allowed.

In case of Narendra Vs. K. Meena reported in MANU/SC/1180/2016 : A.I.R. 2016 S.C. 4599,

it is held that though it is very difficult to establish the allegations relating to extra-marital affair but it is equally true that to suffer an allegation pertaining to one's character of having an extra-marital affair is quite torturous for any person, be it a husband or a wife.

In case of Sowmithri Vishnu Vs. Union of India reported MANU/SC/0199/1985 : A.I.R. 1985

SC 1618, it is held that the wife who was involved in illicit relationship with another man, is a victim and not the author of the crime of adultery.

In case of W. Kalyani Vs. State reported in MANU/SC/1455/2011 : A.I.R. 2012 S.C. 497,

it is held that the mere fact the appellant is a woman makes her completely immune to the charge of adultery and she cannot be proceeded against for the offence of adultery even as an abettor.

A.N. Amruth Kumar vs. A.N. Vanitha and Ors.:

MANU/KA/3811/2019 - It is relevant to note that the Parliament has repealed the Hindu Widows' Remarriage Act, 1856 w.e.f. 31.08.1983.

Thus, even otherwise also an argument that could have been constructed on the basis of Section 2 of the said Act to deny property to the widow because of she contracting the marriage for rebuilding her life now does not avail at all. If unchastity or remarriage of a Hindu widower is not a ground to divest the property vested in him, it strikes at the root of law, at reason and justice to divest a Hindu widow of the property vested in her only because she has contracted a second marriage, especially when the Constitution of India mandates Gender Equality.

Smt. Kasturi Devi v. Deputy Director of Consolidation and Ors. MANU/SC/0531/1976 : (1976) 4 SCC 674, Court while considering the Hindu Succession Act, 1956 held that mother cannot be divested of her interest in her son's property either on the ground of unchastity or remarriage.

Kerala High Court, in Thankam v. Rajan AIR 1999 Kerala 62, held that remarriage of the wife cannot be a ground for her losing right to succeed to her deceased husband's property.

Court, in Velamuri Venkata Sivaprasad (Dead) by LR. v. Kothuri Venkateswarlu (Dead) by LRs and Ors. MANU/SC/0740/1999 : AIR 2000

SC 434 , held: 52. Incidentally, Section 24 of the Succession Act of 1956 placed certain restrictions on certain specified widows in the event of there being a remarriage; while it is true that the section speaks of a pre-deceased son or son of a pre-deceased son but this in our view is a reflection of the Shastric law on to the statute. The Act of 1956 in terms of Section 8 permits the widow of a Hindu male to inherit simultaneously with the son, daughter and other heirs specified in Class I of the Schedule. As a matter of fact she takes her share absolutely and not the widow's estate only in terms of Section 14. Remarriage of a widow stands legalised by reason of the incorporation of the Act of 1956 but on her remarriage she forfeits the right to obtain any benefit from out of her deceased husband's estate and Section 2 of the Act of 1856 as noticed above is very specific that the estate in that event would pass on to the next heir of her deceased husband as if she were dead. Incidentally, the Act of 1856 does not stand abrogated or repealed by the Succession Act of 1956 and it is only by Act 24 of 1983 that the Act stands repealed. As such the

Act of 1856 had its fullest application in the contextual facts in 1956 when Section 14(1) of the Hindu Succession Act was relied upon by Defendant 1.

In Narsimhulu v. Manemma, MANU/AP/0257/1988 : AIR 1988 AP 309 , while dealing with Sections 4, 6 Proviso, Sections 24 to 26 and 28 of Hindu Succession Act, 1956 and right of inheritance vis-a-vis unchastity it was held : "Unchastity of a widow is not a bar to inherit her deceased husband's estate. Section 4 provides that any pre-existing law, which is inconsistent with the provisions of the Act, shall cease to have effect. Sections 24 - 26 prescribe disqualifications; and Section 28 removes disabilities. Under the Shastrik Law preceding the Act, unchastity of a widow was a disqualification. But the Legislature did not engraft the unchastity as a disqualification. Under Section 24 re-marriage was provided as a disqualification but not unchastity. On the other hand, Section 28 engrafts a wide language 'on any other ground whatsoever' encompassing within its ambit any other ground which was a disqualification under the Shastrik Law excepting those disqualifications expressly recognized.

Articles 14 and 15 of the Constitution provide equality of every citizen regardless of sex and prohibits invidious discrimination, enables the Legislature to make inroads into the pre-existing law. The Legislature felt the need most acute to remove many a disability under which the Hindu women are reeling from in matters of inheritance, succession rights. It animated to remove all the disabilities except those prescribed under the Act, used the appropriate language in Section 4 and chose not to make unchastity a disqualification. On the other hand, Section 28, while enumerating removal of named disabilities, used in a wide language 'on any ground whatsoever' which engulfs in its ambit 'unchastity too'. Youthful urge and satiety of biological need may lead to astray and its abhorrence to keep to family prestige or social cohesion may be understandable. But moral or righteous indignation to unchastity or ethical foundation or sentiments of the people 'would not should not' stand in the way to the statutory construction of the wide language 'on any ground whatsoever' and effect given. The doctrine of ejusdem generis cannot be applied while interpreting the term "on any ground whatsoever" and it must be construed broadly. The Legislature intended to wipe out the

pre-existing disqualification of unchastity as a bar to succeed to the deceased coparcener".

WIDOW WAS UNDER GREAT DISABILITY IN OLD LAW

Ramkrishna Kuppuswami vs. Tripurabai Kuppuswami: MANU/MH/0118/1908 - 1908

(10) BomLR 1029 - Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life whereas the right ceases on her death. But the right of maintenance, so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage. These are indisputable propositions of law and indeed they are admitted in the Madras judgment on the authority of the Privy Council ruling in Dhurm Das Pandey v. Mussumat Shama Soondri Dibidh (1843) 3 M.I.A. 242. If the widow, before

the adoption, severs a portion of the in-heritance therefrom and transfers it to a stranger, without any : proper or necessary purpose binding the estate absolutely according to Hindu law, the transfer, logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

But in support of their view the learned Judges who delivered the judgment in *Sreeramulu v. Kristamma* ILR (1902) Mad. 143, rely on those decisions of the Privy Council and of our High Courts, in which, it has been held that a Hindu widow has, "an absolute right to the fullest beneficial interest in her husband's property for her life," that is, "during the term of her widowhood." Now, as a general proposition of Hindu law, that is true. But the cases in which it has been so held and which are cited in the Madras judgment, were cases in none of which was any question of an adoption by the widow and the effect it has on her estate as heir of her husband, involved. It is straining the language of those decisions, particularly of the words "during her widowhood," to apply them to a state of facts not contemplated or covered by those decisions.

That general proposition is qualified by the proposition laid down in other cases that such an adoption puts an end to that estate and divests her of it, though her widowhood continues.

Gopalakrishna (D) by L.Rs. and Ors. vs. Narayanagowda (Dead) by L.Rs. and Ors.: MANU/SC/0467/2019 - (2019) 4 SCC 592 -

One Ramanna was owner of properties which were scheduled to plaintiff. He passed away in 1907. He was married to Jankamma (first wife) who predeceased him. Second wife Seethamma passed away in year 1938. Through his first wife (Jankamma), he had a daughter named Venkamma. Venkamma passed away in 1910. Venkamma, in turn, had a daughter named Jankamma. Appellants claimed right to properties by virtue of sale deeds executed by Jankamma in year 1955. After sale executed by Jankamma, father of first Plaintiff and second Plaintiff claimed that, they were in possession of suit properties. Respondents filed suits for declaration of their title and injunction. Said suit was decreed by trial Court. High Court found that during life time of Jankamma although properties were sold by Seethamma in favour of his brother Srinivasa Rao but she had not challenged same,

so possession of properties by Defendants by virtue of sale deed in favour of Srinivasa Rao and by Srinivasa Rao in favour of Respondents remained unchallenged and that, would be starting point of limitation. Transferees from Jankamma namely Appellants moved Court only in 1975, 1985 and 1986. As per Madras School of Mitakshara Law in a catena of decisions, it was held that at a place other than Bombay State, right of survivorship necessarily was in favour of widow than the daughter and grand-daughter. So alienation made by Seethamma in favour of Srinivas Rao and by Srinivas Rao to Respondents could not be said to be invalid.

Thereafter, Court referred to 'the State Act' and observed that, even under Section 4 as per Section 4(1)(ii) of State Act, widow stood in preference to daughters . Such being position of law, sale made by Jankamma, grand-daughter of Ramanna, in favour of Appellants, if any, was non est, more so, as noted, since Jankamma had not challenged earlier sale made by Seethamma in favour of Srinivas Rao. Seethamma although had a limited interest, alienation had not been challenged by reversioners of Ramanna for 50 years. Right of Seethamma stood unchallenged and alienation made also remained unchallenged.

As regards point relating to limitation, it was found that first of all Jankamma had to challenge alienation by Seethamma, which was of year 1913.

No special privilege was given in excluding limitation created by Limitation Act by observation of High Court in earlier second appeals. Since right of Seethamma had not been challenged by Jankamma, suits were necessarily barred by time. Appellant's contention was that, High Court had committed a clear error in taking view that, Seethamma-widow would get an absolute right. It was his contention that, as per definition of Stridhan which undoubtedly was her absolute right, there was an exception carved out in Section 10(2)(g) of Act. In so far as properties in question were properties inherited by Seethamma on death of her husband-Ramanna and at that time daughter Venkamma was very much alive, therefore, Seethamma would not get an absolute right.

In this case, daughter of Ramanna (Venkamma) died only in 1910 which was after death of Ramanna - 1907. When succession to estate of Ramanna in 1907 opened, then Seethamma his widow would inherit the property where the right is only limited to the estate of a

widow. On her death, property would revert back to reversioners of her late husband-Ramanna.

Held, while dismissing the appeal

1. There was no dispute that, parties were governed by Madras School of Hindu Law. Thereunder, every female who succeeded as a heir whether to a male or a female, took a limited estate in property inherited by her.

2. Thus, female owning stridhana property was conferred absolute powers to dispose of same as also in matter of enjoyment. Disposal could be by will or transfer inter vivos. Only limitation was law relating to guardianship would continue to operate during minority. Reverting back to Section 10 (2) (g), property inherited by a woman from her husband was brought under definition of stridhana. This was a clear expansion of a widow's rights by conferring upon a widow absolute right over property inherited from her husband being a radical departure from widow's estate under Hindu Law which was a limited estate and under which there was no such absolute right of disposal. If husband was survived by widow and a daughter or a daughter son, then widow's estate as understood in Hindu Law was to continue undisturbed. If a daughter or grandson as mentioned did not survive the

husband, widow would get absolute right notwithstanding Section 10(1) defining stridhana as meaning property of any description belonging to a Hindu female other than which she has by law 'only a limited estate'.

3. Reversioners were heirs of last full owner, who would be entitled to succeed to estate of such owner on death of a widow or other limited heir, if they be then living.

4. Under Hindu Law, a widow took a limited estate. She was not a trustee for reversioners. She was owner of properties. But she could alienate property only for necessity or benefit of estate. By State Act, widow's estate became stridhana, which by virtue of Section 11 conferred upon her absolute right to dispose property either by way of inter vivos transfer or will. State Act came into force on 1st January, 1934. When succession opened on Ramanna dying in 1907, he was survived by both his widow Seethama and also his daughter Venkamma. Therefore, it was clear that, Seethama would not get an absolute right under Section 11 of State Act. When succession opened in this case to estate of Ramanna, in fact, State Act was not in force at that time. Estate which was inherited by Seethama was that of a widow. Therefore, be it from stand point of Hindu

Law as applicable prior to State Act or provisions of State Act, Seethamma did not acquire absolute rights. As such, right which she had, was right of Hindu widow under Hindu Law. Further, as long as Seethamma-widow of Ramanna was alive, no reversioners had any vested interest. The daughter of Ramanna (Venkamma) through his first wife passed away in year 1910. At that time, Seethamma the widow of Ramanna was alive. Therefore, she (Venkamma) would not get any right in the property. Seethamma died only in year 1938. When Seethamma died in 1938, no doubt Jankamma was alive. Daughter of a daughter was not recognized as a heir. When succession opened upon the death of the widow, in this case, namely Seethamma in the year 1938, if Jankamma could be treated as the reversioner being grand daughter of last full owner, then property would vest in Jankamma.

5. While it was open to reversioners to ignore an alienation made by a Hindu widow and period of limitation would not start to run upon a transfer effected by Hindu widow, undoubtedly, period of limitation for filing a suit for recovery of possession would commence upon death of the widow.

6. Property was alienated by Seethamma, widow of Ramanna in favour of her brother Srinivas Rao in year 1913. Undoubtedly, it was open to reversioner to proceed on basis that, such alienation did not bind her.

7. Thereafter, in 1938, Seethamma passed away. Even proceeding on basis that, Jankamma, grand-daughter of Ramanna was a reversioner, her estate in expectancy became vested in her, upon death of Ramanna's widow, Seethamma in 1938. While it was open to reversioner to ignore sale deed executed by widow, as not binding on her, as far as suit for recovery of possession, law clearly provided for a period of 12 years and period of limitation started with death of limited owner, namely, widow in 1938. Time started ticking with passing away of widow in 1938. Period of limitation being 12 years, it ran out in 1950. With running out of period of limitation prescribed under Limitation Act, 1908 (by Articles 140 and 141), very right of alleged reversioner Jankamma also came to an end. Thus, when she executed sale in year 1955 in favour of Appellants, she could not have conveyed any right. That apart, even for a moment, proceeding on basis that period of limitation would start from 12 years from 1955 when sale deed was executed

in favour of Appellants by Jankamma even that period ran out in 1967. Admittedly, suits were filed several years even after 1967. Period of limitation for instituting suits had expired.

Gauri Nath Kakaji vs. Gaya Kuar - PRIVY COUNCIL : MANU/PR/0162/1928 - AIR 1928

PC 251 - The general law is so well settled that it scarcely requires restatement, If a Hindu dies leaving two widows, they succeed as joint tenants with a right of survivorship. They are entitled to obtain a partition of separate portions of the property so that such may enjoy her equal share of the income accruing there from. Each can deal as she pleases with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. If they act together they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other, cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the

full fruits of the property during her life-time. These principles have been established by a long series of decisions, one of the earliest and most authoritative of which is a case of Bhugwandeem Doobey v. Myna Baee (1861) 11 M.L.A. 487. the headnote of which contains the following passage :- Where a childless Hindoo dies, leaving two Widows surviving, they succeed by inheritance to their Husband's property as one estate in coparcenary, with a right of survivorship; and there can be no alienation or testamentary gift by one Widow without the concurrence of the other.

In that case there had been a division effected by the Judge of Banares of the estate between the two widows and the argument was that such division having been acquiesced in, the estate of the one widow became a divided and separate estate which she was competent to leave to whomsoever she pleased. This contention was negatived by the Privy Council. In the course of his long and detailed judgment, Sir James Colville said (p. 515) :- The estate of two Widows, who take their Husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property, to the exclusion even of Daughters of the deceased Widow.... They are, therefore, in the strict sense,

coparceners ,and between undivided coparceners there can be no alienation by one without the consent of the other.

The two cases which are founded on as forming an exception to the general current of authority are Kalliyanasundaram Pillai v. Subba Moopanar MANU/TN/0132/1902 : (1904)14MLJ139 . and Jan Narain Singh v. Munna Lal (1927) 26 A.L.J. 268. In the former the head-note bears that "a mortgage executed by the senior widow for a necessary purpose without the concurrence of the junior widow will be binding upon the latter." This broad proposition is not supported by the actual decision, and it is explained in the recent case of Appalasuri v. Kanna-mama Nayuralu MANU/TN/0071/1925 : AIR1926Mad6 . on the footing that the Judges were of opinion on the facts of that case that the senior widow was recognised as manager or agent of the other, and that such an inference can be made only in a case where there was no known hostility between the widows and was not possible where (as in the present case) the widows were hostile to each other.

MITAKSHARA LAW OF SUCCESSION IN BOMBAY REGION

**Kisan Dhondu Gavli and Ors. vs. Shevantabai
Ganpat Rangha and Ors.:
MANU/MH/0090/1950 - AIR 1950 Bom 254**

(FB) - Mitakshara lays down three classes of bandhus, atma bandhus, pitru bandhus and matru bandhus, and the line of succession is laid down in order of preference of each class. Atma bandhus come first, then come the pitru bandhus, and finally come the matru bandhus. It is also well settled that in deciding who is to be preferred in each class, the test that must be applied is propinquity, the proximity of blood relationship. It is immaterial as to whether a particular bandhu is descended ex parte paterna or ex parte materna. It is only when the bandhus are of the same nearness of degree in relationship that the question as to whether the particular bandhu is ex parte paterna or ex parte materna is to be considered, and in that case a bandhu ex parte paterna is to be preferred to a bandhu ex parte materna, and that preference is given because of religious efficacy and the fact that a particular bandhu is in a position to confer higher spiritual benefit upon the propositus than another. Therefore, when one has to consider bandhus in a particular class, the main and the

primary test must be the test of propinquity of relationship. It is only if that test fails that the test of religious efficacy is to be applied. So far, as I shall presently point out, there is no dispute as to the position in law. The only question that arises for our determination is whether, when we apply that test and when we find that a female bandhu is nearer in relationship than a male bandhu, we should exclude the female bandhu and prefer the male bandhu solely on the ground that the former is a female and the latter is a male. If I may put it in a different language, whether we are justified on the state of the authorities to discard the test of propinquity merely because the result of that test is to prefer a female to a male. In our opinion, the recent decisions of the Privy Council make it perfectly clear that the only test that has to be applied is the test of propinquity and that test should not be qualified in any way and certainly not because the result of applying that test in a particular case may be the preference of a female to a male.

In our opinion, therefore, the principle enunciated in *Balkrishna v. Ramkrishna* 45 Bom. 853 : A. I. R 1921 Bom. 189 and *Girimallappa Channappa v. Kenchava* 45 Bom. 768: AIR 1921 Bom. 270, that under Mitakshara Hindu law as

applied to this province a male bandhu is entitled to preference over a female bandhu even though the latter is nearer in degree, is not a correct principle of law. In our opinion the proper test to apply is to determine in which particular class a bandhu falls among the three classes enumerated by Mitakshara and preference should be given to the class enumerated first over the classes enumerated subsequently. The next test to apply would be to determine which bandhu is nearer in degree of relationship as coming within a particular class. If a female is nearer in relationship then she should be preferred to a male bandhu. If there are two bandhus of equal relationship to the propositus, then only the test of religious efficacy should be applied and in that case a male bandhu may be preferred to a female bandhu.

PRINCIPLES OF HINDU LAW STATED BY MYSORE HIGH COURT FULL BENCH

**Rukn-ul-Mulk Syed Abdul Wajid and Ors. vs. R.
Vishwanathan and Ors.:**
MANU/KA/0013/1950 - AIR 1950 Mys 33 (FB)

a) The case debated on whether the business, that was shared by some of the members of a joint

hindu family, was a joint family business - The Court ruled that in view of provisions of Sections 101 and 103 of the Evidence Act, 1872, the plaintiff, who claimed a share in the business, was responsible to give proof in respect of the aforesaid question of fact.

b) The Court adjudicated that if amounts received by one have not been credited to his bank account and almost a similar amount has been credited in the account of another person, the amount received by the former could not be considered as gone into the account of the latter, even if the another person happens to be the father of the first.

c) The Court concluded that according to Hindu Law, separate property of Hindu ceases to be his property and acquires the characteristics of his joint family property, by his own volition and intention.

d) The case discussed whether family settlement under the Hindu Law could be questioned by minors of the family

e) In the particular case, the member of a joint Hindu family met expenses of the family and paid money to his brothers out of kindness - The Court ruled that in the said situation, it could not be contended that the property acquired by him was

not his self-acquired property; and that the amount paid by him to his brothers should be regarded as their joint family property.

f) The case debated whether the use of money belonging to son by his father for purposes of his business could convert the business into a joint family concern.

g) The case focused on the payment made by one brother to other, so as to give up his claim for share in the property of the former - It further debated whether such payment was a gift, under section 122 of the Transfer of Property Act, 1882

h) The case revolved around framing of issues and the extent of relevance of draft issues filed by advocates in such framing, considering rule 1 of order 14 of the Civil Procedure Code, 1908.

i) The Court adjudged that when the testator exclusively bequeathed the self-acquired property to his son, the son's sons could not claim to have interest in such property.

CUSTOMARY HINDU LAW AND CHANGES BROUGHT BY ACT

Gowri vs. Subbu Mudaliar and Ors.: MANU/TN /1347/2017, 2017 (4) CTC 503 - Section 4 of the Hindu Succession Act provides overriding

application of the provision of this Act. In effect it lays down that in respect of any of the matter dealt in the Act, it seeks to repeal of existing laws whether in the shape of enactment or otherwise which are inconsistent to this Act. The Hindu Succession Act brought about some fundamental and radical changes in the Law of Succession and the result is that immediately on the coming into operation of the Act, the Hindu Succession Act alone applicable to the Hindus whether development of any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matters expressly dealt by this Act. From the overriding effect of the Act it could be easily understood that any custom or usage as part of the law which was governing the Hindus in Pondicherry except renouncants immediately before the commencement of this Act shall cease to have effect and such practice in vogue is literally overridden by Section 4 of the Hindu Succession Act.

In this regard, a judgment reported in **Giasi Ram v. Ramjilal [MANU/SC/0286/1969 : AIR 1969 SC 1144]**, wherein a Hindu Jat, governed

by the customary law of the Punjab alienated some ancestral property without legal procedure. In a suit instituted by one of his sons it was declared that sale was null and void and not binding of his sons. As a result, the alienations could not enure beyond the life time of Jwala. He died in the year 1959. It was held that not only his three sons but also his wife and two daughters were entitled to inherit to his estates including the alienated property. Even though under the customary law the wife and the daughters of a holder of ancestral property could not sue to obtain a declaration that the alienation of ancestral property will not bind the reversioners after the death of the alienor, the Hon'ble Supreme Court taking into consideration of overriding effect of the Hindu Succession Act, has held that only Hindu Succession Act prevailing over the customary law of Punjab.

BEQUEST UNDER HINDU LAW AND CHANGES BROUGHT UNDER LAW

Aniruddha Mitra vs. Administrator General Bengal -PRIVY COUNCIL :
MANU/PR/0145/1949 - 1949 (51) BomLR 971
 - Prior to the passing of certain special Acts, the

rule of Hindu law was that a Hindu cannot make a bequest in favour of a person who was not born at the date of the testator's death. This rule of law has been altered by three Acts, namely, the Hindu Transfers and Bequests Act, 1914 (Mad. Act I of 1914), the Hindu Disposition of Property Act, 1916 (Act XV of 1916), and the Hindu Transfers and Bequests (City of Madras) Act, 1921 (Mad. Act VIII of 1921). The Madras Act I of 1914 applies to the Madras Presidency except the town of Madras : The Madras Act VIII of 1921 applies to the Town of Madras; and the Hindu Disposition of Property Act extends to the whole of British India except the Province of Madras. The rule as altered by these Acts may be stated as follows :- Subject to the limitations and provisions contained in Sections 113, 114, 113 and '116, of the Indian Succession Act, 1023, no bequest shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of the testator's death."

It may be mentioned here that, prior to 1929, Section 115 of the Act rendered a bequest to a class wholly void if it was inoperative with regard to some members of the class by reason of the provisions of Sections 113 and 114. Section 115 has been amended in 1929 by Act XXI of

1929, and as a result of the amendment the bequest is void only with respect to those members, and it is valid with respect to the remaining members of the class.

In Ramabai Padmakar Patil (Dead) though L.Rs. and Ors. v. Rukminibai Vishnu Vekhande and Ors. MANU/SC/0583/2003 : AIR 2003 SC 3109 , Court held: 8. A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance, especially in a case where the bequest has been made in favour of an offspring....

Court in **Ishwardeo Narain Singh v. Smt. Kamta Devi and Ors. AIR 1954 SC 980** wherein, inter alia, it was held: The Court of Probate is only

concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the probate Court.

Kuldip Chand and Ors. vs. Advocate General to Government of Himachal Pradesh and Ors.:

MANU/SC/0128/2003 - 40. A dedication for public purposes and for the benefit of the general public would involve complete cessation of ownership on the part of the founder and vesting of the property for the religious object. In absence of a formal and express endowment, the character of the dedication may have to be determined on the basis of the history of the institution and the conduct of the founder and his heirs. Such dedication may either be complete or partial. A right of easement in favour of a community or a part of the community would not constitute such dedication where the owner retained the property for himself. It may be that right of the owner of the property is qualified by public right of user but such right in the instant case, as noticed

hereinbefore, is not wholly unrestricted. Apart from the fact that the public in general and or any particular community did not have any right of participation in the management of the property nor for the maintenance thereof any contribution was made is a matter of much significance. A dedication, it may bear repetition to state, would mean complete relinquishment of his right of ownership and proprietary. A benevolent act on the part of a ruler of the State for the benefit of the general public may or may not amount to dedication for charitable purpose.

41. When the complete control is retained by the owner - be it be appointment of a Chowkidar: appropriation of rents, maintenance thereof from his personal funds -- dedication cannot be said to be complete. There is no evidence except oral statements of some witnesses to the effect that Raj Kumar Bir Singh became its first trustee. Evidence adduced in this behalf is presumptive in nature. How such trust was administered by Raj Kumar Bir Singh and upon his death by his successors in interest has not been disclosed. It appears that the family of the donor retained the control over the property and, therefore, a complete dedication cannot be inferred far less presumed. Furthermore, a trust

which has been created may be a private trust or a public trust. The provisions of Sections 92 of the Code of Civil Procedure would be attracted only when a public trust comes into being and not otherwise.

42. Undoubtedly, bequests for construction of a Dharamsala will be for a charitable purpose. It is not necessary that the properties must be dedicated to any particular deity but what is essential is complete dedication for a charitable purpose. Such dedication may be made to an object both religious and of public utility.

ADOPTIVE MOTHER'S RIGHT TO ADOPT WAS NOT EXTINGUISHED BY THE MAINTENANCE DEED

Neelangouda Limbangouda vs. Ujjangouda Shankargouda - PRIVY COUNCIL -1948 (50) BomLR 682 - MANU/PR/0150/1948

N and S were the widows of two brothers who were members of an undivided Hindu family governed by the Mitakshara law. N inherited the family property after the death of her infant son. Thereafter N adopted the defendant and soon after his adoption the defendant executed in favour of S a deed whereby provision was made

for her maintenance as she did not agree "to live in union" with the other members of the family. S then adopted the plaintiff who filed a suit against the defendant to recover possession of one-half share in the family property. On the questions : (1) whether the plaintiff by virtue of his adoption acquired the right to recover possession of one-half share in the family property and (2) whether Section the adoptive mother of the plaintiff, had lost her right to adopt to her husband in view of the maintenance deed executed in her favour by the defendant:- Held:

- (1) That the case fell within the principles of the decision in Anant Bhikappa Patil v. Shankar Ramchandra Patil (1943) L.R. 70 I.A. 232 : 46 Bom. L.R. 1, and, therefore, the plaintiff was entitled to claim a half share in the family property; and
- (2) That the plaintiff's adoptive mother's right to adopt was not extinguished by the maintenance deed as she was entitled to be maintained from the family properties as a widow of the undivided Hindu family.

**Goswami Shri Maganlalji Gordhanlalji Maharaj
vs. Goswami Shri Purshottamlalji
Wagheshalalji Maharaj PRIVY COUNCIL :**

MANU/PR/0171/1948 - AIR 1949 PC 80 -

Where a Hindu widow enters into possession of property in her capacity as limited owner, she can hold any part of it adversely to third parties and therefore in the interests of the real reversioner or reversioners; but she cannot enlarge it against the reversioner and hold such part so as to make it part of her stridhan.

RIGHT OF UNMARRIED DAUGHTER IN JOINT FAMILY PROPERTY

**M.A. Rajagopala Ayyar vs. M.A. Venkataraman
Minor and Others - PRIVY COUNCIL - AIR 1947
PC 122 : MANU/PR/0065/1947**

The right of an unmarried daughter to maintenance and marriage expenses out of the joint family property is in lien of a share on partition, provision should accordingly be made for her marriage expenses in the decree.

**NIMBAVVA VS. CHANNAVEERAYYA reported
in MANU/KA/3854/2013 : ILR 2013 KAR**

6202 it was the case where a married daughter was not a family member in view of definition of the "family" under Section 2(2) of the Karnataka Land Reforms Act, that would not arise in the present case. It was not the contention of the

plaintiff before the trial Court or this Court that 5th defendant is not entitled for share, as she was married. Therefore, it is not open for the defendants to take such contentions at this stage of the proceeding, when the judgment and decree holding that all the parties are entitled to 1/3rd share each has attained finality. The judgment relied upon by the counsel for the petitioner is entirely different and not applicable to the facts and circumstances of the present case.

The State of Rajasthan and Ors. vs. Deepika Sharma: MANU/RH/0891/2019 (DB) - Court is of the view that having regard to the reasoning adopted by the Allahabad High Court that the term "unmarried daughter" is synonymous to a "single daughter", the previous marital status or lack of it, cannot be determinative to the writ petitioner's claim. In other words, the mere circumstance that the applicant has previously been married, cannot be a relevant ground for the State to reject the application for compassionate appointment if on the date of such application, the claimant was unmarried as in the present case. Unmarried means one who is not married: not, as the State contends, one who was never unmarried. Resultantly if on the date of claim for

compassionate appointment, the daughter not married, she could fulfill the eligibility criteria. Any other interpretation would be contrary to Article 14 of the Constitution of India.

In CGT v. Bandlamudi Subbaiah MANU/AP/0175/1978 : [1980] 123 ITR 509 (AP) , a similar question with regard to married and unmarried daughters arose in this court. Sambasiva Rao C.J., speaking for the Division Bench, held "Undoubtedly, a Hindu joint family has an obligation to maintain and get an unmarried daughter married. That right of the unmarried daughter to be maintained and to get married and the obligation of the family to do this may be inchoate, in the sense, that these rights and obligations do not this may be inchoate, in the sense, that these rights and obligations do not attach to any specific property. But there is an undoubted right under the Hindu law of an unmarried daughter to be maintained and to get married and the corresponding obligation of the Hindu family to discharge these obligations cannot, therefore, be under any doubt. Once under a partition deed or a family settlement or a gift or other instrument certain properties are set apart for the maintenance and marriage of the

unmarried daughters, then the rights of the unmarried daughters and the corresponding obligations of the family gain a coherent and concrete form. They immediately attach to the property thus allotted under the instrument. Since the property is given to the unmarried daughter in recognition of her right, in discharge of the obligation of the family, by no stretch of imagination it could be treated as a gift."

Commissioner of Gift Tax vs. Bandi Subba Rao

: MANU/AP/0049/1987 - When the members of the joint Hindu family allotted certain properties to the unmarried daughters at the time of the partition to discharge the binding obligation on them to maintain and to get them married, it cannot be said that the properties were given to the unmarried daughters voluntarily and without consideration in money or money's worth. If they do not make such a provision for the unmarried daughters, the Hindu family would be obliged to make some other provision. By making such provision, it has ceased to have any monetary obligation towards the unmarried daughters. What the family would have been obliged to spend in money would be given in the form of movable

or immovable property. That they do, as we have already observed, not quite voluntarily but only to discharge their legal obligation. Giving property to an unmarried daughter as incident to maintenance is a legal obligation cast on the father or any person receiving the property of the father except a purchaser for valuable consideration without notice of the said right of the daughter. Equally, giving a reasonable property at the time of the marriage or subsequently in the discharge of that legal obligation, is not, thereby, a voluntary gift made by the father but is in compliance with his legal obligation. Any instrument executed by the father in discharge of that legal obligation or any settlement of a reasonable portion of the property in fulfilment of the existing legal claims of a married or unmarried daughter is not without consideration of money or money's worth as contemplated under the Act nor can it be said to be a voluntary one. Equally, the promise made at the time of the marriage of a daughter to give a reasonable portion of the property or a settlement or a gift made long after the marriage is in fulfilment of the pre-existing legal obligation of the father under the general Hindu law. Therefore, it ceases to be voluntary act nor is it to

be labelled as without consideration but is one in the discharge of a pre-existing legal obligation. Therefore, it is neither an alienation nor a transfer, attracting section (xii) of the Gift-tax Act, but is a family settlement. There is no taxable gift made to a married daughter. Thereby the assessee is not obliged to pay gift-tax.

In **Chandrasekhara Reddy's case MANU/AP/0174/1976 : [1976]105ITR849(AP)** , Divan C.J., speaking for the Division Bench, held that the Income Tax Appellate Tribunal has to further into the question whether there is a custom in the community to discharge that obligation to execute a gift or a settlement deed subsequent to the marriage. With due deference, we express our inability to accord our approval to that view for diverse reasons. It has already been held that an opulent Hindu father is obligated to set apart a reasonable portion of the property towards maintenance of an unmarried daughter or towards marriage expenses including giving of property at the time of the marriage as incident thereto. Equally, a reasonable portion would also be given to a married daughter even after the marriage. The moral or legal obligation under general Hindu law of the father to provide a

reasonable portion of the property as an incident to maintenance to an unmarried daughter under section 21 of the Maintenance Act or in discharge of a promise made at the time of the marriage to a daughter, has been transformed into a legal obligation and thereby the need to prove the existence of the custom in a particular caste or community to is obviated.

In Dasharatharao v. Ramchandraro
MANU/MH/ 0061/1951 : AIR1951Bom141 the meaning to be given to the expression 'Hindu Joint family' was explained as follows: "A joint family consists of persons who are lineally descended from a common ancestor. Such family includes the wives of male members as well as unmarried daughters. As soon as the daughter marries she leaves the family of her father and becomes a member of the husband's family. It is quite true that every member of a Hindu Joint family is not a coparcener. Where a member of an undivided family is a coparcener or not would depend on whether he is entitled to demand partition and that would in its turn, depend on the question whether he has a right in the property of the coparcenary by his birth."

Dodiyala Krishnaprasada Rao vs. K. Jayasri and Ors.: MANU/AP/0118/1986 - S. 20 of the

Hindu Adoptions and Maintenance Act 78 of 1956 (herein after called the Act) imposes absolute obligation and the burden is on the defendant to prove that he has discharged the obligation and the liability to the maintain the daughter subsists so long she remains unmarried. The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be is unable to maintain himself or herself out of his or her own earnings or property. ... So far the daughter is concerned, the obligation to maintain a minor daughter subsists till marriage takes place. On attaining majority if she remains unmarried the obligation continues provided she is unable to maintain herself out of her own earnings or property. S. 20 unlike S. 18 relating to the right of wife for maintenance does not mention the grounds on which the claim for maintenance can be made. It cases an absolute obligation on the part of the parent. The language employed in S. 20 imposes a duty on the part of the parent though it purports to preserve a right

to the child. Hence the burden is on the parent to establish in an action for maintenance that there is no default on his or her part. Even the cases governed under the latter part of sub-sec. (3) the parent should prove that the major daughter who remained unmarried has her own earnings or property to maintain herself.

**LAXMAPPA AND ORS. v. BALAWA,
MANU/SC/0961 /1996 : AIR 1996 SC 3497 -**

"The law on the subject was taken stock of by the High Court by quoting Para 546 of Mulla's book on Hindu Law, 15th Edition, which provides that a Hindu father is bound to maintain his unmarried daughters, and on the death of the father, they are entitled to be maintained out of his estate. The position of the married daughter is somewhat different. It is acknowledged that if the daughter is unable to obtain maintenance from her husband, or, after his death, from his family, her father, if he has got separate property of his own, is under a moral, though not a legal, obligation to maintain her. The High Court has concluded that it was clear that the father was under an obligation to maintain the plaintiff-respondent. Seemingly, the High Court in doing so was conscious of the declaration made in the

gift deed in which she was described as a destitute and unable to maintain herself. In that way, the father may not have had a legal obligation to maintain her but all the same there existed a moral obligation. And if in acknowledgment of that moral obligation the father had transferred property to his daughter then it is an obligation well-fructified. In other words a moral obligation even though not enforceable under the law, would by acknowledgment, bring it to the level of a legal obligation, for it would be perfectly legitimate for the father to treat himself obliged out of love and affection to maintain his destitute daughter, even impinging to a reasonable extent on his ancestral property. It is duly acknowledged in Hindu Law that the karta of the family has in some circumstances, power to alienate ancestral property to meet an obligation of the kind. We would rather construe the said paragraph more liberally in the modern context having regard to the state of law which has been brought about in the succeeding years. Therefore, in our view, the High Court was within its right to come to the conclusion that there was an obligation on the part of the father to maintain his destitute widowed daughter."

RULE OF HINDU LAW AND TRANSFER OF PROPERTY ACT

Dan Kuer, MST. vs. Sarla Devi, MST. - PRIVY COUNCIL - : MANU/PR/0030/1946 - AIR 1947

PC 8 - The true rule of Hindu law in such matters would appear to be as follows:--Two obligations confront a joint Hindu family. (1.) The obligation to pay the debts (for instance, of the father) binding on the family; and (2.) the moral obligation to provide maintenance to the widows of the family. The latter obligation would, under certain circumstances, ripen into a legal obligation, as, for instance, when a charge is created on specific property of the family either by agreement or a decree of the court; that, so long as neither of these two obligations has taken the form of a charge on the family property, the obligation to pay the binding debts will have precedence (as, for instance, in the course of the administration of the estate) over mere claims of a female member's maintenance; but, if either of these two obligations assumes the shape of a charge, it would take precedence over the other. This rule of Hindu law is thus in accord with the principle underlying Section 39 of the Transfer of Property Act.

FATHERS SURETY FOR THIRD PARTY LIABILITY OF ANCESTRAL PROPERTY

Chabirani Bai and Ors. vs. Girdharilal and Ors.: MANU/MP/0021/1976 - AIR 1976 MP 69

- Under the Hindu Law, where the sons are joint with their father, they are under a pious obligation to pay the debts contracted by the father, which are not illegal or tainted with immorality, to the extent of their interest in the joint family property vide Hindu Law, by Mulla, Fourteenth Edition, at p. 354, This liability arises from the religious obligation of the son, as Laid down in the ancient texts. It is well settled that the liability of the sons exists whether the father be alive or dead.¹

The main point for consideration, therefore, is whether the pious obligation of a son exists even in respect of the father's liability under a surety bond. For this purpose it is necessary to consider whether a pecuniary liability incurred by the father on the basis of a surety bond is an avyavaharika debt or not. It appears that according to both Yajnaval-kya and

¹ After 2005 amendment of Hindu Succession act pious obligation liability is removed.

Brihaspati, a debt under a surety bond is to be regarded as avyavaharika only where the surety is for the appearance or for the honesty of another person, but not where the surety is for payment to be made by a third person vide Hindu Law by Mulla, Fourteenth Edition, Article 298, at pp. 386 and 387 and Hindu Law by Raghavachariar, Sixth Edition, at pp. 342 and 343.

In Dwarka Das v. Kishan Das, AIR 1933

All 58,7 it was held by a Division Bench of the Allahabad High Court that the sons are liable for the surety debt of their father for payment, even without consideration. A similar view was expressed by that Court in Daljit Singh v. Harkishan Lal **MANU/UP/0198/1939 : AIR 1940 All 116.**

The original texts on the subject were extensively considered by the Bombay High Court in Tukaram Bhat v. Gangaram **ILR (1899) 23 Bom 454.** The following observations at p. 459 in the said case are pertinent : "It will be sufficient to state that Brihaspati recognizes four different classes of sureties : (1) sureties for appearance, (2) sureties for honesty, (3) sureties for payment of money lent, (4) and sureties for delivery of goods. The obligation of the first two kinds of sureties is limited to themselves personally, and

does not bind their sons; but the obligation incurred by the last two kinds of sureties binds them, and their sons also after their death. The commentary of Ratnakar on this text expressly states that the sons shall be compelled to pay debts incurred by their father under the last two classes of surety obligations. The texts of Narad and Yajna-vaalkya recognize three classes of surety obligations only--those for appearance, those for honesty and those for payment. Narad does not set forth the son's obligation in this place, but the Yajnavalkya text is quite as explicit as that of Brihaspati. The sureties of the first two classes must pay the debt, and not their sons, but the sons of the last kind of surety may be compelled to pay their father's debt incurred by him as surety. Katyayana refers to the same kind of surety when he lays down that the grandson of such a surety need on no account pay the debt, but the son must make it good without interest. The text of Vyasa makes the same distinction between the son's and grandson's liabilities for such suretyship. Manu's texts on the subject clearly distinguish between sureties for appearance or good behaviour and sureties for payment. The son shall not, according to Manu in general be compelled to pay money due for

suretyship, or idly promised to musicians and actresses, or lost at play, or due for spirituous liquors, or for tolls or fines. The general words 'money due for suretyship' used in the text are expressly stated by the commentator Kulluka to refer only to sureties for appearance and good behaviour, but as regards a surety for payment, it is enjoined that the Judge may compel even his heirs to discharge the debt."

It is, therefore, clear that according to the authoritative texts on the subject, pecuniary liabilities arising out of surety bonds for appearance and for honesty of a third person alone can be considered as avyavaharika debts which the son is not under a pious obligation to pay; but a pecuniary liability arising out of a surety bond for the payment of money lent to a third person stands on a different footing and the pious obligation of the son extends to such a liability.

Privy Council in Kesar Chand v. Uttam Chand **MANU/PR/0004/1945 : AIR 1945 PC 91**. In the said case their Lordships made the following observations at p. 94 : "In the present case, the security bond was executed not for the payment of any debt due by Uttam Chand, but for payment of a debt which was due from third

parties. Unless there was a debt due by the father for which the security bond was executed, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property."

The aforesaid decision of the Privy Council was extensively considered by & Full Bench of the Punjab High Court in Hindustan Commercial Bank v. Sohan-lal **MANU/PH/0011/1970 - AIR 1970 P&H 67** - and distinguished on the ground that in that case no personal liability of the father arose under the surety bond. Adverting to the observations made by their Lordships of the Judicial Committee of the Privy Council in that case, it was held that they could not be construed as making any departure from the legal position as enunciated in Tukaratn Bhat v. Gangaram **ILR (1899) 23 Bom 454** (supra). It was held by the Court, after reviewing all the authorities on the subject, that the personal liability of the father to pay the third person's debt under a surety bond was neither an illegal nor an immoral debt and as such the joint family estate in the hands of the sons was liable for payment of the same in view of their pious obligation.

A perusal of the judgment of the Privy Council in Kesar Chand v. Uttam Chand

MANU/PR/0004 /1945 : AIR 1945 PC 91

(supra) shows that their Lordships did not take into consideration the various authoritative texts of Hindu Law and judicial decisions on the subject, apparently because they did! not intend to make any departure from the principles of Hindu Law as recognized by the Courts. Their Lordships rested their decision on the sole consideration that in the case before them the father had not incurred any personal liability under the surety bond and as such there was no debt due from him. It is thus clear that the sons are under a pious obligation to pay the debt of the father arising out of a surety bond executed by him to pay a third person's debt. This liability is, however, only to the extent of their interest in the joint family property.

Their Lordships of the Supreme Court in **Faqir Chand vs Harnam Kaur case AIR 1967 SC 727** - MANU/SC/0286/1966 - have laid down the following propositions:--

(1) That the sons have no right to restrain the execution of the decree obtained by the mortgagee against the father, or the sale of the property in execution of that decree, where the mortgage is of the property of the joint family consisting of

himself and his sons for payment of his debt when the mortgage is not for legal necessity or payment of an antecedent debt, unless they show that the mortgage debt was incurred for Illegal or immoral purpose:

(2) That the liability of the son under the pious obligation extends to the joint family property in his hands;

(3) The second proposition laid down In Brij Narain's case AIR 1924 PC 50 Is founded upon the pious obligation of a son to pay the debt contracted by the father for his own benefit and not for any immoral or Illegal purpose. By incurring the debt, the father enables the creditors to sell the property in execution of a decree against him for payment of the debt. The son is under a pious obligation to pay all debts of the father whether secured or unsecured;

(4) That the second proposition in Brij Narain's case AIR 1924 PC 50 applies not only to an antecedent debt but also to a mortgage debt which the father is personally liable to pay;

(5) Even where the mortgage is not for legal necessity or for payment of an antecedent debt, the creditor can, in execution of a mortgage decree for the realization of a debt which the father is personally liable to repay, sell the estate

without obtaining a personal decree against him. After the sale has taken place, the son is bound by the sale, unless he shows that the debt was non-existent or tainted with immorality or illegality;

(6) That the third proposition in Brij Narain's case AIR 1924 PC 50 does apply where the joint family consists of father and sons. A father, who is also the manager of the family, has no power to mortgage his estate except for legal necessity or for payment of an antecedent debt. The decree against the father does not, of its own force, create a mortgage binding on the sons' Interest. The security of the creditor is not enlarged by the passing of the decree. In spite of the passing of the preliminary or final decree for sale against the father, the mortgage will not, as before, bind the sons' interest in the property and the sons will be entitled to ask for a declaration that their interest has not been alienated either by the mortgage or by the decree.

DOCTRINE OF PIOUS OBLIGATION

Hemraj alias Babu Lal and Ors. vs. Khem Chand and Ors. - PRIVY COUNCIL - : MANU/PR/0053/ 1943

Under the Hindu law a son is under a pious obligation to pay his father's debts to save him from punishment in a future state for non-payment of his debts. "According to the notions of Smriti writers it is regarded as sinful to remain in debt, and a debtor's salvation is deeply imperilled if he dies indebted. According to Vrihaspati, a person who does not repay his debt 'will be born in his creditor's house' as a slave or servant or woman or a quadruped.' According to other writers a person dying in debt goes to hell. A duty is therefore cast upon every person to discharge debts incurred by him": Thus, if the father dies without discharging his debts, a Hindu son is obliged to pay his undischarged debts and relieve him from his sins.

As observed by this Board in *Girdharee Lall v. Kantoo Lall* (1874) L.R. 1 I.A. 321, 331: "It being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts." But this obligation is not unqualified, for the son is not bound to pay his father's debts if the debts are *avyavaharika*.

The Smriti texts on which this qualification is based will be found in the learned judgment of Mookerjee J. in *Chhakauri Mahton v. Ganga*

Prasad (1911) I.L. R.39 C. 862. Their Lordships will in this judgment refer only to one text, the text of Usanas (ascribed also to Vyasa), the only text which uses the term *avyavaharika* (na *vyavaharikam* in the original). After enumerating certain specific debts, more or less in the same language as used by the other Smriti writers, Usanas adds a supplementary category of debts which the sons need not pay which are *avyavaharika*. The text of Usanas appears in Vijñaneswara's commentary on ch. II., v. 47, of Yajñavalkya, which lays down exceptions to the general rule relating to son's liability to pay the father's debts contained in v. 50.

These verses are as follows: Ch. II., v. 50. "When the father is abroad, or in difficulties, his debt proved by witnesses if undisputed, should be paid by the son and grandson."

Ch. II., v. 47. The son shall not pay the [paternal debts] contracted for wines, lust, gambling, or due on account the unpaid [portion] of a fine or toll or [on account of] an idle promise. In his commentary to this verse, Vijñaneswara refers to the text of Usanas which is: "A fine, the balance of a fine, likewise a bribe, or a toll or the balance of it, are not to be paid by the son, neither

shall he discharge a debt which is avyavaharika (na (not) vyavaharikam)."

There has been much difference of opinion as regards the precise significance of the term avyavaharika. Colebrooke translates it as meaning "debts for a cause repugnant to good morals"; Mandlik renders it as "not proper," and Sir Dinshaw Mulla in his "Hindu Law" accepts Colebrooke's translation. The term has also been interpreted in various judgments by courts in India, but the decisions are not all uniform. The Bombay High Court translates the term as "unusual or not sanctioned by law... Put into simple English, the texts amount to this: that the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices": *Durbar Khachar v. Khachar Harsur* (1908) I.L.R. 32 B. 348, 351. This decision has been disapproved in subsequent decisions in Bombay, and by other High Courts also. Mookerjee J. renders the term as equivalent to "not lawful, usual or customary" (*Chhakauri Mahton v. Ganga Prasad* (1911) I.L.R. 39 C. 862), while Sadasiva Iyer J. paraphrases it as "a debt which

is not supportable as valid by legal arguments, and on which no right could be established in the creditor's favour in a court of justice": Venugopala Naidu v. Ramanadhan Chetty (1912) I.L.R. 37 M. 458, 460. Many of the interpretations given to the term have been collected by Patkar and Tyabji JJ. in Bal Rajaram Tukaram v. Maneklal Mansukhbhai (1931) 1. L.R. 56 B. 36. Its meaning has been considered in other decisions also (see Govindprasad v. Raghunathprasad I.L.R. [1939] B. 533; Ramasubramania v. Sivakami Ammal (1925) A.I.R. (Mad.) 841). Their Lordships do not think that any useful purpose will be served by reviewing these and the other decisions brought to their notice, as in their opinion the principles with reference to which the term *avyavaharika* should be interpreted, and by which this case should be decided, are sufficiently clear and do not conflict with those decisions. They will now refer to those principles.

If the doctrine of pious obligation is to be given full effect, there cannot be any doubt that a Hindu son should be held liable for every undischarged debt of his father, for nothing can be nobler than to obtain complete exemption for the father from all penalties which might follow from the non-discharge of his debts; but this

position is not maintained. That the doctrine has reference to the nature or character of the debt which creates the liability can hardly be disputed; this appears from the following pronouncement made by Knight Bruce L.J. in Hunoomanpersaud Panday's case (1856) 6 Moo. I.A. 393, 421: "Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate...."

In *Girdharee Lall v. Kantoo Lall* L.R. 1 I.A. 321, 331, Sir Barnes Peacock quotes the above rule and then proceeds as follows: "It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it...." This also makes clear the connexion between the nature of the debt and the liability to pay it. That the duty cast on the son being religious or moral, the character of the debt

should be examined from the standpoint of justice and morality appears to be fairly clear from the decisions. In this connexion regard may also be had to the debts mentioned in the texts which the son need not pay, most of which are of an objectionable character. It also appears to be clear on principle, and on authority, that examination of the nature or character of the debt should be made with reference to the time when it originated, in other words, when the liability was first incurred by the father. If on such examination it is found that at its inception the debt was not tarnished or tainted with immorality or illegality, then it must be held that it would be binding on the son.

This principle, stated as Rule 1 by Venkatasubba Rao and Madhavan Nair JJ. in *Ramasubramania v. Siva Kami Ammal* (1925) A.I.R. (Mad.) 845, 852, in language almost identical, is amply borne out by the numerous authorities which they have examined. The rule is not rigid, but has to be applied with reference to the circumstances of each case. These principles, which are implicit in the notion of "pious obligation," and are also deducible from the decisions, should be kept in mind in interpreting the term *avyavaharika* used in the

text. The decisions which their Lordships have examined proceed on the ground common to them all, that debts in the nature of avyavaharika are debts which would be comprised in the expression "illegal or immoral debts." Having regard to the principles underlying the rule of "pious obligation," which forms the foundation for the son's liability, their Lordships think that the translation of the term avyavaharika as given by Colebrooke makes the nearest approach to the true conception of the term as used in the Smriti text, and may well be taken to represent its correct meaning. In their Lordships' view, the term does not admit of a more precise definition. When a particular debt is called in question, it will be the duty of the courts to examine its nature in the light of the principles mentioned above, which are not exhaustive but only basic, and to see whether in the circumstances it is of the kind which will give exemption to the son from the liability of paying it, on the ground that it is repugnant to morals. It has now been definitely established by the decision of this Board in Toshanpal Singh v. District Judge of Agra (1934) L.R. 61 I.A. 350, that a son is not liable to pay a debt created by his father which would render the father liable to criminal prosecution.

S. M. Jakati & Another vs S. M. Borkar & Others 1959 AIR 282, 1959 SCR Supl. (1)1384

... the Supreme Court observed about the term 'Avyavaharika' (p. 286): ...This term has been variously translated as being that which is not lawful or what is not just or what is not admissible under the law or under normal conditions. Colebrooke translated it as 'a debt for a cause repugnant to good morals'. There is another track of decision which has translated it as meaning 'a debt which is not supported as valid by legal arguments'. The Judicial Committee of the Privy Council in Hemraj alias Babu Lal v. Khem Chand MANU/PR/0053/1943, held that the translation of the term as given by Colebrooke makes the nearest approach to the true conception of the term used in the 'Smrithis' texts and may well be taken to represent its correct meaning and that it did not admit of a more precise definition.

In Tosharpal Singh v. District Judge of Agra MANU/PR/0068/1934, the Judicial Committee held that drawings of monies for unauthorised purposes, which amounted to criminal breach of trust under Section 405 of the Indian Penal Code, were not binding on the sons, but a civil debt

arising on Recount of the receipt of monies by the father which were not accounted for could not be termed "A vyavatiariku.

(1) that the liability of the sons to discharge the debts of the father which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father and which does not come to an end as a result of partition of the joint family property. All that results from partition is that the right of the father to make an alienation comes to an end.

(2) Where the right, title and interest of a judgment-debtor are set up for sale as to what passes to the auction-purchaser is a question of fact in each case dependent upon what was the estate put up for sale, what the Court intended to sell and what the purchaser intended to buy and did buy and what he paid for.

(3) The words "right, title and interest " occurring in s. 155 of the Bombay Land Revenue Code have the same connotation as they had in the corresponding words used in the Code of Civil Procedure existing at the time the Bombay Land Revenue Code was enacted.

(4) In execution proceedings it is not necessary to implead the sons or to bring another suit if

severance of status takes place pending the execution proceedings because the pious duty of the sons continues and consequently there is merely a difference in the mode of enjoyment of the property.

(5) The liability of a father, who is a managing director and who draws a salary or a remuneration, incurred as a result of negligence in the discharge of his duties is not an avyavaharika debt as it cannot be termed as "repugnant to good morals "

Dhondopant Madhavrao Inde vs. Ashok Haribhau Patil : MANU/MH/0299/1977 - 1978 MhLJ 773 - In our opinion, what is stated above by the Privy Council and the Supreme Court is enough to show that, where the father is convicted in respect of the embezzlement, as in the present case and avoided imprisonment, by selling the property, it cannot be said that the son's share in the property is also bound, because the debt is 'vyavaharika'.

Amrit Lal v. Jayantilal MANU/SC/0195/1960: [1960] 3 SCR 842 , by Gajendragadkar J. (as he then was), in the course of the discussion of the doctrine of pious liabilities of the sons, as under

(p. 966): This doctrine inevitably postulates that the father's debts which it is the pious obligation of the sons to repay must be vyavaharik. If the debts are not vyavaharik or are avyavaharik the doctrine of pious obligation cannot be invoked. The expression 'avyavaharik' which is generally used in judicial decisions has been based on the text of Usanas which has been quoted by Mitakshara in commenting on the relevant text of Yajnavalkya, (Yajnavalkya, ii, 47), According to Usanas, whatever is not vyavaharik has not to be paid by the son. 'Navyavahaarikam' are the words used by Usanas, and put in a positive form they mean 'avyavaharik'. Colebrooke has translated these words as meaning 'debt for a cause repugnant to good morals'. These words have received different interpretations in several decisions. Sometimes they are rendered as meaning 'a debt which as a decent and respectable man the father ought not to have incurred', *Durbar Khachar v. Khachar Harsur* ILR(1908) 32 Bom. 348 : 10 Bom. L.R. 297, or, 'not lawful or customary', *Chhakauri Mahton v. Ganga Prasad* (1911) I.L.R. 39 Cal. 862 a, or, 'not supportable as valid by legal arguments and on which no right could be established in a Court of justice in the creditor's favour', *Venugopala Naidu*

v. Ramanadhan Chetty ILR (1912) Mad. 458 : AIR [1914] Mad. 654. But it appears that in Hemraj v. Khem Chand MANU/PR/0016/1943, the Privy Council has, on the whole, preferred to treat Colebrooke's translation as making the nearest approach to the real interpretation of the word used by Usanas but whatever may be the exact denotation of the word, it is clear that the debt answering the said description is not such a debt as the son is bound to pay, and so as soon as it is shown that the debt is immoral the doctrine of pious obligation cannot be invoked in support of such a debt.

MYSORE HINDU LAW WOMEN'S RIGHTS ACT, 1933

Nagamma vs Deveeramma 2001 (6) KarLJ 373 Mysore Act No. 10 of 1933 (Mysore Hindu Law Women's Rights Act, 1933) had been in force on the First day of January, 1934. The question is what is the effect of the provisions of this Act. This Act no doubt governs succession to interest in the property, after coming into force of the Act, it had the effect of regulating the succession to the property in case of a male Hindu dying intestate. The Act declare that it shall come into force on the first day of January 1934. The Act

became applicable to persons who but for the passing of this Act, would have been subject to the law of Mitakshara in respect of matters for which the provisions are contained in the Act. Section 3 does not reveal that it is retrospective in operation.

High Court of Mysore in **Hutcha Thimme-gowda v. Dyavamma, AIR 1954 Mys 93**. The foregoing shows that the Mithakshara law in force in the former Princely State of Mysore was different from the law which was in force in the State of Madras. It could further be seen that the personal laws of Hindus in Madras as well as in the former Princely State of Mysore were amended by statutes passed by Legislature which were in force in the respective areas.

Chinnamma vs Srinivas AIR 1971 Mys 28, (1970) 2 Mys LJ, MANU/KA/0047/1971, Bench: C Honniah, E.S. Venkataramiah It is well settled law that a Hindu belonging to Mithakshara School continues to be governed by the law in force in the area to which he belongs even though he may migrate to some other area, until it is proved that the family has adopted the Mithakshara law which is in force in the area to

which the family has migrated. It is enough to refer In support of what is stated above to a decision of the Privy Council in *Abdurahim v. Halimabai*, AIR 1915 PC 86, in which it is observed as follows;-- "Where a Hindu family migrates from one part of India to another, prima facie, they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted....." The position would not be different even when a part of one State is taken out of that State and added on to another for administrative reasons. That was the view which was expressed by the Privy Council in *Somashekara Royal v. Sugutur Mahadeva Royal*, AIR 1936 PC 18, in which it was held that the mere transfer of a district to another presidency for administrative purposes was not sufficient to affect the personal law of the residents in that district, unless and until it was shown that in the case of any resident there that he had intended to change and had in fact changed his personal law. The mere fact that Venkata-swamy had gone to Mysore in search of an employment cannot, therefore, be considered as sufficient to hold that there was change of his personal law unless it is shown that

he intended to do so. Further, in this case it is to be seen that it is not pleaded in the plaint that there was any such change of personal law, applicable to the family of the parties to these proceedings on account of their intention to do so. This question is a question of law and fact and unless proper pleadings are placed before the court and necessary evidence is led in support of the pleadings, it would not be possible to hold that there was such a change in the personal law governing the family. It may also be mentioned here that by virtue of the personal law of the parties derived from the texts which constitute the source of the law, the plaintiff would not be entitled to a share in the family properties on the ground that the properties have passed on to the hands of the sole surviving coparcener. Such a right was created for the first time by the Mysore Act of 1933 which came into force on 1-1-1934 in the former princely State of Mysore. So unless it is established that the parties to this suit were governed by the Mysore Act of 1933, the plaintiff would not be entitled to a share on the ground that the joint family properties passed to the hands of a sole surviving coparcener on the death of Venkataswamy.

High Court of Mysore in **Keshava Anantha Dixit v. Rama Dixit, (1947) 25 Mys LJ 94**. That was a case in which a Hindu male who belonged to a family that migrated to former Mysore State from Ranibennur in Dharwar District in the days of his paternal grand-father, died intestate in Mysore after the Mysore Act of 1933 came into force, leaving immoveable property in Mysore. He and his father who had pre-deceased him were born in Mysore after the migration. After his death the plaintiffs who were the sons of his mother's sisters, filed a suit claiming to be his nearest heirs according to the school of Hindu Law that prevailed at Ranibennur at the time of migration. The suit was resisted by the defendants who were the paternal grand-father's sister's sons of the Hindu male in question on the ground that they were the nearest heirs to succeed to his estate according to the Hindu Law Women's Rights Act of 1933 in force in Mysore. The Court found that the members of the family who migrated to Mysore had become the subjects of the Maharaja of Mysore, and, therefore, they were governed by the Mysore Act of 1933 which laid down a course of succession different from the one on which the plaintiffs based their suit.

High Court of Mysore in **Chikka Kempegowda v. .Madaiya, (1951) 29 Mys LJ 64** in which it was held that the interest that was acquired in a joint family property by a Hindu female governed by Mitakshara under Clause (d) of Section 8 (1) of the Mysore Act of 1933, was a vested right which was heritable and transferable. This view of the former High Court of Mysore receives support from a decision of the Supreme Court in *Nagendra Prasad v. Kempananjamma*, AIR 1968 SC 209 . While construing the provisions of Section 8 (1) (d) of the Mysore Act of 1933 Bhargava, J-, speaking for the court observed as follows:-- "This example makes it clear that the scope of ascertainment of the females who are to receive a share under Clause (d) must be very wide, because Clause (d) mentions that when the joint family property passes to a single coparcener by survivorship, the right to shares is vested in all the classes of females enumerated in all the three Clauses (a), (b) and (c). That being the position, we do not think that Clause (d) can be interpreted narrowly as giving a right to only those females who happen to be related to one or the other of the last two male coparceners in the manner laid down in Clauses (a) and (b). In fact the language

of Clause (d) has to be interpreted as laying down that right to shares will vest in all females of the joint Hindu family who would have possibly received the right to a share if at any earlier time there had been oarti-tion in the family in any of the three manners laid down in Clauses (a), (b) and (c). This intention can only be given effect to on the basis that Clause (d) does not restrict itself to finding out females on the basis of an assumed partition, between the last two male coparceners. It is significant that Clause (d) gives a right independently of a partition and we do not see why its scope should be restricted by assuming a partition. The reference to the earlier Clauses in this Clause must be held to be restricted to the sole purpose of ascertainment of the females falling under Clauses (a), (b) and (c). and once they are ascertained, it has to be held that each one of them becomes entitled to a share under this Clause. The object of Clause (d) is to give to all females entitled to maintenance from the coparcenery property a right to claim a share in the joint family property instead of a right to maintenance and that is why reference is made in it to all females enumerated in Clauses (a), (b) and (c)....." It is therefore clear from the observations of the Supreme Court extracted above, that

females who are entitled to a share under Clause (d) of Section 8 (a) of the Mysore Act of 1933, acquire a vested right to a share as laid down by that section. There is no provision in the Mysore Act of 1933 which provides for a vested right being created in respect of a share of a joint family property on a second occasion when the joint family properties pass on the hands of a sole surviving coparcener during the lifetime of the same female who is entitled to a share under that provision.

Nagendra Prasad vs Kempananjamma AIR

1968 SC 209 :- Clause (a) of sub-s. (1) of s 8 of the Hindu Law Women's Rights Act 1933, provided that at a partition of joint family property between a person and his son or sons, those entitled to share with them would be his mother his unmarried daughters, and the widows and unmarried daughters of his predeceased undivided sons and brothers who had no male issue. Clause (b) provided that when the partition was between brothers, those entitled to share with them would be their mother, their unmarried sisters, and the widows and unmarried daughters of their predeceased undivided brothers who had left no male issue. According to cl. (c) clauses (a)

and (b) would apply, *mutatis mutandis*, to a partition among other coparceners in a joint family. Clause (d) laid down that when a joint family property passed to a single coparcener by survivorship it would so pass subject to the right to share of the classes of females enumerated in the earlier clauses. Sub-s.(2) of s. 8 fixed the shares of the aforesaid relatives. Sub-s.(3), *inter alia*, defined the term 'mother' as including whether there were both a mother and a step-mother, all of them jointly, and the term 'son' as including a step-son, a grandson and a great grandson. It also provided that the Provisions of the section relating to the mother would be applicable, *mutatis mutandis*, to the paternal grandmother and great grandmother.

It is, however, to be noticed that s. 8, in conferring rights on females, envisages two different circumstances in which that right is to accrue to them. The first circumstance is when there is a partition of the joint family property between any co-parceners, and the other is when, though there is no partition, the entire joint Hindu family property passes to a single male owner. It is in both these cases that the Act envisages that the property may lose its character of co-parcenary property, because the co-parcenary body may

cease to exist on partition or on survival of a single male member of the family. It seems that the purpose of S. 8 was to safeguard the interests of females in such contingencies where the co-parcenary property is to disappear either by partition or by survival of a sole male member. The legislature seems to have felt that, in such circumstances, it was not safe to leave the females entitled to maintenance, etc, at the mercy of the individuals who may receive property on partition or at the mercy of the individual in whom absolute rights in the property might vest as a result of sole survivorship. For the first contingency, when there is a partition, provision was made in clauses (a), (b) & (c) of sub-section (1) of S. 8 under which a right was granted to the females to ask for separation of their shares if the male members decided to have a partition. Unless the male members themselves sought a partition, it was not considered necessary to grant any right to the females themselves to ask for partition, because the property could not lose its character as co- parcenary property until the male members of the family sought partition. The right of the females under clauses (a), (b) & (c) of section 8(1), therefore, only arises at a partition between the male co-parceners forming the joint Hindu family.

Byamma v. Ramdev reported in MANU/KA/0346/1990 : I.L.R. 1991 KAR 3245. After setting out Section 8 of the 1933 Act, it was held: "It is well settled that devolution of joint family property, which come to the hands of a son from his father or grand-father or great-grand-father as unobstructed heritage is governed by the Rule of Survivorship. A male coparcener acquires right to such property by birth. This is different from property that may come to the hands of a coparcener in which he has no right by birth. This is what is known as obstructed heritage, and such property devolve by succession and not by survivorship. Such a distinction is well known in Hindu Law. Therefore, when Section 8(1)(d) of the Mysore Act refers to the properties passing on to a single coparcener by survivorship, it has reference to the ancestral properties which come to his hands upon partition or otherwise."

"It is also well settled that if a coparcener dies, his interest devolves upon other coparceners by survivorship. As long as the joint family is in existence, all the coparceners jointly own all the properties. Each coparcener is a full owner of each property owned by the joint family. The effect of partition is severance of status and, as a

consequence, each coparcener becomes entitled to separate possession and enjoyment of his share in the joint family properties. Partition by itself does not create a right because the right of a coparcener existed even before partition. It only brings about demarcation of his interest with a right to separate possession and enjoyment. It is therefore, not correct to state that when a coparcener, upon partition, gets his share in the joint family properties, it does not come to him by survivorship. The right which accrues to the coparcener is by operation of the Rule of Survivorship and the partition only demarcates his share in the joint family properties. As observed earlier, unobstructed heritage always devolves by operation of the Rule of Survivorship and there is no exception to this Rule. It has therefore been held that where a father disposes of by a Will, his interest in the joint family properties in favour of his son, the properties in the hands of the son still retain the character of coparcenary property, and not self-acquired property."

"I, therefore, hold that the properties to which Chowdappa became entitled, upon partition passed on to him by survivorship. I find no substance in the contention raised on behalf

of the Respondents that it passed on to him by reason of partition and not by survivorship."

"In view of Section 8(1) of the Act, there can be no doubt that a single coparcener such as Chowdappa took the ancestral property, subject to the right to shares of female members of the joint family enumerated in Clauses (a), (b) or (c) of Section 8(1) of the Mysore Act. The Plaintiff, being a widow of a pre-deceased son, was entitled to a share equal to one half of the share to which her husband would have been entitled if he were alive [vide Section 8(1)(a) of the Mysore Act]. I therefore hold that the Plaintiff is entitled to claim one half of the share which her husband could have claimed if he was alive. In the instant case her husband would have got half share in the properties in a partition between his father and himself in the year 1946 when Chowdappa became a single coparcener. Consequently, she is entitled to 1/4th share in the suit schedule properties."

Sathyaprema Manjunatha Gowda (Smt.) v. Controller of Estate Duty, Karnataka
MANU/SC/ 1606/1997 : (1997) 10 SCC 684,
 "Here, we are concerned with Manjunatha Gowda who had obtained property at a partition with

coparceners. Survivorship, therefore, is the living of one of two or more persons after the death of the others having interest to succeed in the property by succession. The shares in the coparcenary property changes with death or birth of other coparceners. However, in the case of survivorship it is not of the same incidence. He received the property at the partition without there being any other coparcener. It is an individual property and, therefore, he did not receive it by survivorship but by virtue of his status being a coparcener of the Hindu Joint Family along with his father and brothers.

Under these circumstances, the conclusion reached by the High Court that since it is by partition, not by survivorship, Clause (d) of Sub-section (1) of Section 8 does not get attracted, is not (sic) correct. No doubt, the learned Counsel relied upon the judgment of this Court in **Nagendra Prasad v. Kempananjamma MANU/SC/0206/1967 : AIR 1968 SC 209** which was also considered by the High Court in the impugned judgment. This Court therein has explained that the object of Section 8(1)(d) is to give a right to claim a share in the joint family property to all females referred to in Clauses (a) to (c) thereof. Merely because partition by one of

the coparceners under Clauses (a) to (c) is a condition for a class of family members entitled to a share in the property, it does not apply to a case where class of family members entitled Under Clause 8(1)(d) since it stands altogether on a different footing and, therefore, partition is not a condition precedent for claiming a share by a class of family members enumerated in Section 8(1)(a) of the Act. But that principle has no bearing to the facts in this case for the reason that the property held was not received by survivorship.

Under these circumstances, family members enumerated Under Section 8(1)(d) are not entitled to a share in the estate left by the deceased. Thus we do not find any illegality in the view taken by the High Court warranting interference."

Nagendra Prasad v. Kempananjamma
MANU/SC/ 0206/1967 : (1968) 1 SCR 124,
 Court by a majority judgment held: "This intention can only be given effect to on the basis that Clause (d) does not restrict itself to finding out females on the basis of an assumed partition between the last two male coparceners. It is significant that Clause (d) gives a right

independently of a partition and we do not see why its scope should be restricted by assuming a partition."

Smt. Ramakka and Ors. v. Smt. Thanamma since deceased by LR, P. Srinivas and Ors. MANU/KA/3683/2013 : ILR 2014 Karnataka 1335, has been taken by a Division Bench of the Karnataka High Court. While construing Section 8(1)(d), the Division Bench has held: When the coparcenary property passes to a sole surviving coparcener, provision has been made in Clause (d) of Section 8(1). This clause, in protecting the rights of females, had necessarily to give females the right to share in the coparcenary property even if there be no partition at all, because, on passing of property to a sole surviving coparcener, there could not possibly be any partition sought by the male members of the coparcenary body. The right conferred by Clause (d) is, therefore, an independent right and not connected with the rights granted to the females under Clauses (a), (b) and (c). The females who are to get benefit are all those to whom a right to a share in the joint family property would have accrued if there had been a partition either under Clause (a), or Clause (b) or Clause (c). The

language of Clause (d) has to be interpreted as laying down that right to shares will vest in all females of the joint Hindu family who would have possibly received the right to a share if at any earlier time there had been partition in the family in any of the three manners laid down in Clauses (a), (b) and (c). It is significant that Clause (d) gives a right independent of a partition and its scope should not be restricted by assuming a partition." This is the correct view of the law on Section 8(1)(d), and we endorse it, Says Supreme court in *L. Gowramma vs. Sunanda and Ors.*: MANU/SC/0024/2016 - AIR 2016 SC 352.

THE IMPACT OF THE STATE ACT OF 1933.

Gopalakrishna (D) by L.Rs. and Ors. vs. Narayanagowda (Dead) by L.Rs. and Ors.: MANU/SC/0467/2019 - (2019) 4 SCC 592 - The State Act that is the Mysore Act of 1933 (as it was when it was passed) came into force on first day of January, 1934.

Thus, the female owning stridhana property was conferred absolute powers to dispose of the same as also in the matter of enjoyment. The disposal could be by will or transfer inter vivos. The only limitation was the

law relating to guardianship would continue to operate during minority. Reverting back to Section 10 (2) (g), the property inherited by a woman inter alia from her husband was brought under the definition of stridhana. This was a clear expansion of a widow's rights by conferring upon a widow absolute right over property inherited from her husband being a radical departure from the widow's estate under Hindu Law which was a limited estate and under which there was no such absolute right of disposal. There was however a catch and it was this. If the husband was survived by the widow and a daughter or a daughter son, then the widow's estate as understood in Hindu Law was to continue undisturbed. If a daughter or grandson as mentioned did not survive the husband, the widow would get the absolute right notwithstanding Section 10(1) defining stridhana as meaning property of any description belonging to a Hindu female other than which she has by law 'only a limited estate'. Thus though Under Section 4, the widow would inherit in preference to the daughter and daughters' daughter the nature of the right is as contained in Section 10 and Section 11, the effect of which we have called out.

Under the Hindu Law, a widow took a limited estate. She was not a trustee for the reversioners. She was owner of the properties. But she could alienate the property only for necessity or benefit of the estate. By the State Act, the widow's estate became stridhana, which by virtue of Section 11 conferred upon her absolute right to dispose the property either by way of inter vivos transfer or will. The State Act came into force on 01.01.1934. When the succession opened on Ramanna dying in 1907, he was survived by both his widow Seethama and also his daughter Venkamma. Therefore, it is quite clear that Seethama would not get an absolute right Under Section 11 of the State Act. When succession opened in this case to the estate of Ramanna, in fact, the State Act was not in force at that time. The estate which was inherited by Seethama was that of a widow. Therefore, be it from stand point of Hindu Law as applicable prior to the State Act or the provisions of the State Act, Seethama did not acquire absolute rights. As such, the right which she had, was the right of the Hindu widow under Hindu Law.

THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937**Kedar Nath Ambasta vs. Radha Shyam and Ors.: MANU/BH/0025/1953 - AIR 1953 Pat 81**

The Hindu Women's Rights to Property Act, 1937 has made considerable alteration in the Hindu law as to the devolution of property. Where the death intestate occurs of a Hindu governed by the Dayabhag School, or of a Hindu governed by any other school of Hindu Law or by customary law, the widow or widows of the deceased shall be entitled to succeed to the property of the former or the separate property of the latter in the same share as a son. The widow of a predeceased son and the widow of a predeceased son of a predeceased son are also brought into the picture as heirs: The former will succeed in the same manner as a son if there is no surviving son of the predeceased son and shall inherit in the same manner as a son's son if there is a surviving son or son's son of the predeceased son. The same rule 'mutatis mutandis' will apply to the widow of a predeceased son of a predeceased son.

As regards a Hindu governed by any school of Hindu Law other than the Dayabhag school or

by customary law, who at the time of his death has an interest in a Hindu joint family property, the Act provides that his widow shall have in the property the same interest as he himself had. The Act further provides that any interest devolving on a widow under these provisions shall be the limited interest known as a Hindu Woman's estate, subject to the proviso that she shall have the same right of claiming partition as a male owner.

Quoted Citations

**'Saradambal v. S. Subbarama Ayyar',
MANU/TN/ 0200/1941 : AIR 1942 Mad 212**

was the right of a judgment-creditor to proceed against the share in joint family property of a judgment-debtor in the hands of his widow, who had succeeded to it under the Act. The learned Judge pointed out that under Section 3, Sub-section (2), the interest taken by the widow is the same interest as the husband himself had, that is to say, she took the interest subject to the rights and obligations attached to that interest and, subject, further, to the restrictions placed on her powers by Section 3, Sub-section (3). By this latter sub-section, she took a Hindu woman's estate, that is to say, she was competent to alienate the interest only for purposes sanctioned

by Hindu law and the interest was liable to be seized in execution of decrees for the payment of the debts of the last male owner. To the contention, that, her husband having died undivided and his share not having been attached during his lifetime, the judgment-creditor's remedy was defeated by the rule of survivorship, his Lordships replied that the effect of the Act was that the existence of the widow suspended the operation of the rule of survivorship. The interest of her husband, therefore, remained in existence and was liable to attachment in execution of the decree.

The question in -- '**Natarajan Chettiar v. Perumal Animal**', MANU/TN/0180/1942 : AIR 1943 Mad 246 was whether an indorsee from the widow and the two sons of the payee of a promissory note was entitled to maintain a suit on the foot of the promissory note without obtaining a succession certificate. Horwill, J. held that, though the widow under the Act does not succeed to her husband by survivorship, her succession is not one by inheritance so as to make a succession certificate necessary before her right could be enforced in Court. In his Lordship's view, the effect of Section 3, Sub-sections (2) and (3) of the Act is a survival of the

husband's persona in the wife, giving her the same rights as her husband had except that she has a limited power of alienation.

'Satyanarayana Charlu v. Narasamma' MANU/TN/0406/1942 : AIR 1943 Mad 708 was also concerned with a suit on a handnote, the plaintiff being the son of the promisee. The defence was that under the Hindu Women's Rights to Property Act of 1937 the widow of the promisee became entitled to a half share and that the plaintiff was not entitled to bring the suit without impleading his mother. Horwill J. repelled this contention. According to him, the effect of the death of a coparcener is that a widow stands in the shoes of her deceased husband and, although she is not a coparcener, she has the rights of her husband who was a coparcener. She is a member of the joint family and the 'karta' of the family is entitled to sue on behalf of that family including her as a member. The suit was, therefore, competent.

The same question arose in -- 'Kallian Rai v. Kashi Nath', MANU/UP/0051/1942 : AIR 1943 All 188. The promisee Sahu Gopi Nath had died leaving two widows and it was contended that in the absence of the widows the suit was

incompetent. Their Lordships observed : "The Act was intended to give better rights to women in respect of property--that is the Preamble to the Act--but there is no indication that the Act intended to interfere with the established law relating to joint family. Whatever inroads it may have made on the doctrine of survivorship, it does not effect a, statutory severance or disruption of the joint family. The widow as a member of a joint Hindu family is to have the same interest in the joint property as the deceased husband had and this devolution does not otherwise affect the joint family status unless the widow availing herself of the provisions of Sub-section (3) claims a partition. As long as she does not do so, the status of a joint Hindu family continues and although she may not be a coparcener with the other sharers as was held in 'In re Hindu Women's Rights to Property Act, 1937 MANU/FE/0003/1941 (ante) at page 74 in the sense that the principle of survivorship no longer subsists it cannot be said that she is not a member of a joint Hindu family as long as there is no partition. She is therefore capable of being represented by the 'karta' of the family". They held that under Section 3, Sub-section (2), the interest taken by the widow is that of an

undivided member of a joint family in the joint family property.

WHO ARE REVERSIONERS UNDER HINDU LAW

Gopalakrishna (D) by L.Rs. and Ors. vs. Narayanagowda (Dead) by L.Rs. and Ors.: MANU/SC/0467/2019 - (2019) 4 SCC 592 -

The next thing which we must ascertain is who are the reversioners. The reversioners are the heirs of the last full owner, who would be entitled to succeed to the estate of such owner on the death of a widow or other limited heir, if they be then living (as per para 175 of the Mulla on Hindu Law). The nature of the interest of reversioners is also discussed under the same para, which is as follows: (2) Interest of reversioners - The interest of a reversioner is an interest expectant on the death of a limited heir and is not a vested interest. It is a spes successionis or a mere chance of succession within the meaning of Section 6, Transfer of Property Act, 1882. It cannot, therefore, be sold, mortgaged or assigned, nor can it be relinquished. A transfer of a spes

successionis is a nullity, and it has no effect in law.

STATUS OF GRANDSON IN CODIFIED HINDU LAW

Bhanwar Singh vs Puran Singh AIR 2008 SC 1490 “S. 6 of the Hindu Succession Act, 1956, as it stood at the relevant time, provided for devolution of interest in the coparcenary property. S.8 of the Act lays down the general rules of succession that the property of a male dying intestate devolve according to the provisions of the Chapter as specified in clause (1) of the Schedule. In the Schedule appended to the Act, natural sons and daughters are placed in Class-I heirs but a grandson, so long as father is alive, has not been included. S.19 of the Act provides that in the event of succession by two or more heirs, they will take the property per capita and not per stirpes, as also tenants-in-common and not as joint tenants.”

SPECIAL LAW WILL PREVAIL OVER GENERAL LAW

Jose Paulo Coutinho vs. Maria Luiza Valentina Pereira and Ors.: MANU/SC/1257/2019 - 2019

(12) SCALE 338 It is a well settled principle of statutory interpretation that when there is a conflict between the general law and the special law then the special law shall prevail. This principle will apply with greater force to special law which is also additionally a local law. This judicial principle is based on the latin maxim *generalia specialibus non derogant*, i.e., general law yields to special law should they operate in the same field on the same subject. Reference may be made to the decision of this Court in R.S. Raghunath v. State of Karnataka and Ors. MANU/SC/0012/1992 : (1992) 1 SCC 335, Commercial Tax Officer, Rajasthan v. Binani Cements Ltd. and Ors. MANU/SC/0121/2014 : (2014) 8 SCC 319 and Atma Ram Properties Pvt. Ltd. v. The Oriental Insurance Co. Ltd. MANU/SC/1539/2017 : (2018) 2 SCC 27.

THE PRINCIPLES STILL RULING THIS DAY

Haribhau Baliram vs. Hakim S/o Karim and Ors.: MANU/NA/0033/1949 - AIR 1951 Nag 249 - Under the Mitakshara, a father as a karta of the family cannot exercise any greater power

over coparcenary property than any other manager. He can make no disposition of the property which will prejudice his sons unless he obtains their assent, if they are able to give it or unless there is some well established necessity or moral or religious obligation to justify the transaction.

The test to determine the binding character of an alienation is, therefore, either family necessity or benefit or an indispensable act of duty.

A transaction dictated by no mote than considerations of individual convenience or gain of the manager cannot be binding on the family. The right to restrain or impeach any unauthorised alienation by a coparcener be he the manager, father or another coparcener is inherent in every member of the coparcenary body.

A lease does not cease to be an alienation under Hindu law because it is not permanent. Since what is necessary and beneficial to the family has to be judged by reference to all the circumstances of the transaction, the duration of the lease may not be altogether relevant in judging its binding nature on the family. But the

duration of the lease cannot alter the principles which determine the validity of an alienation.

It cannot be assumed in every case, irrespective of the circumstances of a family, that lands cannot be dealt with more profitably by the family itself or by the father or the manager with the help of servants.

INSANITY OF COPARCENER UNDER HINDU LAW

Kumar Ratneswari Nandan Singh and Others vs. Rai Bahadur Bhagwati Saran Singh and Others - FEDERAL COURT - 1949 - 50 F.C.R. 715: AIR 1950 FC 142 - MANU /FE/0032/1949 (5 Judges) -

FACTS OF THE CASE:- A Hindu family governed by the Mitakshara law and living in the United Provinces consisted of two brothers, A and B. The younger brother B became insane in 1859 when he was about 16 years of age and was adjudicated a lunatic in 1874 under the Lunacy Act of 1858. The manager who was appointed under the Act took exclusive possession of one half share in the joint family properties to which B was entitled under the law as it was then understood in the United Provinces, without any objection A's part.

The Court of Wards assumed management of B's share from the manager. The other half share which was in A's possession was placed under the management of the Collector to satisfy decrees obtained against A by his creditors. Between the years 1882 and 1892 the whole estate was partitioned under the U. P. Land Revenue Act into two separate mahals. In 1897, A and his son sold their half share to B and the entire estate was thenceforth managed by the Court of Wards on behalf of B and after B's death in 1902, on behalf of his widow C until 1920 when they handed it over to C. All the properties thereafter continued to be in the exclusive possession of C and persons claiming under her. A died in 1903, and his son's daughter's sons, who succeeded to his estate in 1924 a reversioners, instituted a suit in 1936 against the defendants who claimed under C, for possession of the entire estate alleging that since B was insane, there could be no disruption of the joint family and on B's death the entire estate vested in A by survivorship. They also alleged that B's marriage with C was not valid in law as B was a lunatic at the time of his marriage.

As per three Judges majority it is held as follows:-

- (i) that the right which B had acquired on his birth in the joint family property under Mitakshara law was not extinguished by his supervening, insanity;
- (ii) that B's insanity could not in any way deprive A of the right which he, as a coparcener had, to disrupt the joint status of the family by an unequivocal declaration of his intention to do so;
- (iii) that a declaration of intention need not necessarily be by word of mouth but may be inferred from conduct;
- (iv) that the declaration of the shares of A and B in 1874 and the subsequent division of the family property into two definite shares and the separate and exclusive enjoyment by each, of his own share after that date and the subsequent conduct of the parties established beyond doubt the complete disruption of their joint status;
- (v) that the estate which was vested in B at the time of his death was not joint family estate but B's separate property which devolved at his death on his widow C;
- (vi) that B's marriage with C was not invalid as the lower courts had concurrently found that even though B had been adjudicated lunatic, he was not at the time of the marriage ceremony incapable of understanding that he was accepting

as his wife and contracting a marriage, and the plaintiffs were not therefore entitled to succeed.

Observations of Judges:-

A sane coparcener is not prevented by any rule of law from giving a share to an insane coparcener in a partition of the joint family properties between them, even though the latter may not be entitled to claim a share as a matter of right, and if a share is so allotted to the insane coparcener he would acquire a valid title to the properties given to him even apart from any law of limitation.

Even though marriage is a sacrament under the Hindu law, acceptance of the bride by the bridegroom is an essential part of the ceremony, and a marriage would be invalid if the bridegroom was insane to such an extent that he was not capable of understanding the ceremony of accepting the bride and assenting to the marriage.

After quoting ancient Hindu Texts regarding the subject with below citations court says:-

In Muthusami Gurukkal v. Meenammal, **43 Mad. 464 : (A.I.R 1920 Mad. 652)**,. Seshagiri Ayyar J. observed that if the disqualification was not congenital, the old lawgivers, by providing for

maintenance, did not intend to deprive the heir of his inheritance but only to provide for his share's management during incapacity.

Quoted texts of Mitakshara have been examined in detail in the Madras High Court. In *Venkateswara v, Mankayammal*, **69 M.L.J 410 : (A.I.R 1935 Mad. 775)**. Varadachariar J. expressed the view that there could be a coparcenary even if the family consists of a same father and an insane son only and that the sane member can disrupt the joint status. According to him in such a case, it could not be said that the insane was not in any sense a coparcener. There is a dormant coparcenership in the disqualified coparcener and there is no reason why a severance of status as would put an end to the right of succession by survivorship should then be denied. This was based on the well-established principle that an interest once vested cannot be divested with a law to justify such result.

In *Amruhammal v. Vallimayit Ammal*. **MANU/TN/0059/1942 : I.L.R. (1942) Mad. 807 : (A.I.R 1942 Mad 693.(F B))** a Full Bench of that Court after a review of the texts held that even a congenital idiot has the status of a coparcener under the Hindu law, notwithstanding that he is excluded from the enjoyment of his share He is

described as a co-sharer but not a co-enjoyer. The affliction prevents him from enjoying his right while the affliction lasts.

A coparcener gets his right in the coparcenary property by birth and there appears nothing in the texts quoted above irrevocably to extinguish that right on a supervening insanity. On the other hand, the texts show that although such a person may not have a right to a share or claim a partition when another coparcener disrupts the joint family status, such right is given to him on the malady being cured. It is further clear that the sons of such a disqualified person are not excluded from taking a share in the coparcenary property. The text, providing for the reopening of the partition on the insane being cured, clearly shows that his rights remain in abeyance and are not irrevocably lost in the case of supervening insanity.

What the law says at present:-¹

1. Under Hindu succession Act 1956 section 28 - No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever.

¹ Collected from present texts

2. Under Hindu Marriage act 1955 section 5 both party to marriage who is subjected to recurrent attacks of insanity or epilepsy or neither party is incapable of giving valid consent to it in consequence of unsoundness of mind or though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children. These conditions are looked down under law and not made void. They are not prohibited also. But Divorce on the ground of proved insanity provided.

3. Under Hindu adoption and maintenance act 1956 only person who/she has been declared by competent court as unsound mind cannot take in adoption. There is no provision to take unsound mind person in adoption.

4. There are provisions under Mental Health Act, 1987 to administer and appoint gaurdian for lunatic and unsound mind persons properties.

5. Hindu Inheritance (Removal of Disabilities) Act, 1928 (Central Act XII of 1928) --this was altered for its Section 2 enacted : "Notwithstanding any rule of Hindu law or custom to the contrary, no person governed by Hindu law, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from inheritance or

from any right or share in joint family property by reason only of any disease, deformity or physical or mental defect."

What medical Jurisprudence books say on lunatic description:-

Modi in his book on Medical Jurisprudence, 19th Edition at page 388 classified mental defectiveness as falling chiefly under three grades known as idiocy, imbecility and feeble-mindedness,

Dealing with idiocy, he observed: "This is a congenital condition due to the defective development of the mental faculties. All grades of this condition exist from the helpless life mere vegetable organism to one which can be compared with the life of young children, as far as mental development is concerned. An idiot is wanting in merely and willpower, is devoid of emotions, has no initiative of any kind, is unable to fix attention any subject and "is unable to guard himself against common physical dangers". He is usually quiet, gentle and timid, though he can be easily irritated. He cannot express himself by articulate language, but he may be able to make himself understood by certain signs, cries or sounds. In some cases he is able to recognise

his relatives, and learn with great difficulty. He is usually filthy in his habit and had no concern as to what he eats or drinks. He is very often depraved in morals, and is sometimes cruel to weaker children as well as animals. There is always some bodily deformity or peculiarity, such as a small (Microcephalic), large (Microcephalic, hydrocephalic) or misshapen head, cleft or highly arched palate, irregularly set teeth, enlarged tonsils, adenoids, curved bones etc".

Dealing then with imbecility, Modi observed :

"This is a minor form of idiocy, any may or may not be congenital. Imbeciles are "incapable of managing themselves or their affairs or in the case of children, of being taught to do so,". They are able to speak, though their command of language is very poor. Their memory is very feeble. In some cases it is highly developed, though not the intellect. They can mechanically repeat without any mistake what is taught to them, but cannot understand its meaning. They are easily roused to passion, and may consequently become dangerous. They commit theft or even murder. Owing to their repulsive manners and habits it is not possible to associate with them, but with a little patience and perseverance they can be taught to dress

decently, to eat properly and to control their animal instincts."

Dealing then with feeble-mindedness, Modi observed: "Under the Mental Deficiency (England) Act, 1913 feeble-minded persons or morons are defined as persons in whose early age mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision and control for their own protection, or for the protection of others, or, in the case of children that they by reason of such defectiveness appear to be permanently incapable of receiving proper benefit from instruction of ordinary schools. Feeble-minded individuals do not as a rule, present bodily deformities and stigmata of degeneration, and are often capable of making their own living although they lack in initiative and ability or any work of responsibility. Such persons, however, develop various or criminal propensities, especially of a sexual nature, and are apt to commit assaults or even murders, as are incapable of restraining their impulses."

Taylor in his Principles and Practice of Medical Jurisprudence Volume-I, 11th Edition at page 545 stated that sanity must be presumed, and insanity proved to the satisfaction of a Judge, before it can be legally accepted. He

classified mentally defective persons as idiots, imbeciles and feeble-minded persons. Under the heading idiots, imbeciles or feeble-minded persons, he described all these three exists from birth or from an early age, mental defectiveness of varying degrees as stated by him. The definition of idiot as made by Taylor is clear that idiocy is not always congenital. It can be either congenital or the mental defectiveness may set in from an early age. True, Modi has described idiocy as a congenital condition, but in saying so the opinion expressed by Modi runs counter to that expressed by Taylor. The dictionary writers have described idiocy as a necessary congenital condition but in so defining the term, the definition runs counter to the views expressed by Taylor in his Principles and Practice of Medical Jurisprudence.

SISTER AND HALF SISTER IN OLD HINDU LAW OF INHERITANCE

Sahodra, Musammat vs. Ram Babu - PRIVY COUNCIL : MANU/PR/0018/1942 - (1943) 1 MLJ 180 -

The Hindu Law of Inheritance (Amendment) Act of 1929 - The Act is described as, "An Act to alter the order in which "certain heirs of a Hindu male

dying intestate are entitled to "succeed to his estate," and the preamble is, "Whereas it is "expedient to alter the order in which certain heirs of a "Hindu male dying intestate are entitled to succeed to his "estate." As the object of the Act is thus to alter the order of succession of certain persons therein mentioned, it is desirable to examine how the law stood with reference to their rights of succession before the Act, and how those rights have been altered by it. Before the Act the only females recognized as heirs under the Hindu law, except in Bombay and Madras, were (1.) the widow, (2.) the daughter, (3.) the mother, (4.) the father's mother, (5.) the father's father's mother. Accordingly, "a son's daughter, daughter's daughter and sister "--the first three persons mentioned in the Act--were not heirs at all, except in the presidencies of Bombay and Madras, where the first two of them ranked as bandhus. In Bombay, the third, a "sister " is expressly mentioned as an heir in the Mayukha; though not expressly mentioned as such in the Mitakshara, her right as an heir has long since been recognized. A sister is recognized as a gotraja sapinda both in the Mayukha and in the Mitakshara. In Madras, she was recognized as entitled to succeed as bandhu but only after the

male bandhus. A "sister's son " ranked everywhere as a bandhu before the Act. Under the Act, all the above-mentioned four persons, "A " son's daughter, daughter's daughter, sister and sister's son " are ranked as heirs in a specified order of succession, and placed next after a father's father and before a father's brother, thus enabling them to inherit with gotraja sapindas. The Act came into force on February 21, 1929. When it began to be enforced the question arose in certain courts in India. whether, having regard to the language of the preamble, the provisions of the Act would apply not only to persons who were already heirs under the Mitakshara law, but also to those of the specified persons who were not heirs before the Act, because the Act, it was said, was merely intended to alter the order in which persons already recognized as heirs would succeed and not to create new heirs. The heading and preamble of the Act do not accurately summarize its provisions, but having regard to the language of Section 1, Sub-section 2, of the Act which says that "it applies only to persons who, "but for the passing of the Act, would have been subject to "the law of the Mitakshara in respect of the provisions herein "enacted, ..." the courts

concluded, and in their Lordships' view rightly, that it would apply to the persons specified so as to constitute them heirs even in those provinces where they were not heirs according to the prevailing view of the law of the Mitakshara. It will thus be seen that the Act has amended and altered the old order of succession in Hindu law. It affects all Hindus governed by the Mitakshara. Hence it appears to their Lordships that in the absence of an interpretation clause, the courts should interpret the terms of the enactment in the sense in which they are used in the Mitakshara law.

In the law of the Mitakshara the principle is fundamental that the primary test on all questions of inheritance is propinquity in blood. "To the nearest sapinda the inheritance " next belongs." (Manu, 9.187.) Applying this basic principle of succession, the Hindu law gives preference to the whole-blood over the half-blood. As applied to brothers, the rule is thus stated in the Mitakshara, ch. 2, Section 4, vv. 5 and 6. These run as follows: (5.) "Among brothers, such, as are of the "whole-blood, take the inheritance in the first instance, under "the text ' To the nearest sapinda, the inheritance next " belongs.' Since those of the half-blood are remote through

"the difference of the mothers." (6.) "If there be no uterine "(or whole) brothers, those by different mothers inherit the "estate."

In *Garuddas v. Laldas* (1933) L.R. 60 I.A. 189, the Board held that "the Mitakshara, ch. 2, Section 4, vv. 5 and 6, states a principle with regard "to the preference of the whole-blood to the half-blood " applicable to all sapindas in the same degree of consanguinity."

In *Jatindra Nath Roy v. Nagendra Nath Roy* (1931) L.R. 58 I.A. 372, which was a case between bandhus, it was held that in a Hindu family governed by the Benares school of the Mitakshara law the father's half-sister's sons have preference as heirs over the mother's sister's sons. In the course of the judgment their Lordships observed,

In *Ganga Sahai v. Kesri* (1915) L.R. 42 I.A. 177, 184, it is laid "down that 'having regard to the general scheme of the " Mitakshara the preference of the whole-blood to the half-"blood is confined to members of the same class, or to use "'the language of the judges of the High Court in *Suba Singh v. Sarafray Kunwar* (1896) I.L.R. 19 A. 215 to sapindas of the same degree of "' descent from the common ancestor L.R. 58 I.A. 375. In their Lordships' opinion, the principle of the decision applies equally in the case of

bandhus, not descended from a common ancestor but claiming merely on the basis of propinquity.

Again the Mitakshara (ch. 2, Section 4, vv. 5 to 7) definitely prefers a half-brother to the son of a full brother: see *Krishnaji Vyanktesh v. Pandurang* (1875) 12 Bom. H.C. 65.

It follows that the law of the Mitakshara recognizes no difference between relations of whole-blood and those of half-blood, which would include sisters and half-sisters as well, except when there is a competition inter se.

This has been understood and acted upon as a general principle of Hindu law by the Lahore High Court in *Guranditta v. Jiwani* (1937) A.I.R. (Lah.) 11, in which it was held that a half-sister's son is an heir, according to its general principles. There is nothing in the Act itself to show that the interpretation of the word "sister" as including a "half-sister" sanctioned by the Mitakshara, is contrary to its intention, either express or implied.

In *Lion Mutual Marine Insurance Association v. Tucker* (1883) 53 L.J. (Q.B.) 185, 189 Brett M.R. observed: "It is, I consider, a well settled rule that in "construing a statute or a document it is not right to follow "merely the

words of the statute or document, taking them " in their ordinary grammatical meaning: but it is necessary "also to apply those words to the subject-matter dealt with "in the statute or document, and then to construe them with "reference to that subject-matter, unless there is something "which compels one not so to construe them. The rule is, " I think, that the ordinary meaning of the words used in the "English language must be applied to the subject-matter "under consideration."

In their Lordships' opinion, the term "sister " in the Act would include a half- 3 sister, i.e., a sister by the same father even though the mother be different, but cannot be extended beyond that to include one who has not the same father.

It is stated as an objection that the full sister and the half- sister must take together if the word "sister" in the Act; includes a half-sister; but this is too rigid a view. On ordinary principles, the difficulty will not arise; for, although as recognized under the Mitakshara, a sister will include a half-sister, the latter will take the inheritance only when there is no full sister to claim it.

If the term "sister " in the Act includes a half-sister, then it must be held by parity of

reasoning, that the term "sister's "son" would include a half-sister's son.

Nagpur High Court in its Full Bench decision in *Amrut v. Thagan*, Mst. I.L.R. [1938] Nag. 115 held that " a half-sister who is a child of the same father is an heir under "the Hindu Law of Inheritance (Amendment) Act of 1929. "The word ' sister ' includes a sister by the same father even "though the mother be different." The court proceeded on the view that under the Act a sister is an heir in all the provinces to which the Mitakshara law applied, that it should be interpreted according to the notions of Hindu law, of which it forms part, and that as a general rule the law of the Mitakshara recognizes no distinction between the full-blood and the half-blood except in a competition inter se. The learned judges pointed out that as a sister succeeds as a father's daughter, a half-sister having the same father is an heir if the sister would be an heir. The same court has also held that a half-sister's son is in the line of heirs, and that a "sister's "son" in Section 2 of the Act would include a half-sister's son: see *Skankar v. Raghoba* (1938) A.I.R. (Nag.) 97.

**DEDICATION OF PROPERTY RELIGIOUS OR
CHARITABLE PURPOSE UNDER HINDU LAW
EXPLAINED**

**Maharani Hemanta Kumari Debi vs. Gauri
Sankar Tewari - PRIVY COUNCIL -
MANU/PR/0092/1940 - 1941 (43) BomLR 777**

- Under Hindu law, the dedication of property to religious or charitable uses may be complete or partial. In the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs. Partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object, but also where the owner retains the property in himself and grants the community or part of the community an easement over it for certain specified purposes.

Under Hindu law in the usual case of complete dedication made to an idol the property ceases altogether to belong to the donor and becomes vested in the idol as a juristic person. Complete relinquishment by the owner of his proprietary right is by no means the only form of dedication known to the law and is very different

from anything that can ordinarily be inferred from the public user of a highway. From the standpoint of the Hindu law it is not essential to a valid dedication that the legal title should pass from the owner nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated. Whether the property be charged with a sum of money for the worship of an idol or be subjected to a right of limited user on the part of the public, it descends and is alienable in the ordinary way, the only difference being that it passes with the charge upon it.

The land or other property of a bathing ghat on the banks of the Ganges at Benares dedicated to such a purpose, is dedicated to an object both religious and of public utility, notwithstanding that it is not dedicated to any particular deity; but from such dedication it cannot be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu law which involves the complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object.

The river bank at Benares is a sacred and historical spot with a powerful claim to the regard of a pious Hindu; but the practice of bathing in the Ganges is not in general so directly connected with the worship of a particular deity that nothing short of complete dedication would be appropriate for a public bathing ghat. The character of the use to be made of the bank does not require it. Nor does the public right of use for purposes of bathing take its origin as a rule from an immediate and express act of dedication; rather does it begin by acts of user; which are acquiesced in by the owner of the property who in due course makes provision for the public needs as an act of charity or piety.

The ghatias of Benares as members of a class have no customary right to claim exclusive possession of portions of a public bathing ghat by placing platforms or canopies over them in order to carry on their profession. No individual ghatia can have any right by custom to exclusive possession of any parts of the ghat either by prescription or lost grant.

A right to stand, sit or squat on a ghat for the purposes of exercising the profession of ghatias may be acquired by consent of the owner of the ghat.

It is the usual but not correct practice to order "that the plaintiff's suit as prayed be decreed" without formally stating the terms of the various orders, declarations and injunctions which the Court is granting.

There was a ghat on the bank of the river Ganges as it flowed past the city of Benares, which the plaintiff's predecessor had purchased and rebuilt in the year 1814. No express dedication of the ghat to the public was proved by the production of a deed of endowment or otherwise. No manager was ever appointed, nor was it shown that the plaintiff or her predecessor had purported to act as superintendent, sebaite or mutawalli. They were treated as owners whenever there was disrepair of the ghat, which they repaired at their own expense. They closed it to bathers on proper occasions and levied tolls on the keepers of shops at festivals. Their expenditure on the ghat often exceeded their receipts and they never wished to make a profit from the tolls. There was evidence as to agreements taken from ghatias upon nearby ghats:- Held: That the above evidence pieced together showed that the plaintiff had a proprietary right in the ghat and the soil underneath it.

A bathing ghat on the banks of the Ganges at Benares is a subject-matter to be considered upon the principles of the Hindu law. If dedicated to such a purpose, land or other property would be dedicated to an object both religious and of public utility, just as much as is a dharamsala or a math, notwithstanding that it be not dedicated to any particular deity. But it cannot from this consideration be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu law which involves the complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object. There may or may not be some presumption arising in respect of this from particular circumstances of a given case, but, in the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs. That the dedication of property to religious or charitable uses may be complete or partial is as true under the Benares as under the Bengal school of Hindu law. Partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object, but

also, as Mr. Mayne in his well-known work was careful to notice, "where the owner retained the property in himself but granted the community or part of the community an easement over it for certain specified purposes"

**Vidyawati and Ors. vs. Ram Janki and Ors.:
MANU/UP/2850/2019**

What is Dharmasala?

33. A popular form of Hindu charitable trust is the institution known as Dharmasala. The expression primarily signifies a rest house and it 'corresponds to what is known as choultry in Southern India, the object of which is to provide rest and sometimes food to travellers and itinerant ascetics. Thus, dedication for Dharmasala is a charitable object.

Dedication of property for charity.

**In Pratap Singh Ji N. Desai v. Deputy Charity Commissioner Gujarat and another,
MANU/SC/0834/1987 : 1987 (supp) SCC 714**

(para 8) Hon'ble Supreme Court held that "Endowment" is dedication of property for purposes of religion or charity having both the subject and object certain and capable of

ascertainment. Dedication need not always be in writing and can be inferred from the facts and circumstances appearing. The property so dedicated to a pious purpose is placed extra-commercium and is entitled to special protection at the hands of the Sovereign whose duty is to intervene to prevent fraud and waste in dealing with religious endowments.

In Menakuru Dasaratharami Reddi and another v. Duddukuru Subba Rao and others, MANU/SC/0098/1957 : AIR 1957 SCR 797

(Para 5), Hon'ble Supreme Court considered the requirement of dedication to charity by instrument or grant and held as under: "5. The principles of Hindu Law applicable to the consideration of questions of dedication of property to charity are well-settled. Dedication to charity need not necessarily be by instrument or grant. It can be established by cogent and satisfactory evidence of conduct of the parties and user of the property which show the extinction of the, private secular character of the property and its complete dedication to charity. On the other hand, in many cases Courts have to deal with grants or gifts showing dedication of property to charity. Now it is clear that dedication of a

property to religious or charitable purposes may be either complete or partial. If the dedication is complete, a trust in favour of public religious charity is created. If the dedication is partial, a trust in favour of the charity is not created but a charge in favour of the charity is attached to, and follows, the property which retains its original private and secular character. Whether or not dedication is complete would naturally be a question of fact to be determined in each case in the light of the material terms used in the document. In such cases it is always a matter of ascertaining the true intention of the parties; it is obvious that such intention must be gathered on a fair and reasonable construction of the document considered as a whole. The use of the word "trust" or "trustee" is no doubt of some help in determining such intention; but the mere use of such words cannot be treated as decisive of the matter. Is the private title over the property intended to be completely extinguished? Is the title in regard to the property intended to be completely transferred to the charity? The answer to these questions can be found not by concentrating on the significance of the use of the word "trustee" or "trust" alone but by gathering the true intent of the document considered as a

whole. In some cases where documents purport to dedicate property in favour of public charity, provision is made for the maintenance of the worshipper who may be a member of the family of the original owner of the property himself and in such cases the question often arises whether the provision for the maintenance of the manager or the worshipper from the income of the property indicates an intention that the property should retain its original character and should merely be burdened with an obligation in favour of the charity. If the income of the property is substantially intended to be used for the purpose of the charity and only an insignificant and minor portion of it is allowed to be used for the maintenance of the worshipper or the manager, it may be possible to take the view that dedication is complete. If, on the other hand, for the maintenance of public charity a minor portion of the income is expected or required to be used and a substantial surplus is left in the hands of the manager or worshipper for his own private purposes, it would be difficult to accept the theory of complete dedication. It is naturally difficult to lay down a general rule for the solution of the problem. Each case must be considered on its

facts and the intention of the parties must be determined on reading the document as a whole."

In Kuldeep Chand and another v. Advocate General to Government of H.P. and others, MANU/SC/0128/2003 : (2003) 5 SCC 46 (paras 21, 38, 40, 42) Hon'ble Supreme Court explained the dedication of property for charitable purpose and held as under: "21. It is beyond any dispute that a Hindu is entitled to dedicate his property for religious and charitable purposes wherefore even no instrument in writing is necessary. A Hindu, however, in the event, wishes to establish a charitable institution must express his purpose and endow it. Such purpose must clearly be specified. For the purpose of creating an endowment, what is necessary is a clear and unequivocal manifestation of intention to create a trust and vesting thereof in the donor and another as trustees. Subject of endowment, however, must be certain. Dedication of property either may be complete or partial. When such dedication is complete, a public trust is created in contradistinction to a partial dedication which would only create a charity. Although the dedication to charity need not necessarily be by instrument or grant, there must exist cogent and

satisfactory evidence of conduct of the parties and user of the property, which show the extinction of the private secular character of the property and its complete dedication to charity. (See Menakuru Dasaratharami Reddi v. Duddukuru Subba Rao, MANU/SC/0098/1957 : AIR 1957 SC 797).

38. A dedication for public purposes and for the benefit of the general public would involve complete cessation of ownership on the part of the founder and vesting of the property for the religious object. In absence of a formal and express endowment, the character of the dedication may have to be determined on the basis of the history of the institution and the conduct of the founder and his heirs. Such dedication may either be complete or partial. A right of easement in favour a community or a part of the community would not constitute such dedication where the owner retained the property for himself. It may be that right of the owner of the property is qualified by public right of user but such right in the instant case, as noticed hereinbefore, is not wholly unrestricted. Apart from the fact that the public in general and/or any particular community did not have any right of participation in the management of the property nor for the maintenance thereof any

contribution was made is a matter of much significance. A dedication, it may bear repetition to state, would mean complete relinquishment of his right of ownership and proprietary. A benevolent act on the part of a ruler of the State for the benefit of the general public may or may not amount to dedication for charitable purpose.

40. Undoubtedly, bequests for construction of a Dharamsala will be for a charitable purpose. It is not necessary that the properties must be dedicated to any particular deity but what is essential is complete dedication for a charitable purpose. Such dedication may be made to an object both religious and of public utility.

42. When a dedication to a charity is sought to be established in absence of an instrument or grant, the law requires that such dedication be established by cogent and satisfactory evidence of conduct of the parties and user of the property which show the extinction of the private secular character of the property and its complete dedication to charity. It must be proved that the donor intended to divest himself of his ownership in the dedicated property. The meaning of charitable purpose may depend upon the statute defining the same."

In Pragdasji Guru Bhagwandasji v. Ishwarlalbhai Narsibhai

(MANU/SC/0072/1952 : AIR 1952 SC 143) the Apex Court held that, a suit under Section 92 of C.P.C. is of a special nature, which presupposes the existence of a public trust of religious or charitable nature. Such suit can proceed only on the allegation that there is a breach of such trust or that directions from the court are necessary for the administration thereof, and it must pray for one or other of the reliefs that are specifically mentioned in the section.

In R. Venugopala Naidu v. Venkaiarayulu Naidu Charities (MANU/SC/0433/1989 : AIR 1990 SC 444) the Apex Court held that, a suit under Section 92 of C.P.C. is a suit of a special nature for the protection of public rights in the public trusts and charities. The suit is fundamentally on behalf of the entire body of persons who are interested in the trust. It is for the vindication of public rights.

In Swami Shankananand v. Mahant Sri Sadgum Samanad (MANU/SC/2497/2008 : (2008) 14 SCC 642) the Apex Court held that, Section 92 of C.P.C. provides for special power of

the Court in regard to public trusts both charitable and religious and in a case of this nature, the judiciary exercises the jurisdiction of *parens patriae*.

In Raje Anandrao v. Shamrao (MANU/SC/0356/1961 : AIR 1961 SC 1206) the issue that arose for consideration before the Apex Court was as to whether there is anything in Section 92 of C.P.C. which militates against providing a clause in a Scheme framed thereunder for its modification by an application to the Court framing the Scheme. The Apex Court held that, sub-section (1) of Section 92 of C.P.C. provides for setting a Scheme and if a suit is brought for this purpose it has to comply with the requirements of sub-section (1); but where such a suit has been brought and a Scheme has been settled, there is nothing in sub-section (2) of Section 92 which would make it illegal for the Court to provide a clause in the Scheme itself for its future modification. All that sub-section (2) provides is that, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of a trust as is therein referred to except in conformity with the provisions of that sub-section. This sub-section therefore does not bar an application for

modification of a Scheme in accordance with the provisions thereof, provided such a provision can be made in the Scheme itself, under sub-section (1) the Court has the power to settle a Scheme. That power is comprehensive enough to permit the inclusion of a provision in the Scheme itself which would make it alterable by the Court if and when found necessary in future to do so. Section 92 of C.P.C. certainly comes to an end when a decree is passed therein, including the settlement of a Scheme for the administration of the trust. But there is nothing which prevents the Court, which can settle a Scheme under sub-section (1) of Section 92, from making the Scheme elastic and provide for its modification in the Scheme itself. That does not affect the finality of the decree; all that it provides is that where necessity arises a change may be made in the manner of administration by the modification of the Scheme. If the Scheme is amended in pursuance of such a clause in the Scheme it will not amount to amending the decree. The decree stands as it was, and all that happens is that a part of the decree which provides for management under the Scheme is being given effect to. It is both appropriate and convenient that a Scheme should contain a provision for its modification, as

that would provide a speedier remedy for modification of the manner of administration when circumstances arise calling for such modification than through the cumbersome procedure of a suit.

A Constitution Bench of the Apex Court in Madappa v. M.N. Mahanthadevaru (MANU/SC/0018/1965 : AIR 1966 SC 878)

reiterated that, it is open in a suit under Section 92 of C.P.C. for the settlement of a Scheme to provide in the Scheme itself for modifying it whenever necessary by inserting a clause to that effect. A suit for the settlement of a Scheme is analogous to an administration suit and so long as the modification in the Scheme is for the purpose of administration, such modification could be made by an application under the relevant clause of the Scheme, without the necessity of a separate suit under Section 92, the provisions of which were not violated by such a procedure. justify it's alteration or modification, the bar of res judicata cannot then be pleaded against such alteration or modification. the main purpose of sub-section (1) of Section 92 of C.P.C. is to give protection to public trusts of a charitable or religious nature from being

subjected to harassment by suits being filed against them. That is why it provides that suits under that Section can only be filed either by the Advocate General or two or more persons having an interest in the trust with the [consent in writing of the Advocate General]. The object is that before the Advocate General files a suit or gives his consent for filing a suit, he would satisfy himself that there is a prima facie case either of breach of trust or of the necessity for obtaining directions of the court. a suit for the settlement of a Scheme is analogous to an administration suit and so long as the modification in the Scheme is for the purpose of administration, such modification could be made by an application under the relevant clause of the Scheme, without the necessity of a separate suit under Section 92 of C.P.C. In that case, the question that came up for consideration before the Constitution Bench of the Apex Court was as to whether there is anything in clause (f) of sub-section (1) of Section 92 of C.P.C. which prohibits the giving of any directions as provided in Paras. (11) and (12) of the Scheme in the ordinary administration of the trust. Para.(11) of the Scheme provides for the appointment of two managers for a period of five years who will be

eligible for re-appointment. One of the managers appointed under the Scheme of 1948 was the then first defendant in the suit of 1942. The last part of para.(11) of the Scheme is extracted hereunder; "(11)....."If the first defendant neglects or refuses to co-operate with his co-manager, the co-manager or any two of the veerashaivas interested in the institution may apply for necessary directions to the Court." Paragraph (12) of the Scheme is extracted hereunder; "(12) The parties herein or any two veerashaivas interested in the institution and either of the managers are at liberty to apply for directions to the District Court as and when occasion arises for carrying out the Scheme."

Section 92(1) provides for two classes of cases, namely, (i) where there is a breach of trust in a trust created for public purposes of a charitable or religious nature, and (ii) where the direction of the Court is deemed necessary for the administration of any such trust. The reliefs to be sought in a suit under sub-section (1) of Section 92 are indicated in that section and include removal of any trustee, appointment of a new trustee, vesting of any property in a trustee, directing a removed trustee or person who has ceased to be a trustee to deliver possession of

trust property in his possession to the person entitled to the possession of such property, directing accounts and enquiries, declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust, authorisation of the whole or any part of the trust property to be let, sold, mortgaged or exchanged, or settlement of a Scheme. The nature of these reliefs will show that a suit under Section 92 may be filed when there is a breach of trust or when the administration of the trust generally requires improvement.

Section 92(1) does not have the effect of circumscribing the powers of trustees or managers to carry on ordinary administration of trust property and to deal with it in such manner as they think best for the benefit of the trust and if necessary even to let, sell, mortgage or exchange it. Clause (f) was put in, inter alia, to give power to the Court to permit lease, sale, mortgage or exchange of property where, for example, there may be a prohibition in this regard in the trust deed relating to a public trust. There may be other situations where it may be necessary to alienate trust property which might require Court's sanction and that is why there is such a provision in Clause (f) of sub-section (1) of

Section 92. The Apex Court held that, clause (f) of sub-section (1) of Section 92 cannot be read in such a way as to hamper the ordinary administration of trust properties by trustees or managers thereof; and if that is so, there can be no invalidity in a provision in the Scheme which directs the trustees or managers or, even one out of two co-managers when they cannot agree to obtain directions of the Court with respect to the disposal or alienation of the property belonging to the trust. Therefore, clause (f) of sub-section (1) of Section 92 does not apply to the circumstances of the case and no suit under Section 92 was necessary in consequence. The Apex Court has also clarified that, whether a direction as provided in paras.(11) and (12) of the Scheme can be sought by persons other than trustees or managers or one of two managers is a matter which does not arise for consideration in the present case and the Bench express no opinion thereon. Paras. 9 to 11 of the judgment are extracted hereunder;

"9. The contention on behalf of the respondent is that these two provisions have clearly reserved power in the District Court to give directions for carrying out the Scheme whenever occasion arises for the same. It is contended that

by these provisions power was reserved in the District Court to give directions as to the ordinary administration of the muth in order to carry out the purposes of the Scheme. We are of opinion that this contention on behalf of the respondent is correct. We cannot accept the contention on behalf of the appellant that these paragraphs merely provide for carrying out nitya poojas and vishesh poojas mentioned in the Scheme and nothing else. The generality of the words used in these paragraphs clearly show that power was reserved in the Scheme to get directions of the Court for the ordinary administration of the muth from time to time and that such directions could be sought amongst others by either of the co-managers. We are further of opinion that it cannot be disputed in the present case that the directions asked for by the respondent were in the nature of directions for the ordinary administration of the muth. It is obvious that in order to carry on the ordinary administration of an institution like the present, the managers have the power to dispose of movable property and to deal with lands in such manner as to maximise the income of the muth. Therefore, when the respondent asked for directions of the Court in the interest of economy and practical utility for

the sale of cattle and for selling the right of cultivation of lands from year to year on payment of cash, he was only asking for directions in connection with the ordinary administration of the muth, and the Court would have power under these paragraphs of the Scheme to give such directions as it thought necessary for that purpose.

10. Let us now see if there is anything in Section 92(1). Clause (f) which prohibits the giving of such directions even if there is a provision to that effect in the Scheme. Section 92(1) provides for two classes of cases, namely, (i) where there is a breach of trust in a trust created for public purposes of a charitable or religious nature, and (ii) where the direction of the Court is deemed necessary for the administration of any such trust. The main purpose of Section 92(1) is to give protection to public trusts of a charitable or religious nature from being subjected to harassment by suits being filed against them. That is why it provides that suits under that section can only be filed either by the Advocate General, or two or more persons having an interest in the trust with the consent in writing of the Advocate General. The object clearly is that before the Advocate General files a suit or gives

his consent for filing a suit under Section 92, he would satisfy himself that there is a prima facie case either of breach of trust or of the necessity for obtaining directions of the Court. The reliefs to be sought in a suit under section 92(1) are indicated in that section and include removal of any trustee, appointment of a new trustee, vesting of any property in a trustee, directing a removed trustee or person who has ceased to be a trustee to deliver possession of trust property in his possession to the person entitled to the possession of such property, directing accounts and enquiries, declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust, authorisation of the whole or any part of the trust property to be let-sold, mortgaged or exchanged, or settlement of a Scheme. The nature of these reliefs will show that a suit under Section 92 may be filed when there is a breach of trust or when the administration of the trust generally requires improvement. One of the reliefs which can be sought in such a suit is to obtain the authority of the Court for letting, selling, mortgaging or exchanging the whole or any part of the property of the trust, as provided in Clause (f) of the reliefs.

11. We are, however, of opinion that prayer for such a relief though permissible in a suit under Section 92 does not in any way circumscribe or take away from trustees or managers of public trusts the right of ordinary administration of trust property which would include letting, selling, mortgaging or exchanging such property for the benefit of the trust. We cannot infer from the presence of such a relief being provided in a suit under Section 92(1) that the right of trustees or managers of the trust to carry on the ordinary administration of trust property is in any way affected thereby. If this were so, it would make administration of trust property by trustees or managers next to impossible. This will be clear from a few examples which we may give. Suppose there is a lot of odds and ends accumulated and the trustees or managers of a public trust want to dispose of those odds and ends if they are of no use to the trust. If the interpretation suggested on behalf of the appellant is accepted, the trustees or managers could not sell even such odds and ends without filing a suit for authorising them to sell such movable property. Obviously this could not have been the intention behind Clause (f) in Section 92(1). Take another case where the public

trust has a good deal of land and arranges to cultivate it itself and gets crops every half year. If the produce is not all required for the trust and has to be sold, the presence of Clause (f) in Section 92(1) does not require that every half year a suit should be filed by trustees or managers with the permission of the Advocate General to sell such crop. The absurdity of the argument on behalf of the appellant based on clause (f) of Section 92(1) is, therefore, obvious and that clause does not in our opinion have the effect of Circumscribing the powers of trustees or managers to carry on ordinary administration of trust property and to deal with it in such manner as they think best for the benefit of the trust and if necessary even to let, sell, mortgage or exchange it. It seems that Clause (f) was put in inter alia to give power to Court to permit lease, sale, mortgage or exchange of property where, for example, there may be a prohibition in this regard in the trust deed relating to a public trust. There may be other situations where it may be necessary to alienate trust property which might require Court's sanction and that is why there is such a provision in Clause (f) in Section 92(1). But that clause in our opinion was not meant to limit in any way the power of trustees or managers to

manage the trust property to the best advantage of the trust and in its interest, and if necessary, even to let, sell, mortgage or exchange such property. Further if Clause (f) cannot be read to limit the powers of trustees or managers to manage the trust property in the interest of the trust and to deal with it in such manner as would be to the best advantage of the trust, there can be no bar to a provision being made in a Scheme for directions by the Court in that behalf. If anything, such a provision would be in the interest of the trust, for the Court would not give directions to let, sell, mortgage or exchange the trust property or any part thereof unless it was clearly in the interest of the trust. Such a direction can certainly be sought by the trustees or managers or even by one manager out of two if they cannot agree, and there is nothing in Clause (f) in our opinion which militates against the provision in the Scheme for obtaining such direction. We may add that we say nothing about obtaining of such directions by persons other than managers or trustees, for this is not a case where the direction was sought by a person other than a co-manager. Whether such a direction can be sought by persons other than trustees or managers or one of two managers as provided in paragraphs (11)

and (12) of the Scheme is a matter which does not arise for consideration in the present case and we express no opinion thereon. We are dealing with a case where the prayer is made by one trustee and the order passed thereon relates to matters which are incidental to acts of management of the trust property and we have no doubt that Clause (f) in Section 92(1) cannot be read in such a way as to hamper the ordinary administration of trust properties by trustees or managers thereof: and if that is so, there can be no invalidity in a provision in the Scheme which directs the trustees or managers or even one out of two co-managers when they cannot agree to obtain directions of the Court with respect to the disposal or alienation of the property belonging to the trust. We are, therefore, of opinion that Clause (f) does not apply to the circumstances of this case and no suit under Section 92 was necessary in consequence. The Additional District Judge had jurisdiction to give directions which he did under paras. (11) and (12) of the Scheme, as these directions are of the nature of ordinary administration of trust property and do not fall within clause (f) in Section 92(1) of the Code of Civil Procedure."

In Harnam Singh v. Gurdial Singh (MANU/SC/0007/1967 : AIR 1967 SC 1415) a

Three-Judge Bench of the Apex Court reiterated the view of the Privy Council in the decision in *Vaidvanatha Ayyar v. Swaminatha Ayyar* (MANU/PR/0086/1924 : AIR 192 PC 221) that, the object of Section 92 of C.P.C. was to prevent people interfering by virtue of this section in the administration of charitable trusts merely in the interests of others and without any real interests of their own.

In RM Narayana Chettiar v. N. Lakshmanan Chettiar (MANU/SC/0037/1991 : AIR 1991 SC

221) the Apex Court held that, under Section 92 of C.P.C. leave of the Court is a pre-condition or a condition precedent for the institution of a suit against a public trust for the reliefs set out in the said section; unless all the beneficiaries join in instituting the suit, if such a suit is instituted without leave, it would not be maintainable at all. Having in mind, the objectives underlying Section 92 and the language thereof, as a rule of caution, the Court should normally, unless it is impracticable or inconvenient to do so, give a notice to the proposed defendants before granting leave under Section 92 to institute a suit. The

defendants could bring to the notice of the Court for instance that the allegations made in the plaint are frivolous or reckless. Apart from this, they could, in a given case, point out that the persons who are applying for leave under Section 92 are doing so merely with a view to harass the trust or have such antecedents that it would be undesirable to grant leave to such persons. the desirability of notice being given to the defendants, however, cannot be regarded as a statutory requirement to be complied with before leave under Section 92 can be granted as that would lead to unnecessary delay and, in a given case, cause considerable loss to the public trust. Such a construction of the provisions of Section 92 of C.P.C. would render it difficult for the beneficiaries of a public trust to obtain urgent interim orders from the Court even though the circumstances might warrant such relief being granted. Keeping in mind these considerations, although, as a rule of caution, Court should normally give notice to the defendants before granting leave under the said Section to institute a suit, the Court is not bound to do so. If a suit is instituted on the basis of such leave, granted without notice to the defendants, the suit would not thereby be rendered bad in law or non-

maintainable. The grant of leave cannot be regarded as defeating or even seriously prejudicing any right of the proposed defendants because it is always open to them to file an application for revocation of the leave which can be considered on merits and according to law.

In Vidyodaya Trust v. Mohan Prasad R. MANU/SC/7227/2008 : (2008(2) KLT 68 (SC) :

(2008)4 SCC 115) the Apex Court reiterated that, the object of Section 92 of C.P.C. is to protect the public trust of a charitable and religious nature from being subjected to harassment by suits filed against them. Public trusts for charitable and religious purpose are run for the benefit of the public. No individual should take benefit from them. If the persons in management of the trusts are subjected to multiplicity of legal proceedings, funds which are to be used for charitable or religious purposes would be wasted on litigation. The harassment might dissuade respectable and honest people from becoming trustees of public trusts. Thus, there is need for scrutiny. In the suit against public trusts, if on analysis of the averments contained in the plaint it transpires that the primary object behind the suit was the vindication of individual or personal rights of

some persons, an action under the provision does not lie.

Ray Sudhan vs. Sajeendran: MANU/KE/2409/2016 (DB) - The legal position that emerges from the decisions of the Apex Court referred to above is that, under Section 92 of C.P.C. leave of the Court is a pre-condition for the institution of a suit by two or more persons having an interest in a public trust, against such public trust, for the reliefs set out in sub-section (1) of Section 92. While granting leave, the Court must be satisfied that, there is a prima facie case either of breach of trust or of the necessity for obtaining directions of the Court and that, the primary object behind the suit is not the vindication of individual or personal rights of some persons or merely to harass the trust or its trustees. As a rule of caution, the Court should normally, unless it is impracticable or inconvenient to do so, give a notice to the proposed defendants before granting leave under Section 92 to institute a suit. In case of leave granted without notice to the proposed defendants, it is always open to them to file an application for revocation of the leave, which can be considered on merits and according to law.

In Raje Anandrao v. Shamrao (MANU/SC/0356/1961 : AIR 1961 SC 1206), the Apex Court held that sub-section (2) of Section 92 of C.P.C. does not bar an application for modification of a Scheme in accordance with the provisions made in the Scheme itself and that, the power of the Court under sub-section (1) of Section 92 to settle a Scheme is comprehensive enough to permit inclusion of a provision in the Scheme for its modification by the Court, if and when found necessary. In the said decision, the Apex Court was concerned only with the modification of the Scheme and not with appointment or removal of trustees or any other relief set out in sub-section (1) of Section 92 of C.P.C. Therefore, in Raje Anandrao's case the Apex Court was not concerned with the question as to whether it would be open to the Court to appoint or remove trustees, etc., on the ground of breach of trust, etc. without recourse to a regular suit under Section 92 of C.P.C. Para 10 of the judgment, which is relevant, is extracted hereunder; "10.....Further sub-section (2) of Section 92 bars a suit claiming the above reliefs unless the suit is filed in conformity with Section 92(1). In the present appeal we are concerned

only with the modification of a Scheme: we are not concerned with appointment or removal of trustees or any other matter enumerated in sub-section (1) of Section 92. We do not therefore propose to consider whether it would be open to appoint or remove trustees etc.. on the around of breach of trust without recourse to a suit under Section 92. We shall confine ourselves only to the question whether in a case where there is provision in the Scheme for its modification by an application to the Court, it is open to the court to make modifications therein without the necessity of a suit under Section 92. So far as the Scheme is concerned, Section 92(1) provides for setting a Scheme and if a suit is brought for this purpose it has to comply with the requirements of Section 92(1); but where such a suit has been brought and a Scheme has been settled, we see nothing in Section 92(2) which would make it illegal for the Court to provide a clause in the Scheme itself for its future modification. All that that sub-section provides is that no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of a trust as is therein referred to except in conformity with the provisions of that sub-section. This sub-section therefore does not bar an application for modification of a Scheme in

accordance with the provisions thereof, provided such a provision can be made in the Scheme itself. Under sub-section (1) the Court has the power to settle a Scheme. That power to our mind appears to be comprehensive enough to permit the inclusion of a provision in the Scheme itself which would make it alterable by the Court if and when found necessary in future to do so."

PROPERTY FROM MATERNAL ANCESTER IS NOT ANCESTRAL PROPERTY

Muhammad Husain Khan and Ors. vs. Babu Kishva Nandan Sahai - PRIVY COUNCIL - AIR 1937 PC 233 : MANU/PR/0067/1937 - The rule of Hindu law is well-settled that the property which a man inherits from any of his three immediate paternal ancestors, namely his father, father's father and father's father's father is ancestral property as regards his male issue, and his son acquires jointly with him an interest in it by birth. Such property is held by him in coparcenary with his male issue, and the doctrine of survivorship applies to it. But the question raised by this appeal is whether the son acquires by birth an interest jointly with his father in the

estate, which the latter inherits from his maternal grandfather. Now, Vijnanesvara, the author of Mitakshara, expressly limits such right by birth to an estate which is paternal or grand-paternal. It is true that Colebrooke's translation of the 27th sloka of the first section of the first chapter of Mitakshara, which deals with inheritance is as follows : "It is a settled point that property in the paternal or ancestral estate is by birth". But Colebrooke apparently used the word 'ancestral' to denote grand-paternal, and did not intend to mean that in the estate, which devolves upon a person from his male ancestor in the maternal line, his son acquires an interest by birth. The original text of the Mitakshara shows that the word used by Vijnanesvara, which has been translated by Colebrooke as 'ancestral' is paitamaha which means belonging to pitamaha. Now, pitamaha ordinarily means father's father, and though it is sometimes used to include any paternal male ancestor of the father, it does not mean a maternal male ancestor. The word 'ancestor' in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the 'ancestral' estate in which under the Hindu law, a son acquires jointly with his father an interest by birth must be confined,

as shown by the original text of the Mitakshara, to the property descending to the father from his male ancestor in the male line. The expression has sometimes been used in its ordinary sense, and that use has been the cause of misunderstanding.

SEPARATION OF JOINT HINDU FAMILY

Purnananthachi vs. T.S. Gopalaswami Odayar and Ors. - PRIVY COUNCIL (1936) 71 MLJ 554:

MANU/PR/0129/1936 - Where the members of a joint Hindu family execute a deed by which one member separates from the other members on receiving his share of the family estate and the deed further provides that the remaining estate should be divided in equal shares among the other members, but that in deference to the wishes of the senior member, the remaining members should, during his lifetime, live as members of one family and after his death, partition should be effected according to the shares stipulated, the effect of the document is that there is no separation of interests in present of the remaining members, and they constitute a coparcenary as before. There is only a contract as to what is to be done in future, and such a

contract is not invalid, though it may be rendered ineffective by change of circumstances. A contract of this description, which is to operate in future, is rare and cannot control the provision which defines shares and thereby brings about a severance of status, unless it is expressed in clear and unambiguous terms. Guiding principles. Language of entire deed to be considered. The cardinal rule of interpretation for deeds as well as for other instruments is to gather the intention from the words of the document, and for that purpose the language of the entire deed should be taken into consideration. The interpretation to be adopted should be one which gives effect, if possible, to all the parts, and does not reject any of them.

HINDU LAW DOES NOT PROHIBIT MARRIAGES BETWEEN DIFFERENT VARNAS

Gopi Krishna Kasaudhan vs. Mst. Jaggo and Anr. - PRIVY COUNCIL : MANU/PR/0112/1936 - AIR 1936 PC 198 - The Shastras dealing with the Hindu law of marriage do not contain any injunction for bidding marriages between persons belonging to different divisions of the same Varna; and neither any decided case nor any general

principle can be invoked which would warrant such a prohibition. Then, what is it upon which the Appellant, on whom the onus' rests, can sustain the invalidity of the marriage? It is said that marriages between members of different sub-castes of the same caste do not ordinarily take place, but this does not imply that such a marriage is interdicted and would, if performed, be declared to be invalid. Indeed, there is, at present, a tendency to ignore such distinctions, if they ever existed. There exists no doubt a disinclination to marry outside the sub-caste, inspired probably by a social prejudice; but it cannot be seriously maintained that there is any custom which has acquired the force of law. It is, however, unnecessary to pursue the subject, as in the Courts below no such custom was set up or proved as would render the marriage invalid.

MAINTENANCE LIABILITY OF A PERSON TOWARDS SON'S WIDOW MORAL LIABILITY

**Rajani Kanta Pal vs. Sajani Sundari Dassaya -
PRIVY COUNCIL : MANU/PR/0047/1933 - AIR
1934 PC 29** - The liability of a Hindu for maintenance towards the widow of his son is a moral liability; but that liability when transmitted

to his sons on his death, becomes, in their persons, a legal liability, the measure of which, however, is restricted to the amount of the estate to which they succeed from their father.

IMPARTIBILITY OF PROPERTIES UNDER HINDU LAW

Shiba Prasad Singh vs. Rani Prayag Kumari Debi and Ors. - PRIVY COUNCIL : MANU/PR/0028/1932 - AIR 1932 PC 216 -

Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have; (1) the right of partition: (2) the right to 'restrain alienations by the head of the family except for necessity; (3) the right of maintenance; and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in Satraj Kuari's case [1888] 10 All. 272 and Rama Krishna v. Venkata kumara [1889] 22 Mad. 383, and so also the third as held in Gangadhara v. Rajah of Pittapur A.I.R. 1918 P.C. 81. To this extent the general law of the Mitakshara has been superseded by custom, and

the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right therefore still remains, and this is what was, hold in Baijnath's case A.I.R. 1921 P.C. 62. To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property. Though the ether rights which a coparcener acquires by birth in joint family property no longer exist, the birthright of the senior member to take by survivorship still remains. Nor is this right a mere spes successionis similar to that of a reversionary succeeding on the death of a Hindu widow to her husband's estate. It is a right 'which is capable of being renounced and surrendered. Such being their Lordships' view, it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate.

ILLEGITIMATE SON UNDER OLD HINDU LAW

P.M.A.M. Vellaiyappa Chetty and Ors. vs. Natarajan and Anr. - PRIVY COUNCIL : MANU/PR/0062/1931 - AIR 1931 PC 294 -

Son of Sudra shall be entitled to maintenance out of joint property in hands of surviving members of family to which father belonged. Thus, share of inheritance given to him was not merely in lieu of maintenance, but in recognition of his status as son - Illegitimate son was not entitled to demand partition of joint family property in their hands but he was entitled as member of family to maintenance out of that property - However, position of illegitimate son was analogous to that of widows and disqualified heirs to whom law allows maintenance because of their exclusion from inheritance and from share on partition and that Court might award not only future but also past maintenance and might direct same to be secured by charge on joint family property - There was no opinion as to whether illegitimate son would have any rights of maintenance out of joint family property if father left separate property or if such property was not sufficient for his maintenance.

It has been held in India that the text of Yajnavalkya, cited in verse 1 and the commentary on the text refer to the estate of a separated house-holder. It is to be observed that verses 1 and 2, which relate to a Sudra son make no mention of maintenance where the father has left no property to which the son can succeed. The father having died undivided in the present case, and the text being silent as to maintenance, the case stands outside the text. But this, in their Lordships' opinion, is not sufficient to cause the rejection of the plaintiffs' claim if it can be sustained on some principle recognized by the Hindu law. The High Court have hold that there is such a principle, that principle being that where under the Hindu law a person is excluded from inheritance to property or from a share on partition of joint family property, he is entitled to maintenance out of that property, and that the present case is such a case.

Quoted Citations:-

Ranoji v. Kandoji (1885) 8 Mad. 557. In that case the High Court of Madras held that an illegitimate son does not become a coparcener by birth, that he cannot therefore demand a partition against his father's brother's sons of property held by the father in coparcenary with

them, and that he is entitled to maintenance only. Muttusami Ayyar, J., said: The illegitimate son, it will be observed, does not become a coparcener. He is ordinarily entitled only to maintenance and' in the case of Sudras this right to maintenance is in certain cases to be satisfied by the allocation not of a share, but of a portion of the estate equal to half a share. It appears from the judgment that in the view of the learned Judge the share of inheritance provided for the illegitimate son was not in recognition of his status as a son or an heir, but that it was merely in lieu of maintenance, the maintenance being represented by the specified share of inheritance.

Ananthaya v. Vishnu (1894) 17 Mad. 160. The suit was by an adult illegitimate son of a Brahmin against the legitimate son of his father for maintenance out of joint family property which had passed to the legitimate son by survivorship. As the 'plaintiff's father belonged to a twice-born class, his case came within the terms of verse 3, and he could claim maintenance only, but two questions were raised on both of which the verse was silent, namely, whether the plaintiff, being an adult, was entitled to maintenance, and if so, whether maintenance could be made a charge on the joint family property. Both these questions

were answered in the affirmative. On the first question Muttusami Ayyar, J., said that the maintenance provided for in verse 3 was in lieu of inheritance as in the case of females of the family and disqualified heirs, and that it should therefore be awarded for life. On the second question the learned Judge said: As the maintenance awarded is the result of exclusion from inheritance, and as the Hindu theory is that family property constitutes assets from which charges in the nature of maintenance, &c, are to be made, the maintenance decreed to an illegitimate son may be secured on the family property as in the case of a female member, by being declared to be a charge.

Gopala-sami Chetti v. Arunachellam Chetti (1904) 27 Mad. 32. the suit was by an illegitimate son for his share in his father's estate, or, in the alternative, for maintenance against the father's adopted son and his brother's son with both of whom the father was joint at his death. The claim for a share was disallowed, but maintenance was decreed out of the joint family property. Arrears of maintenance for nine years prior to the suit were also allowed, being presumably arrears accrued due during the father's lifetime. It would appear from the

judgment that the son's right of maintenance was not even contested, and that the only questions argued were as to the scale of maintenance and the arrears of maintenance.

Panchepagesa Odayar v. Kanaka Animal (1917)

42 I.C. 344. In that case a Sudra died leaving a concubine and an illegitimate son by her. The suit was for maintenance by the concubine and the son against the undivided brother of the deceased out of the joint family property in his hands. The Subordinate Judge awarded maintenance to the son until majority and to the mother for life. An appeal was taken to the High Court, and as appears from the judgment, the only question argued was whether a concubine was entitled to maintenance out of joint family property, and the judgment of the Subordinate Judge was confirmed. The son's right to maintenance was not called in question. There was no appeal in this case by the son from that part of the decree which limited his maintenance until majority.

It appears from the above cases that where the father dies undivided and leaves no separate property, the illegitimate son of a Sudra is entitled to maintenance out of the joint property in the hands of the surviving members of the family to which the father belonged. The ground of the

decision would seem to be that the share of inheritance which in the case of a separated householder is allowed to the illegitimate son is in lieu of maintenance, and that where the father has left no property to which the son could succeed, he is entitled to maintenance out of joint family property because of his exclusion from a share on a partition of that property.

Sadu v. Baiza (1880) 4 Bom. 37 (F.B.). The question there was whether, where a Sudra left two sons, one illegitimate and the other legitimate, and the legitimate son died before partition of the estate with the illegitimate son and without leaving male issue, the illegitimate son was entitled to the whole estate by right of survivorship, or whether the share of the legitimate son passed to his own heirs. The High Court at Bombay held that the two sons succeeded to the property as members of a joint family and that the illegitimate son was entitled to the whole estate by survivorship. It was argued in that case that the illegitimate son could not be a coparcener with the legitimate son, first, because of the inequality of shares; and, secondly, because he was not even an heir as he was not mentioned in the list of heirs in Oh. 2, Section 1, verse 2. As to the first argument,

Westropp, C.J., said that inequality of shares did not prevent coparcenary as under the ancient Hindu law the elder son was entitled to a larger share, and his younger brothers nevertheless were his coparceners. As to the second argument- the learned Chief Justice said: It has, to a certain extent, been already noticed in *Rahi v. Govinda* (1876) 1 Bom. 97 at p. 104, though not as clearly expressed as it might be, that the place in which the author of the *Mitakshara* has in his work dealt with illegitimate sons is important. He does so before he treats of obstructed heritage, i. e., of the rights of succession after the failure of sons, principal and secondary, and he has treated the *dasiputra* as amongst those in the case of *Sudras*.

Kenchegowda vs. K.B. Krishnappa and Ors.
ILR 2008 KAR 3453: MANU/KA/0180/2008 -

No suit for partition could be filed against the parents during their life time, in respect of separate self acquired property of parents. The illegitimate son is not a coparcener. He has no right in coparcenary property. However, he has a right in the share of the father in coparcenary property. That right he can exercise only on his father dying interstate. He has no right by birth in the separate or self acquired property of his

parents. His right accrues only after his parents die interstate. Therefore, a son born of void or voidable marriage (illegitimate son) can never maintain a suit in respect of the property of his parent, against his or her parent, The lower appellate Court was justified in holding that the suit filed by plaintiff against his father is not maintainable and also the suit filed by the plaintiff seeking partition in respect of the coparcenary property is also not maintainable.

Supreme Court in the case of **Parayankandiyal Eravath Kanapraavan Lallianiamma and Ors. v. K. Devi and Ors. MANU/SC/0487/1996 : AIR 1996 SC 1963** reported in. After referring to the old text of Hindu Law which pointed out that marriage according to Hindu Law is holy union, it is not a contract but a samskara or sacrament, though polygamy was not permitted, a second marriage was allowed in a restricted sense and that too under stringent circumstances. It also noticed that Monogamy was the rule and ethos of the Hindu society which derided a second marriage and rejected it altogether. The touch of religion in all marriages did not allow polygamy to become a part of Hindu culture. Therefore, noticing the various enactments which dealt with

the marriage through out the length and breadth of this Country, it held that it became necessary for the parliament to amend and codify the law relating to marriage among Hindus and that is how the said enactment was passed. After noticing the various provisions in the said enactment, they also noticed the background in which Section 16 was introduced. Thereafter dealing with the amendment, this is what the Supreme Court has held: The Hindu Marriage Act, 1955 is a beneficent legislation and, therefore, it has to be interpreted in such a manner as advances the object of the legislation. The Act intends to bring about social reforms. Conferment of social status of legitimacy on a group of innocent children, who are otherwise treated as bastards, is the prime object of Section 16.

Section 16 was earlier linked with Sections 11 and 12. On account of the language employed in unamended Section 16 and its linkage with Sections 11 and 12, the provisions had the effect of dividing and classifying the illegitimate children into two groups without there being any nexus between the statutory provisions and the object sought to be achieved thereby. It is to be seen whether this mischief has been removed.

Section 16 contains a legal fiction. It is by a rule of fiction juris that the legislature has provided that children, though illegitimate, shall, nevertheless, be treated as legitimate notwithstanding that the marriage was void or voidable.

In view of the legal fiction contained in Section 16, the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents.

Division Bench of Karnataka High Court had a occasion to consider the scope of Section 16 in the case of **Patel Chandrappa v. Hanumanthappa MANU/KA/0221/1988 : ILR 1989 KAR 2384** . This Court after reviewing the case law on the point held as under: Thus as far a conferment of right upon a child born out of a marriage which is null and void or annulled by a decree of nullity in or to the property of this parents is concerned, there is no change made in the law by Act 68/1976. The same provision was contained in the old Section as contained in the

present Section 16. The words any right in or to the property of any person other than the parents" occurring in Sub-section (3) of Section 16 of the Act are very material for our consideration. From the aforesaid words, it is clear that it is only in the property of the parents such children are given a right and not in any other property of any other person.

A coparcenary property cannot in law be construed to be the exclusive property of any of the coparceners. By Sub-section (3) of Section 16 of the Act, the Parliament has limited right of a child falling under Sub-sections (1) or (2) of Section 16 to claim properties. It has limited the right of such a child to the property of his/her parents. In the absence of Sub-section (3) and in view of conferment of legitimacy upon a child falling under Sub-section (1) or (2) of Section 16 of the Act, in the case of a male child, he would have been entitled to be treated in par with the other legitimate sons of his father as a coparcener of the joint family of which the father of such a child is a member. The parliament by a fiction of law having conferred legitimacy on a child covered by Sub-section (1) or (2) of Section 16 of the Act, keeping in view the concepts of Hindu Law, has restricted the operation of the fiction

and has made sit operative to the extent of the property of the parents of such child by restricting the right of such child in or to the property of his/her parents. Therefore, the Court must endeavour to see that the legitimacy conferred upon a child born out of a void marriage does not exceed its limitation as laid down in Sub-section (3) of Section 16 of the Act. The reason for the parliament to restrict the right of a child born out of a void marriage covered by Sub-section (1) or (2) of Section 16 of the Act on whom the legitimacy is conferred, is not far to see. In this context it is necessary and relevant to remember that the concepts of 'joint family', 'coparcenary property' or 'joint family property' and the right of a coparcener to acquire by birth an interest in the joint family or coparcenary property, are well-known and the Parliament was well aware of these concepts and it did not want them to be affected. Therefore, keeping in view these concepts, the proviso to old Section 16 and Sub-section (3) of the present Section 16, limited the right of a child falling under Sub-section (1) or (2) of Section 16 of the Act to the property of his/her parents.

The devolution of coparcenary property is also kept intact by the Hindu Succession Act,

Section 6 of the Hindu Succession Act specifically provides for devolution of interest in a coparcenary property. Section 8 of the same Act specifically, provides the Rules of succession to the property of a male Hindu dying intestate. Coparcenary property devolves by survivorship whereas the property of a male Hindu devolves by succession. Sub-section (3) of Section 16 of the Act has to be understood, interpreted and applied in the background of the concepts of joint family coparcener, coparcenary property and Sections 6 and 8 of the Hindu Succession Act. The conferment of right upon a child born out of a void marriage in or to the property of the parents is not introduced for the first time by the Marriage Laws (Amendment) Act, 1976. It was there in the proviso to old Section 16 of the Act. Thus we are of the view that Sub-sections (1) to (3) of Section 16 of the Act read together, do not confer upon a child born out of a void marriage falling under Sub-sections (1) or (2) of Section 16 of the Act the status of a 'coparcener' and do not entitle him to claim a share in the joint family or coparcenary property.

Division Bench of Karnataka High Court in the case of **Smt. Sarojamma and Ors. v. Smt.**

Neelamma and Ors. MANU/KA/0245/2005 :

ILR 2005 KAR 3293 , interpreting Section 16

held as under: Sub-section (1) of Section 16 of the Act provides that notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate whether such child is born before or after the commencement of the Marriage Laws (Amendment) act, 1976 (Act 68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under the Act and whether or not the marriage is held to be void otherwise than on a petition under the Act. Sub-section (2) further provides that where a decree of nullity is granted in respect of voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree is had been dissolved instead of being annulled, shall be deemed to be the legitimate notwithstanding the decree for nullity is made. Sub-section (3) of the said Section/.mnber provides that nothing contained in Sub-section (1) or Sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is

annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, but for the passing of the Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

Jinia Keotin and Ors. vs. Kumar Sitaram Manjhi and Ors.: MANU/SC/1192/2002 - 2003(1) SCC 730 "We have carefully considered the submissions of the learned counsel on either side. The Hindu Marriage act underwent important changes by virtue of the Marriage Laws (Amendment) Act, 1976, which came into force with effect from 27.2.1976. Under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of contravention of the statutory prescriptions, any child born of such marriage would have the effect per se, or on being so declared or annulled, as the case may be, of bastardizing the children born of the parties to such marriage. Polygamy, which was permissible and widely prevalent among the Hindus in the past and considered to have evil effects on society, came to be put an end to by the mandate of the

Parliament in enacting the Hindu Marriage Act, 1955. The legitimate status of the children which depended very much upon the marriage between their parents being valid or void, thus turned on the act of parents over which the innocent child had no hold or control. But for no fault of it, the innocent baby had to suffer a permanent set back in life and in the eyes of society by being treated as illegitimate. A laudable and noble act of the legislature indeed in enacting Section 16 to put an end to a great social evil. At the same time, Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable chose also to confine its application, so far as succession or inheritance by such children are concerned to the properties of the parents only. So far as Section 16 of the Act is concerned, though it was enacted to legitimate children, who would otherwise suffer by becoming illegitimate, at the same time it expressly provide in Sub-section (3) by engrafting a provision with a non obstante clause stipulating specifically that nothing contained in Sub-section (1) or Sub-section (2) shall be construed as conferring upon any child of a marriage, which is

null and void or which is annulled by a decree of nullity under Section 12, "any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of this not being the legitimate child of his parents," In the light of such an express mandate of the legislature itself there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further righter than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in Sub-section (3) of Section 16 of the Act but also would attempt to court deregulating on the subject under the guise of interpretation, against even the will expressed in the enactment itself."

LAW OF SUCCESSION IN CASE OF CONVERTS

Vasanti and Ors. vs. Pharez John Abraham and Ors.: MANU/KA/8551/2006 - AIR 2007 Kant

121 - Cited case of Calcutta High Court in MANU/WB/0058/1956 : AIR 1956 Cal 177 in the case of Benoy Kumar Mondal v. Panchanon Majumdar in that Privy Council case of - 'Mitar Sen Singh v. Maqbul Hasan Khan MANU/PR/0047/1930, AIR 1930 PC 251 quoted, which dealt with succession to the estate of a Hindu convert to Mohammedanism and laid down inter alia that his Hindu relations were not eligible for such succession notwithstanding the Caste Disabilities Removal Act (also known as The Freedom of Religion Act), 1850 (Act 21 of 1850). The reason for the decision was very clearly stated by their Lordships, namely, that the law of succession in the case of a Hindu or a Mohammedan depends upon their own personal law, that it depends upon the law of their religion, that the Mohammedan law would in itself prevent a Hindu from succeeding as heir and that Act 21 of 1850 merely protects the Hindu convert alone from losing his rights of inheritance under the Hindu Law. The reasoning is clear, specific, explicit and self-explanatory and it has no application where succession is claimed under the Indian Succession Act for reasons we have already discussed, and, although the case cited is undoubted authority for the view that a Hindu

cannot claim to inherit to a Mohammedan, save in cases falling under the Caste Disabilities Removal Act, 1850 (Act 21 of 1850) as explained in the said decision.

Prayag Gope vs. Etnal Smart and Ors. 1995

(1) PLJR 551 : MANU/BH/0152/1995 -

Property inherited by Christian convert Hindu daughter from her Hindu father :- The property inherited by a Christian convert daughter as a daughter estate, which is a life estate, from her deceased Hindu father by virtue of Caste Disabilities Removal Act 1850, on her death prior to Hindu Succession Act 1956, will pass to the reversioners of her father and not to her own Christian progeny under the Indian Succession Act.

Rukmanibai vs. Bismillabai: AIR 1993 MP 45

MANU/MP/0013/1993 - Section 21 of the Principles of Mahomedan Law provides that in the absence of a custom to the contrary, succession to the estate of a convert to Mahomedanism is governed by the Mahomedan Law.

Nayanaben Firozkhan Pathan vs. Patel Shantaben Bhikhabhai and Ors. 2018 (1) RCR

(Civil) 16: MANU/GJ/1605/2017 - Section 4(1)(b) of the Hindu Succession Act, 1956 envisages that any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in the Act. Following the said provision, a number of Central Acts had been repealed, which are inconsistent to the provisions of the Act. However, the Caste Disabilities Removal Act, 1850 (Act 21 of 1850) had not been repealed so far. This Act contains only one Section, which is as follows : "Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of caste to cease to be enforced; So much of any law or usage now in force within India as inflicts on any person forfeiture of rights or property, or may be held in any way to impair to affect any right of inheritance, by reason of his or her renouncing, or having excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in any Court."

22. A change of religion and loss of caste was at one time considered as grounds for forfeiture of property and exclusion of inheritance. However, this has ceased to be the

case after the passing of the Caste Disabilities Removal Act, 1850.

23. Section 1 of the Caste Disabilities Removal Act inter alia provides that if any law or (customary) usage in force in India would cause a person to forfeit his/her rights on property or may in any way impair or affect a person's right to inherit any property, by reason of such person having renounced his/her religion or having been ex-communicated from his/her religion or having been deprived of his/her caste, then such law or (customary) usage would not be enforceable in any court of law. The Caste Disabilities Removal Act intends to protect the person who renounces his religion.

24. In the case of E. Ramesh and Anr. v. P. Rajini and 2 Ors. [MANU/TN/0540/2001 : (2002) 1 MLJ 216], a Division Bench of the Madras High Court has held that by virtue of Section 1 of the Caste Disabilities Removal Act, the conversion of a Hindu to another religion will not disentitle the convert to his right of inheritance to the property.

25. As stated above, a Hindu convert does not lose the right to inherit property under the Hindu Succession Act, 1956. Therefore, the applicant herein is entitled to inherit her share in her father's property and the Hindu Succession

Act shall apply to her with regard to her right to inherit her share in her father's property.

26. It may be noted that Section 26 of the Hindu Succession Act states that if a Hindu has ceased to be a Hindu by conversion to another religion, children born to the convert after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens. However, this section has no impact on the convert's right to inherit property from her Hindu relatives and shall only apply to the children born after conversion and their descendants.

The most important section is Section 26. Section 26 reads as follows : "26. Convert's descendants disqualified. - Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens."

35. This Section, therefore, does not disqualify a convert. It only disqualifies the descendants of the convert who are born to the convert after such conversion from inheriting the property of any of their Hindu relatives. Section 28 of the Act discard almost all the grounds which impose exclusion from inheritance and lays down that no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity. It also rules out disqualification on any ground whatsoever except those expressly recognized by any provisions of the Act. The exceptions are very few and confined to the case of re-marriage of certain widows. Another disqualification stated in the Act relates to a murderer who is excluded on the principle of justice and public policy (Section 25). The change of religion and loss of caste have long ceased to be the grounds of forfeiture of property and the only disqualification to inheritance on the ground that the person has ceased to be a Hindu is confined to the heirs of such convert (Section 26). The disqualification does not affect the convert himself or herself. This being the position, I have no hesitation to hold that the applicant who is admittedly a sister of the private respondents, i.e. the daughter of late Bhikhabhai Patel, is entitled

to succeed in getting her name mutated in the record of rights as one of the legal heirs. The provisions contained in Section 26 of the Hindu Succession Act is the only provision dealing with the right of succession of children born to a convert after the conversion. However, this provision does not disqualify the convert himself from succeeding to the property of the Hindu father.

AIR 1976 Calcutta 272 para 8 as below: 8. Mr. Panda submits that the appellate Court was wrong to hold that a convert from Hinduism is not a disqualified heir. Mr. Panda refers to us Section 2 of the Act which provides that "this Act applies to any person, who is a Hindu by religion in any of its forms or developments and to any person who is a Buddhist, Jaina or Sikh by religion and to any other person who is not a Muslim, Christian, Parsi or Jew by religion...." Such being the provisions Mr. Panda submits that a Christian is not entitled to inherit the properties of the Hindu. We are unable to accept the contention of Mr. Panda. Section 2 simply provides the class of persons whose properties will devolve according to Hindu Succession Act. It is only the property of those persons mentioned

in Section 2 that will be governed according to the provisions of the Act. This Section has nothing to do with the heirs. This Section does not lay down as to who are the disqualified heirs. Sections 24, 25, 26 and 28 lay down the provisions how a person is disqualified. Section 24 provides "certain widows remarrying may not inherit as widows". Section 25 disqualifies a murderer from inheriting the property of the person murdered. Section 28 provides that no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act. on any other ground whatsoever. The most important section is Section 26. Section 26 reads as follows: Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

This section therefore does not disqualify a convert. It only disqualifies the descendants of the converts who are born to the convert after such conversion from inheriting the property of

any of their Hindu relatives. Section 28 of the present Act discards almost all the grounds which imposed exclusion from inheritance and lays down that no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity. It also rules out disqualification on any ground whatsoever excepting those expressly recognized by any provisions of the Act. The exceptions are very few and confined to the case of remarriage of certain widows. Another disqualification stated in the Act relates to a murderer who is excluded on principles of justice and public policy (Section 25). Change of religion and loss of caste have long ceased to be grounds of forfeiture of property and the only disqualification to inheritance on the ground that a person has ceased to be a Hindu is confined to the heirs of such convert (Section 26). The disqualification does not affect the convert himself or herself. This being the position, we have no hesitation to hold that the respondent who is admittedly a brother of the deceased is entitled to succeed if there be no other preferential heir. Quoted in Suresh Darvade vs. Arjun Ram Pandey: MANU/CG/0017/2010 "Thus provision contained in Section 26 of Hindu Succession Act is the only provision dealing with

the right of succession of children born to a convert after the conversion, however this provision does not disqualify the convert himself from succeeding to the property of Hindu father.

At the outset I will quote para 29, at page 22 of the Hindu Law by Raghavachariar (Sixth Edition). "29. **Converts to Hinduism** :-- Hindu Law would apply even to converts to Hinduism and it is not necessary for its application that a person should be a Hindu by birth. In other words, Hindu Law applied not only to a person who is a Hindu both by birth and religion, but also to a person 'who is a Hindu only by religion. But the mere fact that a non-Hindu professes a theoretical allegiance to the Hindu faith or is an ardent admirer and advocate of Hinduism does not make him a Hindu. Long residence in India, abdication of the original religion by a clear act of renunciation, adopting the Hindu religion by a formal conversion thereto, assuming a Hindu name, marrying a Hindu according to Hindu rules and taking to the Hindu modes of life are proofs that a non-Hindu has become a Hindu, The real test of conversion is not domicile but religion. But it is not necessary that every one of these tests should be fulfilled before an alleged conversion to

Hinduism can be established, for instance, it is not necessary that there should be established a formal conversion to Hinduism except perhaps, in the case of reconversion to Hinduism where the reconversion is into the Brahmin Community of the Hindus. But a mere conversion to any particular religion may not necessarily involve the adoption of the laws as to inheritance and succession obtaining among the followers of that religion, but when the convert identifies himself with those followers, strong evidence must be forthcoming to show that he kept his own laws unaffected by the rules of law obtaining among the other adherents of his new faith. A Hindu who has renounced Hinduism is not debarred from going back to his original faith so as to be governed by Hindu Law and since there are no ceremonies prescribed in the Smrities for conversion or reconversion to the Hindu religion, one has to look to the sense of the community into which the convert or reconvert is alleged to have been let in, and if the members of that community are prepared to receive him as one of themselves, the fact that there has been no purificatory or expiatory ceremonies, does not militate against that person being treated in law as a member who has been duly admitted into the Hindu fold. But

a mere declaration by a non-Hindu that he is a Hindu does not make him a Hindu in the absence of evidence showing that he has adopted the ways and modes of life of Hindu."

Jujjavarapu Yesurao vs. Nadakuduru Kamala Kumar and Ors.: MANU/AP/0394/2007 -

Mulla in his treatise, 'Principles of Hindu Law' (15th edn., 1982), after referring to various reported cases in paragraphs 6 and 7 enumerated the categories of persons to whom Hindu Law applies and categories of persons to whom Hindu Law does not apply as under:

6. The Hindu Law applies--

- (i) not only to Hindus by birth, but also to Hindus by religion, i.e. converts to Hinduism;
- (ii) to illegitimate children where both parents are Hindus;
- (iii) to illegitimate children where the father is a Christian and the mother a Hindu, and the children are brought up as Hindus.
- (iv) to Jains, Buddhists in India, Sikhs, and Nambudri Brahmins except so far as such law is varied by custom and to Lingayats who are considered Sudras;
- (v) to a Hindu by birth who, having renounced Hinduism, has reverted to it after performing the

religious rites of expiration and repentance. Or even without a formal ritual of reconversion when he was recognized as a Hindu by his community:

- (vi) to sons of Hindu dancing girls of the Naik Caste converted to Mohomedanish, where the sons are taken into the family of the Hindu grandparents and are brought up as Hindus;
- (vii) to Brahmos; to Arya Samajists; and to Santhals of Chota Nagpur; and also to Santhals of Manbhum except so far as it is not varied by custom; and
- (viii) to Hindus who made a declaration that they were not Hindus for the purpose of the Special Marriage Act, 1872.

7. Persons to whom Hindu Law does not apply--
-The Hindu Law does not apply--

- (1) to the illegitimate children of a Hindu father by a Christian mother who are brought up as Christians, or to illegitimate children of a Hindu father by a Mahomedan mother;
- (2) to the Hindu converts to Christianity.
- (3) to converts from the Hindu to the Mahomedan faith;
- (4) The Hindu Law of succession does not apply to the property of any person professing the Hindu, Sikh or Jain, religion who married under

the Special Marriage Act III of 1872 or the property of the issue of such marriage.

Who are the persons to whom Succession Act applies? Explanation to Section 2(1) read with Clauses (a), (b) and (k) of Section 2(1) of Succession Act contains categories of persons to whom Succession Act applies by reason of such persons being Hindus. Section 2(1)(c) of the Succession Act contains categories of persons to whom Succession Act does not apply by reason of such persons not being Hindus, to whom Hindu Law of Custom and Usage had never been applied before the enactment of Succession Act. To clarify further, Section 2(1)(c) of Succession Act lays down that the Act applies to any other person (who is not Hindu) to whom Hindu Law of custom and usage was applied prior to Succession Act. It also lays down that Succession Act does not apply to a person who is a Muslim, Christian, Parsi or Jew. In other words, Succession Act applies to any other person, who is not a Hindu but was governed by Hindu Law before the enactment of Succession Act but such person should not be a Muslim, Christian, Parsi or Jew. Applying the above principle and having regard to the main part of the section regarding applicability, inclusionary part and exclusionary part, there

cannot be any doubt that whether or not Hindu Law governed or applied prior to 1956, a Muslim, Christian, Parsi or Jew, after coming into force of Hindu Succession Act, 1956, cannot be governed by Succession Act nor persons who admit that they are Christian by religion can plead before a common law Court that they are governed by Hindu Law in matters of partition of joint family property. There cannot be two opinions that the peculiar concept of Joint Hindu Family, coparcenary and doctrine of blending etc., are very unique to Hindu Law. These cannot be made applicable to Christians, Muslims or Parsis or Jews to whom Succession Act has no application nor Hindu Law has any application as observed by Mulla, whose elucidation is noticed supra. The submission of the learned Counsel for the plaintiff is that they are Harizans claiming themselves as Christians without baptism and therefore, Hindu Law of succession should be applied to them. The argument is liable to be rejected. There cannot be any better evidence than an unexplained admission of a party to the proceedings in a suit. plaintiff admitted that they are Christians and indeed described the defendants as Christians. Therefore, the plaintiff

is not entitled for decree of partition, as per Hindu Law.

WHERE MUSLIMS ARE GOVERNED BY HINDU LAW

Abdul Sattar Sait and Ors. vs. Controller of Estate Duty, Mysore: MANU/KA/0013/1967 -

Muslims belonging to the class called Cutchi Memons are or continue to be governed by, and if so by what portion of, the Hindu law in relation to property has been the subject of consideration in several decisions of High Courts, most of which are decisions rendered by the Bombay High Court. It is also a well accepted fact that the members of this community, originally resident in Cutch, were Hindus governed by the Hindu law of the Mitakshara school before they were converted to Islam about four or five centuries ago. At some subsequent period they migrated in large numbers to Bombay and in smaller numbers to other areas like Madras State. Some of the families, who originally came down to Madras, later migrated to Bangalore and settled in the area called the Civil Station. A few of them are also known to have settled in portions of territory belonging to the erstwhile princely State of

Mysore. They were mostly traders and with profits of their trade acquired considerable immovable property in places where they settled.

The question has to be examined primarily in the light of the decisions of courts and the proved practice or custom followed by the parties in question through these centuries and the modifications, if any, engrafted by them on the principles of Hindu law originally retained by them even after their conversion. Before examining the question that way, it will be convenient to dispose of the argument relating to the effect, if any, that two statutes may be said to have on the question. They are what are called (1) the Cutchi Memons Act, and (2) the Muslim Personal Law (Shariat) Application Act, commonly called the Shariat Act.

Cutchi Memons Act of 1938 enacted by the Central Legislature was not at any time extended by the Viceroy to the Civil Station. But in 1948, some time after the area had been retroceded to Mysore, the Mysore Legislature passed what is called the Retroceded Area (Application of Laws) Act, 1948, extending thereto the laws and enactments in force in the princely State of Mysore. Act and brings it into force on the 1st day of July, 1943.

Section 2 and 3 read as follows :

"2. Subject to the provisions of section 3, all Cutchi Memons shall, in matters of succession and inheritance, be governed by Mohammadan Law.

3. Nothing in this Act shall affect any right or liability acquired or incurred before its commencement, or any legal proceeding or remedy in respect of any such right or liability and any such proceeding or remedy may be continued or enforced as if this Act had not been passed."

The Shariat Act was passed by the Central Legislature in 1937. It was never extended to the Civil Station, Bangalore, any time before its retrocession to the princely State of Mysore. As originally enacted, that Act did not apply to what under the Constitution came to be called Part "B" States. It became for the first time extended to Part "B" States by virtue of the Central Act 48 of 1959 (which came into force on February 1, 1960), called the Miscellaneous Personal Laws (Extension) Act, 1959, which amended its extent clause in such a way as to apply the statute to whole of India except to Jammu and Kashmir.

Section 2, which reads :

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

The obvious effect of the Shariat Act is to prescribe a rule of decision in all questions relating to certain topics where the parties are Muslims; they are matters of personal law. A question in regard to those matters can really arise only as between Muslims. Further, the statement in the statute that the rule of decision is to apply to questions in cases where the parties are Muslims clearly indicates that parties to the question or the disputants are Muslims; that is to say, both disputants are Muslims.

.....One of the matters so held to be outside the scope of the Act was the special law called

Marumakkathayam law which governed the tarwad (joint family) and tarwad property of Mapillas of Malabar District, Madras State.

.....If it is borne in mind that at the inception, all Cutchi Memons while continuing to reside in Cutchi were governed by Hindu law rules as to joint family property, and even thereafter, whether they went to Bombay, Madras or elsewhere, were at one time governed uniformly by the same rules, and if it is further remembered that the very principles by which they were permitted to retain the rules of Hindu law would also permit them to discard portions of them, should they so desire, because they had ceased to be Hindus, it may be perfectly possible and logical among or as between people resident in different parts of this vast country, to exist or arise differences in the matter of the principles of Hindu law applicable to them or the extent to which they may be so applicable.

.....the position has never been doubted or questioned and parties hardly ever went to court to get rid of the original principles of Hindu law retained by them.

Smt. Sarla Mudgal, President, ... vs Union Of India & Ors AIR 1995 SC 1531 - A matrimonial

dispute between a convert to Islam and his or her non-Muslim spouse is obviously not a dispute "where the parties are Muslims" and, therefore, the rule of decision in such a case was or is not required to be the "Muslim Personal Law". In such cases the Court shall act and the Judge shall decide according to justice, equity and good conscience. The second marriage of a Hindu husband after embracing Islam being violative of justice, equity and good conscience would be void on that ground also and attract the provisions of Section 494, IPC.

One wonders how long will it take for the Government of the day to implement the mandate of the framers of the Constitution under Article 44 of the Constitution of India. The traditional Hindu law - personal law of the Hindus - governing inheritance, succession and marriage was given go- bye as back as 1955-56 by codifying the same. There is no justification whatsoever in delaying indefinitely the introduction of a uniform personal law in the country.

Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and

personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27. The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus alongwith Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a "common civil Code" for the whole of India.

Political history of India shows that during the Muslim regime, justice was administered by the Qazis who would obviously apply the Muslim Scriptural law to Muslims, but there was no similar assurance so far litigations concerning Hindus was concerned. The system, more or less, continued during the time of the East India Company, until 1772 when Warren Hastings made Regulations for the administration of civil justice for the native population, without discrimination between Hindus and Mahomedans. The 1772 Regulations followed by the Regulations of 1781 whereunder it was

prescribed that either community was to be governed by its "personal" law in matters relating to inheritance, marriage, religious usage and institutions. So far as the criminal justice was concerned the British gradually superseded the Muslim law in 1832 and criminal justice was governed by the English common law. Finally the Indian Penal Code was enacted in 1860. This broad policy continued throughout the British regime until independence and the territory of India was partitioned by the British Rulers into two States on the basis of religion. Those who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in two-nation or three-nation theory and that in the Indian Republic there was to be only one Nation - Indian nation - and no community could claim to remain a separate entity on the basis of religion. It would be necessary to emphasise that the respective personal laws were permitted by the British to govern the matters relating to inheritance, marriages etc. only under the Regulations of 1781 framed by Warren Hastings. The Legislation - not religion - being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing

a uniform civil code. In this view of the matter no community can oppose the introduction of uniform civil code for all the citizens in the territory of India.

APPLICABILITY IN CASE OF NON-HINDUS

In **Gopal Singh Bhumij v. Giribala Bhumij** reported in **MANU/BH/0016/1991 : AIR 1991 Pat 138** Court held as follows: There can not be any doubt that it is possible that aboriginals of non-Hindu origin can become sufficiently Hinduised so that in the matter of inheritance and succession they are prima, facie governed by the Hindu Law, except so far as any custom at variance with such law is proved. Reference in this connection may be made to *Chunkku Manjhi v. Bhabani Manjhian* reported in **MANU/BH/0068/1945 : AIR 1946 Pat 218**.

However, the question as to whether the parties are "Hinduised out and out or have 'become' sufficiently "Hinduised" are question of fact. The burden of proof is initially upon the Plaintiff to show that the parties have become sufficiently "Hinduised" so as to be governed in the matter of succession and inheritance by any School of

Hindu Law. In this case a question was raised as to whether in view of Section 2(2) of the Hindu Succession Act the same would have any application in respect of any Scheduled Tribe, and it was held that the parties were not sufficiently Hinduised and, thus, they would be governed by their customary laws.

HINDU SUCCESSION ACT, 1956, SHALL NOT APPLY TO THE MEMBERS OF SCHEDULED TRIBE

In *Daudwa Uraon and Anr. v. Karueluous Uraon and Ors.* reported in **MANU/BH/0424/1987 : 1988 PLJR 603**, I have held that in view of Section 2(2) of the Act, the provisions of Hindu Succession Act, 1956, shall not apply to the members of Scheduled Tribe in the matter of inheritance and succession.

PRINCIPLE OF INTERPRETATION UNDER HINDU LAW

Rajbir Singh Dalal vs. Chaudhari Devi Lal University, Sirsa and Ors. : MANU/SC/7924/2008 - (2008) 9 SCC 284

17. We may also consider the matter from our traditional principles of interpretation known as the 'Mimansa Rules of Interpretation'.

18. It is deeply regrettable that in our Courts of law lawyers quote Maxwell and Craies but nobody refers to the Mimansa Principles of interpretation. Most lawyers would not have even heard of their existence. Today our so-called educated people are largely ignorant about the great intellectual achievements of our ancestors and the intellectual treasury which they have bequeathed us. The Mimansa Principles of interpretation is part of that great intellectual treasury, but it is distressing to note that apart from the reference to these principles in the judgment of Sir John Edge, the then Chief Justice of Allahabad High Court, in Beni Prasad v. Hardai Bibi 1892 ILR 14 All 67 (FB), over a hundred years ago and in some judgments of one of us (M. Katju, J.) there has been almost no utilization of these principles even in our own country. Many of the Mimansa Principles are rational and scientific and can be utilized in the legal field (see in this connection K.L. Sarkar's 'Mimansa Rules of Interpretation' which is a collection of Tagore Law Lectures delivered in 1905 containing the best

exposition of these principles in English. Most other books on Mimansa are in Sanskrit).

19. The Mimansa Principles of Interpretation, as laid down by Jaimini around the 5th century B.C. in his sutras and as explained by Sabar, Kumarila Bhatta, Prabhakar, Mandan Mishra, Shalighnath, Parthasarathy Mishra, Apadeva, Shree Bhat Shankar, etc. were regularly used by our renowned jurists like Vijñeshwara (author of Mitakshara), Jimutvahana (author of Dayabhaga), Nanda Pandit (author of Dattaka Mimansa), etc. whenever there they found any conflict between the various Smritis, e.g., Manusmriti and Yajñavalkya Smriti, or ambiguity, ellipse or absurdity in any Smriti. Thus, the Mimansa principles were our traditional system of interpretation of legal texts. Although originally they were created for interpreting religious texts pertaining to the Yagya (sacrifice), they were so rational and logical that gradually they came to be utilized in law, philosophy, grammar, etc., that is, they became of universal application. Thus, Shankaracharya has used the Mimansa Adhikaranas (principles) in his bhashya on the Vedanta sutras.

20. The Mimansa principles were regularly used by our great jurists for interpreting legal texts (see also in this connection P.V. Kane's 'History of the Dharmashastra', Vol. V, Pt. II, Ch. XXIX and Ch. XXX, pp. 1282- 1351).

21. In Mimansa, casus omissus is known as adhyahara. The adhyahara principle permits us to add words to a legal text. However, the superiority of the Mimansa Principles over Maxwell's Principles in this respect is shown by the fact that Maxwell does not go into further detail and does not mention the sub-categories coming under the general category of casus omissus. In the Mimansa system, on the other hand, the general category of adhyahara has under it several sub-categories, e.g., anusanga, anukarsha, vakyashesha, etc. Since in this case we are concerned with the anusanga principle, we may explain it in some detail.

22. The anusanga principle (or elliptical extension) states that an expression occurring in one clause is often meant also for a neighbouring clause, and it is only for economy that it is only mentioned in the former (see Jaimini 2, 2, 16). The anusanga principle has a further sub-categorization. If a clause which occurs in a subsequent sentence is to be read into a previous

sentence it is a case of Tadapakarsha, but when it is vice-versa it is a case of Tadutkarsha.

23. The Anusanga principle of Mimansa was used by Jimutvahana in the Dayabhaga. Jimutvahana found that there is a text of Manu which states: Of a woman married according to the Brahma, Daiva, Arsha, Gandharva and Prajapartya form, the property shall go to her husband if she dies without issue. But her property, given to her on her marriage in the form called Asura, Rakshasa and Paisacha, on her death without issue shall become the property of her parents.

24. It can be seen that in the second sentence the word 'property' is qualified by the words 'given to her on her marriage', whereas in the first sentence there is no such qualification. Jimutvahana, using the anusanga principle of Mimansa, said that the words "given to her on her marriage" should also be inserted in the first sentence after the word "property", and hence there also the word 'property' must be interpreted in a qualified sense.

25. In the Mitakshara also the anusanga principle of Mimansa has been used. Yajnavalkya II. 135-136 lays down the order of succession to the wealth of a person dying sonless. Yajnavalkya

II. 137 deals with succession to property of a forest hermit, an ascetic, or a perpetual Vedic student. The Mitakshara then holds that Yajnavalkya II. 138 'samaristinastu samaristi' is to be construed as an exception to Yajnavalkya II. 135, 136 and understands that the words 'of one dying without having a son' (grand son or great grand son) are to be supplied before Yajnavalkya II. 138 from II. 136, i.e., there is to be anusanga of the word 'svaryatasya-putrasya'.

26. In our opinion, in the present case, the Anusanga principle of Mimansa should be utilized and the expression 'relevant subject' should also be inserted in the qualification for the post of Reader after the words "at the Master's degree level". Hence, we cannot accept the submission of Mr. Patwalia in this respect.

Vijay Narayan Thatte and Ors. vs. State of Maharashtra and Ors.: MANU/SC/1477/2009 - (2009) 9 SCC 92

6. In this connection we may also refer to the Mimansa Rules of Interpretation, which were our traditional principles of interpretation for over 2500 years, but which are unfortunately ignored in our Courts of law today.

7. It is deeply regrettable that in our Courts of law lawyers quote Maxwell and Craies but nobody refers to the Mimansa Principles of Interpretation. Most lawyers would not have even heard of their existence. Today our so-called educated people are largely ignorant about the great intellectual achievements of our ancestors and the intellectual treasury which they have bequeathed us. The Mimansa Principles of Interpretation is part of that great intellectual treasury, but it is distressing to note that apart from the reference to these principles in the judgment of Sir John Edge, the then Chief Justice of Allahabad High Court in Beni Prasad v. Hardai Bibi MANU/UP/0071/1892 : ILR 1892 All 67 (FB), a hundred years ago and in some judgments of one of us (M. Katju, J.) there has been almost no utilization of these principles even in our own country. Most of the Mimansa Principles are rational and scientific and can be utilized in the legal field (see in this connection K.L. Sarkar's 'Mimansa Rules of Interpretation' which is a collection of Tagore Law Lectures delivered in 1905 and which contains the best exposition of these principles).

8. The Mimansa Principles of Interpretation, as laid down by Jaimini in his

sutras around 6th Century B.C. and as explained by Sabar, Kumarila Bhatta, Prabhakar, Mandan Mishra, etc, were regularly used by our renowned jurists like Vijnaneshwara (author of Mitakshara), Jimutvahana (author of Dayabhaga), Nanda Pandit (author of Dattaka Mimansa), etc. Whenever there was any conflict between two Smritis, e.g., Manusmriti and Yajnavalkya Smriti, or ambiguity or absurdity in any Smriti these principles were utilized. Thus, the Mimansa Principles were our traditional system of interpretation of legal texts. Although originally they were created for interpreting religious texts pertaining to the Yagya (sacrifice), gradually they came to be utilized for interpreting legal texts also (see in this connection P.V. Kane's 'History of the Dharmashastra', Vol.V, Pt.II, Ch.XXIX and Ch.XXX, pp. 1282-1351), and also for interpreting texts on philosophy, grammar, etc. i.e. they became of universal application. Thus, Shankaracharya has used the Mimansa adhikaranas in his bhashya on the Vedanta sutras.

9. While the first edition of Maxwell's book was published in 1875, in India we have been doing interpretation for over 2500 years, as already stated above. There were hundreds of

books (all in Sanskrit) written on the subject, though only a few dozens have survived the ravages of time, but even these show how deep our ancestors went into the subject of interpretation.

10. To give an example the Mimansakas examine the subject of negative Vidhis (negative injunctions such as the one in the proviso to Section 6) very searchingly and exhaustively. First of all, they distinguish between what may be called prohibitions against the whole world, and those against particular persons only. This distinction resembles that between judgments or rights in rem and judgments or rights in personam. The former prohibitions are called Pratishedha and the latter Paryudasa. For example, the prohibitory clause 'Do not eat fermented (stale) food (na kalanjam bhakshayet)' is a Pratishedha; while the prohibition 'those who have taken the Prajapati vow must not see the rising sun' is a Paryudasa. In the second place, Pratishedhas are divided practically into two sub-clauses viz. those which prohibit a thing without any reference to the manner in which it may be used, and those which prohibit it only as regards a particular mode of using. For instance, 'Do not eat fermented food' prohibits the use of it under

all circumstances, while 'Do not use the Sorasi vessel at dead of night' forbids the use of the vessel only at the dead of night.

11. Then Paryudasa is also of two kinds. In one case, it relates to a person performing some special act which is not enjoined by a Vidhi, as in the case of the Prajapati vow. In the other, it relates to a person engaged in performing a Vidhi; as for instance, when one is to do Shradh during the full moon by virtue of a Vidhi but not in the night of the full moon. In this case, the prohibition of doing Shradh in the night is a Paryudasa, which is the same as an exception or proviso as we understand these terms. For, the clause 'not in the night' is an exception to the rule 'Perform the Shradh during the full moon'. These are the four classes of negative clauses. The first class, of which the Kalanja (fermented food) clause is an example, may well be called a condemnatory prohibition. The second class consists also of absolute prohibitions of things under certain circumstances, as in the case of the Sorasi vessel. The third class consists of prohibitions in relation to persons in a given situation, as in the case of the Prajapati vow. The fourth class restricts the scope of action of persons engaged in fulfilling an injunction, as

regards the time, place or manner of carrying out the substantive element of the injunction.

12. Thus we see that in the Mimansa system as regards negative injunctions (such as the one contained in the proviso to Section 6 of Land Acquisition Act) there is a much deeper discussion on the subject than that done by Western Jurists. The Western writers on the subject of interpretation (like Maxwell, Craies, etc.) only say that ordinarily negative words are mandatory, but there is no deeper discussion on the subject, no classification of the kinds of negative injunctions and their effects.

13. In the Mimansa system illustrations of many principles of interpretation are given in the form of maxims (nyayas). The negative injunction is illustrated by the Kalanja nyaya or Kalanja maxim.

14. The Kalanja maxim (na kalanjam bhakshayet) states that 'a general condemnatory text is to be understood not only as prohibiting an act, but also the tendency, including the intention and attempt to do it.' It is thus mandatory.

15. A plain reading of the proviso to Section 6 of the Land Acquisition Act shows that it is a general prohibition against the whole world and not against a particular person. Hence the

Kalanja maxim of the Mimansa system will in our opinion apply to the proviso to Section 6.

16. Laughakshi Bhaskara, one of the great Mimansa writers, taking the prohibitory text 'one is not to eat Kalanja or fermented/stale food' (na kalanjam bhakshayet), explains the idiomatic force of the phrase (na bhakshayet). He explains that the suffix 'yat' means 'shall', and that the negative particle 'not' is to be taken as attached to the suffix 'yat' (shall), and not to the idea of Kalanja eating. For if it be taken as attached to the latter idea, then the sentence might mean 'you shall eat but not Kalanja'. In this case strictly there would be no prohibition. So he labours to demonstrate that the gist of the sentence is 'shall not' and therefore the object of it is to turn off from eating Kalanja (fermented/stale food). This may appear to be making a hair splitting distinction, but it is of great importance from the Mimansa point of view because it indicates the mandatory nature of the negative injunction (nishedha). The explanation of a Nishedha Vidhi appears more clearly from Jaimini's Sutras on the Kalanja maxim.

RULE OF HINDU LAW INCORPORATED IN SOCIAL LEGISLATION

**Bawa Enterprises and Ors. vs. G.R. Shet and
Ors.: MANU/KA/4761/2015 - ILR 2016 KAR**

1535 - This rule of damdupat now finds a statutory recognition in the Karnataka Money Lenders Act, 1961. Section 26 of the said Act provides that notwithstanding anything contained in any agreement or any law for the time being in force, no Court shall in respect of any loan whether advanced before or after the date on which the Act comes into force decree, on account of interest, a sum greater than the principal of the loan due on the date of the decree. Thus, this rule of Hindu Law has been incorporated in the said Act in respect of the loans advanced by money-lenders. This Section is based on the rule of damdupat. The rule of damdupat is a branch of Hindu law of debts. According to this rule, the amount of interest recoverable, at any one time cannot exceed the principal. Where a suit has been instituted to recover a loan, the rule of damdupat ceases to operate. The result is that though the Court is bound to apply the rule of damdupat up to the date of the suit, it is free to award interest

to the creditor at such rate, as it thinks proper from the date of the suit, up to the date of decree or payment upon the total amount that may be found due to the plaintiff after applying that rule. The rule of damdupat does not apply to interest recoverable in execution of a decree. The reason is that the rule ceases to operate after the suit. The principle of this section applies not only to a suit brought by a creditor, but also to a suit for redemption brought by a mortgager.

Supreme Court in the case of **K. Manick Chand & others v. Elias Saleh Mohammed Sait & others reported in [MANU/SC/0310/1968 : 1969(1) SCC 52]**, while dealing with Mysore Money Lenders Act, 1939 and the scope of Section 17 calculation of interest, the Apex Court has held as under:-- "So far as the first point raised by learned counsel is concerned, it appears to us that it is totally misconceived, because the language of Section 17 of the Act plainly justifies the view taken by the High Court. Section 17, in prescribing the maximum amount of arrears of interest to be allowed, refers to "the principal of the original loan" and not "the principal of the loan". If the latter expression had been used, it could have been argued in the present case that

the sums of Rs. 20,000/- and Rs. 24,000/- which purported to be the principal amounts of the two loans evidenced by the two mortgage-deeds in suit, were the principal amounts of the loans to be taken into account in working out the maximum amount of interest permissible under Section 17 of the act, The expression "the principal of the original loan" makes it clear that, in determining the maximum amount of arrears of interest allowable, the Court must get behind the transaction of the loan and find out what was the actual cash originally advanced as principal and ignore all interest that may have been added subsequently to that original advance in order to make up the consideration for the loans in suit. In the present case, therefore, the High Court was justified in looking at the transactions prior to the two mortgage-deeds to find out what were the actual cash amounts originally advanced which together with interest and after adjustment of accounts, formed the principal amounts for the two mortgage-deeds. It was admitted by counsel for both parties before us that the figures accepted by the High Court as the principal amounts of the two loans are correct, if the original cash advances are treated as the principal amounts of the original loans. It is,

therefore, clear that, on the plain language of Section 17 of the Act, the High Court was right in holding that the aggregate of the principal amount of the original loans was only Rs. 37,971.50 P and not Rs. 44,000/- and, consequently in awarding arrears of interest only to the extent of the same amount and not a larger amount. On the second question, we are unable to agree with the view of the High Court that the arrears of interest mentioned in Section 17 of the Act mean interest calculated up to the date fixed for redemption. At the same time we are also unable to accept the submission made on behalf of the appellants that the arrears of interest in this section mean arrears of interest up to the date of the suit. It is to be noticed that the section is in the form of a directive to a Court not to pass a decree on account of arrears of interest for a sum greater than the principal of the original loan. This language clearly gives an indication of the intention of the Legislature. Obviously, the directive is to be carried out by the court at the time of passing the decree and, consequently, it would at that time that the court will see how much it is awarding for arrears of interest. The maximum prescribed for the arrears of interest must, therefore, be held to be the

maximum amount in respect of interest payable up to the date of the decree when the court carries out the directive laid down in this section. In the present case, the trial court passed the decree on the 27th March, 1952, and, consequently, the amount of Rs. 37,971.50 awarded as arrears of interest must be the arrears of interest due up to that date. The High Court, in our opinion, was not correct in holding that these arrears of interest will cover interest due up to the date fixed for redemption by the High Court".

NIYOGA SYSTEM IN CASE OF IMPOTENCY

Rakeya Bibi vs. Anil Kumar Mukherji (1948)

ILR 2 Cal 119 : MANU/WB/0227/1947 - In the Hindu law of the smritis, as also in that law as expounded in the Dayabhaga, the recognition of the possibility of marriage by an impotent male person is linked with the possibility of his raising issue by adoption of the niyoga system, the concern of the relevant texts being only with faithful unions, for the issue of which they provide a share in the inheritance. Where the reason for the rule, viz., the possibility of raising issue vicariously, has disappeared, the rule no

longer applies, eligibility for marriage being dependent on that possibility. Accordingly, at the present day, when appointment of another person to raise issue under the sanction of the niyoga system is no longer possible, a marriage of an impotent male person is void ab initio under the Hindu law.

It is to be noticed that Jimutavahana explains the possibility of an impotent person marrying and having children by saying that he may obtain issue from his wife by another man. The reference is to the system of niyoga or the appointment, to the wife, of another man for the purpose of raising progeny by him, which was undoubtedly in vogue at one time, but came to be condemned even at the time of Manu, at least for twice-born classes. At the time of Jimutavahana it was surely obsolete. But the fact remains that Jimutavahana still refers to the practice as explaining and justifying the marriage of an impotent person.

In our opinion, the Hindu law-givers, who regarded impotence as a disqualification for marriage, permitted marriage by impotent persons only because the defect caused by their physical disability could be made good by recourse to the niyoga system and thereby

borrowing the potency of another for the procreation of children. Jimutavahana's statement of the law follows the same lines and naturally, since he himself was referring to the marriage of impotent persons in connection with providing a share for their sons. Under the law so stated, there can be no valid marriage when the niyoga system has disappeared and means for fulfillment of the marriage in one vital respect can no longer be supplied.

DHARAMASHALA A CREATION OF A TRUST FOR RELIGIOUS PURPOSES

In *Deosaran Bharthi v. Deoki Bharthi*, **MANU/BH/0053/1924 : AIR 1924 Pat 657** and *Bhekdhari Singh v. Sri Ram Chand Raji*, **MANU/BH/0147/1930 : AIR 1931 Pat 275** there is a long discussion as to what is essential when dedicating to the public or to God such like property as a Dharamsala, etc. "creation of a trust for religious purposes, it is said "no doubt finds favour in the Hindu Law just in the same way as it does in the other communities and the essential ingredient which constitutes a gift whether of moveable or immovable property in the Hindu Law is the Sankalp and the Samarpan whereby

the property is completely given away and the owner completely divests himself of the ownership in the property. In Hindu law there must be a true Sankalp and Samarpan. "Of this ceremony there is no evidence and as I have already remarked in such alecent case of alleged dedication proof of user only would scarcely be sufficient, while such proof that there is of user is consistent with the private ownership of Molar Mai.

Privy Council reported in
MANU/PR/0009/1940 : AIR 1941 PC 38,
 where their Lordships observed as follows: A bathing Ghat on the bank of the Ganges at Benaras is a subject-matter to be considered upon 'the principle of Hindu Law If dedicated to such a-purpo.se .land or other property would be dedicated to an object both religious and of public futility, just as much as is a Dharamsala or a Math, notwithstanding that it be not dedicated to any particular) deity The character of, the dedication can; pnly be determined on the basis- of the history of the institution and the conduct of the founder and his heirs.

In Malayammal v. A. Malayalam Pillai, MANU/SC/0636/1990 : 1991 (supp. 2) SCC 579 (paras 11, 15, 16 and 19) Hon'ble Supreme Court held, as under:

"11. In Hindu system there is no line of demarcation between religion and charity. On the other hand, Charity is regarded as apart of religion. But "what are purely religious purposes and what religious purposes will be charitable must be entirely decided according to Hindu Law and Hindu notions."

15. It is one of the cardinal principles of construction of Wills that wherever it is possible, effect should be given to every bequest of the testator unless it is opposed to law, custom or practice. If the testator has set apart the property intended for endowment and disclosed his charitable intent in any one of his directions, such direction may be extricated leaving aside the directions which are repugnant to the recognised notions of Hindu religion or Hindu Law. Attempt should be made to give effect to the provisions made for recognised charitable purposes even though the entire scheme of the testator cannot be saved.

16. in construing the validity of an endowment created under a Will, we

cannot be guided merely by the acts of the manager or the manner in which the executor of the Will has understood the directions of the testator. We are required to examine the dominant intention of the testator and that could be ascertained only by the terms of the Will.....

19. As observed by Patanjali Shastri, J., as he then was, in Veluswami Goundan v. Dandapani, [MANU/TN/0244/1946 : (1946) 1 MLJ 354] where no deity is named in the deed of endowment, the Court should ascertain the sect to which the donor belonged, the tenets which he held, the doctrines to which he was attached and the deity to which he was devoted and by such means the presumed intention of the testator as to the application of the property should be ascertained. We agree that these are the safe guides."

In Dayal Chand v. Fifth Additional Additional District and Sessions Judge, Saharanpur and others, MANU/UP/1023/1978 : (1979) 5 ALR 97 (para 6): "6. Section 5 of the Indian Trusts Act lay down that no Trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing, signed by the

author of the trust or the trustee, and registered, or by the will of the author of the trust or the trustee. The Indian Trust Act applies to Hindus. But, Section 1 of the said Act clearly saves from its operation all religious and charitable endowments, either public or private. It is thus clear that except where a trust is created by a will, it is quite competent to a Hindu to dedicate for religious or charitable purposes, any immovable property without document in writing. For creating a trust, what is required is the unequivocal declaration of the intention followed by the dedication of the property. B.K. Mukerji in his book on Hindu Law of Religious and Charitable Trusts stated as follows: "There are a large number of decided cases where it has been held, that to constitute valid dedication of property by a Hindu for religious or charitable purpose, no document in writing or registered is necessary."

Vidyawati and Ors. vs. Ram Janki and Ors.:
MANU/UP/2850/2019 - The ceremonies relating to dedication for charitable purpose are Sankalpa and Uthsarga. Sankalpa means determination, and is really a formal declaration by the settler of his intention to dedicate the

property. Uthsarga is formal renunciation by the founder of his ownership on the property, the result whereof being that it becomes impressed with the trust for which he dedicates it. If Uthsarga is proved to have been performed, the dedication must be held to have been to the public. In *Deoki Nandan v. Murlidhar and others*, MANU/SC/0085/1956 : AIR 1957. SC 133 (paras 14 & 15) Hon'ble Supreme Court held that it is settled law that an endowment can validly be created in favour of an idol or temple without the performance of any particular ceremonies, provided the settlor has clearly and unambiguously expressed his intention in that behalf. Where it is proved that ceremonies were performed, that would be valuable evidence of endowment, but absence of such proof would not be conclusive against it.

In *Tilkayat Sri Govindlalji Maharaj v. State of Rajasthan and others*, MANU/SC/0028/1963 : AIR 1963 SC 1638, Hon'ble Supreme Court laid down the law that "a dedication of private property to a charity need not be made by a writing: it can be made orally or even can be inferred from conduct".

In M. Appala Ramanujacharyula v. M. Venkatanarasimhacharyulu and others, MANU/AP/0107/1974 : AIR 1974 (AP) 316

(para 4) a Division Bench-of Hon'ble Andhra Pradesh High Court held that "an endowment can be created by the execution of a deed of dedication by the donor. But however, it must be noted that the mere execution of a deed of dedication without the donor intending to act upon the terms of the deed, would not create a valid endowment. In other words, to constitute a valid endowment, it must be established that the donor intended to divest himself of his ownership in the property dedicated."

LOOMING DANGER OF MATSYANYAYA

Prakash Kadam and Ors. vs. Ramprasad Vishwanath Gupta and Ors.: MANU/SC/0616/2011

28. Before parting with this case, it is imperative in our opinion to mention that our ancient thinkers were of the view that the worst state of affairs possible in society is a state of lawlessness. When the rule of law collapses it is replaced by Matsyanyaya, which means the law of the jungle. In Sanskrit the word 'Matsya' means fish, and Matsyanyaya

means a state of affairs where the big fish devours the smaller one. All our ancient thinkers have condemned Matsyanyaya vide 'History of Dharmashastra' by P.V. Kane Vol. III p. 21. A glimpse of the situation which will prevail if matsyanyaya comes into existence is provided by Mark Antony's speech in Shakespeare's 'Julius Caesar' quoted at the beginning of this judgment.

29. This idea of matsyanyaya (the maxim of the larger fish devouring the smaller ones or the strong despoiling the weak) is frequently dwelt upon by Kautilya, the Mahabharata and other works. It can be traced back to the Shatapatha Brahmana XI 1.6.24 where it is said "whenever there is drought, then the stronger seizes upon the weaker, for the waters are the law," which means that when there is no rain the reign of law comes to an end and matsyanyaya beings to operate.

30. Kautilya says, 'if danda be not employed, it gives rise to the condition of matsyanyaya, since in the absence of a chastiser the strong devour the weak'. That in the absence of a king (arajaka) or when there is no fear of punishment, the condition of matsyanyaya follows is declared by several works such as the Ramayana II, CH. 67, Shantiparva of Mahabharat

15.30 and 67,16. Kamandaka II. 40, Matsyapurana 225.9, Manasollasa II. 20.1295 etc.

31. Thus in the Shanti Parva of Mahabharat Vol. 1 it is stated: Raja chen-na bhavellokey prithivyaam dandadharakah Shuley matsyanivapakshyan durbalaan balvattaraah

32. This shloka means that when the King carrying the rod of punishment does not protect the earth then the strong persons destroy the weaker ones, just like in water the big fish eat the small fish. In the Shantiparva of Mahabharata Bheesma Pitamah tells Yudhishtir that there is nothing worse in the world than lawlessness, for in a state of Matsyayaya, nobody, not even the evil doers are safe, because even the evil doers will sooner or later be swallowed up by other evil doers.

33. We have referred to this because behind the growing lawlessness in the country this Court can see the looming danger of matsyanyaya.

RELIGIOUS PRACTICE AND LEGAL RIGHTS:-¹

¹ N.H. Patil Chief Justice of Bombay High Court and Justice R.G. Ketkar, in case of Jamshed Noshir Sukhadwalla and Ors. vs. Union of India and Ors. Reported in : MANU/MH/3188/2018 has discussed the detail case laws on Religious practice and legal rights

The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, **MANU/SC/0136/1954 : AIR 1954 SC 282** - Restrictions by the State upon free exercise of religion are permitted both under Arts. 25 and 26 on grounds of public order, morality and health. Clause (2) (a) of Art. 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by sub-cl. (b). under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices. The learned Attorney-General lays stress upon cl (2) (a) of the Article and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation.

Sardar Syedna Taher Saifuddin Saheb Vs. The State of Bombay, MANU/SC/0072/1962 : AIR 1962 SC 853. Paragraph- 33 read as under:- "33. the protection of these articles is not limited to matters of doctrine or belief, they extend also to acts done in pursuance of religion and

therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion."

Tilkayat Shri Govindlalji Maharaj etc. Vs. State of Rajasthan and Ors. MANU/SC/0028/1963 : AIR 1963 SC 1638.:-

"55. Articles 25 and 26 constitute the fundamental rights to freedom of religion guaranteed to the citizens of this country. Article 25(1) protects the citizen's fundamental right to freedom of conscience and his right freely to profess, practice and propagate religion. The protection given to this right is, however, not absolute. It is subject to public order, morality and health as Art. 25(1) itself denotes. It is also subject to the laws existing or future which are specified in Art. 25(2). Article 26 guarantees freedom of the denominations or sections thereof to manage their religious affairs and their properties. Article 26(b) provides that subject to

public order, morality and health, every religious denomination or any section thereof shall have the right to manage its own affairs in matters of religion; and Art. 26(d) lays down a similar right to administer the property of the denomination in accordance with law. Article 26(c) refers to the right of the denomination to own and acquire movable and immovable property and it is in respect of such property that clause (d) makes the provision which we have just quoted. It undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it is not correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might extend even to matters of food and dress." "that the matters of religion in Art. 26(b) include even practices which are regarded by the community as part of its religion." In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether

it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion, how is the Court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to

the conscience of the community and the tenets of its religion. It is in the light of this possible complication which may arise in some cases that this Court struck a note of caution that in order that the practices in question should be treated as a part of religion they 'must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26."

In Shirur Mutt's MANU/SC/0136/1954 : AIR 1954 SC 282 case, the Apex Court opined that in the first place what constitutes the essential part of religion is primarily to be ascertained with reference to the doctrines of that religion itself.

In Durgah Committee's MANU/SC/0063/1961 : AIR 1961 SC 1402 case, although the Apex Court speaking in the context of Article 26, warned that some practices, though religious, may have sprung from merely superstitious beliefs and may, in that sense, be extraneous and unessential accretions to religion itself and

unless such practices are found to constitute an essential and integral part of a religion, their claim for protection as essential practices may have to be carefully scrutinized. In other words, the protection must be confined to such religious practices as are an essential and an integral part of the religion and no other.

In N. Adithayan's MANU/SC/0862/2002 : (2002) 8 SCC 106 case, the Apex Court observed that the legal position that the protection under Articles 25 and 26 extend a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion or practices regarded as parts of religion.

In the case of **Second Anand Marg MANU/SC/0218/2004 : (2004) 12 SCC 770**, the Apex Court opined that the protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for

rituals, observances, ceremonies and modes of worship which are essential or integral part of religion. What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background etc. of the given religion. regarding those aspects that are to be looked into so as to determine whether a part or practice is essential or not). What is meant by 'an essential part or practices of a religion' is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices the superstructure of religion is built. Without which, a religion will be no religion. Test to determine whether a part or practice is essential to the religion is - to find out whether the nature of religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part. Because it is the very essence of that religion and alterations will change its

fundamental character. It is such permanent essential parts is what is protected by the Constitution. Nobody can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the 'core' of religion where the belief is based and religion is founded upon. It could only be treated as mere embellishments to the nonessential part or practices.

Adi Saiva Sivachariyargal Nala Sangam Vs. Government of Tamil Nadu

MANU/SC/1454/2015 : (2016) 2 SCC 725. In

that case it was held that although what constitutes essential religious practice must be decided with reference to what the religious community itself says, yet, the ultimate constitutional arbiter of what constitutes essential religious practice must be the Court, which is a matter of constitutional necessity.

..... It is only the essential part of religion, as distinguished from secular activities, that is the subject matter of the fundamental right. Superstitious beliefs which are extraneous, unnecessary accretions to religion cannot be considered as essential parts of religion. Matters

that are essential to religious faith and/or belief are to be judged on evidence before a court of law by what the community professing the religion itself has to say as to the essentiality of such belief. One test that has been evolved would be to remove the particular belief stated to be an essential belief from the religion - would the religion remain the same or would it be altered? Equally, if different groups of a religious community speak with different voices on the essentiality aspect presented before the Court, the Court is then to decide as to whether such matter is or is not essential. Religious activities may also be mixed up with secular activities, in which case the dominant nature of the activity test is to be applied. The Court should take a commonsense view and be actuated by considerations of practical necessity." ... "13. The expression "subject to" is in the nature of a condition or proviso. Making a provision subject to another may indicate that the former is controlled by or is subordinate to the other. In making clause 1 of Article 25 subject to the other provisions of Part III without introducing a similar limitation in Article 26, the Constitution should not readily be assumed to have intended the same result. Evidently the individual right under Article

25(1) is not only subject to public order, morality and health, but it is also subordinate to the other freedoms that are guaranteed by Part III.

Mohd. Hanif Quareshi's MANU/SC/0027/1958

: AIR 1958 SC 731 case and it was observed that the Court placed reliance upon Islamic religious texts to determine that the sacrificing of cows at Bakr-Id was not an essential practice for Muslims. The Court the looked to the texts and scriptures of the religious community to conclude that the practice claimed to be essential was not supported by religious tenets.

Durgah Committee's MANU/SC/0063/1961 :

AIR 1961 SC 1402 case. Paragraph-33 of that decision was extracted which issued an important caution in following words: "33. in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26. Similarly, even practices though religious may

have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other." ... "35. This statement pushed the essential religious practices doctrine in a new direction. The Court distinguished, for the first time, between 'superstitious beliefs' and religious practice. Apart from engaging in a judicial enquiry to determine whether a practice claimed to be essential was in fact grounded in religious scriptures, beliefs, and tenets, the Court would 'carefully scrutinize' that the practice claiming constitutional protection does not claim superstition as its base. This was considered a necessary safeguard to ensure that superstitious beliefs would not be afforded constitutional protection in the garb of an essential religious practice. The Court also emphasized that purely secular matters clothed with a religious form do not enjoy protection as an essential part of religion."

**S. Mahendran Vs. The Secretary, Travancore
Devaswom Board, Thiruvananthapuram
MANU/KE/0012/1993 : AIR 1993 Kerala 42.**

In paragraph-52, it was observed thus: "52. The High Court proceeded on the basis of the 'complete autonomy' of the followers in determining the essentiality of the practice. This followed the dictum in Shirur Mutt, without taking note of evolution of precedent thereafter, which strengthened the role of the Court in the determination and put in place essential safeguards to ensure to every individual, the constitutional protection afforded by the trinity of dignity, liberty and equality. The approach of the High Court is incorrect. The High Court relied completely on the testimonies of the Thanthris without an enquiry into its basis in religious text or whether the practice claiming constitutional protection fulfilled the other guidelines laid down by this Court. Such an approach militates against the fundamental role of the constitutional Court as a guardian of fundamental rights. Merely establishing a usage will not afford it constitutional protection as an essential religious practice. It must be proved that the practice is 'essential' to religion and inextricably connected

with its fundamental character. This has not been proved."

**Javed vs. State of Haryana
{MANU/SC/0523/2003 : (2003) 8 SCC 369}.**

Paragraphs 44 and 45 read as under:-

"44. The Muslim law permits marrying four women. The personal law nowhere mandates or dictates it as a duty to perform four marriages. No religious scripture or authority has been brought to our notice which provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates of the religion. In our view, the question of the impugned provision of the Haryana Act being violative of Article 25 does not arise. We may have a reference to a few decided cases."

"45. The meaning of religion -- the term as employed in Article 25 and the nature of protection conferred by Article 25 stands settled by the pronouncement of the Constitution Bench decision in M. Ismail Faruqui (Dr) v. Union of India. The protection under Articles 25 and 26 of the Constitution is with respect to religious

practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion. The latter is not protected by Article 25."

A.S. Narayana Deekshitulu vs. State of Andhra Pradesh {MANU/SC/0455/1996 : (1996) 9 SCC 548}}. Relevant portion of Paras 88 and 90 read as under:-

"88. The court, therefore, while interpreting Articles 25 and 26 strikes a careful balance between the freedom of the individual or the group in regard to religion, matters of religion, religious belief, faith or worship, religious practice or custom which are essential and integral part and those which are not essential and integral and the need for the State to regulate or control in the interest of the community."

"90. All secular activities which may be associated with religion but which do not relate or constitute an essential part of it may be amenable to State regulations but what constitutes the essential part of religion may be ascertained primarily from the doctrines of that religion itself according to its tenets, historical background and change in evolved process etc.

The concept of essentiality is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are an integral part of the religion. It must be decided whether the practices or matters are considered integral by the community itself."

Mohammad Ali Khan vs. Special Land Acquisition Officer (1978 SCC OnLine All 948).

Paragraphs 8, 9 and 10 of the judgment read as under:-

"8. The contention of the learned counsel is that the petitioner has a right to practice religion in the mosque and hence the same cannot be the subject-matter of acquisition. We are unable to accept the contention as the guarantee under Cl. (1) of Article 25 itself makes the freedom subject to other provisions of part three. Article 31 which provides for acquisition of land itself exists in part three. Article 25 will, therefore, be subject to Article 31 and the freedom guaranteed in Article 25 will not be sufficient to take away the right of the State to acquire property if the acquisition is lawfully made.

9. Further, the profession, practice and propagation of religion guaranteed in Article 25 is a personal right which has to be exercised by the individual. It has no nexus with the place or territory where it has to be exercised. A person may go to a particular mosque to offer prayers if it exists, he may go to another mosque if the one in which he offered prayer earlier ceased to exist or he may offer prayers even in his house or elsewhere. Hence, the acquisition of land on which a mosque may exist cannot be held to deprive him of his right to freely practise the religion. A free practice of religion has the idea of practicing it anywhere and not its practice in any particular place. After the acquisition of the property the right to use that property for the purpose of offering prayers may be lost, but that does not militate against the guarantee contained in Article 25 of the Constitution.

10. To test the argument about Article 25, we may consider the right of the person to practice his religion in his house or elsewhere. As the prayers can be offered anywhere on earth and a man may be offering prayers in his own house or at some remote place, the right cannot be deemed reasonably to mean that no such place can be acquired. The only reasonable

interpretation of Article 25 can be that no law can prohibit the profession, practice or propagation of religion. The law of acquisition cannot be held to be invalid as that relates to land and not the individual's right to profess, practice or propagate religion. As the right to practice religion has no nexus with any particular place that right cannot be deemed infringed by acquisition of any particular piece of land which is used as a mosque."

Khursheed Ahmad Khan vs. State of U.P.
{MANU/SC/0113/2015 : (2015) 8 SCC 439}.

Relevant portion of Paragraph 13 reads as under:- "13. The right of the State to legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly a social institution, an institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the State is empowered to legislate with regard to social reform under Article

25(2)(b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion."

Dr. Noorjehan Safia Niaz and anr. vs. State of Maharashtra & Ors. {(2016) SCC OnLine Bom 5394}. Paragraphs 38 and 39 read as under:- "38.

What can be culled out from the aforesaid decisions is that, what constitutes 'an integral or essential part of the religion' is to be determined with reference to its doctrines, practices, tenets, historical background, etc. The religious practice has to constitute the very essence of that religion, and should be such, that if permitted, it will change its fundamental character. It is such permanent essential practices which are protected by the Constitution. It is also evident that immunity under Article 26(b) is provided not only to matters of doctrines or belief, but extends to acts done in furtherance of religion such as rituals, observances, ceremonies, modes of worship, which are considered to be fundamental parts of the religious practices. What is required is, that the such religious practices should be an essential and integral part of it and no other.

39. In the present case, reference must be made to the Qur'an, the fundamental Islamic text,

to determine whether a practice is essential to Islam. Essential part of a religion means the core beliefs upon which a religion is founded and essential practice means those practices that are fundamental to follow a religious belief. According to the 'essential functions test', the test to determine whether a part or a practice is essential to the religion, in this case, Islam, to find out whether the nature of religion will change, without that part or practice; and whether the alteration, will change the very essence of Islam and its fundamental character. As is noted in the judgments referred herein above, what is protected by the Constitution are only such permanent essential parts, where the very essence of the religion is altered."

Shayara Bano vs. Union of India & ors.
{MANU/SC/1031/2017 : (2017) 9 SCC 1}.

Paragraph-26 reads as under:- "26. When issues of such nature come to the forefront, the discourse often takes the form of pitting religion against other constitutional rights. I believe that a reconciliation between the same is possible, but the process of harmonising different interests is within the powers of the legislature. Of course, this power has to be exercised within the

constitutional parameters without curbing the religious freedom guaranteed under the Constitution of India. However, it is not for the courts to direct for any legislation."

Church of God (Full Gospel) in India vs. K.K.R. Majestic Colony Welfare Association {MANU/SC/0537/2000 : (2000) 7 SCC 282}.

Paragraph-13 reads as under: "13. In the present case, the contention with regard to the rights under Article 25 or Article 26 of the Constitution which are subject to "public order, morality and health" are not required to be dealt with in detail mainly because as stated earlier no religion prescribes or preaches that prayers are required to be performed through voice amplifiers or by beating of drums. In any case, if there is such practice, it should not adversely affect the rights of others including that of being not disturbed in their activities. We would only refer to some observations made by the Constitution Bench of this Court qua rights under Articles 25 and 26 of the Constitution in Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj v. State of Gujarat. After considering the various contentions, the Court observed that: (SCC p. 20, para 30) "No rights in an organized society can be

absolute. Enjoyment of one's rights must be consistent with the enjoyment of rights also by others. Where in a free play of social forces it is not possible to bring about a voluntary harmony, the State has to step in to set right the imbalance between competing interests." The Court also observed that: (SCC p. 20, para 31)"A particular fundamental right cannot exist in isolation in a watertight compartment. One fundamental right of a person may have to coexist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the Directive Principles in the interests of social welfare as a whole."

N.D. Jayal vs. Union of India
{MANU/SC/0649/2003 : (2004) 9 SCC 362}.

Paragraph- 18 of the judgment reads as under:-
 18. This Court dealt with the safety concerns and held that: (SCC p. 50, para 14) "In our opinion the Court can only investigate and adjudicate the question as to whether the Government was conscious to the inherent danger as pointed out by the petitioners and applied its mind to the safety of the dam. We have already given facts in detail which show that the Government has

considered the question on several occasions in the light of the opinions expressed by the experts. The Government was satisfied with the report of the experts and only thereafter clearance has been given to the project."

Asha Ranjan V/s. State of Bihar & ors.;
Chandrakeshwar Prasad V/s. Union of India.
MANU/SC/0159/2017 : (2017) 4 SCC 397.

Paragraph 54 and relevant portion of paragraph 56 read as under:- "54. Having noted thus, as presently advised, we shall first advert to certain authorities that pertain to balancing of rights. In *Sakal Papers (P) Ltd. v. Union of India*, the Court in the context of freedom of speech and expression, has held that freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. Analysing further, the Court held: (AIR pp. 313-14, para 37) "37. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater

reason, therefore for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom." 56. The Court further held that where there is a clash of two fundamental rights, namely, the appellant's right to privacy as part of right to life and Ms. Y's right to lead a healthy life which is her fundamental right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive."

**In Subramanian Swamy Vs. Union of India
MANU/SC/0621/2016 : (2016) 7 SCC 221:**

"137. . the issue herein is sustenance and balancing of the separate rights, one under Article 19(1)(a) and the other, under Art. 21. Hence, the concept of equipoise and counterweighing fundamental rights of one with other person. It is not a case of mere better enjoyment of another freedom.

**In Acharya Maharajshri Narendra Prasadji
Anandprasadji Maharaj v. State of Gujarat;**

MANU/SC/0034/1974 : (1975) 1 SCC 11, it has been observed that a particular fundamental right cannot exist in isolation in a watertight compartment. One fundamental right of a person may have to coexist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the directive principles in the interests of social welfare as a whole. The Court's duty is to strike a balance between competing claims of different interests.

In DTC v. Mazdoor Congress; MANU/SC/0031/1991 : 1991 Supp (1) SCC 600: the Court has ruled that articles relating to fundamental rights are all parts of an integrated scheme in the Constitution and their waters must mix to constitute that ground flow of unimpeded and impartial justice; social, economic and political, and of equality of status and opportunity which imply absence of unreasonable or unfair discrimination between individuals or groups or classes".

In 'X' v. Hospital 'Z' MANU/SC/0733/1998 : (1998) 8 SCC 296, the issue arose with regard to right to privacy as implicit in the right to life and

liberty as guaranteed to the citizens under Art. 21 of the Constitution and the right of another to lead a healthy life. Dealing with the said controversy, the Court held that as a human being, Ms. 'Y' must also enjoy as she obviously is entitled to all the human rights available to any other human being. This is apart from, and in addition to, the fundamental right available to her under Art. 21, which guarantees "right to life" to every citizen of this country. This Court further held that where there is a clash of two fundamental rights namely, the appellant's right to privacy as part of right to life and Ms. Y's right to lead a healthy life which is her fundamental right under Art. 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive".

CHAPTER-2

CONCEPT OF PROPERTY AND POSSESSION

CONCEPT OF PROPERTY AND POSSESSION¹

The concept of possession has been discussed by "Sir Maine" in Chapter-VIII under the heading "The Early History of Property". Referring to the natural modes of acquiring property known in Roman law he observed: The wild animal which is snared or killed by the hunter, the soil which is added to our field by the imperceptible deposits of a river, the tree which strikes its roots into our ground, are each said by the Roman lawyers to be acquired by us naturally. **"Sir Maine" further says:** Occupancy is the advisedly taking possession of that which at the moment is the property of no man, with the view (adds the technical definition) of acquiring property in it for yourself. The objects which the Roman lawyers called *res nullius*--things which have not or have never had an owner--can only be ascertained by enumerating them. Among things which never had an owner are wild animals, fishes, wild fowl,

¹ Justice Sudhir Agarwal - Uttar Pradesh Gandhi Smarak Nidhi vs. Aziz Mian: MANU/UP/0646/2013 - 2013 (4) ALJ 149

jewels disinterred for the first time, and lands newly discovered or never before cultivated. Among things which have not an owner are moveables which have been abandoned, lands which have been deserted, and (an anomalous but most formidable item) the property of an enemy. In all these objects the full rights of dominion were acquired by the Occupant, who first took possession of them with the intention of keeping them as his own--an intention which, in certain cases, had to be manifested by specific acts. **"Maine" has quoted "Blackstone" as under:** 'The earth.' he writes, 'and all things therein were the general property of mankind from the immediate gift of the Creator. Not that the communion of goods seems ever to have been applicable, even in the earliest ages, to aught but the substance of the thing; nor could be extended to the use of it. For, by the law of nature and reason he who first began to use it acquired therein a kind of transient property that lasted so long as he was using it, and no longer; or to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part was the permanent property of any man in particular; yet whoever

was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust and contrary to the law of nature to have driven him by force, but the instance that he quitted the use of occupation of it, another might seize it without injustice.' He then proceeds to argue that "when mankind increased in number, it became necessary to entertain conceptions of more permanent dominion, and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used **Explaining occupancy, 'Maine' observes:** Occupancy first gave a right against the world to an exclusive but temporary enjoyment, and that afterwards this right, while it remained exclusive, became perpetual. Their object in so stating their theory was to reconcile the doctrine that in the state of Nature res nullius became property through Occupancy, with the inference which they drew from the Scriptural history that the Patriarchs did not at first permanently appropriate the soil which had been grazed over by their flocks and herds.

Referring to "laws of ownership" followed in India by Hindus, 'Sir Maine' says: It

happens that, among the Hindoos, we do find a form of ownership which ought at once to rivet our attention from its exactly fitting in with the ideas which our studies in the Law of Persons would lead us to entertain respecting the original condition of property. The Village Community of India is at once an organised patriarchal society and an assemblage of co-proprietors. The personal relations to each other of the men who compose it are indistinguishably confounded with their proprietary rights, and to the attempts of English functionaries to separate the two may be assigned some of the most formidable miscarriages of Anglo-Indian administration. The Village Community is known to be of immense antiquity. In whatever direction research has been pushed into Indian history, general or local, it has always found the Community in existence at the farthest point of its progress. A great number of intelligent and observant writers, most of whom had no theory of any sort to support concerning its nature and origin, agree in considering it the least destructible institution of a society which never willingly surrenders any one of its usages to innovation. Conquests and revolutions seem to have swept over it without disturbing or displacing it, and the most

beneficent systems of Government in India have always been those which have recognised it as the basis of administration.

The mature Roman law, and modern jurisprudence following in its wake, look upon co-ownership as an exceptional and momentary condition of the rights of property. This view is clearly indicated in the maxim which obtains universally in Western Europe, *Nemo in communione potest invitus detineri* ('No one can be kept in co-proprietorship against his will'). But in India this order of ideas is reversed, and it may be said that separate proprietorship is always on its way to become proprietorship in common. The process has been adverted to already. As soon as a son is born, he acquires a vested interest in his father's substance, and on attaining years of discretion he is even, in certain contingencies, permitted by the letter of law to call for a partition of the family estate. As a fact, however, a division rarely takes place even at the death of the father, and the property constantly remains undivided for several generations, though every member of every generation has a legal right to an undivided share in it. The domain thus held in common is sometimes administered by an elected manager, but more generally, and in some provinces

always, it is managed by the eldest agnate, by the eldest representative of the eldest line of the stock. Such an assemblage of joint proprietors, a body of kindred holding a domain in common, is the simplest form of an Indian Village Community, but the Community is more than a brotherhood of relatives and more than an association of partners. It is an organised society, and besides providing for the management of the common fund, it seldom fails to provide, by a complete staff of functionaries, for internal Government, for police, for the administration of justice, and for the apportionment of taxes and public duties.

Sir Maine observed: The process which I have described as that under which a Village Community is formed, may be regarded as typical. Yet it is not to be supposed that every Village Community in India drew together in so simple a manner. Although, in the North of India, the archives, as I am informed, almost invariably show that the Community was founded by a single assemblage of blood-relations, they also supply information that men of alien extraction have always, from time to time, been engrafted on it, and a mere purchaser of a share may generally, under certain conditions, be admitted to the

brotherhood. In the South of the Peninsula there are often Communities which appear to have sprung not from one but from two or more families; and there are some whose composition is known to be entirely artificial; indeed, the occasional aggregation of men of different castes in the same society is fatal to the hypothesis of a common descent. Yet in all these brotherhoods either the tradition is preserved, or the assumption made, of an original common parentage. Mountstuart Elphinstone, who writes more particularly of the Southern Village Communities, observes of them (History of India, i. 126): 'the popular notion is that the Village landholders are all descended from one or more individuals who settled the village, and that the only exceptions are formed by persons who have derived their rights by purchase or otherwise from members of the original stock. The supposition is confirmed by the fact that, to this day, there are only single families of landholders in small villages and not many in large ones; but each has branched out into so many members that it is not uncommon for the whole agricultural labour to be done by the landholders, without the aid either of tenants or of labourers. The rights of the landholders are theirs collectively and, though

they almost always have a more or less perfect partition of them, they never have an entire separation. A landholder, for instance, can sell or mortgage his rights; but he must first have the consent of the village, and the purchaser steps exactly into his place and takes up all his obligations. If a family becomes extinct, its share returns to the common stock.

In India, not only is there no indivisibility of the common fund, but separate proprietorship in parts of it may be indefinitely prolonged and may branch out into any number of derivative ownerships, the de facto partition of the stock being, however, checked by inveterate usage, and by the rule against the admission of strangers without the consent of the brotherhood.

The Hindu Dharam-shastras containing legal principles are mainly in Smritis. **Narada-smriti or Naradiya Dharmasastra** contains the laws with regard to 'property' or and 'possession' are stated as under:

43. All transactions depend on wealth. In order to acquire it, exertion is necessary. To preserve it, to increase it, and to enjoy it: these are, successively, the three sorts of activity in regard to wealth.

44. Again, wealth is of three kinds : white, spotted, and black. Each of these (three) kinds has seven sub-division.

45. White wealth is (of the following seven sorts) : what is acquired by sacred knowledge, valour in arms, the practice of austerities, with a maiden, through (instructing) a pupil, by sacrificing, and by inheritance. The gain to be derived from exerting oneself to acquire it is of the same description.

46. Spotted wealth is (of the following seven sorts) : what is acquired by lending money at interest, tillage, commerce, in the shape of Sulka, by artistic performances, by servile attendance, or as a return for a benefit conferred on some one.

47. Black wealth is (of the following seven sorts) : what is acquired as a bribe, by gambling, by bearing a message, through one afflicted with pain, by forgery, by robbery, or by fraud.

48. It is in wealth that purchase, sale, gift, receipt, transactions of every kind, and enjoyment, have their source.

49. Of whatever description the property may be, with which a man performs any transaction, of the same description will the fruit be which he derives from it in the next world and in this.

50. Wealth is again declared to be of twelve sorts, according to the caste of the acquirer. Those modes of acquisition, which are common to all castes, are threefold. The others are said to be nine fold.

51. Property obtained by inheritance, gifts made from love, and what has been obtained with a wife (as her dowry), these are the three sorts of pure wealth, for all (castes) without distinction.

52. The pure wealth peculiar to a Brahman is declared to be threefold : what has been obtained as alms, by sacrificing, and through (instructing) a pupil.

53. The pure wealth peculiar to a Kshatriya is of three sorts likewise : what has been obtained in the shape of taxes, by fighting, and by means of the fines declared in lawsuits.

54. The pure wealth peculiar to a Vaisya is also declared to be threefold : (what has been acquired) by tillage, by tending cows, and by commerce.....

Brihaspati Smriti deals with 'possession' as under:

2. Immovable property may be acquired in seven different ways, viz. by learning, by purchase, by mortgaging, by valour, with a wife (as her dowry), by inheritance (from an ancestor), and by

succession to the property of a kinsman who has no issue.

3. In the case of property acquired by one of these seven methods, viz. inheritance from a father (or other ancestor), acquisition (in the shape of a dowry), purchase, hypothecation, succession, valour, or learned knowledge, possession coupled with a legitimate title constitutes proprietary right.

4. That possession which is hereditary, or founded on a royal order, or coupled with purchase, hypothecation or a legitimate title : possession of this kind constitutes proprietary right.

5. Immovable property obtained by a division (of the estate among co-heirs), or by purchase, or inherited from a father or other ancestor), or presented by the king, is acknowledged as one's lawful property; it is lost by forbearance in the case of adverse possession.

6. He who is holding possession (of an estate) after having merely taken it, occupying it without meeting with resistance, becomes its legitimate owner thus; and it is lost (to the owner) by such forbearance.

7. He whose possession has been continuous from the time of occupation, and has never been

interrupted for a period of thirty years, cannot be deprived of such property.

8. That property which is publicly given by co-heirs or others to a stranger who is enjoying it, cannot be recovered afterwards by him (who is its legitimate owner).

9. He who does not raise a protest when a stranger is giving away (his) landed property in his sight, cannot again recover that estate, even though he be possessed of a written title to it.

10. Possession held by three generations produces ownership for strangers, no doubt, when they are related to one another in the degree of a Sapinda; it does not stand good in the case of Sakulyas.

11. A house, field, commodity or other property having been held by another person than the owner, is not lost (to the owner) by mere force of possession, if the possessor stands to him in the relation of a friend, relative, or kinsman.

12. Such wealth as is possessed by a son-in-law, a learned Brahman, or by the king or his ministers, does not become legitimate property for them after the lapse of a very long period even.

13. Forcible means must not be resorted to by the present occupant or his son, in maintaining possession of the property of an infant, or of a

learned Brahman, or of that which has been legitimately inherited from a father.

14. Nor (in maintaining possession) of cattle, a woman, a slave, or other (property). This is a legal rule.

15. If a doubt should arise in regard to a house or field, of which its occupant has not held possession uninterruptedly, he should undertake to prove (his enjoyment of it) by means of documents, (the depositions of) persons knowing him as possessor, and witnesses.

16. Those are witnesses in a contest of this kind who know the name, the boundary, the title (of acquisition), the quantity, the time, the quarter of the sky, and the reason why possession has been interrupted.

17. By such means should a question regarding occupation and possession be decided in a contest concerning landed property; but in a cause in which no (human) evidence is forthcoming, divine test should be resorted to.

18. When a village, field, or garden is referred to in one and the same grant, they are (considered to be) possessed of all of them, though possession be held of part of them only. (On the other hand) that title has no force which is not accompanied by a slight measure of possession even.

19. Not to possess landed property, not to show a document in the proper time, and not to remind witnesses (of their deposition): this is the way to lose one's property.

20. Therefore evidence should be preserved carefully; if this be done, lawsuits whether relating to immovable or to movable property are sure to succeed.

21. Female slaves can never be acquired by possession, without a written title; nor (does possession create ownership) in the case of property belonging to a king, or to a learned Brahman, or to an idiot, or infant.

22. It is not by mere force of possession that land becomes a man's property; a legitimate title also having been proved, it is converted into property by both (possession and title), but not otherwise.

23. Should even the father, grandfather, and great grandfather of a man be alive, land having been possessed by him for thirty years, without intervention of strangers.

24. It should be considered as possession extending over one generation; possession continued for twice that period (is called possession) extending over two generations; possession continued for three times that period (is called possession) extending over three

generations. (Possession continued) longer than that even, is (called) possession of long standing.

25. When the present occupant is impeached, a document or witness is (considered as) decisive. When he is no longer in existence, possession alone is decisive for his sons.

26. When possession extending over three generations has descended to the fourth generation, it becomes legitimate possession, and a title must never be inquired for.

27. When possession undisturbed (by other) has been held by three generations (in succession), it is not necessary to produce a title; possession is decisive in that case.

28. In suits regarding immovable property, (possession) held by three generations in succession, should be considered as valid, and makes evidence in the decision of a cause.

29. He whose possession has passed through three lives, and is duly substantiated by a written title, cannot be deprived of it; such possession is equal to the gift of the Veda.

30. He whose possession has passed through three lives and has been inherited from his ancestors, cannot be deprived of it, unless a previous grant should be in existence (in which

the same property has been granted to a different person by the king).

31. That possession is valid in law which is uninterrupted and of long standing; interrupted possession even is (recognised as valid), if it has been substantiated by an ancestor.

32. A witness prevails over inference; a writing prevails over witnesses; undisturbed possession which has passed through three lives prevails over both.

33. When an event (forming the subject of a complaint) has occurred long ago, and no witnesses are forthcoming, he should examine indirect witnesses, or he should administer oaths, or should try artifice.

Thus in brief, the concept of possession in ancient laws may be stated that Possession in Roman Law recognised two degrees of possession, one is being detention (or possessio naturalise) of the object/thing; and the other is possessio strictly or possessio civilise. Roman law appears to be mainly concern with developing a theory to distinguish between detention and possession from each other. Physical control of an object by sale, a bailee or an agent was considered only as detention and all other kinds of physical control were treated as possession.

In Muslim Law a man in possession of property although by wrongful means has obvious advantages over the possessor. The possessor is entitled to protection against the whole world except the true owner.

In 'Ancient Indian Law' possession was nothing but a legal contrivance based on the considerations of dharma. Use and enjoyment of property was restricted and controlled by the holy scriptures. In old Hindu Law possession was of two kinds, (a) with title; and (b) without title where possession continued for three generations. Enough importance, however, was given to title (agama) to prove possession. Katyayana said, "there can be no branches without root, and possession is the branch".

"Ihering" defines possession, "whenever a person looks like an owner in relation to a thing he has in his possession, unless possession is denied to him by rules of law based on convenience". Apparently this definition does not give any explicit idea on the subject. It only states that the concept of possession is an ever changing concept having different meaning for different purposes and different frames of law.

"Pollock" says, "In common speech a man is said to be in possession of anything of which

he has the apparent control or from the use of which he has the apparent powers of excluding others". The stress laid by Pollock on possession is not on animus but on de facto control.

"Savigny" defines possession, "intention coupled with physical power to exclude others from the use of material object." Apparently this definition involves both the elements namely, corpus possession is and animus do mini. The German Jurist 'Savigny' laid down that all property is founded on adverse possession ripened by prescription. The concept of ownership accordingly as observed by him involve three elements-Possession, Adverseness of Possession, (that is a holding not permissive or subordinate, but exclusive against the world), and Prescription, or a period of time during which the Adverse Possession has uninterruptedly continued.

"Holmes" opined that possession is a conception which is only less important than contract.

According to Salmond on "Jurisprudence", 12th Edition (1966) (First Edition published in 1902) by PJ Fitzgerald, Indian Economy Reprint 2006 published by Universal Law Publishing Co. Pvt. Ltd., Delhi (hereinafter referred to as

"Salmond's Jurisprudence"). On page 51, it says that the concept of "possession" is as difficult to define as it is essential to protect. It is an abstract notion and is not purely a legal concept. It is both a legal and a non-legal or a pre-legal concept. He tried to explain the concept of possession with reference to different factual and legal concepts.

The first one is "possession in fact". It is a relationship between a person and a thing. The things one possesses in his hand or which one has in his control like clothes he is wearing, objects he is keeping in his pocket etc. For such things it can be said that he is in possession of the things in fact. To possess one would have to have a thing under his physical control. If one captures a wild animal, he gets possession of it but if the animal escapes from his control, he loses possession. It implies that things not amenable in any manner to human control cannot form the subject-matter of possession like one cannot possess sun, moon or the stars etc. Extending the above concept, "Salmond" says that one can have a thing in his control without actually holding or using it at every given moment of time like possession of a coat even if one has taken it off and put down or kept in the cupboard. Even if one falls asleep, the possession of the coat

would remain with him. If one is in such a position, has to be able in the normal course of events to resume actual control when one desires, the possession in fact of the thing is there. Another factor relevant to the assessment of control is the power of excluding other people. The amount of power that is necessary varies according to the nature of the object.

The possession consisted of a "corpus possessionis" and "animus possidendi". The former comprised both, the power to use the thing possessed and the existence of grounds for the expectation that the possessor's use will not be interfered with. The latter consisted of an intent to appropriate to oneself the exclusive use of the thing possessed.

Then comes "possession in law". A man, in law, would possess only those things which in ordinary language he would be said to possess. But then the possessor can be given certain legal rights such as a right to continue in possession free from interference by others. This primary right in rem can be supported by various sanctioning rights in personam against those who violates the possessor's primary right; can be given a right for compensation for interference

and a dispossession and the right to have his possession restored from the encroacher.

Another facet of possession is "immediate" or "mediate possession". The possession held by one through another is termed "mediate" while that acquired or retained directly or personally can be said to be "immediate or direct". There is a maxim of civil law that two persons could not be in possession of the same thing at the same time. (*Plures eandem rem in solidum possidere non possunt*). As a general proposition exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realised at the same time. There are, however, certain exceptions, namely, in the case of mediate possession two persons are in possession of the same thing at the same time. Every mediate possessor stands in relation to a direct possessor through whom he holds. Two or more persons may possess the same thing in common just as they may own it in common.

Then comes "incorporeal possession". It is commonly called the possession of a right and is distinct from the "corporeal possession" which is a possession of the thing.

In "The Elementary Principles of Jurisprudence" by G.W. Keeton, II Edition (1949)

published by Sir Isaac Pitman and Sons Ltd. London (First published in 1930), "possession" has been dealt in Chapter XV. It says: 'Possession,' says an old proverb, "is nine points of law." Put in another way, this implies that he who has conscious control of an object need only surrender his control to one who can establish a superior claim in law.

The essentials of possession in the first instance includes a fact to be established like any other fact. Whether it exists in a particular case or not will depend on the degree of control exercised by the person designated as possessor. If his control is such that he effectively excludes interference by others then he has possession. Thus the possession in order to show its existences must show "corpus possessionis" and an "animus possidendi".

Corpus possessionis means that there exists such physical contact of the thing by the possessor as to give rise to the reasonable assumption that other persons will not interfere with it. Existence of corpus broadly depend on (1) upon the nature of the thing itself, and the probability that others will refrain from interfering with the enjoyment of it;

(2) possession of real property, i.e., when a man sets foot over the threshold of a house, or crosses the boundary line of his estate, provided that there exist no factors negating his control, for example the continuance in occupation of one who denies his right; and

(3) acquisition of physical control over the objects it encloses. Corpus, therefore, depends more upon the general expectations that others will not interfere with an individual control over a thing, then upon the physical capacity of an individual to exclude others.

The animus possidendi is the conscious intention of an individual to exclude others from the control of an object.

Possession confers on the possessor all the rights of the owner except as against the owner and prior possessors. "Possession in law" has the advantage of being a root of title.

There is also a concept of "constructive possession" which is depicted by a symbolic act. It has been narrated with an illustration that delivery of keys of a building may give right to constructive possession of all the contents to the transferee of the key.

It would also be useful to have meaning of "possession" in the context of different dictionaries.

In "Oxford English English-Hindi Dictionary" published by Oxford University Press, first published in 2008, 11th Impression January, 2010, at page 920:

possession 1. -- The state of having or owning something. 2. Something that you have or own.

In "The New Lexicon Webster's Dictionary of the English Language" (1987), published by Lexicon Publications, Inc. at page 784: possession -- a possessing or being possessed II that which is possessed II (pl.) property II a territory under the political and economic control of another country II (law) actual enjoyment of property not founded on any title of ownership to take possession of to begin to occupy as owner II to affect so as to dominate.

In "Chambers Dictionary" (Deluxe Edition), first published in India in 1993, reprint 1996 by Allied Publishers Limited, New Delhi at page 1333 defines 'possess' and 'possession' as under: possess poz-es' vt to inhabit, occupy (obs.); to have or hold as owner, or as if owner; to have as a quality; to seize; to obtain; to attain (Spenser); to maintain; to control; to be master of; to occupy

and dominate the mind of; to put in possession (with of, formerly with in); to inform, acquaint; to imbue; to impress with the notion of feeling; to prepossess (obs). possession the act, state or fact of possession or being possessed, a thing possessed; a subject foreign territory.

In "Corpus Juris Secundum", A Complete Restatement of the Entire American Law as developed by All Reported Cases (1951), Vol. LXXII, published by Brooklyn, N.Y., The American Law Book Co., at pages 233-235: Possession expresses the closest relation of fact which can exist between a corporeal thing and the person who possesses it, implying an actual physical contact, as by sitting or standing upon a thing; denoting custody coupled with a right or interest of proprietorship; and "possession" is inclusive of "custody," although "custody" is not tantamount to "possession." In its full significance, "possession" connotes domination or supremacy of authority. It implies a right and a fact; the right to enjoy annexed to the right of property, and the fact of the real detention of thing which would be in the hands of a master or of another for him. It also implies a right to deal with property at pleasure and to exclude other persons from meddling with it. Possession involves power of

control and intent to control, and all the definitions contained in recognized law dictionaries indicate that the element of custody and control is involved in the term "possession."

The word "possession" is also defined as meaning the thing possessed; that which anyone occupies, owns, or controls; and in this sense, as applied to the thing possessed, the word is frequently employed in the plural, denoting property in the aggregate; wealth; and it may include real estate where such is the intention, although this is not the technical signification.

It is also defined as meaning dominion; as, foreign possessions; and, while in this sense the term is not a word of art descriptive of a recognised geographical or Governmental entity, it is employed in a number of federal statutes to describe the area to which various congressional statutes apply.

"Possession" in the sense of ownership, and as a degree of title, and as indicating the holding or retaining of property in one's power or control, is treated in Property.

In "Black's Law Dictionary" Seventh Edition (1999), published by West Group, St. Paul, Minn., 1999, at page 1183:

possession. 1. The fact of having or holding property in one's power; the exercise of dominion over property. 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. 3. (usu. pi.) Something that a person owns or controls;

In Black's Law Dictionary (supra) the following categories of possession have also been referred and explained: actual possession. Physical occupancy or control over property.

adverse possession. A method of acquiring title to real property by possession for a statutory period under certain conditions, esp. a non-permissive use of the land with a claim of right when that use is continuous, exclusive, hostile, open, and notorious.

constructive adverse possession. Adverse possession in which the claim arises from the claimant's payment of taxes under colour of right rather than by actual possession of the land.

bona fide possession. Possession of property by a person who in good faith does not know that the property's ownership is disputed.

civil possession. Civil law. Possession existing by virtue of a person's intent to own a property even

though the person no longer occupies or has physical control of it.

constructive possession. Control or dominion over a property without actual possession or custody of it. Also termed effective possession; *possessio fictitia*.

corporal possession. Possession of a material object, such as a farm or a coin. Also termed natural possession; *possessio corporis*.

derivative possession. Lawful possession by one (such as a tenant) who does not hold title.

direct possession. Something that a person owns or controls.

effective possession. See constructive possession.

exclusive possession. The exercise of exclusive dominion over property, including the use and benefit of the property.

hostile possession. Possession asserted against the claims of all others, including the record owner. See Adverse Possession.

immediate possession. Possession that is acquired or retained directly or personally--Also termed direct possession.

incorporeal possession. Possession of something other than a material object, such as an easement over a neighbour's land, or the

access of light to the windows of a house -- Also termed *possessio juris*; quasi possession.

indirect possession. See mediate possession.

mediate possession. Possession of a thing through someone else, such as an agent. Also termed indirect possession.

naked possession. The mere possession of something, esp. real estate without any apparent right or colourable title to it.

natural possession. Civil law. The exercise of physical detention or control over a thing, as by occupying a building or cultivating farmland.

notorious possession. Possession or control that is evident to others; possession of property that, because it is generally known by people in the area where the property is located, gives rise to a presumption that the actual owner has notice of it -- Also termed open possession; open and notorious possession.

peaceable possession. Possession (as of real property) not disturbed by another's hostile or legal attempts to recover possession.

pedal possession. Actual possession, as by living on the land or by improving it.

possession in fact. Actual possession that may or may not be recognized by law. -- Also termed *possessio naturalis*.

possession in law. 1. Possession that is recognized by the law either because it is a specific type of possession in fact or because the law or some special reason attributes the advantages and results of possession to someone who does not in fact possess. 2. See constructive possession. -- Also termed *possessio civilis*.

possession of a right. The de facto relation of continuing exercise and enjoyment of a right as oppose to the de jure relation of ownership. Also termed possession juris.

precarious possession. Civil law. Possession of property by someone other than the owner on behalf of or with permission of the owner.

quasi possession. See incorporeal possession.

scrambling possession. Possession that is uncertain because it is in dispute.

In "Words and Phrases" Permanent Edition, Vol. 33 (1971), published by St. Paul, Minn. West Publishing Co., at pages 91-92: 'Possession' as used in statute is not synonymous with physical bodily presence of adverse claimant; continuous bodily presence is not required, but rather question is one of fact which must be determined from circumstances of each case.

"Possession" is a common term used in every day conversation that has not acquired any artful meaning.

"Possession", in any sense of term, must imply, first, some actual power over the object possessed, and, secondly, some amount of will to avail oneself of that power.

"Possession" is one of the most vague of all vague terms, and shifts its meaning according to the subject-matter to which it is applied, varying very much in its sense, as it is introduced either into civil or into criminal proceedings.

Possession is that condition of fact under which one can exercise his power over a corporeal thing to the exclusion of all others.

To constitute possession, there must be such appropriation of the land to the individual as will apprise the community in its vicinity that the land is in his exclusive use and enjoyment, and notice of possession to be sufficient must be of the open and visible character, which from its nature will apprise the world that the land is occupied, and who the occupant is.

In "Jowitt's Dictionary of English Law" Vol. 2 Second Edition-1977, Second Impression-1990, published by London Sweet & Maxwell Limited, at pages 1387-1389: Possession, the

visible possibility of exercising physical control over a thing, coupled with the intention of doing so. either against all the world, or against all the world except certain persons. There are, therefore, three requisites of possession. First, there must be actual or potential physical control. Secondly, physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs, for, if the thing shows no signs of being under the control of anyone, it is not possessed; hence, if a piece of land is deserted and left without fences or other signs of occupation, it is not in the possession of anyone, and the possession is said to be vacant. The question whether possession of land is vacant is of importance in actions for recovering possession.

Possession is actual, where a person enters into lands or tenements conveyed to him; apparent, which is a species of presumptive title, as where land descended to the heir of an abator, intruder, or disseisor, who died seised; in law, when lands had descended to a man and he had

not actually entered into them, or naked, that is, mere possession, without colour of right.

Possession may connote different kinds of control according to the nature of the thing or right over which it is being exercised. A man may possess an estate of land; if he leases it he will be in possession of the rents and profits and the reversion, but not of the land which is in the lessee who may bring an action of trespass against the lessor..... The adage, possession is nine parts of the law, means that the person in possession can only be ousted by one whose title is better than his; every claimant must succeed by the strength of his own title and not by the weakness of his antagonist's.

Possession does not necessarily imply use or enjoyment.

Possession gives rise to peculiar rights and consequences. The principle is that a possessor has a presumptive title, that is to say, is presumed to be absolute owner until the contrary is shown, and is protected by law in his possession against all who cannot show a better title to the possession than he has.

With reference to its origin, possession is either with or without right.

Rightful possession is where a person has the right to the possession of (that is, the right to possess) property, and is in the possession of it with the intention of exercising his right. This kind of possession necessarily varies with the nature of the right from which it arises; a person may be in possession of a thing by virtue of his right of ownership, or as lessee, bailee, etc.; or his possession may be merely permissive, as in the case of a licensee; or it may be a possession coupled with an interest, as in the case of an auctioneer (*Woolfe v. Home* (1867) 2 QBD 358). So the right may be absolute, that is, good against all persons; or relative, that is, good against all with certain exceptions; thus a carrier or borrower of goods has a right to their possession against all the world except the owner.

In jurisprudence, the possession of a lessee, bailee, licensee, etc., is sometimes called derivative possession, while in English Law the possessory interest of such a person, considered with reference to his rights against third persons who interfere with his possession, is usually called a special or qualified property, meaning a limited right of ownership.

Possession without right is called wrongful or adverse, according to the rights of the owner or

those of the possessor are considered. Wrongful possession is where a person takes possession of property to which he is not entitled, so that the possession and the right of possession are in one person, and the right to possession in another. Where an owner is wrongfully dispossessed, he has a right of action to recover his property, or, if he has an opportunity, he can exercise the remedy of reception in the case of goods, or of entry in the case of land.

In "Legal Thesaurus" Regular Edition William C. Burton (1981), published by Macmillan Publishing Co., Inc. New York., at page 391:

POSSESSION (Ownership), noun
authority, custody, demesne, domination, dominion, exclusive right, lordship, occupancy, possessio, proprietorship right, right of retention, seisin, supremacy, tenancy, title;

In "Mitra's Legal & Commercial Dictionary" 5th Edition (1990) by A.N. Saha, published by Eastern Law House Pvt. Ltd., at pages 558-559: Possession, the visible possibility of exercising physical control over a thing, coupled with the intention of doing so, either against all the world, or against all the world except certain persons.

There are, therefore, three requisites of possession. First, there must be actual or potential physical control. Secondly, physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs, for, if the thing shows no signs of being under the control of anyone, it is not possessed.

There are two varieties of possession (a) real or actual possession, and (b) constructive or symbolical possession.

The meaning of possession depends on the context in which it is used. English law has never worked out a completely logical and exhaustive definition of possession. *Towers & Co. Ltd. v. Gray* (1961) 2 All ER 68 : (1961) 2 QB 351.

Possession need not be physical possession, but can be constructive, having power and control over the gun. *Gunwantlal v. State* MANU/SC/0130/1972 : AIR 1972 SC 1756.

In P. Ramanatha Aiyar's "The Law Lexicon" with Legal Maxims, Latin Terms and Words & Phrases, Second Edition 1997, published by Wadhwa and Company, Law Publishers, at pages 1481-1483:

1. Physical control, whether actual or in the eye of law, over property; the condition of holding at one's disposal (S. 66, T.P. Act); 2. the area in one's possession (S. 37, Indian Evidence Act).

Possession is a detention or enjoyment of a thing which a man holds or exercise by himself or by another, who keeps or exercise it in his name.

Possession is said to be in two ways either actual possession or possession in law.

"Actual Possession," is, when a man entered into lands or tenements to him descended, or otherwise.

Possession in Law, is when lands or tenements are descended to a man, and he hath not as yet really, actually, and in deed entered into them: And it is called possession in law because that in the eye and consideration of the law, he is deemed to be in possession, inasmuch as he is liable to every man's action that will sue concerning the same lands or tenements.

The term has been defined as follows: Simply the owning or having a thing in one's power; the present right and power to control a thing; the detention and control of the manual or ideal custody of anything which may be the subject of property, for one's use or enjoyment, either as owner or as the proprietor of a qualified right in

it, and either held personally or by another who exercises it in one's place and name; the detention or enjoyment of a thing which a man holds or exercise by himself or by another who keeps or exercises it in his name; the act of possession, a having and holding or retaining of property in one's power or control; the sole control of the property or of some physical attachment to it; that condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all other persons. MANU/UP/0113/1937 : 171 IC 159 : 1937 ALJ 951 : 1937 ALR 913 : 1937 AWR 823 : AIR 1937 All 735; 12 Bom. LR 316 : 5 IC 457; 6 Bom LR 887 : 16 CPLR 13; 4 NLR 78 : 8 CriLJ 18.

There can be no possession without intention or consciousness or will. Norendranath Masumdar v. The State, MANU/WB/0027/1951 : AIR 1951 Cal 140. (S.19(f) Arms Act, 1878).

Possession need not be physical possession but can be constructive, having power and control over the gun, while the person to whom physical possession is given holds it subject to that power or control. Gunwantlal v. The State of M.P., MANU/SC/0130/1972 : AIR 1972 SC 1756, 1759.

Possession is a polymorphous term which may have different meanings in different contents. The possession of a fire-arm must have the element of consciousness or knowledge of that possession and when there is no actual physical possession a control or dominion over it, there is no possession.

The word "possession" naturally signifies lawful possession. The possession of a trespasser could not be a possession of a tenant so as to attract Section 14(1). Bhagat Ram v. Smt. Ulawati Galib, MANU/HP/0031/1972 : AIR 1972 HP 125,130.

The word 'possessed' means the state of owning or having in one's hand or power but even this broad meaning will not apply in the case of a share or a woman when there has been no partition by metes and bounds. Modi Nathubai Motilal v. Chhotubhai Manibhai Besai, MANU/GJ/0046/1962 : AIR 1962 Guj 68, 77.

Obtaining a symbolic possession is in law equivalent to obtain actual physical possession and has the effect of terminating the legal possession of the person bound by the decree and order. Umrao Singh v. Union of India, MANU/DE/0213/1974 : AIR 1975 Del 188, 191.

The word 'possession' implies a physical capacity to deal with the thing as we like to the exclusion of every one and a determination to exercise that physical power on one's own behalf. In Re, Pachiripalli Satyanarayanan, MANU/TN/0254/1953 : AIR 1953 Mad 534.

Where an estate or interest in realty is spoken of as being "in possession", that does not, primarily, mean the actual occupation of the property; but means, the present right thereto or to the enjoyment thereof.

The word "possession" in S. 28 of the Limitation Act XV of 1877, embraces both actual possession and possession in law (1902) 6 CWN 601.

The word "possession" in C.P. Code, includes constructive possession, such as possession by a tenant (1901) ILR 25 B 478 (491).

Possession in Specific Relief Act (I of 1877), S. 9 does not include joint possession, but refers to exclusive possession (1914) 23 Ind Cas 618 (619).

The word "possession" means the legal right to possession. Health v. Drown (1972) 2 All ER 561, 573(HL).

There is a distinction between the terms "possession", "occupation" and "control". The distinction between "possession" and "occupation" was considered in *Seth Narainbhai Ichharam Kurmi and another v. Narbada Prasad Sheosahai Pande and others*, MANU/NA/0125/1941 : AIR 1941 Nag 357, and the Court held: Bare occupation and possession are two different things. The concept of possession, at any rate as it is understood in legal terminology, is a complex one which need not include actual occupation. It comprises rather the right to possess, and the right and ability to exclude others from possession and control coupled with a mental element, namely, the *animus possidendi*, that is to say, knowledge of these rights and the desire and intention of exercising them if need be. The adverse possession of which the law speaks does not necessarily denote actual physical ouster from occupation but an ouster from all those rights which constitute possession in law. It is true that physical occupation is ordinarily the best and the most conclusive proof of possession in this sense but the two are not the same. It is also true that there must always be physical ouster from these rights but that does not necessarily import

physical ouster from occupation especially when this is of just a small room or two in a house and when this occupation is shared with others. The nature of the ouster and the quantum necessary naturally varies in each case.

The distinction between "possession", "occupation" or "control" was also considered in *Sumatibai Wasudeo Bachuwar v. Emperor*, MANU/MH/0008/1943 : AIR 1944 Bom 125 and the Court held: Some documents containing prejudicial reports were found in a box in the house occupied by the applicant and her husband. When the house was raided by the police, the husband was out and the applicant (wife) produced the keys with one of which the box could be opened. In addition to pre judicial reports, there were some letters in the box addressed to the applicant. Held, (1) that, prima facie, the box containing the documents would be in the possession of the husband and the mere fact that in his absence he had left the keys with the applicant (wife) would not make her in joint possession with himself; nor did the fact that there were letters in the box addressed to the wife mean that she was in joint possession of all the contents of the box; (2) that the wife was in the circumstances in possession of the box within the

meaning of R. 39(1) of the Defence of India Rules; (3) that occupation in R. 39(2) of the Defence of India Rules meant legal occupation, and the applicant could not be held to be in occupation or control of the house so as to render her guilty under R. 39 of the Defence of India Rules.

In "Mitra's Law of Possession and Ownership of Property" reprint 2010 published by Sodhi Publication, Allahabad, certain kinds of possession in the light of Courts' verdict have been provided as under: Continuous possession. -- The meaning of the word "continue" means to keep existing or happening without stopping and the word "continuous" describes something that continues without stopping. In a case where the plaintiff was in possession for a period of five years at a time on the basis of a lease, the moment the period of lease expired, the Court held in *Kartik Mandal v. State of Bihar*, MANU/BH/0439/2008 : AIR 2009 Pat 33, that he was bound to restore before the possession of the settler and cannot claim to be in continuous possession.

Effective possession. -- Where the plaintiff did not get the possession of the land as to control it as per his desire means that he is not having effective possession of the land as held in

Alkapuri Co-operative Housing Society Ltd. v. Jayantibhai Naginbhai, MANU/SC/0049/2009 : AIR 2009 SC 1948.

De jure possession. -- A possession deemed in law though actually it is in possession of another is de jure possession as held in Kottakkal Co-operative Urban Bank v. Balakrishna, MANU/KE/0049/2008 : AIR 2008 Ker 179.

Exclusive possession. -- In Nirmal Kanta (Smt.) v. Ashok Kumar, MANU/SC/7383/2008 : 2008 (7) SCC 722 : (AIR 2008 SC 1768), the respondent No. 2 was accommodated by respondent No. 1 to assist him in his cloth business by helping customers to assess the amount of cloth required for their particular purposes. The said activity did not give respondent No. 2 exclusive possession for that part of the shop room from where he was operating and where his sewing machine had been affixed. This view taken by the Court below was upheld by the Apex Court.

Hostile possession. -- A possession against the real owner within his knowledge constitute hostile possession. Where a person is not sure who is the true owner, the question of his being in hostile possession does not arise and

it would also not result in assuming that he was denying title of true owner. This is what was held by this Court in Ramzan v. Smt. Gafooran (MANU/UP/1451/2007 : AIR 2008 All 37) (supra). When a person claims possession over a property showing himself to be the owner, the question of showing hostile possession would not arise. Similarly, in Gopendra Goswami v. Haradhan Das, MANU/GH/0399/2008 : AIR 2009 Gau 41, it was held that mere possession over a land cannot be treated hostile to the title of the real owner unless it is shown that the real owner has the knowledge and thereupon the possession of the stranger continued.

Physical possession. -- It is the actual possession over the land. (See: Dhara Singh v. Fateh Singh, MANU/RH/0246/2009 : AIR 2009 Raj 132).

Wrongful possession. -- Possession contrary to law is the wrongful possession.

Possession can also be classified as under:

(a) De facto possession, (b) De jure possession, (c) Symbolic possession, (d) Joint possession, (e) Concurrent possession. Besides, some more categories are forcible possession, independent possession, lawful possession, permissive possession and settled possession.

Possession, therefore, has two aspects. By itself it is a limited title which is good against all except a true owner. It is also prima facie evidence of ownership. In *Hari Khandu v. Dhondi Nanth*, (1906) 8 Bom LR 96, Sir Lawrence Jenkins, C.J. observed that possession has twofold value, it is evidence of ownership and is itself the foundation of a right to possession. The possession, therefore, is not only a physical condition which is protected by ownership but a right itself.

In Supdt. & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja & Ors., MANU/SC/0266/1979 : AIR 1980 SC 52 the possession was described by the Court in paras 13, 14 and 15 as under:

13. "Possession" is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the contexts of all statutes. Dias & Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorizing it is that of "possession". Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Edition, 1966) caused by the fact that possession is not purely a legal concept.

"Possession", implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See Dias and Hughes, *ibid*)

14. According to Pollock & Wright "when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that "possession" is not a purely legal concept but also a matter of fact; Salmond (12th Edition, page 52) describes "possession, in fact", as a relationship between a person and a thing. According to the learned author the test for determining "whether a person is in possession of anything is whether he is in general control of it.

Quoted case laws:-

In Bhupendra Narayan Sinha v. Rajeswar Prosad Bhakat & Ors., MANU/PR/0042/1931 : AIR 1931 PC 162 the Privy Council held where a

person without any colour of right wrongfully takes possession as a trespasser of a property of another, any title which he may require by adverse possession will be strictly limited to what he has actually so possessed. That was an interesting case of dispute of ownership in respect to subsoil. It was held that there can be separate ownership of different strata of subsoil, at all events where minerals are involved. If a grant of surface right was given by the owner and the licensee is given possession to carry out the said right, by quarrying stones etc. possession of subsoil in the eyes of law remain with the owner though it is only a constructive possession but in the absence of anything to show that with the knowledge of the owner the licensee held possession of subsoil and minerals therein and continued with that possession for statutory period of limitation to continue its ownership such plea of adverse possession in respect to subsoil cannot be accepted.

In Basant Kumar Roy v. Secretary of State for India (MANU/PR/0025/1917 : AIR 1917 PC 18), it was held: An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former

owner on the ground for a specific purpose from time to time. Conversely; acts which prima facie are acts of dispossession may under particular circumstances fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other characters or have some other object....If, as their Lordships think, no dispossession occurred, except possibly within twelve years before the commencement of this suit, Article 144 is the Article applicable, and not Article 142.

Apex Court in P. Lakshmi Reddy (MANU/SC/0083/1956 : AIR 1957 SC 314).

Case was that of co-heirs where the plea of adverse possession was set up. In this regard it was held: But it is well settled in order, to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be

on the basis of the joint title. The co-heir in possession cannot render his possession adverse to the other co-heir, not in possession, merely by any secret hostile animus of his own part in derogation of the other co-heir title. It is settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.

In Thakur Kishan Singh v. Arvind Kumar, MANU/SC/0015/1995 : AIR 1995 SC 73 the Court said: A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession.

In Sheo Raj Chamar & another v. Mudeer Khan & others, MANU/UP/0224/1934 : AIR 1934 All 868, it was held: If, indeed it did, the defendants have acquired a right by sheer

adverse possession held and maintained for more than 12 years. The adverse possession to be effective need not be for the full proprietary right.

In Saroop Singh v. Banto and others, MANU/SC/1146/2005 : 2005(8) SCC 330 : (AIR 2005 SC 4407) the Court held in para 30: Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence.....

In T. Anjanappa and others v. Somalingappa and another, MANU/SC/8429/2006 : 2006 (7) SCC 570 : (2006 AIR SCW 4368) the preconditions for taking plea of adverse possession has been summarised as under: It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent to as to show that it is adverse to the true owner. The

classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

In P.T. Munichikkanna Reddy & Ors. v. Revamma & Ors., MANU/SC/7325/2007 : AIR 2007 SC 1753 it was held: It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper-owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper-owner.

Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor

on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile.

Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the Court expires through effluxion of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. Therefore, to assess a claim of adverse possession, two pronged enquiry is required:

1. Application of limitation provision thereby jurisprudentially "wilful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.
2. Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

In Annakili v. A. Vedanayagam and others, MANU/SC/8027/2007 : AIR 2008 SC 346 the Court pointed out that a claim of adverse possession has two elements (i) the possession of the defendant becomes adverse to the plaintiff; and (ii) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi is held to be a requisite ingredient of adverse possession well known in law. The Court held: It is now a well settled principle of law that mere possession of the land would not ripen into possessor title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true

owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more do not ripen into a title.

In Vishwanath Bapurao Sabale v. Shalinibai Nagappa Sabale and others, MANU/SC/0442/2009 : JT 2009 (5) SC 395 : (AIR 2009 SC (supp) 1525) the Court said: for claiming title by adverse possession, it was necessary for the plaintiff to plead and prove animus possidendi. A peaceful, open and continuous possession being the ingredients of the principle of adverse possession as contained in the maxim nec vi, nec clam, nec precario, long possession by itself would not be sufficient to prove adverse possession.

The title of property can vest in idols also by adverse possession as held in Ananda Chandra Chakrabarti v. Broja Lal Singha and others, MANU/WB/0418/1922 : AIR 1923 Cal 142 wherein reliance was also placed on Balwant

v. Puran MANU/PR/0006/1883 : (1883) 10 Ind App 90; Ramprakash v. Ananda Das, MANU/PR/0001/1916 : 43 Cal (1916) 707; Vidya v. Balusami MANU/PR/0062/1921 : (1921) 48 IA 302; Khaw Sim v. Chuah Hooi MANU/PR/0115/1921 : (1922) 49 IA 37; Damodar Das v. Lakhandas MANU/PR/0026/1910 : (1910) 37 IA 147 : 1910 (37) ILR (Cal) 885.

In Secretary of State v. Debendra Lal Khan (**MANU/PR/0072/1933 : AIR 1934 PC 23**) it was held that the period of possession of a series of independent trespassers cannot be added together and utilized by the last possessor to make up the statutory total period of adverse possession.

In (Sm.) Bibhabati Devi v. Ramendra Narayan Roy & others, **MANU/PR/0032/1946 : AIR 1947 pc 19** it was observed that in order to claim a right of ownership applying the principle of adverse possession it is a condition precedent that the possession must be adverse to a living person. Herein the appellant was possessing the property under a mosque after the death of the

defendant, it was held that the possession cannot be said to be adverse.

In Chhote Khan & others v. Mal Khan & others, **MANU/SC/0128/1954 : AIR 1954 SC 575**, the Court observed that no question of adverse possession arises where the possession is held under an arrangement between the co-sharers.

The Court in P. Lakshmi Reddy (**MANU/SC/0083/1956 : AIR 1957 SC 314**) quoted with approval Mitra's Tagore Law Lectures on Limitation and Prescription (6th Edition) Vol. I, Lecture VI, at page 159, quoting from Angell on Limitation: An adverse holding is an actual and exclusive appropriation of land commenced and continued under a claim of right, either under an openly avowed claim, or under a constructive claim (arising from the acts and circumstances attending the appropriation), to hold the land against him (sic) who was in possession. (Angell, sections 390 and 398). It is the intention to claim adversely accompanied by such an invasion of the rights of the opposite party as gives him a cause of action which constitutes adverse possession. Consonant with this principle the

commencement of adverse possession, in favour of a person, implies that that person is in actual possession, at the time, with a notorious hostile claim of exclusive title, to repel which, the true owner would then be in a position to maintain an action. It would follow that whatever may be the animus or intention of a person wanting to acquire title by adverse possession his adverse possession cannot commence until site animus.

In Karbalai Begum v. Mohd. Sayeed
MANU/SC/0363/1980 : (1980) 4 SCC 396 :
(AIR 1981 SC 77) in the context of a cosharer, it was held: ...It is well settled that mere non-participation in the rent and profits of the land of a cosharer does not amount to an ouster so as to give title by adverse possession to the other cosharer in possession.

In Annasaheb Bapusaheb Patil v. Balwant **MANU/SC/0172/1995 : (1995) 2 SCC 543 : (AIR 1995 SC 895)** the Court, in para 15, said: 15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile

to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all.

In Vidya Devi v. Prem Prakash MANU/SC/0345/1995 : (1995) 4 SCC 496 : (AIR 1995 SC 1789) the Court in paras 27 and 28 held: 27...it will be seen that in order that the possession of co-owner may be adverse to others, it is necessary that there should be ouster or something equivalent to it. This was also the observation of the Supreme Court in P. Lakshmi Reddy case (MANU/SC/0083/1956 : AIR 1957 SC 314) which has since been followed in Mohd. Zainulabudeen v. Sayed Ahmed Mohideen (MANU/SC/0785/1989 : AIR 1990 SC 507). 28. 'Ouster' does not mean actual driving out of the cosharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea

of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law.

In Roop Singh v. Ram Singh
MANU/SC/0204/2000 : (2000) 3 SCC 708 :
(AIR 2000 SC 1485) it was held that if the defendant got the possession of suit land as a lessee or under a batai agreement then from the permissive possession it is for him to establish by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession. The Court relied on its earlier decisions in Thakur Kishan Singh (MANU/SC/0015/1995 : AIR 1995 SC 73) (supra).

In Darshan Singh v. Gujjar Singh
MANU/SC/0007/2002 : (2002) 2 SCC 62 : (AIR

2002 SC 606) in paras 7 and 9, the Court held:

...It is well settled that if a cosharer is in possession of the entire property, his possession cannot be deemed to be adverse for other, cosharers unless there has been an ouster of other cosharers. 9. In our view, the correct legal position is that possession of a property belonging to several cosharers by one cosharer shall be deemed that he possesses the property on behalf of the other cosharers unless there has been a clear ouster by denying the title of other cosharers and mutation in the revenue records in the name of one cosharer would not amount to ouster unless there is a clear declaration that title of the other cosharers was denied.

In Md. Mohammad Ali v. Jagadish Kalita & Ors. MANU/SC/0785/2003 : (2004) 1 SCC 271

with reference to a case dealing with such an issue amongst cosharers it was observed that "Long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of

the land to a cosharer does not amount to ouster so as to give title by prescription.

In Amarendra Pratap Singh v. Tej Bahadur Prajapati and others, MANU/SC/0955/2003 : AIR 2004 SC 3782 : (2004) 10 SCC 65

considering as to what is adverse possession, the Court in para 22 observed: What is adverse possession? Every possession is not, in law, adverse possession. Under Article 65 of the Limitation Act, 1963, a suit for possession of immovable property or any interest therein based on title can be instituted within a period of 12 years calculated from the date when the possession of the defendant becomes adverse to the plaintiff. By virtue of Section 27 of the Limitation Act, at the determination of the period limited by the Act to any person for instituting a suit for possession of any property, his right to such property stands extinguished. The process of acquisition of title by adverse possession springs into action essentially by default or inaction of the owner. A person, though having no right to enter into possession of the property of someone else, does so and continues in possession setting up title in himself and adversely to the tide of the owner, commences

prescribing title into himself and such prescription having continued for a period of 12 years, he acquires title not on his own but on account of the default or inaction on part of the real owner, which stretched over a period of 12 years results into extinguishing of the latter's title. It is that extinguished tide of the real owner which comes to vest in the wrongdoer. The law does not intend to confer any premium on the wrong doing of a person in wrongful possession; it pronounces the penalty of extinction of title on the person who though entitled to assert his right and remove the wrong doer and reenter into possession, has defaulted and remained inactive for a period of 12 years, which the law considers reasonable for attracting the said penalty. Inaction for a period of 12 years is treated by the Doctrine of Adverse Possession as evidence of the loss of desire on the part of the rightful owner to assert his ownership and reclaim possession.

..... 23. The nature of the property, the nature of title vesting in the rightful owner, the kind of possession which the adverse possessor is exercising, are all relevant factors which enter into consideration for attracting applicability of the Doctrine of Adverse Possession. The right in the property ought to be one which is alienable

and is capable of being acquired by the competitor. Adverse possession operates on an alienable right. The right stands alienated by operation of law, for it was capable of being alienated voluntarily and is sought to be recognized by doctrine of adverse possession as having been alienated involuntarily, by default and inaction on the part of the rightful claimant, who knows actually or constructively of the wrongful acts of the competitor and yet sits idle. Such inaction or default in taking care of one's own rights over property is also capable of being called a manner of 'dealing' with one's property which results in extinguishing one's title in property and vesting the same in the wrong doer in possession of property and thus amounts to 'transfer of immovable property' in the wider sense assignable in the context of social welfare legislation enacted with the object of protecting a weaker section.

In L.N. Aswathama & another v. V.P. Prakash, MANU/SC/1222/2009 : JT 2009 (9) 527 : (2009 AIR SCW 5439) the Court, in paras 17 and 18 said:

17. The legal position is no doubt well settled. To establish a claim of title by

prescription, that is adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. It is also well settled that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence.

18....When a person is in possession asserting to be the owner, even if he fails to establish his title, his possession would still be adverse to the true owner. Therefore, the two pleas put forth by the defendant in this case are not inconsistent pleas but alternative pleas available on the same facts. Therefore, the contention of the plaintiffs that the plea of adverse possession is not available to defendant is rejected.

25. When defendant claimed title and that was proved to be false or fabricated, then the burden is heavy upon him to prove actual, exclusive, open, uninterrupted possession for 12 years. In this case we have already held that he did not make out such possession for 12 years prior to the suit.

The question of effect of gap in continuous possession came to be considered in *Devi Singh v. Board of Revenue for Rajasthan and others*, MANU/SC/0567/1994 : (1994) 1 SCC 215 and in para 5 the Court held as under: The salutary principle of appreciation of evidence in possessory matters is that when a state of affairs is shown to have existed for a long course of time but a gap therein puts to doubt its continuity prudence requires to lean in favour of the continuity of things especially when some plausible explanation of the gap is forthcoming.

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232. From the above discussion what boils down is that the concept of adverse possession contemplates a hostile possession, i.e., a possession which is expressly or impliedly in

denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's right and in fact deny the same. A person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. In order to determine whether the act of a person constitutes adverse possession is 'animus in doing that act' and it is most crucial factor. Adverse possession commences in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of owner's right excluded him from the enjoyment of his property. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that person's title. Possession is not held to be adverse if it can be referred to a lawful title. The persons setting up adverse possession may have been holding under the rightful owner's title, i.e., trustees, guardians, bailiffs or agents, such person cannot set up adverse possession. Burden is on the defendant to prove affirmatively.

233. An occupation of reality is inconsistent with the right of the true owner. Where a person possesses property in a manner in which he is not entitled to possess it, and without anything to show that he possesses it otherwise than an owner, i.e., with the intention of excluding all persons from it, including the rightful owner, he is in adverse possession of it. Where possession could be referred to a lawful title it shall not be considered to be adverse. The reason is that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another does not by mere denial of other's title make his possession adverse so as to give himself the benefit of the statute of limitation. A person who enters into possession having a lawful title cannot divest another of that title by pretending that he had no title at all.

234. Adverse possession is of two kinds. (A) Adverse from the beginning or (B) that become so subsequently. If a mere trespasser takes possession of A's property, and retains it against him, his possession is adverse ab initio. But if A grants a lease of land to B, or B obtains possession of the land as A's bailiff, or guardian,

or trustee, his possession can only become adverse by some change in his position. Adverse possession not only entitles the adverse possessor, like every other possessor, to be protected in his possession against all who cannot show a better title, but also, if the adverse possessor remains in possession for a certain period of time produces the effect either of barring the right of the true owner, and thus converting the possessor into the owner, or of depriving the true owner of his right of action to recover his property although the true owner is ignorant of the adverse possessor being in occupation.

Quoted case laws

In Hari Chand v. Daulat Ram, MANU/SC/0385/1986 : AIR 1987 SC 94 the Court held if the encroachment was not new one but the structure was in existence prior to acquiring title over the property the decree on the basis of adverse possession cannot be granted in favour of the plaintiff. Paras 10 and 11 of the judgment read as under:

10. On a consideration of these evidences it is quite clear that the disputed kachha wall and the khaprail over it is not a new construction, but existed for over 28 years and the defendant has

been living therein as has been deposed to by Ramji Lal vendor of the plaintiff who admitted in his evidence that the land in dispute and the adjoining kachha walls had been affected by salt and the chhappar over the portion shown in red was tiled roof constructed about 28 years back. This is also supported by the evidence of the defendant, D.W. 1, that the wall in dispute was in existence when the partition was effected i.e., 28 years before. On a consideration of these evidences the Trial Court rightly held that the defendant had not trespassed over the land in question nor he had constructed a new wall or khaprail. The trial court also considered the report 57C by the court Amin and held that the wall in question was not a recent construction but it appeared 25-30 years old in its present condition as (is) evident from the said report. The suit was therefore dismissed. The lower appellate court merely considered the partition deed and map Exts. 3/1 and 3/2 respectively and held that the disputed property fell to the share of the plaintiff's vendor and the correctness of the partition map was not challenged in the written statement. The court of appeal below also referred to Amin's map 47A which showed the encroached portion in red colour as falling within the share of

plaintiff's vendor, and held that the defendant encroached on this portion of land marked in red colour, without at all considering the clear evidence of the defendant himself that the wall and the khaprail in question existed for the last 28 years and the defendant has been living there all along. P.W. 1 Ramji Lal himself also admitted that the wall existed for about 28 years as stated by the defendant and the kachha walls and the khaprail has been effected by salt. The lower appellate court though held that P.W. 1 Ramji Lal admitted in cross-examination that towards the north of the land in dispute was the khaprail covered room of Daulat Ram in which Daulat Ram lived, but this does not mean that the wall in dispute exists for the last any certain number of years, although it can be said that it is not a recent construction. Without considering the deposition of defendant No. 1 as well as the report of the Amin 57 C the IIInd Addl. Civil Judge, Agra wrongly held that the defendant failed to prove that the wall in dispute and the khaprail existed for the last more than 12 years before the suit. The Civil Judge further held on surmises as "may be that the wall and khaprail have not been raised in May, 1961 as is the plaintiff's case, but they are recent constructions." This decision of the

court of appeal below is wholly incorrect being contrary to the evidences on record.

11. On a consideration of all the evidences on record it is clearly established that the alleged encroachment by construction of kuchha wall and khaprail over it are not a recent construction as alleged to have been made in May 1961. On the other hand, it is crystal clear from the evidences of Ramji Lal P.W. 1 and Daulat Ram D.W. 1 that the disputed wall with khaprail existed there in the disputed site for a long time, that is 28 years before and the wall and the khaprail have been affected by salt as deposed to by these two witnesses. Moreover the court Amin's report 57C also shows the said walls and khaprail to be 25-30 years old in its present condition. The High Court has clearly come to the finding that though the partition deed was executed by the parties yet there was no partition by metes and bounds. Moreover there is no whisper in the plaint about the partition of the property in question between the co-sharers by metes and bounds nor there is any averment that the suit property fell to the share of plaintiff's vendor Ramji Lal and Ramji Lal was ever in possession of the disputed property since the date of partition till the date of sale to the plaintiff. The

plaintiff has singularly failed to prove his case as pleaded in the plaint.

In Maharaja Sir Kesho Prasad Singh Bahadur v. Bahuria Mt. Bhagjogna Kuer and others, MANU/PR/0029/1937 : AIR 1937 pc 69 the

Hon'ble Privy Council has held that mere receipt of rent by persons claiming adversely is not sufficient to warrant finding of adverse possession. The possession of persons or their predecessors-in-title claiming by adverse possession must have "all the qualities of adequacy, continuity and exclusiveness" necessary to displace the title of the persons against whom they claim. Relevant extracts from page 78 of the said judgment reads as follows: the mere fact that many years after the sale the Gangbarar maliks or persons depriving title from them are obtaining rent for the land is in itself very significant. Even in a locality exposed to dilution by the action of the river this circumstance alone might be given considerable weight. But without sufficient proof to cover the intervening years it was most reasonably held by the learned Subordinate Judge to be insufficient. The circumstance that the Maharaja was not in

possession or in receipt of rent is, it need hardly be said, insufficient under Art. 144 to warrant a finding of adverse possession on behalf of the respondents or their predecessors-in-title. Their Lordships are of opinion that on the materials produced it cannot be contended that the learned Subordinate Judge was obliged in law to find that the possession of the principal respondents had "all the qualities of adequacy, continuity and exclusiveness" (per Lord Shaw 126 CWN 666 (1922) at p. 673) necessary to displace the title of the Maharaja, and they think that no reason in law exists why his finding of fact in this respect should not be final.

In Ramzan and others v. Smt. Gafooran (MANU/UP/1451/2007 : AIR 2008 All 37) the Hon'ble Allahabad High Court has held that unless there is specific plea and proof that adverse possession has disclaimed his right and asserted title and possession to the knowledge of the true owner within the statutory period and the true owner has acquiesced to it, the adverse possessor cannot succeed to have it established that he has perfected his right by prescription. Where the adverse possessor was not sure as to who was the true owner and question of his being

in hostile possession, then the question of denying title of true owner does not arise. Relevant paras 27, 29 and 30 of the said judgment read as follows: 27. It is, therefore, explicit that unless there is specific plea and proof that adverse possessor has disclaimed his right and asserted title and possession to the knowledge of the true owner within a statutory period and the true owner has acquiesced to it, the adverse possessor cannot succeed to have it established that he has perfected his right by prescription.

29. As pointed out above, where the defendants are not sure who is the true owner and question of their being in hostile possession then the question of denying title of true owner does not arise. At the most, the defendants have claimed and which is found to be correct by the trial Court that they have been in possession of the disputed property since the inception of the sale deeds in their favour. They came in possession, according to their showing, as owner of the property in question. It follows that they exercised their right over the disputed property as owner and exercise of such right, by no stretch of imagination, it can be said that they claimed their title adverse to the true owner.

30. Viewed as above, on the facts of the present case, the possession of the contesting defendants is not of the variety and degree which is required for adverse possession to materialise.

In Qadir Bux v. Ram Chandra (MANU/UP/0046/1970 : AIR 1970 All 289) the

Hon'ble Allahabad High Court has held that the term "dispossession" applies when a person comes in and drives out others from the possession. It implies ouster; a driven out of possession against the will of the person in actual possession. The term "discontinuance" implies a voluntary act and openness of possession followed by the actual possession of another. It implies that a person discontinuing as owner of the land and left it to be dispossessed by any one who has not to come in. Relevant para 30 of the said judgment reads as follows: 30. The main point for consideration is whether in such circumstances it can be said that the plaintiff had been dispossessed or had discontinued his possession within the meaning of Article 142 of the First Schedule to the Indian Limitation Act. The term "dispossession" applies when a person comes in and drives out others from the possession. It imports ouster a driving out of

possession against the will of the person in actual possession. This driving out cannot be said to have occurred when according to the case of the plaintiff the transfer of possession was voluntary, that is to say, not against the will of the person in possession but in accordance with his wishes and active consent. The term "discontinuance" implies a voluntary act and abandonment of possession followed by the actual possession of another. It implies that the person discontinuing has given up the land and left it to be possessed by anyone choosing to come in. There must be an intention to abandon title before there can be said to be a discontinuance in possession, but this cannot be assumed. It must be either admitted or proved. So strong in fact is the position of the rightful owner that even when he has been dispossessed by a trespasser and that trespasser abandons possession either voluntarily or by vis major for howsoever short a time before he has actually perfected his title by twelve years' adverse possession the possession of the true owner is deemed to have revived and he gets a fresh starting point of limitation -vide Gurbinder Singh v. Lal Singh, MANU/SC/0256/1965 : AIR 1965 SC 1553. Wrongful possession cannot be assumed against the true owner when according

to the facts disclosed by him he himself had voluntarily handed over possession and was not deprived of it by the other side.

In Gurbinder Singh and another v. Lal Singh and another, MANU/SC/0256/1965 : AIR

1965 SC 1553 the Hon'ble Supreme Court held that in order that Article 142 is attracted the plaintiff must initially be found in possession of the property and should have been dispossessed by the defendant or someone through whom the defendants claim or alternatively the plaintiff should have discontinued possession. It has also been held that in a suit to which Article 144 attracted the burden is on the party who claims adverse possession to establish that he was in adverse possession for 12 years before the date of suit and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims but not the adverse possession of an independent trespasser. Relevant paras 6, 8 and 10 of the said judgment read as follows:

6. In order that Art. 142 is attracted the plaintiff must initially have been in possession of the property and should have been dispossessed by the defendant or someone through whom the

defendants claim or alternatively the plaintiff should have discontinued possession. It is no one's case that Lal Singh ever was in possession of the property. It is true that Pratap Singh was in possession of part of the property which particular part we do not know-by reason of a transfer thereof in his favour by Bakshi Singh. In the present suit both Lal Singh and Pratap Singh assert their claim to property by success on in accordance with the rules contained in the dastur-ul-amal whereas the possession of Pratap Singh for some time was under a different title altogether. So far as the present suit is concerned it must, therefore, be said that the plaintiffs-respondents were never in possession as heirs of Raj Kaur and consequently Art. 142 would not be attracted to their suit.

8. Mr. Tarachand Brijmohanlal, however, advanced an interesting argument to the effect that if persons entitled to immediate possession of land are somehow kept out of possession may be by different trespassers for a period of 12 years or over, their suit will be barred by time. He points out that as from the death of Raj Kaur her daughters, through one of whom the respondents claim, were kept out of possession by trespassers and that from the date of Raj Kaur's death right

up to the date of the respondents' suit, that is, for a period of nearly 20 years trespassers were in possession of Mahan Kaur's, and after her death, the respondents' share in the land, their suit must therefore be regarded as barred by time. In other words the learned counsel wants to tack on the adverse possession of Bakshi Singh and Pratap Singh to the adverse possession of the Raja and those who claim through him. In support of the contention reliance is placed by learned counsel on the decision in *Ramayya v. Kotamma*, MANU/TN/0166/1921 : ILR 45 Mad 370 : (AIR 1922 Mad 59). In order to appreciate what was decided in that case a brief resume of the facts of that case is necessary. Mallabattudu, the last male holder of the properties to which the suit related, died in the year 1889 leaving two daughters Ramamma and Govindamma. The former died in 1914. The latter surrendered her estate to her two sons. The plaintiff who was a transferee from the sons of Govindamma instituted a suit for recovery of possession of Mallabattudu's property against Punnayya, the son of Ramamma to whom Mallabattudu had made an oral gift of his properties two years before his death. Punnayya was minor at the date of gift and his elder brother Subbarayudu was

managing the property on his behalf. Punnayya, however, died in 1894 while still a minor and thereafter his brothers Subbarayudu and two others were in possession of the property. It would seem that the other brothers died and Subbarayudu was the last surviving member of Punnayya's family. Upon Subbarayudu's death the properties were sold by his daughters to the third defendant. The plaintiffs-appellants suit failed on the ground of limitation. It was argued on his behalf in the second appeal before the High Court that as the gift to Punnayya was oral it was invalid, that consequently Punnayya was in possession as trespasser, that on Punnayya's death his heir would be his mother, that as Subbarayudu continued in possession Subbarayudu's possession was also that of a trespasser, that as neither Subbarayudu nor Punnayya completed possession for 12 years they could not tack on one to the other and that the plaintiff claiming through the nearest reversioner is not barred. The contention for the respondents was that there was no break in possession so as to retest the properties in the original owners, that Punnayya and Subbarayudu cannot be treated as successive trespassers and that in any event the real owner having been out of

possession for over 12 years the suit was barred by limitation. The High Court following the decision of Mookerjee J. in Mohendra Nath v. Shamsunnessa, 21 Cal LJ 157 at p. 164 : (AIR 1915 Cal 629 at p 633), held that time begins to run against the last full owner if he himself was dispossessed and the operation of the law of limitation would not be arrested by the fact that on his death he was succeeded by his widow, daughter or mother, as the cause of action cannot be prolonged by the mere transfer of title. It may be mentioned that as Mallabattudu had given up possession to Punnayya under an invalid gift Art. 142 of the Limitation Act was clearly attracted. The sons of Govindamma from whom the appellant had purchased the suit properties claimed through Mallabattudu and since time began to run against him from 1887 when he discontinued possession it did not cease to run by the mere fact of his death. In a suit to which that Article applies the plaintiff has to prove his possession within 12 years of his suit. Therefore, so long as the total period of the plaintiff's exclusion from possession is, at the date of the plaintiff's suit, for a period of 12 years or over, the fact that this exclusion was by different trespassers will not help the plaintiff provided

there was a continuity in the period of exclusion. That decision is not applicable to the facts of the case before us. This is a suit to which Art. 144 is attracted and the burden is on the defendant to establish that he was in adverse possession for 12 years before the date of suit and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims but not the adverse possession of independent trespassers.

10. This view has not been departed from in any case. At any rate none was brought to our notice where it has not been followed. Apart from that what we are concerned with is the language used by the legislature in the third column of Art.144. The starting point of limitation there stated is the date when the possession of the defendant becomes adverse to the plaintiff. The word "defendant" is defined in S. 2(4) of the Limitation Act thus: 'defendant' includes any person from or through whom a defendant derives his liability to be sued. No doubt, this is an inclusive definition but the gist of it is the existence of a jural relationship between different persons. There can be no jural relationship between two independent trespassers. Therefore, where a defendant in possession of property is

sued by a person who has title to it but is out of possession what he has to show in defence is that he or anyone through whom he claims has been in possession for more than the statutory period. An independent trespasser not being such a person the defendant is not entitled to tack on the previous possession of that person to his own possession. In our opinion, therefore, the respondents' suit is within time and has been rightly decreed by the courts below. We dismiss this appeal with costs.

In S.M. Karim v. Mst. Bibi Sakina, MANU/SC/0236/1964 : AIR 1964 SC 1254 the Hon'ble Apex Court has held that the alternative claim must be clearly made and proved, adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point on limitation against the party affected can be found. A mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "a possible title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and prayer

clause is not a substitute for a plea. Relevant paras 3 to 5 of the said judgment read as follows:

3. In this appeal, it has been stressed by the appellant that the findings clearly establish the benami nature of the transaction of 1914. This is, perhaps, true but the appellant cannot avail himself of it. The appellant's claim based upon the benami nature of the transaction cannot stand because S. 66 of the Code of Civil Procedure bars it. That section provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims. Formerly, the opening words were, no suit shall be maintained against a certified purchaser and the change was made to protect not only the certified purchaser but any person claiming title under a purchase certified by the Court. The protection is thus available not only against the real purchaser but also against anyone claiming through him. In the present case, the appellant as plaintiff was hit by the section and the defendants were protected by it.

4. It is contended that the case falls within the second sub-section under which a suit is possible at the instance of a third person who wishes to

proceed against the property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner. Reliance is placed upon the transfer by Syed Aulad Ali in favour of the appellant which is described as a claim by the transferee against the real owner. The words of the second sub-section refer to the claim of creditors and not to the claims of transferees. The latter are dealt with in first sub-section, and if the meaning sought to be placed on the second sub-section by the appellant were to be accepted, the entire policy of the law would be defeated by the real purchaser making a transfer to another and the first sub-section would become almost a dead letter. In our opinion, such a construction cannot be accepted and the plaintiff's suit must be held to be barred under S. 66 of the Code.

5. As an alternative, it was contended before us that the title of Hakir Alam was extinguished by long and uninterrupted adverse possession of Syed Aulad Ali and after him of the plaintiff. The High Court did not accept this case. Such a case is, of course, open to a plaintiff to make if his possession is disturbed. If the possession of the real owner ripens into title under the Limitation Act and he is dispossessed, he can sue to obtain

possession, for he does not then rely on the benami nature of the transaction. But the alternative claim must be clearly made and proved. The High Court held that the plea of adverse possession was not raised in the suit and reversed the decision of the two courts below. The plea of adverse possession is raised here. Reliance is placed before us on *Sukan v. Krishanand*, ILR 32 Pat 353 and *Sri Bhagwan Singh and others v. Ram Basi Kuer and others*, MANU/BH/0054/1957 : AIR 1957 Pat 157 to submit that such a plea is not necessary and alternatively, that if a plea is required, what can be considered a proper plea. But these two cases can hardly help the appellant. No doubt, the plaint sets out the fact that after the purchase by Syed Aulad Ali, benami in the name of his son-in-law Hakir Alam Ali continued in possession of the property but it does not say that this possession was at any time adverse to that of the certified purchaser. Hakir Alam was the son-in-law of Syed Aulad Ali and was living with him. There is no suggestion that Syed Aulad Ali ever asserted any hostile title against him or that a dispute with regard to ownership and possession had ever arisen. Adverse possession must be adequate in continuity, in publicity and extent and a plea is

required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea. The cited cases need hardly be considered, because each case must be determined upon the allegations in the plaint in that case. It is sufficient to point out that in *Bishun Dayal v. Kesho Prasad*, MANU/PR/0042/1940 : AIR 1940 PC 202 the Judicial Committee did not accept an alternative case based on possession after purchase without a proper plea.

In B. Leelavathi v. Honnamma and another, MANU/SC/0365/2005 : (2005) 11 SCC 115 the Hon'ble Supreme Court has held that the adverse possession is a question of fact which has to be specifically pleaded and proved and in the absence of any plea of adverse possession, framing of an issue and adducing evidence it

would not be held that the plaintiffs had perfected towards the title by way of adverse possession. Para 11 of the judgment read as follows: 11. Plea of adverse possession had been taken vaguely in the plaint. No categorical stand on this point was taken in the plaint. No issue had been framed and seemingly the same was not insisted upon by the plaintiff-respondent. Adverse possession is a question of fact which has to be specifically pleaded and proved. No evidence was adduced by the plaintiff-respondent with regard to adverse possession. Honnamma, the plaintiff in her own statement did not say that she is in adverse possession of the suit property. We fail to understand as to how the High Court, in the absence of any plea of adverse possession, framing of an issue and evidence led on the point, could hold that the plaintiff-respondent had perfected her title by way of adverse possession.

In Dharamarajan & Ors. v. Valliammal & Ors., MANU/SC/8194/2007 : 2008 (2) SCC 741 : (AIR 2008 SC 850) the Hon'ble Supreme Court has held that in a claim of adverse possession openness and adverse nature of the possession has to be proved against the owner of the property in question. Relevant para 11 of the said

judgment reads as follows: 11. In our opinion none of these questions could be said to be either question of law or a substantial question of law arising out of the pleadings of the parties. The first referred question of law could not and did not arise for the simple reason that the plea of adverse possession has been rightly found against the plaintiff. Karupayee Ammal's possession, even if presumed to be in a valid possession in law, could not be said to be adverse possession as throughout it was the case of the appellant Dharmarajan that it was a permissive possession and that she was permitted to stay on the land belonging to the members of the Iyer family. Secondly it has nowhere come as to against whom was her possession adverse. Was it adverse against the Government or against the Iyer family? In order to substantiate the plea of adverse possession, the possession has to be open and adverse to the owner of the property in question. The evidence did not show this openness and adverse nature because it is not even certain as to against whom the adverse possession was pleaded on the part of Karupayee Ammal. Further even the legal relationship of Doraiswamy and Karupayee Ammal is not pleaded or proved. All that is pleaded is that after

Karupayee Ammal's demise Doraiswamy as her foster son continued in the thatched shed allegedly constructed by Karupayee Ammal. There was no question of the tacking of possession as there is ample evidence on record to suggest that Doraiswamy also was in the service of Iyer family and that he was permitted to stay after Karupayee Ammal. Further his legal heirship was also not decisively proved. We do not, therefore, see as to how the first substantial question of law came to be framed. This is apart from the fact that ultimately High Court has not granted the relief to the respondents on the basis of the finding of this question. On the other hand the High Court has gone into entirely different consideration based on reappreciation of evidence. The second and third questions are not the questions of law at all. They are regarding appreciation of evidence. The fourth question is regarding the admissibility of Exhibit A8. In our opinion there is no question of admissibility as the High Court has found that Exhibit A8 was not admissible in evidence since the Tehsildar who had issued that certificate was not examined. Therefore, there will be no question of admissibility since the document itself was not proved. Again the finding of the High Court goes

against the respondent herein. Even the fifth question was a clear cut question of fact and was, therefore, impermissible in the Second Appeal.

In A.S. Vidyasagar v. S. Karunanandam : 1995

Supp (4) SCC 570 the Hon'ble Supreme Court has held that permissive possession is not adverse possession and can be terminated at any time by the rightful owner. Relevant para 5 of the judgment reads as follows: 5. Adverse possession is sought to be established on the supposition that Kanthimathi got possession of the premises as a licensee and on her death in 1948, the appellant who was 4 years of age, must be presumed to have become a trespasser. And if he had remained in trespass for 12 years, the title stood perfected and in any case, a suit to recovery of possession would by then be time barred. We are unable to appreciate this line of reasoning for it appears to us that there is no occasion to term the possession of Kanthimathi as that of a licensee. The possession was permissive in her hands and remained permissive in the hands of the appellant on his birth, as well as in the hands of his father living then with Kanthimathi. There was no occasion for any such licence to have been terminated. For the view we are taking there was

no licence at all. Permissible possession of the appellant could rightfully be terminated at any moment by the rightful owners. The present contesting respondents thus had a right to institute the suit for possession against the appellant. No oral evidence has been referred to us which would go to support the plea of openness, hostility and notoriety which would go to establish adverse possession. On the contrary, the Municipal Tax receipts, Exts. B39 and 40, even though suggestedly reflecting payment made by the appellant, were in the name of Kuppuswami, the rightful owner. This negates the assertion that at any stage did the appellant assert a hostile title. Even by examining the evidence, at our end, we come to the same view as that of the High Court. The plea of adverse possession thus also fails. As a result fails this appeal. Accordingly, we dismiss the appeal, but without any order as to costs.

In Goswami Shri Mahalaxmi Vahuji v. Shah Ranchhoddas Kalidas, MANU/SC/0466/1969 : AIR 1970 SC 2025 the Hon'ble Supreme Court held that a party cannot be allowed to set up a case wholly inconsistent with that pleaded in its written statement. Relevant para 8 of the said

judgment reads as follows: 8. We may now proceed to examine the material on record for finding out 'the true character of the suit properties viz. whether they are properties of a public trust arising from their dedication of those properties in favour of the deity Shree Gokulnathji or whether the deity as well as the suit properties are the private properties of Goswami Maharaj. In her written statement as noticed, earlier, the 1st defendant took up the specific plea that the idol of Shree Gokulnathji is the private property of the Maharaj the Vallabh Cult does not permit any dedication in favour of an idol and in fact there was no dedication in favour of that idol. She emphatically denied that the suit properties were the properties of the deity Gokulnathji but in this Court evidently because of the enormity of evidence adduced by the plaintiffs, a totally new plea was taken namely that several items of the suit properties had been dedicated to Gokulnathji but the deity being the family deity of the Maharaj, the resulting trust is only a private trust. In other words the plea taken in the written statement is that the suit properties were the private properties of the Maharaj and that there was no trust, private or public. But the case argued before this Court is a wholly different

one viz., the suit properties were partly the properties of a private trust and partly the private properties of the Maharaj. The 1st defendant cannot be permitted to take up a case which is wholly inconsistent with that pleaded. This belated attempt to bypass the evidence adduced appears to be more a manor than a genuine explanation of the documentary evidence adduced. It is amply proved that ever since Mathuranathji took over the management of the shrine, two sets of account books have been maintained, one relating to the income and expenses of the shrine and the other relating to that of the Maharaj. These account books and other documents show that presents and gifts used to be made to the deity as well as to the Maharaj. The two were quite separate and distinct. Maharaj himself has been making gifts to the deity. He has been, at times utilising the funds belonging to the deity and thereafter reimbursing the same. The account books which have been produced clearly go to show that the deity and the Maharaj were treated as two different and distinct legal entities. The evidence afforded by the account books is telltale. In the trial Court it was contended on behalf of the 1st defendant that none of the account books

produced relate exclusively to the affairs of the temple. They all record the transactions of the Maharaj, whether pertaining to his personal dealings or dealings in connection with the deity. This is an obviously untenable contention. That contention was given up in the High Court. In the High Court it was urged that two sets of account books were kept, one relating to the income and expenditure of the deity and the other of the Maharaj so that the Maharaj could easily find out his financial commitments relating to the affairs of the deity. But in this Court Mr. Narasaraju, learned Counsel for the appellant realising the untenability of the contention advanced in the Courts below presented for our consideration a totally new case and that is that Gokulnathji undoubtedly is a legal personality; in the past the properties had been dedicated in favour of that deity; those properties are the properties of a private trust of which the Maharaj was the trustee. On the basis of this newly evolved theory he wanted to explain away the effect of the evidence afforded by the account books and the documents. We are unable to accept this new plea. It runs counter to the case pleaded in the written statement. This is not a purely legal contention. The 1st defendant must have known

whether there was any dedication in favour of Shri Gokulnathji and whether any portion of the suit properties were the properties of a private trust. She and her adviser's must have known at all relevant times the true nature of the accounts maintained. Mr. Narasaraju is not right in his contention that the plea taken by him in this Court is a purely legal plea. It essentially relates to questions of fact. Hence we informed Mr. Narasaraju that we will not entertain the plea in question.

In P. Periasami v. P. Periathambi & Ors., MANU/SC/0821/1995 : 1995 (6) SCC 523 it was said: Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property.

In Mohan Lal v. Mirza Abdul Gaffar MANU/SC/1039/1996 : (1996) 1 SCC 639 : (AIR 1996 SC 910), the Court said: As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and

that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription nec vi, nec clam, nec precario.

In Karnataka Board of Wakf v. Government of India & others MANU/SC/0377/2004 : (2004) 10 SCC 779, the Court held that whenever the plea of adverse possession is projected, inherent therein is that someone else is the owner of the property. In para 12 it said: The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. As we have already found, the respondent obtained title under the provisions of the Ancient Monuments Act. The element of the respondent's possession of the suit property to the exclusion of the appellant with the animus to possess it is not specifically pleaded and proved. So are the aspects of earlier title of the appellant or the point of time of disposition. Consequently, the alternative plea of adverse possession by the respondent is unsustainable.

Apex Court in **Parsinni & another v. Sukhi (MANU/SC/0575/1993 : 1993 SCW 3606)** laid down the following three requisites for satisfying

the claim based on adverse possession: 5. The appellants claimed adverse possession. The burden undoubtedly lies on them to plead and prove that they remained in possession in their own right adverse to the respondents.....Possession is prima facie evidence of title. Party claiming adverse possession must prove that his possession must be "nec vi nec clam, nec precario" i.e. peaceful, open and continuous. The possession must be adequate, in continuity, in publicity and in extent to show that their possession is adverse to the true owner.

LAWFUL POSSESSION CANNOT BE ESTABLISHED WITHOUT THE CONCOMITANT EXISTENCE OF LAWFUL RELATIONSHIP BETWEEN THE LANDLORD AND THE TENANT

M.C. Chockalingam and others v. V. Manickavasagam and others, MANU/SC/0338 /1973 : [1974] 2 SCR 143

While considering the scope of lawful possession, held "The fact that after expiry of the lease the tenant will be able to continue in possession of the property by resisting a suit for eviction, does

not establish a case in law to answer the requirement of lawful possession of the property within the meaning of Rule 13. Lawful possession cannot be established without the concomitant existence of lawful relationship between the landlord and the tenant. This relationship cannot be established against the consent of the landlord unless, however, in view of a special law, his consent becomes irrelevant. Lawful possession is not litigious possession and must have some foundation in a legal right to possess the property which cannot be equated with a temporary right to enforce recovery of the property in case a person is wrongfully or forcibly dispossessed from it. This Court in *Lalu Yeshwant Singh's case* MANU/SC/0425/1967 : [1968]2SCR203 had not to consider whether juridical possession in that case was also lawful possession. We are clearly of opinion that juridical possession is possession protected by law against wrongful dispossession but cannot per se always be equated with lawful possession."

Krishna Kishore Firm v. The Government of A.P., MANU/SC/0412/1990 : AIR 1990 SC 2292

"The one pertains to dispute in which possession may be conterminous with physical or de facto control, only, whereas the domain of other is control with some legal basis. The former may be uncertain in character and may even be without any basis or interest but the latter is founded on some rule, sanction or excuse. Dictionary 'litigious' means "disputed" or "disputable" or "marked by intention to quarrel", "inviting controversy", "relating to or marked by litigation", "that which is the subject of law suit". Lawful on the other hand is defined as, "legal, warranted or authorised by the law." It was also held - "Same though about lawful has been brought out by Pollock and Wright by explaining that "Lawful Possession" means a legal possession which is also rightful or at least excusable. Thus that which is not stricter legal may yet be lawful. It should not be forbidden by law. In fact legal is associated with provisions in the Act, rules etc., whereas lawful visualises all that is not illegal against law or even permissible. Lawful is wider in connotation than legal." It was further held ".....from conduct of lessor the tenant's possession may stand converted into lawful. The other may be where lessor may not agree to renew the lease nor he may acquiesce in his

continuance. Such a lessee cannot claim any right or interest. His possession is neither legal nor lawful. Such was the Chockatingam's case (supra). The Court held that continuance of lessee's possession after expiry of period of lease was not lawful for purposes for renewal of licence under Madras Cinema Regulation Act 1955 obviously because lessee was left with no interest which could furnish any excuse or given it even colour of being legal."

Shanti Prasad Devi and Anr. v. Shankar Mahto and Ors. MANU/SC/0404/2005 : (2005) 5 SCC 543 wherein this Court, while interpreting Section 116 of the Transfer of Property Act, 1882 with regard to its applicability and the effect of "holding over", held that it is necessary to obtain assent of the landlord for continuation of lease after the expiry of lease period and mere acceptance of rent by the lessor, in absence of agreement to the contrary, for subsequent months where lessee continues to occupy lease premises cannot be said to be conduct signifying assent on its part. The relevant paras 18 and 19 of the case are extracted below: 18. We fully agree with the High Court and the first appellate court below that on expiry of period of lease, mere

acceptance of rent for the subsequent months in which the lessee continued to occupy the lease premises cannot be said to be a conduct signifying "assent" to the continuance of the lease even after expiry of lease period. To the legal notice seeking renewal of lease, the lessor gave no reply. The agreement of renewal contained in Clause (7) read with Clause (9) required fulfilment of two conditions: first, the exercise of option of renewal by the lessee before the expiry of original period of lease and second, fixation of terms and conditions for the renewed period of lease by mutual consent and in absence thereof through the mediation of local mukhia or panchas of the village. The aforesaid renewal Clauses (7) and (9) in the agreement of lease clearly fell within the expression "agreement to the contrary" used in Section 116 of the Transfer of Property Act. Under the aforesaid clauses option to seek renewal was to be exercised before expiry of the lease and on specified conditions. 19. The lessor in the present case had neither expressly nor impliedly agreed for renewal. The renewal as provided in the original contract was required to be obtained by following a specified procedure i.e. on mutually agreed terms or in the alternative through the mediation of Mukhias and Panchas. In the

instant case, there is a renewal Clause in the contract prescribing a particular period and mode of renewal which was "an agreement to the contrary" within the meaning of Section 116 of the Transfer of Property Act. In the face of specific Clauses (7) and (9) for seeking renewal there could be no implied renewal by "holding over" on mere acceptance of the rent offered by the lessee. In the instant case, option of renewal was exercised not in accordance with the terms of renewal Clause that is before the expiry of lease. It was exercised after expiry of lease and the lessee continued to remain in use and occupation of the leased premises. The rent offered was accepted by the lessor for the period the lessee overstayed on the leased premises. The lessee, in the above circumstances, could not claim that he was "holding over" as a lessee within the meaning of Section 116 of the Transfer of Property Act.

POSSESSION AND ADVERSE POSSESSION

Historical background

State of Haryana vs. Mukesh Kumar and Ors.:

MANU/SC/1147/2011 - AIR 2012 SC 559 (DB)

- The concept of adverse possession was born in

England around 1275 and was initially created to allow a person to claim right of "seisin" from his ancestry. Many felt that the original law that relied on "seisin" was difficult to establish, and around 1623 a statute of limitations was put into place that allowed for a person in possession of property for twenty years or more to acquire title to that property. This early English doctrine was designed to prevent legal disputes over property rights that were time consuming and costly. The doctrine was also created to prevent the waste of land by forcing owners to monitor their property or suffer the consequence of losing title.

31. The concept of adverse possession was subsequently adopted in the United States. The doctrine was especially important in early American periods to cure the growing number of title disputes. The American version mirrored the English law, which is illustrated by most States adopting a twenty-year statute of limitations for adverse possession claims. As America has developed to the present date, property rights have become increasingly more important and land has become limited. As a result, the time period to acquire land by adverse possession has been reduced in some States to as little as five years, while in others, it has remained as long as

forty years. The United States has also changed the traditional doctrine by preventing the use of adverse possession against property held by a governmental entity.

32. During the colonial period, prior to the enactment of the Bill of Rights, property was frequently taken by states from private land owners without compensation. Initially, undeveloped tracts of land were the most common type of property acquired by the government, as they were sought for the installation of public road. Under the colonial system it was thought that benefits from the road would, in a newly opened country, always exceed the value of unimproved land.

33. The doctrine of adverse possession arose in an era where lands were vast particularly in the United States of America and documentation sparse in order to give quietus to the title of the possessor and prevent fanciful claims from erupting. The concept of adverse possession exists to cure potential or actual defects in real estate titles by putting a statute of limitation on possible litigation over ownership and possession. A landowner could be secure in title to his land; otherwise, long-lost heirs of any former owner, possessor or lien holder of

centuries past could come forward with a legal claim on the property. Since independence of our country we have witnessed registered documents of title and more proper, if not perfect, entries of title in the government records. The situation having changed, the statute calls for a change.

Court observations on Adverse possession:-

1. People are often astonished to learn that a trespasser may take the title of a building or land from the true owner in certain conditions and such theft is even authorized by law.
2. The theory of adverse possession is also perceived by the general public as a dishonest way to obtain title to property. Property right advocates argue that mistakes by landowners or negligence on their part should never transfer their property rights to a wrongdoer, who never paid valuable consideration for such an interest.
3. The government itself may acquire land by adverse possession. Fairness dictates and commands that if the government can acquire title to private land through adverse possession, it should be able to lose title under the same circumstances.
4. **Court in S.M. Karim v. Mst. Bibi Sakina MANU/SC/0236/1964 : AIR 1964 SC 1254** wherein this Court has laid down that the adverse

possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse. The Court also held that long possession is not necessarily adverse possession.

5. Bhim Singh and Ors. v. Zile Singh and Ors. MANU/PH/0354/2006 : AIR 2006 P&H 195, wherein it was stated that no declaration can be sought by a Plaintiff with regard to the ownership on the basis of adverse possession.

6. In a democracy, governed by rule of law, the task of protecting life and property of the citizens is entrusted to the police department of the government. In the instant case, the suit has been filed through the Superintendent of Police, Gurgaon, seeking right of ownership by adverse possession.

7. The revenue records of the State revealed that the disputed property stood in the name of the Defendants. It is unfortunate that the Superintendent of Police, a senior official of the Indian Police Service, made repeated attempts to grab the property of the true owner by filing repeated appeals before different forums claiming right of ownership by way of adverse possession.

8. The citizens may lose faith in the entire police administration of the country that those

responsible for the safety and security of their life and property are on a spree of grabbing the properties from the true owners in a clandestine manner.

9. In a relatively recent case in P.T. Munichikkanna Reddy v. Revamma MANU/SC/7325/2007 : (2007) 6 SCC 59 -

Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile.

10. Efficacy of adverse possession law in most jurisdictions depends on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring

an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title.

11. A person pleading adverse possession has no equities in his favour since he is trying to defeat the rights of the true owner. It is for him to clearly plead and establish all facts necessary to establish adverse possession. Though we got this law of adverse possession from the British, it is important to note that these days English Courts are taking a very negative view towards the law of adverse possession. The English law was amended and changed substantially to reflect these changes, particularly in light of the view that property is a human right adopted by the European Commission.

12. The right to property is now considered to be not only constitutional or statutory right but also a human right. Human rights have already been considered in realm of individual rights such as right to health, right to livelihood, right to shelter and employment etc. But now human rights are

gaining a multi faceted dimension. Right to property is also considered very much a part of the new dimension. Therefore, even claim of adverse possession has to be read in that context.

13. Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan and Ors.

MANU/SC/4083/2008 : (2009)16 SCC 517 -

Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner. We fail to comprehend why the law should place premium on dishonesty by legitimising possession of a rank trespasser and compelling the owner to lose his possession only because of

his inaction in taking back the possession within limitation.

14. It is our bounden duty and obligation to ascertain the intention of the Parliament while interpreting the law. Law and Justice, more often than not, happily coincide only rarely we find serious conflict. The archaic law of adverse possession is one such. A serious re-look is absolutely imperative in the larger interest of the people.

15. Adverse possession allows a trespasser - a person guilty of a tort, or even a crime, in the eyes of law - to gain legal title to land which he has illegally possessed for 12 years. How 12 years of illegality can suddenly be converted to legal title is, logically and morally speaking, baffling. This outmoded law essentially asks the judiciary to place its stamp of approval upon conduct that the ordinary Indian citizen would find reprehensible.

16. The doctrine of adverse possession has troubled a great many legal minds. We are clearly of the opinion that time has come for change.

17. If the protectors of law become the grabbers of the property (land and building), then, people will be left with no protection and there would be a total anarchy in the entire country.

18. It is indeed a very disturbing and dangerous trend. In our considered view, it must be arrested without further loss of time in the larger public interest. No Government Department, Public Undertaking, and much less the Police Department should be permitted to perfect the title of the land or building by invoking the provisions of adverse possession and grab the property of its own citizens in the manner that has been done in this case.

19. In our considered view, there is an urgent need for a fresh look of the entire law on adverse possession. **We recommend the Union of India to immediately consider and seriously deliberate either abolition of the law of adverse possession** and in the alternate to make suitable amendments in the law of adverse possession.

Brijesh Kumar V/s Shardabai MANU/SC/ 1448/ 2019 : (2019) 9 Supreme Court Cases 369 wherein it was observed that a person pleading adverse possession has no equities in his favour as he is trying to defeat rights of true owner, therefore it is for him to clearly plead and establish all facts necessary to establish adverse possession. It was further observed in the

judgment that mere possession does not ripen into possessory title until possessor holds property adverse to title of true owner and the onus is on the claimant to establish (i) when and how he came into possession; (ii) nature of his possession; (iii) factum of possession known and hostile to other parties; and (iv) continuous possession over 12 years which was open and undisturbed.

Tribhuvanshankar Versus Amrutlal, MANU/SC/1169/2013 : 2014(1) Civ. CC 360 by the Apex Court wherein it was observed that once a suit for recovery of possession against the person who is in adverse possession is filed, the period of limitation for perfecting title by adverse possession comes to a grinding halt and such adverse possession does not continue to run after filing of the suit irrespective of time spent in the suit.

Saroop Singh v. Banto and others MANU/SC/1146/2005 : (2005) 8 SCC 330 has held that in the light of Article 65 of the Limitation Act, 1963, the plaintiffs have to prove their title and it is for the defendant to prove title by adverse possession and in terms of Article 65 of the Limitation Act,

1963 starting point of limitation does not commence from the date when the right of ownership arises to the plaintiffs, but commences from the date the defendant's possession becomes adverse.

"Animus possidendi" is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd. Mohd. Ali v. Jagadish Kalita MANU/SC/0785/2003 : (2004) 1 SCC 271,)"

M. Durai v. Muthu and others MANU/SC/7035/2007 : (2007) 3 SCC 114 and it has been held as under:- "7. The change in the position in law as regards the burden of proof as was obtaining in the Limitation Act, 1908 vis-à-vis the Limitation Act, 1963 is evident. Whereas in terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act,

1963, once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession."

Maharaja Srischandra Nandy and others v. Baijnath Jugal Kishore (Firm) MANU/PR/0010/1934 : AIR 1935 Privy Council 36, it has been held that the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.

S.M. Karim v. Mst. Bibi Sakina MANU/SC/0236/1964 : AIR 1964 SC 1254, the Supreme Court has ruled that:- "(5) ... Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found...."

Annasaheb Bapusaheb Patil and others v. Balwant alias Balasaheb Babusaheb Patil (dead) by Lrs. & heirs etc. MANU/SC/0172/1995 : AIR 1995 SC 895, the Supreme Court held as under:- "12. Article 65 of the Schedule to the Limitation Act, 1963 prescribes that for

possession of immovable property or any interest therein based on title, the limitation of 12 years begins to run from the date of the defendant's interest becomes adverse to the plaintiff. Adverse possession means a hostile assertion i.e. a possession which is expressly or impliedly in denial of title of the true owner. Under Article 65, burden is on the defendants to prove affirmatively. A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

Karnataka Board of Wakf v. Government of India and others MANU/SC/0377/2004 : (2004) 10 SCC 779, the Supreme Court has held that person pleading adverse possession has no

equity in his favour. It runs as under:- "11. ... Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. ... Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

Kurella Naga Druva Vidya Bhaskara Rao v. Galla Jani Kamma alias Nacharamma MANU/SC /7914/2008 : 2008 AIR SCW 5682,

the Supreme Court held that mere possession for some years by the party would not be sufficient to claim adverse possession. Paragraph 17 of the report states as under:- "17. The defendant claimed that he had perfected his title by adverse possession by being in open, continuous and hostile possession of the suit property from 1957. He also produced some tax-receipts showing that he has paid the taxes in regard to the suit land. Some tax receipts also showed that he paid the tax on behalf of someone else. After considering the oral and documentary evidence, both the courts have entered a concurrent finding that the defendant did not establish adverse possession, and that mere possession for some years was not sufficient to claim adverse possession, unless such possession was hostile possession, denying the title of the true owner. The courts have pointed out that if according to defendant, plaintiff was not the true owner, his possession hostile to plaintiff's title will not be sufficient and he had to show that his possession was also hostile to the title and possession of the true owner. After detailed analysis of the oral and

documentary evidence, the trial court and High Court also held that the appellant was only managing the properties on behalf of the plaintiff and his occupation was not hostile possession."

Ravinder Kaur Grewal and Ors. vs. Manjit Kaur and Ors.: MANU/SC/1053/2019 - AIR 2019 SC

3827 Possession is the root of title and is right like the property. As ownership is also of different kinds of viz. sole ownership, contingent ownership, corporeal ownership, and legal equitable ownership. Limited ownership or limited right to property may be enjoyed by a holder. What can be prescribable against is limited to the rights of the holder. Possession confers enforceable right under Section 6 of the Specific Relief Act. It has to be looked into what kind of possession is enjoyed viz. de facto i.e., actual, 'de jure possession', constructive possession, concurrent possession over a small portion of the property. In case the owner is in symbolic possession, there is no dispossession, there can be formal, exclusive or joint possession. The joint possessor/co-owner possession is not presumed to be adverse. Personal law also plays a role to construe nature of possession.

1. The statute does not define adverse possession, it is a common law concept, the period of which has been prescribed statutorily under the law of limitation Article 65 as 12 years. Law of limitation does not define the concept of adverse possession nor anywhere contains a provision that the Plaintiff cannot sue based on adverse possession. It only deals with limitation to sue and extinguishment of rights. There may be a case where a person who has perfected his title by virtue of adverse possession is sought to be ousted or has been dispossessed by a forceful entry by the owner or by some other person, his right to obtain possession can be resisted only when the person who is seeking to protect his possession, is able to show that he has also perfected his title by adverse possession for requisite period against such a Plaintiff.

2. Under Article 64 also, suit can be filed based on the possessory title. Law never intends a person who has perfected title to be deprived of filing suit under Article 65 to recover possession and to render him remediless. In case of infringement of any other right attracting any other Article such as in case the land is sold away by the owner after the extinguishment of his title, the suit can be filed by a person who has

perfected his title by adverse possession to question alienation and attempt of dispossession.

3. Law of adverse possession does not qualify only a Defendant for the acquisition of title by way of adverse possession, it may be perfected by a person who is filing a suit. It only restricts a right of the owner to recover possession before the period of limitation fixed for the extinction of his rights expires. Once right is extinguished another person acquires prescriptive right which cannot be defeated by re-entry by the owner or subsequent acknowledgment of his rights. In such a case suit can be filed by a person whose right is sought to be defeated.

4. There is the acquisition of title in favour of Plaintiff though it is negative conferral of right on extinguishment of the right of an owner of the property. The right ripened by prescription by his adverse possession is absolute and on dispossession, he can sue based on 'title' as envisaged in the opening part under Article 65 of Act. Under Article 65, the suit can be filed based on the title for recovery of possession within 12 years of the start of adverse possession, if any, set up by the Defendant. Otherwise right to recover possession based on the title is absolute irrespective of limitation in the absence of adverse

possession by the Defendant for 12 years. The possession as trespasser is not adverse nor long possession is synonym with adverse possession.

5. In Article 65 in the opening part a suit "for possession of immovable property or any interest therein based on title" has been used. Expression "title" would include the title acquired by the Plaintiff by way of adverse possession. The title is perfected by adverse possession has been held in a catena of decisions.

6. Section 27 of Limitation Act, 1963 provides for extinguishment of right on the lapse of limitation fixed to institute a suit for possession of any property, the right to such property shall stand extinguished. The concept of adverse possession as evolved goes beyond it on completion of period and extinguishment of right confers the same right on the possessor, which has been extinguished and not more than that. For a person to sue for possession would indicate that right has accrued to him in presenti to obtain it, not in future. Any property in Section 27 would include corporeal or incorporeal property. Article 65 deals with immovable property.

7. Possession is the root of title and is right like the property. As ownership is also of different kinds of viz. sole ownership, contingent

ownership, corporeal ownership, and legal equitable ownership. Limited ownership or limited right to property may be enjoyed by a holder. What can be prescribable against is limited to the rights of the holder. Possession confers enforceable right under Section 6 of the Specific Relief Act. It has to be looked into what kind of possession is enjoyed viz. de facto i.e., actual, 'de jure possession', constructive possession, concurrent possession over a small portion of the property. In case the owner is in symbolic possession, there is no dispossession, there can be formal, exclusive or joint possession. The joint possessor/co-owner possession is not presumed to be adverse. Personal law also plays a role to construe nature of possession.

8. The adverse possession requires all the three classic requirements to co-exist at the same time, namely, nec-vi i.e. adequate in continuity, nec-clam i.e., adequate in publicity and nec-precario i.e. adverse to a competitor, in denial of title and his knowledge. Visible, notorious and peaceful so that if the owner does not take care to know notorious facts, knowledge is attributed to him on the basis that but for due diligence he would have known it. Adverse possession cannot be decreed on a title which is not pleaded. Animus

possidendi under hostile colour of title is required. Trespasser's long possession is not synonym with adverse possession. Trespasser's possession is construed to be on behalf of the owner, the casual user does not constitute adverse possession. The owner can take possession from a trespasser at any point in time. Possessor looks after the property, protects it and in case of agricultural property by and the large concept is that actual tiller should own the land who works by dint of his hard labour and makes the land cultivable. The legislature in various States confers rights based on possession.

9. Adverse possession is heritable and there can be tacking of adverse possession by two or more persons as the right is transmissible one. In our opinion, it confers a perfected right which cannot be defeated on re-entry except as provided in Article 65 itself. Tacking is based on the fulfillment of certain conditions, tacking maybe by possession by the purchaser, legatee or assignee, etc. so as to constitute continuity of possession, that person must be claiming through whom it is sought to be tacked, and would depend on the identity of the same property under the same right. Two distinct trespassers cannot tack their possession to

constitute conferral of right by adverse possession for the prescribed period.

10. A person in possession cannot be ousted by another person except by due procedure of law and once 12 years' period of adverse possession is over, even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/owner as the case may be against whom he has prescribed. In our opinion, consequence is that once the right, title or interest is acquired it can be used as a sword by the Plaintiff as well as a shield by the Defendant within ken of Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession. In case of dispossession by another person by taking law in his hand a possessory suit can be maintained under Article 64, even before the ripening of title by way of adverse possession. By perfection of title on extinguishment of the owner's title, a person cannot be remediless. In case, he has been dispossessed by the owner after having lost the right by adverse possession, he can be evicted by the Plaintiff by taking the plea of adverse possession. Similarly, any other person who might have dispossessed the Plaintiff having

perfected title by way of adverse possession can also be evicted until and unless such other person has perfected title against such a Plaintiff by adverse possession. Similarly, under other Articles also in case of infringement of any of his rights, a Plaintiff who has perfected the title by adverse possession, can sue and maintain a suit.

11. When law of adverse possession as has developed vis-a-vis to property dedicated to public use is considered, Courts have been loath to confer the right by adverse possession. There are instances when such properties are encroached upon and then a plea of adverse possession is raised. In such cases, on the land reserved for public utility, it is desirable that rights should not accrue. The law of adverse possession may cause harsh consequences, hence, we are constrained to observe that it would be advisable that concerning such properties dedicated to public cause, it is made clear in the statute of limitation that no rights can accrue by adverse possession.

12. Resultantly, decisions of Gurudwara Sahab v. Gram Panchayat Village Sirthala and decision relying on it in State of Uttarakhand v. Mandir Shri Lakshmi Siddh Maharaj and Dharampal (dead) through LRs v. Punjab Wakf Board cannot

be said to be laying down the law correctly, thus they are hereby overruled. Plea of acquisition of title by adverse possession can be taken by Plaintiff under Article 65 of the Limitation Act and there is no bar under the Limitation Act, 1963 to sue on aforesaid basis in case of infringement of any rights of a Plaintiff.

Constitution Bench in M Siddiq (D) through L.Rs v. Mahant Suresh Das and Ors. MANU/SC/1538/2019 wherein, it has been held that a plea of adverse possession is founded on the acceptance that ownership of the property vests in another, against whom the claimant asserts possession adverse to the title of the other. The Court held as under:

747. A plea of adverse possession is founded on the acceptance that ownership of the property vests in another against whom the claimant asserts a possession adverse to the title of the other. Possession is adverse in the sense that it is contrary to the acknowledged title in the other person against whom it is claimed. Evidently, therefore, the Plaintiffs in Suit 4 ought to be cognizant of the fact that any claim of adverse possession against the Hindus or the temple would amount to an acceptance of a title

in the latter. Dr Dhavan has submitted that this plea is a subsidiary or alternate plea upon which it is not necessary for the Plaintiffs to stand in the event that their main plea on title is held to be established on evidence. It becomes then necessary to assess as to whether the claim of adverse possession has been established.

748. A person who sets up a plea of adverse possession must establish both possession which is peaceful, open and continuous - possession which meets the requirement of being 'nec vi nec claim and nec precario'. To substantiate a plea of adverse possession, the character of the possession must be adequate in continuity and in the public because the possession has to be to the knowledge of the true owner in order for it to be adverse. These requirements have to be duly established first by adequate pleadings and second by leading sufficient evidence. Evidence, it is well settled, can only be adduced with reference to matters which are pleaded in a civil suit and in the absence of an adequate pleading, evidence by itself cannot supply the deficiency of a pleaded case. Reading paragraph 11(a), it becomes evident that beyond stating that the Muslims have been in long exclusive and continuous possession beginning from the time

when the Mosque was built and until it was desecrated, no factual basis has been furnished. This is not merely a matter of details or evidence. A plea of adverse possession seeks to defeat the rights of the true owner and the law is not readily accepting of such a case unless a clear and cogent basis has been made out in the pleadings and established in the evidence.

752. In *Supdt. and Remembrance of Legal Affairs, West Bengal v. Anil Kumar Bhunja*, MANU/SC/0266/1979 : (1979) 4 SCC 274, Justice R S Sarkaria, speaking for a three judge Bench of this Court noted that the concept of possession is "polymorphous. embodying both a right (the right to enjoy) and a fact (the real intention). The learned judge held: 13. It is impossible to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of "possession". Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Edn., 1966) caused by the fact that possession is not purely a legal concept. "Possession", implies a right and a fact; the right

to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control.

In P Lakshmi Reddy v. L Lakshmi Reddy, MANU/SC/0083/1956 : 1957 SCR 195, Justice Jagannadhadas, speaking for a three judge Bench of this Court dwelt on the "classical requirement" of adverse possession: 4. Now, the ordinary classical requirement of adverse possession is that it should be nec vi nec clam nec precario. (See Secretary of State for India v. Debendra Lal Khan [MANU/PR/0072/1933 : (1933) LR 61 IA 78, 82]). The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. 7...Consonant with this principle the commencement of adverse possession, in favour of a person implies that the person is in actual possession, at the time, with a notorious hostile claim of exclusive title, to repel which, the true owner would then be in a position to maintain an action. It would follow that whatever may be the animus or intention of a person wanting to acquire title by adverse possession his adverse possession cannot commence until he obtains actual possession with the requisite animus.

In Karnataka Board of Wakf v. Government of India, MANU/SC/0377/2004 : (2004) 10 SCC 779, Justice S Rajendra Babu, speaking for a two judge Bench held that: 11...Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed.

The ingredients must be set up in the pleadings and proved in evidence. There can be no proof sans pleadings and pleadings without evidence will not establish a case in law.

In Annakili v. A Vedanayagam, MANU/SC/8027/2007 : (2007) 14 SCC 308, Court emphasized that mere possession of land would not ripen into a possessory title. The

possessor must have animus possidendi and hold the land adverse to the title of the true owner. Moreover, he must continue in that capacity for the period prescribed under the Limitation Act.

**Tanaji vs. The State of Maharashtra and Ors.:
2019 (6) ABR 558 - MANU/MH/2778/2019 -**

The law on the point of establishing a plea of adverse possession, is well settled. For a person to plead and establish such a plea, the pleadings necessarily have to demonstrate the point of time, when the possession became adverse to the original owner, the knowledge of the owner as to such hostile assertion of title and the absence of any action by the owner for the statutory period as contemplated by Article 65 of the Limitation Act. The plaintiff himself contends that he had entered upon the suit property, under the document styled as "Eksalina Karar". Thus, the entry of the plaintiff in the suit property was under an agreement, with the express permission of the defendants. This being so, any continuation of occupation by the plaintiff of the suit property, beyond the period of the "Eksalina Karar" could never be presumed to be hostile to the title of the defendants. The plea of adverse possession necessarily mandates the assertion of

an "Animus possidendi", and unless the person possessing the land has a requisite animus, the period for prescription does not commence. It is a settled position of law that peaceful, open and continuous possession for whatever time, does not constitute an "Animus possidendi". In other words, mere physical fact of exclusive possession, is not enough. The "Animus possidendi" to hold as owner in exclusion to the actual owner, to his knowledge, is the most important factor to establish a plea of adverse possession.

Therefore, a person, who claims adverse possession, should state/show:

- (a) Admit that he is not owner of the land in respect of which he claims a declaration of ownership by way of adverse possession;
- (b) admit the title of the owner to the property to which he claims a declaration of ownership by way of adverse possession;
- (c) on what date he came into possession;
- (d) what was the nature of his possession;
- (e) whether such possession was on account of wrongful dispossession of the original owner;
- (f) whether such dispossession was actual, visible, exclusive;
- (g) whether the factum of dispossession was known to the rightful owner;

(h) whether there was any hostile assertion of title to the knowledge of the rightful owner;

(i) the date of such hostile assertion and the continuity of the same throughout the statutory period, to the knowledge of the rightful owner;

(j) the document which may demonstrate such hostile assertion, if there is any;

(k) in case his possession relates to or stems from agreement/document or is in the nature of permissible user, there ought to be a document in writing who demonstrates his claim of adverse possession satisfying all the ingredients as required, as an oral plea would naturally stand excluded, considering his entry was under a document or was permissible;

These are some of the ingredients necessary for raising and establishing a plea for adverse possession.

Chatti Konati Rao and others Vs. Palle Venkata Subba Rao, MANU/SC/1033/2010 : (2010) 14 SCC 316: " 14. In view of the several

authorities of this Court, few whereof have been referred above, what can safely be said that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or

impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The plaintiff is bound to prove his title as also possession within 12 years and once the plaintiff proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of 12 years thereafter.

15. Animus possidendi as is well known a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until possessor holds property adverse to the title of the true owner for the said purpose. The person who claims adverse possession is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge to the true owner, duration of possession and possession was open and undisturbed. A person pleading adverse

possession has no equities in his favour as he is trying to defeat the rights of the true owner and, hence, it is for him to clearly plead and establish all facts necessary to establish adverse possession. The courts always take unkind view towards statutes of limitation overriding property rights."

Hon'ble Apex Court in a judgment reported in **MANU/SC/1519/2017 : 2018 (1) SCC 574 'Nanjegowda alias Gowda (Dead) by legal representatives & Another vs. Ramegowda'**. Paragraph 19 of the said judgment is quoted hereunder: "19. In our opinion, the stand taken by the defendants was wholly inconsistent. They first set up a plea of adverse possession but it was rightly held not proved. The defendants, however, did not challenge this finding in the second appeal, which became final. Even otherwise, the plea of adverse possession was wholly misconceived and untenable. It is a settled law that there can be no adverse possession among the members of one family for want of any animus among them over the land belonging to their family"

R. Chandevaramappa & Others v. State of Karnataka & Others MANU/SC/0805/1995 : (1995) 6 SCC 309 are similar to the case at hand.

In this case, court observed as under:- "The question then is whether the appellant has perfected his title by adverse possession. It is seen that a contention was raised before the Assistant Commissioner that the appellant having remained in possession from 1968, he perfected his title by adverse possession. But the crucial facts to constitute adverse possession have not been pleaded. Admittedly the appellant came into possession by a derivative title from the original grantee. It is seen that the original grantee has no right to alienate the land. Therefore, having come into possession under colour of title from original grantee, if the appellant intends to plead adverse possession as against the State, he must disclaim his title and plead his hostile claim to the knowledge of the State and that the State had not taken any action thereon within the prescribed period. Thereby, the appellant's possession would become adverse. No such stand was taken nor evidence has been adduced in this behalf. The counsel in fairness, despite his research, is unable to bring to our notice any such plea having been taken by the appellant."

In D.N. Venkatarayappa and Another v. State of Karnataka and Others
MANU/SC/0766/1997 : (1997) 7 SCC 567

court observed as under:- "Therefore, in the absence of crucial pleadings, which constitute adverse possession and evidence to show that the petitioners have been in continuous and uninterrupted possession of the lands in question claiming right, title and interest in the lands in question hostile to the right, title and interest of the original grantees, the petitioners cannot claim that they have perfected their title by adverse possession."

TITLE IS ACQUIRED BY ADVERSE POSSESSION¹

In Balkrishan v. Satyaprakash and Ors.,
MANU/SC/0043/2001 : 2001 (2) SCC 498,
 decided by a Coordinate Bench, the Plaintiff filed a suit for declaration of title on the ground of adverse possession and a permanent injunction. This Court considered the question, whether the Plaintiff had perfected his title by adverse

¹ Ravinder Kaur Grewal and Ors. vs. Manjit Kaur and Ors.:
 MANU/SC/1053/2019 - AIR 2019 SC 3827

possession. This Court has laid down that the law concerning adverse possession is well settled, a person claiming adverse possession has to prove three classic requirements i.e. nec - nec vi, nec clam and nec precario. The trial court, as well as the First Appellate Court, decreed the suit while the High Court dismissed it. This Court restored the decree passed by the trial court decreeing the Plaintiff suit based on adverse possession and observed: 6. The short question that arises for consideration in this appeal is: whether the High Court erred in holding that the Appellant had not perfected his title by adverse possession on the ground that there was an order of a Tahsildar against him to deliver possession of the suit land to the auction purchasers.

7. The law with regard to perfecting title by adverse possession is well settled. A person claiming title by adverse possession has to prove three "neck" - nec vi, nec clam and nec precario. In other words, he must show that his possession is adequate in continuity in publicity and in extent. In *S.M. Karim v. Bibi Sakina* MANU/SC/0236/1964 : [1964] 6 SCR 780 speaking for this Court Hidayatullah, J. (as he then was) observed thus: Adverse possession must be adequate in continuity, in publicity and

extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found.

14. In *Sk. Mukbool Ali v. Sk. Wajed Hossein*, (1876) 25 WR 249 the High Court held: Whatever the decree might have been, the Defendant's possession could not be considered as having ceased in consequences of that decree, unless he were actually dispossessed. The fact that there is a decree against him does not prevent the statute of limitation from running.

15. In our view, the Madras High Court correctly laid down the law in the aforementioned cases.

17. From the above discussion, it follows that the judgment and decree of the High Court under challenge cannot be sustained. They are accordingly set aside and the judgment and decree of the First Appellate Court confirming the judgment and decree of the trial court is restored. The appeal is accordingly allowed but in the circumstances of the case without costs.

In Des Raj and Ors. v. Bhagat Ram (Dead) by Lrs. and Ors., MANU/SC/7153/2007 : (2007) 9 SCC 641, a suit filed by the Plaintiff for

declaration of title and also for a permanent injunction based on adverse possession. The Courts below decreed the suit of the Plaintiff on the ground of adverse possession. The same was affirmed by this Court. This Court considered the change brought about in the Act by Articles 64 and 65 vis-a-vis to Articles 142 and 144. Issue No. 1 was framed whether the Plaintiff becomes the owner of the suit property by way of adverse possession? This Court has observed that a plea of adverse possession was indisputably governed by Articles 64 and 65 of the Act. This Court has discussed the matter thus:

20. A plea of adverse possession or a plea of ouster would indisputably be governed by Articles 64 and 65 of the Limitation Act.

22. The mere assertion of title by itself may not be sufficient unless the Plaintiff proves animus possidendi. But the intention on the part of the Plaintiff to possess the properties in suit exclusively and not for and on behalf of other co-owners also is evident from the fact that the Defendants-Appellants themselves had earlier filed two suits. Such suits were filed for partition. In those suits the Defendants-Appellants claimed themselves to be co-owners of the Plaintiff. A bare

perusal of the judgments of the courts below clearly demonstrates that the Plaintiff had even therein asserted hostile title claiming ownership in himself. The claim of hostile title by the Plaintiff over the suit land, therefore, was, thus, known to the Appellants. They allowed the first suit to be dismissed in the year 1977. Another suit was filed in the year 1978 which again was dismissed in the year 1984. It may be true, as has been contended on behalf of the Appellants before the courts below, that a co-owner can bring about successive suits for partition as the cause of action, therefor, would be a continuous one. But, it is equally well-settled that pendency of a suit does not stop running of 'limitation'. The very fact that the Defendants despite the purported entry made in the revenue settlement record of rights in the year 1953 allowed the Plaintiff to possess the same exclusively and had not succeeded in their attempt to possess the properties in Village Samleu and/or otherwise enjoy the usufruct thereof, clearly goes to show that even prior to institution of the said suit the Plaintiff-Respondent had been in hostile possession thereof.

24. In any event the Plaintiff made his hostile declaration claiming title for the property at least

in his written statement in the suit filed in the year 1968. Thus, at least from 1968 onwards, the Plaintiff continued to exclusively possess the suit land with a knowledge of the Defendants-Appellants.

26. Article 65 of the Limitation Act, 1963, therefore, would in a case of this nature have its role to play, if not from 1953, but at least from 1968. If that be so, the finding of the High Court that the Respondent perfected his title by adverse possession and ouster cannot be said to be vitiated in law.

28. We are also not oblivious of a recent decision of this Court in Govindammal v. R. Perumal Chettiar and Ors., MANU/SC/8567/2006 : (2006) 11 SCC 600 wherein it was held: (SCC p. 606, para 8) In order to oust by way of adverse possession, one has to lead definite evidence to show that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case.

31. We, having regard to the peculiar facts obtaining in the case, are of the opinion that the Plaintiff-Respondent had established that he acquired title by ousting the Defendant-Appellants by declaring hostile title in himself which was to the knowledge of his co-sharers.

In Kshitish Chandra Bose v. Commissioner of Ranchi, MANU/SC/0364/1981 : (1981) 2 SCC

103 a three-Judge Bench of this Court considered the question of adverse possession by a Plaintiff. The Plaintiff has filed a suit for declaration of title and recovery of possession based on Hukumnama and adverse possession for more than 30 years. The trial court decreed the suit on both the grounds, 'title' as well as of 'adverse possession'. The Plaintiff's appeal was allowed by this Court. It has been observed by this Court that adverse possession had been established by a consistent course of conduct of the Plaintiff in the case, possession was hostile to the full knowledge of the municipality. Thus, the High Court could not have interfered with the finding as to adverse possession and could not have ordered remand of the case to the Judicial Commissioner. The order of remand and the proceedings thereafter were quashed. This Court restored decree in favour of Plaintiff for declaration of title and recovery of possession and also for a permanent injunction, has dealt with the matter thus:

2. The Plaintiff filed a suit for declaration of his title and recovery of possession and also a

permanent injunction restraining the Defendant municipality from disturbing the possession of the Plaintiff. It appears that prior to the suit, proceedings Under Section 145 were started between the parties in which the Magistrate found that the Plaintiff was not in possession but upheld the possession of the Defendant on the land until evicted in due course of law.

3. In the suit the Plaintiff based his claim in respect of plot No. 1735, Ward No. 1 of Ranchi Municipality on the ground that he had acquired title to the land by virtue of a hukumnama granted to him by the landlord as far back as April 17, 1912 which is Ex. 18. Apart from the question of title, the Plaintiff further pleaded that even if the land belonged to the Defendant municipality, he had acquired title by prescription by being in possession of the land to the knowledge of the municipality for more than 30 years, that is to say, from 1912 to 1957.

10. Lastly, the High Court thought that as the land in question consisted of a portion of the tank or a land appurtenant thereto, adverse possession could not be proved. This view also seems to be wrong. If a person asserts a hostile title even to a tank which as claimed by the municipality, belonged to it and despite the

hostile assertion of title no steps were taken by the owner, (namely, the municipality in this case), to evict the trespasser, his title by prescription would be complete after thirty years.

In Nair Service Society Ltd. v. K.C. Alexander

MANU/SC/0144/1968 : AIR 1968 SC 1165, the

Plaintiff filed a suit claiming to be in possession for over 70 years. The Plaintiff claimed possession of the excess land from the society, its Manager and Defendants Nos. 3 to 6. The society denied the rights of the Plaintiff to bring a suit for ejectment or its liability for compensation. Alternatively, the society claimed the value of improvements. The main controversy decided by the High Court was whether the Plaintiff can maintain a suit for possession without proof of title. This Court observed that in case the rightful owner does not come forward within the period of limitation his right is lost, and the possessory owner acquires an absolute title. The Plaintiff was in de facto possession and was entitled to remain in possession and only the State could evict him. The State was not impleaded as a party in the case. The action of the society was a violent invasion of his possession and in the law, as it stands in India, the Plaintiff can maintain a

possessory suit under the provisions of the Specific Relief Act, 1963. The Plaintiff has asserted that he had perfected his title by "adverse possession" but he did not join the State in a suit to get a declaration. He may be said to have not rested the suit on the acquired title. The suit was thus limited to recovery of possession from one who had trespassed against him. The Court observed that for the Plaintiff to maintain suit based on adverse possession, it was necessary to implead the State Government i.e. the owner of the land as a party to the suit. A Plaintiff can maintain a suit based on adverse possession as he acquires absolute title. The Court observed:

(17) In our judgment this involves an incorrect approach to our problem. To express our meaning we may begin by reading 1907 AC 73 to discover if the principle that possession is good against all but the true owner has in any way been departed from. 1907 AC 73 reaffirmed the principle by stating quite clearly:

It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful

owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title.

Therefore, the Plaintiff who was peaceably in possession was entitled to remain in possession and only the State could evict him. The action of the Society was a violent invasion of his possession and in the law, as it stands in India the Plaintiff could maintain a possessor suit under the provisions of the Specific Relief Act in which title would be immaterial or a suit for possession within 12 years in which the question of title could be raised. As this was a suit of latter kind title could be examined. But whose title? Admittedly neither side could establish title. The Plaintiff at least pleaded the statute of Limitation and asserted that he had perfected his title by adverse possession. But as he did not join the State in his suit to get a declaration, he may be said to have not rested his case on an acquired title. His suit was thus limited to recovering possession from one who had trespassed against him. The enquiry thus narrows to this: did the Society have any title in itself, was it acting under

authority express or implied of the true owner or was it just pleading a title in a third party? To the first two questions we find no difficulty in furnishing an answer. It is clearly in the negative. So the only question is whether the Defendant could plead that the title was in the State? Since in every such case between trespassers the title must be outstanding in a third party a Defendant will be placed in a position of dominance. He has only to evict the prior trespasser and sit pretty pleading that the title is in someone else. As Erle J put it in *Burling v. Read* (1848) 11 QB 904 'parties might imagine that they acquired some right by merely intruding upon land in the night, running up a hut and occupying it before morning'. This will be subversive of the fundamental doctrine which was accepted always and was reaffirmed in 1907 AC 73. The law does not, therefore, countenance the doctrine of 'findings keepings'.

(22) The cases of the Judicial Committee are not binding on us but we approve of the dictum in 1907 AC 73. No subsequent case has been brought to our notice departing from that view. No doubt a great controversy exists over the two cases of (1849) 13 QB 945 and (1865) 1 QB 1 but it must be taken to be finally resolved by 1907 AC

73. A similar view has been consistently taken in India and the amendment of the Indian Limitation Act has given approval to the proposition accepted in 1907 AC 73 and may be taken to be declaratory of the law in India. We hold that the suit was maintainable.

In Lallu Yashwant Singh (dead) by his legal representative v. Rao Jagdish Singh and Ors.

MANU/SC/0425/1967 : AIR 1968 SC 620,

Court has observed that taking forcible possession is illegal. In India, persons are not permitted to take forcible possession. The law respect possession. The landlord has no right to re-enter by showing force or intimidation. He must have to proceed under the law and taking of forcible possession is illegal. The Court affirmed the decision of Privy Council in *Midnapur Zamindary Company Ltd. v. Naresh Narayan Roy* MANU/PR/0054/1920 : AIR 1924 PC 144 and other decisions and held:

In Midnapur Zamindary Company Limited v.

Naresh Narayan Roy, MANU/PR/0054/1920 :

51 Ind App 293 at p. 299 : (AIR 1924 PC 144

at p. 147), the Privy Council observed: In India persons are not permitted to take forcible

possession; they must obtain such possession as they are entitled to through a Court.

In K.K. Verma v. Naraindas C. Malkani (AIR 1954 Bom 358 at p. 360) Chagla C.J., stated that the law in India was essentially different from the law in England. He observed: Under the Indian law the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy his possession is juridical and that possession is protected by statute. Under Section 9 of the Specific Relief Act a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession cannot go to Court Under Section 9 and claim possession against the true owner.

In Yar Mohammad v. Lakshmi Das (MANU/UP/0001/1959 : AIR 1959 All 1 at p. 4), the Full Bench of the Allahabad High Court observed: No question of title either of the Plaintiff or of the Defendant can be raised or gone into in that case (Under Section 9 of the Specific Relief

Act). The Plaintiff will be entitled to succeed without proving any title on which he can fall back upon and the Defendant cannot succeed even though he may be in a position to establish the best of all titles. The restoration of possession in such a suit is, however, always subject to a regular title suit and the person who has the real title or even the better title cannot, therefore, be prejudiced in any way by a decree in such a suit. It will always be open to him to establish his title in a regular suit and to recover back possession. The High Court further observed: Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a Court. No person can be allowed to become a Judge in his own cause. As observed by Edge C.J., in *Wali Ahmad Khan v. Ayodhya Kundu* MANU/UP/0034/1891 : (1891) ILR 13 All. 537 at p. 556: The object of the Section was to drive the persons who wanted to eject a person into the proper Court and to prevent them from going with a high hand and ejecting such persons.

In Hillava Subbava v. Narayanappa,
MANU/MH/0143/1911 : (1911) 13 Bom. LR

1200 it was observed: No doubt, the true owner of property is entitled to retain possession, even though he has obtained it from a trespasser by force or other unlawful means: *Lillu v. Annaji*, (1881) ILR 5 Bom. 387 and *Bandu v. Naba*, (1890) ILR 15 Bom 238.

We are unable to appreciate how this decision assists the Respondent. It was not a suit Under Section 9 of the Specific Relief Act. In (1881) ILR 5 Bom 387, it was recognised that "if there is a breach of the peace in attempting to take possession, that affords a ground for criminal prosecution, and, if the attempt is successful, for a summary suit also for a restoration to possession Under Section 9 of the Specific Relief Act I of 1877-*Dadabhai Narsidas v. The Sub-Collector of Broach*, (1870) 7 Bom. HC AC 82." In (1890) ILR 15 Bom 238 it was observed by Sargent C J., as follows:

The Indian Legislature has, however, provided for the summary removal of anyone who dispossesses another, whether peaceably or otherwise than by due course of law; but subject to such provision there is no reason for holding that the rightful owner so dispossessing the other is a trespasser, and may not rely for the support of his possession on the title vested in him, as he

clearly may do by English law. This would also appear to be the view taken by West J., in (1881) ILR 5 Bom 387.

In Somnath Berman v. Dr. S.P. Raju and Anr.
MANU/SC/0399/1969 : AIR 1970 SC 846,

Court has recognized the right of a person having possessory title to obtain a declaration that he was the owner of the land in a suit and an injunction restraining the Defendant from interfering with his possession. This Court has further observed that Section 9 of the Specific Relief Act, 1963 is in no way inconsistent with the position that as against a wrongdoer, prior possession of the Plaintiff, in an action of ejectment is sufficient title even if the suit is brought more than six months after the act of dispossession complained of and that the wrongdoer cannot successfully resist the suit by showing that the title and the right to possession vested in a third party. This Court has observed: In Narayana Row v. Dharmachar, MANU/TN/0088 /1902 : (1903) ILR 26 Mad 514 a bench of the Madras High Court consisting of Bhashyam Ayyangar and Moore, JJ. held that possession is, under the Indian, as under the English law, good title against all but the true

owner. Section 9 of the Specific Relief Act is in no way inconsistent with the position that as against a wrongdoer, prior possession of the Plaintiff, in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of and that the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person. The same view was taken by the Bombay High Court in *Krishnarao Yashwant v. Vasudev Apaji Ghotikar*, (1884) ILR 8 Bom 871. That was also the view taken by the Allahabad High Court-see *Umrao Singh v. Ramji Das*, MANU/UP/0015/1913 : ILR 36 All 51, *Wali Ahmad Khan v. Ahjudhia Kandur*, MANU/UP/0034/1891 : (1891) ILR 13 All 537. In *Subodh Gopal Bose v. Province of Bihar* MANU/BH/0055/1950 : AIR 1950 Pat 222 the Patna High Court adhered to the view taken by the Madras, Bombay and Allahabad High Courts. The contrary view taken by the Calcutta High Court in *Debi Churn Boldo v. Issur Chunder Manjee*, MANU/WB/0131/1882 : (1883) ILR 9 Cal 39; *Ertaza Hossein v. Bany Mistry*, MANU/WB/0156/1882 : (1883) ILR 9 Cal 130, *Purmeshur Chowdhry v. Brijo Lall Chowdhry*, MANU/WB/0114/1889 : (1890) ILR 17 Cal 256

and Nisa Chand Gaita v. Kanchiram Bagani, MANU/WB/0277/1899 : (1899) ILR 26 Cal 579, in our opinion does not lay down the law correctly."

In Padminibai v. Tangavva and Ors. MANU/SC/0385/1979 : AIR 1979 SC 1142, a suit was filed by the Plaintiff for recovery of possession on the basis that her husband was in exclusive and open possession of the suit lands adversely to the Defendant for a period exceeding 12 years and his possession was never interrupted or disturbed. It was held that he acquired ownership by prescription. The suit filed within 12 years of his death was within limitation. Thus, the Plaintiff was given the right to recover possession based on adverse possession as Tatya has acquired ownership by adverse possession. This Court has observed thus:

1. Tatya died on February 2, 1955. The Respondents, Tangava and Sundra Bai are the co-widows of Tatya. They were co-Plaintiffs in the original suit.

11. We have, therefore, no hesitation in holding in agreement with the courts below that Tatya had acquired title by remaining in exclusive and open possession of the suit lands adversely to

Padmini Bai for a period far exceeding 12 years, and this possession was never interrupted or disturbed. He had thus acquired ownership by prescriptions.

In State of West Bengal v. The Dalhousie Institute Society MANU/SC/0447/1970 : AIR 1970 SC 1778, this Court considered the question of adverse possession of Dalhousie Institute Society based on invalid grant. It was held by this Court that title was acquired by adverse possession based on invalid grant and the right was given to the claimant/applicant to claim compensation. This Court held that a person acquires title by adverse possession and observed:

16. There is no material placed before us to show that the grant has been made in the manner required by law though as a fact a grant of the site has been made in favour of the Institute. The evidence relied on by the Special Land Acquisition Judge and the High Court also clearly establishes that the Respondent has been in open, continuous and uninterrupted possession and enjoyment of the site for over 60 years. In this respect, the material documentary evidence referred to by the High Court clearly establishes

that the Respondent has been treated as owner of the site not only by the Corporation but also by the Government. The possession of the Respondent must have been on the basis of the grant made by the Government, which, no doubt, is invalid in law. As to what exactly is the legal effect of such possession has been considered by this Court in *Collector of Bombay v. Municipal Corporation of the City of Bombay*, MANU/SC/0001/1951 : [1952] SCR 43 as follows: ...the position of the Respondent Corporation and its predecessor in title was that of a person having no legal title but nevertheless holding possession of the land under colour of an invalid grant of the land in perpetuity and free from rent for the purpose of a market. Such possession not being referable to any legal title it was prima facie adverse to the legal title of the Government as owner of the land from the very moment the predecessor in title of the Respondent Corporation took possession of the land under the invalid grant. This possession has continued openly, as of right and uninterruptedly for over 70 years and the Respondent Corporation has acquired the limited title to it and its predecessor in title had been prescribing for during all this period, that is to say, the right to

hold the land in perpetuity free from rent but only for the purposes of a market in terms of the Government Resolution of 1865....

17. The above extract establishes that a person in such possession clearly acquires title by adverse possession. In the case before us, there are concurrent findings recorded by the High Court and the Special Land Acquisition Judge in favour of the Respondent on this point and we agree with those findings.

TITLE DECLARATION BASED ON ADVERSE POSSESSION¹

In Mohammed Fateh Nasib v. Swarup Chand Hukum Chand and Anr. MANU/PR/0021/1947 : AIR 1948 PC 76, Privy Council considered the question of adverse possession by a Plaintiff. In the plaint, his case was based upon continuous, open, exclusive and undisturbed possession. He averred that he had acquired an indefeasible title to the suit property by adverse possession against the whole world. In 1928, he was surreptitiously dispossessed from the suit property. The question

¹ Ravinder Kaur Grewal and Ors. vs. Manjit Kaur and Ors.: MANU/SC/1053/2019 - AIR 2019 SC 3827

arose for consideration whether the Plaintiff remained in adverse possession for 12 years and whether it was adverse to the wakf. The Privy Council agreed with the findings of the High Court that the "Plaintiff" and his predecessors-in-interest had remained in possession of the suit property for more than 12 years before 1928 to acquire a title Under Section 28 of the Act and the Plaintiff was not a mere trespasser. The court further held that title by the adverse possession can be established against wakf property also. The Privy Council observed: On that basis the first question to be determined is whether the Plaintiff proved continuous, open exclusive and undisturbed possession of the property in suit for 12 years and upwards before 1928 when he was dispossessed, that being the relevant date Under Article 142 of the Limitation Act. If that question is answered in the affirmative then the further question arises whether such possession was adverse to the wakf.

Their Lordships agree that this is the correct test to apply and, having examined the evidence, oral and documentary, they agree with the finding of the High Court that the Plaintiff and his predecessors-in-interest had been in possession of the suit property for more than 12

years prior to 1928 so as to acquire a title Under Section 28 of the Limitation Act. It is no doubt true, as the learned Subordinate Judge held, that the claim of a mere trespasser to title by adverse possession will be confined strictly to the property of which he has been in actual possession. But that principle has no application in the present case. The Plaintiff is not a mere trespasser; he himself purchased the property for a large sum and Aberjan, upon whose possession the claim ultimately rests, was put into possession by an order of the Court, whether or not such order was rightly made. Apart from this, their Lordships think that the character of the possession established by the Plaintiff was adequate to found title even in a trespasser.

Their Lordships feel no hesitation in agreeing with the High Court that adverse possession by the Plaintiff and his predecessors-in-interest has been proved for the requisite period.

The only question which then remains is whether such possession was adverse to the wakf. It is not disputed that in law a title by adverse possession can be established against wakf property, but it is clear that a trustee for a charity entering into possession of property

belonging to the charity cannot, whilst remaining a trustee, change the character of his possession, and assert that he is in possession as a beneficial owner.

The question of perfecting title by adverse possession again came to be considered by the Privy Council in **Gunga Govind Mundul and Ors. v. The Collector of the Twenty-Four Pergunnahs and Ors. MANU/PR/0010/1867 : 11 M.I.A. 212**, it observed that there is an extinguishment of title by the law of limitation. The practical effect is the extinction of the title of the owner in favour of the party in possession and this right is an absolute interest. The Privy Council has observed thus:

4. The title to sue for dispossession of the lands belongs, in such a case, to the owner whose property is encroached upon; and if he suffers his right to be barred by the Law of Limitation, the practical effect is the extinction of his title in favour of the party in possession; see Sel. Rep., vol. vi., p. 139, cited in Macpherson, Code of Civil Procedure, p. 81 (3rd ed.). Now, in this case, the family represented by the Appellants is proved to have been upwards of thirty years in possession. The High Court has decided that the Prince's title

is barred, and the effect of that bar must operate in favour of the party in possession.

Supposing that, on the extinction of the title of a person having a limited interest, a right to enter might arise in favour of a remainderman or a reversioner, the present case has no resemblance to that.

8. It is of the utmost consequence in India that the security which long possession efforts should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands, -- contiguous owners are apt to charge one another with encroachment. If twelve years' peaceable and uninterrupted possession of lands, alleged to have been enjoyed by encroachment on the adjoining lands, can be proved, a purchaser may taken that title in safety; but, if the party out of possession could set up a sixty years' law of limitation, merely by making common cause with a Collector, who could enjoy security against interruption? The true answer to such a contrivance is; the legal right of the Government is to its rent; the lands owned by others; as between private owners contesting inter see the title of the lands, the law has established a limitation of twelve years; after that time, it declares not simply that the remedy is barred, but

that that the title is extinct in favour of the possessor. The Government has no title to intervene in such contests, as its title to its rent in the nature of jumma is unaffected by transfer simply of proprietary right in the lands. The liability of the lands of Jumma is not affected by a transfer of proprietary right, whether such transfer is affected simply by transfer of title, or less directly by adverse occupation and the law of limitation.

In S.M. Karim v. Mst. Bibi Sakina MANU/SC/0236/1964 : AIR 1964 SC 1254, a question arose Under Section 66 of the Code of Civil Procedure, 1908 which provides that no suit shall be maintained against a certified purchaser. The question arose for consideration that in case possession is disturbed whether a Plaintiff can take the alternative plea that the title of the person purchasing benami in court auction was extinguished by long and uninterrupted adverse possession of the real owner. If the possession of the real owner ripens into title under the Act and he is dispossessed, he can sue to obtain possession. This Court has held that in such a case it would be open for the Plaintiff to take such a plea but with full particulars so that the starting

point of limitation can be found. A mere suggestion in the relief Clause that there was an uninterrupted possession for several 12 years or that the Plaintiff had acquired an absolute title was not enough to raise such a plea. Long possession was not necessarily an adverse possession and the prayer Clause is not a substitute for a plea of adverse possession. The opinion expressed is that Plaintiff can take a plea of adverse possession but with full particulars. The Court has observed:

5. As an alternative, it was contended before us that the title of Hakir Alam was extinguished by long and uninterrupted adverse possession of Syed Aulad Ali and after him of the Plaintiff. The High Court did not accept this case. Such a case is, of course, open to a Plaintiff to make if his possession is disturbed. If the possession of the real owner ripens into title under the Limitation Act and he is dispossessed, he can sue to obtain possession, for he does not then rely on the benami nature of the transaction. But the alternative claim must be clearly made and proved. The High Court held that the plea of adverse possession was not raised in the suit and reversed the decision of the two courts below. The

plea of adverse possession is raised here. Reliance is placed before us on Sukhan Das v. Krishanand, ILR 32 Pat 353 and Sri Bhagwan Singh v. Ram Basi Kuer MANU/BH/0054/1957 : AIR 1957 Pat 157, to submit that such a plea is not necessary and alternatively, that if a plea is required, what can be considered a proper plea. But these two cases can hardly help the Appellant. No doubt, the plaint sets out the fact that after the purchase by Syed Aulad Ali, benami in the name of his son-in-law Hakir Alam, Syed Aulad Ali continued in possession of the property but it does not say that this possession was at any time adverse to that of the certified purchaser. Hakir Alam was the son-in-law of Syed Aulad Ali and was living with him. There is no suggestion that Syed Aulad Ali ever asserted any hostile title against him or that a dispute with regard to ownership and possession had ever arisen. Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse if it at all did, and a mere suggestion in the relief Clause that there was an uninterrupted possession for "several 12

years" or that the Plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer Clause is not a substitute for a plea. The cited cases need hardly be considered because each case must be determined upon the allegations in the plaint in that case. It is sufficient to point out that in *Bishun Dayal v. Kesho Prasad* MANU/PR/0042/1940 : AIR 1940 PC 202 the Judicial Committee did not accept an alternative case based on possession after purchase without a proper plea.

There is an acquisition of title by adverse possession as such, such a person in the capacity of a Plaintiff can always use the plea in case any of his rights are infringed including in case of dispossession. **In Mandal Revenue Officer v. Goundla Venkaiah and Anr.,** MANU/SC/0026/2010 : (2010) 2 SCC 461 this Court has referred to the decision in *State of Rajasthan v. Harphool Singh* MANU/SC/0348/2000 : (2000) 5 SCC 652 in which the suit was filed by the Plaintiff based on acquisition of title by adverse possession. This Court has referred to other decisions also in

Annakili v. A. Vedanayagam
 MANU/SC/8027/2007 : (2007) 14 SCC 308 and
 P.T. Munichikkanna Reddy v. Revamma
 MANU/SC/7325/2007 : (2007) 6 SCC 59. It has
 been observed that there can be an acquisition of
 title by adverse possession. It has also been
 observed that adverse possession effectively shifts
 the title already distanced from the paper owner
 to the adverse possessor. Right thereby accrues
 in favour of the adverse possessor. This Court has
 considered the matter thus: 48. In State of
 Rajasthan v. Harphool Singh,
 MANU/SC/0348/2000 : 2000 (5) SCC 652, this
 Court considered the question whether the
 Respondents had acquired title by adverse
 possession over the suit land situated at Nohar-
 Bhadra Road at Nohar within the State of
 Rajasthan. The suit filed by the Respondent
 against his threatened dispossession was decreed
 by the trial court with the finding that he had
 acquired title by adverse possession. The first and
 second appeals preferred by the State
 Government were dismissed by the lower
 appellate court and the High Court respectively.
 This Court reversed the judgments and decrees of
 the courts below as also of the High Court and
 held that the Plaintiff-Respondent could not

substantiate his claim of perfection of title by adverse possession. Some of the observations made on the issue of acquisition of title by adverse possession which have bearing on this case are extracted below: (SCC p. 660, para 12)

12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third-party encroacher title where he had none. The decision in *P. Lakshmi Reddy v. L. Lakshmi Reddy* MANU/SC/0083/1956 : AIR 1957 SC 314, adverted to the ordinary classical requirement—that it should be *nec vi, nec clam, nec precario*—that is the possession required must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus.

50. Before concluding, we may notice two recent judgments in which law on the question of

acquisition of title by adverse possession has been considered and reiterated. In *Annakili v. A. Vedanayagam*, MANU/SC/8027/2007 : 2007 (14) SCC 308, the Court observed as under: (SCC p. 316, para 24) 24. Claim by adverse possession has two elements: (1) the possession of the Defendant should become adverse to the Plaintiff; and (2) the Defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now a well-settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more does not ripen into a title.

51. In *P.T. Munichikkanna Reddy v. Revamma*, MANU/SC/7325/2007 : 2007 (6) SCC 59, the Court considered various facets of the law of

adverse possession and laid down various propositions including the following: (SCC pp. 66 & 68, paras 5 &

8. ... to assess a claim of adverse possession, two-pronged enquiry is required:

1. Application of limitation provision thereby jurisprudentially "wilful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.

2. Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper-owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

In P.T. Munichikkanna Reddy v. Revamma, MANU/SC/7325/2007 : (2007) 6 SCC 59, Court has observed as under: 2. The Defendant-Respondents in their written statement denied and disputed the aforementioned assertion of the Plaintiffs and pleaded their own right, title and interest as also possession in or over the said 1 acre 21 guntas of land. The learned trial Judge decreed the suit inter alia holding that the

Plaintiff-Appellants have acquired title by adverse possession as they have been in possession of the lands in question for a period of more than 50 years. On an appeal having been preferred thereagainst by the Respondents before the High Court, the said judgment of the trial court was reversed holding:

(i) ... The important averments of adverse possession are twofold. One is to recognise the title of the person against whom adverse possession is claimed. Another is to enjoy the property adverse to the title-holder's interest after making him known that such enjoyment is against his own interest. These two averments are basically absent in this case both in the pleadings as well as in the evidence....

(ii) The finding of the court below that the possession of the Plaintiffs became adverse to the Defendants between 1934-36 is again an error apparent on the face of the record. As it is now clarified before me by the learned Counsel for the Appellants that the Plaintiffs' claim in respect of the other land of the Defendants is based on the subsequent sale deed dated 5-7-1936.

It is settled law that mere possession even if it is true for any number of years will not clothe the person in enjoyment with the title by adverse

possession. As indicated supra, the important ingredients of adverse possession should have been satisfied.

6. Efficacy of adverse possession law in most jurisdictions depends on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. (See American Jurisprudence, Vol. 3, 2d, p. 81.) It is important to keep in mind while studying the American notion of adverse possession, especially in the backdrop of limitation statutes, that the

intention to dispossess cannot be given a complete go-by. Simple application of limitation shall not be enough by itself for the success of an adverse possession claim.

8. Therefore, to assess a claim of adverse possession, two-pronged enquiry is required:

1. Application of limitation provision thereby jurisprudentially "wilful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.

2. Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper-owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

30. In Karnataka Wakf Board the law was stated, thus: (SCC p. 785, para 11) 11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile

possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity, and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See S.M. Karim v. Bibi Sakina, Parsinni v. Sukhi and D.N. Venkatarayappa v. State of Karnataka.) Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in

his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

In State of Haryana v. Mukesh Kumar and Ors., MANU/SC/1147/2011 : (2011) 10 SCC 404, the court considered the question whether the Plaintiff had become the owner of the disputed property by way of adverse possession and in that context considered the decisions in Revamma (supra) and Fairweather v. St. Marylebone Property Co. Ltd. MANU/UKHL/0001/1962 : (1962) 2 AER 288 (HL) and Taylor v. Twinberrow 1930 All ER Rep 342 (DC) and observed that adverse possession confers negative and consequential right effected only as somebody else's positive right to access the court is barred by operation of law. Right of the paper owner is extinguished and that competing rights evolve in favour of adverse possessor as he cared for the land, developed it as against the owner of the property who had ignored the property. This Court has observed thus: 32. This Court in Revamma MANU/SC/7325/2007 : (2007) 6 SCC 59 observed that to understand the true nature of

adverse possession, *Fairweather v. St Marylebone Property Co. Ltd.* MANU/UKHL/0001/1962 : (1962) 2 All ER 288 (HL) can be considered where the House of Lords referring to *Taylor v. Twinberrow* (1930) 2 K.B. 16 termed adverse possession as a negative and consequential right effected only because somebody else's positive right to access the court is barred by operation of law. As against the rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property.

In Krishnamurthy S. Setlur (dead) by L.Rs. v. O.V. Narasimha Setty and Ors., MANU/SC/1169/2007 : (2007) 3 SCC 569, the Court pointed out that the duty of the Plaintiff while claiming title based on adverse possession. The suit was filed by the Plaintiff on 11.12.1981. The trial court held that the Plaintiff has perfected the title in the suit lands based on adverse possession, and decreed the suit. This Court has observed that the Plaintiff must plead and prove the date on and from which he claims to be in

exclusive, continuous and undisturbed possession. The question arose for consideration whether tenant's possession could be treated as possession of the owner for computation of the period of 12 years under the provisions of the Act. What is the nature of pleading required in the plaint to constitute a plea of adverse possession has been emphasised by this Court and another question also arose whether the Plaintiff was entitled to get back the possession from the Defendants? This Court has observed thus: 12. Section 27 of the Limitation Act, 1963 operates to extinguish the right to property of a person who does not sue for its possession within the time allowed by law. The right extinguished is the right which the lawful owner has and against whom a claim for adverse possession is made, therefore, the Plaintiff who makes a claim for adverse possession has to plead and prove the date on and from which he claims to be in exclusive, continuous and undisturbed possession. The question whether possession is adverse or not is often one of simple fact but it may also be a conclusion of law or a mixed question of law and fact. The facts found must be accepted, but the conclusion drawn from them, namely, ouster or

adverse possession is a question of law and has to be considered by the court.

13. As stated, this civil appeal arises from the judgment of the High Court in RFA No. 672 of 1996 filed by the original Defendants Under Section 96 Code of Civil Procedure. The impugned judgment, to say the least, is a bundle of confusion. It quotes depositions of witnesses as findings. It quotes findings of the courts below which have been set aside by the High Court in the earlier round. It criticizes the findings given by the coordinate Bench of the High Court in the earlier round of litigation. It does not answer the question of law which arises for determination in this case. To quote an example, one of the main questions which arises for determination, in this case, is whether the tenant's possession could be treated as possession of the owner in computation of the period of twelve years Under Article 64 of the Limitation Act, 1963. Similarly, as an example, the impugned judgment does not answer the question as to whether the decision of the High Court dated 14.8.1981 in RSA No. 545 of 1973 was at all binding on the LR's. of Iyengar/their alienees. Similarly, the impugned judgment does not consider the effect of the judgment dated 10.11.1961 rendered by the trial

court in Suit No. 94 of 1956 filed by K.S. Setlur against Iyengar inter alia for reconveyance in which the court below did not accept the contention of K.S. Setlur that the conveyance executed by Kalyana Sundram Iyer in favour of Iyengar was a benami transaction. Similarly, the impugned judgment has failed to consider the effect of the observations made by the civil court in the suit filed by Iyengar for permanent injunction bearing Suit No. 79 of 1949 to the effect that though Shyamala Raju was in possession and cultivation, whether he was a tenant under Iyengar or under K.S. Setlur was not conclusively proved. Similarly, the impugned judgment has not at all considered the effect of Iyengar or his LRs. not filing a suit on title despite being liberty given to them in the earlier Suit No. 79 of 1949. In the matter of adverse possession, the courts have to find out the plea taken by the Plaintiff in the plaint. In the plaint, the Plaintiff who claims to be owner by adverse possession has to plead actual possession. He has to plead the period and the date from which he claims to be in possession. The Plaintiff has to plead and prove that his possession was continuous, exclusive and undisturbed to the knowledge of the real owner of the land. He has to show a

hostile title. He has to communicate his hostility to the real owner. None of these aspects have been considered by the High Court in its impugned judgment. As stated above, the impugned judgment is Under Section 96 Code of Civil Procedure, it is not a judgment Under Section 100 Code of Civil Procedure. As stated above, adverse possession or ouster is an inference to be drawn from the facts proved (sic) that work is of the first appellate court.

In P.T. Munichikkanna Reddy v. Revamma, MANU/SC/7325/2007 : (2007) 6 SCC 59, the Plaintiff claimed the title based on adverse possession. The court observed:

5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See *Downing v. Bird* 100 So. 2d 57 (Fla. 1958); *Arkansas Commemorative Commission v. City of Little Rock* 227 Ark. 1085: 303 S.W. 2d 569 (1957); *Monnot v. Murphy* 207 N.Y. 240 100

N.E. 742 (1913); City of Rock Springs v. Sturm 39 Wyo. 494: 273 P. 908: 97 A.L.R. 1 (1929).

6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. (See American Jurisprudence, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess cannot be given a complete go by.

Simple application of limitation shall not be enough by itself for the success of an adverse possession claim.

In Pannalal Bhagirath Marwadi v. Bhaiyalal Bindraban Pardeshi Teli

MANU/NA/0090/1936 : AIR 1937 Nagpur 281,

it has been observed that in-between two trespassers, one who is wrongly dispossessed by the other trespasser, can sue and recover possession. A person in possession cannot be dispossessed otherwise than in due course of law and can sue for injunction for protecting the possession as observed in Krishna Ram Mahale (dead) by L.Rs. v. Shobha Venkat Rao, MANU/SC/0278/1989 : (1989) 4 SCC 131, State of U.P. v. Maharaja Dharmander Prasad Singh, MANU/SC/0563/1989 : (1989) 2 SCC 505.

In Radhamoni Debi v. The Collector of Khulna and Ors. MANU/WB/0070/1900 : (1900) ILR

27 Cal. 943 it was observed that to constitute a possessory title by adverse possession, the possession required to be proved must be adequate in continuity in publicity, and in the extent to show for a period of 12 years.

In Somnath Burman v. S.P. Raju, MANU/SC/0399/1969 : (1969) 3 SCC 129, the Court recognized the right of the Plaintiff to such declaration of title and for an injunction. Section 9 of the Specific Relief Act is in no way inconsistent, the wrongdoer cannot resist suit on the ground that title and right are in a third person. Right to sue is available to the Plaintiff against owners as well as others by taking the plea of adverse possession in the plaint.

In Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan and Ors., MANU/SC/4083/2008 : (2009) 16 SCC 517, relying on *T. Anjanappa v. Somalingappa* MANU/SC/8429/2006 : (2006) 7 SCC 570, observed that title can be based on adverse possession. This Court has observed thus: 23. This Court had an occasion to examine the concept of adverse possession in *T. Anjanappa v. Somalingappa*, MANU/SC/8429/2006 : 2006 (7) SCC 570. The court observed that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his title was hostile to the real owner and amounted to denial of his title to the property claimed. The court further observed that: (SCC p. 577, para 20)

20.... The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

Gurdwara Sahib v. Gram Panchayat Village Sirthala and Anr., MANU/SC/0939/2013 : (2014) 1 SCC 669 decided by two-Judge Bench wherein a question arose whether the Plaintiff is in adverse possession of the suit land this Court referred to the Punjab & Haryana High Court decision on *Gurdwara Sahib Sannauli v. State of Punjab* MANU/PH/0366/2009 : (2009) 154 PLR 756 and observed that there cannot be 'any quarrel' to the extent that the judgments of courts below are correct and without any blemish. Even if the Plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. The discussion made is confined to para 8 only. The same is extracted hereunder:

4. In so far as the first issue is concerned, it was decided in favour of the Plaintiff returning the findings that the Appellant was in adverse possession of the suit property since 13.4.1952 as this fact had been proved by a plethora of documentary evidence produced by the Appellant. However, while deciding the second issue, the court opined that no declaration can be sought on the basis of adverse possession inasmuch as adverse possession can be used as a shield and not as a sword. The learned Civil Judge relied upon the judgment of the Punjab and Haryana High Court in *Gurdwara Sahib Sannuali v. State of Punjab* MANU/PH/0366/2009 : (2009) 154 PLR 756 and thus, decided the issue against the Plaintiff. Issue 3 was also, in the same vein, decided against the Appellant.

8. There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the Plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the Appellant and the Appellant is arrayed as Defendant that it can use this adverse possession as a shield/defence.

WHEN NO PLEADING AS TO PROPERTY IS JOINT FAMILY PROPERTY

In KUPPALA OBUL REDDY v. BONALA VENKATA NARAYANA REDDY (dead) THROUGH LRs MANU/SC/0180/1984 : AIR 1984 SC 1171 one of the contentions was that the property gifted by one Thimma Reddy, belonged to joint family of which Thimma Reddy was the manager and therefore, the gift was invalid. The Supreme Court held that there was no pleading that property was a joint family property and no issue was framed involving the said question. Thereafter, the Supreme Court observed at page 1176: "There may be presumption that there is a Hindu Joint Family but there can be no presumption that the joint family possesses joint family properties..... No case is made out in the pleadings with regard to the properties gifted by Thimma Reddy to his wife Naramma being joint family properties. No issue with regard to the properties being joint family properties was raised and no such issue could possibly have been raised in the absence of any pleading. The evidence of Yella Reddy in the suit does not

mention that the properties gifted by his father to his mother under the deed of gift belonged to the joint family. In the absence of any pleading and any issue and further in the absence of any proper evidence, the view expressed by the learned Judge of the High Court that the properties were joint family properties is clearly unwarranted. There may be presumption that there is a Hindu Joint Family but there can be no presumption that the joint family possesses joint family properties."

In Nagayasami Naidu v. Kochadai Naidu, , AIR 1969 Mad 329 the Division Bench of Madras High Court consisting of Ramamurti, J. and Alagiriswami, J., as he then was, upheld the whole some principle and said it is for the parties who claim properties as joint family properties to specifically plead the particulars and details in the pleadings and establish the same by adducing evidence. If there is no pleading and if on the side of the plaintiffs there is no evidence, there is no need for detailed scrutiny of the case of female members or persons claiming through them, as to the resources of the female members and as to how they acquired the properties in question. More stronger language is not necessary to reject

the contention of the plaintiff in the instant case that the properties which stood in the name of Pattathammal are to be deemed and held as her own properties. Excepting for the bare ipse dixit of the plaintiff, there is no acceptable material for us to reject the real title of Pattathammal in the properties purchased by her in Tholuvur Village. There is also evidence in this case that Pattathammal's parents were rich and that they provided the necessary funds to Pattathammal to purchase the properties. Incidentally the plaintiff's case is that such properties were held by Pattathammal benami for the family. The theory of benami also depends on express pleadings followed up by clear proof. There is, of course, pleadings in this case but proof is completely absent."

In the case of Ram Sarup Gupta v. Bishun Narain Inter College AIR 1987 SC 1242, 1987 SCR (2) 805, the Apex Court had an occasion to consider the issue of lack of pleadings in terms of Order 6, Rule 1 of the Code of Civil Procedure and held that it is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel

beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet, In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words, which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by

producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.

POSSESSION OF ONE CO-SHARER IS TREATED AS POSSESSION OF OTHER CO-SHARER ALSO.

In a case before Supreme Court **Vidya Devi vs Prem Prakash AIR 1995 SC 1789**, It is a matter of fundamental principle of law that where possession can be referred to a lawful title, it will not be considered to be adverse. It is on the basis of this principle that it has been laid down that since the possession of one co-owner can be referred to his status as co-owner, it cannot be considered adverse to other co- owners.¹

In **N. Padmamma v. S. Ramakrishna Reddy as reported in (2015)1 SCC 417**, it has been held as follows. “It is fairly well-settled principle of law that the possession of a co-heir is in law treated

¹ (See: Maharajadhiraj of Burdhwani, Udaychand Mahatab Chand Vs. Subodh Gopal Bose and others AIR 1971 SC 376; P. Lakshmi Reddy Vs. L.Lakshmi Reddy AIR 1957 SC 314; Mohammad Baqar and others Vs. Naim-un-Nisa Bibi & Others AIR 1956 SC 548).

as possession of all the co-heirs. If one co-heir has come in possession of the properties, it is presumed to be on the basis of a joint title. A co-heir in possession cannot render its possession adverse to other co-heirs not in possession, merely by any secret hostile animus on his own part, in derogation of the title of his other co-heirs. Ouster of the other co-heirs must be evidenced by hostile title coupled by exclusive possession and enjoyment of one of them to the knowledge of the other."

OUSTER OF CO-SHARER - ADVERSE POSSESSION - NECESSARY INGREDIENTS

Mohd. Zain-ul-Abdin Vs. Syed Ahmad Mohiudding (AIR 1990 SC 507). "Ouster" does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus (ii) long and uninterrupted possession of the person pleading ouster and (iii) exercise of right of exclusive ownership openly and to the

knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law.

CO-SHARER IN POSSESSION OF THE PROPERTY WOULD BE A CONSTRUCTIVE TRUSTEE

In **Karbali Begum Vs. Mohd Sayeed (AIR 1981 SC 77)**, it was held that a co-sharer in possession of the property would be a constructive trustee on behalf of other co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustee co-sharer.

NATURE OF THE PROPERTY ACQUIRED BY THEM ARE NOT SO SIMPLE TO BE DECIDED BY A SUMMARY ENQUIRY, AND THAT TOO WITHOUT THE ASSISTANCE OF TRAINED LAWYERS

Appi Belchadthi And Ors. Vs. V. Sheshi Belchadthi And Ors. Reported In 1982 (2) KLJ 565 The questions such as, the existence of a joint family, the rights of the members thereof,

the position and power of the manager, and the nature of the property acquired by them are not so simple to be decided by a summary enquiry, and that too without the assistance of trained lawyers. The joint Hindu family or coparcenary is a creature of Hindu family. The status to every Hindu family is presumed to be joint, joint in food, worship and estate. That presumption is stronger in the case of brothers. Once the family is proved to be joint, that presumption continues until it is rebutted. Those who allege separation must prove unless it is admitted that there was a separation at some point of time. The question as to whether a particular family retains its character of jointness at a particular time is a difficult question for decision. Mere severance in food and worship does not effect a separation of the family nor separate residence by members operates as a severance of the joint status. We are only mentioning some of these principal features to impress upon that the decision on these questions requires a lot of brooding even by Courts of law. We may only add that a person's right to get a share in the occupancy right does not depend upon the liberty being reserved by the Tribunal to approach the Civil Court, because as seen earlier, such a right is not

extinguished by not approaching the Tribunal. It is pertinent to remember that the grant of occupancy right by the Tribunal in the name of a given individual in respect of joint family tenanted lands will not have the effect of converting that in a separate property of that individual. Nor the occupancy right granted in respect of a personal tenancy of that individual would acquire a different character. In both the cases, the antecedent tenancy rights are enlarged into permanent occupancy rights by doing away with the landlord. To put it shortly, the Act converts the lease hold into freehold and does no damage to the existing rights of the occupant's family or any member thereof.

PRESUMPTION OF POSSESSION UNDER SECTION 110 OF EVIDENCE ACT

THE HON'BLE JUSTICE Dr B.S. Chauhan, THE HON'BLE JUSTICE Fakkir Mohamed Kalifulla of Supreme Court of India in the case of **State Of A.P. & Ors. vs M/S. Star Bone Mill & Fertiliser ... Decided on 21 February, 2013 - (2013) 9 SCC 319** The principle enshrined in Section 110 of the Evidence Act, is based on public policy with the object of preventing persons from committing

breach of peace by taking law into their own hands, however good their title over the land in question may be. It is for this purpose, that the provisions of Section 6 of the Specific Relief Act, 1963, Section 145 of Code of Criminal Procedure, 1973, and Sections 154 and 158 of Indian Penal Code, 1860, were enacted. All the afore- said provisions have the same object. The said presumption is read under Section 114 of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected, for instance, in the case of waste lands, or where nothing is known about possession one-way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party. Possession of the plaintiff is not prima facie wrongful, and title of the plaintiff is not proved. It certainly does not mean that because a man has title over some land, he is necessarily in possession of it. It infact means, that if at any time a man with title was in possession of the said property, the law allows the presumption that such possession was in continuation of the title vested in him. A person

must establish that he has continued possession of the suit property, while the other side claiming title, must make out a case of trespass/encroachment etc. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant, that in order to displace this claim of apparent title and to establish beneficial title in himself, he must establish by way of satisfactory evidence, circumstances that favour his version. Even, a revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof, both forward and backward, can also be raised under Section 110 of the Evidence Act.

In Gurunath Manohar Pavaskar & Ors. v. Nagesh Siddappa Navalgund & Ors., AIR 2008 SC 901, Court held as under:- “A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under Section 110 of the Evidence Act.”

In Nair Service Society Ltd. v. K.C. Alexander & Ors. & Ors., AIR 1968 SC 1165, dealing

with the provisions of Section 110 of the Evidence Act, Court held as under:- “Possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession alone decides.”

In Chief Conservator of Forests, Govt. of A.P. v. Collector & Ors., AIR 2003 SC 1805, Court held that : “Presumption, which is rebuttable, is attracted when the possession is prima facie lawful and when the contesting party has no title.”

WHEN NO OTHER DOCUMENTARY OR ORAL EVIDENCE WAS BROUGHT ON RECORD TO SHOW THAT THE PARTIES WERE IN JOINT POSSESSION OF THE PROPERTIES.

2008 (7) SCC 46, HARDEO RAI VS SAKUNTALA DEVI AND OTHERS BENCH: S.B. SINHA & V.S. SIRPURKAR The first appellate court did not arrive at a conclusion that the appellant was a member of a Mitakashra co-parcenary. The source of the property was not disclosed. The manner in which the properties were being possessed by the appellant vis-a-vis, the other co-

owners had not been taken into consideration. It was not held that the parties were joint in kitchen or mess. No other documentary or oral evidence was brought on record to show that the parties were in joint possession of the properties. One of the witnesses examined on behalf of the appellant admitted that the appellant had been in separate possession of the suit property. Appellant also in his deposition accepted that he and his other co-sharers were in separate possession of the property.

CO-HEIR IN POSSESSION CANNOT RENDER HIS POSSESSION ADVERSE TO THE OTHER CO-HEIR, NOT IN POSSESSION

In P. Lakshmi Reddy v. L. Lakshmi Reddy reported in MANU/SC/0083/1956 : AIR 1957 S.C. page 314 it is held as under: "It is well settled that in order to establish adverse possession of one-co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession

of all the coheirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir, not in possession, merely by any secret hostile animus of his own part in derogation of the other co-heir title. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.

This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and excluded heir takes no steps to vindicate his title. ... It is well settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession."

In Shambu Prasad Singh v. Most. Phool Kumari and others reported in

MANU/SC/0483/1971 : AIR 1971 S.C. page 1337 it is held at para 17 as under: "On the question of adverse possession by a co-sharer, the law is fairly well settled. Adverse possession has to have the characteristics of adequacy, continuity and exclusiveness. The onus to establish these characteristics is on the adverse possessor. As between co-sharers, the possession of one co-sharer is in law the possession of all co-sharers. Therefore, to constitute adverse possession, ouster of the non-possessing co-sharer has to be made out. As between them, therefore, there must be evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other."

In Karbalai Begum v. Mohd. Sayeed and another reported in MANU/SC/0363/1980 : AIR 1981 S.C. page 77 at para. 7 following proposition is laid down: "It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact is admitted, then the legal position would be that the co-sharers in possession would

become constructive trustees on behalf of the co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustees. The possession of the defendants, apart from being in the nature of constructive trustees, would be in law the possession of the plaintiff."

In Darshan Singh and others v. Gujjar Singh (dead) by LRs. and others reported in MANU/SC/0007/2002 : (2002) 2 SCC page 62 at para 9 it is held as under: "In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied."

In T. Anjanappa v. Somalingappa reported in MANU/SC/8429/2006 : 2006 (7) SCC page. 570 at para. 12 it is held as under: "12. The concept of adverse possession contemplates a

hostile possession i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property."

The Apex Court in **Jai Singh and others v. Gurmej Singh** reported in **MANU/SC/0054/2009 : 2009 AIR SCW page 3652** after referring to several earlier judgments, has laid down the following principles at para. 7 which reads as under:

"The principles relating to the inter se rights and liabilities of co-sharers are as follows:

1. A co-owner has an interest in the whole property and also in every parcel of it.
2. Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.
3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.
4. The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.
5. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.
6. Every co-owner has a right to use the joint property in a husband like manner not

inconsistent with similar rights of other co-owners.

7. Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to anybody to disturb the arrangement without the consent of others except by filing a suit for partition."

Vidya Devi @ Vidya Vati (Dead) by L.Rs. v. Prem Prakash and Others reported in MANU/SC/ 0345/1995: (1995)4 SCC 496 the minority view is expressed in the following words: "28. 'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law."

Janatha Dal Party v. The Indian National Congress, New Delhi and Others reported in MANU/KA/2676/2013 : 2014 (1) KCCR 95. It was held as under:--

"The plea of adverse possession raises a mixed question of law and fact. Where a person wants to base his title on it, he should specifically set up the plea. Unless the plea is raised, it cannot be entertained. A plea must be raised and it must be shown when possession became adverse, so that the starting point of limitation against the party affected can be found. The prayer clause is not a substitute for a plea. A person acquires title by way of adverse possession when he is in continuous, uninterrupted, hostile possession over a period of 12 years. In order to calculate 12 years period there should be a starting point. The date of commencement of adverse possession is very crucial for calculating the period of 12 years. Therefore, the law mandates that the person who seeks a declaration that he has perfected his title by way of adverse possession should specifically plead the date from which his possession becomes adverse to that of the opposite party against whom the said plea is set up. It is from that date if the party proves continuous,

uninterrupted possession for a period of 12 years, then the right of the opposite party to the property stands extinguished and the party who has set up the plea would acquire title by way of adverse possession. Therefore, in the absence of crucial pleadings, which constitute adverse possession, the party cannot claim that he has perfected their title by adverse possession. In a proper case, the Court may have to construe the entire pleadings so as to come to a conclusion as to whether the proper plea of adverse possession has been raised in the pleadings or not which can also be gathered from the cumulative effect of the averments made therein. Therefore, a person who claims adverse possession should show:

- (a) on what date he came into possession,
- (b) what was the nature of his possession,
- (c) whether the factum of possession was known to the other party,
- (d) how long his possession has continued, and
- (e) his possession was open, continuous and undisturbed.

A person pleading adverse possession has no equities in his favour. Because, adverse possession is commenced in wrong and is aimed against right. Since he is trying to defeat the rights of the true owner, it is for him to clearly

plead and establish all facts necessary to establish his adverse possession. Once a suit for recovery of possession is instituted against a defendant in adverse possession his adverse possession does not continue thereafter. In other words, the running of time for acquiring title by adverse possession gets arrested."

The Apex Court in the case of **Jai Singh & Others. v. Gurmej Singh reported in MANU/SC/ 0054/2009 : 2009 AIR SCW 3652** has held that, a co-owner has an interest in the whole property and also in every parcel of it. Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

Nanjamma vs. Akkayamma and Ors.: MANU/KA/ 3634/2014 - It is well settled that in order to establish adverse possession of one-co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties.

Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession, merely by any secret hostile animus of his own part in derogation of the other co-heir title. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.

If ouster is to be pleaded, the title has to be acknowledged. Once such a plea is taken, irrespective of the fact that as to whether any other plea is raised or not, conduct of the parties would be material. If, therefore, plea of ouster is not established, a fortiori the title of other co-sharers must be held to have been accepted. 'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse

possession. It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession.

The co-sharer in possession would become constructive trustees on behalf of the co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustees. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all. Mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied.

Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint family property. It is only when he is ousted from the joint family property and after such ouster, he is out of possession of the property for a period of more than 12 years and in the meanwhile, the person who ousted, asserts his title, continues in possession for the statutory period openly, then person out of possession loses his right to have possession.

When possession of one co-owner in the eye of law is the possession of all the co-owners, till the partition is effected, by metes and bounds, anybody can claim exclusive title of the property because each co-owner has the interest in every parcel of the property.

Merely because one co-owner is in exclusive possession of the properties and other co-owners are residing separately it cannot be said that the co-owners who are not in possession are ousted from the property. In the absence of ouster, hostile title, mere exclusive possession would not constitute either adverse possession or ouster. Even in case of alienation, though the alienee is put in exclusive possession of portion of the property, as the property is not divided by metes and bounds, he cannot claim exclusive title in the property for the co-owner who is not a party to the alienation is deemed to be in possession of the property.

In Chhote Khan v. Mal Khan, MANU/SC/0128 /1954 : AIR 1954 SC 575, Hon'ble Supreme Court considered the question of adverse possession and on an arrangement between co-sharers and held that no question of adverse possession would arise.

In Mohammad Baqar and others v. Naim-un-Nisa Bibi and another, MANU/SC/0125/1955 : AIR 1956 SC 548, Hon'ble Supreme Court held that the possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession and exclusion and ouster for the statutory period.

IT IS FOR THE PERSON ALLEGING SEVERANCE OF THE JOINT FAMILY TO PROVE IT

The Apex Court in **Bharat Singh and others v. Mst. Bhagirathi** reported in **MANU/SC/0362/1965 : AIR 1966 S.C. page 405** at para 7 has held as under: "There is a strong presumption in favour of Hindu brothers constituting a joint family. It is for the person alleging severance of the joint family to prove it. The mere fact that after the death of the father mutation entry was made in favour of three brothers and indicated the share of each to be one-third, by itself could be no evidence of the severance of the joint family which, after the death of the father consisted of the three brothers

who were minors. Mutation entry in favour of the widow of one of the three brother on his death might have been made without the knowledge of the other two brothers w.p. were minors at the time. Their minority will also explain the absence of objection to the mutation being made in her favour."

The Apex Court in **Binapani Paul v. Pratima Ghosh and others** reported in **MANU/SC/2428/2007 : (2007) 6 S.C.C page 100 at para. 39** has held as under: "Interestingly, Amal pleaded ouster. If ouster is to be pleaded, the title has to be acknowledged. Once such a plea is taken, irrespective of the fact that as to whether any other plea is raised or not, conduct of the parties would be material. If, therefore, plea of ouster is not established, a fortiori the title of other co-sharers must be held to have been accepted."

Govindammal v. R. Perumal Chettiar and others **MANU/SC/8567/2006 : (2006) 11 SCC 600** has held that to prove ouster and adverse possession against a co-owner the following relevant factors may be taken into consideration:

- (i) exclusive possession and perception of profits

for well over the period prescribed by the law of limitation; (ii) dealings by the party in possession treating the properties as exclusively belonging to him; (iii) the means of the excluded co-sharer of knowing that his title has been denied by the co-owner in possession. It was further held that in order to oust by way of adverse possession, one has to lead definite evidence to show the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case.

Nagabhushanammal (Dead) by Legal Representatives v. C. Chandikeswaralingam MANU/SC/0231/2016 : (2016) 4 SCC 434 held that ouster is a weak defence in a suit for partition of family property and it is strong, if the defendant is able to establish consistent and open assertion of denial of title, long and uninterrupted possession and exercise of right of exclusive ownership openly and to the knowledge of the other co-owner, and relied upon the earlier three decisions by observing as under:- "22. This Court in Syed Shah Ghulam Ghouse Mohiuddin v. Syed Shah Ahmed Mohiuddin Kamisul Quadri MANU/SC/0486/1971 : (1971) 1 SCC 597 held that ... possession of one co-owner is presumed

to be on behalf of all co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. It was further held that there has to be open denial of title to the parties who are entitled to it by excluding and ousting them.

23. A three-Judge Bench of Court in P. Lakshmi Reddy v. L. Lakshmi Reddy MANU/SC/0083/1956 : AIR 1957 SC 314, while examining the necessary conditions for applicability of doctrine of ouster to the shares of co-owners, held as follows: "4. Now, the ordinary classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario. (See Secy. of State for India in Council v. Debendra Lal Khan MANU/PR/0072/1933 : The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. (See Radhamoni Debi v. Collector of Khulna MANU/PR/0007/1900 : But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir

by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the coheirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other."

24. This Court in *Vidya Devi v. Prem Prakash* MANU/SC/0345/1995 : (1995) 4 SCC 496 held that: "28. 'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i)

declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law."

Jatina Khatoon and others v. S.K. Najeeb (Dead) Through Legal Representatives and others MANU/SC/1076/2017 : (2018) 11 SCC 717, it has been held by the Supreme Court that mere non-participation in rent and profit of land of a co-sharer does not amount to ouster so as to be given title by adverse possession, relying upon its earlier decision in the matter of Karbalai Begum v. Mohd. Sayeed MANU/SC/0363/1980 : (1980) 4 SCC 396.

Darshan Singh and others v. Gujjar Singh (Dead) by LRs. and others MANU/SC/0007/2002 : (2002) 2 SCC 62, the Supreme Court has held that mere mutation in revenue records in favour of one co-sharer does not amount to ouster unless there is a clear

declaration denying title of the other co-sharers and in the normal course possession by one co-sharer of property belonging to several co-sharers will be deemed to be possession on behalf of the others. It was further held in paragraph 9 of the report as under:- "9. In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied."

LAND REFORMS ACT AND ADVERSE POSSESSION

'Vidya Devi alias Vidyavati (Dead) by Lrs. Vs. Prem Prakash & Others', MANU/SC/0345/1995 : 1995(4) SCC 496

which was emanating from the tenancy and land laws arising out of the Delhi Land Reforms Act of 1954, wherein, the question was pertaining to the Suit for partition of a joint holding by a co-

bhumidhar and the question involved was as to whether the said Suit for partition will have any implications as far as the period of limitation is prescribed for the plea of acquisition of the title over the property by adverse possession by co-sharer under Delhi Land Reforms Act, wherein, it has been held out that the theory of adverse possession is not available to the bhumidhar against whom such suit is filed who belongs to be the co-bhumidhar of the land in question. A reference may be had to paragraph 27, 28 and 34 of the said judgment, which too has denounced that a co-tenure holder or a family member of the property cannot claim a right over the same by way of an adverse possession, despite of the fact that the principles of limitation as contained under Article 65 of the Limitation Act would be creating a right over the property, but the said principle of creation of land hold rights by applying law of limitation to claim right by adverse possession, the same will not apply where a claim of a right and its mutuality is foundationed on the basis of the expiry of the period of limitation, which is claimed on the basis of an adverse possession, but not as against the blood relationship or a co-tenure holder. The said principle has been widely dealt with in paragraph

5 to 7 of the said judgment, which is quoted hereunder:

"6. The short question which needs our consideration in this appeal relates to the correctness of the view taken by the Division Bench of the High Court in the impugned judgment as regards the applicability of section 67(d) of the DL Act to the facts of the present case and the direction given to the Revenue Assistant based on that view for framing an issue in the suit on 1st defendants title to the holding and referring the same to Civil Court for its finding under section 186(1) of the DL Act.

7. Section 67, insofar it is material, reads: "Extinction of the interest of a Bhumidhar - The interest of a Bhumidhar in his holding or any part thereof shall be extinguished -

(a) when he dies intestate leaving no heir entitled to inherit in accordance with the provisions of this Act.

(d) When he has been deprived of possession and his right to recover possession is barred by limitation."

DOCTRINE OF LISPENDENCY

T. Ravi and Ors. vs. B. Chinna Narasimha and Ors.: MANU/SC/0279/2017 - Supreme court upheld the findings of Trial court. The trial court in the aforesaid civil suit gave the following findings against the Plaintiff: (i) that the purchase was hit by doctrine of lis pendens so that they are not entitled for relief of injunction against the Defendants who are co-sharers as per the preliminary decree dated 24.11.1970 passed in the partition suit; (ii) it was also held that the possession of the Plaintiff could not be said to be a rightful possession. It is not open to the Plaintiff to claim right on the basis of sale deed on the ground that they were not parties to the partition suit. It was also held that whatever their vendors would get in the suit for partition, to that extent they would be entitled to and they could not claim rights over the entire property; (iii) the plea of adverse possession was also negated by the trial court on the ground that the purchase was during lis pendens and there was no pleading or evidence regarding adverse possession.

Thomson Press (India) Ltd. v. Nanak Builders and Investors Pvt. Ltd. and Ors. MANU/SC/0192/2013 : (2013) 5 SCC 397, Court has laid down thus: 26. It would also be

worth discussing some of the relevant laws in order to appreciate the case on hand. Section 52 of the Transfer of Property Act speaks about the doctrine of lis pendens. Section 52 reads as under:

52. Transfer of property pending suit relating thereto.-- During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under the decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

Explanation.--For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree

or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

It is well settled that the doctrine of lis pendens is a doctrine based on the ground that it is necessary for the administration of justice that the decision of a court in a suit should be binding not only on the litigating parties but on those who derive title pendente lite. The provision of this Section does not indeed annul the conveyance or the transfer otherwise, but to render it subservient to the rights of the parties to a litigation.

Discussing the principles of lis pendens, the Privy Council in **Gouri Dutt Maharaj v. Sk. Sukur Mohammed MANU/PR/0064/1948 : AIR 1948 PC 147** observed as under: (IA p. 170) ...The broad purpose of Section 52 is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. The applicability of the Section cannot depend on matters of proof or the strength or weakness of the case on one side or the other in bona fide proceedings. To apply any such test is to misconceive the object of the enactment and, in

the view of the Board, the learned Subordinate Judge was in error in this respect in laying stress, as he did, on the fact that the agreement of 8-6-1932, had not been registered.

In Kedar Nath Lal v. Ganesh Ram MANU/SC/0445/1969 : AIR 1970 SC 1717,

Court referred the earlier decision in Samarendra Nath Sinha v. Krishna Kumar Nag MANU/SC/0217/1966 : AIR 1967 SC 1440 and observed: The purchaser pendente lite under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind the person deriving his right, title and interest from or through him. This principle is well illustrated in Radhamadhub Holder v. Monohur Mookerji MANU/PR/0015/1888 : (1887-88) 15 IA 97 where the facts were almost similar to those in the instant case. It is true that Section 52 strictly speaking does not apply to involuntary alienations such as court sales but it is well established that the principle of lis pendens applies to such alienations.

Rajender Singh v. Santa Singh MANU/SC/0342/1973 : AIR 1973 SC 2537 and Their

Lordships with approval of the principles laid down in *Jayaram Mudaliar v. Ayyaswami* MANU/SC/0507/1972 : (1972) 2 SCC 200 reiterated: 15. The doctrine of *lis pendens* was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending, by private dealings which may remove the subject-matter of litigation from the ambit of the court's power to decide a pending dispute or frustrate its decree. Alienees acquiring any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of *lis pendens* is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property, which are the subject-matter of a litigation, to the power and jurisdiction of the court so as to prevent the object of a pending action from being defeated.

A. Nawab John v. V.N. Subramaniam
MANU/SC/ 0516/2012 : (2012) 7 SCC 738,
 laying down thus: 18. It is settled legal position that the effect of Section 52 is not to render

transfers effected during the pendency of a suit by a party to the suit void; but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The pendente lite purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the court.

12. ...The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The Section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court." (Sanjay Verma v. Manik Roy MANU/SC/5371/2006 : (2006) 13 SCC 608)

Sanjay Verma v. Manik Roy and Ors. MANU/SC/5371/2006 : (2006) 13 SCC 608, in which Court laid down: 10. Bibi Zubaida Khatoon case MANU/SC/0886/2003 : (2004) 1 SCC 191 on which learned Counsel for the Respondents had placed reliance in fact goes

against the stand of the Respondents. Though a casual reading of para 9 supports the stand taken by the Respondents, it is to be noted that the factual position was entirely different. In fact a cross-suit had been filed in the suit in that case. The Respondents being transferees pendente lite without leave of the court cannot as of right seek impleadment in the suit which was in the instant case pending for a very long time. In fact in para 10 of the judgment this Court has held that there is absolutely no Rule that the transferee pendente lite without leave of the court should in all cases contest the pending suit.

In Sarvinder Singh v. Dalip Singh MANU/SC/1212/1996 : (1996) 5 SCC 539 it was observed in para 6 as follows: 6. Section 52 of the Transfer of Property Act envisages that: During the pendency in any court having authority within the limits of India ... of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under the decree or order which may be made therein, except under

the authority of the court and on such terms as it may impose. It would, therefore, be clear that the Defendants in the suit were prohibited by operation of Section 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the Appellant except with the order or authority of the court. Admittedly, the authority or order of the court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of lis pendens by operation of Section 52. Under these circumstances, the Respondents cannot be considered to be either necessary or proper parties to the suit." The principles specified in Section 52 of the TP Act are in accordance with equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit. The principle of lis pendens embodied in Section 52 of the TP Act being a principle of public policy, no question of good faith or bona fide arises. The principle underlying Section 52 is that a litigating party is

exempted from taking notice of a title acquired during the pendency of the litigation. The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The Section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court."

Jagan Singh v. Dhanwanti

MANU/SC/0046/2012 : (2012) 2 SCC 628,

wherein Court has laid down the legal principle that Under Section 52 of the Transfer of Property Act, 1882, the 'lis' continues so long as a final decree or order has not been obtained from the Court and a complete satisfaction thereof has not been rendered to the aggrieved party contesting the civil suit. It has been further held by this Court that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail.

32. The broad principle underlying Section 52 of the TP Act is to maintain the status quo unaffected by the act of any party to the litigation

pending its determination. Even after the dismissal of a suit, a purchaser is subject to lis pendens, if an appeal is afterwards filed, as held in *Krishanaji Pandharinath v. Anusayabai* MANU/MH/0141/1959 : AIR (1959) Bom 475. In that matter the Respondent (original Plaintiff) had filed a suit for maintenance against her husband and claimed a charge on his house. The suit was dismissed on 15.7.1952 under Order 9 Rule 2, of the Code of Civil Procedure 1908, for non-payment of process fee. The husband sold the house immediately on 17.7.1952. The Respondent applied for restoration on 29.7.1952, and the suit was restored leading to a decree for maintenance and a charge was declared on the house. The Plaintiff impleaded the Appellant to the darkhast as purchaser. The Appellant resisted the same by contending that the sale was affected when the suit was dismissed. Rejecting the contention the High Court held in para 4 as follows: ...In Section 52 of the Transfer of Property Act, as it stood before it was amended by Act 20 of 1929, the expression 'active prosecution of any suit or proceeding' was used. That expression has now been omitted, and the Explanation makes it abundantly clear that the 'lis' continues so long as a final decree or order has not been obtained

and complete satisfaction thereof has not been rendered. At p. 228 in Sir Dinshah Mulla's "Transfer of Property Act", 4th Edn., after referring to several authorities, the law is stated thus:

Even after the dismissal of a suit a purchaser is subject to 'lis pendens', if an appeal is afterwards filed.

If after the dismissal of a suit and before an appeal is presented, the 'lis' continues so as to prevent the Defendant from transferring the property to the prejudice of the Plaintiff, I fail to see any reason for holding that between the date of dismissal of the suit under Order 9 Rule 2 of the Code of Civil Procedure and the date of its restoration, the 'lis' does not continue.

33. It is relevant to note that even when Section 52 of TP Act was not so amended, a Division Bench of Allahabad High Court had following to say in *Moti Chand v. British India Corpn. Ltd.* MANU/UP/0240/1931 : AIR (1932) All 210: 10, ...The provision of law which has been relied upon by the Appellants is contained in Section 52, TP Act. The active prosecution in this Section must be deemed to continue so long as the suit is pending in appeal, since the proceedings in the appellate court are merely

continuation of those in the suit ...'(see Gobind Chunder Roy v. Guru Churn Kurmocar MANU/WB/0113/1887 : ILR 1988 15 Cal. 94).

34. If such a view is not taken, it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail. The Explanation to this Section lays down that the pendency of a suit or a proceeding shall be deemed to continue until the suit or a proceeding is disposed of by final decree or order, and complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

35. In the present case, it would be canvassed on behalf of the Respondent and the applicant that the sale has taken place in favour of the applicant at a time when there was no stay operating against such sale, and in fact when the second appeal had not been filed. We would however, prefer to follow the dicta in Krishanaji Pandharinath MANU/MH/0141/1959 : AIR 1959 Bom 475 to cover the present situation under the principle of lis pendens since the sale was executed at a time when the second appeal had

not been filed but which came to be filed afterwards within the period of limitation. The doctrine of lis pendens is founded in public policy and equity, and if it has to be read meaningfully such a sale as in the present case until the period of limitation for second appeal is over will have to be held as covered Under Section 52 of the TP Act.

Vinod Seth v. Devinder Bajaj MANU/SC /0424/2010 : (2010) 8 SCC 1 in which Court has laid down that the doctrine of lis pendens does not affect the conveyance by a party to the suit but only renders it subservient to the rights of other parties to the litigation. Section 52 will not therefore render a transaction void. This Court has laid down thus: 42. It is well settled that the doctrine of lis pendens does not annul the conveyance by a party to the suit, but only renders it subservient to the rights of the other parties to the litigation. Section 52 will not therefore render a transaction relating to the suit property during the pendency of the suit void but render the transfer inoperative insofar as the other parties to the suit. Transfer of any right, title or interest in the suit property or the consequential acquisition of any right, title or

interest, during the pendency of the suit will be subject to the decision in the suit.

43. The principle underlying Section 52 of the TP Act is based on justice and equity. The operation of the bar Under Section 52 is however subject to the power of the court to exempt the suit property from the operation of Section 52 subject to such conditions it may impose. That means that the court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject-matter of the suit without being subjected to the rights of any part to the suit, by imposing such terms as it deems fit. Having regard to the facts and circumstances, we are of the view that this is a fit case where the suit property should be exempted from the operation of Section 52 of the TP Act, subject to a condition relating to reasonable security, so that the Defendants will have the liberty to deal with the property in any manner they may deem fit, in spite of the pendency of the suit.

Jayaram Mudaliar v. Ayyaswami and Ors.
MANU/SC/0507/1972 : (1972) 2 SCC 200: 47.

It is evident that the doctrine, as stated in Section 52, applies not merely to actual transfers or rights

which are subject-matter of litigation but to other dealings with it "by any party to the suit or proceeding, so as to affect the right of any other party thereto". Hence, it could be urged that where it is not a party to the litigation but an outside agency, such as the tax collecting authorities of the Government, which proceeds against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by Section 52. Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot resile from or disown the transaction impugned before the Court dealing with the litigation, the Court may bind them to their own acts. All these are matters which the Court could have properly considered. The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward.

T.G. Ashok Kumar v. Govindammal and Anr.
MANU/SC/1044/2010 : (2010) 14 SCC 370 in which it has been laid down that in the case of

pendente lite transfer of property during the pendency of the partition suit held by the other co-owner, sale pendente lite is not void but subject to the decree in partition suit. The title of the vendee would depend upon the decision in the partition suit in regard to the title of vendor. If the vendor has title only in respect of a part of the property, vendee's title would be saved only to that extent. The sale of the remaining portion which fell to the share of other co-owner would be ineffective. On the basis of the aforesaid decision, Bala Mallaiah, his heirs and purchasers can get what can be allotted to vendor Hamid Ali Khan's share. That precisely is the preliminary as well as the final decree.

14. On the other hand, if the title of the pendente lite transferor is recognised or accepted only in regard to a part of the transferred property, then the transferee's title will be saved only in regard to that extent and the transfer in regard to the remaining portion of the transferred property to which the transferor is found not entitled, will be invalid and the transferee will not get any right, title or interest in that portion.

15. If the property transferred pendente lite, is allotted in entirety to some other party or parties or if the transferor is held to have no right

or title in that property, the transferee will not have any title to the property. Where a co-owner alienates a property or a portion of a property representing to be the absolute owner, equities can no doubt be adjusted while making the division during the final decree proceedings, if feasible and practical (that is, without causing loss or hardship or inconvenience to other parties) by allotting the property or portion of the property transferred pendente lite, to the share of the transferor, so that the bona fide transferee's right and title are saved fully or partially.

Khemchand Shankar Chaudhari and Anr. v. Vishnu Hari Patil and Ors.
MANU/SC/0168/1982 : (1983) 1 SCC 18 in which Court has laid down thus:

6. Section 52 of the Transfer of Property Act no doubt lays down that a transferee pendente lite of an interest in an immovable property which is the subject-matter of a suit from any of the parties to the suit will be bound insofar as that interest is concerned by the proceedings in the suit. Such a transferee is a representative in interest of the party from whom he has acquired that interest. Rule 10 of Order 22 of the Code of Civil Procedure clearly recognises the right of a

transferee to be impleaded as a party to the proceedings and to be heard before any order is made. It may be that if he does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard, he has got to be so impleaded and heard. He can also prefer an appeal against an order made in the said proceedings but with the leave of the appellate court where he is not already brought on record. The position of a person on whom any interest has devolved on account of a transfer during the pendency of any suit or a proceeding is somewhat similar to the position of an heir or a legatee of a party who dies during the pendency of a suit or a proceeding, or an Official Receiver who takes over the assets of such a party on his insolvency. An heir or a legatee or an Official Receiver or a transferee can participate in the execution proceedings even though their names may not have been shown in the decree, preliminary or final. If they apply to the court to be impleaded as parties they cannot be turned out. The Collector who has to effect partition of an estate Under Section 54 of the Code of Civil Procedure has no doubt to divide it in accordance with the decree sent to him. But if a party to such

a decree dies leaving some heirs about whose interest there is no dispute should be fold up his hands and return the papers to the civil court? He need not do so. He may proceed to allot the share of the deceased party to his heirs. Similarly he may, when there is no dispute, allot the share of a deceased party in favour of his legatees. In the case of insolvency of a party, the Official Receiver may be allotted the share of the insolvent.

In the case of transferees pendente lite also, if there is no dispute, the Collector may proceed to make allotment of properties in an equitable manner instead of rejecting their claim for such equitable partition on the ground that they have no locus standi. A transferee from a party of a property which is the subject-matter of partition can exercise all the rights of the transferor. There is no dispute that a party can ask for an equitable partition. A transferee from him, therefore, can also do so. Such a construction of Section 54 of the Code of Civil Procedure advances the cause of justice. Otherwise in every case where a party dies, or where a party is adjudicated as an insolvent or where he transfers some interest in the suit property pendente lite the matter has got to be referred back to the civil court even though

there may be no dispute about the succession, devolution or transfer of interest. In any such case where there is no dispute if the Collector makes an equitable partition taking into consideration the interests of all concerned including those on whom any interest in the subject-matter has devolved, he would neither be violating the decree nor transgressing any law. His action would not be ultra vires. On the other hand, it would be in conformity with the intention of the legislature which has placed the work of partition of lands subject to payment of assessment to the Government in his hands to be carried out "in accordance with the law (if any) for the time being in force relating to the partition or the separate possession of shares.

In Jayaram Mudaliar v. Ayyaswami and Ors.
MANU/SC/0507/1972 : (1972) 2 SCC 200, it has been laid down thus:

47. It is evident that the doctrine, as stated in Section 52, applies not merely to actual transfers or rights which are subject-matter of litigation but to other dealings with it "by any party to the suit or proceeding, so as to affect the right of any other party thereto". Hence, it could be urged that where it is not a party to the

litigation but an outside agency, such as the tax collecting authorities of the Government, which proceeds against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by Section 52. Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot resile from or disown the transaction impugned before the Court dealing with the litigation, the Court may bind them to their own acts. All these are matters which the Court could have properly considered. The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward.

48. In the case before us, the Courts had given directions to safeguard such just and equitable claims as the purchaser-Appellant may have obtained without trespassing on the rights of the Plaintiff-Respondent in the joint property involved in the partition suit before the Court. Hence, the doctrine of lis pendens was correctly applied.

In Marirudraiah and Ors. v. B. Sarojamma and Ors. MANU/SC/0516/2009 : (2009) 12 SCC 710, a Constitution Bench Court set aside an order passed by the High Court directing allotment of Item No. 9 sold pendente lite to purchaser and compensation to the co-sharers of his predecessor in interest in terms of money based on the market value of the property which was alienated to him. This Court has laid down that courts are not supposed to encourage pendente lite transactions, and regularizing their conduct by showing equity in their favour at the cost of co-sharers.

In **Kammana Sambamurthy (Dead) by L.Rs. v. Kalipatnapu Atchutamma (Dead) and Ors. MANU/SC/0809/2010 : (2011) 11 SCC 153**, Court has laid down that when the vendor was having only 1/2 share in the property but executed the contract for sale of the entire property, the vendee would be entitled to decree for specific performance only to the extent of 1/2 share of the vendor and not beyond it.

PREVIOUS POSSESSION AS TENANT AND SUBSEQUENT SALE AGREEMENT

A.K. Sunder vs. V. Srinivas and Ors.:

MANU/KA /3569/2015 - Placing reliance on the decision of the Hon'ble Supreme Court reported in AIR 1951 SC page 186, the learned counsel for the petitioner/first defendant submitted that the lease was taken in the year 1957. Possession continues with the first defendant. In the final decree proceedings, there is no evidence of taking possession and nothing is produced to show that possession was taken. In view of sale agreement there is a merger of tenancy rights with higher rights due to part performance. Placing reliance on the decision of the Hon'ble Supreme Court reported in MANU/SC/0084/1952 : AIR 1956 SC page 12, the learned counsel for the petitioner/first defendant submitted that the advance money is paid pursuant to the sale agreement and there is a recital in the receipts about the agreement which constitutes a written sale agreement. Further Placing reliance on the decision of the Hon'ble Supreme Court reported in MANU/SC/0019/1968 : AIR 1968 SC page 1028, the learned counsel for the petitioner/first defendant submitted that for a sale agreement two things are required i.e., fixation of price and consideration. In the present case, consideration was agreed and

Chokkanathan has issued receipts. Therefore, it constitutes sale agreement..... Further placing reliance on the decision of the Hon'ble Supreme Court reported in MANU/SC/0139/1968 : AIR 1968 SC page 794, the learned counsel for the petitioner/first defendant submitted that receipts show payment of rents and the petitioner is in possession under section 53A of the T.P. Act and it can be used as a defence. Therefore, the lessor cannot claim any rights. Placing reliance on the decision of the Hon'ble Supreme Court reported in MANU/SC/0225/1997 : (1996) 6 SCC page 373, the learned counsel for the petitioner/first defendant submitted that it is open for the tenant to set up a plea that the partition was behind the back of the petitioner and it will take away the valuable rights of the petitioner. Hon'ble Supreme Court reported in MANU/SC/0564/2002 : AIR 2002 SC page 2562, the learned counsel for the petitioner/first defendant submitted that the sale agreement is evidenced from the recitals in the receipt itself. The tenant is already in possession. The amount paid by means of advance was meant to purchase the property. The leasehold rights have merged with higher rights. In view of section 111(d), the lesser rights cease to exist and merged

with the higher rights which is not considered by the Trial Court. Placing reliance on the decisions reported in MANU/TN/0343/1979 : AIR 1979 Madras page 47, MANU/RH/0008/1961 : AIR 1961 Rajasthan page 18 and MANU/SC/0326/1973 : AIR 1973 SC page 2256, the learned counsel for the petitioner/first defendant submitted that if the tenant is already in possession based on the written agreement of lease and if the lessor receives further amount even on the basis of oral agreement and it is evidenced by the receipt, the tenant is entitled to invoke section 53A of the Transfer of Property Act. ... Placing reliance on the decisions of the Hon'ble Supreme Court reported in MANU/SC/0793/1999 : AIR 2000 SC page 573, MANU/SC/1097/2003 : (2004) 3 SCC page 711 and (2010) 1 page 287, the learned counsel for the petitioner/first defendant submitted that the advance amount paid under the agreement to T.N. Chokkanathan as a member of the joint family would be a statutory charge in terms of section 55(6)(b) of the Transfer of Property Act. Placing reliance on the decision of the Hon'ble Supreme Court reported in MANU/SC/0588/1971 : AIR 1971 SC page 2548, the learned counsel for the petitioner/first

defendant submitted that the burden of proving that the document is forged one is on the person who denies the document. The contents of the document need not be proved. Placing reliance on the decision reported in MANU/TN/0423/1975 : AIR 1976 Madras page 70, the learned counsel for the petitioner/first defendant submitted that the compromise decree is collusive and the family members were aware of the sale agreement between the petitioner and Chokkanathan and therefore, the impugned judgment and decree cannot be sustained in law.

EVICITION SUIT AGAINST TENENT BY CO OWNER

A.K. Sunder vs. V. Srinivas and Ors.:
MANU/KA /3569/2015 - Placing reliance on the decision reported in MANU/KA/8105/2006 : ILR 2006 Karnataka page 2466, the learned counsel for the respondents 1 to 4 submitted that as per the family arrangement, the property has fallen to the share of the plaintiffs. The petitioner has not denied that he is the tenant. Therefore, it is not open for the tenant to contend that the plaintiffs have no locus standi to file the ejectment

suit..... Placing reliance on the decision of the Hon'ble Supreme Court reported in MANU/SC/0289/1988 : AIR 1988 SC page 1365, the learned counsel for the respondents submitted that on partition, the suit schedule property has come to the share of the plaintiffs. Therefore, it is not necessary to implead the other sharers. The co-owners can file a suit for ejection. Further Placing reliance on the decision of the Hon'ble Supreme Court reported in MANU/KA/0355/2007 : ILR 2007 Karnataka page 379, the learned counsel for the respondents submitted that one co-heir of the deceased landlord could sue for eviction in the absence of other co-heirs who do not have any objection. One of the co-owners is competent to serve notice terminating tenancy and competent to maintain a suit under section 106 of the Transfer of Property Act. Placing reliance on the decision reported in MANU/KA/1406/2010 : ILR 2011 Karnataka page 229, the learned counsel for the respondents submitted that Small Cause Courts have jurisdiction to take cognizance of not only a suit for ejectment, but also a suit for ejectment with a prayer for recovery of mesne profits or damages. Further Placing reliance on the decision of the Patna High Court reported

in MANU/BH/0001/1993 : AIR 1993 Patna page 1, the learned counsel for the respondents submitted that plea of part performance is not available to a tenant as written contract is sine qua non for applicability of doctrine of part performance. In the absence of a written agreement, the party cannot be allowed to raise the plea of part performance.

RELIABLE METHOD TO TRACE PENDING LITIGATION BY PURCHASER STRESSED

T.G. Ashok Kumar v. Govindammal and Anr.
MANU/SC/1044/2010 : (2010) 14 SCC 370

13. But a prospective purchaser has no way of ascertaining whether there is any suit or proceeding pending in respect of the property, if the person offering the property for sale does not disclose it or deliberately suppresses the information. As a result, after parting with the consideration (which is many a time the life time savings), the purchaser gets a shock of his life when he comes to know that the property purchased by him is subject to litigation, and that it may drag on for decades and ultimately deny him title to the property. The pendente lite

purchaser will have to wait for the litigation to come to an end or he may have to take over the responsibility of conducting the litigation if the transferor loses interest after the sale. The purchaser may also face objections to his being impleaded as a party to the pending litigation on the ground that being a lis pendens purchaser, he is not a necessary party. All these inconveniences, risks, hardships and misery could be avoided and the property litigations could be reduced to a considerable extent, if there is some satisfactory and reliable method by which a prospective purchaser can ascertain whether any suit is pending (or whether the property is subject to any decree or attachment) before he decides to purchase the property.

TESTAMENTARY DISPOSITION OF PROPERTY

Justice V. Ramasubramanian and Justice Anis of High court at Hyderabad for Telangana, in case of R. Seethamma vs. M. Thimma Reddy: MANU/AP/ 0233/2017 (DB) - A careful look at Section 6(1) would show that by the amendment brought forth by Central Act No. 39/2005, the daughter of a coparcener in a joint Hindu family governed by the Mitakshara law was made a

coparcener by birth, in the same manner as the son and was vested with the same rights and obligations in respect of the coparcenary property, as a son would have. But the proviso to sub-section (1) makes it clear that nothing therein would affect or invalidate any disposition or alienation including any partition or testamentary disposition which had taken place before 20.12.2004.

Two expressions appearing in the proviso to sub-section (1) of Section 6 are of significance. They are (1) disposition and (2) alienation. These two expressions are followed by a rider to the effect that any partition or testamentary disposition is also included within the purview of these two expressions.

While we would have no difficulty in understanding the purport of the expression "alienation", there is some difficulty in expounding the meaning of the expression "disposition". This difficulty is compounded by the inclusion of "testamentary disposition", within the meaning of the expression "disposition". Normally one would understand the expression "testamentary disposition" to mean the execution of a testamentary instrument, the bequest under which is to take effect in future,

while alienation takes place in praesenti. Therefore the confusion or difficulty posed by the proviso to Section 6(1) is as to whether it includes testamentary disposition that has come into effect due the death of the testator before the crucial date or bequest which has not yet come into effect, due to the testator being alive as on the crucial date.

Supreme Court in *Prakash v. Phulavati* MANU/SC/1241/2015 : (2016)2 SCC 36. The Supreme Court held therein that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters were born. The Supreme Court further held that disposition or alienation including partition, which may have taken place before 20.12.2004 as per the law applicable prior to the said date, will remain unaffected.

In *Prakash*, the Supreme Court considered some of its earlier decisions in which a tricky question similar to the one arising in the present case came up for consideration. For instance, in *S. Sai Reddy v. S. Narayana Reddy* MANU/SC/0788/1991 : (1991)3 SCC 647, a preliminary decree for partition was passed in favour of a son against his father. But before a

final decree could be passed, an amendment was introduced by the State of Andhra Pradesh under Hindu Succession (A.P. Amendment) Act, 1986, allowing a share to the unmarried daughters. Therefore, a question arose as to whether the share allotted to the son under the preliminary decree would undergo a change or not. The Court upheld the right of the unmarried daughters on the ground that the rights of the son had not crystallized. But the Supreme Court pointed out in Prakash that the decision in S. Sai Reddy did not arise out of a case where the shares of the parties stood already crystallized by operation of law. Moreover, the A.P. amendment Act did not include under Section 29-A, a provision similar to the proviso to Section 6(1), introduced by the 2005 Central Amendment. Clause (iv) of Section 29A merely covered, marriage or partition effected before the commencement of the A.P. Amendment Act, 1986. There was no inclusion of "testamentary disposition" under the exclusion clause, in the A.P. Amendment Act.

Heavy reliance is placed by the learned counsel for the respondent/defendant on the judgment of the Supreme Court in Pavitri Devi v. Darbari Singh MANU/SC/0577/1993 : (1993)4 SCC 392, in support of his contention that the

expression 'testamentary disposition' includes the mere execution of a Will. In the said case before the Supreme Court, what was in question was only a gift deed and not a Will. Therefore the expression "testamentary disposition" appearing in Section 30(1) of the Hindu Succession Act, 1956 had no application to the case before the Supreme Court. But nevertheless, the Supreme Court referred to the expression "testamentary disposition" appearing in Section 30 (1) and went into the scope and ambit of the said expression in paragraph 3. Paragraph-3 of the said decision reads as follows: "Webster in Comprehensive' Dictionary in international edition at page 1298, stated the meaning of the word 'testamentary' thus: (i) derived from, bequeathed by, or set forth in a will; (ii) appointed or provided by, or done in accordance with, a will; (iii) pertaining to a will, or to the administration or settlement of a will, testamental. In the Law Lexicon by P. Ramanatha Aiyar, reprint edition 1987 at P. 1271 testamentary instrument was defined to mean a "testamentary instrument" is one which declares the present will of the maker as to the disposal of his property after death, without attempting to declare or create any rights therein prior to such event. Black's Law Dictionary [6th Ed. 1991]

defines "testamentary disposition" at page 1475 thus -"the passing of property to another upon the death of the owner. A disposition of property by way of a gift, Will or deed which is not to take effect unless the grantor dies or until that event." Section 123 of the Transfer of Property Act provides disposition by a gift which takes effect even during the lifetime of the donor and effective as soon as it is registered and normally given possession of the property therein. Section 30 of the Act is merely declaratory of the law not only as it stood before the Act, but as it now stands modified by the provisions of the Act. It declares that any Hindu may dispose of by a will or other testamentary disposition his property or interest in coparcenary which is capable of being so disposed of by him in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force applicable to the Hindus. Its explanation is really material. The testamentary disposition, therefore, would mean disposition of the property which would take effect after the death, instead of co-intestine on the execution of the document. A testamentary disposition is generally effected by a will or by a codicil which means an instrument made in relation to a will extending, altering or

adding to its disposition arid is to be deemed to form part of the will. Will as defined in Section 2(h) of the Indian Succession Act, 1925 means legal declaration of the intention of the testator with respect to his property which he desired to carry into effect after his demise. It limits alienation intra vivos. While the gift being a disposition in presenting, it becomes effective on due execution and registration and generally delivery of the possession. Section 30 makes it clear that testamentary disposition under the Act would be dealt with in accordance with the Indian Succession Act. Section 55 and Schedule 3 of the said Act prescribe procedure effecting succession amongst Hindus by testamentary succession by will or codicil. Section 30 employs non-obstinate clause and excludes from the operation of pre-existing or any other law applicable to coparcenary property governed by Mitakshara law and introduced fiction in its explanation and empowers the Hindu male or female to dispose of his or her interest by a will or any other testamentary disposition known to law-which would be effective after the demise. It would, therefore, be difficult to envisage that disposition by gift partakes the character of testamentary succession under Section 30 of the Act.

Though the Supreme Court, in Pavitri Devi, expounded the meaning of the expression 'testamentary disposition' and gave it a meaning, we do not think that we can take the decision in Pavitri Devi as an authoritative pronouncement on the issue now before us, for two reasons. They are:

"(a) As we have pointed out in the preceding paragraph, the Supreme Court was concerned in Pavitri Devi with a gift deed and not a Will. A gift is actually a transfer of property, while a Will is not. Therefore, the interpretation given by the Supreme Court in Pavitri Devi to the expression "testamentary disposition" is actually out of context and did not arise out of the lis before the Supreme Court. Hence, the decision in Pavitri Devi cannot be taken to be the last word on the interpretation of the expression found in the proviso to Section 6(1).

(b) By its very nature, a testamentary disposition is one which does not take effect and which does not become final, unless and until the testator dies. It is not only the bequest under Will, which is subject to various uncertainties, dependent upon the life and wish of the testator, but even the right of the testator to bequeath particular property may undergo change before he dies.

Take for instance a case where the testator begets a child after the execution of Will. If his undivided share in the joint family property had been the subject matter of the Will, his own share may undergo a change with the birth of a son after the execution of the Will. In peculiar cases it may even happen with the birth of a sibling to the testator. Therefore, a testamentary disposition can never be an actual disposition in the true sense of the term, since its coming into effect as well as the extent to which it takes effect, are always subject to the uncertainties of time and mind, apart from birth and death. As pointed out by the Supreme court in Mathai Samuel v. Eapen {MANU/SC/0996/2012 : (2012) 13 SCC 80}, a Will is merely a legal declaration of the testator's intention and its essential characteristic is its ambulatoriness and revocability."

Unfortunately, the word 'disposition' itself emerged from the English language and law and hence the manner in which law dictionaries have expounded the term, is in tune more with linguistics than with law. This is perhaps why the Supreme court pointed out in Goli Eswariah v. Commissioner of Gift Tax {MANU/SC/0258/1970 : AIR 1970 SC 1722} that the word 'disposition' is not a term of law, having a precise meaning and

that its meaning has to be gathered from the context in which it is used.

Black's Law Dictionary defines "disposition" to mean "the fact of transferring something to another's care or possession especially by deed or will; the relinquishing of property". The same dictionary defines "testamentary disposition" to mean "a disposition to take effect upon the death of the person making it, who retains substantially entire control of the property until death". P. Ramanatha Aiyar's the Law Lexicon (3rd Edition 2012) deals with the definition of the word "disposition" in a variety of circumstances. One of the several connotations given in the Law Lexicon is as follow: "The word disposition in relation to property means disposition made by deed or will and also disposition made by or under a decree or under order of a Court as the qualifying phrase used in Section 21(2), viz., including any transfer in execution of a decree or order of a Court, Tribunal or authority (Sanjay v. State of Maharashtra - MANU/SC/0200/1985 : AIR 1986 SC 414).

The right of a Hindu to dispose of his property by will or other testamentary disposition is recognised by Section 30 of the Hindu

Succession Act. It is that in Section 30, the expression "testamentary disposition" is used. A careful look at the manner in which Section 30 is worded would show two things, viz., - a) that a testamentary disposition could be either by way of will or otherwise; and b) that what is sought to be done through will or other testamentary disposition is considered by Section 30 to be a "disposal".

Interestingly the Oxford English Dictionary defines the word, whenever used as a noun in the branch of law, to mean "the distribution or transfer of property or money to someone especially by bequest". The origin and etymology of the word 'disposition', as indicated in Merriam Webster Dictionary shows that the word evolved in the 14th century from the Latin word 'Dispositio' and from the word 'disponere'. Though no disposition or disposal or distribution of property takes place at the time of execution of the Will, the word disposition has come to be associated even with testamentary instruments.

But the Proviso to section 6(1) does not merely use the expression 'testamentary disposition'. It starts with the word 'disposition', then proceeds to include 'testamentary disposition' within its ambit and then qualifies it

with the words "which had taken place". Therefore, we think that the proviso to Section 6(1) has to be split into 3 parts-

"(i) the first part containing the words "disposition or alienation"

(ii) the second part containing the words "including any partition or testamentary disposition" and

(iii) the third part containing the words "which had taken place before 20-12-2004."

Therefore, if a case is to be brought within the purview of the proviso to section 6(1), especially in relation to a Will, 2 things are to be proved namely (i) that there was a valid Will and (ii) that the disposition under the Will had taken place before the date specified. The disposition under Will would take place only when the testator dies and not otherwise. This is not only due to the very nature of testamentary disposition but also due to the fact that during the period between the date of execution of the Will and the date of death of the testator, many things may happen, even beyond the control of the testator, that would make the bequest invalid, wholly or partially. Therefore, the expression 'testamentary disposition' appearing in the proviso to section 6(1) should be understood to mean only a Will

which had taken come into effect before 20-12-2004. The words "which had taken place" should be understood to mean "which had taken effect".

There is one clue available in Section 6 itself, for anyone to come to the same conclusion as we have. It is in sub-section (5) and the Explanation following the same. Sub-section (5) of section 6 and the Explanation following the same, read as follow: "(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. Explanation: For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a Court."

While the proviso under sub-section (1) of section 6 excludes from the operation of sub-section (1), any alienation or disposition, including any partition or testamentary disposition that has taken place before the appointed day, sub-section (5) excludes from the operation of section 6 in entirety, a partition made by a registered deed repartition effected by a decree of court. It is important to note that the proviso to sub-section (1) is confined in its applicability to sub-section (1). In contrast, the

prescription contained in sub-section (5) and the Explanation there under, are applicable to the entirety of section 6.

The prescription contained in sub-section (5) and the Explanation following the same, give a clear indication to the fact that the law makers did not want parties to plead oral partition effected before the appointed day, for the purpose of defeating the right created by the Amendment Act. An oral partition or a Memorandum recording past partition, had always been accepted by courts, subject to proof. But the Explanation to section 6, makes it clear that unless a partition had been effected by a registered deed or by a decree of court, the benefit of subsection (5) may not be available.

It is needless to point out that in a partition, mutual transfers take place in presenti. Even then, the benefit of sub-section (5) will not be available unless the partition had been effected by a registered deed or a decree of court. Therefore, the intention of the law makers is very clear to the effect that no one should be allowed to create documents, after the advent of the Amendment Act of 2005, to defeat the rights conferred by the amendment. In order to prevent the creation of ante dated documents, the

Amendment ensures that even reliance upon such documents is impermissible. In such circumstances, if the expression "testamentary disposition" is taken to mean the mere execution of a Will, the rights conferred by section 6 can be easily defeated by parties by setting up a Will, which is not required to be compulsorily registered.

Therefore, we are of the considered view that in cases where the testator was alive as on 20-12-2004, the Will, even if any executed by him genuinely before the said date, would not make it a case of "testamentary disposition which had taken place", so as to make the case fall under the proviso and to take it out of the application of section 6(1). In other words, a case will fall under the proviso to section 6(1), only if 2 things had taken place before 20-12-2004 namely (i) execution of a Will and (ii) the death of the testator. The execution of the Will before 20-12-2004 alone is not sufficient to take a case out of the operation of section 6(1), as no disposition under the Will would have taken place, if the testator was alive. As pointed by the Supreme court in *S. Rathinam v. Mariappan* {MANU/SC/7732/2007 : AIR 2007 SC 2134}, a Will of a man is the aggregate of his testamentary

intentions manifested in writing and is not a transfer.

Today there can be no dispute any longer about the proposition that to fall under the category of "a disposition that had taken place", a partition should have become final and conclusive and that even a preliminary decree for partition would not suffice. This is in view of at least 3 decisions of the Supreme court namely (1) S. Sai Reddy v. S. Narayana Reddy MANU/SC/0788/1991 : (1991) 3 SCC 647 (2) Prema v. Nanje Gowda MANU/SC/0607/2011 : (2011) 6 SCC 462 and (3) Ganduri Koteshwaramma v. Chakiri Yanadi MANU/SC/1216/2011 : (2011) 9 SCC 788. If a preliminary decree for partition itself cannot bring a case within the ambit of the proviso to section 6(1) or within the ambit of section 6(5), on account of the same not becoming final and conclusive, we do not know how the mere execution of a Will, without the death of the testator before the appointed day, can make the case come within the purview either of the proviso to section 6(1) or of section 6(5).

Supreme Court in the matter of **Jodh Singh v. Union of India and another**

MANU/SC/0426/1980 : (1980) 4 SCC 306

wherein Their Lordships have held that a special family pension granted to a widow in her capacity as widow could never form part of the estate of the deceased which could be disposed of by testamentary disposition and held as under:- "12. The real controversy is whether a special family pension admissible to a widow in her capacity as widow could ever form a part of the estate of the deceased which could be disposed of by testamentary disposition? Special family pension is payable to the widow on the death of the officer. It is not payable in his lifetime. What is not payable during lifetime of the deceased over which he has no power of disposition cannot form part of his estate. It is the event of his death that provides the eligibility qualification for claiming special family pension. Such qualifying event which can only occur on the death of the deceased and which event confers some monetary benefit on someone other than the deceased albeit related to the deceased, cannot form part of the estate of the deceased which he can dispose of by testamentary disposition. Therefore, it is unquestionably established that special family pension sanctioned to the widow of an officer of the Indian Air Force by the President of India

under Rule 74 of the Rules could not be subject-matter of testamentary disposition."

Samunda Bai and Ors. vs. General Public and Ors.: MANU/CG/0222/2019 - On the basis of

the principles of law laid down in the above-stated judgments, the following guiding principles of law relating to retiral benefits vis-à-vis their testamentary disposition emerges out:-

1. An employee has no power of testamentary disposition with respect to something which was not payable to him during his lifetime.
2. If the qualifying event/benefit occurs only on the death of the deceased while he is in service and due to this, some monetary benefits accrue, it would not form part of the estate of the deceased and the same cannot be disposed by testamentary disposition because there is an element of uncertainty of happening of event.
3. If the scheme and/or service Rules designate certain persons who are entitled to receive benefits out of the scheme, then no other person except those designated persons can be entitled to the said benefits.
4. If the employee makes no contribution to the benefit, he has no control over the same to dispose it by testamentary disposition.

5. If the scheme/Rules do not provide for nomination of any person during the lifetime of the deceased employee, he has no title to the same and it cannot be disposed by testamentary disposition.

S.N. Mathur vs. Board of Revenue and Ors.:

MANU/SC/0235/2009 - It is evident from the definition of "settlement" in Section 2 (24) of the Indian Stamp Act, 1899 that any non-testamentary disposition in writing, either of movable or immovable property made for any religious or charitable purpose is a settlement. The definition also makes it clear that even where there is no such disposition in writing, any instrument recording whether by way of declaration of trust or otherwise, the terms of any of such disposition will also be a settlement. It is thus evident that not only instruments which are non-testamentary dispositions of property for any religious or charitable purpose, but also declarations of trust which record the terms of such disposition, are settlements. Merely because an instrument answers the definition of a trust deed it does not cease to be a settlement deed for the purpose of stamp duty, if it answers

the definition of 'settlement' also. It is well-settled that all trusts are not settlements, and all settlements are not trusts, but a deed of trust can also be a deed of settlement.

S. Rathinam and Ors. vs. L.S. Mariappan and Ors.: MANU/SC/7732/2007 - Whether right to manage private temple and/or shebaitship can be subject-matter of testamentary disposition? - Will denotes testamentary document-It means legal declaration of testator with respect to his property desired by him to be carried into effect after his death-Will is not transfer but mode of devolution-Will being not transfer, bar contained in Section 6 (d) has no application-High Court right in holding that Will was valid in law-Trial Judge to pass appropriate order on handing over possession. Right to manage a temple can be a subject matter of testamentary succession.

CHAPTER-3

PARTITION - REUNION - REOPEN

WHAT IS PARTITION ?

Justice A Sen, Justice D Desai, Justice V Tulzapurkar of Supreme court of India in the case of **Kalyani (Dead) By Lrs. vs Narayanan And Ors. Reported in AIR 1980 SC 1173, 1980 Supp (1) SCC 298, 1980 2 SCR 1130** Partition is a word of technical import in Hindu law. Partition in one sense is a severance of joint status and coparcener of a coparcenary is entitled to claim it as a matter of his individual volition. In this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severally. Such an unequivocal intention to separate brings about a disruption of joint family status, at any rate, in respect of separating member or members and thereby puts an end to the coparcenary with right of survivorship and such separated member holds from the time of disruption of joint family as tenant-in-common. Such partition has an impact

on devolution of shares of such members. It goes to his heirs displacing survivorship. Such partition irrespective of whether it is accompanied or followed by division of properties by metes and bounds covers both a division of right and division of property . A disruption of joint family status by a definite and unequivocal indication to separate implies separation in interest and in right, although not immediately followed by a de facto actual division of the subject-matter. This may at any time, be claimed by virtue of the separate right. A physical and actual division of property by metes and bounds follows from disruption of status and would be termed partition in a broader sense.

MANU/WB/0145/1915 : (1916) ILR 43 Cal 504

Atrabannessa Bibi vs. Safatullah Mia: "..... The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners; or, as has some-times been said, partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer. Partition is thus the division made between several persons of joint lands, which belong to them as co proprietors, so that each becomes the sole owner of the part which is allotted to him; the

essence of partition is that the property is transformed into estates in severalty and one of such estates is assigned to each of the former occupants for his sole use and as his sole property."

MANU/AP/0118/1957 : AIR 1958 AP 647

Ramaprasada Rao Vs. Subbaramaiah: "23.

Partition is a legal process by which joint title and possession of co-owners of the entire joint property is converted into separate title and possession of each of the co-owners in respect of specific item or items. The joint property is divided in specie and each one of the erstwhile joint owners is put in possession of specific extent of property, which is allotted to his share. But many contingencies may be visualised when in practice the division by metes and bounds of every item of joint family property is not possible."

MANU/SC/0216/2004 : AIR 2004 SC 1893

Vasantiben Prahladi Nayak Vs. Somnath

Muljibhai Nayak: "6. partition is really a process by which a joint enjoyment of the property is transformed into an enjoyment severally. In the case of partition, each co-sharer

has an antecedent title and, therefore, there is no conferment of a new title."

WHAT CONSTITUTES PARTITIONS EXPLAINS SC

Justice A Sen, Justice D Desai, Justice V Tulzapurkar of Supreme court of India in the case of **Kalyani (Dead) By Lrs. vs Narayanan And Ors. Reported in AIR 1980 SC 1173, 1980 Supp (1) SCC 298, 1980 2 SCR 1130** However, in Hindu law qua joint family and joint family property the word 'partition' is understood in a special sense. If severance of joint status is brought about by a deed, a writing or an unequivocal declaration of intention to bring about such disruption, qua the joint family, it constitutes partition. To constitute a partition all that is necessary is a definite and unequivocal indication of intention by a member of a joint family to separate himself from the family. What form such intimation, indication or representation of such interest should take would depend upon the circumstances of each case. A further requirement is that this unequivocal indication of intention to separate must be to the knowledge of the persons affected by such

declaration. A review of the decisions shows that this intention to separate may be manifested in diverse ways. It may be by notice or by filing a suit. Undoubtedly, indication or intimation must be to members of the joint family likely to be affected by such a declaration.

Apex Court in **Shub Karan Bubna @ Shub Karan v. Sita Saran Bubna & Ors reported in (2009)9 SCC 689**, which are as follows:- 5. 'Partition' is a re-distribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them, into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severally.

6. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. 'Separation of share' is a species of 'partition'. When all co-owners get separated, it is a partition. Separation of shares/ s refers to a division where only one or only a few among several co-owners/ coparceners get separated,

and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.

7. In a suit for partition or separation of a share, the prayer is not only for declaration of plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues:

- (i) whether the person seeking division has a share or interest in the suit property/properties;
- (ii) whether he is entitled to the relief of division and separate possession; and
- (iii) how and in what manner, the property/properties should be divided by metes and bounds?

In a suit for partition or separation of a share, the Court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first

stage decision termed as 'decree' under Order 20 Rule 18(1) and termed as 'preliminary decree' under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject matter of the final decree under Rule 18(2).

Supreme Court in the matter of **Vasantiben Prahladji Nayak and others v. Somnath Muljibhai Nayak and others** **MANU/SC/0216/2004 : (2004) 3 SCC 376** has held that in case of partition each co-sharer has an antecedent title and therefore there is no conferment of a new title.

Constitution Bench of the Supreme Court in the matter of **V.N. Sarin v. Ajit Kumar Poplai and another** **MANU/SC/0360/1965 : AIR 1966 SC 432** has held that partition of joint Hindu family property is not a transfer of property and held as under:- "10. Having regard to the basic

character of joint Hindu family property, each coparcener has an antecedent title to the said property though its extent is not determined until partition takes place. That being so, partition really means that whereas initially all the coparceners had subsisting title to the totality of the property of the family jointly, that joint title is transformed by partition into separate titles of the individual coparceners in respect of several items of properties allotted to them respectively. As this is the true nature of a partition, the contention that partition of an undivided Hindu family property necessarily means transfer of the property to the individual coparceners cannot be accepted..... "

Theiry Santhanamal vs. Viswanathan and Ors.:
MANU/SC/0016/2018 - AIR 2018 SC 556 - A partition deed was entered into between the father and the sons. Later on, a suit was instituted by the father to nullify the said partition deed. While the suit was pending the father sold portions of suit property to first and second Respondents, the sons sold the same to the Appellants. The suit was decreed in the favor of the father. An appeal was preferred wherein the High Court held the sons as the absolute owner.

On appeal the Division Bench High Court reverses the order holding the father as the absolute owner. Since the father and the sons were governed by French Civil Law and as per the said French Code, customary Hindu Law was applicable and sons could not seek partition in the property of their father. Therefore, the Partition Deed was not a valid instrument. Hence present appeal was made. The present Court noted that even if French Code was not applied, the question cannot be answered with reference to the provisions of the Hindu Succession Act. Partition Deed can be entered into between the parties who are joint owners of the property. In case the father wanted to give property to his sons, of whom he was absolute owner, it could be done by will or by means of gift deed/donation etc. The present Court was of the opinion that the High Court was, therefore, right in observing that **such a partition deed has to be construed either a gift deed or family settlement.**

Any partition, even if effected, would, therefore, be inconsistent with the law. The father was, therefore, entitled to seek a declaration that he continued to be the absolute owner of the properties in question. The father sought such a declaration and obtained it. He submitted that in

the absence of any right or any entitlement in favour of the said Respondents under the customary Hindu law, the partition cannot create a right in their favour more particularly when the partition was set at naught at the instance of the father. If at all the partition was the product of the absolute right of the father, he had the authority to recall it. This he did through judicial process. In the aforesaid circumstances, the transfer or alienation of property effected by the father towards the family necessity would stand on a higher footing compared to the alienation made by the abovesaid Respondents without any authority whatsoever.

HINDU FATHER'S RIGHT TO PARTITION ANCESTRAL PROPERTY WITHOUT CONSENT OF SONS 1980 SC

Justice A Sen, Justice D Desai, Justice V Tulzapurkar of Supreme court of India in the case of **Kalyani (Dead) By Lrs. vs Narayanan And Ors. Reported in AIR 1980 SC 1173, 1980 Supp (1) SCC 298, 1980 2 SCR 1130** There was some controversy whether a Hindu father governed by Mitakshara law has a right to partition ancestral properties without the consent

of his sons. After referring to Mitakshara, I, ii, 2, Mayne in 'Hindu Law & Usage', 11th Edn. p. 547, states that a Hindu father under the Mitakshara Law can effect a partition between himself and his sons as also between his sons inter se without their consent and that not only can he partition the property acquired by himself but also the ancestral property. The relevant text may be extracted: The father has power to effect a division not only between himself and his sons but also between the sons inter se. The power extends not only to effecting a division by metes and bounds but also to a division of status. Similarly, in Mulla's Hindu Law, 14th Edn., p. 410 (para 323), it is stated that the father of a joint family has the power to divide the family property at any moment during his life time provided he gives his sons equal shares with himself, and if he does so, the effect in law is not only a separation of the father from the sons, but a separation of the sons inter se. The consent of the sons is not necessary for the exercise of that power. It, therefore, undoubtedly appears that Hindu father joint with his sons governed by Mitakshara law has the power to partition the joint family property at any moment during his life time.

**DEED OF PARTITION OR MEMORANDUM OF
PARTITION - ONLY MEMORANDUM OF PAST
EVENT IS ADMISSIBLE 2004 SC**

(2004) 11 SCC 391 (C.T.Ponnappa Vs State of Karnataka). “4. previous partition has been attempted to be proved by the document dated 2-4-1996, Exhibit P-46, wherein there is a recital that partition had already been effected by deed dated 31-3-1975, which has not been brought on record. It is not known whether the 1975 deed was a deed of partition or a memorandum of partition. In case partition was effected thereby, we do not know whether the same was registered or unregistered. If it was unregistered, the same could not be taken into consideration to prove partition between the parties as it was inadmissible in evidence. It was pointed out that Exhibit P-46 further shows that apart from the partition effected by deed dated 31-3-1975, parties partitioned their properties at least by the deed dated 2-4-1996, Exhibit P-46. Learned counsel very fairly could not contend that the said deed was a memorandum of partition. This document being not a registered one was inadmissible in evidence and, therefore, it cannot

be of any avail to the prosecution to prove partition amongst the two brothers.”

WHICH PARTITION DEED REQUIRES REGISTRATION 1988 SC

In **Roshan Singh v. Zile Singh - AIR 1988 SC 881, 1988 SCR (2) 1106** it is held that-- "It is well settled that while an instrument of partition which operates or is intended to operate as a declared volition constituting or severing ownership and causes a change of legal relation to the property divided amongst the parties to it, requires registration under Section 17(1)(b) of the Act, a writing which merely recites that there has in time past been a partition, is not a declaration of Will, but a mere statement of fact, and it does not require registration. The essence of the matter is whether the deed is a part of the partition transaction or contains merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well settled that a mere list of properties allotted at a partition is not an instrument of partition and does not require registration. Section 17(1)(b) lays down that a document for

which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right and there would be no necessity of registering such a document. Two propositions must therefore flow: (1) A partition may be effected orally; but it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it is not registered, Section 49 of the Act will prevent its being admitted in evidence. Secondly, evidence of the factum of partition will not be admissible by reason of Section 91 of the Evidence Act, 1872. (2) Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered, to prove the fact of partition." It is further held that : "It is also well settled that the document though unregistered can however be looked into for the limited purpose of establishing a severance in status, though that severance would ultimately affect the nature of the possession held by the members of the separated family as co-tenants.

The document in the instant case can be used for the limited and collateral purpose of showing that the subsequent division of the properties allotted was in pursuance of the original intention to divide. In any view, the document was a mere list of properties allotted to the shares of the parties."

To sum up the legal position

- (I) A family arrangement can be made orally.
- (II) If made orally, there being no document, no question of registration arises.
- (III) If the family arrangement is reduced to writing and it purports to create, declare, assign, limit or extinguish any right, title or interest of any immovable property, it must be properly stamped and duly registered as per the Indian Stamp Act and Indian Registration Act.
- (IV) Whether the terms have been reduced to the form of a document is a question of fact in each case to be determined upon a consideration of the nature of phraseology of the writing and the circumstances in which and the purpose with which it was written.
- (V) However, a document in the nature of a Memorandum, evidencing a family arrangement already entered into and had been prepared as a record of what had been agreed upon, in order

that there are no hazy notions in future, it need not be stamped or registered.

(VI) Only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess.

(VII) If the family arrangement is stamped but not registered, it can be looked into for collateral purposes.

(VIII) Whether the purpose is a collateral purpose, is a question of fact depends upon facts and circumstances of each case. A person can not claim a right or title to a property under the said document, which is being looked into only for collateral purposes.

(IX) A family arrangement which is not stamped and not registered cannot be looked into for any purpose in view of the specific bar in Section-35 of the Indian Stamp Act.

In **Maturi Pullaiah and another v. Maturi Narasimham and others AIR 1966 SC 1836**, the Hon'ble Supreme Court was dealing with a

document marked as Ex.B.1, similar to Ex.A.6 in this case. It provided for devolution of shares upon parties to it, on a future date. The Hon'ble Supreme Court extracted the relevant part of the document; as under: " The operative part of Ex.B-1 reads thus: "Therefore out of our family property, i.e., property which belongs to us at present and the property which we may acquire in future, the 1st party of us and his representatives shall take two shares while the 2nd party of us and his representatives shall take three shares. We both parties, having agreed that whenever any one of us or any one of our representatives desires at any time that the family properties should be partitioned according to the above mentioned shares and that till such time our family shall continue to be joint subject to the terms stipulated herein entered into this agreement." "It is common case that this document did not bring about a division by metes and bounds between the parties. It did not also affect the interest of the parties in immovable properties in praesenti. What in effect it is said was that the parties would continue to be members of the joint Hindu family and that Narasimha would manage the family properties as before, and that when they effect a partition in

future Venkatramaiah would get 2 shares and Narasimha would get 3 shares in the properties then in existence or acquired thereafter. There was neither a division in status nor a division by metes and bounds in 1939. Its terms relating to shares would come into effect only in the future if and when division took place. If so understood, the document did not create any interest in immovable properties in praesenti in favour of the parties mentioned therein. If so, it follows that the document was not hit by S.17 of the Indian Registration Act."

ORAL PARTITION OF PROPERTY IS A PERMISSIBLE MODE OF PARTITION WHICH CAN BE ADOPTED BY ANY UNDIVIDED HINDU FAMILY

It is well settled that oral partition of property is a permissible mode of partition which can be adopted by any undivided Hindu family as has been held in Karpagathachi's case **1965 AIR 1752, 1965 SCR (3) 335** and S. Sai Reddy v. S. Narayana Reddy, (1991)13 S.C.C. .647. Similar view has been expressed by the Supreme Court in Bakhtawar Singh v. Gurdev Singh, (1996)9 S.C.C. 370 and Hans Raj Agarwal v. CIT, (2003)2

S.C.C. 295=A.I.R. 2003 S.C. 2112. In Hans Raj Agarwal's case (supra). The Supreme Court has placed reliance on the view taken by it in the case of Nani Bai v. Gita Bai, A.I.R. 1958 S.C. 706 and also in the case of Roshan Singh v. Zile Singh, A.I.R. 1988 S.C. 881. As far back as in 1958 in Nani Bai v. Gita Bai, (1959 S.C.R. 479) it was held: (A.I.R. 1958 S.C. 706 para 11) "Partition in the Mitakshara sense may be only a severance of the joint status of the members of the coparcenary, that is to say, what was once a joint title has become a divided title though there has been no division of any properties by metes and bounds. Partition may also mean what ordinarily is understood by partition amongst co-sharers who may not be members of a Hindu coparcenary... For partition in the latter sence of allotting specific properties or parcels to individual coparceners, agreement amongst all the coparceners is absolutely necessary. Such a partition may be effected orally, but if the parties reduce the transaction to a formal document which is intended to be the evidence of the partition, it has the effect of declaring the exclusive title of the coparcener to whom a particular property is allotted by partition and is, thus, within the mischief of Section 17(1)(b)."

This view has been affirmed in *Roshan Singh v. Zile Singh*, A.I.R 1988 S.C. 881 at P.885, para 9: "A partition may be effected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it."

PARTITION AND RESERVING RIGHT TO SURVIVORSHIP

Karpagathachi And Ors vs Nagarathinathachi 1965 AIR 1752, 1965 SCR (3) 335

Under the Hindu Law the widows were competent to partition the properties and allot separate portions each, and incidental to such allotment each could agree to relinquish her right of survivorship in the portion allotted to the other. Such an arrangement was not repugnant to s. 6(a) of the Transfer of Property Act, 1882. Mere partition of the estate between the two widows does not destroy the right of survivorship of each to the properties allotted to the other. The party who asserts that there was an arrangement by which the widows agreed to relinquish the right of survivorship must establish this arrangement by clear and cogent evidence.

..... The respondent, in the instant case, had failed to discharge this onus.

PARTITION OF FAMILY PROPERTY UNDER THE HINDU LAW IS NOT A MERE DIVISION OR DISTRIBUTION OF PROPERTIES OR A MERE ENFORCEMENT OF WHAT MAY BE STRICTLY DESCRIBED AS LEGAL RIGHTS.

Division Bench of Court in the case of **Veerabhadrapa v. Lingappa, AIR 1963 Mysore 5** wherein it is held : "It is well to remember that a partition of family property under the Hindu Law is not a mere division or distribution of properties or a mere enforcement of what may be strictly described as legal rights. The nature of right in respect of joint family properties, its management and its enjoyment by the several members of the family are such that it cannot possibly be equated to considerations appropriate to English law ideas of joint tenancy or tenancy in common nor as the position of joint family Manager one comfortably assimilated in English Law ideas of trusteeship, agency or mere managership."

**PARTITION EFFECTED CANNOT BE RE-
OPENED UNLESS IT IS SHOWN IT IS
OBTAINED BY FRAUD COERCION
MISREPRESENTATION AND UNDUE
INFLUENCE**

**Ratnam Chettiar & Ors vs S. M. Kuppaswami
Chettiar & Ors 1976 AIR, 1 1976 SCR (1) 863**

(1) A partition effected between the members of an Hindu Undivided Family by their own volition and with their consent cannot be reopened unless it is shown that it was obtained by fraud, coercion, misrepresentation or undue influence. In such a case. the Court should require strict proof of facts, because, an act inter vivos cannot be lightly set aside.

(2) When the partition is effected between the members of the Hindu Undivided Family which consists of minor coparceners it is binding on the minors also, if it is done in good faith and in a bona fide manner keeping into account the interests of the minors.

(3) But if the partition is proved to be unjust and unfair and is detrimental to the interests of the minors the partition can be reopened after any length of time. In such a case, it is the duty of the Court to protect and safeguard the interests of the

minors and the onus of proof that the partition was just and fair is on the party supporting the partition.

(4) Where there is a partition of immovable and movable properties, but the two transactions are distinct and separable, or have taken place at different times, if it is found that only one of these transactions is unjust and unfair, it is open to the court to maintain the transaction which is just and fair and to reopen the partition that is unjust and unfair.

INDIAN COURTS HAVE MADE EVERY ATTEMPT TO SUSTAIN FAMILY ARRANGEMENT RATHER THAN TO AVOID IT
1966 SC

The first decision is in *Maturi Pullaiah v. Maturi Narasimham*, **AIR 1966 SC 1836**. In para. 9 of the judgment at p 1839 of the report, Subba Rao J., as he then was speaking for the Supreme courts, after citing the passage from Halbury's Laws of England which we have set out hereinabove, observed (p. 1839): "This passage indicates that even in England, Courts are averse to disturb family arrangement but would try to sustain them on broadest consideration of the

family peace and security. This concept of a 'family arrangement' had been accepted by Indian courts but has been adapted to suit the family set up of this country which is different in many respects from that obtained in England. As in England so in India, courts have made every attempt to sustain family arrangement rather than to avoid it, having regard to the broadest consideration of family peace and security."

A MEMBER NEED NOT RECEIVE ANY SHARE IN THE JOINT ESTATE BUT MAY RENOUNCE HIS INTEREST THEREIN

In Rukhmabai v. Laxminarayan (1960 AIR 335, 1960 SCR (2) 253), the Supreme Court laid down thus: There is a presumption in Hindu Law that a family is joint. There can be a division in status among the members of a joint Hindu family by definition of shares which is technically called "division in status", or an actual division among them by allotment of specific property to each one of them which is described as "division by metes and bounds". A member need not receive any share in the joint estate but may renounce his interest therein, his renunciation merely extinguishes his interest in

the estate but does not affect the status of the remaining members vis-a-vis the family property. A division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether movable or immovable, held by a member of a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property.

**FATHER HAS A RIGHT TO MAKE A PARTITION
OF THE JOINT FAMILY PROPERTY IN HIS**

HAND, HE HAS NO RIGHT TO MAKE A PARTITION BY WILL

Kallyani vs Narayanan AIR 1980 SC 1173, 1980 SCC (2) 1130

A Hindu father joint with his sons governed by Mitakshara law has the power to partition the joint family property at any moment during his life time. The consent of the sons is not necessary for the exercise of that power..... This power comprehends the power to disrupt joint family status. Even though the father has a right to make a partition of the joint family property in his hand, he has no right to make a partition by will of joint family property amongst various members of the family except, of course, with their consent..... An ineffective will sometimes though not always, if otherwise consented by all adult members, may be effective as a family arrangement but as the father of a joint Hindu family has no power to impose a family arrangement under the guise of exercising the power of partition, the power which undoubtedly he had but which he has failed to effectively exercise, it cannot in the absence of consent of all male members bind them as a family arrangement.... A family management must be an agreement amongst the various

members of the family intended to be generally and reasonably for the benefit of the family and secondly the agreement should be with the object either of compromising doubtful or disputed rights or for preserving the family property or the place and security of the family..... To be effective as a family arrangement the deed must be one intended to operate from the date of the execution, and it must be assented to and acquiesced in and acted upon by all affected party.....

Supreme Court in Apoorva Shantilal Shah, HUF vs. Commissioner of Income Tax, Gujarat-1, Ahmedabad (1983 (2) SCC 155) holding that the father as a patriae potestas is entitled to effect partition in the following words: “ It is recognised in ancient Hindu Law that in a joint family governed by Mitakshara School, father in exercise of his superior right has father or of his rights as patria potestas is entitled to bring about a complete disruption of the joint family consisting of himself and his minor sons and to effect a complete partition of the joint family properties even against the will of the minor sons.”

**M.S.M.M. Meyyappa Chettiar vs.
Commissioner of Income Tax:**

MANU/TN/0130/1951- AIR 1951 Mad 506

(DB) - Under the Hindu law, a physical division of the properties of a joint family is not necessary to constitute a partition. Once the shares of the members are defined and fixed, there is a severance of the joint status. The sharers may then make a physical division of the property, or they may decide to enjoy it in common. But the property ceases to be joint immediately the shares are defined and thenceforward the sharers hold it as tenants-in-common. A partition whether by means of a physical division of property or by a definition of shares therein, may be either total or partial. The partition of a portion of the joint family properties does not necessarily imply a division in status among the members and whether there has been a severance in status in the case of a partial division must be gathered from the terms of the instrument effecting the partition or the conduct of the parties. In a joint Hindu family consisting of a father and his sons, the father has power, irrespective of the consent of his sons, to effect a division not only between them and himself but also between the sons inter se The power of the father extends not

only to effecting a division by metes and bounds but also a division in status between him and his sons inter se A partition by metes and bounds, if effected by the father in the exercise of the power conferred on him by Hindu law,, must be fair and the allotments substantially equal. Where a partition is effected by a Hindu father between himself and his sons in the exercise of his power and the sons are allotted a smaller share of the joint property than would justly be due to them so as to defraud them of their equal and legitimate rights, it would be open to the sons to have the partition set aside on the ground of gross inequality or fraud. If the sons happen to be minors at the time of the partition, they can have the partition set aside on their attaining majority..... In other words the transaction is not void but only voidable at the option of the sons and if the latter seek to stand by it or enforce its terms, it will not be open to the father to plead the invalidity of the arrangement on the ground of the inequality of the allotments. Where there is an execution of a power with something added which is improper, the execution is good and the excess is bad. The execution is not void ab initio. The inequality in the partition could be redressed by an allotment of the excess property

retained by the father without disturbing the other terms of the partition arrangement. Even if the division of properties effected by the father were prejudicial to his minor sons and, therefore, liable to be set aside at their instance, a division in status between the father and his sons would have resulted from the transaction. The propriety of the partition, whether it should be effected at all, whether it should be effected at a particular time, what properties should be allotted to the different members, and how the family properties should be divided, are all matters for the coparceners to decide, if they are adults, or for their guardians, if they are minors or for the father, if the family consists of himself and his minor sons. Once a real and de facto partition is found to have been effected, it is not for the revenue authority to redress alleged inequalities in the partition by professing to ignore it in the interests of the minor coparceners.

AFTER A JOINT FAMILY SEPARATES ANY MEMBER OF THAT FAMILY MAY AGREE TO REUNITE - REUNITING WAS OF A VERY RARE OCCURRENCE AND WHEN IT HAPPENS IT MUST BE STRICTLY PROVED

The Hon'ble Apex Court in the case of Bhagwan Dayal v. Reoti Devi, reported in AIR 1962 SC 287 observed that after a joint family separates any member of that family may agree to reunite as a joint Hindu Family, but such a reuniting was of a very rare occurrence and when it happens it must be strictly proved. It is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite in estate and such an agreement need not be express but may be implied from the conduct of the parties alleged to have reunited. But the conduct must be of such an incontrovertible character that an agreement of reunion must be necessarily implied therefrom. It was also observed in the same case that the burden was heavy on the party asserting reunion and ambiguous pieces of conduct equally consistent with a reunion or ordinary joint enjoyment cannot sustain a plea of reunion.

WITH THE PROMULGATION OF THE 1956 ACT, THE CONCEPT OF NOTIONAL PARTITION WAS INTRODUCED

THE HON'BLE **MRS.JUSTICE B.V.NAGARATHNA** of HIGH COURT OF

KARNATAKA in the case of **Pandun vs Laxmibai C Subhadra Decided on 1 October, 2012**

With the promulgation of the 1956 Act, the concept of notional partition was introduced when a male Hindu died intestate leaving behind a female Hindu as a Class-I heir under section 6 of the Act. Ofcourse, the said section has undergone a radical change with the amendment brought about in the year 2005 by which the term coparcenary is expanded to include a daughter as a part of it by birth just like a son. By virtue of the 1956 Act, the Doctrine of Survivorship has been completely diluted where there is a female Class-I heir. That apart, Section 14 of the Act states that where a female Hindu is possessed of any property whether acquired before or after, the commencement of the Act, the same shall be held by her as a full owner and not as a limited owner. Sub-section (2) of Section 14 however, excludes the concept of full ownership to any property acquired by way of gift or under a Will or any other instrument or under a decree or order of a Civil Court or under an award where the terms thereof prescribe a restricted estate in such property.

Anar Devi and Ors. vs. Parmeshwari Devi and Ors.: MANU/SC/4370/2006 - Treatise of Mulla,

Principles on Hindu Law, Seventeenth Edition, page 250 wherein while interpreting Explanation I to Section 6 of the Act, the learned author stated that "Explanation I defines the expression 'the interest of the deceased in Mitakshara coparcenary property' and incorporates into the subject the concept of a notional partition. It is essential to note that this notional partition is for the purpose of enabling succession to and computation of an interest, which was otherwise liable to devolve by survivorship and for the ascertainment of the shares in that interest of the relatives mentioned in Class I of the Schedule. Subject to such carving out of the interest of the deceased coparcener the other incidents of the coparcenary are left undisturbed and the coparcenary can continue without disruption. A statutory fiction which treats an imaginary state of affairs as real requires that the consequences and incidents of the putative state of affairs must flow from or accompany it as if the putative state of affairs had in fact existed and effect must be given to the inevitable corollaries of that state of affairs. "the operation of the notional partition and its inevitable corollaries and

incidents is to be only for the purposes of this section namely, devolution of interest of the deceased in coparcenary property and would not bring about total disruption of the coparcenary as if there had in fact been a regular partition and severance of status among all the surviving coparceners. According to the learned author, at page 253, the undivided interest "of the deceased coparcener for the purpose of giving effect to the rule laid down in the proviso, as already pointed out, is to be ascertained on the footing of a notional partition as of the date of his death. The determination of that share must depend on the number of persons who would have been entitled to a share in the coparcenary property if a partition had in fact taken place immediately before his death and such person would have to be ascertained according to the law of joint family and partition. The rules of Hindu law on the subject in force at the time of the death of the coparcener must, therefore, govern the question of ascertainment of the persons who would have been entitled to a share on the notional partition.

Ramesh Verma (D) tr. L.Rs. vs. Lajesh Saxena (D) by L.Rs. and Ors. : MANU/SC/1549/2016
 - Section 6 deals with the question of coparcener

in a Mitakshara coparcener dying after coming into operation of the Hindu Succession Act, without making any testamentary disposition of his undivided share in the joint family property. The initial part of Section 6 stresses that the Act does not interfere with the special rights of those who are members of Mitakshara property except to the extent that it seeks to ensure the female heirs as specified in Class I of the Schedule, a share in the interest of a coparcener in the event of his death, by introducing the concept of a notional partition immediately before his death. Proviso to Section 6 operates where the deceased has left surviving him, a daughter, or any female as specified in Class I of the Schedule.

EXCEPTION TO RULE PARTIAL PARTION IS NOT MAINTAINABLE

THE HON'BLE MR. JUSTICE N. KUMAR AND
THE HON'BLE MR. JUSTICE H. S. KEMPANNA of
Karnataka High Court in the case of **Basavaraj
Guddappa Maliger vs Beerappa @
Doddabeerappa Decided on 31 July, 2012**

It is settled law, there can be only one partition generally. All the properties belonging to joint family have to be divided by metes and

bounds in such a partition. Said partition may be by an agreement or by a decree of the Court. It is only when all the properties are taken into consideration, effective partition can be effected. But this rule is not without exceptions. It is possible that some properties which are not available for partition are excluded. Properties in which the rights of the parties are not crystalized are excluded and in respect of such properties, a second suit is perfectly maintainable provided an acceptable reason is given for not including in the earlier suit. At the same time, if properties are before the Court, all the parties who are entitled to share are before Court as in this case, merely because in one suit a particular property belonging to joint family is not included which is subject matter of cross suit and which is very much before the court, the court is not justified in dismissing the suit on the ground, that all the properties of joint family are not included in the suit. Once the court records a finding that the said property is joint family property and it is before the court and as all the parties who are entitled to share are before the court, nothing prevented the court from effecting partition. There is no evidence on record to show that the joint family has contributed anything for

purchase of the said property. In fact, there is no evidence on record to show what is the income of the joint family and the income derived from agricultural operations.

**STAYING AWAY AND WORKING AS TEACHER
DOES NOT SEVERE JOINT STATUS**

**THE HON'BLE MR.JUSTICE MOHAN
SHANTANAGOUDAR of Karnataka High Court
in the case of Sri Shivaputra vs Sri Kashinath
Decided on 5 July, 2012**

After appointment he went to various places on transfer. Merely because the plaintiff is a Teacher and was not generally staying with the other defendants, it cannot be said that the plaintiff has seized to be the joint family member. Admittedly there is no severance of status and there is no prior partition. Since the family had got sufficient nucleus and all the major portions of the property are purchased out of the joint family funds, the Courts below have rightly concluded that all the properties are joint family properties.

**IN ORDER TO OPERATE AS A SEVERANCE OF
JOINT STATUS THE EXPRESSION OF
INTENTION BY THE MEMBER SEPARATING**

**HIMSELF FROM THE JOINT FAMILY MUST BE
DEFINITE AND UNEQUIVOCAL**

**Mudi Gowda Gowdappa Sankh vs Ram Chandra
Ravagowda Sankh AIR 1969 SC 1076, (1969)**

1 SCC 386, 1969 3 SCR 245 It is now well established that an agreement between all the coparceners is not essential to the disruption of the joint family status, but a definite and unambiguous indication of intention by one member to separate himself from the family and to enjoy his share in severalty will amount in law to a division of status. It is immaterial in such a case whether the other members assent or not. Once the decision is unequivocally expressed, and clearly intimated to his co-sharers, the right of the coparcener to obtain and possess the share to which he admittedly is entitled, is unimpeachable. But in order to operate as a severance of joint status, it is necessary that the expression of intention by the member separating himself from the joint family must be definite and unequivocal. If, however the expression of intention is a mere pretence or a sham, there is in the eye of law no separation of the joint family status.

Nagaraja Shetty vs. Krishna: ILR 1996 KAR 1156 - MANU/KA/0312/1995

It is only by act of parties namely the coparceners that a partition can take place and in a case where one or more members of a Hindu Undivided Family decide to sever the joint family status, that intention must be very clear from the material before the Court. The fact that the party decides to reside separately or to start business separately or to dispose of his share of the joint family assets is strong supportive evidence of an intention to put an end to the joint family status but each of these by themselves may not necessarily be conclusive. Invariably the Court will look to the totality of the circumstances at the point of time when the severance has taken place and one of the predominant factors would be the question as to whether a pro-rata share has been carved out of the assets and whether that share has in fact been taken away by the separating party. A partition is not to be confused with a mere domestic or family arrangement whereby for a variety of reasons some sort of loose divisions may take place, unless all the necessary ingredients as laid down by law namely the definite intention to separate, the carving out of shares and the physical division thereof and the

separating or handing over or taking away of that share. It is the totality of these factors alone that can lead to the conclusion that partition has in fact taken place.

In MANU/KA/0088/1977 : AIR1977Kant175 , Gooty Thotappa and Ors. v. Gooty Gurusiddappa and Anr. the Court once again had occasion to carefully analyse the nature of the transaction and held that the intention to separate must be clear and unequivocal and that this must be accompanied by ascertainment of the shares.

JOINT TITLE IS TRANSFORMED BY PARTITION INTO SEPARATE TITLES OF THE INDIVIDUAL COPARCENERS

Gajendragadkar, CJ, in V.N. Sarin vs. Ajit Kumar Poplai (1966) 1 SCR 349 = AIR 1966 SC 432 observed that, "the true effect of partition was that each co-parcener got a specific property in lieu of his undivided right in respect of the totality of the property of the family." Has held that having regard to the basis character of joint Hindu family property, each coparcener has an antecedent title to the said property, though its

extent is not determined until partition takes place. That being so, partition really means that whereas initially all the coparceners had subsisting title to the totality of the property of the family jointly, that joint title is transformed by partition into separate titles of the individual coparceners in respect of several items of properties allotted to them respectively.

It was also pointed out by this Court in *Tek Bahadur Bhujil vs. Debi Singh Bhujil & Ors.* **AIR 1966 SC 292**, as also in an earlier decision in *Ram Charan Das vs. Giria Nandini Devi & Ors.* AIR 1966 SC 323, that it was not necessary to show that every person taking a benefit under a Family Arrangement had a share in the property; it was enough if they had a possible claim or even if they are related, a semblance of a claim.

WHEN PARTITION AMOUNTS TO TRANSFER

Sk. Sattar Sk. Mohd. Choudhari v. Goundappa Amabadas Bukate (**AIR 1997 SC 998**). If a partition of the joint family property takes place by act of parties, it would not, as seen above, be treated as "Transfer" within the meaning of Section 5 of the act. But if a suit for partition is filed and the partition is brought

about through a decree of the Court, it would amount to a "Transfer" vide Section 2(d), which specifically excludes transfers by operation of law or under a decree or order of a Court. Section 5, which, in a way, defines transfer, is, therefore, over-ridden by Section 2(d) of the Act.

The Calcutta High Court in *Sm. Durgarani Devi vs. Mohiuddin & Ors.* **(1950) 86 Calcutta Law Journal 198**, held that although partition was not a transfers the owners, on severance of different portions, get "all the rights contemplated by Section 109 of the Act, including the right of the owners of the severed portion to recover possession from the tenant by terminating his tenancy.

A Full Bench of the Madhya Pradesh High Court in *Sardarilal vs. Narayanlal* **AIR 1980 MP 8**, held that assignment of a part of holding effects a severance of the holding and entitles the transferee to proceed against the tenant. Similar view was expressed by the same High Court in an earlier decision in *Pyarelalsa vs. Garanchandsa & Ors.* AIR 1965 MP 1 and by the Patna High Court in *Badri Prasad vs. Shyam Lal Jaiswal and Ors.* AIR 1963 Patna 85. The High Court of Jammu & Kashmir in *Skattar Singh vs. Rawela* AIR 1954 J&K 18 took the view that "partition was a

transfer to which Section 109 would be applicable.

The Allahabad High Court in *Ram Chandra Singh & Ors. vs. Ram Saran & Ors.* AIR 1973 Allahabad 173 laid down that it was open to one of the co-owners, after partition, to sue for ejectment of the tenant from his share of the leased property.

A Full Bench of the Madras High Court in *Puthiapurayil Kannyan Baduvan & Anr vs. Chennyantheakath Puthiapurayil Alikutti & Ors.* AIR 1920 Madras 838 is also of the same view. The Madras and Allahabad decisions (cited above) were approved by Supreme Court in *Mohar Singh vs. Devi Charan* 1988(1) RCR 654 (SC) = AIR 1988 SC 1365 = 1988(2) RCJ 471 (SC).

MANU/KA/8437/2006 : AIR 2007 KAR. 91 in the case of ARALAPPA AND ETC., VS. JAGANNATH AND ORS. - partition is not 'transfer' and the reason being, no conveyance is involved and in partition every one has antecedent title. Partition does not give title or create title. If the party to the partition has an antecedent title to the property, it only enables him to obtain what is his own in a definite and specific form. In a partition, no one transfers title which he possesses in favour of a person who

does not possess a title. Every one has an antecedent title. Therefore, no conveyance is involved, in the process as conferment of a new title is not necessary. It does not amount to transfer.

PARTITION OF TENANTED PROPERTY BY CO-OWNERS

Sk. Sattar Sk. Mohd. Choudhari v. Goundappa Amabadas Bukate (AIR 1997 SC 998). The tenancy cannot be split up either in estate or in rent or any other obligation by unilateral act of one of the co-owners. If, however, all the co-owners or the co-lessors agree among themselves and split by partition the demised property by metes and bounds and come to have definite, positive and identifiable shares in that property, they become separate individual owners of each severed portion and can deal with that portion as also the tenant thereof as individual owner/lessor. The right of joint lessors contemplated by Section 109 comes to be possessed by each of them separately and independently. There is no right in the tenant to prevent the joint owners or co-lessors from partitioning the tenanted accommodation among

themselves. Whether the Premises, which is in occupation of a tenant, shall be retained jointly by all the lessors or they would partition it among themselves, is the exclusive right of the lessors to which no objection can be taken by the tenant, particularly where the tenant knew from the very beginning that the property was jointly owned by several persons and that, even if he was being dealt with by only one of them on behalf of the whole body of the lessors, he cannot object to the transfer of any portion of the property in favour of a third person by one of the owners or to the partition of the property. It will, however, be open to the tenant to show that the partition was not bona fide and was a sham transaction to overcome the rigours of Rent Control laws which protected eviction of tenants except on specified grounds set out in the relevant statute.

Madras High Court in the case of Venkatappa Naidu v. Musal Naidu and Ors. reported in AIR 1934 MADRAS 204, wherein it was held that for the purpose of construing the nature of the document in question, it is not necessary to consider the contentions raised by the parties, as regards their right to the properties. Even if they are not really co-owners in the eye of the law, still

if they purport to be co-owners and if a document is executed in that capacity, it would come within the definition of an instrument of partition.

**PARTITION DOES NOT GIVE TITLE OR
CREATE TITLE – IT DOES NOT AMOUNTS TO
TRANSFER**

THE HON'BLE JUSTICE N. KUMAR of Karnataka High Court in the case of **Sri Aralappa ... vs Sri Jagannath Reported in AIR 2007 Kant 91, ILR 2007 KAR 339** Even if the plaintiffs had no subsisting right in the property on the date of partition, when they, along with their father effect partition of the joint family properties purport to be the co-owners, then the said document would come within the definition of an instrument, of partition and the plaintiffs have a right to the property that has fallen to their share. The word "Vibhaga" in Sanskrit, "Bhaga" in Kannada is usually rendered into English by the words "Partition". It denotes adjustment of diverse rights regarding the whole by distributing them in particular portions of the aggregate. It is a process by which the joint enjoyment of a property is transformed into an enjoyment in severalty. It may be by the

agreement between the parties or by a decree of the court. However, in either of the cases, the parties to the partition possess an antecedent title in the property and through the process of partition, the antecedent title is specifically defined. Before partition, the property was enjoyed jointly and after partition, they would enjoy the property in severalty. Therefore, in the partition no party gets the title for the first time. In other words, partition does not give title or create title. If the party to the partition has an antecedent title to the property, it only enables him to obtain what is his own in a definite and specific form, Section 5 of the Transfer of Property Act contemplates transfer of property by a person whose title in the said property, to another person who has no title. In a partition, no one transfers title which he possesses in favour of a person who does not possess a title. Every one has an antecedent title. Therefore, no conveyance is involved, in the process as conferment of a new title is not necessary. It does not amount to transfer. Therefore, partition is not a transfer and by partition no body acquires title to any property for the first time. Consequently the partition deed only recognises an existing right, which each

party to the deed has in the joint property and no right spring from the deed of partition.

Court in *Kale & Ors. vs. Deputy Director of Consolidation & Ors.* AIR 1976 SC 807 and *Ram Charan Das vs. Giria Nandini Devi & Ors.* **AIR 1966 SC 323 = (1965) 3 SCR 841**, also took the same view and held that a "Family Arrangement" proceeds on the assumption that the parties, in whose favour the arrangement was made and who, under that arrangement, come to have definite and positive share in the property, is not a transfer but is only a recognition of the title already existing in them.

In a decision reported in **AIR 1976 SC 807** (in the case of *Kale and Others -vs- Deputy Director of Consolidation and Others*) the Supreme Court has held that, in case of family settlement set up by the parties, the family settlement must be a bonafide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family.

The Supreme Court in the case of *The Commissioner of Income Tax, Gujarat, v. Keshavlal Lallubhai Patel* **1965 AIR 1392, 1965 SCR (2) 139** dealing with the question whether

the partition is a transfer, has held that, "it is not".

PARTITION OF THE PROPERTY CAN ONLY BE AMONG THE PARTIES WHO HAVE A PRE-EXISTING RIGHT TO THE PROPERTY

Hiraji Tolaji Bagwan (since deceased by L.R.'s) v. Shakuntala 1990 AIR 619, 1990 SCR (1)

66 A partition of the property can only be among the parties who have a pre-existing right to the property. Under the Hindu Law, a female, major or minor has no share in the ancestral property. A female is given a share either in the self-acquired property of the husband or the father, or in the share of the husband or the father in the coparcenary property after the property is partitioned. There cannot, therefore, be a partition and hence a family settlement with regard to the ancestral property so long as it is joint, in favour of either the wife or the daughter.

ORAL PARTITION HAD BEEN EFFECTED WHICH HAD BEEN SUBSEQUENTLY REDUCED INTO WRITING AS A MEMORANDUM AND NOT AS AN ACTUAL DEED OF PARTITION

Narendra Kante vs Anuradha Kante & Ors. (2010) 2 Supreme Court Cases 77

As far as factum of partition is concerned, the same being a question of fact, this Court is not inclined to interfere with the prima facie view taken by the courts below, for the purpose of interim order, that an oral partition had been effected which had been subsequently reduced into writing as a Memorandum and not as an actual Deed of Partition.

WHETHER PARTITION DEED AMOUNTS TO TRANSFER DISCUSSED

Justice N Kumar of Karnataka High Court in the case of Aralappa vs Jagannath Reported in AIR 2007 Kant 91, ILR 2007 KAR 339

“.....partition deed the parties have described themselves as Roman Catholics. Therefore, in view of this categorical admission in the plaint as well as in the registered partition deed, it is clear that they are not members of Hindu undivided family as understood under Hindu Law. They are, governed by the provision of Indian Succession Act. In the property of the father, during his life time the sons do not get any right. The concept of blending, known under Hindu Law is not

applicable to them. Therefore, it is clear that the aforesaid Sy.No. 47/2 absolutely belongs to Chowrappa and the only mode in which he could have conveyed title to his sons in the said property was by way of registered sale deed or gift deed. However, the recital Ex.P-1 shows that they treated themselves as undivided joint family and then 35 guntas in the aforesaid survey number was given to the share of these plaintiffs by their father under the aforesaid partition deed. Even under Hindu Law, if the sons have no pre-existing light, in a partition deed they cannot get right in the property for the first, time.”

Quoted Citations

The law on the point is well settled. The Privy Council in the case of Mt. Girija Bai v. Sadashiv Dhundiraj and Ors. reported in **AIR 1916 PRIVY COUNCIL** has held that Partition does not give title or create a title. It only enables the sharer to obtain what is his own in a definite and specific Form for purposes of disposition independent of the wishes of his former co-sharers. Where a division of right had already taken place as evidenced by a deed of partition, the right which each individual member has in the joint property did not spring from the deed or the agreement of

parties to which it gave expression. The agreement only recognised existing rights in each individual member which he was entitled to assert at any time he liked.

The Supreme Court in the case of *The Commissioner of Income Tax, Gujarat, v. Keshavlal Lallubhai Patel* **1965 AIR 1392, 1965 SCR (2) 139** dealing with the question whether the partition is a transfer, has held that, "it is not".

The Supreme Court in the case of V.N. Sarin v. Ajit Kumar Poplai and Anr., 1966 AIR 432, 1966 SCR (1) 349 has held that having regard to the basis character of joint Hindu family property, each coparcener has an antecedent title to the said property, though its extent is not determined until partition takes place. That being so, partition really means that whereas initially all the coparceners had subsisting title to the totality of the property of the family jointly, that joint title is transformed by partition into separate titles of the individual coparceners in respect of several items of properties allotted to them respectively.

Again the Supreme Court in the case of Sk. Sattar Sk. **Mohd. Choudhari v. Gundappa Amabadas Bukate (1996) 6 SCC 373** after reviewing the entire case law on the point has held that Section 5 contemplates transfer of property by a person who has a title in the said property to another person who has no title. A family arrangement, on the contrary, is a transaction between members of the same family for the benefit of the family so as to preserve the family property, the peace and security of the family, avoidance of family dispute and litigation and also for saving the honour of the family. Such an arrangement is based on the assumption that there was an antecedent title in the parties and the agreement acknowledges and defines what that title is. It is for this reason that a family arrangement by which each party takes a share in the property has been held as not amounting to a "conveyance of property" from a person who has title to it to a person who has no title. However, if a partition of the joint family property takes place by act of parties, it would not be treated as 'transfer' within the meaning of Section 5 of the Act.

Referred in Quoted citations

Kale & Ors. vs. Deputy Director of Consolidation & Ors. AIR 1976 SC 807

and Ram Charan Das vs. Giria Nandini Devi & Ors. AIR 1966 SC 323 = (1965) 3 SCR 841, also took the same view and held that a "Family Arrangement" proceeds on the assumption that the parties, in whose favour the arrangement was made and who, under that arrangement, come to have definite and positive share in the property, is not a transfer but is only a recognition of the title already existing in them.

Court in Tek Bahadur Bhujil vs. Debi Singh Bhujil & Ors. AIR 1966 SC 292, as also in an earlier decision in *Ram Charan Das vs. Giria Nandini Devi & Ors.* (supra), that it was not necessary to show that every person taking a benefit under a Family Arrangement had a share in the property; it was enough if they had a possible claim or even if they are related, a semblance of a claim.

Gajendragadkar, CJ, in V.N. Sarin vs. Ajit Kumar Poplai (1966) 1 SCR 349 = AIR 1966 SC 432 observed that, "the true effect of partition was that each co-parcener got a specific property in lieu of his undivided right in respect of the totality of the property of the family."

ONCE PARTITION STANDS CONCEDED AND THE PROPERTY IN DISPUTE FALLEN TO HIS

SHARE THE PLEA OF HIS BEING A LUNATIC REJECTED

Karumanda Gounder vs Muthuswamy Gounder & Others AIR 1996 SC 1002. Once the partition is given effect to and the property is divided and shared, the plea that person so took the share is a lunatic will have no effect. A plea of Lunacy is sustainable only if the District court has adjudged the person in question as lunatic.

WHEN THE PARTITION CAN BE RE-OPENED

Ratnam Chettiar & Ors vs S. M. Kuppuswami Chettiar & Ors 1976 AIR, 1 1976 SCR (1) 863

(1) A partition effected between the members of an Hindu Undivided Family by their own volition and with their consent cannot be reopened unless it is shown that it was obtained by fraud, coercion, misrepresentation or undue influence. In such a case. the Court should require strict proof of facts, because, an act inter vivos cannot be lightly set aside.

(2) When the partition is effected between the members of the Hindu Undivided Family which consists of minor coparceners it is binding on the minors also, if it is done in good faith and in a

bona fide manner keeping into account the interests of the minors.

(3) But if the partition is proved to be unjust and unfair and is detrimental to the interests of the minors the partition can be reopened after any length of time. In such a case, it is the duty of the Court to protect and safeguard the interests of the minors and the onus of proof that the partition was just and fair is on the party supporting the partition.

(4) Where there is a partition of immovable and movable properties, but the two transactions are distinct and separable, or have taken place at different times, if it is found that only one of these transactions is unjust and unfair, it is open to the court to maintain the transaction which is just and fair and to reopen the partition that is unjust and unfair.

THE RULE OF REOPENING OF PARTITION DOES NOT APPLY TO A DECREE IF THE MINOR IS PROPERLY REPRESENTED BEFORE THE COURT UNLESS THE MINOR CAN SHOW FRAUD OR NEGLIGENCE ON THE PART OF HIS NEXT FRIEND

**Bishundeo Narain And Another vs Seogeni Rai
And Jagernath AIR 1951 SC 280, 1951 SCR**

548 Where a Court has sanctioned an agreement or compromise in a suit to which a minor is a party after satisfying itself that it is for the minor's benefit, the decree based on the agreement or compromise cannot be held to be invalid or not binding on the minor merely because the sanction of the Court was not obtained by the next friend or guardian before he began to negotiate for the agreement or compromise. The rule that in the case of a partition between members of a joint Hindu family one of whom is a minor, if the minor, on obtaining majority, is able to show that the division was unfair and unjust, the court will set it aside, does not apply to decrees in partition suits in which the minor was properly represented before the court. The decree is as binding on him as on the adult parties unless the minor can show fraud or negligence on the part of his friend or guardian ad litem.

**AN AGREEMENT BETWEEN ALL THE
COPARCENERS IS NOT ESSENTIAL TO THE
DISRUPTION OF THE JOINT FAMILY STATUS**

Mudi Gowda Gowdappa Sankh vs Ram Chandra Ravagowda Sankh AIR 1969 SC 1076, (1969)

1 SCC 386, 1969 3 SCR 245 It is now well established that an agreement between all the coparceners is not essential to the disruption of the joint family status, but a definite and unambiguous indication of intention by one member to separate himself from the family and to enjoy his share in severalty will amount in law to a division of status. It is immaterial in such a case whether the other members assent or not. Once the decision is unequivocally expressed, and clearly intimated to his co-sharers, the right of the coparcener to obtain and possess the share to which he admittedly is entitled, is unimpeachable. But in order to operate as a severance of joint status, it is necessary that the expression of intention by the member separating himself from the joint family must be definite and unequivocal. If, however the expression of intention is a mere pretence or a sham, there is in the eye of law no separation of the joint family status. there is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person

who claims it as coparcenary property. But if the possession of a nucleus of the joint family property is either 'admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

ORAL PARTITION IS ADMISSIBLE IN LAW

In Hans Raj Agarwal v. CIT, (2003)2 S.C.C. 295, A.I.R. 2003 S.C. 2112. their Lordships observed as under "The further submission of the appellants that an oral partition was impermissible in law is erroneous. As far back as in 1958 in Nani Bai v. Gita Bai, (1959 S.C.R. 479) it was held: Nani Bai v. Gita Bai, A.I.R. 1958 S.C. 706 "Partition in the Mitakshara sense may be only a severance of the joint status of the members of the coparcenary, that is to say, what was once a joint title has become a divided title though there has been no division of any

properties by metes and bounds. Partition may also mean what ordinarily is understood by partition amongst co-sharers who may not be members of a Hindu coparcenary... For partition in the latter sense of allotting specific properties or parcels to individual coparceners, agreement amongst all the coparceners is absolutely necessary. Such a partition may be effected orally, but if the parties reduce the transaction to a formal document which is intended to be the evidence of the partition, it has the effect of declaring the exclusive title of the coparcener to whom a particular property is allotted by partition and is, thus, within the mischief of Section 17(1)(b)." (Supreme Court in the case of Karpagathachi v, Nagarathinathachi, A.I.R. 1965 S.C. 1752, S. Sai Reddy v. S. Narayana Reddy, (1991)13 S.C.C. 647. Similar view has been expressed by the Supreme Court in Bakhtawar Singh v. Gurdev Singh, (1996)9 S.C.C. 370)

CO-OWNER OR CO-SHARER RIGHTS IN PROPERTY – NON PARTICIPATION NOT AMOUNTS TO OUSTER

In AIR 1981 SC 77 : (1980) 4 SCC 396, Karbalai Begum v. Mohd. Sayeed Fazal Ali, J. held : "It is well settled that mere non-participation in the

rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact be admitted, then the legal position would be that the defendants being co-sharers of the plaintiff, would become constructive trustees on behalf of the plaintiff and the right of the plaintiff would be deemed to be protected by the trustees."

WITHOUT GETTING THE PRELIMINARY AND FINAL DECREES SET ASIDE OR CANCELLED, THE PLAINTIFFS ARE NOT ENTITLED TO REOPENING OF THE PARTITION

In the case of K.S. Mariyappa and Others v K.T. Siddalinga Setty and Others, 1989(1) Kar. L.J. 150 (DB); Court has held that where a suit was filed as one for declaration that the preliminary and final decrees passed were nullity because they were tainted with fraud and coercion, if such a relief is granted, in effect, it would result in setting aside the preliminary and final decrees and the Court went on to observe that, in fact, without getting the preliminary and final decrees set aside or cancelled, the plaintiffs are not entitled to reopening of the partition

because, their father was a party to the preliminary and final decrees passed in the previous suit. In the instant case also, the plaintiffs, by seeking the relief of partition and separate possession of their share in the suit property are, in effect, calling in question the deed of relinquishment of the year 1969, which is a registered document. Therefore, unless and until the said deed of relinquishment is set aside, the question of the plaintiffs staking a claim for share in the suit property will not arise.

**NOTIONAL PARTITION HAS TO BE ASSUMED
IMMEDIATELY BEFORE COPARCENERS
DEATH**

Anar Devi and ors vs Parameshwari Devi and ors AIR 2006 SC 3332, “Thus we hold that according to Section 6 of the Act (Hindu Succession Act) when a coparcener dies leaving behind any female relative specified in Class I of the Schedule to the Act or male relative specified in that class claiming through such female relative, his undivided interest in the Mitakshara coparcenary property would not devolve upon the surviving coparcener, by survivorship but upon his heirs by intestate succession. Explanation 1 to Section 6 of the Act provides a mechanism

under which undivided interest of a deceased coparcener can be ascertained and, i.e., that the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. It means for the purposes of finding out undivided interest of a deceased coparcener, a notional partition has to be assumed immediately before his death and the same shall devolve upon his heirs by succession which would obviously include the surviving coparcener who, apart from the devolution of the undivided interest of the deceased upon him by succession, would also be entitled to claim his undivided interest in the coparcenary property which he could have got in notional partition.

Justice B.V. Nagarathna of Karnataka High court in case of Balavant Rao and Ors. vs. Geeta and Ors.: MANU/KA/3504/2016 - 2017

(1) KCCR 915"..... Keeping in mind the amendment made to Section 6 in the year 2005, if the deceased coparceners has left behind a daughter and if the deceased coparcener i.e., the

father and the daughter were both alive on 09/09/2005, in that case, the daughter would be entitled to a share equal to that of a son i.e., her brother and not otherwise."..... "But in the instant case, the deceased coparcener, Praveen was not alive as on 09/09/2005 so as to come to a conclusion that his daughter, if he had one, would be entitled to a share equal to that of her brother. Although the deceased coparcener Praveen has no daughter, the amendment to Section 6 would have applied only in case of the death of a male coparcener i.e., Praveen, after 09/09/2005 and the judgment of the Supreme Court would apply if on 09/09/2005 the deceased coparcener i.e., the father and daughter are alive and not otherwise. But in the instant case, the contention of the appellants is that defendant No. 1, father and his four daughters are alive even as on today and therefore, as they were alive as on 09/09/2005 when the amendment was enforced therefore, by applying the dictum of Hon'ble Supreme Court in Prakash vs. Phulavati, the daughters would be entitled to a share equal to the sons. Their contention in substance is that the parents, sons and daughters would all get an equal share in the joint family properties and each one would get

one-tenth share. Thus, according to appellants, plaintiffs' share together is not one-sixth share together but only one-tenth. Such a contention cannot be accepted for the simple reason that the right of the deceased coparcener Praveen was created by birth. That right got crystallized on his death, which occurred in the year 1991. The vested right of his Class-I heirs in the share of the deceased coparcener, Praveen cannot be watered-down or nullified on account of the amendment made to Section 6 of the Act. Although the amendment has been made to Section 6 of the Act to the effect that the daughters are entitled to a share equal to that of the sons or their brothers and are treated as coparceners, the said amendment cannot be applied in a straight-jacket manner without taking into consideration the date of death of a male coparcener in the family or irrespective of the date of a male coparcener. As already noted, in the instant case, the male coparcener Praveen (son of defendant Nos. 1 and 2) died way back in the year 1991 and succession to his estate opened in the year 1991 itself. The vested right of the deceased coparcener in the suit schedule properties, which was crystallized on his death and which would devolve on his legal

heirs cannot be negated by virtue of the amendment made to Section 6. In fact, that is precisely what has been enunciated by the Hon'ble Supreme Court in Prakash vs. Phulavati by holding that the amendment made to Section 6 is prospective in nature and in its operation. Further, on a reading of paragraph Nos. 17 and 18 of the judgment of the Hon'ble Supreme Court, it becomes clear that the statutory notional partition has not been given a go-bye on account of the amendment made to Section 6. Any other interpretation would cause havoc to the rights of the successors of a deceased male coparcener, who has died prior to amendment made to Section 6 of the Act in the year 2005. In the circumstances, having regard to the aforesaid dicta of the Hon'ble Supreme Court, it is held that in the instant case, when Praveen died in the year 1991, succession opened and he had one-sixth share in the suit schedule properties (3 brothers + father+ mother+ himself). That one-sixth share would devolve on his legal representatives being Class - I heirs, who are the plaintiffs and defendant No. 2, his mother. In the circumstances, defendant No. 2 would also be entitled to a share equal to that of the plaintiffs in the one-sixth share allotted to them. Thus,

plaintiffs and defendant No. 2 would be entitled to one-twenty fourth share in the suit schedule properties. Since defendant No. 2 is dead, her right to one-twenty fourth share therein would be divided between her husband, her three other sons and four daughters. Further, the rest of the suit schedule properties i.e., five-sixth share after excluding one-sixth share, which has together devolved on the plaintiffs and defendant No. 2 would be available for partition amongst the other members of the family. While dividing the remaining five-sixth share amongst the members of the family, the amendment made to Section 6 in the year 2005 would apply and the daughters would get a share equal to that of the sons. It is further clarified that the share allotted to defendant No. 2 is also available for further partition amongst the other members of the family as defendant No. 2 is since deceased...."

IF A COPARCENER EXPRESSES HIS INDIVIDUAL INTENTION IN UNEQUIVOCAL TERMS TO SEPARATE HIMSELF FROM THE REST OF THE FAMILY, THAT EFFECTS A PARTITION, SO FAR AS HE IS CONCERNED, FROM THE REST OF THE FAMILY

NANI BAI v. GITABAI, , AIR 1958 SC 706 the Supreme Court has held thus : "Partition in the Mitakshara sense may be only a severance of the joint status of the coparcenary, that is to say, what was once a joint title, has become a divided title though there has been no division of any properties by metes and bounds. Partition may also mean what ordinarily is understood by partition amongst co-sharers who may not be members of a Hindu coparcenary. For partition in the former sense, it is not necessary that all the members of the joint family should agree, because it is a matter of individual volition. If a coparcener expresses his individual intention in unequivocal terms to separate himself from the rest of the family, that effects a partition, so far as he is concerned, from the rest of the family. By this process what was a joint tenancy has been converted into a tenancy in common. For partition in the latter sense of allotting specific properties or parcels to individual coparceners, agreement amongst all the coparceners is absolutely necessary."

ONCE A PARTITION IN THE SENSE OF DIVISION OF RIGHT, TITLE OR STATUS IS PROVED OR ADMITTED, THE PRESUMPTION

**IS THAT ALL JOINT PROPERTY WAS
PARTITIONED OR DIVIDED.**

In Kesharbai @ Pushpabai Eknathrao Nalawade (D) by L.Rs & Anr. v. Tarabai Prabhakar Rao Nalawade & Ors as reported in AIR 2014 SC 1830, it has been held:- It is a settled principle of law that once a partition in the sense of division of right, title or status is proved or admitted, the presumption is that all joint property was partitioned or divided. Undoubtedly the joint and undivided family being the normal condition of a Hindu family, it is usually presumed, until the contrary is proved, that every Hindu family is joint and undivided and all its property is joint. This presumption, however, cannot be made once a partition (of status or property), whether general or partial, is shown to have taken place in a family. This proposition of law has been applied by this court in a number of cases. We may notice here the judgment of this Court in **Bhagwati Prasad Sah & Ors. v. Dulhin Rameshwari Kuer & Anr [1951] SCR 603** wherein it was inter alia observed as under:- "8. Before we discuss the evidence on the record, we desire to point out that on the admitted facts of this case neither party has any presumption on

his side either as regard jointness or separation of the family. The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but where it is admitted that one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the other side too that because one member of the family separated himself, there has been separation with regard to all. It would be 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 amongst the other coparceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief."

PARTIAL PARTITION AND REUNION

Aruna and Ors. vs. Madhukar Bapusaheb Lengade and Ors.: MANU/KA/2528/2015 - 2017 (1) KCCR 777 - It is settled in law that there can be a partial partition between the coparceners either in respect of property or in

respect of persons making it. It is open to the members of joint family to divide even a portion of joint estate while retaining their status as a joint family and holding the rest as properties of undivided family. In the case of hand, plaintiff in OS 95/91 has come to Court with a pleading that the signatures of her husband Nanda Kumar were taken on blank forms while his mental state was vulnerable. However, in view of admission in the evidence that her husband was given his share in the form of a running business concern, the factum of partition will have to be presumed. This results in loading heavy burden upon the plaintiff to prove that there was a re-union. There is no pleading of reunion nor a whisper in the depositions of parties. It is no doubt true that re-union is permissible between the persons who were parties to original partition. Even if the version of the plaintiffs in OS 95/91 that they have been living with the defendants is accepted that would lead to another moot question as to whether at all there was a re-union. There is no pleading to this effect. It is now well settled that a mere fact that parties who were separated started to live together after partition does not amount to a re-union.

While considering the question with regard to re-union, the Hon'ble Supreme Court in the case of Bhagawan Dayal V. Mst. Reoti Devi **MANU/SC/ 0374/1961 : AIR 1962 SC 287** quoting the observations of judicial commission reported in the case of Palani Ammal vs. Muthuvenkatacharla Moniagar reported in MANU/PR/0040/1924 : AIR 1925 PC 49 has held thus: For the correct approach to this question, it would be convenient to quote at the outset the observation of the Judicial Committee in Palani Ammal V. Muthuvenkatacharla Moniagar(1) "It is also quite clear that if a joint Hindu family separates, the family or any members of it may agree to reunite as a joint Hindu family, but such a reuniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved. The leading authority for that last proposition is Balabux Ladhuram v. Rukhmabai MANU/PR/ 0019/1903 : (1903) L.R. 30 I.A. 130 : s.c. 5 Bom. L.R. 480".

It is also well settled that to constitute a reunion there must be an intention of the parties to reunite in estate and interest. It is implicit in the concept of a reunion that there shall be an

agreement between the parties to reunite in estate with an intention to revert to their former status of members of a joint Hindu family. Such an agreement : need not be express, but may be implied from the conduct of the parties alleged to have reunited. But the conduct must be of such an incontrovertible character that an agreement of reunion must be necessarily implied therefrom. As the burden is heavy on a party asserting reunion, ambiguous pieces of conduct equally consistent with a reunion or ordinary joint enjoyment cannot sustain a plea of reunion. The legal position has been neatly summarized in Mayne's Hindu Law, 11th edn., thus at p. 569: "As the presumption is in favour of union until a partition is made out, so after a partition the presumption would be against a reunion. To establish it, it is necessary to show, not only that the parties 'already (1924) L.R. 52. I.A. 83, 86. (1903) L.R. 30 I.A. 190, divided, lived, or traded together, but that they did so with the intention of thereby altering their status and of farming a joint estate with all its, usual incidents it requires very cogent evidence to satisfy the burden of establishing that by agreement between them, the divided members of a joint Hindu family have succeeded in so altering their status an to bring

themselves within all the rights and obligations that follow from the fresh formation of a joint undivided Hindu family."

We feel it appropriate to quote the entire passage contained the Palani Ammal's judgment which reads as follows: In coming to a conclusion that the members of a Mitakshara joint family have or have not separated, there are some principles of law which should be borne in mind when the fact of a separation is denied. A Mitakshara, family is presumed in law to be a joint family until it is proved that the members have separated. That the coparceners in a joint family can by agreement amongst themselves separate and cease to be a joint family, and on separation are entitled to partition the joint family property amongst themselves, is now well established law. An authority for that proposition is the judgment of the Board in Appovier v. Rama Subba Aiyar MANU/PR/ 0013/1866 : (1866) 11 M.I.A. 75 which applies to joint families such as the joint family which descended from the propositus. But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for

ascertaining what the shares of the coparceners on a separation would be. It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining co-parceners without any special agreement amongst 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. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. It is also quite clear that if a joint Hindu family separates, the family or any members of it may agree to reunite as a joint Hindu family, but such a reuniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved. The leading authority for that last proposition is *Balabux Ladhuram v. Rukhmabai* MANU/PR/0019/1903 : (1903) L.R. 30 I.A. 130, s.c. 5 Bom. L.R. 480.

SECOND PARTITION SUIT MAINTAINABILITY**Venkata Rao vs. Narayana:****MANU/KA/0306/1993 - ILR 1994 KAR 387**

(DB) - Whether in respect of properties intentionally & deliberately excluded from purview of earlier partition suit by consent of parties, second suit for partition is maintainable is the question before this court. Court observed " A perusal of para-2 of the Compromise Petition apparently discloses that the said movable assets were received by the plaintiff in full and final settlement of his share in the family properties, and that, he had relinquished his right in other properties shown in the two plaint schedules. In Para-3 of the Compromise it is, inter alia, agreed that items 4, 5 and 6 of the suit property, corresponding to the instant suit property, constituted family charities, and that none of the parties to the suit have any interest therein. The entire dispute in this suit revolves round the interpretation of the Compromise Petition... In view of the conflict between the parties, it is incumbent upon the Court to make an honest attempt to read the two provisions in the Compromise Petition harmoniously and only when it is not possible to do so, the earlier provision would prevail and the latter becomes

otiose... A perusal of the, pleadings in the earlier suits, and the clinching evidence in the instant case, clearly indicates that the parties had intentionally excluded the suit properties from the purview of the partition in the earlier suit on the ground that the said properties are dedicated to charities and they are not partible or available for partition. As such, it is not possible to read Clause (2) of the Compromise Petition as a relinquishment of the plaintiffs right in the suit properties... The properties in the cited case had been excluded in the earlier suit on the ground that permission of the Charity Commissioner was required for effecting partition, and the second partition suit was filed later when the said objection was removed. In the instant case, by consent of parties, the suit properties were intentionally and deliberately excluded from the purview of the earlier suit. As such, a second suit for partition thereof was clearly maintainable."

Constitution bench in Ramkishore Lal vs. Kamal Narain: MANU/SC/0022/1962 - AIR 1963 SC 890 Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than

one sense and that sense differs in different circumstances. Again, even where a particular word has, to a trained conveyancer, a clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of conveyancing. Sometimes it happens in the case of documents as regards disposition of properties, whether they are testamentary or non-testamentary instruments, that there is a clear conflict between what is said in one part of the document and in another. A familiar instance of this is where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where this happens ? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. (See Sahebzada Mohd. Kamgar Shah v. Jagdish Chandra Deo Dhabal Deo) MANU/SC/0246/1960 : [1960]3SCR604 . It

is clear, however, that an attempt should always be made to read the two parts of the documents harmoniously, if possible. It is only when this is not possible, e.g., where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void.

PARTITION AND SUCCESSION

Ganachari Veeraiah and Ors. vs. Ganachari Shiva Ranjani: MANU/AP/0590/2009 - 2010

(1) ALD 214 Partition of joint family properties can be sought at any point of time, but succession would open, only on death of the owner of the property

It is noteworthy that Sections 6(3) and 8 give an indication that the succession would open on the death of a person, whose property is to devolve. Coparcenary is a typical concept, specific to persons, professing Hindu religion. It clothes an individual, with right to property, with the incidence of mere worth. Though succession is also a concept through which, an individual gets right, vis-a-vis the property, on account of his kinship to the owner, there exists a clear distinction between these two concepts. The first

is that, the right of coparcener is against a property, which is held by joint family, and not an individual. Succession, on the other hand, is, in respect of the property held by one individual. The second is that a coparcener can enforce his right at any point of time, by seeking partition, whereas succession would take place only after the death of the owner of the property.

Though the title of the Hindu succession Act suggests that it deals with matters of succession, it has several ingredients, relating to coparcenary also. It may be that, one and the same individual may be entitled for the rights as a coparcener, on the one hand, and right to succeed, on the other hand. While the succession would open, only on the death of the predecessor, the right to seek partition can be exercised even while the other coparceners, including the manager of the family is alive. Some times, it may so happen, that against the same set of persons, an individual may have rights, partly of coparcenary in nature, and partly of succession. One thing can certainly be said that, one and the same item of property cannot be subject-matter of partition, on the one hand, and succession, on the other hand. More often than not, these two aspects are treated as interchangeable/or

different facets of the same right. This naturally would give rise to certain complications.

Sections 6(3) and 8 of the Act deal with succession to the property, by a Hindu, who is governed by the Mitakshara Law. The succession provided for, under those provisions, has nothing to do with the right to seek partition.

The recent amendment to Section 6 of the Act has virtually obliterated the distinction between male and female members of a joint Hindu family, as regards conferment of coparcenary rights. The result is that wherever it is compatible for a Hindu male, to exercise rights of coparcener, including the one, of seeking partition, it is equally competent for a Hindu female of the same degree, to exercise such rights.

It is not uncommon that developments are made by coparceners, with their own funds, over the sites, or land, that belong to joint family. Subjecting the land together with the building, constructed by one of the coparceners, would naturally lead to injustice. The Madras High Court, in Periakaruppan v. Arunuchalam (2) MANU/TN/0719/1926 : AIR 1927 Mad 676 held that, in such cases, what becomes partible is the value of the land, and not the superstructure.

SALE OF UNDIVIDED SHARE AND CONSEQUENCES

Gajara Vishnu Gosavi vs. Prakash Nanasahed Kamble and Ors.: MANU/SC/1697/2009

Undivided share of co-parcener--Can be subject-matter of sale/transfer--But possession cannot be handed over to vendee--Unless property partitioned by metes and bounds either by decree of Court in partition suit. There is another aspect of the matter. An agricultural land belonging to the coparceners/co-sharers may be in their joint possession. The sale of undivided share by one co-sharer may be unlawful/illegal as various statutes put an embargo on fragmentation of holdings below the prescribed extent. Thus, in view of the above, the law emerges to the effect that in a given case an undivided share of a coparcener can be a subject matter of sale/transfer, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds, either by the decree of a Court in a partition suit, or by settlement among the co-sharers.

**In Kartar Singh v. Harjinder Singh
MANU/SC/0158/1990 : AIR 1990 SC 854**

Court held that where the shares are separable

and a party enters into an agreement even for sale of share belonging to other co-sharer, a suit for specific performance was maintainable at least for the share of the executor of the agreement, if not for the share of other co-sharers. It was further observed: As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty. Whenever a share in the property is sold, the vendee has a right to apply for the partition of the property and get the share demarcated.

Ramdas v. Sitabai and Ors.
MANU/SC/0910/2009 : JT 2009 (8) SC 224

placing reliance upon two earlier judgments of this Court in *M.V.S. Manikayala Rao v. M. Narasimhaswami and Ors.* MANU/SC/0363/1965 : AIR 1966 SC 470; and *Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh and Ors.* MANU/SC/0089/1953 : AIR 1953 SC 487 Court came to the conclusion that a purchaser of a coparcener's undivided interest in the joint family property is not entitled to possession of what he had purchased. He has

a right only to sue for partition of the property and ask for allotment of his share in the suit property.

MANU/TN/0226/1975 : AIR 1975 MADRAS

316 in the case of VENKATAMMAL VS. SINNA VENKATARAMA CHETTIAR AND OTHERS.

Referring to this judgment, he would contend that when the sale is of an undivided interest of a coparcener in the whole of the joint family, the purchaser would be entitled to get the share that is allotted to his vendor in the general partition suit, though he would not be entitled to joint possession with the other coparceners and to claim mesne profits till a decree is passed in the partition suit.

OUSTER IS A WEAK DEFENCE IN PARTITION SUIT

Nagabhushanammal vs. C.

Chandikeswaralingam: MANU/SC/0231/2016

- The other main defense in the suit is ouster and limitation. Ouster is a weak defense in a suit for partition of family property and it is strong if the Defendant is able to establish consistent and open assertion of denial of title, long and uninterrupted possession and exercise of right of

exclusive ownership openly and to the knowledge of the other co-owner.

Syed Shah Ghulam Ghouse Mohiuddin and Ors. v. Syed Shah Ahmed Mohiuddin Kamisul Quadri and Ors. MANU/SC/0486/1971 : (1971) 1 SCC 597 held that possession of one co-owner is presumed to be on behalf of all co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. It was further held that there has to be open denial of title to the parties who are entitled to it by excluding and ousting them.

A three judge bench Court in **P. Lakshmi Reddy v. R. Lakshmi Reddy AIR 1957 SC 1789**, while examining the necessary conditions for applicability of doctrine of ouster to the shares of co-owners, held as follows: 4. Now, the ordinary classical requirement of adverse possession is that it should be nec vi nec clam nec precario..... The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. But it is well-settled that in

order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other.

Court in **Vidya Devi v. Prem Prakash**
MANU/SC/0345/1995 : (1995) 4 SCC 496 held that:

21. Normally, where the property is joint, co-sharers are the representatives of each another. The co-sharer who might be in possession of the joint property shall be deemed to be in possession on behalf of all the co-sharers. As such, it would be difficult to raise the plea of adverse possession by one co-sharer against the other. But if the co-sharer or the joint owner had been professing hostile title as against other co-sharers openly and to the knowledge of others joint owners, he can, provided the hostile title or possession has continued uninterruptedly for the whole period prescribed for recovery of possession, legitimately acquire title by adverse possession and can plead such title in defence to the claim for partition.

22. "Adverse possession" means hostile possession, that is, a possession which is expressly in denial of the title of the true owner. (See: *Gaya Parshad Dikshit v. Nirmal Chander and another* (MANU/SC/0231/1984 : AIR 1984 SC 930). The denial of title of the true owner is a sign of adverse possession. In *Ezaz Ali v. Special Manager, Court of Wards* (MANU/PR/0014/1934 : AIR 1935 PC 53), it was observed: "The principle of law is firmly established that a person, who bases his title on adverse possession, must show

by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

23. Dr. Markby in his treatise "Elements of Law" (Second Edition) has observed that possession "to be adverse must be possession by a person who does not acknowledge the other's rights but denies them.

24. It is a matter of fundamental principle of law that where possession can be referred to a lawful title, it will not be considered to be adverse. It is on the basis of this principle that it has been laid down that since the possession of one co-owner can be referred to his status as co-owner, it cannot be considered adverse to other co-owners.

25. In *Karbali Begum v. Mohd Sayeed* (MANU/SC/0363/1980 : AIR 1981 SC 77), it was held that a co-sharer in possession of the property would be a constructive trustee on behalf of other co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustee co-sharer.

26. Certain observations of the Privy Council in *Coera v. Appuhamy* (AIR 1914 PC 243, 245-246) may be quoted below: "Entering into

possession and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have ensured for the benefit of his co-proprietors. The principle recognised by Wood, V.C. in *Thomas v. Thomas* (1856) 25 LJCh 159 (161) : 110 RR 107 holds good: 'Possession is never considered adverse if it can be referred to a lawful title'.

His possession was, in law, the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

27. From the underlined portion extracted above, it will be seen that in order that the possession of co-owner may be adverse to others, it is necessary that there should be ouster or something equivalent to it. This was also the observation of the Supreme Court in *P. Lakshmi Reddy's case* (supra) which has since been followed in *Mohd. Zain-ul-Abdin v. Syed Ahmad Mohiudding* (MANU/SC/0785/1989 : AIR 1990 SC 507).

28. 'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with

all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law.

The Supreme Court in the matter of **Jai Singh and others v. Gurmej Singh MANU/SC/0054/2009 : (2009) 15 SCC 747** has laid down the principles relating to the inter se rights and liabilities of co-sharers and held as under:- "9. It is to be noted that the subsequent Full Bench judgment in *Bhartu v. Ram Sarup* MANU/PH/0364/1981 : 1981 PLJ 204 the earlier decision in *Lachhman Singh v. Pritam Chand* MANU/PH/0048/1970 : AIR 1970 P&H 304 was distinguished on facts. The principles relating to

the inter-se rights and liabilities of co-sharers are as follows:

(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not

inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to disturb the arrangement without the consent of others except by filing a suit for partition."

Supreme Court in the matter of **Govindammal v. R. Perumal Chettiar and others MANU/SC/8567/2006 : (2006) 11 SCC 600** has held that to prove ouster and adverse possession against a co-owner the following relevant factors may be taken into consideration: (i) exclusive possession and perception of profits for well over the period prescribed by the law of limitation; (ii) dealings by the party in possession treating the properties as exclusively belonging to him; (iii) the means of the excluded co-sharer of knowing that his title has been denied by the co-owner in possession. It was further held that in order to oust by way of adverse possession, one has to lead definite evidence to show the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case.

Jatina Khatoon and others v. S.K. Najeeb (Dead) Through Legal Representatives and others **MANU/SC/1076/2017 : (2018) 11 SCC 717**, it has been held by the Supreme Court that mere non-participation in rent and profit of land of a co-sharer does not amount to ouster so as to be given title by adverse possession, relying upon its earlier decision in the matter of Karbalai Begum v. Mohd. Sayeed MANU/SC/0363/1980 : (1980) 4 SCC 396.

Darshan Singh and others v. Gujjar Singh (Dead) by LRs. and others MANU/SC/0007/2002 : (2002) 2 SCC 62, the Supreme Court has held that mere mutation in revenue records in favour of one co-sharer does not amount to ouster unless there is a clear declaration denying title of the other co-sharers and in the normal course possession by one co-sharer of property belonging to several co-sharers will be deemed to be possession on behalf of the others. It was further held in paragraph 9 of the report as under:- "9. In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a

clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied."

In Nanjegowda alias Gowda (DEAD) BY LEGAL REPRESENTATIVES AND ANOTHER v. RAMEGOWDA, MANU/SC/1519/2017 : (2018) 1 SCC 574 (Paragraph 19) Hon'ble Supreme Court considered the question of adverse possession amongst the members of one family for want of any animus among them over the land belonging to their family and answered in negative as under: "19. In our opinion, the stand taken by the defendants was wholly inconsistent. They first set up a plea of adverse possession but it was rightly held not proved. The defendants, however, did not challenge this finding in the second appeal, which became final. Even otherwise, the plea of adverse possession was wholly misconceived and untenable. It is a settled law that there can be no adverse possession among the members of one family for want of any animus among them over the land belonging to their family".

In Chhote Khan v. Mal Khan, MANU/SC/0128/1954 : AIR 1954 SC 575, Hon'ble Supreme Court considered the question of adverse possession and on an arrangement between co-sharers and held that no question of adverse possession would arise.

In **Shambhu Prasad Singh v. Phool Kumari, MANU/SC/0483/1971 : (1971) 2 SCC 28** (Para 18), Hon'ble Supreme Court considered the question as to whether mere use and enjoyment does amount to adverse possession? and answered it in negative. The relevant portion of the judgment is reproduced below: "On the question of adverse possession by a co-sharer against another co-sharer, the law is fairly well-settled. Adverse possession has to have the characteristics of adequacy, continuity and exclusiveness. The onus to establish these characteristics is on the adverse possessor. Accordingly, if a holder of title proves that he too had been exercising during the currency of his title various acts of possession, then, the quality of those acts, even though they might not be sufficient to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that

exclusiveness and continuity which is demanded from a person challenging by possession the title which he holds. As between co-sharers, the possession of one co-sharer is in law the possession of all co-sharers. Therefore, to constitute adverse possession, ouster of the non-possessing co-sharer has to be made out. As between them, therefore, there must be evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other. But, once the possession of a co-sharer has become adverse as a result of ouster, a mere assertion of a joint title by the dispossessed co-sharer would not interrupt the running of adverse possession. He must actually and effectively break up the exclusive possession of his co-sharer by re-entry upon the property or by resuming possession in such a manner as it was possible to do. The mere fact that a dispossessed co-sharer comes and stays for a few days as a guest is not sufficient to interrupt the exclusiveness or the continuity of adverse possession, so as not to extinguish the rights of the dispossessed co-sharer.

**In Darshan Singh v. Gujjar Singh,
MANU/SC/0007/2002 : (2002) 2 SCC 62**

(Paragraph Nos. 7 and 9), Hon'ble Supreme Court considered the question of adverse possession by a co-sharer and held as under: "7. The next question which requires our decision is whether Rulia Singh and after his death the present appellants, who were in possession of the land since 1930 and also got their names mutated, have perfected their title by adverse possession over the land of Jagjit Singh. It is well-settled that if a co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse for other co-sharers unless there has been an ouster of other co-sharers.

9. In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possess the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue record in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied".

**DISMISSAL OF PARTITION SUIT AS SETTLED
OR NOT PRESSED****Mahadevi vs. Mallikarjun and Ors.: MANU/KA/
3284/2016 - ILR 2016 KAR 4583 (DB) -**

When a plaintiff wants a partition suit to be dismissed or withdrawn as settled out of Court, the Court should require notice of such application or memo to all other parties (not only all defendants, but co-plaintiffs if any) and hear the parties. If all parties are agreeable for the dismissal or withdrawal, the Court may grant the request..... If any defendant has already sought partition and separate possession by paying Court Fee and opposes the dismissal/withdrawal, it shall permit such defendant to transpose himself/herself as plaintiff and continue the suit, irrespective of whether he makes an application for transposition or not. Even if no defendant has sought the relief of partition and separate possession, till then, the Court may in appropriate cases permit any defendant who files an application in that behalf, to get himself transposed as plaintiff and claim partition and separate possession by paying necessary Court Fee and continue the suit. Refusal to grant such permission should be for valid reasons to be assigned by the Court.

Supreme Court in the case of **Hulas Rai vs. KB. Bass and Co., MANU/SC/0023/1967 : AIR 1968 SC 111**. It was laid down that the procedure to be followed by Courts in a partition suit when the plaintiffs want to withdraw the suit or when the plaintiff wants the suit to be dismissed as settled out of Court with some defendants as compromised, as follows: "8. THE procedure to be adopted by Courts in a partition suit, when a plaintiff wants to withdraw the suit, or when plaintiff wants the suit to be dismissed as settled out of Court with some defendants, can be summarised thus:

(i) When a plaintiff wants a partition suit to be dismissed or withdrawn as settled out of Court, the Court should require notice of such application or memo to all other parties (not only all defendants, but co-plaintiffs if any) and hear the parties.

(ii) If all parties are agreeable for the dismissal or withdrawal, the Court may grant the request.

(iii) If any defendant has already sought partition and separate possession by paying Court Fee and opposes the dismissal/withdrawal, it shall permit such defendant to transpose himself/herself as plaintiff and continue the suit, irrespective of

whether he makes an application for transposition or not.

(iv) Even if no defendant has sought the relief of partition and separate possession, till then, the Court may in appropriate cases permit any defendant who files an application in that behalf, to get himself transposed as plaintiff and claim petition and separate possession by paying necessary Court Fee and continue the suit. Refusal to grant such permission should be for valid reasons to be assigned by the Court."

DISMISSAL FOR DEFAULT FRESH PARTITION SUIT CAN BE BROUGHT

S.K. Lakshminarasappa and Ors. vs. B Rudriah and Ors.: MANU/KA/2737/2011 (DB) ILR 2012

KAR 4129, - A suit for partition dismissed for default under Order 9 Rule 8 of CPC does not bar a subsequent suit for partition. The reason is that the right to enforce a partition is a continuous right, which is a legal incident of a joint tenancy and which enures so long as the joint tenancy continues. Cause of action is continuous in partition cases which subsists so long as the property is held jointly. In other words, the joint owner can file a suit for partition, until partition is actually effected, irrespective of the fact

whether earlier suits for such partition were dismissed for default or withdrawn or an earlier decree for partition was not acted upon. The plaintiff's suit is for partition of certain joint family property which was jointly held at the time of the previous suit and continues to be joint upto now. When it was dismissed for non-prosecution, the plaintiffs applied for restoration of the suit, but their application was dismissed on the ground that they have failed to establish sufficient cause for their non-appearance in the Court. The dismissal of the suit for default would not put an end to the joint status of the property. The effect of such dismissal is the joint status continues. The property continues to be joint. The co-sharers right to seek partition of the property held jointly, continues. It is a recurring cause of action. The cause of action comes to an end only after partition of the property held in joint, is severed and the share to which each co-sharer is entitled to, is put in possession of their respective share. Therefore, the order of dismissal for default passed under Order 9 Rule 8 CPC, would not have the effect of filing yet another suit for partition on the same cause of action.

WHO ARE NECESSARY PARTIES TO PARTITION SUIT

S.K. Lakshminarasappa and Ors. vs. B Rudriah and Ors.: MANU/KA/2737/2011 (DB) ILR 2012

KAR 4129, For determining the question who is a necessary party, there are two tests, one - there must be a right to some relief against such party in respect of the matter involved in the proceedings in question; second - it should not be possible to pass an effective decree in the absence of such a party. An eventual interest of a party in the fruits of litigation cannot be held to be the true test for impleading a party. Persons who ought to have been joined as parties are called necessary parties, i.e. persons in whose absence the Court will not be able to give effective decree at all. Therefore, a necessary party is a party without whose presence a suit cannot be proceeded with, i.e., a party necessary to the constitution of the suit without whom no decree can at all be passed failure to implead a necessary party as a party to the proceeding is fatal to a suit.

In a suit for partition, at the stage of passing of a preliminary decree for partition, the only question that needs to be adjudicated by the Trial Court is, whether the property in question is a co-parcenary property or a joint family property

and if so, what is the share to which these family members are entitled to. For the declaration of such shares, the presence of alienees is not necessary. Even in their absence the suit of the plaintiff can be adjudicated upon and their presence is in no way necessary for the Court to determine the questions involved in the suit. It is only after declaration of shares, at the stage of dividing the property by metes and bounds and putting them in possession of the extent of the share so declared, the character, validity and the nature of alienations have to be taken note of. It is at that stage, it is necessary to hear the persons who are claiming title through such members of the family and who have parted with valuable consideration and who are in possession of the property. This is because if they have to be dispossessed from the property, if their sale deeds are to be annulled, they have to be heard. Therefore, a suit for partition cannot be dismissed on the ground of non-joinder of these third parties/strangers to the family.

In a partition suit, all co-parceners must be before Court either as plaintiffs or as defendants. Any co-parcener or co-sharer who sues for partition of property must make the other co-parceners or co-sharers as defendants because

the partition which is made in his favour is a partition against his co-parceners or co-sharers. Any decree which gives him a portion of property takes away all rights which they, i.e., the others co-parceners or co-sharers would otherwise have to that portion, and therefore, it is a decree against them and in his favour. A decree for partition made in a suit instituted by a member of -Joint Hindu Family is therefore *res judicata* as between all who are parties to the suit- Besides the co-parceners, the wife, the mother, grandmother or other legal heirs, are necessary parties to the suit when they are entitled to a share on a partition having succeeded to the estate of such co-parceners or co-sharers. When the partition is claimed as between branches of the family only, the heads of all the branches alone need be made parties. Of course, in such a case, it is open to the others to apply to be made parties. Those members of the family who are entitled to maintenance would be proper parties to a suit for partition. So too, the joinder of creditors and in particular decree holders as well as mortgages as defendants may be proper in cases where their claims are disputed. Every co-parcener and every purchaser of the interest of a co-parcener is entitled to institute a suit for partition.

A suit for partition can be dismissed only if the members of the family who have an interest in the property are not made parties as they are the only necessary parties to the suit. At worst if a person other than a necessary party is not made a party to the suit, the decree passed in their absence may not bind them, if they are claiming any independent title to the property being in possession of the same. If members of a joint family file a suit for partition without impleading alienees and collude and get a decree passed affecting the interest of alienees, the said collusive decree being void, as alienees being not made parties and such a decree does not in any way affect their interests. But, a suit for partition cannot be dismissed on that ground. - In a suit for partition not only those who are entitled to a share in the joint family property but also those persons who are entitled to maintenance and also those persons for whose marriages provision has to be made from out of the funds of joint family property are necessary parties.

The plaintiffs in a suit for partition, whose share is declared, cannot be denied the benefit of possession of the property on the ground that they are not in possession on the date of the suit. Once the suit is filed against a co-sharer/joint

family member who has put others in possession, notwithstanding the fact that the third party purchaser is in possession of the suit schedule property, the plaintiff would be entitled to recover possession from third party also, if the property is in their possession legitimately falls to the share of the plaintiffs after passing of final decree, The contention of the defendants that the plaintiffs are not entitled to possession as they were not in possession of any portion of the property as on the date of suit is without substance, and contrary to the admitted pleadings and evidence on record.

When the alienees claim title under the members of the family or co-parceners and when they are lawfully inducted into possession by them, the possession of the said family members and persons claiming under them would be the possession of the plaintiffs in the suit also. Till the partition is effected by metes and bounds, nobody can claim exclusive title to any portion of the property. Therefore, the alienees though they are put in exclusive possession of a portion of the property, as the property is not divided by metes and bounds, they cannot claim exclusive title to the property which is to be in their possession. Therefore, the plaintiffs are deemed to be in

possession in law, of the property, which is in the possession of such alienees. Therefore, the limitation do not run against such alienees. The plaintiffs cannot maintain a suit against such alienees, as there is no privity of contract between them. Therefore, if the plaintiffs have to recover possession from such alienees, it is necessary for the plaintiffs to file a suit for general partition against the co-parceners or family members or co-sharers and include such alienees who are only proper parties in a suit for partition. Only if they get decree against co-sharers, family members or co-parceners, they would be entitled to possession from such alienees. Therefore, the suit that is being filed against the alienees is in fact a suit for partition filed against the members of the family, co-sharers and co-parceners and as admittedly no period of limitation is prescribed for filing such a suit, this suit is not barred by law of limitation in so far as alienees are concerned.

In Section 333 of Malla's Hindu Law 17th Edition at page 537 dealing with the question as to who should be the parties to the suit it is stated as under:-

a) The plaintiff in a partition suit should implead as defendants :-

- (i) the heads of all branches;
 - (ii) females who are entitled to a share on partition;
 - (iii) the purchaser of a portion of the plaintiffs share, the plaintiff himself being a coparcener;
 - (iv) if the plaintiff himself is a purchaser from a coparcener, his alienor,
- b) It is desirable that the following persons should be made parties; though not necessary parties, they are proper parties to such a suit:
- (i) a mortgagee with possession of the family property or of the undivided interest of a coparcener;
 - (ii) simple mortgagees of specific items of the family property;
 - (iii) purchaser of the undivided interest of a coparcener;
 - (iv) persons entitled to provision for their maintenance and marriage, that is widows, daughters, sisters and such like and distinguished heirs;
 - (v) any person entitled to maintenance from the family, the plaintiff may also plead any other coparcener or any person interested in the family property such as a mortgage or a lessee. Such a person may himself apply and be made a party.

Smt. Puttakkaiah v. Smt. Basamma reported in MANU/KA/2069/2012 has held as follows:

11. It is settled principle of law that partition suit should include all the joint family properties and also all persons who are entitled for a share are to be impleaded as parties. Otherwise, such a suit is not maintainable. In the absence of a sharer who has interest in the suit property, no effective decree for partition can be passed. Therefore, the judgment and decree of the Trial Court cannot be sustained.

ADDING OF PARTIES IN PARTITION SUIT

S.K. Lakshminarasappa and Ors. vs. B Rudriah and Ors.: MANU/KA/2737/2011 (DB) ILR 2012 KAR 4129,- In a suit for partition of properties of a Joint Hindu Family, there is no legal bar even after a preliminary decree had been passed, in an appropriate circumstances to add a party under Order 1 Rule 10 in the final decree proceedings if the Court thinks that the addition of such party is necessary to adjudicate upon all questions effectively and completely. The proceedings in a partition suit do not become final unless the final decree is passed. It is only the final decree that brings about termination of suit. The Court can

The Court dealing with a partition suit should give an opportunity to the plaintiff to include all

necessary properties and all persons who are necessary parties. If Court comes to the conclusion that some more properties have been left out, nothing comes in the way of the Court to direct the concerned party to include the properties. The purpose of holding judicial proceedings is to ascertain the truth and do justice between the parties. Courts are not umpires so as to allow the contest develop and ultimately to decide as to who has won and who has lost. A Division Bench of this Court in the case of Subbanna Vs Kamaiah reported in MANU/KA/0235/1988 : ILR KAR 1988(2) 786 has specifically held that that Rule 9 of Order 1 of C.P.C. specifically provides that no suit shall be defeated by reason of the mis-joinder or non-joinder of parties and therefore the Court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. Sub-rule (2) of Rule 10 of Order 1 C.P.C., empowers the Court to direct the plaintiff to add a person to the suit who ought to have joined whether as plaintiff or defendant whose presence before the Court is necessary in order to effectually and completely adjudicate upon and settle all the questions involved in the suit. When the First Appellate Court has

come to the conclusion that certain persons have to be added as necessary parties for effectively deciding the matter in controversy and when there are some more properties to be included, nothing came in the way of the First Appellate Court either to direct the parties to rectify those mistakes by directing necessary parties to come on record and by including all the properties or remanding the matter to the trial Court to add necessary parties and to do all efforts necessary for effectively deciding the matter. Having not done so, the judgment of the First Appellate Court is not sustainable.

WHAT IS DETERMINED BY SUIT FOR PARTITION IN PRELIMINARY DECREE

S.K. Lakshminarasappa and Ors. vs. B Rudriah and Ors.: MANU/KA/2737/2011 (DB) ILR 2012 KAR 4129, 61. In a suit for partition, at the

stage of passing of a preliminary decree for partition, the only question that needs to be adjudicated by the Trial Court is, whether the property in question is a co-parcenary property or a joint family property and if so, what is the share to which these family members are entitled to. For the declaration of such shares, the presence of alienees is not necessary. Even in their absence

the suit of the plaintiff can be adjudicated upon and their presence is in no way necessary for the Court to determine the questions involved in the suit. It is only after declaration of shares, at the stage of dividing the property by metes and bounds and putting them in possession of the extent of the share so declared, the character, validity and the nature of alienations have to be taken note of. It is at that stage, it is necessary to hear the persons who are claiming title through such members of the family and who have parted with valuable consideration and who are in possession of the property. This is because if they have to be dispossessed from the property, if their sale deeds are to be annulled, they have to be heard. Therefore, a suit for partition cannot be dismissed on the ground of non-joinder of these third parties/strangers to the family. A suit for partition can be dismissed only if the members of the family who have an interest in the property are not made parties as they are the only necessary parties to the suit. At worst if a person other than a necessary party is not made a party to the suit, the decree passed in their absence may not bind them, if they are claiming any independent title to the property being in possession of the same. If members of a joint

family file a suit for partition without impleading alienees and collude and get a decree passed affecting the interest of alienees, the said collusive decree being void, as alienees being not made parties and such a decree does not in any way affect their interests. But, a suit for partition cannot be dismissed on that ground.

62. In a suit for partition not only those who are entitled to a share in the joint family property but also those persons who are entitled to maintenance and also those persons for whose marriages provision has to be made from out of the funds of joint family property are necessary parties. A transferee of an item of property from the vendee who purchased it from a party to the suit is not directly a transferee and therefore there is no nexus between the transferee and the party to the suit from whom the property was purchased. Therefore, such transferee is not a necessary party to the suit. In a suit for partition of properties of a Joint Hindu Family, there is no legal bar even after a preliminary decree had been passed, in an appropriate circumstances to add a party under Order 1 Rule 10, in the final decree proceedings if the Court thinks that the addition of such party is necessary to adjudicate upon all questions effectively and completely. The

proceedings in a partition suit do not become final unless the final decree is passed. It is only the final decree that brings about termination of suit. The Court can add a party in a partition suit even after a preliminary decree but before a final decree takes place. A suit for partition is finally disposed off only with the passing of a final decree. Impleading of additional parties subsequent to passing of a preliminary decree in a suit for partition is permissible, only if none of the questions already settled by the preliminary decree would not have to be re-opened by reason of such a joinder. Therefore, it is clear in order to decide the share to which each member of a family or a person claiming under such member of a joint family, the necessary parties are only the members of the joint family. Once all those members are made parties, the suit for partition cannot be dismissed on the ground of non-joinder of necessary parties. The purchasers from those members of the family or subsequent purchasers from the earlier purchasers are proper parties in a suit for partition. They could be, added even during final decree proceedings. For not adding them as parties, a suit for partition cannot be dismissed.

WHO CAN FILE PARTITION SUIT, PERIOD OF LIMITATION

N. Nagendra vs. A. Chowdamma: MANU/KA/

2243/2017 - One can seek partition only if one has pre existing right in the property to be divided. That's why in a partition suit relationship between the parties is an important aspect. If the plaintiff fails to establish his relationship with defendants, suit for partition has to be dismissed. Relationship may arise out of consanguinity or adoption. Some times purchaser of an undivided interest in a joint family property can file a suit for general partition. Whenever two or more reliefs are sought in a suit, the effective relief decides the period of limitation for the suit. For instance, if a plaintiff seeks cancellation of a sale deed in respect of an immovable property executed by him in favour of defendant and possession of the same from him, the period of limitation is three years according to Article 59 of the Limitation Act. Here the effective or main relief is cancellation of the sale deed as it amounts to transfer within the meaning of Section 5 of the Transfer of Property Act. Although the sale deed is void or voidable against a person, if it is left outstanding, it may cause serious injury to the plaintiff, and therefore, he has to get it adjudged

void or voidable and the Court has to cancel the instrument in such a situation. Unless it is cancelled the plaintiff gets no right to seek possession. Therefore, in a multifarious suit, the limitation issue has to be decided with reference to the effective main relief. Here the period of limitation applicable is 12 years from the date of dispossession according Article 65 of the Limitation Act.

The Hon'ble Supreme Court in the case of **Krishna Pillai Rajasekharan Nair (D) by LRs vs. Padmanabha Pillai (D) by LRs and others reported in MANU/SC/1043/2003 : AIR 2004 SC 1206**, while considering the provisions of Article 120 of the Limitation Act, at paragraph 22, held as under: "22. In our opinion, the suit filed in the present case being a suit for partition primarily and predominantly and the relief of redemption having been sought for only pursuant to the direction made by the High Court in its order of remand, the limitation for the suit would be governed by Article 120 of Limitation Act, 1908. For a suit for partition the starting point of limitation is - when the right to sue accrues, that is, when the plaintiff has notice of his entitlement to partition being denied. In such a suit, the right

of the redeeming co-mortgagor would be to resist the claim of non-redeeming co-mortgagor would be to resist the claim of non-redeeming co-mortgagor by pleading his right of contribution and not to part with the property unless the non-redeeming co-mortgagor had discharged his duty to make contribution. This equitable defence taken by the redeeming co-mortgagor in the written statement would not convert the suit into a suit for contribution filed by the non-redeeming co-mortgagor".

The Apex Court in the case of **Rukhmabai vs. Lala Laxminarayan and others reported in MANU/SC/0186/1959 : AIR 1960 SC 335**, at paragraphs 31, 32 and 33, held as under: 31. The argument on the question of limitation is put thus: The plaintiff, respondent herein, had knowledge of the fraudulent character of the trust deed as early as 1917 or, at any rate, during the pendency of the partition suit between Rukhmabai and Chandanlal instituted in the year 1929, and the suit filed in 1940, admittedly after six years of the said knowledge, would be barred under Article 120 of the Limitation Act. This Article was subject to judicial scrutiny both by the Judicial Committee as well as by the High

Court of various States. The leading decision on the subject is that of the Judicial Committee in *Bolo v. Koklan* [MANU/PR/0054/1930 : (1929-30) LR 57 IA 325, 331]. Therein, Sir Benod Mitter, observed: "There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted." The said principle was restated and followed by the Judicial Committee in *Annamalai Chettiar v. A.M.K.C.T. Muthukaruppan Chettiar* [MANU/PR/0080/1930 : (1930) ILR 8 Rang 645] and in *Gobinda Narayan Singh v. Sham Lal Singh* [MANU/PR/0025/1931 : (1930-31) LR 58 IA 125]. The further question is, if there are successive invasions or denials of a right, when it can be held that a person's right has been clearly and unequivocally threatened so as to compel him to institute a suit to establish that right. In *Pothukutchi Appa Rao v. Secretary of State* [MANU/TN/0136/1937 : AIR 1938 Mad 193, 198], a Division Bench of the Madras High Court had to consider the said question. In that case, Venkatasubba Rao, J., after considering the relevant decisions, expressed his view thus: "There is nothing in law which says that the

moment a person's right is denied, he is bound at his peril to bring a suit for declaration. The Government beyond passing the order did nothing to disturb the plaintiffs possession. It would be most unreasonable to hold that a bare repudiation of a person's title, without even an overt act, would make it incumbent on him to bring a declaratory suit." "It is a more difficult question, what is the extent of the injury or infringement that gives rise to, what may be termed, a compulsory cause of action?" 33. The legal position may be briefly stated thus: The right to sue under Article 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.

PARTITION SUIT CANNOT BE FILED IN FAMILY COURT

B.V. Harinarayana Reddy vs. Chukki Nanjunda**Swamy: MANU/KA/2522/2011** - Under Section

7(1)(c) Hindu Marriage Act, provides "a suit or proceeding between the parties to a marriage with respect to the "property of the parties" or of "either of them". The Division Bench of this Court in Genu @ Ganu and others -vs- Jalabai and others reported in MANU/KA/0638/2008 : ILR 2009 KAR 612 has held that, "a suit filed by the wife against her husband for partition and separate possession against his family property is not maintainable in the Family Court since the other parties who are not parties to the marriage also have interest in the said property. In the cited case, the daughters have filed a suit against the father for partition before the Family Court. In the instant case also, apart from the wife along with her children had filed a suit against her husband. Therefore, evidently, the Family Court had no jurisdiction to entertain the suit.

CHAPTER-4

JOINT FAMILY

THE BURDEN WOULD UNDOUBTEDLY LIE ON THE PARTY WHO ASSERTS THE EXISTENCE OF JOINT FAMILY

In BHAGWATI PRASAD SAH AND OTHERS v. DULHIN RAMESHWARI JUERAND ANOTHER 1952 AIR 72 , the Supreme Court after referring to several pronouncements of the judicial committee of Privy Council, laid down the general principle of Hindu Law in the following terms:

.....The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but, as it is admitted here, that Imrit, one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the other side too that because one member of the family separated himself, there has been separation with regard to all. It would be 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 amongst the other coparceners or that they remained united. The burden would undoubtedly, lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief.....

Apex Court reported in **AIR 1954 SC 379 (SRINIVAS KRISHNARAO KANGO V. NARYAN DEVJI KANGO AND OTHERS)** the burden is upon the person to prove the existence of joint family property in case he pleads acquisition by a member of the joint family as joint family property.

APPASAHEB PEERAPPA CHANDGADE V. DEVENDRA PEERAPPA CHANDGADE & ORS. reported in **AIR 2007 SC 218** whereunder it has been held:

"9. So far the legal proposition is concerned, there is no gainsaying that whenever a suit for partition and determination of share and possession thereof is filed, then the initial burden is on the plaintiff to show that the entire property was a joint Hindu family property and after initial discharge of the burden, it shifts on the defendants to show that the property claimed by

them was not purchased out of the joint family nucleus and it was purchased independent of them. This settled proposition emerges from various decisions of this Court right from 1954 onwards".

MERELY ON PROOF THAT HE TREATED HIS YOUNGER BROTHERS WITH ORDINARY KINDNESS, SUPPORTING THEM WHEN THEY WERE NOT EARNING, HELPING THEM TO START BUSINESS AND, SEEING TO THEIR MARRIAGE AND SO FORTH - DOES NOT CREATE JOINT FAMILY

PRIVY COUNCIL DECISION

Bhuru Mal v. Jagannath, AIR 1942 PC 13 the Judicial Committee of the Privy Council considered this aspect of the matter and held that there is no presumption in law that joint business is a joint family business. It was held. Though a business, if it belongs to a Hindu joint family, is an item of joint family property, special considerations apply to the question whether or not a business belongs to the family or to the individual member who carries it on. If it be a joint family business, then all the members of the family are liable for its debts upon the terms and

to the extent laid down by the Hindu law. Whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property but joint property, no such presumption can be applied to a business. A member of a joint undivided family can make separate acquisition of property for his own benefit and, unless it can be shown that the business grew from joint family property or that the earnings were blended with joint family estate they remain free and separate.... The question whether a business carried on by a member of a joint Hindu family was begun or carried on with the assistance of joint family property is a question of fact upon which the burden of proof lies upon the plaintiff who claims a share in the business. The burden of proving that the business was separate in its inception cannot be cast upon the defendant who asserts it. Jointness may be proved by evidence that the business was carried on as a family business, by proof that the profits were treated as joint family property being brought to one account or divided among the members. The Privy Council also observed that adverse inference against a member of the joint family

that business carried on by him was not his individual business cannot be drawn merely on proof that he treated his younger brothers with ordinary kindness, supporting them when they were not earning, helping them to start business and, seeing to their marriage and so forth.

ESSENCE OF JOINT HINDU FAMILY PROPERTY IS UNITY OF OWNERSHIP AND COMMUNITY OF INTEREST, AND THE SHARES OF THE MEMBERS ARE NOT DEFINED

Nanchand Gangaram Shetji vs Mallappa Mahalingappa Sadalge 1976 AIR 835, 1976 SCR (3) 287 In a joint Hindu family business, no member of the family can say that he is the owner of one-half, one-third or one-fourth. The essence of joint Hindu family property is unity of ownership and community of interest, and the shares of the members are not defined. Similarly, the patterns of the accounts of a joint Hindu family business maintained by the karta is different from those of a partnership. In the case of the former the shares of the individual members in the profits and losses are not worked

out while they have to be worked out in the case of partnership accounts.

The Supreme Court in **Sita Bai v. Ramachandra MANU/SC/0296/1969 : AIR 1970 SC 343** held that a joint Hindu family may consist of a single male member and widows of deceased male members and the property of a joint family does not cease to belong to a joint family merely because the family is represented by a single coparcener who possesses rights which an absolute owner of property may possess. The property which was the joint family property of Hindu undivided family does not cease to be so because of the "temporary reduction of the coparcenary unit to a single individual." The character of property viz., that it was the joint property of a Hindu undivided family remains the same.

In Mudigowda V. Ramchandra MANU/SC/0289 /1969 : AIR 1969 SC 1076 the Supreme Court held that if the possession of nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property.

**EXISTENCE OF A JOINT FAMILY DOES NOT
LEAD TO THE INFERENCE THAT PROPERTY
HELD BY ANY MEMBER OF THE FAMILY IS
JOINT**

**Dandappa Rudrappa Hampali And ... vs
Renukappa Alias Revanappa AIR 1993 Kant
148, ILR 1993 KAR 1182, 1993 (1) KarLJ 138**

Existence of a joint family does not lead to the inference that property held by any member of the family is joint. In Appala-swami v. Suryanarayanamurti, AIR 1947 PC 189 the Privy Council held at p. 192: "Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon any one asserting that any item of property is joint to establish the fact. 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 may have been acquired, the burden shifts to the party alleging self acquisition to establish affirmatively that the property was acquired without the aid of the joint family property."

In Appalaswami v. Suryanarayanamurti and others, MANU/PR/0051/1947 : AIR 1947 PC 189 it was held that Hindu law is very clear. Proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon one who asserts that an item of property is joint, to establish that fact. 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 property in question may have been acquired, the burden shifts to the party alleging self-acquisition, to establish affirmatively that the property was acquired without the aid of joint family property/fund.

Srinivas Krishnarao Kango v. Narayan Devji Kango, MANU/SC/0126/1954 : AIR 1954 SC 379 it was held that proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon anyone asserting that any item of property is joint to establish the fact. 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 property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of joint family property.

In Rukhmabai v. Lala Laxminarayan, MANU/SC/0186/1959 : AIR 1960 SC 335 the Court said: "There is a presumption in Hindu Law that a family is joint. There can be a division in status among the members of a joint Hindu family by refinement of shares which is technically called "division in status", or an actual division among them by allotment of specific property to each one of them which is described as "division by metes and bounds". A member need not receive any share in the joint estate but may renounce his interest therein, his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members vis-a-vis the family property, A division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to

prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether movable or immovable, held by a member of, a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property, to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property..."

In Achuthan Nair v. Chinnammu Amma and others, MANU/SC/0361/1965 : AIR 1966 SC 411 their Lordships said: "Under Hindu law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the

property was acquired by him without the aid of the said nucleus. This is a well settled proposition of law."

In Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh,

MANU/SC/0289/1969 : (1969) 1 SCC 386 the

Court noticed the observations of Sir John Beaumont in Appalaswami (supra) and reiterated that burden of proving that any particular property is joint family property, in the first instance, is, upon the person who claims it as coparcenary property. But, if possession of a nucleus of the joint family is either admitted or proved, any acquisition made by a member of joint family is presumed to be joint family property. This is however, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

In Baikuntha Nath Paramanik v. Sashi Bhusan Pramanik and others, MANU/SC/0381/1972 : (1973) 2 SCC 334 Court again held, when a joint family is found to be in possession of nucleus sufficient to make impugned acquisitions, then a presumption arises that the acquisitions standing in the names of the person who were in the management of the family properties, are family acquisitions.

In Bhagwant P. Sulakhe v. Digantbar Gopal Sulakhe, MANU/SC/0267/1985 : AIR 1986 SC 79 the Court observed that character of any joint family property does not change with the severance of status of 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 amongst the co-sharers. By a unilateral act it is not open to any member of joint family to convert any joint family property into his personal property.

In Surendra Kumar v. Phoolchand, MANU/SC/0307/1996 : (1996) 2 SCC 491 the Court said: "It is no doubt true that there is no presumption that a family because it is joint possessed joint property and therefore the person alleging the

property to be joint has to establish that the family was possessed of some property with the income of which the property could have been acquired. But such a presumption is a presumption of fact which can be rebutted."

In D.S. Lakshmaiah and another v. L. Balasubramanyam and another, MANU/SC/0639/2003 : in para 18 of the judgment the Court, after a retrospect of various earlier decisions, said: "18. The legal principle, therefore, is that there is no presumption of a property being joint family property only an account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

In Appasaheb Peerappa Chandgade v. Devendra Peerappa Chandgade,

MANU/SC/8597/2006 : (2007) 1 SCC 521 the Court said: "...there is no presumption of a joint Hindu family but on the evidence if it is established that the property was joint Hindu family property and the other properties were acquired out of that nucleus, if the initial burden is discharged by the person who claims joint Hindu family, then 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 by cogent and necessary evidence."

WHEN PRESUMPTION ARISES AS TO PROPERTIES ACQUIRED BY THE MANAGER, AS KARTHA, WERE JOINT FAMILY PROPERTIES

In **Mallappa Girirnalappa Betgeri v. R. Yellappagouda Patil, AIR 1959 SC 906**, the Supreme Court, in the light of the undisputed fact that certain properties belong to the joint family and having restrained itself from interfering with the finding of sufficiency of nucleus, recorded by the civil court, held that there arose a presumption that the properties acquired by the manager, as Kartha, were joint family properties.

**THERE IS A STRONG PRESUMPTION IN
FAVOUR OF HINDU BROTHERS
CONSTITUTING A JOINT FAMILY**

Supreme Court in **Bharat Singh v. Mst Bhagirathi, 1966 AIR 405, 1966 SCR (1) 606** wherein Hon'ble Supreme Court has observed as follows: "There is a strong presumption in favour of Hindu brothers constituting a joint family. It is for the person alleging severance of the Joint Hindu Family to prove it. The mere fact that after the death of the father mutation entry was made in favour of three brothers and indicated the share of each to be one-third, by itself could be no evidence of the severance of the joint family which, after the death of the father consisted of the three brothers who were minors" The appellants filed a suit for a declaration that the entry in the name of the respondent in the Jamabandi papers of certain villages was incorrect and alleged that they along with their brother, the husband of the respondent, constituted a joint Hindu family, that their brother died as a member of the joint Hindu family and thereafter his widow- the respondent- lived with the appellants who continued to be

owners and possessors of the property in suit, the widow being entitled to maintenance only, and that by mistake the respondent's name was entered in village records in place of the deceased husband. The respondent contested the suit alleging, inter alia, that her husband did not constitute a joint Hindu family with the appellants at the time of his death and also that the suit was barred by time as she had become owner and possessor of the land in suit in 1925 on the death of her husband when the entries in her favour were made, and the suit was brought in 1951. The respondent had admitted in certain documents about the existence of the joint Hindu family or a joint Hindu family firm. The trial Court decreed the suit, which on appeal, the High Court set aside. The High Court did not use the admissions of respondent as she, when in the witness box, was not confronted with those admissions; and as those documents, if read as a whole did not contain any admissions on behalf of the respondent that there was any joint family still in existence. In appeal by certificate to this Court. HELD : (i) There is a strong presumption in favour of Hindu brothers constituting a joint family. It is for the person alleging severance of joint Hindu family to establish it. The mere fact of

the mutation entry being made in favour of the respondent on the death of her husband was no clear indication that there was no joint Hindu family of the appellant, and the respondent's husband at the time of the latter's death.

**JOINT FAMILY PROPERTY AND MITAKSHARA
CO-PARCENARY PROPERTY
DIFFERENTIATED**

**2008 (7) SCC 46, HARDEO RAI VS SAKUNTALA
DEVI AND OTHERS** BENCH: S.B. SINHA & V.S.

SIRPURKAR Mitakashra Coparcenary is a body of individuals created by law whereas joint family is constituted by agreement of the parties. The appellant and the respondent's father entered into an agreement to sell a property. In the agreement, the appellant made a representation that the joint family property was partitioned and the co-sharers were in possession of the separate properties. Respondent's father paid certain sum out of the total amount and was put in the possession of the property. However, the appellant did not execute the sale deed. Respondent filed suit for specific performance. Appellant contended that he was forced to sign a blank stamped paper on which agreement of sale

was scribed later; and that the property was a joint family property. Respondent's father was examined. The scribe of the agreement as also witnesses were examined. Trial court decreed the suit. The appeal by the appellant was allowed on the ground that the property was a joint family property. Aggrieved, respondent filed appeal and the Division Bench of High Court allowed the same. Supreme court Dismissed the appeal.

Dodda Thayappa vs. H.N. Venkatesh Reddy and Ors.: MANU/KA/9522/2019 - The Hindu

Joint family properties which are also known as co-parcenary properties generally consists of:-

1. Ancestral properties succeeded by the 'Karta' (management of the joint family).
2. Properties earned out of income from such ancestral properties.
3. Properties acquired from the income of the joint family.
4. Separate properties and income from such properties of its members but contributed to the common basket of the joint family.

JOINT FAMILY WHICH CAN BE CONSTITUTED BY AGREEMENT OF THE PARTIES - A

MITAKASHRA COPARCENARY IS A CREATURE OF LAW

2008 (7) SCC 46, HARDEO RAI VS SAKUNTALA DEVI AND OTHERS BENCH: S.B. SINHA & V.S.

SIRPURKAR There exists a distinction between a Mitakashra Coparcenary property and Joint Family property. A Mitakashra Coparcenary carries a definite concept. It is a body of individuals having been created by law unlike a joint family which can be constituted by agreement of the parties. A Mitakashra Coparcenary is a creature of law. Thus, it is necessary to determine the status of the appellant and his brothers.

PRINCIPLES OF LAW REGARDING HUF AND ITS PROPERTIES DEDUCED FROM SEVERAL DECISIONS

- (i) There is a presumption that a Hindu family is joint.
- (ii) Existence of a joint family itself does not cause a presumption that the property held by the members of the family is joint.
- (iii) The initial burden to establish the existence some joint family property is on the person who

alleges that a property is joint or shows a nucleus, from which a new property or assets could have been acquired.

(iv) What is the nucleus, depends upon the nature and the value of the property.

(v) Existence of such nucleus by itself would not prove that the new assets acquired by any member of the family would be joint family property.

(vi) If a member of a joint family was in a position to utilise the joint family assets to acquire further assets or if such a member had control or command over the joint family assets to acquire further assets, then alone can such further properties be taken to be joint family properties.

(vii) Whether or not such family assets were sufficient to form the nucleus for further acquisition is a question of fact.

(viii) Such a fact can be proved by direct evidence or circumstantial evidence which should be unequivocal and clinching.

(See: Dandappa Rudrappa Hampali & ors. Renukappa alias Revanappa & ors., reported in AIR 1993 Karnataka 148 which inter alia followed the case of Srinivas Krishnarao Kango vs. Narayan Devji Kango & ors. AIR 1954 SC 379 = (1955) 1 SCR 1 and 19 Mudi Gowda Gowdappa

Sankh vs. Ram Chandra Ravagowda Sankh, AIR 1969 SC 1076 = (1969) 3 SCR 245.)

Supreme Court in the case of **Sathyaprema Manjunatha Gowda (Smt.) v. Controller of Estate Duty, Karnataka, (1997) 10 SCC 684**, wherein it is held as follows:- "The Hindu Joint family is purely a creature of law and cannot be created by act of parties save insofar that by adoption or marriage a stranger may be affiliated as a member thereof. An undivided family which is the normal condition of Hindu society is ordinarily joint not only in estate but in food and worship; therefore, not only the concerns of the joint family, but whatever relates to their commonality and their religious duties and observances are regulated by the members or by the manager to whom they have, expressly or by implication, delegated the task of regulation. The joint family status being the result of birth, possession of joint properties is only an adjunct of the joint family and is not necessary for its constitution. Nor is it necessary that all the members possess rights or status even though the property of the family is called joint family property. On the other hand, coparcenary is a narrower body than a joint family and consists of

only those persons who have taken, by birth, an interest in the property of the holder for the time being and who can enforce a partition whenever they like. It commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees."

Satya Prema Manjunatha Gowda vs. Controller of Estate Duty: MANU/KA/0054/1985 -

(1986) 50 CTR (Kar) 201 - A joint Hindu family consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows and unmarried daughters bound together by the fundamental principle of sapindaship or family relationship which is the essence and distinguishing feature of the institution (vide Karsandas Dharamsey v. Gangabai MANU/MH/0011/1908 : ILR [1908] Bom 479). This body is purely a creature of law and cannot be created by act of parties save in so far that by adoption or marriage a stranger may be affiliated as a member thereof (vide Sudarsanam v. Narasimhulu ILR [1901] Mad 149). An undivided family which is the normal condition of Hindu society is ordinarily joint not only in estate but in food and worship and,

therefore, not only the concerns of the joint family, but whatever relates to their commensality and their religious duties and observances are regulated by the members or by the manager to whom they have expressly or by implication delegated the task of regulation (vide *Virada Pratapa Ragunanda Deo v. Brozo Kishore patta Deo* ILR [1876] Mad 69 : 3 IA 154 (PC). The joint family status being the result of birth, possession of joint property is only an adjunct of the joint family and is not necessary for its constitution (vide *Haridas Narayandas Bhatia v. Devkuvarbai Mulji* [1926] MANU/MH/0025/1926 : AIR1926Bom408 . Nor is it that all the members possess equal rights or status even though the property of the family is called joint family property.

Gangaben Motiji Thakor and Ors. vs. Maneklal Ishwarlal Patel and Ors.:
MANU/GJ/1521/2018 - (2019) 2 GLR 898 -

The joint undivided family is a normal condition of a Hindu society. Joint Hindu Family consists of all persons lineal descended from a common ancestors and includes all wives and unmarried daughters. Undivided Hindu family is originally joint not only in estate but also in food and

worship. The existence of joint estate is not an essential requisite to constitute joint family and family which does not own any property, may nevertheless be joint. Hindu Joint Family is by birth and joint family property is only adjunct of the joint family. Joint or Undivided Hindu Family may consists of single male member and widows of deceased male members. The property of a joint family does not cease to be a joint family property belonging to any other family merely because the family is represented by a single male member. It may consists of a male Hindu and his wife. It may even consists of two joint members. However, there must be at least two members to constitute joint family. The general principle is that a Hindu Family is presumed to be Joint unless the contrary is proved. A daughter ceases to be a member of her father's family, on marriage and becomes member of her husband's family.

The Privy Council in the case of **Kalyanji Vithaldas v. Commissioner of Income-tax, Bengal, reported in MANU/PR/0045/1936 : AIR 1937 PC 36**, explained the meaning of Hindu Undivided Family as under: "The phrase "Hindu Undivided Family" is used in the statute with reference not to one school only of Hindu Law, but

to all schools; and their Lordships think it a mistake in method to begin by passing over the wider phrase of the Act the words "Hindu co-parcenary", all the more that it is not possible to say on the face of the Act that no female can be a member."

The Apex Court in the case of **Smt. Sitabai v. Ramachandra,** reported in **MANU/SC/0296/1969 : AIR 1970 SC 343**, held thus: "Under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members and the property of a joint family does not cease to belong to a joint family merely because the family is represented by a single co-parcener who possesses rights which an absolute owner of property may possess. The property which was the joint family property of the Hindu undivided family does not cease to be so because of the "temporary reduction of the co-parcenary unit to a single individual". The character of the property, viz. that it was the joint property of a Hindu undivided family remains the same. It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined

whether the family property can properly be described as 'joint property' of the undivided family."

The Supreme Court in the case of **Gowli Buddanna v. Commissioner of Income-tax, Mysore, reported in MANU/SC/0110/1966 : AIR 1966 SC 1523**, held thus: "6. A Hindu Joint Family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. A Hindu coparcenary is a much narrower body than the joint family : it includes only those persons who acquire by birth an interest in the joint or coparcenary property, these being the sons, grandsons, and great grandsons of the holder of the joint property for the time-being. Therefore, there may be a Joint Hindu Family consisting of a single male member and widows of deceased coparceners."

The Apex Court in the case of **Bhagwati Prasad Sah v. Dulhin Rameshwari Kuer, reported in MANU/SC/0060/1951 : AIR 1952 SC 72**, held as under: "The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved but where one of the co-

parceners separates himself from the other members of the joint family and has his share in the joint property partitioned off for him, there is no presumption that the rest of the co-parceners continued to be joint. It would be 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 amongst the other co-parceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief."

PRESUMPTION OF JOINT FAMILY

Justice Surinder Singh Nijjar, & Justice A.K. Sikri of Supreme Court of India in case of **Kesharbai @ Pushpabai Eknathrao ... vs Tarabai Prabhakar Rao Nalawade & ...** **Decided on 14 March, 2014**, It is a settled principle of law that once a partition in the sense of division of right, title or status is proved or admitted, the presumption is that all joint property was partitioned or divided. Undoubtedly the joint and undivided family being the normal condition of a Hindu family, it is usually presumed, until the contrary is proved, that every Hindu family is

joint and undivided and all its property is joint. This presumption, however, cannot be made once a partition (of status or property), whether general or partial, is shown to have taken place in a family. This proposition of law has been applied by this court in a number of cases. We may notice here the judgment of this Court in **Bhagwati Prasad Sah & Ors. Vs. Dulhin Rameshwari Kuer & Anr.**[[1951] 2 SCR 603], wherein it was inter alia observed as under: “8. Before we discuss the evidence on the record, we desire to point out that on the admitted facts of this case neither party has any presumption on his side either as regards jointness or separation of the family. The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but where it is admitted that one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the other side too that because one member of the family separated himself, there has been separation with regard to all. It would be 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 amongst the other co-parceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief." This principle has been reiterated by this Court in Addagada Raghavamma & Anr. Vs. Addagada Chenchamma & Anr.[AIR 1964 SC 136]

Hon'ble Supreme Court in the case of **Adivappa and Ors. v. Bhimappa and Ors., reported in MANU/SC /1117/2017 : (2017) 9 SCC 586.**

Paragraph 19 of the said judgment is quoted herein below: "19. It is a settled principle of Hindu law that there lies a legal presumption that every Hindu family is joint in food, worship and estate and in the absence of any proof of division, such legal presumption continues to operate in the family. The burden, therefore, lies upon the member who after admitting the existence of jointness in the family properties asserts his claim that some properties out of entire lot of ancestral properties are his self-acquired property."

Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh, reported in MANU/SC/0289/1969 : 1969 (1) SCC 386. "5. It was also

contended on behalf of the appellants that even though the partition deed was bogus there was in law a severance of joint family status and the family could not continue to be joint after 20th April, 1944, which was the date of the partition deed. In other words, the argument was that there was a declaration by the coparceners of their intention to separate and that declaration was sufficient to put an end to the joint family status of the two brothers. In our opinion, there is no substance in this argument. It is now well established that an agreement between all the coparceners is not essential to the disruption of the joint family status, but a definite and unambiguous indication of intention by one member to separate himself from the family and to enjoy his share in severalty will amount in law to a division of status. It is immaterial in such a case whether the other members assent or not. Once the decision is unequivocally expressed, and clearly intimated to his co-sharers, the right of the coparcener to obtain and possess the share to which he admittedly is entitled, is unimpeachable. But in order to operate as a

severance of joint status, it is necessary that the expression of intention by the member separating himself from the joint family must be definite and unequivocal. If however the expression of intention is a mere pretence or a sham, there is in the eye of law no separation of the joint family status."

**Yellappa Ramappa and Ors. vs. Tippanna -
PRIVY COUNCIL : MANU/PR/0003/1928 - AIR**

1929 PC 8 - It is no doubt true that there is a presumption that a Hindu family continues joint, but the sound proposition has for many years been accepted that " the strength of the presumption necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker." Thus properly cited by Mr. Mayne in his work on Hindu Law. The citation is from Moro Vishvanath v. Ganesh 10 Bom. H.C. 444, 453., which is now and has long been a leading and authoritative judgment. Their Lordships think it advisable to quote from it further the following statement of the law made by West J.: " The state of things shown to have existed is presumed to have

continued, until the contrary be shown. But it is not inconsistent with this doctrine, and is, indeed, obvious that, as the course of nature itself brings about inevitable changes in a family, the presumption is one which grows weaker at each stage of descent from the common ancestor. Brothers are for the most part united; second cousins are generally separated. After a considerable lapse of time, testimony of the precise terms on which a partition was effected, and of the precise time at which it was made, will, in most cases, be wanting. The presumption that the old state of things continued is, at some point, met by the presumption that the present state of things had a legal origin, and it cannot be said that the Hindu law, in the form in which it has come down to this generation, looks on all separation of families with disfavour."

The proposition is indeed one which speaks for itself apart from judicial authority. When it appears from facts that through generations a property has been possessed in a certain single line, it can never be said that it lies upon that line to establish that it was dissociated generations ago from another line which appears on the scene as a claimant and propones no facts of jointness, such as living in the same home, sharing in food

or worship, or quoad estate participating in the enjoyment or fruits thereof. To put, in consequence of a stretch of the doctrine of onus, an unnatural and forced construction upon the actual facts of family life and development is not warranted either by the reason of the case or the law of India.

PRESUMPTION OF JOINT FAMILY PROPERTIES WHEN ARISES

Hon'ble Supreme Court in the case of **Mallappa Girimallappa Betgiri & Ors. v. R. Yellappagouda Patil & Ors., reported in MANU/SC/0241/1959 : AIR 1959 SC 906.**

Paragraphs 7 and 10 of the said judgment are quoted herein below:

"7. There is no dispute that the "K" properties came to the appellant by transfer under the deed of sale mentioned earlier nor that the other properties were acquired out of the income of the "K" properties. Both the Courts below however disbelieved the case of the appellant that the "K" properties had been transferred to him without any consideration. They came to the conclusion that the consideration mentioned had been paid. They further held that the evidence showed that

there was a sufficient nucleus of joint family property, called the Belhode properties, out of which the "K" properties could have been acquired and that being so, a presumption arose that the "K" properties acquired in the name of the appellant, the senior member of the joint family, were joint properties and it was for the appellant to discharge the onus of proving that they were not so. The Courts below came to the conclusion that the appellant had not been able to discharge that onus and, therefore, held that the "K" properties were joint family properties. Since the subsequently acquired properties had been admittedly purchased with the income of the "K" properties, it followed that they were also joint properties.

10. We then find that the appellant was a manager of a joint family and had acquired the "K" properties in his own name for a consideration. It was never disputed that the Belhode properties were joint family properties. The Courts below held that the Belhode properties provided a sufficient nucleus of joint family property out of which the "K" properties might have been acquired. The sufficiency of the nucleus is again a question of fact and it is not for us to interfere with the findings of the Courts

below on that question. For reasons to be hereinafter stated, we think that apart from the Belhode properties the appellant had no other source of income. In those circumstances a presumption arises that the "K" properties were the properties of the joint family: See *Srinivas Krishnarao Kango v. Narayan Devji Kango*, (MANU/SC/0126/1954 : (1955) 1 SCR 1 : AIR 1954 SC 379). Unless that presumption is rebutted it must prevail. It is quite clear that the appellant has failed to displace that presumption. The only way in which he sought to do so was by proving that the transfer to him was by way of a gift. But he has failed. The presumption remains unrebutted."

MANU/TN/0370/1999 : AIR 1999 MADRAS 383 in the case of PACKIYAM AMMAL AND OTHERS VS. PATTU AMMAL AND OTHERS.

Referring to this judgment, he would contend that there is no evidence before the Court that B.V. Ramaswamy Reddy had any source of income to purchase the property. He further contended that the above judgment is aptly applicable to the case on hand and when the kartha had no other source of income and acquired the suit property out of funds of the family, the presumption arises

that said acquisition enures to the benefit of family. Hence, the coparcenary property is liable to be partitioned.

MANU/SC/0241/1959 : AIR 1959 SC 906 (V 46 C 127) in the case of MALLAPPA GIRIMALLAPPA BETGERI AND OTHERS vs. R. YELLAPPAGOUDA PATIL AND OTHERS. Referring to this judgment, he would contend that when there is no independent source of income, the presumption arises that new acquisition was joint family property.

MANU/TN/0226/1975 : AIR 1975 MADRAS 316 in the case of VENKATAMMAL VS. SINNA VENKATARAMA CHETTIAR AND OTHERS. Referring to this judgment, he would contend that when the sale is of an undivided interest of a coparcener in the whole of the joint family, the purchaser would be entitled to get the share that is allotted to his vendor in the general partition suit, though he would not be entitled to joint possession with the other coparceners and to claim mesne profits till a decree is passed in the partition suit.

CHAPTER-5

ANCESTRAL PROPERTY

A PROPERTY GIFTED/BEQUESTED TO SON BECOMES ANCESTRAL PROPERTY OF A GRANDSON – IT ALL DEPENDS UPON TERMS OF GIFT/WILL

The Supreme Court in the case of **C. N. Arunachala Mudaliar 1953 AIR 495, 1954 SCR 243** held that the father is not only competent to sell the self acquired immovable property to a stranger without the-concurrence of his sons but he can make a gift of such property to one of his own sons to the detriment of another and he can make even an unequal distribution amongst his heirs.

As the law is accepted and well settled that a Mitak- shara father has complete powers of disposition over his selfacquired property, it must follow as a necessary consequence that the father is quite competent to provide expressly, when he makes a gift, either that the donee would take it exclusively for himself or that the gift would be for the benefit of his branch of the family. If there are express provisions to that effect either in the deed

of gift or a will, no difficulty is likely to arise and the interest which the son would take in such property would depend upon the terms of the grant. If, however, there are no clear words describing the kind of -interest which the donee is to take, the question would be one of construction and the court would have to collect the intention of the donor from the language of the document taken along with the surrounding circumstances in accordance with the wellknown canons of construction. Stress would certainly(have to be laid on the substance of the disposition and not on its mere form. The material question which the court(would have to decide in such cases is, whether taking the document and all the relevant facts into consideration, it could be said that the donor intended to confer a bounty upon his son exclusively for his benefit and capable of being dealt with by him at his pleasure or that the apparent gift was an integral part of a scheme for partition and what was given to the son was really the share of the property which would normally be allotted to him and in his branch of the family on partition. In other words, the question would be whether the grantor really wanted to make a gift of his properties or to partition the same. As it is open to the father to make a gift or partition

of his properties as he himself chooses, there is, strictly speaking, no presumption that he intended either the one or the other.

ANCESTRAL PROPERTY WITH MUSLIMS AND HINDUS

In Muhammed Hussain Khan v. Babu Kishva Nahdan Sahai, AIR 1937 PC 233 (at P. 239), the Privy Council observed: "The word 'ancestor' in its ordinary meaning includes an ascendant in the maternal as well as the paternal, line; but the 'ancestral' estate, in which, under the Hindu Law, a son acquires jointly with his father an interest by birth, must be confined, as shown by the original text of Mitakshara, to the property descending to the father from his male ancestor in the male line. Hence, the estate, which is inherited by father from his maternal grandfather, cannot be held to be ancestral property in which his son has an interest jointly with him".

PROPERTY GIFTED BY A FATHER TO HIS SON COULD NOT BECOME ANCESTRAL PROPERTY IN THE HANDS OF THE SON

C. N. Arunachala Mudaliar vs C. A. Muruganatha Mudaliar 1953 AIR 495, 1954

SCR 243 Property gifted by a father to his son could not become ancestral property in the hands of the son simply by reason of the fact that he got it from his father. The father is quite competent when he makes a gift, to provide expressly either that the donee would take it exclusively for himself or that the gift would be for the benefit of his branch of the family and if there are express provisions to that effect in the deed of gift or will, the interest which the son would take in such property would depend on the terms of the grant. If there are no clear words describing the kind of interest which the donee is to take, the question would be one of construction and the court would have to collect the intention of the donor from the language of the document taken along with the surrounding circumstances in accordance with the established canons of construction. The material question in such cases would be whether the grantor really wanted to make a gift of the properties to his son or the apparent gift was only an integral part of a scheme to partition the same. There is no presumption that he intended either the one or the other, as it is open to the father to

make a gift or partition his properties as he himself chooses.

PROPERTY CAN ORDINARILY BE RECKONED AS ANCESTRAL ONLY IF THE PRESENT HOLDER HAS GOT IT BY VIRTUE OF HIS BEING A SON OR DESCENDED OF THE ORIGINAL OWNER

AIR 1962 Mys 38, Sidramappa Veerabhadrappe v. Babajappa Balappa It was

also observed that to find out whether a property is or is not ancestral in the hands of a particular person, not merely the relationship between the original and the present holder but the mode of transmission also must be looked to; and the property can ordinarily be reckoned as ancestral only if the only if the present holder has got it by virtue of his being a son or descended of the original owner. But when the father obtains the grandfather's property by way of gift, he receives it not because he is a son or has any legal right to such property but because his father chose to bestow a favour on him which he could have bestowed on any other person as well. The interest which he takes in such property must depend upon the will of the grantor. Even

if we accept the entire evidence adduced by the plaintiff . bearing on this point, as true still it is wholly insufficient to uphold the theory of treating the business of the first defendant as family trade. The burden of proving that assertion in heavily on the plaintiffs, the presumption being that every individual would like to maintain his individual right. The evidence adduced in support of such a contention should be trade-worthy, clear and unambiguous. If that evidence is circumstantial the circumstances as are only consistent with the contentions advanced. If they are reasonably capable of two interpretations then the interpretations which is consistent with the continuance of the existing legal rights has to be preferred. Viewed that way the evidence in question is wholly insufficient to hold that the first defendant consciously and deliberately gave up the individual rights in the wit properties and agreed to treat the same as joint family properties. If a business is started by an adult member of the family separately the mere fact that his sons who are defendant on him and are being continued by him gave him some help in the carrying on of that business would not necessarily make the business cease to be his own business and make it the joint business of

himself and his sons. No doubt when the sons grew up the father and the sons may so conduct themselves that from their conduct it may be apparent that it was either expressly or impliedly agreed that the business which at its start was a separate business of the father became the joint business of the father and the sons by some arrangement between them. The matter should be decided on the circumstances and facts of each case.

Shyam Narayan Prasad vs. Krishna Prasad and Ors.: MANU/SC/0665/2018

- It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will

take interest in it and is entitled to it by survivorship.

In C. Krishna Prasad v. C.I.T., Bangalore, MANU/SC/0240/1974 : 1975 (1) SCC 160,

Court was considering a similar question. In the said case, C. Krishna Prasad, the Appellant along with his father Krishnaswami Naidu and brother C. Krishna Kumar formed Hindu undivided family up to October 30, 1958, when there was a partition between Krishnaswami Naidu and his two sons. A question arose as to whether an unmarried male Hindu on partition of a joint Hindu family can be assessed in the status of undivided family even though no other person besides him is a member of the family. It was held that the share which a coparcener obtains on partition is ancestral property as regards male issue. It was held as under: The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property, and if the coparcener dies without leaving male

issue, it passes to his heirs by succession (see p. 272 of Mulla's Principles of Hindu Law, 14th Ed.). A person who for the time being is the sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. If a son is subsequently born to him or adopted by him, the alienation, whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations made by his father before he was born or begotten.

INHERITANCE OF ANCESTRAL PROPERTY AFTER 1956 DOES NOT CREATE AN HUF PROPERTY

HON'BLE MR. JUSTICE VALMIKI J. MEHTA – DELHI HIGH COURT *Surender Kumar Vs. Dhani Ram* AIR 2016 Delhi 120 wherein it has been held as under:-

"5. The Supreme Court around 30 years back in the judgment in the case of Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others, MANU/SC/0265/1986 : (1986) 3 SCC 567, held that after passing of the Hindu Succession Act, 1956 the traditional view that on

inheritance of an immovable property from paternal ancestors up to three degrees, automatically an HUF came into existence, no longer remained the legal position in view of Section 8 of the Hindu Succession Act, 1956. This judgment of the Supreme Court in the case of Chander Sen (supra) was thereafter followed by the Supreme Court in the case of Yudhishter Vs. Ashok Kumar, MANU/SC/0525/1986 : (1987) 1 SCC 204 wherein the Supreme Court reiterated the legal position that after coming into force of Section 8 of the Hindu Succession Act, 1956, inheritance of ancestral property after 1956 does not create an HUF property and inheritance of ancestral property after 1956 therefore does not result in creation of an HUF property.

6. In view of the ratios of the judgments in the cases of Chander Sen (supra) and Yudhishter (supra), in law ancestral property can only become an HUF property if inheritance is before 1956, and such HUF property therefore which came into existence before 1956 continues as such even after 1956. In such a case, since an HUF already existed prior to 1956, thereafter, since the same HUF with its properties continues, the status of joint Hindu family/HUF properties continues, and only in such a case, members of

such joint Hindu family are coparceners entitling them to a share in the HUF properties.

7. On the legal position which emerges pre 1956 i.e before passing of the Hindu Succession Act, 1956 and post 1956 i.e after passing of the Hindu Succession Act, 1956, the same has been considered by me recently in the judgment in the case of Sunny (Minor) & Anr. vs. Sh. Raj Singh & Ors., MANU/DE/3560/2015 : CS(OS) No. 431/2006 decided on 17.11.2015. In this judgment, I have referred to and relied upon the ratio of the judgment of the Supreme Court in the case of Yudhishter (supra) and have essentially arrived at the following conclusions:-

(i) If a person dies after passing of the Hindu Succession Act, 1956 and there is no HUF existing at the time of the death of such a person, inheritance of an immovable property of such a person by his successors-in-interest is no doubt inheritance of an 'ancestral' property but the inheritance is as a self- acquired property in the hands of the successor and not as an HUF property although the successor(s) indeed inherits 'ancestral' property i.e a property belonging to his paternal ancestor.

(ii) The only way in which a Hindu Undivided Family/joint Hindu family can come into

existence after 1956 (and when a joint Hindu family did not exist prior to 1956) is if an individual's property is thrown into a common hotchpotch. Also, once a property is thrown into a common hotchpotch, it is necessary that the exact details of the specific date/month/year etc of creation of an HUF for the first time by throwing a property into a common hotchpotch have to be clearly pleaded and mentioned and which requirement is a legal requirement because of Order VI Rule 4 CPC which provides that all necessary factual details of the cause of action must be clearly stated. Thus, if an HUF property exists because of its such creation by throwing of self-acquired property by a person in the common hotchpotch, consequently there is entitlement in coparceners etc to a share in such HUF property.

(iii) An HUF can also exist if paternal ancestral properties are inherited prior to 1956, and such status of parties qua the properties has continued after 1956 with respect to properties inherited prior to 1956 from paternal ancestors. Once that status and position continues even after 1956; of the HUF and of its properties existing; a coparcener etc will have a right to seek partition of the properties.

(iv) Even before 1956, an HUF can come into existence even without inheritance of ancestral property from paternal ancestors, as HUF could have been created prior to 1956 by throwing of individual property into a common hotchpotch. If such an HUF continues even after 1956, then in such a case a coparcener etc of an HUF was entitled to partition of the HUF property.

9. I would like to further note that it is not enough to aver a mantra, so to say, in the plaint simply that a joint Hindu family or HUF exists. Detailed facts as required by Order VI Rule 4 CPC as to when and how the HUF properties have become HUF properties must be clearly and categorically averred. Such averments have to be made by factual references qua each property claimed to be an HUF property as to how the same is an HUF property, and, in law generally bringing in any and every property as HUF property is incorrect as there is known tendency of litigants to include unnecessarily many properties as HUF properties, and which is done for less than honest motives. Whereas prior to passing of the Hindu Succession Act, 1956 there was a presumption as to the existence of an HUF and its properties, but after passing of the Hindu Succession Act, 1956 in view of the ratios of the judgments of the

Supreme Court in the cases of Chander Sen (supra) and Yudhishter (supra) there is no such presumption that inheritance of ancestral property creates an HUF, and therefore, in such a post 1956 scenario a mere ipse dixit statement in the plaint that an HUF and its properties exist is not a sufficient compliance of the legal requirement of creation or existence of HUF properties inasmuch as it is necessary for existence of an HUF and its properties that it must be specifically stated that as to whether the HUF came into existence before 1956 or after 1956 and if so how and in what manner giving all requisite factual details. It is only in such circumstances where specific facts are mentioned to clearly plead a cause of action of existence of an HUF and its properties, can a suit then be filed and maintained by a person claiming to be a coparcener for partition of the HUF properties.

11. I may note that the requirement of pleading in a clear cut manner as to how the HUF and its properties exist i.e whether because of pre 1956 position or because of the post 1956 position on account of throwing of properties into a common hotchpotch, needs to be now mentioned especially after passing of the Benami Transaction (Prohibition) Act, 1988 (hereinafter

referred to as 'the Benami Act') and which Act states that property in the name of an individual has to be taken as owned by that individual and no claim to such property is maintainable as per Section 4(1) of the Benami Act on the ground that monies have come from the person who claims right in the property though title deeds of the property are not in the name of such person. An exception is created with respect to provision of Section 4 of the Benami Act by its sub-Section (3) which allows existence of the concept of HUF. Once existence of the concept of HUF is an exception to the main provision contained in sub-Sections (1) and (2) of Section 4 of the Benami Act, then, to take the case outside sub- Sections (1) and (2) of Section 4 of the Benami Act it has to be specifically pleaded as to how and in what manner an HUF and each specific property claimed as being an HUF property has come into existence as an HUF property. If such specific facts are not pleaded, this Court in fact would be negating the mandate of the language contained in sub- Sections (1) and (2) of Section 4 of the Benami Act.

12. This Court is flooded with litigations where only self- serving averments are made in the plaint of existence of HUF and a person being a

coparcener without in any manner pleading therein the requisite legally required factual details as to how HUF came into existence. It is a sine qua non that pleadings must contain all the requisite factual ingredients of a cause of action, and once the ratios of the judgments of the Supreme Court in the cases of Chander Sen (supra) and Yudhishter (supra) come in, the pre 1956 position and the post 1956 position has to be made clear, and also as to how HUF and its properties came into existence whether before 1956 or after 1956. It is no longer enough to simply state in the plaint after passing of the Hindu Succession Act 1956, that there is a joint Hindu family or an HUF and a person is a coparcener in such an HUF/joint Hindu family for such person to claim rights in the properties as a coparcener unless the entire factual details of the cause of action of an HUF and each property as an HUF is pleaded.

13. In view of the above, actually the application filed under Order VII Rule 11 CPC in fact is treated as an application under Order XII Rule 6 CPC, inasmuch as, it is observed on the admitted facts as pleaded in the plaint that no HUF and its properties are found to exist. There is no averment in the plaint that late Sh. Jage Ram

inherited property(s) from his paternal ancestors prior to 1956. In such a situation, therefore, the properties in the hands of late Sh. Jage Ram cannot be HUF properties in his hands because there is no averment of late Sh. Jage Ram inheriting ancestral property(s) from his paternal ancestors prior to 1956. There is no averment in the plaint also of late Sh. Jage Ram's properties being HUF properties because HUF was created after 1956 by late Sh. Jage Ram by throwing properties into a common hotchpotch. I have already elaborated in detail above as to how an HUF has to be pleaded to exist in the pre 1956 and the post 1956 positions and the necessary averments which had to be made in the present plaint. The suit plaint however grossly lacks the necessary averments as required in law to be made for a complete cause of action to be pleaded for existence of an HUF and its properties."

it is a settled principle that after the enactment of the Hindu Succession Act 1956, property which devolves on an individual from a paternal ancestor does not become HUF property but the inheritance is in the nature of self-acquired property unless an HUF exists at the time of the devolution. This view was based on the judgments

of this Court in Commissioner of Wealth-tax, Kanpur v. Chander Sen MANU/SC/0265/1986 : (1986) 3 SCC 567 and Yudhishter v. Ashok Kumar MANU/SC/0525/1986 : (1987) 1 SCC 204.

WHICH IS NOT ANCESTRAL PROPERTY

In Vijaya College Trust v. The Kumta Co-operative Arecanut Sales Society Limited AIR 1995 Kar. 35 , the Division Bench of Karnataka High Court while dealing with the concept of ancestral property under Hindu Law observed that the property must have been inherited by a male Hindu from his father, father's father etcetera and the property inherited from female cannot be treated as ancestral and gift of some properties by brother to sister and on her death her sons inheriting it cannot be said to be ancestral property and her sons not having any other property cannot be said that the gifted properties were blended with other properties so as to impress it with character of ancestral properties.

Muhammad Husain Khan v. Babu Kishva Nandan Sahai MANU/PR/0067/1937, wherein

their Lordships of the Privy Council while dealing with the meaning of "ancestral" observed "The word 'ancestor' in its ordinary meaning includes an ascendant in the maternal, as well as the paternal line; but the 'ancestral' estate, in which, under the Hindu Law, a son acquires jointly with his father and interest by birth, must be confined, as shown by the original text of the Mitakshara, to the property descending to the father from his male ancestor in the male line. Hence the estate, which is inherited by father from his maternal grandfather, cannot be held to be ancestral property in which his son has an interest jointly with him."

POSITION OF LAW IF THE PROPERTIES ARE PROVED TO BE ANCESTRAL

The Supreme Court in case of **Valliammai Achi v. Nagappa Chettiar and Anr.** **MANU/SC/0209/1967 : AIR 1967 SC 1153**, had held that-- A father cannot turn joint family property into absolute property of his son by merely making a Will, thus depriving sons of the son who might be born thereafter of their right in the joint family property. It is well settled that the share which a co-sharer obtains on partition of

ancestral property is ancestral property as regards his male issues. They take an interest in it by birth whether they are in existence at the time of partition or are born subsequently. It was further held in para-11 that : Further it was equally well settled that under the Mitakshara Law each son upon his birth takes an interest equal to that of his father in ancestral property, whether it be movable or immovable. It is very important to note that the right which the son takes at his birth in the ancestral property is wholly independent of his father. He does not claim through the father.

Patel Ramanbhai Mathurbhai vs. Govindbhai Chhotabhai Patel and Ors.:

MANU/GJ/0774/2018 - It is needless to say that the essence of a coparcenary under the Mitakshara School of Hindu law is community of interest and unity of possession. A member of joint Hindu family has no definite share in the coparcenary property, but has an undivided interest in the property which is liable to be enlarged by deaths and diminished by births in the family. Therefore, one coparcener would not have any right to dispose of either by gift or otherwise, even his undivided share in the

coparcenary property without the consent of the other coparceners. It has been held in catena of decisions by the Supreme Court that a gift by a coparcener of his undivided interest in the coparcenary property is void. Beneficial reference of the judgments of Apex Court in case of T. Venkata Subbamma v. T. Rathamma, MANU/SC/0570/1987 : AIR 1987 SC 1775, and in case of Baljinder Singh v. Rattan Singh, MANU/SC/7926/2008 : (2008) 16 SCC 785 be made in this regard. When a person claiming that a particular property was ancestral or it belonged to the joint family, the burden of proving the same lies on him. He must show initially that there was sufficient nucleus. A presumption that a property in the hands of an individual coparcener was joint family property can be drawn only if it is shown that there was a nucleus of the joint family property, from which it might fairly be said to have grown. If such nucleus is proved by sufficient evidence or admitted by the opposite party, only then, the onus of proving separate acquisition on the coparcener alleging the same would arise. In the instance case, a careful analysis of the evidence, both oral and documentary would reveal that the plaintiffs have not discharged the burden of proof,

showing that the suit properties were ancestral properties. The case of the plaintiffs is very specific. According to them, the suit properties were purchased by their grandfather and those properties came to be devolved upon their father by Testamentary disposition i.e. on the strength of the 'will' of their grandfather. The Hindu Law, as it stands today, clearly postulates that if it is a self acquired property of the father, it falls into the hands of his sons not as coparcenary property, but would devolve on them in their individual capacity. Where the property is a self acquired property of the father, it falls into the hands of his son in his individual capacity and not as coparcenary property in such case son's son cannot claim right in such property.

The legal position as regards the rights of Karta or Manager to manage the joint family property has been reiterated by the Apex Court in case of **Sunil Kumar & Anr. v. Ram Prakash & Ors.** **MANU/SC/ 0521/1988 : AIR 1988 SC 576** in which it has been observed in para 21 as under :-
 "21. In a Hindu family, the karta or manager occupies a unique position It is not as if anybody could become manager of a joint Hindu family.
 "As a general rule, the father of a family, if alive,

and in his absence the senior member of the family, is alone entitled to manage the joint family property." The manager occupies a position superior to other members. He has greater rights and duties. He must look after the family interests. He is entitled to possession of the entire joint estate. He is also entitled to manage the family properties. In other words, the actual possession and management of the joint family property must vest in him. He may consult the members of the family and if necessary take their consent to his action but he is not answerable to every one of them." It has been further held in para 24 as under : "24. Although the power of disposition of joint family property has been conceded to the manager of joint Hindu family for the reasons aforesaid, the law raises no presumption as to the validity of his transactions. His acts could be questioned in the Courts of law. The other members of the family have a right to have the transaction declared void, if not justified. When an alienation is challenged as being unjustified or illegal it would be for the alienee to prove that there was legal necessity in fact or that he made proper and bonafide enquiry as to the existence of such-necessity. It would be for the alienee to prove that he did all that was

reasonable to satisfy himself as to the existence of such necessity. If the alienation is found to be unjustified, then it would be declared void. Such alienations would be void except to the extent of managers share in Madras, Bombay and Central Provinces. The purchaser could get only the managers share. But in other provinces, the purchaser would not get even that much. The entire alienation would be void. [Maynes Hindu Law 11th ed. Para 396]." The Supreme Court in the said case further observed in para 26 inter alia that-- "I do not think that these submissions are sound. It is true that a coparcener takes by birth an interest in the ancestral property, but he is not entitled to separate possession of the coparcenary estate. His rights are not independent of the control of the karta. It would be for the karta to consider the actual pressure on the joint family estate. It would be for him to foresee the danger to be averted. And it would be for him to examine as to how best the joint family estate could be beneficially put into use to subserve the interests of the family. A coparcener cannot interfere in these acts of management. Apart from that, a father-karta in addition to the aforesaid powers of alienation has also the special power to sell or mortgage ancestral property to

discharge his antecedent debt which is not tainted with immorality. If there is no such need or benefit, the purchaser takes risk and the right and interest of coparcener will remain unimpaired in the alienated property. No doubt the law confers a right on the coparcener to challenge the alienation made by karta, but that right is not inclusive of the right to obstruct alienation. Nor the right to obstruct alienation could be considered as incidental to the right to challenge the alienation. These are two distinct rights. One is the right to claim a share in the joint family estate free from unnecessary and unwanted encumbrance. The other is a right to interfere with the act of management of the joint family affairs. The coparcener cannot claim the latter right and indeed, he is not entitled for it. Therefore, he cannot move the court to grant relief by injunction restraining the karta from alienating the coparcenary property."

MANU/SC/0374/1961 : AIR 1962 SC 287

(Bhagwan Dayal v. Reoti Devi) Coparcenary is a creature of Hindu Law and cannot be created by agreement of parties except in the case of reunion. It is a corporate body or a family unit. The law also recognizes a branch of the family as

a subordinate corporate body. The said family unit, whether the larger one or the subordinate one, can acquire, hold and dispose of family property subject to the limitations laid down by law. Ordinarily, the manager, or by consent, express or implied, of the members of the family, any other member or members can carry on business or acquire property, subject to the limitations laid down by the said law, for or on behalf of the family. Such business or property would be the business or property of the family. The identify of the members of the family is not completely lost in the family. One or more members of that family can start a business or acquire property without the aid of the joint family property, but such business or acquisition would be his or their acquisition. The business so started or property so acquired can be thrown into the common stock or blended with the joint family property in which case the said property becomes the estate of the joint family. But he or they need not do so, in which case the said property would be his or their self-acquisitions, and succession to such property would be governed not by the law of joint family but only by the law of inheritance. In such a case, if a property was jointly acquired by them, it would

not be governed by the law of joint family, for Hindu Law does not recognise some of the members of a joint family belonging to different branches, or even to a single branch, as a corporate unit. Therefore, the rights inter se between the members who have acquired the said property would be subject to the terms of the agreement whereunder it was acquired. The concept of joint tenancy known to English law with the right of survivorship is unknown to Hindu Law except in regard to cases specially recognized by it. The acquisitions made by the members of different branches jointly cannot be impressed with the incident of joint family property. They can only be co-shares or co-tenants, with the result that their properties pass by inheritance and not by survivorship."

Supreme Court in **Yudhishter v. Ashok Kumar reported in MANU/SC/0525/1986 : AIR 1987 SC 558** held as below: "10. This question has been considered by this Court in Commr. of Wealth Tax. Kanpur v. Chander Sen MANU/SC/0265/1986 : (1986) 3 SCC 567; (AIR 1986 SC 1753), where one of us (Sabyasachi Mukharji, J.) observed that under the Hindu Law, the moment a son is born, he gets a share in

father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally therefore, whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separate property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8 of the Hindu Succession Act, 1956 he does not take it as Karta of his own undivided family but takes it in his individual capacity. At pages 577 to 578 of SCC : at p. 1760 of AIR) of the report this Court dealt with the effect of Section 6 of the Hindu Succession Act 1956 and the commentary made by Mulla, 15th Edn. Page 924 - 926 as well as Mayne's on Hindu Law 12th edition pages 918 - 919. Shri Banerji relied on the said observations of Mayne on Hindu La, 12th Edn. At pages 918-919. This Court observed in the aforesaid decision that the views expressed by the

Allahabad High Court the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn. Page 919. In that view of the matter it would be difficult to hold that property which devolved on a Hindu under Section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-à-vis his own sons. If that be the position then the property which devolved upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellate authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house."

Supreme Court reported in **MANU/SC/0246/1963 : 1964 (2) SCR 172 (Lakkireddi Chinna Venkata Reddi v. Lakkireddi Lakshmama)** wherein the Supreme Court held thus: "Law relating to blending of separate property with joint family property is well settled. Property separate or self-acquired of a member of a joint Hindu family 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 to waive separate rights must be established. From the mere fact that other members of the family were allowed to use the property jointly with himself, or that the income of the separate property was utilised out of generosity to support 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 a legal obligation. It is true that Butchi Tirupati who was one of the devisees under the will of Venkata Konda Reddy was a member of the joint family consisting of himself, his five brothers and his father Bala Konda. It is also true that there is no clear evidence as to how the property was dealt with, nor, as to the appropriation of the income thereof. But there is no evidence on the record to show that by any conscious act or exercise of volition Butchi Tirupati surrendered his interest in the property devised in his favour under the will of Venkata Konda Reddy so as to blend it with the

joint family property. In the absence of any such evidence, the High Court was, in our judgment, right in holding that Lakshmama was entitled to a fourth share in the property devised under the will of Venkata Konda Reddy."

Hardeo Raj v. Sakuntala Devi and others reported in MANU/SC/7540/2008 : AIR 2008 SC 2489, wherein the Supreme Court has held as under: "For the purpose of assigning one's interest in the property it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a coparcener is determined, it ceased to be a coparcenary property. The parties in such an event would not possess the property as "joint tenants" but as "tenants in common". The decision of this court in State Bank of India (supra), therefore is not applicable to the present case. Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property."

SHEBAITSHIP IS IMMOVEABLE PROPERTY

Supreme Court in the case of **Ram Rattan (dead) by L.Rs. Vs. Bajrang Lal And Others** reported in **MANU/SC/0318/1978 : (1978) 3 SCC 236** declared shebaitship rights as immovable property in paragraph 13 of the judgment: 13. The definition of immovable property in Section 3 of the Transfer of Property Act is couched in negative form in that it does not include standing timber, growing crops, or grass. The statute avoids positively defining what is immovable property but merely excludes certain types of property from being treated as immovable property. Section 2(6) of the Registration Act defines immovable property to include lands, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops or grass. Section 2(26) of the General Clauses Act defines immovable property to include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. It may

be mentioned that the definition of immovable property in Registration Act lends assurance to treating Shebait's hereditary office as immovable property because the definition includes hereditary allowances. Office of Shebait is hereditary unless provision to the contrary is made in the deed creating the endowment. In the conception of Shebait both the elements of office and property, duties and personal interest are mixed up and blended together and one of the elements cannot be detached from the other. Old texts, one of the principal sources of Hindu law and the commentaries thereon, and over a century the courts with very few exceptions have recognised hereditary office of Shebait as immovable property, and it has all along been treated as immovable property almost uniformly. While examining the nature and character of an office as envisaged by Hindu law it would be correct to accept and designate it in the same manner as has been done by the Hindu law text writers and accepted by courts over a long period. It is, therefore, safe to conclude that the hereditary office of Shebait which would be enjoyed by the person by turn would be immovable property. The gift of such immovable property must of course be by registered

instrument. Exhibit I being not registered, the High Court was justified in excluding it from evidence. On this conclusion the plaintiff's suit has been rightly dismissed.

R.S. Sarkaria J. in the case of **Profulla Chorone Requitte and others Vs. Satya Chorone Requitte reported in MANU/SC/0620/1979 : AIR 1979 SC 1682**, referred to shebaitship rights as the blending of office and property rights. Paragraphs 21 and 22 of this judgment are inserted below: As regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office; but even so, it will not be quite correct to describe Shebaitship as a mere office. "Office and property are both blended in the conception of Shebaitship". Apart from the obligations and duties resting on him in connection with the endowment, the Shebait has a personal interest in the endowed property. He has, to some extent, the rights of a limited owner. Shebaitship being property, it devolves like any other species of heritable property. It follows that, where the founder does not dispose of the shebaiti; rights in the endowment created by him, the Shebaitship devolves on the heirs of the founder according to

Hindu Law, if no usage or custom of a different nature is shown to exist.

Raikishori Dassi Vs. Official Trustee West Bengal & Others reported in MANU/WB/0061/1960 : AIR 1960 Cal 235

opined that since the rule against perpetuity was part of Hindu Law, any disposition of property against the perpetuity rule would be against law and invalid. In most lucid language his lordship summarised the law in paragraphs 34, 39 and 40 of the report:

34. From the above it appears clear that shebaiti is not merely an office but partakes of the nature of property descendible according to the ordinary rules of Hindu law. Even if by the interposition of a trust the management of the endowed properties is confided to a set of trustees shebaiti does not lose altogether the characteristics of property. Indeed the shebait has been said to have a right of property in his office. The owner of the endowed property is the idol and indeed by the will in this case all the properties movable and immovable, have been made the subject matter of absolute gift to the deity, the trustees having no more than a mere right of management. The shebait is only

denuded of his right to the extent the same is carved out in favour of the trustees but he does not lose altogether his beneficial interest in the property. It is he who can assert the right of the deity if the trustees are negligent or delinquent. It is for him to protect the Thakur if there be any threat of injury to it. As I have already said if all the trustees died without appointing fresh trustees or refused to act the full rights of the shebait would again come into play. Even when the trustees are functioning it is the shebait alone who can spend the income directed to be made over to him for the purpose of the daily sheba and the periodical worship. He is not accountable to the trustees. Even if he is deprived of the right to manage the properties on behalf of the deity he has an interest in some part of the income of the Debutter property. In my view therefore the rules in *Tagore v. Tagore* (I.A. Sup. Vol. 47) (P.C.) will apply to the office of the shebait in this case.

39. An argument was advanced by Mr. Mukharji, counsel for Gora Chand Dutta that the rule in *Tagore v. Tagore* (I A Sup Vol. 47) (PC) ought not to be made applicable to this case because the shebait really had no personal or beneficial interest in the debutter properties and his interest cannot be said to be property.

Reference was made to the case of Gokul Chand Dey v. Gopinath MANU/WB/0077/1952 : Dey, 89 Cal. LJ 162 : (AIR 1952 Cal 705); in this case Das J. who delivered the judgment of the appeal bench of this Court sitting with Harries, C.J. observed that the principle in Tagore v. Tagore (Ind App Sup Vol. 47) (P.C.) and the rule in Monohar Mukherjee's case, MANU/WB/0364/1932 : 37 Cal WN 29 : (MANU/WB/0359/1932 : AIR 1932 Cal 791), would not be applicable where the shebait has not even a qualified right to the endowed property and the legal title was in the trustees who had full powers of management or disposal, the shebait having merely a right to receive a fixed sum for carrying on the worship of the deity with a liability to account. Although all his judgments command great respect I find myself unable to concur in the above views expressed by Das, J. which are to be found at page 180 (Cal LJ) : (at p. 711 of AIR) of the above report. From the judgments from which I have quoted rather copiously it is established beyond question that a shebait has some kind of property in the office and some beneficial interest in the debutter property even if there are no emoluments attaching to the office. Further, shebaiti itself has been described as property

descendible according to the ordinary rules of Hindu Law. The highest tribunals have held that it is not possible to separate the two elements of office and property. Mere curtailment of the right to manage the property which a shebait would otherwise have, would not in my opinion, make shebait a right or property of a kind to which the ordinary rules of succession in Hindu Law are inapplicable.

40. In the result I hold that the attempt by the testator to confine the shebait to the lineal male descendants of the persons named in Clause 4 of the Will is repugnant to the Hindu Law and as such void. There is no independent gift in favour of any of the male descendants of the said named persons.

IN ANCESTRAL PROPERTY RIGHTS STARTS BY BIRTH

Shyam Narayan Prasad vs. Krishna Prasad and Ors.: MANU/SC/0665/2018 - It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons

of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship.

In C. Krishna Prasad v. C.I.T., Bangalore, MANU/SC/0240/1974 : 1975 (1) SCC 160 - The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue.

Rohit Chauhan vs. Surinder Singh and Ors. : MANU/SC/0692/2013 - In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common

ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener.

Uttam vs. Saubhag Singh and Ors.:

MANU/SC/0256/2016 - Applying the law to the facts of this case, it is clear that on the death of Jagannath Singh in 1973, the joint family property which was ancestral property in the

hands of Jagannath Singh and the other coparceners, devolved by succession Under Section 8 of the Act. This being the case, the ancestral property ceased to be joint family property on the date of death of Jagannath Singh, and the other coparceners and his widow held the property as tenants in common and not as joint tenants. This being the case, on the date of the birth of the Appellant in 1977 the said ancestral property, not being joint family property, the suit for partition of such property would not be maintainable.

In N.R. Raghavachariar's Hindu Law Principles & Precedents, 8th Edn. 1987, Section 244, it is stated: ...Besides, it is absolutely immaterial whether the sons were born to the inheritor before or after the inheritance fell in. But if the property is inherited from a paternal ancestor beyond the third degree then the property is not ancestral as against the inheritor's sons, and the inheritor has absolute powers of disposal over it. So also, if the inheritor has neither a son, son's son nor son's son's son, the property is absolute in the inheritor's hands even though he may have other relations, for instance, a great-great-grandson or a paternal uncle, in the case of inheritance from

father But property which comes to an inheritor from one of his three immediate paternal ancestors as absolute property owing to the absence of sons, grandsons or great-grandsons, becomes ancestral property with the birth of any of them, though an alienation made by the inheritor before such birth, cannot be impeached. The character of ancestral property is not taken away by there being a partition of the property in the family of the inheritor, and though a share of ancestral property allotted to a coparcener on partition will be his separate property as regards others ... it will be ancestral property as against the allottee's sons, grandsons, and great-grandsons whether born before or after the partition.

Madanlal Phulchand Jain vs. State of Maharashtra and Ors.: MANU/SC/0233/1992 -

It is well settled that a Hindu can have interest in ancestral property as well as acquire his separate or self-acquired property. If he acquires by inheritance separate property a birth of a son or adoption of a son will not deprive him of the power he has to dispose of his separate property by gift or will. That means that a Hindu can own separate property besides having a share in

ancestral property. Therefore, when the appellant inherited the land left by his uncle (natural father) that property came to him as a separate property and he had an absolute and unfettered right to dispose of that property in the manner he liked. It is equally well settled that excluding the property inherited from a maternal grandfather the only property which can be characterised as ancestral property is the property inherited by a person from his father, father's father, or father's father's father. That means property inherited by a person from any other relation becomes his separate property and his male issue does not take any interest therein by birth. Thus property inherited by a person from collaterals such as a brother, uncle, etc., cannot be said to be ancestral property and his son cannot claim a share therein as if it were ancestral property. There can, therefore, be no doubt that the property which the appellant inherited from his uncle (natural father) was his separate property in which his major son could not claim any share whatsoever. But the appellant contends that his separate property got blended with his ancestral property and thereby acquired the character of ancestral property in which his major son became entitled to 1/5th share on notional

partition. It is true that under the Mitakshara Law each son upon his birth takes an interest equal to that of his father in ancestral property, both moveable and immovable. This right is independent of his father. Therefore, if the appellant is able to establish blending of his separate property with ancestral property, the plea of deduction of 1/5th share of his son on notional partition may perhaps be well founded. It must, therefore, be shown that he had thrown his separate property into the common stock with the intention of abandoning his separate claim thereon . Evidence must be led to show a clear intention on his part to give up his separate rights and allow the separate property to be treated as an ancestral property and be enjoyed by the coparceners. Such an intention has to be proved by tendering evidence, since no such inference can be drawn even from the fact that he had permitted his family members to use it along with him nor can it be proved from the mere fact that the income of the separate property was used for supporting his son or from the fact that he had failed to maintain separate accounts of the yield of both sets of properties.

MUSLIMS ANCESTRAL PROPERTIES

Vidhyadhar Krishnarao Mungi and Ors. vs. Usman Gani Saheb Konkani and Ors.: **MANU/SC/0352/1974** - To a Muslim the words "our ancestral ownership" would connote not only paternal ancestral property but also maternal ancestral property. We are satisfied that the first defendant understood those words in the sense of maternal ancestral property.

ESSENTIAL FEATURE OF ANCESTRAL PROPERTY

Shyam Narayan Prasad vs. Krishna Prasad and Ors. : MANU/SC/0665/2018 - It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property

and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship.

In C. Krishna Prasad v. C.I.T., Bangalore, MANU/SC/0240/1974 : 1975 (1) SCC 160,

Court was considering a similar question. In the said case, C. Krishna Prasad, the Appellant along with his father Krishnaswami Naidu and brother C. Krishna Kumar formed Hindu undivided family up to October 30, 1958, when there was a partition between Krishnaswami Naidu and his two sons. A question arose as to whether an unmarried male Hindu on partition of a joint Hindu family can be assessed in the status of undivided family even though no other person besides him is a member of the family. It was held that the share which a coparcener obtains on partition is ancestral property as regards male issue. It was held as under: The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property,

and if the coparcener dies without leaving male issue, it passes to his heirs by succession (see p. 272 of Mulla's Principles of Hindu Law, 14th Ed.). A person who for the time being is the sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. If a son is subsequently born to him or adopted by him, the alienation, whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations made by his father before he was born or begotten.

In M. Yogendra and Ors. v. Leelamma N. and Ors. MANU/SC/1433/2009 : 2009 (15) SCC 184, it was held as under: It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole

survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid."

In Rohit Chauhan v. Surinder Singh and Ors.

MANU/SC/0692/2013 : 2013 (9) SCC 419, a

contention was raised by the Defendant No. 1 that after partition of the joint Hindu family property, the land allotted to the share of Defendant No. 2 became his self acquired property and he was competent to transfer the property in the manner he desired. It was held that the property which Defendant No. 2 got by virtue of partition decree amongst his father and brothers was although separate property qua other relations but it attained the characteristics of coparcenary property the moment a son was born to Defendant No. 2. It was held thus: A person, who for the time being is the sole surviving coparcener as in the present case Gulab Singh was, before the birth of the Plaintiff, was entitled to dispose of the coparcenary property as if it were his separate property. Gulab Singh, till the birth of Plaintiff Rohit Chauhan, was competent to sell, mortgage and deal with the property as his property in the manner he liked. Had he done so before the birth of Plaintiff, Rohit Chauhan, he was not competent

to object to the alienation made by his father before he was born or begotten. But, in the present case, it is an admitted position that the property which Defendant 2 got on partition was an ancestral property and till the birth of the Plaintiff he was the sole surviving coparcener but the moment Plaintiff was born, he got a share in the father's property and became a coparcener. As observed earlier, in view of the settled legal position, the property in the hands of Defendant 2 allotted to him in partition was a separate property till the birth of the Plaintiff and, therefore, after his birth Defendant 2 could have alienated the property only as karta for legal necessity. It is nobody's case that Defendant 2 executed the sale deeds and release deed as karta for any legal necessity. Hence, the sale deeds and the release deed executed by Gulab Singh to the extent of entire coparcenary property are illegal, null and void. However, in respect of the property which would have fallen in the share of Gulab Singh at the time of execution of sale deeds and release deed, the parties can work out their remedies in appropriate proceeding.

**Smt. Dipo v. Wassan Singh and Ors. MANU/SC
/0227/1983 : 1983 (3) SCC 376**

Property inherited from paternal ancestors is, of course, ancestral property as regards the male issue of the propositus, but it is his absolute property and not ancestral property as regards other relations. In Mulla's Principles of Hindu Law (15th Edn.), it is stated at p. 289: ... if A inherits property, whether movable or immovable, from his father or father's father, or father's father's father, it is ancestral property as regards his male issue. If A has no son, son's son, or son's son's son in existence at the time when he inherits the property, he holds the property as absolute owner thereof, and he can deal with it as he pleases.... A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, sons' sons and sons' sons' sons, but as regards other relations he holds it, and is entitled to hold it, as his absolute property. Again at p. 291, it is stated: The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As

regards other relations, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession. We are, therefore, of the view that the lower courts were wrong in refusing to grant a decree in favour of the plaintiff as regards property described by them as ancestral property. The defendants were collaterals of Bua Singh and as regards them the property was not ancestral property and hence the plaintiff was the preferential heir. The plaintiff was entitled to a decree in respect of all the plaintiff properties....

John Kennedy vs. Ranjana:
MANU/SC/1039/2014 - Whether the suit scheduled property is ancestral property of the Plaintiffs father or self acquired property depends upon various factors. The law in this regard is well settled. Whether the Plaintiff is entitled for a right of partition in the suit scheduled property by virtue of the amendment carried to the Hindu Succession Act by the State of Tamil Nadu in 1989, or subsequently by the Parliament, are matters to be decided after the pleadings are completed and evidence adduced.

Pushpalatha N.V. vs. V. Padma and Ors.:

MANU/KA/4850/2018 - Whenever a partition of ancestral property takes place, the share that a coparcener gets continues to be ancestral if on the date of partition he has a son. He holds such property as his absolute property if no son exists on the date of partition, but if a son is born subsequently, the ancestral character revives. If succession to self acquired property of a male Hindu takes place among his heirs in accordance with Section 8 of the Hindu Succession Act, the share that every member takes will be held by each of them as his or her separate property.

MANGAMMAL ALIAS HULASI AND ANOTHER v.

T.B. RAJU and others reported in MANU/SC/0440/2018 : (2018) 15 SCC 662 wherein the Hon'ble Supreme Court, at paragraphs 16 and 20 of the judgment has held as follows:

"16. It is pertinent to note here that recently, this Court in *Danamma @ Suman Surpur & Anr. Vs. Amar & Ors.*, MANU/SC/0064/2018 : 2018 (1) Scale 657 dealt, inter-alia, with the dispute of daughter's right in the ancestral property. In the above case, father of the daughter died in 2001, yet court permitted

the daughter to claim the right in ancestral property in view of the amendment in 2005. On a perusal of the judgment and after having regard to the peculiar facts of the Danamma (supra), it is evident that the Division Bench of this Court primarily did not deal with the issue of death of the father rather it was mainly related to the question of law whether daughter who born prior to 2005 amendment would be entitled to claim a share in ancestral property or not? In such circumstances, in our view, Prakash & Ors. (supra), would still hold precedent on the issue of death of coparcener for the purpose of right of daughter in ancestral property. Shortly put, only living daughters of living coparceners would be entitled to claim a share in the ancestral property.

20. At this juncture, we would like to make it clear that any sale which made to Respondent Nos. 2 & 3 in pursuance of two sale deeds dated 03.04.1996 and 24.08.1998 respectively shall not be disturbed anymore. In lieu of the same, the appellants shall be entitled to their legitimate share, if any, which belonged to them in such properties and which had been sold through sale deeds from Respondent No. 1 by way of money or some other property of the same amount."

Renuka vs. V. Muniraju and Ors. : MANU/KA/1383/2020 - The 1956 Act is an Act to codify

the law relating to intestate succession among Hindus. The new Section 6 of the Act provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family. The intention of the legislature has now conferred substantive right in favour of the daughters. In view of the declaration of Section 6 to the Act that the daughter shall have the said rights and liabilities in the coparcenary property as she would have been a son is unambiguous and unequivocal and in view of the amendment therein, the daughter is entitle to a share in the ancestral property as a coparcener as if she had been a son. The language employed in Section 6 of the Amendment Act is very clear and the right accrued to a daughter in the property of a joint Hindu family governed by Mitakshara Law is absolute except in the circumstances provided in proviso to Section 6(i) of the Act. In view of the amendment to Section 6 of the Act, "partition" means any partition made by execution of a deed of partition fully registered under the Registration Act, 1908 over a partition effected by a decree of a Court. In other words, the legal position is settled that, partition of a Hindu family can be

effected by two modes, viz. (i) by a registered instrument of partition; and (ii) by a decree of court.

Nathu Ram and Ors. vs. Deputy Director of Consolidation, Varanasi and Ors. : MANU/UP/2535/2017

- There may be a situation, where a property may be joint property without having been ancestral. Where the members of a joint family acquire property, by or with the assistance of joint funds, or by their joint labour, or in their joint business, or by a gift or, a grant made to them, as a joint family, such property is the coparcenary property of persons who have acquired it, whether it is an increment to ancestral property, or whether it has arisen without any nucleus of descended property. In other words, when members of a joint family, by their joint labour or in their joint business, acquire property, that property, in absence of a clear indication of a contrary intention, would be owned by them as joint family property and their male issues would necessarily acquire a right by birth in such property. Where the business is carried on and property is acquired jointly during subsistence of joint status, the presumption is that the property, so acquired, is joint family

property, even if it was acquired without the aid of ancestral nucleus. This presumption may be rebutted by leading evidence indicative of acquirers' intention to own property as co-owners between themselves. Property acquired by joint labour without the aid of joint family property is joint property of acquirers. The issues of acquirers do not take any interest by birth. So long as a family remains an undivided family, two or more members of it, whether they be members of different branches or of the one and the same branch of family, can have no legal existence as a separate independent unit, but all the members of a branch, or of a sub-branch, can form a distinct and separate corporate unit within the larger corporate family and hold property as such. Such property will be joint family property of members of the branch inter se, but will be separate property of that branch in relation to the larger family. Property acquired by members of different branches cannot partake the character of joint family property as members will be in the position of co-sharers and the said property will devolve by inheritance and not by survivorship, A property, originally self-acquired, may become joint family property, if it has been voluntarily thrown by the owner into the joint stock, with the

intention of abandoning all separate claims upon it.

COPARCENARY PROPERTY CONSISTS OF ANCESTRAL PROPERTY

Rohit Chauhan vs. Surinder Singh and Ors.:

MANU/SC/0692/2013 - In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property

treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener. The view which we have taken finds support from a judgment of this Court in the case of *M. Yogendra v. Leelamma N.* MANU/SC/1433/2009 : (2009) 15 SCC 184, in which it has been held as follows:

29. It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid.

CHAPTER-6

COPARCENARY

**COPARCENARY IS A CREATURE OF HINDU
LAW AND CANNOT BE CREATED BY
AGREEMENT OF PARTIES EXCEPT IN THE
CASE OF REUNION 1962 SC**

Bhagwan Dayal vs Mst. Reoti Devi 1962 AIR 287, 1962 SCR (3) 440 Every Hindu family is presumed to be joint unless the contrary is proved; but this presumption can be rebutted by direct evidence of partition or by course of conduct leading to an inference of partition. There is no presumption that when one member separates from the others the latter remain united; whether the latter remain united or not must be decided on the facts of each case. In the case of old transactions when no contemporaneous documents are maintained and when most of the active participants of the transactions have passed away, though the burden still remains on the person who asserts separation, it is permissible to fill up gaps more readily by reasonable inferences than in cases where the evidence is not obliterated by passage of time. The conduct of the parties for about 50

years was consistent with their separation rather than with their jointness. Held, further, that it was not established that there was any reunion between K and his nephews. Reunion must be strictly proved. To constitute 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 of a joint Hindu family. It is not necessary that there should be a formal and express agreement to reunite; such an agreement can be established by clear evidence of conduct incapable of explanation on any other footing. In, the plaint it was not alleged that a reunion had taken place by agreement but the court was asked to hold that there was reunion on the ground that the conduct of parties amounted to a reunion. The conduct of the parties spreading over 50 years did not show that K and his nephews had consciously entered into an agreement to reunite and become members of a joint Hindu family. Coparcenary is a creature of Hindu law and cannot be ,created by agreement of parties except in the case of reunion. It is a corporate body or a family unit. The law also recognizes a branch of the family as

a subordinate corporate body. The said family unit, whether the larger one or the subordinate one, can acquire, hold and dispose of family property subject to the limitations laid down by law. Ordinarily, the manager, or by consent, express or implied, of the members of the family, any other member or members can carry on business or acquire property, subject to the limitations laid down by the said law, for or, on behalf of the family. Such business or property would be the business or property, of the, family. The identity of the members of the, family is not completely lost in the family. One or more - members of :that family can start a business or acquire property without the aid of the joint family Property, but such business or acquisition would be his or their acquisition. The business so started or property so acquired can be thrown into the common stock or blended with the joint family property in which case the said property becomes the estate of the joint family. But he or they need not do so, in which case the said property would be his or their self- acquisition, and succession to such property would be governed not by' the law of joint family but only by the law of inheritance. In such a case if a property was jointly acquired by them, it would

not be governed by the law of joint family ; for Hindu law does not recognize some of the members of a joint family belonging to different branches, or even to a single branch, as a corporate unit. Therefore, the rights inter se between the members who have acquired the said property would be subject to the terms of the agreement where under it was acquired.

Sushil Kumar (Sunil) and Anr. v. Ram Prakash and Ors. MANU/SC/0521/1988 : (1988) 2 SCC 77, held as under: 18. The coparcenary consists of only those persons who have taken by birth an interest in the property of the holder and who can enforce a partition whenever they like it is a narrower body than joint family. It commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. The reason why coparcenership is so limited is to be found in the tenet of the Hindu religion that only male descendants up to three degree can offer spiritual ministration to an ancestor. Only males can be coparceners.

The Privy Council in the case of **Kalyanji Vithaldas v. Commissioner of Income Tax**,

Bengal reported in MANU/PR/0045/1936 : AIR 1937 PC 36, explained the meaning of Hindu undivided family as under: The phrase "Hindu undivided family" is used in the statute with reference not to one school only of Hindu law, but to all schools; and their Lordships think it a mistake in method to begirt by pasting over the wider phrase of the Act the words "Hindu coparcenary", all the more that it is not possible to say on the face of the Act that no female can be a member.

Smt. Sitabai and Anr. v. Ramachandra reported in MANU/SC/0296/1969 : AIR 1970 SC 343 held thus: Under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members and the property of a joint family does not cease to belong to a joint family merely because the family is represented by a single coparcener who possesses rights which an absolute owner of property may possess. The property which was the joint family property of the Hindu undivided family does not cease to be so because of the "temporary reduction of the coparcenary unit to a single individual". The character of the property, viz. That it was the joint property of a Hindu

undivided family remains the same. It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as 'joint property' of the undivided family.

Gowli Buddanna v. Commissioner of Income Tax, Mysore reported in AIR 1986 SC 1523

held thus: 6. A Hindu joint family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. A Hindu coparcenary is a much narrower body than the joint family: it includes only those persons who acquire by birth an interest in the joint or coparcenary property, these being the sons, grandsons, and great-grandsons of the holder of the joint property for the time being: Therefore, there may be a joint Hindu family consisting of a single male member and widows of deceased coparceners.

Bhagwati Prasad Sah and Ors. v. Dulhin Rameshwari Kuer and Anr. reported in MANU/SC/0060/1951 : AIR 1952 SC 72, held as under: The general principle undoubtedly is

that a Hindu family is presumed to be joint unless the contrary is proved but where one of the coparceners separates himself from the other members of the joint family and has his share in the joint property partitioned off for him there is no presumption that the rest of the coparceners continued to be joint. It would be 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 amongst the other coparceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief.

Gangaben Motiji Thakor and Ors. vs. Maneklal Ishwarlal Patel and Ors.:
MANU/GJ/1521/2018 - (2019) 2 GLR 898

20. A Co-Parcener is one who shares (equally) with others in inheritance in the estate of a common ancestor. Otherwise called parceners, are such as have equal portion in the inheritance of an ancestor, or who come in equality to the lands of their ancestors. A person to whom an estate descends jointly and who holds it as an entire estate. But sometimes, two or more persons together constituted the heir, and to this

case, they took the land as 'parceners' or 'co-parceners', the latter expression being the more common. In theory of law, co-parceners together constituted a single heir; 'they be but one heir and yet several persons'. They were called parceners because, every co-parcener had a common law right to have a partition made.

21. A male member of a joint family and his sons, grandsons and great grandsons constitute a co-parcenary. In other words, three generations comes to the holder in unbroken male descendant. Co-parcenary is a creature of law. It cannot be created by act of parties. By adoption, a stranger may be introduced as a member thereof. It is a family unit. A Hindu co-parcenary is, however, a narrower body than the joint family, daily males who acquire by birth an interest in the joint or co-parcenary property can be members of the co-parcenary or co-parceners. No female can be a co-parcener.

Balak Ram vs. Shiv Ram:

MANU/JK/0008/1988 - The property in the hands of a manager cannot always be deemed to a coparcenary property unless it is shown that said property had descended from common ancestors, father, grandfather or great-grand-

father. If the property is inherited from any other source that will not be deemed to a coparcenary property. However, a distinction is to be drawn between joint family property and ancestral property, which in common parlance is known as coparcenary property and a separate property. The instance of joint family property, or what is known as coparcenary property which is inherited from common ancestor, is that each and every coparcener had a joint interest and joint possession therein.

WITHOUT DIVISION BY METES AND BOUNDS, THEY DID NOT HOLD AS JOINT TENANTS UNLESS RE-UNION IS PLEADED AND PROVED - ONCE A DISRUPTION OF JOINT FAMILY STATUS TAKES PLACE, COPARCENERS CEASE TO HOLD THE PROPERTY AS JOINT TENANTS BUT THEY HOLD AS TENANTS-IN-COMMON

The Hon'ble Apex Court in the case of Kalyani v. Narayanan, reported in **AIR 1980 SC 1173** has observed that :-- "Where one of five sons is separated unless a reunion is pleaded, other four sons cannot constitute a corporate body like a co-

parcenary by agreement or even by subsequent conduct of remaining together enjoying the property together." Partition can be partial qua person and property but a partition which follows disruption of a joint family status will be amongst those who are entitled to a share on partition. There was first a disruption of the joint family by specifying the shares Till disruption of joint family status takes place no coparcener can claim what is his exact share in coparcenary property. It is liable to increase and decrease depending upon the addition to the number or departure of a male member and inheritance by survivorship. But once a disruption of joint family status takes place, coparceners cease to hold the property as joint tenants but they hold as tenants-in-common. Looking to the terms of Ext.P-1 there was a disruption of joint family status, the shares were specified and vested, liabilities and obligations towards the family members were defined and imbalance out of unequal division was corrected. This certainly has effect of bringing about disruption of joint family status and even if there was no partition by metes and bounds and the coparceners continued to remain under the same roof or enjoyed the property without division by

metes and bounds, they did not hold as joint tenants unless re-union is pleaded and proved.

MERE FACT SEPARATED CO-PARCENERS CHOOSE TO LIVE TOGETHER OR ACT JOINTLY FOR PURPOSES OF BUSINESS OR TRADE OR IN THEIR DEALINGS WITH PROPERTIES, WOULD NOT GIVE THEM THE STATUS OF COPARCENERS

Hon'ble Apex Court in the case of Bhagwati Prasad San v. Dulhin Rameshwari Kuer, reported in AIR 1952 SC'72 where one of the co-parceners had separated and some of the reunited members of the Joint Family lived together, acted jointly for the purposes of business or trade or in their dealings with properties, observed that :-- "Except in the case of reunion, the mere fact separated co-parceners choose to live together or act Jointly for purposes of business or trade or in their dealings with properties, would not give them the status of coparceners under the Mitakshara law."

COPARCENARY IS A NARROWER BODY THAN A JOINT FAMILY AND CONSISTS OF ONLY THOSE PERSONS WHO HAVE TAKEN BY

BIRTH AN INTEREST IN THE PROPERTY OF THE HOLDER FOR THE TIME BEING AND WHO CAN ENFORCE A PARTITION WHENEVER THEY LIKE.

THE HON'BLE MRS.JUSTICE B.V.NAGARATHNA
of HIGH COURT OF KARNATAKA in the case of
**Pandun vs Laxmibai C Subhadra Decided on
1 October, 2012**

While answering the points for consideration together, it would be relevant to consider the general principles of inheritance by female heirs as the widow and daughters of Mahadeo were the only heirs of Mahadeo, particularly with regard to the Mitakshara joint family, as applicable by the Bombay School, as the parties herein are from Belgaum, part of erstwhile Bombay Province and the lands are situated at Uchagaon. While considering the same, the law of inheritance prior to the enforcement of Hindu Succession Act 1956 and after its enforcement have to be taken note of. The 1956 Act came into force on 17/6/1956, which brought about radical and drastic changes in the traditional or shastric or uncodified law of succession.

An undivided family, is the normal condition of Hindu Society, the joint family status is the result

of birth but possession of joint property is not a necessary concomitant of a joint family. Coparcenary is a narrower body than a joint family and consists of only those persons who have taken by birth an interest in the property of the holder for the time being and who can enforce a partition whenever they like. There is a community of interest and unity of possession between all members of a coparcenary, and upon the death of any one of them the others took by survivorship, that in which, during the deceased's life time, they had a common interest and common possession until the enforcement of the 1937 Act followed by the 1956 Act made applicable to those areas where the shastric or uncodified law did not permit female members any right in the joint family or ancestral property. No individual member while the family remains joint could predict his definite share, either in the corpus or in the income. Till a partition takes place a coparcener's interest remained a fluctuating interest, enlarged by deaths and diminished by births in the family. A coparcener obtains an interest by birth in the coparcenary property and has joint possession and enjoyment of the same. A coparcener has rights of alienation and can enforce a partition of his share in the

coparcenary property. The coparcenerary relationship is a creature of law and cannot be created by act of parties except when a member is introduced into the coparcenary by adoption. The wife and children of a coparcenar have right to be maintained out of the joint family property. On the death of the last surviving coparcenar, the whole property devolves on his own heirs.

Coparcenary property is distinguished from separate property. Coparcenary property can be divided into ancestral property and joint family property, which is not ancestral. The distinction between the two is that in the former property is acquired with the aid of ancestral property and in the latter property is acquired by the individual coparcenar without such aid but treated as property of whole family. Where there is ancestral joint family property, every member of the family acquires in it a right by birth, which cannot be defeated by individual alienation or disposition of any kind except under certain peculiar circumstances. What distinguishes, an ancestral joint family property from joint family property simplicitor is that in the case of the latter, pre existence of nuclues is not necessary. But, if property is proved to be joint family property, it is subject to the same legal incidents as the

ancestral property. According to the erudite author, N.R.Raghavachariar, "Hindu Law - Principles and precedents," coparcenary property can be divided into the following four types:

- i) Ancestral property,
- ii) Acquisitions made by the coparceners with the help of ancestral property,
- iii) Joint acquisitions of the coparceners even without such help provided there was no proof of intention on their part that the property should not be treated as joint family property, and
- iv) Separate property of the coparceners thrown into the common stock.

The distinction between ancestral property and joint family property has been stated. In the case of (i) and (ii) above the existence of a nucleus is necessary. While in the case of (iii) and (iv) above the acquisition of property would not depend upon the existence of a nucleus or ancestral property.

State Bank of India v. Ghamandi Ram (Dead) Through Gurbax Rai MANU/SC/0297/1969 : (1969) 2 SCC 33. In paragraph 5 of the reported decision, the Court observed thus: 5. According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in

collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (see Mitakshara, Chapter I, 1-27). The incidents of co-parcenership under the Mitakshara law are: first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly, that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property, conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. A coparcenary under the Mitakshara School is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a coparcener with his

adoptive father as regards the ancestral properties of the latter.

Hardeo Rai v. Sakuntala Devi and Others
MANU/SC/7540/2008 : (2008) 7 SCC 46 -

Court went on to observe in paragraph Nos. 20 to 23 as follows:

20. The first appellate court did not arrive at a conclusion that the Appellant was a member of a Mitakshara coparcenary. The source of the property was not disclosed. The manner in which the properties were being possessed by the Appellant vis-à-vis the other co-owners had not been taken into consideration. It was not held that the parties were joint in kitchen or mess. No other documentary or oral evidence was brought on record to show that the parties were in joint possession of the properties.

21. One of the witnesses examined on behalf of the Appellant admitted that the Appellant had been in separate possession of the suit property. The Appellant also in his deposition accepted that he and his other co-sharers were in separate possession of the property.

22. For the purpose of assigning one's interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners

must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a coparcener is determined, it ceases to be a coparcenary property. The parties in such an event would not possess the property as "joint tenants" but as "tenants-in-common". The decision of this Court in SBI, therefore, is not applicable to the present case.

23. Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property.

Commissioner of Wealth Tax, Kanpur and Others v. Chander Sen and Others
MANU/SC/0265/1986 : (1986) 3 SCC 567.

Court considered the interplay between Sections 4, 6 and 8 of the 1956 Act including Chapter II and heirs in Class-I of the Schedule. The Court noted as follows:.....The Hindu Succession Act, 1956 lays down the general Rules of succession in the case of males. The first Rule is that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II

and Class I of the Schedule provides that if there is a male heir of Class I then upon the heirs mentioned in Class I of the Schedule. The heirs mentioned in Class I of the Schedule are son, daughter etc. including the son of a predeceased son but does not include specifically the grandson, being, a son of a son living. there was no scope for consideration of a wide and general nature about the objects attempted to be achieved by a piece of legislation when interpreting the clear words of the enactment. the provisions of Section 6 of the Hindu Succession Act, that in the case of assets of the business left by father in the hands of his son will be governed by Section 8 of the Act and he would take in his individual capacity. Section 4 of the said Act provides for overriding effect of Act. Save as otherwise expressly provided in the Act, any text, Rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in the Act and any other law in force immediately before the commencement of the Act shall cease to apply to Hindus insofar it is inconsistent with any of the provisions contained in the Act. Section 6 deals

with devolution of interest in coparcenary property and it makes it clear that when a male Hindu dies after the commencement of the 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 the Act. The proviso indicates that if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

It is clear that under the Hindu law, the moment a son is born, he gets a share in the father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his

son and grandson and other members who form joint Hindu family with him. Section 8 indicates the heirs in respect of certain property and Class I of the heirs includes the son but not the grandson. It includes, however, the son of the predeceased son. Under Section 8 of the Hindu Succession Act, 1956 the property of the father who dies intestate devolves on his son in his individual capacity and not as karta of his own family. It is necessary to bear in mind the preamble to the Hindu Succession Act, 1956. The preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus. In view of the preamble to the Act i.e. that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, ... **It would be difficult to hold today that the property which devolved on a Hindu Under Section 8 of the Hindu Succession Act would be HUF in his hand vis-à-vis his own son;** that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property vis-à-vis son and female heirs with respect to

whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule Under Section 8 of the Act included widow, mother, daughter of predeceased son etc. The express words of Section 8 of the Hindu Succession Act, 1956 cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, inter alia, to "amend" the law, with that background the express language which excludes son's son but includes son of a predeceased son cannot be ignored.

ONCE THE SHARE OF A CO-PARCENER IS DETERMINED, IT CEASES TO BE A COPARCENARY PROPERTY

2008 (7) SCC 46, HARDEO RAI VS SAKUNTALA DEVI AND OTHERS BENCH: S.B. SINHA & V.S. SIRPURKAR For the purpose of assigning one's interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a co-parcener is determined, it ceases to be a coparcenary property. The parties in such an

event would not possess the property as "joint tenants" but as "tenants in common".

A COPARCENARY INTEREST CAN BE TRANSFERRED SUBJECT TO THE CONDITION THAT THE PURCHASER WITHOUT THE CONSENT OF HIS OTHER COPARCENERS CANNOT GET POSSESSION

2008 (7) SCC 46, HARDEO RAI VS SAKUNTALA DEVI AND OTHERS BENCH: S.B. SINHA & V.S. SIRPURKAR Even a coparcenary interest can be transferred subject to the condition that the purchaser without the consent of his other coparceners cannot get possession. He acquires a right to sue for partition. Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property.

IF A COPARCENER RELINQUISHES HIS INTEREST IN FAVOUR OF ANOTHER, IT ENURES FOR THE BENEFIT OF THE REMAINING COPARCENERS

Apex Court in the case of **Thamma Venkata Subbamma (dead) by L.R. v Thamma Rattamma and Others, AIR 1987 SC 1775**. It has been held in the said case by the Apex Court that if a coparcener relinquishes his interest in favour of another, it enures for the benefit of the remaining coparceners also. The very same decision also gives an indication that the concept of relinquishing or renunciation is also not alien to Hindu Law. In fact, a passage from Mulla's Hindu Law (15th Edition) has also been excerpted and Article 264 at page 357 is as under: "Article 264. (1) Renunciation or relinquishment of his share:- A coparcener may renounce his interest in the coparcenary property in favour of the other coparceners as a body but not in favour of one or more of them. If he renounces in favour of one or more of them the renunciation enures for the benefit of all other coparceners and not for coparceners in whose favour the renunciation is made. Such renunciation is not invalid even if the renouncing coparcener makes it a condition that he would be paid something towards maintenance. The renunciation or relinquishment must, of course, be genuine. If fictitious and not acted upon it would not be operative as between the parties and partition can

be claimed". Apex Court in the very case under discussion has observed that though the transaction is ostensibly gift, but really the donor meant to relinquish his interest in the coparcenary in favour of the brother and his sons and such renunciation enures for the benefit of all other coparceners and, as such, the gift may be construed as renunciation or relinquishment.

A CO-OWNER IS AS MUCH AN OWNER OF THE ENTIRE PROPERTY AS ANY SOLE OWNER

In Sri Ram Pasricha Vs. Jagannath and Ors. - (1976) 4 SCC 184, it has been held that a co-owner is as much an owner of the entire property as any sole owner. In coming to the said finding, the learned Judges relied on the proposition laid down in Salmond on Jurisprudence (13th edition). The relevant principles in Salmond on Jurisprudence are set out herein below: "...It is an undivided unity, which is vested at the same time in more than one person....The several ownership of a part is a different thing from the co- ownership of the whole. So soon as each of two co-owners begins to own a part of the thing instead of the whole of it, the co-ownership has been dissolved into sole ownership by the process

known as partition. Co-ownership involves the undivided integrity of what is owned. "Jurisprudentially it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property. The position will change only when partition takes place..."

The principles which have been affirmed in *Mohinder Prasad Jain Vs. Manohar Lal Jain - (2006) 2 SCC 724*. MANU/SC/8054/2006 are that one co-owner filing a suit for eviction against the tenant does so on his own behalf in his own right and as an agent of the other co-owners. In this matter, the consent of other co-owners is assumed as taken unless it is shown that the other co-owners were not agreeable to eject the tenant and the suit was filed in spite of their disagreement. A suit filed by a co-owner, thus, is maintainable in law. It is not necessary for the co-owner to show before initiating the eviction proceeding before the Rent Controller that he had taken option or consent of the other co-owners. However, in the event, a co-owner objects thereto, the same may be a relevant fact.

In the instant case, nothing has been brought on record to show that the co-owners of the respondent had objected to eviction proceedings initiated by the respondent herein."

RIGHTS AND LIABILITIES OF CO-SHARERS OR CO-OWNERS

JAI SINGH AND ORS. VS GURMEJ SINGH 2009 (1) SCALE 679 MANU/SC/0054/2009 : 2009 AIR SCW 3652 The principles relating to the inter-se rights and liabilities of co-sharers are as follows:

- (1) A co-owner has an interest in the whole property and also in every parcel of it.
- (2) Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.
- (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.
- (4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not

only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to disturb the arrangement without the consent of others except by filing a suit for partition.

When a co-sharer is in exclusive possession of some portion of the joint holding he is in possession thereof as a co-sharer and is entitled to continue in its possession if it is not more than his share till the joint holding is partitioned. Vendor cannot sell any property with better rights than himself. As a necessary corollary when a co-sharer sells his share in the joint holding or any portion thereof and puts the vendee into possession of the land in his possession what he

transfers is his right as a co-sharer in the said land and the right to remain in its exclusive possession till the joint holding is partitioned amongst all co-sharers.

HINDU LAW: ALIENATION OF UNDIVIDED CO-PARCENARY PROPERTY

A gift by a coparcener of his undivided interest in the coparcenary property is void. Thamma Venkata Subbamma (dead) by Lrs. v. Thamma Rattamma and Ors. **1987 (3) SCC 294**

CO-OWNER OWNS EVERY PART OF THE COMPOSITE PROPERTY ALONG WITH OTHERS AND IT CANNOT BE SAID THAT HE IS ONLY A PART OWNER OR A FRACTIONAL OWNER OF THE PROPERTY

In Sri Ram Pasricha v. Jagannath [AIR 1976 SC 2335], this Court observed :
 "Jurisprudentially it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property. The position will change only when partition takes

place. .." The contention of the appellant that the co-sharer plaintiff must be the absolute owner and a co-owner cannot without impleading all the owners of the premises ask for eviction cannot be accepted because the plea pertaining to the domain of the frame of the suit should have been raised at the earliest opportunity and it was not done. Secondly, the relation between the parties being that of landlord and tenant only the landlord could terminate the tenancy and institute the suit for eviction. The tenant in such a suit is estopped from questioning the title of the landlord under s. 116 of the Evidence Act. Under the general law, in a suit between the landlord and tenant, the question of title to the lease property is irrelevant. The plaintiff is one of the co-owners of the premises. The other co-sharers being his mother and married brother who reside in the same premises along with him. Jurisprudentially, it is not correct to say that a co-owner of a property is not an owner. He owns every part of the composite property along with others and it cannot be said that he is only a part owner or a fractional owner of the property. The position will change when partition takes place. It is, therefore, not possible to accept the submission

that the plaintiff who is admitted- ly the landlord and co-owner of the premises is not the owner of the premises within the meaning of s. 13(1)(f).

PARTNERSHIP AND COPARCENERS AND MUTUAL RIGHTS

Firm Of Bhagat Ram Mohanlal vs The Commissioner 1956 AIR 374, 1956 SCR 143

The Supreme Court in the same passage referred to the decision of the Privy Council in Lachhmandas' case [1948] 16 ITR 35 (PC) and did not disapprove of it. If a coparcener by contributing his separate property can enter into a valid partnership with the karta of his family, as held by the Privy Council in Lachhmandas' case [1948] 16 ITR 35 (PC) there seems no valid reason why a coparcener cannot, by contributing merely his skill and labour, enter into a partnership with the karta. If the former does not cut at the root of the notion of the joint Hindu family, the latter also does not. Even in the case of the former, the partnership property will consist of the contribution made by the karta from the coparcenary property and the contribution made by the coparcener of his individual property. Both taken together would

become partnership property in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership [Narayandppa v. Bhaskara Krishnappa, AIR 1966 SC 1300, 1304 (para. 5)]. If in such a situation the coparcener entering into the partnership can be a partner in relation to coparcenary property contributed for the partnership business, there can be no difficulty in holding that the same result would follow when the coparcener entering into a partnership only contributes his skill and labour. In the former case, as stated by the Privy Council in Lachhman Das' case [1948] 16 ITR 35, the coparcener entering into the partnership, retains his share and interest in the family property while simultaneously enjoying the benefit of his separate property and the fruits of its investment. In the same way, it can be said that in the latter case the coparcener retains his share and interest in the property of the family while simultaneously enjoying the benefits of his skill and labour which he contributes as consideration for formation of the partnership and for sharing profits.

DESCENDANTS UPTO THREE DEGREES ARE IN COPARCENARY

Satya Prema Manjunatha Gowda vs. Controller of Estate Duty: MANU/KA/0054/1985 -

(1986) 50 CTR (Kar) 201 - A coparcenary is a narrower body than a joint family and consists of only those persons who have taken by birth an interest in the property of the holder for the time being and who can enforce a partition whenever they like. It commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. Thus, while a son, a grandson, or a great-grandson is a coparcener with the holder of the property, the great-great-grandson cannot be a coparcener with with him, because he is removed by more than three degrees from the holder. The reason why coparcenership is so limited is to be found in the peculiar tenet of the Hindu religion that only descendants up to three degrees can offer spiritual ministrations to an ancestor. Besides, only males can be coparceners, and all females are excluded from the coparcenary, because the test of coparcenership is the right to enforce a partition and no female has that right though females like wives and mothers may be allotted shares when a partition takes place. Though a

common ancestor is necessary for the origination of a coparcenary, it may yet continue without him, consisting of collaterals and their descendants, some of them being removed more than three degrees from the deceased common ancestor.

The Supreme Court in **State Bank of India v. Ghamandi Ram**, reported as **MANU/SC/0297/1969 : AIR 1969 SC 1330** has laid down **main attribute to coparcenary and joint family property** as under : --

- i) It devolves by survivorship and not by succession. The proposition of succession is to be understood in the context of various provisions of Hindu Succession Act, wherever those are applicable;
- ii) It is property in which the male issue of coparceners acquires an interest by birth.

The instances of separate property are that:--

- i) It belongs exclusively to a Hindu;
- ii) No other member of coparceners , not even his male issue acquires any interest in it by birth;
- iii) A Hindu, even if he is living in joint family, may be possessed of separate property which he can sell or dispose of in any manner; and

iv) On the death of a Hindu, it passes to his heirs by succession and not by survivorship.

**UNLESS PARTITIONED RIGHTS OF
COPARCENERS CANNOT BE DEFINED**

The Hon'ble Supreme Court in the case of **Girijanandini Devi v. Bijendra Narain Choudhary (MANU/SC/0287/1966 : AIR 1967 SC 1124)** has held that 'in a Hindu undivided family governed by the Mitakshara law, no individual member of that family, while it remains undivided, can predicate that he has a certain definite share in the property of the family. The rights of the coparceners are defined when there is partition. Partition consists in defining the shares of the coparceners in the joint property, actual division of the property by metes and bounds is not necessary to constitute partition. Once the shares are defined, whether by agreement between the parties or other-wise, partition is complete. The parties may thereafter choose to divide the property by metes and bounds, or may continue to live together and enjoy the property in common as before. If they live together, the mode of enjoyment alone remains joint, but not the tenure of the property.

CREATION OF COMPOSITE FAMILY BY CUSTOM OR AGREEMENT

**Angalakurthy Venkata Narayanamma and Ors.
vs. Molakapalli Lakshamma and Ors. :**

MANU/AP/0920/2015 - The concept of composite family is almost foreign to Hindu law, but such concept is developed due to custom prevailing in a particular community or due to express or implied contract between the parties to form a composite family. Composite family means where two or more families agreed to live and work together, pool their resources, throw their gains and labour into the joint stock, shoulder the common risk, utilize the resources of the units indiscriminately for the purpose of the whole family, such a case may be within the ambit of composite family, provided that there is a custom of such merger known to those families. A composite family is indeed constituted with the same purpose.

Evidently, it has for its objects the convenient and efficient management at family property by co-operate effort. Spirit of co-operation and mutual help is a dominant factor in constitution of such families. The families

usually knit together by strong ties of marriage feel impelled to pool together their joint resources and merge themselves into a single unit under some engagement. There are also cases where rich husbands take into their families the brothers of their poor wives along with their family property and entrust them with the management of their house-hold duties and cultivation. These instances are merely illustrative. As a matter of course, there can be several other considerations which may bring two or more families together blending them into one composite whole reinforcing them further by strong ties of matrimonial relations. The requirements of a composite family indeed are varied. They are not satisfied if there is no custom known to the family. It will be fatal for the institution, if its origin is not traced to any agreement express or implied. The blending should be so far complete as to make it appear, in all its ventures and undertakings, a complete unified whole. The resources of the units must be available for the purpose of the whole family without any discrimination and each member thereof must be in a position to act for the other members. And all this, as already said, must be a necessary consequence of the original agreement

between the parties. The agreement may be express or implied, but it must be between the families to pool together their labour, skill and resources and work for the common weal.

The extent of their share in the family will depend upon the terms of the agreement and unless it is agreed to the contrary, the shares of the families will ordinarily be equal. If such an agreement is to be inferred from the circumstances, the circumstances must be such as to lead to that inevitable conclusion. Being a creature of custom having its origin in agreement, it admits of no doubt that the evidence to be adduced in support thereof must be clear and convincing as held by a Division Bench judgment of this Court in *Anchuru Veerapa Naidu v. Gurijala Vetikaiah Chowdari* MANU/AP/0207/1961 : AIR 1961 A.P. 534.

Division Bench judgment of Court in *Kakarla Subbayya and others v. Makkena Sitaramamma and another* MANU/AP/0101/1959 : 1958 (2) An.W.R. 59 : AIR 1959 AP 86, it is ruled as follows: "In the absence of an express agreement, the formation of a composite family cannot ordinarily be inferred from the mere circumstances of two different families living together and cultivating

jointly, unless the conduct and mutual relations of the component units are wholly incompatible with the preservation of their individuality. A long duration, say, the passing of a few generations of common living may, in itself, raise a presumption of merger sometimes." "Again, a continuous course of dealing with the properties of the quondam units for the common Benefit of the family, or acquisitions jointly in the names of all the members of a common head and the launching of joint ventures, of the shouldering of common risks and the utilization of the resources of the units indiscriminately for the purpose of the whole family would be some of the indicia of a merger."

Division Bench judgment of this Court in **Vakati Venkatasubba Reddi v. Pelleti Pitchamma and others MANU/AP/0163/1960 : AIR 1960 AP 263**, Court while discussing the similar facts discussed about the burden of proof and held as follows at Para 11: "Thus in this case when the plaintiff succeeded in proving merely that the parties are, be it closely, and the families lived together for sometime in the same house helping each other and had a common mess, but the properties belonging to each branch were kept distinct and dealt with separately and exclusively,

the question whether there has been a 'composite family' giving rise to right of partition of the properties held in severally needs to be considered. At the out-set in ascertaining the legal position of the parties placed in similar circumstances as these in the instant case, we may steer clear of the law propounded concerning the 'composite family' coming into existence by a proved custom and the arrangement resulting from the affiliation of an illatom son-in-law to a member of a Hindu joint family; nor the learned Advocate-General has adopted this analogy to substantiate the case of the appellant. Creation of a 'composite family' said to have been brought about by living together of the representatives of different families by pooling their labour and property with a view to facilitate convenient and efficient management of that property needs from its very nature to be established by unmistakable and unimpeachable evidence of such merger of the units constituting the composite family, that the blending together should not only be complete but impossible of yielding any scope for assertion of individuality for the use of the composing units either in the matter of owning property or acts in relation thereto or concerning them. Though it might be

that the practice of different families living together to gain and having been benefited by the corporate existence may have divided the pooled resources according to the understanding between the parties or in equal shares, Courts have been anxious not to recognise such composite families with legal rights unless it is possible to infer a tenable and enforceable arrangement which may be either express or implied."

Court in R. Sudhakar Reddy v. J. Govinda Reddy MANU/AP/2254/2014 : 2015

(2) ALD 531, held as follows: "It is further held that unless a custom is prevailing in the particular caste or region, the illatom adoption of a third party cannot be accepted. Custom if recognized by a group of persons or area etc., is a source of law. Jurisprudentially custom is a known source of law and an integral part of the Lex non-script or unwritten law having law creating efficacy. It commends itself to the national and social conscience as principles of justice and public utility."

Division Bench judgment of Madras High Court in Allareddi Subbamma v. Nallapareddi Audilakshmmamma MANU/TN/0003/1888 : 22 MLJ 260, it was ruled as follows: "Isolated cases

are of little value unless it be proved that these two families have been united together on equal terms. There is nothing to show that any member of the Allareddi family has ever managed any of the lands which stand in the name of the Nallapareddi family.".... "The arrangement, if regarded as a union, was therefore unequal."

Court in Garimella Annapurnayya v. Kota Appalanarasimhamurthy and others
MANU/AP/ 0353/1994 : 1994 (3) ALT 491,

Court in Para 16 held as follows: "As the legal texture, a composite family is neither related to coparcenary nor to a Hindu Joint Family. The institution has no basis in the original text of Hindu Law and is purely a creature of custom obtaining in some parts of the families. It is mostly prevalent in certain parts of South India especially in Andhra Pradesh. A 'composite family' may be described as follows: ".....Where two or more families agree to live and work together, pool their resources, throw their gains into the joint stock, shoulder the common risks and utilise the resources of the units indiscriminately for the purpose of the whole family, such a case may well be within the ambit of composite family, provided there is a custom of such merger known to those families. A

composite family is indeed constituted with some purpose and has evidently for its object the convenience and efficient management of the properties of the larger unit by the corporate effort of all the members of the smaller units composing the same. The spirit of co-operation and mutual help and the policy of all-for-each, and each-for-all are the dominant factors permeating the constitution of such a family. The family is usually knit together by strong ties of matrimony and affection among its members, who though not descended from a common ancestor feel impelled to pool together their several resources and merge the same into a single unit under the same management. There are instances of such composite families in existence under the custom in which the husbands affiliate into the matrimonial home, the brothers of their wives and entrust them with the management of their household duties and cultivation. The requisites of a composite family are not satisfied if there is not a custom in the family and it will be fatal for such an institution if its origin is not traced to some engagement, expressed or implied. The blending should be so far complete as to make it appear in all its ventures and undertakings a complete unified whole. The resources of the unit

must be available for the whole family without any discrimination and each member thereof must be in a position to act for the other members. And all this must be a necessary consequence of the original agreement between the parties. The extent of their shares will depend upon the terms of the agreement and unless it is agreed to the contrary the shares of the families will ordinarily be equal. If such an agreement is to be inferred from the circumstances, those circumstances must be such as to lead inevitably to that conclusion. The mere fact that one of the members of one family had been helping in the cultivation by the members of another family is not by itself sufficient to raise such a presumption when all the other circumstances brought to light go against the plea of composite family."

The Supreme Court has settled the law, that the burden of proving custom in derogation of general law, lies heavily on the party who sets it up, vide **Kunjuraman v. Mathevan MANU/SC/0477/1971 : AIR 1971 SC 1398, and Md. Baqar v. Naimunnisa Bibi AIR 1965 SC 548**. The mode and degree of proof of any type of custom can be stipulated in law in substratum: "In order that an alleged custom may be given the

force of law, first, the evidence should be such as to prove the uniformity and continuity of the usage, and the conviction of those following it that they were acting in accordance with law and this conviction must be inferred from the evidence. Secondly, evidence of acts of the kind, acquiescence in those acts, their publicity, decision of Courts, or even of panchayats upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid, will be admissible. But evidence of this latter kind will be of little weight, if unsupported by actual examples of the usage asserted..... Custom cannot be extended by analogy. It must be established inductively not deductively and it cannot be established by a priori methods",

Family custom being a category of special custom, should have the attributes of antiquity, certainty and uniformity and it must be consciously accepted as having the force of law and these conditions must be proved by clear and unambiguous evidence, Harihar v. Balmiki MANU/SC/0008/1974 : AIR 1975 SC 733, and Pushpavathi v. Viswesumra MANU/SC/0141/1953 : AIR 1964 SC 118. As a first measure, such a custom should be pleaded

in specific terms what the custom is, upon which a party is relying on, for the purpose of proof.

In view of the principles laid down in the decisions referred supra, unless there is a custom or an agreement between two families to constitute a composite family, such plea is not acceptable. Hence, by applying the principles laid down in the decision referred supra, and for lack of sufficient pleading and evidence to establish that Ramulu and his natural family constituted as composite family, this plea is only an after thought or an invention made for the first time during Appeal without any plea and evidence before the trial Court.

R. Sudhakar Reddy vs. J. Govinda Reddy:
MANU/ AP/2254/2014 - Requirements to constitute a composite family:

- "1. There should be one pooling of their labour and property for convenient and efficient management of their composite family;
2. The state of facts should be such that it is possible to infer an arrangement and place it to a legal origin, so that the members of the family become entitled to share the property;
3. The arrangement so made out whether express or implied should be capable of establishing a

union of families where each and every member, as of right, could deal with property in his own right and act for the other members;

4. That the terms on which the families got united must be ascertainable or at least been culled out as flowing from the conduct of the parties;

5. Indications like the management of the property standing in the name of one family by another family not belonging to another family who had joined as a member of the composite family should be such as to form indexation purpose to constitute the composite family;

6. A long duration of common living so as to give rise to a presumption of merger is also a continuous course of dealings with the properties of the quondam units to the common benefit of the family or acquisition jointly in the names of all the members of common head and the launching of joint ventures;

7. The mutual co-operation of members of both the families for their common benefit and the earnings must be for whole family; and

8. There must be a blending of property of both the families with an intention to enjoy both the units by the members of all the family and utilization of the proceeds of the property without

any discrimination by any of the members of the family."

Thus, the principle underlying in composite family is corporate management of the property or co-operative management of the property by the members of two families clubbing their property together for effective management and for better earnings. Therefore, a composite family is nothing but union of two or more families, blending their property for effective management, either by express or implied contract or by custom and to utilize the proceeds of the property by all the members commonly without any discrimination.

Keeping in view of the concept of composite family enunciated in various judgment of this Court and Madras High Court referred supra to infer composite family, there must be a prevailing custom in the particular caste or area to constitute such composite families. As discussed above, the concept of composite family is not a part of Hindu Law, but it is a development by custom. A custom if recognized by a group of persons or area, etc., it is a source of law. Jurisprudentially custom is a known source of law and an integral part of the Lex non-script or unwritten law having law creating efficacy. It

commends itself to the national and social conscience as principles of justice and public utility. 'Custom is to society what law is to the State'. Two broad classifications admit (1) legal custom and (2) conventional custom. Legal custom is operative per se as a binding rule of law independently of any agreement and whose legal authority is absolute one which in itself and proprio vigore possesses the force of law. A conventional custom operates only indirectly through the medium of agreements whereby it is accepted and adopted in individual instances as conventional law between the parties whose authority is conditional on its acceptance and incorporation in agreements between the parties to be bound by it. Legal custom is two kinds viz., (1) local custom prevalent and having the force of law in a particular locality only and (2) the general custom of the realm. Thus, the three classes of custom are: (1) conventional custom or usage, (2) local custom and (3) the general custom of the realm. If any of the classifications of custom do not answer the description, then such usage or practice akin to custom would no longer be a custom, but assume the character of source of rights called prescriptions. The parameters of prescription as a custom are deliberated by the

jurists as follows: ".... Regarded historically, the law of prescription is merely a branch of the law of custom. A prescription was originally conceived as a personal custom, that is to say, a custom limited to a particular person and his ancestors or predecessors in title. It was distinguished from a local custom, which was limited to an individual place, not to an individual person. Local and personal customs were classed as the two species of particular customs and as together opposed to the general customs of the realm.....In the common law, a prescription which is personal is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; or in bodies politique or corporate and their predecessors....."

A bare reading of the principles laid down in various judgments, to claim a right of land that there is a composite family by agreement, and such formation of composite family is by virtue of custom in the particular caste, area or etc., In the instant case, the plaintiff pleaded that there is an agreement between the plaintiff and the defendant to form into a composite family so that the plaintiff can attend agricultural operations of the composite family property, as the defendant

was not blessed with any male children and agreed to give half share of the property. It is not the case of the plaintiff that the composite family is formed by way of illatom affiliation, but is only for effective management of the property of the defendant after blending the property allotted to the share of the plaintiff in the alleged partition that allegedly took place one day prior to the agreement for formation of composite family. The plaintiff did not raise any plea of prevailing custom in 'Pokanati Reddy' caste regarding formation of composite family. Thus, the case of the plaintiff is totally based on an express agreement which is not reduced into writing between the plaintiff and the defendant. In view of the various requirements to constitute a composite family as laid down in the above judgments, it is for the plaintiff to establish the express agreement between the plaintiff and the defendant and its validity. Otherwise, he is disentitled to the relief of partition. In Para 4 of the plaint, the plaintiff specifically pleaded that there is an agreement for formation of composite family so that the plaintiff may look after the agriculture work of the composite family, about 12 years prior to filing of the suit. The suit was filed in the year 1983 and if 12 years is calculated

backwards, the agreement would have taken place in the year 1971. By the date of filing of the suit, the plaintiff was aged 27 years. If 12 years period is calculated backwards, the plaintiff would be aged 15 years by the date of alleged agreement between the plaintiff and the defendant for formation of composite family. As the plaintiff being a minor incapacitated to enter into any contract or agreement with the 3rd parties except for his necessities in view of Section 11 of Indian Contract Act, 1872. It is not the case of the plaintiff that he entered into an agreement for his necessities during minority, but allegedly entered into an agreement to form a composite family so that he can claim half share agricultural property of the plaintiff and the defendant and blended his share of property with the property of the defendant. In view of his incapacity (minor) to enter into agreement under Section 11 of the Indian Contract Act, the agreement for formation of composite family itself is unenforceable under law, void ab-initio.

Since the plaintiff set up oral agreement in clear terms for formation of composite family between the plaintiff and defendant and blending share of his property with the property of the defendant, so as to enjoy both the property by the

members of the composite family and to give half share to the plaintiff, whenever he intends to separate from the composite family, the burden of proof is on the plaintiff to establish that there is an implied or express agreement for formation of composite family with an understanding to give half share in the property to the plaintiff. The defendant unequivocally denied the express or implied agreement between the plaintiff and the defendant while contending that he borrowed amount and improved property by his own exertions and the plaintiff is no way concerned with the family of the defendant except living for some time cultivating his land at Thambuganipalle and assisting the defendant in agricultural operations.

In view of rival contentions, when the plaintiff pleaded an agreement for formation of composite family in the pleadings, the burden of proof is on him to establish that there is an agreement for formation of composite family. Section 101 of the Indian Evidence Act, 1872 is the relevant provision which deals with burden of proof; and according to it, whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist and

the burden of proof lies on that person. However, the burden of proof must not be changed during course of evidence and is not a static truth or otherwise, the case must be judged on the evidence adduced by both the parties, but not on the initial burden which rests on the defendant. At the same time, Section 102 of the Indian Evidence Act says that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. In view of these two provisions, the initial burden of proof squarely lies on plaintiff as he approached the Court for a judgment depending upon the existence of certain facts i.e., agreement for formation of composite family between the plaintiff and defendant; if for any reason, he failed to establish existence of agreement for formation of composite family, his case would fail. Therefore, in view of Section 102 of the Indian Evidence Act, the initial burden squarely lies upon the plaintiff and it is for him to produce cogent and satisfactory evidence to prove existence of an agreement for formation of a composite family between himself and the defendant and blending his share of property with the property of the defendant.

The concept of composite family is almost foreign to Hindu law, but such concept is developed due to custom prevailing in a particular community or due to express or implied contract between the parties to form a composite family. Composite family means where two or more families agreed to live and work together, pool their resources, throw their gains and labour into the joint stock, shoulder the common risk, utilize the resources of the units indiscriminately for the purpose of the whole family, such a case may be within the ambit of composite family, provided that there is a custom of such merger known to those families. A composite family is indeed constituted with the same purpose.

Evidently, it has for its objects the convenient and efficient management of family property by co-operative effort. Spirit of co-operation and mutual help is a dominant factor in constitution of such families. The families usually knit together by strong ties of marriage feel impelled to pool together their joint resources and merge themselves into a single unit under some engagement. There are also cases where rich husbands take into their families the brothers of their poor wives along with their family property and entrust them with the

management of their house-hold duties and cultivation. These instances are merely illustrative. As a matter of course, there can be several other considerations which may bring two or more families together blending them into one composite whole reinforcing them further by strong ties of matrimonial relations. The requirements of a composite family indeed are varied. They are not satisfied if there is no custom known to the family. It will be fatal for the institution, if its origin is not traced to any agreement express or implied. The blending should be so far complete as to make it appear, in all its ventures and undertakings, a complete unified whole. The resources of the units must be available for the purpose of the whole family without any discrimination and each member thereof must be in a position to act for the other members. And all this, as already said, must be a necessary consequence of the original agreement between the parties. The agreement may be express or implied, but it must be between the families to pool together their labour, skill and resources and work for the common weal.

CHAPTER-7
JOINT NUCLEUS

NUCLEUS WAS NOT SUFFICIENT TO DISCHARGE THE INITIAL BURDEN WHICH LAY ON THE PLAINTIFF OF PROVING THAT THE ACQUISITIONS WERE MADE WITH THE AID OF JOINT FAMILY PROPERTIES 1954 SC

In Shrinivas v. Narayan (1954 AIR 379), the Supreme Court laid down the following principles.

(i) Proof of existence of joint family does not lead to a presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish that fact. 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 have been acquired, the burden shifts to the party alleging self-acquisition to establish that property was acquired without the aid of joint family funds.

(ii) The mere proof of existence of joint family nucleus out of which acquisitions should have been made is not sufficient. The important thing

to consider is whether the income which the nucleus yields is sufficient to lead to an inference that acquisitions were made with that income. A building in the occupation of the members of a family yielding no income could not be a nucleus out of which acquisitions could be made even though it might be of considerable value.

THE SUFFICIENCY OF THE NUCLEUS IS AGAIN A QUESTION OF FACT

M. Girimallappa v. R. Yellappagouda, AIR 1959 SC 906 the Supreme Court referred to Srinivas v. Narayan and held as under. ..We then find that the appellant was a manager of a joint family and had acquired the "K" properties in his own name for a consideration. It was never disputed that the Belhode properties were joint family properties. The Courts below held that the Belhode properties provided a sufficient nucleus of joint family property out of which the "K" properties might have been acquired. The sufficiency of the nucleus is again a question of fact and it is not for us to interfere with the findings of the Courts below on that question. For reasons to be hereinafter stated, we think that apart from the Belhode properties the appellant had no other

source of income. In those circumstances a presumption arises that the "K" properties were the properties of the joint family, Unless that presumption is rebutted it must prevail. It is quite clear that the appellant has failed to displace that presumption. The only way in which he sought to do so was by proving that the transfer to him was by way of a gift. But he has failed. The presumption remains unrebutted.

INITIAL BURDEN OF PROVING EXISTENCE OF SUFFICIENT NUCLEUS IS ON PLAINTIFF 2003 SC

JUSTICE Y Sabharwal, and JUSTICE B Agarwal in the case of **D.S. Lakshmaiah & Anr. Vs L. Balasubramanyam & Anr. Reported in AIR 2003 SC 3800** The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who

claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.

In Appalaswami v. Suryanarayanamurti and Ors. AIR 1947 PC 189, in a partition suit filed against their father by minor sons from the first marriage, the father claimed the properties in question were his self-acquired properties and denied that the plaintiffs had any right to seek partition. The High Court, reversing the judgment of the trial court, held that the view expressed by the trial court that only joint family property was that which the father took under partition Exhibit A was not correct and further held that whole of the property set out in Schedule to the written statement of the appellant/father, which had been acquired after partition Exhibit A was joint family property. The contention accepted by the High Court was that the share which the father took under Exhibit A formed the nucleus from which all his further acquisitions sprang. The plea of the father that was accepted by the Privy Council was that the whole of the property that came to him under Exhibit A was intact and unencumbered except a small portion sold which

amount had been debited against household expenditure. The Privy Council held that the Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property is joint to establish the fact. 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 may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. In the case before the Privy Council, on facts, it was held that the burden had shifted to the father to prove self-acquisition of properties as it was established that the family possessed joint property which from its nature and relative value, may have formed the nucleus to acquire the property in question. Those properties were large in number and have been noticed in Privy Council decision. However, on further facts found, it was held that the father had discharged that burden. The properties were

held to be self-acquired properties of the appellant.

In Srinivas Krishnarao Kango v. Narayan Devji Kango and Ors. MANU/SC/0126/1954 :

[1955]1SCR1 , the contention that was urged on behalf of the appellant was that the burden was wrongly cast on the plaintiff of proving that the acquisition of the properties were made with the aid of joint family funds, the argument being that as the family admittedly possessed the ancestral Watan lands of the extent of 56 acres, it must be presumed that the acquisitions were made with the aid of joint family funds and, therefore, the burden lay on the defendants who claimed that they were self-acquired acquisitions to establish that they were made without the aid of joint family funds and that the evidence adduced by them fell far short of it and that the presumption in favour of the plaintiff stood un rebutted. It was noticed by this Court that on the question of the nucleus, the only properties which were proved to belong to the joint family were the Watan lands of the extent of about 56 acres bearing an annual assessment of Rs. 49/-. There was no satisfactory evidence about the income which these lands were yielding at the material time. Under these

circumstances, noticing with approval the aforesaid Privy Council decision, it was held that whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him to establish that there was adequate nucleus out of which the acquisition could have made is one of fact depending on the nature and extent of the nucleus. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income which may well form the foundation of the subsequent acquisitions.

In Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh
MANU/SC/0289/1969 : [1969] 3 SCR 245 ,

noticing the observations of Sir John Beaumont in Appalaswami's case (supra), it was reiterated that the burden of proving that any particular property is joint family property in the first instance is upon the person who claims it to be

so. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is, however, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired, it is only after the possession of an adequate nucleus is shown, that the onus shifts on to the, person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. We are unable to accept the contention of learned counsel for the respondents that the aforesaid later observations have been made without reasons or that the Privy Council's decision does not hold so. The observation that only after possession of adequate nucleus is shown that the onus shifts also get support from Srinivas Krishnarao Kango's case (supra) where, while considering the question of shifting or burden, it has been held that the important thing to consider is the income which the nucleus yields.

In Baikuntha Nath Paramanik (dead) by His L.Rs. & Heirs v. Sashi Bhusan Pramanik (dead)

by his L.Rs. and Ors. MANU/SC/0381/1972 : AIR1972SC2531 , Court again held that when a joint family is found to be in possession of nucleus sufficient to make the impugned acquisitions then a presumption arises that the acquisitions standing in the names of the person who were in the management of the family properties are family acquisitions.

In Surendra Kumar v. Phoolchand (dead) through LRs and Anr. MANU/SC/0307/1996 : [1996] 2 SCR 15 , this Court held that where it is established or admitted that the family which possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was the joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family funds.

In Mallesappa Bandeppa Desai and Anr. V. Desai Mallappa alias Mallesappa and Anr. MANU/SC/0377/1961 : [1961]3SCR779 , Court held that where a manager claims that any immovable property has been acquired by him

with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate fund. The onus of proof in such a case has to be placed on the manager and not on his coparceners, it is difficult to comprehend how this decision lends any support to the contention of the respondents that in absence of leading any evidence, the claim of appellant No. 1 of the property being self-acquired has to fail. In the cited decision, the manager was found to be in possession and in charge of joint family funds and, therefore, it was for him to prove that despite it he purchased the property from his separate funds. In the present case, admittedly, no evidence has been led by the respondents that the first appellant was in possession of any such joint family funds or as to value or income, if any, of Item No. 2 property.

In Achuthan Nair v. Chinnammu Amma and Ors. MANU/SC/0361/1965 : [1966] 1 SCR 454

, it was noticed that there were number of properties owned by joint family which were received at the time of separation under a decree

passed in a partition suit. The claim of the defendants in the written statement was that the property in question had been purchased from the private funds of defendant No. 1 and her son defendant No. 4. In this decision too, it was reiterated that when it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. After noticing this settled propositions, it was observed that if a property is acquired in the name of a karanvan, there is a strong presumption that it is a tarwad (joint Hindu family) property and the presumption must hold good unless and until it is rebutted by acceptable evidence. This Court did not hold that if a property is acquired in the name of karta, the law as to presumption or shifting of onus would be different. The question of presumption would depend upon the facts established in each case. In the present case, no evidence of nucleus having been led, onus remained on the respondents and, therefore, there could be no

question of presumption about the property being joint family property.

**THE IMPORTANT THING TO CONSIDER IS
THE INCOME WHICH THE NUCLEUS YIELDS.**

In Srinivas Krishnarao Kango v. Narayan Devji Kango & Ors. [AIR 1954 SC 379], the contention that was urged on behalf of the appellant was that the burden was wrongly cast on the plaintiff of proving that the acquisition of the properties were made with the aid of joint family funds, the argument being that as the family admittedly possessed the ancestral Watan lands of the extent of 56 acres, it must be presumed that the acquisitions were made with the aid of joint family funds and, therefore, the burden lay on the defendants who claimed that they were self-acquired acquisitions to establish that they were made without the aid of joint family funds and that the evidence adduced by them fell far short of it and that the presumption in favour of the plaintiff stood un rebutted. It was noticed by this Court that on the question of the nucleus, the only properties which were proved to belong to the joint family were the Watan lands of the extent of about 56 acres bearing an annual assessment of

Rs.49/-. There was no satisfactory evidence about the income which these lands were yielding at the material time. Under these circumstances, noticing with approval the aforesaid Privy Council decision, it was held that whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him to establish that there was adequate nucleus out of which the acquisition could have made is one of fact depending on the nature and extent of the nucleus. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income which may well form the foundation of the subsequent acquisitions.

ONLY AFTER POSSESSION OF ADEQUATE NUCLEUS IS SHOWN THAT THE ONUS SHIFTS

In **Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh [(1969) 1 SCC 386]**, noticing the observations of Sir John Beaumont

in Appalaswami's case (supra), it was reiterated that the burden of proving that any particular property is joint family property in the first instance is upon the person who claims it to be so. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is, however, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. We are unable to accept the contention of learned counsel for the respondents that the aforesaid later observations have been made without reasons or that the Privy Council's decision does not hold so. The observation that only after possession of adequate nucleus is shown that the onus shifts also get support from Srinivas Krishnarao Kango's case (supra) where, while considering the question of shifting of burden, it has been held that the important thing

to consider is the income which the nucleus yields.

**WHEN THERE IS SUFFICIENT NUCLEUS TO
MAKE ACQUISITIONS – THEN PRESUMPTION
RAISES THAT PROPERTIES IN THE NAME OF
MANAGER IS JOINT FAMILY PROPERTY**

In **Baikuntha Nath Paramanik (dead) by His L.Rs. & Heirs v. Sashi Bhusan Pramanik (dead) by his L.Rs. & Ors.** [(1973) 2 SCC 334], Court again held that when a joint family is found to be in possession of nucleus sufficient to make the impugned acquisitions then a presumption arises that the acquisitions standing in the names of the person who were in the management of the family properties are family acquisitions.

**NO EVIDENCE OF NUCLEUS HAVING BEEN
LED ONUS REMAINED - THERE COULD BE NO
QUESTION OF PRESUMPTION ABOUT THE
PROPERTY BEING JOINT FAMILY PROPERTY**

In **Achuthan Nair v. Chinnammu Amma & Ors.** [AIR 1966 SC 411], it was noticed that there were number of properties owned by joint family which were received at the time of separation under a

decree passed in a partition suit. The claim of the defendants in the written statement was that the property in question had been purchased from the private funds of defendant No.1 and her son defendant No.4. In this decision too, it was reiterated that when it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. After noticing this settled propositions, it was observed that if a property is acquired in the name of a karanvan, there is a strong presumption that it is a tarwad (joint Hindu family) property and the presumption must hold good unless and until it is rebutted by acceptable evidence. This Court did not hold that if a property is acquired in the name of karta, the law as to presumption or shifting of onus would be different. The question of presumption would depend upon the facts established in each case. In the present case, no evidence of nucleus having been led, onus remained on the respondents and, therefore, there could be no

question of presumption about the property being joint family property.

NUCLEUS WAS NOT SUFFICIENT TO DISCHARGE THE INITIAL BURDEN WHICH LAY ON THE PLAINTIFF

The Supreme Court referred to the decision of the Privy Council in Appala-swami's case, with approval, in Srinivas Krishnarao Kango v. Narayan Devji Kango, **1954 AIR 379, 1955 SCR 1** Supreme Court held that though the joint family owned lands of the extent of 56 acres, there was no satisfactory evidence about the income which those lands are yielding at the material period, when the disputed property was acquired. At page 382, the Supreme Court observed that Siddopant (who acquired the disputed properties) was a Tahsildar and that though there was no precise evidence as to what salary he was drawing, it could not have been negligible, "and salary is the least of the income which Tahsildars generally make". ... It is well-settled that proof of the existence of a Hindu joint family does not lead to the presumption that property held by any member of the family is joint and the burden rests upon any one asserting that any item of property

was joint to establish the fact. 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 may have been acquired the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. Held, that on the facts the nucleus was not sufficient to discharge the initial burden which lay on the plaintiff of proving that the acquisitions were made with the aid of joint family properties. Held, further, that even if the burden shifted on the defendants of establishing self acquisitions that had been discharged by proof and the ancestral lands were intact and the income derived therefrom must have been utilized for the maintenance of the members of the family. While it is not unusual for a family to hold properties for generations without a title deed, an acquisition by a member would ordinarily be evidenced by a deed. When, therefore, a property is found to have been in the possession of a family from time immemorial, it is not unreasonable to presume that it is ancestral and to throw the burden on the party pleading self-acquisition to establish it.

**SUFFICIENCY OF NUCLEUS CAPABLE OF
YIELDING INCOME – NO PRESUMPTION CAN
BE DRAWN**

Krishna Gowda v. Ningegowda. ILR 1987 KAR

2883 At para 7, the Bench observed : "Of course in the case of acquisition by a junior member of a joint family in fact that the joint family possessed considerable nucleus capable of yielding income sufficient to enable acquisition of property is not by itself sufficient to hold that acquisition by a junior member of such joint family is with the aid of the joint family and the presumption to that effect cannot also be drawn. It shall have to be proved either by showing that it was acquired by the joint family funds or by proving that such junior member was in charge or management of the joint family property or business, though not the kartha of the family, capable of yielding income so as to enable him to purchase the property. In the latter case, if such junior member was not able to show that he had independent source of income or the consideration to the acquisition of the property had flown from the particular source not connected with joint family property, a presumption shall have to be drawn that such acquisition of property was with the aid

of joint family funds inasmuch as in such a case the junior member being in possession and management of the joint family property or business, his position be akin to that of kartha."

INITIAL BURDEN IS ON PLAINTIFF TO PROVE EXISTENCE OF JOINT FAMILY AND JOINT NUCLEUS:-

Dandappa Rudrappa Hampali And ... vs Renukappa Alias Revanappa AIR 1993 Kant 148, ILR 1993 KAR 1182, 1993 (1) KarLJ 138

All properties inherited by a male Hindu from his father, father's father or father's paternal grand father, is 'ancestral property'. A person may possess ancestral property as well as his self acquired property; it is permissible for a coparcener to blend his self acquired property with that of the ancestral or joint family property. A property acquired with the aid of the joint family property also becomes joint family property. The person acquiring a property if has command over sufficient joint family property, with the aid of which the new property could be acquired, there is a presumption that the acquired property belongs to the joint family. In such a case the acquieser has to show that his acquisition was

without the aid of any joint family assets. However the initial burden is on the person who asserts, that the newly acquired asset is of the joint family to prove, that the acquieser had command over sufficient joint family assets with the aid of which he could have acquired the new asset.

**MEMBER WHO ACQUIRED NEW ASSET
SHOULD BE IN A POSITION TO USE SUCH
JOINT NUCLEUS**

**Dandappa Rudrappa Hampali And ... vs
Renukappa Alias Revanappa AIR 1993 Kant
148, ILR 1993 KAR 1182, 1993 (1) KarLJ 138**

Therefore the initial burden is to establish the existence of some joint family property, capable of being the nucleus from which new property or asset could have been acquired; it is not sufficient to show that the joint family possessed some assets; it is necessary to prove that the assets of the joint family may have formed the nucleus from which the disputed assets may have been acquired. Whether joint family assets could have formed the nucleus, again, depends upon their nature and relative value. Existence of such joint family property which could have formed the

nucleus for the acquisition of new assets, by itself would not lead that the new assets acquired by any member of the family would be joint family property, because, such a member may not have control or command over the joint family assets. The idea is that the member who acquired the new assets may have utilised the joint family assets to acquire further assets; this is possible only if the said member was in a position to utilise the joint family asset to acquire further asset or assets.

IF THERE IS JOINT NUCLEUS BURDEN IS ON HIM TO SHOW IT IS NOT ACQUIRED OUT OF JOINT FUNDS

Dandappa Rudrappa Hampali And ... vs Renukappa Alias Revanappa AIR 1993 Kant 148, ILR 1993 KAR 1182, 1993 (1) KarLJ 138

In the case of the manager of the joint family or any other member who was in management of the family affairs or in possession of sufficient joint family assets, it is likely that the joint family property or part thereof, formed the nucleus from which he acquired other assets and in such a case, burden will be on him to prove that the acquisition by him was without the aid of the joint

family property. The initial burden to prove the existence of sufficient family property which could form a nucleus for other acquisition or for the business carried on by the brothers, is on the plaintiff.

EXISTENCE OF SUFFICIENT NUCLEUS SHALL BE PROVED BY DIRECT EVIDENCE WITH CLEAR UNEQUIVOCAL AND CLINCHING

Dandappa Rudrappa Hampali And ... vs Renukappa Alias Revanappa AIR 1993 Kant 148, ILR 1993 KAR 1182, 1993 (1) KarLJ 138

Existence of sufficient family asset so as to form a nucleus for further acquisition is a question of fact. Such a fact can be proved by direct evidence should be clear, unequivocal and clinching, as otherwise, there is every danger of the self acquisitions of a person being lost to another who claims a share in it, based on the past prosperity of the family".

IT IS ONLY AFTER THE POSSESSION OF AN ADEQUATE NUCLEUS IS SHOWN, THAT THE ONUS SHIFTS ON TO THE PERSON WHO CLAIMS THE PROPERTY AS SELF-ACQUISITION TO AFFIRMATIVELY MAKE OUT

**THAT THE PROPERTY WAS ACQUIRED
WITHOUT ANY AID FROM THE FAMILY
ESTATE**

The Apex Court in the case of **Mudigowda Gowdappa Sankh v. Ramachandra Revagowda Sankh 1969 AIR 1076, 1969 SCR (3) 245** held thus : "The case of the appellants was that these lands were self-acquisition of Goudappa, but the respondents contended that they were joint family properties. The law on this aspect of the case is well settled. Of course there is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it as coparcenary property. But if the possession of a nucleus of the joint family properly is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property

as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. In Appalaswamy v. Suryanarayanamurti, ILR (1948) Mad 440 : (AIR 1947 PC 189) Sri John Beaumont observed as follows : "The Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. 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 may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property."

A BUILDING IN THE OCCUPATION OF THE MEMBERS OF A FAMILY AND YIELDING NO INCOME CANNOT BE CONSIDERED AS A NUCLEUS OUT OF WHICH ACQUISITIONS COULD HAVE BEEN MADE

THE HON'BLE MR. JUSTICE AJIT J.GUNJAL
AND THE HON'BLE MRS. JUSTICE B.V.
NAGARATHNA of Karnataka High Court in the
case of **K T Venkatappa vs K N Krishnappa**
Decided on 27 September, 2012

It is settled law that the proof of existence of a Joint Family does not lead to the presumption that it possesses joint family property. The property held by a member of a Joint Family cannot be presumed to be a Joint Family Property. In a Joint family, if a person claims that it is a Joint Family property, the burden of proving that it is so, rests on the party who asserts it. However, in the case where it is established that the Joint Family possesses some joint family properties, which from its nature and relative value appears to be joint family property, the presumption arises that it is a joint family property and the burden shifts on the defendants alleging that the property was acquired without the aid of the Joint family. The legal position would be that the joint and undivided family is the normal condition of Hindu society. An undivided . family is not only joint in estate but also in food and worship. The existence of joint estate is not an essential requisite to constitute a joint family and a family which does not own any

property may nevertheless be joint. The presumption of union is the general presumption in the case of father and sons. The strength of presumption necessarily varies in every case. But the presumption is strong in the case of brothers. This is also well settled that where on the date of the acquisition of a particular property, the Joint Family had nucleus for acquiring the property in the name of any member of the Joint Family, should be presumed and was to form the part of the joint Family property unless it is shown to the contrary. It is more so in the case of a kartha of the Joint Family proving that he acquired with the independent funds without aid of the joint family funds. An important ingredient, which is required to be considered is the income of the nucleus family. Once the evidence adduced by the plaintiff is sufficient to shift the burden, which initially rested on them of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and the extent of the nucleus. The important thing to consider is the income, which the nucleus yields. A building in the occupation of the members of a family and yielding no income cannot be considered as a nucleus out of which acquisitions

could have been made even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income, which might form the foundation of the subsequent acquisitions. These are not abstract questions of law, but questions of fact to be determined on the evidence in the case. Where the finding of the Courts is that the income from the ancestral lands was not sufficient enough for the maintenance of the members and the houses in dispute are substantial, burden is on the plaintiff, who alleges the houses to have been acquired out of the Joint Family Funds to establish it. To render the property joint, the plaintiff must prove that the family was possessed of some property, out of which income, other property could have been acquired or from which the presumption could be drawn that all the property possessed by the family is joint family property, or that it was purchased from the Joint Family funds such as the proceeds of sale of ancestral property, or by joint labour. None of these alternatives is a matter of legal presumption. It can only be brought to cognizance of a Court in the same way as any other fact, namely, by evidence. There is at times

un-discriminated use of the expression 'presumption' in the context. It is to be understood to indicate those presumptions of fact, which may be said to arise in considering whether the burden of proof has or has not been discharged by a party. It is not as if there is any general rule for all cases. Where it is established or admitted 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 may have been acquired, the presumption arises that it was joint property and the burden shifts to the party alleging self acquisition to establish affirmatively, that the property was acquired without the aid of the joint family. However, no such presumption would arise, if the nucleus is such that with its help, the property claimed to be joint could not have been acquired.... Having regard to the principles laid down as to the concept of Joint Family Property, the nucleus and the acquisition of the properties, one is required to examine whether the suit schedule properties are the Joint Family properties or at least some of the properties are the self-acquisitions of the defendant.

HOW BURDEN OF PROOF SHIFTS IN CASE JOINT NUCLEUS IS PROVED

The Apex court in the case of **Srinivas Krishnarao Kango V/S Narayan Devji Kango** reported in AIR 1954 SC 379 has observed thus: "Proof of existence of a Hindu Joint Family does not lead to the presumption that property held by any member of the family is joint and the burden rests upon any one asserting that any item of property was joint to establish the fact. 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 may have been acquired the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property."

**IT HAS TO BE ESTABLISHED BY THE
PROPOUNDER THAT A NUCLEUS OF JOINT
HINDU FAMILY INCOME WAS AVAILABLE AND
THAT THE SAID PROPERTY HAD BEEN
PURCHASED FROM THE SAID NUCLEUS**

The decision reported in **AIR 2004 SC 1619 (P S SAIRAM AND ANOTHER Vs. P S RAMA RAO PISEY AND OTHERS)** is in relation to the joint family business. In the decision reported in AIR 2007 SC 1808 (MAKHAN SINGH (D) BY L.RS. Vs. KULWANT SINGH), it has been held that there was no presumption that the property owned by the members of the Joint Hindu Family could be a fortiori be deemed to be of the same character and to prove such a status it has to be established by the propounder that a nucleus of Joint Hindu Family income was available and that the said property had been purchased from the said nucleus and that the burden to prove such a situation lay on the party, who so asserted it where the suit property had been purchased by the father from his income as an employee of the Railways and it was therefore his self-acquired property such a property falling to his sons by succession could not be said to be the property of the Joint Hindu Family.

JOINT NUCLEUS GENERATING SUFFICIENT INCOME AND SAVINGS TO BE PROVED

THE HON'BLE MR.JUSTICE AJIT J GUNJAL of Karnataka High Court in the case of **Smt. Revamma vs Sri Basha Saab Decided on 12**

December, 2007 Indeed there is always a presumption that the Joint Family continues to be Joint. The normal state of every Hindu Family is Joint. Presumably, every Hindu family is joint in food, worship and estate. In the absence of proof of division of a Joint Hindu Family the presumption is. until the contrary is proved, the family continues to be joint But however, it is also to be noticed that there is no presumption that a family, because it is joint, possesses joint property or any property. When in a suit for partition, the one who claims that any particular item of the property is joint family property, and would assert that the property is joint family property, the burden would rest on him to prove that it is. a Joint Family. To render the property joint, the plaintiff must prove that the Family was possessed of some property with the income from which, the property could have been acquired or from which the presumption could be drawn that all the property possessed by the family is Joint Family property. Where it is established or admitted 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 may have been acquired, the presumption arises that it was joint property and

the burden shifts to the party alleging self acquisition to establish affirmative that the property was acquired without the aid of the joint family. However, no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption the nucleus must be such that with its help the property claimed to be joint could have been acquired. Whether the evidence adduced by a party is sufficient to shift the burden, which initially rested on him to establish that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and extent of the nucleus. An important element for consideration is the income, which the nucleus yielded. A family house in the occupation of the members and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. ... 10. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income, which may There are no abstract question of law but question of fact to be determined on the evidence in the case. The wide proposition that once the

ancestral nucleus is proved or admitted, the onus on the member to prove that fee properly acquired was his self-acquisition cannot be accepted as correct. The existence of some nucleus is not the sole criterion to impress the subsequent acquisitions with family character. What is required to be shown is that the family had as a result of the nucleus sufficient surplus income from which the subsequent acquisitions could be made.

**WHERE THE FATHER INHERITED NOTHING
AND THERE WAS NO NUCLEUS OF
ANCESTRAL PROPERTY**

The Privy Council in the case of **Peary Lal (AIR 1948 PC 108)** held where the father inherited nothing and there was no nucleus of ancestral property, in a joint family consisting father and son, the onus on the son to show that he was associated in the business started by the father's initiative and carried on mainly or wholly under the father's direction, in such a manner as to raise a reasonable inference that the father intended to make and did make the business a joint family business. This onus is heavy where there is no ancestral property.

**WHEN THERE IS SUFFICIENT NUCLEUS –
PRESUMPTION OF JOINT FAMILY PROPERTY
CAN BE RAISED**

In **Mallappa Girirnalappa Betgeri v. R. Yellappagouda Patil**, AIR 1959 SC 906, the Supreme Court, in the light of the undisputed fact that certain properties belong to the joint family and having restrained itself from interfering with the finding of sufficiency of nucleus, recorded by the civil court, held that there arose a presumption that the properties acquired by the manager, as Kartha, were joint family properties.

**ONLY AFTER THE POSSESSION OF AN
ADEQUATE NUCLEUS IS SHOWN, THAT THE
ONUS SHIFTS ON TO THE PERSON WHO
CLAIMS THE PROPERTY AS SELF-
ACQUISITION**

The Apex Court in the case of **Mudigowda Gowdappa Sankh v. Ramachandra Revagowda Sankh** 1969 AIR 1076, 1969 SCR (3) 245 held thus : "The case of the appellants was that these lands were self-acquisition of Goudappa, but the respondents contended that they were joint

family properties. The law on this aspect of the case is well settled. Of course there is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it as coparcenary property. But if the possession of a nucleus of the joint family properly is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. In *Appalaswamy v. Suryanarayanamurti*, ILR (1948) Mad 440 : (AIR 1947 PC 189) Sri John Beaumont observed as follows : 'The Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone

asserting that any item of property was joint to establish the fact. 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 may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property."

THERE IS NO PRESUMPTION OF JOINT FAMILY UNLESS JOINT NUCLEUS PROVED

In the case of **Appasaheb Chamdgade v. Devendra Chamdgade and Ors., (2007) 1 SCC 521**, Court, held: "17. what emerges is that there is no presumption of a joint Hindu family but on the evidence if it is established that the property was joint Hindu family and the other properties were acquired out of that nucleus, if the initial burden is discharged by the person who claims joint Hindu family, then the burden shifts to the party alleging self-acquisition to establish affirmatively that property was acquired without the aid of the joint family property by cogent and necessary evidence."

A BUILDING IN OCCUPATION OF THE FAMILY MEMBERS YIELDED NO INCOME - IT COULD NOT FORM A NUCLEUS

In the earliest case of **Srinivas Krishnarao Kango vs. Narayan Devji Kango & ors., AIR 1954 SC 379**, the extent of income of the property which formed the nucleus yielded for acquisition of further properties came to be considered. In that case, a building in occupation of the family members yielded no income. It was held that it could not form a nucleus out of which the acquisition could be made even though the building had considerable value. On the other hand, a running business in which capital was invested, though comparatively smaller, might produce substantial income which could form the foundation for subsequent acquisitions. Hence it was held that such a question could be a question of fact to be determined on the evidence in the case. Since the burden lays upon the Plaintiff to show that the property claimed by the Plaintiff was joint property, the nucleus from which a further property could have been acquired has to be shown initially by the Plaintiff after which the onus would shift to the party alleging self

acquisition to establish affirmatively that the property was acquired without the aid of joint family property. The Plaintiff would, therefore, have to show that the nucleus of the joint family property assisted the Defendant in acquisition of the properties claimed by the Plaintiff.

**WHERE HELD TO BE MORE THAN
SUFFICIENT TO FORM A NUCLEUS FOR THE
PURCHASE OF THE PROPERTIES AT
DIFFERENT DATES**

In the case of **Mudi Gowda Gowdappa Sankh vs. Ram Chandra Ravagowda Sankh, AIR 1969 SC 1076** on the question of fact, it was held that there was adequate nucleus of joint family properties from which later acquisitions could have been made. The ancestral lands in that case yielded an income of Rs.143/-. One of these lands was Bagayat land. The income from that land was assessed at Rs.5,000/- to Rs.6,000/- before the first world war. The family was stated to have 8/12 bullocks for the purpose of cultivation and most of the lands were cultivated personally by the family members. In the earlier years further lands were acquired. Income was, therefore, held to be more than sufficient to form a nucleus for

the purchase of the properties at different dates. Consequently, the onus, which initially was upon the Plaintiff, was held to be discharged and the onus shifted upon the Defendants to show that the properties were self acquisitions.

WHEN THERE IS NO EVIDENCE OF INCOME GENERATED FROM THE PROPERTY AND ITS VALUE – BURDEN NOT SHIFTED

In the case of **D.S. Lakshmaiah & anr. vs. L. Balasubramanyam & anr., AIR 2003 SC 3800** the Plaintiff as one of the three branches of a joint family claimed 1/3rd share each upon the premise that the disputed properties were joint Hindu family funds. The Court was called upon to determine whether the disputed properties were self acquired properties of the Defendant or joint family property. There was no evidence of income generated from that property or value of the ancestral property. No separate income to acquire the property was shown. It was not shown that the joint family property yielded any income to show that a nucleus was available for further purchase. The share which the father of the parties took under an earlier partition was shown to be the nucleus from which all his further

acquisitions sprang. It was held that where it was established that the family possessed some joint property which formed its nucleus from which the property in question may have been acquired, the burden shifted on the party alleging self acquisition to establish the fact that the property was acquired without the aid of joint family property affirmatively.

CONSIDERATION WAS PAID FROM JOINT EARNINGS FROM THE CULTIVATION OF LANDS HELD BY THE JOINT FAMILIES JOINT FAMILY PROPERTY

In the case of **State of A.P. & anr. vs. T. Yadagiri Reddy & ors., JT 2009 (1) SC 104**, upon considering the earlier cases, it was observed that the original land holder had agreed to alienate the land under an agreement for sale. The ancestral land of 9/10 acre was being cultivated by himself. Further land was purchased by him. The consideration was paid from joint earnings of himself and his sons from the cultivation of lands held by the joint families. It was held that the nucleus of the joint family was shown and the income therefrom was accounted for purchase of further lands which was then partitioned.

Consequently, it was observed thus:- There is a case to believe that the declarant was having ancestral lands and out of the income of these lands, he purchased the lands from Shri Khaja Shakhir Hussain etc. in the year 1956 and, therefore, these lands also form part and parcel of joint family properties in which his five major sons will have equal notional share and the share of the declarant will be 1/6th.

THE INITIAL BURDEN TO PROVE THE EXISTENCE OF SUFFICIENT FAMILY PROPERTY WHICH COULD FORM A NUCLEUS FOR OTHER ACQUISITION OR FOR THE BUSINESS CARRIED ON BY THE BROTHERS, IS ON THE PLAINTIFF

Dandappa Rudrappa Hampali and Others v Renukappa and Others, AIR 1993 Kant 148, ILR 1993 KAR 1182, 1993 (1) KarLJ 138 wherein it has been held as under: "The initial burden is to establish the existence of some joint family property, capable of being the nucleus from which new property or asset could have been acquired; it is not sufficient to show that the joint family possessed some assets; it is necessary to prove that the assets of the joint family may have

formed the nucleus from which the disputed assets, may have been acquired. Whether joint family assets could have formed the nucleus, again, depends upon their nature and relative value. Existence of such joint family property which could have formed the nucleus for the acquisition of new assets, by itself would not lead that the new assets acquired by any member of the family would be joint family property, because, such a member may not have control or command over the joint family assets. The idea is that the member who acquired the new assets may have utilised the joint family assets to acquire further assets; this is possible only if the said member was in a position to utilise the joint family asset to acquire further asset or assets. In the case of the manager of the joint family or any other member who was in management of the family affairs or in possession of sufficient joint family assets, it is likely that the joint family property or part thereof formed the nucleus from which he acquired other assets and in such a case burden will be on him to prove that the acquisition by him was without the aid of the joint family property. Ordinary presumption is that the eldest member "of the family is its manager; this presumption has to be rebutted by cogent

evidence, to be adduced by the person who asserts that the family was being managed by a junior member. The initial burden to prove the existence of sufficient family property which could form a nucleus for other acquisition or for the business carried on by the brothers, is on the plaintiff. Existence of sufficient family asset so as to form a nucleus for further acquisition is a question of fact. Such a fact can be proved by direct evidence or circumstantial evidence. However, circumstantial evidence should be clear, unequivocal and clinching, as otherwise, there is every danger of the self-acquisitions of a person being lost to and other who claims a share in it, based on the past prosperity of the family".

ACQUISITION BY JUNIOR MEMBERS – WHEN THERE IS SUFFICIENT NUCLEUS – THEY HAVE TO SHOW THAT THEY HAD INDEPENDENT INCOME

Krishna Gowda v. Ningegowda . ILR 1987 KAR 2883 At para 7, the Bench observed : "Of course in the case of acquisition by a junior member of a joint family in fact that the joint family possessed considerable nucleus capable of yielding income sufficient to enable acquisition of property is not

by itself sufficient to hold that acquisition by a junior member of such joint family is with the aid of the joint family and the presumption to that effect cannot also be drawn. It shall have to be proved either by showing that it was acquired by the joint family funds or by proving that such junior member was in charge or management of the joint family property or business, though not the kartha of the family, capable of yielding income so as to enable him to purchase the property. In the latter case, if such junior member was not able to show that he had independent source of income or the consideration to the acquisition of the property had flown from the particular source not connected with joint family property, a presumption shall have to be drawn that such acquisition of property was with the aid of joint family funds inasmuch as in such a case the junior member being in possession and management of the joint family property or business, his position will be akin to that of kartha."

THOUGH THE JOINT FAMILY OWNED LANDS OF THE EXTENT OF 56 ACRES, THERE WAS NO SATISFACTORY EVIDENCE ABOUT THE INCOME WHICH THOSE LANDS ARE YIELDING

**AT THE MATERIAL PERIOD, WHEN THE
DISPUTED PROPERTY WAS ACQUIRED**

The Supreme Court referred to the decision of the Privy Council in Appala-swami's case, with approval, in **Srinivas Krishnarao Kango v. Narayan Devji Kango, AIR 1954 SC 379**. Supreme Court held that though the joint family owned lands of the extent of 56 acres, there was no satisfactory evidence about the income which those lands are yielding at the material period, when the disputed property was acquired." the Supreme Court further observed that "Siddopant (who acquired the disputed properties) was a Tahsildar and that though there was no precise evidence as to what salary he was drawing, it could not have been negligible, "and salary is the least of the income which Tahsildars generally make". As to the proof of facts, Supreme Court further observed that : "Whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and the extent of the nucleus. The important thing to consider is the income which the nucleus yields.

A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income when may well form the foundation of the subsequent acquisitions. These are not abstract questions of law, but question of fact to be determined on the evidence in the case."

POSSESSION AND USE OF JOINT NUCLEUS

Ramappa Basappa Palled vs. Basava: ILR 1993

KAR 1865, MANU/KA/0207/1993 - The basic idea is that the benefit of acquisition should go to the joint family, if it was acquired by a person in possession of other joint family properties or joint family funds from which he could have acquired the new property, unless, he proves that the joint family property or funds were not utilised to acquire the new property. It is the user of the joint family assets (which could have formed a sufficient nucleus to acquire the new property), that makes the acquisition, the joint family property. If the joint family was not possessed of

any sufficient nucleus from which the new property was acquired, the acquirer of the property cannot be denied the benefit of acquisition, solely because, the acquirer happened to be the manager of a joint family, in the absence of proof as to other circumstances, such as, the acquirer treating the acquired property as of the joint family, or other members of the family considering it as a joint family property by participating in its cultivation and development. A joint family is presumably "joint in food, worship and estate." However such a presumption does not inevitably lead to the conclusion that every joint family possesses joint family properties... Two conditions require to be satisfied before holding the newly acquired property by the manager as of the property of the joint family : (i) There was sufficient nucleus of the joint family property out of which the property could have been acquired; and (ii) apart from the said joint family property, the manager had no other source of income... The onus shifts on the manager, when it is shown that he was in possession and charge of the joint family funds, which necessarily implies that, the said joint family funds could have formed a sufficient nucleus to acquire the new property.... Emphasis

is always on the nucleus to be formed out of joint family property or joint family funds, as the basis to lead to the presumption that the benefit of acquisition would be for the joint family. Burden is cast on the Kartha to prove that property acquired by him is his self-acquired property, when it is shown that the joint family possessed sufficient nucleus of which he had the control. Therefore, it cannot be said that in the absence of other circumstances, property acquired by a person belongs to the joint family, solely because, the acquirer was the manager of the family, at the relevant point of time. In the absence of any evidence that the family had no sufficient assets or funds and similarly, the evidence also is insufficient to trace the source of funds from which the property was acquired by the then Manager of a joint family, Court shall have to examine other circumstances such as the way the undivided members of the family lived and treated the newly acquired property and whether there is any indication that the manager conducted himself in such a manner as giving an impression that the acquired property belonged to the family; the probability of other members contributing either labour or their earnings for the acquisition also has to be examined, for which purpose,

Court may have to find out whether other members were in fact earning and handing over their earnings or savings to the manager.

ACQUISITION OF LEASE HOLD RIGHTS

Ramesh Srinivasa Jannu vs. Srinivas Vittoba Jannu and Ors.: 2000(4)KCCR2609 MANU/KA/0742/2000 - Acquisition of property or leasehold rights therein by a member or even the eldest member of the joint family like the father or karta-No presumption that such acquisition was by joint family unless proved or established that there existed sufficient nucleus with the joint family to enable such acquisition on such proof burden would shift on the member claiming that acquisition by him was without contribution by the joint family but with his own funds.

CHAPTER-8
LENDING AND RECOVERY

**DUTY OF THE CREDITOR TO ASCERTAIN
WHETHER THE PERSON MAKING THE
ACKNOWLEDGEMENT STILL HOLDS HIS
REPRESENTATIVE CAPACITY AS KARTA**

Nanchand Gangaram Shetji vs Mallappa Mahalingappa Sadalge 1976 AIR 835, 1976 SCR (3) 287 It is the duty of the creditor to ascertain whether the person making the acknowledgement still holds his representative capacity as karta of the family. The law does not cast any duty upon the members of the family to inform the creditors by a general notice about the disruption of the family. If the creditor fails to make an enquiry and satisfy himself about the capacity of the executant to represent the family at the time of making the acknowledgement, he does so at his own peril. Disruption of the joint family status puts an end to the representative capacity of the karta and any acknowledgement of a debt made by him after such disruption cannot save the creditor's claim from becoming time barred against the other members.

ANY ACKNOWLEDGEMENT MADE BY THE ERSTWHILE KARTA OF SUCH FAMILY CANNOT KEEP THE DEBT ALIVE AND EXTEND LIMITATION AS AGAINST ALL THE MEMBERS

Nanchand Gangaram Shetji vs Mallappa Mahalingappa Sadalge 1976 AIR 835, 1976

SCR (3) 287 The words "manager of a family for the time being" occurring in s. 21(3)(b) of the Limitation Act. 1908. indicate that at the time when the acknowledgement was made and signed, the person making and signing it, must be the manager of a subsisting joint Hindu family. If at the relevant time the joint Hindu family, as such, was no longer in existence, any acknowledgement made by the erstwhile karta of such family cannot keep the debt alive and extend limitation as against all the members of the family, his representative capacity as karta being co-terminus with the joint status of the family. Disruption of the joint family status, as already noticed, puts an end to the representative capacity of the karta and any acknowledgement of a debt made by him after such disruption cannot save the creditors' claim from becoming time barred against the other members.

AT SALE TRANSACTION ALL ADULT MEMBERS SHOULD BE CONSULTED

In 1964 Supreme Court 1385 (Balmukand V. Kamla Wati and others) it has been held that "manager agreeing to sell property of joint family, the Court has to analyse as to whether the said transaction is beneficial to joint family and further, all adult members must be consulted."

FATHER DEBT AND BROTHER DEBT & ITS LIABILITY ON OTHERS UNDER HINDU LAW

Court in the case of (Mariammal and another vs. Subbuthai and others) reported in 2013 (5) CTC 49 wherein it was held that a Hindu father can very well sell or mortgage ancestral property whether movable or immovable, including the interest of his son, grand sons and great-grandsons for the payment of his own debt, provided that such debt is not incurred for immoral or illegal purpose. In the present case, as mentioned above, there is no whisper in the plaint as to whether the father of the plaintiffs' resorted to immoral or illegal activities and the sale consideration received out of the sale made

in favour of the defendant was utilised for the purpose of indulging in any immoral activities.

QUOTED:- In **AIR 1992 Madras 203** (Sarangapani V. K.V.Parthiban and others), wherein this Court has held that "under Hindu Law, in case of alienation of Hindu undivided family properties for payment of debts, no doubt the debts incurred by brother manager will stand on a different footing from the debts incurred by a father manager, but only to this limited extent, namely, in the case of a brother manager, the debts have to be for the benefit of the family before they are said to be binding on the other members of the family. In case of a father manager, even if the debts are not for the benefit of the family, they are binding on the members of the family if they are antecedent debts, which are not tainted by illegality or immorality. But for that, there is no other difference between the two sets of debts.

On the basis of the decision referred to supra, it is easily discernible that if a transfer is made in respect of property of Hindu Joint Family by brother manager a legal necessity must be in existence, whereas, if a transfer is made by father manager, legal necessity need not be proved and at the same time, the said transfer is binding

upon other members of the joint family. Therefore, it is quite clear that father manager is having vast power of alienation of Hindu joint family properties. The only limitation is that the so- called antecedent debt should not be tainted with immorality or illegality. In the instant case, such allegation have not been made against the father of the plaintiff in the plaint.

Honourable Supreme Court in the case of (Manibhai and others vs. Hemraj and others) **(1990) 3 Supreme Court Cases 68** wherein it was held that when the alienation of joint family is for a legal necessity by the father to satisfy the debts contracted or even for his personal benefit it is binding on their sons on the basis of doctrine of pious obligation if the alienation is not avyavharik or tainted with immorality or illegality. Further, for judging such validity of transaction, each transaction should be independently examined.

In **1971 Supreme Court 776** (Raghubanchmani Prasad Narain Singh V. Ambica Prasad Singh (dead) by his legal representatives and others) the Hon'ble Apex Court has held that "alienation by father manager of joint Hindu family even without legal necessity is voidable and not void."

In **(1996) 8 Supreme Court Cases 54** (Sri Narayan Bal and others Vs. Sridhar Sutar and others), the Hon'ble Apex Court has held that "Karthha of Hindu joint family is having unfettered right of alienation of joint family property and the same is binding upon other members."

POWER OF KARTHA TO BORROW MONEY

Honourable Supreme Court in the case of (Venkatesh Dhonddev Deshpande vs. Sou. Kusum Dattatraya Kulkarni and others) reported in **(1979) 1 Supreme Court Cases 98** wherein it was held that the Karta or Manager of joint Hindu family has implied authorities to borrow money for family purposes and such debts are binding on the other co-parceners and the liability of the co-parceners in such a case does not cease by subsequent partition.

PIOUS OBLIGATION OF SONS

Honourable Supreme Court in the case of (S.M. Jakati vs. S.M. Borkar) reported in 1959 SCR 1384 = AIR 1959 SC 282 wherein it was held that when the sons do not challenge the liability of their interest in the execution of the decree

against the father and the Court, after attachment and proper notice of sale sells the whole estate and the auction purchaser pays for the whole estate, then the mere fact that the sons were co nominee not brought on the record would not be sufficient to defeat the rights of the auction purchaser or put an end to the pious obligation of the sons.

In BHUPATIRAJU SREERSMARAJU AND OTHERS VS. NADIMPALLI PULLAM RAJU AND ANOTHER (AIR 1963 Andhra Pradesh 403) it has been laid down as follows: "Where a new business is started by a sole surviving co-parcener of Mithakshara family the business becomes from its origin a family business and the minor members of the family born subsequently are not competent to say that the risk and liability of the new business cannot be imposed on them. The risk and liability has been taken by the family and the new comers in the family must share the debts and the new business along with other assets and liability of that family."

Hemraj alias Babu Lal and Ors. vs. Khem Chand and Ors. - PRIVY COUNCIL - : MANU/PR/0053/ 1943

Under the Hindu law a son is under a pious obligation to pay his father's debts to save him from punishment in a future state for non-payment of his debts. "According to the notions of Smriti writers it is regarded as sinful to remain in debt, and a debtor's salvation is deeply imperilled if he dies indebted. According to Vrihaspati, a person who does not repay his debt 'will be born in his creditor's house' as a slave or servant or woman or a quadruped.' According to other writers a person dying in debt goes to hell. A duty is therefore cast upon every person to discharge debts incurred by him": Thus, if the father dies without discharging his debts, a Hindu son is obliged to pay his undischarged debts and relieve him from his sins.

As observed by this Board in *Girdharee Lall v. Kantoo Lall* (1874) L.R. 1 I.A. 321, 331: "It being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts." But this obligation is not unqualified, for the son is not bound to pay his father's debts if the debts are *avyavaharika*.

The Smriti texts on which this qualification is based will be found in the learned judgment of Mookerjee J. in *Chhakauri Mahton v. Ganga*

Prasad (1911) I.L. R.39 C. 862. Their Lordships will in this judgment refer only to one text, the text of Usanas (ascribed also to Vyasa), the only text which uses the term *avyavaharika* (na *vyavaharikam* in the original). After enumerating certain specific debts, more or less in the same language as used by the other Smriti writers, Usanas adds a supplementary category of debts which the sons need not pay which are *avyavaharika*. The text of Usanas appears in Vijñaneswara's commentary on ch. II., v. 47, of Yajñavalkya, which lays down exceptions to the general rule relating to son's liability to pay the father's debts contained in v. 50.

These verses are as follows: Ch. II., v. 50. "When the father is abroad, or in difficulties, his debt proved by witnesses if undisputed, should be paid by the son and grandson."

Ch. II., v. 47. The son shall not pay the [paternal debts] contracted for wines, lust, gambling, or due on account the unpaid [portion] of a fine or toll or [on account of] an idle promise. In his commentary to this verse, Vijñaneswara refers to the text of Usanas which is: "A fine, the balance of a fine, likewise a bribe, or a toll or the balance of it, are not to be paid by the son, neither

shall he discharge a debt which is avyavaharika (na (not) vyavaharikam)."

There has been much difference of opinion as regards the precise significance of the term avyavaharika. Colebrooke translates it as meaning "debts for a cause repugnant to good morals"; Mandlik renders it as "not proper," and Sir Dinshaw Mulla in his "Hindu Law" accepts Colebrooke's translation. The term has also been interpreted in various judgments by courts in India, but the decisions are not all uniform. The Bombay High Court translates the term as "unusual or not sanctioned by law... Put into simple English, the texts amount to this: that the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices": *Durbar Khachar v. Khachar Harsur* (1908) I.L.R. 32 B. 348, 351. This decision has been disapproved in subsequent decisions in Bombay, and by other High Courts also. Mookerjee J. renders the term as equivalent to "not lawful, usual or customary" (*Chhakauri Mahton v. Ganga Prasad* (1911) I.L.R. 39 C. 862), while Sadasiva Iyer J. paraphrases it as "a debt which

is not supportable as valid by legal arguments, and on which no right could be established in the creditor's favour in a court of justice": Venugopala Naidu v. Ramanadhan Chetty (1912) I.L.R. 37 M. 458, 460. Many of the interpretations given to the term have been collected by Patkar and Tyabji JJ. in Bal Rajaram Tukaram v. Maneklal Mansukhbhai (1931) 1. L.R. 56 B. 36. Its meaning has been considered in other decisions also (see Govindprasad v. Raghunathprasad I.L.R. [1939] B. 533; Ramasubramania v. Sivakami Ammal (1925) A.I.R. (Mad.) 841). Their Lordships do not think that any useful purpose will be served by reviewing these and the other decisions brought to their notice, as in their opinion the principles with reference to which the term *avyavaharika* should be interpreted, and by which this case should be decided, are sufficiently clear and do not conflict with those decisions. They will now refer to those principles.

If the doctrine of pious obligation is to be given full effect, there cannot be any doubt that a Hindu son should be held liable for every undischarged debt of his father, for nothing can be nobler than to obtain complete exemption for the father from all penalties which might follow from the non-discharge of his debts; but this

position is not maintained. That the doctrine has reference to the nature or character of the debt which creates the liability can hardly be disputed; this appears from the following pronouncement made by Knight Bruce L.J. in Hunoomanpersaud Panday's case (1856) 6 Moo. I.A. 393, 421: "Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate...."

In *Girdharee Lall v. Kantoo Lall* L.R. 1 I.A. 321, 331, Sir Barnes Peacock quotes the above rule and then proceeds as follows: "It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it...." This also makes clear the connexion between the nature of the debt and the liability to pay it. That the duty cast on the son being religious or moral, the character of the debt

should be examined from the standpoint of justice and morality appears to be fairly clear from the decisions. In this connexion regard may also be had to the debts mentioned in the texts which the son need not pay, most of which are of an objectionable character. It also appears to be clear on principle, and on authority, that examination of the nature or character of the debt should be made with reference to the time when it originated, in other words, when the liability was first incurred by the father. If on such examination it is found that at its inception the debt was not tarnished or tainted with immorality or illegality, then it must be held that it would be binding on the son.

This principle, stated as Rule 1 by Venkatasubba Rao and Madhavan Nair JJ. in *Ramasubramania v. Siva Kami Ammal* (1925) A.I.R. (Mad.) 845, 852, in language almost identical, is amply borne out by the numerous authorities which they have examined. The rule is not rigid, but has to be applied with reference to the circumstances of each case. These principles, which are implicit in the notion of "pious obligation," and are also deducible from the decisions, should be kept in mind in interpreting the term *avyavaharika* used in the

text. The decisions which their Lordships have examined proceed on the ground common to them all, that debts in the nature of avyavaharika are debts which would be comprised in the expression "illegal or immoral debts." Having regard to the principles underlying the rule of "pious obligation," which forms the foundation for the son's liability, their Lordships think that the translation of the term avyavaharika as given by Colebrooke makes the nearest approach to the true conception of the term as used in the Smriti text, and may well be taken to represent its correct meaning. In their Lordships' view, the term does not admit of a more precise definition. When a particular debt is called in question, it will be the duty of the courts to examine its nature in the light of the principles mentioned above, which are not exhaustive but only basic, and to see whether in the circumstances it is of the kind which will give exemption to the son from the liability of paying it, on the ground that it is repugnant to morals. It has now been definitely established by the decision of this Board in Toshanpal Singh v. District Judge of Agra (1934) L.R. 61 I.A. 350, that a son is not liable to pay a debt created by his father which would render the father liable to criminal prosecution.

S. M. Jakati & Another vs S. M. Borkar & Others 1959 AIR 282, 1959 SCR Supl. (1)1384

... the Supreme Court observed about the term 'Avyavaharika' (p. 286): ...This term has been variously translated as being that which is not lawful or what is not just or what is not admissible under the law or under normal conditions. Colebrooke translated it as 'a debt for a cause repugnant to good morals'. There is another track of decision which has translated it as meaning 'a debt which is not supported as valid by legal arguments'. The Judicial Committee of the Privy Council in Hemraj alias Babu Lal v. Khem Chand MANU/PR/0053/1943, held that the translation of the term as given by Colebrooke makes the nearest approach to the true conception of the term used in the 'Smrithis' texts and may well be taken to represent its correct meaning and that it did not admit of a more precise definition.

In Toshanpal Sing v. District Judge of Agra MANU/PR/0068/1934, the Judicial Committee held that drawings of monies for unauthorised purposes, which amounted to criminal breach of trust under Section 405 of the

Indian Penal Code, were not binding on the sons, but a civil debt arising on account of the receipt of monies by the father which were not accounted for could not be termed "A vyavahariku.

(1) that the liability of the sons to discharge the debts of the father which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father and which does not come to an end as a result of partition of the joint family property. All that results from partition is that the right of the father to make an alienation comes to an end.

(2) Where the right, title and interest of a judgment-debtor are set up for sale as to what passes to the auction-purchaser is a question of fact in each case dependent upon what was the estate put up for sale, what the Court intended to sell and what the purchaser intended to buy and did buy and what he paid for.

(3) The words "right, title and interest " occurring in s. 155 of the Bombay Land Revenue Code have the same connotation as they had in the corresponding words used in the Code of Civil Procedure existing at the time the Bombay Land Revenue Code was enacted.

(4) In execution proceedings it is not necessary to implead the sons or to bring another suit if severance of status takes place pending the execution proceedings because the pious duty of the sons continues and consequently there is merely a difference in the mode of enjoyment of the property.

(5) The liability of a father, who is a managing director and who draws a salary or a remuneration, incurred as a result of negligence in the discharge of his duties is not an avyavaharika debt as it cannot be termed as "repugnant to good morals"

Dhondopant Madhavrao Inde vs. Ashok Haribhau Patil : MANU/MH/0299/1977 - 1978 MhLJ 773 - In our opinion, what is stated above by the Privy Council and the Supreme Court is enough to show that, where the father is convicted in respect of the embezzlement, as in the present case and avoided imprisonment, by selling the property, it cannot be said that the son's share in the property is also bound, because the debt is 'vyavaharika'.

Amrit Lal v. Jayantilal MANU/SC/0195/1960: [1960] 3 SCR 842 , by Gajendragadkar J. (as he

then was), in the course of the discussion of the doctrine of pious liabilities of the sons, as under (p. 966): This doctrine inevitably postulates that the father's debts which it is the pious obligation of the sons to repay must be vyavaharik. If the debts are not vyavaharik or are avyavaharik the doctrine of pious obligation cannot be invoked. The expression 'avyavaharik' which is generally used in judicial decisions has been based on the text of Usanas which has been quoted by Mitakshara in commenting on the relevant text of Yajnavalkya, (Yajnavalkya, ii, 47), According to Usanas, whatever is not vyavaharik has not to be paid by the son. 'Navyavahaarikam' are the words used by Usanas, and put in a positive form they mean 'avynvaharik'. Colebrooke has translated these words as meaning 'debt for a cause repugnant to good morals'. These words have received different interpretations in several decisions. Sometimes they are rendered as meaning 'a debt which as a decent and respectable man the father ought not to have incurred', *Durbar Khachar v. Khachar Harsur* ILR(1908) 32 Bom. 348 : 10 Bom. L.R. 297, or, 'not lawful or customary', *Chhakauri Mahton v. Ganga Prasad* (1911) I.L.R. 39 Cal. 862 a, or, 'not supportable as valid by legal arguments and on

which no right could be established in a Court of justice in the creditor's favour', Venugopala Naidu v. Ramanadhan Chetty ILR (1912) Mad. 458 : AIR [1914] Mad. 654. But it appears that in Hemraj v. Khem Chand MANU/PR/0016/1943, the Privy Council has, on the whole, preferred to treat Colebrooke's translation as making the nearest approach to the real interpretation of the word used by Usanas but whatever may be the exact denotation of the word, it is clear that the debt answering the said description is not such a debt as the son is bound to pay, and so as soon as it is shown that the debt is immoral the doctrine of pious obligation cannot be invoked in support of such a debt.

SON AND GRANDSON ARE NOT LIABLE FOR ANY DEBT UNLESS THEY RECEIVE ASSETS AND OBLIGATIONS OF PROPERTY

Masit Ullah and Ors. vs. Damodar Prasad - PRIVY COUNCIL : MANU/PR/0034/1926 - AIR 1926 PC 105- Under law of Mitakshara great-grandson was as much member of joint family as son or grandson and rights of descendants were co-extensive with their obligations - However, great-grandsons obligation to discharge valid

debts of that ancestor was co-extensive with rights - Thus, son and grandson were not liable for any debt unless they receive assets and obligations of each of them were co-extensive

Under the law of the Mitakshara the rights of descendants are co-extensive with their obligations. Sons and grandsons are expressly declared to have controlling rights in respect of ancestral estate. Vijnaneswara in ch. 1, Section 1, v. 27, declares as follows: "Therefore it is a settled point, that property in the paternal estate is by birth, although the father has independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth; but he is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his' father or other predecessor.

GUIDELINES FRAMED BY RAJASTHAN HIGH COURT IN CASE PARTITION SUITS AND DEBT RECOVERY PROCEEDINGS

**Mohan Lal And Anr. vs Dwarka Prasad And Ors.
AIR 2007 Raj 129 following guidelines and
directions emerge:**

(i) That while Civil Courts still remain appropriate forums and can continue to decide inter-party civil rights in the cases involving civil rights of the parties like in the cases of partition, cancellation of sale deed, gift deed, right of pre-emption, redemption of mortgage etc. and the bar contained in Section 34 of the Securitisation Act is not absolute and does not debar Civil Courts to entertain such suits, however, no suit or injunction in any Civil Court can be allowed to prohibit and debar the measures taken by banks and financial institutions under Securitisation Act, 2002 or under R.D.B. Act, 1993, except as specified below in para (ii).

(ii) In cases of partition suits of ancestral property owned by a Hindu Undivided Family which has been mortgaged by one or more of the coparceners, without other coparceners being guarantors or borrowers of the bank or financial institution, the Bank, financial institution or Debt Recovery Tribunal cannot proceed to take over and sell, transfer or otherwise alienate the said ancestral undivided property unless and until the share of the particular borrower-

coparcener is determined at the instance of such borrower-coparcener or the bank itself.

(iii) That the cut-off date excluding the jurisdiction of the Civil Court in respect of measures specified Under Section 13(4) of the Securitisation Act is the date when such measures are taken after expiry of notice period Under Section 13(2) of the Act and after such cut-off date no civil suit or injunction barring or prohibiting the right of the banks and financial institutions with respect to measures Under Section 13(4) of the Act can adversely affect the bank nor such injunction would be binding on the bank or financial institution, except the cases of exception specified in para (ii) above.

(iv) From the said cut-off date if any such third party has a pending claim or intends to claim his right, title or interest over the property, which is security of the bank or financial institution, the remedy opens for him before the Debt Recovery Tribunal Under Section 17(1) of the R.D.B. Act and he can raise his objection or bring it to the notice of the Tribunal the fact of pendency of such civil suit and thereafter the Tribunal shall decide such objection within 60 days, as stipulated in Section 13(5) of the Act and hold either way as to whether a note to the effect of pending litigation

has to be made by the bank or financial institution concerned in the notification, advertisement for sale and conveyance deed, if any, executed in exercise of their powers Under Section 13(4) of the Act in favour of any third party, and also whether to allow the Bank or financial institution to proceed further under these special enactments against the security or mortgaged property at all or not.

(v) In case upon adjudication of right, title or interest of any third party in a civil suit is decreed in his favour, such party upon such decree becoming final, shall be entitled to follow the whole or the part of the property, which formed security of the bank or the financial institution concerned and claim back either the suit property from the successor-in-title or to claim damages in the alternative for the same.

(vi) If in such civil suits filed for determination of civil rights between the parties including the borrower, who has mortgaged the suit property in whole or in part with the bank or financial institution, who have initiated steps Under Section 13(4) of the Act, the banks and financial institutions would be free to apply to the competent Civil Court and upon such application the bank or financial institution shall be deleted

from the array of defendants and no injunction granted by the Civil Court would bind the bank or financial institution in respect of measures taken Under Section 13(4) of the Act, except in the cases relating to partition of Joint Hindu Undivided Family ancestral property.

RIGHT OF PLAINTIFFS' TO CLAIM PARTITION IN THE SUIT SCHEDULED PROPERTIES, IF THEY PROVE THEY ARE ANCESTRAL JOINT FAMILY PROPERTIES, CANNOT BE DEPRIVED OF AS CONTENTED BY THE BANK

In Krishna v. Kedarnath AIR 2006 Kant 21, the Division Bench of Karnataka High Court referring to Para 51 of the judgment of Supreme Court in Mardia Chemical's case held that while the bank can enforce its security interest for realization of its amount, right of plaintiffs' to claim partition in the suit scheduled properties, if they prove they are ancestral Joint family properties, cannot be deprived of as contended by the bank, which contention was erroneously accepted by the trial Court and therefore, the Division Bench of Karnataka High Court held that for adjudication of such claim, the bar under Section 34 of the Act shall not come in the way, While doing so and

allowing the appeals, the Division Bench, however, dissolved the status quo order passed in the suits against the bank in view of exercised bar Under Section 34 of the Act and held that the bank is at liberty to proceed for the recovery of its amount by taking necessary steps in respect of the mortgaged properties by the debtors under the provisions of the Act vide Para 8 of the judgment.

JOINT FAMILY PROPERTIES MORTGAGED TO THE BANK TOWARDS THE LOAN

Krishna And Anr. vs Kedarnath And Ors. AIR 2006 Kant 21, ILR 2005 KAR 5338, 2005 (6) KarLJ 337, Whether all the suits schedule properties are joint family properties and all the properties are mortgaged to the Bank and plaintiffs are entitled to partition etc. after the first charge upon the same is cleared, are all aspects required to be decided by the Civil Court as the plaintiffs rights are traceable to the provision of Section 9 of CPC. Section 34 of the Act is a bar for the Civil Court to entertain the suits in respect of the matters which are empowered to be determined by the Debts

Recovery Tribunal or Appellate Tribunal. But, adjudication or determination of rights or claims of the parties for partition of the properties which are in the nature of civil rights, cannot be stopped. Partition suits that would be instituted by a party claiming civil rights in respect of either ancestral joint family properties or co-ownership properties will have to be exclusively dealt with by the Civil Court. While the Bank can enforce its security interest for realisation of its amount, right of the plaintiffs to claim partition in the suit schedule properties if they prove are ancestral joint family properties cannot be deprived off as contended by the Bank. For adjudication of such claims, the Bar under Section 34 of the Act shall not come in the way.

Bhuru Mal v. Jagannath, AIR 1942 PC 13 the Judicial Committee of the Privy Council

Though a business, if it belongs to a Hindu joint family, is an item of joint family property, special considerations apply to the question whether or not a business belongs to the family or to the individual member who carries it on. If it be a joint family business, then all the members of the family are liable for its debts upon the terms and to the extent laid down by the Hindu law.

KARTA CAN ALIENATE FOR ANTECEDENT DEBTS

Sushil Kumar & Anr vs Ram Prakash & Ors
1988 AIR 576, 1988 SCR (2) 623

Karta of the joint Hindu family had undoubtedly the power to alienate the joint family property for legal necessity or for the benefit of the estate as well as for meeting antecedent debts.....It is well-settled that in a Joint-Hindu Mitakshara family, a son acquires by birth an interest equal to that of the father in the ancestral property. The father by reason of his paternal relation and his position as the head of the family is its manager and he is entitled to alienate the joint family property so as to bind the interests of both the adult and minor coparceners in the property, provided that the alienation is made for legal necessity or for the benefit of the estate or for meeting an E-antecedent debt. A father-Karta in addition to the aforesaid powers of alienation has also the special power to sell or mortgage ancestral property to discharge his antecedent debt not tainted with immorality.

**PRINCIPLES OF THE HINDU LAW AFTER 2005
AMENDMENT**

THE HON'BLE JUSTICE MRS. ROSHAN DALVI, of Bombay High Court in the case of Shalini Sumant Raut & Ors vs Milind Sumant Raut & Ors Decided on 14 December, 2012 Quoted following Alienation can be made for the benefit of the estate, for legal necessity or for meeting any antecedent debts, for management of the joint property by the Karta or pious obligation of a son to discharge his father's debts subject to Section 6(4) of the has as amended in 2005 which runs thus. (4). After the commencement of the Hindu Succession (Amendment) Act, 2005, no Court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect-

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Trijugi Narain (Dead) through Legal Representatives and Ors. vs. Sankoo (Dead) through Legal Representatives and Ors.: MANU/SC/1742/2019

Preamble of the Succession Act states that, it is an Act to amend and codify the law relating to intestate succession amongst Hindus and as originally enacted did not profess to amend and codify the law relating to the nature of all the properties held by Hindus, with the exception of Section 14 of the Succession Act. Section 4 of the Succession Act provides that the text, rule, interpretation, custom or usage of Hindu law will cease to have effect with respect to any matter for which provision is made in the Act and further any other law in force, which is inconsistent with

the provisions of the Act, will cease to apply. Section 6 of the Succession Act deals with devolution of interest of a Hindu male (and daughter of a coparcener after amendment vide the Hindu Succession (Amendment) Act 2005) having interest in a Mitakshara coparcenary as distinct from a joint Hindu family. Sections 8 and 9 of the Succession Act relating to the general Rules of succession in case of males and females, respectively, do not apply to a living person but apply on the succession opening on the death. Similarly, Section 30 of the Succession Act which deals with testamentary succession and empowers a Hindu to dispose of any property by will in accordance with the provisions of the Indian Succession Act, 1925, does not ipso facto apply to a living person and applies in the event of the holder's death. Section 5(ii) is an exception to Section 4 and protects application of terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or the terms of any enactment passed before commencement of the Succession Act as per which the estate would descend to a single heir. The provisions of the Succession Act, with the possible exception of Section 14 and some amendments vide the Hindu Succession

(Amendment) Act 2005, do not apply unless the succession opens and, therefore, no legal rights of a living person would get affected.

WHERE SALE FOR DEBT HELD AS SHAM TRANSACTION

In Sadasivam v. K. Doraisamy (AIR 1996 SC 1724) it was found that when the father has executed sale deed in favour of a near relative and the intention to repay debt or legal necessity has not been proved as a sham transaction.

KARTA RIGHTS TO CARRY ON BUSINESS AND PLEDGE JOINT FAMILY PROPERTY

Firm Of Bhagat Ram Mohanlal vs The Commissioner 1956 AIR 374, 1956 SCR 143

It is well settled that when the karta of a joint Hindu family enters into a partnership with strangers, the members of the family do not ipso facto become partners in that firm. They have no right to take part in its management or to sue for its dissolution. The creditors of the firm would no doubt be entitled to proceed against the joint family assets including the shares of the non-

partner copareeners for realisation of their debts. But that is because under the Hindu Law, the karta has the right when properly carrying on business to pledge the credit of the joint family to the extent of its assets, and not because the junior members become partners in the business.

CLAIMS OF ADVERSE POSSESSION AMONG JOINT OWNERS

In Annasaheb Bapusaheb Patil v. Balwant, AIR 1995 SC 895; the Hon'ble Supreme Court observed that a claim of adverse possession, being a hostile assertion involve expressly or impliedly, in denial of the title of the true owner, the burden is always on the person who asserts such a claim to prove by clear and unequivocal evidence that his possession was hostile to the real owner and in deciding such' claim, the Courts must have regard to the animus of the person doing those acts.

In State of Rajasthan v. Harphool Singh, 2000 (5) SCC 652, the Hon'ble Supreme Court observed as under: "More concrete details of the nature of occupation with proper proof thereof would be absolutely necessary and mere vague

assertions cannot be themselves, be a substitute for such concrete proof required of open and hostile possession....Such lackadaisical finding based upon mere surmises and conjectures, if allowed....the inevitable casualty is justice and approval of such rank injustice would only result in gross miscarriage of justice."

In P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314; the Hon'ble Supreme Court considered the issue of adverse possession over the family's property and held that it has to be proved by cogent reasons that there has been hostile relations between the parties and the members, who are being denied their right, had insisted to have their share and it had been refused persistently by the members of the family claiming adverse possession. While deciding the said case, the Hon'ble Supreme Court placed reliance upon the judgment in *Secretary of State for India v. Debendra Lal Khan* (AIR 1934 SC 23), wherein it had been observed that the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. But it is well settled that in order to establish adverse possession of one coheir as against another, it is

not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co- heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties, it is presumed to be on the basis of joint title. The Court further observed as under: - "The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir takes no

steps to vindicate his title. Whether that line of cases is right or wrong, we need not pause to consider. It is sufficient to notice that the Privy Council in *N. Varada Pillai v. Jeevarathnammal* AIR 1919 PC 44....quotes, apparently with approval, a passage from *Culley v. Deod Taylerson* (1840) 3 P & H 539 : 52 RR 566 (E) which indicates that such a situation may well lead to an inference of ouster 'if other circumstances concur.'.....It may be further mentioned that it is well-settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession."

In Karbalai Begum v. Mohammed Sayeed and Anr., AIR 1981 SC 77; the Hon'ble Apex Court observed that mere non-participation in the rent and profits of the property by a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. In such a fact-situation, the possession of the party is always in the nature of constructive trustees and would be deemed in law to be the possession of co- sharer ousted.

In Kshitish Chandra Bose v. Commissioner of Ranchi, AIR 1981 SC 707; the Hon'ble Apex Court held that in case of adverse possession, all that the law requires is that the possession must be open and without any attempt at concealment. It is not necessary that the possession must be so effective so as to bring it to the specific knowledge of the owner. Such a requirement may be insisted on where an ouster of title is pleaded.

In M. Arthur Paul Ratna Raju and Ors. v. Gudese Garaline Augusta Bhushanbai and Anr., (1998) 7 SCC 103; the Hon'ble Supreme Court held as under:- "In the case of co-sharer, mere exercise of possession as of right cannot make out a case of ouster of co-sharer and consequential exercise of adverse possession by the other co-sharer so that ultimately the title of the ouster co-sharer is extinguished on account of adverse possession for the prescribed period."

Apex Court in Bharat Singh and others v. Mst. Bhagirathi reported in MANU/SC/0362/1965 : AIR 1966 SC 405 at para 7 has held as under: "There is a strong presumption in favour of Hindu brothers constituting a joint family. It is for the person alleging severance of the joint family to

prove it. The mere fact that after the death of the father mutation entry was made in favour of three brothers and indicated the share of each to be one-third, by itself could be no evidence of the severance of the joint family which, after the death of the father consisted of the three brothers who were minors. Mutation entry in favour of the widow of one of the three brother on his death might have been made without the knowledge of the other two brothers w.p. were minors at the time. Their minority will also explain the absence of objection to the mutation being made in her favour."

Shambu Prasad Singh v. Most. Phool Kumari and others reported in MANU/SC/0483/1971 : AIR 1971 S.C.1337 it is held at para 17 as under: "On the question of adverse possession by a co-sharer, the law is fairly well settled. Adverse possession has to have the characteristics of adequacy, continuity and exclusiveness. The onus to establish these characteristics is on the adverse possessor. As between co-sharers, the possession of one co-sharer is in law the possession of all co-sharers. Therefore, to constitute adverse possession, ouster of the non-possessing co-sharer has to be made out. As

between them, therefore, there must be evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other."

In Karbalai Begum v. Mohd. Sayeed and another reported in MANU/SC/0363/1980 : AIR 1981 S.C. 77 at para. 7 following proposition is laid down: "It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact is admitted, then the legal position would be that the co-sharers in possession would become constructive trustees on behalf of the co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustees. The possession of the defendants, apart from being in the nature of constructive trustees, would be in law the possession of the plaintiff."

In Darshan Singh and others v. Gujjar Singh (dead) by LRs. and others reported in MANU/SC/0007 /2002 : (2002)2 SCC 62 at para 9 it is held as under: "In our view, the correct

legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied."

The Apex Court in Binapani Paul v. Pratima Ghosh and others reported in MANU/SC/2428/2007 : (2007) 6 S.C.C 100 at para. 39 has held as under: "Interestingly, Amal pleaded ouster. If ouster is to be pleaded, the title has to be acknowledged. Once such a plea is taken, irrespective of the fact that as to whether any other plea is raised or not, conduct of the parties would be material. If, therefore, plea of ouster is not established, a fortiori the title of other co-sharers must be held to have been accepted."

In T. Anjanappa v. Somalingappa reported in MANU/SC/8429/2006 : 2006(7) SCC 570 at para. 12 it is held as under: "12. The concept of adverse possession contemplates a hostile

possession i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property."

Apex Court in Jai Singh and others v. Gurmej Singh reported in MANU/SC/0054/2009 : 2009 AIR SCW 3652 after referring to several earlier judgments, has laid down the following principles at para. 7 which reads as under:

"The principles relating to the inter se rights and liabilities of co-sharers are as follows:

1. A co-owner has an interest in the whole property and also in every parcel of it.
2. Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.
3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.
4. The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.
5. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.
6. Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

7. Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to anybody to disturb the arrangement without the consent of others except by filing a suit for partition."

Vidya Devi @ Vidya Vati (Dead) by L.Rs. v. Prem Prakash and Others reported in MANU/SC/0345 /1995 : (1995) 4 SCC 496 the **minority view** is expressed in the following words:

"28. 'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law."

The **majority view** as expressed in Para 16 of the said judgment reads as under:

"16. When we now consider the plea of acquisition of title by adverse possession to the holding of co-bhumidhars raised by defendant-1 (respondent-1 herein), a co-bhumidhar in a suit for partition of that holding by another co-bhumidhar, it becomes wholly and clearly untenable because of the entries in Columns 4 and 5 relating to suit for partition of co-bhumidhar in respect of his holding envisaged at Sl. No. 11 to Schedule-1 fixing no period of limitation for such suit against other co-bhumidhar/s. Thus, when no period of limitation is fixed for filing a suit for partition by co-bhumidhar against his other co-bhumidhars in respect of a joint holding, the question of the other co-bhumidhar acquiring his title to such holding by adverse possession for over 12 years can never arise. If that be so, such plea of perfection of title by adverse possession of a holding by co-bhumidhar against his other co-bhumidhar as defence in the latter's suit for partition can be of no legal consequence. In the said view of the matter, we agree with the learned single Judge of the High Court who held that the explanation to sub-section (1) of section 186 of the DL Act came in the way of defendant-1

(respondent-1 herein) in raising the issue of his title to the holding said to have been acquired by adverse possession and getting it referred by the Revenue Court to Civil Court for decision and disagree with the Division Bench of the High Court which has held that section 67(d) of the DL Act which provides for extinction of bhumidhar's interest in a holding enabled defendant-1 (respondent-1 herein) to take the plea of title by adverse possession in respect of the holding in a suit for partition of such holding filed by a co-bhumidhar".

Apex Court in Des Raj and Ors. v. Bhagat Ram (dead) by L.RS. AND ORS. reported in MANU/SC/7153 /2007 : (2007) 9 SCC 641

wherein at Paragraph 10 it was held as under: "10. We have noticed hereinbefore the factual aspects of the matter which are neither denied nor disputed. Admittedly, the plaintiff respondent had remained in possession for a long time i.e. since 1953. It may be true that in his plaint, the plaintiff did not specifically plead ouster but muffusil pleadings, as is well known, must be construed liberally. Pleadings must be construed as a whole."

Janatha Dal Party v. The Indian National Congress, New Delhi and Others reported in MANU/KA/2676 /2013 : 2014 (1) KCCR 95. It was held as under:--

"The plea of adverse possession raises a mixed question of law and fact. Where a person wants to base his title on it, he should specifically set up the plea. Unless the plea is raised, it cannot be entertained. A plea must be raised and it must be shown when possession became adverse, so that the starting point of limitation against the party affected can be found. The prayer clause is not a substitute for a plea. A person acquires title by way of adverse possession when he is in continuous, uninterrupted, hostile possession over a period of 12 years. In order to calculate 12 years period there should be a starting point. The date of commencement of adverse possession is very crucial for calculating the period of 12 years. Therefore, the law mandates that the person who seeks a declaration that he has perfected his title by way of adverse possession should specifically plead the date from which his possession becomes adverse to that of the opposite party against whom the said plea is set up. It is from that date if the party proves continuous,

uninterrupted possession for a period of 12 years, then the right of the opposite party to the property stands extinguished and the party who has set up the plea would acquire title by way of adverse possession. Therefore, in the absence of crucial pleadings, which constitute adverse possession, the party cannot claim that he has perfected their title by adverse possession. In a proper case, the Court may have to construe the entire pleadings so as to come to a conclusion as to whether the proper plea of adverse possession has been raised in the pleadings or not which can also be gathered from the cumulative effect of the averments made therein. Therefore, a person who claims adverse possession should show:

- (a) on what date he came into possession,
- (b) what was the nature of his possession,
- (c) whether the factum of possession was known to the other party,
- (d) how long his possession has continued, and
- (e) his possession was open, continuous and undisturbed.

A person pleading adverse possession has no equities in his favour. Because, adverse possession is commenced in wrong and is aimed against right. Since he is trying to defeat the

rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. Once a suit for recovery of possession is instituted against a defendant in adverse possession his adverse possession does not continue thereafter. In other words, the running of time for acquiring title by adverse possession gets arrested."

Nanjamma vs. Akkayamma and Ors. 2015 (2)

KCCR 1437 : MANU/KA/3634/2014 : 2015 (3)

Kar LJ 357 - "60. It is well settled that in order to establish adverse possession of one-co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession, merely by any secret hostile animus of his own part in derogation of the other co-heir title. It is a settled

rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.

61. If ouster is to be pleaded, the title has to be acknowledged. Once such a plea is taken, irrespective of the fact that as to whether any other plea is raised or not, conduct of the parties would be material. If, therefore, plea of ouster is not established, a fortiori the title of other co-sharers must be held to have been accepted. 'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession.

62. The co-sharer in possession would become constructive trustees on behalf of the co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustees. A mere occupation of a larger portion or even of an entire joint property does not

necessarily amount to ouster as the possession of one is deemed to be on behalf of all. Mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied.

63. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint family property. It is only when he is ousted from the joint family property and after such ouster, he is out of possession of the property for a period of more than 12 years and in the meanwhile, the person who ousted, asserts his title, continues in possession for the statutory period openly, then person out of possession loses his right to have possession. When possession of one co-owner in the eye of law is the possession of all the co-owners, till the partition is effected, by metes and bounds, anybody can claim exclusive title of the property because each co-owner has the interest in every parcel of the property.

64. Merely because one co-owner is in exclusive possession of the properties and other co-owners are residing separately it cannot be said that the co-owners who are not in possession are ousted from the property. In the absence of ouster,

hostile title, mere exclusive possession would not constitute either adverse possession or ouster. Even in case of alienation, though the alienee is put in exclusive possession of portion of the property, as the property is not divided by metes and bounds, he cannot claim exclusive title in the property for the co-owner who is not a party to the alienation is deemed to be in possession of the property.

65. In the instant case, though the plaintiffs marriage took place in 1958, the right to seek partition accrued in her favour only on the death of her father Bachappa in 1972. Since the time of marriage, the plaintiff was living with her husband and therefore, no portion of her father's property was in the physical possession of the plaintiff. It is only on the date of death of Bachappa all the legal heirs of Bachappa became co-owners; possession of one co-owner is the possession of all the co-owners. Ex. D6, the registered power of attorney is not cancelled till today. But Kalappa as observed earlier did not choose to act as the power of attorney holder of the executants of Ex. D6. Nor did Kalappa execute joint development agreement or sale deed for and on behalf of the plaintiff. Ex. D7 speaks about the cordial relationship that existed between the sons

and daughters of Bachappa. Therefore it can be concluded that the hostile animus to exclude the plaintiff from the suit properties was lacking.

66. There was a partition between Kalappa and Narayanappa pursuant to which the properties were mutated, taxes were paid. These entries were not challenged by the plaintiff and her sisters. It is settled law that a mutation entry or katha change does not extinguish the title of the owner of the property. It may be beneficial to refer to Ex. D6 here as the plaintiff, her sisters had authorized Kalappa to do all acts on their behalf in respect of the properties. Under these circumstances mere change in the RTC entries or changing the khata or payment of tax by the defendants will not amount to asserting hostile title.

67. It is settled principle of law that moffusil pleadings must be liberally construed and pleadings must be construed as a whole. In the instant case absolutely there is no plea of adverse possession or ouster in the written statements. No doubt applications are filed for conversion of the land for non-agricultural purposes, lay-outs have been formed and approval has been obtained for the same. Even these acts cannot constitute a hostile act or assertion of a hostile

title against the co-owners. At best it may amount to development of the properties by those in charge of the same and managing their properties.

76. In the case of a property belonging to coparcenary, joint family or co-ownership, possession of one co-parcener or a member of the joint family or a co-owner is the possession of all. To hold that the plaintiff is in joint possession on the date of the suit, it is not necessary that the plaintiff should be in actual physical possession of the whole or part of the property which is the subject matter of the suit. Even the plaintiff need not be getting a share in the income from the property. So long as the plaintiff has a right to a share, the law presumes that he is in joint possession."

RIGHTS OF WOMEN IN IN-LAW'S HOUSE

Supreme Court in S.R. Batra and Anr. v. Taruna Batra, MANU/SC/0007/2007 : (2007) 3 SCC 169 had considered the issue of 'shared household' and laid down various principles to determine whether there was a 'shared

household' and what the rights of the daughter-in-law were. The question as to whether the daughter-in-law would be entitled as a matter of right to live in the home of her in-laws has, thereafter, been dealt in several judgments of this Court. Subsequent to Taruna Batra (supra), there have been decisions where some Courts have held that irrespective of whether the property belongs to the in-laws or not, so long as the daughter-in-law was living in the said home and no alternate accommodation had been made available to her by her husband, she could continue to live and any attempt to evict her would constitute domestic violence. On the other hand, there have been decisions where it has been held that if the house of the in-laws belongs exclusively to them, the same would not constitute a 'shared household' Under Section 2(s) of the DV Act. The only right of the woman in such cases would be to seek maintenance from the husband or children.

In Vimalben Ajitbhai Patel and Ors. v. Vatslabeen Ashokbhai Patel and Ors. MANU/SC/7334/2008 : AIR 2008 SC 2675, the Supreme Court considered a petition filed by the in-laws where it noticed that both the in-laws

were very old and the daughter in law was permitted to pursue her remedies against her husband. The Court held as under: "24. The Domestic Violence Act provides for a higher right in favour of a wife. She not only acquires a right to be maintained but also there under acquires a right of residence. The right of residence is a higher right. The said right as per the legislation extends to joint properties in which the husband has a share.

Supreme Court in Hiral P. Harsora and Ors. v. Kusum Narottamdas Harsora and Ors., MANU/SC/1269/2016 : (2017) CRI. L.J. 509 -

Court analyzed the purpose of the DV Act including the Statement of Objects and Reasons. The Supreme Court struck down Section 2 (q) of the DV Act in view of the definition of 'shared household' in Section 2 (s) and held that Section 2 (q) was restrictive in nature. The Supreme Court considered the scheme of the DV Act and in respect of 'shared household' observed as under: "18. It will be noticed that the definition of "domestic relationship" contained in Section 2(f) is a very wide one. It is a relationship between persons who live or have lived together in a shared household and are related in any one of

four ways-blood, marriage or a relationship in the nature of marriage, adoption, or family members of a joint family. A reading of these definitions makes it clear that domestic relationships involve persons belonging to both sexes and includes persons related by blood or marriage. This necessarily brings within such domestic relationships male as well as female in-laws, quite apart from male and female members of a family related by blood. Equally, a shared household includes a household which belongs to a joint family of which the Respondent is a member. As has been rightly pointed out by Ms. Arora, even before the 2005 Act was brought into force on 26.10.2006, the Hindu Succession Act, 1956 was amended, by which Section 6 was amended, with effect from 9.9.2005, to make females coparceners of a joint Hindu family and so have a right by birth in the property of such joint family. This being the case, when a member of a joint Hindu family will now include a female coparcener as well, the restricted definition contained in Section 2(q) has necessarily to be given a relook, given that the definition of 'shared household' in Section 2(s) of the Act would include a household which may belong to a joint family of which the Respondent is a member. The

aggrieved person can therefore make, after 2006, her sister, for example, a Respondent, if the Hindu Succession Act amendment is to be looked at. But such is not the case Under Section 2(q) of the 2005 Act, as the main part of Section 2(q) continues to read "adult male person ", while Section 2(s) would include such female coparcener as a Respondent, being a member of a joint family. This is one glaring anomaly which we have to address in the course of our judgment."

In Neetu Mittal v. Kanta Mittal and Ors., MANU/DE/1415/2008 : 2008 (106) DRJ 623, a Ld. Single Judge held that the parents/in-laws have a right to turn the son and daughter-in-law out of the house if the property belongs to them. Only if it is an ancestral house, the son can enforce partition. The right of the woman to seek maintenance is only against the husband or her children but she cannot thrust herself against the parents of the husband.

In Sardar Malkiat Singh v. Kanwaljit Kaur and Ors., MANU/DE/0714/2010 : 2010 (116) DRJ 295, the Ld. Single Judge held that the father-in-law has no obligation to maintain his daughter-

in-law. In this judgment, the ld. Single Judge, following Taruna Batra (supra), observed in paragraph 17 as under: "..... The Appellant is the sole and absolute owner of the suit property and at best the possession of the Respondent No. 1 during the subsistence of her marriage with the Appellant's son could be said to be permissive in nature. This by itself cannot entitle the Respondent No. 1 to claim a right of residence against her father-in-law, who has no legal obligation to maintain his daughter-in-law during the lifetime of her husband, more so when the Respondent No. 1 has parted the company with her husband and is admittedly residing in Chandigarh since the year 1992."

In Shumita Didi Sandhu v. Sanjay Singh Sandhu and Ors. MANU/DE/2773/2010 : (2010) 174 DLT 79 (DB), the ld. Division Bench was considering a judgment of the Single Judge which had followed Taruna Batra (supra) and held that the in-laws home cannot be a 'shared household' or the 'matrimonial home' and hence the daughter in law has no legal right to stay in the house belonging to her parents in law. The ld. Division then approved the view of the Single Judge and followed Taruna Batra (supra). It

concluded that the right of residence of the wife does not mean the right to reside in a particular property but would mean the right to reside in a commensurate property. The right of residence is not the same thing as a right to reside in a particular property which the Appellant refers to as her 'matrimonial home'. The Single Judge's judgment was upheld and it was observed that the learned single Judge had amply protected the Plaintiff by directing that she would not be evicted from the premises in question without following the due process of law.

In Smt. Preeti Satija v. Smt. Raj Kumari and Anr., MANU/DE/0167/2014, however, another ld. Division Bench of the Delhi High Court held that even a tenanted property of the in-laws where the husband has no share, right, interest or title would constitute 'shared household'. The ld. Division Bench held that the right of residence would exist irrespective of whether the house is owned by the in-laws or is merely tenanted. Even if they are tenants, the Court observed that the DV Act is a secular legislation.

Navneet Arora v. Surender Kaur and Ors., MANU/DE/2132/2014, the ld. Division Bench

considered Taruna Batra (supra) and Preeti Satija (supra) and recognized the daughter-in-law's right to residence. This judgment distinguished Taruna Batra (supra) by holding that Taruna Batra would be applicable only in a fact situation where she has lived with the husband separately but not as a member of the joint family. It was held that the DV Act gives statutory protection to the right of the wife for a roof. Since the parties were living together with their parents and were conducting joint business, the property would be 'shared household'.

In Ekta Arora v. Ajay Arora and Anr., MANU/DE/2234/2015 : AIR 2015 Del 180, the mother-in-law was held to be the absolute owner of the property and hence the property could not be a 'shared household'.

In Darshna v. Govt. of NCT of Delhi and Ors., [LPA 537/2018 decided on 03rd October, 2018] and Sunny Paul v. State of NCT of Delhi and Ors. MANU/DE/3649/2018 : 253 (2018) DLT 410, the Id. Division Benches of this Court again considered the provisions of the PSC Act. In both these cases, the rights of the in-laws to seek eviction of the son or daughter-in-law from their

own property was upheld on an interpretation of the PSC Act and the Rules of 2017 enacted in Delhi under the said Act. The ld. Division Bench of this Court considered a case arising under the PSC Act wherein the District Magistrate, in proceedings arising under the said Act, had directed the eviction of the daughter-in-law. The writ petition was dismissed and the ld. Division Bench was considering the LPA. In the said judgment, the ld. Division Bench held that in view of the Rule 22(3)(1)(i) of Delhi Maintenance and Welfare of Parents and Senior Citizens (Amendment) Rules, 2017, the son and the daughter-in-law could not claim any right in the property.

In Dattatrey Shivaji Mane v. Lilabai Shivaji Mane and Ors. MANU/MH/1980/2018 : AIR 2018 Bom 229, the Bombay High Court was considering an order passed by the maintenance tribunal under the PSC Act, in a writ petition. The Court observed therein that the petition of the daughter-in-law under the DV Act was dismissed for default. The Court then considered the decision of the Delhi High Court in Sunny Paul (Supra) and held that once the senior citizen is the owner of the property, the possession of the

senior citizen cannot be interfered with. Thus, the tribunal's order directing the son and his family to vacate the property was upheld. In this judgment the objects and reasons of the PSC Act were considered in detail by the Court. Thus, the view of the Bombay High Court is that the question of title or proprietary right is of no relevance.

In Hashir v. Shima MANU/KE/0842/2015 : ILR 2015 (2) Kerala 855, the Kerala High Court was considering the provisions of the DV Act and the definition of 'shared household' and followed the judgment of the Supreme Court in Taruna Batra (supra) to hold that a residence belonging to the in-laws would not be a 'shared household'.

Hamina Rang v. District Magistrate (U.T.) and Ors. MANU/PH/0098/2016 : 2016(2) Crimes 517 (P & H), the Punjab and Haryana High Court considered the DV Act and the PSC Act. In Harmohinder Singh (supra), the Court observed as under: "The provisions of the Act of 2007 and the Act of 2005, referred to above, cannot be used for cross purposes, one annihilating the other. A parent who invokes the provisions of the Act of 2007 cannot create a situation that makes

irrelevant the right of a female for securing a protection which is guaranteed under the Act of 2005. The provisions of the protection which is contemplated under Chapter V is an empowering provision for the welfare of a senior citizen that must be read cohesively that the right of a woman to be protected which is guaranteed under the Act of 2005."

In Jayantram Vallabhdas Meswania v. Vallabhdas Govindram Meswania

MANU/GJ/1042/2012 : AIR 2013 Guj 160, the tribunal under the PSC Act had directed the son to hand over possession to his father. The Court again considered the provisions of the PSC Act and held that a father who is not earning and has no money to sustain can make an application Under Section 5 of the Act to claim maintenance since the son is in possession of the property of the father and is not taking sufficient care and not providing sufficient maintenance. Thus, the father is entitled to have his own income from the property and the order of eviction from the son was upheld.

Vinay Varma vs. Kanika Pasricha and Ors.:
MANU/DE/4076/2019 - The DV Act was

enacted in 2005 and has been the subject matter of innumerable decisions. One of the objects of the DV Act is to provide for the rights of women to reside in their 'matrimonial home' or 'shared household' irrespective of whether their husband or the in-laws have a title to the property. The DV Act, thus, protects one of the three basic necessities of human life- viz. shelter, for the woman. Thus, in several proceedings, the right of the daughter-in-law to reside in her 'matrimonial home' or 'shared household' has been recognised. The PSC Act of 2007 was not the subject matter of the Supreme Court decisions either in Taruna Batra (supra) or in Vimal Ben (supra). The said Act has been enacted to provide maintenance to parents and senior citizens. The purpose of this Act is to ensure that parents and senior citizens are not subjected to harassment by their children in any manner. An obligation has been cast on the children to maintain senior citizens if the said children are in possession of the property of the parent or lay claims to inherit the property of the parents.....

The question, however, is as to how the objectives and provisions of these two Acts are to operate, considering the overlapping nature of the relationships which they seek to govern. Both are

special statutes. While, the daughter-in-law's right to residence and a roof over her head is extremely important, the parent's right to enjoy their own property and earn income from the same is also equally important. There can be multitudinal situations which may arise before Courts wherein a view would have to be taken as to which rights are to be preferred over the other.....

However, later decisions of various High Courts have, while giving divergent opinions on the concept of 'shared household', followed one uniform pattern in order to protect the daughter-in-law and to provide for a dignified roof/shelter for her. The question then arises as to whether the obligation of providing the shelter or roof is upon the in-laws or upon the husband of the daughter-in-law i.e., the son. Some broad guidelines as set out below, can be followed by Courts in order to strike a balance between the PSC Act and the DV Act:

1. The court/tribunal has to first ascertain the nature of the relationship between the parties and the son's/daughter's family.
2. If the case involves eviction of a daughter in law, the court has to also ascertain whether the

daughter-in-law was living as part of a joint family.

3. If the relationship is acrimonious, then the parents ought to be permitted to seek eviction of the son/daughter-in-law or daughter/son-in-law from their premises. In such circumstances, the obligation of the husband to maintain the wife would continue in terms of the principles under the DV Act.

4. If the relationship between the parents and the son are peaceful or if the parents are seen colluding with their son, then, an obligation to maintain and to provide for the shelter for the daughter-in-law would remain both upon the in-laws and the husband especially if they were living as part of a joint family. In such a situation, while parents would be entitled to seek eviction of the daughter-in-law from their property, an alternative reasonable accommodation would have to be provided to her.

5. In case the son or his family is ill-treating the parents then the parents would be entitled to seek unconditional eviction from their property so that they can live a peaceful life and also put the property to use for their generating income and for their own expenses for daily living.

6. If the son has abandoned both the parents and his own wife/children, then if the son's family was living as part of a joint family prior to the breakdown of relationships, the parents would be entitled to seek possession from their daughter-in-law, however, for a reasonable period they would have to provide some shelter to the daughter-in-law during which time she is able to seek her remedies against her husband.

LIABILITY OF CO-PARCENERS

In **MANU/SC/0692/2013 : 2013 4 CTC 539 - Rohit Chauhan v. Surinder Singh & Others**, the Hon'ble Supreme Court held as follows: 11. ...In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu Family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to

bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener. The view which we have taken finds support from a judgment of this Court in the case of *M. Yogendra v. Leelamma N.*, :MANU/SC/1433/2009 : 2009 (15) SCC 184 : in which it has been held as follows: 29. It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has

been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the Karta would be valid.

B. Dharaniya and Ors. vs. A. Chandran and Ors. (2014) 2 MLJ 186 : MANU/TN/2788/2013 - In

MANU/SC/0692/2013 : 2013 4 CTC 539 (Rohit Chauhan v. Surinder Singh & Others), (cited supra) the Hon'ble Supreme Court held that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. Admittedly, the partition was between the said Nachimuthu Gounder and his two sons on one side and one Ponnusamy, brother of Nachimuthu Gounder on the other side in the year 1990. After such partition the property has to be treated as the ancestral property in the hands of father and two sons. They had entered in to a sale agreement in the year 1995. The father along with his sons had received the suit amount. Now there is decree against them. There was no division of property

between father and sons. The properties of Hindu Joint family was divided between two brothers and sons, particularly, A schedule was allotted to the said Nachimuthu Gounder and his two sons as one share and remains to be so. It has to be borne in mind that a share in the coparcenary property enlarges by death and diminishes by birth, the moment any son (now daughter also included) is born, the share diminishes and on the death of one coparcener, viz., the grandfather, as in this case, the share enlarges. As long as the properties are joint is in the hands of the coparceners, the son and daughter of the coparcener gets a right in the property. However the liabilities also to be shared. It is a money decree on the joint family. Sec. 6 of the Hindu Succession (Amendment) Act 2005 would state that the daughter of a coparcener shall,

- (a) by birth become a coparcener in her own right in the same manner as the son;
- (b) have the same rights in the coparcenary property as she would have had if she had been a son;
- (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son

When she acquires the same right of a son, she is also subjected to the same liabilities as that of a son.

**In VADLAMANATI VENKATANARAYANA RAO
VS. GOTTUMUKKULE VENKATA SOMARAJU
MANU/TN/0453/1937 : AIR 1937 Mad 610 a**

Full Bench of Madras High Court has held as follows: "Where a father is sued as a representative of a joint Hindu family in respect of a joint family liability, the other members of the family must be held to be substantially parties to the suit through him. The fact that they are not parties/ co nominee, will not render them any the less parties to the suit. A decree obtained against him in such suit will be binding on the joint undivided son and entire joint family property can be taken in execution of such decree even if the son is not a party to the suit. The decree in such case, even if it does not show on its face that it was passed against the coparcenary, would yet be binding upon the whole family in as much as he can effectively represent the entire family in such suit. The decree can be executed against the joint family property in the hands of the son on the death of the father. The son cannot plead in execution that a partition has taken place

between him and his father before such decree." In AMRIT SAGAR GUPTA AND OTHERS VS. SUDESH BEHARI LAL AND OTHERS MANU/SC/0484/1969, the Madras Full Bench decision has been relied on and approved. It has been held that, "it is not necessary, in order that a decree against the manager may operate as res judicata against coparceners who were not parties to the suit that the plaint or written statement should state in express terms that he is suing as manager or is being sued as a manager. It is sufficient if the manager was in fact suing or being sued as representing the whole family. The suit by or against the manager will be deemed to be one brought by him or against him as representing the family if the circumstances of the case show that he is the manager of the family and the property involved in the suit is family property. It is not necessary, where the manager is the plaintiff, that the plaint should state in distinct terms that he is suing as manager or where he is the defendant that he is being sued as manager. A Karta can represent the family effectively in a proceeding though he is not named as such." "The principle of Hindu Law is that members who are united at the time a joint family liability is incurred, are not absolved from

their liability by the fact that they became subsequently divided So far as creditor is concerned, he is entitled to have recourse to every item of the joint family property so long as it is in the hands of the persons who; are under the law liable for his debt. When they must be held to be parties to the suit, it is immaterial what the character of the property in their hands is, whether it is still undivided property or has become separate property by division."

Following the abovesaid Full Bench decision, in **T.A. Sankaralingam v. T.N. Mani, MANU/TN/0191/ 1975 : AIR 1975 Mad 206** , court has further held as follows:- "No doubt, where the other members of a coparcenary are not impleaded as parties to the suit, it would be open to them in execution to impeach the debt on the ground that it is tainted with illegality or immorality but certainly not on the ground that the decree is not binding upon them because they have not been made co nominee parties to the suit. If procurement of a decree against the manager of the joint family has this effect, the objection of T.N. Mani, that he had been wrongly impleaded as a minor, when, in fact, he was a major, would have no significance in law

whatsoever. It is noteworthy, that he was living with his mother. Mariyayee, and Mariyayee was impleaded as the third defendant to the action and was appointed as guardian ad item of T.N. Mani. In these circumstances, despite the misdescription of T.N. Mani as a minor, T.N. Mani must have been aware of this litigation through his mother but he took no steps to rectify the misdescription. Even assuming that he was not aware of the proceedings, the decree would be still binding upon him because it has been granted against the manager of the joint family of which T.N. Mani was an undivided coparcener. In this view, we disagree with the second appellate judge and hold that the decree granted in O.S. No. 888 of 1960. Would be binding upon T.N. Mani and that it is not open to him to contend that because he was a major and he had been misdescribed as a minor, the decree would not be effective against him. We, consequently, reverse the finding of the first appellate court and the second appellate court, allow this appeal and restore the order of the executing court and direct that the execution application filed by the first respondent, T.N. Mani, be dismissed with costs throughout".

KARTA CAPACITY IN JOINT FAMILY

In Kona Adinarayana v. Dronavalli Venkata Subbayya and Anr. MANU/TN/0203/1937 : AIR 1937 Mad 869 the learned Judge of the Madras High Court while dealing with joint family-kartha, contract of sale signed by kartha for himself and separately as representing minor, observed as hereunder: The eldest brother of a joint Hindu family as karta entered into a contract of sale of an item of joint family property wherein he signed it for himself and as representing the minor brother. The second brother also signed the contract by way of concurrence in the sale. In a suit for specific performance of the contract by the brothers, it was contended by the vendees that the contract could not be said to have been entered into on behalf of the family and all the members of the family were not parties as the minor was separately represented by the karta: Held: that karta alone could represent the minor member. In fact, he alone could represent by himself the entire family. Therefore the karta must be deemed to have represented the entire family and the other brother signed only by way of concurrence.

In Raja Sagi Padmanbharaju v. Sagi Lakshmi Kumara Raju and Ors. MANU/AP/0122/1967 : AIR 1967 AP 237 while dealing with Section 53A of the Transfer of Property Act, it was observed that the words by a writing signed by him or on his behalf joint family consisting of father and his minor sons, father as manager of joint family, executing contract of sale of property, sale ex hypothesi for benefit of family, transferee paying consideration and father putting him in possession of property, transferee, under Section 53A, of the T.P. Act resist claim of son for possession of property because, under Hindu Law, father can be said to have executed contract on behalf of sons also.

In Amrit Sagar Gupta and Ors. v. Sudesh Behari Lal and Ors. MANU/SC/0484/1969 : [1969] 3 SCR 1002 the Apex Court at paras 6 and 7 observed as hereunder. It is not necessary, in order that a decree against the manager may operate as res judicata against coparceners who were not parties to the suit that the plaint or written statement should state in express terms that he is suing as manager or is being sued as a manager. It is sufficient if the manager was in fact suing or being sued as representing the whole

family. The suit by or against the manager will be deemed to be one brought by him or against him as representing the family if the circumstances of the case show that he is the manager of the family and the property involved in the suit is family property. It is not necessary, where the manager is the plaintiff, that the plaint should state in distinct terms that he is suing as manager or where he is the defendant that he is being sued as manager. A karta can represent the family effectively in a proceeding though he is not named as such.

K. Adivi Naidu and Ors. v. E. Duruvasulu Naidu and Ors. MANU/SC/0796/1995 : (1995) 6 SCC 150 wherein at para 5 the Apex Court observed at para 5 as hereunder. Having considered the respective contentions, we are of the view that since the preliminary decree was allowed to become final, the trial court needs to give effect to it. It is settled law that alienees of the alienees have no right to equities. Equally, it is settled law that a coparcener has no right to sell his undivided share in the joint family property and any sale of undivided and specified items does not bind the other coparceners. Since the specific properties were purchased prior to the institution

of the suit for partition, though the appellants have no right to equities, it could be said that the respective share to which their principal alienor was entitled would be allottable to them as a special case. However, since the preliminary decree specifically directed that the good and bad qualities of the land should be taken into consideration in effecting the partition, it should, in letter and spirit, be given effect to. While passing final decree, if the lands purchased by the appellants are found more valuable than the lands to be allotted to the respondents, the respective values thereof should be ascertained and the respondents need to be compensated in monetary value. That would be the effect of the preliminary decree as well. Considered from this perspective, the direction issued by the Division Bench would be modified as above, and the trial court would pass the final decree accordingly.

Subimal Kumar Maity and Ors. vs. Jhareswar Maity and Ors.: MANU/WB/1050/2019 - Before contracting a sale, a father-karta of a joint family must satisfy the following three conditions: (a) The debt, for which alienation is made must be antecedent in time. (b) The debt must not have been taken for an illegal or immoral purpose. (c)

The alienation is necessary for discharging family duties and obligations.

Karta ... had the exclusive authority to manage ancestral joint property on behalf of himself and of the coparceners. It is true that a coparcener takes by birth an interest in the ancestral property, but he is not entitled to separate possession of the coparcenary estate. His rights are not independent of the control of the karta. It would be for the karta to consider the actual pressure on the joint family estate. It would be for him to foresee the danger to be averted and it would be for him to examine as to how best the joint family estate could be beneficially put into use to subserve the interests of the family. A coparcener cannot interfere in these acts of management. Apart from that, a father-karta in addition to the aforesaid powers of alienation has also the special power to sell or mortgage ancestral property to discharge his antecedent debt which is not tainted with immorality. If there is no such need or benefit, the purchaser takes risk and the right and interest of coparcener will remain unimpaired in the alienated property. No doubt the law confers a right on the coparcener to challenge the alienation made by karta, but that right is not

inclusive of the right to obstruct alienation. Nor the right to obstruct alienation could be considered as incidental to the right to challenge the alienation. These are two distinct rights. One is the right to claim a share in the joint family estate free from unnecessary and unwanted encumbrance. The other is a right to interfere with the act of management of the joint family affairs. The coparcener cannot claim the latter right and indeed, he is not entitled for it. Therefore, he cannot move the court to grant relief by injunction restraining the karta from alienating the coparcenary property. The above principle relating to the rights of karta in management of ancestral joint property vis-a-vis the right and interest of the coparcener has been laid down by the Hon'ble Supreme Court in **Sushil Kumar & Anr vs. Ram Prakash & Ors reported in MANU/SC/0521/1988 : AIR 1988 SC 576.**

Hon'ble Supreme Court in the case of **Shreya Vidyarthi Vs. Ashok Vidyarthi and others (MANU/SC/1465/2015 : (2015) 16 Supreme Court cases 46)**, wherein the Head Notes A and B are as under: "..... Powers, Rights and Duties of-Hindu widow is not coparcener in

undivided family of her husband-Therefore, she cannot act as Karta of that undivided family, however she can act as its manager-Position of Hindu widows remains unaltered even after amendment to Hindu Succession Act, 1956 in 2005-Manager denotes role distinct from that of Karta-Where male adult died and there is minor coparcener, under such circumstances, joint family does not comes to end-Mother of minor coparcener as legal guardian of minor can act as manager-Words and Phrases-"Karta" and "Manager"-Not synonymous. Properties purchased out of insurance amount received on account of death of common ancestor-Property assumes character of joint family property-Further, after death of common ancestor family continued to be joint-Allotment of share to plaintiff, justified."

LEGAL NECESSITY

In Radhakrishnadas and Anr. v. Kaluram MANU/ SC/ 0393/1962 : [1963] 1 SCR 648 it was held at para 5 as hereunder. Before us Mr. S.P. Sinha accepts the position that Rs. 45,000/- out of the consideration of Rs. 50,000/- was in fact for debts binding on the family, but contends

that even so it cannot be said that there was legal necessity for the sale. His argument is that a sum of Rs. 5,000/- or so for which, according to him, legal necessity had not been established was not a negligible part of the consideration of Rs. 50,000/-. This argument is based upon a misapprehension of the true legal position. It is well established by the decisions of the Courts in India and the Privy Council that what the alienee is required to establish is legal necessity for the transaction and that it is not necessary for him to show that every bit of the consideration, which he advanced, was actually applied for meeting family necessity.

In Smt. Rani and Anr. v. Smt. Santa Bala Debnath and Ors. AIR 1984 SC 846 the Apex Court observed at paras 10 and 11 as hereunder. Legal necessity to support the sale must however be established by the alienees. Sarala owned the land in dispute as a limited owner. She was competent to dispose of the whole estate in the property for legal necessity or benefit to the estate. In adjudging whether the sale conveys the whole estate, the actual pressure on the estate, the danger to be averted, and the benefit to be conferred upon the estate in the particular

insistence must be considered. Legal necessity does not mean actual compulsion: it means pressure upon the estate, which in law may be regarded as serious and sufficient. The onus of proving legal necessity may be discharged by the alienee by proof of actual necessity or by proof that he made proper and bona fide enquiries about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity. Recitals in a deed of legal necessity do not by themselves prove legal necessity. The recitals are, however, admissible in evidence, their value varying according to the circumstances in which the transaction was entered into. The recitals may be used to corroborate other evidence of the existence of legal necessity. The weight to be attached to the recitals varies according to the circumstances. Where the evidence which could be brought before the Court and is within the special knowledge of the person who seeks to set aside the sale is withheld, such evidence being normally not available to the alienee, the recitals go to his aid with greater force and the Court may be justified in appropriate cases in raising an inference against the party seeking to set aside the sale on the ground of absence of legal

necessity wholly or partially, when he withholds evidence in his possession.

In Gangadharan v. Janardhana Mallan and Ors.

MANU/SC/0533/1996 : AIR1996SC2127 the Apex Court while dealing with validity of the alienation made by father observed that the findings by subordinate court as to adequacy of sale consideration, substantial portion having gone into discharge of antecedent debts and enquiries made by purchaser regarding legal necessity and the suit to challenge alienation filed after long lapse is not maintainable.

In Kehar Singh (Dead) Through Legal Representatives and Others Versus Nachittar Kaur and Others, reported in

MANU/SC/0874/2018 : (2018) 14 Supreme Court Cases 445, wherein it was held that, "Once the factum of existence of legal necessity stood proved, then, no co-parcener (son) has a right to challenge the sale made by the Karta of his family. The plaintiff being a son was one of the co-parceners along with his father P. He had no right to challenge such sale in the light of the findings of legal necessity being recorded against him. It was more so when the plaintiff failed to prove by

any evidence that there was no legal necessity for sale of the suit land or that the evidence adduced by the defendants to prove the factum of existence of legal necessity was either insufficient or irrelevant or no evidence at all."

In Sakha ram Mahadji Rajegore and others Versus Datta Vithalrao Rajegore and others, reported in MANU/MH/0452/2010: 2010 (6) Mh.L.J. 225, wherein it was held that, "Karta of the family can sell the property for legal necessity." Similar view was taken in Prasad and Others Versus V. Govindaswami Mudaliar and Others And K.P. Ramamurthi and Others Versus V. Govindaswami Mudaliar and Others, reported in MANU/SC/0317/1981 : (1982) 1 Supreme Court 185, Sunder Das and Others Versus Gajananrao and Others, reported in MANU/SC/0388/1997 : (1997) 9 Supreme Court Cases 701, and Shridhar s/o Bajirao Pawar and others Versus Bajirao s/o Dhondiba Pawar and other, reported in MANU/MH/1310/2016 : (2016) 5 AIR Bom R 243.

E. Ramendra Rao Versus Dinesh Chand Verma and Others, reported in MANU/CG/0321/2010 : 2010 (2) CGLJ 281 that, expenses incurred for

medical treatment is a necessity for purposes of which a Karta can alienate the joint family properties. It was on the basis of the fact that the defendants have proved that, defendant No. 1's wife was suffering from Tuberculosis (TB) and was hospitalized. Huge expenses have been incurred on her treatment, and therefore, defendant No. 1 had taken step to sell out the land.

Kakumanu Pedasubhayya and Another Versus Kakumanu Akkamma and Another, reported in MANU/SC/0147/1958 : AIR 1958 SC 1042, wherein it has been held that, "A minor has no volition on his own in law and therefore cannot ask for partition of family property."

Nagaiah and another Versus Smt. Chowdamma (dead) By Lrs. And another, reported in MANU/SC/ 0014/2018, wherein it has been held that, "A minor cannot file a suit through the next friend unless the guardian representing the minor has an interest adverse to the interest of the minor."

A PERSON NOT PARTY TO CONTRACT CANNOT ENFORCE ITS COVENANTS

In the decision reported as MANU/SC/0008/1969 : 1969 (2) SCC 343 M.C. Chacko Vs. The State Bank of Travancore, Trivandrum it was held: "9. Kottayam Bank not being a party to the deed was not bound by the covenants in the deed, nor could it enforce the covenants. It is settled law that a person not a party to a contract cannot subject to certain well recognised exceptions, cannot enforce the terms of the contract: the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant.

SUIT TO SET ASIDE SALE DEED BY MINOR TO BE FILED WITHIN LIMITATION

Vishwambhar and Others Vs. Laxminarayanan (Dead) Through LRS. And Another. MANU/SC/0374/2001 : 2001 6 SCC 163,

"3. The gist of the case pleaded by the plaintiffs was that their mother as guardian executed the above sale deeds without any legal necessity and without sanction of the court. The

transfers made by her were void ab initio and not binding on the plaintiffs and they are entitled to ignore the same altogether. In para 4 of the plaint, it was averred "the transaction, therefore, is liable to be treated as of no legal validity, right from its inception and Defendant 1 never got any title to it under the law". Averment to the same effect was made in respect of the sale deed dated 24-10-1974 in favour of Defendant 2 in para 5 of the plaint. The plaintiffs pleaded that the purchasers are trespassers on the suit land; that the plaintiffs have a right to recover possession of the suit land from the purchasers within 12 years which they have done. Reliance was placed on Article 65 of the Limitation Act. In para 7 of the plaint, it was asserted that the suit has been filed within the period of limitation with reference to the suit transaction for the relief of recovery of possession by way of partition of the suit land. It is relevant to state here that the relief of declaration that the sale deeds executed by Defendant 3 in favour of Defendants 1 and 2 are invalid and inoperative and that the said sale deeds be set aside, were added in the plaint subsequently by amendment."

"4. The contesting Defendants 1 and 2 filed written statements pleading, inter alia, that the

Hindu Minority and Guardianship Act is not applicable in the case since the alienation has been made by the mother as natural guardian of the minors. She was also the manager of the joint family property. In such a case, according to the defendants, lack of sanction under Section 8 of the Act is not fatal to the alienations. The defendants further averred that the alienations were made for legal necessity, for maintenance of the plaintiffs, for meeting the marriage expenses of Defendants 4 to 7, for satisfying antecedent debts etc. They also took the plea of limitation since the suit was filed beyond 3 years after the minors attained majority. They prayed for dismissal of the suit with costs. Defendants 3 to 7 supported the case of the plaintiffs."

"9. On a fair reading of the plaint, it is clear that the main fulcrum on which the case of the plaintiffs was balanced was that the alienations made by their mother-guardian Laxmibai were void and therefore, liable to be ignored since they were not supported by legal necessity and without permission of the competent court. On that basis, the claim was made that the alienations did not affect the interest of the plaintiffs in the suit property. The prayers in the plaint were inter alia to set aside the sale deeds dated 14-11-1967 and

24-10-1974, recover possession of the properties sold from the respective purchasers, partition of the properties carving out separate possession of the share from the suit properties of the plaintiffs and deliver the same to them. As noted earlier, the trial court as well as the first appellate court accepted the case of the plaintiffs that the alienations in dispute were not supported by legal necessity. They also held that no prior permission of the court was taken for the said alienations. The question is, in such circumstances, are the alienations void or voidable? In Section 8(2) of the Hindu Minority and Guardianship Act, 1956, it is laid down, inter alia, that the natural guardian shall not, without previous permission of the court, transfer by sale any part of the immoveable property of the minor. In sub-section (3) of the said section, it is specifically provided that any disposal of immoveable property by a natural guardian, in contravention of sub-section (2) is voidable at the instance of the minor or any person claiming under him. There is, therefore, little scope for doubt that the alienations made by Laxmibai which are under challenge in the suit were voidable at the instance of the plaintiffs and the plaintiffs were required to get the alienations set aside if they wanted to avoid the transfers and

regain the properties from the purchasers. As noted earlier in the plaint as it stood before the amendment the prayer for setting aside the sale deeds was not there, such a prayer appears to have been introduced by amendment during hearing of the suit and the trial court considered the amended prayer and decided the suit on that basis. If in law the plaintiffs were required to have the sale deeds set aside before making any claim in respect of the properties sold, then a suit without such a prayer was of no avail to the plaintiffs. In all probability, realising this difficulty the plaintiffs filed the application for amendment of the plaint seeking to introduce the prayer for setting aside the sale deeds. Unfortunately, the realisation came too late. Concededly, Plaintiff 2 Digamber attained majority on 5-8-1975 and Vishwambhar, Plaintiff 1 attained majority on 20-7-1978. Though the suit was filed on 30-11-1980 the prayer seeking setting aside of the sale deeds was made in December 1985. Article 60 of the Limitation Act prescribes a period of three years for setting aside a transfer of property made by the guardian of a ward, by the ward who has attained majority and the period is to be computed from the date when the ward attains majority. Since the limitation

started running from the dates when the plaintiffs attained majority the prescribed period had elapsed by the date of presentation of the plaint so far as Digamber is concerned. Therefore, the trial court rightly dismissed the suit filed by Digamber. The judgment of the trial court dismissing the suit was not challenged by him. Even assuming that as the suit filed by one of the plaintiffs was within time the entire suit could not be dismissed on the ground of limitation, in the absence of challenge against the dismissal of the suit filed by Digamber the first appellate court could not have interfered with that part of the decision of the trial court. Regarding the suit filed by Vishwambhar, it was filed within the prescribed period of limitation but without the prayer for setting aside the sale deeds. Since the claim for recovery of possession of the properties alienated could not have been made without setting aside the sale deeds the suit as initially filed was not maintainable. By the date the defect was rectified (December 1985) by introducing such a prayer by amendment of the plaint the prescribed period of limitation for seeking such a relief had elapsed. In the circumstances, the amendment of the plaint could not come to the rescue of the plaintiff."

It is thus seen that the Honourable Supreme Court had specifically held that the suit should be filed within the period of limitation, namely three years from the age of attaining majority **and there should be a prayer to set aside the sale deed.**

Laloo and Ors. vs. Board of Revenue and Ors.:
MANU/UP/2566/2019 - The proposition of law as per the aforesaid judgment are thus:

- (i) the alienation made by the mother, the natural guardian of the minor are voidable at the instance of plaintiffs;
- (ii) the plaintiffs are required to get the alienation set aside, if they wanted to avoid such transfer and regain the property from its purchasers;
- (iii) the plaintiffs were also required to get the sale deed set aside before making any claim in respect of properties sold by them and the suit without setting aside the alienation was of no avail;
- (iv) when there were more than one minor and some of them had attained the majority, the prescribed period has lapsed by the date of presentation of plaint for some of them and even for setting aside the suit, alienation would be barred by limitation as prescribed under Article 60 of the Limitation Act, which prescribes the

limitation period of three years for filing the suit for setting aside the deed; and

(v) if the suit was not filed within the prescribed period of three years from the date of attaining the majority by the plaintiffs, the other relief for declaration of their rights or possession would not be maintainable.

Madhegowda v. Ankegowda

MANU/SC/0739/2001 : AIR 2002 SC 215. In

this case, the original owner Ninjegowda died leaving behind two daughters Sakamma and Madamma. While Sakamma was minor, Madamma acting as guardian sold her share by registered sale deed to Madhegowda on 24.04.1961. It was sold for collecting funds for marriage of Sakamma. The appellant was also put in possession of the property. Sakamma after attaining majority sold her share of the property to Ankegowda, predecessor of respondent nos. 1 to 9 therein, by a registered Sale Deed dated 1.7.1967. In the light of these facts, relying on Section 11 prohibiting de facto guardian from alienating the property of minor, it was held that, "Section 11 had done away with the authority of any person to deal with or dispose of any property of a Hindu minor on the ground of his being the

de facto guardian of such minor. Any alienation by a de facto guardian will be governed by the provisions in Section 11 of the Act. The alienation, being against the statutory prohibition, would be void ab initio and the alienee would not acquire any title to the property.

The apex Court observed, "it is to be kept in mind that this is not a case of alienation of minor's interest in a joint family property. As noted earlier, Ninge Gowda died leaving his two daughters, namely Smt. Sakamma and Smt. Madamma. It is not the case of any of the parties that the suit property was a joint family property in the hands of Ninge Gowda or that the alienation by Smt. Madamma, who is the sister of the minor, was a transfer of the minors interest in the joint family property. Therefore, the question whether the provision in Section 11 is applicable in the case of transfer of minors interest in a joint family does not arise for consideration here. Section 11 includes all types of properties of a minor. No exception is provided in the Section. Undoubtedly Smt. Madamma, sister of the minor, is not a guardian as defined in Section 4(b) of the Act. Therefore, she can only be taken to be a de facto guardian or more

appropriately de facto manager. To a transfer in such a case Section 11 of the Act squarely applies. Therefore, there is little scope for doubt that the transfer of the minors interest by a de facto guardian/manager having been made in violation of the express bar provided under the Section is per se invalid. The existence or otherwise of legal necessity is not relevant in the case of such invalid transfer. A transferee of such an alienation does not acquire any interest in the property. Such an invalid transaction is not required to be set aside by filing a suit or judicial proceeding. The minor, on attaining majority, can repudiate the transfer in any manner as and when occasion for it arises. After attaining majority if he/she transfers his/her interest in the property in a lawful manner asserting his/her title to the same that is sufficient to show that the minor has repudiated the transfer made by the de facto guardian/manager."

Githa Hariharan (Ms) Vs. Reserve Bank of India reported in MANU/SC/0117/1999 : (1999) 2 SCC 228. - In our opinion, the word 'after" shall have to be given a meaning which would subserve the need of the situation, viz., the welfare of the minor and having due regard to the factum that

law courts endeavour to retain the legislation rather than declare it to be void, we do feel it expedient to record that the word "after" does not necessarily mean after the death of the father, on the contrary, it depicts an intent so as to ascribe the meaning thereto as "in the absence of" - be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise and it is only in the event of such a meaning being ascribed to the word "after" as used in Section 6 then and in that event, the same would be in accordance with the intent of the legislation, viz., the welfare of the child. In that view of the matter, the question of ascribing the literal meaning to the word "after" in the context does not and cannot arise having due regard to the object of the statute, read with the constitutional guarantee of gender equality and to give a full play to the legislative intent, since any other interpretation would render the statute void and which situation, in our view, ought to be avoided.

In Panni Lal Versus Rajinder Singh and another reported in MANU/SC/0552/1993 : (1993) 4 SCC 38. Mother Gurkirpal sold the land owned by her minor sons Rajendra & Baldeo

during their minority by registered sale deed dt. 30.07.1964. The respondents, upon attaining majority, sued the appellant for possession of the said land on the ground that the sale thereof, having been made without the permission of the court, was void. The appellants heavily relied on the fact that sale deed had been attested by the father of the respondents and that the sale must be deemed to have been a sale by the legal guardian. It was also contended that the sale had been for legal necessity and for the benefit of the respondents. In the light of these facts, the apex Court observed as follows: In this behalf our attention was invited to this Court's judgment in Jijabai Vithalrao Gajre vs. Pathankhan and ors., MANU/SC/0516/1970 : AIR 1971 SC 315. This was a case in which it was held that the position in Hindu law was that when the father was alive he was the natural guardian and it was only after him that the mother became the natural guardian. Where the father was alive but had fallen out with the mother of the minor child and was living separately for several years without taking any interest in the affairs of the minor, who was in the keeping and care of the mother, it was held that, in the peculiar circumstances, the father should be treated as if nonexistent and,

therefore, the mother could be considered as the natural guardian of the minor's person as well as property, having power to bind the minor by dealing with her immovable property. In the present case, there is no evidence to show that the father of the respondents was not taking any interest in their affairs or that they were in keeping and care of the mother to the exclusion of the father. In fact, his attestation of the sale deed shows that he was very much existent and in the picture. If he was, then the sale by the mother, notwithstanding the fact that the father attested it, cannot be held to be a sale by the father and natural guardian satisfying the requirements of section 8.

Hon'ble Supreme Court of India in **Narne Rama Murthy v. Ravula Somasundaram and Others** **MANU/SC/0492/2005 : 2005 (6) SCC 614** held as follows: "5. We also see no substance in the contention that the Suit was barred by limitation and that the Courts below should have decided the question of limitation. When limitation is the pure question of law and from the pleadings itself it becomes apparent that a suit is barred by limitation, then, of course, it is the duty of the Court to decide limitation at the outset even in

the absence of a plea. However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved."

JOINT FAMILY PARTITION AND REUNION EXPLAINED

U. Manjunath Rao vs. U. Chandrashekar and Ors.: MANU/KA/6562/2019 - The Hon'ble Apex Court in *Bhagwan Dayal* (since deceased) and thereafter his heirs and legal representatives *Bansgopal Dubey* and another vs. *Mst. Reoti Devi* (deceased) and after her death, *Mst. Dayavati*, her daughter, reported in *MANU/SC/0374/1961* : *AIR 1962 SC 287*, has elaborately discussed on the point of presumption of partition under Hindu joint family and its re-union in Paragraphs, 16, 22 and 47 of its judgment, the extract of which are reproduced here below:

"16: The general principle is that every Hindu family is presumed to be joint unless the contrary is proved; but this presumption can be rebutted by direct evidence or by course of conduct. It is also settled that there is no

presumption that when one member separates from others that the latter remain united; whether the latter remain united or not must be decided on the facts of each case. To these it may be added that in the case of old transactions when no contemporaneous documents are maintained and when most of the active participants in the transactions have passed away, though the burden still remains on the person who asserts that there was a partition, it is permissible to fill up gaps more readily by reasonable inferences than in a case where the evidence is not obliterated by passage of time."

"22: if a Hindu family separates, the family or members of it may agree to reunite as a Hindu family, but such a reuniting is obvious reasons, which would apply in cases under the law of the Mitakshara, very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved. The leading authority for that last proposition is Balabux Ladhuram v. Rukhmabai, 30 Ind App 130 (PC). It is also well settled that to constitute a reunion there must be an intention of the parties to reunite in estate and interest. It is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite in estate with an intention to

revert to their former status of members of a joint Hindu family. Such an agreement need not be express, but may be implied from the conduct of the parties alleged to have reunited. But the conduct must be of such an incontrovertible character that an agreement of reunion must be necessarily implied therefrom. As the burden is heavy on a party asserting reunion, ambiguous pieces of conduct equally consistent with a reunion or ordinary joint enjoyment cannot sustain a plea of reunion. ."

"47: .Coparcenary is a creature of Hindu law and cannot be created by agreement of parties except in the case of reunion. It is a corporate body or a family unit. The law also recognizes a branch of the family as a subordinate corporate body. The said family unit, whether the larger one or the subordinate one, can acquire, hold and dispose of family property subject to the limitations laid down by law. Ordinarily, the manager, or by consent express or implied of the members of the family, any other member or members can on business or acquire property, subject to the limitations laid down by the said law, for or on behalf of the family. Such business or property would be the business or property of the family. The identity of the

members of the family is not completely lost in the family. One or more members of that family can start a business or acquire property without the aid of the joint family property, but such business or acquisition would be his or their acquisition. The business so started or property so acquired can be thrown into the common stock or blended with the joint family property in which case the said property becomes the estate of the joint family. But he or they need not do so, in which case the said property would be his or their self-acquisition, and succession to such property would be governed not by the law of joint family but only by the law of inheritance. In such a case, if a property was jointly acquired by them, it would not be governed by the law of joint family; for Hindu law does not recognize some of the members of a joint family belonging to different branches, or even to a single branch, as a corporate unit. Therefore, the rights inter se between the members who have acquired the said property would be subject to the terms of the agreement whereunder it was acquired. The concept of joint tenancy known to English law with the right of survivorship is unknown to Hindu law except in regard to cases specially recognized by it. In the present case, the uncle

and the two nephews did not belong to the same branch. The acquisition made by them jointly could not be impressed with the incidents of joint family property. They can only be co-sharers or co-tenants, with the result that their properties passed by inheritance and not by survivorship."

A Division Bench of Karnataka High Court in the case of M/s. Paramanand L. Bajaj, Bangalore vs. The Commissioner of Income Tax, Karnataka, II, Bangalore, reported in MANU/KA/0059/1981 : ILR 1981 Kar 1219, in Paragraph-12 of its judgment was pleased to observe as below: "12: The provision for reunion has been provided for, for enabling erstwhile members of a Hindu undivided family, to come together and to form once again a joint family governed by Mitakshara law. The mutual love, affection arising from blood relationship and the desire to reunite proceeding therefrom, constitutes the very foundation of reunion. This is evident from the text of Brihaspati in which even the relationship of persons who could reunite is specified though some of the commentators have taken the view that it is only illustrative and not exhaustive and that reunion is possible even among persons not specified in the text of Brihaspati. (See: Virmitrodaya,

translated by Gopalachandra Sarkar (1879) pp 204-205; Vivadachintamani Gaekwad's Oriental Series Vol. XCIX pp 288-289). But even so there is no controversy that reunion is possible only among persons who were on an earlier date members of a HUF. Reunion therefore is a reversal of the process of partition. Therefore, it is reasonable to take the view that reunion is not merely an agreement to live together as tenants in common, but is intended to bring about a fusion in interest and estate among the divided members of an erstwhile HUF so as to restore to them the status of HUF once again and therefore reunion creates right on all the reuniting coparceners in the joint family properties which were the subject matter of partition among them to the extent they were not dissipated away before the date of reunion." In the very same judgment, ...Court was pleased to observe in Paragraph-16 that, it is well settled that, a partition of a Hindu undivided family can be effected orally and it follows that parties to such oral partition, can reunite also with mutual consent without the requirement of any registered Deed of reunion. If, however, earlier partition was by a registered Deed, the reunion which follows it, to be valid in

law, must also be effected by means of a registered Deed.

In the light of the above judgments, it is clear that there is no bar under Hindu Law for reunion of a Hindu family making it a joint family, which joint family was earlier divided. However, such a reunion in Mitakshara appears to be a very rare occurrence and when it happens, it must be strictly proved as any other disputed fact is proved. Most important is that, to constitute a reunion, there must be an intention of the parties to reunite in estate and interest. It is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite the estate with an intention to revert to their former status of a member of a joint Hindu family. Generally, such an agreement need not be express, but, may be implied from the conduct of the parties alleged to have reunited. But, the conduct must be of such an incontrovertible character that an agreement of reunion must be necessarily implied therefrom. Reunion is not merely an agreement to live together as tenants in common, but is intended to bring about a fusion in interest and estate among the divided members of an erstwhile Hindu undivided family so as to restore them the status of Hindu

undivided family once again. As the burden is heavy on a party asserting reunion, ambiguous pieces and conduct equally consistent with a reunion or ordinary joint enjoyment cannot sustain a plea of reunion. If the earlier partition was by way of registered Deed, the reunion which follows it, to be valid in law, also to be effected by means of a registered Deed.

PROPERTY OF GOD

In MANU/SC/0393/1999 : 1999 (5) SCC 50, their Lordships of Hon. Apex Court in the case of "Ram Jankijee Deities & others v. State of Bihar & others", have held that Images according to Hindu authorities, are of two kinds: the first is known as Sayambhu or self-existent or self-revealed, while the other is Pratisthita or established. A Sayambhu or self-revealed image is a product of nature and it is Anadi or without any beginning and the worshippers simply discover its existence and such images do not require consecration or Pratistha but a manmade image requires consecration. This manmade image may be painted on a wall or canvas. God is Omnipotent and Omniscient and its presence is felt not by reason of a particular form or image

but by reason of the presence of the omnipotent: It is formless, it is shapeless and it is for the benefit of the worshippers that there is manifestation in images of the Supreme Being. It was further held that the deity/idol are the juridical person entitled to hold the property. In paragraph Nos. 14, 16 and 19, their Lordships have held as under:- "14. Images according to Hindu authorities, are of two kinds: the first is known as Sayambhu or self-existent or self-revealed, while the other is Pratisthita or established. The Padma Purana says: "the image of Hari (God) prepared of stone earth, wood, metal or the like and established according to the rites laid down in the Vedas, Smritis and Tantras is called the established images...where the self-possessed Vishnu has placed himself on earth in stone or wood for the benefit of mankind, that is styled the self-revealed." (B.K. Mukherjea-Hindu Law of Religious and Charitable Trusts: 5th Edn.) A Sayambhu or self-revealed image is a product of nature and it is Anadi or without any beginning and the worshippers simply discover its existence and such images do not require consecration or Pratistha but a manmade image requires consecration. This manmade image may be painted on a wall or canvas. The Salgram Shila

depicts Narayana being the Lord of the Lords and represents Vishnu Bhagwan. It is a Shila - the shalagram form partaking the form of Lord of the Lords Narayana and Vishnu.

16. The observations of the Division Bench has been in our view true to the Shastras and we do lend our concurrence to the same. If the people believe in the temples' religious efficacy no other requirement exists as regards other areas and the learned Judge it seems has completely overlooked this aspect of Hindu Shastras - In any event, Hindus have in Shastras "Agni" Devta; "Vayu" Devta - these deities are shapeless and formless but for every ritual Hindus offer their oblations before the deity. The Ahuti to the deity is the ultimate - the learned Single Judge however was pleased not to put any reliance thereon. It is not a particular image which is a juridical person but it is a particular bent of mind which consecrate the image.

19. God is Omnipotent and Omniscient and its presence is felt not by reason of a particular form or image but by reason of the presence of the omnipotent: It is formless, it is shapeless and it is for the benefit of the worshippers that there is manifestation in images of the Supreme Being. 'The Supreme Being has no attribute, which

consists of pure spirit and which is without a second being, i.e. God is the only Being existing in reality, there is no other being in real existence excepting Him - (see in this context Golap Chandra Sarkar, Sastri's Hindu Law: 8th Edn.). It is the human concept of the Lord of the Lords - it is the human vision of the Lord of the Lords: How one sees the deity: how one feels the deity and recognises the deity and then establishes the same in the temple upon however performance of the consecration ceremony. Shastras do provide as to how to consecrate and the usual ceremonies of Sankalpa and Utsarga shall have to be performed for proper and effective dedication of the property to a deity and in order to be termed as a juristic person. In the conception of Debutter, two essential ideas are required to be performed: In the first place, the property which is dedicated to the deity vests in an ideal sense in the deity itself as a juristic person and in the second place, the personality of the idol being linked up with natural personality of the shebait, being the manager or being the Dharam karta and who is entrusted with the custody of the idol and who is responsible otherwise for preservation of the property of the idol. The Deva Pratistha Tatwa of Raghunandan and Matsya and Devi

Puranas though may not be uniform in its description as to how Pratistha or consecration of image does take place but it is customary that the image is first carried to the Snan Mandap and thereafter the founder utters the Sankalpa Mantra and upon completion thereof, the image is given bath with Holy water, Ghee, Dahi, Honey and Rose water and thereafter the oblation to the sacred fire by which the Pran Pratistha takes place and the eternal spirit is infused in that particular idol and the image is then taken to the temple itself and the same is thereafter formally dedicated to the deity. A simple piece of wood or stone may become the image or idol and divinity is attributed to the same. As noticed above, it is formless, shapeless but it is the human concept of a particular divine existence which gives it the shape, the size and the colour. While it is true that the learned Single Judge has quoted some eminent authors but in our view the same does not however, lend any assistance to the matter in issue and the Principles of Hindu Law seems to have been totally misread by the learned Single Judge."

In MANU/SC/0219/2000 : AIR 2000 SC 1421,
their Lordships of Hon. Supreme Court in the

case of 'Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & others' have held that the concept 'Juristic Person' arose out of necessities in the human development-Recognition of an entity as juristic person-is for subserving the needs and faith of society. In paragraph Nos. 11, 13 and 14, their Lordships held as under:-

"11. The very words "Juristic Person" connote recognition of an entity to be in law a person which otherwise it is not. In other words, it is not an individual natural person but an artificially created person which is to be recognised to be in law as such. When a person is ordinarily understood to be a natural person, it only means a human person. Essentially, every human person is a person. If we trace the history of a "Person" in the various countries we find surprisingly it has projected differently at different times. In some countries even human beings were not treated to be as persons in law. Under the Roman Law a "Slave" was not a person. He had no right to a family. He was treated like an animal or chattel. In French Colonies also, before slavery was abolished, the slaves were not treated to be legal persons. They were later given recognition as legal persons only through a

statute. Similarly, in the U.S. the African-Americans had no legal rights though they were not treated as chattel.....

13. With the development of society, 'where an individual's interaction fell short, to upsurge social development, co-operation of a larger circle of individuals was necessitated. Thus, institutions like corporations and companies were created, to help the society in achieving the desired result. The very Constitution of State, municipal corporation, company etc. are all creations of the law and these "Juristic Persons" arose out of necessities in the human development. In other words, they were dressed in a cloak to be recognised in law to be a legal unit.

Corpus Juris Secundum, Vol. LXV, page 40 says: Natural person. A natural person is a human being; a man, woman, or child, as opposed to a corporation, which has a certain personality impressed on it by law and is called an artificial person. In the C.J.S. definition 'Person' it is stated that the word "person," in its primary sense, means natural person, but that the generally accepted meaning of the word as used in law includes natural persons and artificial, conventional, or juristic persons.

Corpus Juris Secundum, Vol. VI, page 778 says: Artificial persons. Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

Salmond on Jurisprudence, 12th Edn., 305 says: A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human being is one of the most noteworthy feats of the legal imagination.... Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. Those which are actually recognised by our own system, however, are of comparatively few types. Corporations are undoubtedly legal persons, and the better view is that registered trade unions and friendly societies are also legal persons though not verbally regarded as corporations. ... If, however, we take account of other systems than our own, we find that the conception of legal personality is not so limited in its application, and that there are several distinct varieties, of which three may be selected for special mention...

1. The first class of legal persons consists of corporations, as already defined, namely, those which are constituted by the personification of groups or series of individuals. The individuals who thus form the corpus of the legal person are termed its members....

2. The second class is that in which the corpus, or object selected for personification, is not a group or series of persons, but an institution. The law may, if it pleases, regard a church or a hospital, or a university, or a library, as a person. That is to say, it may attribute personality, not to any group of persons connected with the institution, but to the institution itself....

3. The third kind of legal person is that in which the corpus is some fund or estate devoted to special uses - a charitable fund, for example or a trust estate...

Jurisprudence by Paton, 3rd Edn. page 349 and 350 says: It has already been asserted that legal personality is an artificial creation of the law. Legal persons are all entities capable of being right-and-duty-bearing units-all entities recognised by the law as capable of being parties to legal relationship. Salmond said: 'So far as

legal theory is concerned, a person is any being whom the law regards as capable of rights and duties... ...Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol. Twenty men may form a corporation which may sue and be sued in the corporate name. An idol may be regarded as a legal persona in itself, or a particular fund may be incorporated. It is clear that neither the idol nor the fund can carry out the activities incidental to litigation or other activities incidental to the carrying on of legal relationships, e.g., the signing of a contract: and, of necessity, the law recognises certain human agents as representatives of the idol or of the fund. The acts of such agents, however (within limits set by the law and when they are acting as such), are imputed to the legal persona of the idol and are not the juristic acts of the human agents themselves. This is no mere academic distinction, for it is the legal persona of the idol that is bound to the legal relationships created, not that of the agent. Legal personality then refers to the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities." Analytical and Historical Jurisprudence, 3rd Edn. At page 357 describes

"person"; We may, therefore, define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights or duties may be attributed.

14. Thus, it is well settled and confirmed by the authorities on jurisprudence and Courts of various countries that for a bigger thrust of socio-political-scientific development evolution of a fictional personality to be a juristic person became inevitable. This may be any entity, living inanimate, objects or things. It may be a religious institution or any such useful unit which may impel the Courts to recognise it. This recognition is for subserving the needs and faith of the society. A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law. When an idol, was recognised as a juristic person, it was known it could not act by itself. As in the case of minor a guardian is appointed, so in the case of idol, a Shebait or manager is appointed to act on its behalf. In that sense, relation between an idol and Shebait is akin to that of a minor and a guardian. As a minor cannot express himself,

so the idol, but like a guardian, the Shebait and manager have limitations under which they have to act. Similarly, where there is any endowment for charitable purpose it can create institutions like a church hospital, gurudwara etc. The entrustment of an endowed fund for a purpose can only be used by the person so entrusted for that purpose in as much as he receives it for that purpose alone in trust. When the donor endows for an Idol or for a mosque or for any institution, it necessitates the creation of a juristic person. The law also circumscribes the rights of any person receiving such entrustment to use it only for the purpose of such a juristic person. The endowment may be given for various purposes, may be for a church, idol, gurdwara or such other things that the human faculty may conceive of, out of faith and conscience but it gains the status of juristic person when it is recognised by the society as such."

LIABILITY OF ANIMAL TRANSPORTERS

Hon'ble Supreme Court in
MANU/SC/1799/2009 : 2010 (1) SCC 234, in
 the case of "Bharat Amratlal Kothari & another
 vs. Dosukhan Samadkhan Sindhi & others", have

held that animals filled in trucks in a cruel manner and being transported, seized by police on complainant's report and sent to pinjrapole and the owner of animals claiming custody of animals. In these circumstances, normal cost of maintenance and treatment of animals under Section 35(4) would be payable by the persons claiming custody and not by the complainant. Their Lordships have held as under:- "40. Moreover, no claim was advanced by Respondent 8 herein that Appellant 1 should be directed to pay, on behalf of the owners i.e. Respondents 1 to 6, the cost of maintenance and treatment of the animals in question in accordance with the provisions of sub-section (4) of Section 35 of the Act. Normally, cost of maintenance and treatment of the animals in such cases would be payable by one who claims custody or who are the owners of the livestock but not by the complainant. In the instant case the assertion made by Appellant 1 is that he was handed over custody of goats and sheep by the police after registration of FIR whereas the case of Respondents 1 to 6 seems to be that Appellant 1 had taken possession of the livestock and trucks illegally before the FIR was lodged and had acted in a high-handed manner."

**Hon'ble Supreme Court in
MANU/SC/0426/2014 : 2014 (7) SCC 547,** in

the case of "Animal Welfare Board of India vs. A. Nagaraja & others", have held that animal welfare laws have to be interpreted keeping in mind the welfare of animals and species best interest subject to just exceptions out of human necessity. Their Lordships have further held that there are internationally recognized freedoms of animals as under:- (i) freedom from hunger, thirst and malnutrition; (ii) freedom from fear and distress; (iii) freedom from physical and thermal discomfort; (iv) freedom from pain, injury and disease; and (v) freedom to express normal patterns of behavior. These five freedoms have to be read into Sections 3 and 11 of PCA Act and have to be protected and safeguarded by the States, Central Government, Union Territories, MoEF and AWBI. Though no international agreement ensures protection of animals' welfare, campaigns like UDAW and WSPA's and OIE's effort in this regard, taken judicial note off. It is the duty to protect welfare of animals and not to put them to avoidable pain and suffering. Their Lordships have also explained the meaning of "pain and suffering". Pain informs an animal which stimuli it needs to avoid and suffering

informs it about a situation to avoid. Their Lordships have held that every species has a right to life and security, subject to the law of the land, which includes depriving its life, out of human necessity. Article 21 of the Constitution, while safeguarding the rights of humans, protects life and the word "life" has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including animal life, which are necessary for human life, within the meaning of Article 21 of the Constitution. So far as animals are concerned, "life" means something more than mere survival or existence or instrumental value for human beings, but to lead a life with some intrinsic worth, honour and dignity.

ANIMALS ARE NOT PROPERTIES

Karnail Singh and Ors. vs. State of Haryana: MANU/PH/0580/2019 Their Lordships of the Hon'ble Supreme Court in "A. Nagaraja's" case have held that Article 21 of the Constitution, while safeguarding the rights of humans, protects life and the word "life" has been given an expanded definition and any disturbance from the basic environment which includes all forms of

life, including animals life, which are necessary for human life, fall within the meaning of Article 21 of the Constitution. "Life" means something more than mere survival or existence or instrumental value for human beings, but to lead a life with some intrinsic worth, honour or dignity. All the animals have honour and dignity. Every specy has an inherent right to live and is required to be protected by law. The rights and privacy of animals are to be respected and protected from unlawful attacks. Their Lordships have evolved the term "species' best interest." The Corporations, Hindu idols, holy scriptures, rivers have been declared legal entities and thus, in order to protect and promote greater welfare of animals including avian and aquatic, animals are required to be conferred with the status of legal entity/legal person. The animals should be healthy, comfortable, well nourished, safe, able to express innate behavior without pain, fear and distress. They are entitled to justice. The animals cannot be treated as objects or property.

MITAKSHARA CO-PARCENARY PROPERTY

Hon'ble Supreme Court in the case of Hardeo Rai vs. Sakuntala Devi & others reported in

MANU/SC /7540/2008 : (2008) 7 SCC 46 that "According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (See Mitakshara, Chapter I. 1-27). The incidents of coparcenership under the Mitakshara law are: first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly, that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. A coparcenary under the Mitakshara School is a creature of law and cannot arise by

act of parties except in so far that on adoption the adopted son becomes a coparcener with his adoptive father as regards the ancestral properties of the latter."

FEMALE HINDU RIGHTS ON PROPERTY

Smt. Akkayamma and Another Vs. The State of Karnataka and others (MANU/KA/0967/2006 : 2006 (4) KCCR 2520) - In order to attract provisions of Section 14 of the Hindu Succession Act, it must be established that the female Hindu had a right to the possession of the property in question and that she was in possession of such property, either actually or constructively. If the female Hindu is merely in possession of the property in question without having any sort of right in it, she cannot be said to have possessed property in question within the meaning of Section 14 of the Hindu Succession Act. The expression used 'possessed by a female Hindu' and not 'in the possession of the female Hindu'. The female must have right or interest akin to ownership with a right to possession. In the present case, it was only Rangaiah, who was in cultivation of the land in question and not his

daughter Akkayamma or his son Rangaswamaiah. Hence, held, the order of the Land Tribunal holding that it was Rangaiah only, who was entitled to grant of occupancy right, was correct and was upheld. Further held, Akkayamma never had any right to the possession of the land in question and hence, the argument that she became full owner of the land in question by virtue of Section 14 of the Act was not tenable and was rejected."

JOINT FAMILY AND SUFFICIENT NUCLEUS

K.V. Narayanaswami Iyer Vs. K.V. Ramakrishna Iyer and others (MANU/SC/0307/1964 : AIR 1965 Supreme Court 289), wherein, Para No. 15 reads as under: "The legal position is well settled that if in fact at the date of acquisition of a particular property the joint family had sufficient nucleus for acquiring it, the property in the name of any member of the joint family should be presumed to be acquired from out of family funds and so to form part of the joint family property, unless the contrary is shown.

CHAPTER-9
SEPARATE PROPERTY

**SHIFTING OF BURDEN - PARTY ALLEGING
SELF-ACQUISITION TO ESTABLISH
AFFIRMATIVELY THAT THE PROPERTY WAS
ACQUIRED WITHOUT THE AID OF THE JOINT
FAMILY FUNDS**

In Surendra Kumar v. Phoolchand (dead) through LRs & Anr. [(1996) 2 SCC 491], Court held that where it is established or admitted that the family which possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was the joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family funds.

**IT IS FOR HIM TO PROVE BY CLEAR AND
SATISFACTORY EVIDENCE HIS PLEA THAT
THE PURCHASE MONEY PROCEEDED FROM
HIS SEPARATE FUND**

In Mallesappa Bandeppa Desai & Anr. V. Desai Mallappa alias Mallesappa & Anr. [AIR 1961 SC 1268], Court held that where a manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate fund. The onus of proof in such a case has to be placed on the manager and not on his coparceners. It is difficult to comprehend how this decision lends any support to the contention of the respondents that in absence of leading any evidence, the claim of appellant No.1 of the property being self-acquired has to fail. In the cited decision, the manager was found to be in possession and in charge of joint family funds and, therefore, it was for him to prove that despite it he purchased the property from his separate funds. In the present case, admittedly, no evidence has been led by the respondents that the first appellant was in possession of any such joint family funds or as to value or income, if any, of Item No.2 property.

The Supreme Court in the case of **Achuthan Nair v. Chinnammu Amma MANU/SC/0361/1965** has also held as under:- 7. ...Under Hindu law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. This is a well-settled proposition of law...."

IF THE PROPERTIES ARE PURCHASED BY A FEMALE MEMBER OF THE FAMILY WITHOUT THE AID OR NUCLEUS FROM OUT OF THE JOINT FAMILY NUCLEUS, SAID PROPERTY MAY BE PRESUMED TO BE THE SELF-ACQUIRED PROPERTY OF SUCH LADY AND CANNOT BE TREATED AS A JOINT FAMILY PROPERTY

THE HON'BLE Mr. JUSTICE K.L. MANJUNATH of HIGH COURT OF KARNATAKA

in the case of **Gunasundari vs Logambal**
Decided on 18 September, 2012 Admittedly,

mother of the appellant cannot be considered as a co-parcener and if the properties are purchased by a female member of the family without the aid or nucleus from out of the joint family nucleus, said property may be presumed to be the self-acquired property of such lady and cannot be treated as a joint family property to give share to others. On perusal of entire evidence, it is clear that plaintiff under the impression that property has been acquired out of the money of her father, has instituted the suit for partition. But the plaintiff has not proved that it is father who purchased the property by contributing his money with an intention to treat as a joint family property. When the father had not inherited any ancestral property or any family properties, then the concept of joint family and possessing property of such family does not arise at all. Therefore, viewed from any angle, appellant has not proved that plaintiff is also having a share in the property standing in the name of her mother.

**IT MUST BE ESTABLISHED THAT THERE WAS
A CLEAR INTENTION ON THE PART OF THE**

COPARCENER TO WAIVE HIS SEPARATE PROPERTY.

The Apex Court in **G. Narayana Raju's case 1968 AIR 1276, 1968 SCR (3) 464** held thus : "It is well established that there is no presumption under Hindu Law that a business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family. Unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blended with the joint family estate, the business remains free and separate." The separate property of a Hindu coparcener ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by mere act of physical mixing with his joint family or ancestral property but by his own volition and intention, by his waiving or surrendering his special right in it as separate property. Mere recitals in deeds dealing with self acquisitions as ancestral joint family property is not by itself sufficient; but it must be established that there

was a clear intention on the part of the coparcener to waive his separate property.

BURDEN LIES ON KARTHA WHEN HE IS IN POSSESSION OF JOINT NUCLEUS TO SHOW IT IS HIS SEPARATE ACQUISITION

Mallesappa Bandeppa Desai And ... vs Desai Mallappa And Others 1961 AIR 1268, 1961 SCR (3) 779 We do not know what the income of the said properties was; obviously it could not be of any significant order; but, in our opinion, there is no doubt that where a manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his coparceners.

HINDU GAINS OF LEARNING ACT – SELF ACQUIRED PROPERTY

Before the enactment of Hindu Gains of Learning Act, 1930 it was settled law that income earned by a member of a joint family by the practice of a profession or occupation requiring special training was joint family property, if such training was imparted from the funds of the joint family. But this term „learning“ was interpreted by the Courts to mean some kind of special learning, as distinguished from ordinary general education, that all members of the family might be expected to receive. The most famous decision in said regards is the decision of the Privy Council reported as AIR 1921 PC 35 Gokalchand v. Hukumchand where a person had acquired education by paying fee from the joint family income which enabled him to acquire knowledge, compete at a competitive examination and become a member of the Indian Civil Service. It was held by the Court that salary earned by said person was the property of joint family and thus should be partitioned between the members of the said family. After the decision of Privy Council in Gokalchand's case (supra), Hindu Gains of Learning Act, 1930 was enacted by virtue of which all gains of learning, whether the learning be special or ordinary, became the self-acquired property of the acquirer.

Madras High Court in the decision reported as**AIR 1953 Mad 834 Parsam Venkataramayya v****Parsam Venkatarmappa** wherein it was observed

as under:- "11. We are inclined to the view that if a member of a Joint family who was given a certain sum from the Joint family funds and who goes out of the family in the sense of leaving the family house as in the present case, starts a business of his own individually or in partnership and by virtue of his exertions he prospers in his business and acquires properties it will be not justifiable to hold that either the business or his properties would be joint family properties. In view of the constitution of the Hindu joint family and the incidents of its ownership of properties, to come to any other conclusion would be to deprive a member of such family of his initiative and his desire to eke out a livelihood by his individual efforts and intelligence. The trend of judicial opinion has been as far as possible to recognise properties acquired out of the individual exertions of a member of a joint family to be his self-acquisition. The Hindu Gains of Learning Act (Act 30 of 1930) is one of the enactments which gave legislative recognition to this view, by treating the properties acquired out

of the earnings of the members of the family who happened to have had their education from out of the joint family funds as self-acquired and separate properties. The Act provides that notwithstanding any custom, rule or interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely for the reason that his learning, in whole or in part has been acquired with the aid of the funds of the family and "learning" has been understood to mean education which is to enable a person to pursue any trade, industry, profession or avocation in life. If a member of the family is inclined to start a trade and for that purpose he gets assistance by way of a contribution from the joint family funds without any further assistance from the joint family and goes and starts a business and acquires properties, it appears to be reasonable to extend the principle of the Hindu Gains of Learning Act to such a case. We are unable to find any real distinction between the case of a member getting himself educated out of the joint family funds and employing himself somewhere earning and acquiring properties and a member getting a cash contribution from the family and starting a trade on his own account."

**Chandrakant Manilal Shah And Anr vs
Commissioner Of Income Tax 1992 AIR 66,
1991 SCR Supl. (1) 546**

The definition of the term "learning" under Section 2 of the Hindu Gains of Learning Act, 1930 is very wide and almost encompasses within its sweep every acquired capacity which enables the acquirer of the capacity 'to pursue any trade, industry, profession or vocation in life'. The dictionary meaning of "skill" *inter alia*, is: "the familiar 'knowledge of any science, art, or handicraft, as shown by dexterity in execution or performance; technical ability" and the meaning of "labour" *inter alia* is: "physical or mental exertion, particularly for some useful or desired end." Whether or not skill and labour would squarely fail within the traditional jurisprudential connotation of property e.g. *jura in re propria*, *jura in re aliena*, corporeal and incorporeal etc. may be a moot point but it cannot be denied that skill and labour involve as well as generate mental and physical capacity. This capacity is in its very nature an individual achievement and normally varies from individual to individual. It is by utilisation of this capacity that an object or goal is achieved by the person possessing the

capacity. Achievement of an object or goal is a benefit. This benefit accrues in favour of the individual possessing and utilising the capacity. Such individual may, for consideration, utilise the capacity possessed by him even for the benefit of some other individual. The nature of consideration will depend on the nature of the contract between the two individuals.

Chandrakant Manilal Shah And Anr vs Commissioner Of Income Tax 1992 AIR 66, 1991 SCR Supl. (1) 546

“Just like a cash asset, the mental and physical capacity generated by the skill and labour of an individual is possessed by or is a possession of such individual. Indeed, skill and labour are by themselves possessions. "Any possession" is one of the dictionary meaning of the word 'property'. In its wider connotation, therefore, the mental and physical capacity generated by skill and labour of an individual and indeed the skill and labour by themselves would be the property of the individual possessing them. They are certainly assets of that individual and there is no reason why they cannot be contributed as a consideration for earning profit in the business of a partnership. They certainly are not the properties of the HUF, but are separate

properties of the individual concerned. To hold to the contrary, would also be incompatible with the practical, economic and social realities of present day living.”

Chandrakant Manilal Shah And Anr vs Commissioner Of Income Tax 1992 AIR 66, 1991 SCR Supl. (1) 546 Where an undivided member of a family qualifies in technical fields -- may be at the expense of the family - he is free to employ his technical expertise elsewhere and the earnings will be his absolute property; he will, therefore, not agree to utilise them in the family business unless the latter is agreeable to remunerate him therefor immediately in the form of a salary or share of profits. This, of course, will have to be the subject matter of an agreement between the HUF and the member, but where there is such an agreement, it cannot be characterised as invalid. It is, therefore, illogical to hold that an undivided member of the family can qualify for a share of profits in the family business by offering moneys -- either his own or those derived by way of partition from the family -- but not when he offers to be a working partner contributing labour and services or much

more valuable expertise, skill and knowledge for making the family business more prosperous.

Irrumathirumala ... vs Irumathirumal AIR

1969 AP 303 The offerings given to any Guru performing Samasrayanam are his personal property. The statement that property acquired from science and learning is separate property has had ancient sanction. Katyayana enumerates exhaustively the gains of learning. As pointed out by Mayne (Mayne's Hindu Law and Usage (11th Edn 352) gains which were the result, not of the education received at the expense of the joint family but of the peculiar skill and mental ability of a member educated at the expense of the family were not partible. There is no doubt left after the passing of the Hindu Gains of Learning Act, which provides that no gains of learning shall be held not to be the exclusive and separate property of the acquirer, merely by reason of his learning having been imparted to him by any member of his family, or with the aid of the joint funds of the family or with the aid of the funds of any member. The further fact that the acquirer or his family, while undergoing education or training was maintained by the funds of the joint family or of any member of it, is made wholly immaterial.

T.M. Channabasamma And Ors. vs T.M. Rudriak And Ors AIR 1982 Kant 198, ILR 1982 KAR 98 (DB) We have examined the purpose of repealing Section 6 of the Mysore Act X of 1933. It appears to us that that repeal was a necessary consequence of the extension of the Hindu Gains of Learning Act, 1930 to the State of Karnataka as well. The Miscellaneous Personal Laws (Extension) Act, 1959 amended S. 2 of the Hindu Gains of Learning Act, 1930 by extending the Act with effect from February 1, 1960 throughout the territory of India except Jammu and Kashmir while simultaneously repealing Section 6 of the Mysore Act X of 1933. Section 6 of the Mysore -Act X of 1933 is analogous to the provisions of the Hindu Gains of Learning Act, 1930 and it became redundant and se was repealed. No other inference is possible in this context.

SELF ACQUIRED PROPERTY IN MITAKSHARA LAW

C.N. Arunachala Mudaliar v. C.A. Muruganatha Mudaliar and another 1953 AIR 495, 1954 SCR 243 in which the Apex Court has held that

father under the Mitakshara law is competent to sell his self-acquired property or gift to one of his own sons to the detriment another and he can make even an unequal distribution amongst his heirs.

S. Subramanian Vs. S. Ramasamy and others reported in MANU/SC/0650/2019 : (2019) 6 SCC 46, wherein it is held as follows: 9. Even the reasons given by the High Court that as the loans were taken on the suit properties for borewell, crop loan, electric motor pump set loan, jewel loan by all the three joint family members, namely Sengoda Gounder, Ramasamy and Subramanian and, therefore, there was a blending of the suit properties into joint family properties also, cannot be accepted. As all the three were residing together and some loans might have been taken by the family members residing together, by that itself, it cannot be said that there was a blending of the suit properties into joint family properties. The law on the aspect of blending is well settled that property separate or self acquired of a member of a joint Hindu family 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 to waive separate rights must be established. Clear intention to abandon the separate rights in the property must be proved. Even abandonment cannot be inferred from mere allowing other family members also to use the property or utilisation of income of the separate property out of generosity to support the family members

INDIVIDUAL PROPERTY AND JOINT FAMILY PROPERTY DIFFERENTIATED

Mrs. MALLIKA AND OTHERS v. Mr. CHANDRAPPA AND OTHERS reported in ILR 2007 KAR 3216, which is extracted hereinbelow:

"HINDU SUCCESSION ACT, 1956-SECTION 8-Rules of Succession in the case of males under-Son inheriting the self acquired property of his father-HELD, The said property shall be treated as the individual property of the son and the heirs of the son will have no right in the said property as co-parceners-FURTHER HELD, Though under traditional Hindu Law, a son by his birth in the family gets a share in his father's ancestral property and becomes a co-parcener, that position is affected and modified by Section 8 of

the Hindu Succession Act, 1956- Consequently, the property of the father who had separated from his family, on his death will be inherited and held by his sons in their individual capacity and son's son/sons will have no right therein as coparceners-ON FACTS, HELD, Ten guntas of land in Sy.No.84/3A is the exclusive property of defendant No.1-The plaintiffs as sons did not have any right therein by their birth and therefore the sale deeds executed by the defendant No.1 in favour of the defendants No.2 to 5 were not affected by the plaintiffs being the members of the family since they had no right in the said property sold by defendant No.1- Hence, the suit filed by the plaintiffs is liable to be dismissed."

In M. Yogendra and Ors. v. Leelamma N. and Ors. MANU/SC/1433/2009 : 2009 (15) SCC 184, it was held as under: It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and

unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid."

In Rohit Chauhan v. Surinder Singh and Ors.

MANU/SC/0692/2013 : 2013 (9) SCC 419, a contention was raised by the Defendant No. 1 that after partition of the joint Hindu family property, the land allotted to the share of Defendant No. 2 became his self acquired property and he was competent to transfer the property in the manner he desired. It was held that the property which Defendant No. 2 got by virtue of partition decree amongst his father and brothers was although separate property qua other relations but it attained the characteristics of coparcenary property the moment a son was born to Defendant No. 2. It was held thus: A person, who for the time being is the sole surviving coparcener as in the present case Gulab Singh was, before the birth of the Plaintiff, was entitled to dispose of the coparcenary property as if it were his separate property. Gulab Singh, till the birth of Plaintiff Rohit Chauhan, was competent to sell, mortgage and deal with the property as his property in the

manner he liked. Had he done so before the birth of Plaintiff, Rohit Chauhan, he was not competent to object to the alienation made by his father before he was born or begotten. But, in the present case, it is an admitted position that the property which Defendant 2 got on partition was an ancestral property and till the birth of the Plaintiff he was the sole surviving coparcener but the moment Plaintiff was born, he got a share in the father's property and became a coparcener. As observed earlier, in view of the settled legal position, the property in the hands of Defendant 2 allotted to him in partition was a separate property till the birth of the Plaintiff and, therefore, after his birth Defendant 2 could have alienated the property only as karta for legal necessity. It is nobody's case that Defendant 2 executed the sale deeds and release deed as karta for any legal necessity. Hence, the sale deeds and the release deed executed by Gulab Singh to the extent of entire coparcenary property are illegal, null and void. However, in respect of the property which would have fallen in the share of Gulab Singh at the time of execution of sale deeds and release deed, the parties can work out their remedies in appropriate proceeding.

IMPARTIBLE ESTATE WHEN BECOMES SEPARATE PROPERTY

Chinnathayi vs. Kulasekara Pandiya Naicker and Ors.: MANU/SC/0066/1951 - AIR 1952 SC

29 - In our opinion, division amongst the members of this family by allotment of properties was not possible as the only property known to belong to the family was the impartible zamindari of which partition could not be made or demanded. To establish that an impartible estate has ceased to be joint family property for purposes of succession it is necessary to prove an intention, express or implied, on the part of the junior members of the family to give up their chance of succeeding to the estate. In each case, it is incumbent on the plaintiff to adduce satisfactory grounds for holding that the joint ownership of the defendant's branch in the estate was determined so that it became the separate property of the last holder's branch. The test to be applied is whether the facts show a clear intention to renounce or surrender any interest in the impartible estate or a relinquishment of the right of succession and an intention to impress upon the zamindari the character of separate property...... The family admittedly had been

joint. It appeared that the common ancestor of the deceased holder and of the claimant had lived 200 years before the suit, that for a long period there had been a complete separation in worship, food and social intercourse between the claimant's branch of the family and that of the deceased holder, and that upon the death of the holder the claimant had not disputed that the widow of the deceased was entitled to succeed. It was held that there was not to be implied from the circumstances stated above a renunciation of the right to succeed so as to terminate the joint status for the purposes of that right. "The whole emphasis of Mr. Raghavan who represented Kulasekhara was on the words of the deed contained in Clause 5 set out above. Sundara Pandiya by this clause stipulated that he will have no right to the property shown as belonging to the widow. Sundara Pandiya was then agreeing that the widow should retain the Zamindari absolutely, his mind being influenced by the will. Later on by the compromise made in Kandasami's suit what had been given absolutely to the widow was converted into a life estate with the exception of the pannai lands and Kandasami was acknowledged as the rightful heir. The recitals in the release deed, therefore, have to be

read in the light of the terms and conditions of the deed of compromise and the proper inference from these is that Sundara Pandiya relinquished his rights to succeed to the Zamindari immediately as the senior most member of the family but that he did not renounce his contingent right of succeeding to it by survivorship if and when the occasion arose. It is well settled that general words of a release do not mean release of rights other than those then put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed."

CHAPTER-10
EVIDENCE AND DOCUMENTS

**AWARD PASSED BY ARBITRATORS
REGARDING DIVISION OF PROPERTIES
NEEDS NO REGISTRATION:-**

In the decision reported in Kashinathsa v. Narsingsa, AIR 1961 SC 1077, the award of the court was accepted by the parties and subsequently ignoring such acceptance, a suit was instituted by one of the parties. Defence was set up on the basis of such acceptance. An award was passed by the Arbitrators regarding division of properties. In the circumstances, it was held that the award passed by the Arbitrators was not required to be registered under Section 17 of the Registration Act and that the partition thus effected based on the award dividing the family properties between the members of the family are binding on the parties.

**WHEN PLAINTIFFS CASE WAS DAMAGED BY
THEIR OWN ADMISSIONS**

Bishwanath Prasad And Others vs Dwarka Prasad 1974 AIR 117, 1974 SCR (2) 124 In a

suit for partition the first defendant (respondent in this Court) claim that the-disputed items of property exclusively belonged to him. The trial court as well as the High Court accepted his case on the basis of admission made by the first plaintiff and the eighth. Defendant (father of the plaintiff) it depositions in an earlier suit as well as similar admissions made in the writer statement Wed in that suit by the eighth defendant together with the present plaintiffs, and held that the said property belonged to the first defendant. There is no doubt that if the depositions of the first plaintiff, the deposition by the eighth defendant and the written statement filed by these parties in the title suit were reliable, the plaintiffs case was damaged by their own admissions.

ADMISSION OF KARTHA IS BINDING IN THE ABSENCE OF OTHER INTENTION

A Division Bench of Court in case of **K.M.Subbaiah and others V/s. Union of India and others reported in ILR 1973 KAR 1335** has observed thus: "An admission of a 'Karthā' of a Joint Hindu Family would be binding on the other members of a Co-parcenary in the absence of

intention on the part of the 'Karthi' himself giving rise to an inference that he was attempting to acquire some property for himself at the expense of the other members of the family."

BURDEN TO PROVE PREVIOUS PARTITION ON DEFENDANT

THE HON'BLE MR. JUSTICE AJIT J. GUNJAL of Karnataka High Court in the case of **Dodda Bayyanna vs Nalajaruvamma Decided on 3 September, 2012** Insofar as the defendants claim of prior partition is concerned, there is no evidence at all in support of such a plea of prior partition except an assertion in the written statement that there was a prior partition. If there was a prior partition, something more was required either by way of any other evidence like entries in the revenue record, which is also not forthcoming. Indeed, the burden is on the defendants to prove that there was a prior partition. The defendants have failed to discharge the said burden.....Insofar as the self acquired property is concerned, the revenue records would clearly disclose that the name of late Sanna Bayyanna would appear in the records along with that of the defendants. Even though a feeble

attempt is made and explanation is sought to be given that the entries in the revenue records indicate the name of Sanna Bayyanna along with that of the defendant is for name sake, since he was staying with him. However on these facts, it cannot be said that they are self-acquired properties. Indeed something more was required to show that the purchase of the property is not from the nucleus of the joint family but from the other independent income which is not forthcoming.

THERE IS NO PRESUMPTION OF A PROPERTY BEING JOINT FAMILY PROPERTY ONLY ON ACCOUNT OF EXISTENCE OF A JOINT HINDU FAMILY

Apex Court in **D S LAKSHMAIAH AND ANOTHER Vs. BALASUBRAMANYAM AND ANOTHER AIR 2003 SC 3800,**.. It will be useful to excerpt para-18, which reads as under: "18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that

there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

WHEN INITIAL BURDEN TO PROVE JOINT FAMILY IS FAILED BY PLAINTIFF

The Apex Court in the case of **APPASAHEB PEERAPPA CHANDGADE VS. DEVENDRA PEERAPPA CHANDGADE AND OTHERS (AIR 2006 SCW 5562)** has observed that the initial burden is on the plaintiff to show that the entire property was a joint family property. After initial discharge of the burden, it shifts on the defendants to show that the property claimed by them was not purchased out of the joint family nucleus and it was purchased independent of them.

An identical view is taken by the Apex Court in the case of **MARABASAPPA VS. NINGAPPA (AIR 2012 (1) KAR 345)**. The Apex Court after reviewing all the judgments has observed in

Paragraph 22 as under: "22. This Court has time and again held that there is no presumption that of joint family property, and there must be some strong evidence in favour of the same.

In the case of **Appasaheb Chandgade Vs. Devendra Chandgade and others (2007) 1 SCC 521 : (AIR 2007 SC 218 : AIR 2006 SCW 5562)**, after examining the decisions of this Court, it was held: "17. Therefore, on survey aforesaid decisions, what emerges is that there is no presumption of a joint Hindu family but on the evidence if it is established that the property was joint Hindu family and the other properties were acquired out of that nucleus, if the initial burden is discharged by the person who claims joint Hindu family, then the burden shifts to the party alleging self-acquisition to establish affirmatively that property was acquired without the aid of the joint family property by cogent and necessary evidence."

IN THE ABSENCE OF DISCHARGE OF THE INITIAL BURDEN, THE QUESTION OF CALLING UPON THE DEFENDANT TO PROVE TO THE CONTRARY THAT IT IS SELF-ACQUIRED PROPERTY IS NOT PERMISSIBLE

THE HON'BLE MR. JUSTICE AJIT J.GUNJAL of
Karnataka High Court in the case of **Bhagirathi
@ Konavva vs Parashuram Decided on 9
August, 2012**

Having regard to the law laid down by the Apex Court, the case of the plaintiff is required to be examined. In the case on hand, the only documents which are produced by the plaintiff to show that it is a joint family property are two property extracts. To my mind, that itself would not be sufficient to hold that the property is joint family property. It is no doubt true that the plaintiff has examined two witnesses PWs-2 and 3. But, however, their evidence cannot be looked into for the purpose of determining whether the property in question is a joint family property or not. I am of the view that the plaintiff has not been able to discharge initial burden cast on her. In the absence of discharge of the initial burden, the question of calling upon the defendant to prove to the contrary that it is self-acquired property is not permissible. I am of the view that the entire case of the parties would rest on the appreciation of evidence.

**ALLEGATIONS BASED ON MERE SURMISES
WITHOUT LEGAL EVIDENCE CANNOT BE
ACCEPTED**

THE HON'BLE MR. JUSTICE N. KUMAR AND
THE HON'BLE MR. JUSTICE H. S. KEMPANNA of
Karnataka High Court in the case of **Basavaraj
Guddappa Maliger vs Beerappa @
Doddabeerappa Decided on 31 July, 2012**

He also acquired property by allotment after obtaining permission from the Government and in fact other members have given no objection saying that they have no right in the property which enabled him to acquire the land and he has put up construction. But in the oral evidence adduced by the parties, there is evidence to the effect that both these brothers had the benefit of joint family funds. It is on the basis of that evidence, the court below has come to the conclusion, both properties are joint family properties. It is settled law, if property stands in the name of member of joint family, there is no presumption it is a joint family property. Presumption is only family is joint. If the joint family also owns property and then the members acquired property in their name to constitute the properties acquired in the name of the members of joint family, the person who is setting up the

plea of joint family has to prove that there was sufficient nucleus derived from the joint family fund out of which the member of the joint family acquired the properties in their name.

There is no evidence to show what is the income derived from the joint family properties, what is the nucleus which is available after meeting the family necessities which was utilized for acquiring these properties in the name of individual members. Absolutely the evidence on record is silent on this aspect. It is barely based on surmises. Therefore the said finding is not based on legal evidence and therefore it cannot be sustained.

IF PROPERTY STANDS IN THE NAME OF MEMBER OF JOINT FAMILY, THERE IS NO PRESUMPTION IT IS A JOINT FAMILY PROPERTY. PRESUMPTION IS ONLY FAMILY IS JOINT.

THE HON'BLE MR. JUSTICE N. KUMAR AND
THE HON'BLE MR. JUSTICE H. S. KEMPANNA of
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these properties in the name of individual members. Absolutely the evidence on record is silent on this aspect. It is barely based on surmises. Therefore the said finding is not based on legal evidence and therefore it cannot be sustained.

MERE CONTENDING IT AS JOINT FAMILY WITHOUT SUFFICIENT MATERIAL TO PROVE INITIAL BURDEN IN PARTITION SUIT

THE HON'BLE MR. JUSTICE A.S.PACHHAPURE of Karnataka High Court in the case of **Sri Chandru vs Sri A V Govindaraju, Decided on 2 July, 2012**

Though the defendants contend that it is the joint family property, it is relevant to note that apart from ancestral house, the family did not own any other properties. In such circumstances, as the defendants have not proved the existence of nucleus, no presumption could be raised that the suit site, which was purchased by the plaintiff in his name is a joint family property. There is nothing in the evidence of D.W.1 that the earnings from their business was being paid to the plaintiff. Even at the time when the suit site was purchased by the plaintiff, defendants 1, 3

and 4 were less than 20 years of age. So, the question that they were doing business and contributing the income for purchase of the suit property cannot be accepted. So, the material placed on record clearly reveals that the suit site was purchased by the plaintiff in his name and it is he, who constructed a house by obtaining loan from the Co- operative Society. It is in these circumstances that the Courts below have come to a conclusion that the suit property is absolutely owned by the plaintiff. As the only ancestral house was partitioned in the life-time of the father and was given to the defendants, the question of partition of the suit property does not arise as it is exclusively owned by the plaintiff and further, the Courts below on the basis of the material placed on record have held that the suit property is the absolute property of the plaintiff.

**NECESSARY PLEADINGS AS TO WHEN AND IN
WHAT DATE AND JOINT FAMILY
ACQUISITIONS MADE IS NOT THERE -
EXCEPT SELF SERVING STATEMENT OF
PLAINTIFF AND CONTRADICTORY VERSIONS
NO SUFFICIENT MATERIALS PLACED**

THE HON'BLE MR.JUSTICE S NAYAK AND THE
HON'BLE MR.JUSTICE RAM MOHAN REDDY of
Karnataka High Court in the case of **T.S.
Subbaraju vs T.A. Shivarama Setty And Ors.**
Reported in AIR 2004 Kant 479, 2004 (7)
KarLJ 190

It is by now well established in law that the initial burden to prove the existence of ancestral property which forms a nucleus for other acquisitions or for business of the brothers squarely lies on the plaintiff. This being a pure question of fact, can be proved by direct or circumstantial evidence. However, the circumstantial evidence should be clear, unequivocal and clinching, as otherwise, there is every chance of self-acquisition of a person being lost to another who claims a share in it.

The claims of ancestral property, joint family nucleus and the commencement of joint business at Bangalore, stems from paragraph-4 of the plaint. The plaint averments are bereft of details such as dates on which the so-called ancestral immovable properties were purchased, the date on which it was sold, the date on which the joint family of his grandfather separated and migrated to Bangalore and the date on which the

alleged joint business was said to have commenced at Bangalore, between the plaintiffs grandfather and the 1st defendant. In addition, the plaint averments are as bald as can be and do not state as to what was the exact sum of money that was brought by the grandfather and applied as capital for the joint business. There is also no pleading as to where, when and in what name the said joint family business was commenced.

The sale deed does not anywhere covenants that the immovable property conveyed therein was ancestral property. Quite contrary to the claim of the plaintiff, the document contains recitals that the immovable property was the self-acquired property of Adinarayana Setty Amongst Hindus, it is common knowledge for the children of the vendor to join the execution of the sale deed of immovable property for and by way of abundant caution. Merely, because the sons of Adinarayana Setty joined in the execution of Ex. P-1 sale deed, it cannot be inferred that the immovable property conveyed under the said Deed was ancestral, property.

The plaintiff having pleaded joint business, did not produce an iota of evidence in support of such claim. The plaintiff ought to have secured at least the licence or other such documents issued

by the statutory authorities to carry on Provision Store's business in order to prove the commencement of the joint business. It has come in evidence that the plaintiff was 3 years of age in the year 1950 and therefore, he could not have had any personal knowledge of any of the facts asserted by him. In this view of the matter, the civil Court did come to a correct conclusion that the claim of the plaintiff of joint business was false.

The plaintiff having failed at the threshold itself to establish any of the allegations set out in the plaint, with regard to ancestral property and joint family nucleus, mere allegation bereft of proof of purchase of plaint Schedule movable and immovable properties from out of the joint family funds, as a consequence, will have to necessarily fail. Keeping in mind the principles of law enunciated by the Apex Court, this Court and other Courts in this country, with regard to ancestral property and applying the same to the facts of this case, we are of the considered opinion that the joint family of the 1st defendant and his children had no nucleus from which the disputed acquisitions could have been made. It is not in dispute that the 1st defendant and his family

members are Hindu Undivided Family which does not necessarily mean that the family possessed joint family properties. No such presumption is available for the plaintiff, in law, and on facts also, there is no legal evidence worth the while, to raise any presumption.

There is no material to show that the property was joint or the family possessed joint fund or that there was a nucleus to augment or add movable or immovable properties to the same. There is also no material to show that the plaintiff had in fact made any contribution thereof. The respondents placed sufficient material before the civil Court that the purchase of immovable properties were out of their own funds and that the 1st defendant being an absolute owner of item No. 1 of 'A' Schedule property was entitled, in law, to dispose of the same in the manner he desires. Except for the self serving statement of the plaintiff which we find to be self contradictory, there is nothing placed on record either oral or in writing to establish the case of the plaintiff, mere assertions will not suffice. The civil Court having thoroughly examined the pleadings and the evidence both oral and documentary and having adverted to all

the circumstances, arrived at a correct conclusion.

WHEN THE PROPERTY STANDS IN THE NAME OF A FEMALE MEMBER WITHOUT THE AID OF PRESUMPTION THE PARTY ALLEGING HAS TO CONVINCINGLY PROVE THAT HAS BEEN PURCHASED OUT OF THE JOINT FAMILY FUNDS

M.A. Raju vs Annaiah And Ors. AIR 2003 Kant

497 The proposition of Hindu Law that any property ostensibly standing in the name of any co-parceners could be presumed as a Joint Family Property, if it is shown that the family had sufficient nucleus and funds to acquire the property. However, the presumption is rebuttal, the co-parcener is entitled to show that the property indeed is a self-acquired property. The said presumption does not apply when the property stands in the name of a female member without the aid of presumption the party alleging has to convincingly prove that the female member is only an ostensible owner and the same has been purchased out of the joint family funds. Now, from the date of passing of the Benami Transaction Prohibition Act, the legal position

regarding the plea of Benami has undergone a thorough change.

**BURDEN LIES UPON THE PERSON WHO
ASSERTS THAT A PARTICULAR PROPERTY IS
JOINT FAMILY PROPERTY TO ESTABLISH
THAT FACT**

In the decision of the Apex Court in the case of **Mst. Rukhmabai v. Lala Laxminarayan and others, reported in AIR 1960 SC 335**, it has been held in para 5 as under : "(5) ... But there is no presumption that any property, whether moveable or immovable, held by a member of a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the members of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property."

Mudigowda Gowdappa Sankh v. Ramchandra Revgowda Sankh, AIR 1996 SC 1976 the

Supreme Court held as under:- "Of course, there is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it as coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. In Appalaswamy v. Suryanarayana Murti (ILR (1948) MAD 440 = AIR 1947 PC 189) Sir John Beaumont observed as follows:- "The Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is

joint, and the burden rests upon any one asserting that any item of property was joint to establish the fact. 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 may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. See Babu Bhai Girdharlal v. Ujamlal Hargovandas (ILR (1937) Bom 708 = AIR 1937 Bom 446); Venkatramayya v. Seshamma (ILR (1937) MAD 1012 = AIR 1937 Mad 538) and Vythianntha v. Varadaraja (ILR (1938) Mad 696 = AIR 1938 Mad 841)."

HOW BURDEN SHIFTS AFTER PROOF OF INITIAL BURDEN

In the subsequent decision of the Apex Court in the case of **Achuthan Nair v. Chinnammu Amma and others**, reported in **AIR 1966 SC 411**, it has been held in para 7 as under : "(7) ...Under Hindu law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint

family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. This is a well settled proposition of law. ..."

THERE WAS NO DOCUMENTARY EVIDENCE TO SHOW THAT THE PROPERTIES WERE INHERITED BY HIM, OR THAT THE PROPERTIES ORIGINALLY BELONGED TO HIS FATHER

In the decision of the Apex Court in the case of **Saroja v. Santhilkumar and others, reported in (2011) 11 SCC 483**, the question was whether the properties in question were the joint family properties belonging to Late Shri Ratna Mudaliar or were the self-acquired properties of his son Arumugha Mudaliar. The Apex Court held in para 8 of the said decision that the properties stood in the name of Arumugha Mudaliar and there was no documentary evidence to show that the properties were inherited by him, or that the

properties originally belonged to his father Late Shri Ratna Mudaliar. In the absence of such evidence, the Court rejected the contention that the properties were the joint family properties and not the self-acquired properties of Arumugha Mudaliar.

THE ADMISSIONS MADE BY ONE OR OTHER MEMBERS OF THE FAMILY TO MEET PARTICULAR CONTINGENCIES OR TO GET AN ADVANTAGE WERE NOT OF MUCH VALUE IN DETERMINING THE QUESTION WHETHER SOME OF THE MEMBERS OF THE JOINT HINDU FAMILY HAD SEPARATED

Supreme Court in **Rukmabai v. Laxminarayan, 1960 AIR 335, 1960 SCR (2) 253** The admissions made by one or other members of the family to meet particular contingencies or to get an advantage were not of much value in determining the question whether some of the members of the joint Hindu family had separated. Persons sometimes made statements which served their purpose, or proceeded upon ignorance of the true position ; and it was not their statements but their relations, with the estate, which should be taken into consideration

in determining the issue. Adopted the following observations of their Lordships of the Privy Council in Venkatapathi Raju v. Venkatanarasinha Raju, AIR 1936 PC 264; "It sometimes happens that persons make statements which serve their purpose or proceed upon ignorance of the true position and it is not their Statements, but their relations with the estate, which should be taken into consideration in determining the issue".

CONTENTS OF DOCUMENT SHALL PREVAIL OVER ORAL EVIDENCE

THE HON'BLE MR. JUSTICE A S BOPANNA of HIGH COURT OF KARNATAKA in the case of **Sri Raj Singh vs Sri M Chandy Kunju Decided on 18 September, 2012** The law is well settled that the evidence of a witness can only be to explain a document but anything which is stated contrary to contents of the documents without any other document would not be of any avail, as the contents of the documents would prevail over the oral evidence.

The Apex Court in **V.K. Surendra v. V.K. Thimmaiah** and others, **MANU/SC/0375/2013**

: (2013)10 SCC 211, has observed that recitals in the documents are binding on the persons who were parties to the said document.

The Apex Court in **Vidhyadhar v. Manikrao** and another, **MANU/SC/0172/1999 : AIR 1999 SC 1441**, has observed that the intention is to gather from the recital in the sale deed, conduct of the parties and the evidence of record.

The High Court of **Andhra Pradesh in Darisi Masthanamma v. Mandiga Rama Krishna**, **MANU/AP/0051/2006 : AIR 2006 AP 286**, has observed that a party to a document should not go back from the recitals in the document.

PRESUMPTION REGARDING THE DOCUMENTS OF THIRTY YEARS OLD IS NOT APPLICABLE TO WILL

The Apex Court in the case of **BHARPUR SINGH AND OTHERS -vs- SHAMSHER SINGH - (2009) 3 SCC 687** has held that the presumption regarding the documents of thirty years old is not applicable to Will and that the Will must be proved in terms of Section-63(c) of the Succession Act and Section-68 or Section-69 of the Evidence

Act. In view of the dictum laid down by the Apex Court in the aforementioned judgment, it is mandatory on the part of the propounder of the Will to lead the evidence in terms of Section 63 (c) of the Indian Succession Act and under Section-68/69 of the Indian Evidence Act. Since the defendant has failed to adduce evidence in terms of the aforementioned provisions and as the presumption is not available in favour of the defendant under Section-90 of the Evidence Act

RELEVANCY OF ADMISSION OF A PARTY IN A SUIT

Parameshwari Bai vs Muthojirao Scindia AIR 1981 Kant 40, ILR 1981 KAR 78 Stray sentences elicited in the cross-examination could hardly be construed as admission. Before the right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and conclusive. There should not be any doubt or ambiguity about the alleged admission and to examine whether there is ambiguity in the admission, it would be necessary for the Court to read the other parts of the

evidence and the stand taken by him in the pleadings.

**Chikkam Koreswara Rao vs Chikkam Subbarao
And Ors. AIR 1971 SC 1542, (1970) 1 SCC 558**

From this (Chief evidence statement) statement, it is clear that he had put forward a positive case that the lands in, question are his separate properties. In the course of his cross-examination it was elicited from him: Under Ex. B-6 the consideration was paid by my father. I do not know how he got it.

7. This admission must be read along with the evidence given by him in his chief-examination. Soon after he made that statement, he also stated: From the time I took the sale deed Exh. B-6, I was paying taxes. I filed those tax receipts in a separate book for my personal properties. My father was paying taxes on family lands, separate from my lands.

8. If we read these statements along with his other evidence and in a harmonious manner, it is clear that what the appellant admitted was that the acquisition in question, was made by his father on his behalf and the consideration for the same was paid by his father from out of the appellant's private funds that were in the hands

of his father. Hence we are unable to agree with the High Court that the appellant had admitted that the properties covered by Ex B-6 were the acquisitions of his father.

Prem Ex-Servicemen Co-Op. Tenant ... vs State Of Haryana And Ors. AIR 1974 SC 1121, (1974) 2 SCC 319

It may be that the members of the Co-operative Societies had made some admissions the nature and effect of which require examination. It is well settled that the effect of an alleged admission depends upon the circumstances in which it was made. We are unable to go into these questions until they have been fully and properly investigated by an authority empowered to consider them.

THE HONOURABLE MR.JUSTICE
M.VENUGOPAL of Madras High Court in the case
of **K. K. Annamalai vs Rakkiannan Decided on
24 January, 2012**

25. It is to be pointed out that an admission is a self-harming and not a self-serving statement, express or implied, oral or written, which is adverse to an individual's case.

26. A person against whom an admission has been proved may call upon his opponent, as a part of latter's case, to prove so much of the entire statement, document or correspondence, containing or referred to in an admission, as is necessary to explain it, although such additional part is unfavourable to the other side proving admission.

27. Admissions are not conclusive, although they are pieces of evidence. Admissions do not constitute 'Estoppel'. A maker of an admission is at liberty to prove that it is mistaken or it is untrue.

28. The previous admissions of a party are substantial evidences by themselves against the maker. Admissions must be taken as a whole as per the decision rendered by the Honourable Supreme Court in AIR 1979 SC 154 (Haji C.H.Mohammad Koya vs. T.K.S.M.A.Muthukoya). Admissions must be unequivocal. It must be comprehensive. It must go to the point of issue or the whole log. Admissions are receivable to prove matters of Law or matters mixed of Law and Fact.

Smt. S.V. Kunhima vs B.N. Viswanath ILR 1996 KAR 1853, 1996 (2) KarLJ 726 It is well settled that, the entire evidence of a witness

cannot be rejected merely because he tells lies on certain points. It is for the Court to scrutinise the evidence to accept what appears to be true and to reject what appears to be not true.

M/s. Mahesh Centre and Another -vs- People Charity Fund by its Trustees (ILR 2007 Kar 4344) It is the obligatory on the part of the trial Court to assess and appreciate the entire oral and documentary evidence on record to arrive at a just conclusion. A stray admission or statement of witness in his deposition shall not be the criteria or basis to arrive at a conclusion. It is the duty of Court to consider the evidence in a case as a whole and its finding should depend upon the cumulative effect of the entire oral and documentary evidence.

SHAM TRANSACTION AND BURDEN OF PROOF

Rangammal vs. Kuppuswami and another (AIR 2011 SC 2344) Application of Section 101 of the Evidence Act, 1872 thus came up for discussion in this matter and while discussing the law on the burden of proof in the context of dealing with the allegation of sham and bogus transaction, it was

held that party which makes allegation must prove it. But the court was further pleased to hold wherein the question before the court was “whether the transaction in question was a bona fide and genuine one” so that the party/plaintiff relying on the transaction had to first of all prove its genuineness and only thereafter would the defendant be required to discharge the burden in order to dislodge such proof and establish that the transaction was sham and fictitious..... it is well established dictum of the Evidence Act that misplacing burden of proof would vitiate judgment. It is also equally and undoubtedly true that the burden of proof may not be of much consequence after both the parties lay evidence, but while appreciating the question of burden of proof, misplacing of burden of proof on a particular party and recording findings in a particular way definitely vitiates the judgment as it has happened in the instant matter.

Vithaldas Jagannath Khatri (D) through Shakuntala and Ors. vs. The State of Maharashtra Revenue and Forest Department and Ors.: MANU/SC/1188/2019 The finding that the transaction is unnatural apart from raising serious suspicion effortlessly opens the

doors to a finding of it being sham. Ordinarily, in the case of sham transaction its terms deceptively disguise the underlying truth. The task become uphill, when the transaction appears natural, to prove it to be a sham transaction. But when the transaction itself is unnatural, the task of the court is made lighter. ... For the purpose of determining whether a document is a collusive, a fraudulent or a sham transaction, it would indeed be argued that the Authority to so decide must be in a position to consider relevant evidence in the form of deposition of witnesses as also evaluate documentary evidence which may throw light on the matter. In a sham transaction, be it a sale or a partition, though it has all the trappings of a transfer or a partition and it may be registered as such, in effect, the transferor continues to be the owner. The person who was the previous owner, would, in the case of the partition which is sham, continue to be the owner. A clever camouflage or a document ingenuously disguised as a sale or a partition, cannot be permitted to defeat the intention of the Legislature. If the surrounding circumstances and the actual reality behind the transaction is objectively probed and it is established that the transferor or the previous owner, as the case may

be, in the case of a transfer or a partition, respectively, continued to hold the property as such on the appointed day, it must be ignored.

Raghwendra Sharan Singh vs. Ram Prasanna Singh (Dead) by L.Rs.: MANU/SC/0367/2019 -

Plaintiff filed suit against the Appellant for a declaration that the deed of gift executed in favour of the Appellant was showy and sham transaction and no title and possession with respect to the gifted property ever passed to the Appellant-original Defendant and hence the same is not binding on him. Defendant after filing his written statement, filed an application Under Order 7 Rule 11 of Code for rejection of the plaint on the ground that the suit is clearly barred by law of limitation. Trial Court rejected the said application on the ground that from the perusal of records and other documents, for determining the question of Limitation, oral evidence were required to be taken into account. Appellant filed a revision application before the High Court. By the impugned judgment and order, the High Court had dismissed the revision application and has confirmed the order passed by the Trial Court. Therefore, considering the averments in the plaint and the bundle of facts

stated in the plaint, we are of the opinion that by clever drafting the Plaintiff had tried to bring the suit within the period of limitation which, otherwise, was barred by law of limitation. Therefore, the suit was clearly barred by law of limitation, the plaint was required to be rejected in exercise of powers under Order 7 Rule 11 of the Code of Civil Procedure.

Narahari Dhal and Ors. vs. Subarna Dei and Ors. : MANU/OR/0153/2001 - 2001 (I) OLR 716 Obviously, it means that while plaintiff admitted that a sale deed had been executed, she had come out with the specific case that the transaction was a sham transaction not intended to be acted upon. The lower appellate court seems to have put the onus on the defendants to prove the genuineness of the transaction apparently on the footing that the vendor had put thumb impression on the document. It is not the case of the plaintiff that the document in question had not been read over and explained to her father, the vendor. It was the specific case that though a sale deed had been executed, it was not intended to be acted upon. In other words, while admitting about the due execution, the plaintiff had come out with a specific case that the transaction was

intended to be a sham transaction and title was not intended to be conferred on the vendee. Since the lower appellate court has proceeded on a wrong footing relating to onus, the findings recorded by it are required to be scrutinized. It is also contended that both the vendor and vendee being dead, the recital in the sale deed relating to payment of consideration had great evidentiary value which has not been considered by the lower appellate court. It is further contended that plaintiff herself has admitted that the vendees were in possession and there is no finding regarding the motive for the alleged sham transaction. It is well settled that while considering the question as to whether a transaction is sham or genuine, the Court is required to find out about the motive, possession and consideration as well as relationship between the parties and custody of the document. It is, of course, true that the document was produced by the plaintiff, but an explanation had been furnished by defendants. In this context, the counsel for the appellants has rightly submitted that the lower appellate court has not tried to appreciate the explanation furnished by the defendants on the basis of wrong assumption that no such plea had been taken in the written

statement. So far as motive for the alleged sham transaction is concerned, it is simply the case of the plaintiff that in order to avoid payment of land revenue, such a sale deed had been executed. This does not appear to be strong enough motive for the alleged sham transaction. So far as payment of consideration is concerned, it is not disputed that the earlier transaction was of the year 1943 and the suit had been filed after about thirty-six years in the year 1979. There is a recital in the sale deed regarding receipt of consideration. Apart from the bare denial of the plaintiff, who obviously did not have any direct knowledge in the matter, there is no material to rebut the recital regarding payment of consideration. It has been held in the decision reported in A. I. R. 1971 Supreme Court 1028 (Smt. Rani and another v. Smt. Santa Bala Debanath and others) that recital in old sale deed relating to payment of consideration particularly when the vendor and the vendee are dead, is admissible. So far as possession is concerned, the lower appellate court has observed that defendant No. 2 had failed to prove that he was in possession. The lower appellate court has accepted the possession on the basis of the entry in the Record-of-Rights. The very fact that

plaintiff herself admitted that the purchasers from her father were in possession, but the lands had been recorded in her name clearly indicates that the Record-of-Rights did not reflect the correct position, The lower appellate court has refused to consider the explanation furnished by the defendants on the pretext that such a plea had not been taken. However, this appears to be an error of record, as the defendant No. 2 had taken a plea that the document had been handed over to the son of the plaintiff. I hold that the plaintiff has failed to prove that the sale deed in favour of defendant No. 2 by her father was a sham transaction and has failed to prove her possession over the suit land. As such, the Second Appeal is allowed and the plaintiff's suit is dismissed.

Vimal Chand Ghevarchand Jain and Ors. vs. Ramakant Eknath Jajoo:

MANU/SC/0441/2009 - (2009) 5 SCC 713 - A

document, as is well known, must be construed in its entirety. Reading the said in its entirety, there cannot be any doubt whatsoever that it was a deed of sale. It satisfies all the requirements of a conveyance of sale as envisaged under Section 54 of the Transfer of Property Act.

In Bishwanath Prasad Singh v. Rajendra Prasad and Anr. MANU/SC/8062/2006 : AIR 2006 SC 2965 , Court held: 16. A deed as is well known must be construed having regard to the language used therein. We have noticed hereinbefore that by reason of the said deed of sale, the right, title and interest of the respondents herein was conveyed absolutely in favour of the appellant. The sale deed does not recite any other transaction of advance of any sum by the appellant to the respondents which was entered into by and between the parties. In fact, the recitals made in the sale deed categorically show that the respondents expressed their intention to convey the property to the appellant herein as they had incurred debts by taking loans from various other creditors....

19. It is of some significance to note that therein the expressions "vendor", "vendee", "sold" and "consideration" have been used. These expressions together with the fact that the sale deed was to be executed within a period of 23 months i.e. up to June 1978, evidently the expression "vaibulwafa" as a condition was loosely used.

20. Furthermore, the agreement was also executed for a fixed period. The other terms and conditions of the said agreement (ekrarnama) also clearly go to show that the parties understood the same to be a deed of reconveyance and not mortgage or a conditional sale.

21. The terminology "vaibulwafa" used in the agreement does not carry any meaning. It could be either "bai-ul-wafa" or "bai-bil-wafa".

22. It will bear repetition to state that with a view to ascertain the nature of a transaction the document has to be read as a whole. A sentence used or a term used may not be determinative of the real nature of transaction.....Despite the fact that the term 'baib-ul-wafa' was used in the transaction, this Court held that the document in question was a deed of reconveyance and not a mortgage with conditional sale, stating:

23. Baib-ul-wafa, it was held by the trial court connotes only an agreement for sale. In terms of Section 91 of the Evidence Act, if the terms of any disposition of property is reduced to writing, no evidence is admissible in proof of the terms of such disposition of property except the document itself.

**Vimal Chand Ghevarchand Jain and Ors. vs.
Ramakant Eknath Jajoo:**

MANU/SC/0441/2009 - (2009) 5 SCC 713 - We

would, therefore, proceed on the premise that it was open to the respondent to adduce oral evidence in regard to the nature of the document. But, in our opinion, he did not discharge the burden of proof in respect thereof which was on him. The document in question was not only a registered one but also the title deeds in respect of the properties have also been handed over. Symbolical possession if not actual physical possession, thus, must be held to have been handed over. It was acted upon. The pleadings were required to be considered provided any evidence in support thereof had been adduced. No cogent evidence had been adduced by the respondent to show that the deed of sale was a sham transaction and/or the same was executed by way of a security..... Right of possession over a property is a facet of title. As soon as a deed of sale is registered, the title passes to the vendee. The vendor, in terms of the stipulations made in the deed of sale, is bound to deliver possession of the property sold. If he does not do so, he makes him liable for damages. The indemnity clause should have been construed

keeping in view that legal principle in mind. Although evidences had been brought on record to show that upon grant of leave and licence, the keys of godowns had been handed over but in respect thereof no contrary findings had been arrived at. We would assume that the parties entered into an arrangement as a result whereof the father of the respondent was to continue in possession. The character of his possession, however, changed from that of an owner to a licensee. A legal fiction in a situation of this nature is created in terms whereof the owner becomes dispossessed and regains possession in a different capacity, namely, as a licensee..... A heavy burden of proof lay upon the defendant to show that the transaction was a sham one. It was not a case where the parties did not intend to enter into any transaction at all. Admittedly, a transaction had taken place. Only the nature of transaction was in issue. A distinction must be borne in mind in regard to the nominal nature of a transaction which is no transaction in the eye of law at all and the nature and character of a transaction as reflected in a deed of conveyance. The construction of the deed clearly shows that it was a deed of sale. The stipulation with regard to payment of compensation in the event appellants

are dispossessed was by way of an indemnity and did not affect the real nature of transaction..... In any event, in view of the conduct of the respondent, he cannot claim equity. An equitable relief can be prayed for by a party who approaches the court with clean hands.....We, therefore, have no hesitation in holding that in the facts and circumstances of this case, the plaintiff's suit should have been decreed.

Division Bench of Court in Mandas vs. Manbai, MANU/MP/0134/1970 : 1972 MPLJ 852, In this case the purchaser had sued for possession of the land on the basis of sale-deed in his favour- The vendor pleaded that the document was not intended to convey title but was related to loan and led oral evidence about it. The vendor was an old man of above 60-years. The Court observed that the defendant could plead that the document was not intended to convey title put related to loan. The price was found to be inadequate. In these circumstances the sale-deed was held to be fictitious and the suit was dismissed.

Supreme Court dealt with the bar of Section 92 of Evidence Act, in the case of **Gangabai vs. Chhabubai, MANU/SC/ 0385/1981 : AIR 1982**

SC 20. Their Lordships observed that bar imposed by sub-section (1) of Section 92 applied only when a party seeks to rely upon the document embodying the terms of the transaction. In that event the law declares that the nature and intent of the transaction must be gathered from the terms of the document and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. This clause is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon between the parties and that the document is a sham. Such question arises when the party asserts that there was a different-transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether not recorded in the document, was entered into between the parties.

Mahadev Prasad Umadutt and Ors. vs. Munnibai and Ors.: MANU/MP/0674/1999 -

2001 (2) RCR (Civil) 127 When the transaction is unconscionable on the facts established on record and there is close relationship between vendor and vendee and the vendee is in a position to influence the will of the vendor, the plea of the vendor that the transaction intended was different than what is recorded as sale-deed, has to be accepted. The burden shifts on vendee to establish that the transaction was not unconscionable or sham. The vendee could achieve the end in the present case by showing that the current market price was actually paid. In fact there is proof on record that the amount of Rs.4,000/- for sale was totally inadequate i.e., even less than 1/6 of market price, then current.

Syed Rasool and others vs. Mohammad Moulana reported in MANU/KA/0094/1977 : AIR 1977 KAR 173, wherein it has been held as under: "3. A reading of the plaint shows that the plaintiffs case was that the sale deed executed by Saiduddin was a nominal one and was not intended to be effective by the parties to it. It was not their case that the sale deed was avoidable instrument. In the circumstances, the courts below were in error in holding that it was necessary for the plaintiffs to seek the relief of

cancellation of the sale deed. They were further in error in thinking that no oral evidence could be adduced by the plaintiffs to show that the document was a nominal one. When the document in question is a void one, the question of seeking its cancellation would not arise at all. It is only when a document is a voidable one that is valid until it is declared as void, the question of seeking its cancellation would arise. Section 92 of the Indian Evidence Act precludes a party from adducing oral evidence for the purpose of contradicting, varying, adding to, or subtracting from the terms of a contract or grant. In order to attract the provision of S. 92 there should be a contract in existence. When a party pleads that there was no contract at all or that an instrument which had been brought into existence earlier was only a sham one not intended, to be acted upon, it would be open to him to establish by oral evidence that there was no intention on the part of the parties to bring into existence a contract or an effective document. The Courts below while disposing of the case before them, failed to notice the above distinction. The order passed by the trial court rejecting the plaint and the judgment passed by the lower appellate court are, therefore, liable to be set aside. They are, accordingly, set

aside. The suit is remitted to the trial court with a direction to dispose it of afresh after recording the evidence to be adduced by the parties. The trial court shall if necessary after hearing the parties re-cast the issues framed in the suit. The institution fee paid on the memorandum of appeal shall be refunded to the appellants. No costs."

A. Abdul Rashid Khan (Dead) and Others Vs., P.A.K.A. Shahul Hamid and Others reported in MANU/SC/2734/2000 : (2000) 10 SCC 636, -

As per the proviso (4) to Section 92 of Indian Evidence Act, the oral evidence cannot exclude the written document except the oral agreement. Hon'ble Supreme Court says: "4. At the outset, we may consider the case of the appellants, as contained in the additional written statement that it was understood between the parties that the plaintiff would obtain the signatures of respondents 2 and 3 and that the sale deed would be executed as one composite sale deed of the entire property. On the contrary, the case of respondent 1 is that the appellants undertook to get the signatures of their sisters. They are all plea and contentions which are not borne out from the agreement and sale. These are pleas by

both the parties beyond the said written agreement. The law in this regard is well settled, in view of Section 92 of the Indian Evidence Act; where any contract is required by law to be reduced in writing, then no oral evidence or understanding to the contrary or what is apart from the said contract would be admissible in law. It is not in dispute in the present case, the agreement of sale was reduced to writing which was for an immovable property. Hence, these pleas, both of the appellants and respondent 1, as aforesaid being beyond the written agreement of sale cannot be taken into consideration."

S. Saktivel (Dead) by LRs., Vs., M. Venugopal Pillai and Others reported in MANU/SC/0499/2000 : (2000) 7 SCC 104. -

"6. In sum and substance what proviso (4) to Section 92 provides is that where a contract or disposition, not required by law to be in writing, has been arrived at orally then subsequent oral agreement modifying or rescinding the said contract or disposition can be substantiated by parol evidence and such evidence is admissible. Thus if a party has entered into a contract which is not required to be reduced in writing but such a contract has been reduced in writing, or it is

oral, in such situations it is always open to the parties to the contract to modify its terms and even substitute by a new oral contract and it can be substantiated by parol evidence. In such kind of cases the oral evidence can be let into prove that the earlier contract or agreement has been modified or substituted by a new oral agreement. Where under law a contract or disposition is required to be in writing and the same has been reduced to writing, its terms cannot be modified or altered or substituted by oral contract or disposition. No parol evidence will be admissible to substantiate such an oral contract or disposition. A document for its validity or effectiveness is required by law to be in writing and, therefore, no modification or alteration or substitution of such written document is permissible by parol evidence and it is only by another written document the terms of earlier written document can be altered, rescinded or substituted. There is another reason why the defendant/appellant cannot be permitted to let in parol evidence to substantiate the subsequent oral arrangement. The reason being that the settlement deed is a registered document. The second part of proviso (4) to Section 92 does not permit leading of parol evidence for proving a

subsequent oral agreement modifying or rescinding the registered instrument. The terms of registered document can be altered, rescinded or varied only by subsequent registered document and not otherwise. If the oral arrangement as pleaded by the appellant, is allowed to be substantiated by parol evidence, it would mean re-writing of Ext. A-1 and, therefore, no parol evidence is permissible. In view of the aforesaid legal position on interpretation of proviso (4) to Section 92 we have to examine as to whether settlement deed Ext. A-1 was required to be in writing under the law or not. It is not disputed that by settlement deed Ext. A-1, which is a disposition, Muthuswamy Pillai passed on right to property to all his sons who acquired right in the property. Where there is such conferment of title to the property, law requires it be in writing for its efficacy and effectiveness. A document becomes effective by reason of the fact that it is in writing. Once under law a document is required to be in writing parties to such a document cannot be permitted to let in parol evidence to substantiate any subsequent arrangement which has effect of modifying earlier written document. If such parol evidence is permitted it would divest the rights of other

parties to the written document. We are, therefore, of the view that the subsequent oral arrangement set up by the defendant-appellant cannot be proved by the parol evidence. Such a evidence is not admissible in evidence."

Supreme Court in the matter of **Jamila Begum (dead) through legal representatives v. Shami Mohd. (dead) through legal representatives and Anr. MANU/SC/1488/2018 : (2019) 2 SCC 727** has held that registration of the sale deed reinforces valid execution of the sale deed. It was observed as under:- "16. Sale deed dated 21.12.1970 in favour of Jamila Begum is a registered document and the registration of the sale deed reinforces valid execution of the sale deed. A registered document carries with it a presumption that it was validly executed. It is for the party challenging the genuineness of the transaction to show that the transaction is not valid in law.

Prem Singh and Ors. vs. Birbal and Ors. : MANU/SC/8139/2006 - There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be

on a person who leads evidence to rebut the presumption.

Supreme Court in the matter of **Vidhyadhar v. Manikrao and another MANU/SC/0172/1999 : (1999) 3 SCC 573** has held that even if the whole of the price is not paid, but sale deed is executed and thereafter registered, if the property is of value of more than Rs. 100, the sale would be complete.

Subhra Mukherjee v. Bharat Coaking Coal Ltd. MANU/SC/0162/2000 : AIR 2000 SC 1203, whether the document in question was genuine or sham or bogus, the party who alleged it to be bogus had to prove nothing until the party relying upon the document established its genuineness. <- (Rangammal vs. Kuppuswami and Ors. : MANU/SC/0620/2011) -> It is further well-settled that a suit has to be tried on the basis of the pleadings of the contesting parties which is filed in the suit before the trial court in the form of plaint and written statement and the nucleus of the case of the Plaintiff and the contesting case of the Defendant in the form of issues emerges out of that. It hardly needs to be highlighted that in a suit for partition, it is expected of the

Plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else's property meaning thereby disputed property is included in the schedule of the suit for partition, and the same is contested by a third party who is allowed to be impleaded by order of the trial court, obviously it is the Plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property belongs to the joint family which should be partitioned excluding someone who claims that some portion of the joint family property did not belong to the Plaintiff's joint family in regard to which decree for partition is sought.

Court in the matter of **Corporation of City of Bangalore v. Zulekha Bi MANU/SC/7346/2008 : 2008 (11) SCC 306 (308)** that it is for the Plaintiff to prove his title to the property. This ratio can clearly be made applicable to the facts of this case for it is the Plaintiff who claimed title to the property which was a subject-matter of the alleged sale deed of 24.2.1951 for which he had sought partition against his brother and,

therefore, it was clearly the Plaintiff who should have first of all established his case establishing title of the property to the joint family out of which he was claiming his share. When the Plaintiff himself failed to discharge the burden to prove that the sale deed which he executed in favour of his own son and nephew by selling the property of a minor of whom he claimed to be legal guardian without permission of the court, it was clearly fit to be set aside by the High Court which the High Court as also the courts below have miserably failed to discharge. The onus was clearly on the Plaintiff to positively establish his case on the basis of material available and could not have been allowed by the High Court to rely on the weakness or absence of defence of the Defendant/Appellant herein to discharge such onus.

**Lakhan Sao (Deceased) through Legal Heirs
vs. Dharamu Chaudhary :**

MANU/SC/0598/1991 - (1991) 3 SCC 331 - In the suit based on title the burden was undoubtedly on the plaintiff to prove such title. When the plaintiff has assailed the earlier deed executed by his vendor in respect of the same land it was for the plaintiff to establish that it was

a Farzi Kebala and sham transaction unsupported by consideration. The learned Additional District Judge has proceeded to consider how far this onus which lay heavily on the plaintiff had been discharged. He referred to the various tests that have been laid down in order to ascertain that a particular deed is a Farzi Kebala. He considered the relationship between the parties, the evidence relating to the custody of the document, passing of consideration, motive and possession. It was found that Lakhan Sao and his brother Gulab Sao were closely related to Tetri, that Ex.2-A sale deed was in the custody of Tetri and it had been produced in Court by the plaintiff. On the evidence, it was found that the stamp paper for the document was purchased by the vendor and there was clear indication that the vendee did not take part in the preparation of the document. The inferred this fact from the circumstance that incorrect particulars had been incorporated in the deed. He rejected the contention that the documents were surreptitiously obtained by the plaintiff and his vendor. It was noticed that even after the execution of the deeds, Tetri was continued to be in possession. She moved the authorities for recording her name in Jamabandi and she had

paid the rent. Regarding the motive for the execution of the deed, it was noticed that Mst. Tetri had debts and the deeds was executed to cover the property from the reach of the creditors and without consideration. The learned Additional District Judge considered the evidence relating to the consideration. He referred to the evidence of PW-8, the attesting witness and PW-14 the plaintiff. These witnesses stated that nothing had been paid as consideration. As per the recital in the deed an amount of Rs. 500/- was a prior payment and Rs.100/- was paid in cash at the time of execution. The learned Judge noticed that there was no specific statement regarding the payment of any part of the consideration in cash. The vendor was dead. Lakhan Sao, the defendant, avoided the witness box. The evidence of the parties to the document was not therefore on record. Gulab Sao, the brother of Lakhan Sao, was examined as DW-11. His evidence was analysed and was found to be discrepant. The learned Judge on a consideration of evidence on both sides found that the evidence on the point of payment of consideration by appellant Lakhan Sao is far from satisfactory and the evidence of the appellants is unworthy of credit. Motive was found to be satisfactorily

established as the existence of debts to some creditors was admitted. On the question of possession, the learned Judge scrutinised the evidence and found that Tetri was in possession even after execution of Ex. 2-A. Having found these ingredients in favour of the plaintiff, the learned Judge concluded that Ex.2-A executed by Tetri on 14.2.1959 was only Farzi Kebala without any consideration and it created no title and possession to the appellants.

The only point that has been stressed before us is that lower appellate court has wrongly proceeded on the basis that onus shifted to the defendant to prove the passing of consideration and that the evidence did not establish that fact. It was maintained that the onus did not shift as the burden was entirely on the plaintiff to prove the fact that document was inoperative and no consideration did pass thereunder. We have pointed out earlier that the High Court has set aside the earlier decree pointing out the error committed by the lower appellate court. This observation made by the High Court has been kept in mind by the Additional District Judge in disposing of the appeal thereafter. The learned Judge has considered the question of burden on the plaintiff

to establish that there had been no consideration. In examining the question whether the plaintiff had succeeded in proving the negative fact it was open to the court to consider the entire evidence on record when both the parties have tendered evidence and no part of the evidence could be left out. On a consideration of the whole evidence, the Court has concluded that there had passed consideration. This finding cannot, therefore, be said to be vitiated.

Supreme Court in **Pawan Kumar Gupta v. Rochiram Nagdeo. MANU/SC/1187/1999** has held that burden of proof to substantiate that recitals in the documents are untrue lies on the party who wants to prove it. The relevant extract is quoted below ; "23. The clear pleading of the plaintiff is that he purchased the suit property as per Ext. P. 11 sale deed. Burden of proof cannot be cast on the plaintiff to prove that the transaction was consistent with the apparent tenor of the document Ext. P-11 sale deed contains the recital that sale consideration was paid by the plaintiff to Narain Prasad the transferor. Why should there be a further burden of proof to substantiate that recitals in the

document are true? The party who wants to prove that the recitals are untrue must bear the burden to prove it..... 25. In this case. Ext. P. II is the document by which transfer of ownership from Narain Prasad was effected. When any party proposes to show something which is at variance with the terms of Ext. P. 11 the burden of proof is on him. When respondent asserted that the real transaction is not what is apparently mentioned in Ext, P. 11 the burden is on the respondent to establish the transaction which he asserts to be the real one."

In Vishwanath Bapurao Sabale v. Shalinibai Nagappa Sabale and others,
MANU/SC/0442/2009 : JT 2009 (5) SC 395 :
(AIR 2009 SC (supp) 1525) : (2009) 12 SCC 101
 wherein it was held as under: "27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption."

A Division Bench of the Calcutta High Court in the case of **Bhuban Mohini Dasi and others v. Kumud Bala Dasi and others reported in MANU/WB/0117/1923 : AIR 1924 Calcutta 467** has observed as under: "The rule thus enunciated must be coupled with the elementary principle that the burden of proof lies upon the person who asserts that the apparent is not the real state of things. It is important to bear in mind in this class of cases that, as pointed out by Lord Phillimore in *Manick Lal v. Bijoy Singh* A.I.R. 1921 P.C. 69, the decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. This recalls the earlier pronouncements to the same effect by Lord Westbury in *Sreeman v. Gopaul* (1866) 11 M.I.A. 28, and by Sir Lawrence Jenkins in *Minakumari v. Bijoy Singh* MANU/PR/0026/1916 : A.I.R. 1916. P.C. 238. But we are not unmindful that, in the words of Lord Hobhousa in *Uman Prasad v. Gandharp Singh* (1887) 15 Cal. 20, and of Lord Shaw in *Mohammad Mahbub v. Bharatindu* A.I.R. 1918 P.C. 137, as benami transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who

impugns its apparent character must not rely however solely on probabilities, as Lord Buckmaster observed in *Irshad Ali v. Kariman* MANU/PR/0105/1917 : A.I.R. 1917 P.C. 169. He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person, who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things : *Azimut v. Hurdwaree* MANU/PR/0008/1870 : (1870) 13 M.I.A. 395, *Faez Buksh v. Fukeerooden* MANU/PR/0018/1871 : (1871) 14 M.I.A. 234, *Suleiman v. Mehndi Begam* MANU/PR/0036/1897 : (1897) 25 Cal. 473, *Nirmal v. Mahomed* MANU/WB/0002/1898 : (1898) 26 Cal. 11, *Moti Lal v. Kundan Lal* MANU/PR/0136/1917 : A.I.R. 1917 P.C. 1."

In the case of Anil Rishi Vs. Gurbasaksh Singh reported in MANU/SC/8133/2006 : (2006) 5 SCC 558, dealing with the burden of proof, the Apex Court observed as follows:- "Difficulties which may be faced by a party to the lis can never be determinative of the question as to upon whom the burden of proof would lie. The learned Trial Judge, therefore, posed unto himself a wrong question and arrived at a wrong answer. The High

Court also, in our considered view, committed a serious error of law in misreading and misinterpreting Section 101 of the Indian Evidence Act. With a view to prove forgery or fabrication in a document, possession of the original sale deed by the defendant, would not change the legal position. A party in possession of a document can always be directed to produce the same. The plaintiff could file an application calling for the said document from the defendant and the defendant could have been directed by the learned Trial Judge to produce the same. There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always

on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same."

Renushree Lahkar and Ors. vs. Pradip Kr. Lahkar and Ors.: MANU/GH/0796/2018 - 2018

(4) GLT 733 (GAUHATI HC) - When both the parties adduce evidence in support of their respective issues and the entire evidence relating to the facts in issue are before the court, burden of proof loses its importance and the question of burden of proof becomes merely academic. What is important to note is that, evidence must be adduced in respect of the issue involved. Mere examining some witness by both the parties or adducing some evidence not relevant to prove the real issue in controversy or when such evidence adduced by the parties are not sufficient to arrive at a satisfactory conclusion without further evidence, relevancy of burden of proof does not disappear. Therefore, when each party adduces evidence to prove and disprove the fact-in-issue, then only, the importance of burden of proof disappears.

There is no gainsaying, that the initial burden is on the shoulder of the plaintiff, who knocks the door of the court for a decree or relief in his favour asserting certain facts, being the sole basis of the claim, be it negative or positive to prove such facts. Unless the plaintiff discharges his burden, he cannot succeed in the suit, despite weakness of the defence case. Apparently, in the case at hand, the plaintiff brought the suit for declaration that the alleged deed of partition was forged, therefore, necessarily initial burden was on the plaintiff to prove the plea of forgery. If the plaintiff adduces some evidence in discharge of his burden, the onus may stand shifted to the defendant to rebut such evidence. Therefore, unless evidence is brought on record enabling the court to come to a conclusion on the facts in issue, the question of burden of proof remains relevant.

The provision of Section 110 Evidence Act embodies the well known principle, that possession is the nine point of title or that the possession is a prima facie proof of ownership. Section 110 of the Indian Evidence Act raises a presumption of title in favour of a person in possession of the property, unless it is rebutted or proved that the other party possesses better

title. Hon'ble Bombay High Court in Secretary of State Vs. Cimon Lal 1942 Bombay 357 - in MANU/MH/0130/1941 : AIR 1942 Bombay 161 observed, that the presumption u/s. 110 would apply only if two conditions are satisfied - (1) that the possession of the plaintiff is not prima facie wrongful and (ii) that the title of the defendants is not proved. It is to be borne in mind, that the possession by itself constitutes limited title to the property, which is good against all, except the rightful owner. In order to draw a presumption u/s. 110 of the Indian Evidence Act and to shift the burden of proof of title on the defendants, Section 110 can be invoked only when apparently the defendants had no title, or there was absence of evidence with regard to title of either party.

In the instant case, admittedly the suit property was ancestral property of both the plaintiff and the defendants. Once property in question is proved to be ancestral property of both the plaintiff & defendant, nothing more is required to prove the title, and presumption u/s. 110 of the Evidence Act does not apply. The logical presumption on the facts of the present case would be that both the plaintiff and the defendants had title, until and unless it is proved, that the plaintiff alone had title over the suit

properties in exclusion of the other heirs. Therefore, Section 110 of the Evidence Act could not be invoked in the instant case for shifting the burden to the defendants to prove that the plaintiff did not have title over the suit properties. When admittedly the properties were ancestral properties of both the plaintiff and the defendants and the plaintiff had come with a plea that as per the subsequent family settlement, he became the owner of the property and sought for declaration that the previous deed of partition was forged and again unless the plaintiff proves the previous deed of partition to be forged, there could not be a presumption of title of the plaintiff, and as such, the provision of Section 110 Evidence Act would not apply in the case in hand. In any view of the matter, when both the courts below were of concurrent finding, that the plaintiff failed to discharge his burden to prove that the partition deed of 1994 was forged, which was essentially a finding of fact, such factual finding cannot be interfered in second appeal, unless found to be perverse.

In Tirupathi v. Lakshmana,
MANU/TN/0259/1953 : AIR 1953 Mad 545 the
Madras High Court held: ".....In my opinion,

whether a sale deed was a sham and simulated one not intended to convey any title or whether it was real one intended to pass title to the transferee thereunder depends upon the 'animus transferred' at the time when the parties entered into the transaction and each case has to be decided with reference to the documents & the surrounding circumstances."

In Udaya Chand Dutt v. Saibal Son, MANU/SC/0571/1987 : AIR 1988 SC 367 it was contended before the Supreme Court that one of the main indications which would show whether the transaction in question was one of loan and the document of sale was executed by way of security or that the transaction was an out and out sale of the property is whether the consideration appearing in the document appears to be too low. If, the consideration is too low, it would indicate that the transaction could not have been one of sale. If the consideration is fair or reasonable, it would indicate that the transaction was one of sale."

Akula Madhava Rao and Ors. vs. P. Rukmini Bai: MANU/AP/0625/1995 - In essence, the plea of the appellants was that the alleged

transaction of sale was no sale at all, as it was not intended to be acted upon by the parties. It was alleged to be a nominal and sham transaction. Whether it was intended to serve the collateral purpose of security for repayment of loan, or was a device to defeat the claim of the plaintiffs in the partition-suit, is immaterial. The main question is whether it was intended to be acted upon by the parties and for deciding that question, all such attending circumstances, which may be helpful in arriving at a just conclusion may be looked into. In other words, though the plea of loan was not raised, there are materials to indicate that it was a loan transaction and those materials are supplied by the respondent herself by her plaint pleadings and the documents executed by her and referred to hereinbefore.

Kalwa Devadattam and Ors. vs. The Union of India (UOI) and Ors.: MANU/SC/0106/1963 - AIR 1964 SC 880 - The plaintiffs contended that the debts due by Nagappa to Kumaji Sare Mal being immoral or avyavharika their share in the properties was not liable to be sold. In any event, they contended, the shares allotted to them under the deed of partition were not liable to be attached and sold in execution proceeding in enforcement

of the decree against their father Nagappa, and the remedy of the creditor even if the debts were not avyavharika was to file a suit to enforce the pious obligation of the plaintiffs and not in execution of the decree obtained against Nagappa alone. The creditors contended that the deed of partition was a sham transaction and therefore they were entitled to proceed in execution. Alternatively, it was contended that even if the deed of partition did not evidence a sham transaction, it was open to them as holders of a decree obtained before the partition to enforce the pious obligation of the plaintiffs to discharge the debts of their father in execution of the decree, and it was not necessary for them to file a separate suit. On the question as to the proper procedure for enforcement of the liability of a Hindu son to discharge the debts of his father which are not avyavharika, where since the passing of the decree on the debt against the father there has been a partition between the father and son, there has arisen difference of opinion. The Madras High Court in *Schwebo K. S. R. M. Firm v. Subbiah* I.L.R. (1945) Mad. 138., held that the son's share in the property cannot be proceeded against in execution, as the division of status brought about by the partition will

stand, notwithstanding the avoidance of the partition as a fraudulent transfer. This was reaffirmed in a Full Bench judgment of the Madras High Court in Katragadda China Ramayya v. Chiruvella Venkanraju MANU/TN/0372/1954 : AIR1954Mad864 , where the Court held :- "A son under the Hindu law is undoubtedly liable for the pre-partition debts of the father which are not immoral or illegal. If a decree, however, is obtained against the father alone, and there is a partition of the family properties, in execution of such a decree, the son's share cannot be seized by the creditor as by reason of the partition the disposing power of the father possessed by him over the son's share under the pious obligation of the son to discharge the father's debts can no longer be exercised. With the partition, the power comes to an end. The liability thereafter can be enforced only in a suit. After partition, the son's share can no longer be treated as property over which the father had a disposing power within the meaning of s. 60 Civil P.C."

18. On the other hand the Bombay High Court has held in Ganpatrao Vishwanathappa v. Bhimrao Sahibrao I.L.R. (1950) Bom. 414., that a decree obtained against the Hindu father may

after partition be executed against the son's interest by impleading the son as a party to the executing proceeding against the father. There is no clear expression of opinion by this Court on this question, though in *S. M. Jakati v. S. M. Borkar* MANU/SC/0148/1958 : [1959] 1 SCR 1384 , this Court has held that the liability of a Hindu son to discharge the debts of his father which are not tainted with immorality or illegality is founded in the pious obligation of the son which continues to exist in the life time and even after the death of the father and which does not come to an end as a result of partition of the joint family property : all that results from partition is that the right of the father to make an alienation comes to an end. In that case the property of the family was sold in execution of a money decree against the father and the sons sued to set aside the sale in so far as is affected their interest in the property and for a decree for possession of their share. The Court held that it was not proved that the liability which was incurred by the father was illegal or immoral and the sale of the joint family property including the share of the sons for satisfying the debts was valid notwithstanding the severance of the joint family status effected before the sale was held through Court. We do not

think it necessary to express our opinion on the question whether the remedy of the creditor is to file a separate suit to enforce the pious obligation of a Hindu son to discharge the debts of his father, where since the decree against the father on a debt there has been a severance of the joint family status, or whether he can proceed to execute the decree against the son's interest in the property, after impleading him as a party to the execution proceeding, for we are definitely of the opinion that the High Court was right in holding that that partition was a sham transaction which was not intended to be operative.

Sk. Sattar Sk. Mohd. Choudhari vs. Gundappa AMabadas Bukate: MANU/SC/0225/1997 - AIR 1997 SC 998 - Whether the premises, which is in occupation of a tenant, shall be retained jointly by all the lessors or they would partition it among themselves, is the exclusive right of the lessors to which no objection can be taken by the tenant, particularly where the tenant knew from the very beginning that the property was jointly owned by several persons and that, even if he was being dealt with by only one of them behalf of the whole body of the lessors, he cannot object to the

transfer of any portion of the property in favour of a third person by one of the owners or to the partition of the property. It will, however, be open to the tenant to show that the partition was not bona fide and was a sham transaction to overcome the rigours of Rent Control laws which protected eviction of tenants except on specified grounds set out in the relevant statute.

Mohni Bai Gurdasmal Hirwani vs. Kundanlal Chotelal Jain: MANU/MP/0605/1999 - The scope for challenging the partition between the co-owners by the tenant is very limited. There is no right in the tenant to prevent the joint owners or co-lessors from partitioning the tenanted accommodation among themselves. Whether the premises, which is in occupation of a tenant, shall be retained jointly by all the lessors or they would partition it amongst themselves, is the exclusive right of the lessors to which no objection can be taken by the tenant. It will, however, be open to the tenant to show that the partition was not bona fide and was a sham transaction to overcome the rigours of the Rent Control Laws which protect eviction of the tenants except on specified grounds set out in the statute.

State of Bihar vs. Radha Krishna Singh and Ors.: MANU/SC/0303/1983 - It is impossible to

infer that this genealogy is correct and connects all the necessary links in order to prove the plaintiffs' case as put forward in the plaint. For instance, Deep Narain Singh, elder brother of Bhola Singh has not been mentioned at all in this genealogy. Similarly, Pratap Narain Singh who was a great-grandson of Gajraj Singh has not been mentioned in this genealogy, and also the name of Raghunath Singh who was son of Aini Singh is also not mentioned therein. Moreover, no legal value or significance can be attached to the genealogy when the terms and recitals of the document have been found to be false and the court in which the suit based on the sale deed was filed was clearly of the opinion that the entire transaction was a sham one. Thus, there can be no guarantee of the truth of the statements made by Bhola Singh or even the genealogy given by him in that sale deed. Therefore, the genealogy is incorrect, inaccurate and incomplete and no reliance could be placed on this document for the purpose of proving the plaintiffs' genealogical tree.

Thiruvengadam Pillai vs. Navaneethammal, reported in MANU/SC/0942/2008 : (2008) 4 SCC 530: AIR 2008 SC 1541, wherein the Supreme Court held that when the execution of an unregistered document put forth by the plaintiff was denied by the defendants, the ruling that it was for the defendants to establish that the document was forged or concocted is not a sound proposition. The first appellate Court proceeded on the basis that it is for the party who asserts something to prove that thing; and as the defendants alleged that the agreement was forged, it was for them to prove it. But the first appellate Court lost sight of the fact that the party who propounds the document will have to prove it. It was the plaintiff who had come to Court alleging that the first defendant had executed an agreement of sale in his favour. The defendant having denied it, the burden was on the plaintiff to prove that the defendant had executed the agreement and not on the defendant to prove the negative.

In Krishna Mohan Kul @ Nani Charan Kul & Anr. v. Pratima Maity & Ors. MANU/SC/0690/2003 : AIR 2003 SC 4351, the Supreme Court, in para-12, observed as under:

"12. ... When fraud, mis- representation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence."

In K. Laxmanan v. Thekkayil Padmini & Ors., MANU/SC/8352/2008 : AIR 2009 SC 951. In para-19, the Supreme Court observed as under; "19. ... when there are suspicious circumstances regarding the execution of the Will, the onus is also on the propounder to explain them to the satisfaction of the Court and only when such responsibility is discharged, the Court would accept the Will as genuine. Even where there are no such pleas, but circumstances give rise to

doubt, it is on the propounder to satisfy the conscience of the Court. Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair or there might be other indications in the Will to show that the testator's mind was not free. In such a case, the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator."

Justice J B Pardiwala of Gujarat High court in case of **Akbarbhai Kesarbhai Sipai and Ors. vs. Mohanbhai Ambabhai Patel and Ors.:** **MANU/GJ/1282/2019 - 2019 GLH (3) 523 -** has summed up law on proof of sale deed and its execution and contents as follows:-

144. It is true that on mere production of a certified copy of a document which is more than 30 years old, no presumption is permitted regarding its genuineness or execution under Section 90 of the Evidence Act. Section 90 requires production in Court of the particular document in original in regard to which the Court

is asked to draw the statutory presumption of its execution. In *Basant Singh v. Brij Raj Saran Singh*, MANU/PR/0038/1935 : AIR 1935 PC 132 their Lordships of the Privy Council observed: "Their Lordships approve of the decision in *Shripuja v. Kanhayalal*, 15 Nag LR 192 : AIR 1918 Nag 114 in which the Judicial Commissioner held that production of a copy was not sufficient to justify the presumption of due execution of the original under Section 90, and they are unable to agree with the subsequent overruling of that decision in *Gopinath Maharaj Sansthan. v. Moti*, MANU/NA/0021/1933 : 30 Nag LR 155: AIR 1934 Nag 67."

145. This view came to be affirmed by the Supreme Court in *Harihar Prasad v. Deonarain Prasad*, (S) MANU/SC/0092/1956 : AIR 1956 SC 305 at p. 310. Although therefore a certified copy may be used to prove the contents of a document, yet no statutory presumption under Section 90 of the Evidence Act is available in a case where the original is not produced but a certified copy alone is produced.

146. The necessary question which arises from the above is: Is the certified copy of the sale deed given by the Registrar's Office admissible to prove the execution of the sale deed? I do not

think it can be seriously disputed that the certified copy although admissible in evidence as secondary evidence may be enough to prove the contents of the document, but is not enough to prove its execution.

147. It cannot however be contended that the certified copy is not admissible in evidence to prove even the contents of the document. Section 61 of the Evidence Act embodies the general rule that the contents of the documents may be proved either by primary or secondary evidence. The terms "primary" and "secondary evidence" have been explained in Sections 62 and 63. It is Section 64 which lays down that the documents must be proved by primary evidence except in the cases where the secondary evidence is permitted under the Evidence Act. This section rests on the maxim that the 'best evidence' must always be produced. But when it is proved that the original is either lost, or has been willfully suppressed or cannot be produced for reasons beyond the control of the plaintiff, secondary evidence can certainly be looked into.

148. Now under Section 65, the secondary evidence may be given of the existence, condition or contents of a document when the original is a public document within the meaning of Section

74. Section 74 defines what are public documents. Subsection (2) of Section 74 states that the public records kept in any State of private documents are also public documents. This Section therefore refers to such records also as are kept under the Indian Registration Act, particularly Sections 51 and 57-Section 51 refers to the register-books to be kept in the several registration offices. Under Section 57 registering officers are under a legal obligation to allow inspection of certain books and indexes, and to give certified copies of entries. Under Sub-section (5) of Section 57 all copies given under the said Section are to be signed and sealed by the registering officer. These certified copies shall be admissible for the purposes of proving the contents of the original document.

149. Under Section 77 of the Evidence Act also certified copies are admissible to prove the contents of the public documents. There is however some difference between Section 57 of the Registration Act and Section 77 of the Evidence Act. Whereas Section 57 of the Registration Act makes the certified copies admissible to prove the contents of the original documents. Section 77 of the Evidence Act makes the certified copies admissible to prove the

contents of the public documents. This difference does not alter the effect as far as this case is concerned. This Section i.e., Section 57, therefore, permits a certified copy to be used for the purposes of proving the contents of the original document. Similarly under Section 60(2) of the Registration Act a certificate containing the word. 'registered' together with the number and page of the book in which the document has been copied-shall be signed and sealed and dated by the registering officer. This certificate under Section 60(2) is admissible for the purpose of proving that the document has been duly registered in the manner provided by this Act and that the facts mentioned in the endorsement referred to in Section 59 have occurred as therein mentioned.

150. Although therefore a mere registration of a document may not by itself constitute sufficient proof of the execution of the document, but in view of Sections 57 and 60 of the Registration Act the-certified copy and the certificate issued by the Registrar, do, in my judgment, constitute sufficient evidence to prove the contents of the document and also to some extent an evidence of the execution of the document. It may be that the proof of admission

of execution before the Registrar may not satisfy completely the requirements of Section 67 of the Evidence Act which requires that the signature of the executant must be proved to be in his handwriting. But it cannot be argued that admission of signature before the Registrar cannot in any case form an evidence of the execution of the document. It may be argued validly that merely on the basis of admission before the Registrar "it may be dangerous to declare the execution of the document as proved, but certainly if there is other corroborating evidence the admission of execution before the Registrar can be a relevant piece of evidence from which the presumption of execution can legitimately be drawn. After all the solemnity of the registration of a document cannot be lost sight of. The statutory inference which gives rise from the solemnity of the registration, cannot be, therefore, ignored.

151. A combined reading of Sections 57 and 60 of the Registration Act and Section 67 of the Evidence Act lead me to the conclusion that mere production of a certified copy of a document registered may not be enough to prove the execution of the document. But it is sufficient to prove the contents of the document. A certificate

issued by the Registrar under Section 60 is acceptable in evidence to prove to some extent the admission of execution made by the executor before the Registrar. It may be that an imposter approached the Registrar and got the registration made, but no such allegation is made in this case. It is not even suggested to any one in the witness box. If apart from the admission incorporated in the certificate of the Registrar under section 60(2) of the Registration Act, there is other evidence to corroborate the admission, the execution of the document can be considered as proved. The two courts below, as stated above, after due consideration of the oral as well as the documentary evidence on record, has recorded a concurrent finding as regards the genuineness of the sale deed as well as due execution of the sale deed. The attempt on the part of the learned counsel appearing for the power of attorney is to persuade me to take the view that the evidence on record is deficient and not sufficient to hold valid execution of the sale deed.

Sohan Lal vs. Ghanshyam:
MANU/HP/2036/2016 - It is more than settled that heavy burden of proof lies upon a person impugning transaction to show that the

transaction was a sham or fraudulent one. It is not a case where a party did not intend to enter into any transaction at all because admittedly, the parties had already entered into two transactions earlier to the one involved in the present lis. It is also not in dispute that a transaction did take place. Only the nature of transaction is in issue. A distinction must therefore be borne in mind in regard to the nominal nature of a transaction which is no transaction in the eye of the law at all and the nature and character of a transaction as reflected in a deed of conveyance. The parties entered into an agreement as a result whereof, the defendant was put in possession and, therefore, in such circumstances, it was incumbent upon the plaintiff to have led clear, cogent and convincing evidence regarding the sale deed being vitiated by fraud. Indisputably, the sale deed in question is a registered one and is presumed to have been validly executed and the onus of proof, will be on those, who want to off-set the above presumption. It would also be noticed that the plaintiff has miserably failed to prove the plea of fraud. It is well settled that the plea of fraud must be specifically proved and cannot be based on mere suspicion. The party alleging fraud is to establish

it beyond reasonable doubt with cogent evidence and suspicion cannot be accepted as proof. Fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt and same cannot therefore be based on suspicion and conjecture.

In Trishala Jain and Anr. v. State of Uttaranchal and Anr. MANU/SC/0587/2011 : AIR 2011 SC 2458, this Court held that in case the parties do not lead any evidence on record it is difficult for the court to award compensation merely on the basis of imagination/conjectures, etc. The Act provides for compensation for acquisition of land and deprivation of the property which is reasonable and just. The court must avoid relying on a sham transaction which lacks bona fide and which had been executed for the purpose of raising the land price just before the acquisition to get more compensation for the reason that fraudulent move or design should not be considered as a proof in such cases though such a conclusion can be inferred from the facts and circumstances of the case.

Kishorilal Agrawalla and Ors. vs. Jugal Kishore Agrawalla and Ors.: MANU/OR/0174/2016 -

Here let me also state that said plea itself is not entertainable in the eye of law. In a case of nominal and sham transaction, the foundation stands that by such document no transaction has actually been effected and the transferor retains the title. So such a stand is available to be taken only by the transferor that he merely executed the document without intending to transfer the title which in fact he retained and continued to enjoy the property as such. But in the instant case, the said plea is taken by the purchaser. So, it is not understood as to what he actually means to say by that and in what direction it leads him and as to which destination. If inference is drawn then it may be said that he wants to plead that the transaction did not affect his title over the land that he was having as the successor of Changilal, the real owner. In this situation, undoubtedly the burden heavily lies upon him to prove as to for what purpose then this document was brought into existence by taking up the said exercise and unless that is duly established, the very plea of Benami itself falls flat on the ground and bites dust as those amount to blowing hot and cold in the same breath.

Gurdial Singh and others v. Raj Kumar Aneja and others MANU/SC/0077/2002 : (2002) 2 SCC 445 has held that Landlord-tenant relationship can be challenged on ground that lease deed creating it represents a sham transaction aimed at avoiding the effect of rent control legislation and not intended to be acted upon. Burden of proof however lies on party taking such plea. Where direct evidence is not available, it would be permissible to draw an inference from significant circumstances.

PLAINTIFF HAS TO ESTABLISH TITLE OF PROPERTY TO THE JOINT FAMILY

It was still further held by this Court in the matter of **Corporation of City of Bangalore vs. Zulekha Bi, 2008 (11) SCC 306 (308)** that it is for the plaintiff to prove his title to the property. This ratio can clearly be made applicable to the facts of this case for it is the plaintiff who claimed title to the property which was a subject-matter of the alleged sale deed of 24.2.1951 for which he had sought partition against his brother and, therefore, it was clearly the plaintiff who should have first of all established his case establishing

title of the property to the joint family out of which he was claiming his share. When the plaintiff himself failed to discharge the burden to prove that the sale deed which he executed in favour of his own son and nephew by selling the property of a minor of whom he claimed to be legal guardian without permission of the court, it was clearly fit to be set aside by the High Court which the High Court as also the courts below have miserably failed to discharge. The onus was clearly on the plaintiff to positively establish his case on the basis of material available and could not have been allowed by the High Court to rely on the weakness or absence of defence of the defendant/appellant herein to discharge such onus.

Rangammal vs. Kuppuswami and another (AIR 2011 SC 2344) It hardly needs to be highlighted that in a suit for partition, it is expected of the plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else's property meaning thereby disputed property is included in the schedule of the suit for partition, and the same is contested

by a third party who is allowed to be impleaded by order of the trial court, obviously it is the plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property belongs to the joint family which should be partitioned excluding someone who claims that some portion of the joint family property did not belong to the plaintiff's joint family in regard to which decree for partition is sought.

PLAINTIFF CANNOT RELY ON WEAKNESS OF DEFENCE TO DISCHARGE ONUS

Supreme Court in the case of **State of J & K vs. Hindustan Forest Company, 2006 (12) SCC 198**, wherein it was held that the onus is on the plaintiff to positively establish its case on the basis of material available and it cannot rely on the weakness or absence of defence to discharge onus.

THE BURDEN WOULD UNDOUBTEDLY LIE ON THE PARTY WHO ASSERTS THE EXISTENCE OF A PARTICULAR STATE OF THINGS ON THE BASIS OF WHICH HE CLAIMS RELIEF

Court in Bhagwati Prasad Sah v. Dulhin Rameshwari Juer [1951] S. C. R. 603, stated the law thus : "The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but where it is admitted that one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the other side too that because one member of the family separated himself, there has been separation with regard to all. It would be 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 amongst the other coparceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief."

Court in **Varada Bhavanarayana Rao v. State of A.P. MANU/SC/0196/1963 : AIR 1963 SC 1715**, held that in terms of Section 102 of the Evidence Act, 1872, the burden of proof in a suit or proceeding lies on that person who would fail

if no evidence at all were given on either side. It was held as under: 15. That being the position, the question on which of the contending parties the burden of proof would lie has to be decided on the relevant provisions of the Evidence Act. Section 101 of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Section 102 provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Section 103 provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the burden of proof of that fact shall lie on any particular person.

DEED OF PARTITION OR MEMORANDUM OF PARTITION? ONLY MEMORANDUM OF PAST EVENT IS ADMISSIBLE?

(2004) 11 SCC 391 (C.T.Ponnappa Vs State of Karnataka). “4. previous partition has been attempted to be proved by the document dated 2-4-1996, Exhibit P-46, wherein there is a recital

that partition had already been effected by deed dated 31-3-1975, which has not been brought on record. It is not known whether the 1975 deed was a deed of partition or a memorandum of partition. In case partition was effected thereby, we do not know whether the same was registered or unregistered. If it was unregistered, the same could not be taken into consideration to prove partition between the parties as it was inadmissible in evidence. It was pointed out that Exhibit P-46 further shows that apart from the partition effected by deed dated 31-3-1975, parties partitioned their properties at least by the deed dated 2-4-1996, Exhibit P-46. Learned counsel very fairly could not contend that the said deed was a memorandum of partition. This document being not a registered one was inadmissible in evidence and, therefore, it cannot be of any avail to the prosecution to prove partition amongst the two brothers."

In Roshan Singh v. Zile Singh 1988 AIR 881, 1988 SCR (2)1106 it is held that-- "It is well settled that while an instrument of partition which operates or is intended to operate as a declared volition constituting or severing ownership and causes a change of legal relation

to the property divided amongst the parties to it, requires registration under Section 17(1)(b) of the Act, a writing which merely recites that there has in time past been a partition, is not a declaration of Will, but a mere statement of fact, and it does not require registration. The essence of the matter is whether the deed is a part of the partition transaction or contains merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well settled that a mere list of properties allotted at a partition is not an instrument of partition and does not require registration. Section 17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right and there would be no necessity of registering such a document. Two propositions must therefore flow: (1) A partition may be effected orally; but it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register

it. If it is not registered, Section 49 of the Act will prevent its being admitted in evidence. Secondly, evidence of the factum of partition will not be admissible by reason of Section 91 of the Evidence Act, 1872. (2) Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered, to prove the fact of partition." It is further held that : "It is also well settled that the document though unregistered can however be looked into for the limited purpose of establishing a severance in status, though that severance would ultimately affect the nature of the possession held by the members of the separated family as co-tenants. The document in the instant case can be used for the limited and collateral purpose of showing that the subsequent division of the properties allotted was in pursuance of the original intention to divide. In any view, the document was a mere list of properties allotted to the shares of the parties."

TO SUM UP THE LEGAL POSITION

- (I) A family arrangement can be made orally.
- (II) If made orally, there being no document, no question of registration arises.
- (III) If the family arrangement is reduced to writing and it purports to create, declare, assign, limit or

extinguish any right, title or interest of any immovable property, it must be properly stamped and duly registered as per the Indian Stamp Act and Indian Registration Act.

(IV) Whether the terms have been reduced to the form of a document is a question of fact in each case to be determined upon a consideration of the nature of phraseology of the writing and the circumstances in which and the purpose with which it was written.

(V) However, a document in the nature of a Memorandum, evidencing a family arrangement already entered into and had been prepared as a record of what had been agreed upon, in order that there are no hazy notions in future, it need not be stamped or registered.

(VI) Only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess.

(VII) If the family arrangement is stamped but not registered, it can be looked into for collateral purposes.

(VIII) Whether the purpose is a collateral purpose, is a question of fact depends upon facts and circumstances of each case. A person can not claim a right or title to a property under the said document, which is being looked into only for collateral purposes.

(IX) A family arrangement which is not stamped and not registered cannot be looked into for any purpose in view of the specific bar in Section-35 of the Indian Stamp Act.

BURDEN LAY ON THE PLAINTIFF TO PROVE THAT THE PROPERTY HAD NOT BEEN PARTITIONED IN THE PAST EVEN IF THERE WAS NO WRITTEN STATEMENT TO THE CONTRARY OR ANY EVIDENCE OF REBUTTAL
2012 SC

Honourable Apex Court in **C.N.Ramappa Gowda v. C.C.Chandregowda** reported in (2012) 5 Supreme Court Cases 265. BY THE HONBLE JUSTICE T.S.THAKUR & THE HONBLE JUSTICE GYAN SUDHA MISHRA “Even if the trial court relied upon these documents to infer that the property was joint in nature, it failed to record any reason as to whether the property was never partitioned among the coparceners. It is a well

acknowledged legal dictum that assertion is no proof and hence, the burden lay on the plaintiff to prove that the property had not been partitioned in the past even if there was no written statement to the contrary or any evidence of rebuttal. The trial court in our view clearly adopted an erroneous approach by inferring that merely because there was no evidence of denial or rebuttal, the plaintiff's case could be held to have been proved. The trial court, therefore, while accepting the plea of the plaintiff-appellant ought to have recorded reasons even if it were based on ex-parte evidence that the plaintiff had succeeded in proving the jointness of the suit property on the basis of which a decree of partition could be passed in his favour. plaintiff-appellant has sought to prove his case that the suit property was a joint family property only on the strength of affidavit which he had filed and has failed to lead any oral or documentary evidence to establish that the property was joint in nature. Even if the case of the plaintiff-appellant was correct, it was of vital importance for the trial court to scrutinize the plaintiff's case by directing him to lead some documentary evidence worthy of credence that the property sought to be partitioned was joint in nature. But the trial court

seems to have relied upon the case of the plaintiff merely placing reliance on the affidavit filed by the plaintiff which was fit to be tested on at least a shred of some documentary evidence even if it were by way of an ex-parte assertion. Reliance placed on the affidavit in a blindfold manner by the trial court merely on the ground that the defendant had failed to file written statement would amount to punitive treatment of the suit and the resultant decree would amount to decree which would be nothing short of a decree which is penal in nature. the effect of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgement, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgement and decree could not possibly be passed without requiring him to prove the fact pleaded in the plaint. It is only when the Court for recorded

reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the Court can conveniently pass a judgement and decree against the defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex-parte judgement without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex-parte judgement although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceeding which hardly promotes the cause of speedy trial. However, if the Court is clearly of the view that the plaintiff's case even without any evidence is prima facie unimpeachable and the defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree. What would be the nature of such a case ultimately will have to be left to the wisdom and

just exercise of discretion by the trial court who is seized of the trial of the suit.”

**GENEROSITY OR KINDNESS CANNOT
ORDINARILY BE REGARDED AS AN
ADMISSION OF A LEGAL OBLIGATION**

**K. V. Narayanan vs K. V. Ranganandhan & Ors
AIR 1976 SC 1715. 1976 SCR (3) 637** It is true that property separate or self- acquired of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with intention of abandoning his separate claim therein but the question whether a coparcener has done so or not is entirely a question of fact to be decided in the light of all the circumstances of the case. It must be established that there was a clear intention on the part of the coparcener to waive his separate rights such an intention cannot be inferred merely from the physical mixing of the property with his joint family or from the fact that other members of the family are allowed to use the property jointly with himself or that the income of the separate property is utilised out of generosity or kindness to support persons whom the holder is not bound

to support or from the failure to maintain separate accounts for an act of generosity or kindness cannot ordinarily be regarded as an admission of a legal obligation. The mere fact that the properties were not separately entered by the coparcener in the book of account or that he did not maintain a separate account of earnings from these properties would not deprive the properties of their character of self acquired properties.

IN THE ABSENCE OF PROOF OF MISAPPROPRIATION OR FRAUDULENT OR IMPROPER CONVERSION MANAGER CANNOT BE ASKED ACCOUNTS FOR PAST DEALINGS

K. V. Narayanan vs K. V. Ranganandhan & Ors
AIR 1976 SC 1715. 1976 SCR (3) 637 The legal position is well settled that in the absence of proof of misappropriation or fraudulent or improper conversion by the manager of a joint family a coparcener seeking partition is not entitled to call upon the manager to account for his past dealing with the family property. The coparcener is entitled only to an account of the joint family property as it exists on the date he demands partition.

PERSONS CLAIMING JOINT ACQUISITION TO PROVE BY COGENT AND STRONG EVIDENCE THAT THE PROPERTY IN DISPUTE WAS ACQUIRED WITH THEIR CONTRIBUTIONS AND ALSO TO FURNISH SUFFICIENT GOOD EVIDENCE TO PROVE THAT THERE WERE OTHER JOINT PROPERTIES CREATED BY THEM.

Usman Sab vs Dastagir Sab ILR 1996 KAR 484, 1995 (4) KarLJ 429 Until and unless the persons claiming that the properties are joint acquisition prove by cogent and strong evidence that the property in dispute was acquired with their contributions and also to furnish sufficient good evidence to prove that there were other joint properties created by them, that the property was purchased by joint income or some part of the sale consideration was provided by contributions, that property was acquired as such and that enjoyed the property by him with the person in whose name the property was purchased as belonging to them jointly. In other words, in such cases the person contributing, may not be termed as a co-sharer, but, he might be advancing consideration, therefore, that person has to prove that by contribution, he has provided certain

funds for purchase of the property by the person in his name and that transfer deeds stand in name of purchaser as co-sharer in the item purchased.

PRINCIPLES DEDUCIBLE REGARDING UN-REGISTERED DOCUMENTS

B. CHANDRA KUMAR, J of AP High Court in the case of **Lakkoji Mohana Rao vs Lakkoji Viswanadham** Decided on 16-12-2011

1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.
2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.
3. A collateral transaction must be independent of, or divisible from, the transaction to affect which the law required registration.
4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc., any right, title or interest in immovable property of the value of one hundred rupees and upwards.

5. If document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose.

PROOF OF RELATIONSHIP – ONLY VOTER LIST IS NOT ENOUGH

Muniga Alias And Abbaiah Another vs Muniraja And Others ILR 2000 KAR 3564, 2000 (5)

KarLJ 527 So far as the entries made in the voters list, they do not assume the character of evidence at all as the person who prepared the voters list is not examined. Mere production of voters list is no proof of the particulars furnished and that no legal inference can be drawn only because some relationship is attributed to the person named in the voters list. It is no doubt a public document, but the said document cannot be relied upon to prove the relationship.

..... The law presumes strongly in favour of legitimacy of offspring as it is birth that determines the status of a person. Section 112 of the Evidence Act reads as follows.- "The fact that any person was born during the continuance of a valid marriage between his mother and any man,

or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the 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". The presumption arises under Section 112 of the Act on proof of the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the 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. The presumption of legitimacy is a rebuttable presumption of law and the only way of displacing it, is to show, as pointed out in the later part of the section, that the parties to the marriage had no access to each other at the time when the child was begotten and no other exception is allowed. That is, it must be proved that access was impossible on account of impotency, serious illness, absence etc., or by very convincing evidence that though opportunity existed, there was no sexual intercourse during

the period when the child must have been begotten. The question whether there was access or non-access in the case on hand does not assume importance as the question requiring for consideration is whether they were born to their father.....

PARTY ALLEGING THAT PROPERTY IS NOT PURCHASED BY HIM ON OWN BUT FOR OTHERS HAVE TO PROVE IT

G. Chikkapapanna Alias G.C. ... vs Smt. Kenchamma ILR 1998 KAR 3450, 1998 (5)

KarLJ 360 Plea of a transaction exhibited by a deed to be benami is to be established by the party raising it. Burden of proof to establish a transaction to be benami is to be discharged by party raising the plea. The party raising such a plea, either in the plaint or in the written statement as defence cannot succeed unless it proves that property under the deed of transfer though has been purchased in the name of a person in whose name the deed stands, but the real purchaser is a different person and that the same had not been purchased for the benefit of such person named in the deed as purchaser in addition to establishing the passing of sale

consideration and conduct or dealing with property by the parties namely possession, control, etc., over property. It is also well established principle of law that when both the parties have lead evidence in the case, it is question of appreciation of evidence and question of burden of proof remains one of academic importance.

ONLY PUBLIC DOCUMENT CAN BE PRODUCED AND PROVED IN CERTIFIED FORM - NOT PRIVATE DOCUMENTS

G. Chikkapapanna Alias G.C. ... vs Smt. Kenchamma ILR 1998 KAR 3450, 1998 (5) KarLJ 360 It is trite principle of law as per Section 64 of the Evidence Act, that the documents are to be proved by primary evidence only with exception to cases for adducing secondary evidence is made out, established under Section 65 or 66 of the Act. The primary evidence as per Section 62 of the Act means the documents itself. It is thus if a document is to be proved, it has to be proved by production of the document in original itself except in cases or situations referred to or covered by Section 65 or 66 of the Act. Under clause (e) of Section

65 of the Evidence Act, secondary evidence may be given of existence, condition and contents of a document, if original is a public document within the meaning of Section 74 or if the original is document of which a certified copy is permitted by Evidence Act or any other law in force in the Country to be given in evidence. The emphasis under clause (e) is on original being a public document i.e., the original is document of which certified copy is sought to be produced should itself be a public document as per Section 74 of the Evidence Act. It is well settled the documents such as sale deeds, mortgage deeds, gift deeds, leases, settlement deeds exhibiting settlements made by private parties are private documents. Under Section 74 of the Evidence Act, public documents have been defined, and as per sub-section (1) of Section 74, such documents as are said to form acts or record acts of public authorities as such, as indicated by clauses (i), (ii) and (iii) of sub-section (1) of Section 74, itself, not of private individuals. Sub-section (2) further provides the public records, kept in a state of private documents, are also taken to be public documents. All the other documents which are not public documents are private documents vide, Section 75 of the Evidence Act. Thus

Sections 74 and 75 indicate the distinction between public and private documents. The Books maintained in Sub-Registrar's Office during the course of registration, in which the document is copied out, may be said or termed to be public document, but that does not make the original deed a public document by itself. The sale deed, mortgage deed, gift deed, leases or settlement deed entered between private parties remain private documents and do not become public documents by reason of registration.

Section 57 of the Registration Act, provides that registering office have to allow the inspection of certain books and indexes as well as to have to, or have been authorised to, give certified copies of the entries made in such books as are referred to in Section 57 of the Registration Act. Sub-section (11) of Section 57 provides that Book Nos. 1 and 2 and index relating to Book No. 1 shall be subject to payment fee payable at all times be open to inspection by any person applying for inspection. It further provides that subject to Section 62 of the Registration Act, all persons who apply for the supply of copies of entries contained in such books shall be given the copies of entries in such books. Sub-sections (2) and (3) of Section 57 provides for copies of entries in Books

3 and 4 and indexes relating thereto to be given to person referred therein only or in circumstances specified therein i.e., in the sub-section concerned. Sub-section (5) of Section 57 provides that all copies given under this section shall be signed and sealed by the registering officers and shall be admissible for the purpose of proving the contents of the original documents. The entries made in Book No. 1 or Book No. 2 etc., are only entries of books. May it contain a copy of original document, i.e., copied in the book concerned but the said entry by itself is not the original document. The entry may be a copy, in register or book, from the original deed itself, which original deed is, as per Section 61(2) of Registration Act, returned to person presenting it. So the copy of entry which is given under Section 57 is not the copy from original deed itself but the copy from the copy of deed only. Sub-section (5) of Section 57 makes provision for copy from copy of document given under Section 57(1), (2) and (3), admissible only for limited purpose namely of proving the contents of the original document. Such a copy cannot be termed to be certified copy of the original document, but a copy of the entry or of the (copy) of the document. It may be a secondary

evidence but not covered by clause (f) of Section 65 of the Evidence Act.

**PRESUMPTION ABOUT OLD DOCUMENTS –
NOT AVAILABLE TO CERTIFIED COPIES**

G. Chikkapapanna Alias G.C. ... vs Smt. Kenchamma ILR 1998 KAR 3450, 1998 (5) KarLJ 360 Section 90 of the Evidence Act as held not to be applicable to certified copies of deeds, even of more than thirty years period and there may be cases where after expiry of long period of thirty years or more, no witnesses of the deed being available, inspite of original having been lost or destroyed and on certified copies of said private deed, such as sale deed etc., being filed and admitted in evidence as secondary evidence under Section 65 of the Evidence Act and presumption under Section 90 of Evidence Act being not available and applicable, the parties may suffer irreparably and the object and provision of Section 65 of Evidence Act, allowing filing of secondary evidence 'Certified copy of deed' may be rendered illusory, may be said to be genuine grievance or problem. In Uttar Pradesh by introducing amendment to Section 90 of the Evidence Act vide, Uttar Pradesh Civil Laws

(Amendment) Act No. 24 of 1954 and by enacting sub-section (2) to Section 90 of Evidence Act and introducing Section 90-A as well the Uttar Pradesh Legislature provided such a presumption being applicable to cases where certified copies of such old documents are filed.

THE HON'BLE JUSTICE Dr B.S. Chauhan, THE HON'BLE JUSTICE Fakkir Mohamed Kalifulla of Supreme Court of India in the case of **State Of A.P. & Ors. vs M/S. Star Bone Mill & Fertiliser ... Decided on 21 February, 2013** - Section 90 of the Evidence Act is based on the legal maxims : Nemo dat quid non habet (no one gives what he has not got); and Nemo plus juris tribuit quam ipse habet (no one can bestow or grant a greater right, or a better title than he has himself). This section does away with the strict rules, as regards requirement of proof, which are enforced in the case of private documents, by giving rise to a presumption of genuineness, in respect of certain documents that have reached a certain age. The period is to be reckoned backward from the date of the offering of the document, and not any subsequent date, i.e., the date of decision of suit or appeal. Thus, the said section deals with the admissibility of ancient documents, dispensing

with proof as would be required, in the usual course of events in usual manner.

RELEASE DEED INTENTION OF PARTIES TO BE DEDUCED FROM DEED

In **CHINNATHAYI v. KULASEKHARA PANDIYA NAICKER AND ORS. 1952 AIR 29, 1952 SCR 241** , the Supreme Court has stated the principle “It is well settled that general words of a release do not mean release of rights other than those then put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed.” In each case it is incumbent on the plaintiff to adduce satisfactory grounds for holding that the joint ownership of the defendant's branch in the estate was determined so that it became the separate property of the last holder's branch. The test to be applied is whether the facts show a clear intention to renounce or surrender any interest in the impartible estate or a relinquishment of the right of succession and an intention to impress upon the zamindari the character of separate property. The right to bring about a partition of an impartible estate cannot be inferred from the power of alienation that the holder thereof

may possess. In the case of an impartible estate the power to divide it amongst the members does not exist, though the power in the holder to alienate it is there, and from the existence of the one power the other cannot be deduced, as it is destructive of the very nature and character of the estate and makes it partible property. A member of a joint family owning an impartible estate can on behalf of himself and his heirs renounce his right of succession but any such relinquishment must operate for the benefit of all the members and the surrender must be in favour of all the branches of the family as representing all its members.

IF THE REPRESENTATION TO THE RESPONDENTS' FATHER WAS INCORRECT, THE APPELLANT SHOULD HAVE EXAMINED HIS BROTHERS.

2008 (7) SCC 46, HARDEO RAI VS SAKUNTALA DEVI AND OTHERS BENCH: S.B. SINHA & V.S.

SIRPURKAR The representation made by the appellant is noticed. If the representation to the respondents' father was incorrect, the appellant should have examined his brothers. He should have shown that such a representation was made

under a mistaken belief. He did nothing of that sort.

ADMISSION OF SEPARATE POSSESSION RAISES PRESUMPTION OF PARTITION

2008 (7) SCC 46, HARDEO RAI VS SAKUNTALA DEVI AND OTHERS BENCH: S.B. SINHA & V.S. SIRPURKAR In view of the admission made by the appellant himself that the parties had been in separate possession, for the purpose of grant of a decree of specific performance of an agreement, a presumption of partition can be drawn. The Single Judge of the High Court committed a serious error in so far as it failed to take into consideration the essential ingredients of a Mitakshra Coparcenary.

WHERE THERE IS A DOCUMENT THE LEGAL EFFECT OF WHICH CAN ONLY BE TAKEN AWAY BY SETTING IT ASIDE OR ITS CANCELLATION

In the next decision in the case of **Smt. Bismillah v Janeshwar Prasad and Others, AIR 1990 SC 540: (1990)1 SCC 207;** the Apex Court was dealing with a case where the issue revolved on a

plea of nullity of certain sale deeds and the High Court had held that the plaint averment which amounted to plea of nullity of the transactions was only a prayer which was simply illusory but the main relief was that of the relief of possession. The Apex Court, reversing the above finding of the High Court, held that in order to determine the precise nature of the action, the pleadings should be taken as a whole and the real substance of the case has to be gathered by construing the pleadings as a whole and then refer to the law laid down by it in earlier decisions which are to be found at paragraphs 10 and 15 as mentioned hereunder: Indeed in *Gorakh Nath Dube v Hari Narain Singh and Others*, (1973)2 SCC 535, this Court, dealing with the provisions of the Uttar Pradesh Consolidation of the Holdings Act, 1954 where the provision excluding the Civil Court's jurisdiction is even wider, has had occasion to observe: (SCR p. 342: SCC p. 538, para 5) "... but, where there is a document the legal effect of which can only be taken away by setting it aside or its cancellation, it could be urged that the consolidation authorities have no power to cancel the deed, and, therefore, it must be held to be binding on them so long as it is not cancelled by a Court having the power to cancel it....". This

decision was referred to with approval by this Court in *Ningawwa v Byrappa Shiddappa Hireknrabar and Others*, AIR 1968 SC 956. It was observed: (SCR pp. 800-01) "It is well-established that a contract or other transaction induced or tainted by fraud is not void, but only voidable at the option of the party defrauded. Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the mean time acquire rights and interests in the matter which they may enforce against the party defrauded". This would be a voidable transaction. But the position was held to be different if the fraud or misrepresentation related to the character of the document. This Court held: (SCR p. 801) "The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable".

IN INDIA, IT IS NOT EXPRESSLY LAID DOWN IN ANY STATUTE THAT A PERSON WHO COMES IN AS PLAINTIFF CLAIMING RELIEF AGAINST THE EFFECT OF A DEED VOIDABLE AT HIS INSTANCE SHOULD HAVE IT JUDICIALLY RESCINDED BEFORE OR AT THE TIME OF HIS GETTING THE RELIEF

JUSTICE V. JAGANNATHAN OF THE HIGH COURT OF KARNATAKA, IN A CASE OF **SUSHEELAMMA VS. SHIVAKUMAR AND ORS, DECIDED ON NOV 19 2008, REPORTED IN 2010 (2) KARLJ 195,**

In India, it is not expressly laid down in any statute that a person who comes in as plaintiff claiming relief against the effect of a deed voidable at his instance should have it judicially rescinded before or at the time of his getting the relief. According to the Indian Contract Act, Section 17(a), it is clear that the rescission of the contract unless accepted by the other party, must be by a judicial pronouncement. A mere unilateral repudiation in pais (e.g., effected by act out of Court) cannot constitute an effectual rescission of a contract. (See Bigelow on Fraud, pages 74 to 69). This view is confirmed by the provisions of Indian Contract

Act and Section 35 of the Specific Relief Act, 1963. Articles 11, 12, 13, 14, 15 and 44 provides as shown above for suits to set aside the obstacles affecting adversely the interest of the plaintiff. Article 114 provides for the rescission of a contract. Thus by implication Indian Law requires judicial rescission. Sir H.H. Shephard says that Section 35 of the Specific Relief Act indicates that 'rescission imports a judicial decision, and that 'rescission by a person entitling to rescind means that he, having resolved not to persist in demanding performance is in a position to sue for rescission or to defend an action brought on the contracts. It follows therefore that the plaintiff has to sue for rescission in a Court of law, and if he omits to take such a step within the time fixed under Article 91, the instrument will operate as a bar for the relief claimed by her against the tenor of the instrument. There is no principle on which suits involving the issue of validity of an instrument should, if of a declaratory nature, be brought within one period of time, but if involving relief based on that declaration, may be brought within another period of time. The combination of several claims in a suit would not deprive each claim of its specific character and description".

**THE INDIAN STAMP ACT IS NOT ENACTED TO
ARM A LITIGANT WITH A WEAPON OF
TECHNICALITY TO MEET THE CASE OF HIS
OPPONENT**

**DR. CHIRANJI LAL (D) BY LRS. VS HARI DAS
(D) BY LRS. AIR 2005 SC 2564,**

The Indian Stamp Act, 1899 is a fiscal measure enacted with an object to secure revenue for the State on certain classes of instruments. Since a decree in a suit for partition creates rights and liabilities of the parties with respect to the immovable properties, it is considered as an instrument liable for the payment of stamp duty under the Indian Stamp Act. The Indian Stamp Act is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of initial defect in the instrument.

**SCRIBE OF THE ADOPTION DEED GIVING
DIFFERENT VERSION OF THE TIMINGS THAN
THOSE OF THE WITNESSES**

**Siddaramappa and Ors. vs. Gouravva :
MANU/KA/ 0854/2003 - ILR 2004 KAR 3611**

- Witnesses speaking about ceremony conducted on the day of adoption. No one speaking about the nature of the ceremony. Nobody is able to say who were all present at the time of the adoption ceremony. Scribe of the adoption deed giving different version of the timings than those of the witnesses. Validity of such evidence. Such evidence on record is bristled in inconsistency and casts a doubt on the case set up by the defendants about Adoption and Adoption deed.

INTERPRETING DOCUMENT

In Devasironmani and another v. T. Rajathangam and another
[MANU/TN/1142/1997 : 1998 (1) MLJ 322] it was held in paragraph 16: "For interpreting a document, we have to interpret the document on the words used and not by the subsequent conduct. If the parties are not getting any title, to the property on the basis of the document, a mere

subsequent statement that they have obtained title on the basis of the earlier document will not create interest in them."

Abdulla Ahmed v. Animendra Kissen Mitter
[MANU/SC/0013/1950: AIR 1950 SC 15]

rendered by the Constitution Bench, wherein it was held in paragraph 23 as follows: "The subsequent conduct of both the parties to the agreement very strongly supports this view. The evidence of such conduct is relevant in this case because, as pointed out by Viscount Simon, L.C., in the case already referred to, the phrase "finding a purchaser" is itself not without ambiguity. Here the phrase is "securing a purchaser ". This phrase similarly is not without ambiguity. The evidence of conduct of the parties in this situation as to how they understood the words to mean can be considered in determining the true effect of the contract made between the parties. Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of the acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument.

In K.H. Krishna Iyer and others v. Parvathy Ammal and others [MANU/KE/0378/1988 : 1988 (2) KLJ 156], a learned Single Judge Court had occasion to consider the parameters, which can bring a document in the category of a family arrangement. In order to bring out a document within the scope of family arrangement, it was held that "..... the essential requirements are (1) there must be agreement among the various members intended generally and reasonably for the benefit of the family, (2) the agreement must be with the object of compromising doubtful or disputed claims or rights for preserving the family property or for purchasing peace and security of the family by avoiding litigation or saving its honour and (3) there is consideration which could be the expectation that the arrangement will result in establishing or ensuring amity or goodwill among the relations. It must be an arrangement that comes into existence in presente."

In Rajammal alias Sundarammal and others [MANU/PR/0023/1944 : AIR 1945 PC 82], it was held:- "It is settled that mere attestation is not enough to involve the witnesses with knowledge of the contents of the deed, and this is

equally true of the witnesses who identify the executant before the Registrar."

In Torabaz Khan and another v. Nanak Chand and another [MANU/LA/0154/1932 : AIR 1932 Lahore 566], it was held:- "It is true that, merely by signing a document as an attesting witness, a person cannot be said to have knowledge of its contents, but there may be circumstances when he would be deemed to have notice of the contents of the document which he is attesting and signing as a witness."

State of Kerala v. M.A. Babu and another [MANU/KE/0165/2003 : 2003 (2) KLJ 299], wherein it was held:- "But then one cannot be unmindful of the realities of everyday life that when the son functions as attestor to a document executed by his own old, sick and infirm father, the son may be playing a major role in the matter of arranging for the sale identifying the purchaser and even negotiating as to what should be the consideration for the sale. Attestor to a document cannot by mere attestation be imputed with the knowledge of the contents of the document. However, on the facts of a given case where there is a close relationship between the executant and

the attesor such as husband and wife, father and son, the possibilities of the attesor having knowledge regarding the recitals in the documents and about the circumstances under which the document came to be executed cannot be ruled out. Under the order of clarification I permitted the petitioner to examine the son of the executant, an attesor to the document as a substitute for his father only because of the submission that the son is competent to speak about the circumstances under which the document was executed."

In Sir Chunilal V. Mehta and sons Ltd. v. Century Spinning and Manufacturing Co. Ltd. [MANU/SC/0056/1962 : AIR 1962 SC 1314], it was held in paragraph 2 that - "It is not disputed before us that the question raised by the appellant in the appeal is one of law because what the appellant is challenging is the interpretation placed upon certain clauses of the managing agency agreement which are the foundation of the claim in suit. Indeed it is well settled that the construction of a document of title or of a document which is the foundation of the rights of parties necessarily raises a question of law."

Kashmir Singh v. Harnam Singh and another
[MANU/SC/7267/2008 : AIR 2008 SC 1749],

wherein it was held in paragraph 16 that - "An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law."

Court in Yellapu Uma Maheswari and Anr. v.
Buddha Jagadheeswararao and Ors.
MANU/SC/1141/2015 : (2015) 16 SCC 787,

Court held that the nomenclature given to the document is not decisive factor but the nature and substance of the transaction has to be determined with reference to the terms of the documents. This Court after considering both the documents, B-21 and B-22 held that they require registration. In paragraph 15 following was held:
15. It is well settled that the nomenclature given to the document is not decisive factor but the nature and substance of the transaction has to be determined with reference to the terms of the

documents and that the admissibility of a document is entirely dependent upon the recitals contained in that document but not on the basis of the pleadings set up by the party who seeks to introduce the document in question. A thorough reading of both Exts. B-21 and B-22 makes it very clear that there is relinquishment of right in respect of immovable property through a document which is compulsorily registrable document and if the same is not registered, it becomes an inadmissible document as envisaged Under Section 49 of the Registration Act. Hence, Exts. B-21 and B-22 are the documents which squarely fall within the ambit of Section 17(1)(b) of the Registration Act and hence are compulsorily registrable documents and the same are inadmissible in evidence for the purpose of proving the factum of partition between the parties. We are of the considered opinion that Exts. B-21 and B-22 are not admissible in evidence for the purpose of proving primary purpose of partition.

In Atluri Brahmanandam (D), Thr. LRs. v. Anne Sai Bapuji, MANU/SC/0957/2010 : AIR 2011 SC 545, the Supreme Court held: "The aforesaid deed of adoption was produced in evidence and

the same was duly proved in the trial by the evidence led by PW-1, the respondent. We have carefully scrutinized the cross-examination of the said witness. In the entire cross-examination, no challenge was made by the appellant herein either to the legality of the said document or to the validity of the same. Therefore, the said registered adoption deed went un-rebutted and unchallenged. We have already referred to the recitals in the said documents which is a registered document and according to the recitals therein, the respondent was legally and validly adopted by the adoptive father. Since the aforesaid custom and aforesaid adoption was also recorded in a registered deed of adoption, the Court has to presume that the adoption has been made in compliance with the provisions of the Act, since the respondent has utterly failed to challenge the said evidence and also to disprove the aforesaid adoption."

In S.T. Krishnappa v. Shivakumar & Ors., MANU/SC/2209/2007 : (2007) 10 SCC 761, Hon'ble Supreme Court observed that the "adoption deed" must be read as a whole and that on reading the same in such a way, the intention of the parties with respect to whether the adoptive

father/mother wanted to make an adoption according to law and not merely, to appoint an heir, must be clearly established.

Mst. Deu & Ors. v. Laxmi Narayan & Ors., MANU/SC/1351/1998 : (1998) 8 SCC 701, the presumption of registered documents under Section 16 of the Act was discussed. It was held that in view of Section 16, wherever any document registered under any law is produced before any court purporting to record an adoption made, and the same is signed by the persons mentioned therein, the court shall presume that the said adoption has been made in compliance with the provisions of the Act, until and unless such presumption is disproved. It was further held, that in view of Section 16 it is open for a party to attempt to disprove the deed of adoption by initiating independent proceedings.

In Delta International Limited v. Shyam Sundar Ganeriwalla & Anr., MANU/SC/0258/1999 : AIR 1999 SC 2607
Hon'ble Apex Court held that the intention of the parties is to be gathered from the document itself. Intention must primarily be gathered from the meaning of the words used in the document,

except where it is alleged and proved that the document itself is a camouflage. If the terms of the document are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for the purpose of ascertaining the real relationship between the parties. If a dispute arises between the very parties to the written instrument, then intention of the parties must be gathered from the document by reading the same as a whole.

The Hon'ble Supreme Court in the case of **Prem Singh v. Birbal (MANU/SC/8139/2006 : 2006 (5) SCC 353)**, has held that 'there is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof thus would be on a person who leads evidence to rebut the presumption.' Hon'ble Supreme Court has reiterated this settled law in the case of **Vimal Chand Ghevar Chand Jain and others v. Ramakant Eknath Jadoo (2009) 5 SCC 71**.

BURDEN OF PROOF

Rangammal vs. Kuppuswami and Ors.: MANU/SC/0620/2011 - AIR 2011 SC 2344 - Burden of

proving fact lies upon person, who asserts it.

Plethora of commentaries emerging from series of case laws on burden of proof which are too numerous to cite, lay down that when a person after attaining majority, questions any sale of his property by his guardian during his minority, the burden lies on the person who upholds/asserts the purchase not only to show that the guardian had the power to sell but further that the whole transaction was bona fide. Subhra Mukherjee v. Bharat Coaking Coal Ltd. MANU/SC/0162/2000 : AIR 2000 SC 1203, whether the document in question was genuine or sham or bogus, the party who alleged it to be bogus had to prove nothing until the party relying upon the document established its genuineness. since it is well established dictum of the Evidence Act that misplacing burden of proof would vitiate judgment. It is also equally and undoubtedly true that the burden of proof may not be of much consequence after both the parties lay evidence, but while appreciating the question of burden of proof, misplacing of burden of proof on a particular party and recording findings in a particular way definitely vitiates the judgment State of J and K v. Hindustan Forest Co. MANU/SC/8278/2008 : 2006 (12) SCC 198,

wherein it was held that the onus is on the Plaintiff to positively establish its case on the basis of material available and it cannot rely on the weakness or absence of defence to discharge onus. It is further well-settled that a suit has to be tried on the basis of the pleadings of the contesting parties which is filed in the suit before the trial court in the form of plaint and written statement and the nucleus of the case of the Plaintiff and the contesting case of the Defendant in the form of issues emerges out of that. It hardly needs to be highlighted that in a suit for partition, it is expected of the Plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else's property meaning thereby disputed property is included in the schedule of the suit for partition, and the same is contested by a third party who is allowed to be impleaded by order of the trial court, obviously it is the Plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property belongs to the joint family which should be partitioned excluding someone who claims that some portion of the joint family property did not belong to the

Plaintiff's joint family in regard to which decree for partition is sought.

Hon'ble Supreme Court reported in **MANU/SC/0126/1954 : AIR 1954 SC 379** in Srinivas Krishnarao Kango v. Narayan Devji Kango and Others, the learned counsel for the appellant submitted that proof of existence of joint family does not lead to a presumption that the property held by a member of the family is joint. The burden to establish that the property is a joint family property is on the person who asserts it.

Nagaraja vs. Ramesh and Ors.:
MANU/KA/1567/2019 - On burden of proof/
proof in a suit for partition: It is settled law that though there is presumption as regards the existence of a joint family, there is no presumption about properties being joint family properties and therefore, a plaintiff, who commences a suit contending that properties listed in the plaint are joint family properties must necessarily prove the same. Indeed it is settled that proof of the existence of a joint family does not lead to the presumption that properties held by any member of the family is a joint family

property, and the burden shifts upon anyone asserting that certain properties are joint family properties to establish such fact. However, where it is established that the joint family possessed some income yielding properties which from its nature and relative value may have formed the nucleus for the purchase of properties in question, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family nucleus.

i. In a suit for partition, there is initial burden on the plaintiff to show that the properties were joint Hindu family properties, and after the discharge of this initial burden, the onus shifts on to the defendants to show the property claimed by them was purchased by them independent of the joint family nucleus MANU/SC/7187/2007 : AIR 2007 SC Page 218.

ii. If the members of joint family had no source of income except the income from the joint family properties, then the properties acquired by the Kartha or other members of the joint family should be presumed to be out of the joint family income: if such Kartha or the other family members assert that the concerned properties are

self acquired properties, the burden is on them to establish the same Kar. L.J. 1990 (2) Page 147.

iii. A property acquired by a Kartha or a coparcener or member of a joint family, is impressed with the character of joint family. The test to decide whether the property acquired by a Kartha or a co-parcener or a member of a joint family, is that such property is purchased without any assistance or aid from the ancestral/joint family property: and the burden thereof is on the member/co-parcener/Kartha who asserts that the property is a self acquired property distinct and separate from being joint family/co-parcenary property
MANU/SC/0193/1967 : AIR 1968 SC Page 683.

On probative value of Assessment Orders as regards Joint Family Business: A joint family often carries on joint family business under different names and styles, and quite often constitutes different companies or partnerships for better handling of the business or to keep it manageable or for various other reasons. Therefore, mere correspondence with Income Tax Department/Authorities, or Assessment Orders passed by Income Tax Authorities, will not constitute proof of separation or that the properties are owned by such

companies/partnership firms de hors the joint family MANU/SC/0161/2003 : AIR 2003 SC page 1880.

On joint Possession of the members of a joint family: A co-owner has an interest in the whole of the property and also in every parcel thereof: possession of joint property by one co-owner is, in the eyes of law, possession of all even if one co-owner is not in actual possession of the subject properties 2009 AIR SCW page 365.

Burden of Proof of establishing Oral Partition: Merely because the members of a joint family are living separately, it cannot be presumed there was an oral partition. It is for such members of the joint family, who assert oral partition, to establish the same by placing necessary attendant circumstances MANU/KA/0431/2005 : AIR 2006 Karnataka 31.

Adverse Inference against the party does not enter evidence: When a party to the suit does not enter the witness box and states his case offering himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct and therefore, adverse inference will have to be drawn. Vidhyadhar vs. Manikrao - MANU/SC/0172/1999

Supreme Court in its subsequent decision in **Marabasappa (dead) by LRs and others versus Ningappa (dead) by LRs and others reported in MANU/SC/1077/2011 : (2011) 9 SCC 451.**

There cannot be any quarrel with the proposition that the initial burden is on the person, who claims that the properties are joint family properties to establish the same. But, after the discharge of this initial burden, the burden shifts onto the party who claims that the properties have been purchased by him through his own source and not from the joint family nucleus. Therefore, it imperatively follows that the plaintiff who asserts that certain properties are joint family properties, must establish (a) existence of joint family properties and (b) such properties yielded income of value; of course, as regards sufficiency of income, the plaintiff would be entitled to the benefit of presumption from the nature and value of the properties/ income. If these requirements are established, the initial burden is discharged and the burden shifts onto the defendants, who assert that such properties are self acquired properties. This would be in line with the settled proposition that the burden of proof is not static and it shifts during the course of the evidence. Initial burden rests on the party

who would fail if no evidence is given, and after such evidence is recorded, the burden shifts upon the party against whom Judgment would be given if no further evidence is recorded.

A Note on The 'Evidence and Burden of Proof in the Indian Contract Act, 1872, 14th edition, by Pollock and Mulla, reads thus:

"Evidence and Burden of Proof in a great majority of cases, fraud is not capable of being established by positive and tangible proof. It is by its very nature secret in its movements. It is, therefore, sufficient if the evidence given is such as may lead to an inference that fraud must have been committed. In most cases circumstantial evidence is the only resource in dealing with questions of fraud.¹ If this were not allowed, the ends of justice would be constantly, if not invariably, defeated.²

At the same time the inference of fraud is to be drawn only from positive materials on record

¹ (Rakhal Chandra Bardhan v. Prosad Chandra Chatterjee, MANU/WB/0246/1925 : AIR 1926 Cal 73 at 77; Umrao Begum v. Sheikh Rahmat Ilahi, MANU/LA/0019/1939 : AIR 1939 Lah 439 at 36, 451; Bhabhutmal Nathmal v. Khan Mohammad, MANU/NA/0236/1945 : AIR 1946 Nag 419 at 423; Passarilal Mannoolal v. Chhuttanbai, MANU/MP/0157/1958 : AIR 1958 MP 417 at 422).

² (Pandit Parkash Narain V. Raja Birendra Bikram Singh, MANU/OU/0036/1931 : AIR 1931 Oudh 333; Thangachi Nachial v. Ahmed Hussain Malumiar, MANU/TN/0126/1957 : AIR 1957 Mad 194 at 197; (1957) 1 Mad LJ 300)

and cannot be based on speculation and surmises;¹ however suspicious the circumstances, however strange the coincidences and however grave the doubts, they alone cannot take place of proof of fraud. The evidence of fraud must be sufficient to overcome the natural presumption of honesty and fair dealing; it is not to be presumed or inferred lightly.² Evidence of unfairness in the transaction may be considered, but not when direct evidence on the question of fraud is unreliable.³ Pleas of fraud must be examined by the Court with utmost rigour.⁴ The burden of proving fraud lies on the person alleging it.

The charge of fraud, though in a civil proceeding, must be established beyond reasonable doubt.⁵ In any case, the level of proof

¹ (Arabinda Barma v. Chandra Kanta, MANU/GH/0144/1953 : AIR 1954 Assam 94; Passarilal Mannoolal v. Chhuttanbai, MANU/MP/0157/1958 : AIR 1958 MP 417 at 422);

² (Rakhal Chandra Bardhan v. prosad Chandra Chatterjee, MANU/WB/0246/1925 : AIR 1926 Cal 73 at 77; Govinda Naik Gurunath Naik v. Gururao Puttanbhat Kadekar, MANU/KA/0129/1971 : AIR 1971 Mys 330 at 331).

³ (Harihar Prasad Singh v. Narsingh Prasad Singh, MANU/BH/0123/1940 : AIR 1941 Pat 83 at 90). The solitary testimony of the plaintiff would not suffice. (Hajra Bai v. Jadavbai, MANU/MP/0024/1986 : AIR 1986 MP 106).

⁴ (Firm of Sodawaterwala v. Volkart Brothers, AIR 1923 Sind 25 at 28)

⁵ (ALN Narayanan Chettyar v. Official Assignee High Court Rangoon, MANU/PR/0009/1941 : AIR 1941 PC 93; followed in Union of India v. Chaturbhai M Patel and Co., MANU/SC/0046/1975 : (1976) 1 SCC 747, AIR 1976 SC 712)

required is extremely high and is rated on par with a criminal trial.¹

The burden of proof is not a light one. On another view, although the burden of proof is the same as in other civil proceedings,² namely, proof on the balance of probabilities, yet it is not easily discharged in practice.³ To prove fraud, it must be proved that the representations made were false to the knowledge of the party making them, or were such, that the party could have no reasonable belief that they were true; that they were made for the purpose of being acted upon and that they were believed and acted upon and caused the actual damage alleged.⁴ He can succeed only upon proof of fraud as alleged by him."

Patel Ramanbhai Mathurbhai vs. Govindbhai Chhotabhai Patel and Ors.:
MANU/GJ/0774/2018 The 'burden of proof

¹ (Savithramma v. H Gurappa Reddy, MANU/KA/0025/1996 : AIR 1996 Kant 99 at 104; Ranganayakamma v. K.S. Prakash, MANU/SC/7734/2008 : AIR 2009 SC, (Supp) 1218, (2008) 15 SCC 673; Alva Aluminum Ltd. v. Gabriel India Ltd., MANU/SC/0951/2010 : (2011) 38 1 SCC 167, (heavy burden to show fraud).

² (Hornal v. Neuberger Products Ltd., [1957] 1 QB 247, [1956] 3 All ER 970)

³ (Chitty on Contracts, 28th edn, p. 361, para 6-045.)

⁴ (Gauri Shankar v. Manki Kunwar, MANU/UP/0713/1923 : 45 All 624, AIR 1924 All 17 at 19; People's Insurance Co. Ltd. V. Sardur Sardul Singh Caveeshar, MANU/PH/0093/1962 : AIR 1962 Punj 543)

means a party's duty to prove a disputed assertion or charge. The 'burden of proof' includes both 'burden of persuasion' and the 'burden of production'. The 'burden of persuasion' means the duty imposed on a person to convince the fact finder to view the facts in a way that favours that person. The 'burden of production' is the duty imposed on the person to introduce enough evidence on a issue to have the issue decided by the fact finder, in that person's favour. The party having the 'burden of proof' must introduce some evidence if he wishes to get a certain issue decided in his favour. The 'burden of proof', therefore, denotes the duty of establishing by a fair preponderance of the evidence the truth of the operative facts upon which the issue at hand is made to turn by substantive law (Black's Law Dictionary, 7th Edition).

According to Phipson, who is considered to be an authority on the Law of Evidence, the phrase, 'burden of proof', has three meanings, namely, (I) the persuasive burden, the burden of proof as a matter of law and pleading the burden of establishing a case, whether by preponderance of evidence or beyond a reasonable doubt; (ii) the evidential burden, the burden of proof in the

sense of adducing evidence; and (iii) the burden of establishing the admissibility of evidence. While persuasive burden i.e. onus probandi never shifts and is always stable, the evidential burden may shift constantly, according as one scale of evidence or other preponderates. Onus probandi rests upon the party, who would fail if no evidence at all is adduced. The general principle of burden of proof that he who invokes the aid of law should be the first to prove his case may be affected by statutory provision, e.g. in a case where the matters within the knowledge of the person against whom a proceeding is initiated, like the proceeding under the provisions of the 1946 Act, as it will not only be difficult but also impossible for the State, at whose instance reference is made to the Tribunal, to first lead evidence on the question as to whether a person against whom such proceeding is initiated is a foreigner or not.

The Supreme Court in **Subhra Mukherjee v. Bharat Coking Coal Limited** [MANU/SC/0162/2000 : 2000(3) SCC 312] observed in para 13 as under: "There can be no dispute that a person who attacks a transaction as sham, bogus and fictitious must prove the same. But a plain reading of question No. 1

discloses that it is in two parts; the first part says, 'whether the transaction, in question, is bona fide and genuine one, which has to be proved by the appellants. It is only when this has been done that the respondent has to dislodge it by proving that it is a sham and fictitious transaction. When circumstances of the case and the intrinsic evidence on record clearly point out that the transaction is not bona fide and genuine, it is unnecessary for the Court to find out whether the respondent has led any evidence to show that the transaction is sham, bogus or fictitious."

Supreme Court in the case of **Anil Rishi v. Gurbaksh Singh** reported in **MANU/SC/8133/2006 : (2006) 5 SCC 558** has observed as under: "7. In the impugned judgment, the High Court proceeded on the basis that although generally it is for the plaintiff to prove such fraud, undue influence or misrepresentation, but when a person is in a fiduciary relationship with another and the latter is in a position of active confidence, the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position.

8. The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under :- "Sec. 101. Burden of proof.- Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

9. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be exception thereto. The learned trial Court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.

10. Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship

between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side.

11. The fact that the defendant was in a dominant position must, thus, be proved by the plaintiff at the first instance.

12. Strong reliance has been placed by the High Court in the decision of this Court in Krishna Mohan Kul alias Nani Charan Kul and another v. Pratima Maity and others, (MANU/SC/0690/2003 : AIR 2003 SC 4351). In that case, the question of burden of proof was gone into after the parties had adduced evidence. It was brought on record that the witnesses whose names appeared in the impugned deed and which was said to have been created to grab the property of the plaintiffs were not in existence. The question as regards oblique motive in execution of the deed of settlement was gone into by the Court. The executant was more than 100

years of age at the time of alleged registration of the deed in question. He was paralytic and furthermore his mental and physical condition was not in order. He was also completely bed-ridden and though his left thumb impression was taken, there was no witness who could substantiate that he had put his thumb impression. It was on the aforementioned facts, this Court opined:- "12. The onus to prove the validity of the deed of settlement was on the defendant No. 1. When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person, in the dominating position, he has to prove that there was fair-play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a

fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position.... "

13. This Court in arriving at the aforementioned findings referred to Section 111 of the Indian Evidence Act which is in the following terms :-"Sec. 111. Proof of good faith in transactions where one party is in relation of active confidence.- Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

14. But before such a finding is arrived at, the averments as regard alleged fiduciary relationship must be established before a presumption of undue influence against a person

in position of active confidence is drawn. The factum of active confidence should also be established.

15. Section 111 of the Evidence Act will apply when the bona fides of a transaction is in question but not when the real nature thereof is in question. The words 'active confidence' indicate that the relationship between the parties must be such that one is bound to protect the interests of the other.

16. Thus, point for determination of binding interests or which are the cases which come within the rule of active confidence would vary from case to case. If the plaintiff fails to prove the existence of the fiduciary relationship or the position of active confidence held by the defendant-appellant, the burden would lie on him as he had alleged fraud. The trial Court and the High Court, therefore, in our opinion, cannot be said to be correct in holding that without anything further, the burden of proof would be on the defendant.

17. The learned trial Judge has misdirected himself in proceeding on the premise "it is always difficult to prove the same in negative a person/party in the suit."

18. Difficulties which may be faced by a party to the lis can never be determinative of the question as to upon whom the burden of proof would lie. The learned Trial Judge, therefore, posed unto himself a wrong question and arrived at a wrong answer. The High Court also, in our considered view, committed a serious error of law in misreading and misinterpreting Section 101 of the Indian Evidence Act. With a view to prove forgery or fabrication in a document, possession of the original sale deed by the defendant, would not change the legal position. A party in possession of a document can always be directed to produce the same. The plaintiff could file an application calling for the said document from the defendant and the defendant could have been directed by the learned Trial Judge to produce the same.

19. There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in

support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

In R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P. Temple and another, (MANU/SC/0798/2003 : 2004 (6) JT (SC) 442),

the law is stated in the following terms : "29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him..... However, as held in A. Raghavamma v. A. Chenchamma there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a

continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."

Supreme Court in the case of **Madhukar D. Shende v. Tarabai Aba Shedage** reported in **MANU/SC/ 0016/2002 : AIR 2002 SC 637** in connection with genuineness of the 'will' has observed that when the 'will' is alleged to have been executed under undue influence, onus of proving undue influence is upon the person making such allegation and mere presence of motive and opportunity are not enough. The Supreme Court proceeded to further observe as below: "The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson

to the Jury in R v. Hodge, 1838, 2 Lewis CC 227 may be apposite to some extent - "The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected hole; and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete." The conscience of the Court has to be satisfied by the propounder of Will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a Will provided that there is something unnatural or suspicious about the Will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict - positive or negative."

In Narayan Bhagwatrao Gosavi Balajiwale v. Gopal Vinayak Gosavi and others reported in

MANU/SC/0173/1959 : AIR 1960 SC 100, the Supreme Court in para 11 has observed as under: "The expression "burden of proof" really means two different things. It means sometimes that a party is required to prove an allegation before judgment can be given in its favour; it also means that on a contested issue one of the two contending parties has to introduce evidence. Whichever way one looks, the question is really academic in the present case, because both parties have introduced their evidence on the question of the nature of the deity and the properties and have sought to establish their own part of the case. The two Courts below have not decided the case on the abstract question of burden of proof; nor could the suit be decided in such a way. The burden of proof is of importance only where by reason of not discharging the burden which was put upon it, a party must eventually fail. Where, however, parties have joined issue and have led evidence and the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic."

Full Bench decision of the Andhra Pradesh High Court reported in **Nelluru Sundararam areddi**

**and Ors. v. State of Andhra and Ors.,
MANU/AP/0143/1959 : AIR 1959 AP 215,** it

has been observed as follows : "Section 101 gives effect to the ancient rule founded on considerations of good sense that the party who substantially asserts the affirmative of an issue has to prove it. It is well-settled that the effect of the rule cannot be circumvented by manipulating the words of the issue. Phipson in his book on 'The Law of Evidence' (9th Edition, p. 33) Says--I have omitted the authorities cited-- "In deciding which party asserts the affirmative, regard must of course be had to the substance of the issue and not merely to its grammatical form, which latter the pleader can frequently vary at will; moreover, a negative allegation must not be confounded with the mere traverse of an affirmative one. The true meaning of the rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him."

Patel Ramanbhai Mathurbhai vs. Govindbhai Chhotabhai Patel and Ors.:
MANU/GJ/0774/2018 - The principles discernible from the above referred decisions may be summarised as under:

[a] The general principles of law that can be gainfully culled out from the judicial pronouncements noted above is that the burden of proof cast under Sections 101 and 102 of the Indian Evidence Act, 1872 is the persuasive burden or the onus probandi. The persuasive burden to prove and establish the case always lies upon the plaintiff and the said burden never shifts upon the defendant. What may, however, shift is the onus to lead evidence in the sense that once the plaintiff side succeeds in *prima facie* establishing his pleaded case by leading evidence, the onus will then shift upon the defendant side to lead evidence so as to disprove the case. The parties may also have to discharge the burden of establishing the admissibility of the evidence by leading evidence in respect thereof. The initial burden to establish the basic allegations made in the plaint constituting the foundational facts, regardless of whether such assertion is couched in the affirmative or in the negative, would undoubtedly lie upon the plaintiff and the failure to discharge the said burden must lead to the dismissal of the suit."

[b] The burden of proof on the pleadings should not be confused with the burden of adducing evidence.

[c] Pleading is not evidence, far less proof.

[d] The rule that the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it, is not one of the universal applications and there may be exception thereto.

[e] The inference of fraud can be drawn only from the positive materials on record and cannot be based on speculation and surmises. However, the suspicious circumstances, however, strange the co-incidences and however grave the doubts, they alone cannot take place of proof of fraud.

[f] The evidence of fraud must be sufficient to overcome the natural presumption of honesty and fair dealing. It is not to be presumed or inferred lightly.

[g] When the plaintiff comes before the Court with a case of forgery, then he has to prove the forgery in accordance with law. A mere assertion or allegation of forgery is not sufficient to shift the onus on the other side to establish that there is no forgery.

[h] It is always open to the defendant not to lead any evidence where the onus is upon the plaintiff. After having gone into the evidence, he cannot ask the Court not to look at it and act on it. The question of burden of proof at the end of the case

when both the parties have tendered evidence is not of any great importance and the Court has to give a decision on a consideration of all the materials.

**ADMISSIONS IN WRITTEN STATEMENT
CANNOT BE WITHDRAWN BUT CAN BE
CLARIFIED IN EVIDENCE**

**Ram Niranjana Kajaria and Ors. vs. Sheo
Prakash Kajaria and Ors.:**

MANU/SC/1066/2015 - Delay in itself may not be crucial on an application for amendment in a written statement, be it for introduction of a new fact or for explanation or clarification of an admission or for taking an alternate position. It is seen that the issues have been framed in the case before us, only in 2009. The nature and character of the amendment and the other circumstances as in the instant case which we have referred to above, are relevant while considering the delay and its consequence on the application for amendment. But a party cannot be permitted to wholly withdraw the admission in the pleadings.

**In Modi Spinning and Weaving Mills Co. Ltd. v.
Ladha Ram and Co. MANU/SC/0012/1976 :**

(1976) 4 SCC 320, it was held as follows at Paragraph-10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paras 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the Plaintiff completely from the admissions made by the Defendants in the written statement. If such amendments are allowed the Plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the Defendants. The High Court rightly rejected the application for amendment and agreed with the trial court.

In Gautam Sarup v. Leela Jetly and Ors. MANU/SC/7401/2008 : (2008) 7 SCC 85, after considering Panchdeo Narain Srivastava (supra) and Modi Spinning and Weaving Mills Co. Ltd. v. Ladha Ram and Co. (supra) and several other decisions dealing with the amendment on withdrawal of admissions in the pleadings, it was held at Paragraph-28 as follows: 28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the

same, however, would depend upon the nature and character thereof. It may be that a Defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other.

Nagindas Ramdas v. Dalpatram Ichharam alias Brijram and Ors. MANU/SC/0417/1973 : (1974) 1 SCC 242. To quote Paragraph-27. From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be prima facie satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself. Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible Under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing

of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.

QUEST FOR TRUTH IS DUTY OF COURT

Cheedella Radhakrishna Sharma and Ors. vs. Radhakrishnamurthy and Ors. : MANU/AP/2751 /2014 - "..... it is relevant to

state the settled propositions of law, not only on proof and presumptions on existence of joint family, joint family property, partition or division in status, sufficiency of nucleus for subsequent acquisitions and whether subsequent acquisitions are separate or part of joint family, but also on appreciation of pleadings and evidence including with reference to the documents, in particular wills, entries in books of accounts, boundary recitals of documents, evidencing value of the same with reference to

facts and circumstances, solemn duty of Court in ascertaining truth from trial of suit

"14.(a).(i). Judging is not merely a job, but a way of life based a spiritual wealth that includes by obligation of an impartial search for truth. The greatest legal engine is ever invented for discovery of truth from the well-known saying that-Trial is a voyage in which trust is the quest-reiterated in by the Apex Court in- Ritesh Tiwari v. State of UP MANU/SC/0742/2010 : 2010(10)SCC-677.

14(a).(ii). Appreciation of evidence is thus part of the process in search for truth. Even in case of conflict between stability and truth, truth is preferable as truth should be the guiding star in the entire judicial process. Truth alone has to be the foundation and justice. The entire judicial system has been created only to find out the truth as Truth alone triumphs, not falsehood. Through truth, the divine path is spread out by which the sages, whose desires have been completely fulfilled, reach where that supreme treasure of truth resides. Thus, it is the bounden duty of Judges in the journey of trial/enquiry to discover truth by application of procedural and adjectival law to decide the substantial rights -Vide decision-Maria M.S. Fernandes v. Erasmo J. De

Sequerio MANU/SC/0225/2012 : AIR 2012 SC 1727 : 2012(3)ALT-SC-14.

14(a).(iii). The Law of Evidence is as old as the human civilization. Truth implies reality in two kinds viz., (1). Paramartha known as eternal truth-(with which we are now not concerned) & (2). Yathartha known as factual truth-(with which we are now concerned), is to discern with the testimony of immediate perception in the here and now world, where subject-object duality is persistent.

14(a).(iv). Though, BHAVABUTHI a Sanskrit poet in his "UTTARA RAMA CHARITAM" said that unlike from saintly men, it is difficult to expect absolute truth from an ordinary being, however the court is to presume a witness on oath speaks truth and then appreciate his truthfulness or otherwise with reference to the material and surrounding circumstances. That is the great task of a Judge in appreciation of evidence to ascertain truth where lies among the disputants.

14(a).(v). NARADA, a saintly poet gave attention to many issues concerning the Indian philosophy and Hindu mythology in this regard and he summarised the rules of evidence in a nutshell that when any dispute arises between

parties, he states that the party must check whether he has any document in his favour to substantiate his claim. If no document is available, the party must produce the direct witness who can testify on his behalf with regard to the facts under dispute. When neither a document nor a direct witness is available, third preference shall be given to inferences, which can be drawn by a prudent man with regard to existence or non-existence of relevant facts with reference to other facts and circumstances to draw necessary inferences. If with the help of above statement of NARADA, we venture to analyse the Indian Evidence Act, it is nothing but extraction and elaboration of above principle as stated by NARADA, that even under the Evidence Act, the court will prefer the documentary Evidence (subject to its probative value, requirement of stamp and registration and if not original on foundation for any secondary evidence) over oral evidence (subject to credibility of the witness) and it will prefer primary/direct-oral evidence from that of indirect oral evidence/circumstantial evidence, other than hearsay, subject to exceptions on admissibility of hearsay evidence.

14(a).(vi). Appreciation of Evidence is a judicial function and there shall not be any element of arbitrariness in appreciating the evidence. The logic behind appreciation of evidence is - A Judge who know nothing about the cause outside the four wall of the Court, but for what is brought to his notice by pleadings and evidence in proof of facts under controversy, can reasons and decide well. It is also in fact the logic behind the bane of justice. It is apt to refer the recent expression of the Apex Court in *Om Prakash Chautala v. Kanwar Bhan* MANU/SC/0075/2014 : 2014 (5)SCC-417- at Paras -19&20 that, A Judge should abandon his passion. He must constantly remind himself that he has a singular master "duty to truth" and such truth is to be arrived at with the legal parameters. No heroism, no rhetorics. A Judgement has rhetorics but the said rhetoric has to be dressed with reason and must be in accord with legal principles, otherwise may likely to cause injustice.

14(a).(vii). The Rules of Evidence laid down in the Evidence Act have thereby special value to a judge, furnishing him with solid, systematic and well considered tests to arrive at truth. If the Evidence Act has no application, one has to

necessarily follow the incidence of the Evidence Act as a law of evidence; else it is a difficult task to a judge to arrive at truth, for no systematic and definite alternative guidance to arrive at truth from over adjectival laws.

14(a).(viii). The whole exercise is by trial and in civil proceedings the object is to ascertain some right or property or status or right of one party and liability of other, to some form of relief by judgment which must not be based on surmises or conjectures, but upon facts relevant and duly proved by correct application of law.

14.(b).(i). The functions of a Court of Justice are two fold viz., (1) to ascertain the existence or non-existence of certain facts and the method used to bring them before court of law (evidence) & (2) to apply substantive law to the ascertained facts and declare the rights, liabilities and duties etc. of parties in so far as they are effected by such facts. Unless the facts be correctly ascertained, however accurate be the application of substantive law, the result cannot be free from error. The Rules, which guide and assist in appreciation of evidence that are contained in the Indian Evidence Act thereby, are of great value.

14(b).(ii). Evidence Act is the foundation for proof. Appreciation of evidence to mean evaluation, assessment and estimation etc. of the evidence (oral, documentary, direct, circumstantial or real or combination of some or all - placed on record) judiciously with reference to factual and legal aspects (including legal fictions, burden of proof, presumptions, benefit of doubt, general/special exceptions, legal bars like Bar of limitation, Double jeopardy/Resjudicata and Estoppel etc.,) of a given case as to any fact in issue/for consideration is proved or not proved or disproved (to hold it as proved or not proved or disproved-it also depends upon the nature of the lis)- to say:-it is the proof by preponderance of probabilities-(the requirement-in cases of civil nature and for defence of accused in criminal cases or it is the proof beyond reasonable doubt (not beyond doubt)-(the requirement-in criminal cases) or it is in between (the requirement-in Election disputes to establish allegations of fraud and misconduct etc., and disputes relating to legitimacy and also in title suits-where the defence is denial of plaintiffs title) as the case may be, as per the requirement of Law from the nature of the case.

14(c)(i). Thus substantial rights are to be ascertained with reference to adjectival law-(rules of evidence and rules of procedure). The adjectival law facilitates the results to be obtained since the rights conferred on persons by substantive law will reach them through the process of rules of evidence and procedure.

14(c)(ii). As per M.C. Shetalwad, the Civil Procedural Law is based on the theory that there must be a full disclosure by each party of his case to the other, that rival contentions (in the pleadings) must be reduced as quickly as possible to the form of clear & precise points or issues for decision and there must be a prompt adjudication by the Court on those points. Justice delays not so much due to defects in procedure but by faulty application.

14(d). Coming to scope of pleadings need not embody law and legal terminology concerned; it is also the well-settled proposition of law on pleadings from S.B. Noronal v. Prem Kundi AIR 1989 SC 193 that, pleadings are not statutes and legalism is not verbatim. Common sense should not be kept in cold storage, when pleadings are construed. In Ram Sarup Gupta v. Bishur Narain Inter College MANU/SC/0043/1987 : AIR 1987 SC 1242 referring to the expression of the

Constitution Bench in Bhagwati Prasad v. Chandra maul MANU/SC/0335/1965 : AIR 1966 SC 735 also of Sheodhari Rai v. Suraj Prasad Singh MANU/SC/0058/1950 : AIR 1954 SC 458 and Trojan & Company v. R.M.N. Nagappa Chettiar MANU/SC/0005/1953 : AIR 1953 SC 235 that it is not desirable to place undue emphasis on form, instead substance of pleadings should be considered; as the pleadings should receive a liberal and not pedantic approach as meant to ascertain the substance and not form, it only requires the opposite party to know. It is well settled that in the absence of pleadings; any evidence produced by parties generally cannot be considered. It is also equally settled that, no party should be permitted to travel beyond its pleadings with the object and purpose to enable the opposite party to know the case it has to meet. Keeping this object and purpose, though generally no plea, no evidence can be looked into and for no issue, no finding can be given; it is not always the static principle from the fact that even a plea not made specifically from deficiency in pleadings, but if covered by implication and evidence let in and parties know the case, it can be looked into and even to give finding no issue framed is of no bar

to formulate a point and decide. The Apex Court in Bhagavathi Prasad (supra) by referring to Balmukund v. Dalu (03) 25 ALL 498 FB observed that it is undesirable and inexpedient to lay down any general rule in respect of such a situation (of evidence adduced fully by both sides on the question of title, a decree based on title can be given or not, for no plea), held that if Court is satisfied that the ground on which reliance is placed by one or other of the parties was, in substance, at issue between them, and both of them have had opportunity to lead evidence at the trial, the formal requirement of the pleading can be relaxed and the same is the proposition laid down in Ponnaipillai v. Pannai MANU/TN/0136/1946 : AIR 1947 Madras 282.

14(e). On Burden of proof and onus probandi with reference to pleadings and appreciation; it was held by the Apex Court in Kalwa Devadatham V Union of India MANU/SC/0106/1963 : AIR 1964 SC 880 that the question of onus probandi is certainly important in the early stages of the case. It may also assume important where no evidence at all is let in on the question in dispute by either side. In such a contingency, the party on whom the onus lies to prove a certain fact must fail. Where,

however, evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place and truth or otherwise of the case must always be adjudged on the evidence led by the parties, burden of proof in such matters, loses its importance and pales its significance- also vide A. Raghavamma V. Chenchamma MANU/SC/0250/1963 : AIR 1964 SC 136 & Smt. Premalatha V. Arahamth Kumar Jain. MANU/SC/0400/1972 : AIR 1973 SC 626 Thus, what is necessary is party shall aware of the plea and let in evidence for the Court to give finding from the hearing covering the lis, but not outside the scope, irrespective of who led what evidence by make use of entire evidence on record. It was also held in some of the expressions that even alternative remedy not pleaded if entitled, Court can grant it where it is appropriate to do so. In Balasankar v. Charity Commissioner, Gujarat MANU/SC/0034/1995 : AIR 1995 SC 167 at para-19-it was similarly held that, burden of proof pales significance when both parties adduced evidence and it is the duty of the court to appreciate the entire evidence adduced by both sides in deciding the lis; also on the aspect as to party proved in possession of best evidence is bound to produce the same to throw light on the

lis and to unfold any truth and thereby cannot take shelter on the abstract doctrine of burden of proof saying burden not on him to prove by filing the material document or producing the material witness-as laid down in NIC v. Jugal Kishore MANU/SC/0341/1988 : AIR 1988 SC 719(B) and Lakhan Sao v. Dharamu Chaudhary MANU/SC/0598/1991 : 1991 (3) SCC 331. Vide also Karnesh Kumar v. State of Uttar Pradesh MANU/SC/0051/1968 : AIR 1968 SC 1403 & Gopalakrishnaji ketkar v. Mahammad Haji Lathief MANU/SC/0168/1969 : AIR 1968 SC 1413, which followed the privy council's expression in Murugesan Pillai v. G.S.P. Sannadhi MANU/PR/0053/1916 : AIR 1917 PC 6 at 8 that "a practice has grown in Indian procedure those in possession of important document or information lying by, trusting to the abstract doctrine of onus of proof, and failing, accordingly, to furnish to the Courts best material for its decision. With regard to third parties this may be right enough- they have no responsibility for the conduct of the suit but with regard to the parties to the suit it is, in their Lordship's opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in

their possession which would throw light upon the proposition, held that if a party in possession of best evidence which throws light on the issue in controversy withholds it, the Court ought to draw an adverse inference against him from non filing of the material document or non producing of the material witness, notwithstanding the fact that onus of proof not lie on him or because he was not called upon to produce it, by relying on the abstract doctrine of onus of proof". Same is relied upon in *Sri Venkateshwara Oil Company v. Guduru Jalaja Reddy* MANU/AP/0759/2001 : 2002(1) ALD 182 DB

14(f)(i). Coming to appreciation of evidence and interference by superior Court concerned; it was also laid down in this regard by the three Judge Bench of Apex Court in *Iswar Prasad Misra v. Mohammad Isa* MANU/SC/0040/1962 : AIR 1963 SC 1728 - that, Judicial experience shows that in adjudicating upon rival claims brought before the Courts, it is not always easy to decide where truth lies. Evidence is adduced by the respective parties in support of the conflicting contentions and circumstances are similarly pressed into service. In such a case, it is no doubt, the duty of the judge to consider the evidence objectively and dispassionately, examine

it in the light of probabilities and decide within which exactly the truth lies. The impression formed by the judge about the character of evidence will ultimately determine the conclusion which he reaches.

14(f)(ii). In fact, it could be unsafe to overlook the fact that all judicial minds may not react in the same way to said evidence and it is not unusually that evidence which appears to be respectable and trustworthy to one judge may not appears to be so to the other. That explains why in some cases courts of appeal reverse conclusions of facts recorded by trial Courts on its appreciation of oral evidence. The knowledge that another view is possible on the evidence adduced in a case acts as a sobering factor and leads to the use of temperate language in recording judicial conclusions. Judicial approach in such a cases will always be based on the consciousness that one may make a mistake; that is why the use of unduly strong words in expressing conclusion---- in our opinion, the use of such intemperate language may in some cases tend to show either lack of experience in judicial matters or an absence of judicial poise and balance--. Judges are not computers and thus bound to call in aid their experience in life and

test with probabilities-*vide* - Chaturbhuj Pande v. Collector, Rayagarh MANU/SC/0377/1968 : AIR 1969 SC 255.

14(f)(iii). It is also held that in assessing the value to be attached to oral evidence, particularly as Judge of fact, it is open to the appellate Judges to test the evidence placed before them on the basis of probabilities, irrespective of lack of effective or no cross examination by opposite party, Court is not bound to rely, if probabilities show otherwise, but for to consider in the facts if so to construe as admission from facts deposed supported by plea not disputed in cross examination as a rule of essential justice. *vide* - A.E.G. Carapiet v. A.Y. Derderian MANU/WB/0074/1961 : AIR 1961 Calcutta 359.

14(f)(iv). Rules of justice require that the party cross examining must put the crucial and important part of his case to the witness of the other side in his cross-examination and if no question is put to the witness in the cross examination with regard to a certain fact challenging the same, then such fact has to be presumed to be true. No doubt for that conclusion it is to be seen, whether there is any pleading in this regard and in the absence of which, merely because the attention of the said stray sentence

of the witness, inadvertently not drawn attention while cross-examination to put a question on it by itself does not amount to admission but for to read the entire evidence as a whole to cull out such is the admission or not from non-testing by cross-examination of said sentence-vide- Shri Ravinder Kumar Sharma v. RFA 757/2002 16 State of Assam MANU/SC/0561/1999 : 1999 SAR(Civil) 837.

14(f)(v). Thus, in appreciation of evidence, Judges are bound to call into aid their experience and knowledge of human affairs, depending upon facts and circumstances of each case and regard had to the credibility of the witness, probative value of the documents, lapse of time if any in proof of the events and occurrence for drawing inferences, from consistency to the material on record to draw wherever required the necessary inferences and conclusions from the broad probabilities and preponderances from the overall view of entire case to judge as to any fact is proved or not proved or disproved.

14(g). Coming to the proof of facts out of the facts in issue to the extent of relevant facts concerned, it depends upon the nature of the lis and in civil matters proof is always by preponderance of probabilities. In RVEE Gounder

v. RVS Temple 2003(8)-Supreme Today-194 at 196 the Apex Court held that, in civil cases the proof is by preponderance of probabilities for including in suits relating to ejectment or declaration of title or for possession; and the onus shifts from initial burden on the plaintiffs if able to establish from preponderance of probabilities for entitlement, on the defendant to rebut the same including with specific claim on their part if any. It is in explaining the earlier propositions of law that, in a suit for ejectment, plaintiff shall win or lose his case only on his own strength principle, since it does not mean the onus of proof is static and always on the plaintiff or it shall never shifts on the defendant even if the plaintiff is able to establish his case from preponderance of the probability as to what is meant by proved, not proved or disproved required for the above expressions with reference to Section 3 of Evidence Act without going into the other components of "may presume, shall presume and conclusive proof", from the very definition, proved and disproved to say not proved is when it is neither proved nor disproved. It requires considering the matters before the Court on any fact for either believes it to exist or does not exist (which is by direct evidence), or considers its

existence so probable that a prudent man ought, under the circumstance of a particular case to act upon supposition that it exists or does not exist (which is by circumstantial evidence). At paras-25-29 of the judgment, the Apex Court clearly held that in a suit for ejectment once plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant, it is for the defendant to discharge his onus and in the absence thereof, the burden of proof lies on the plaintiff shall be held to have been discharged so as to prove the plaintiff's title. What is meant by proved, not proved or disproved with reference to Section 3 of the Evidence Act was discussed in detail by the division bench of this Court in N.K. Somani v. Punam Somani MANU/AP/0700/1998 : 1998(5)-ALD-349. It is also needful to note the difference between legal burden(as per pleadings) and evidentiary burden-how it shifts during trial under Sections 101-103 of the Evidence Act- vide Vasu v. Syed Yason S Quadri MANU/AP/0217/1987 : AIR 1987 AP 139(FB) that was quoted with approval by the Apex Court in Bharat B & D.M. Co. v. Amin Chand Pyaralal MANU/SC/0123/1999 : AIR 1999 SC 1008 and in Hiten P. Dalal v. Bratindranath Benarji MANU/SC/0359/2001 : AIR 2001 SC 3897

14(h). It is also important to appreciate a fact with reference to the context in which it is stated, rather taking it as conclusive. It is relevant to recollect as part of appreciation of evidence with reference to the pleadings as part of discovering truth, the well laid down expression of the three judge bench of the Apex Court in *Mrs. Rukhmabai v. Lala Laxminarayana* MANU/SC/0186/1959 : AIR 1960 SC 335 at para-19 by relying upon the Privy council's expression *Alluri Venkatapathi Raju v. Danthuluri Venkata Narasimha Raju* MANU/PR/0023/1936 : AIR 1936 PC 264 that, it sometimes happens that persons make statements which serve their purpose or proceed upon ignorance of the true position; and there it is not their statements, but their relations with the estate, which should be taken into consideration in determining the issue.

14(i). Court is not confined merely to look into the form of the transaction between the parties concerned; the well laid down expression of the Apex Court in *Provident Investment Company Limited v. Court of I.T.* AIR 1954 Bombay 95 at para-3 speaks in this regard that, Court is not confined merely to look into the form of the transaction between the parties (in giving

effect to the legal rights and obligations there under), but the true legal position that arises out of it (by ignoring the form to ascertain real nature) in which the transaction was embodied and for that the Court may even look at the surrounding circumstances in construing the fact covered by oral statement or document, with reference to the substance and subject to the limitations for admissibility of oral over documentary evidence under Sections 91 and 92 of the Evidence Act.

14(j). Coming to appreciation of evidence in special reference to appeals and in moulding or grant of reliefs; it was held by the Apex Court in Banarsi v. Ramphal MANU/SC/0147/2003 : AIR 2003 SC 1989=2003(9) SCC 606 and Pannalal v. State of Bombay MANU/SC/0240/1963 : AIR 1963 SC 1516 : 1964(1) SCR 980 (5 judges bench) that, 1st appellate Court must re-appreciate (appreciate afresh) the entire evidence in giving its findings supported by reasons as to decide the lis and therefrom to find how far the decision of the trial court on any of its findings and conclusions are correct or incorrect, including for confirmation or reversal of said findings of the trial Court and the appellate Court for that is conferred with powers of wide amplitude under Order XLI Rules 22,24 and 33 so as to do

complete justice between the parties and such power is unfettered to make whatever order it thinks fit, even between correspondents, for ordinarily cross-objections between co-respondents they do not prefer. It is also as per *Santhosh Hazari v. Purushottam Tiwari*, MANU/SC/0091/2001 : AIR-2001-SC-965 *Madan Lal v. Yoga Bai* MANU/SC/0161/2003 : (2003(5)-SCC-89) and *Harihar Prasad Singh v. Balmiki Prasad Singh* MANU/SC/0008/1974 : 1975(1)SCC 212, that in Civil appeals, particularly in first appeal, the appreciation of evidence is at large like appreciation of evidence in a suit, more particularly from Order XLI, Rules 33 & 24 C.P.C. The appellate court got powers under Order 41 Rules 33 & 24 CPC not only to pass an order or decree that the trial court ought to have passed, but also while sitting in appeal against, irrespective of the appeal filed is challenging even part of the order or decree of the trial court, to grant any further decree or order within the scope of relief, though not beyond, as the case may require within the facts and circumstances, which include subsequent events to take note of in so moulding the reliefs-Vide- *S. Nasser Ahmed* (supra). In *P.V. Karuppanan v. Pandari Sundara Raja Ayyar*

MANU/TN/0147/1939 : AIR-1940-Madras-71 - it was held that even suit is filed for declaration of title and possession and plaintiff entitled to possession from anterior possession, the relief can be granted even no plea specifically asking for the relief.

14(k). Burden of appellant/cross-objector concerned; no doubt, the burden of showing that the judgment or even a finding therein under a challenge in appeal is wrong or incorrect either wholly or in part lies on the appellant and same is also the proposition in the course of the cross-objections as the cross-objectors are at par with appellants so far as their contentions in the cross-objections concerned, in the course of the cross-objections in shifting the burden on them, from hearing the main appeal. Coming to the powers of the 1st appellate Court in this regard concerned, more particularly from Order XLI, Rules 33 and 24 C.P.C. and from several expressions of the Apex Court including - Koksingh v. Deokabai MANU/SC/0408/1975 : AIR-1976-SC-634; Gaisi Ram v. Ramji Lal MANU/SC/0286/1969 : AIR-1969-SC-1144 and Madan Lal (supra); the 1st appellate court is competent to grant relief if finds appropriate on any facts though that was not granted by the trial

Court in rendering complete justice and prevent to the extent possible scope for further litigation and to give finality to the lis. But as held in Banarsi and Pannalal (supra) there are three limitations on the said power-Viz., it must not be to the prejudice of persons not parties (Rule 24), if given up a claim not to revive on its own and if part of the lis in the claim for relief not appealed (by cross objections or otherwise) and made final, Court cannot grant relief on the un-appealed portion and the relief to be granted may be lesser to the plea, but not higher or totally outside the pleadings and evidence MANU/SC/0005/1953 : AIR 1953 SC 235. Among the defendants to the suit, generally they won't prefer appeal and it is not a bar to decide their claims inter se in spite of non-filing of appeal or cross-objections with any specific plea. For granting such reliefs it is within the power of the appellate Court, subject to the rider that but for permitting on one ground or other to substantiate the relief granted by trial court, it cannot grant more relief than what was granted by the trial Court for want of cross-objections-vide decisions: Ranjana Prakash v. Divisional Manager MANU/SC/0897/2011 : 2011(8) Scale 240 where categorically held that but for to substantiate the quantum on one

ground or other from impugning any findings in that regard or by interference by this Court within its appellate power under Order XLI Rule 33 CPC, the respondent to the appeal cannot ask for reducing or increasing the quantum in the absence of cross-objections or independent appeal; *Oriental Insurance Company Limited v. R. Swaminathan* 2006 ACJ 1398 following the earlier expression of the Apex Court in *Banarsi* (supra) in the same line; in *Banarsi* (supra) referring to *Pannalal* (supra), *Rameshwar Prasad v. Shambharilal Jagannad* (three judge Bench), MANU/SC/0203/1963 : 1964(3) SCR 549 *Harihar Prasad Singh v. Balmiki Prasad Singh* MANU/SC/0008/1974 : 1975(1) SCC 212 holding that normally a party who is aggrieved by a decree should, if he seeks to escape from its operation, appeal against it within the time allowed after complying with the requirements of law. Where he fails to do so, no relief should ordinarily be given to him even under Order XLI Rule 33 CPC. But there are well recognized exceptions to this Rule. One is where as a result of interference in favour of the appellant; it becomes necessary to readjust the rights of other parties. A second class of cases based on the same principle is, where the question is one of

settling mutual rights and obligations between the same parties. A third class of cases is when the relief prayed for is single and indivisible, but is claimed against a number of defendants. In such cases, if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants there is possibility that there might come into operation at the same time and with reference to the same subject matter two decrees which are inconsistent and contradictory. This, however, is not an exhaustive enumeration of the class of cases in which Courts would interfere under Order XLI Rule 33 of CPC. Such an enumeration neither possible nor even desirable. In *Nirmala Balaghosh v. Balaichandghosh* (three judge Bench) MANU/SC/0346/1965 : 1965(3) SCR 550 - it was held that Order XLI Rule 33 is undoubtedly expressed in terms which are wide but it has to be applied with discretion, and to cases where interference in favour of appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. ---The Rule does not confer an unrestricted right to reopen decrees which have become final merely because the appellate Court

does not agree with the opinion of the Court appealed from----by failure of the respondent to prefer appeal or to take cross-objections, the respondent has allowed the part of the trial Court's decree to achieve a finality which was adverse to him. While dismissing the appeal, modifying the decree in favour of the appeal-respondent in the absence of cross-appeal or cross-objections is interference by the appellate Court that has reduced the appellant's to a situation worse than in what they would have been if they had not been appealed. The High Court ought to have noticed this position of law and should have interfered to correct the error of the law committed by the lower Court(appellate) - in laying down the principle therefrom in Banarsi (supra) that in an appeal filed by the defendant laying challenge to the grant of a smaller relief, the plaintiff as a respondent cannot seek a higher relief if he had not filed an appeal on his own or had not taken any cross-objection and as such held by relying on it in R.Swaminathan (supra) that in the appeal filed by the insurer the claimant neither filed cross-objections nor appealed independently and thereby not entitled to claim more than what the tribunal awarded. It is needless to say the 1st appellate Court if desires

to reverse the judgment and decree of lower Court; it should discuss the findings and set aside those which are unsustainable either on fact or on law."

FRAUD AND BURDEN OF PROOF

The Privy Council in the case of **Satish Chandra Chatterji and others v. Kumar Satish Kantha Roy reported in MANU/PR/0070/1923 : AIR 1923 Privy Council 73** has observed as under: "Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who made them-- proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspensions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused or fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so many a clever and dexterous knave would escape."

In Mahabir Tewary v. Chhathu Tewary MANU/BH/0028/1931 : 19 A.I.R. 1932 Pat 170, a Bench of Court (Courtney O Terrell C.J., and Fazi Alil J.) dealt "with the importance of such evidence when fraud is alleged. The facts of that case were that in a partition suit a decree was passed based on a compromise between the parties which was however, subsequently challenged in the suit on the ground of fraud. It was held that the simple question in the suit related to the allegations as to fraud, and the Court below was wrong in first taking up to the question as to whether the bargain was hard to the plaintiff in order to infer when there the compromise was genuine or fraudulent. It must be admitted that a Court is entitled to go into the question of fairness or otherwise of a bargain to ascertain whether that bargain was induced by fraud, and the evidence as to unfairness may assist the Court in coming to a conclusion upon the credibility of the witnesses dealing with the question of fraud.

The Privy Council in the case **of Harihar Prasad Singh v. Narsingh Prasad Singh reported in 1941 AIR (PAT) 83** has observed as under: "... It may be that this was an unfortunate bargain for

the defendants first party, but a Court cannot infer from that that fraud must have been practised. If, however, direct evidence on the question of fraud is wholly unreliable, a Court cannot possibly base a finding of fraud purely on a finding that the transaction was unfair."

Hajra Bai v. Jadabai reported in MANU/MP/0024/1986 : 1986 AIR (MP) 106, wherein the Court observed as under: "The plaintiffs case is not of undue influence, but of fraud though the learned counsel for the plaintiff-respondent, while making his submission urged that this was a case of undue influence and consequently a case of fraud. However, we are not persuaded and impressed with this sort of submission. A party has to come with a positive case either of fraud or undue influence or coercion or misrepresentation or all of them or some of them. But here the plaintiff has restricted her case to the case of fraud alone though sometimes in certain cases they may overlap to some extent." "...The mere fact that the plaintiff; as alleged by her, was an illiterate and old lady, by itself would not make us to infer that the transaction in question is vitiated in any such manner because the initial burden lies on her to prove all these facts. Even

assuming that the relations between the parties were friendly or close on that basis it cannot be readily inferred that the defendants were in a dominating position or that they were exerting any undue influence or were trying to take undue advantage of her position and thus wanted to practice fraud upon her. It is unlikely that the plaintiff even after coming to know of the alleged fraud would have waited for such a long period and in order to justify the delay she has introduced a peculiar case in her notice, which is not consistent with the pleadings. There is no satisfactory evidence that at the relevant time of the said transaction she was indisposed to such an extent that she was physically and mentally so upset that she was incapable of understanding what she was doing. It is, therefore, difficult to rely on the solitary testimony of the plaintiff in absence of any other convincing, satisfactory and reliable evidence.

Madhya Pradesh High Court in the case of **Passarilal Mannoolal v. Chhuttanbai reported in MANU/MP/0157/1958 : AIR (MP) 1958 417** has observed as under: "It is true that 'fraud' or 'collusion' is secret in its origin and inception and the means adopted for fraudulent design cannot

be proved to the very hilt and so it can only be inferred from the circumstances placed before the Court. At the same time, it has to be borne in mind that the inference of fraud or collusion is to be drawn only from positive materials on record and it cannot be based merely on speculation and surmises. No evidence, oral or documentary, has been produced in support of the allegation of fraud or collusion. The plaintiff ought to have proved that the son prevailed upon the father to give away the suit house to his sister in order to deprive the plaintiff of the suit house."

Karnataka High Court in the case of **Savithramma v. H. Gurappa Reddy reported in MANU/KA/ 0025/1996 : 1996 AIR (Kar) 99** has observed as under: "8... It is a well settled law that even within the province of civil litigation when an allegation of misrepresentation or fraud is made, that the level of proof required is extremely high and is rated on par with a criminal trial. On the basis of the material before the Court here, it would therefore be impossible to uphold the charge that the compromise decree stood vitiated on grounds of either misrepresentation or fraud. To my mind, therefore that contention cannot be upheld."

Supreme Court in the case of **Paras Nath Thakur v. Smt. Mohani Dasi (deceased) and others reported in MANU/SC/0156/1959 : AIR 1959 SC 1204** has observed in para 4 as under: "In the first place, the High Court has misplaced the onus of proof, as will appear from the conclusion just quoted above. The onus of proof loses much of its importance where both the parties have adduced their evidence. But the High Court seems to have laid some emphasis on onus of proof, with a view to examining for itself whether that onus had been discharged by the contesting defendant, the deity. This becomes clear from the following observation of the High Court : "Judged by these principles Ext. F, the deed of trust by itself creates no endowment; and it is necessary for the defendants to show by evidence aliened that there had been an existing endowment in favour of this particular idol to which the description 'devottar' can be applied." Further down, the High Court observed as follows, after referring to what it characterized as "innumerable decisions": "Applying the above principles to the facts of this case, we find that no evidence has been given with regard to the formal dedication of the properties to the deity except what is recited

in Ex. F. This recital is insufficient to support a finding that there had been a real dedication of these properties." With due respect to the High Court, it must be remarked that it appears to have lost sight of the well-established rule applicable to suits of the kind it was dealing with, that the burden of proof is heavy on a plaintiff who sues for a declaration of a document solemnly executed and registered, as a fictitious transaction. The burden becomes doubly heavy when the plaintiff seeks to set aside the order of the civil court, passed in execution proceedings, upholding the claim of a third party to a property sought to be proceed against in execution. The plaintiff, who seeks to get rid of the effect of the adverse order against him, has to show affirmatively that the order passed on due inquiry by the executing court, was erroneous. Hence, in this case, apart from the fact that the respondents were the plaintiffs, there was an initial heavy burden on them not only to show that the order of the civil court in the claim case was erroneous, but also that the deed of trust relied upon by the contesting defendant was fictitious. The two courts of fact had discussed all the relevant evidence in great detail, and had agreed in finding that the plaintiffs had failed to

prove their case. The question which the courts below decided and which was the only question in controversy before the High Court was whether the trust deed was a fictitious transaction. Such a question is essentially one of fact. See the latest decision of this Court in the case of *Sree Meenakshi Mills, Madurai v. Commissioner of Income-tax, Madras*, MANU/SC/0044/1956 : 1956 SCR 691: ((S) AIR 1957 SC 49), where it has been laid down, inter alia, that a finding of fact, even when it is an inference from other facts found on evidence is not a question of law, except in certain specified cases. The case before us certainly is not one of those specified cases. These observations are sufficient completely to displace the decision of the High Court, but we shall examine the reasons of the High Court for setting aside the concurrent findings of fact of the courts below, to see whether the High Court was right in its conclusions, assuming all the time that the High Court was competent to go into those questions of fact."

Calcutta High Court in the case of **Bhuban Mohini Dasi and others v. Kumud Bala Dasi and others reported in MANU/WB/0117/1923 : AIR 1924 Calcutta 467 (DB)** has observed as

under: "The rule thus enunciated must be coupled with the elementary principle that the burden of proof lies upon the person who asserts that the apparent is not the real state of things. It is important to bear in mind in this class of cases that, as pointed out by Lord Phillimore in *Manick Lal v. Bijoy Singh* A.I.R. 1921 P.C. 69, the decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. This recalls the earlier pronouncements to the same effect by Lord Westbury in *Sreeman v. Gopaul* (1866) 11 M.I.A. 28, and by Sir Lawrence Jenkins in *Minakumari v. Bijoy Singh* MANU/PR/0026/1916 : A.I.R. 1916. P.C. 238. But we are not unmindful that, in the words of Lord Hobhousa in *Uman Prasad v., Gandharp Singh* (1887) 15 Cal. 20, and of Lord Shaw in *Mohammad Mahbub v. Bharatindu* A.I.R. 1918 P.C. 137, as benami transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely however solely on probabilities, as Lord Buckmaster observed in *Irshad Ali v. Kariman* MANU/PR/0105/1917 : A.I.R. 1917 P.C. 169. He must show something definite to establish that it

is a sham transaction, on the principle that the burden of proof lies upon the person, who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things : Azimut v. Hurdwaree MANU/PR/0008/1870 : (1870) 13 M.I.A. 395, Faez Buksh v. Fukeerooden MANU/PR/0018/1871 : (1871) 14 M.I.A. 234, Suleiman v. Mehndi Begam MANU/PR/0036/1897 : (1897) 25 Cal. 473, Nirmal v. Mahomed MANU/WB/0002/1898 : (1898) 26 Cal. 11, Moti Lal v. Kundan Lal MANU/PR/0136/1917 : A.I.R. 1917 P.C. 1."

**Supreme Court in K. Laxmanan v. Thekkayil
[MANU/SC/8352/2008 : AIR 2009 SC 951]**

"19. When there are suspicious circumstances regarding the execution of the Will, the onus is also on the propounder to explain them to the satisfaction of the Court and only when such responsibility is discharged, the Court would accept the Will as genuine. Even where there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of the Court. Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions of the testator's mind,

the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case, the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. The aforesaid view is taken by us in consonance with the decision of this Court in *Shashi Kumar Banerjee v. Subodh Kumar Banerjee* [MANU/SC/0278/1963 : AIR 1964 SC 529] and *Pushpavathi v. Chandraraja Kadamba* [MANU/SC/0396/1972 : (1973) 3 SCC 291].

20. So far as Section 68 of the Act is concerned, it categorically provides that a Will is required to be attested and therefore, it cannot be used as evidence until at least one of the attesting witnesses is called for the purpose of proving its execution provided such attesting witness is alive, and subject to the process of the court and capable of giving evidence.

21. In the present case the scribe and one of the attesting witnesses to the Will namely Vasu died before the date of examination of the witnesses. The second attesting witness namely

Gopalan was also not in good physical condition inasmuch as neither was he able to speak nor was he able to move, the fact which is proved by the deposition of the doctor examined as DW 2. Consequently, as the execution of the Will cannot be proved by leading primary evidence, the propounder i.e. the appellant herein was required to lead secondary evidence in order to discharge his onus of proving the Will as held by this Court to be permissible in *Daulat Ram v. Sodha* [MANU/SC/0969/2004 : (2005) 1 SCC 40].

26. Execution of the aforesaid Deed of Gift is also under challenge. The attesting witnesses to the said Deed of Gift are also not examined. It was, however, submitted that the mandatory requirement of examining an attesting witness under section 68 of the Act is only in respect of a Will and in respect of Gift Deed, if execution of the said is not specifically denied, then in that case there is no obligation on the part of the propounder of the Deed of Gift to prove the execution by examining an attesting witness like that of a Deed of Will.

31. The two attesting witnesses to the said Deed of Gift viz. Ext. B2 are K.T. Vasu and Urulummal Ukkappan. K.T. Vasu admittedly had died whereas Urulummal Ukkappan was alive.

Urulummal Ukkappan being alive could have been examined in the present case to establish the legality of the Deed of Gift. But neither was he examined nor any reason was assigned by the appellant for not examining him.

32. Since both the attesting witnesses have not been examined, in terms of Section 69 of the Act it was incumbent upon the appellant to prove that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. DW 3, who was an identifying witness also in Ext. B2, specifically stated that he had not signed as an identifying witness in respect of Ext. B2 and also that he did not know about the signature in Ext. B2. Besides, considering the nature of the document which was a Deed of Gift and even assuming that no pleading is filed specifically denying the execution of the document by the executant and, therefore, there was no mandatory requirement and obligation to get an attesting witness examined but still the fact remains that the plaintiff never admitted the execution of the gift deed and, therefore, the same was required to be proved like any other document."

PERSON WHO HAS TAKEN BENEFIT CANNOT CHALLENGE

In Prafulla Chandra v. Chotanagpur Banking Association reported in MANU/BH/0142/1965 : AIR 1965 Pat 502 , the

apex Court held, "The doctrine of approbation and reprobation is akin to the law of election and estoppel applies to those where a person has elected to take benefit otherwise than on merit and the claim in the litigation under an order to which benefit he could not have been entitled except for the order. Another criterion is that the person receiving a benefit under the order must have a choice between two rights and that after the exercise of the choice restitution was impossible or inequitable."

In Bhanu Ram v. Baijnath reported in AIR 1961 SC 1327, Supreme Court held, "The principle that a person may not approbate and reprobate expresses two propositions, first that the person in question, having a choice between the two courses of conduct, is to be treated as having made an election from which he cannot resile, and second, that he will not be regarded, in general at any rate, as having so elected unless

he has taken a benefit under or arising out of the course of conduct which he has pursued and with which his subsequent conduct is inconsistent."

In Ram Charan Das v. Girja Nandini reported in MANU/SC/0358/1965 : [1965] 3 SCR 841 , the apex Court has held, "That a party who has taken benefit cannot challenge."

In Adimoola Padyachi v. Kasi reported in AIR 1943 Madras 701, it has been held, "When the person acquiesced in the family arrangement and accepts the benefits given thereby is estopped from disputing the arrangement."

In Puma v. Sarojendra reported in MANU/WB/0092/1953 : AIR 1953 Cal 251 , it has been held, "Whether a particular statement in an earlier suit debars the party from taking contradictory statement in a later suit? A party to a suit is estopped from setting up a plea contrary to his pleading which he had successfully set up in the previous suit."

EVIDENTIARY VALUE OF ENTRY OF BIRTH DATE AFTER MAGISTRATE DIRECTION

H. Subba Rao v. The Life Insurance Corporation of India and

Ors.MANU/KA/0037/1976 : ILR 1976 KAR

800, while considering Section 13 (3) of the Registration of Births and Deaths Act, 1969, held that entry of date of birth made pursuant to the direction of Magistrate is not conclusive evidence of disputed date of birth and held as under:- "The policy of the law embodied in the Section, as it appears to me, is to avoid manipulation in the entries relating to the date of births and deaths. Such entry shall be made immediately after the occurrence. Precaution should be taken while making delayed entries. The law says that an entry which has not been made within one year of its occurrence cannot be made without an order of the Magistrate. Section 13(3) of the Act is just a constraint on the Registrar. It is not a provision whereby an aggrieved party could get an adjudication on his disputed date of birth. The order of the Magistrate binds only the Registrar and not others. The entry made by the Registrar, pursuant to an order of the Magistrate, cannot carry higher probative value and its proof must necessarily depend upon the facts and circumstances of each case."

**In the matter of Bujhawan Singh and Ors. v.
Mt. Shyama Devi and Ors.**

MANU/BH/0085/1964 : AIR 1964 Patna 301,

Division Bench of Patna High Court has held that entries in birth and death register are public documents and are admissible under Section 35 of the Evidence Act. The ground of reception of such evidence is that it is the public duty of a person who keeps the register to make such entries after satisfying himself of the truth. When it is the duty of the public servant to make such entries in any public or official register, it becomes admissible to prove the truth of facts entered as well as the fact that the entries were made by the officer. It was further held that entries in a register of birth, death or marriage are at least prima facie, though they may not be always conclusive evidence. It is not necessary to prove who made the entries and what was the source of information.

**SETTING ASIDE SALE DEED IN SPECIFIC
PERFORMANCE SUIT**

Delhi High Court has held in the case of **Jafar Imam Versus Devender Chauhan and others**
MANU/DE/3933/2014 : 2014 (3) ILR 1917 that

there would be no necessity to claim a declaratory relief qua subsequent transferee, while further holding that the relief of specific performance of agreement to sell is a substantive relief and the declaration of invalidity of the sale deed is only an ancillary relief and there was no necessity for the plaintiff to ask for cancellation of the sale deed. The Delhi High Court held as under:- "20. The legal position thus emerges is that:

(i) If in a suit the Plaintiff seeks the substantive relief of specific performance of contract, the declaration of the invalidity of the sale deed in favour of the subsequent transferees would be an ancillary relief.

(ii) It is not necessary at all for the Plaintiff to ask for any such declaration for cancellation of Sale Deed.

(iii) It would be enough for the Plaintiff to have joined subsequent transferees as co-Defendants so as to contend that the subsequent sale deeds were not binding on him.

(iv) The proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him, to the prior transferee.

(v) Subsequent transferee does not join in any special covenants made between the prior transferee and his vendor, all that he does is to pass on his title to the prior transferee.

(vi) If the court reaches the conclusion that the title to the property has validly passed from the vendor and resides in the subsequent transferee. The sale to him would not be void but only voidable at the option of the earlier "contractor".

(vii) If there are any special covenants and conditions agreed upon in the contract for sale between the original purchaser and the vendor those have to be incorporated in the sale deed although it is only the vendor who will enter into them and the subsequent purchaser will not join in those special covenants.

(viii) The whole idea and the purpose underlying a decree for specific performance is that if a decree for, such a relief is granted the person who has agreed to purchase the property should be put in the same position which would have obtained in case the contracting parties, i.e., vendor and the purchaser had, pursuant to the agreement, executed a deed of sale and completed it in every way.

(ix) The relief of declaration prayed for against the subsequent transferees is not required to be valued in terms of money.

(x) There would be no necessity of claiming any declaratory relief as against the subsequent transferee. Consequently, there will be no question of payment of court-fees in respect of said relief. The said relief claimed would be superficial and unnecessary in the facts and circumstances of the case."

CHAPTER-11
WOMENS ABSOLUTE ESTATE

SECTION 14 (1) OF THE 1956 ACT MEANS THAT SHE MUST HAVE A PRE EXISTING RIGHT FOR CONFERMENT OF A FULL OWNERSHIP

In Ram Vishal (dead) by L.Rs and Others v. Jagannath [2004 (9) SCC 302], it has been held that the expression property possessed by a female Hindu in explanation to Section 14 (1) of the 1956 Act means that she must have a pre existing right for conferment of a full ownership and that a mere right of maintenance without actual acquisition in any manner is not sufficient to attract Section 14.

LIMITED OWNER BECOMES ABSOLUTE OWNER AFTER SECTION 14 BROUGHT

In AIR 1991 SC 1581 [Kalawatibai v. Soiryabai], it has been held that a female Hindu possessed of the property on the date the Act came into force could become absolute owner only if she was a limited owner and not otherwise.

**HINDU WOMENS ABSOLUTE PROPERTY -
SHALL NOT BE TREATED AS A PART OF THE
JOINT HINDU FAMILY PROPERTY**

Marabasappa (D) By Lrs. & Ors. vs Ningappa & Ors 2011 (9) SCC 451 Section 14 of the Hindu Succession Act, 1956 clearly mandates that any property of a female Hindu is her absolute property and she, therefore, has full ownership. The Explanation to sub-section (1) further clarifies that a Hindu woman has full ownership over any property that she has acquired on her own or as stridhana. As a consequence, she may dispose of the same as per her wish, and that the same shall not be treated as a part of the joint Hindu family property.

**ALIENATION BY GIFT OF ENTIRE WIDOW'S
ESTATE BEING CONTRARY TO LAW DID NOT
BIND THE REVERSIONER WHO COULD FILE A
SUIT AFTER THE DEATH OF THE WIDOW**

Kalawatibai vs Soiryabai And Others 1991 AIR 1581, 1991 SCR (2) 599 A Hindu widow executed a gift deed in 1954 of the entire estate inherited by her from her husband in favour of the appellant, one of her daughters. This led to

the filling of two cross-suits-one by the appellant for permanent injunction basing her claim on the gift deed and the other by the respondent, another daughter of the widow's for declaration and partition assailing the validity of the gift deed and claiming reversioners' right after death of the mother in 1968. In the instant case the alienation by gift of entire widow's estate being contrary to law did not bind the reversioner who could file a suit after the death of the widow. The appellant could not claim to have acquired title to the property under the gift deed. Nor had she become a limited owner under Hindu Law which could mature into full ownership when the Act came into force. In fact such possession was not backed by any title as against reversioner which could preclude her from bringing the suit for declaration. Possession under a gift deed which was found to be invalid as it was not permitted under Hindu Law was on general principle contrary to law and as such could be adverse. The appellant could not acquire any right by adverse possession against reversioner during life time of her mother. Her claim was rightly negatived by the first appellate court. Even assuming that the alienee had perfected adverse possession against the donor, it was not sufficient

to clothe her with right or title in the property so as to deprive the reversioners of their right to claim the property after the death of the widow, inasmuch as in the case of an alienation by Hindu widow without legal necessity, the reversioners were not bound to institute a declaratory suit during the lifetime of the widow. They could wait till her death and then sue the alienee for possession of the alienated property treating the alienation as a nullity.

Quoted citations:-

Gummalapura Taggina Matada
Kotturuswami v. Setra Veeravva and Ors.

MANU/SC/0102/1958 : AIR 1959 SC 577 the widow was held to have acquired rights as the adoption made by her having been found to be invalid she was deemed to be in constructive possession and thus 'possession' of the property on the date the Act came into force.

Mangal Singh v. Smt. Rattno
MANU/SC/0205/1967 AIR 1967 SC 1786 was another case where widow's constructive possession enured to her benefit as she having been dispossession by her collaterals in 1954 and filed a suit for recovery of possession before the Act came into force was held to be 'possession' of

the property so as to entitle her to become full owner.

Munna Lal v. Raj Kumar **AIR 1962 SC 1495** was a case where the share of the widow was declared in preliminary decree. No actual division of share had taken place, yet the court held that it was property 'possessed' by her on the date the Act came into force.

In Sukhram v. Gauri Shankar **MANU/SC/0208 /1967 : [1968]1SCR476** it was held that a widow was full owner in joint Hindu family property as she became entitled to the interest which her husband had by virtue of Hindu Women Right to Property Act. The Court ruled that even though a male was subject to restrictions qua alienation on his interest in joint Hindu family property, but a widow acquiring an interest by virtue of the Act did not suffer such restriction.

V. Tulsamma v. Shesha **Reddy MANU/SC /0380/1977 : [1977]3SCR261** and Bai Vija v. Thakorbhai Chelabhai **[1979] 3 SCC 311** were cases where the widow was 'possessed' of the property in lieu of maintenance, and therefore, she was held to be full owner.

Court in Radhey Krishan Singh and Ors. v. Shiv Shankar Singh and Ors.

MANU/SC/0259/1973 : AIR 1973 SC 2405

that, the alienation could be challenged by the reversioner as there was nothing in the Hindu Succession Act which has taken away such a right. A female alienee did not enjoy better or different status as the Hindu Law applied universally and uniformly both to male and female alienees. She did not become limited owner or holder of a limited estate as understood in Hindu Law. And the alienation without legal necessity could be assailed by the reversioner. No change was brought about in this regard by the Act. If the alienation was valid i.e., it was for legal necessity or permitted by law then the donee became an owner of it and the right and title in the property vested in her. But if it was contrary to law, as in this case the gift being of entire widow's estate, then it did not bind the reversioner who could file a suit after the death of the widow. And the appellant cannot claim to have acquired title to the property under the gift deed. Nor had she become a limited owner under Hindu Law which could mature into full ownership when the Act came into force. In fact such possession was not backed by any title as against reversioner which could preclude her from bringing the suit for declaration.

Badri Pershad v. Smt. Kanso Devi
MANU/SC /0293/1969 : [1970] 2 SCR 95 It was a case where the widow entitled to the interest of her husband got certain property prior to 1956 as a result of arbitration with specific stipulation that she shall have only life interest. This was ignored and she was held, rightly, to be the absolute owner whose rights were governed by Section 14(1) and not 14(2).

In **Radha Rani v. Hanuman Prasad**
MANU/SC/ 0359/1965 : [1966] 1 SCR 1 - Court overruled the decisions of the Allahabad and Patna High Courts that there were no reversioners or reversionary rights after 1956 and held, "it is open to reversioner to maintain a suit for declaration that an alienation made by a Hindu female limited owner before the coming into force of Hindu Succession Act 1956 was without legal necessity and was not binding upon reversioners".

**TO APPLY SECTION 14 POSSESSION OF
 WOMEN AS ON THE DATE OF
 COMMENCEMENT OF HINDU SUCCESSION
 ACT IS IMPORTANT**

Gummalapura Taggina Matada Kotturuswami v. Setra Veeravva & Ors., [1959] Supp. 1 SCR 968=AIR 1959 SC 577"

A suit instituted by the nearest reversioner of K for a declaration that the adoption made by K's widow was invalid, was dismissed -and during the pendency of the appeal filed against the decree dismissing the suit, the Hindu Succession Act, 1956, came into force. At the hearing of the appeal the respondent raised the preliminary objection that even if the adoption were held to be invalid, the appellant's suit must fail in view of the provisions of S. 14 Of the Act under which K's widow, who was a party to the suit and the appeal, would be entitled to a full ownership of her husband's properties, while it was urged for the appellant that s. 14 Of the Act did not apply to the facts of the case because the properties were not in, the possession of K's widow, but were only with the adopted son at the time the Act came into force. Held, that the word "possession" in s. 14 Of the Hindu Succession Act, 1956, is used in the widest connotation and it may be either actual or constructive or in any form recognised by law.

Mangal Singh v. Smt. Rattno, AIR 1967 SC 1786 was another case where widow's

constructive possession enured to her benefit as she having been dispossessed by her collaterals in 1954 and filed a suit for recovery of possession before the Act came into force was held to be 'possession' of the property so as to entitle her to become full owner.

Munna Lal v. Raj Kumar, AIR 1962 SC 1495

was a case where the share of the widow was declared in preliminary decree. No actual division of share had taken place, yet the court held that it was property 'possessed' by her on the date the Act came into force.

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476 it was held that a widow was full owner in joint Hindu family property as she became entitled to the interest which her husband had by virtue of Hindu Women Right to Property Act. The Court ruled that even though a male was subject to restrictions qualification on his interest in joint Hindu family property, but a widow acquiring an interest by virtue of the Act did not suffer such restriction.

V. Tulsamma v. Shesha Reddy, [1977] 3 SCC 99 and Bai Vijia v. Thakorbhai Chelabhai,

[1979] 3 SCC 311 were cases where the widow was 'possessed' of the property in lieu of maintenance, and therefore, she was held to be full owner.

In all these cases since the widow was in possession, actual or constructive, on the date the Act came into force she was held to be a female Hindu 'possessed' of the property, and consequently, her limited ownership stood converted into full ownership by operation of law.

Gulwant Kaur v. Mohinder Singh, [1987] 3 SCC 674 that the Court in Bai Vija's case did not support, to lay down, that, "what was enlarged by sub- section (1) of section 14 into a full estate was the Hindu woman's estate known to Hindu Law. When the Court uses the word, 'limited estate', the words are used to connote a right in the property to which possession of the female Hindu may be traced, but which is not a full right of ownership".

Maharaja Pallai Lakshmi Ammal v. Maharaja Pillai T. Pillai, [1988] 1 SCC 99 where Court while examining right of wife put in exclusive possession of the property with the right to take the income for her maintenance was held to have

become full owner under section 14(1) as she entered into possession after the death of her husband in 1955 and was in possession in 1956. The Court held that the right to utilise income for her maintenance must be "presumed to have resulted in property being given to her in lieu of maintenance". On this finding the property being possessed on the date the Act came into force as contemplated in the explanation, the widow being a limited owner became a full owner and the gift executed by her in favour of her daughter after 1956 was unexceptionable.

Jagannathan Pillai v. Kunjithapadam Pillai, [1987] 2 SCC 572 a decision which shall be adverted to later. But it too was concerned with acquisition after 1956. And the bench while discussing scope of section 14(1) observed. "that the limited estate or limited ownership of a Hindu female would enlarge into an absolute estate or full ownership of the property in question in the following fact situation: 'Where she acquired the limited estate in the property before or after the commencement of the Act provided she was in possession of the property at the time of the coming into force of the Act on June 17, 1956'."

In Jaisri v. Raj Diwan Dubey, [1961] 2 SCR 559

it was observed by Court that "when a widow succeeds as heir to her husband the ownership in the property both legal and beneficial vests in her". And the restriction on her power to alienate except for legal necessity is imposed, "not for the benefit of reversioners but is an incident of estate".

In Kamala Devi v. Bachu Lal Gupta, [1957]

SCR 453 this Court after reviewing various authorities extended this principle to female donee. A gift made within reasonable limits, in favour of daughter even two years after the marriage but in pursuance of promise made at time of the marriage was upheld and the reversioners claim was repelled on permissible alienation under Hindu Law.

In Natwalal Punjabhai & Anr. v. Dadubhai

Manubhai & Ors., AIR 1954 SC 61, the Court

held as under: "The Hindu Law certainly does not countenance the idea of a widow alienating her property without any necessity merely as a mode of enjoyment as was suggested before us by Mr. Ayyangar. If such a transfer is made by a Hindu widow it is not correct to say that the transferee

acquires necessarily and in law an interest commensurate with the period of the natural life of the widow or at any rate with the period of her widowhood. Such transfer is invalid in Hindu Law, but the widow being the grantor herself, cannot derogate from the grant and the transfer cannot also be impeached so long as a person does not come into existence who can claim a present right to possession of the property."

Radhey Krishan Singh & Ors. v. Shiv Shankar Singh & Ors., [1973] 2 SCC 472 that, the alienation could be challenged by the reversioner as there was nothing in the Hindu Succession Act which has taken away such a right. A female alienee did not enjoy better or different status as the Hindu Law applied universally and uniformly both to male and female alienees. She did not become limited owner or holder of a limited estate as understood in Hindu Law. And the alienation without legal necessity could be assailed by the reversioner. No change was brought about in this regard by the Act. If the alienation was valid i.e., it was for legal necessity or permitted by law then the donee became an owner of it and the right and title in the property vested in her. But if it was contrary to law, as in

this case the gift being of entire widow's estate, then it did not bind the reversioner who could file a suit after the death of the widow. And the appellant cannot claim to have acquired title to the property under the gift deed. Nor had she become a limited owner under Hindu Law which could mature into full ownership when the Act came into force. In fact such possession was not backed any title as against reversioner which could preclude her from bringing the suit for declaration.

Jagannathan Pillai v. Kunjithapadam Pillai & Ors., [1987] 2 SCR 1070 that, "To obviate hair splitting, the legislature has made it abundantly clear that whatever be the property possessed by a Hindu female, it will be of absolute ownership and not of limited ownership notwithstanding the position under the traditional Hindu Law", and it was submitted that the appellant satisfied the criteria to entitle her to claim that her estate irrespective of its nature Hindu Law got enlarged under section 14 of the Act. An observation without reference to facts discloses neither the law nor the ratio- de-cedendi which could be taken assistance of. Factually, the issue was the effect of re-transfer by the alienee in favour of the

widow after 1956. And the answer was that, "When the transaction was reversed and what belonged to her was retransmitted to her, what the concerned Hindu female acquired was a right which she herself once possessed namely, a limited ownership (as it was known prior to the coming into force of the Act) which immediately matures into or enlarges into a full ownership in view of Section 14(1) of the Act on the enforcement of the Act. The resultant position on the reversal of the transaction would be that the right, title and interest that the alienee had in the property which was under 'eclipse' during the subsistence of the transaction had re-emerged on the disappearance of the eclipse".

Badri Pershad v. Smt. Kanso Devi, [1970] 2 SCR 95 of any assistance. It was a case where the widow entitled to the interest of her husband got certain property prior to 1956 as a result of arbitration with specific stipulation and she shall have only life interest. This was ignored and she was held, rightly, to be the absolute owner whose rights were governed by section 14(1) and not 14(2).

In Radha Rani v. Hanuman Prasad, AIR 1966 SC 216 Court overruled the decisions of the Allahabad and Patna High Courts that there were no reversioners or reversionary rights after 1956 and held, "it is open to reversioner to maintain a suit for declaration that an alienation made by a Hindu female limited owner before the coming into force of Hindu Succession Act 1956 was without legal necessity and was not binding upon reversioners".

FEMALE RIGHTS UNDER SECTION 14 OF HINDU SUCCESSION ACT

Santhosh and others VS Saraswathibai and another BENCH: S.B. SINHA & HARJIT SINGH BEDI AIR 2008 SC 500.

The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has

property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

S.14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by this long needed legislation. Sub-section (2) of s.14 is in the nature of a proviso and has a field of its own without interfering with the operation of s.14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by s.14(1) or in a way so as to become totally inconsistent with the main provision. Sub-section (2) of s.14 applies to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application

where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and s.14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of s.14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-section (2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee.

The use of express terms like 'property acquired by a female Hindu at a partition', 'or in lieu of maintenance', 'or arrears of maintenance', etc. in the Explanation to s.14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2). The words 'possessed by' used by the Legislature in s. 14(1) are of the widest

possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of s.14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

In Shivdev Kaur (D) by L.Rs. & Ors. v. R.S. Grewal (Civil Appeal Nos.5063-5065 of 2005, decided on 20.3.2013), Court dealt with the issue of Section 14(2) of the Act 1956 and held :-
 “Thus, in view of the above, the law on the issue can be summarised to the effect that if a Hindu female has been given only a “life interest”, through Will or gift or any other document referred to in Section 14 of the Act 1956, the said rights would not stand crystallised into the absolute ownership as interpreting the provisions

to the effect that she would acquire absolute ownership/title into the property by virtue of the provisions of Section 14(1) of the Act 1956, the provisions of Sections 14(2) and 30 of the Act 1956 would become otios. Section 14(2) carves out an exception to rule provided in sub-section (1) thereof, which clearly provides that if a property has been acquired by a Hindu female by a Will or gift, giving her only a “life interest”, it would remain the same even after commencement of the Act 1956, and such a Hindu female cannot acquire absolute title.” While deciding the said issue, Court has placed reliance upon various previous judgments of this Court, including *Mst. Karmi v. Amru & Ors.*, AIR 1971 SC 745; *Navneet Lal @ Rangi v. Gokul & Ors.*, AIR 1976 SC 794; *Sadhu Singh v. Gurdwara Sahib Narike & Ors.*, AIR 2006 SC 3282; and *Jagan Singh (Dead) Through LRs. v. Dhanwanti & Anr.*, (2012) 2 SCC 628. (See also: *Muniananjappa & Ors. v. R. Manual & Anr.*, AIR 2001 SC 1754; *Sharad Subramanyan v. Soumi Mazumdar & Ors.*, AIR 2006 SC 1993; and *Gaddam Ramakrishnareddy & Ors. v. Gaddam Ramireddy & Anr.*, (2010) 9 SCC 602).

In Gangamma & Ors. Vs. G. Nagarathnamma & Ors., MANU/SC/1118/2009 : (2009) 15 SCC 756, the Supreme Court has held as under:-

"4. The suit properties consist of both agricultural lands and urban properties and the plaint case is that they are ancestral properties belonging to the joint family. The further plaint case is that though some of the properties stand in the name of the first defendant, they were bought benami in her name by the late Ganganna out of the income from agricultural lands and the income of the first plaintiff's husband who was working as an accountant in a private firm and drawing salary. He also had a leather business and had earning from running a taxi. Thus he was contributing seven to eight thousand rupees every month to the family and out of such income the suit properties were purchased.

5. The first defendant being a housewife had no income to purchase properties. However, later on relationship between Plaintiff 1 and her husband and Defendant 1 became strained and Plaintiff 1 and her husband had to leave the ancestral house. The plaint case is that out of the properties those at Items 1 to 4 are joint family properties.

9. Section 14(1) of the Hindu Succession Act, 1956 (hereinafter referred to as "the Act") has a bearing on the issue. As the properties at Items 1 and 2 are recorded in the name of the appellant, in the absence of any evidence to the contrary in this case, the appellant by operation of Section 14(1) of the said Act is the full owner of those properties. In the facts of this case discussed above it has to be accepted that those properties are not joint properties but the appellant is the sole owner of those properties.

10. The principle laid down in Section 14(1) of the said Act has been read by courts in a very comprehensive manner since the said Act overrides the old law on stridhana in respect of properties possessed by a female Hindu. In *Eramma v. Veerupana Ramaswami*, J. speaking for the Court held that Section 14(1) of the Act contemplates that a female Hindu, who in the absence of the said provision would have been a limited owner of the property, will now become full owner by virtue of the said section. Such female Hindu will have all powers of disposition to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder.

11. Again, in *Punithavalli Ammal v. Minor Ramalingam*] a three-Judge Bench of this Court

reiterated the position that the said Act has overriding effect and confers full ownership on Hindu female and made it very clear that rights conferred under Section 14(1) to a Hindu female are not restricted or limited by any rule of Hindu Law. In the opinion of the Court in Punithavalli [MANU/SC/0396/1970 : (1970) 1 SCC 570 : AIR 1970 SC 1730] the said section makes a clear departure from all texts of Hindu laws and rules and those texts and rules cannot be used for circumventing the plain meaning of Section 14(1) of the said Act.

In fact, the Supreme Court in Jagannathan Pillai Vs. Kunjithapadam Pillai & Ors. MANU/SC/0415/1987 : 1987 (2) SCC 572 has held that by enacting Section 14 of the Act, 1956, the legislature has done away with the concept of limited ownership in respect of property owned by Hindu female all together. To obviate hair-splitting, the legislature has made it abundantly clear that whatever be the property possessed by a Hindu female, it will be of absolute ownership and not of limited ownership notwithstanding the position obtaining under the traditional Hindu law.

**In Vankamamidi Venkata Subba Rao Vs.
Chatlapalli Setharamaratna**

Ranganayakamma, MANU/SC/0800/1997 :

1997 (5) SCC 460, the Apex Court held that it is a well settled legal position that if the right of a Hindu woman under any instrument is in recognition of pre-existing right, the limited right though prescribed under the instrument, gets enlarged into an absolute right by operation of Section 14(1) of the Act, 1956.

CHAPTER-12

KARTHA AND MANAGER

PERMANENT INJUNCTION CANNOT BE GRANTED AGAINST KARTHA OF JF – BUT TEMPORARY INJUNCTION CAN BE GRANTED UPON MERITS 1988 SC

Sushil Kumar & Anr vs Ram Prakash & Ors
1988 AIR 576, 1988 SCR (2) 623

There was one difficulty for the sustainability of the suit for injunction. Temporary injunction can be granted under sub-section (I) of section 37 of the Specific Relief Act, 1963. A decree for perpetual injunction is made under sub-section (2) of section 37. Such an injunction can be granted upon the merits of the suit. The injunction would be to restrain the defendant perpetually from commission of an act contrary to the rights of the plaintiff. Section 38 of the Specific Relief Act governs the grant of perpetual injunction.....The grant of such a relief will have the effect of preventing the father permanently from selling or transferring the property belonging to the joint Hindu family even if there is a genuine legal necessity. If such a suit for injunction is held maintainable, the effect will be that whenever the father as Karta of the joint Hindu coparcenary property will propose to sell

such property owing to a bona fide legal necessity, any coparcener may come up with such a suit for permanent injunction and the father will not be able to sell the property for legal necessity till that suit is decided. In case of waste or ouster, an injunction may be granted against the manager of the joint Hindu family at the instance of the coparcener, but a blanket injunction restraining the manager permanently from alienating the property of a joint Hindu family even in the case of legal necessity, cannot be granted..... In a suit for permanent injunction under section 38 of the Specific Relief Act by a coparcener against the father or Manager of the joint Hindu family property, an injunction cannot be granted as the coparcener has got equally efficacious remedy to get the sale set aside and recover possession of the property. Thus the relief sought for was to restrain by permanent injunction the Karta of the Joint Hindu Mitakshra family from selling or alienating the property. The defendant No. 1 as Karta of the joint Hindu family had undoubtedly the power to alienate the joint family property for legal necessity or for the benefit of the estate as well as for meeting antecedent debts.....It is well-settled that in a Joint-Hindu Mitakshara family, a son acquires

by birth an interest equal to that of the father in the ancestral property. The father by reason of his paternal relation and his position as the head of the family is its manager and he is entitled to alienate the joint family property so as to bind the interests of both the adult and minor coparceners in the property, provided that the alienation is made for legal necessity or for the benefit of the estate or for meeting an antecedent debt. In a suit for permanent injunction under section 38 of the Specific Relief Act by a coparcener against the father or Manager of the joint Hindu family property, an injunction cannot be granted as the coparcener has got equally efficacious remedy to get the sale set aside and recover possession of the property..... In a Hindu family, the Karta or manager occupies a unique position. He has greater rights and duties. He must look after the family interests. He is entitled to possession of the entire joint estate. He is also entitled to manage the family properties. In other words, the actual possession and management of the joint family property must vest in him..... The managing member or Karta has not only the power to manage but also the power to alienate joint family property. The alienation may be either for family necessity or for the benefit of the estate.

Such alienation would bind the interests of all the undivided members of the family, adults or minors. Although the power of disposition of joint family property has been conceded to the manager of joint Hindu family, the law raises no presumptions as to the validity of his transactions. His acts could be questioned in the court of law. The other members of the family have a right to have the transaction declared void, if not justified. When an alienation is challenged as unjustified or illegal, it would be for the alienee to prove that there was legal necessity in fact or that he made proper and bona fide enquiry as to the existence of such necessity and satisfied himself as to the existence of such necessity. If the alienation is found to be unjustified, it would be declared void. Such alienations would be void except to the extent of the manager's share, in Madras, Bombay and Central provinces. The purchaser could get only the manager's share. In other provinces, the purchaser would not get even that much. The entire alienation would be void..... A coparcener cannot interfere in these acts of management. A father-Karta in addition to the aforesaid powers of alienation has also the special power to sell or mortgage ancestral property to discharge his antecedent debt not

tainted with immorality. If there is no such need or benefit, the purchaser takes risk and the right and interest of the coparcener will remain unimpaired in the alienated property. No doubt the law confers a right on the coparcener to challenge the alienation made by Karta, but that right is not inclusive of the right to obstruct alienation. Nor could the right to obstruct alienation be considered incidental to the right to challenge the alienation. The coparcener cannot claim the right to interfere with the act of management of the joint family affairs; he is not entitled for it. Therefore, he cannot move the Court to grant relief by injunction restraining the Karta from alienating the coparcenary property.

WITH THE CONSENT OF OTHERS EVEN A JUNIOR MEMBER OF THE FAMILY CAN ACT AS KARTA

Manager of business is not necessarily the Karta of the HUF. The Apex court in Narindra Kumar J. Modi Vs. CIT AIR 1976 SC 1953 has held that with the consent of others, even a junior member of the family can act as Karta.

A similar view is taken in the case of M/S. Nopany Investments (P) Ltd. vs. Santokh Singh (HUF), reported in **MANU/SC/8184/2007 : AIR 2008 SC 673**. Orissa High Court in the case of Harihar Sethi and Anr. vs. Ladukishore Sethi and Ors., reported in **MANU/OR/0024/2002 : AIR 2002 Orissa 110** at paragraph 10 held as under:-
 "However, it is no more res integra that a senior member of the family may give up his right and a junior member of the family can act as Karta with consent of all the other members. In the present case, the defendants who put forth a claim that the plaintiff acted as Karta of the family, though he is not the eldest member, have totally failed to prove the said fact by adducing cogent evidence. In the absence of any evidence, it is not possible to accept the contention raised by the appellants that the plaintiff, though he was not the senior member of the family, acted as the Karta...."

J. Veerabhadrappe vs. Joint Hindu Family Firm of Jantakal Gadilingappa and Ors. 2007 (4) KCCR 2494 : MANU/KA/7118/2007 -

Position of karta is acquired by birth, regulated by seniority, subject to his capacity to act, is terminable either by resignation or relinquishment. On the death of karta, the next

senior most member of the family will automatically be the karta till such time that the family decides to confer the authority on specified member of the joint Hindu family to represent it. A senior member may also give up his right and a junior member of the family can act as karta with the consent of all the other members.

**Muniyappa vs. Ramaiah :
MANU/KA/0063/1996 - ILR 1996 KAR 1883 -**

The Court concluded that even a junior member can be a Manager of the joint family with the consent of the other members. It stated that the alienation was admittedly by the Manager of the joint family which was only a voidable transaction at the instance of a junior member. Therefore, the Manager is competent to alienate the property. It mentioned that the sale being only voidable unless it is avoided by an action, the alienee is entitled to continue in possession. It mentioned that the remedy of the Defendant is to file a suit and to recover his share which he had already initiated by filing O.S. And without pursuing his remedies in that suit, he is not entitled to interfere with the possession of the Plaintiff who is in possession of the plaint schedule property under a sale deed executed by the joint family.

manager. Hence, the Plaintiff was entitled for a permanent injunction. manager of a Joint Hindu Family is entitled to alienate the joint Family property for joint family necessity or for the benefit of the estate, in certain circumstances. Whether the manager is the father or not, will not make any difference. If such an alienation is made by the manager of the Joint Hindu Family of joint family property, the sale would bind not only his share in the property but the share of the other coparceners as well. No doubt, the other coparceners may be entitled to file a suit for partition and recover their share if the alienation was not for family necessity or for the benefit of the estate. The burden in such cases will also lie on the alienee to prove family necessity or the benefit to the estate to uphold the alienation by the manager. But that right of a coparcener does not affect competency of the manager to alienate the joint family property. When once such alienation is made, the alienee is entitled to be in possession of the property and right of any other coparcener is to sue for partition and recover possession of his share in the joint family properties. The sale being only voidable unless it is avoided by an action, the alienee is entitled to continue in possession. The position may be

different if one coparcener alienates his share alone, but once the alienation is made by the manager of the property, it will be effective until it is properly avoided by the non-alienating coparcener by filing a suit for partition.

POWER OF KARTA OF JOINT FAMILY

Supreme Court said in *Sarda Prasad v. Jumna Prasad*. **AIR 1961 SC 1074**. There it was held, that under the Hindu law, the kartha of a joint family represents the members of the family, and has the power and duty to take action, which binds the members of the family in connection with all matters regarding the management. The Court said:-- "Under the Hindu law the kartha of a Hindu joint family represents all the members of the family and has the power and duty to take action which binds the family in connection with all matters of management of the family property. Clearly, therefore, when in respect of a transaction of property possession has to be received by the several members of the family, it is the Kartha's duty and power to take possession on behalf of the entire family, including himself, the members of the family who are sui juris as well as who are not."

KARTA'S RIGHT TO SELL JOINT FAMILY PROPERTY

Section 8 of the Hindu Minority and Guardianship Act, 1956 is not applicable in respect of a joint Hindu family property, which is sold/disposed of by the Karta involving an undivided interest of the minor in the said joint family property. It is to be borne in mind that Section 8 of the Hindu Minority and Guardianship Act, 1956 prevents a natural guardian of Hindu minor to transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor without prior sanction/permission of the Court. This restriction on the natural guardian in respect of the property of the minor applies only to the separate or absolute property of the minor. It does not include the minor's undivided share in the joint family property as there cannot be a natural guardian in respect of such property which is specifically excluded as per Section 6.

Hon'ble Supreme Court Sri Narayan Bal and others V. Sridhar Sutar and others in AIR 1996 Supreme Court 2371 wherein it is held hereunder: Under Section 8 a natural guardian of

the property of the Hindu minor, before he disposes of any immovable property of the minor, must seek permission of the Court. But since there need be no natural guardian for the minor's undivided interest in the joint family property, as provided under Sections 6 and 12 of the Act, the previous permission of the Court under Section 8 for disposing of the undivided interest of the minor in the joint family property is not required. The joint Hindu family by itself is a legal entity capable of acting through its Karta and other adult members of the family in management of the joint Hindu family property. Thus Section 8 in view of the express terms of Sections 6 and 12, would not be applicable where a joint Hindu family property is sold/disposed of by the Karta involving an undivided interest of the minor in the said joint Hindu family property.

It cannot be gainsaid that term 'Natural Guardian' as mentioned in Section 6 of the Act is a guardian for the separate property of the minor and not in respect of his interest in joint family property, in the considered opinion of this Court. Under the old Hindu law, in the case of a joint Hindu family governed by Mitakshara law, it is the karta or the manager of the joint family who has the power to deal with the property of the

joint Hindu family, which comprises of minor children also. The manager may be in some cases a member of the joint family other than the father. Section 6 of the Act by excluding the interest in the joint family property recognises the old Hindu law principle in regard to joint family property of the minor as per decision Pattayi V. Subbayya in 1980 HLR 500 (Mad).

Under the Hindu law, the father has special powers of alienation of joint family property including the minor son's share either for legal necessity or for the benefit of the estate. He can even sell the joint family property including the minor son's share for the discharge of antecedent debts, which are not tainted by illegality or immorality as per decision Ramaraja (V.V.V.) V. Korada Malleswara Rao in 1999 (2) HLR 257 (AP). It is well settled that under Hindu Law the father has special powers of alienation of joint family property including the son's share either for legal necessity or for the benefit of the estate. He can also sell joint family property including the son's share for the discharge of antecedent debts, which are not Avyavaharika i.e., which are not tainted by illegality or immorality.

Court in Jagdish Mandal v. State of Orissa and others, (2007) 14 SCC 517: "Power of judicial

review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.”

A SALE OR MORTGAGE OF FAMILY PROPERTY BY THE MANAGING MEMBER AND ITS VALIDITY

Sidheshwar Mukherjee vs Bhubneshwar Prasad Narainsingh 1953 AIR 487, 1954 SCR 177 A

father can by incurring a debt, even though the same be not for any purpose necessary or beneficial to the family, so long as it is not for illegal or immoral purposes, lay the entire joint family property including the interests of his sons open to be taken in execution proceedings upon a decree for the payment of debt. The father can, so long as the family continues undivided, alienate the entirety of the family property for the discharge of his antecedent personal debts subject to their not being illegal or immoral. In other words, the power of the father to alienate for satisfying his debts is co-extensive with the right of the creditors to obtain satisfaction out of family property including the share of the sons in such property. Where a father purports to burden the estate by a mortgage for purposes not

necessary and beneficial to the family, the mortgage qua mortgage would not be binding on the sons unless the same was for the discharge of an antecedent debt. Where there is no antecedency, a mortgage by the father would stand in the same position as an out and out sale by the father of family property for a purpose not binding on the family under which he receives the sale price which is utilised for his personal needs. After the joint status of the family is disrupted by a partition, the father has no right to deal with the family property by sale or mortgage even to discharge an antecedent debt, nor is the son under any legal or moral obligation to discharge the post-partition debt of the father. Antecedent debt in this context means a debt antecedent in fact as well as in time. The debt must be truly independent and not part of the mortgage which is impeached. The prior debt must be independent of the debt for which the mortgage is created and the two transactions must be dissociated in fact so that they cannot be regarded as part of the same transaction.

CONCLUSION

A sale or mortgage of family property by the managing member is valid on the ground of justifying family necessity where it is:

- (a) For the payment of decree debts and other debts binding on the family.
- (b) To pay off the claims of Govt on account of Land Revenue, cesses, taxes and other dues.
- (c) For the payment of rents due to the landlord or the payment of decrees for arrears of rent obtained by land lord against family.
- (d) For the maintenance of members of the family.
- (e) For the purpose of defraying the expenses of the first marriage of the co-parcener and of daughters born in the family.
- (f) For the expenses of the necessary family ceremonies including funeral and annual shradha.
- (g) For the expenses of necessary litigation in connection with the recovery or protection of the joint estate or the establishment of adoption of his minor son.
- (h) For the expenses of defending the head of the family or any member against a serious criminal charge.
- (i) For the purpose of carrying on an ancestral trade or business.

(j) To raise money to avert a sale or destruction of the whole or any part of the family property.

(k) For the expenses of necessary repairs to the family residential house or family properties and for the protection of fields and lands belonging to the family from floods etc.,

RIGHT ON THE COPARCENER TO CHALLENGE THE ALIENATION MADE BY KARTA, BUT THAT RIGHT IS NOT INCLUSIVE OF THE RIGHT TO OBSTRUCT ALIENATION

Sushil Kumar & Anr vs Ram Prakash & Ors
1988 AIR 576, 1988 SCR (2) 623 It is well-settled that in a Joint-Hindu Mitakshara family, a son acquires by birth an interest equal to that of the father in the ancestral property. The father by reason of his paternal relation and his position as the head of the family is its manager and he is entitled to alienate the joint family property so as to bind the interests of both the adult and minor coparceners in the property, provided that the alienation is made for legal necessity or for the benefit of the estate or for meeting an E-antecedent debt. The power of the Manager of a joint Hindu family property is analogous to that of a Manager for an infant heir..... In a suit

for permanent injunction under section 38 of the Specific Relief Act by a coparcener against the father or Manager of the joint Hindu family property, an injunction cannot be granted as the coparcener has got equally efficacious remedy to get the sale set aside and recover possession of the property. Sub-section (h) of section 38 of the Specific Relief Act bars the grant of such an injunction. The grant of such a relief will have the effect of preventing the father permanently from selling or transferring the property belonging to the joint Hindu family even if there is a genuine legal necessity. If such a suit for injunction is held maintainable, the effect will be that whenever the father as Karta of the joint Hindu coparcenary property will propose to sell such property owing to a bona fide legal necessity, any coparcener may come up with such a suit for permanent injunction and the father will not be able to sell the property for legal necessity till that suit is decided. In case of waste or ouster, an injunction may be granted against the manager of the joint Hindu family at the instance of the coparcener, but a blanket injunction restraining the manager permanently from alienating the property of a joint Hindu family even in the case of legal necessity, cannot be granted.

MANU/KA/0063/1996 : I.L.R. 1996 KAR 1883

in the case of MUNIYAPPA VS. RAMAIAH

paragraph No. 12 of the judgment, wherein it has been held that when once such alienation is made, the alienee is entitled to be in possession of the property and right of any other coparcener is to sue for partition and recover possession of his share in the joint family properties. The sale being only voidable unless it is avoided by an action, the alienee is entitled to continue in possession. The position may be different if one coparcener alienates his share alone, but once the alienation is made by the manager of the property, it will be effective until it is properly avoided by the non-alienating coparcener by filing a Suit for partition.

COPARCENOR CANNOT OBJECT TO ALIENATIONS VALIDLY MADE BY HIS FATHER OR OTHER MANAGING MEMBER BEFORE HE WAS BORN

THE HON'BLE MR. JUSTICE AJIT J.GUNJAL of Karnataka High Court in the case of **Siddesha S/O Somashekarappa vs Smt Honnamma** on 10 September, 2012 A son or the other

coparcenor cannot object to alienations validly made by his father or other managing member before he was born or begotten, because he could only by birth obtain an interest in the property, which had not validly passed out of the family before he comes into legal existence. If at the time of the alienation there was no one in existence whose assent was necessary, or if those who were then in existence consented a coparcenor not in existence, at that date cannot object on the ground that there was no necessity for the transaction.

**Balmukand vs JOINT FAMILY PROPERTY
COULD NOT AGREE TO BE PARTED WITH BY
THE MANAGER ON THE GROUND OF BENEFIT
TO THE FAMILY WHEN IT IS OPPOSED BY
THE ADULT MEMBERS OF THE FAMILY**

Kamla Wati & Ors AIR 1964 SC 1385. Managers discretion regarding legal necessity or benefit of the estate can be subjected to judicial review. The appellant entered into a contract with the karta for the purchase of property belonging to a joint Hindu family. This property consisted of a fractional share belonging to the family in a large plot of land. Earnest money was paid to the karta.

As the karta did not execute the sale deed the appellant instituted a suit for specific performance. The other members who are the brothers of the karta and who were adults at the time of the contract were also impleaded in the suit as defendants. The suit was resisted on the ground that there was no legal necessity and that the contract for sale was not for the benefit of the family. Held:(i) For a transaction to be regarded as one which is of benefit to the family it need not necessarily be only of a defensive character, but what transactions would be for the benefit of the family would depend on the facts and circumstances of each case. In each case the Court must be satisfied from the material before it that it was in fact such as conferred or was necessarily expected to confer benefit on the family at the time it was entered into. (ii) No part of the joint family property could be parted with or agreed to be parted with by the manager on the ground of alleged benefit to the family when the transaction is opposed by the adult members of the family. (iii) In the present case the appropriate pleas were not raised by the plaintiff nor the necessary evidence led. The granting of specific performance is always in the discretion of the court. In the facts and circumstances of the case

the courts below were justified in refusing to order specific performance and the appeal is dismissed.

GIFT BY A MANAGER EVEN OF A SMALL EXTENT OF JOINT FAMILY PROPERTY TO A RELATIVE OUT OF LOVE AND AFFECTION IS VOID AS IT IS NOT A GIFT FOR PIOUS PURPOSES

Guramma Bhratar Chanbasappa ... vs Malappa
1964 AIR 510, 1964 SCR (4) 497 The sole surviving member of a coparcenary has an absolute power to alienate the family property, as at the time of alienation there is no other member who has joint interest in the family. If another member was conceived in the family or inducted therein by adoption the power of the manager was circumscribed and if the alienations were made by the manager or father for a purpose not binding on the estate, they would be voidable at the instance of subsequently born son or adopted son. that a gift to a stranger of joint family property by the manager of the family is void as he has not the absolute power of disposal over the joint Hindu family property..... that the Hindu Law texts conferred a right upon a

daughter or a sister, as the case may be, to have a share in the family property at the time of partition. The right was lost by efflux of time. But it became crystallized into a moral obligation. The father or his representative can make a valid gift by way of reasonable provision for the maintenance of the daughter, regard being had to the financial and other relevant circumstances of the family. By custom or by convenience, such gifts are made at the time of marriage, but the right of the father or his representative to make such a gift is not confined to the marriage occasion. It is a moral obligation and it continues to subsist till it is discharged. Marriage is only a customary occasion for such a gift. But the moral obligation can be discharged at any time, either during the life time of the father or thereafter. Applying the aforesaid principles, the deed of gift made by father to the daughter, i.e. 8th defendant in the present case, was within his right and certainly reasonable.

**JOINT FAMILY PROPERTY SALE BY KARTA –
POWERS- PROCEDURE TO BE FOLLOWED BY
OPPOSING CO-PARCENER 2007 SC**

Justice Dr. Arijit Pasayat & Justice S. H. Kapadia in case of **SUBHODKUMAR & ORS. .Vs. BHAGWANT NAMDEORAO MEHETRE & ORS.** **Reported in AIR 2007 SC 1324**, A Karta of Hindu Undivided Family had five sons. The Karta and four sons entered into an agreement of sale with respondents for selling part of their ancestral lands and thereafter executed a sale deed. The fifth son opposed the transaction and entered into a separate agreement of sale for selling part of the sold lands with appellants. The respondents-plaintiff filed a suit for possession of lands before trial court contending that the agreement entered into by the opposing son with the appellants-defendants was a fabricated antedated document. The appellants contested the suit contending that their agreement of sale was genuine and first in point of time: that they were not aware of the agreement executed by the Karta in favour of the respondents: and that the transaction was not for legal necessity. The trial court decreed the suit holding that the transaction was for legal necessity. The appellate court also dismissed the appeal but held that the legal necessity for possession was not a 'fact in issue' The High Court dismissed the second Appeal of the appellants holding that the

transaction was on account of legal necessity. In appeal to this court, the appellants contended that there was no legal necessity for the Karta and his four sons to execute the conveyance in favour of the respondents; that the conveyance was executed without the consent of one of the coparceners; that the opposing son entered into a conveyance with them in respect of his undivided share and was it earlier in point of time. Dismissing the appeal, the Court. HELD: A karta has power to alienate for value the joint family property either for necessity or all the coparceners of the family. When he alienates for legal necessity interest. When the Karta, however, conveys by way of imprudent transaction, the alienation is voidable to the extent of the undivided share of the non-consenting coparcener. Neither the opposing son nor his successors-in-title instituted a suit for partition and for demarcation of their share by metes and bounds. In the suit for possession filed by the respondents, the issue of legal necessity becomes irrelevant. A mere declaration that transaction was imprudent or was not for legal necessity in such a suit cannot give any right to the appellants to get their share without taking appropriate proceedings in accordance with law. The legal

necessity in the present suit for possession was not a "fact in issue".

KARTHA ALONE COULD REPRESENT THE MINOR MEMBER AND, IN FACT, HE ALONE COULD REPRESENT BY HIMSELF THE ENTIRE FAMILY

The next decision is the one in the case of **Kona Adinarayana v Dronavalli Venkata Subbayya, AIR 1937 Mad. 869**; and it was held in the said case that, where the eldest brother of a joint Hindu family as kartha entered into a contract of sale of an item of joint family property, wherein he signed it for himself and as representing the minor brother, the contention that the contract could not be said to have been entered into on behalf of the family and all the members of the family were not parties as the minor was separately represented by the kartha was negatived by the Court by holding that the kartha alone could represent the minor member and, in fact, he alone could represent by himself the entire family and, therefore, the kartha must be deemed to have represented the entire family and the other brother signing it is only by way of concurrence.

VOID AND VOIDABLE ACTS

In Words and Phrases by Justice R.P. Sethi the expression `void' and `voidable' read as under: "Void- Black's Law Dictionary gives the meaning of the word "void" as having different nuances in different connotations. One of them is of course "null or having no legal force or binding effect". And the other is "unable in law, to support the purpose for which it was intended". After referring to the nuances between void and voidable the lexicographer 26 pointed out the following: "The word `void' in its strictest sense, means that which has no force and effect, is without legal efficacy, is incapable of being enforced by law, or has no legal or binding force, but frequently the word is used and construed as having the more liberal meaning of `voidable'. The word `void' is used in statute in the sense of utterly void so as to be incapable of ratification, and also in the sense of voidable and resort must be had to the rules of construction in many cases to determine in which sense the legislature intended to use it. An act or contract neither wrong in itself nor against public policy, which has been declared void by statute for the protection or benefit of a certain party, or class of parties, is voidable only".

(Pankan Mehra and Anr. v. State of Maharashtra and Ors. (2000 (2) SCC 756).

Per Fazal Ali, J- The meaning of the word "void" is stated in Black's Law Dictionary (3rd Edn.) to be as follows: "Null and void; ineffectual; nugatory; having no legal force or binding effect; unable in law to support the purpose for which it was intended; nugatory and ineffectual so that nothing can cure it; not valid". Keshavan Madhava Menon v. State of Bombay (1951 SCR 228).

The expression "void" has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void and for avoiding the same no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise. Judicial Review of Administration Action, 5th Edn., para 5-044 (See also Judicial Remedies in Public Law at page 131; Dhurandhar Prasad Singh v. Jai Prakash University and Ors. (2001 (6) SCC 534)

The other type of void act, e.g. may be transaction against a minor without being represented by a next friend. Such a transaction is a good transaction against the whole world. So far as the minor is concerned, if he decides to

avoid the same and succeeds in avoiding it by taking recourse to appropriate preceding the transaction becomes void from the very beginning. Another type of void act may be one, which is not a nullity, but for avoiding the same, a declaration has to be made. (Government of Orissa v Ashok Transport Agency and Ors (2002 (9) SCC 28)

The meaning to be given to the word "void" in Article 13 of the Constitution is no longer res integra, for the matter stands concluded by the majority decision of the Court in Keshavan Madhava Menon v. The State of Bombay (1951) SCR 228. We have to apply the ratio decidendi in that case to the facts of the present case. The impugned Act was a existing law at the time when the Constitution came into force. That existing law imposed on the exercise of the right guaranteed in the citizens of the India by Article 19(1)(g) restrictions which could not be justified as reasonable under clause (6) as it then stood and consequently under Article 13, that existing Law became void "to the extent of such inconsistency". As explained in Keshavan Madhava Menon's case (supra) the Law became void in toto or for all purposes or for all times or for all persons but only "to the extent of such

inconsistency", that is to say, to the extent it became inconsistent with the provisions of Part III which conferred the fundamental rights on the citizens.

It did not become void independently of the existence of the rights guaranteed by Part III. (Bhikaji Narain Dhakras and Ors. v. The State of Madhya Pradesh and Anr. (1955 (2) SCR 589).

The word "void" has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. In Halsbury's Laws of England, 4th Edn. (Re-issue) Vol. 1(1) in para 26, p.31 it is stated thus: "If an act of decision, or an order or other instrument is invalid, it should, in principle, be null and void for all purposes; and it has been said that there are no degrees of nullity. Even though such an act is wrong and lacking in jurisdiction, however, it subsists and remains fully effective unless and until it is set aside by a court of competent jurisdiction. Until its validity is challenged, its legality is preserved". (State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) and ors. (1996 (1) SCC 435).

"Voidable act" is that which is a good act unless avoided, e.g. if a suit is filed for a declaration that a document is fraudulent, it is voidable as the

apparent state of affairs is the real state of affairs and a party who alleges otherwise is obliged to prove it. If it is proved that the document is forged and fabricated and a declaration to that effect is given, a transaction becomes void from the very beginning. There may be voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases, where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable. *Government of Orissa v. Ashok Transport Agency and Ors.* (2002 (9) SCC 28)".

KARTAS COMPETENCY TO ALIENATE COPARCENARY PROPERTY

AIR 2000 SC 3529 THIMMAIAH VS NINGAMMA

The Karta is competent or has the power to dispose of coparcenary property only if (a) the disposition is of a reasonable portion of the coparcenary property and (b) the disposition is for a recognised pious purpose.

This Court in **Guramma V. Mallappa AIR 1964 SC 510** has envisaged three situations of voidable

transactions. It was held that a managing member may alienate joint family property in three situations namely: (i) legal necessity, or (ii) benefit of the estate or (iii) with the consent of all the coparceners of the family. Where the alienation is not with the consent of all the coparceners, it is voidable at the instance of the coparcener whose consent has not been obtained.

In this connection, a reference may be made in the case of **State Bank of India Vs. Ghamandi Ram reported in AIR 1969 SC 1333**, it was held thus:- "According to the Mitakshara School of Hindu Law all the property of a Hindu Joint Family is held in collective ownership by all the coparceners in the quasi-corporate capacity. The textual authority of the Mitakshara Lays down in express terms that the joint family property is held in trust from the joint family members then living and thereafter to be both. The incidents of coparcenership under the Mitakshara Law are: first the lineal male descendants of a person upto the third generation, acquire on birth ownership in the ancestral properties of such person; Secondly that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got

ownership extending over the entire property co-jointly with the rest; forthly, that as a result of such co-ownership the possession and enjoyment of the properties is common fifthly that no alienation of the property is possible unless it before necessity, without the concurrence of the coparceners, and sixthly; that the interest of a deceased member lapses on his death to the survivors. A coparcenary under the Mitakshara School is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a co-parcener with his adoptive father as regards the ancestral properties of the letter." The concept of coparcener as given in the Mitakshara School of Hindu Law as already mentioned above, is that of a joint family property wherein all the members of the coparceners share equally. In this connection a reference may be made to a decision of this Court in the case of State of Maharashtra vs. Narayan Rao Sham Rao Deshmukh & Ors. reported in (1985) 2 SCC 321 in which Their Lordships have held as follows: " A Hindu coparcenary is however, a narrower body than the joint family. Only males who acquire by birth an interest in the joint or coparcenary property can be members of the coparcenary or coparceners. A

male member of a joint family and his sons, grandsons and great grandsons constitute a coparcenary. A coparcener acquires right in the coparcenary property by birth but his right can be definitely ascertained only when a partition takes place. When the family is joint, the extent of the share of a coparcener cannot be definitely predicated since it is always capable of fluctuating."

In N.R. Raghavachariar's Hindu Law Principles and precedents " 8th Edition (1987) at page 230 under the heading 'Rights of Coparceners' it is said thus:- "The following are the rights of a coparcener :- (1) Right by birth (2) Right by survivorship, (3) Right to partition, (4) Right to joint possession and enjoyment, (5) Right to restrain unauthorized acts (6) Right of alienation, (7) Right to accounts and (8) Right to make self-acquisition".

Likewise, **S.V. Gupta, author of Hindu Law, Vol. 1, Third Edition (1981) at page 162**, the learned author deals with the rights of a coparcener. He says thus:- "Until partition, coparcener is entitled to:- (1) join possession and enjoyment of joint family property (2) the right to take the joint

family property by survivorship, and (3) the right to demand partition of the joint family property"

The position in Hindu law is that whereas the father has the power to gift ancestral movables within reasonable limits, he has no such power with regard to the ancestral immovable property or coparcenary property. He can, however make a gift within reasonable limits of ancestral immovable property for "pious purposes". However, the alienation must be by an act inter vivos, and not by will. This Court has extended the rule and held that the father was competent to make a gift of immovable property to a daughter, if the gift is of reasonable extent having regard to the properties held by the family. This Court considered the question of extended meaning given in numerous decisions for "pious purposes" in *Kamla Devi vs. Bachulal Gupta* [1957 SCR 452]. In the said case a Hindu widow in fulfilment of an ante-nuptial promise made on the occasion of the settlement of the terms of marriage of her daughter, executed a registered deed of gift in respect of 4 houses allotted to her share in a partition decree, in favour of her daughter as her marriage dowry, after two years of her marriage. The partition decree had given

her the right to the income from property but she had no right to part with the corpus of the property to the prejudice of the reversioners. Her step sons brought a suit for declaration that the deed of gift was void and inoperative and could not bind the reversioners. The trial court and the High Court dismissed the suit holding that the gift was not valid. This Court accepted the appeal and held that the gift made in favour of the daughter was valid in law and binding on the reversioners. This point was again examined in depth by this Court in Guramma Bhratar Chanbasappa Deshmukh and another vs. Malappa 1964 (4) SCR 497 and it was held:- "The legal position may be summarized thus: The Hindu law texts conferred a right upon a daughter or a sister, as the case may be, to have a share in the family property at the time of partition. That right was lost by efflux of time. But it became crystallized into a moral obligation. The father or his representative can make a valid gift, by way of reasonable provision for the maintenance of the daughter, regard being had to the financial and other relevant circumstances of the family. By custom or by convenience, such gifts are made at the time of marriage, but the right of the father or his representative to make

such a gift is not confined to the marriage occasion. It is a moral obligation and it continues to subsist till it is discharged. Marriage is only a customary occasion for such a gift. But the obligation can be discharged at any time, either during the lifetime of the father or thereafter. It is not possible to lay down a hard and fast rule, prescribing the quantitative limits of such a gift as that would depend on the facts of each case and it can only be decided by Courts, regard being had to the overall picture of the extent of the family estate, the number of daughters to be provided for and other paramount charges and other similar circumstances. If the father is within his rights to make a gift of a reasonable extent of the family property for the maintenance of a daughter, it cannot be said that the said gift must be made only by one document or only at a single point of time. The validity or the reasonableness of a gift does not depend upon the plurality of documents but on the power of the father to make a gift and the reasonableness of the gift so made. If once the power is granted and the reasonableness of the gift is not disputed, the fact that two gift deeds were executed instead of one, cannot make the gift anytheless a valid one."

In M.V.S. Manikayala Rao vs. M. Narasimhaswami & Ors. [(AIR 1966 SC 470),

Court held: "Now, it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased."

KARTA RIGHTS TO CARRY ON BUSINESS AND PLEDGE JOINT FAMILY PROPERTY

Firm Of Bhagat Ram Mohanlal vs The Commissioner 1956 AIR 374, 1956 SCR 143 It is well settled that when the karta of a joint Hindu family enters into a partnership with strangers, the members of the family do not ipso facto become partners in that firm. They have no right to take part in its management or to sue for its dissolution. The creditors of the firm would no doubt be entitled to proceed against the joint family assets including the shares of the non-partner coparceners for realisation of their debts. But that is because under the Hindu Law, the karta has the right when properly carrying on

business to pledge the credit of the joint family to the extent of its assets, and not because the junior members become partners in the business.

THERE CAN BE A VALID PARTNERSHIP BETWEEN A KARTA AND A COPARCENER WHEN THE COPARCENER PUTS INTO THE PARTNERSHIP HIS SEPARATE PROPERTY

In Lachhman. Das case [1948] 16 ITR 35, the Privy Council in holding that there can be a valid partnership between a karta and a coparcener when the coparcener puts into the partnership his separate property, made the following observations (p. 40): "After careful consideration, their Lordships cannot accept this view and on general principles they cannot find any sound reason to distinguish the case of a stranger from that of a coparcener who puts into the partnership what is admittedly his separate property held in his individual capacity and unconnected with the family funds. Whatever the view of a Hindu joint family and its property might have been at the early stages of its development, their Lordships think that it is now firmly established that an individual coparcener, while

remaining joint, can possess, enjoy and utilise, in any way he likes, property which was his individual property not acquired with the aid of or with any detriment to the joint family property. It follows from this that to be able to utilise this property at his will, he must be accorded the freedom to enter into contractual relations with others, including his family, so long as it is represented in such transactions by a definite personality like its manager. In such a case he retains his share and interest in the property of the family, while he simultaneously enjoys the benefit of his separate property and the fruits of its investment. To be able to do this, it is not necessary for him to separate himself from his family. "

MINOR SHARE IN CO-PARCENARY CAN BE SOLD BY KARTA

Court in the case of **Sri Narayan Bal & Ors. vs. Sridhar Sutar & Ors., (1996) 8 SCC 54**, construing the provisions of applicability of Section 8 to a case of transfer of the undivided interest of a Hindu minor in a joint family property held that the joint Hindu family by itself is a legal entity capable of acting through its Karta

and other adult members of the family in management of the joint Hindu family property and that Section 8 in view of the express terms of Sections 6 and 12, would not be applicable where a joint Hindu family property is sold/disposed of by the Karta involving an undivided interest of the minor in the said joint Hindu family property. In that connection, this Court made the following observations : Each provision, and in particular Section 8, cannot be viewed in isolation. If read together the intent of the legislature in this beneficial legislation becomes manifest. Ordinarily the law does not envisage a natural guardian of the undivided interest of a Hindu minor, other than the undivided interest in joint family property, is alone contemplated under Section 8, whereunder his powers and duties are defined. Section 12 carves out an exception to the rule that should there be no adult member of the joint family in management of the joint family property, in which the minor has an undivided interest, a guardian may be appointed; but ordinarily no guardian shall be appointed for such undivided interest of the minor. The adult member of the family in the management of the joint Hindu family property may be a male or a female, not necessarily the

Karta. The power of the High Court otherwise to appoint a guardian, in situations justifying, has been preserved. This is the legislative scheme on the subject. Under Section 8 a natural guardian of the property of the Hindu minor, before he disposes of any immovable property of the minor, must seek permission of the Court. But since there need be no natural guardian for the minors undivided interest in the joint family property, as provided under Sections 6 and 12 of the Act, the previous permission of the court under Section 8 for disposing of the undivided interest of the minor in the joint family property is not required....."

SUIT ON BEHALF OF JOINT FAMILY CAN BE FILED BY INDIVIDUAL

Venkat vs. Anitha and Ors.: MANU/KA/9687/2019 - When a partition of ancestral property of Hindu Joint Family takes place, a member of a joint family entitled to a share takes it absolutely if on the date of partition, he has no son or daughter, and he continues to hold it absolutely till a son or daughter is born. But when there is threat to his title or to the branch he represents, he can either individually if he

alone is the absolute owner, or representing his branch, bring a suit for declaration of title or for any other relief depending upon the circumstances. There is no any such prohibition.

KARTHA AND MINOR

M. Arumugam vs. Ammaniammal and Ors.:

MANU/SC/0015/2020 A Karta is the manager of the joint family property. He is not the guardian of the minor members of the joint family. What Section 6 of the Act provides is that the natural guardian of a minor Hindu shall be his guardian for all intents and purposes except so far as the undivided interest of the minor in the joint family property is concerned. This would mean that the natural guardian cannot dispose of the share of the minor in the joint family property. The reason is that the Karta of the joint family property is the manager of the property. However, this principle would not apply when a family settlement is taking place between the members of the joint family. When such dissolution takes place and some of the members relinquish their share in favour of the Karta, it is obvious that the Karta cannot act as the guardian of that minor whose share is being relinquished in favour of the Karta.

There would be a conflict of interest. In such an eventuality it would be the mother alone who would be the natural guardian and, therefore, the document executed by her cannot be said to be a void document. At best, it was a voidable document in terms of Section 8 of the Act and should have been challenged within three years of the Plaintiff attaining majority.

CHAPTER-13
WOMENS RIGHTS TO SHARE

**MYSORE HINDU WOMEN'S RIGHT TO
PROPERTY ACT, 1933 AND THE PROVISIONS
OF HINDU SUCCESSION ACT, 1956**

THE HON'BLE MR.JUSTICE N. ANANDA of HIGH COURT OF KARNATAKA in the case of **S Siddagangaiah vs Smt Lalithamma Decided on 7 September, 2012** In a decision reported in JT 2000 (9) SC 516 (in the case of Thimmaiah and Ors. -vs- Ningamma and Anr.) the Supreme Court dealing with the provisions of Section 8 (1) (a), 1 (d) of the Mysore Hindu Women's Right to Property Act, 1933 and the provisions of Hindu Succession Act, 1956 and also Act as amended by 2005 has held: "It is not in dispute that the Mysore Act deals with Hindu Mitakshara coparcenary rights. This is also clear from the definition of 'Hindu' in section 3 (c) of the Mysore Act. Section 4 of the 1956 Act gives overriding effect to the 1956 Act in so far as any law governing Hindus, is inconsistent with the provisions of the 1956 Act. Reading the proviso to section 6 of the 1956 Act with section 8 of the Mysore Act, it is clear that where the female members sought to be protected under Section 8

of the Mysore Act are in fact Class I heirs of a deceased coparcener, his interest in the joint family property cannot pass by survivorship at all. Thus the question of it passing subject to the rights of any class of females under Section 8(1) (d) of the Mysore Act does not also arise. This would mean that Section 8(1) (d) of the Mysore Act has been superseded by the proviso to Section 6 of the 1956 Act to the extent stated.”

Annamma -vs- Pattamma ILR 1993 KAR 755

It is no doubt true that the Preamble of the Act (Mysore Hindu Law Womens Rights Act, 1933) states that the Act is intended to amend the Hindu Law as to the Rights of Women and in certain other respects. The preliminary portion of the Act contains the definition of certain expressions or words used in the body of the Act. The Act consists of five parts. First part deals with the 'inheritance'. It consists of two Sections namely Sections 4 and 5. Section 4 provides 'order of succession', when a male Hindu dies intestate. Section 5 lays down "General Rules as to order of preference". Part II deals with the 'separate property', 'partition' and 'adoption'. It consists of Sections 6 to 9. We may point out here itself that in the case of partition of joint family

property between a person and his son/sons and among brothers, Section 8 specifically provides as to who are the female heirs who are entitled to shares in the joint family properties. It specifically names those heirs, whereas we do not find such naming of heirs in Sub-section (2) of Section 6 of the Act. Part III deals with "Women's Full Estate". Part IV deals with "Women's Limited Estate". Part V deals with "Maintenance". In this case we are not concerned with Parts-III, IV and V of the Act because we are not concerned with the case of Women's Full estate, Women's limited estate and maintenance. In Section 6(2) and Section 4 of the Act, we do not find any ambiguity or uncertainty so as to fall back on the intendment of the Legislature of the Statute. As already pointed out Sub-section (2) of Section 6 only provides that the separate property by a person in the event of dying intestate will pass by succession to his own heirs male or female. As such it does not specify as to who are those male or female heirs. Therefore, we have to fall back on Section 4 of the Act. The interpretation placed by us that Section 6(2) has to be read with Section 4 of the Act does not affect the object and intendment of the Act, nor does it in any way defeat the same.

SHARE OF THE FEMALE MEMBER ON SUCH PARTITION WAS IN ADDITION TO ANY SHARE WHICH SHE MAY GET AS AN HEIR OF THE DECEASED COPARCENER

The decision in **Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum & Ors. [1978 (3) SCR 671]** is an authority for the proposition that where a female is entitled to a share in coparcenary property on partition, then by virtue of Explanation I to Section 6 of 1956 Act, she continues to be so entitled despite the fact that no partition may actually have taken place prior to the coparcener's death. This Court held that Explanation I to Section 6 covered a situation where a Hindu coparcener dies without actual partition having taken place. In such event, the Court will have to assume that a partition had in fact taken place immediately prior to the death of the coparcener concerned and grant shares on the basis of such notional partition. This Court also held that the share of the female member on such partition was in addition to any share which she may get as an heir of the deceased coparcener. [See also State of Maharashtra V.

Narayan Rao 1985 (3) SCR 358; AIR (1985) SC 716, 721].

DAUGHTERS BORN PRIOR TO 1956 ARE NOT CO-PARCENERS

THE HON'BLE MR. JUSTICE N. KUMAR AND
THE HON'BLE MR. JUSTICE H. S. KEMPANNA of
Karnataka High Court in the case of **Basavaraj
Guddappa Maliger vs Beerappa @
Doddabeerappa Decided on 31 July, 2012**

All the three daughters were married prior to 1956 Act came into force. Therefore, by virtue of Section 6(a) of 1956 Act, they cannot be considered as coparceners having equal share in the joint family properties. Therefore, the law applicable is the law prior to amendment in 2005 where Section 6(a) was substituted by old Section 6. Section 6 of the Act made it clear, if a male Hindu dies who is a coparcener at the time of death, leaving behind female heir, his share devolves by succession and not by survivorship. Therefore, these three daughters born prior to 1956 cannot be treated as coparceners and are not entitled to equal share with the brothers. But in the share of their father they are entitled to equal share with their brothers.

DAUGHTER OF A CO-PARCENAR WHO IS BORN AFTER THE ACT CAME INTO FORCE ALONE WILL BE ENTITLED TO A RIGHT IN THE CO-PARCENARY PROPERTY AND NOT A DAUGHTER WHO WAS BORN PRIOR TO 17.6.1956

Pushpalatha N.V. vs. V.Padma, ILR 2010 Kar.1484 has addressed the question of the status of a daughter of a coparcener born prior to 17.6.1956 and the effect of the amended Act on such a female heir and has held thus:- "56. Therefore, it follows that the Act when it was enacted, the legislature had no intention of conferring rights which are conferred for the first time on a female relative of a Co-parcener including a daughter prior to the commencement of the Act. Therefore, while enacting this substituted provision of Section 6 also it cannot be made retrospective in the sense applicable to the daughters born before the Act came into force. In the Act before amendment the daughter of a Co-parcener was not conferred the status of a Co-parcener. Such a status is conferred only by the Amendment act in 2005. After conferring such status, right to Co-parcenary property is given

from the date of her birth. Therefore, it should necessarily follow such a date of birth should be after the Act came into force, i.e., 17.6.1956. There was no intention either under the unamended Act or the Act after amendment to confer any such right on a daughter of a Co-parcener who was born prior to 17.6.1956. Therefore, in this context also the opening words of the amending section assumes importance. The status of a Co-parcener is conferred on a daughter of a Co-parcener on and from the commencement of the Amendment Act, 2005. The right to property is conferred from the date of birth. But, both these rights are conferred under the Act and, therefore, it necessarily follows the daughter of a Co-parcener who is born after the Act came into force alone will be entitled to a right in the Co-parcenary property and not a daughter who was born prior to 17.6.1956.

**IF SUCCESSION OPENED PRIOR TO THE
AMENDMENT ACT OF 2005 THE PROVISIONS
OF THE AMENDMENT ACT WOULD HAVE NO
APPLICATION**

Supreme Court in the case of **Sheela Devi & Ors. v. Lal Chand & Anr. (2006) 8 SCC 581** The question which arose therein was vesting of right of a coparcener of a mitakshra family under the old Hindu Law vis-à-vis Hindu Succession Act, 1956. The contention raised therein that the provisions of the Amendment Act, 2005 will have no application as the succession had opened in 1989 was negated, holding: "The Act indisputably would prevail over the old Hindu Law. We may notice that the Parliament, with a view to confer right upon the female heirs, even in relation to the joint family property, enacted Hindu Succession Act, 2005. Such a provision was enacted as far back in 1987 by the State of Andhra Pradesh. The succession having opened in 1989, evidently, the provisions of Amendment Act, 2005 would have no application."

RETROSPECTIVE OPERATION OF AMENDMENT ACT MAY PROMOTE THE MISCHIEF OF DISHONEST LITIGATIONS BY CLAIMING AN INTEREST IN A COPARCERNERY PROPERTY HITHERTO NEVER CLAIMED

THE HON'BLE MR.JUSTICE ANAND
BYRAREDDY of HIGH COURT OF
KARNATAKA in the case of **Swamy vs
Thimmamma Decided on 16 April, 2013**

Observed:- If the Act was restrospective we do not see how daughters born only after 1956 would be entitled to claim interest in a coparcenery property and not daughters before 1956 also. As observed in that judgment when a provision is substituted for an earlier provision by an amendment of the Act it would apply from the date of the unamended Act. That would be from 1956. Hence, if from 1956 the daughter would get her interest by birth by the very retrospectivity bestowed upon the section it would apply equally to daughters born even prior to 1956. This analogy is, however, academic since the amending Statute is made to come into effect from a specified date i.e., 9 September 2005 and we are fortified in our view by the proviso which seeks to expressly curtail the mischief envisaged.

(a) It may be mentioned that Section 6 creates substantive rights in favour of a daughter as a coparcener; it would, therefore, be ordinarily prospective.

(b) there are no express words showing retrospective operation in the Statute and in fact

the express words are "on and from" denoting prospectivity.

(c) the plain normal grammatical meaning of the words "shall become" and "shall be deemed" shows the future tense and the total absence of any past participle. The words must be given the grammatical meaning as per the grammatical tense.

(d) The section is incapable of two meanings; it cannot mention that all the daughters born before the amendment would be included and that only daughters born after the amendment would be included. Since two meanings are not contemplated, it would rule out interpretations which are required in legislations which are capable of two meanings.

(e) The absurdity of making all the daughters born before or after the commencement of the amendment Act included in the amendment Act would not only be directly against and diametrically different from the express provision of making the section applicable to daughters who shall be coparceners by birth only on and after the amendment, but would make the applicability of the Act so all-pervasive that the entire populace who are Hindus and have any HUF property of the family would be

encompassed setting at naught various transactions entered in to by coparceners creating vested rights as in this case.

Commissioner of Wealth Tax, Kanpur and Ors.

v. Chander Sen and Ors., [1986] 3 SCC 567, "It

is clear that under the Hindu law, the moment a son is born, he gets a share in the father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. But the question is: is the position affected by Section 8 of the Hindu Succession Act, 1956 and if so, how? The basic argument is that Section 8 indicates the heirs in respect of certain property and Class I of the heirs includes the son but not the grandson. It includes, however, the son of the predeceased son. It is this position which has mainly induced the Allahabad High Court in the two judgments,

we have noticed, to take the view that the income from the assets inherited by son from his father from whom he has separated by partition can be assessed as income of the son individually. Under Section 8 of the Hindu Succession Act, 1956 the property of the father who dies intestate devolves on his son in his individual capacity and not as karta of his own family. On the other hand, the Gujarat High Court has taken the contrary view."

In Eramma v. Veerupana and Ors., AIR (1966) SC 1879, Court observed: "It is clear from the express language of the section that it applies only to coparcenary property of the male Hindu holder who dies after the commencement of the Act. It is manifest that the language of Section 8 must be construed in the context of Section 6 of the Act. We accordingly hold that the provisions of Section 8 of the Hindu Succession Act are not retrospective in operation and where a male Hindu died before the Act came into force i.e. where succession opened before the Act, Section 8 of the Act will have no application."

Court in G. Sekar v. Geetha (2009) 6 SCC 99 pronounced by one of us (Hon'ble S.B. Sinha,J.), the effect of amendment in the Hindu Succession

Act, 1956 by reason of the Hindu Succession (Amendment) Act, 2005 insofar as therein Section 23 has been omitted, was considered. It was held as under : “21. The said property belonging to Govinda Singh, therefore, having devolved upon all his heirs in equal share on his death, it would not be correct to contend that the right, title and interest in the property itself was subjected to the restrictive right contained in Section 23 of the Act. The title by reason of Section 8 of the Act devolved absolutely upon the daughters as well as the sons of Govinda Singh. They had, thus, a right to maintain a suit for partition. Section 23 of the Act, however, carves out an exception in regard to obtaining a decree for possession inter alia in a case where dwelling house was possessed by a male heir. Apart therefrom, the right of a female heir in a property of her father, who had died intestate is equal to her brother. Section 23 of the Act merely restricts the right to a certain extent. It, however, recognises the right of residence in respect of the class of females who come within the purview of the proviso thereof. Such a right of residence does not depend upon the date on which the suit has been instituted but can also be subsequently enforced by a female, if she comes within the

purview of the proviso appended to Section 23 of the Act."

Venkata Reddy v. Pethi Reddy AIR 1963 SC

992 the Constitution Bench was called upon to consider the question as to what meaning should be given to the expression 'final decision' occurring in the first proviso to Section 28A of the Provincial Insolvency Act, 1920.

".....A decision is said to be final when, so far as the court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree -- the decree which would be executable would be the final decree. But the

finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to Section 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree.”

Court in Phoolchand v. Gopal Lal AIR 1967 SC

1470 "We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby

augmented. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the court. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with

other kinds of suits in which also preliminary and final decrees are passed... .."

THE HINDU WOMEN'S RIGHT TO PROPERTY ACT 1937 WAS NOT APPLICABLE IN RELATION TO AGRICULTURAL LAND.

Chinthamani Ammal Vs. Nandagopal Gounder and Anr Coram: S.B. SINHA MARKANDEY KATJU 2007 (4) SCC163 , The legal position that the appellant could not claim any right, title and interest whether in terms of the provisions of the Hindu Women's Right to Property Act, 1937 or as a successor of her father, if the joint status was not severed, is not in dispute. The Hindu Women's Right to Property Act was not applicable in relation to agricultural land. The State made an amendment in that behalf in the year 1947 whereafter, only a widow became entitled to claim limited ownership in the share of her husband. The mother of the appellant i.e. wife of 'K', thus, did not derive any right, title and interest in the property of her husband in the year 1943, when he expired. Furthermore, admittedly, she left the family and married another person in the year 1945 and thus the question of her deriving any

benefit in terms of the 1947 amendment also did not arise.

HINDU WOMENS RIGHT TO PROPERTY AFTER STATE AND CENTRAL AMENDMENTS

Sugalabai vs Gundappa A. Maradi And Ors. on 18/9/2007 KARNATAKA HIGH COURT JUDGMENT BY JUSTICE V. Jagannathan, J.

Question of law of considerable importance being raised concerning the question relating to a married daughter also being entitled to be treated as a co-parcener irrespective of the marriage taking place prior to the Karnataka Amendment Act, 1990 coming into force or afterwards, in view of the amendment affected to the Hindu Succession Act, 1956, (for short 'the Principal Act') by the State of Karnataka by The Hindu Succession (Karnataka Amendment) Act, 1990 (Karnataka Act No. 23/1994), with effect from 30th July 1994 and the subsequent amendment brought to the Principal Act by the Central Government by the Hindu Succession (Amendment) Act, 2005 (C.A. 39/2005) with effect from 9.9.2005.

INTERPRETATION OF STATUTE

The settled principles of interpretation of statutes as laid down by the Apex Court and referred to by a Division Bench of Karnataka High court in the case of **Mercury Press v. Ameen Shacoor ILR 2002 Kar 2304**, the principles laid down by the Apex Court In *Mahadeolal Kanodia v. The Administrator General of West Bengal*, AIR 1960 SC 936 : (1960)1 SCJ 15 : (1960)3 SCR 578 the Supreme Court referred to the following four well-settled principles of interpretation of statutes:

- (1) Statutory provisions which create or take away substantive rights are ordinarily prospective. They can be retrospective if made so expressly or by necessary implication and the retrospective operation must be limited only to the extent to which it has been so made either expressly or by necessary implication;
- (2) The intention of the Legislature has to be gathered from the words used by it, giving them their plain, normal, grammatical meaning;
- (3) If any provision of a legislation, the purpose of which is to benefit a particular class of persons is ambiguous so that it is capable of two meanings, the meaning which preserves the benefits should be adopted;

(4) If the strict grammatical interpretation gives rise to an absurdity or inconsistency, such interpretation should be discarded and an interpretation which will give effect to the purpose will be put on the words, if necessary, even by modification of the language used.

The Supreme Court has however added a rider by warning that while applying the third rule of interpretation relating to ambiguity, the Courts in their anxiety to advance the beneficent purpose of legislation, must not however yield to the temptation of seeking ambiguity where there is none.

In Commissioner of Income Tax v. Indian Bank Limited , 1965 AIR 1473, 1965 SCR (1) 833 the Supreme Court reiterated: In our opinion, in construing the Act, we must adhere closely to the language of the Act. If there is ambiguity in the terms of a provision, recourse must naturally be had to well established principles of construction, but it is not permissible first to create an artificial ambiguity and then try to resolve the ambiguity by resort to some general principles.

The principles are so succinctly stated in American Jurisprudence, quoted with approval in **S.R. Bommai v. Union of India A.I.R. 1994 S.C. 1980**. While it has been held that it is duty of the

courts to interpret as statute as they find it without reference to whether its provisions are expedient or inexpedient. It has also been recognised that where a statute is ambiguous and subject to more than one interpretation, the expediency of one construction or the other is properly considered. Indeed, where the arguments are nicely balanced, expediency may trip the scales in favour of a particular construction. It is not the function of a court in the interpretation of statutes, to vindicate the wisdom of the law. The mere fact that the statute leads to unwise results is not sufficient to justify the Court in rejecting the plain meaning of unambiguous words or in giving to a statute a meaning of which its language is not susceptible, or in restricting the scope of a statute. By the same token an omission or failure to prove for contingencies, which it may seem wise to have provided for specifically, does not justify any judicial addition to the language of the statute. To the contrary, it is the duty of the Courts to interpret a statute as they find it without reference to whether its provisions are wise or unwise, necessary or unnecessary, appropriate or inappropriate, or well or ill conceived.

Rule of interpretation are meant to ascertain the true intent and purpose of the enactment and set right any anomaly, inconsistency or ambiguity, while giving effect to it. The several rules of interpretation when juxtapositioned may give an impression that they are 'inconsistent with each other. Further, the same provision, when interpreted with reference to different Rules of interpretation may lead to different results. This is because the Rules of interpretation are meant to set right different types of defects. It is not possible to apply all rules of interpretation together, to a provision of law. An appropriate rule of interpretation should be chosen as a tool depending upon the nature of the defect in drafting which has to be set right. The Rules of interpretation are to be applied in interpreting the statutes, only if there is ambiguity, inconsistency, absurdity or redundancy. Where the words are clear and unambiguous, there is little need to open the tool kit of Interpretation.

REPUGNANCY OF THE PROVISION OF SECTION 6-A(D) OF THE KARNATAKA ACT WILL TAKE EFFECT FROM THE DATE ON WHICH THE CENTRAL AMENDMENT ACT OF 2005 CAME INTO FORCE 9.9.2005

As regards this, it is useful to refer to the decision of this Court in the case of Ramappa Gudadappa Gudadannavar v. Chandangouda Neelangowda Goudar 1960 MYS LJ 476. In the said case, this Court has observed that the provisions of the Hindu Succession Act, 1956 are not retrospective in their operation and in a case where succession had already opened and the estate in question had already vested in persons in accordance with the law which was in force before the Hindu Succession Act, 1956 came into force, the said succession cannot be reopened and the vesting which has taken place, cannot be divested. Following the aforesaid law laid down by this court, in the cases on hand, the repugnancy of the provision of Section 6-A(d) of the Karnataka Act will take effect from the date on which the Central Amendment Act of 2005 came into force i.e. 9.9.2005 and further, the Central Act itself makes it clear in the proviso to Section 6(1) that nothing contained in the said sub-Section 6(1) shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which have taken place before 20th December 2004. It thus becomes obvious that cases, which are covered by

the said proviso, however will not be affected by the change in the law brought about by the Central Amendment Act of 2005.

But, as regards the pending proceedings are concerned, the law laid down by the Apex Court in the case of *United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd. and Ors.* [2000] 7 SCC 357, will have to be taken note of. In the said decision, the Apex Court has observed thus: It is well settled that it is the duty of a court whether it is trying original proceedings or hearing an appeal, to take notice of the change in the law affecting pending actions and to give effect to the same. If the law states that after its commencement, no suit shall be "disposed of or "no decree shall be passed" or "no court shall exercise powers or jurisdiction". The Act applies even to the pending proceedings and has to be taken judicial notice by the Civil Courts.

FINAL ORDERS

(1) The provision of Section 6-A(d) of the Karnataka (Amendment) Act 1990 is repugnant to the Central Amendment Act of 2005 insofar as the position of a daughter married prior to coming into force of the Karnataka Amendment Act, 1990, is concerned and as such, the Central

Amendment Act of 2005 which makes no such discrimination will prevail over the State Act.

(2) To the extent the provision of Section 6-A(d) of the Karnataka Amendment Act 1990 is repugnant to the Central Amendment Act, 2005, the said provisions of Section 6-A(d) of the Karnataka Amendment Act 1990 is declared void and it shall cease to have any effect.

(3) The Central Amendment Act of 2005, which has been brought into force from 9.9.2005, shall not have any effect insofar as any disposition or alienation including any partition or testamentary disposition of property which had taken place, before the 20th day of December, 2004.

(4) In respect of pending proceedings i.e. suits/appeals, the provisions of Section 6-A(d) of the Karnataka Amendment Act 1990, to the extent it is repugnant to the Central Amendment Act of 2005, shall cease to have any effect and the said pending proceedings shall be governed by the Central Amendment Act of 2005 which has been brought into force from 9.9.2005.

Bombay High Court in the case of **Ms. Vaishali Satish Ganorkar & Anr vs Mr. Satish**

Keshaorao Ganorkar & ... on 30 January, 2012

- Bench: Justice R. S. Dalvi

The subtitle of a section is required to be considered in the interpretation of the section and hence the devolution of the interest is condition precedent for any claim in coparcenary interest. Even de hors the subtitle the section is required to be interpreted to see whether a daughter of a coparcener would have an interest in the coparcenary property by virtue of her birth in her own right prior to the amendment Act having been brought into effect. It may be mentioned that prior to the amendment Act (aside from the State Amendment Act of 1995 which amended Section 29 of the HSA) indeed the daughter was not a coparcener; she had no interest in a coparcenary property. She had, therefore, no interest by virtue of her birth in such property. This she got only "on and from" the commencement of the amendment Act i.e, on and from 9 September 2005. The basis of the right is, therefore, the commencement of the amendment Act. The daughter acquiring an interest as a coparcener under the Section was given the interest which is denoted by the future participle "shall". What the section lays down is that the daughter of a coparcener shall by birth

become a coparcener. It involves no past participle. It involves only the future tense. Consequently, by the legislative amendment contained in the amended Section 6 the daughter shall be a coparcener as much as a son in a coparcenary property. This right as a coparcener would be by birth. This is the natural ingredient of a coparcenary interest since a coparcenary interest is acquired by virtue of birth and from the moment of birth. This acquisition (not devolution) which until the amendment Act was the right and entitlement only of a son in a coparcenary property, was by the amendment conferred also on the daughter by birth. The future tense denoted by the word "shall" shows that the daughters born on and from 9 September 2005 would get that right, entitlement and benefit, together with the liabilities. It may be mentioned that if all the daughters born prior to the amendment were to become coparceners by birth the word "shall" would be absent and the section would show the past tense denoted by the words "was" or "had been". The future participle makes the prospectivity of the section clear. Similarly in sub clause (a) of the amended Section 6 the word "become" shows what was contemplated to be in the future on and after the

date the amendment came into force. It is from that date that the daughter would "become" a coparcener, which she was not until then. If she was to be taken to be the coparcener since even prior to the coming into force of the Act the word "become" in sub clause A of Section 6 would have been instead "was". Reading the operative part of the section alongside the sub clause (a) shows that the daughter "shall become" a coparcener by virtue of her birth in a coparcenary property. This future tense is consistent with the operative words "on and from". Hence on and from 9 September 2005 a daughter shall become a coparcener in a coparcenary property by birth. The words "was" or "had been" etc., would be inconsistent with the words "on and from". The words "on and from" are indeed unique. They show the date from which the amendment would come into effect. The footnote of the section itself shows w.e.f 9 September 2005 hence on and w.e.f 9 September 2005 a daughter shall become a coparcener in coparcenary property by virtue of her birth. That would be acquisition of interest in a coparcenary property though not devolution. Similarly in the latter part of the section after sub clause (c) the reference to a Hindu

Mitakshara coparcener which would be deemed to include the daughter is also in the future tense denoted by the words "shall be". Had the section being retrospective and was to be effective for all daughters born prior to the date the amendment was effected or prior to the succession having opened, the reference to the daughter as a coparcener in a Hindu Mitakshara family would be shown to have been deemed "always have included" a reference to the daughter of a coparcener. The section further contains a proviso. The proviso is to prevent mischief of application of the section to nonapplicable cases, precisely the kind of mischief that is made in the suit of the appellants themselves. The section has a limited effect. That is because for as many as about 50 years after the HSA came into force in 1956 various Hindu families having coparcenary property could have made various dispositions and alienations which had to be saved. Under the proviso any disposition including a testamentary disposition and any alienation including a partition made prior to 20 December 2004 (presumably when the Act was tabled in Parliament and which was only about 9 months prior to the coming into force of the amendment Act) were saved from the effect of the section.

Hence for such disposition and alienation made prior to 20 December 2004 the daughter of the coparcener would not be entitled to claim her interest in the coparcenary property. A reading of Section as a whole would, therefore, show that either the devolution of legal rights would accrue by opening of a succession on or after 9 September 2005 in case of daughters born before 9 September 2005 or by birth itself in case of daughters born after 9 September 2005 upon them. Supreme Court in the case of Sheela Devi & Ors. Vs. Lal Chand & Anr. (2006) 8 SCC 581 followed thereafter in the case of G. Sekar Vs. Geetha & Ors. (2009) 6 SCC 99. It was held that the date of the opening of the succession was the relevant date and if succession opened prior to the amendment Act of 2005 the provisions of the amendment Act would have no application because rights under the succession would vest upon the successors from the date the succession opened. If the Act was retrospective we do not see how daughters born only after 1956 would be entitled to claim interest in a coparcenary property and not daughters before 1956 also. As observed in that judgment (Division Bench of the Karnataka High Court in the case of Pushpalatha N. V. Vs. V. Padma AIR 2010

Karnataka 124) when a provision is substituted for an earlier provision by an amendment of the Act it would apply from the date of the unamended Act. That would be from 1956. Hence, if from 1956 the daughter would get her interest by birth by the very retrospectivity bestowed upon the section it would apply equally to daughters born even prior to 1956. This analogy is, however, academic since the amending Statute is made to come into effect from a specified date i.e., 9 September 2005 and we are fortified in our view by the proviso which seeks to expressly curtail the mischief envisaged.

In the case of Bijender Singh Vs. State of Haryana AIR 2005 SC 2262 the Supreme Court considered the perspective of the J.J. Act, 2000. It noted that the appointed date of the Act being 1 April 2001 was the date from which the provisions of the Act would come into force. "the act, thus is prospective in its operation".

It can be seen that the Supreme Court considered the prospectivity by virtue of the fact that the legislature expressly specified the date from which the amended Act would come into force. It, therefore, held that the amended Act would come into force from that date and not from an earlier date. In para 11 of the Judgment the

Supreme Court observed that the purpose of such Act would have to be seen and the act cannot be extended beyond the purpose for which it is created, or beyond the language of the provision by which it is created.

Hari Ram Vs. State of Rajasthan & Anr.

2009(6) SCALE 698 the Supreme Court explained the explanation to Section 20 of the J.J. Act 2006 thus: "The Explanation which was added in 2006, makes it very clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of Clause(l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1st April, 2001, when the Juvenile Justice 21 Act, 2000, came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. In fact, Section 20 enables the Court to consider and determine the juvenility of a person even after conviction by the regular Court and also empowers the Court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the

Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Juvenile Justice Act, 2000."

Such would be the express provision for a legislation to be held to be retrospective or retroactive in operation. In its absence, similar intent of the legislature must be at least latently apparent. That aspect is missing in the amended HSA. Experience such as the one in this case demonstrates the wisdom of the legislature in providing its ambit. In the amended HSA mere protection is not granted to the daughters; they are given a substantive right to be treated as coparceners upon devolution of interest to them and even otherwise by virtue of their birth. This grant would effect vested rights, as in this case, when alienations and dispositions have been made. Hence retrospectivity such as to make the Act applicable to all the daughters born even prior to the amendment cannot be granted when the legislation itself specifies the posterior date from which the Act would come into force unlike the anterior date in the Orissa Tenants Protection Act 1948. The law as it stands upon the admitted facts show no such rights. Hence the appellants' appeal itself is

dismissed. The grant of ad-interim relief is refused.

2005 AMENDMENT BRINGS GENDER EQUALITY

It has been held in the case of **Pravat Chandra Pattnaik & Ors. Vs. Sarat Chandra Pattnaik & Anr. AIR 2008 Orissa 133** that the aforesaid Section was enacted for removing the gender discrimination that prevailed leading to oppression and negation of the fundamental right of equality to women and to render social justice by giving them equal status in the Society. The Act came into force from 9th September 2005 and the statutory provisions under Section 6 of Hindu Succession Act, 1956 thereof created a new right. The provisions are not expressly made retrospective by the legislature. The Act is clear and there is no ambiguity. Therefore, words cannot be interpolated. They do not bear more than one meaning. The Act is therefore, prospective. It creates a substantive right in favour of the daughter. The daughter gets a rights of a coparcener from the date when the amended Act came into force. Consequently, the contention

that only the daughters who were born after 2005 would be treated as coparceners was not accepted. It specifically clarifies that the daughter gets a right as a coparcener from the year 2005 whenever she may have been born. She can claim a partition of the property which was not partitioned earlier. However, the judgment specifies a rider. That is in view of the proviso to Section 6(1) of the Act. "But if the same was effected earlier i.e., prior to 20th December, 2004 the same should not be reopened."

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"It follows, therefore, that the provisions of the Act can be enforced when the right to succession opens and not before. The petitioner's father is said to be alive and hence her right to succession as a co-parcener has not opened." In that case the Plaintiff/Petitioner applied for partition of the coparcenary property whilst her father was alive under Section 6 of the new Act of 2005 upon the premise that she, as a coparcener, was entitled to all the rights of coparcener including partition. Her father was alive at that time. It was held that Section 6 of the new Act of 2005 was the law

relating to intestate succession which regulates the succession of properties of all Hindus by its heading itself which speaks of "devolution" of interest. It was held that "Devolve" means to pass from a person dying to a person living. Hence, the right of a daughter to be treated like a son should be construed only with regard to the share that "devolves" on her when her right to succession opens having regard to the scope and ambit of the Act itself.

In the case of Sheela Devi & Ors. Vs. Lal Chand & Anr. (2006) 8 SCC 581 the Court considered the estate of one Babu Ram who died in the year 1989. He was one of the 5 sons of Tulsi Ram and one of the members of the coparcenary property. He left behind two sons and three daughters. Babu Ram had inherited 1/5th share of the property of his father and 1/20th share through another brother who had died intestate without issues. The succession between the two brothers and their descendants was in issue. The applicability of the Section 6 of the Hindu Succession Act of 1956 was under consideration. Though that is a different matter, observation in paragraph 21 of the judgment relates to the new

Act of 2005. It was inter alia observed that the succession was opened in 1989 and hence the provisions of the amendment Act 2005 would have no application. Thereupon Section 6(1) of the old Act of 1956 which related to succession on the death of a coparcener in the event the heirs were only male descendants came to be considered.

WOMEN WHO DIED BEFORE 2005 AND BEFORE HER FATHERS DEATH WHEN THERE IS ONLY SON, SUCCESSION THROUGH SURVIVORSHIP

Bombay High Court in the case of **Sadashiv Sakharam Patil & Ors vs Chandrakant Gopal Desale & Ors** on 6 September, 2011, Bench: Justice R. S. Dalvi

One Sakharam had three children: two daughters, Narmadabai and Muktabai and one son, Sadashiv. The two daughters predeceased him. His son succeeded him. Muktabai died in 1978. Narmadabia, the other daughter died in 1987 prior to Sakharam who died on 4th October 1995. Sadashiv, claiming to be the sole heir and successor of Sakharam, got the Revenue records altered showing a mutation entry dated 3rd

December 2002 reflecting his name. The son of Muktabai filed the suit claiming the share of Muktabai in the properties of her father Sakharam. He claims that the properties of Sakharam are ancestral properties or properties purchased from the proceeds of the sale of ancestral properties. Sadashiv, who is the Defendant No.1 in the suit, claims that the properties were purchased by Sakharam alongwith Sadashiv himself and are, therefore, his self acquired properties. These properties are stated to have been bequeathed by him under the registered Will dated 11th September 1989. The son of Muktabai claims that the Will is bogus and that Sakharam had no bequeathable interest, the properties being ancestral properties which he could not have disposed off by Will. The other heirs of Muktabai and Narmadabai similarly claim the properties of their deceased mothers. Upon the case that they are ancestral properties, the heirs claim that Muktabai was a coparcener under Section 6 of the Hindu Succession Act 1956 as amended by the Hindu Succession (Amendment) Act 39 of 2005. It is claimed that Muktabai being a daughter of a coparcener viz: Sakharam became a coparcener by her birth in her own right as did Sadashiv.

..... Sadashiv claims that even if the properties are ancestral properties Muktabai or Narmadabai were not coparceners and cannot claim any interest therein. It is his contention that only on and from 9th September 2005 on which date the Amendment Act 39 of 2005 came into force that the daughter who was then living would become a coparcener. Muktabai as well as Narmadabai died not only prior to the Act having come into force, but even prior to their father. The succession of Sakharam opened on 4th October 1995 when he expired. On and from that date his estate had to be administered. On and from that date his coparcenary interest in the ancestral property would devolve by survivorship. So far as his intestate succession is concerned, Sadashiv as also the children of Muktabai and Narmadabai would take their shares from 1995. Neither of the children claimed her share. In fact, Sakharam died testate leaving behind a registered Will. Seven years after his death the mutation entry came to be made. Sadashiv was shown as the owner of the suit lands. None challenged the ownership or the mutation entry within three years of the death of Sakharam and also within three years of the mutation entry having been made respectively. Sadashiv entered into an

assignment for development of his properties with the other Defendants on 24th December 2004 followed by a registered development agreement on 10th March 2005. The development commenced from 30th May 2005. A public notice dated 10th May 2006 was not objected by any party. The initial claim has been made only in the suit filed in 2010.

In the case of Sugalabai Vs. Gundappa A. Maradi & Ors. ILR 2007 KAR 4790 the first three words of the aforesaid section came to be considered and interpreted in paragraph 24. It has been observed that the words "on and from" mean "immediately and after" - the commencement of the Act. It is observed that in other words as soon as the amending Act came into force the daughter of the coparcener becomes, by birth, a coparcener in her own right in the same manner as the son. In that case the change in law came into effect during the pendency of the Appeals. It was held that the changed law applied to pending Appeals and consequently, the said Appeal. Hence the daughter in that case was held to be the coparcener. It was observed that there was nothing in the Act which showed that only those

born on and after the commencement of the Act would become coparceners. Hence it was held that even a daughter who was born prior to the amendment Act became a coparcener immediately on and after the Amendment Act.

This is the case where the daughters had already expired prior to the coming into force of the amendment Act and prior to any litigation, her son having filed the suit himself. There is nothing in the Section which shows that it would apply to all females retrospectively including a daughter who had expired prior to the coparcener himself, prior to any litigation and prior to the amendment Act itself. If such a daughter was also to be included the entire population would come to be included and the children and grandchildren of all deceased females would claim their share in the estate of their grandparents and great grandparents through their mother. It would have to be seen whether the legislation is capable of such an absurd interpretation. The words "on" and "from" show and suggest that on a date prior to the Act coming into force the daughter (female) would not be included as a coparcener. Consequently, all daughters born to coparceners in a Hindu joint family living at the time the Act

came into force would become coparcener. Daughters (females) who had expired a day prior thereto, unfortunately, could not, because they would be covered by the law prior to the amendment. If such interpretation is not given the words "on" and "from" "the commencement of the Hindu Succession (Amendment) Act, 2005" would lose their significance all together and would be rendered otiose. This aspect is essentially decipherable from the proviso to Section 6(1) of the Act cited above. This provision has been specifically enacted to lay down a cut-off date for the daughter of a coparcener to claim her right as a coparcener including her right of partition which is restricted by any disposition or alienation made prior to 20th December 2004. Hence when the Act came into force on 9th September 2004 partition could be claimed by a daughter, if the coparcenary property was not partitioned about nine months prior thereto. This shows that the earlier dispositions and alienations could not be challenged so that whilst the daughter was not a coparcener and certain rights were created they would stand. This is to lend stability to facts and circumstances that may have prevailed in innumerable families having joint family properties prior to the creation of the

new right in favour of the daughter. It would, therefore, have to be seen when in this case the daughters of Sakharam would become coparceners. Both the daughters had died prior to Sakharam and definitely prior to the Act coming into force. Consequently, on and from 9th September 2005 they were not living to be coparceners in their own right in the same manner as Sadashiv had. Had they been living on 9th September 2005 they would have had the same right in their father's property as his son. It is, therefore, that it is rightly contended on behalf of the Defendants in the suit that Sakharam's succession opened on 4th October 1995 on that date his daughters Muktabai and/or Narmadabai were not coparceners. His coparcenary property would devolve by survivorship to his only son Sadashiv. The devolution of interest in the coparcenary property as specified in the sub-title/heading of Section 6 would take place only to the son. The words in the sub-title "devolution of interest" also therefore, show that for an interest to devolve upon a person that person must be alive. No devolution of interest in coparcenary property can take place upon a deceased coparcener. On the date of the death of Sakharam his daughters were not even

coparceners; they were not even alive. No devolution of interest upon them could take place..... We are not concerned with the interpretation of the old Section 6 which was the issue in the case of Sheela Devi (supra). We are concerned with only the aspect of the applicability of the amendment Act on the date the succession opened. Since it was held that the new Act would not apply when succession opened prior to the date on which it came into force - in that case in 1989 - the Court considered Section 6 of the earlier Act. Unless the Plaintiff had shown a legal right in the estate of Sakharam he cannot proceed with the suit and derail various transfers effected earlier. The filing of the suit decades after Sakharam died, mutation entries came to be made and also five years after the amendment itself came into force would even otherwise be barred by the law of limitation.

PUSPHALATHA CASE BEFORE HIGH COURT

Division Bench of the Karnataka High Court in the case of **Pushpalatha N. V. Vs. V. Padma AIR 2010 Karnataka 124** which has held that

the section is retrospective and that all the daughters no matter when they were born and no matter when the succession opened were entitled to equal share along with the sons of the coparcener. The Court considered the law before the amendment, the mischief and the difficulty that the law did not provide for and the remedy therefor. In paragraph 15 of the judgment, the Court held that the construction "which would suppress the mischief and advance the remedy" and "which would suppress subtle inventions and evasions for continuance of the mischief" were to be upheld so that they would "add force and life to cure the remedy, according to true intent of the makers of the Act". The observation in paragraph 52 of the judgment in the case of Pushpalatha (supra) relates to when the daughter would get the right under the amended Section 6 of the Act shows that it was by birth "leaving no scope for interpretation". The further observation in paragraph 53 of the judgment is that such a right is given to a daughter born after 1956. In paragraph 44 of the judgment the Court considered the settled rules of interpretation of the Statutes embedded in various judgments of the Supreme Court thus:

(a) statutory provisions of substantive rights are ordinarily prospective.

(b) retrospective operation must be given only when it is made expressly or by necessary implication.

(c) the intention of the legislature has to be gathered from the plain words giving them a plain grammatical meaning. (d) if the legislation has two meanings, the meaning which preserves the benefits should be adopted.

(e) interpretation giving rise to absurdity or inconsistency should be discarded.

(See Mahadfolal Kanodia Vs. Administrator General of West Bengal AIR 1960 SC 936)

(a) It may be mentioned that Section 6 creates substantive rights in favour of a daughter as a coparcener; it would, therefore, be ordinarily prospective.

(b) there are no express words showing retrospective operation in the Statute and in fact the express words are "on and from" denoting prospectivity.

(c) the plain normal grammatical meaning of the words "shall become" and "shall be deemed" shows the future tense and the total absence of any past participle. The words must be given the

grammatical meaning as per the grammatical tense.

(d) The section is incapable of two meanings; it cannot mention that all the daughters born before the amendment would be included and that only daughters born after the amendment would be included. Since two meanings are not contemplated, it would rule out interpretations which are required in legislations which are capable of two meanings.

(e) The absurdity of making all the daughters born before or after the commencement of the amendment Act included in the amendment Act would not only be directly against and diametrically different from the express provision of making the section applicable to daughters who shall be coparceners by birth only on and after the amendment, but would make the applicability of the Act so all-pervasive that the entire populace who are Hindus and have any HUF property of the family would be encompassed setting at naught various transactions entered in to by coparceners creating vested rights as in this case.

HINDU WOMEN RIGHT TO PROPERTY AS CO-PARCENER

JUSTICE ANIL R. DAVE & JUSTICE ADARSH KUMAR GOEL in the case of **PRAKASH & ORS. VS PHULAVATI & ORS. MANU/SC/1241/2015 : (2016) 2 SCC 36** held as follows:-

The text of the amendment itself clearly provides that the right conferred on a 'daughter of a coparcener' is 'on and from the commencement of Hindu Succession (Amendment) Act, 2005'. Section 6(3) talks of death after the amendment for its applicability. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a substantive provision is always prospective unless either expressly or by necessary intentment it is retrospective.

In the present case, there is neither any express provision for giving retrospective effect to the amended provision nor necessary intentment to that effect. Requirement of partition being registered can have no application to statutory notional partition on opening of succession as per unamended provision, having regard to nature of such partition which is by operation of law.

The proviso keeping dispositions or alienations or partitions prior to 20th December, 2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when the main provision is applicable. Similarly, Explanation has to be read harmoniously with the substantive provision of Section 6(5) by being limited to a transaction of partition effected after 20th December, 2004. Notional partition, by its very nature, is not covered either under proviso or under sub-section 5 or under the Explanation.

In this background, we find that the proviso to Section 6(1) and sub-section (5) of Section 6 clearly intend to exclude the transactions referred to therein which may have taken place prior to 20th December, 2004 on which date the Bill was introduced. Explanation cannot permit reopening of partitions which were valid when effected. Object of giving finality to transactions prior to 20th December, 2004 is not to make the main provision retrospective in any manner.

In no case statutory notional partition even after 20th December, 2004 could be covered by the Explanation or the proviso in question.

Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation.

In S. Sai Reddy case ((1991) 3 SCC 647), the question for consideration was whether even after a preliminary decree is passed determining the shares in partition, such shares could be varied on account of intervening events at the time of passing of the final decree. In the said case, partition suit was filed by a son against his father in which a preliminary decree was passed determining share of the parties. Before final decree could be passed, there was an amendment in the Hindu Succession Act (vide

A.P. Amendment Act, 1986) allowing share to the unmarried daughters. Accordingly, the unmarried daughters applied to the court for their shares which plea was upheld. The said judgment does not deal with the issue involved in the present matter. It was not a case where the coparcener whose daughter claimed right was not alive on the date of the commencement of the Act nor a case where shares of the parties stood already crystalised by operation of law to which the amending law had no application. Same is the position in Prema and Ganduri cases ((2011) 6 SCC 462 & (2011) 9 SCC 788).

In Narayan Rao case ((1985) 2 SCC 321), it was observed that even after notional partition, the joint family continues. The proposition laid down in this judgment is also not helpful in deciding the question involved herein. The text of the Amendment itself shows that the right conferred by the Amendment is on a 'daughter of a coparcener' who is member of a coparcenary and alive on commencement of the Act.

We are unable to find any reason to hold that birth of the daughter after the amendment was a necessary condition for its applicability. All that is required is that daughter should be alive and

her father should also be alive on the date of the amendment.

**Mangammal and Ors. vs. T.B. Raju and Ors.:
MANU/SC/0440/2018**

Court in Prakash and Ors. v. Phulavati and Ors., MANU/SC/1241/2015 : (2016) 2 SCC 36, Court while dealing with the identical matter held at Para 23 as under: 23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born.....

Court in Danamma @ Suman Surpur and Anr. v. Amar and Ors., MANU/SC/0064/2018 : 2018 (1) Scale 657 dealt, inter-alia, with the dispute of daughter's right in the ancestral property. In the above case, father of the daughter died in 2001, yet court permitted the daughter to claim the right in ancestral property in view of the amendment in 2005. On a perusal of the judgment and after having regard to the peculiar facts of the Danamma (supra), it is evident that the Division Bench of this Court primarily did not deal with the issue of death of the father rather it was mainly related to the question of law whether

daughter who born prior to 2005 amendment would be entitled to claim a share in ancestral property or not? In such circumstances, in our view, Prakash and Ors. (supra), would still hold precedent on the issue of death of coparcener for the purpose of right of daughter in ancestral property. Shortly put, only living daughters of living coparceners would be entitled to claim a share in the ancestral property.

Hence, without touching any other aspect in the present case, we are of the view that the Appellants were not the coparceners in the Hindu Joint Family Property in view of the 1989 amendment, hence, they had not been entitled to claim partition and separate possession at the very first instance. At the most, they could claim maintenance and marriage expenses if situation warranted.

In Rohit Chauhan v. Surinder Singh and others, MANU/SC/0692/2013 : AIR 2013 SC 3525 in para 11, it has been held as under: "11. We have bestowed our consideration to the rival submission and we find substance in the submission of Mr. Rao. In our opinion coparcenary property means the property which consists of ancestral property and a coparcener

would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener....."1

¹ Applying this ratio after 2005 amendment son also includes daughter.

WOMENS RIGHT TO PROPERTY OF HER HUSBAND

The Hon'ble Mr.Justice R.S.Ramanathan of Madras High Court, in the case of **K.Karai Gowder (Died) vs G.Siddan**, Decided on 13 November, 2013 Summarized the legal principles on the subject as follows:-

- i) The right of maintenance of a wife is a preexisting right against the husband, irrespective of the fact, whether the husband is possessed of any separate property, or ancestral property and it can be enforced even against the husband's separate property.
- ii) When the property has been given to wife under an instrument, in lieu of her maintenance, it is in recognition of her pre-existing right and when the wife/widow is in possession of the property, on the date of coming into force of the Hindu Succession Act, 1956, the limited interest, stated in that instrument, would enlarge into absolute estate.
- iii) When the wife is in possession of the property, not pursuant to any legal right, or, in recognition of her preexisting right, that interest will not be enlarged into absolute estate.

WOMENS RIGHT TO MAINTENANCE

On detailed analysis of the authorities and the Shastric Hindu Law on the subject in the case of **V. Tulasamma and Ors. vs. Sesha Reddy (Dead) by Lrs.: 1977 (3) SCR 261 - MANU/SC/0380/1977** the following propositions laid with respect to the incidence and characteristics of a Hindu woman's right to maintenance:

- (1) that a Hindu woman's right to maintenance is a personal obligation so far as the husband is concerned. and it is his duty to maintain her even if he has no property. If the husband has property then the right of the widow to maintenance becomes an equitable charge on his property and any person who succeeds to the property carries with it the legal obligation to maintain the widow;
- (2) though the widow's right to maintenance is not a right to property but it is undoubtedly a pre-existing right in property, i. e. it is a jus and rem not jus in rem and it can be enforced by the widow who can get a charge created for her maintenance on the property either by an agreement or by obtaining a decree from the civil court:

(3) that the right of maintenance is a matter of moment and is of such importance that even if the joint property is sold and the purchaser has notice of the widow's right to maintenance, the purchaser is legally bound to provide for her maintenance:

(4) that the right to maintenance is undoubtedly a pre-existing right which existed in the Hindu Law long before the passing of the Act of 1937 or the Act of 1946. and is, therefore, a pre-existing right:

(5) that the right to maintenance flows from the social and temporal relationship between the husband and the wife by virtue of which the wife becomes a sort of co-owner in the property of her husband, though her co ownership is of a subordinate nature: and

(6) that where a Hindu widow is in possession of the property of her husband, she is entitled to retain the possession in lieu of her maintenance unless the person who succeeds to property or purchases the same is in a position to make due arrangements for her maintenance.

It is true that a widow's claim for maintenance does not ripen into a full-fledged right to property, but nevertheless it is undoubtedly right which in certain cases can

amount to a right to property where it is charged. It cannot be said that where a property is given to a widow in lieu of maintenance, it is given to her for the first time and not in lieu of a preexisting right. The claim to maintenance, as also the right to claim property in order to maintain herself, is an inherent right conferred by the Hindu Law and, therefore, any property given to her in lieu of maintenance is merely in recognition of the claim or right which the widow possessed from before. It cannot be said that such a right has been conferred on her for the first time by virtue of the document concerned and before the existence of the document the widow had no vestige of a claim or right at all. Once it is established that the instrument merely recognized the pre-existing right, the widow would acquire absolute interest. Secondly, the Explanation to Section 14(1) merely mentions the various modes by which a widow can acquire a property and the property given in lieu of maintenance is one of the modes mentioned in the Explanation. Sub-section (2) is merely a proviso to Section 14(1) and it cannot be interpreted in such a manner as to destroy the very concept of the right conferred on a Hindu woman. Under Section 14(1) Sub-section (2) is limited only to those cases where by virtue of a

certain grant or disposition a right is conferred on the widow for the first time and the said right is restricted by certain conditions. In other words, even if by a grant or disposition a property is conferred on a Hindu male under certain conditions, the same are binding on the male. The effect of Sub-section (2) is merely to equate male and female in respect of grant conferring a restricted estate.

Summarising the conclusions of law which Fazal Ali, J., reached after an exhaustive consideration of the texts and authorities mentioned by him, he enumerated them thus:

(1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge

is created for the maintenance of-a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing right.

(2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by this long-needed legislation.

(3) Sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of Section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision.

(4) Sub-section (2) of Section 14 supplies to instruments, decrees, awards, gifts, etc., which create independent and new titles in favour of females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-

existing rights. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the Sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of Sub-section (2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee.

(5) The use of express terms like "property acquired by a female Hindu at a partition", "or in lieu of maintenance" "or arrears of maintenance", etc., in the Explanation to Section 14(1) clearly makes Sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of Sub-section (2).

(6) The words "possessed by" used by the Legislature in Section 14(1) are of the widest possible amplitude and include the state of

owning a property even though the owner is not in actual or physical possession of the same.

Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the Section does not contemplate the possession of any rank trespasser without any right or title.

(7) That the words "restricted estate" used in Section 14(2) are wider than limited interest as indicated in Section 14(1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee.

BEFORE NOTIONAL PARTITION ALL THE CONSEQUENCES WHICH FLOW FROM A REAL PARTITION HAVE TO BE LOGICALLY WORKED OUT

M. Arumugam vs. Ammaniammal and Ors.:
MANU/SC/0015/2020 - When we read Section 6 of the Succession Act the opening portion

indicates that on the death of a male Hindu, his interest in the coparcenary property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Act. That would mean that only the brothers would get the property. However, the Proviso makes it clear that if the deceased leaves behind a female heir specified in Class-I of the Schedule, the interest of the deceased in the coparcenary property shall devolve either by testamentary or by intestate succession under the Succession Act and not by survivorship. The opening portion of Section 6, as it stood at the relevant time, clearly indicates that if male descendants were the only survivors then they would automatically have the rights or interest in the coparcenary property. Females had no right in the coparcenary property at that time. It was to protect the rights of the women that the proviso clearly stated that if there is a Class-I female heir, the interest of the deceased would devolve as per the provisions of the Act and not by survivorship. The first Explanation to Section 6 makes it absolutely clear that the interest of the Hindu coparcener shall be deemed to be his share in the property which would have been allotted to him if partition had taken place immediately before his death. In the

present case, if partition had taken place immediately before the death of Moola Gounder then he and Defendant Nos. 1 and 2 would have been entitled to 1/3 share each in the property. Nothing would have gone to the female heirs as per the law as it stood at that time. However, since partition had not actually taken place, and there were Class-I female heirs, 1/3 share of Moola Gounder was to devolve on the Class-I legal heirs in accordance with Section 8 of the Succession Act.

In Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum and Ors. MANU/SC/0407/1978 : (1978) 3 SCC 383, the main issue was as to what share a Hindu widow would get in terms of Sections 6 and 8 of the Succession Act. Court held that the partition which was a deemed partition cannot be limited to the time immediately prior to the death of the deceased coparcenary but "all the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the life time of the deceased."

In Commissioner of Wealth Tax, Kanpur and Ors. v. Chander Sen and Ors.

MANU/SC/0265/1986 : (1986) 3 SCC 567, the

dispute related to a joint family business between a father and son. This business was divided and thereafter, carried by a partnership firm of which both were partners. The father died leaving behind his son, two grandsons and a credit balance in the account of the firm. The issue that arose was whether the credit balance in the account left behind by the deceased was to be treated as joint family property or the property was to be distributed to Class-I legal heirs in accordance with Section 8 of the Succession Act. This Court held that Succession Act supersedes all Mitakshara law. The relevant portion of the judgment reads as follows: 22. ... It would be difficult to hold today the property which devolved on a Hindu Under Section 8 of the Hindu Succession Act would be HUF in his hand vis-a-vis his own son; that would amount to creating two classes among the heirs mentioned in class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may

be mentioned that heirs in class I of Schedule Under Section 8 of the Act included widow, mother, daughter of predeceased son etc.

In Appropriate Authority (IT Deptt.) and Ors. v. M. Arifulla and Ors. (2002) 10 SCC 342 the issue which arose was whether the property inherited in terms of Sections 6 and 8 of the Succession Act was to be treated as the property of co-owners or as joint family property. The Court held as follows: 3. ... This Court has held in CWT v. Chander Sen that a property devolving Under Section 8 of the Hindu Succession Act, is the individual property of the person who inherits the same and not that of the HUF.

M. Arumugam vs. Ammaniammal and Ors.: MANU/SC/0015/2020 - Applying the principles laid down in the aforesaid cases, it is apparent that after the death of Moola Goundar, his interest in the coparcenary property would devolve as per the provisions of Section 8 since he left behind a number of female Class-I heirs.

15. There is another reason to take this view. Section 30 of the Succession Act clearly lays down that any Hindu can dispose of his share of the property by Will or by any other testamentary

disposition which is capable of being so disposed of by him. The explanation to Section 30 clearly provides that the interest of a male Hindu in Mitakshara coparcenary shall be deemed to be property capable of being disposed of by him within the meaning of Section 30. This means that the law makers intended that for all intents and purposes the interest of a male Hindu in Mitakshara coparcenary was to be virtually like his self-acquired property. Furthermore, when we conjointly read Section 30 with Section 19, which provides that when two or more heirs succeed together to the property of an intestate, they shall take the property per capita and as tenants in common and not as joint tenants. This also clearly indicates that the property was not to be treated as a joint family property though it may be held jointly by the legal heirs as tenants in common till the property is divided, apportioned or dealt with in a family settlement.

16. Even assuming that the property was a joint family property then also we cannot accept the submission that the Karta i.e., Defendant No. 1 was the natural guardian of the minor Plaintiff. The Karta is the manager of the Hindu Undivided Family and acts on behalf of the entire family. True it is that Section 6 of the Act is not

applicable in respect of undivided interest of a minor in the joint family property but here we are dealing with a situation where all the family members decided to dissolve the Hindu Undivided Family assuming there was one in existence.

HINDU WIDOWS RIGHT TO GET SHARE IN HINDU JOINT FAMILY

Ram Nath Sao since deceased thr. L.Rs. and Ors. vs. Goberdhan Sao since deceased thr. L.Rs. and Ors. : MANU/SC/0387/2017 -

Fuchan Mahto died in the year 1940. At the time of his death, the Hindu Women's Rights to Property Act, 1937 (hereinafter referred to as "the 1937 Act") was in force. Section 3(2) of the 1937 Act which is relevant for the present case provided as follows: 3(2) When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of Sub-section (3), have in the property the same interest as he himself had. Under Section 3(2) of the 1937 Act, on the death of Fuchan Mahto his widow/wife Puniya Devi became entitled to a share in the

joint family property. However, the share of Puniya Devi would remain undetermined till such time when there is a partition in the family. This is what has been held by this Court in Potti Lakshmi Perumallu v. Potti Krishna Venamma MANU/SC/0308/1964 : (1965) 1 SCR 26. The relevant paragraph in the said judgment to the above effect is extracted below: According to the theory underlying the Hindu law the widow of a deceased Hindu is his surviving half and, therefore, as long as she is alive he must be deemed to continue to exist in her person. This surviving half had under the Hindu law texts no right to claim a partition of the property of the family to which her husband belonged. But the Act of 1937 has conferred that right upon her. When the Act says that she will have the same right as her husband had it clearly means that she would be entitled to be allotted the same share as her husband would have been entitled to had he lived on the date on which she claimed partition.

On the date of death of Fuchan Mahto, his son Mithu Sao did not have any male issue. However, the joint family in question can be understood to have continued with Mithu Sao as the 'Karta' and the property continued to belong

to the joint family. The above view would find support from the decision of this Court in *Gowli Buddanna v. Commissioner of Income Tax, Mysore, Bangalore* MANU/SC/0110/1966 : (1966) 3 SCR 224, relevant portion of which is extracted below: Property of a joint family therefore does not cease to belong to the family merely because the family is represented by a single coparcener who possesses rights which an owner of property may possess. In the case in hand the property which yielded the income originally belonged to a Hindu undivided family. On the death of Buddappa the family which included a widow and females born in the family was represented by Buddanna alone but the property still continued to belong to that undivided family and income received therefrom was taxable as income of the Hindu undivided family. The position, therefore, prior to the coming into force of the Hindu Succession Act, 1956 was that the joint family continued on the death of Fuchan Mahto with Mithu Sao as the sole coparcener and the joint family properties continued to belong to the family and furthermore Puniya Devi continued to have a share in the property.

**TRANSFERS EFFECTED BEFORE 20-12-2004
CANNOT BE INVALIDATED**

Saraswathi Gopinath vs. Uma Ram :
MANU/KA /1807/2012 (DB) - Reading of Section 6 provides for parity of right in the co-parcener property among the male and female members of the Hindu joint family. The daughter of the co-parcener becomes a co-parcener by birth in her own-rights and liabilities in the same manner as the son. However, Section 6(1) shall not affect or invalidate any dispossession or alienation or partition or testamentary disposition, which has taken place before 20th December 2004. The language employed in the provision is unambiguous and clear. The intention was to save the earlier disposition, alienation including any partition or testamentary disposition of the property, which has taken place before 20th December 2004. In the instant case, admittedly as per the settlement deed dated 13-4-1970, the property has been settled in favour of the sole co-parcener. Section 6 of the Hindu Succession Act protected the alienation or testamentary disposition made prior to 20th December 2004 even if we hold that the suit schedule properties are the joint family properties. The Hon'ble Supreme Court in a

judgment reported in MANU/SC/1216/2011 : 2011(6) KLJ 307 (SC) GANDURI KOTESHWARAMMA AND ANOTHER v/s CHAKIRI YANADI AND ANOTHER clearly held that Section 6(1) will not invalidate dispossession or alienate including any partition or testamentary disposition taken place before 20th December 2004. The Division Bench of this court in a judgment reported in MANU/KA/0124/2010 : ILR 2010 KAR 1484 cited supra has clearly held that Section 6(1) will not affect the alienation made prior to 20th December 2004. Further in a judgment reported in MANU/SC/0581/2009 : AIR 2009 SC 2649 in the case of SEKAR v/s GEETHA AND OTHERS, the Apex Court clearly held that "Neither the 1956 Act nor the 2005 Act seeks to reopen vesting of a right where succession had already been taken place. The operation of the said statute is no doubt prospective in nature." In view of the declaration of law by the Hon'ble Supreme Court and also this Court, the plaintiffs are not entitled for any share in the suit schedule property.

CHAPTER-14
LIMITATION AND ESTOPEL

**WHEN PLAINTIFF WAS EXCLUDED FROM THE
FAMILY PROPERTIES AND CONSEQUENTLY
THE EXCLUSION IS RIGHTLY HELD TO BE
PROVED – SUIT IS BARRED**

THE HON'BLE MR.JUSTICE MOHAN SHANTANAGOUDAR of HIGH COURT OF KARNATAKA in the case of **Smt. Nagamani vs Sri Subbraya Decided on 6 November, 2012** On the basis of such admission on record to the effect that the plaintiff went along with her mother deserting the defendant about more than 30 years prior to the filing of the suit and that the plaintiff was excluded from the joint family about 30 years prior to the filing of this suit, the Courts below have rightly held that the suit is barred by limitation under Article 110 of the Limitation Act, under which, suit for partition shall be filed within 12 years from the date of exclusion. In the matter on hand, admittedly the plaintiff went along with her mother voluntarily when she was aged about six years and since then she is residing separately from the defendant. Moreover, the plaintiff has issued notice to the defendant

through one Ramesh claiming partition and such request of the plaintiff was refused by the defendant. In spite of the same, no suit is filed by the plaintiff for partition. Thus it is clear that the plaintiff was excluded from the family properties and consequently the exclusion is rightly held to be proved by the courts below. From the above, it is clear that the Courts below are justified in dismissing the suit as barred by limitation.

In case of Radhoba Baloba Vagh and others v. Aburao Bhagwantrao Shirole

MANU/PR/0049/1929 : AIR 1929 PC 231; the Privy Council has observed as under: "There is no definition of the word "exclusion" in the Limitation Act and the question whether a person has been excluded from joint family, must depend upon the facts of the particular case. An intention to exclude is an essential element. It is necessary, therefore, for the Court to be satisfied that there was an intention on the part of those in control and possession of the joint family property to exclude the person and that exclusion was to his knowledge."

In the case of Shri Veerayya Mahantayya Koppad & Ors. v. Smt. Geetha W/o. Gangadha

**Hiremath & Ors., reported in
MANU/KA/2245/2007 : ILR 2008 KAR 1773;**

"when there is no foundation laid to prove the factum of exclusion, the limitation under Art. 110 will not start unless it is shown that a person was excluded from a joint family property to enforce his rights to share therein. Has also referred to the decision of the Apex Court in case of Sadasivan v. K. Doraiswamy, reported in MANU/SC/0445/1996 : AIR 1996 SC 1724 dealing with the question of exclusive possession by a coparcener under Arts. 64 and 65 of the Limitation Act, has held that exclusion possession of a co-sharer does not amount to adverse possession against other cosharers unless such possession is exercised by ousting the other cosharers."

In the case of (Thakur) Nirman Singh and others v. Thakul Lal Rudra Partab Narain Singh and others, reported in MANU/PR/0071/1926 : AIR 1926 PC 100; "it is an error to suppose that the proceedings for the mutation of names are judicial proceedings in which the title to and the proprietary rights in immovable property are determined. They are nothing of the kind, as has been pointed out times innumerable by the

Judicial Committee. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid. It was also observed therein that orders in mutation proceedings are not evidence that the successful applicant was in possession as sole legal owner in a proprietary sense, to the exclusion, for example, of all claims of the other members of the family as co-owners or for maintenance or otherwise, as revenue authorities have no jurisdiction to pronounce upon the validity of such a claim".

IT IS ONLY IN THE EVENT OF OUSTER OF A SHARER FROM THE JOINT FAMILY PROPERTIES, THE LIMITATION STARTS RUNNING

THE HON'BLE MR. JUSTICE N. KUMAR AND
THE HON'BLE MR. JUSTICE H. S. KEMPANNA of
Karnataka High Court in the case of Smt

Sulochana Manvi vs Chitriki Shivayogappa
Decided on 8 August, 2012

Though the plaintiff was married in the year 1954 and she ceased to be a member of the joint family, the suit having been filed on 17.03.2004, nearly after 60 years, it is contended the suit is barred by limitation. In the Limitation Act, no period is prescribed for filing a suit for partition and separate possession. The reason is, the right of a sharer in a joint family continues till the property is divided by meets and bounds. It is only in the event of ouster of a sharer from the joint family properties, the Limitation starts running and a suit by such sharer has to be filed within 12 years from the date of ouster. If there is no ouster and if there is no partition, if the property is held in joint, even if a partition takes place among few members excluding the sharer; in so far as the said share is concerned, the partition is not binding and he can bring a suit for partition. Rightly the trial Court has held the suit for partition is not barred and the said finding does not call for interference and is in accordance with law.

In the case of Shri Veerayya Mahantayya Koppad & Ors. v. Smt. Geetha W/o. Gangadha Hiremath

& Ors., reported in MANU/KA/2245/2007 ; ILR 2008 KAR 1773 - "when there is no foundation laid to prove the factum of exclusion, the limitation under Art. 110 will not start unless it is shown that a person was excluded from a joint family property to enforce his rights to share therein. Court has also referred to the decision of the Apex Court in case of Sadasivan v. K. Doraiswamy, reported in MANU/SC/0445/1996 : AIR 1996 SC 1724 dealing with the question of exclusive possession by a coparcener under Arts. 64 and 65 of the Limitation Act, has held that exclusion possession of a co-sharer does not amount to adverse possession against other cosharers unless such possession is exercised by ousting the other cosharers."

PARTITION SUIT FILED AFTER LAPSE OF 27 YEARS FROM THE DATE OF REGISTERED RELEASE DEED

THE HON'BLE MR.JUSTICE D.V.SHYLENDRA KUMAR AND THE HON'BLE MR.JUSTICE B.MANO HAR of Karnataka High Court in the case of Smt Saraswathi Gopinath vs Ms Uma Ram Decided on 3 August, 2012

In view of the declaration of law by the Hon'ble Supreme Court and also this Court, the plaintiffs are not entitled for any share in the suit schedule property. Apart from that the plaintiffs have not objected for alienating the other joint family properties and they have failed to prove that the suit schedule property was purchased by the first defendant from and out of the nucleus of joint family fund. Hence it is difficult to believe that the plaintiffs were not aware of the execution of registered settlement deed in favour of R.Gopinath. The suit has been filed after lapse of 27 years of execution of the registered settlement deed. Under Article 109 of the Limitation Act, the suit has to be filed within 12 years from the date of alienee taking possession of the property. Further, the amendment to the Hindu Succession Act came into force on 30-7-1994 and within three years of coming into force of the Act, they ought to have filed the suit. In the instant case, suit has been filed on 12-12-1997 that is beyond three years. Hence, the suit filed by the plaintiffs is barred by limitation. Further, the plaintiffs themselves have admitted that they have got one more sister and she was not made party to the suit and also two children of the second defendant who have also got share in the

properties were not made parties to the suit. Hence, the suit filed by the plaintiffs is non-joinder of necessary parties. For all these reasons, the appellants have to succeed in the appeal. The Trial Court without considering all these aspects of the matter mainly on the ground that there is no transfer or alienation of the suit schedule property permanently and in view of the amendment to the Hindu Succession, the plaintiffs are entitled for their share in the suit schedule property, without noticing the cut off date fixed under proviso to Section 6(1) of the amended Act of 2005 has decreed the suit and held that the plaintiffs are entitled to their share in the suit schedule property. When the plaintiffs claim that the suit schedule property was purchased from the nucleus of the joint family properties, it is for the plaintiffs to prove the same. However, no document has been produced and the Trial Court without critically examining the evidence on record decreed the suit.

ALIENATIONS MADE PRIOR TO 20-12-2004 CANNOT BE RE-OPENED

The Hon'ble Supreme Court in a judgment reported in **2011(6) KLJ 307(SC)** GANDURI

KOTESHWARAMMA AND ANOTHER v/s CHAKIRI YANADI AND ANOTHER clearly held that Section 6(1) will not invalidate dispossession or alienate including any partition or testamentary disposition taken place before 20th December 2004. The Division Bench of Karnataka High court in a judgment PUSHPALATHA N.B. v/s V.PADMA AND OTHERS reported in ILR 2010 KAR 1484, has clearly held that Section 6(1) will not affect the alienation made prior to 20th December 2004. Further in a judgment reported in AIR 2009 SC 2649 in the case of SEKAR v/s GEETHA AND OTHERS, the Apex Court clearly held that "Neither the 1956 Act nor the 2005 Act seeks to reopen vesting of a right where succession had already been taken place. The operation of the said statute is no doubt prospective in nature."

PLEA OF INVALIDATING THE AWARD ON THE GROUND OF NON- REGISTRATION MAY NOT BE OPEN AFTER THE LAPSE OF THE PRESCRIBED PERIOD

Kashinathsa v. Narsingsa, AIR 1961 SC 1077, the award of the court was accepted by the parties and subsequently ignoring such acceptance, a

suit was instituted by one of the parties. Defence was set up on the basis of such acceptance. An award was passed by the Arbitrators regarding division of properties. In the circumstances, it was held that the award passed by the Arbitrators was not required to be registered under Section 17 of the Registration Act and that the partition thus effected based on the award dividing the family properties between the members of the family are binding on the parties.

Lachhman Dass v. Ram Lal and Another (1989) 3 SCC 99 , it was held that for the purpose of registration of a document, Section 17 of the Registration Act has to be strictly construed and at the same time, it was held that the plea of invalidating the award on the ground of non-registration may not be open after the lapse of the prescribed period of limitation in an application under Sections 30 to 33 of the Registration Act.

SKILLFULLY MENTIONING IN THE PLEADINGS THAT THE PLAINTIFFS CAME TO KNOW ABOUT THE RELINQUISHMENT DEED ONLY ABOUT TWO MONTHS PRIOR TO THE FILING OF THE SUIT, THEY CANNOT AVOID THE LIMITATION PERIOD

JUSTICE V. JAGANNATHAN OF THE HIGH COURT OF KARNATAKA, IN A CASE OF SUSHEELAMMA VS. SHIVAKUMAR AND ORS, DECIDED ON NOV 19 **2008**, **REPORTED IN 2010 (2) KARLJ 195**,

The Trial Court had dismissed the suit as barred by limitation. But, the lower Appellate Court held it otherwise. The first relief sought in the plaint is to declare the relinquishment deed dated 13-3-1969 as invalid (the word used in Kannada is "Asindhu"). The second relief sought is consequent to the first prayer being granted, the plaintiffs are entitled to their separate share and possession from out of the suit property, which is put at 1 acre and 33 guntas to each one of them, and also for mesne profits, therefore, it is clear that the plaintiffs getting their share depends upon declaring the relinquishment deed as invalid. The period of limitation prescribed under Article 58 of the Limitation Act, 1963 to obtain any other declaration other than what is mentioned in Articles 56 and 57 is three years and the time starts to run when the right to sue first accrues. Therefore, it has to be found out as to when the right to sue first accrued to the plaintiffs. the plaintiffs came to

know of the deed of relinquishment only two months prior to the filing of the suit and that, for two years prior to filing of the suit, the defendants have been trying to interfere with the plaintiffs possession of the suit property, the documents produced by the defendants viz., Exs, D. 1 to D. 10 and Ex. D.12 which is the relinquishment deed, indicated that the khatha stood in the name of the first defendant pursuant to the deed of relinquishment and the plaintiffs had not questioned the said khatha in the name of the first defendant before any forum. it has also come in the evidence of P.W. 1-Vinoda, that, at the time of the relinquishment deed i.e., in the year 1969 except the fourth plaintiff, all other plaintiffs were aged more than 18 years and the learned Judge of the Trial Court has also referred to the year in which each one of the plaintiffs attained majority and has observed in paragraph 18 of his judgment that all the plaintiffs had attained majority and the plaintiffs woke up to question the validity of the relinquishment deed after a lapse of more than three years from the date of their attaining majority. The learned Judge of the lower Appellate Court has not referred to this part of the reasoning of the Trial Court, in her judgment.

..... Further, the very same witness P.W. 1 has also admitted in the course of his evidence that on 13-3-1969, defendants 3 and 4 executed the relinquishment deed in favour of Patel Mallegowda and has also stated further that in the very year in which the relinquishment deed was executed, the khatha also stood transferred. The witness has also further stated in the course of his cross-examination that he and his brothers had a partition effected in the year 1982. In the light of the aforesaid evidence on record, the learned Judge of the Trial Court, therefore, held that the suit of the plaintiffs was hopelessly barred by time. The lower Appellate Court did not take the trouble of examining the evidence properly and did not even refer to the reasons given by the Trial Court as regards the suit being barred by limitation is concerned. In the case on hand, the plaintiffs' main prayer is to declare the relinquishment deed is invalid and the subsequent prayer is to grant their share in the suit item. Therefore, it cannot be said that the prayer seeking the relinquishment deed to be declared as invalid is an ancillary prayer but, in my view, the said prayer is the substantive prayer in the present suit. Therefore, by skillfully mentioning

in the pleadings that the plaintiffs came to know about the relinquishment deed only about two months prior to the filing of the suit, they cannot avoid the limitation period that is applicable to the case on hand having regard to the nature of the suit that is filed viz., suit for declaration of the relinquishment deed of the year 1969 as invalid. on the very day itself, khatha was also changed in the name of Patel Mallegowda and thereafter, the plaintiffs did not raise their little finger when there was partition in the plaintiffs' family in the year 1982 and furthermore, even after attaining the age of majority and long after that, the plaintiffs slept over their right, if they had any, and did not file the suit to question the validity of the relinquishment deed within three years of attaining the age of their majority.

WHEN THE DONEE WAS AWARE OF THE CHARACTER OF THE TRANSACTION WHEN HE EXECUTED THE DEED, LIMITATION FOR SETTING ASIDE THE DEED OF GIFT WOULD RUN FROM THE DATE OF THE GIFT

In the case of Ramachandra Jivaji Kanago and Another v Laxman Shrinivas Naik and Another, AIR 1945 PC 54 : it has been held that the fact

that the transaction of gift was brought about by undue influence, does not necessarily mean that it was not made voluntarily within the meaning of Section 122 of the Transfer of Property Act, 1882 and is, therefore, void. Where the donor wished to make a gift and acted voluntarily in making it, but the transaction was induced by undue influence, the gift is only voidable and requires to be set aside before the property conveyed by it can be claimed by the donee or anyone claiming through him and Article 91 applies to such a case and when the donee was aware of the character of the transaction when he executed the deed, limitation for setting aside the deed of gift would run from the date of the gift because under Article 91 time runs from the date of the knowledge.

PARTY WHO HAD TAKEN BENEFIT UNDER THE TRANSACTION WAS NOT NOW ENTITLED TO TURN ROUND AND SAY THAT THE TRANSACTION WAS OF A KIND WHICH THE OTHER PARTY COULD NOT ENTER INTO AND WAS THEREFORE INVALID

As far as the decision in the case of Ram Charan Das v Girja Nandini Devi and Others, AIR 1966 SC 323: is concerned, it has been held in the

said case that the Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property amongst members of a family and in this context, the word "family" is not to be understood in a narrow sense of being a group of persons of which law recognises as having a right of succession by having a claim to a share in the disputed property. 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. That consideration having passed by each of the disputants the settlement consisting of recognition of the right by each other cannot be permitted to be impeached thereafter. It was further observed in the said case that a party who had taken benefit under the transaction was not now entitled to turn round and say that the transaction was of a kind which the other lady party could not enter into and was therefore invalid.

APPLICABILITY OF THE RELEVANT ARTICLE OF THE LIMITATION ACT, 1963 WILL HAVE TO BE DECIDED ON THE BASIS OF THE PLEADINGS

In the case of Ramaiah v N. Narayana Reddy (deceased) by L.Rs, 2004(6) Kar. L.J. 164 (SC); it has been held by the Apex Court that applicability of the relevant article of the Limitation Act, 1963 will have to be decided on the basis of the pleadings. But, by suppression of material facts and skillful pleading, the plaintiff cannot seek to avoid inconvenient article and, after observing thus, the Apex Court found in the case before it that the suit was filed by the appellant in 1984 without disclosing that admittedly he was ousted from the property in 1971 and, therefore, applying Article 64, the Apex Court found that the suit had been filed 13 years after dispossession and accordingly, it was held barred by limitation.

LIMITATION STARTS FROM THE DATE OF DECREE AND NOT FROM THE DATE OF ENGROSSMENT ON STAMP PAPER

DR. CHIRANJI LAL (D) BY LRS. VS HARI DAS (D) BY LRS. AIR 2005 SC 2564, Limitation Act, 1963-Article 136- Decree passed in a partition suit-Period of limitation for execution of such decree commences from the date of the decree and not from the date of engrossment of the

decree on the stamp paper-Engrossment of the decree on stamp paper would relate back to the date of the decree-Indian Stamp Act, 1899-Section 35. In a suit for partition filed against the predecessor-in-interest of the appellants, final decree was passed on 7th August, 1981 in favour of the predecessor-in-interest of the respondents. There was no order of the Court directing the parties to furnish stamp papers for the purposes of engrossing the decree. The stamp papers required for engrossing the decree were furnished by respondents on 25th May, 1982 and the decree was engrossed thereafter. The execution application was filed on 21st March, 1994 in the High Court. The appellant raised objection that the execution application was barred by limitation in view of Article 136 of the Act, but the execution court rejected the objection. That order was upheld by the Division Bench in appeal, which held that unless and until the decree is engrossed on the stamp paper it is merely a judgment of the Court and there is no decree available for execution and therefore, the starting point of limitation in case of execution of a decree in partition suit is the date when the decree is engrossed on the requisite stamp papers as that would be the date when decree becomes

enforceable. Hence the present appeal. Limitation starts from the date of decree and not from the date of engrossment on stamp paper.

The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon date of the engrossment of such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain, purview and control of a party. No date or period is fixed for furnishing stamp papers. No rule has been shown requiring the court to call upon or give any time for furnishing of stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that period of limitation would remain suspended till stamp paper is furnished and decree engrossed thereupon and only thereafter the period of twelve years will begin to run would lead to absurdity.

**SUIT FOR SHARE IN PROPERTIES WHICH ARE
NOT JOINT FAMILY PROPERTIES**

Indira Bai vs. Shyamasundar ILR 1988 KAR 1095: MANU/KA/0246/1988 (DB) - The self

acquired property, on death intestate, passes by succession to heirs. The property of the deceased so obtained is not the joint family property. The heirs succeed to it as tenants in common and not as joint tenants. Thus, they become co-owners, The share of the widow was subject to Sub-section (3) of Section 3 of 1937 Act till Hindu Succession Act, 1956 came into force. On coming into force of the Act, she also became the absolute owner of her share. The second plaintiff (son) died intestate as a divided member as he died after filing the suit for partition and after the coming into force of the Act, therefore, his share in the suit properties which is not a joint family property devolved according to the provisions of Chapter II of the Act. The share in the suit properties left by the deceased plaintiff No. 2 was not a Mitakshara coparcenary property. It was a self-acquired property of his father which he got by succession and not by inheritance. Therefore Section 6 of the Act was not applicable. Section 8 of the Act was attracted. Accordingly, the share of the second plaintiff devolved upon the first plaintiff who is the only Class-1 heir to the deceased plaintiff-2 as mentioned in the Schedule

to the Act. The brother and sisters of deceased plaintiff-2, are not Class-1 heirs. Therefore, plaintiff-1 alone is entitled to succeed to the share in the suit properties left by deceased 2nd plaintiff. The right to claim a share given to a Hindu Widow is not taken away or lost on her claiming maintenance and obtaining an order or decree for maintenance. Awarding of maintenance also does not take away the right to claim share. On obtaining a share, she will not be entitled to maintenance...Section 3(3) of the Hindu Women's Right to Property Act, 1937 specifically conferred upon her the rights of claiming partition as a male owner, but she was to enjoy such property with limited interest otherwise known as Hindu Women's Estate. This limited interest has now enlarged into absolute ownership under Section 14(1) of the Act. Therefore, she is entitled to claim her share by way of partition irrespective of the fact that she has been awarded maintenance. Article 65 Limitation Act, 1963, Governs suit for share in properties which are not joint family properties Unity of interest and possession continuing, suit only when there is threat to right. Refusal to be maintained, although in joint possession properties, is occurrence of such

threat..... As long as unity of interest and possession continues, it is open to file a suit only when there is a threat to her right. Such a threat could be said to have occurred only when she was refused to be maintained though she continued to remain in possession of the suit properties...The suit is governed by Article 65 of the Limitation Act, as it is a suit for partition and separate possession of the share of the plaintiff in the suit properties which are not the joint family properties.....Such a situation arose only on 27-1-1977 when she was compelled to institute proceedings for maintenance in Crl. Misc. Case No. 25/77. The suit was filed on 19-10-78 within twelve years from 27-1-1977. Hence the suit is in time.

FOR FILING PARTITION SUIT THERE IS NO TIME LIMIT

S.K. Lakshminarasappa and Ors. vs. B Rudriah and Ors.: MANU/KA/2737/2011 (DB) ILR 2012 KAR 4129, Court has held as follows: "71. It was contended on behalf of alienees that though no limitation is prescribed for filing a suit for partition, that holds good only against the coparceners/co-sharers. The said principle has

no application to the alienees who are third party strangers to the family. If the alienees are claiming title independent of the family members or co-parceners, there is merit in the said submission. When they claim title under the members of the family or co-parceners and when they are lawfully inducted into possession by them, the possession of the said family members and persons claiming under them would be the possession of the plaintiffs in the suit also. Till the partition is effected by metes and bounds, nobody can claim exclusive title to any portion of the property. Therefore the alienees though they are put in exclusive possession of a portion of the property, as the property is not divided by metes and bounds, they cannot claim exclusive title to the property which is to be in their possession. Therefore the plaintiffs are deemed to be in possession in law, of the property, which is in the possession of such alienees. The plaintiffs cannot maintain a suit against such alienees, it is necessary for the plaintiffs to file a suit for general partition against the co-parceners or family members or co-sharers and include such alienees who are only proper parties in a suit for partition. Only if they get decree against co-sharers, family members or coparceners, they would be entitled

to possession from such alienees. Therefore, the suit that is being filed against the alienees is in fact a suit for partition filed against the members of the family, co-sharers and co-parceners and as admittedly no period of limitation is prescribed for filing such a suit, this suit is not barred by law of limitation in so far as alienees are concerned."

CANCELLATION OF DOCUMENT AND LIMITATION

Prem Singh v. Birbal, reported in MANU/SC/8139/2006 : AIR 2006 SC 3608, wherein the Supreme Court has observed as under:

"Limitation is a statute of repose. It ordinarily bars a remedy, but, does not extinguish a right. The only exception to the said rule is to be found in Sec. 27 of the Limitation Act, 1963, which provides that at the determination of the period prescribed thereby, limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

An extinction of right, as contemplated by the provisions of the Limitation Act, prima facie would be attracted in all types of suits. The Schedule appended to the Limitation Act, as

prescribed by the Articles, provides that upon lapse of the prescribed period, the institution of a suit will be barred. Section 3 of the Limitation Act provides that irrespective of the fact as to whether any defence is set out is raised by the defendant or not, in the event a suit is found to be barred by limitation, every suit instituted, appeal preferred and every application made after the prescribed period shall be dismissed.

Article 59 of the Limitation Act applies specially when a relief is claimed on the ground of fraud or mistake. It only encompasses within its fold fraudulent transactions which are voidable transactions.

A suit for cancellation of instrument is based on the provisions of Sec. 31 of the Specific Relief Act, which reads as under: "31. When cancellation may be ordered:- (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled. (2) If the instrument has been registered under the Registration Act, 1908, the Court shall also send a copy of its

decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation."

Section 31 of the Specific Relief Act, 1963 thus, refers to both void and voidable document. It provides for a discretionary relief.

When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non-est in the eye of law, as it would be a nullity.

Once, however, a suit is filed by a plaintiff for cancellation of a transaction, it would be governed by Art. 59. Even if Art. 59 is not attracted, the residuary Article would be. Article 59 would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of such instruments. It would, therefore, apply where a document is *prima facie* valid. It would not apply only to instruments which are presumptively invalid."

Supreme Court in the matter of **Jamila Begum (dead) through legal representatives v. Shami Mohd. (dead) through legal representatives and Anr. MANU/SC/1488/2018 : (2019) 2 SCC 727** has held that registration of the sale deed reinforces valid execution of the sale deed. It was observed as under:- "16. Sale deed dated 21.12.1970 in favour of Jamila Begum is a registered document and the registration of the sale deed reinforces valid execution of the sale deed. A registered document carries with it a presumption that it was validly executed. It is for the party challenging the genuineness of the transaction to show that the transaction is not valid in law.

Supreme Court in the matter of **Bayanabai Kaware v. Rajendra S/o Baburao Dhote MANU/SC/ 1481/2017 : (2018) 1 SCC 585** that Section 68 of the Evidence Act which deals with examination of attesting witnesses to prove execution of document does not apply to sale deed.

Delhi High Court has held in the case of **Jafar Imam Versus Devender Chauhan and others MANU/DE/3933/2014 : 2014 (3) ILR 1917** that

there would be no necessity to claim a declaratory relief qua subsequent transferee, while further holding that the relief of specific performance of agreement to sell is a substantive relief and the declaration of invalidity of the sale deed is only an ancillary relief and there was no necessity for the plaintiff to ask for cancellation of the sale deed. The Delhi High Court held as under:-

"20. The legal position thus emerges is that:

(i) If in a suit the Plaintiff seeks the substantive relief of specific performance of contract, the declaration of the invalidity of the sale deed in favour of the subsequent transferees would be an ancillary relief.

(ii) It is not necessary at all for the Plaintiff to ask for any such declaration for cancellation of Sale Deed.

(iii) It would be enough for the Plaintiff to have joined subsequent transferees as co-Defendants so as to contend that the subsequent sale deeds were not binding on him.

(iv) The proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him, to the prior transferee.

(v) Subsequent transferee does not join in any special covenants made between the prior transferee and his vendor, all that he does is to pass on his title to the prior transferee.

(vi) If the court reaches the conclusion that the title to the property has validly passed from the vendor and resides in the subsequent transferee. The sale to him would not be void but only voidable at the option of the earlier "contractor".

(vii) If there are any special covenants and conditions agreed upon in the contract for sale between the original purchaser and the vendor those have to be incorporated in the sale deed although it is only the vendor who will enter into them and the subsequent purchaser will not join in those special covenants.

(viii) The whole idea and the purpose underlying a decree for specific performance is that if a decree for, such a relief is granted the person who has agreed to purchase the property should be put in the same position which would have obtained in case the contracting parties, i.e., vendor and the purchaser had, pursuant to the agreement, executed a deed of sale and completed it in every way.

(ix) The relief of declaration prayed for against the subsequent transferees is not required to be valued in terms of money.

(x) There would be no necessity of claiming any declaratory relief as against the subsequent transferee. Consequently, there will be no question of payment of court-fees in respect of said relief. The said relief claimed would be superficial and unnecessary in the facts and circumstances of the case."

Rabindra Nath Mukherjee v. Panchanan Banerjee (dead) by L.Rs., MANU/SC/0322/1995 : 1995 (3) R.R.R. 520 by the Apex Court wherein it was observed that where the will has been registered and Registrar has given his certificate on it that the same was read over to the executant and admitted him, the witnesses being interested loses significance.

In Md. Noorul Hoda v. Bibi Raifunnisa and Ors. reported in (MANU/SC/1414/1996 : 1996 (7) SCC 767), Court held that Article 59 of the Limitation Act would be applicable if a person affected is a party to a decree or an instrument or a contract which was questioned by initiation of a suit. Article 59 would apply to set aside the

decrees, instruments or contracts between the parties inter se. However, in the case of a person claiming title through a party to the decree or instrument or contract who seeks to avoid the instrument, contract or decree by a specific declaration, the starting point of limitation Under Article 59 would be the date of knowledge of the fraud and/or illegality which renders the decree and/or instrument and/or other document void.

The Supreme Court in the matter of *Vidhyadhar v. Manikrao and another* **MANU/SC/0172/1999 : (1999) 3 SCC 573** has held that even if the whole of the price is not paid, but sale deed is executed and thereafter registered, if the property is of value of more than Rs. 100, the sale would be complete.

Supreme Court in the matter of **Lakhi Baruah and others v. Padma Kanta Kalita and others** **MANU/SC/0334/1996 : (1996) 8 SCC 357** may be noticed herein profitably in which Their Lordships have held that presumption under Section 90 of the Evidence Act, 1872 does not apply to a copy or a certified copy even though thirty years old; but if a foundation is laid for the admission of secondary evidence under Section

63 of the Evidence Act, 1872 by proof of loss or destruction of the original and the copy which is thirty years old is produced from proper custody, then only the signature authenticating the copy may under Section 90 be presumed to be genuine. Their Lordships while highlighting the object of Section 90 of the Evidence Act, 1872, held that it is based on the principle of necessity and convenience and observed as under:- "15. Section 90 of the Evidence Act, 1872 is founded on necessity and convenience because it is extremely difficult and sometimes not possible to lead evidence to prove handwriting, signature or execution of old documents after lapse of thirty years. In order to obviate such difficulties or improbabilities to prove execution of an old document, Section 90 has been incorporated in the Evidence Act, 1872 which does away with the strict rule of proof of private documents. Presumption of genuineness may be raised if the documents in question is produced from proper custody. It is, however, the discretion of the court to accept the presumption flowing from Section 90. There is, however, no manner of doubt that judicial discretion under Section 90 should not be exercised arbitrarily and not being informed by reasons.

16. So far as applicability of presumption arising from Section 90 of the Evidence Act, 1872 in respect of copy of the old document is concerned, the earliest decision of the Indian Court was made in 1880 in *Khetter Chunder Mookerjee v. Khetter Paul Streeterutno* MANU/WB/0046/1880 : ILR (1879-1880) 5 Cal 886 : 6 CLR 199. Later on, in the decisions of various High Courts the presumption under Section 90 was also made applicable to the certified copy. The Privy Council, upon review of the authorities, however, did not accept the decision rendered in *Khetter* and other decisions of the High Court, where the presumption was attached also to copies, as correct. It was indicated that in view of the clear language of Section 90 the production of the particular document would be necessary for applying the statutory presumption under Section 90. If the document produced was a copy admitted under Section 65 as secondary evidence and it was produced from proper custody and was over thirty years old, then the signature authenticating the copy might be presumed to be genuine; but production of the copy was not sufficient to justify the presumption of due execution of the original under Section 90. In this

connection, reference may be made to the decisions in *Seethayya v. Subramanya Somayajulu* MANU/PR/0077/1929 : LR (1928-29) 56 IA 146 : AIR 1929 PC 115 and *Basant Singh v. Brij Raj Saran Singh* MANU/PR/0038/1935 : AIR 1935 PC 132 : 1935 All LJ 847 : 39 CWN 1057 : 62 IA 180. In view of these Privy Council decisions, disproving the applicability of presumption under Section 90 to the copy or the certified copy of an old document, in the subsequent decisions of the High Courts, it has been consistently held by different High Courts that production of a copy or a certified copy does not raise the presumption under Section 90.

17. The position since the aforesaid Privy Council decisions being followed by later decisions of different High Courts, is that presumption under Section 90 does not apply to a copy or a certified copy even though thirty years old; but if a foundation is laid for the admission of secondary evidence under Section 63 of the Evidence Act, 1872 by proof of loss or destruction of the original and the copy which is thirty years old is produced from proper custody, then only the signature authenticating the copy may under Section 90 be presumed to be genuine."

Supreme Court in the matter of **Dayamathi Bai (Smt) v. K.M. Shaffi MANU/SC/0580/2004 : (2004) 7 SCC 107**, where the certified copy of the sale deed was admitted without any objection by the other side, Their Lordships have held that where a party gives certified copy in evidence and it was not objected by the other side to be marked as an exhibit and admitted in evidence, it cannot be questioned on the ground that the foundation of secondary evidence has not been laid properly. It was observed as under:- "14. To the same effect is the judgment of the Privy Council in the case of Gopal Das v. Thakurji MANU/PR/0002/1943 : AIR 1943 PC 83 : 47 CWN 607 in which it has been held that when the objection to the mode of proof is not taken, the party cannot lie by until the case comes before a court of appeal and then complain for the first time of the mode of proof. That when the objection to be taken is not that the document is in itself inadmissible but that the mode of proof was irregular, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. Similarly, in Sarkar on Evidence, 15th Edn., p. 1084, it has been stated that where copies of the documents are admitted

without objection in the trial court, no objection to their admissibility can be taken afterwards in the court of appeal. When a party gives in evidence a certified copy, without proving the circumstances entitling him to give secondary evidence, objection must be taken at the time of admission and such objection will not be allowed at a later stage."

CHAPTER-15
WILL, GIFT AND ADOPTION

**NOMINEE IS AN AGENT TO RECEIVE ON
BEHELF OF DECEASED LRS**

Apex Court in case of **Vishin N. Khanchandani vs. Vidya Lachmandas Khanchandani, (2000) 6 SCC, 724**, wherein it has been held to the effect that any amount paid to the nominee after valid deductions becomes the estate of the deceased. Such an estate devolves upon all persons who are entitled to succession under law, custom or testament of the deceased holder.

Various High Court in India in different cases, namely, Ramballav Dhandhanian v. Gangadhar Nathmal [AIR 1956 Cal. 275], Life Insurance Corporation of India v. United Bank of India Ltd. [AIR 1970 Cal 213], D. Mohanavelu Mudaliar v. Indian Insurance and Banking Corporation Ltd., Salem [AIR 1957 Mad 115], Sarojini Amma v. Neelakanta Pillai [AIR 1961 Kerala 126], Atmaram Mohanlal Panchal v. Gunvantiben [AIR 1977 Guj. 134], Malli Dei v. Kanchan Prava Dei [AIR 1973 Orissa 83], Lakshmi Amma v. Saguna Bhagath [ILR 1973 Kant 827] have taken a view that the nominee under Section 39 of the Insurance Act is nothing more than an agent to

receive the money due under the life insurance policy. The money as such received remains the property of the assured during his life time and on his death forms part of his estate subject to the law of succession applicable to him.

NOMINATION IN CO-OPERATIVE SOCIETY IS HERITABLE BUT NOT DIVISIBLE

Supreme Court in the case of Gayatri De vs. Mousumi Cooperative Housing Society Ltd. & others reported in **(2004) 5 SCC 90**. Has held to the effect that - Interest of a member of a Co-operative Society governed by the Act is heritable like any other property of the deceased. However, such property is not subject to partition among the heirs and legal representatives like other immovable property. Therefore, if there is no agreement among the heirs about the allotment of the membership in favour of a particular heir and at the same time, even if there is any such agreement but such heir is ineligible to become a member under the provision of the Act, the society would distribute the value of the share of the deceased among the heirs and legal representatives of the deceased member and will transfer the membership to any other person

having the requisite qualification to become the member.

CONSEQUENTIAL DIRECTION FOR DELIVERY OF POSSESSION CAN BE GIVEN IN FAVOUR OF THE PERSON HAVING VALID NOMINATION

Usha Ranjan Bhattacharjee And ... vs Abinash Chandra Chakraborty JT 1997 (10) SC 356, (1997) 10 SCC 344

In terms of determination of valid nomination the consequential direction for delivery of possession can be given in favour of the person having valid nomination under the provisions of Section 70 of the Cooperative Societies Act. The dispute as to the question of title is not to be decided within the limited scope and ambit of Section 69 and 70 of the cooperative Societies Act. We, therefore, dispose of this appeal by directing that in view of the finding by the Tribunal that the respondent had obtained a valid nomination from the deceased Ranendra Kumar Acharya, the respondent is entitled to get the possession of the said flat in accordance with the provisions of Section 70 of the Cooperative Societies Act. But the dispute as to the title of the said flat should not be held to have been decided either by the Cooperative Tribunal or by the High

Court by the impugned judgment. Such question is kept open to be decided by an appropriate forum if such challenge is made before the appropriate forum.

**NOMINEE HOLDS BENEFITS AND
SUCCESSION STARTS AS PER PERSONAL LAW**

**Smt. Sarabati Devi & Anr vs Smt. Usha Devi
1984 AIR 346, 1984 SCR (1) 992** A mere nomination made under Section 39 of the Insurance Act, 1938 does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them. An analysis of the provisions of Section 39 of the Act clearly established that the policy holder continues to hold interest in the policy during his life time and the nominee acquires no sort of interest in the policy during the life time of the holder. If that is so, on the death of the

policyholder the amount payable under the policy becomes part of his estate which is governed by the law of succession applicable to him such succession may be testamentary or intestate.
.....

GIFT OF UN-DIVIDED SHARE BY CO-PARCENER

In a case before Supreme Court of India, in **Venkata Subbamma vs Rattamma AIR 1987 SC 1775**, it is explained in following words “A gift made by the coparcener to his brother should he construed as renunciation of his undivided interest in the coparcenary in favour of his brother and his sons, who were the remaining coparceners. A gift was, therefore, valid and consent of other coparceners was immaterial.” It is, however, settled law that a coparcener may alienate his undivided interest in the coparcenary property for a valuable consideration even without the consent of other coparceners. Such recognition of alienations of coparcenary property for valuable considerations has been one of gradual growth rounded upon the equity which the purchaser for value has to be allowed to stand in his vendor's shoes and to work out his rights by means of a

partition. The personal Law of the Hindus governed by Mitakshara school of Hindu Law is that a coparcener can dispose of his undivided interest in the coparcenary property by a will but he cannot make a gift of such interest. It is a settled law that a coparcener can make a gift of his undivided interest in the coparcenary property to another coparcener or to a stranger with the prior consent of other coparceners. Such a gift will be quite legal and valid..... The parties are admittedly governed by the Mitakshara School of Hindu Law. The essence of a coparcenary under the Mitakshara School of Hindu Law is community of interest and unity of possession. A member of joint Hindu family has no definite share in the coparcenary property, but he has an undivided interest in the property which is liable to be enlarged by deaths and diminished by births in the family. An interest in the coparcenary property accrues to a son from the date of his birth. His interest will be equal to that of his father.”

HINDU RIGHT TO MAKE WILL OF UNDIVIDED CO-PARCENARY PROPERTY

THE HONBLE JUSTICE S. NAYAK AND THE HONBLE JUSTICE MANJULA CHELLUR of Karnataka High Court in the case of Smt. Radhamma And Ors. vs H.N. Muddukrishna And Ors. Reported in **AIR 2006 Kant 68, 2006 (1) KarLJ 176** Prior to coming into force of the Hindu Succession Act, no coparcener could dispose of whole or any portion of his undivided coparcenary interest by Will. Now, by virtue of Section 30 of the Act, read with Explanation, a coparcener derives a right to dispose of his undivided share in Mitakshara joint family property by "Will" or any testamentary disposition, i.e., by virtue of law. Again, the Court has to see whether a coparcener was divided from the joint family prior to the execution of the Will and other circumstances. In other words, the facts and circumstances of each case would also have bearing on this aspect. Prior to Hindu Succession Act coming into force, a coparcener was not entitled to either gift or Will his interest in the coparcenary property. That ban or embargo is removed so far as Will is concerned. His disability to gift away his undivided interest in the coparcenary property continues to remain the same even after the codification of Hindu Law, Only a small portion of the joint family property

can be gifted off by manager of the family for "pious purpose". Section 30 makes it clear that a Hindu testator may dispose of any property which is capable of being disposed of by him by Will or other testamentary disposition in accordance with Indian Succession Act of 1925. The Explanation again clarifies that it is only in respect of interest of a male Hindu in Mitakshara joint family property. The disability prevailed till coming into force of Section 30 of the Act is removed so far as Will is concerned. Having regard to the fact that one of the cardinal principles of construction of Will is to the extent that it is legally possible, effect should be given to every disposition contained in the Will unless the law prevents effect being given to it, ...

The law relating to the capacity or the right of a Hindu to execute a Will his share of property in the coparcenary property has seen a sea change subsequent to coming into force of Hindu Succession Act of 1956. Section 4(1)(a) and (b) of the Act is of relevance, which reads as under:

4. (1) Save as otherwise expressly provided in this Act.--

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act

shall cease to have effect with respect to any matter for which provision is made in this Act;
(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act.

46. By reading Section 4(1)(a) and (b), it is very clear if there is any express provision in the codified law, it is the duty of the Court to look into the said provision. In other words, it alone shall govern the rights of the parties though there is radical alteration or modification from the previous law. If no provision is made in the 'Act', the old law shall be applicable. Therefore, one has to necessarily look into whether any provision in the Act, either specifically or by necessary implication empowers or enables a Hindu to Will away his share in the coparcenary property.

47. After coming into effect of Hindu Succession Act of 1956, it is the duty of the Court to see the circumstances and the law prevailing on the date of the death of the testator in order to put a seal of validity and genuineness to the disputed Will. Section 30 of the Hindu Succession Act, 1956 reads as under: Section 30. Testamentary succession.-Any Hindu may dispose of by Will or other testamentary

disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925) or any other law for the time being in force and applicable to Hindus.

Explanation.--The interest of a male Hindu in Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavani shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this Sub-sections.

A FATHER IN A MITAKSHARA FAMILY HAS A VERY LIMITED RIGHT TO MAKE A WILL

Valliammai Achi vs Nagappa Chettiar & Ors
1967 AIR 1153, 1967 SCR (2) 448

A father in a Mitakshara family has a very limited right to make a will and Pallaniappa's father could not make the will disposing of the entire joint family property, though he gave the residue to his son. We are therefore of opinion, that merely because Pallaniappa's father made the will and Pallaniappa probably as a dutiful son took out

probate and carried out the wishes of his father, the nature of the property could not change and it will be joint family property in the hands of Pallaniappa so far as his male issues are concerned. Further it is equally well settled that under the Mitakshara law each son upon his birth takes an interest equal to that of his father in ancestral property, whether it be movable or immovable. It is very important to note that the right which the son takes at his birth in the ancestral property is wholly independent of his father. He does not claim through the father...." (see Mulla's Hindu Law, Thirteenth Edition, p. 251, para 224). It follows therefore that the character of the property did not change in this case because of the will of Pallaniappa's father and it would still be joint family property in the hands of Pallaniappa so far as his male issue was concerned. Further as soon as the respondent was adopted he acquired interest in the joint family property in the hands of Pallaniappa and this interest of his was independent of his father Pallaniappa. In such circumstances even if Pallaniappa could be said to have made an election there can be no question of the respondent being bound by that election, for he is not claiming through his father.

GIFT OF UNDIVIDED CO-PARCENARY PROPERTY VOID

In **Thamma Venkata Subbamma (dead) by Lrs. V. Thamma Rattamma and Others (1987 (3) SCC 294)** wherein it has been held that a gift by a coparcener's undivided interest in the coparcenary property either to a stranger or to his relation without the consent of the other coparcenary is void. it was observed as follows: "There is a long catena of decisions holding that a gift by a coparcener of his undivided interest in the coparcenary property is void. It is not necessary to refer to all these decisions. Instead, we may refer to the following statement of law in Mayne's Hindu Law, eleventh Edn., Article 382: "It is now equally well settled in all the Provinces that a gift or devise by a coparcener in a Mitakshara family of his undivided interest is wholly invalid....A coparcener cannot make a gift of his undivided interest in the family property, movable or immovable, either to a stranger or to a relative except for purposes warranted by special texts. We may also refer to a passage from Mulla's Hindu Law, fifteenth edn., Article 258,

which is as follows: Gift of undivided interest. -
 (1) According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of the other coparceners.

"7. The parties are admittedly governed by the Mitakshara School of Hindu Law. The essence of a coparcenary under the Mitakshara School of Hindu Law is community of interest and unity of possession. A member of joint Hindu family has no definite share in the coparcenary property, but he has an undivided interest in the property which is liable to be enlarged by deaths and diminished by births in the family. An interest in the coparcenary property accrues to a son from the date of his birth. His interest will be equal to that of his father....

15. The rigour of this rule against alienation by gift has been to some extent relaxed by the Hindu Succession Act, 1956. Section 30 of the Act permits the disposition by way of will of a male Hindu in a Mitakshara coparcenary

property. The most significant fact which may be noticed in this connection is that while the legislature was aware of the strict rule against alienation by way of gift, it only relaxed the rule in favour of disposition by a will the interest of a male Hindu in a Mitakshara coparcenary property. The legislature did not, therefore, deliberately provide for any gift by a coparcenary of his undivided interest in the coparcenary property either to a stranger or to another coparcener. Therefore, the personal law of the Hindus, governed by Mitakshara School of Hindu Law, is that a coparcener can dispose of his undivided interest in the coparcenary property by a will, but he cannot make a gift of such interest.

17. It is, however, a settled law that a coparcener can make a gift of his undivided interest in the coparcenary property to another coparcener or to a stranger with the prior consent of all other coparceners. Such a gift would be quite legal and valid."

MANU/TN/0162/1957 : AIR 1957 Mad 330 (DB) [Palvanna Nadar Vs. Annamalai Ammal], wherein it has been reiterated that a gift to a relation is not for pious purposes and that the

special powers of a father do not extend beyond purposes warranted by special texts.

COPARCENAR CAN MAKE A GIFT OF HIS UNDIVIDED INTEREST IN THE COPARCENARY PROPERTY TO ANOTHER COPARCENER OR TO A STRANGER WITH THE PRIOR CONSENT OF ALL OTHER COPARCENERS

2008 (11) SCR 904 Baljinder Singh . Vs Rattan Singh It is, however, a settled law that a coparcenary can make a gift of his undivided interest in the coparcenary property to another coparcener or to a stranger with the prior consent of all other coparceners. Such a gift would be quite legal and valid.

NOMINATION IN INSURANCE POLICY AND SUCCESSION MATTERS

Section 39 of the Insurance Act, 1938 enables the holder of a policy, while effecting the same, to nominate a person to whom the money secured by the policy shall be paid in the event of his death. The effect of such nomination was considered by this Court in Vishin N.

Khanchandani & Anr. Vs. Vidya Lachmandas
Khanchandani & Anr. **[(2000) 6 SCC 724]**
wherein the law has been laid down in the following terms: "...The nomination only indicated the hand which was authorised to receive the amount on the payment of which the insurer got a valid discharge of its liability under the policy. The policy-holder continued to have an interest in the policy during his lifetime and the nominee acquired no sort of interest in the policy during the lifetime of the policy-holder. On the death of the policy-holder, the amount payable under the policy became part of his estate which was governed by the law of succession applicable to him. Such succession may be testamentary or intestate. Section 39 did not operate as a third kind of succession which could be styled as a statutory testament. A nominee could not be treated as being equivalent to an heir or legatee. The amount of interest under the policy could, therefore, be claimed by the heirs of the assured in accordance with the law of succession governing them."

**GIFT OF ANCESTRAL PROPERTY BY KARTA –
UNDER REASONABLE LIMITS**

This Court in Ammathayee alias Perumalakkal and Another V. Kumaresan alias Balakrishnan and Others **AIR 1967 SC 569** summarised the Hindu Law on the question of gifts of ancestral properties in the following words: Hindu law on the question of gifts of ancestral property is well settled. So far as moveable ancestral property is concerned, a gift out of affection may be made to a wife, to a daughter and even to a son, provided the gift is within reasonable limits. A gift for example of the whole or almost the whole of the ancestral moveable property cannot be upheld as a gift through affection. But so far as immovable ancestral property is concerned, the power of gift is much more circumscribed than in the case of moveable ancestral property. A Hindu father or any other managing member has power to make a gift of ancestral immovable property within reasonable limits for pious purposes; Now what is generally understood by pious purposes is gift for charitable and/or religious purposes. But this Court has extended the meaning of pious purposes to cases where a Hindu father makes a gift within reasonable limits of immovable ancestral property to his daughter in fulfilment of an antenuptial promise made on the occasion of the settlement of the terms of her marriage, and

the same can also be done by the mother in case the father is dead.

ESSENTIALS OF VALID ADOPTION

AIR 2006 SC 3275, M. Gurudas & Ors. VS Rasaranjan & Ors. To prove valid adoption, it would be necessary to bring on records that there had been an actual giving and taking ceremony. Performance of 'datta homam' was imperative, subject to just exceptions. Above all, as noticed hereinbefore, the question would arise as to whether adoption of a daughter was permissible in law. In Mulla's Principles of Hindu Law, ..., it is stated: "488. Ceremonies relating to adoption

(1) The ceremonies relating to an adoption are (a) the physical act of giving and receiving, with intent to transfer the boy from one family into another; (b) the datta homam, that is, oblations of clarified butter to fire; and (c) other minor ceremonies, such as putresti jag (sacrifice for male issue).

(2) The physical act of giving and receiving is essential to the validity of an adoption; As to datta homam it is not settled whether its performance is essential to the validity of an adoption in every

case. As to the other ceremonies, their performance is not necessary to the validity of an adoption.

(3) No religious ceremonies, not even datta homam, are necessary in the case of Shudras. Nor are religious ceremonies necessary amongst Jains or in the Punjab."

In Rahasa Pandiani (dead) by L.Rs. and Ors. v. Gokulananda Panda and Ors., MANU/SC/0418 /1987 : AIR 1987 SC 962, aforesaid aspect was observed as under: When the Plaintiff relies on oral evidence in support of the claim that he was adopted by the adoptive father in accordance with the Hindu rites, and it is not supported by any registered document to establish that such an adoption had really and as a matter of fact taken place, the Court has to act with a great deal of caution and circumspection. Be it realized that setting up a spurious adoption is not less frequent than concocting a spurious will, and equally, if not more difficult to unmask. And the Court has to be extremely alert and vigilant to guard against being ensnared by schemers who indulge in unscrupulous practices out of their lust for property. If there are any suspicious circumstances, just as the propounder of the will

is obliged to dispel the cloud of suspicion, the burden is on one who claims to have been adopted to dispel the same beyond reasonable doubt. In the case of an adoption which is not supported by a registered document or any other evidence of a clinching nature if there exist suspicious circumstances, the same must be explained to the satisfaction of the conscience of the Court by the party contending that there was such an adoption. Such is the position as an adoption would divert the normal and natural course of succession. Experience of life shows that just as there have been spurious claims about execution of a will, there have been spurious claims about adoption having taken place. And the Court has therefore to be aware of the risk involved in upholding the claim of adoption if there are circumstances which arouse the, suspicion of the Court and the conscience of the Court is not satisfied that the evidence preferred to support such an adoption is beyond reproach.

Kishori Lal v. Mst. Chaltibai - MANU/SC/0145 /1958 : AIR 1959 SC 504, As an adoption results in changing the course of succession, depriving wives and daughters of their rights and

transferring properties to comparative strangers or more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicion of fraud and so consistent and probable as to leave no occasion for doubting its truth. Failure to produce accounts, in circumstances such as have been proved in the present case, would be a very suspicious circumstance.

FATHER RIGHT TO GIFT JOINT FAMILY PROPERTY TO THE DAUGHTER - LIMITATIONS

In Guramma Bhratap Chanbasappa Deshmukh v. Mallappa Chanbasappa, **1964 AIR 510, 1964 SCR (4) 497** the Supreme Court held as under: - "The Hindu Law texts conferred a right upon a daughter or a sister, as the case may be, to have a share in the family property at the time of partition. That right was lost by efflux of time. But it became crystallized into a moral obligation. The father or his representative can make a valid gift, by way of reasonable provision for the maintenance of the daughter, regard being had to the financial and other relevant circumstances of

the family. By custom or by convenience, such gifts are made at the time of marriage, but the right of the father or his representative to make such a gift is not confined to the marriage occasion. It is a normal (moral) obligation and it continues to subsist till it is discharged. Marriage is only a customary occasion for such a gift. But the obligation can be discharged at any time, either during the life time of the father or thereafter. It is not possible to lay down a hard and fast rule, prescribing the quantitative limits of such a gift as that would depend on the facts of each case and it can only be decided by Courts, regard being had to the overall picture of the extent of the family estate, the number of daughters to be provided for and other paramount charges and other similar circumstances. If the father is within his rights to make a gift of a reasonable extent of the family property for the maintenance of a daughter, it cannot be said that the said gift must be made only by one document or only at a single point of time. The validity or the reasonableness of a gift does not depend upon the plurality of documents but on the power of the father to make a gift and the reasonableness of the gift so made. If once the power is granted and the reasonableness of the

gift is not disputed, the fact that two gift deeds were executed instead of one, cannot make the gift any the less a valid one."

CONSEQUENCES OF ADOPTION BY A WIDOW

Apex Court in Dina Ji and others Vs. Daddi and others **MANU/SC/0213/1990 : AIR 1990 SC 1153**, wherein it was held as follows at Para 7: "7. Proviso (C) of this Section departs from the Hindu General Law and makes it clear that the adopted child shall not divest any person of any estate which has vested in him or her before the adoption. It is clear that in the present case, Smt. Yashoda Bai who was the limited owner of the property after the death of her husband and after Hindu Succession Act came into force, has become an absolute owner and therefore the property of her husband vested in her and therefore merely by adopting a child she could not be deprived of any of her rights in the property. The adoption would come into play and the adopted child could get the rights for which he is entitled after her death as is clear from the Scheme of Section 12 proviso (C)."

In *Sawan Ram and others Vs. Kala Wanti and others* **MANU/SC/0207/1967 : AIR 1967 SC 1761**, the rights of widow to adopt the child and vesting of property by adopted son came up for consideration before the Apex Court, wherein it was held that a female widow is competent to adopt the child in view of disability removed by Section 8 of the Hindu Adoptions and Maintenance Act and the adoption would not relates back to the date of death of husband of the adopter (widow), doctrine of relation back cannot be applied in view of Section 12 proviso (C) of Hindu Adoptions and Maintenance Act, distinguishing the Division Bench judgment of AP High Court in *Nara Hanumantha Rao Vs. Nara Hanumayya* and another 1964 (1) AWR 166 while disagreeing with the judgment of that Court held as follows: "10. A question naturally arises what is the adoptive family of a child who is adopted by a widow, or by a married woman whose husband has completely and finally renounced the world or has been declared to be of unsound mind even though alive. It is well recognized that, after a female is married, she belongs to the family of her husband. The child adopted by her must also, therefore, belongs to the same family. On adoption by a widow,

therefore the adopted son is to be deemed to be a member of the family of the deceased husband of the widow. Further still, he loses all his rights in the family of his birth and those rights are replaced by the rights created by the adoption in the adoptive family." "11. Under the Shastric Law, if a child was adopted by a widow, he was treated as natural-born child and, consequently, he could divest other members of the family of rights vested in them prior to his adoption. It was only with the limited object of avoiding any such consequence on the adoption of a child by a Hindu widow that these provisions in clause (c) of the proviso to s. 12, and section 13 of the Act were incorporated. In that respect, the rights of the adopted child were restricted. It is to be noted that this restriction was placed on the rights of a child adopted by either a male Hindu or a female Hindu and not merely in a case of adoption by a female Hindu. This restriction on the rights of the adopted child cannot. Therefore, in our opinion, lead to any inference that a child adopted by a widow will not be deemed to be the adopted son of her deceased husband."

In Shripad Gajanan Suthankar Vs. Dattaram Kashinath Suthankar and others

MANU/SC/0288 /1974 : AIR 1974 SC 878, similar question came up for consideration before the Apex Court and the Apex Court while deciding the rights of a Hindu widow reviewing old judgments of different High Courts held as follows: "17. The doctrine of relation back will not extend to a case where a transfer has already been made either by the sole surviving coparcener or by his heir. The principle is that when a disposition is made inter vivos by one who has full power over property under which a portion of that property is carried away, no rights of a son who is subsequently adopted can affect that portion which is disposed."

In *Namdev Vyankat Ghadge and another Vs. Chandrakant Ganpat Ghadge and others* **MANU/SC/ 0150/2003 : AIR 2003 SC 1735**, the Apex Court considering the scope of Sections 12 and 13 of the Hindu Adoptions and Maintenance Act ruled as follows: "An adopted child shall be deemed to be the child of his or her adopted father or mother for all purposes with effect from the date of adoption as is evident from the main part of Section 12 proviso C to Section 12, in clear terms states that the adopted child

shall not divest any person of any estate, which vested in him or her before the adoption."

**UNTIL UNIFORM CIVIL CODE BROUGHT
PERSONAL LAW AS TO ADOPTION APPLY**

Supreme Court in Shabnam Hashmi vs. Union of India [**MANU/SC/0119/2014 : AIR 2014 SC 1281**] has held: "11. The J.J. Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA Guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Art. 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an

unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date".

ACCEPTANCE OF GIFT

With regard to the fact that if the minor accepts the gift during his minority of a property burdened with obligation and on attaining majority does not repudiate but retains it, he would be bound by the obligation attached to it and also acceptance of gift can be presumed to have been made by beneficiary or on his behalf without any overt act signifying acceptance by the minor, he relied upon the judgment rendered by the Hon'ble Supreme Court in the case of K. Balakrishnan v. K. Kamalam & Ors., reported in **MANU/SC/1071/2003 : (2004) 1 SCC 581**. Paragraphs 18, 19 and 25 of the said judgment are quoted herein below:

"18. Section 127 throws light on the question of validity of transfer of property by gift to a minor.

It recognises minor's capacity to accept the gift without intervention of guardian, if it is possible, or through him. It reads: "127. Onerous gift.-- Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully. Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.....Onerous gift to disqualified person.--A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound."

19. The last part of Section 127, underlined above, clearly indicates that a minor donee, who can be said to be in law incompetent to contract under Section 11 of the Contract Act is, however, competent to accept a non-onerous gift. Acceptance of an onerous gift, however, cannot bind the minor. If he accepts the gift during his minority of a property burdened with obligation

and on attaining majority does not repudiate but retains it, he would be bound by the obligation attached to it.

25. Where a gift is made in favour of a child of the donor, who is the guardian of the child, the acceptance of gift can be presumed to have been made by him or on his behalf without any overt act signifying acceptance by the minor. In the instant case, the mother who is the natural guardian gifted the property to her minor son in the year 1945. The donee was an educated lad of 16 years of age, capable of understanding and living jointly with the donor. Knowledge of the execution of the gift would have been derived in normal circumstances, by the minor, being beneficiary, sooner or later after its execution. Knowledge of gift deed to both the parents as natural guardians and the donee is sufficient to indicate acceptance of gift by the minor himself or on his behalf by the parents. The gift deed was revoked by the mother much after its execution as late as in the year 1970. By that time, the donee had become a major and he never repudiated the gift. We have examined the terms of the gift deed. Non-delivery of possession of the gifted property, non-exercise of any rights of ownership over it, and failure by the donee, on

attaining majority, in getting his name mutated in official records are not circumstances negating the presumption of acceptance by the minor during his minority or on his attaining majority. The donor had reserved to herself, under the terms of the gift deed, the right to manage, possess and enjoy the property during her lifetime. Since the possession and enjoyment of the property including management of the school were retained by the donor during her lifetime, the acceptance of the ownership of the property gifted could be by silent acceptance. Such acceptance is confirmed by its non-repudiation by his parents and by him on attaining majority. As is the evidence on record, the mother, the donor, was herself the natural guardian of the minor donee. The father was also a guardian and had knowledge of the gift. He also did not repudiate the gift on behalf of the donee. The donee himself was 16 years of age and could understand the nature of beneficial interest conferred on him. He also had knowledge of the gift deed and on attaining majority did not repudiate it. These are all circumstances which reasonably give rise to an inference, if not of express but implied acceptance of the gift. Where a gift is made by the parent to a child, there is a

presumption of acceptance of the gift by the donee. This presumption of acceptance is founded on human nature. "A man may be fairly presumed to assent to that to which he in all probability would assent if the opportunity of doing so were given to him."

RELATIONSHIP OF ADOPTED CHILD WITH OTHERS EXPLAINED

In Smt. Sitabai and Anr. vs. Ramchandra **MANU/SC/0296/1969 : A.I.R. 1970 S.C. 343** it was held that it is necessary implication of section 12 and 14 of the Hindu Adoption and Maintenance Act, 1956 that a son adopted by the widow becomes a son not only of the widow but also of deceased husband. It is clear on a reading of the main part of Section 12 and Sub-section (vi) of Section 11 that the effect of adoption under the Act is that it brings about severance of all ties of the child given in adoption in the family of his or her birth. The child altogether ceases to have any ties with the family of his birth. Correspondingly, these very ties are automatically replaced by those created by the adoption in the adoptive family. The legal effect of giving the child in adoption must therefore be to

transfer the child from the family of its birth to the family of its adoption. The result is, as mentioned in Section 14(1) namely where a wife is living, adoption by the husband results in the adoption of the child by both these spouses; the child is not only the child of the adoptive father but also of the adoptive mother. In case of there being two wives, the child becomes the adoptive child of the senior-most wife in marriage, the junior wife becoming the step-mother of the adopted child. Even when a widower or a bachelor adopts a child, and he gets married subsequent to the adoption, his wife becomes the step-mother of the adopted child. When a widow or an unmarried woman adopts a child, any husband she marries subsequent to adoption becomes the step-father of the adopted child. The scheme of Sections 11 and 12, therefore, is that in the case of adoption by a widow the adopted child becomes absorbed in the adoptive family to which the widow belonged. In other words the child adopted is tied with the relationship of sonship with the deceased husband of the widow. The other collateral relations, of the husband would be connected with the child through that deceased husband of the widow. For instance, the husband's brother would necessarily be the uncle

of the adopted child. The daughter of the adoptive mother (and father) would necessarily be the sister of the adopted son, and in this way, the adopted son would become a member of the widow's family, with the ties of relationship with the deceased husband of the widow as his adoptive father. It is true that Section 14 of the Act does not expressly state that the child adopted by the widow becomes the adopted son of the husband of the widow. But it is a necessary implication of Sections 12 and 14 of the Act that a son adopted by the widow becomes a son not only of the widow but also of the deceased husband. It is for this reason that we find in Sub-section (4) of Section 14 a provision that where a widow adopts a child and subsequently marries a husband, the husband becomes the "step-father" of the adopted child. The true effect and interpretation of Sections 11 and 12 of Act No. 78 of 1956 therefore is that when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family. In other words the result of adoption by either spouse is that the adoptive child becomes the child of both the spouses.

**THE RIGHTS OF AN ADOPTED SON CANNOT
BE MORE THAN THAT OF HIS ADOPTIVE
FATHER**

**Govind Hanumantha Rao Desai vs. Nagappa
and Ors. MANU/SC/0384/1972 : A.I.R. 1972**

S.C. 1401 it was held thus, a long line of decision has firmly laid down that adoption dates back to the stage of the death of the adoptive father. long after partition between A and his younger son C, his elder son B died, and long after that partition widow of B adopted D as adopted son to her husband B. In the circumstances, it was held that the adopted son was entitled to 1/3rd share therein as his adoptive father if alive at the time of aforesaid partition could not have obtained more than one third share. But, the adoption was held on September, 18, 1955, i.e. before the Hindu Adoption and Maintenance Act, 1956, came into force on Dec. 21, 1956. If the plaintiff's adoptive father was alive in 1933 when the partition took place, he could not have obtained anything more than 1/3rd share in the family properties. It passes our comprehension how the plaintiff could acquire a greater right than his adoptive father could have had if he had

been alive on the date of partition and that he could have got if he had been adopted prior to that date.

Vasant and Ors. vs. Dattu and Ors. MANU/SC /0308/1986 : A.I.R. 1987 S.C. 398 it was held that the introduction of a member into a joint family, by birth or adoption, may have the effect of decreasing the share of the rest of the members of the joint family, but it certainly does not involve any question of divesting any person of any estate vested in him. To interpret section 12 to include cases of devolution of survivorship on the death of a member of the joint family would be to deny any practical effect to the adoption made by the widow of a member of the joint family, this is not contemplated under law.

SON INCLUDES ADOPTED SON UNDER GENERAL CLAUSES ACT

Division Bench judgment of Allahabad High court in the case of **Ajit Datt v. Mrs. Ethel Walters and Ors. reported in Air 2001 Allahabad 109** on the proposition of right of inheritance of adopted child of an Indian Christian, divergent views are expressed by Sri G.P. Mathur J., and S.R. Singh

J., My Lord G.P. Mathur takes the view that "Although there is no rule or law which permits adoption. In Christianity there is no prohibition against adoption. The right to inheritance by an adopted child in the estate of adopted father, is a statutory right. Where as in U.K. and USA and other European Countries, the State has made a law giving right of inheritance to the adopted child. Since there is no such adoption procedures in India the adoptive child does not have a right to claim the property in accordance with the Christian Canons. My Lord S.R. Singh J., on the other hand while interpreting the provisions of Section 3(57) of the General Clauses Act, 1904 declares that an adopted son is also a son and the adoption is not prohibited in Christianity. Therefore, holds that adopted child has right of inheritance in view of the definition of the 'son' in the General Clauses Act.

Kerala High Court in the case of Philips Alfred Malvin v. Y.J. Gonsalvis and Ors. reported in MANU/KE/0495/1999 : AIR 1999 Ker 187 has held that the Christian couple can adopt and the adopted child gets all rights of a naturally born child and entitled to inherit assets of the adoptive parents. I am in full agreement with the view of

the Kerala High Court and with the view of my Lord S.R. Singh J., that an adopted child of a Christian parents shall have light of inheritance. Unlike in Hindu Law, there is no law prohibiting the Christian, couple to adopt male or a female child although they may have natural born male or a female child as the case may be. The adoption according to Christians is based on both temporal and spiritual values. Therefore, I am of the view that the 3rd defendant and the defendants 4 and 5 are entitled to a share notwithstanding that the third defendant and late Maccabeaus are the adopted children.

MALE HAS A WIFE LIVING, HE SHALL NOT ADOPT EXCEPT WITH THE CONSENT OF HIS WIFE

**Siddaramappa and Ors. vs. Gouravva :
MANU/KA/ 0854/2003 - ILR 2004 KAR 3611**

- The proviso to Section 7 of Hindu Adoption And Maintenance Act, 1956, makes it very clear that if that male has a wife living, he shall not adopt except with the consent of his wife; unless the wife(a) has completely and finally renounced the world (b) has ceased to be a Hindu or (c) has been declared by a Court of competent jurisdiction to

be of unsound mind. Therefore, the proviso makes it very clear under what circumstances in spite of a wife living a male Hindu is competent to adopt a child without her consent. Having regard to the language employed in the said proviso, the said proviso is exhaustive. The law does not provide for any other contingency under which a male Hindu can adopt a child without the consent of his wife living at the time of adoption. When the circumstances under which a consent of wife is not necessary are specified, they cannot be added to. To do that would be adding words to the statute. More over the words in the proviso that "he shall not adopt except with the consent of his wife" is emphatic and renders the provision mandatory and should be obeyed if the adoption to be lawful. When the wife's consent not obtained by her husband at the time of adoption, the adoption is ab initio void and non-est. Adoption is the admission of a stranger by birth to the privileges of a child as if the said child was born to the adoption parents. With the adoption the child takes birth to the adoptive parents and acquires interest in the property belonging to the adoptive parents. Thus, the adoption affects the rights of a Hindu wife in the property of her husband. When a wife gives birth to a child

whether she likes the child or not, law recognizes her as the mother of the said child and the said child as the son or daughter of the said wife. For recognizing this relationship consent, concurrence of the mother is not required. But, if a stranger by birth has to be conferred with the privileges of a child of the said wife the consent of the wife is a must. No child could be foisted against such a wife by her husband without her consent and against her wish. In other words she cannot be compelled to recognize a stranger by birth as her child and she as the mother of the said child. More so, when such adoption affects her absolute right to the property of her husband. Therefore, having regard to the object sought to be achieved by the Act and the underlining principle of equality sought to be achieved by the passing of the Act any other interpretation would be contrary to the letter and spirit of the enactment.

DWYAMUSHYAYANA FORM OF ADOPTION

**S.T. Krishnappa vs. Shivakumar and Ors.
2006 (3) KCCR 1920 : MANU/KA/8704/2006 -**

The term 'dwyamushyayana' is applicable to an adopted son retaining his voluntary relationship

to his natural father with his acquired relation to his adoptive parents and as such is entitled to claim succession or heirship in both the families. Where a person gives his son to another under an agreement that he should be considered to be the son of both the natural and the adoptive fathers, the son so given in adoption is called 'dwyamushyayana'. In this form of adoption, it is essential to prove such an agreement and it should also be proved that there was the ceremony of giving and taking of the adoptive son. A 'dwyamushyayana' inherits both in his natural and adoptive families. The evidence or proof required for normal adoption is also applicable to this type of adoption also. It is the adoption deed which must reflect the intention of adoptive or genitive father to treat the boy as son of both families. In the present case, held, no such intention was apparent from the adoption deed. In every case of absolute dwyamushyayana form of adoption, there must be an agreement to the effect that the person given in adoption shall be the son of both i.e., the natural father as well as the adoptive father and as such an agreement must be proved like any other fact by the party alleging the same.

**REVERSIONERS CONSENT NOT REQUIRED
AFTER AMENDMENTS IN HINDU LAW**

G. Appaswami Chettiar v. R. Sarangapani Chettiar, reported in A.I.R. 1978 S.C. 1951, the Apex Court considered the difference between the old Hindu Law relating to adoption and the one under the 1956 Act and has observed that though the 1956 Act is not applicable, the consent of sapindas required under the old Hindu Law has become unnecessary due to changed circumstances. The Apex Court dealt with the requirement of assent of sapindas in paragraph-13 of the aforesaid decision and has held as under: The Hindu Adoptions and Maintenance Act, 1956 has codified the law of adoption and maintenance. The codified law has made several changes in the law of adoption. With the passing of the Hindu Succession Act, 1956, sons and daughters are treated equally in the matter of succession. Equality in status is recognized in the matter of adoptions also. The Hindu Adoptions and Maintenance Act, 1956, provides for adoptions of boys as well as girls. Formerly a woman could adopt only to her husband but now she can adopt for herself. A widow can now adopt a son or daughter to herself in her own right. No

question of divesting of any property vested in any person arises for under the Succession Act she is entitled to take the property absolutely. Under the changed circumstances, therefore, the questions of the sapinda's consent or depriving him of his reversionary interest or the motive of the widow for adoption do not arise. The adoption in the instant case was in 1953 before the Act came into force. The court has to take into account the changed circumstances particularly disappearance of the basis of the requirements of sapinda's assent on the ground of presumed incapacity of the woman.

INTERPRETATION OF WILL

Supreme Court in its later decision in **Mauleshwar Mani & Ors v. Jagdish Prasad & Ors : MANU/SC/0044/2002 : (2002) 2 SCC 468**. In that case, the testator had bequeathed the suit properties absolutely to his wife in the first part of the Will and in the latter part of the Will, had also bequeathed the same suit property to nine sons of his daughters. In the aforesaid contest, the Supreme Court held as under:- "The next question that arises for consideration is, the validity of the second part of the will whereby and

whereunder the testator gave the very same property to nine sons of his daughters.

In *Ramkishorelal v. Kamalnarayan* it was held that in a disposition of properties, if there is a clear conflict between what is said in one part of the document and in another where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion, in such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded. In *Radha Sundar Dutta v. Mohd. Jahadur Rahim* it was held where there is conflict between the earlier clause and the later clauses and it is not possible to give effect to all of them, then the rule of construction is well established that it is the earlier clause that must override the later clauses and not vice versa. In *Rameshwar Bakhsh Singh v. Balraj Kuar* it was laid down that where an absolute estate is created by a will in favour of devisee, the clauses in the will which are repugnant to such absolute estate cannot cut down the estate; but they must be held to be invalid.

From the decisions referred to above, the legal principle that emerges, inter alia, are;

- 1) where under a will, a testator has bequeathed his absolute interest in the property in favour of his wife, any subsequent bequest which is repugnant to the first bequeath would be invalid; and
- 2) where a testator has given a restricted or limited right in his property to his widow, it is open to the testator to bequeath the property after the death of his wife in the same will."

Madhuri Ghosh and Anr. v. Debobroto Dutta and Anr.: MANU/SC/1478/2016 : (2016) 10 SCC 805, the Supreme Court referred to the aforesaid decisions and held as under:- "In law, the position is that where an absolute bequest has been made in respect of certain property to certain persons, then a subsequent bequest made qua the same property later in the same Will to other persons will be of no effect."

In *Ramachandra Shenoy and another v. Mrs. Hilda Brite and others* [**MANU/SC/0248/1963 : AIR 1964 SC 1323**], the terms of a Will containing the following clause had to be construed:- "All kinds of movable properties

inclusive of the amounts that shall be got from others and the cash; - all these my eldest daughter Severina Sobina Coelho shall after my death enjoy and after her lifetime, her male children also shall enjoy permanently and with absolute right."

In the decision in *Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer* [**MANU/SC/0081/1952 : AIR 1953 SC 7**], a will executed by Raja Bisheshwar Singh by which five properties, described in lists A and B attached to the plaint, were bequeathed to Dhuj Singh, the younger son, by way of making provisions for the maintenance of the said son and his heirs, was considered. It was held that- "As I have become sufficiently old and no reliance can be placed on life, by God's grace I have got two sons namely, Bajrang Bahadur Singh, the elder, and Dhuj Singh, the younger. After my death the elder son would according to rule, become the Raja, the younger one is simply entitled to maintenance." It was also stated in the Will that- "Consequently, with a view that after my death the younger son and his heirs and successors, generation after generation, may not feel any trouble and that there may not be any quarrel between them".

..... "In case where the intention of the testator is to grant an absolute estate, an attempt to reduce the powers of the owner by imposing restraint on alienation would certainly be repelled on the ground of repugnancy; but where the restrictions are the primary things which the testator desires and they are consistent with the whole tenor of the will, it is a material circumstance to be relied upon for displacing the presumption of absolute ownership implied in the use of the word "malik". We hold, therefore, that the Courts below were right in holding that Dhuj Singh had only a life interest in the properties under the terms of his father's will."

In Sadaram Suryanarayana and another v. Kalla Surya Kantham and another **[MANU/SC/0886/2010 : 2011 SAR (Civil) 1]**, it was held that where an absolute estate is created by Will in favour of the devisee, the clauses in the Will, which are repugnant to such absolute estate, cannot cut down the estate; but they must be held to be invalid. It has been further held that, where there is a conflict between two clauses appearing in a Will and when it is not possible to give effect to all of them, then the rule of construction is well established that it is the

earlier clause that must override the later clauses and not vice versa.

Raman Sameeranan v. Raman Varunan and others [MANU/KE/0106/1960 : AIR 1960 Kerala 226], wherein it was held- "The father having conveyed the properties absolutely in favour of the plaintiff and the first defendant, further down says that both of them are entitled to enjoy the property themselves taking Pattas and paying revenue and other taxes due on the properties. No doubt, the father expresses an intention that he will continue to be in possession and management of the properties during the lifetime of the first defendant who was then a minor and this is further followed by a later expression that the first defendant should not convey any properties during the minority of the plaintiff. This, in my opinion, is nothing more than a pious wish expressed by a well-intentioned father that the properties given by him to his two sons must be preserved for the benefit of both. This, in my view, cannot certainly put any restriction in the disposing power of the first defendant in respect of the properties given to him, and which have been clearly expressed in the earlier portions of the document. Even if this

is considered to be a restriction in my opinion that restriction cannot operate in the face of unequivocal disposition in full of all his rights in favour of the two sons. As stated earlier, this is nothing more than a pious wish by a well-intentioned father."

Fatima Sarohini Suresh and others v. K. Saraswathi Amma and others
[MANU/KE/0015/1986 : AIR 1986 Kerala 56].

In that decision, a Division Bench of Court had to consider the restrictions imposed on one Suresh in respect of the properties allotted to him. Properties were allotted to the two daughters, namely, Hasheela and Jamila, and also one son namely, Mahesh. With regard to the other son named Suresh, two items of properties were set apart. The first item was to be retained by his mother with a right to take its income, till the marriage of the youngest daughter Jamila; and after her marriage, Suresh was to step into his mother's shoes with a right to enjoy it during his lifetime. The second item was also to be retained by the mother during her life, Suresh getting it only after her death with a right to get income during his lifetime. It was also mentioned that he could not encumber or alienate items 1 and 2 at

any time, and after his death, they were to devolve successively on his descendants. By relying on the decision in *Ragunath v. Deputy Commissioner* [MANU/PR/ 0150/1929 : AIR 1929 PC 283], the Division Bench in *Fatima Sarohini Suresh* held that as far as the properties allotted to Suresh are concerned, they have to be understood as allotting a share to Suresh and then creating conditions repugnant to the estate so created. In *Ragunath*, the Privy Council held that such conditions must be regarded as an attempt to impose repugnant conditions upon the estate so created and are, therefore, void.

In ***Indu Kakkar v. Haryana State Industrial Development Corporation Ltd.*** and another [MANU/SC/0760/1998 : (1999) 2 SCC 37], it was held in paragraph 16 that- "However, the allottee has contended before the trial court that clause 7 of the agreement is unenforceable in view of Section 11 of the TP Act. But that contention was repelled, according to us, rightly because the deed of conveyance had not created any absolute interest in favour of the allottee in respect of the plot conveyed. For a transferee to deal with interest in the property transferred "as if there were no such direction" regarding the particular

manner of enjoyment of the property, the instrument of transfer should evidence that an absolute interest in favour of the transferee has been created. This is clearly discernible from Section 11 of the TP Act. The section rests on a principle that any condition which is repugnant to the interest created is void and when property is transferred absolutely, it must be done with all its legal incidents."

In **Hill Properties Limited v. Union Bank of India** and others [MANU/SC/0921/2013 : (2014) 1 SCC 635], it was held that when there is a transfer of a species of interest, a legal bar on the saleability or transferability of such a species of interest, will create chaos and confusion. It was held that the right or interest to occupy and enjoy such a species of property, if curtailed against its saleability or transferability, such clauses are not valid.

In **Rameshwar Bakhsh v. Balraj Kuar** [MANU/PR/0050/1935 : AIR 1935 PC 187], it was held: "These two documents constitute the testamentary instrument, and in interpreting them it is the duty of the Court to find out the intention of the testator. It is clear that that

intention is to be gathered from the language used by the testator, because it is the words used in the instrument by which he has conveyed the expression of his wishes. The meaning to be attached to the words may however be affected by surrounding circumstances; and, when this is the case, those circumstances should be taken into consideration. As laid down by Section 82, Succession Act, the meaning of any clause in a will is to be collected from the entire instrument; and all the parts of a will are to be construed with reference to each other and so as, if possible, to form one consistent whole. Where it is not possible to reconcile all the parts, the latter must prevail."

Narmadaben Maganlal Thakker v. Pranjivandas Maganlal Thakker (1997) 2 S.C.C. 255, paragraph 3 of the judgment gives the wordings of the gift, as in our case. There was also a direction to the donees to enjoy the property as exclusive owners of the same and they are entitled to enjoy, transfer, etc. But the gift further provided that the donor will continue in possession of the property and collect the profits therefrom during his lifetime and that he had also retained the power to let out the building and to

collect the rent therefrom. In spite of the above wordings, when the document was cancelled by a subsequent deed, and when litigation arose, their lordships held in paragraph 7 thus: It would thus be clear that the execution of a registered gift deed, acceptance of the gift and delivery of the property, together make the gift complete. Thereafter, the donor is divested of his title and the donee becomes the absolute owner of the property. The question is, whether the gift in question had become complete under Section 123 of the T.P. Act? It is seen from the recitals of the gift deed that; Motilal Gopalji gifted the property to the respondent, In other words, it was a conditional gift. There is no recital of acceptance nor is there any evidence in proof of acceptance, Similarly, he had specifically stated that the property would remain in his possession till he was alive. Thereafter, the gifted property would become his property and he was entitled to collect mesne profits in respect of the existing rooms throughout his life. The gift deed conferred only limited right upon the respondent/donee. The gift was to become operative after the death of the donor and he was to be entitled to have the right to transfer the property absolutely by way of gift or he would be entitled to collect the mesne

profits. It would thus be seen that the donor had executed a conditional gift during his lifetime. Their Lordships considered the document not as a gift, but as a document which has to come into force on the death of the donor. If this is the interpretation that has to be given, on the basis of the decided cases, I can only hold that there was no right in praesenti created.

Supreme Court reported in Gomtibai v. Mattulal MANU/SC/0052/1997 : [1996] 1 SCR

839 , the case was regarding partition deed between two brothers. A recital was made that they intended to gift the land to their cousin sister Kasturibai, and a subsequent correspondence also shows that the land was allotted to Kasturibai. The question before the Supreme Court was, whether the earlier intention to execute a gift and the subsequent correspondence will amount to a gift. That was a document which came into, existence at a time when the Transfer of Property Act was not in force in the State of Hyderabad. But there was a similar provision under the Hyderabad Transfer of Property Act. Considering the same, in paragraph 4 of the judgment, their Lordships said thus: ... it is seen that the gift of immovable property should

be made only for transferring the right, title and Interest by the donor to the donee by a registered instrument signed by or on behalf of the donor and must be attested by at least two witnesses. The preexisting right, title and interest of donor thereby stand divested in the donee by operation of Section 17 of the Registration Act only when the gift deed is duly registered and thereafter the donor would lose title to the property. It must also be proved that the donee had accepted the property gifted over under the instrument. In this case, though the transfer or gift was acted upon by Kasturibai as per the correspondence and evidence on record, but, admittedly, there is no written instrument executed by the donor, namely, the plaintiff and the defendant in favour of their cousin sister Kasturibai and it was got attested by at least two witnesses and registered in accordance with the provisions of the Stamp Act and the Registration Act. Their Lordships were of the view that unless the property is legally transferred in favour of their cousin, here cannot be any question of gift though there may be a valid intention to gift.

Navneet Lal vs. Gokul and Ors. 1976 (1) SCC 630: MANU/SC/0328/1975

(1) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed. *Ram Gopal v. Nand Lal* MANU/SC/0044/1950 : [1950] 1 SCR 766 .

(2) In construing the language of the will the court is entitled to put itself into the testator's armchair (*Venkata Narasimha v. Parthasarathy*) (1913) 41 Ind App 51 73 and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense.... But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. (*Venkata Narasimha's case* (supra) and *Gnanambal Ammal v. T. Raju Ayyar* : MANU/SC /0045/1950 : [1950] 1 SCR 949 .

(3) The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them

as redundant or contradictory (Raj Bajrang Bahadur Singh v. Bakhtraj Kuer), : MANU/SC/0081/1952 : [1953] 4 SCR 232 .

(4) The court must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The court will look at the circumstances under which the testator makes his will, such as the state of his property, of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus. (Pearey Lal v. Rameshwar Das) : MANU/SC/0398/1962 : AIR 1963 SC 1703 .

(5) It is one of the cardinal principles of construction of wills that to the extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring

successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will. (Ramachandra Shenoy v. Mrs. Hilda Brite : MANU/SC/0248/1963 : [1964] 2 SCR 722

In **K.S. Palanisami (Dead) through Legal Representatives v. Hindu Community in General and Citizens of Gobichettipalayam and others, MANU/SC/0266/2017 : (2017) 13 SCC 15** (paras 42, 45 and 61):

"42. Justice B.K. Mukherjea J., speaking for this Court in *Gnambal Ammal v. T. Raju Ayyar and others*, MANU/SC/0045/1950 : AIR 1951 SC 103, on construction of the will laid down the following in para 10: "10. The cardinal maxim to be observed by Courts in construing a will is to endeavour to ascertain the intentions of the testator. This intention has to be gathered primarily from the language of the document which is to be read as a whole without indulging in any conjecture or speculation as to what the testator would have done if he had been better informed or better advised.

In construing the language of the will as the Privy Council observed in Venkata Narasimha v. Parthasarathy Appa Row, MANU/PR/0005/1913: "[the Courts] are entitled and bound to bear in mind other matters than merely the words used They must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure. "The Court is entitled to put itself into the testator's armchair'.....But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document so soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions.....In all cases it must loyally carry out the will as properly construed, and this duty is universal, and is true alike of wills of every nationality and every religion or rank of life."

44. General principles for construction of a Will have been reiterated by this Court in a large number of cases. It shall be sufficient to refer to

a three Judge Bench judgment of this Court in Navneet Lal alias Rangi v. Gokul and others, MANU/SC/0328/1975 : 1976 (1) SCC 630. After referring to judgment of Privy Council and several judgments of this Court, certain principles were enumerated in paragraph 8 of the judgment, which is to the following effect: "8. From the earlier decisions of this Court the following principles, inter alia, are well established:

(1) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed. (Ram Gopal v. Nand Lal, MANU/SC/0044/1950 : AIR 1951 SC 139).

(2) In construing the language of the will the Court is entitled to put itself into the testator's armchair (Venkata Narasimha v. Parthasarathy MANU/PR/0005/1913) and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense. ... But all this is solely as an aid to arriving at a right construction

of the will, and to ascertain the meaning of its language when used by that particular testator in that document. (Venkata Narasimha's case (supra) and Gnambal Ammal v. T. Raju Ayyar, MANU/SC/0045/1950 : AIR 1951 SC 103)

(3) The true intention of the testator has to be gathered not by attaching importance to isolated expression but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory. (Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer, MANU/SC/0081/1952 : AIR 1953 SC 7)

(4) The Court must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The Court will look at the circumstances under which the testator makes his will, such as the state of his property, of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy that should be discarded in

favour of a construction which does not create any such hiatus. (Pearey Lal v. Rameshwar Das, MANU/SC/0398/1962 : AIR 1963 SC 1703)

(5) It is one of the cardinal principles of construction of wills that to the extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will. (Ramachandra Shenoy v. Mrs. Hilda Brite, MANU/SC/0248/1963 : AIR 1964 SC 1323)"

45. The High Court in the impugned judgment has elaborately considered whether a Will is a Joint Will or Joint and Mutual Will. High Court after referring to the large number of cases has come to the conclusion that it is a Joint and Mutual Will, since both the testator and testatrix agreed to devote their properties for carrying out charities, the High Court concluded that intention of both testator and testatrix to give

property to charities is manifest from the reading of the Will in its entirety.

61. We, thus, are of the view that giving absolute right to the survivor during his lifetime to deal with the properties in no manner cannot be said to be right given in disregard of object of trust. The charitable purpose of the Will is not lost even if survivor is given absolute right. The obligation of survivor to act in furtherance of object as agreed by both the testators survives and binds the survivor. Although the Will was irrevocable after the death of survivor but the Will expressly granted absolute right to survivor."

ESSENTIALS OF VALID GIFT

Patel Ramanbhai Mathurbhai vs. Govindbhai Chhotabhai Patel and Ors.

MANU/GJ/0774/2018 - The essentials of a valid Gift can be enumerated as under:

a) There must be transfer of ownership - As in the case of a sale, there must be a transfer of all the rights in the property by the donor to the donee. However, it is permissible to make conditional gifts. The only restriction is that the condition must not be repugnant to any of the provisions of

Sections 10 to 34 of the Transfer of Property Act, 1882.

b) The ownership must relate to a property in existence - Gift must be made of existing movable or immovable property capable of being transferred. Future property cannot be transferred.

c) The transfer must be without consideration - The word "consideration" refers to monetary consideration and does not include natural love and affection.

d) The gift must have been made voluntary - The offer to make the gift must be voluntary. A gift therefore should be executed with free consent of the donor. This consent should be untainted by force, fraud or undue influence.

e) The donor must be a competent person - In a transaction by way of gift the transferor is called a donor and he divests his ownership in the property so as to vest it in the transferee, the donee. The donor must be a sui juris. He must have attained the age of majority, possess a sound mind and should not be otherwise disqualified.

f) The transferee must accept the gift - The gift must be accepted by the donee himself.

Acceptance must be made during lifetime of the donor and while he is capable of giving.

Supreme Court in **Perumallakkal V. Kumarsean Balakrishnan MANU/SC/0289/1966 : AIR 1967 SC 569** held that the gift made to wife by her husband of the ancestral immovable property out of affection cannot be upheld even where the husband is carrying out his father's wishes, for no such gift is permitted under Hindu Law in so far as immovable ancestral property is concerned. Even the father-in-law, if he had desire to make a gift at the time of the marriage of his daughter-in-law, would not be competent to do so in so far as immovable ancestral property is concerned.

Privy Council in **Seth Lakshmi Chand V. Mt. Anandi MANU/PR/0053/1926 : AIR 1926 P.C. 54**, laid down that a bequest by an undivided coparceny of his interest was justified on the basis of a family arrangement which was acted upon and consented to by all the co-sharers.

Division Bench of the Madras High Court in **Rathinasabhpathy Piliai V. Saraswathi Ammal MANU/TN/0210/1954 : AIR 1954 Mad 307** in that case, the Division Bench clearly held

that " a gift of undivided coparcenary interest is not permitted under Hindu Law But however, it held That such a gift can be made with the consent of all the coparceners and that with such consent gift may be even to a stranger or a charity."

Division Bench of Court in **Suryakantham v. Suryanarayana Murthy MANU/AP/0373/1955 : AIR 1957 A.P. 1012**. learned Judges held: "The rule of law is not that the gift of undivided share is void in the sense that it is a nullity but only in the sense that it is not binding on the other coparceners. The rule is that no such gift can be made without the concurrence of the parsons affected But whereas in this case the members of the family subsequently recognised and acted upon the gift and allotted a share to the donee, the transaction cannot be attacked by a stranger or the donor himself. Hence there could be no impediment of law in passing of a good title in favour of the minor wife under that arrangement."

GIFT OR TRANSFER WITH CONDITION

Prem Kali vs. Deputy Director of Consolidation Sitapur and Ors.:

MANU/UP/0293/2016 - A gift is "transfer of property whether movable or immovable" with meaning of Section 5 of Transfer of Property Act, 1882 and are governed by its provisions. Gift has been defined under Section 122 of Transfer of Property Act, 1882 and mode of gift has been given under Section 123. In this case, interpretation of Section 10, 122 and 126 which are necessary, quoted below:--

"10. Condition restraining alienation.-- Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same for her beneficial interest therein.

122. "Gift" defined.--"Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called

the donee, and accepted by or on behalf of the donee.

Acceptance when to be made.--Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

126. When gift may be suspended or revoked.--The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked, but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations

(a) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B, and his descendants die before A. B dies

without descendants in A's lifetime. A may take back the field.

(b) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000 but is void as to Rs. 10,000 which continue to belong to A."

A bare reading of Sections 10 and 126 of Act, 1882, shows that Section 10 lays down that in a transfer, the condition restraining alienation, cannot be inserted. Section 126 of Act, 1882 lays down that on happening of certain condition, not depended on the will of the donor, the gift can be suspended or revoked. Present case is not covered under Section 126. According to the respondent, gift can be conditional. In this case, a perusal of the gift deed shows that in the gift deed non-transferable right has been conferred upon Smt. Parag Devi with further stipulation that after her death the property will devolve upon the sons of donor. This condition restraining Smt. Parag Devi from transferring the property in dispute is void and gift deed dated 05.03.1974 executed by Smt. Parag Devi is valid.

Mohinder Singh Verma vs. J.P.S. Verma and Ors.: MANU/DE/0787/2014 - Plaintiff, "within a

few months" of the execution of the Gift Deed became aware of the fraud claimed to have been exercised by the defendants - Limitation of three years commence from the date when the right to sue first accrues - It is neither the case of the plaintiff that the Donor and the Donee had agreed that on the happening of any specified event the Donor may revoke the gift nor is any such term found in the registered Gift Deed - A gift subject to the condition that Donee is to maintain the Donor cannot be revoked under Section 126 for failure of the Donee to maintain Donor. Gift is a form of transfer of property. Once a gift in accordance with law has been made, the property stands transferred from the Donor to the Donee and the Donor is divested of all rights in the property and the property vests absolutely in the Donee and the Donor cannot subsequently revoke/cancel the said transaction, just like once a property is sold, the seller/vendor cannot subsequently revoke or cancel the sale. The only difference between a Sale Deed and a Gift Deed, both of which are forms/modalities of transfer of property, is that while in the Sale Deed the consideration is materialistic, in a Gift Deed the consideration is non-materialistic. To hold that transfer of property, after affecting the transfer,

retains a right to revoke/cancel the transfer would tantamount to unsettling the rights and transactions in immovable property. Of course, a transfer of property, whether it be by way of sale or gift or lease or in any other manner/mode prescribed under the Transfer of Property Act, being but a contract, is void/voidable and can be declared so on the grounds permitted under the Indian Contract Act, 1872. The said grounds include the ground of fraud and undue influence. Section 19 of the Contract Act provides that when consent to an Agreement is caused by fraud, the contract is voidable at the option of the party whose consent was so caused. Similarly Section 19A of the Contract Act makes a contract, the consent of a party whereto is caused by undue influence, voidable at the option of the party whose consent was so caused.

**Naramadaben Maganlal Thakker Vs.
Pranjivandas Maganlal Thakker
MANU/SC/1045/1997 : JT 1996 (9) SC 273 -**

On an interpretation of the recitals of the Gift Deed it was held that it was a conditional gift; there was no recital in the Gift Deed of acceptance nor was there any evidence in proof of

acceptance; the stipulation in the Gift Deed that the property would remain in possession of the Donor till his lifetime and that the property would become the property of the Donee after the lifetime of the donor. It was held on the said interpretation of the Gift Deed that the gift was to become operative after the death of the Donor, as the Donee was to have a right to transfer the property absolutely and to collect its mesne profits only after the lifetime of the Donor. It was further held that the Donor having retained possession and enjoyment of the property during his lifetime, was entitled to revoke/cancel the Gift Deed.

The decision in **MANU/MH/0323/1988 : AIR 1988 Bom 116 Manohar Shivram Swami v. Mahadeo Guruling Swami and Ors.** is one wherein a learned Single Judge of the Bombay High Court, dealing with a condition incorporated in the sale deed of a property that it should not be sold to anybody outside the family of the vendor, held the same to offend Section 10 of the Transfer of Property Act and therefore was void.

The decision in **MANU/UP/0283/1935 : AIR 1935 All 493 Gayasi Ram and Ors. v.**

Shahabuddin and Ors. is that of a Division Bench of the High Court wherein the validity of a clause in a sale-deed that the vendee should not transfer the property by mortgage, gift or sell to anyone excepting vendor or his heirs came up for consideration and the Division Bench held that such a condition is contrary to Section 10 of the Transfer of Property Act and therefore void.

In **MANU/PH/0122/1971 : A.I.R. 1971 P&H 87 Smt. Lilawati and Ors. v. Firm Ram Dhari Suraj Bhan and Anr.** a learned Single Judge of the said High Court held that a vendee is entitled to ignore a condition which cuts down his absolute right of enjoyment over the property and any direction in the sale-deed which is contrary to the enjoyment of such absolute estate is void and unenforceable.

In **1988 (2) Sim. L.C. 126 Brahama Nand and Anr. v. Roshani Devi**, a learned Single Judge of Himachal Pradesh High Court held that the stipulation in a document of sale regarding non-alienation and not to have any right to dissipate or alienate but rather only get benefit therefrom, from generation to generation as desired by the vendor was void for being in violation of Section 10 of the Transfer of Property Act besides being

hit by Section 23 of the Contract Act and consequently the vendor was not entitled to file a suit for revocation of the sale deed.

In **MANU/UP/0004/1927 : A.I.R. 1927 All 170 Aulad Ali and Ors. v. Syed Ali Athar and Anr.** a

Full Bench ,of the Allahabad High Court had an occasion to deal with a condition in a deed of transfer that if any of the vendee wish to transfer the whole or part of their share in the village they might do so by transferring it from one to other but if either of them desired or in fact attempted to transfer, the same to a third person the other party has the right to pre-empt. Such a clause was considered to be an agreement between the parties and was held to be valid and enforceable against the legal representatives of the parties and the same did not offend rule --against perpetuities.

The decision in **MANU/SC/0212/1966 : A.I.R. 1967 S.C. 744 Ram Baran Prasad v. Ram Mohit Hazra and Ors.** is that of the Apex Court wherein it was held by the Hon'ble Supreme Court that a pre-emption clause in an award of partition was not merely a personal covenant between the contracting parties but was a covenant binding

on assignees or successors-in-interest of original contracting parties and that the Rule against perpetuities cannot be applied to covenant for pre-emption even though there is no time limit within which such right of pre-emption has to be exercised.

In **MANU/UP/0084/1938 : A.I.R. 1939 All 221**

Mr. Brij Devi v. Shiva Nanda Prasad and Ors. a

Division Bench of the Allahabad High Court held that the provisions contained in Sections 10 and 12 are purely general and refer to all transfers, viz., transfer by gift, sale or otherwise and a condition imposed upon a donee of a gift must, before it can be held to be valid, should be consistent with the general principles in regard to conditions on transfers contained in Section 10 of the Transfer of Property Act. On the peculiar facts and circumstances and the recitals contained in the document construed therein the learned Judges of the Division Bench also held that the gift deed conferred upon the donee full proprietary title to the property gifted and hence the condition restraining the donor's right of alienation being a condition repugnant to the estate created in him was void and inoperative.

In MANU/TN/0088/1938 : A.I.R. 1939 Mad 509 Official Receiver, West Tanjore v. Samudravijayan Chettiar and Ors. a Division Bench of Madras High Court held that in case where the instrument contains recitals that the donor conveyed property to the donees on account of affection and in consideration of service and also for the reason because they are the donor's only heirs and with power to enjoy the same with all rights, the intention of the donor was only to create absolute estate and any subsequent words which are repugnant to an absolute title must be ignored.

In MANU/HP/0002/1962 : A.I.R. 1962 H.P. 4 Smt. Gaurju v. Tara Chand, it was held that the gift under consideration in that case was an unconditional gift that had been completed, and, therefore, Section 126 of the Transfer of Property Act had no application to the case to enable the donor to revoke the gift. The donor attempted to revoke the gift in that case alleging that though she had gifted the suit land on the condition that the donee would maintain her during her lifetime but the donee ceased to maintain. While rejecting the claim of the donor it was also pointed out that the gift deed as such contained no provision for

cancellation or suspension of the gift in case of violation of any of the conditions.

In MANU/HP/0015/1995 : A.I.R. 1995 H.P. 117, a learned Single Judge of Himachal Pradesh High Court held in construing a gift deed executed for past and future services that there is no scope for revoking the same since the deed did not contain any clause as such providing for revocation on the failure of the donee to render service to the donor or maintain the donor.

In MANU/BH/0005/1982 : A.I.R. 1982 Pat 32 Jagdeo Sharma v. Nandan Mahto and Ors. a learned Judge of the Patna High Court had an occasion to deal with the respective scope and operation of Sections 10 and 126 of the Transfer of Property Act and it was ultimately held that Section 126 is a General Section which is controlled by Section 10 and therefore, Section 126 could not be read in isolation and has to be read with Section 10 which says that any stipulation completely restraining the donee from transferring the gifted property is void and therefore the gift deed cannot be cancelled on account of the alienation of the gifted land. It was

also held that the stipulation in the gift deed restraining alienation was void.

Naranjnu vs. Hukami Devi and Ors. :

MANU/HP/ 0133/1998 Chapter VII of the Transfer of Property Act deals with the law relating to gifts and while defining gift and providing for the manner in which a gift of immovable property can be effected, Section 126 of the Act provides for the suspension or revocation of gifts made and the circumstances when such suspension or revocation is permissible. Section 10 of the Transfer of Property Act stipulates that where a property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void except in respect of cases which are not relevant for the purpose of the present case. Section 11 also mandates that where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, the transferee shall be entitled to receive and dispose of such interest as if there were no such

direction. A careful analysis of the scope and purport of the restrictions contained in Sections 10 and 11 of the Transfer of Property Act would go to show that there cannot be any total or absolute restriction on the enjoyment of the property transferred and any such restriction, absolute in terms, would be rendered void if such restriction is found to have been created after an absolute interest has been created in a document, it has to be ignored and the transferee will get the property without in any manner his rights being curtailed by the restrictive clause. At the same time it is by now well settled that Section 10 will not be attracted in case the restriction or condition incorporated in any deed of transfer is only partial in nature. As held by the apex court in the decision reported in MANU/SC/0212/1966 : A.I.R. 1967 SC 744, the Rule of perpetuity concerns rights of property only and does not affect the making of contracts which do not create rights of property and that the Rule does not also applied to personal contracts which do not create interest in property even though the contract may have reference to the land, it was also held by the apex Court that a covenant for pre-emption, be it even unlimited

in point of time does not offend the rule against perpetuity.

The Allahabad High Court in the subsequent judgment in Smt. Prem Kali v. Deputy Director of Consolidation, Sitapur and Ors. MANU/UP/0293/2016 : 2016 (116) ALR 794, followed the earlier judgment of the High Court. In paragraph 15 following was laid down: 15. A bare reading of Sections 10 and 126 of Act, 1882, shows that Section 10 lays down that in a transfer, the condition restraining alienation, cannot be inserted. Section 126 of Act, 1882 lays down that on happening of certain condition, not depended on the will of the donor, the gift can be suspended or revoked. Present case is not covered Under Section 126. According to the Respondent, gift can be conditional. But there is no question as to whether a gift can be conditional but the real question is that condition, which has been specifically prohibited Under Section 10 of Act, 1882 can be imposed in the gift or not. There is no reason to hold that the condition which is specifically prohibited Under Section 10 of Act, 1882 is not applicable to gift.

F.M. Devaru Ganapathi Bhat v. Prabhakar Ganapathi Bhat, MANU/SC/1100/2003 : (2004) 2 SCC 504, ...The gift deed which came

into consideration in the aforesaid case has been reflected in paragraph 4 of the judgment which is to the following effect: 4. In the gift deed, the donor retained Property Survey No. 306 for her livelihood till demise. The contention is that on true construction of the gift deed on demise of Mahadevi, the Appellant became the absolute owner of Property Survey No. 306. The Respondent has no right over it. The answer would depend upon the construction of the gift deed..... There is no ban on the transfer of interest in favour of an unborn person. Section 20 permits an interest being created for the benefit of an unborn person who acquires interest upon his birth. No provision has been brought to our notice which stipulates that full interest in a property cannot be created in favour of an unborn person. Section 13 has no applicability to the facts and circumstances of the present case. In the present case, the donor gifted the property in favour of the Appellant, then living, and also stipulated that if other male children are later born to her brother, they shall be joint holders with the Appellant. Such a stipulation is not hit by Section 13 of the

Act.¹ Creation of such a right is permissible Under Section 20 of the Act. The Respondent, thus, became entitled to the property on his birth.

ADOPTED PERSONS RIGHTS TO INHERIT HIS NATURAL PARENTS PROPERTY

Division Bench of Bombay High Court reported as **Kalgavda Tavanappa Patil v. Somappa Tamangavda Patil and Anr.** **MANU/MH/0060/1909 : ILR (1909) 33 Bom 669** wherein it has been held as under: The son, then, begotten by an adopted Hindu before adoption has vested rights in the ancestral property of the family of his birth. Rights of property once vested cannot be taken away except in the mode or modes prescribed by Hindu Law. They cease either by death, sale, gift, degradation, disqualification or by adoption. In the case of a son whose father has been given in adoption after his birth, if none of these modes for the extinction of his vested rights of property

¹ Section 13 of the Transfer of Property Act provides: Transfer for benefit of unborn person.--Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

applies, there must be the clear authority of some text for holding that the rights in question are extinguished because the father of the owner of those rights, having been given in adoption, has his rights in his natural family extinguished by the act of adoption.

The Full Bench of Bombay High Court in Martand Jiwajee Patil and Anr. v. Narayan Krishna Gumast-Patil and Anr. MANU/MH/0194/1939 : AIR 1939 Bom 305

referred to the aforesaid judgment when considering a case as to whether the adoptee has a right to give his son, born prior to his adoption, in adoption. The Court held as under: In *Raghuraj Chandra v. Subhadra Kunwar* [MANU/PR/0031 /1928 : (1928) L.R. 55 I.A. 139 at p. 148, S.C. 30 Bom. L.R. 829.] their Lordships of the Privy Council after stating at p. 148 that though adoption is spoken of as "new birth" in many cases, a term sanctioned by the theory of Hindu law, yet "As has been more than once observed, the expressions 'civilly dead or as if he had never been born in the family' are not for all purposes correct or logically applicable, but they are complementary to the term 'new birth'." The

inapplicability of the theory can be illustrated by concrete instances:

(a) The tie of blood between the adopted son and the members of his natural family is not severed. He cannot marry in his natural family within the prohibited degrees, nor can he adopt from his natural family a boy whom he could not have adopted if he had remained in that family.....

(c) The adoptive father cannot give his adopted son in adoption (Sarkar's Hindu Law of Adoption, pages 281-282).....

These instances show that an adopted son is not civilly dead in his natural family nor reborn in his adoptive family.

It is no doubt true that by giving away his son in adoption the adopted father indirectly meddles with the riktha or property of his natural family, since the effect of that adoption will be to extinguish the son's interest in that property. But thereby the father himself gains no interest in the property. All that Manu's text says is that he should not take for himself the gotra and riktha of his natural family, and does not prohibit him from doing any act which may affect the property of his natural family. Thus, for instance, if he has a brother in his natural family, he is not prohibited from giving his son born after his own

adoption, in adoption to that brother, although thereby the different interests in the property of his natural family are affected.

In the absence of any express text or judicial decision depriving an adopted son of his right to give away in adoption his son born before his adoption, we do not think that any useful purpose will be served by imposing such a restriction upon him. The modern trend of decisions is to take a more liberal view and to interpret the texts from a practical point of view as far as possible. This is particularly noticeable in the decisions of this Court on several questions of adoption, such as the adoption of an only son, the adoption of a married boy, the adoption of a boy whose mother the adopting father could not have legally married, and the adoption by a widow without the express consent of her husband. We do not see why a similar liberal view should not be taken in this case, having regard to the interests of the boy to be given in adoption. With his father actually living, it would be a hardship on the boy to treat him as an orphan, merely because the father has gone in adoption. Usually when the father is adopted, his preborn sons are still minors, and in practice they go with their father to live with him, though legally they are

held to have remained in the natural family of their father. Though the father has gone in adoption, the ties of affinity and love for his preborn sons cannot be severed, and he is the proper man to look after their education and welfare. If a guardian is to be appointed for them, he will naturally be consulted. Having their interest at heart, he is the best person to decide whether one of them should be given in adoption and what is conducive to their benefit. By giving one of his sons in adoption he himself gains no benefit, and he may be safely trusted to exercise his discretion rightly for the good of his son, though born before his own adoption.

Kalindi Damodar Garde (D) by L.Rs. vs. Manohar Laxman Kulkarni and Ors.: MANU/SC/0137/2020 Since the succession has opened after the death of Laxman on 10th January, 1987, therefore, succession has to be in accordance with the Act and not as per Hindu law as all text, Rule or interpretation of Hindu law prior to commencement of the Act have ceased to have any effect unless expressly provided for in the said Act. This Court in a judgment reported as Bhaiya Ramanuj Pratap Deo v. Lalu Maheshanuj Pratap Deo MANU/SC/0313/1981 :

(1981) 4 SCC 613 held that a bare perusal of Section 4 would indicate that any custom or usage as part of Hindu law in force will cease to have effect after the enforcement of Hindu Succession Act with respect to any matter for which provision is made in the Act. The principle that the Act will be applicable on the date succession opens is well settled. Reference may be made to a judgment reported as Bhanwar Singh v. Puran and Ors. MANU/SC/7141/2008 : (2008) 3 SCC 87, wherein this Court held that the Act brought about a sea of change in the matter of inheritance and succession amongst Hindus. Section 4 of the Act contains a non-obstante provision in terms whereof any text, Rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act, ceased to have effect with respect to any matter for which provision is made therein save as otherwise expressly provided. Since there is no provision of denying the rights of succession to the natural born son of an adoptee father, therefore, the succession will be in terms of the provisions of the Act alone.

Tewari Raghuraj Chandra and Ors. v. Rani Subhadra Kunwar and Ors.

MANU/PR/0031/1928 : AIR 1928 PC 87 does not afford any guidance to the question as to whether the legitimate children born prior to adoption would cease to be included in the category of her children.

Division Bench of the Karnataka High Court in a judgment reported as **Smt. Neelawwa v. Smt. Shivawwa MANU/KA/0143/1989 : AIR 1989 Karnataka 45** wherein, the daughter of deceased Mallappa claimed half share in the suit property and the Defendant claimed her right as a widow, being the step mother of the Plaintiff. However, the Defendant alleged that the Plaintiff was born prior to the adoption. Mallappa was given in adoption in the year 1939 whereas the Plaintiff was born in the year 1937. In this case, the Court held as under: 9.....In our view it means and includes moveable and immoveable property, whether separate or self acquired or an interest in a Mitakshara Coparcenary property provided he has left him surviving any of the female heir or a daughter's son mentioned in Class I of the Schedule to the Act. The fact that the deceased Mallappa had come to own and

possess the suit land by reason of his adoption did not make any difference for the purpose of Section 8 of the Act as it was the property of Mallappa at the time of his death. Now we shall see whether the Plaintiff cannot be considered to be an heir of her father merely because she was born before he was given in adoption. The expressions 'heir' and 'related' are also defined in Section 3(f) and (j) respectively of the Act. "Heir" means any person male or female who is entitled to succeed to the property of an intestate under the Act. "Related" means related by legitimate kinship. The proviso to this definition is not relevant for our purpose, because it is not in dispute that the Plaintiff is the legitimate daughter of the deceased Mallappa born through his 1st wife. It is true, adoption had the effect of removing Mallappa from his natural family into the adoptive family, but did not and could not sever the tie of blood relationship between him and the Plaintiff, or for that matter the members of his natural family. Therefore, the Plaintiff irrespective of the adoption of her father continued to be the daughter of Mallappa. Thus the Plaintiff being the daughter falls in the category of heirs specified in Class I of the Schedule to the Act.....

PROOF OF WILL

Sridevi and others vs. Jayaraja Shetty and others, reported in MANU/SC/0065/2005 : 2005(2) SCC 784 has held that the onus of proof of the Will is on propounder Proof of testamentary capacity and signature of testator is sufficient to discharge the onus in absence of any suspicious circumstances. Onus to explain suspicious circumstances, if any, is also on the propounder but onus to establish allegations of undue influence, fraud or coercion is on the person making such allegations. Proof in either case should be one of the satisfaction of a prudent man. the Supreme Court held that the propounder of a Will has to show that the Will was signed by the testator; that at the relevant time he was of sound and disposing state of mind and had understood the effect and nature of the disposition and had put his signatures to the testament of his own free will. Further that he had signed in the presence of two witnesses who attested the Will in his presence and in the presence of each other. Once these elements were established, the onus resting on the propounder is discharged, DW 2 the scribe, in his testimony

has categorically stated that the Will was scribed by him at the dictation of the testator. The attesting witnesses have deposed that the testator had signed the Will in their presence while in sound disposing state of mind after understanding the nature and effect made by him. In the cross examination, the appellants had failed to elicit anything to persuade the Court to disbelieve testimony. The testimony of the scribe and the two attesting witnesses were fully corroborated. The Court therefore held that the Will had been duly executed. As far as suspicious circumstances are concerned, in that case the testator was about 80 years of age. He died 15 days after execution of the Will. Two attesting witnesses had categorically stated that the testator was in a sound state of health and possessed his full physical and mental faculties and nothing had been brought on record that the testator was not in good health or not possessed of his physical or mental health. The appellants had failed to bring out anything which could have put a doubt regarding the physical or mental incapacity of the testator to execute the Will. Although the appellant in that case had contended that the respondent had played a prominent part in execution of the Will and he

was present in the house at that time. Mere presence in the house is not proof that he had taken prominent part in executing the Will. the Will was disclosed after a period of 4 years and that was stated to be a suspicious circumstance. The Court however, on facts did not find any merit in the contention. It is thus contended on behalf of the petitioners that the presence of the petitioner at the time of execution of the Will, advanced age of the petitioner, the presence of the plaintiff when the Will was being executed in the house were suspicious circumstances. Delay in disclosing the will was not found to be a suspicious circumstances in that case.

Niranjan Umeshchandra Joshi Vs. Mrudula Jyoti Rao and others reported in MANU/SC/8788/2006 : (2006) 13 Supreme Court Cases 433, Paragraph Nos. 32 & 33 held as follows:

"32. Section 63 of the Succession Act lays down the mode and manner in which the execution of an unprivileged Will. Section 68 of the Evidence Act postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal

terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

33. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by

leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document."

Bharpur Singh and Others Vs. Shamsher Singh reported in MANU/SC/8404/2008 : (2009) 3 SCC 687, the Hon'ble Supreme Court of India made an observation as follows: "14. The legal principles in regard to proof of a will are no longer res-integra. A will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, in terms whereof the propounder of a will must prove its execution by examining one or more attesting witnesses. Where, however, the validity of the Will is challenged on the ground of fraud, coercion or undue influence, the burden of proof would be on the caveator. In a case where the Will is surrounded by suspicious circumstances, it

would not be treated as the last testamentary disposition of the testator.

H. Venkatachala Iyengar vs. B.N. Thimmajamma [MANU/SC/0115/1958 : AIR 1959 SC 443] opined that the fact that the

propounder took interest in execution of the Will is one of the factors which should be taken into consideration for determination of due execution of the Will. It was also held that: one of the important features which distinguishes Will from other documents is that the Will speaks from the date of death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. It was also held that the propounder of will must prove:

(i) that the Will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will, and

(ii) when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of testator's mind and his signature as required 13 by law, Courts would be justified in making a finding in favour of propounder, and

(iii) If a Will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion.

In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated therein.

There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of

relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."

Jaswant Kaur vs. Amrit Kaur & ors.
[MANU/SC/0530/1976 : (1977) 1 SCC 369]

Court pointed out that "when the Will is allegedly shrouded in suspicion, its proof ceases to be a

simple lis between the plaintiff and defendant. An adversarial proceeding in such cases becomes a matter of Court's conscience and propounder of the Will has to remove all suspicious circumstances to satisfy that Will was duly executed by testator wherefore cogent and convincing explanation of suspicious circumstances shrouding the making of Will must be offered."

Guro (Smt) vs. Atma Singh and Ors.
MANU/SC/0492/1992 : (1992) 2 SCC 507

Supreme Court noticed and summarized certain suspicious circumstances which are as follows;

"(1) The will mentioned that the testator had been ill for a long time and was seriously ill at the time of execution of the will.

(2) The testator stated that he did not have any sister, which was not correct.

(3) The respondent, the sole legatee, had been wrongly described as the real brother of the testator.

(4) No reasons were mentioned in the will why the appellant, who was the natural heir of the testator, was being ignored.

(5) Although the testator was literate, the will bore his thumb impression.

(6) The will was an unregistered document not scribed by a regular deed writer and as such could be prepared at any time.

(7) Within eight days of the execution of the will the testator died. The appellate court also found that contradictory statements had been made by the respondent with regard to his presence at the time of execution of the will, by the scribe as well as by K. The appellate court, therefore, reversed the decree of the trial court and dismissed the suit of the respondent. But the High Court allowed the second appeal filed by the respondent and restored the judgment and decree of the trial court on the view that the will had been validly executed."

In Gorantla Thataiah vs. Thotakura Venkata Subbaiah and Ors. MANU/SC/0114/1968 : AIR 1968 SC 1332, the Supreme Court was considering the effect of Section 74 of the Succession Act in the matter of construction of Will and suspicious circumstances, the Court has reiterated that suspicious circumstances must be touched in the facts and circumstances of the each case and it is this decision in which the Will is prepared under circumstances which raises suspicion of the Court indicating that it does not

express the mind of the testator. It is for those who propound the Will to remove that suspicion. The propounder takes a prominent part in the execution of the Will which confers substantial benefits on him that itself is a suspicious circumstance. Reference was made to Williams on "Executors and Administrators" Vol. I, 13th Edition. Page 92 which observes as follows: "Although the rule of Roman Law that 'Qui se scripsit haeredem' could take no benefit under a will does not prevail in the law of England, yet, where the person who prepares the instrument, or conducts its execution, is himself benefited by its dispositions, that is a circumstance which ought generally to excite the suspicion of the court, and calls on it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased."

In Pushpavati and Ors. vs. Chandraja Kadamba and Ors. MANU/SC/0396/1972 : AIR 1972 SC 2492, the Supreme Court reiterated that the burden of proof of the Will is on the propounder of the Will especially when it is alleged to be a

forgery. In the instant case, the affidavit in support of the caveat does not allege forgery but it indirectly suggests that the deceased died intestate and the document which is propounded as Will does not bear the signatures of the deceased. There is no specific allegation that the Will has been forged. In the affidavit in lieu of examination-in-chief of the Caveator, he reiterates that the deceased had Parkinson's disease, had difficulty in signing and on several occasions he is alleged to have been informed that the plaintiff used to sign for the deceased. There is an assertion in paragraph 8 that the signature on the so called Will is not of the deceased but that of the plaintiff and it is for this reason that the plaintiff engaged a handwriting expert. There is no specific contention taken up that the signature appearing on the Will is a forgery, therefore the allegation has not been taken to its logical conclusion. The Supreme Court held that where the signature of the testator is challenged as a forged one, and the will does not come from the custody of a public authority or a family solicitor the fact that the disposition made in the will were unnatural, improbable or unfair would undoubtedly create some doubt about the will, especially when the document is unregistered

and comes from the custody of a person who is the major beneficiary under the Will.

In Smt. Jaswant Kaur vs. Smt. Amrit Kaur and Ors. MANU/SC/0530/1976 : (1977) SCC 369,

Supreme Court observed that the defendant was the propounder of the will and the principal legatee probably the sole legatee who had set up the will in answer to the defendant's claim in the suit for a one-half share. The burden as it was commonly held was to test whether a party would fail in the suit if no evidence was led on the fact alleged by him. In that case it was held that the defendant ought to have led satisfactory evidence to prove the due execution of the Will by his grandfather. The Court observed that in cases where the execution of a will is shrouded in suspicion, proof cannot be simple and in adversarial proceedings, urged the Courts to consider whether the evidence led by the propounder would satisfy the conscience of the Court and the Will was duly executed by the testator and further that it was impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanations of the suspicious circumstances.

In Kalyan Singh vs. Smt. Chhoti and Ors. MANU/SC/0258/1989 : AIR 1990 SC 396, the principle reiterated is similar, that trustworthy and unimpeachable evidence should be produced before the court to establish genuineness and authenticity of the will that the Court could consider circumstances brought out in evidence or which would appear in the nature of the contents of the documents itself. The Court would have to consider the credibility of the witnesses and disengage the truth from falsehood. In another case of Rukmani Devi (supra), the Supreme Court held that a decision of the probate court is a judgment in rem and a probate granted by a competent court is conclusive of its validity until it is revoked and no evidence can be admitted to impinge on it except in a proceeding for revocation of probate.

In N. Kamalam (Dead) and Anr. vs. Ayyasamy and Anr MANU/SC/0422/2001 : (2001) 7 SCC 503, it was held that signature of scribe of the will cannot be granted equality of status with signatures of attesting witnesses, must be proved by evidence to have animus attestandi and every such signatures of such witness would be valid. The Court inter alia held that onus probandi and

animus attestandi are the two basic features that a court was concerned with in its testamentary jurisdiction. Onus probandi is on the party propounding to will and animus attestandi means intention to attest the will. Thus, these two factors must co-exist. The will being a solemn document and probate being in rem, it is only appropriate that stringent standards be applied. Onus probandi lies on every person propounding a will and who must satisfy the conscience of the court that the will was executed when the testator was of sound and disposing mind and memory. Attestation is required under Section 68 of the Evidence Act meaning thereby that if a document is required by law to be attested, it cannot be used in evidence until at least one attesting witness has been called for proving execution of the will except in cases of registered wills. In cases where surrounding circumstances were shrouded in suspicious, it is the duty of the propounder to remove suspicion by leading satisfactory evidence. The animus to attest, thus, is not available, so far as the scribe is concerned: he is not a witness to the will but a mere writer of the will. The statutory requirement as noticed above cannot thus be transposed in favour of the writer, rather goes against the propounder since both the

witnesses are named therein with detailed address and no attempt has been made to bring them or to produce them before the court so as to satisfy the judicial conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to be the proof of due attestation unless the situation is so expressed in the document itself -- this is again, however, not the situation existing presently in the matter under consideration. Some grievance was made before this Court that sufficient opportunity was not being made available, we are however, unable to record our concurrence therewith. No attempt whatsoever has been made to bring the attesting witnesses who are obviously available.

In B. Venkatamuni v/s. C.J. Ayodhya Ram Singh MANU/SC/4692/2006 : (2006) 13 SCC 449, the Supreme Court was considering an appeal and scope of interference on facts. The Court relied on its decision in Umabai v/s. Nilkanth Dhondiba Chavan. [MANU/SC/0285/2005 : (2005) 6 SCC 243] and observed that the proving of execution of a will does not only mean proving of the signatures of the executors and the attesting witnesses. The Court must satisfy its conscience having regard

to the totality of the circumstances of the case that the Will was valid. A will is not an ordinary document and though it required to be proved like any other document, the statutory conditions imposed by Section 63(c) and 68 of the Evidence Act cannot be ignored. Proof of signature alone would not prove the execution of a Will, if the mind of the testator appears to be very feeble and debilitated but if a defence of fraud, coercion or undue influence is raised, the burden would be on the Caveator, as decided by the Supreme Court in the case of *Madhukar D. Shende v/s. Tarabai Aba Shedage* MANU/SC/0016/2002 : (2002) 2 SCC 85, *Sridevi v/s. Jayaraja Shetty* MANU/SC/0065/2005 : (2005) 2 SCC 784. The Court also reiterated the requirement of satisfying its conscience and the fact that animus attestandi is a necessary ingredient. The Supreme Court has set aside the Division Bench judgment which had held that upon compliance of legal formalities, the suspicious circumstances surrounding the execution of the Will are not of much significance.

Rebendra Datta v/s. Seema Parab & Ors. 2019 (4) ABR 486: AIR Online 2019 Bom 359, the father and wife of the executor were attesting witnesses. The testator was neither showed the

alleged Will to the daughters of the testator nor did he send them any communication. The affidavits of attesting witnesses were not filed as required under law. There were serious discrepancies and contradictions in the two affidavits filed by the executor about the place of alleged execution of Will. The Court held that the Will could not be probated, inter alia, the Will being registered with the Registrar of Assurance and collection of the original will by the father of the plaintiff was ex facie in violation of provisions of law. It was contended that there was no original will. There were allegations of delay in filing the affidavit of attesting witness of more than 7 years.

In Uma Devi Nambiar & Ors. v/s. T.C. Sidhan (Dead) MANU/SC/1026/2003 : (2004) 2 SCC 321, natural heirs were excluded. It was held that merely excluding natural heirs or giving them lesser share by itself cannot be said to be a suspicious circumstances.

Rabindra Nath Mukherjee v/s. Panchanan Banerjee MANU/SC/0322/1995 - 1995(4) SCC 459 the Supreme Court held that depriving natural heirs should not raise suspicion because

the whole idea behind execution of the Will is to interfere with the normal line of succession. reveals that the natural heirs had been deprived by the testatrix. The testatrix was identified before the Sub-Registrar by an Advocate of Calcutta who had acted as a lawyer of one of the executors in some cases. The witnesses to the documents were interested in the appellants and the close relative of Rabindra, one of the executors in executing the Will. Apropos the first aspect, to deprive all natural heirs the Court observed that itself would not raise suspicion because the whole idea behind execution of Will is to interfere with the normal line of succession. The natural heirs can be debarred in any Will some partially and completely in others. Likewise, identification of the testatrix by an Advocate who was contacted by one of the parties was not a suspicious circumstances.

In Pentakota Satyanarayana & Ors. v/s. Pentakota Seetharatnam & Ors. MANU/SC/0819/2005 : (2005) 8 SCC 67, the Supreme Court held that the initial onus is on the propounder. In paragraph 24, the Court found that the propounders were called upon to show by evidence that the Will was signed by the

testator and that the testator was not in a sound and disposing state of mind. The onus was discharged by the propounder adducing prima facie evidence, proving competence of the testator and execution of the Will in the manner contemplated by law. The onus shifts to the persons opposing the Will to bring the material on record meeting such prima facie case in which event the onus shifts back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the Will and executed the same in a sound and disposing capacity. That every circumstance is not a suspicious one and therefore active participation of the beneficiaries and the execution of the Will by the propounders and beneficiaries, cannot create doubt about the testamentary capacity or genuineness of the Will. Mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken a prominent part in execution of the Will. It is held that the signature of registering officer and of identifying witnesses affixed to registration endorsement and the endorsement by the Sub-Registrar that the executant had acknowledged the execution before him, amounts to attestation and the executants' signatures taken by the Sub-Registrar in the document and

the signature and thumb impression of the identifying witnesses were also taken in document and all the witnesses therein deposed that they had signed as identifying witnesses and that the testator was in a sound and disposing state of mind and the document also contained signature of the attesting witnesses and scribe. Then, the burden of proof to prove the Will had been duly and satisfactorily discharged by the claimants therein.

In Smt. Malkani v/s. Jamdar & Ors. MANU/SC/0422/1987 : AIR 1987 SC 767, the Supreme court considered the circumstances in which the plaintiff knew that her mother was about to execute a Will and she tried to prevent her from doing so but the testatrix did execute the Will. After execution of the Will, the testatrix lived with the plaintiff till her demise. If the allegation that the defendants have procured the Will by fraud were to be believed, the testatrix would have made a report to the authorities against the defendants or revoked the Will. If the testatrix had been abducted by the defendants, the testatrix could have but did not seek to revoke the Will or alter it and the Court thus found the Will to be a genuine one.

**Madhukar D. Shende v. Tarabai Aba Shedage
reported in MANU/SC/0016/2002 : (2002) 2**

SCC 85, at para 9 held as under: "9. It is well settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of "not proved" merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a

will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

Supreme Court reported in MANU/SC/8788/2006 : 2007 (2) CTC 172 (SC) (Niranjan Umeshchandra Joshi Vs. Mridula Jyoti Rao and others), wherein the Supreme Court held that there arises suspicion circumstance on the Will, when the deposition appears to be unnatural or wholly unfair in the light of the relevant circumstances and when the propounder himself takes prominent part in execution of the Will which confers on him substantial benefit.

MANU/SC/0113/1954 : AIR 1955 SC 363 (Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta and another):- It is held that when once it has been proved that a Will had been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. It is further held in that decision of the Apex Court that it is elementary law that it is not every influence which is brought to bear on a testator

that can be characterised as "undue". It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. If the testator retains his mental capacity, and there is no element of fraud or coercion, it has been often observed that undue influence may in the last analysis be brought under one or the other of these two categories and the Will cannot be attacked on the ground of undue influence.

MANU/SC/0278/1963 : AIR 1964 SC 529

(Shashi Kumar Banerjee and others Vs. Subodh Kumar Banerjee, since deceased and after him, his legal representatives and others):-

It is held that the mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act; the onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law, is sufficient to discharge the onus. Further, where the caveator alleges undue influence, fraud or

coercion, the onus is on him to prove the same. It is further held that if the propounder succeeds in removing the suspicious circumstances, the Court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations.

MANU/SC/0289/1974 : AIR 1974 SC 1999 (Surendra Pal and others Vs. Dr. (Mrs). Saraswathi Arora and another): It is held that where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. A plea of undue influence where set up is a special plea, Section 103 of the Indian Evidence Act places the burden of substantiating such a plea on the party which sets it up.

MANU/SC/0969/2004 : AIR 2005 SC 233 (Daulat Ram and others Vs. Sodha and others): It is held that burden to prove that the Will was forged or that it was obtained under undue influence or coercion or by playing a fraud, is on the person who alleges it to be so.

In the matter of Savithri v. Karthyayani Amma MANU/SC/8061/2007 : (2007) 11 SCC 621 the Supreme Court has held that whenever there is

any suspicious circumstance, the obligation is cast on the propounder of the Will to dispel the suspicious circumstance. It was observed as under:-

"17. The legal requirements in terms of the said provisions are now well- settled. A Will like any other document is to be proved in terms of the provisions of the Indian Succession Act and the Indian Evidence Act. The onus of proving the Will is on the propounder. The testamentary capacity of the propounder must also be established. Execution of the Will by the testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the execution of the Will. It is required to be shown that the Will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and understood the nature and effect of the disposition. It is also required to be established that he has signed the Will in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exist suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before it can be accepted as genuine.....

21. Deprivation of a due share by the natural heirs itself is not a factor which would lead to the conclusion that there exist suspicious circumstances. For the said purpose, as noticed hereinbefore, the background facts should also be taken into consideration. The son was not meeting his father. He had not been attending to him. He was not even meeting the expenses for his treatment from 1959, when he lost his job till his death in 1978. The testator was living with his sister and her children. If in that situation, if he executed a Will in their favour, no exception thereto can be taken. Even then, something was left for the appellant.

22. In *Ramabai Padmakar Patil (Dead) though L.Rs. and Others v. Rukminibai Vishnu Vekhande and Others* [MANU/SC/0583/2003 : (2003) 8 SCC 537], the Supreme Court held: "8. A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural

heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance, especially in a case where the bequest has been made in favour of an offspring. [See also S. Sundaresa Pai and Others v. Sumangala T. Pai (Mrs.) and Another - MANU/SC/0750/2001 : 2002 (1) SCC 630].

23. Strong reliance has been placed by the learned counsel on Gurdial Kaur and Others v. Kartar Kaur and Others [MANU/SC/0271/1998 : (1998) 4 SCC 384], wherein it was held: "4. The law is well settled that the conscience of the court must be satisfied that the Will in question was not only executed and attested in the manner required under the Indian Succession Act, 1925 but it should also be found that the said Will was the product of the free volition of the executant who had voluntarily executed the same after knowing and understanding the contents of the Will. Therefore, whenever there is any suspicious circumstance, the obligation is cast on the propounder of the Will to dispel the suspicious circumstance. As in the facts and circumstances of the case, the court of appeal below did not accept the valid execution of the Will by indicating reasons and coming to a specific finding that

suspicion had not been dispelled to the satisfaction of the Court and such finding of the court of appeal below has also been upheld by the High Court by the impugned judgment, we do not find any reason to interfere with such decision. This appeal, therefore, fails and is dismissed without any order as to costs." The principle of law laid down in Savithri, has been followed by the Supreme Court in the matter of Ramesh Verma v. Lajesh Saxena MANU/SC/1549/2016 : (2017) 1 SCC 257.

Janki Narayan Bhoir v. Narayan Namdeo Kadam MANU/SC/1155/2002 : (2003) 2 SCC 91 " ...The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required Under Section 63 of the Succession Act. Where one

attesting witness examined to prove the will Under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act."

**JUDICIAL VERDICT ON WILL BE BASED ON
CONSIDERATION OF**

Leela Rajagopal and Ors. v. Kamala Menon Cocharan and Ors. MANU/SC/0783/2014 : (2014) 15 SCC 570 wherein it was held that it is the overall assessment of the Court on the basis of the unusual features appearing in the Will or the unnatural circumstances surrounding its execution, that justifies a close scrutiny of the same before it can be accepted. Herein, the cumulative effect of the unusual features and circumstances surrounding the Will, would weigh upon the court in the determination required to

be made by it. The judicial verdict will be based on the consideration of all the unusual features and suspicious circumstances put together and not upon the impact of any single feature that may be found in a Will or a singular circumstance that may appear from the process leading to its execution. A will may have certain features and may have been executed in certain circumstances which may appear to be somewhat unnatural. Such unusual features appearing in a will or the unnatural circumstances surrounding its execution will definitely justify a close scrutiny before the same can be accepted. It is the overall assessment of the court on the basis of such scrutiny; the cumulative effect of the unusual features and circumstances which would weigh with the court in the determination required to be made by it. The judicial verdict, in the last resort, will be on the basis of a consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature that may be found in a will or a singular circumstance that may appear from the process leading to its execution or registration. This, is the essence of the repeated pronouncements made by this Court on the subject including the decisions referred to and relied upon before

us.....In the present case, a close reading of the will indicates its clear language, and its unambiguous purport and effect. The mind of the testator is clearly discernible and the reasons for exclusion of the sons is apparent from the will itself...

Ved Mitra Verma v. Dharam Deo Verma
MANU/SC/0709/2014 : (2014) 15 SCC 578

wherein this Court held that the exclusion of the children of the testator and execution of the Will for the sole benefit of one of the sons by the testator, is not a suspicious circumstance. This Court held as under: The exclusion of the other children of the testator and the execution of the will for the sole benefit of one of the sons i.e. the Respondent, by itself, is not a suspicious circumstance. The property being self-acquired, it is the will of the testator that has to prevail.

GIFT AND POSSESSION

Renikuntla Rajamma (D) by LRs versus K. Sarwanamma,
reported in
MANU/SC/0612/2014 : AIR 2014, SC 2906.

"The matter can be viewed from yet another angle. Section 123 of the T.P. Act is in two parts. The

first part deals with gifts of immovable property while the second part deals with gifts of movable property. Insofar as the gifts of immovable property are concerned, Section 123 makes transfer by a registered instrument mandatory. This is evident from the use of work "transfer must be effected" used by Parliament in so far as immovable property is concerned. In contradiction to that requirement the second part of Section 123 dealing with gifts of movable property, simply requires that gift of movable property may be effected either by a registered instrument signed as aforesaid or "by delivery". The difference in the two provisions lies in the fact that in so far as the transfer of movable property by way of gift is concerned the same can be effected by a registered instrument or by delivery. Such transfer in the case of immovable property no doubt requires a registered instrument but the provision does not make delivery of possession of the immovable property of the immovable property gifted as an additional requirement for the gift to be valid and effective. If the intention of the legislature was to make delivery of possession of the property gifted also as a condition precedent for a valid gift, the provision could and indeed would have specifically said so. Absence of

any such requirement can only lead us to the conclusion that delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property."... 18. We are in respectful agreement with the statement of law contained in the above passage. There is indeed no provision in law that ownership in property cannot be gifted without transfer of possession of such property. As noticed earlier, Section 123 does not make the delivery of possession of the gifted property essential for validity of a gift. It is true that the attention of this Court does not appear to have been drawn to the earlier decision rendered in *Naramadaben Maganlal Thakker v. Pranjivandas Maganlal Thakker and Ors.* MANU/SC/1045/1997 : (1997) 2 SCC 255. where this Court had on a reading of the recital of the gift deed and the cancellation deed held that the gift was not complete. This Court had in that case found that the donee had not accepted the gift thereby making the gift incomplete. This Court, further, held that the donor cancelled the gift within a month of the gift and subsequently executed a Will in favour of the Appellant on a proper construction of the deed and the deed cancelling the same this Court held that the gift in favour of the donee was conditional and that

there was no acceptance of the same by the donee. The gift deed conferred limited right upon the donee and was to become operative after the death of the donee. This is evident from the following passage from the said judgment: "It would thus be clear that the execution of a registered gift deed, acceptance of the gift and delivery of the property, together make the gift complete. Thereafter, the donor is divested of his title and the donee becomes the absolute owner of the property. The question is whether the gift in question had become complete Under Section 123 of the TP Act? It is seen from the recitals of the gift deed that Motilal Gopalji gifted the property to the Respondent. In other words, it was a conditional gift. There is no recital of acceptance nor is there any evidence in proof of acceptance. Similarly, he had specifically stated that the property would remain in his possession till he was alive. Thereafter, the gifted property would become his property and he was entitled to collect mesne profits in respect of the existing rooms throughout his life. The gift deed conferred only limited right upon the Respondent-donee. The gift was to become operative after the death of the donor and he was to be entitled to have the right to transfer the property absolutely by way of gift

or he would be entitled to collect the mesne profits. It would thus be seen that the donor had executed a conditional gift deed and retained the possession and enjoyment of the property during his lifetime."

S. Sarojini Amma with Velayudhan Pillai Sreekumar [MANU/SC/1215 /2018 : 2018 (6) CTC 108]

"16. In Reninkuntla Rajamma v. K. Sarwanamma MANU/SC/0612/2014 : (2014) 9 SCC 445 a Hindu woman executed a registered gift deed of immovable property reserving to herself the right to retain possession and to receive rent of the property during her lifetime. The gift was accepted by the donee but later revoked.

17. In Reninkuntla Rajamma (supra), this Court held that the fact that the donor had reserved the right to enjoy the property during her lifetime did not affect the validity of the deed. The Court held that a gift made by registered instrument duly executed by or on behalf of the donor and attested by at least two witnesses is valid, if the same is accepted by or on behalf of the donee. Such acceptance must, however, be

made during the lifetime of the donor and while he is still capable of making an acceptance.

18. We are in agreement with the decision of this Court in Reninkuntla Rajamma (supra) that there is no provision in law that ownership in property cannot be gifted without transfer of possession of such property. However, the conditions precedent of a gift as defined in Section 122 of the Transfer of Property Act must be satisfied. A gift is transfer of property without consideration. Moreover, a conditional gift only becomes complete on compliance of the conditions in the deed.

19. In the instant case, admittedly, the deed of transfer was executed for consideration and was in any case conditional subject to the condition that the donee would look after the Petitioner and her husband and subject to the condition that the gift would take effect after the death of the donor. We are thus constrained to hold that there was no completed gift of the property in question by the Appellant to the Respondent and the Appellant was within her right in cancelling the deed. The judgment and order of the High Court cannot, therefore, be sustained."

Illoth Valappil Ambunhi (D) by L.Rs. vs. Kunhambu Karanavan: MANU/SC/1401/2019

- The proposition of law that when the document of transfer by gift records delivery of possession, a presumption of acceptance would arise, in the absence of overt repudiation of the gift, by and/or on behalf of the donee, was unexceptionable. As held by the High Court, when the deed itself said that the possession of the property was given to the donee, the burden of proving, that the said recital was not correct, lay on the party who asserted so. The law had correctly been appreciated and enunciated by the High Court.... The gift not being onerous, there was no reason why person acting on behalf of the person should not have accepted the gift on behalf of the said person. The deed of gift did not provide for reversion of the suit property to the donor in case of failure to pay maintenance to the donor in terms of the deed of gift. The High Court, therefore arrived at the conclusion that Raman was not competent to execute the deed of cancellation or the deed of transfer, as he had ceased to be the owner of the suit property. Article 59 of the Limitation Act deals with suits for cancellation for setting aside an instrument or decree or for rescission of a contract and prescribes a period of

three years commencing from the time when the fact entitling the Plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded is first known to him. So far as gift deed being the deed of gift was concerned, the donor had no authority to revoke the same. Hence, the subsequent documents were in themselves without authority and null and void. The declaration was only incidental to the title and possession of the donee and hence Article 59 had no application.

CANCELLATION OR REVOCATION OF GIFT

In Narayanamma vs. Papanna, reported in ILR 1987 KAR 3892, Court at Paragraph-12 of its judgment was pleased to observe as below: "12. As to under what circumstances a gift can be suspended, cancelled or revoked is dealt in Section 126 of the Act which is as follows: "The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be. A gift may also be

revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.....Save as aforesaid, a gift cannot be revoked."Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.".....From the contents of Section 126 of the Act, it is clear that a gift can be cancelled or rescinded only under the following circumstances:-

- a) On the happening of an event specified in the gift deed:
- b) The Donor and the Donee must have agreed to such condition; acceptance of such condition specified in the gift deed must be agreed to by the donee while accepting the gift:
- c) The event agreed upon must be such that the happening of it does not depend on the will of the donor:
- d) The conditions so imposed must not be repugnant to the gift and should not be illegal or immoral:
- e) A gift may also be revoked or rescinded as if it were a contract on the same grounds on which a contract may be rescinded except on the ground of failure of consideration.

A contract is normally rescinded or avoided, as per Sections 19 and 19A of the Contract Act. When consent to an agreement is caused by coercion, fraud, misrepresentation or undue influence, at the instance of the party whose consent is so obtained. Except on the aforesaid grounds, a gift cannot be rescinded or revoked on any other ground. This position is specifically made clear by stating in Section 126 of the Act "Save as aforesaid, a gift cannot be revoked." However it may also be noticed that in the event the case falls under Section 20 of the Contract Act, the gift will be void ab initio and in such a situation, the question of avoiding it does not arise. There is no recital contained in the gift deed as to happening of any specific event independent of the will of the donor. There is also no recital in the gift deed enabling the donor to revoke it on the failure of the donee to maintain the donor or on the happening of any other event. A gift deed cannot be revoked save as provided in Section 126 of the Act. The circumstances under which a gift can be revoked or rescinded are already pointed out."

Jambulingayya Hiremath vs. Akkamahadevi and Ors. MANU/KA/1559/2020 - In the instant

case, there is no evidence to show that the donor and donee had agreed that on the happening of any specified event, independent of the will of the donor, the gift should be revoked. It is also not the case that the gift was vitiated or caused by fraud, coercion, misrepresentation or undue influence as per Section 19 and Section 19(A) of Indian Contract Act, 1872. It is not even the case of the parties who are challenging the gift that the said gift was hit by Section 20 of Indian Contract Act. Therefore, the unilateral revocation of the gift which falls out of the ambit of Section 126 of T.P. Act, as in the instant case, is not a valid revocation.

In Md. Noorul Hoda v. Bibi Raifunnisa and Ors. reported in (MANU/SC/1414/1996 : 1996 (7) SCC 767), Court held that Article 59 of the Limitation Act would be applicable if a person affected is a party to a decree or an instrument or a contract which was questioned by initiation of a suit. Article 59 would apply to set aside the decrees, instruments or contracts between the parties inter se. However, in the case of a person claiming title through a party to the decree or instrument or contract who seeks to avoid the instrument, contract or decree by a specific

declaration, the starting point of limitation Under Article 59 would be the date of knowledge of the fraud and/or illegality which renders the decree and/or instrument and/or other document void.

CHAPTER-16
PARTNERSHIP AND FAMILY BUSINESS

**THERE IS NO PRESUMPTION AS TO JOINT
FAMILY BUSINESS EVEN IF IT IS STARTED BY
KARTHA OR MEMBER**

In Chattanatha Karayalar v. Ramachandra Iyer
1955 AIR 799, 1955 SCR (2) 477 the question was whether the business started by the father was in family concern. At p. 800. the Supreme Court held: "Under the Hindu law, there is no presumption that a business standing in the name of any member is a joint family one even when that member is the manager of the family, and it makes no difference in this respect that the manager is the father of the coparceners."

Division Bench judgment of Madras High Court in the case of **PADMINI CHANDRASEKARAN VS. SOMASUNDARAM CHETTIAR AND OTHERS** reported in **1965 2 M.L.J. 65** wherein it has been held that: "There can be no presumption that a business started and conducted by a junior member of a Hindu joint family, in his own name, is not his separate business but a joint family one. Unless it can be shown that the business in

the hands of a coparcener grew up from joint family property or that the earnings were blended with joint family estate, they remain free and separate. The question whether the business was begun or carried on with the assistance of joint family property or as a family business is a question of fact upon which the initial burden of proof lies upon those who claim a share in the business. Under the Hindu Law, there is no presumption that a business standing in the name of any member is a joint family one even when that member is a manager of the family; it would make no difference in this respect even if the manager happens to be the father of the coparceners. "

BURDEN OF PROOF LIES UPON THE PLAINTIFF WHO CLAIMS A SHARE IN THE BUSINESS

In the case of Rukn-Ul-Mulk Syed Abdul Wajid AIR 1950 Mys 33(FB) what fell for consideration for the Full Bench of this Court was whether the business carried on by a member of a Joint Hindu Family was begun or carried on with the assistance of the joint family property is a question of fact upon which burden of proof lies

upon the plaintiff who claims a share in the business. The burden of proving that the business was separate at its inception cannot be cast upon the defendant who asserts it. The Full Bench further held that the mere fact that a member of a joint family meets the expenses of the family and employs his brothers in his business and pays them for their services or pays some money to each of the brothers out of generosity or kindness cannot show that the property acquired by him was not his self acquired property or what was paid by him to his brothers should be regarded as their joint family property.

In the case of **MANICKAM CHETTY VS. KAMALAM ALIAS KAMALATHAMMAL MANU/TN/0155/1936** Wherein it has been held that : "Where before partition a business is carried on by one member with the aid of joint family funds, it may be that the concern belongs to that individual member, his share being debited with the sums employed therefor; but the presumption from that circumstance is that it is a joint family concern."

In the case of **S.K.T.SOUNDARARAJALU VS. MINOR SHANMUGAM AND ANOTHER 1942 M.L.J. 184** wherein it has been held as hereunder: "Where a business was started by the manager of a Hindu joint family which had absolutely no connection with the old business that had been carried on by their father, the fact that the business was of the same nature as the old business, cannot make it an ancestral business at all."

In the case of **PARASAM VENKATARAMAYYA VS. PARASAM VENKATARAMAPPA AND OTHERS 1951 M.L.J. 508** wherein it was held : "If a member of the family is inclined to start a trade and for that purpose he gets assistance by way of contribution from the joint family and goes and starts a business and acquired properties, it is reasonable to extend the principle of Hindu Gains of Learning Act (XXX of 1930) to such a case. There is no real distinction between the cases of a member getting himself educated out of the joint family funds and employing himself somewhere earning and acquiring properties and a member getting a cash contribution from the family and starting a trade on his own account. Unless it is shown that the family did not stop

with the contribution but continued to take interest and the business was subsequently carried on with the assistance of the joint family it should not be held that the business is a family business".

In the case of **C.SUNDARAM VS. RUKMANIAMMAL AND OTHERS 1974 M.L.J.**

354 it has been held as below: " Where a business was in its origin the exclusive business of the father, whether that business came to acquire a joint family character would depend on the nature of the help or assistance given by the son. It is not every act or work done or assistance given by a son to the father in the conduct of the business that will make the business a joint family business. If the work done or assistance given by the son is such as to lead to the inference that the father had intended to treat his exclusive business as a joint family business, then alone the presumption of joint business could be invoked. In invoking such a presumption the joint exertion by the son with his father should be such that the father could be said to have intended to treat the business as belonging to both, or to the joint family."

**THERE IS NO PRESUMPTION THAT A
BUSINESS COMMENCED OR CARRIED ON BY
A MEMBER OF A HINDU JOINT FAMILY IS A
JOINT FAMILY BUSINESS**

**Division Bench of Court in G.B.
Mallakarjunaiah's case (AIR 1961 Mys 64),**

addressing the question as to whether the burden of proving self acquisition of properties by a member of the family would arise, held that it must be shown that the family was possessed of such joint family funds or joint family properties which would enable the acquisition of the properties in question. It is a firmly established principle that the separate property of a Hindu ceases to be his property and acquires the characteristics of his joint family or ancestral property, not by any physical mixing with his joint family or ancestral property but by his own volition and intention, by his waiving or surrendering his special right in it as separate property. The evidence of such intention is not forthcoming in this case. It is a sound proposition of law which has been considered to be well established that there is no presumption that a business commenced or carried on by a member of a Hindu joint family is a joint family

business and that such a presumption would be unavailable even if that member was the manager of that joint family. Now, it is settled law that the proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But, where it b 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 may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property.

G. Narayana Raju vs G. Chamaraju & Others
1968 AIR 1276, 1968 SCR (3) 464 There is no presumption under Hindu law that a business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family. Unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blended

with the joint family estate, the business remains free and separate. - The separate property of a Hindu coparcener ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by mere act of physical mixing with his joint family or ancestral property but by his own volition and intention, by his waiving or surrendering his special right in it as separate property. Mere recitals in deeds dealing with self acquisitions as ancestral joint family property is not by itself sufficient; but it must be established that there was a clear intention on the part of the coparcener to waive his separate property. - "It is a well-established doctrine of Hindu Law that property which was originally self-acquired may become joint property if it has been voluntarily thrown by the coparcener into joint stock with the intention of abandoning all separate claims upon it. The doctrine has been repeatedly recognised by the Judicial Committee (See Harpurshad v. Sheo Dayal (1876) 3 Ind App 259 (PC) and Lal Bahadur v. Khnnhain Lal (1907) 34 Ind App 65 (PC). But the question whether the coparcener has done so or not is entirely a question of fact to be decided in the light of all the circumstances of the case. It must be established that there was a clear

intention on the part of the coparcener to waive his separate rights and such an intention will not be inferred merely from acts which may have been done from kindness or affection (see the decision in *Lala Muddun Gopa v. Khikhindu Koer* (1891) 18 Ind App 9(PC). For instance in *Nairn Pillai v. Daivanai Amnuil* (AIR 1936 Mad 177) where in a series of documents self-acquired property was described and dealt with as ancestral joint family property, it was held by the Madras High Court that the mere dealing with self-acquisitions as joint family property was not sufficient but an intention of the coparcener must be shown to waive his claims with full knowledge of his right to it as his separate property. The important point to keep in mind is that the separate property of a Hindu coparcener ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by mere act of physical mixing with his joint family or ancestral property, but by his own volition and intention, by his waiving or surrendering his special right in it as separate property. A man's intention can be discovered only from his words or from his acts and conduct. When his intention with regard to his separate property is not expressed in words, we must seek for it in his acts

and conduct. But it is the intention that we must seek in every case, the acts and conduct being no more than evidence of the intention."

**IT CANNOT BE THE SKILL OR THE LABOUR
OF THE INDIVIDUAL MEMBERS
CONSTITUTING THE FAMILY TRADE**

Sidramappa Veera-bhadrapa vs Babajappa Balappa (AIR 1962 Mys 38), It is a misnomer to call the vocation of dyeing as a trade. When one speaks of a family trade he means "shop keeping or commerce or buying and selling" In that content the word "trade" is not used as being equivalent to a craft. If we bear in mind the fact that a family trade is but an asset of the family just as any other asset it goes without saying that it must be an asset possessed by the family -may be it is something physical or even a goodwill - but all the same it must be something belonging to the family. In the very nature of things, it cannot be the skill, or the labour of the individual members constituting the family. Obviously the word "trade" in the contest is not used as a term of law but should be understood in its popular sense. The fact that the first defendant took to the profession of his ancestors for some time - a

profession into a family trade. In aid of his vocation he got nothing from his family excepting his blood and possibly the special knowledge gathered from his surroundings. These are insufficient to dub his vocation as a family trade. A lawyer's son or a doctor's son may have similar advantages. If he takes to the profession of his father. For that reason it has not been said, and it cannot be said, that he enters on a family trade.

PARTNERSHIP ACT DOES NOT APPLY TO HINDU TRADING FAMILIES

The apex court in **Nanchand Gangaram Shetji Vs. Malappa Mahalingappa Sadarge AIR 1976 SC 835** has held that the legislature in its wisdom excluded joint Hindu trading families from operation of the Partnership Act and thus the principles thereof cannot be applied to joint Hindu trading families. It has to be, thus, seen whether without reference to the provisions of the Partnership Act, what is the liability of various constituents of such families. The determination thereof would also entail determination of what is the private property of such constituents and what is the family property.

**THERE IS NO PRESUMPTION IN HINDU LAW
THAT A BUSINESS STANDING IN THE NAME
OF A MEMBER OF THE HINDU JOINT FAMILY
IS JOINT FAMILY BUSINESS**

AIR 1961 Mys 64 G.B. Mallakarjunaiah v. J.S.

Kanniah Setty Now, it is settled law that the proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But, where it be 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 may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. This view expressed by their Lordships of the Privy Council in Appalaswami v. Suryanarayanamurti, ILR (1948) Mad 440: (AIR 1947 PC 189), was referred to with approval by their Lordships of the Supreme Court in Srinivas Krishnarao Kango v. Narayan Devji Kango, 1954 AIR 379, 1955 SCR 1. It is a sound

proposition of law which has been considered to be well established that there is no presumption that a business commenced or carried on by a member of a Hindu joint family is a joint family business and that such a presumption would be unavailable even if that member was the manager of that joint family. This was what their Lordships of the Supreme Court pointed out in **Chattanatha Karayalar v. Ramachandra Iyer, (S) . 1955 AIR 799, 1955 SCR (2) 477** As pointed out by their Lordships of the Privy Council in Bhuru Mal v. Jagannath, AIR 1942 PC 13, a member of a joint undivided family can make separate acquisition of property for his own benefit and, unless it can be shown that the business grew from joint family property or that the earnings were blended with joint family estate, they remain free and separate. On page 16 of the report, Sir George Rankin said this:-- "Whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property hut joint property, no such presumption can be applied to a business. Lord Buckmaster delivering the judgment of the Board in Annamalai Chetty v. Subramanian Chetty, AIR

1929 PC 1, at p. 2 put the law thus: 'A member of a joint undivided family can make separate acquisition of property for his own benefit and, unless it can be shown that the business grew from joint family property, or that the earnings were blended with joint family estate, they remain free and separate.'

WHAT CONSTITUTE FAMILY TRADE OR JOINT FAMILY BUSINESS- IT DOES NOT INCLUDE SKILL CRAFT

AIR 1962 Mys 38, Sidramappa Veerabhadrappe v. Babajappa Balappa It is a misnomer to call the vocation of dyeing as a trade. When one speaks of a family trade he means "shop keeping or commerce or buying and selling" In that content the word "trade" is not used as being equivalent to a craft. If we bear in mind the fact that a family trade is but an asset of the family just as any other asset it goes without saying that it must be an asset possessed by the family -may be it is something physical or even a goodwill - but all the same it must be something belonging to the family. In the very nature of things, it cannot be the skill, or the labour of the individual members constituting the family. Obviously the word

"trade" in the contest is not used as a term of law but should be understood in its popular sense. The fact that the first defendant took to the profession of his ancestors for some time - a profession into a family trade. In aid of his vocation he got nothing from his family excepting his blood and possibly the special knowledge gathered from his surroundings. These are insufficient to dub his vocation as a family trade. A lawyer's son or a doctor's son may have similar advantages. If he takes to the profession of his father. For that reason it has not been said, and it cannot be said, that he enters on a family trade.

COMMENCING NEW TRADE WITH FAMILY FUNDS IS IMPORTANT

AIR 1962 Mys 38, Sidramappa Veerabhadrappe v. Babajappa Balappa My attention has been drawn to the decision of Courtney Terrsell, C.J. in Ghasiram Biseswar Lal Firm v. Otlal General Otlal Basaraj Firm. AIR 1956 Pat 485, wherein it was held that where a member of a Hindu joint family carries on a business which is appropriate to the caste to which he belongs it may be properly inferred that that

business is part of the joint family property. With great respect to the learned judge I do not think that this a correct statement of the law. The law, as I understand it is that when trade is the Kulachar or the hereditary vocation of a family. If a member of that family continuous an existing trade of the family or he commences a new trade with family funds then it assumes the character of a family trade, and thereby entailing certain rights and consequences. Therefore, it cannot be said that when the first defendant took to dyeing of clothes he was carrying on a family trade.

G. Narayana Raju (dead) by his legal representative Vs. G. Chamaraju and others, reported in MANU/SC/0113/1968 : AIR 1968 SC 1276 dealing with a similar nature of case at paragraph-3 of the said decision held as under, which is relevant for our discussion. "(3) The first question to be considered in this appeal is whether the business of Ambika Stores was really the business of the joint family and whether the plaintiff was entitled to a partition of his share in the assets of that business. It was contended on behalf of the appellant that the business of Ambika Stores grew out of a nucleus of the joint family funds of at least by the efforts of the

members of the joint family include the appellant. The contention of the appellant has been negatived by both the lower courts and there is a concurrent finding that the Ambika Stores was the separate business of Muniswami Raju and it was neither the joint family business nor treated as joint family business. It is well established that there is no presumption under Hindu law that business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family. Unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blended with the joint family estate, the business remains free and separate. The question therefore whether the business was begun or carried on with the assistance of joint family property or joint family funds or as a family business is a question of fact.-(See the decisions of the Judicial Committee in Bhuru Mal v. Jagannath, MANU/PR/0045/1941 : AIR 1942 PC 13 and in Pearey Lal v. Nanak Chand, MANU/PR/0008/1948 : AIR 1948 PC 108 and of this Court in Chattanatha Karayalar v.

Ramachandra Iyer, MANU/SC/0050/1955 : AIR 1955 SC 799)....."

**BUSINESS STARTED BY KARTHA AND
LIABILITY OF CO-PARCENERS, MINORS AND
SUBSEQUENT BORN**

ILR 1989 Kant 169, Gopal Purshotham Bichu v. Purushotham Govinda Bichu There was also no running business of the joint family. The 1st defendant started the business on his own afresh. In the case of a new business started by a kartha of a Hindu joint family, the principle is that the kartha as the manager of a joint Hindu family cannot, impose on, or is not entitled to expose the interest of, the members of the coparcenary, to the risk and liability, of a new business. Therefore a new business started by the kartha or manager of a joint family is not considered to be the business of a joint family, unless it is started or carried on with the express or implied consent of adult coparceners or it is proved that the joint family funds are utilised for the business to the advantage of the joint family or its continuation was found to be beneficial to the joint family or it was adopted as a joint family business by the other members of the family who continued to

enjoy the benefits of the same. The case of a coparcener who was a minor on the date of commencement of the new business by the karta of the joint family stands on a different footing in as much as the minor's interest cannot be exposed to risk and liability. However, the minor members of the family who are born subsequent to the commencement of the business, are not entitled to say that the risk of the new business cannot be imposed on them in as much as the risk and liability having been already taken by family, the newcomers must share them along with the other assets and liabilities of the family.

MERE USE OF JOINT FAMILY PREMISES FOR BUSINESS

Hon'ble Supreme Court in the case of **P.S. Sairam and another Vs. P.S. Rama Rao Pisey and others, reported in MANU/SC/0085/2004 : AIR 2004 SC 1619**, wherein at paragraph-10 it is held as under:- "10 The question to be examined in the present case is as to whether mere user of the joint family property (item No. 1 property), as a business premises by defendant No. 1, who was karta of the joint family, for

running his separate business can be said to be in any manner detrimental to the joint family property? Undisputably, the joint family had not invested a single farthing in the business at any point of time as it was started by defendant No. 1 by raising loans from the market. This being the position, we have no option but to hold that the business carried on by defendant No. 1 in the property described as item No. 1 in the Schedule cannot be treated to be joint family business and the same remained his separate business throughout, especially in view of the fact that there was neither any case nor evidence to show any blending....."

LIABILITY OF MEMBERS OF TRADING JOINT HINDU FAMILY

Justice Rajiv Sahai Endlaw of Delhi High Court in the case of A. Khandelwal and Sons vs. Sardar Mall Alok Kumar :
MANU/DE/1769/2008 - ILR 2008 (7) DELHI 200. - I am of the view that all constituents of a trading Joint Hindu Family are liable for debts thereof not only from their share in properties of Joint Hindu Family but also from their personal, self acquired properties for the following reasons:

- i) the trading Joint Hindu Family being merely a compendious name in which all constituents thereof are trading, there is no rationale for discriminating between the manager and other co-parceners, in the matter of debts/liabilities.
 - ii) there is no reason why, when the co-parceners have a share in the profits of the business as per their share in the family, they should not share the losses and debts also in the same proportion.
 - iii) a manager or the Karta is merely by his position as eldest in the family and by such position does not become entitled to any extra share in the profits of the business and there is no reason to make his personal or self acquired properties liable and exclude those of others.
 - iv) a third party dealing with such trading Joint Hindu Family may not know its actual constitution as a Joint Hindu Family and not a partnership and is likely to give credit thereto on the strength of the financial capacity of all persons appearing to be having a share therein.
- In this regard it is significant that there is no statutory compulsion for such trading Joint Hindu Family to affix the words "HUF" to its trading name, as is in the case of a limited company under the Companies Act. Most of such trading families are known not to affix HUF to

their trading name, though it is not so in the present case. Order XXX Rule 10 of CPC also permits a HUF carrying on business under any name to sue and be sued in such name or style as if it were a firm name. To make only the manager's private properties and the Joint Hindu Family properties liable for debts/liabilities can given a tool in the hands of unscrupulous families of arranging their affairs in a manner to defeat debts/liabilities.

v) it is not essential for a Joint Hindu Family to carry on business. However, if they do carry on business they/its constituents need no special protection.

vi) the reason given in judgments (Supra), which are all of more than half century ago for protecting private/personal/self acquired properties of co-parceners was that the said co-parceners were then considered as subservient to and having no say whatsoever in the matter or affairs of the family or against the will or say of eldest member of the family. However, the social fabric has drastically changed since then. Neither is Joint Hindu Family the norm nor do considerations of regard, respect today deters youngers in the family from putting forth their views. In fact the youngsters in the family are

today consulted in all matters and considered to be more knowledgeable and having the pulse of the time. Today the single unit or maximum two generations staying together is the norm. In the circumstances there is no compulsive trading Joint Hindu Family and the trading Joint Hindu Family may be adopted as a trading vehicle for commercial and other reasons. In today's time a younger member of family does not feel shy to severe relationships. In today's context, if there is a trading Joint Hindu Family, all constituents thereof ought to be made liable for debts/liabilities of business and out of their self acquired properties also. In today's times it is impossible to believe that a co-parcener would compulsorily allow another to act as manager and if he does so, he ought to be bound by his actions. Law is a living organ and has to evolve with the time and changing social conditions.

vii) all the judgments (Supra) refer to Manager and not to Karta of the HUF. Manager of business is not necessarily the Karta of the HUF. The Apex court in Narindra Kumar J. Modi v. CIT MANU/SC/0523/1976 : [1976]105ITR109(SC) has held that with the consent of others, even a junior member of the family can act as Karta. It was so held by this Court also in Nopany

Investments Pvt. Ltd., v. Dr. Santokh Singh (HUF) RSA 209/2005 decided on 19th April, 2007 and appeal where against was dismissed by Apex Court. If that be so, there is no need to subject self acquired properties of Manager only to attachment and sale for debts/liabilities of the business of the family.

CHAPTER-17
GRANTED LAND

UNLESS THE GRANTED LAND IS INTENDED TO BE FOR THE BENEFIT OF THE FAMILY, OR A CONTRARY INTENTION APPEARS FROM THE GRANT, OR IT WAS TREATED AS JOINT FAMILY PROPERTY BY THE DONEE AND THE MEMBERS OF THE FAMILY - IT IS SELF ACQUIRED PROPERTY

THE HON'BLE MRS.JUSTICE B.V.NAGARATHNA
of HIGH COURT OF KARNATAKA in the case of
**Pandun vs Laxmibai C Subhadra Decided on
1 October, 2012**

Where the Government grants an estate in the exercise of its sovereign power, normally the estate becomes the self-acquired property of the grantee, whether it is a new grant or the restoration of an estate previously confiscated by the government, unless the grant is intended to be for the benefit of the family, or a contrary intention appears from the grant, or it was treated as joint family property by the donee and the members of the family, either by a family arrangement or a family custom. Therefore, prima facie a gift or grant made to a member of a joint

family is his separate property, will only become joint family property either when it descends to his sons, or he himself has thrown it into the common stock. Therefore whether a Government grant enures to the grantee as his separate property or as his joint family property is one of construction of the grant with reference to its terms and the surrounding circumstances.

An impartible estate is created by a grant, which is the prerogative of the Sovereign or the State. An impartible estate may be separate property of the holder or it may be the property of a joint undivided family of which he is a member. If it is the latter, succession to it will be regulated according to the rule of survivorship. However all the incidents of joint family property would not be applicable to an impartible estate. For instance, right of partition would not exist in the case of an impartial estate. Similarly, the right to alienation by the head of family is incompartible with impartibility. It is also held that the right of maintenance does not arise vis-a-vis impartible estate. But, the right of survivorship exists and to this extent an impartible estate has a character of joint family property, and its devolution is governed by the general Mitakshara Law as applicable to such property. Thus, on the death

of a holder of an impartiable estate, the other coparceners who survive him would succeed to the said estate.

THE REGRANT OF THE LANDS IN THE NAME OF ONE OF THE MEMBERS OF THE FAMILY REVIVED THE RIGHT OF THE SUCCESSORS OF THE ORIGINAL HOLDER OF THE VILLAGE OFFICE TO SUCCEED TO THE LANDS.

THE HON'BLE MRS.JUSTICE B.V.NAGARATHNA
of HIGH COURT OF KARNATAKA in the case of
**Pandun vs Laxmibai C Subhadra Decided on
1 October, 2012**

The next aspect that requires consideration is the impact of The Karnataka Village Officers' Abolition Act, 1961 on the instant case. The said Act was enforced w.e.f. 1/2/1963. The object of the Act is to abolish the village offices which were held hereditarily. Under the said Act 'Holder of a village office' or 'holder' is defined to mean a person having an interest in a village office under an existing law relating to such an office. The proviso states that where a village office has been entered in a register or record under any existing law relating to such village office, as held by the whole body of persons having interest in the

village office, the whole of such body shall be deemed to be the holder. Section 2(1) (b) defines 'authorised holder' to mean a person in whose favour the land granted or continued in respect of or annexed to a village office by the State or a part thereof has been validly alienated permanently, whether by sale, gift, partition or otherwise under the existing law relating to such office. 'Village office' is defined in Clause (n) to mean every village office to which emoluments were attached and which was held hereditarily before the commencement of the Constitution under an existing law relating to a village office, for the performance of duties connected with the administration or collection of the revenue or with the maintenance of order or with the settlement of boundaries or other matter of civil administration of a village, whether the services originally appertaining to the office continue or have ceased to be performed or demanded and by whatsoever designation, the office may be locally known. Section 4 states that w.e.f. the appointed date i.e., 20/07/1961 all village offices have been abolished and all incidents attached to the said village offices are extinguished. Further, all land granted or continued in respect of or annexed to a village office by the State stood resumed by the

State subject however, to regrant of land to the holder of the village office or authorised holders as the case may be.

SHIVAPPA FAKIRAPPA SHETSANADI v. KANNAPPA MALLAPPA SHETSANADI, ILR 1987 KAR 3155 that: "There is nothing in Section 4 of the Act which can be held to affect the personal law of the parties so as to deprive the junior members of the family of their right to claim partition of the suit land on the abolition of the village office and resumption and regrant of the land."

CHANDRABAI v. LAXMIBAI, 1975(1) MLJ Sh.N. Item No. 19, as follows: "A grant of land resumed under Section 4 to the holder of the Village Office has to be regarded as compensation to the holder of the Village Office. Until the lands are regranted to the holder of the Village Office, other members of the family derive no title, assuming that the watan was family property which was impartible until its abolition. It is too premature for them to institute a suit for partition before re-grant is obtained by the holder of the Village Office."

BHIMAPPA RAMAPPA GHASTI v. ARJAN LAXMAN GHASTI, 1993(2) KLJ 179 that: "after the abolition of the village office and resumption of the land, it becomes a ryotwari land only on regrant and as such it would be released from the nature of its impartibility and becomes available for partition."

Patel Veerabasappa vs Basamma ILR 1996 KAR 1435, 1996 (2) KarLJ 102 According to Sub-section (3) of Section 5 of the Act, the regranted land cannot be alienated within 15 years otherwise than by partition among members of Joint Hindu Family. Further the land cannot be partitioned before the same is regranted

ABOLITION OF THE VILLAGE OFFICE DOES NOT AFFECT THE PERSONAL LAW OF THE OFFICER

The provisions of the Act have been considered by a Division Bench of this Court in the case of **Beerappa v. Fakeerappa Beerappa Bandrolli [2007 (1) KLJ 477 DB]** wherein, it has been stated that where land was attached to the village

office, the lineal primogeniture stood continued and the senior branch of the family would normally continue the village office. That the abolition of the village office resulted in the land vesting in the State subject to regant of the land, but the abolition of the village office does not affect the personal law of the officer. Till the village office was abolished, the land attached to the village office was impartible. It is only when the said land is regranted, that it would be available for partition and interest in the village office in a holder would include the right to survivorship as if it is a joint family estate. Therefore, even the junior members of a joint family has an interest in the village office and have to be considered as holders of the village office. Once the land attached to the village office is regranted, it becomes available for partition and even the junior branch of the joint family would be entitled to a share in the land granted to the family. A mere fact that an estate is impartible does not make it separate or exclusive property of the holder. Also, where a person succeeds to the village office as a holder, it does not become his separate property but it is a joint estate of the undivided family. Till the land is not

regranted, it remains as impartible land and not available for division.

GRANT ENURES TO ENTIRE BENEFIT OF FAMILY

In AIR 1982 SC 887 [Nagesh Bisto Desai etc., v. Khando Tirmal Desai etc.] it has been held that on regrant of watan lands after its resumption to the holder for the time being of the hereditary office, the watandar is not entitled to remain in exclusive possession and enjoyment thereof to the exclusion of the other members of the joint Hindu family.

INTEREST IN VILLAGE OFFICE INCLUDES RIGHT TO SURVIVORSHIP OF MEMBERS OF THE JOINT HINDU FAMILY

In the case of **Shviappa Fakirappa Shetsanadi v. Kannappa Mallappa Shetsanadi** [ILR 1987 Kar. 3155], it has been held that the normal rights of a member of a joint Hindu family are not affected by the Act. Interest in village office includes right to survivorship of members of the joint Hindu family. That after abolition of the village office and resumption of the land, it

became a ryotwari land and only on regrant the land is released from the nature of impartibility.

**SUIT LAND WAS NOT AVAILABLE FOR
PARTITION TILL REGRANT AS IT WAS
IMPARTIBLE ESTATE**

THE HON'BLE MRS.JUSTICE B.V.NAGARATHNA
of HIGH COURT OF KARNATAKA in the case of
**Pandun vs Laxmibai C Subhadra Decided on
1 October, 2012**

In the instant case, the plaintiffs belong to the junior branch of the family while the defendants belong to the senior branch of the family. The land in question was attached to a village office for rendering sanadi service by the grandfather of the plaintiffs. It is also a settled position that the suit land was not available for partition till regrant as it was impartible estate. Even though the land is granted in favour of one or two members of the joint family it would enure to the other members of the joint family. The family continued to remain joint. After the enforcement of the Act, the land should vested in the State Government and the family lost all rights in the said land and then suit land was not available with the family. When the State

Government regranted the land in the names of the successors of the original holder of the village office, namely Venkat, the land lost by the family was regained by the family and became available for partition. This regrant of land has to be related to the original holder of the village office as the original holder of the village office is entitled to regrant and on his demise his successor/s were entitled to apply for regrant.

**PARTY ALLEGATING HAS TO PROVE
REGRANT ENURES TO ENTIRE BENEFIT OF
THE FAMILY**

Supreme Court in **The State of U.P. -v.- Rukmini Raman, AIR 1971 SC 1687** and held as follows : "In my opinion, the facts are distinguishable and the decision relates to transfer by way of gift of a part of the estate which consisted of certain Inamindari villages. In the present instances, the suit land is not an estate inherited as an ancestral property, but it is the service inam land given to the holder of the office. The rule of law laid down in Rukmini Rama's case cannot apply to the fact of the present case. In the result, I hold that the plaintiff's father alone was the exclusive owner of the suit property and the

property has been re-granted only to the plaintiff. The defendants have failed to prove that it is the joint family property and that the regrant enures to the benefit of plaintiff and defendants. Hence Issues land 2 are answered in the affirmative and Issue No. 5, 6 and Additional Issue No. 1 are answered in the negative."

REGRAANT OF WATAN LANDS IS JOINT FAMILY PROPERTY FOR BOTH HINDU AND MUSLIM

Imamsa Chandas Gurikar and Ors. vs. Mohdinsa Nabisa Gurikar: 2018 (2) KCCR 1520 - MANU/KA/3559/2017 - That the Karnataka Village Offices Abolition Act, 1961, was enacted, and it came into force on 01/02/1963. ("KVOA Act, 1961", for the sake of brevity). All village offices and watans including walikaraki watans were abolished and the right to hold such offices and the emoluments attached thereto stood extinguished. The lands annexed to the village office stood resumed by the State Government subject to the right of the holders of the village offices immediately prior to the appointed date i.e., 01/02/1963, being given the right of regrant

to them on payment of the occupancy price prescribed by law.

According to the plaintiff, although the regrant is made in favour of senior member, it enures for the benefit of all the members of the family. In the instant case, regrant of suit lands has been made in favour of defendants as the legal heirs of Nabisa, who was the senior member of the family of plaintiffs and defendants. Further, it is also not in dispute that on the abolition of the village office under the provisions of KVOA Act, 1961, applications for regrant of the suit lands were made both by Nabisa and Imamsa - plaintiff No. 1. But the regrant was sought by Nabisa in his own name. But Imamsa had sought regrant of the lands in the names of the family members of both plaintiffs as well as defendants. However, the application of plaintiff No. 1 was rejected and the regrant order dated 24/06/1984 was in favour of Nabisa. The order of regrant has been confirmed by the judgment of the learned District Judge dated 04/07/1988 vide Ex. P-1. It is in that judgment itself that liberty has been reserved to the plaintiffs to seek the relief of partition and separate possession of the suit lands.

Conclusion:- On a consideration of the judgments¹ of the Hon'ble Supreme Court as well as this Court, what emerges is that the grant of watan to the eldest member of a family would not make him the exclusive owner of the watan properties. That any member of the family of watandar who has a hereditary interest, both in watan property and in the hereditary office, (as these two concomitants that constitute the watan in terms of Section, 4 of the Watan Act) would be entitled to hold the said office. But in practice, the office of walikar as watandar, was conferred only on the eldest member of the family on the basis of custom by applying the rule of primogeniture applicable to such office. That the Watan Act has been enacted to preserve the pre-existing rights of the members of a joint Hindu family. The word 'family' is defined in Section 4 of the Watan Act to include "each of the branches of the family descended from an original watandar and the expression "head of the family" is defined to include the chief representative of each branch of a family. Although Section 3 of the said Act has brought about a change in the tenure or character of holding as watan land, but that did not affect the other legal incidents of the property

¹ Quoted below

under personal law. Further, the Hon'ble Supreme Court has held that the expression "watandar" cannot be limited to the narrow class of persons who have claimed the hereditary interest both in the watan property or in the hereditary office. Watan property has always been treated as property belonging to the family and all persons belonging to the watan family who had a hereditary interest in such watan property and were entitled to be watandars of the same watan within the meaning of Watan Act were entitled to a share in such property once it ceased to be impartible. It has also been held by the Hon'ble Supreme Court that the watan lands continued to be hereditary property of the family although according to the custom, the watan was only in the name of senior member of the family as the succession according to custom was in accordance with the rule of primogeniture. This Court has further held that an interest in the village office means, that the member of the joint family even though belonged to the junior branch in the family had a right to succeed to the office in the event none was available in the senior branch to succeed to the office. Thus, the holder of the village office under KVOA Act, 1961 would mean, a person having an interest in the village

office under the existing law relating to the said office, would also include junior members of the family who had interest in the village office and not restricted to only those appointed to the said office.

On a survey of the decisions of the Hon'ble Supreme Court and this Court, it is clear that the lands attached to the village office were impartible and they become partible only after they were converted into ryotwari lands. But one cannot lose sight of the fact that the lands in question are watan lands and Nabisa, Imamsa and Rajesa had an interest in the said lands as they were watan lands and it was only on the basis of the rule of primogeniture that Nabisa being the eldest son, was conferred the office of walikar. In fact, Nabisa's application made in the year 1953 was also on the basis of being the eldest son of Chandsa. When Imamsa also sought for appointment as a walikar, the same was negatived as Imamsa was not the eldest son of Chandsa, who was holding the office of walikar till his demise, and not because he did not have any merit to hold the said office.

On a reading of the aforesaid judgments, what emerges is, the impartibility of the watan lands did not per se dilute its nature as joint

family property or render it as separate property of the last holder of the village office so as to negate the right of other members of the joint family to a share in the said property. That an impartible estate is not coparcenary property, but it is joint family property under Hindu law. Further, the watan land attached to an office cannot be excluded from the other properties of the joint family as that would run counter to the scheme of the 1874 Act or the Watan Act. Therefore, the regrant of watan land in favour of any member of the joint Hindu family would imply that it would enure to the benefit of the entire joint Hindu family. This principle would also apply to Muslim family as ruled by the Hon'ble Supreme Court. Further, the right of a member of the joint Hindu family to seek for partition of a joint family property cannot be regarded as a right relating to regrant of land as service inam or as an incident in respect thereof. Such a right is irrespective of regrant of the said land to a holder of the village office. On regrant of the land, the holder is deemed to be an occupant and therefore, the holding changes its intrinsic character and becomes ryotwari land and the land becomes capable of partition by metes and bounds amongst the members of the joint family, be it

Hindu or Muslim, as and when the succession opens or the right to claim partition exists. That once the office of the watandar stood extinguished, the rule of lineal primogeniture stood abolished and the land, on regrant became Hindu Joint Family property held by the watandar for and on behalf of the joint Hindu family just as other property which is in possession of a co-heir, which in law is treated as possession of all co-heirs of the joint family. This is because the grant made in favour of one of the persons of the joint family would enure to the benefit of all. This position also applies to a Muslim family also. Thus, the grant made in the name of ex-watandar or his heir does not mean that the property ceases to be joint family property so as to be excluded from partition and separate possession

Thus, the regrant made in the name of an individual in the joint family would not take away the right of a junior members of the family, who had interest in the village office, to seek partition and share in the suit land according to his personal law, despite the regrant being made in the name of the holder of the village office immediately prior to the date of regrant. The other members of the family of ex-watandar can seek

partition of the watan lands once the same is regranted to a watandar and it becomes ryotwari lands, in terms of their personal law. Thus, on the watan lands becoming ryotwari lands, the Watandari being extinguished, the applicability of rule of lineal primogeniture would also stand abolished and all the persons entitled to claim right to partition in accordance with law as per their personal law.

Case laws quoted:-

Nagesh Bisto Desai Vs. Khando Tirmal Desai reported in MANU/SC/0172/1982 : (1982) 2 Supreme Court 79 (Nagesh Bisto Desai):

(i) The aforesaid was a case which arose under the Bombay Pargana and Kulkarni Watans (Abolition) Act, 1950 (for short "Act 60 of 1950"). The principal question in controversy in those appeals was, as to, whether, Sections 3 and 4 of the said Act and Sections 4 and 7 of the Bombay Merged Territories Miscellaneous Alienation's Abolition Act, 1955 (for short "Act 22 of 1955"), which provided for abolition of watans and alienations in the merged territories, resumption of watan land and its regrant to the holder for the time being, which brought about a change in the tenure or the character of holding as watan land,

affected the other legal incidents of the property under personal law.

(ii) In the said case, the suit was filed inter alia seeking a declaration that the properties described in Schedule B and C appended to the plaint therein, situated in the district of Dharwar, in the State of Karnataka, formed an impartible estate and governed by the rule of lineal primogeniture and that the plaintiff therein being the present holder of the office of Desai was entitled to remain in full and exclusive possession and enjoyment of the suit properties and that the other members of the family had no right, title or interest therein but were only entitled to maintenance and residence. Alternatively, in the event of the Court holding that the properties described in Schedules B, C and D therein were properties belonging to the joint Hindu Family could the plaintiff claim 1/6th share in the said properties. Plaintiffs father, in that case was the last holder of the office of Desai and plaintiff claimed that he was entitled to remain in full and exclusive possession and enjoyment of the properties as watandar and that other members had no right, title or interest therein except as to maintenance as junior members.

(iii) Before the Hon'ble Supreme Court it was argued that impartibility of the tenure was not an incident of the grant but the watan was impartible by custom and succession to it was governed by the rule of lineal primogeniture. The Hon'ble Supreme Court considered the question, whether impartibility of the estate and the rule of lineal primogeniture by which succession to it was governed made the suit properties self-acquired or exclusive properties of the plaintiff therein and therefore, could not be partitioned by metes and bounds between the members of the joint family. While considering the said question, the Hon'ble Court observed that the grant of watan to the eldest member of a family did not make the watan properties the exclusive property of the person who was the watandar for the time being. The said decision was in the context of the rights of persons belonging to joint Hindu family and the Hon'ble Supreme Court observed that the impartibility of the property does not per se destroy its nature as joint family property or render it the separate property of the last holder, so as to destroy the right of survivorship; hence, the estate retains its character of joint family properties and devolves by the general law upon that person who, being in fact and in law joint in

respect of estate, is also senior member in the senior line.

(iv) Relying upon the decision of Privy Council in the case of Anant Bhikappa Patil Vs. Shankar Ramchandra Patil reported in MANU/PR/0026/1943 : AIR 1943 PC 196, the Hon'ble Supreme Court observed that an impartible estate is not held in coparcenary though it may be joint family property. It may devolve as joint family property or as separate property of the last male holder. In the former case, it goes by survivorship to that individual, among those male members who in fact and in law are undivided in respect of the estate, who is singled out by the special custom e.g. lineal male primogeniture. In the latter case, jointness and survivorship are not as such in point, the estate devolves by inheritance by the last male holder in the order prescribed by the special custom or according to the ordinary law of inheritance as modified by the custom.

(v) Thereafter, the Hon'ble Supreme Court considered as to whether the estate attached to the office of the watandar was entitled to remain in full and exclusive possession and enjoyment thereof to the exclusion of the other members of the joint Hindu family and held that if the watan

land attached to such an office was held to be in full exclusive possession and enjoyment of the watandar to the exclusion of the other members of the joint Hindu family, that would run counter to the scheme of the Bombay Hereditary Offices Act, 1874 (now the Maharashtra Hereditary Offices Act) (also known as "Watan Act") and is against settled legal principles. The Hon'ble Supreme Court concluded that the right of the plaintiff in that case in the watan property was subject to the rights of the other members of the family. While saying so, definition of watandar under Watandar Act, was referred to in the following terms:- "'Watandar' means a person having an hereditary interest in a watan. It includes a person holding watan property acquired by him before the introduction of British Government into the locality of the watan, or legally acquired subsequent to such introduction, and a person holding such property from him by inheritance. It includes a person adopted by an owner of a watan or part of a watan, subject to the conditions specified in Sections 33 and 35."

(vi) After referring to the said definition the Hon'ble Supreme Court noted that if the words used in the definition are strictly and literally construed, it would mean that before a person

can be said to be a watandar, he must have a hereditary interest both in the watan property and in the hereditary office, because it is these two that constitute the watan. There is no basis whatever for such a strict construction. The definition is undoubtedly in two parts: the first sets out-what 'watandar' means and the other, states what is included in it and the question arises whether the primary definition i.e., the meaning portion of it, should be regarded as primary and the inclusive part as illustrative or both the parts should be regarded as constituting one whole definition, the inclusive part being supplementary to the former. After discussing the controversy on the aforesaid two lines of interpretation the Hon'ble Supreme Court noted that Watan Act was designed to preserve the pre-existing rights of the members of a joint Hindu family. The word 'family' is defined in Section 4 of the Watan Act to include "each of the branches of the family descended from an original watandar" and the expression 'head of a family' is defined therein to include "the chief representative of each branch of a family". Section 4, which defines watandar includes the members of the joint Hindu family and expression of the watan would include the members of the family other than the

watandar, who are entitled to remain in possession and enjoyment of the watan property.

(vii) It was further observed that the commutation of service had not the effect of changing the nature of the tenure and that even after service, the watan office ordinarily survives without liability to perform service, and on that account the character of watan property still remains attached to the grant. But the State Government may abolish the office and release the property from its character as watan property.

(viii) Further, Act 60 of 1950, had the effect of abolition of the watan, extinction of the office and modification of the right in which the land is held vide Section 3 of the said Act and the same brought about a change in the tenure or character of holding as watan land but they did not affect the other legal incidents of the property under personal law. That sub-section (1) of Section 4 of the Act 60 of 1950, deals with regrant of watan land, Act 22 of 1955 was on similar terms. That the watan lands resumed under the aforesaid Acts had to be regranted to the holder of the watan and he was to be deemed to be an occupant.

(ix) In this context, the Hon'ble Supreme Court referred to the Watan Act and observed that it

contemplated two classes of persons: one is a larger class of persons belonging to the watan families having a hereditary interest in the watan property as such and, the other, smaller class of persons who were appointed as representative watandars and who were liable for the performance of duties connected with the office of such watandars. That it would not be correct to limit the word 'watandar' only to the narrow class of persons who could claim to have a hereditary interest both in the watan property and in the hereditary office. Watan property had always been treated as property belonging to the family and all persons belonging to the watan family who had a hereditary interest in such watan property and were entitled to be called 'watandars of the same watan' within the meaning of Watan Act. That being so, the members of a joint Hindu family must be regarded as holders of the watan land along with the watandar for the time being, and therefore the regrant of the lands to the watandar under sub-section (1) of Section 4 of the Act 60 of 1950 and under Section 3 of Act 22 of 1955 must enure to the benefit of the entire joint Hindu family.

(x) The Hon'ble Supreme Court further noted that a controversy had arisen as to the purport and

effect of the non obstante clause contained in Section 4 of the Bombay Inferior Village Watans Abolition Act, 1958 and ultimately referred to Lakshmi Bai Sadashiv Date and others Vs. Ganesh Shankar Date and others [MANU/MH/0043/1977 : AIR 1977 Bombay 350 (FB)] (Lakshmi Bai Sadashiv Date), wherein a Full Bench of the Bombay High Court had upheld the view taken by Malvankar J., in the case of Dhondi Vithoba Koli Vs. Mahadeo Dagdu Koli & others [MANU/MH/0093/1973 : AIR 1973 Bom 323] (Dhondi Vithoba Koli), wherein it was observed that the effect of non obstante clause in Section 4 was to abolish alienation and rights and incidents in respect thereof. The right of a member of joint Hindu family to ask for partition of a joint family property cannot be regarded as a right relating to grant of land as service inam or as an incident in respect thereof. The object of Section 4 was not to affect in any manner rights created under the personal law relating to the parties and if the property belonged to joint Hindu family, then the normal rights of the members of the family to ask for partition were not in any way affected by reason of the non obstante clause contained in Section 4.

(xi) The Hon'ble Supreme Court accepted the interpretation given by the Bombay High Court on the non obstante clause found in the commencement of Section 4 of the said Act. After referring to sub-section (2) of Section 4 of Act 60 of 1950 and sub-section (3) of Section 7 of Act 22 of 1955, the Hon'ble Supreme Court observed that the object of the said provisions was to impose restrictions in the matter of alienations. On regrant of the land, the holder is deemed to be an occupant and therefore the holding changes its intrinsic character and becomes ryotwari and is like any other property which is capable of being transferred or partitioned by metes and bounds subject, of course, to the sanction of the Collector and on payment of the requisite amount.

Kalgonda Babgonda Patil Vs. Balgonda Kalgonda Patil and others reported in MANU/SC/0255/1989 : 1989 Supp (1) Supreme Court 246 (Kalgonda Babgonda Patil):

(i) In the aforesaid case, the Hon'ble Supreme Court considered Bombay Inferior Village Watans Abolition Act, (1958 Act 1 of 1959) in the aforesaid case. That case questioned the judgment of the Division Bench of Bombay High

Court, which had dismissed the suit for partition by holding that when watan (inam) rights were abolished all rights including the right of partition also stood abolished. In that case, a contention was raised that despite there being a partition of other properties of the joint family, the watan lands continued to be the hereditary property of the family although according to the custom the watan was only in the name of the senior member of the family as the succession according to the custom was in accordance with rule of primogeniture. It was also held in the said case that on the abolition of watans, the watan lands were converted into ryotwari lands and therefore, they become partible. The Hon'ble Supreme Court set aside the judgment of Bombay High Court and held that the watan lands were subject to partition and that the said lands could be partitioned, after they were converted into ryotwari lands.

In Shivappa Tammannappa Karaban Vs. Parasappa Hanammappa Kuraban and others reported in MANU/SC/0864/1995 : 1995 Supp (1) Supreme Court Cases 162 (Shivappa Tammannappa Karaban): (i) The controversy in the aforesaid case was under KVOA Act, 1961,

wherein it was held that the right given to the person in respect of regrant is only a pre-existing right namely, the property attached to the office and the same continues to be enjoyed and belongs to the family and it is impartible by rule of primogeniture. But on account of abolition of the office and grant of ryotwari patta, the land becomes partible subject to the conditions under Section 5(3). In that case it was held that there is no exclusive right to the property and there was no illegality in the decree of partition granted by the Courts below.

Annasaheb Bapusaheb Patil & others Vs. Balwant alias Balasaheb Babusaheb Patil (dead) by L.Rs. & heirs & others [MANU/SC/0172/1995 : (1995) 2 Supreme Court Cases 543] (Annasaheb Bapusaheb Patil):

(i) The aforesaid matter arose under the Maharashtra Revenue Patels (Abolition of office) Act, 1962, which came into force on 01.01.1963. Discussing the scheme of the said Act, the question considered was, whether, on regrant made under Section 5(1) of the Act, the attached watan land was characterized as self acquired property of watandar or not. Reference was made to Nagesh Bisto Desai (supra) and also to the

effect of abolition and extension and modification by operation of Section 3 of Act 22 of 1955 Act (supra) and to the other decisions referred to above emanating from Bombay High Court and it was held in paragraph No. 10 of the judgment that by virtue of Section 3 of the said Act of 1962, the watans were abolished and all the incidents attached to the watandari including the pre-existing custom, operation of law or any decree of Court were nullified by statutory operation. Thereby, incidents attached to the watan i.e., liability to render service as Patel became extinct and the lands became ryotwari lands, the office of watan stood extinguished, the rule of primogeniture stood abolished and the land on regrant became the Hindu Joint Family property held by the watandar for and on behalf of the members of the joint Hindu family. All the members of the family became entitled to claim right to partition by survivorship and that the right to claim partition would accrue to all members of the family after it is regranted. Of course, in that case, the Hon'ble Supreme Court considered the question of adverse possession in light of Article 65 of the Schedule to the Limitation Act, 1963 and held that where possession can be referred to a lawful title, it will

not be considered to be adverse and that a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all.

Abubakar Abdul Inamdar (dead) by LRs and another Vs. Harun Abdul Inamdar and others reported in MANU/SC/0023/1996 : (1995) 5 SCC 612 (Abubakar Abdul Inamdar):

(i) The controversy in this case again arose under Act 22 of 1955, which was also considered in the case of Nagesh Bisto Desai. In this case, the facts were that on the death of the inamdar the agricultural lands were assigned to his eldest son by certain orders passed by the Ruler of Kolhapur. The said inam lands were impartible and the lands devolved upon the eldest son by the rule of primogeniture. On the enforcement of the 1955 Act, the eldest son of the inamdar, Abubakar was regranted the properties as the watandar. His siblings laid a claim to the said lands as co-heirs of Abubakar taking the plea that by virtue of inheritance they had a share in the property as the original inamdar, Syed Abdulla was the father of Abubakar but the office had devolved on Abubakar being the eldest son. It was contended that the bar of impartibility and the

rule of primogeniture fell into insignificance on account of the 1955 Act. The suit had been decried even by the High Court.

(ii) It was contended before the Hon'ble Supreme Court that the parties in that case were Mohamaddens, that the estate of Syed Abdulla, the original inamdar should normally have devolved upon his children in accordance with the shares as defined under the Shariat law. But since the inam lands were impartiable and the services to the Ruler were due from the members of the family through the eldest son by the rule of primogeniture, even then the eldest son was the representative to hold the inam. Once the inam was abolished and regrant was given to Abubakar, the eldest son, the members of the family had a share in the said land as per the law of Shariat. While observing so, the Hon'ble Supreme Court repelled the contention that the legal position would alter if the inamdar was a Mohammedan and the parties seeking succession were Mohammedans and not belonging to a Hindu Joint Family. The Hon'ble Supreme Court emphasized that when Abubakar was confirmed with the inam, there was no distinction created between the Inamdar being a Muslim or a Hindu and that uniformity of tradition in that regard was

a good rule of reason and therefore when the land was available for division by way of inheritance, then even if one member of family was conferred with the office of Inamdar, once it was regranted to him, the members of the family could seek a share in the said estate on the premise that the conferment of office to only one member of the family was on the basis of right of primogeniture and that the said office was held as a hereditary right.

B.L. Sreedhar Vs. K.M. Munireddy reported in MANU/SC/1101/2002 : (2003) 2 SCC 355 (B.L. Sreedhar): (i) The matter arose under the KVOA Act, 1961. It has been held by the Hon'ble Supreme Court that the regrant of the resumed land in the said Act in favour of one of the family members would enure to the whole family but members relinquishing right by word or conduct, in favour of other members, would be bound by estoppel.

K.V. Sudharshan Vs. A. Ramakrishnappa reported in MANU/SC/4277/2008 : (2008) 9 SCC 607 (K.V. Sudharshan): (i) The controversy was considered under the provisions of Mysore (Religious and Charitable) Inams Abolition Act,

1955. In the said case, it was held that respondent No. 1 therein was made Archaka after the death of his father because he was the eldest member of the family. Being the Archaka, he cultivated lands and obtained occupancy rights. In such circumstances, it would be highly unjust to deprive the other members of the family from getting their shares in the said land attached to the office of Archaka and such lands are also available for partition and if the occupancy rights were granted to one of the members of the family, it would not disentitle the other members from claiming a right in the said lands.

N. Padmamma and others Vs. S. Ramakrishna Reddy and others reported in MANU/SC/0911/2014 : (2015) 1 SCC 417 (N. Padmamma): (i)

The question considered was whether the Civil Court had jurisdiction to entertain a suit for partition for division of respective shares amongst the members of a joint family, when in respect of some of the lands, occupancy right had been granted in favour of one of them in terms of the provisions of the Andhra Pradesh (Telangana Area) Abolition of Inams Act, 1955. While considering the said question, in light of the scheme of the said Act, the Hon'ble Supreme

Court held at para-10 that it is well settled principle of law that possession of a co-heir is in law treated as possession of all co-heirs. If one co-heir has come in possession of the properties, it is presumed to be on the basis of a joint title. A co-heir cannot come in possession adversely to other co-heirs not in possession, merely by any secret hostile animus on his own part and in derogation of the title of other co-heirs. Ouster of the other co-heirs must be evidenced by hostile title coupled by exclusive possession and enjoyment of one of them to the knowledge of the other. In that case reliance has been placed on *Kalgonda Babgonda Patil* and the decision in the case of *Nagesh Bisto Desai*. The Hon'ble Supreme Court concluded that the grant made in favour of one of the persons of the joint family would enure to the other members as the grant is for the benefit of all. That is because the grant made in the name of the watandar did not mean that the property ceased to be joint family property.

Mohamadsa Vs. Allisa reported in MANU/KA/0277/1988 : 1988 (2) KLJ 89 (Mohamadsa):

(i) A Division Bench of this Court considered the controversy under the provisions of the KVOA Act, 1961 in an appeal that arose from the

judgment and decree passed in a suit by the trial Court. The said suit was filed seeking a decree for partition and separate possession of the lands in question. The facts could be noted in detail as the said case also concerned with the office of walikar of the village as in the instant case. The lands were enjoyed by the propositus Maktumsa. He had three sons by name, Madansa, Allisa and Mashaksa @ Mashanna. Madansa had three sons by name Mohammadasa, Hanifsa and Kasimsa. The two other sons of Maktumsa i.e., Allisa and Mashaksa @ Mashanna were the plaintiffs in the suit and the three sons of Madansa were the defendants in the suit. The suit seeking partition and separate possession was resisted by the defendants.

(ii) The Division Bench considered the consequences of abolition of village office and regrant of the lands assigned to the village office by placing reliance on another decision of the Division Bench of this Court in the case Shivappa Fakirappa Shetsanadi Vs. Kannappa Mallappa Shetsanadi reported in MANU/KA/0238/1987 : ILR 1987 Kar 3155 (Shivappa Fakirappa), wherein reference was made to two decisions of the Bombay High Court referred to above namely, Laxmi Bai Vs. Ganesh and Nagesh Bisto Desai Vs.

Khando Thirmal and held that under the Act on the abolition of the village offices, regrant of the land is made to the person who was the holder of the village office immediately prior to date of appointment on payment by or on behalf of such holder to the State Government the occupancy price. The Division Bench quoted from the aforesaid judgments to hold that village office and the suit land annexed to it had been continued to be joint family property till the date on which the village office was abolished and the land was annexed to it was resumed. Further, an 'interest' in the village office means that the member of the joint family even though he may belong to a junior branch, had a right to succeed to the office in the event none was available in the senior branch to succeed to the office. Therefore, in the said case it was held that the inferior village office which was granted to the great grandfather of the parties and the suit land which was annexed to the said office, on abolition of the village office and resumption of the suit land as a consequence of abolition of the village office, became available for regrant and the person officiating the said office became entitled to have the land regranted. Further, the Division Bench also cited that the definition of 'holder' means a person having an

interest in the said office under an existing law relating to such office and the expression 'existing law relating to a village office' includes any enactment, ordinance, rule, bye-law, regulation, order, notification, firman, hukum, vat hukum, or any instrument or any custom or usage having the force of law relating to a village office which may be in force immediately before the appointed date. Therefore, the junior members of the family having an interest under the village office must be considered as holders of the village office and a regrant made in favour of a person does not take away the right of the other persons or junior members of the family to seek partition in the suit land as per their personal law.

(iii) Dwelling on the facts of the case, the Division Bench noted that the plaintiffs as well as the defendants in the said suit being the descendants of the common propositus, Maktumsa to whom the village office was granted, also fell within the definition of 'holders of a village office' and that the plaintiffs therein had an interest in the village office under the existing law relating to village office because in the absence of heirs from the elder branch, the plaintiffs were entitled to officiate as Shetsanadis and that a regrant did not take away the right of a junior member of the

family who had an interest in the village office to seek partition and possession of his share in the suit lands according to his personal law, even though the regrant was made in the name of the holder of the village office immediately prior to the date of regrant.

(iv) The Division Bench also placed reliance on Section 90 of the Indian Trust Act, illustration (b), wherein, the person would hold the lands for the benefit of himself and other members of the undivided family and that the principle applies to a Mohammeden family as well holding Shet sanadi lands immediately on the appointed date by relying on a judgment of a learned Single Judge of this Court in the case of Aminsahab Dastagirsahab Mulla and others Vs. Hussainsahab Rasulsahab Mulla and another in RSA No. 281/1972 dated 22.06.1976. Accordingly, it was held that on the regrant of the lands in favour of the first defendant therein, the plaintiffs and defendants became the co-owners as each one of them became entitled to a share in the suit lands and the decree granted by the trial Court was affirmed.

**Beerappa Vs. Fakirappa Beerappa Bandrolli
reported in MANU/KA/1267/2006 : ILR 2006**

Kar 4170 (Beerappa): (i) This is again a judgment of the Division Bench of this Court, reliance has been again placed on the decision of the Shivappa Fakirappa as well as the decisions of the Hon'ble Supreme Court referred to above to hold that a 'holder' of village office means a person having interest in the village office under the existing law relating to the said office. An interest in the village office means and includes the right to survivorship of the members of the joint family. The right to succession by survivorship is a right accrued to the members of the joint family in respect of joint family property and therefore junior members of the family have the interest in the village office and they have to be considered as the holders of village office. Reiterating that lands attached to the village office is not available for partition till it becomes ryotwari land i.e., when it is regranted subsequent to resumption made by the State, the Division Bench held that succession to such land would be on the basis of the rules regarding succession as applicable to the parties in terms of their personal law. Further, any person holding village office will hold the said office on his behalf and also on behalf of other members of the joint family. By placing reliance on the decision in the case of Annasaheb

Bapusaheb Patil, the Division Bench held, even on the abolition of watans, all the incidents attached to the watandari namely, the obligation to render service becomes extinct and the land becomes ryotwari land on regrant and the office of watans become extinguished. The applicability of lineal primogeniture also would stand abolished, all members of the family would be entitled to claim right to partition by survivorship.

Division Bench decision of this Court in the case of **Malleshappa Yeshvantahappa Patil Vs. Kallappa Vithoba Patil and others reported in 1970 (2) KLJ 350**, wherein question arose as to whether an individual is exclusively the holder of the village office, or whether the entire joint family of which he is a member, is the holder of the village office, as such a question falls within Section 3(1)(b) of the KVOA Act, 1961. The Division Bench held that while considering the question as to in whose favour land should be regranted under Section 5 of the said Act, if a question arises as to which of such applicants is or are holder or holders of the village office, it cannot be said that such a question does not fall within Section 3(1)(b), merely because those applicants had not made an application or

applications in the manner provided in Rule 3 but had made the applications under Rule 5 of the rules made under KVOA Act, 1961. Rule 3 made under the said Act prescribes the manner of holding an enquiry under Section 3. Sub-rule (1) of Rule 3 provides that any person interested in the village office or in any land granted or continued in respect of or annexed to, such an office and desiring a decision on any question referred to in Section 3, may make an application to the Deputy Commissioner. Whereas sub-rule (1) of Rule 5 provides, inter alia, that a person entitled to the regrant of a land, shall make an application to the Deputy Commissioner for such regrant within three months from the date of payment of full occupancy price. The functioning of the Deputy Commissioner in this regard has been delegated to the Assistant Commissioners in-charge of Revenue Sub-Divisions and in respect of the areas within their respective jurisdiction and subsequently there has been a further delegation to the Tahasildar. The Division Bench further held that Section 2(1) of the Act which contains the definition of 'holder of a village office', which term includes not only an individual but also the whole body of persons having interest in a village office where such

village has been entered in a register or record relating to such village office is being held by such body. The word 'person' in clause (b) of Section 3(1) includes persons.

G.K. Basappa and others Vs. Tahsildar, Shimoga and another reported in [1991 (3) Kar.L.J. 401] (G.K. Basappa and others): This is also a case, which arose under the very same subject. In this case also there were rival applications filed by the members of the same family. A dispute arose as to which of the parties had to be regranted the lands attached to the village office and it is observed that when rival claims are made before the Tahasildar for regrant of the land and when such of claimants are unsuccessful in their attempt they cannot turn round and say they would be entitled to the benefit that may accrue in favour of holders of the village office.

Yamanauva and another Vs. Chandrawwa reported in MANU/KA/0162/2005 : 2007 (1) Kar.L.J. 626 (Yamanawa and another): In this case, it has been held that where land is granted exclusively in favour of a party, it would not be entitled for the benefit of the family, particularly

when there was severance of status of joint family. In that case also the dispute was with regard to walikari land and the question was whether the family continued to remain joint. There was a concurrent finding of the Courts below that there was partition of properties between the family members and thereafter the grant was made in favour of one of the members of the family. In that context, it was held that the grant was exclusively in favour of the defendant in the said case and it would not enure to the benefit of the plaintiff as the family no longer remained joint pursuant to a partition in the family.

Court in the case of **Appanna and others Vs. Lakkappa Devappa reported in 1983 (1) KLJ 482** (Appanna and others), which also pertains to walikari watans, wherein it has been held that in the case of walikarki properties, where a regrant is made in the name of one of the members of the family, who was performing the walikarki services, the grant enures to the benefit of all the holders of that office in the family and the members of the family have a right to claim partition in the said regranted land. It was further held that after the village office was abolished and

the watan lands were resumed on the appointed date i.e., 01.02.1963 and thereafter the cause of action for partition would arise only in 1963 (or on a subsequent date when the land is regranted). Reliance has been placed on the Full bench decision of the Bombay High Court in Lakshmi Bai Sadashiv Date and others Vs. Ganesh Shankar Date and others [MANU/MH/0043/1977 : AIR 1977 Bombay 350 (FB)] (Laxmi Bai Sadashiv Date) in coming to such conclusion. It is further observed that when lands are regranted, the same would enure to the benefit of the entire family, provided there would be no partition between the members of the family as on the date of the regrant. In Lakshmi Bai Sadashiv Date, while considering the provisions of the Act, the Bombay High Court held that the provisions of the said Act does not affect the normal rights of a member of a Hindu family under the personal law applicable to Hindus. Thus, where the service inam was a grant to the joint Hindu family in the name of the senior member and the same was abolished it could not be contended that the right of the other members of the family relating to partition of joint family property was extinguished nor could it be contended that when the regrant was made under

Section 7 in the name of the grantee, the other members had no right to ask for a share therein by way of partition.

Mudakappa Vs. Rudrappa and others reported in MANU/SC/0259/1994 : AIR 1994 SC 1190

has been pressed into service to contend that under the provisions of Karnataka Land Reforms Act, if a question would arise as to whether the joint family or one of its members is a tenant, the Tribunal would have jurisdiction to decide such question under Section 48A read with Section 133 and not the Civil Court and when the Tribunal is invested with the power and jurisdiction to adjudicate rival claim, the correctness of its order could be tested either in an appeal or by judicial review under Article 226 or Article 227 of the Constitution, as the case may be, but the finding given with regard to rival claims on tenancy rights cannot be subject to a jurisdiction once again before the Civil Court. The Civil Court will have power only to decide other issues. Learned Counsel for the respondents by drawing an analogy from the aforesaid decision contended that in the instant case also rival applications were filed for conferment of office of the Walikar both by Nabisa as well as Imamsa

and by order dated 24/06/1954 the concerned authority conferred the office of walikar on Nabisa and challenge made to the said order before the Pranth Officer was also unsuccessful as the appeal was dismissed on 30/11/1954. Thereafter, there has been no further challenge to that order. The said conferment of office on Nabisa was in his individual capacity and not on the family of Chandsa. Consequently, the holder of the office namely, Nabisa was rightly regranted the land under the provisions of the KVOA Act, 1961 on the resumption of such land on 01/02/1963 (appointed date) and hence the findings arrived at while regranted the land to Nabisa (which were also challenged by the appellants herein before the District Court in Misc. Case No. 5/1984 which appeal has also been dismissed as per Ex. P-1) would clearly imply that the questions which have gone into by those statutory authorities cannot be re-agitated in the present suit.

Anjanappa and others Vs. Byrappa (Since deceased) by LRs. reported in MANU/KA/0451/1995 : 1995 (5) Kar.L.J. 459
to contend that even under the provisions of the Mysore (Personal and Miscellaneous) Inams

Abolition Act, 1954 where a grant of occupancy right is made to the tenants of inam lands, the exclusive jurisdiction is conferred on Special Deputy Commissioner to do so and the jurisdiction of the Civil Court is ousted and when once the order of the Deputy Commissioner attains finality, the same cannot be challenged in collateral proceedings like in a suit for partition and possession of property.

Syed Basheer Ahamed Vs. State of Karnataka reported in MANU/KA/0032/1994 : ILR 1994 Kar 159 and the other is Laxman Gowda and others Vs. State of Karnataka reported in MANU/KA/0179/1980 : ILR Kar 1980 (2) 892 (Laxman Gowda). Of course, the said decision pertains to the prohibition of alienation of service inam lands and the legality of the alienation made after enforcement of the KVOA Act, 1961 and, as to, whether, an alienee can derive any right or interest in such land. It was held that the holder or the authorized holder of the service inam land do not get any title to it when that land stood resumed to the Government under sub-section (3) of Section 4, but he gets title to it when it is regranted to him under Section 5 or 6, as the case may be. If there had been no alienation before the

Act coming into force and before it was regranted, then the alienee acquires title to that land after such regrant is made to alienor.

LAND REFORMS TENENCY GRANT AND PARTITION

Shatawwa and Ors. vs. Parwatevva and Ors.:

MANU/KA/0631/2016 - In the instant case, on the death of Siddayya, the tenant, Doddayya and Basayya inherited the tenancy in respect of the suit land. Both the courts have held that the family continued to remain joint and the branch of Doddayya and Basayya continued to cultivate the lands jointly. After the demise of Doddayya, Shankrayya filed an application in Form No. 7 under the provisions of the Act seeking grant of occupancy rights. The grant of occupancy rights in the name of Shankrayya would enure to the benefit of the entire family comprising of two branches, which according to both the courts below, had remained joint. In fact, it is not in dispute that just as Basayya had inherited the tenancy Doddayya had also inherited tenancy rights in respect of the land in question. Therefore, the question is with regard to partition and separate possession of the land having

regard to the inheritance of tenancy by Doddayya and Basayya. During their lifetime there being no partition of the suit land, the family of Doddayya and Basayya continued to be joint. Therefore, when the application was filed by Shankrayya for grant of occupancy rights, it was not in his individual capacity. It was as a member of the joint family comprising of Doddayya's branch as well as Basayya's branch. In fact, Shankrayya had male and female children. It was not as if, only he could have been registered as a sole occupant of the land in question. Thus, it is held that if the Land Tribunal, Hungund, granted occupancy rights in the name of Shankrayya, it enured to the benefit of the entire family, comprising of two branches, whose heads were the heirs of the original tenant, Siddayya.

Shivappa Tammannappa Karaban v. Parasappa Hanammappa Kuraban and Ors.
MANU/SC/0864 /1995 : 1995 Supp (1) SCC 162. That was a case arising under the Karnataka Village Officers Abolition Act, 1961. Re-grant was made in that case in the name of the former holder of the village office as a

watandar. This Court held that just because the grant was made in the name of watandar, did not mean that the properties ceased to be joint family properties.

In Lokraj and Ors. v. Kishan Lal and Ors.

MANU/SC/0669/1995 : (1995) 3 SCC 291 also

this Court was dealing with abolition of inam under the Andhra Pradesh (Telangana Area) Abolition of Inams Act, 1955. A suit for partition of the inam land was filed which was contested on the ground that abolition of the pre-existing right, title and interest of inamdar and grant of occupancy right to the occupant of the land disentitled anyone to claim a partition of such land. This Court while holding that the suit was not maintainable on account of abolition of pre-existing right, title and interest of the inamdar, observed: 4. Consequent to the abolition, the pre-existing right, title and interest of the inamdar or any person having occupation of the inam lands stood divested and vested the same in the State until re-grant is made. The inamdar, thereby lost the pre-existing right, title and interest in the land. The right to partition itself also has been lost by the statutory operation unless re-grant is made. We are not concerned with the

consequences that would ensue after re-grant of this appeal. Therefore, it is not necessary for us to go into the question that may arise after the re-grant.

In Kalgonda Babgonda Patil v. Balgonda Kalgonda Patil and Ors. MANU/SC/0255/1989 : 1989 Supp (1) SCC 246, Court was dealing with inam lands held by ancestors of Appellants under Vat Hukums of Kolhapur State. The ancestors of the Appellant were holding the watan (inam) land in lieu of service and as they were holding in the capacity of watan or inam, they were impartible. The Trial Court decreed the suit for partition in regard to watan land. In an appeal before the High Court of Bombay, the Division Bench of that Court held that when watan (inam) rights were abolished, all rights including the right of partition also stood abolished. A three-Judge Bench of the High Court of Bombay overruled the view in another case holding that in view of abolition of inam, the properties enure for enjoyment of the members of the family who are entitled to claim partition. This Court held: These watan lands continued to be the hereditary property of the family although according to the custom the watan was only in the name of the

senior member of the family and the succession according to the custom was in accordance with rule of primogeniture. For the first time under this Act these watans were abolished and the lands were converted into rayotwari lands and therefore it became partible.

In the case of **Nimbavva Others vs. Channaveerayya & Others**, reported in **MANU/KA/3854/2013 : ILR 2013 KAR 6202**, a Division Bench Court has held as follows:

"17. So far as the first point is concerned, Section 2(12) of the Karnataka Land Reforms Act defines "Family" as under:

2(12) "Family" means-

- (a) in the case of an individual who has a spouse or spouses, such individual, the spouse or spouses and their minor sons and unmarried daughters, if any;
- (b) in the case of an individual who has no spouse, such individual and his or her minor sons and unmarried daughters;
- (c) in the case of an individual who is a divorced person and who has not remarried, such individual and his minor sons and unmarried daughters, whether in his custody or not; and

(d) where an individual and his or her spouse are both dead, their minor sons and unmarried daughters."

By looking into the definition of family, it includes only the spouse, minor sons and unmarried daughters. At no place, "married daughters" finds a place under the Karnataka Land Reforms Act.

18. Section 24 of the Karnataka Land Reforms Act reads as hereunder: "24. Rights of tenant to be heritable: Where a tenant dies, the landlord shall be deemed to have continued the tenancy to the heirs of such tenant on the same terms and conditions on which such tenant was holding at the time of his death."

19. On perusal of Section 24 of the Act read with the definition of family, it is clear that married daughter cannot claim share in respect of tenanted land. The question whether the married daughters can claim a share in respect of a tenanted land of their father is decided by this Court in KAMALA vs. LINGAMMA HENGUSU (Supra), wherein it is held that only the family members as defined in the Karnataka Land Reforms Act are entitled for inheritance by way of succession after the death of their father. The legal position in regard to the right of a married

daughter to claim a share in respect of a tenanted land of her father cannot be disputed by the plaintiff's counsel. We would have agreed with the contentions urged by Mr. Kini that the plaintiffs are entitled to equal share on par with the sons when the father died intestate provided there is a heritable right to them under the Act. Karnataka Land Reforms Act is a special enactment which has been enacted for the benefit of cultivator, the same cannot be deviated by this Court by applying the provisions of Hindu Succession Act.

In I.L.R. 1975 Kar 1499 (Korapolu Hengsu v. Sesu) looking to the substance of the matter and having found that it was not a case of rival tenancy at all, the Court held that when the dispute is whether a particular item of the property is a joint family or individual property, it is only the Civil Court that has to decide such dispute.

In MANU/KA/0080/1976 (Vaikunta Prabhu v. Roasari D'Almeda) the learned Judge keeping in view Ss. 48A(5), 112(B)(b) and 133 concluded that the Tribunal alone has the jurisdiction to decide the question of rival tenancy set up by the parties observing that exclusive jurisdiction is conferred

on the Tribunal to decide whether a person is a tenant or not and also to decide who among the rival claimants, is entitled for grant of occupancy rights.

In 1979 (1) KarLJ 18 (Dhareppa v. State of Karnataka) the learned Judge held that where there are rival claims of tenancy they can be decided by the Tribunal by finding out who amongst them was the tenant as defined in the Act. It is stated, broadly speaking rival claims may fall into two categories :

(1) cases where each claims himself to be the tenant as defined in the Act.

(2) rival claims wherein each claims occupancy rights not on the basis that he was a tenant as defined in the Act, but as a success or-in-interest of the original tenant or as a member of a joint family, the lease hold rights being the property of such a family.

In 1982 (2) Kar L.J 565 (Appi Belchadthi v. Sheshi Belchadthi) the Division Bench of this Court having referred to the decision in the cases of Mudakappa and Dhareppa has stated thus in para 20 (at page 571): "We will now consider the decisions relied upon by the Counsel on both

sides. Mr. Acharya strongly relied upon the decision of this Court in *Mudakappa v. Rudrappa* MANU/KA/0143/1978. Therein, one of the members of the family had claimed occupancy rights on the ground that he alone was the tenant of the land in disputes to the exclusion of others. But the other members of the family contended that they were jointly cultivating the land as lessees along with the applicant and the tenancy belonged to the joint family and that was not divided in the partition. The question between the parties therein was therefore, mainly based on the possession and cultivation of the tenanted lands and it was in that context this Court has rightly observed that it was an incidental question the determination of which was within the powers of the Tribunal. It was observed therein that the question whether the tenancy was held by one of the members of the family exclusively or by all the applicants jointly would be a question incidental and ancillary to the main question to be decided, the main question being who was entitled to be registered as occupant. The question involved in the present case is quite different. The crux of the matter herein, as we have noticed earlier, is as to the right of the appellants to claim a share in the occupancy right

granted in respect of the plaint B Schedule properties. The decision in Mudakappa v. Rudrappa has been exhaustively considered by Venkatesh J. in Dhareppa v. State of Karnataka (1979 (1) Kar LJ 18) wherein it was observed : "Is it the intention of the legislature that all such issues like the existence of a joint family or coparcenary, whether a person is a member of a joint family; if he is, had he succeeded by survivorship to the property of such family; to what extent; and whether a person who claims to be an heir of the deceased tenant was in fact the heir; to what quantum of a share in the property of the deceased is he entitled to; and whether the will or the gift set up by a party is genuine or not etc. should also be decided by the Tribunal? If we look at the broad scheme of the Act that does not appear to be the intention at all. On the other hand, the intention of the legislature was to allow such complicated questions to be fought out by the contesting parties in Civil Courts".

The learned Judge after summarising the various provisions of the Act and the Rules, continued : "Now while deciding the rights of rival claimants if it becomes necessary to decide questions such as heirship, succession and existence of a joint family, and the like, how

should the Tribunal proceed with the matter? It cannot refer such issues to the Civil Courts. Even if the parties are already litigating in the civil Court re : their respective rights the Tribunal cannot await the decision from that court keeping the applications pending before it. The only course that it can adopt is to choose one of the rival claimants for conferment of occupancy rights reserving liberty to other claimants claiming occupancy rights before it to establish their rights, if any, in the land in question in a civil court of competent jurisdiction".

We entirely agree with the above view expressed by Venkatesh J. we may only add that a person's right to get a share in the occupancy right does not depend upon the liberty being reserved by the Tribunal to approach the Civil Court, because as seen earlier, such a right is not extinguished by not approaching the Tribunal. It is pertinent to remember that the grant of occupancy right by the Tribunal in the name of a given individual in respect of joint family tenanted lands will not have the effect of converting that into a separate property of that individual. Nor the occupancy right granted in respect of a personal tenancy of that individual would acquire a different character. In both the cases, the

antecedent tenancy rights are enlarged into permanent occupancy rights by doing away with the landlord. To put it shortly, the Act converts the lease hold into freehold and does no damage to the existing rights of the occupant's family or any member thereof".

In 1983 (1) Kar L.J 61 the Court has held that the Tribunal has no power to decide the shares of the heirs and apportion. The only course open to the Tribunal is to choose one of the rival claimants for conferring occupancy rights reserving opportunity to the other claimants to establish their rights in civil Courts.

In 1983 (2) Kar L.J 27 the Court has stated that if the Tribunal conferred occupancy rights as a joint family property in favour of the joint family, the party aggrieved can establish his exclusive right in the said property in a regular suit.

In MANU/KA/0255/1984 : ILR1985KAR386 (Guruvappa v. Manjappu Hengsu) the Division Bench Court affirmed the view taken in Mudukappa's case and held that the Tribunal has the necessary jurisdiction and power to decide as to who is a tenant. A joint family can also be a

tenant and that the Tribunal has the power to decide as to whether a joint family is a tenant or not under S. 112(B) of the Act.

In MANU/KA/0243/1987 : ILR1987KAR3336 (Timmakka Kom Venkanna Naik v. Land Tribunal) the Division Bench Court has taken the view that when an application filed under S. 48A of the Act comes, up before the Tribunal, it has to necessarily examine the question as to whether the applicant is a tenant or not under S. 112(B)(b) and that it is the duty of the Tribunal to decide whether a person is a tenant or not. The Court proceeded to say that, therefore, it may be necessary for Land Tribunal to go into the question of genuineness or the validity of a will whenever such a will is the basis of a claim of a person, claiming to be a tenant.

Booda Poojary vs. Thoma Poojarthi and Ors.: MANU/KA/0008/1993 - ILR 1992 KAR 1359 (FB) The grant of occupancy rights by the Tribunal to an individual in respect of joint family tenanted lands will not have the effect of converting that into a separate property of that individual nor the occupancy rights granted in respect of personal tenancy of that individual

would acquire a different character. After grant of occupancy rights in respect of an agricultural land, the lease hold rights stand converted into free hold rights without damaging the existing rights of the occupants family or any member thereof. It is open to the parties to get their share, title or interest decided in the Civil Court in the property in respect of which occupancy rights are granted under S. 48A of the Act.

Venkatarayappa and Ors. vs. Ramakka and Ors.: MANU/KA/1689/2017 -

However, when the entire judgment of Full Bench Booda Poojary's case, referred to supra, is looked into, the 'cultivator' is not individually referred to as 'cultivator' in all the judgments, which are referred to therein and also in the judgment rendered by the Full Bench. In fact, it is referred to as "cultivators' family" throughout signifying that family has a special and different meaning in the context of the Karnataka Land Reforms Act, which cannot be either understood or considered in any different way to include married daughter as a member of that family, for the reason that the 'family' as defined in Section 2(12) of the aforesaid Act does not give scope for such interpretation. When once a land is allotted to the

family of cultivator, it remains in the family of cultivator and can be devolved upon the members of that particular family and not to any persons who have gone out of the family. However, there may be exception in a situation where the cultivator being alone and his family does not have any other person other than himself, then it becomes an absolute property of that person. Thereafter, that property can be available for succession as in the case of male or female succession as provided under Hindu Succession Act and not in the other way.

Narayana v. A. Sadashiva
[MANU/KA/0374/2000 : ILR 2000 Kar. 487], it has been held that once the occupancy rights are granted to the Tribunal, the lease-hold rights would get converted into freehold right without affecting the other rights of the joint family of which the person to whom occupancy rights are granted, is a member. It is always open to the other members to claim their share in a Civil Court.

In Balagouda Alagouda Patil & others v. Babasaheb Ramagouda Patil
[MANU/KA/0444/1998 : ILR 1999 Kar. 831], it

has been held that where tenancy rights have been acquired by a member of the joint family, such rights shall be held to be for the benefit of the entire family.

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CHAPTER-18
COMPROMISE - SETTLEMENT -
ARRANGEMENT

**COMPROMISE IN THE SUIT REGARDING
FAMILY SETTLEMENT NEED NOT BE
REGISTERED 1976 SC**

In the decision reported in **Kale v. Dy. Director of Consolidation, AIR 1976 SC 807**, it was held that the compromise need not require any registration. In **Ram Charan v. Girja Nandini, AIR 1966 SC 323**, it was held that the compromise between parties in a previous suit was family settlement and was binding on them and that every party who takes benefit under it need not necessarily be shown to have, under the law, a claim to a share in the property. 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 a claim or even a semblance of a claim on some other ground, as say affection.

Ram Gopal v. Tulshi Ram
MANU/UP/0144/1928 : AIR 1928 Alld. 641
(FB), in which it has been held that if family

settlement is reduced in writing and its value is more than ` 100/- then it requires registration. **Ram Gati Chaube v. Ram Adahar Chaube** MANU/UP/0137/1961 : AIR 1961 Alld. 537 (FB), in which it has been held that compromise declaring right in immovable property of the value of more than ` 100/- was compulsorily registrable document. Its non-registration would render compromise decree ineffective.

Supreme Court in **Kuppuswami Chettiar v. A.S.P.A. Arumugam Chettiar** MANU/SC/0211/1966 : AIR 1967 SC 1395, in which it has been held that a deed called a deed of release can, by using words of sufficient amplitude, transfer title to one having no title before the transfer.

Yellapu Uma Maheswari v. Buddha Jagadheeswararao MANU/SC/1141/2015 : 2016 (130) RD 479 (SC), in which it has been held that the nomenclature given to the document is not decisive factor but the nature and substance of the transaction has to be determined with reference to the terms of the documents and that the admissibility of a document is entirely dependent upon the recitals

contained in that document but not on the basis of the pleadings set up by the party who seeks to introduce the document in question.

Supreme Court in Tek Bahadur Bhujil v. Debi Singh Bhujil MANU/SC/0389/1965 : AIR 1966 SC 292, in which it has been held that it is well settled that a compromise or family settlement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each parties relinquishing all claims to the properties other than that falling to his share and recognizing the right of the others, as they had previously asserted it, to the portion allotted to them respectively.

Tarakanath v. Sushil Chandra Dey MANU/SC/1176/1996 : 1998 (Suppl.) RD 205 (SC), in which it has been held that it would be open to the sisters to relinquish their rights by way of gift, even oral, which is valid in personal law. Since the tenant has been in occupation, it would be constructive delivery of the possession. Delivery of the physical possession to the brothers, in the circumstances, is not warranted. As regards the family settlement of the brothers, it would be

open to the brothers to resolve the prospective dispute by way of family settlement. The brothers having agreed for the settlement, though they have been impleaded as party respondents to the suit, they have not challenged the family settlement nor have they contested the validity thereof.

Bakhtawar Singh v. Gurdev Singh (1996) 9 SCC 370, in which it has been held that a subsequent memorandum recording past oral partition as a family settlement was not required to be registered.

ORDINARY COMPROMISE BETWEEN STRANGERS, DO NOT EQUALLY APPLY TO THE CASE OF COMPROMISES IN THE NATURE OF FAMILY ARRANGEMENT

Kale v. Deputy director of Consolidation, AIR 1976 Sc 807, the Supreme Court had dealt with the legal position regard it family arrangement. Fazal Ali J., speaking for himself and Krishan Iyer J. had at p. 812, cited the following passage from Kerr on Fraud: "The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises

in the nature of family arrangement. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend."

FAMILY SETTLEMENT EXPLAINED

In Kale and others v. Deputy Director of Consolidation and others, AIR 1976 SC 807 it has been held that the object of the arrangement is to protect family from filing long drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Their Lordships opined that the family is to be understood in the wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of claim or even if they have a spes successionis so that future disputes are sealed forever and litigation are avoided. What could be the binding

effect and essentials for a family settlement were expressed thus:-

“10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangements may be even oral in which case no registration is necessary;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or

extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) (sic) (Sec. 17 (1) (b)?) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.”

S. Shanmugam Pillai & others v. K. Shanmugam Pillai & others. AIR 1972 SC 2069 in the following terms:- “In *Maturi Pullaiah v. Maturi Narasimham*, AIR 1966 SC 1836 this

Court held that although conflict of legal claims in praesenti or in futuro is generally a condition for the validity of family arrangements, it is not necessarily so. Even bona fide disputes present or possible, which may not involve legal claims would be sufficient. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an agreement is entered into bona fide and the terms thereto are fair in the circumstances of a particular case, the Courts would more readily give assent to such an agreement than to avoid it."

M.N. Aryamurthy and another v. M.D. Subbaraya Setty [MANU/SC/0479/1971 : AIR 1972 SC 1279] rendered by a three Judge Bench, has argued that Ext. A1 cannot be considered as a family settlement. It was held in paragraph 10 of the decision noted supra, that: "As pointed out in Halsbury's Laws of England, 3rd Edition, Vol. 17, at p. 215: A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the

family by avoiding litigation or by saving its honour." The aforesaid view in relation to family settlement had been originally formed by the Apex Court in *Maturi Pullaiah and another v. Maturi Narasimham and others* [MANU/SC/0328/1966 : AIR 1966 SC 1836]. "It will be, therefore, seen that, in the first place, there must be an agreement amongst the various members of the family intended to be generally and reasonably for the benefit of the family. Secondly, the agreement should be with the object either of compromising doubtful or disputed rights, or for preserving the family property, or the peace and security of the family by avoiding litigation, or for saving its honour. Thirdly, being an agreement, there is consideration for the same, the consideration being the expectation that such an agreement or settlement will result in establishing or ensuring amity and good-will amongst the relations."

In K.H. Krishna Iyer and others v. Parvathy Ammal and others [MANU/KE/0378/1988 : 1988 (2) KLJ 156], Court had occasion to consider the parameters, which can bring a document in the category of a family arrangement. In order to bring out a document within the scope of family arrangement, it was

held that - "..... the essential requirements are (1) there must be agreement among the various members intended generally and reasonably for the benefit of the family, (2) the agreement must be with the object of compromising doubtful or disputed claims or rights for preserving the family property or for purchasing peace and security of the family by avoiding litigation or saving its honour and (3) there is consideration which could be the expectation that the arrangement will result in establishing or ensuring amity or goodwill among the relations. It must be an arrangement that comes into existence in presente."

Namburi Basava Subrahamanyam Vs. Alapathi Hyma Vathi and others [MANU/SC/0564/1996 : (1996) 9 SCC 388] The said recital clearly would indicate that the settlement deed executed on that date is to take effect on that day. She created rights thereunder intended to take effect from that date, the extent of the lands mentioned in the Schedule with the boundaries mentioned thereunder. A combined reading of the recitals in the document and also the schedule would clearly indicate that on the date when the document was executed she had created right, title and interest

in the property in favour of her second daughter but only on her demise she was to acquire absolute right to enjoyment, alienation etc. In other words, she had created in herself a life interest in the property and vested remainder in favour of her second daughter. It is settled law that the executant while divesting herself of the title to the property could create a life estate for her enjoyment and the property would devolve on the settlee with absolute rights on settlor's demise. A reading of the documents together with the Schedule would give an indication that she had created right and interest in praesenti in favour of her daughter Vimlavathy in respect of the properties mentioned in the schedule with a life estate for her enjoyment during her life time. Thus, it could be construed rightly as a settlement deed but not as a will. Having divested self thereunder, right and title thereunder, she had, thereafter, no right to bequeath the same property in favour of her daughter Hymavathy. The trial Court and the learned single Judge rightly negatived the claim. The Division Bench was not, therefore, correct in law in interfering with the decree of the trial Court."

Rajammal v. Pappayee Ammal
[MANU/TN/2002 /2002 : 2002(4) CTC 406],

Madras High Court, considering the various judgments in the field, in Paragraph No. 32, has held as follows:

32. From the above said decisions, we can formulate the following broad formula to be applied to find out the nature of the document:-

(1) The intention of the executor or executrix has to be found out by reading the entire recitals in the document and the phraseology used therein.

(2) The nomenclature (settlement or will) given in the document is not a deciding factor.

(3) The registration of the document and the quantum of stamp paper used also have to be taken into consideration.

(4) The recitals regarding the right to revoke or restriction to revoke the document is not a deciding factor with reference to the character of the document.

(5) Though actual disposition can be postponed till the lifetime of the settlor or though prima facie it appears that disposition consummates after his death, if there is a present disposition and vesting of right in praesenti, the document has to be construed as a settlement and not as testamentary.

(6) If any restriction is imposed on the beneficiaries to encumber or alienate the properties during the lifetime of the executor, then the said document is only a testamentary and not a settlement.

(7) If the executant is entitled to be in possession of the property and enjoy the benefits during his lifetime with the power to encumber, the document has to be construed only as a will.

(8) If the executant imposes self-restriction and with reference to sale and encumbrance, though he is in possession of the property after execution of the said document, the document has to be construed only as a settlement and not as a will."

MANU/SC/0180/2010 : 2010 (5) CTC 113

[P.K. Mohan Ram v. B.N. Ananthachary], the Hon'ble Apex Court, drawing a distinction between vested interest and contingent interest, has held that when there is immediate right of present enjoyment or present right for future enjoyment created in the document, a vested interest has been created in favour of the settlee.

..... In the above judgment, in Paragraph 13, the Hon'ble Apex Court has held as follows: "Having noticed the distinction between vested interest and contingent interest, we shall now

consider whether Ex.A.2 was a Settlement Deed or a Will. Although, no strait-jacket formula has been evolved for construction of such instruments, the consistent view of this Court and various High Courts is that while interpreting an instrument to find out whether it is of a testamentary character, which will take effect after the life time of the executant or it is an instrument creating a vested interest in praesenti in favour of a person, the Court has to very carefully examine the document as a whole, look into the substance thereof, the treatment of the subject by the settlor/executant, the intention appearing both by the expressed language employed in the instrument and by necessary implication and the prohibition, if any, contained against revocation thereof. It has also been held that form or nomenclature of the instrument is not conclusive and the Court is required to look into the substance thereof."

IF A PARTY TO THE SETTLEMENT HAS NO TITLE OTHER PARTIES RELINQUISHED ALL ITS CLAIM OR TITLE IN FAVOUR OF SUCH PERSON AND ACKNOWLEDGES HIM TO BE THE SOLE OWNER THEN THE FAMILY ARRANGEMENT WILL BE UPHELD

In the case of **Kale and others vs. Deputy Director of Consolidation, AIR 1976 Supreme Court 807**, the Hon'ble Supreme Court has held that "even if one of the parties to the settlement has no title but under the arrangement the other parties relinquished all its claim or title in favour of such person and acknowledges him to be the sole owner then the vesting of title must be assumed and the family arrangement will be upheld and the court will find no difficulty in giving assent to the same."

FAMILY SETTLEMENTS TO BE VIEWED DIFFERENTLY FROM ORDINARY CONTRACTS AND THEIR INTERNAL MECHANISM FOR WORKING OUT THE SETTLEMENT SHOULD NOT BE LIGHTLY DISTURBED

In **K.K. Modi v. K.N. Modi ((1998) 3 SCC 573)** (Sujata Manohar and D.P. Wadhwa, JJ.) "[A] family settlement which settles disputes within the family should not be lightly interfered with especially when the settlement has been already acted upon by some members of the family. In the present case, from 1989 to 1995 the memorandum of understanding has been

substantially acted upon and hence the parties must be held to the settlement which is in the interest of the family and which avoids disputes between the members of the family. Such settlements have to be viewed a little differently from ordinary contracts and their internal mechanism for working out the settlement should not be lightly disturbed."

Ram Charan Das Vs. Girja Nandini Devi AIR 1966 SC 323. However, in partition there is no transfer or transferor or transferee. Each of the co-owners is the owner of each and every parcel of the property and it cannot be said that any part of the property is transferred by one co-owner to the other.

WHAT COULD BE THE BINDING EFFECT AND ESSENTIALS FOR A FAMILY SETTLEMENT

In **Kale and others v. Deputy Director of Consolidation and others AIR 1976 SC 807**, "10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

- (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
- (2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;
- (3) The family arrangements may be even oral in which case no registration is necessary;
- (4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) (sic) (Sec. 17 (1) (b)?) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.”

THE RULE OF ESTOPPEL IS PRESSED INTO SERVICE AND IS APPLIED TO SHUT OUT PLEA OF THE PERSON WHO BEING A PARTY TO FAMILY ARRANGEMENT SEEKS TO UNSETTLE A SETTLED DISPUTE AND CLAIMS TO REVOKE THE FAMILY ARRANGEMENT

In **A.I.R. 2006 Supreme Court 2488** (Hari Shankar Singhania vs. Gaur Hari Singhania), the

Apex Court has held at paragraph 51 as follows:
"51. In *Kale & others v. Deputy Director of Consolidation and others*, (1976) 3 SCC 119 (VR Krishna Iyer, RS Sarkaria & S. Murtaza Fazal Ali, JJ.) this Court examined the effect and value of family arrangements entered into between the parties with a view to resolving disputes for all. This Court observed that "By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made.....the object of the arrangement is to protect the family from long drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the

society and therefore, of the entire country, is the prime need of the hour.....the Courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement The law in England on this point is almost the same.

WHEN ONE OF THE SONS OF THE FAMILY SHOWN TO HAVE NOT ACCEPTED OR PARTICIPATED IN THE FAMILY ARRANGEMENT, THE FAMILY ARRANGEMENT IS NOT BINDING

M.N. Aryamurthy vs. M.D. Subbaraya Setty (dead) through LRs. [(1972) 4 SCC 1], wherein in the facts of the case it was held by this Court that under the Hindu Law if a family arrangement is not accepted unanimously, the Family Settlement has to fail as a binding agreement. On reading the document as

a whole, there can be hardly any doubt that Lachiah was wanting to make a will. It was drafted by his family lawyer. The whole form of the document is of a will. It is attested by two witnesses. Executors are appointed and a number of bequests have been made which were to take effect after his death. In the beginning and at the end, Lachiah described the document as his Will which he was making in his old age, while in good mental state. The will shows his awareness that, if the family properties were regarded as joint family properties, he would not be in a position to make any disposition of the same by a will. So, although two of his elder sons had contributed largely to the family acquisitions, all those acquisitions, he insisted, were his self-acquired properties, over which, he claimed, he had absolute power of disposition, As a matter of fact, if the properties as claimed by him had been self-acquired, there is no doubt that the document would have absolutely operated as the last will and testament of Lachiah Setty. But unfortunately, Luchiah, though a father, could not, under the Hindu law, dispose of, by will, joint family property or any part thereof and as a will it was clearly inoperative on the various dispositions made by him. The

plaintiffs submitted that, since the sons had agreed to the dispositions made in the will, the will should be given effect to as a family arrangement. Court Held that When a document which is unexceptionable as a will that is to say, a testamentary document, revocable by the testator at his sweet-will is supposed to embody a family arrangement, we are transported into a different realm where the intentions and objects of the maker or makers of the document are quite different. when one of the sons of the family shown to have not accepted or participated in the family arrangement, the family arrangement as a binding agreement between the several coparceners must fail.

THE OBJECT OF THE ARRANGEMENT IS TO PROTECT FAMILY FROM FILING LONG DRAWN LITIGATION OR PERPETUAL STRIFES WHICH MAR THE UNITY AND SOLIDARITY OF THE FAMILY AND CREATE HATRED AND BAD BLOOD BETWEEN THE VARIOUS MEMBERS OF THE FAMILY

In Kale and others v. Deputy Director of Consolidation and others AIR 1976 SC 807, it has been held that the object of the arrangement

is to protect family from filing long drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Their Lordships opined that the family is to be understood in the wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of claim or even if they have a spes successionis so that future disputes are sealed forever and litigation are avoided.

COURTS TO LEAN STRONGLY IN FAVOUR OF FAMILY ARRANGEMENTS TO BRING ABOUT HARMONY IN A FAMILY AND DO JUSTICE

Krishna Beharilal v. Gulabchand ((1971) 1 SCC 837) Court reiterated the approach of the courts to lean strongly in favour of family arrangements to bring about harmony in a family and do justice to its various members and avoid in anticipation future disputes which might ruin them all. This approach was again re-emphasised in **S. Shanmugam Pillai v. K. Shanmugam Pillai ((1973) 2 SCC 312)** where it was declared

that this Court will be reluctant to disturb a family arrangement.

In Sahu Madho Das v. Pandit Mukand Ram (AIR 1955 SC 481) "So strongly do the courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid, in anticipation, future disputes which might ruin them all, that we have no hesitation in taking the next step (fraud apart) and upholding an arrangement...."

FAMILY ARRANGEMENT IS BASED ON THE ASSUMPTION THAT THERE IS AN ANTECEDENT TITLE OF SOME SORT IN THE PARTIES

In Sahu Madho Das v. Mukund Ram, AIR 1955 SC 481, the question of family arrangement by Hindu was dealt with by the Supreme Court, Bose J., speaking for the Supreme Court observed: "But if there was a family arrangement assassinated to by the daughters and later accepted and acted on by the sons when they attained majority, their claim to separate and independent, absolute titles is understandable. It does not matter whether the claims were well

founded in law because what we are considering at the moment is not the legal effect of the arrangement but whether there saw one in fact."... "It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that falling to his share and recognising the right of the others as they had previously asserted, it, to the portion allotted to them respectively. That explains why no conveyance is required in these case to pass the title from the one in whom it resides to the persons receiving it under the family arrangement, it is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and, therefore, no conveyance is necessary. But, in our opinion, the principle can be carried further and so strongly do the courts lean in favour of family arrangement that bring about harmony in a family and do justice to its various members and avoid, in anticipation, future disputes which might ruin them all, that we have no hesitation in taking the next step (fraud apart) and upholding an arrangement

under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and simple from him or her, or as a conveyance for consideration when consideration is present."

In Ponnammal v. R. Srinivasaran-gan, AIR 1956 SC 162 the Supreme Court has treated it as a well settled legal position that the family arrangement had to be judged with reference to the events and circumstances as they existed at the date of that transaction and not what actually emerged at a later date.

Supreme Court in the above decision (Kale's case) (AIR 1976 SC 807) has quoted with approval the statement of law regarding family arrangement by Halsbury thus : "Principles governing family arrangements. Family arrangements are governed by principles which are not applicable to dealings between strangers. When deciding the rights of parties under a family

arrangement or a claim to upset such an arrangement, the court considers what in the broadest view of the matter is most in the interest of the family and has regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements....."

FAMILY SETTLEMENT SEEKING TO PARTITION JOINT FAMILY PROPERTIES, THE SAME CANNOT BE RELIED UPON UNLESS SIGNED BY ALL THE CO-SHARERS

Narendra Kante vs Anuradha Kante & Ors. (2010) 2 Supreme Court Cases 77 As regards the placing of reliance on the Deed of Family Settlement seeking to partition joint family properties, the same cannot be relied upon unless signed by all the co-sharers. Admittedly, respondent No. 8 was not a signatory to the Deed of Settlement dated 8th February, 1967, although she is the daughter of the family. Under the Hindu Law if a family arrangement is not accepted unanimously, it fails to become a

binding precedent on the co-sharers. However, acting upon the said settlement, the appellants had also executed sale deeds in respect of the suit property. Having done so, it would not be open to the appellant to now contend that the Deed of Family Settlement was invalid.

No conveyance is required in the case of family agreement/arrangement which acknowledges and defines the share falling to a person while recognising the right of the other. This is clearly laid down by the Supreme Court in Hansa Industries (P) Ltd. v. Kidar Sons (P) Ltd. (2006) 8 SCC 531, Bhagwan Kishan Gupta v. Prabha Gupta & Ors. (2009) 11 SCC 33.

LIFE INTEREST WITH MOTHER IN CASE OF SETTLEMENT

Supreme Court reported in
MANU/SC/0263/1985 : AIR1985SC1359 A
 Sreenivasa Pai and Anr. v. Saraswathi Ammal @
 G. Kamala Bai where in the course of a Settlement
 Deed, a life interest was created in favour of the
 mother-in-law and the Supreme Court upheld the
 validity of such an arrangement.

Decision reported in MANU/TN/0129/1952 : AIR 1952 Mad 166 Ammireddi Sooranna v. Ammireddi Venkataratnam where in he points out that an arrangement whereby life interest is created in one person and an absolute interest in another person thereafter is not only common but that the Madras High Court in a considered Judgment has held that it is perfectly valid and within the framework of law.

Supreme Court reported in MANU/SC/0081/1952 : [1953] 4 SCR 232 Raj Bajrang Bahadur Singh v. Thakurain Bhaktraj Kuer, where in the Apex Court had occasion to examine the nature of interest it is permissible to create and to hold conclusively that a life interest can be created in these circumstances.

COMPROMISE DECREE IS A CONTRACT

In HABIB MIAN AND ANR. v. MUKHTAR AHMAD AND ANR. 3. MANU/UP/0055/1969 : AIR 1969 All 296 (FB), a Full Bench of the Court has stated the principle thus: "I think it necessary at the outset to examine the provisions of the compromise decree and to ascertain how the several rights and liabilities between the parties

have been distributed under the decree. In doing so, the principles of construction of a compromise decree must be borne in mind. There is authority for the proposition that a compromise decree is a creature of the agreement on which it is based and is subject to all the incidents of such agreement, that it is but a contract with the command of a Judge superadded to it and in construing its provisions the fundamental principles governing the construction of contracts are applicable." 40. "One of the cardinal principles in the construction of contracts is that the entire contract must be taken as constituting an organic synthesis, embodying provisions which balance in the sum of reciprocal rights and obligations. It is through the prism of that principle that the terms of the compromise decree must be analysed."

FAMILY SETTLEMENT AND MINOR

M. Arumugam vs. Ammaniammal and Ors.:

MANU/SC/0015/2020 A Karta is the manager of the joint family property. He is not the guardian of the minor members of the joint family. What Section 6 of the Act provides is that the natural guardian of a minor Hindu shall be his guardian

for all intents and purposes except so far as the undivided interest of the minor in the joint family property is concerned. This would mean that the natural guardian cannot dispose of the share of the minor in the joint family property. The reason is that the Karta of the joint family property is the manager of the property. However, this principle would not apply when a family settlement is taking place between the members of the joint family. When such dissolution takes place and some of the members relinquish their share in favour of the Karta, it is obvious that the Karta cannot act as the guardian of that minor whose share is being relinquished in favour of the Karta. There would be a conflict of interest. In such an eventuality it would be the mother alone who would be the natural guardian and, therefore, the document executed by her cannot be said to be a void document. At best, it was a voidable document in terms of Section 8 of the Act and should have been challenged within three years of the Plaintiff attaining majority.

CONDITION FOR THE VALIDITY OF FAMILY ARRANGEMENTS

Maturi Pullaiah and Anr. v. Maturi Narasimham and Ors. MANU/SC/0328/1966 : AIR 1966 SC 1836 were reiterated in *S. Shanmugam Pillai and Ors. v. K. Shanmugam Pillai and Ors. MANU/SC/0398/1972 : AIR 1972 SC 2069* in the following terms: In *Maturi Pullaiah v. Maturi Narasimham MANU/SC/0328/1966 : AIR 1966 SC 1836* this Court held that although conflict of legal claims in praesenti or in futuro is generally a condition for the validity of family arrangements, it is not necessarily so. Even bona fide disputes present or possible, which may not involve legal claims would be sufficient. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an agreement is entered into bona fide and the terms thereto are fair in the circumstances of a particular case, the Courts would more readily give assent to such an agreement than to avoid it.

Supreme Court in the case of **Ram Charan v. Girja Nandhini Devi, reported in MANU/SC/0358/1965 : AIR 1966 SC 323**, wherein it has been observed in paragraph No. 11 as under: "...In the first place once it is held that

the transaction being a family settlement is not an alienation, it cannot amount to the creation of an interest. For, as the Privy Council pointed out in Mst. Hiran Bibi's case, MANU/PR/0086/1914 : AIR 1914 PC 44 in a family settlement each party takes a share in the property by virtue of the independent title which is admitted to that extent by the other parties. It is not necessary, as would appear from the decision in Rangasami Gounden v. Nachiappa Gounden, 46 Ind. App 72: (AIR 1918 PC 196), that every party taking benefit under a family settlement must necessarily be shown to have, under the law, a claim to a share in the property. All that is necessary is that the parties must be related to one another in some way and have a possible claim to the property or a claim or even a semblance of a claim on some other ground as, say, affection....."

In **Krishna Beharilal (dead) by his legal representatives v. Gulabchand & others, MANU/SC /0478/1971 : AIR 1971 SC 1041**, it has been observed at paragraph No. 8 as under: "... To consider a settlement as a family arrangement, it is not necessary that the parties to the compromise should all belong to one family. As observed by this Court in Ram Charan

Das v. Girija Nandini Devi,
MANU/SC/0358/1965 : (1965) 3 SCR 841 at pp.
850 and 851 : (AIR 1966 SC 323 at pp. 328 and
329) the word "family" in the context of the family
arrangement is not to be understood in a narrow
sense of being a group of persons who are
recognised in law as having a right of succession
or having a claim to a share in the property in
dispute. If the dispute which is settled is one
between near relations then the settlement of
such a dispute can be considered as a family
arrangement."

CHAPTER-19
BLENDING OF PROPERTY AND INCOME

Privy Council in Shiba Prasad Singh v. Rani Prayag Kumari Debi [MANU/PR/0028/1932],

this doctrine is based on the text of Yagnavalkya and the commentary of Mitakshara; the next of Yagnavalkya reads thus : "In cases where the common stock undergoes an increase, an equal division is obtained" [Ch. 1, sect. 4, 30]. In his commentary on this text Vijnyaneshwara has observed as follows : "Among unseparated brothers, if the common stock be improved or augmented by any one of them through agriculture, commerce or similar means, an equal distribution nevertheless takes place; and a double share is not allotted to the acquirer" [Mitakshara, ch. 1 sect. 4, pl. 31]. Sir Dinshah Mulla, who delivered the judgment of the Privy Council in the case of Shiba Prasad Singh [MANU/PR/0028/1932], has observed that the words of Yagnavalkya mean that "if a member of a joint family augments joint property, whatever may be the mode of augmentation, the property which goes to augment the joint family property becomes part of the joint family property, and he is entitled on a partition to an equal share with

the other members of the family, and not to a double share, as in some other cases dealt with in the preceding verses. This is the placitum on which the whole doctrine of merger of estates by the blending of income is founded" (p. 349). It would thus be seen that according to this decision the doctrine of blending or throwing into the common stock is based on the text just quoted.

Mudda Rama Jaya Narasimha Phani Kumar and Ors. vs. Mudda Kameswara Somayajulu and Ors.: MANU/AP/0820/1999 - The concept of blending is peculiar to the Mithakshara School of joint Hindu family and it has to be inferred from the conduct and intention of the parties. It is essential to note that a Hindu joint family is not a creature of statute or a contract. No statute can override the settled legal principles based on facts and circumstances of each case. The property which was originally separate or the self-acquired property of a member of a joint family may by operation of doctrine of blending become joint family property, if it has been voluntarily thrown by him into the common stock with the "intention of abandoning of all claims upon it". A clear intention to waive his separate rights be established and it may not be inferred from the

mere fact of his allowing the other members of the family to use it conjointly with himself nor from the fact that the income of the separate property was used by the members of the joint family. The basis of the doctrine of blending is the existence of a coparcenary and a coparcenary property as well as existence of the separate property of a coparcener. This doctrine cannot be applied unless the conduct and intention of the parties unequivocally declares his intention to throw the property into the common hotchpot waiving his personal right.

Balak Ram vs. Shiv Ram:

MANU/JK/0008/1988 - Then there is another concept known only to Hindu Law, which is called 'Doctrine of blending'. It postulates that any property which was originally separate or self-acquired property of a member of joint family or of a coparcener may become joint family property if it has been voluntarily thrown by such member into common stock with the intention of abandoning of separate claims upon it. A clear intention to waive of separate right by a member for such property is required to be established. However, the only exception to this rule is the property held by a Hindu female as a limited

owner which cannot become joint family property or coparcenary property by the operation of 'doctrine of blending'. Joint family property can be managed by a karta who has same powers which can be exercised by a manager. He is to look after the property with due diligence and care and is not permitted to alienate the property at his own will. He may do so only if there is legal necessity, which necessity must be of a coparcenary family and not his personal. A Hindu may inherit property from any other source. That property will be deemed to be his self-acquired property, he being a member of joint Hindu family notwithstanding. Such property can become joint only when the owner thereof throws it into common pool and waives of his personal right in it. But after the death of a Hindu if it is inherited by his collaterals, a brother or brother's sons, it will become a self-acquired property in the hands of such Hindus who inherit it. The question of throwing such property into common pool would not arise because it is acquired on account of death of a Hindu. The deceased cannot be said to have after his death thrown his property by doctrine of blending into joint family property so as to make it coparcenary property. Such property for all intents and purposes would

be deemed to be self-acquired property of a collateral and not coparcenary property, over which his sons, grandsons or great-grand-sons, may not have any right by the incident of birth.

K.V. Narayanan vs. K.V. Ranganandhan and

Ors.: MANU/SC/0528/1976 - It is true that property separate or self acquired of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with intention of abandoning his separate claim therein but the question whether a coparcener has done so or not is entirely a question of fact to be decided in the light of all the circumstances of the case, It must be established that there was a clear intention on the part of the coparcener to waive his separate rights such an intention cannot be inferred merely from the physical mixing of the property with his join family or from the fact that other members of the family are allowed to use the property jointly with himself or that the income of the separate property is utilised out of generosity or kindness cannot ordinarily be regarded as an admission of a legal obligation.

MERE FACT THAT MEMBERS OF JF ARE ALLOWED TO USE SEPARATE PROPERTY – BLENDING CANNOT BE INFERRED 2003 SC

JUSTICE Y Sabharwal, and JUSTICE B Agarwal in the case of **D.S. Lakshmaiah & Anr. Vs L. Balasubramanyam & Anr. Reported in AIR 2003 SC 3800** From the mere fact that other members of the family were allowed to use the property jointly with himself, or that the income of the separate property was utilized out of generosity to support 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 a legal obligation {see Lakkireddi Chinna Venkata Reddy v. Lakkireddi Lakshamama [1964 (2) SCR 172] and K.V. Narayanan v. K.V. Ranganadhan & Ors. [(1977) 1 SCC 244]}.

Ramesh Srinivasa Jannu vs. Srinivas Vittoba Jannu and Ors.: 2000(4)KCCR2609 MANU/KA/0742/2000 - The mere fact that the other members of the family were allowed to use the self-acquired property or that its income was utilised out of generosity to support persons

whom the holder was not bound to support, or his failure to maintain separate accounts, cannot result in abandonment of such property by him and the blending with the Joint Family properties. Held on facts that the plaintiff-appellant had failed to prove that there was any coparcenary property into which the B Schedule suit property could have been blended and further failed to prove that his father who acquired its leasehold rights at any time intended to treat it as Joint Family property.

UNLESS SPECIFIC PLEA IS RAISED AND AN ISSUE IS FRAMED AND TRIED, IT IS NOT POSSIBLE FOR THE PARTIES TO KNOW THE CASE OF BLENDING

Division Bench Court in the case of **Gopal Purushotham Bichu (ILR 1989 Kant 169)** held that a new business started by the karta or manager of a joint family is not considered to be the business of a joint family, unless it is started or carried on with the express or implied consent of adult coparceners or it is proved that the joint family funds are utilised for the business to the advantage of the joint family.

This plea was not raised in the plaint. There was no issue in this regard. Blending or treating the

new business as a joint family business is a question of fact depending upon the intention and conduct of the parties. Unless specific plea is raised and an issue is framed and tried, it is not possible for the parties to know the case of blending. No doubt in a case where the issue is raised without a proper plea, it may be presumed that the parties were aware of the plea involved and had adduced the evidence even in the absence of a plea, therefore, such a contention could be allowed. Such is not the case here. In the instant case, there is neither a plea nor an issue is raised and tried. However, during the course of arguments, it was raised in the trial Court. The trial Court has not accepted this plea. In the absence of the plea and the issue raised in this regard and tried by the trial Court, in our considered view, it is neither just and proper, nor permissible in law, to allow the plaintiff-appellant to canvass this contention in the appeal.

**ABSENCE OF A PLEA OF BLENDING –
ALLOWING OTHERS TO ENJOY SELF
ACQUIRED PROPERTY – NOT SUFFICIENT TO
HOLD IT IS BLENDED**

Mallappajaiah vs Muddanna (ILR 1990 Kant 336) In the absence of a plea of blending, the mere fact that Defendant-2 allowed in other members of the joint family to enjoy the benefits of Item No. 5 which was gifted to Defendant-2 by itself is not sufficient to hold that it was blended by Defendant-2 with other joint family properties.
....

Lakkireddi Chinna Venkata Reddi vs Lakkireddi Lakshmama 1963 AIR 1601, 1964 SCR (2) 172 "Law relating to blending of separate property with joint family property is well settled. Property separate or self-acquired of a member of a joint Hindu family may be impressed with the character of a joint Hindu 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 to waive separate rights must be established. From the mere fact that other members of the family were allowed to use the property jointly with himself, or that the income of the separate property was utilised out of generosity to support 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 a legal obligation."

LAW OF BLENDING OF INCOME IN COMMON HOTCHPOTCH

The law of blending of income in common hotchpotch or throwing of self-acquired property in the joint stock is well settled. The decision of the Apex Court in the case of **G. Narayana Raju (dead) by his legal representative v. G. Chamaraju and others, reported in AIR 1968 SC 1276**, needs to be seen. The relevant portion is contained in para 6 of the said decision, which is reproduced below : "(6) ... It is a well-established doctrine of Hindu Law that property which was originally self-acquired may become joint property if it has been voluntarily thrown by the coparcener into joint stock with the intention of abandoning all separate claims upon it. The doctrine has been repeatedly recognised by the Judicial Committee (See *Hurpurshad v. Sheo Dayal*, (1876) 3 Ind App 259 (PC) and *Lal Bahadur v. Kanhaia Lal*, (1907) 34 Ind App 65 (PC)). But the question whether the coparcener has done so or not is entirely a question of fact to be decided in the light of all the circumstances of the case. It

must be established that there was a clear intention on the part of the coparcener to waive his separate rights and such an intention will not be inferred merely from acts which may have been done from kindness or affection (See the decision in *Lala Muddun Gopal v. Khikhindu Doer*, (1891) 18 Ind App 9 (PC). For instance in *Naina Pillai v. Daivanai Ammal*, AIR 1936 Mad 177 where in a series of documents self-acquired property was described and dealt with as ancestral joint family property, it was held by the Madras High Court that the mere dealing with self-acquisitions as joint family property was not sufficient but an intention of the coparcener must be shown to waive his claims with full knowledge of his right to it as his separate property. The important point to keep in mind is that the separate property of a Hindu coparcener ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by mere act of physical mixing with his joint family or ancestral property, but by his own volition and intention by his waiving or surrendering his special right in it as separate property. A man's intention can be discovered only from his words or from his acts and conduct. When his intention with regard to his separate property is not

expressed in words, we must seek for it in his acts and conduct. But it is the intention that we must seek in every case, the acts and conduct being no more than evidence of the intention. ..."

BLENDING OF SELF ACQUIRED PROPERTY INTO JOINT FAMILY PROPERTY

Mallesappa Bandeppa Desai and another v. Desai Mallappa alias Mallesappa and another (AIR 1961 Supreme Court 1268) Where a member of a joint Hindu family blends his self-acquired property with property of the joint family, either by bringing his self acquired property into a joint family account or by bringing joint family property into his separate account, the effect is that all the property so blended becomes a joint family property. This doctrine inevitably postulates that the owner of the separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property. There can be no doubt that the conduct on which a 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 coming from the said property may not be necessarily be enough to justify an inference of blending; but the basis of the doctrine is the existence of coparcenary and coparcenary property as well as the existence of the separate property of a coparcener.

CAN IMPRESS SELF ACQUIRED PROPERTY WITH CHARACTER OF JOINT FAMILY PROPERTY

Krishnamurthy vs Deepak And Ors. ILR 2005 KAR 1202, 2005 (3) KarLJ 420 Parties by their conduct and treatment of property in their hands, can impress self acquired property with character of joint family property with character of joint family property. An examination of the legal position on this aspect leads to the conclusion that property jointly acquired by the members of a joint family with the assistance of the joint funds will become the joint family property. If the properties are acquired by joint labour or on account of joint business by some of the members of a joint family, such property has to be regarded as a coparcenary or

joint family property unless it is established that there was a clear intention indicated by the acquires to treat that property as the co-ownership of only the acquires and not that of the family. Thus when members of a joint family by their joint labour or out of their business acquire property, that property, in the absence of a clear indication of a contrary intention, would be owned by them as a joint family property. Their male issue would necessarily acquire right by birth in the said properties.

Under Hindu Succession act remarriage is not one of the disqualifications mentioned, she is entitled to inherit. A property vested in her by inheritance before remarriage is not divested on remarriage. Kasturidevi case: AIR 1976 SC 2595.

BLENDING OF SEPARATE PROPERTY INTO JOINT FAMILY

Supreme Court in LAKKIREDDI CHINNA VENKATA REDDI AND ORS. v. LAKKIREDDI LAKSHMANA, 1963 AIR 1601, 1964 SCR (2) 172 . The relevant portion is as follows: "Law relating to blending of separate property with joint family property is well settled. Property separate or self-acquired of a member of a joint

Hindu family may be impressed with the character of a joint Hindu 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 to waive separate rights must be established. From the mere fact that other members of the family were allowed to use the property jointly with himself, or that the income of the separate property was utilised out of generosity to support 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 a legal obligation."

Rama Ch. Prusty and Ors. vs. Bidyadhar Prusty and Ors.: MANU/OR/0745/2015 - In order to establish that the separate or self-acquired property of a coparcener is blended with a joint family property following ingredients have to be established.

1. There must be a coparcenary joint family in existence;
2. Property in question must be separate or self acquired of a Hindu coparcener;

3. He allows such property to be used by joint family;
4. Such action of the coparcener must be out of his own volition;
5. He must have an intention of waiving, surrendering and/or abandoning his claim of separate rights over such property.

Ram Janam Singh v. State of Uttar Pradesh and another, reported in MANU/SC/0415/1994 : AIR 1994 SC 1722,

enumerates the doctrine of blending as follows: 6. To pronounce on the question of law presented for our decision, we must first examine what is the true scope of the doctrine of throwing into the "common stock" or "common hotchpot". It must be remembered that a Hindu family is not a creature of a contract. As observed by this Court in Mallesappa Bendeppa Desai v. Desai Mallappa that the doctrine of throwing into common stock inevitably postulates that the owner of a separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property. The existence of a coparcenary is absolutely necessary before a coparcener can throw into the common stock his self-acquired properties. The

separate property of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by him into the common stock with the intention of abandoning his separate claim therein. The separate property of a Hindu ceases to be a separate property and acquires the characteristic of a joint family or ancestral property not by any physical mixing with his joint family or his ancestral property but by his own volition and intention by his waiving and surrendering his separate rights in it as separate property. The act by which the coparcener throws his separate property to the common stock is a unilateral act. There is no question of either the family rejecting or accepting it. By his individual volition he renounces his individual right in that property and treats it as a property of the family. No longer he declares his intention to treat his self acquired property as that of the joint family property, the property assumes the character of joint family property. The doctrine of throwing to the common stock is a doctrine peculiar to the Mitakshara School of Hindu law. When a coparcener throws is separate property into the common stock, he makes no gift under Chapter VII of the Transfer of Property Act. In such a case there is no donor

or donee. Further no question of acceptance of the property thrown into the common stock arises."

Nakka Srinivas and Ors. vs. Nakka Yadagiri and Ors.: MANU/AP/0501/2016 - Doctrine of

blending postulates existence of joint family property, existence of separate property of coparcenar and intention of coparcenar to throw his separate property into common hotch pot. Now coming to theory of blending from the evidence on record, it is clear that family arrangement had taken place in February, 1965 and necessary sale deeds were executed as per understanding between parties. So once sale deeds are executed, the theory of blending or existence of joint family property cannot be accepted unless strong material is produced to show that in spite of execution of document, parties agreed to treat properties as joint family properties. Further, if the properties are treated as joint family properties, plaintiffs in O.S. No. 69 of 1993 have to seek for partition but they cannot claim for recovery of possession on the theory of blending. it is clear that the details are very vague and necessary details like when the plaintiffs got possession and when they lost their

possession and when the period of limitation commenced, particularly, under Article 64 of the Limitation Act. In the plaint, many transactions are pleaded and for all those the only plea in the cause of action para is that the cause of action arose when defendants started denying plaintiffs right. But the plaintiffs are expected to plead cause of action with specific date in order to examine whether the claim is within limitation or not. On examination of above cause of action para, we are of the considered view that the details required to appraise the cause of action are very vague and cryptic. As seen from the pleadings and evidence, the entire claim of Raghunandan and Jagan Mohan is on the basis of family arrangement which is an inadmissible document which cannot be enforced, particularly, when sale deeds are executed, **the recitals of which are not challenged.** As already referred supra, **recitals in all the sale deeds are to the effect that property is conveyed for consideration.** When the property is conveyed for consideration and if there are any wrong recitals contrary to the agreement between the parties, the effected party has to question the correctness of that recitals in the document and having allowed to remain those recitals as it is, **it is not**

open to make any claim contrary to the recitals of the sale deeds. because of the disputes at the time of the family arrangement, all the properties are treated as a joint family properties and parties agreed to take specific properties in pursuance of which, registered documents are executed. So after execution of registered documents particularly sale deeds, there cannot be any jointness or joint family properties. If the registered documents i.e., sale deeds are not executed, the properties will remain as joint family properties, but once transfer is effected from that date, jointness cannot be accepted. it is clear that though sale deed was executed in the year 1965 recording that possession was delivered, but fact remains that possession was not delivered as recorded in the document, therefore, we have no hesitation in holding that guardian of Raghunandan and Jagan Mohan allowed Yadagiri to enjoy the property during the minority of these two persons and Raghunandan and Jagan Mohan themselves allowed Yadagiri to enjoy the property till filing of the suit. As already referred to above, there are no allegations attributing any malafides to the guardian and admittedly suit is not filed within three years of attaining majority by either

of them. the appellate Court shall not ordinarily or casually interfere with the findings of the trial Court, unless those findings are contrary to law or weight of evidence or probabilities of the case or perverse or arbitrary or superficial or capricious or unsustainable either on fact or on law which is well settled proposition.

Sarabjeet Singh and Ors. vs. Rajesh Prashad and Ors.: MANU/HP/0617/2016 - "Plaintiff led

ample evidence to prove that property in hands of his father was coparcenary - Defendants had not rebutted revenue entries proved by Plaintiff - Father of Plaintiff had not individually kept separate land purchased by him on basis of sale and preemption decrees as claimed by Defendant - Property in dispute was thrown by father of Plaintiff in common stock - In present case, 'doctrine of blending' was attracted since father of Plaintiff had thrown his property into common stock and separate property has lost its significance and identity - It had become joint family property of coparceners - Father of Plaintiff had permitted his son to raise construction over property - Property would devolve upon members of coparcenary property by way of survivorship on

surviving members of coparcenary - Electricity and water connections in house in dispute were in name of Plaintiff - No evidence to prove that father of Plaintiff or Defendant raised any objection to construction raised by Plaintiff - Therefore Plaintiff was entitled for half share in property and was exclusive owner in possession of land in question. The rule of survivorship applies to joint family property while the rule of succession applies to property held in absolute severally by the last owner. It is reiterated that Mehtaba was common male ancestor of the parties as per the revenue record. He was shown in exclusive ownership and possession of the suit land. The case of the plaintiff specifically was that the property was purchased by his father from the funds contributed by him. This plea has remained un rebutted. The defendants have not led any conclusive evidence that Satya Pal was living separately from his sons. The suit land was joint Hindu coparcenary property and not self acquired property of Satya Pal. there was no need for Satya Pal to sell the land to Champa Devi on 13.2.1989. Champa Devi has not entered into the witness box to depose about the legal necessity. There is no evidence on record to prove that during his life time the father of the plaintiff,

Satya Pal raised any objection to the construction raised by the plaintiff. Even, defendant No. 2 has not raised any objection when the plaintiff raised construction in the year 1990. Thus, the sale deed entered into between Satya Pal and Champa Devi was without any legal necessity. It was for the defendants to prove that the land purchased by Satya Pal through preemption decrees was kept separate from the joint holding. It cannot be conclusively proved from the evidence led and conduct of Satya Pal that he had no intention to keep the property purchased by him and by way of preemption decrees as separate. ..."

BLENDING AND MATRIARCHICAL SCHOOL

Kavalappara Kottarathil and Kochunni vs. States of Madras and Kerala and Ors. MANU/SC/0366/1960 - Sthanam primarily means a dignity and denotes the status of the senior Raja in a Malabar Kovilagom or palace. It is surmised that sthanams were also created by the Rajas by giving certain properties to military chieftains and public officers and also by tarwads creating them and allocating certain properties for their maintenance. Most of the incidents of a sthanam are well-settled. Usually the senior most male member of the family and occasionally a

female member attains a sthanam. Properties are attached to the sthanam for the maintenance of its dignity. The legal position of a sthanee is equated to that of a Hindu widow in that he represents the estate for the time being and he can alienate the properties for necessity or for the benefit of the estate. Unlike a Hindu widow, the successor to a sthanee is always a life-estate-holder. In that respect his position is more analogous to an impartible estate-holder. He ceases to have any present interest in the tarwad properties. Like a Hindu widow or an impartible estate-holder, he has an absolute interest in the income of the sthanam properties or acquisitions therefrom. His position is approximated to a member separated from the family and the members of the tarwad succeed to his acquisitions unless accreted to the estate and he succeeds to the tarwad properties, if the tarwad becomes extinct. If there is no male heir to a sthanam at any point of time a subsequent birth of a male heir would revive the sthanam. If the sthanee, on attaining the sthanam is in the position of a separated member of a Hindu family, there may not be any scope for the application of the doctrine of blending of sthanam property with the property of the tarwad so as to make it a

tarwad property. "No member of a tarwad has any right to maintenance from out of the sthanam properties and the mere fact that a sthanee for the time being, out of generosity or otherwise, gives maintenance to one or other members of the tarwad cannot legally have the effect of converting the sthanam property into a tarwad property; nor the fact that the sthanam properties are treated as tarwad properties can have such a legal effect. Ordinarily, the senior most member of a tarwad succeeds to the position of a sthanee, but once he succeeds, he ceases to have any proprietary interest in the tarwad. So too, the members of the tarwad have absolutely no proprietary interest in the sthanam property. Thereafter, they continue to be only "blood relations" with perhaps a right of succession to the property of each other on the happening of some contingency. The said right is nothing more than a spes successionis; the tarwad may supply future sthanees. If the word "intermingling" conveys only the idea of mere factual mixing up of the sthanam properties with the tarwad properties, it cannot, by any known legal notion of Marumakkathayam Law or on any analogy drawn from Hindu Law, convert the sthanam property into the tarwad property. Even if it is understood in the sence of blending,

the sthanee, who ceases to be a member of the tarwad and is in a position of a separated member, cannot legally blend his property with that of the tarwad, for the legal concept of blending implies that the person who blends his property with that of the family is an undivided member of the family.

Sthanams and tarwads are peculiar institutions of the Malabar area and a few words about them are necessary. A tarwad is an undivided family governed by the Marumakkathayam Law, the customary law of Malabar. The outstanding feature of that law is that for the purposes of inheritance, descent is traced through the female line. The property of the tarwad or family is owned by all its members but is managed ordinarily by the eldest male member, such manager being called the karnavan. Before the Madras Marumakkathayam Act, 1932 was passed, a member of the tarwad could not insist on a partition and a partition took place only when all the adult members agreed. The members had however the right to be maintained by the karnavan and had certain other rights to which it is not necessary for us to refer. The Madras Marumakkathayam Act, 1932 made some changes in the customary law. The

more important changes were that the junior members were given power to inspect the accounts of the karnavan and a right to ask for partition subject to certain limitations.

BLENDING OF INCOME AND BLENDING OF PROPERTY

Shiba Prasad Singh vs. Rani Prayag Kumari Debi and Ors. - PRIVY COUNCIL : MANU/PR/0028/1932 - AIR 1932 PC 216 - If a

member of a joint family blends the income of his self-acquired property with the income of the joint family property, it raises a presumption of an intention to incorporate the self-acquired property with the joint family property. But no such presumption can arise if a member of a joint family who is the holder of an ancestral impartible estate mixes the income of his self-acquired property with the income of the estate. Blending of income however is not the only mode of indicating the intention to incorporate. A member of a joint family may possess self-acquired property which yields no income for the time being as where it is land not yet brought into cultivation. If he desires to incorporate such property with the joint family property it may be done by declaring expressly or impliedly his

intention to do so. The crucial test in all such cases is intention and the intention may be expressed by the blending of income or in some other way. On the same principle a member of a joint family, who is the holder of an ancestral impartible estate, may declare his intention to incorporate his self-acquired property with the impartible estate; by so doing he expresses his intention to alter the course of devolution of the self-acquired property. This their Lordships think, he is entitled to do, though the ancestral estate is impartible. All that can be said against it is that he may alienate the self-acquired property the moment after the declaration of his intention to incorporate. It is true that he can alienate the property, but that is not because the property still retains the character of self-acquired property but because on incorporation with the impartible estate it is impressed with all the incidents of that estate one of which is that he can alienate it at his pleasure. The mere fact however that he may alienate the property after incorporation does not conclude the matter for he may not alienate it at all. Surely then the property will pass not as his separate property, but by survivorship as joint property devolution by survivorship being another incident of an impartible estate. The fact

is that when self-acquired property is incorporated with an ordinary joint family estate the property so incorporated is impressed with all the incidents which attach to an ordinary joint family estate and when self-acquired property is incorporated with an ancestral impartible estate the property so incorporated is impressed with all the incidents which attach to an ancestral impartible estate. The mere possibility therefore of the holder alienating the property after incorporation is no reason for denying to him the power which the Hindu law gives him of changing the mode of descent to his property. Nor is there anything in that rule of law which is inconsistent with the custom of impartiality. Apart therefore from the question of succession by primogeniture presently to be considered their Lordships are of opinion that the holder of an impartible estate is entitled to incorporate other properties belonging to him with that estate.

Bipinbhai Vadilal vs. Commissioner of Income Tax, Gujarat-I and Ors.: MANU/GJ/0176/1980

- The principles which emerge from the above authorities can be summed up as under :

(1) The rule of blending postulates that a coparcener interested in the coparcenary

property by his deliberate volition and intentional conduct treats his separate property as part of the coparcenary property.

(2) The basis of the doctrine is the existence of the coparcenary and coparcenary property as well as the existence of the separate property of a coparcener.

(3)(a) A coparceners intention can be discovered only from his words or from his acts and conduct. It is only when such an intention is not expressed in words, we must seek for it in his acts and conduct. The expression of intention may be made in a statement in a deposition by an affidavit or by executing a document or by the course of conduct. However, an act of generosity or kindness will not ordinarily be regarded as a legal obligation;

(b) no formalities whatsoever are required for impressing the self-acquired property with the character of joint family property.

(4) The answer to the question, whether the remuneration received by the karta of an HUF or as his shares of profits in the partnership business, will depend on whether the remuneration or profit was earned with the joint family assets.

**CLEAR INTENTION TO ABANDON THE
SEPARATE RIGHTS IN THE PROPERTY MUST
BE PROVED**

**S. Subramanian Vs. S. Ramasamy and others
reported in MANU/SC/0650/2019 : (2019) 6**

SCC 46, wherein it is held as follows: 9. Even the reasons given by the High Court that as the loans were taken on the suit properties for borewell, crop loan, electric motor pump set loan, jewel loan by all the three joint family members, namely Sengoda Gounder, Ramasamy and Subramanian and, therefore, there was a blending of the suit properties into joint family properties also, cannot be accepted. As all the three were residing together and some loans might have been taken by the family members residing together, by that itself, it cannot be said that there was a blending of the suit properties into joint family properties. The law on the aspect of blending is well settled that property separate or self acquired of a member of a joint Hindu family 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 to waive separate rights must be established. Clear intention to

abandon the separate rights in the property must be proved. Even abandonment cannot be inferred from mere allowing other family members also to use the property or utilisation of income of the separate property out of generosity to support the family members.

In Rajani Kanta Pal v. Jaga Mohan Pal [MANU/PR/0005/1923], the Privy Council held that "Where a member of a joint Hindu family blends his self-acquired property with property of the joint family, either by bringing his self-acquired property into a joint family account, or by bringing joint family property into his separate account, the effect is that all the property so blended becomes a joint family property."

Supreme Court reported in **Goli Eswariah v. Gift Tax Commissioner, MANU/SC/0258/1970** ∴ The Supreme Court had laid down the criteria for determining as to when a coparcener throws the self-acquired property into common hotchpot. The Supreme Court has held as follows: "The separate property of a Hindu coparcener ceases to be so and acquires the characteristic of a joint family or ancestral property not by any physical mixing with his joint family or ancestral property

but by his own volition and intention by his waiving and surrendering his separate rights in it as separate property. The act is a unilateral act. No longer he declares his intention the property assumes the character of joint family property. The doctrine is peculiar to Mitakshara School of Hindu law. When a coparcener throws his separate property into the common stock he makes no gift under T.P. Act. There is no donor or donee and no question of acceptance of property thrown into the common stock arises."

HINDU FEMALE CANNOT BLEND HER SEPARATE PROPERTY

Pushpa Devi Vs. Commissioner of Income-Tax, New Delhi MANU/SC/0378/1977 : (1977) 4 SCC 184, it was held (i) that a Hindu coparcenary is a much narrower body than the joint family and it includes only those persons who acquire by birth an interest in the joint or coparcenary property; (ii) that a Hindu female, is not a coparcener; (iii) that even the right to reunite is limited under the Hindu law to males; (iv) that a female member of such family cannot blend her separate property, even if she is an absolute owner thereof, with the joint family property; (v) that if a Hindu female, who is a member of an

undivided family, impresses her absolute, exclusive property with the character of joint family property, she creates new claimants to her property, to the exclusion of herself, because not being a coparcener, she has no right to demand a share in the joint family property by asking for a partition; she has no right of survivorship and is entitled only to be maintained out of the joint family property; her right to demand a share in the joint family property is contingent, on partition taking place between her husband and his sons; (vi) that thus the expression 'blending' is inapposite in the case of a Hindu female who puts her separate property, be it her absolute property or limited estate, in the joint family stock; (vii) that the only way a Hindu female can divest herself of her property in favour of an undivided family of which she is a member, is by way of a gift; and, (viii) that whether the separate property is female's absolute property or whether she has a limited estate in that property would make no difference to that position.

High Court of Orissa in **Santanu Kumar Das Vs. Bairagi Charan Das MANU/OR/0083/1995 : AIR 1995 Ori 300** and with which I respectfully agree. In that case, the property was purchased

in the name of a female, when the family members were living jointly and the husband of the said female was the manager and karta of the family. It was the case of the son of the said female that the property was purchased from joint family fund and it was so purchased in the name of the female to maintain goodwill with her. It was held that the Courts below were under a misconception of law that when a property is purchased in the name of a female member of the joint family and there is sufficient nucleus, the said property should be presumed to be joint family property. Such a presumption was held to be available only in the case of a male member of the family, but not a female member. It was held that a female may continue to be a member of the joint family, but property purchased in her name is not joint family property.

Supreme Court in Jagannathan Pillai Vs. Kunjithapadam Pillai & Ors.

MANU/SC/0415/1987 : 1987 (2) SCC 572 has held that by enacting Section 14 of the Act, 1956, the legislature has done away with the concept of limited ownership in respect of property owned by Hindu female all together. To obviate hair-splitting, the legislature has made it abundantly

clear that whatever be the property possessed by a Hindu female, it will be of absolute ownership and not of limited ownership notwithstanding the position obtaining under the traditional Hindu law.

Mallesappa Bandeppa Desai and Ors. vs. Desai Mallappa and Ors.: MANU/SC/0377/1961 -

The rule of blending postulates that a coparcener who is interested in the coparcenary property and who owns separate property of his own may by deliberate and intentional conduct treat his separate property as forming part of the coparcenary property. If it appears that property which is separately acquired has been deliberately and voluntarily thrown by the owner into the joint stock with the clear intention of abandoning his claim on the said property and with the object of assimilating it to the joint family property, then the said property becomes a part of the joint family estate; in other words, the separate property of a coparcener loses its separate character by reason of the owner's conduct and get thrown into the common stock of which it becomes a part. This doctrine therefore inevitably postulates that the owner of the separate property is a coparcener who has an

interest in the coparcenary property and desires to blend his separate property with the coparcenary property. There can be no doubt that the conduct on which a 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 coming from the said property may not necessarily be enough to justify an inference of blending; but the basis of the doctrine is the existence of coparcenary and coparcenary property as well as the existence of the separate property of a coparcener. How this doctrine can be applied to the case of a Hindu female who has acquired immovable property from her father as a limited owner it is difficult to understand. Such a Hindu female is not a coparcener and as such has no interest in coparcenary property. She holds the property as a limited owner, and on her death the property has to devolve on the next reversioner. Under Hindu law it is open to a limited owner like a Hindu female succeeding to her mother's estate as in Madras, or a Hindu widow succeeding to her husband's estate, to efface herself and accelerate the reversion by

surrender; but, as is well known, surrender has to be effected according to the rules recognised in that behalf. A Hindu female owning a limited estate cannot circumvent the rules of surrender and allow the members of her husband's family to treat her limited estate as part of the joint property belonging to the said family. On first principles such a result would be inconsistent with the basic notion of blending and the basic character of a limited owners' title to the property held by her.

BLENDING AND NUCLEUS

**Ram Murti Devi vs. Reoti Saran and Ors :
MANU/UP/0412/1984**

1. Separation in mess does not constitute severance of the status of the joint family.
2. A building in occupation of the members of a family and yielding No. income could not be nucleus out of which acquisitions could be made, even though it might be of considerable value.
3. In civil cases no admission is relevant, if it is made in the circumstances from which the court can infer that the parties agreed together that the evidence of it should not be given.

4. In the absence of proof of division the presumption is that it is joint. Person alleging severance of joint Hindu family has to prove it.

5. A Hindu family is normally presumed to be joint. In the absence of proof of division such is the legal presumption.

6. The presumption is strong in the case of father and sons. The strength of the presumption necessarily varies depending on the constitution of the family and other factors. Simply because father and son live and work in different places and own only a joint family house in common, it cannot be said that they do not form a joint Hindu family.

7. It is for the person alleging severance of the joint Hindu family to prove it.

8. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. Intention must be unequivocal and clearly expressed to have that effect.

9. No. presumption can be raised because the family is joint, it possesses joint property or any property.

10. There is no presumption that a family, because it is joint, possesses joint property or any property.

11. Where in a suit for partition, a party claims that any particular item of the property is joint family property the burden of proving that it is so rests on the party asserting it.

12. There is no presumption "that a family has any joint property" and "it cannot be presumed that property found in the possession of any one member is joint family property unless it is shown that the family as such possessed at least some property" the necessity of establishing the existence of a nucleus of joint family property before the property in possession of any one member can be presumed to be joint family property is well recognized.

13. Mere existence of a nucleus is not enough to raise a presumption that all the properties possessed by its various members are joint. In the case of a joint family the mere existence of a nucleus is not enough to raise a presumption that all the properties possessed by its various members are joint. "The presumption arises only if the nucleus is substantial and is such that its yield could provide in whole or at any rate in considerable part the money necessary for acquiring the property in question".

14. Proof of the existence of a joint family does not lead to the presumption that the property held by any member of the family is joint.

15. The burden rests upon anyone asserting that any item of property as joint. The burden rests upon anyone asserting that any item, of property was joint to establish that fact. 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 may have been acquired, the burden shifts to the party alleging self acquisition p establish affirmatively that the property was acquired without the did of the joint family property.

16. Separate or self acquired property of a member of a joint family may become joint family property if it has been thrown by the owner into the joint stock of the family. Intentions of abandoning all separate claims upon it must be clear and unequivocal.

17. Property which was originally the separate or self acquired property of a member of a joint family may become joint family property if it has been thrown by the owner into the joint stock of the family, But before the separate or self acquired property of a coparcener can be

regarded as a joint family property it must be proved that the owner had thrown the property in the common stock and done so voluntarily and with the intention of abandoning all separate claims. Upon it, "Intention must be clear and unequivocal. A clear intention to waive his separate rights must be established and cannot be inferred (i) the mere fact that other members of the family have had the use of such property or, (ii) acts which may have been done merely from kindness or affection".

18. The conduct on which a 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 coming from the said property may not necessarily be enough to justify an inference of blending.

19. Intention on the part of the coparcener to waive his separate right will not be inferred from acts which may have been done from kindness or affection. It is not the mere act of physical mixing with the joint family property but the volition and intention to waive special right in it as separate property which counts.

BLENDING DOES NOT AMOUNT TO TRANSFER OR GIFT

Controller of Estate Duty, Madras vs. N. Shankaran and Ors.: MANU/SC/0549/1992 -

Madras High Court earlier in Rajamani Ammal v. Controller of Estate Duty MANU/TN/0436/1972 : [1972]84ITR790(Mad) . In deciding the issue, the High Court had the benefit of two earlier decisions of this Court in Goli Eswariah v. C.G.T. MANU/SC/0258/1970 : [1970]76ITR675(SC) and C.G.T. v. Getti Chettiar MANU/SC/0249/1971 : [1971]82ITR599(SC) where this Court had held, in the context of the Gift Tax Act, that the act of blending and the act of a coparcener receiving, on partition of a HUF, less than the share he was entitled to receive would not constitute gifts.

Rajamani specifically dealt with the language of the two Explanations to Section 2(15) and that its decision rested on three grounds:

- (i) a 'disposition', as held in Goli Eswariah MANU/SC/0258/1970 : [1970]76ITR675(SC) ., has to be a "bilateral" or 'multilateral' act or transaction, not a unilateral act;
- (ii) the act of blending does not create any right enforceable against the blender or his property

but only brings to the surface rights already latent and inherent in the others; and

(iii) the act of blending does not result in the extinguishment of any right of the blender with a correlative conferral of benefit on others.

Madras High Court in Ranganayaki Ammal, the Andhra Pradesh decision in Cherukuru Eswaramma v. C.E.D. MANU/AP/0163/1967 : and the Punjab and Haryana High Court judgment in C.E.D. v. Jai Gopal Mehra MANU/PH/0219/1971 - answered the question in the affirmative. This Court distinguished Goli Eswariah MANU/SC/0258/1970 : and Getti Chettiar MANU/SC/0249/1971 : [1971]82ITR599(SC) on the ground that the definition of 'disposition' in Explanation 2 to Section 2(15) of the Estate Duty Act is much wider than the scope of that expression used in the Gift Tax Act.

The Allahabad High Court, in C.E.D. v. Laxmi Bai MANU/UP/0305/1980 : [1980]126ITR73(All) , a decision rendered after Kantilal Trikamlal, thought that the act of blending would not be a 'disposition' within the meaning of the Estate Duty Act.

In C.E.D. v. Babubhai T. Panchal MANU/GJ/0069/1980 : [1982]133ITR455(Guj) ,

the Gujarat High Court had occasion to consider the question whether a transaction of release by a member of a Hindu Undivided family, within a period of two years of his death, of his interest in the family properties would amount to a 'disposition' within the meaning of Explanation 2 to Section 2(15) of the Estate Duty Act. The question was answered in the negative.

In C.E.D. v. Satyanarayan Babulal Chaurasia 1983 (140) I.T.R. 158, the Bombay High Court, within touching the issue in detail, merely held, applying Goli Eswariah v. C.G.T. MANU/SC/0258/1970 : [1970]76ITR675(SC) , .., that the act of blending does not involve a transfer.

Suffice it to say that we endorse this reasoning and think that the High Court was right in holding, in the present cases, that the acts of blending did not result in the 'gift' of immovable properties within the meaning of the statute and that Rajamani required no reconsideration because of Ranganayaki Ammal Trikamalal.

This disposes of the question sought to be referred in these cases. We should however like to advert to another aspect which may arise for consideration at some future date. It may,

perhaps, be possible to contend that, though as declaration of blending does not amount to a 'gift', where the act of blending is followed up by a subsequent partition, the two transactions taken together do result in the extinguishment, at the expense of the deceased, of his rights in the properties which go to the share of other coparceners at the subsequent partition and that, if the two can be treated as parts of the same transaction, Explanation 2 to Section 2(15) may be attracted. But this, apart from being a totally new question of law not raised at any stage and not debated before us, would also require not only a closer look from the legal angle but also investigation into facts, particularly as to whether the act of blending and the subsequent partition can be treated, in law and on facts, as parts of a Single transaction, We, therefore, express no opinion on this issue.

CHAPTER-20
PARTITION SUIT AND MESNE PROFITS

**JOINDER OF NECESSARY PARTY IN
PARTITION SUIT**

THE HON'BLE MR. JUSTICE N. KUMAR AND
THE HON'BLE MR. JUSTICE H. S. KEMPANNA of
Karnataka High Court in the case of **Smt
Sulochana Manvi vs Chitriki Shivayogappa**
Decided on 8 August, 2012

The law on the point is well settled. All persons who have an interest in the joint family are necessary parties for a suit for partition. However, if the joint family consists of sons and their sons and their wives, each male member of a family who represents the family, if they are made parties, that would satisfy the requirement of law. Therefore, when first defendant and second defendant are made parties to the suit even though his children are not made parties, the suit of the plaintiff cannot be dismissed on the ground of non joinder of necessary parties. However, the trial Court has dismissed the suit for non joinder of necessary parties in as much as that the daughter of Totappa has not been made party. That is not the plea raised, no issue is framed on that account. It is equally well settled an objection

regarding non joinder of necessary parties have to be taken at the earliest point of time but before settlement of issues. If that is not done, the suit is maintainable. However, under Order 1 Rule 10 (2) CPC the Court has the ample power to direct the parties to implead as parties who ought to have been impleaded and then grant the relief.

**DECLARATORY SUIT CAN GRANT PARTITION
WHEN ALL THE MEMBERS OF FAMILY ARE
PARTIES TO THE SUIT**

THE HON'BLE MR. JUSTICE A.S.PACHHAPURE
of Karnataka High Court in the case of **B N
Shivaram vs B Nanjegowda Decided on 12
June, 2012**

Counsel for the appellant would contend that if the suit property is either absolute property of the deceased plaintiff or the joint family property, in a suit for declaration, the Court can grant the relief of partition and on this aspect of the matter, he has placed reliance of the decision of this Court reported in AIR 1989 Kar. 45 [Smt. Neelawwa Vs. Smt. Shivawwa]; wherein this Court while discussing the aspect relating to granting a relief of partition in a suit for declaration, has made an observation in para 10

and it reads: "Once it is declared that the plaintiff is entitled to a half share in the suit land, the necessary consequence of it is to divide the suit land and give her half share. As all the persons entitled to a share in the suit land are parties to the suit, in a suit of this nature the relief for partition must be deemed to have been prayed for in the suit. It is also relevant to notice that the relief of partition and separate possession flows from the same cause of action which forms the basis for the present suit."

Though in a suit for declaration, a decree for partition could be granted, it is subject to a rider that all the members of the joint family must be parties to the suit. In such circumstances, the relief granted by the trial Court will have to be molded and a declaration to the effect that the suit property is a joint family property has to be granted.

AVERRMENT OF DEPRIVATION OF ENJOYMENT IS NECESSARY TO HAVE MESNE PROFITS

Mallappajaiah vs Muddanna (ILR 1990 Kant 336) The plaintiff is not entitled to claim profit in respect of his share in the suit properties prior to

the date of the suit. Because, he has not averred in the plaint that he was deprived of possession and enjoyment of the joint family properties. On the contrary, his case in the plaint is that he has been in possession and enjoyment -of the joint family properties. That being so, he is entitled to have the profits accounted to him regarding the income from his share from the date of the suit. Whosoever is found to be in possession and enjoyment of the property will be liable to account for it. That being so, the Court below ought to have directed an enquiry into the accounting as to the profits from the date of the suit will be the date of delivery of possession.

SUIT FOR PARTITION OF THE JOINT FAMILY PROPERTY FILED BY MINOR CAN BE CONTINUED BY HIS MOTHER AFTER HIS DEATH

Lakkireddi Chinna Venkata Reddi vs Lakkireddi Lakshmama 1963 AIR 1601, 1964 SCR (2) 172 Suit for partition of the joint family property could, after the death of the minor, be continued by his mother. Action by the minor for a decree for partition and separate possession of his share in the family property was not founded

on a cause of action personal to him. The right claimed was in property and devolved on his death even during minority upon his legal representative. The effect of the decision of the Court granting a decree for partition in a suit instituted by a minor was not to create a new right which the minor did not possess but merely to recognise the right which accrued to him when the action was commenced. It is the institution of the suit, subject to the decision of the Court and not the decree of the Court that brings about the severance. A suit filed on behalf of a Hindu minor for partition of a joint family property does not, on the death of the minor during the pendency of the suit abate and may be continued by his legal representative and decree obtained therein if the Court holds that the /institution of the suit was for the benefit of the minor.

PLAINTIFF OR DEFENDANT IN A SUIT FOR PARTITION, IS ENTITLED TO CLAIM A SEPARATE ALLOTMENT AT ANY STAGE BEFORE THE FINAL DECREE

Division bench decision of Calcutta high court in **Insane Nil Govinda Misra v. Smt. Rukmini Deby reported in AIR (31) 1944 Calcutta 421** it

is held that, it is an established principle that a co-sharer, be he or she a plaintiff or defendant in a suit for partition, is entitled to claim a separate allotment at any stage before the final decree. It is further held that there is no reasons to drive the parties to a separate suit for partitioning the properties of the second class by metes and bounds when that can be done in the suit without greater expense or trouble. It is on the principle of shortening the litigation by the avoidance of multiplicity of suits, it is directed the partition by metes and bounds amongst the defendants of the rest of properties mentioned in the plaint in which the plaintiff has no share.

A PETITION OR APPLICATION TO DRAW FINAL DECREE IS NOT A PLAINT AND NEED NOT CONTAIN THE MATERIAL FACTS

THE HON'BLE JUSTICE C ULLAL & THE HON'BLE JUSTICE H.N. Naghmohan Das, of Karnataka High Court in the case of **Smt. Rukmani vs V. Uday Kumar Reported in ILR 2008 KAR 13, 2008 (3) KarLJ 129**

Order 6 Rule 1 to 18 of CPC specifies about pleadings, material facts and particulars to be stated, forms of pleadings, signing of pleadings,

verification of pleadings, striking of pleadings, amendment of pleadings etc. Rule 1 of Order 6 defines pleadings to mean plaint or written statement. Whereas Rule 3 specifies forms of pleadings as stated in Appendix A. Further more as we see Appendix A specifies as many as 49 forms of plaints for various kinds of reliefs and 15 forms of written statement for different types of defence. Order 7 specifies particulars to be contained in a plaint and on the other hand Order 8 of CPC specifies the particulars to be stated in a written statement. As we further see nowhere in the CPC the form for final decree proceedings is specified. A petition to draw final decree proceedings is not a plaint or written statement as defined under Rule 1 of Order 6 CPC. In our considered view when it is not a plaint it is not necessary that it shall contain the particulars as specified under Order 7 Rule 1 of CPC.

As we see Order 20 Rule 18 specifies that where the Court passes a decree for partition of property or for the separate possession of shares of the parties then the Court may pass a preliminary decree declaring the rights of the parties interested in the property and hence the Court can further direct partition or separation to be made by metes and bounds in terms of such

declaration as per the provisions of Section 54 or under Order 26 Rule 13 of CPC. Let apart the final decree proceedings being continuation of the suit for partition, the partition suit in law is deemed to be pending until a final decree is passed by the Court. A party to the preliminary decree is therefore entitled to file petition/application under Order 20 Rule 18 CPC to draw the final decree in what is commonly known as Final Decree Proceedings. A petition/application to draw final decree is not a plaint and need not contain the material facts as specified under Order 7 Rule 1 of CPC. Further Order 20 Rule 18 CPC do not specify as to what are the particulars to be mentioned in a petition/application to draw the final decree.

SCOPE OF PARTITION SUIT WHEN PROPERTY IS INDIVISIBLE

The Supreme Court in **R. Ramamurthi Aiyar v. Rajeswararao, AIR 1973 SC 643**, while interpreting the scope of Sections 2 and 3 of the Partition Act specified the various stages in the proceedings under Sections 2 and 3 of the Partition Act as under:

(i) In a suit for partition if, it appears to the court that for the reasons stated in Section 2 a division of the property cannot reasonably and conveniently be made and that a sale of property would be more beneficial it can direct sale. This can be done, however, only on the request of the shareholders interested individually, or collectively to the extent of one moiety or upwards.

(ii) When a request is made under Section 2 to the court to direct a sale any other shareholder can apply under Section 3 for leave to buy at a valuation the share of the other party asking for a sale.

(iii) The court has to order valuation of the share of the party asking for sale.

(iv) After the valuation has been made the court has to offer to sell the share of the party asking for sale to the shareholder applying for leave to buy under Section 3.

(v) If two or more shareholders severally apply for leave to buy the court is bound to order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the court.

(vi) If no shareholder is willing to buy such share or shares at the price so ascertained the

application under Section 3 shall be dismissed, the applicant being liable to pay all the costs.

A SUIT FOR PARTITION COULD BE FILED AS LONG AS THE PROPERTY IS JOINT.

THE HON'BLE MR.JUSTICE N.KUMAR & THE HON'BLE MR.JUSTICE H.S.KEMPANNA of Karnataka High Court in the case of **Thimmakka vs Mariyamma Decided on 10-08-2012**. The partition deed is not a document which requires attestation. By attesting the said document as an witness, the right, if any, of the attesting witness in the property is not lost.

A suit for partition could be filed as long as the property is joint. Limitation Act do not prescribe any period of limitation for filing a suit for partition. Right to file a suit for partition would not run from the date of a partition in the family, if in the said partition they exclude a sharer.

WHETHER PROPERTY AVAILABLE FOR PARTITION OR NOT CANNOT BE GONE UNDER ORDER 7 RULE 11

Hon'ble Supreme Court in the case of **KAMALA & OTHERS vs. K.T.ISHWARA SA &**

OTHERS reported in 2008 AIR SCW 5364,

Order VII, Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order VII, Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order VII, Rule 11 of the Code is the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order VII, Rule 11 of the Code is one, Order XIV, Rule 2 is another. We may proceed on the assumption that the shares of the parties were defined. There was a partition amongst the parties in the sense that they could transfer their undivided share. What would, however, be the effect of a partition suit which had not been taken to its logical conclusion by getting the properties partitioned by metes and bounds is a question which, in our opinion, cannot be gone into in a

proceeding under Order VII, Rule 11(d) of the Code. Whether any property is available for partition is itself a question of fact. The third- party interest have been created and third parties are not made parties before the Court. Hence, the suit is bad in law for misjoinder and non-joinder of necessary parties. Moreover, third parties interest has been created and separate khatas have been issued. What would be its effect is again a question which cannot fall for determination under Order VII, Rule 11(d) of the Code. These facts require adjudication. The identity of the properties which were the subject matter of the earlier suit vis-`-vis the properties which were subsequently acquired and the effect thereof is beyond the purview of Order VII, Rule 11(d) of the Code. Whether the properties mentioned in the plaint are available for partition is essentially a question of fact. We may place on record that the plaintiffs are said to be guilty of suppression of facts, as would appear from para 2 of the application filed under Order VII, Rule 11(d) of the Code, but then what would be the effect of such suppression has to be determined. [See S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others, AIR 1994 SC 853] What would be the

effect of non-availability of the property vis-à-vis the contentions of the respondents in regard to Item No. 8 is a question which requires further probe.

Court in *M/s Kalloomal Tapeswari Prasad (HUF), Kanpur v. Commissioner of Income Tax, Kanpur* [(1982) 1 SCC 447] to contend that even partial partition is permissible. No exception thereto can be taken but the effect thereof vis-à-vis another suit, it is trite, cannot be determined under Order VII, Rule 11 of the Code.

**JOINT PROPERTY UNDER SALE AGREEMENT
BY ONE CO-SHARER – PARTY TO CONTRACT
TO EXECUTE SALE DEED – ONLY AFTER
THAT PURCHASER CAN SEEK PARTITION.**

In the case of **A. Abdul Rashid Khan (Dead) & Ors. v. P.A.K.A. Shahul Hamid & Ors. (2000) 10 SCC 636**, Supreme Court held that even where any property is held jointly and once any party to the contract has agreed to sell such joint property by agreement, then, even if the other co-sharer has not joined, at least to the extent of his share, the party to the contract is bound to execute the sale deed. So far the Right of Pre-emption that has not been raised in any of the

courts below by any party and cannot be permitted to be raised in this appeal for the first time. The vendee on the date of filing this suit has yet not become the owner of this property, as he merely seeks right in the said property though the decree of specific performance. When the sale deed itself has yet to be executed, whose right in the property has yet not matured, how can he claim partition and possession over it? Even after decree is passed, his right will only mature when he deposit the balance consideration and the sale deed is actually executed. This apart how could be any partition in the property, without other co-sharer joining, who are not part of the disputed agreement. No issue is framed between them. No evidence led. Hence, we find that the High Court was not right in decreeing this alternative prayer of partition in this suit.

**CO-SHARER SELLING HIS SHARE IN
DWELLING HOUSE AND PARTITION OF
DWELLING HOUSE**

THE HONBLE JUSTICE P. Sathasivam, & THE
HONBLE JUSTICE R.M. Lodha in the case of
Kammana Sambamurthy (D) By Lrs. vs

Kalipatnapu Atchutamma & Ors 2010 (7)

Supreme Today 171 The crucial question in the case is whether the agreement could be enforced against the vendor to the extent of his half share in the property. The terms of the agreement show that the vendor represented to the vendee that he was absolute owner of the property that fell to his share in the partition effected with his brothers and he did not have any male child. The vendor assured the vendee that excepting him none has got any right over the property and he would obtain the witness signatures of his daughters and get their voluntary consent letters in his favour. It is clear from the evidence that the vendee had no knowledge that vendor's wife has half share in the property which devolved upon her on the death of her son intestate.

The present case is not a case of the performance of a part of the contract but the whole of the contract insofar as the vendor is concerned since he had agreed to sell the property in its entirety but it later turned out that vendor had only half share in the property and his wife held the remaining half. The agreement is binding on the vendor as it is without being fractured. As regards him, there is neither segregation or separation of contract nor creation of a new contract.

The High Court, accordingly, allowed the appeal preferred by vendor's wife to the extent of half share in the property and the judgment and decree of the Subordinate Judge was confirmed to the extent of half share of the vendor in the property. Supreme court upheld High court decision.

Contention raised that property is an undivided dwelling house and the court should not grant specific performance against the co-owners of the family dwelling house. By relying upon *Ghantesher Ghosh v. Madan Mohan Ghosh & ; Ors.* (1996) 11 SCC 446 *Pramod Kumar Jaiswal and Ors. v. Bibi Husn Bano and Ors.* (2005) 5 SCC 492 and *Shanmughasundaram & Ors. v. Diravia Nadar (Dead) By LRs. & Anr.* (2005) 10 SCC 728.

The above submission was canvassed before the High Court. The High Court considered this aspect in the following manner : "It is too premature for the defendant to have invoked the provisions of section 4 of the Partition Act. The plaintiff's right has not been crystallized yet and he cannot at this stage be considered as a purchaser of the undivided interest of the first defendant. In order to validly invoke section 4 of

the Partition Act, the following five conditions have to be satisfied :

1. A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;
2. The transferee of such undivided interest of co-owner should be an outsider or stranger to the family;
3. Such transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned;
4. As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of preemption by undertaking to buy out the share of such transferee and;
5. While accepting such a claim for preemption by the existing co-owners of the dwelling house belonging to the undivided family, the Court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption and said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger-transferee can have no

more claim left for partition and separate possession of his share in the dwelling house and accordingly can he effectively deny entry in any part of such family dwelling house. The whole object seems to be to preserve the privacy of the family members by not allowing a stranger to enter in a part of the family dwelling house. Such is not the situation obtaining in this case having regard to the context. I am reinforced in my above view by the judgment of the Apex Court in Babulal V. Habibnoor Khan, 2000 (5) SCC 662. The apex Court placing reliance upon its earlier judgment in Ghantesher Ghosh V. Madan Mohan Ghosh, 1996 (11) SCC 446 reiterated the five essential requisites. For the foregoing reasons, the contention of the learned counsel merits no consideration."

Conclusion of supreme court:- In our opinion, the High Court has rightly concluded that at the present stage, Section 4 of the Partition Act, 1893 is not attracted. It is only after the sale deed is executed in favour of the vendee that right under Section 4 of the Partition Act, 1893 may be available. Similarly, insofar as vendee is concerned, he has right to apply for partition of the property and get the share demarcated only after sale deed is executed in his

favour. Section 44 of the T.P. Act is also of no help to the case of vendor's wife.

WHENEVER A SHARE IN THE PROPERTY IS SOLD THE VENDEE HAS A RIGHT TO APPLY FOR THE PARTITION OF THE PROPERTY AND GET THE SHARE DEMARCATED

In Kartar Singh v. Harjinder Singh & Ors. (1990) 3 SCC 517, Court was concerned with a case where vendor--brother and a sister had each half share in the suit properties. The agreement for the sale was executed by the brother concerning the suit properties in which the sister had half share. The sister was not executant to the agreement; rather she refused to accept the agreement. The question for consideration before this Court was whether agreement could be enforced against the vendor--brother to the extent of his half share. This Court considered Section 12 and held as under : "5. We are, therefore, of the view that this is not a case which is covered by Section 12 of the Act. It is clear from Section 12 that it relates to the specific performance of a part of a contract. The present is not a case of the performance of a part of the contract but of the whole of the contract so far as the contracting

party, namely, the respondent is concerned. Under the agreement, he had contracted to sell whole of his property. The two contracts, viz. for the sale of his share and of his sister's share were separate and were severable from each other although they were incorporated in one agreement. In fact, there was no contract between the appellant and the respondent's sister and the only valid contract was with respondent in respect of his share in the property. As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty. Whenever a share in the property is sold the vendee has a right to apply for the partition of the property and get the share demarcated. We also do not see any difficulty in granting specific performance merely because the properties are scattered at different places. There is no law that the properties to be sold must be situated at one place. As regards the apportionment of consideration, since admittedly the appellant and respondent's sister each have half share in the properties, the consideration can easily be reduced by 50 per cent which is what the first appellate court has rightly done.”

**IN THE ABSENCE OF PLEADING AS TO
DEPRIVED POSSESSION MESNE PROFITS
CANNOT BE AWARDED**

ILR 1990 Kant 336, Mallappajaiah v.

Muddanna The plaintiff is not entitled to claim profit in respect of his share in the suit properties prior to the date of the suit. Because, he has not averred in the plaint that he was deprived of possession and enjoyment of the joint family properties. On the contrary, his case in the plaint is that he has been in possession and enjoyment -of the joint family properties. That being so, he is entitled to have the profits accounted to him regarding the income from his share from the date of the suit.

K.V. Narayanan vs. K.V. Ranganandhan and

Ors.: MANU/SC/0528/1976 - The legal position is well settled that in the absence of proof of misappropriation or fraudulent or improper conversion by the manager of a joint family a coparcener seeking Partition is not entitled to call upon the manager to account for his past dealing with the family property. The coparcener is entitled only to an account of the joint family

property as it exists on the date he demands partition.

PARTITION SUIT AND NECESSARY PARTIES

Smt. Gowramma vs Nanjappa And Ors. AIR

2002 Kant 76 When a suit for partition is filed,

by a member of a joint family, he expresses his unequivocal intention to separate himself from the joint family and consequently there is a severance of joint family status from the date of suit. A suit for partition is invariably brought in respect all the joint family properties. Every person (including female members) who is entitled to a share on partition is impleaded as plaintiff or defendant, having regard to the fact that any decree which gives a property or a portion of a property to a plaintiff, takes away the right of the other members in that property or portion of the property, and non-impleading of the necessary parties will lead to its dismissal. (Where however partition is claimed branch-wise by any particular branch, it may be sufficient if the heads of all the branches are made parties). In a suit for partition, each defendant is entitled to seek partition and separate possession of his share by paying the specifically prescribed Court

Fee for such purpose. When a plaintiff seek partition, he is seeking partition not only against the defendants but also against his co-plaintiff, if any. Similarly when a defendant seeks partition, the relief is sought not only against the plaintiffs, but against the co-defendants also. In other words, each party to a suit for partition, whether a plaintiff or defendant, who seeks the relief of partition and separate possession by paying separate Court Fee, is in the position of plaintiff with reference to all other parties to the suit. When a defendant seeks partition and separate possession of his share, in a suit for partition filed by a plaintiff, the defendant's claim neither a set-off, nor a 'counter-claim' against the plaintiff in the traditional sense, but is one of a wider scope. The Karnataka Court Fees and Suits Valuation Act, 1958 treats a counterclaim and a defendants' claim for partition differently by providing for them under Section 8 and 35(3) respectively and prescribes different types of Court-fee. Therefore, when the defendants in a suit have paid separate Court Fee and sought partition and separate possession of their shares also, the suit cannot be dismissed as withdrawn or settled out of Court by plaintiff with other defendants.

**PROCEDURE TO BE ADOPTED BY COURTS IN
A PARTITION SUIT WHEN A PLAINTIFF WANTS
TO WITHDRAW THE SUIT**

Smt. Gowramma vs Nanjappa And Ors. AIR 2002 Kant 76 The procedure to be adopted by Courts in a partition suit, when a plaintiff wants to withdraw the suit, or when plaintiff wants the suit to be dismissed as settled out of Court with some defendants, can be summarised thus :

- (i) When a plaintiff wants a partition suit to be dismissed or withdrawn as settled out of Court, the Court should require notice of such application or memo to all other parties (not only all defendants, but co-plaintiffs if any) and hear the parties.
- (ii) If all parties are agreeable for the dismissal or withdrawal, the Court may grant the request.
- (iii) If any defendant has already sought partition and separate possession by paying Court Fee and opposes the dismissal/ withdrawal, it shall permit such defendant to transpose himself/herself as plaintiff and continue the suit, irrespective of whether he makes an application for transposition or not.
- (iv) Even if no defendant has sought the relief of partition and separate possession, till then, the

Court may in appropriate cases permit any defendant who files an application in that behalf, to get himself transposed as plaintiff and claim partition and separate possession by paying necessary Court Fee and continue the suit. Refusal to grant such permission should be for valid reasons to be assigned by the Court.

COURT FEE IN CASE OF PARTITION SUIT

B.S. Malleshappa v. Koratagigere B. Shivalingappa and Ors. AIR 2001 Karnataka 384, considering almost an identical situation, after referring to various case laws and the pronouncements of the Apex Court in the case of Neelavathi (Hon'ble Supreme Court in the case of Neelavati and Ors. v. Natraj and Ors. AIR 1990 SC 691 For the purpose of court fee, it is only the allegations in the plaint which have to be taken as basis and not the pleadings in the written statement or the findings of the trial Court.), the Division Bench has held as follows:

11. We may now conveniently summarise the principles relating to Court-fee in regard to suits for partitions and appeals therefrom:

(i) Payment of Court-fee will depend on plaint averment alone. Neither the averments in the

written statement, nor the evidence nor the final decision have a bearing on the decision relating to Court-fee.

(ii) The scope of investigation under Section 11 is confined practically to determine two points: (i) under valuation of the subject-matter of the suit and (ii) category under which the suit falls, for the purpose of Court-fee. Once the category of suit is determined with reference to plaint averments, the Court cannot subsequently change the category on the basis of the averments in the written statement or on the basis of evidence and arguments. In short, if the suit is found to fall under Section 35(2) of the Act on the plaint averments, the Court has no power to convert the suit as one falling under Section 35(1) of the Act, at any point of time, much less while rendering judgment. The only exception is when the plaint is amended.

(iii) The plaintiff in a suit being dominus litis has the choice of filing a suit of particular nature or seek a particular relief. Neither the defendant nor the Court can alter the suit as one for a different relief or as a suit falling in a different category and require the plaintiff to pay Court-fee on such altered category of suit.

(iv) If the plaintiff claims that he is in joint possession of a property and seeks partition and separate possession, he categorises the suit under Section 35(2) of the Act. He is, therefore, liable to pay Court-fee only under Section 35(2). If on evidence, it is found that he was not in joint possession, the consequence is that the relief may be refused in regard to such property or the suit may be dismissed. But the question of Court treating the suit as one falling under Section 35(1) of the Act and directing the plaintiff to pay the Court-fee under Section 35(1) of the Act does not arise. Even after written statement and evidence, (which may demonstrate absence of possession or joint possession) if the plaintiff chooses not to amend the plaint to bring the suit under Section 35(1) and pay Court-fee applicable thereto, he takes the chance of suit getting dismissed or relief being denied.

(v) On appreciation of evidence, if the Court disbelieves the claim of plaintiff regarding joint possession, it can only hold that the case does not fall under Section 35(2) and, therefore, plaintiff is not entitled to relief. It cannot, in the judgment, hold that the case of plaintiff should be categorised under Section 35(1) nor direct the

plaintiff to pay Court-fee on market value under Section 35(1) of the Act.

(vi) The Court-fee payable on an appeal is the same as the Court-fee payable on the suit. Therefore, even if the Trial Court holds that plaintiff was not in joint possession or that plaintiff had been excluded from possession, there will be no change in the Court-fee payable in an appeal by the plaintiff against such decision. The Court-fee on the appeal will still be the same as the Court-fee paid on the plaint in the Court of first instance.

PARTITION SUIT SHALL CONTAIN ALL THE PROPERTIES

Shasidhar and others V. Ashwini Uma Mathad and another reported in MANU/SC/0025/2015 : (2015) 11 SCC 269:

"20. We may consider it apposite to state being a well settled principle of law that in a suit filed by a co-sharer, coparcener, co-owner or joint owner, as the case may be, for partition and separate possession of his/her share qua others, it is necessary for the Court to examine, in the first instance, the nature and character of the properties in suit, such as who was the original

owner of the suit properties, how and by which source he/she acquired such properties, whether it was his/her self-acquired property or ancestral property, or joint property or coparcenary property in his/her hand and, if so, who are/were the coparceners or joint owners with him/her as the case may be. Secondly, how the devolution of his/her interest in the property took place consequent upon his/her death on surviving members of the family and in what proportion, whether he/she died intestate or left behind any testamentary succession in favour of any family member or outsider to inherit his/her share in properties and if so, its effect. Thirdly whether the properties in suit are capable of being partitioned effectively and if so, in what manner? Lastly, whether all properties are included in the suit and all co-sharers, coparceners, co-owners or joint-owners, as the case may be, are made parties to the suit? These issues, being material for proper disposal of the partition suit, have to be answered by the Court on the basis of family tree, inter se relations of family members, evidence adduced and the principles of law applicable to the case."

Aruna and Ors. vs. Madhukar Bapusaheb Lengade and Ors.: MANU/KA/2528/2015 (DB)

- It is settled in law that there can be a partial partition between the coparceners either in respect of property or in respect of persons making it. It is open to the members of joint family to divide even a portion of joint estate while retaining their status as a joint family and holding the rest as properties of undivided family. While considering the question with regard to re-union, the Hon'ble Supreme Court in the case of Bhagawan Dayal V. Mst. Reoti Devi MANU/SC/0374/1961 : AIR 1962 SC 287 quoting the observations of judicial commission reported in the case of Palani Ammal vs. Muthuvenkatacharla Moniagar reported in MANU/PR/0040/1924 : AIR 1925 PC 49 has held thus: For the correct approach to this question, it would be convenient to quote at the outset the observation of the Judicial Committee in Palani Ammal V. Muthuvenkatacharla Moniagar(1) "It is also quite clear that if a joint Hindu family separates, the family or any members of it may agree to reunite as a joint Hindu family, but such a reuniting is for obvious reasons, which would apply in many oases under the law of the Mitakshara, of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved. The leading authority for

that last proposition is Balabux Ladhuram v. Rukhmabai MANU/PR/0019/1903 : (1903) L.R. 30 I.A. 130 : s.c. 5 Bom. L.R. 480".

It is also well settled that to constitute a reunion there must be an intention of the parties to reunite in estate and interest. It is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite in estate with an intention to revert to their former status of members of a joint Hindu family. Such an agreement : need not be express, but may be implied from the conduct of the parties alleged to have reunited. But the conduct must be of such an incontrovertible character that an agreement of reunion must be necessarily implied therefrom. As the burden is heavy on a party asserting reunion, ambiguous pieces of conduct equally consistent with a reunion or ordinary joint enjoyment cannot sustain a plea of reunion. The legal position has been neatly summarized in Mayne's Hindu Law, 11th edn., thus at p. 569:

"As the presumption is in favour of union until a partition is made out, so after a partition the presumption would be against a reunion. To establish it, it is necessary to show, not only that the parties 'already (1924) L.R. 52. I.A. 83, 86. (1903) L.R. 30 I.A. 190, divided, lived, or traded

together, but that they did so with the intention of thereby altering their status and of farming a joint estate with all its, usual incidents it requires very cogent evidence to satisfy the burden of establishing that by agreement between them, the divided members of a joint Hindu family have succeeded in so altering their status as to bring themselves within all the rights and obligations that follow from the fresh formation of a joint undivided Hindu family."

PARTIAL PARTITION AS TO PROPERTIES IS PERMISSIBLE

KASHIBAI AND ORS. v. SMT. PUTALABAI AIR 1987 Karnataka 156' In that case, it is found that the plaint averment made it clear that what was pleaded was partial partition on an earlier occasion and not general partition of all the properties of the family. That partial partition is valid and what remains is joint family property held by the persons who hold such property as tenants in common. Where there is evidence to show that the parties intended to sever, then the joint family status is put an end to and with regard to any portion of the property which remained undivided the presumption would be

that the members of the family would hold it as tenants-in-common unless and until a special agreement to hold as joint tenants is proved. In the facts and circumstances of that case, it was held that partial partition of the properties is permissible and the partition of the remaining properties can be sought and the family can be deemed to have continued in a joint status in so far as the properties are concerned and as such the presumption was never rebutted by the defendants. Similar is the situation in the instant case.

THE HON'BLE MR. JUSTICE A.V. CHANDRASHEKARA of HIGH COURT OF KARNATAKA on 30TH DAY OF APRIL, 2015 in the case of M S VISHWANATHA RAO vs M S NAGARAJ SINCE DEAD BY LRS & ors R.S.A. NO.238/2005 Held that "Every suit for partition should ordinarily embrace all joint family properties. But a suit for partial partition will lie only when the portion omitted is not in the possession of coparceners and will subsequently be deemed not available for partition. For instance, where a part of the joint family property is in possession of a mortgagee or lessee or is

impartible zamindari or being held by strangers who have no interest in the family partition."

SECOND SUIT FOR PARTITION - ACCEPTABLE EXPLANATION SHOULD BE GIVEN IN THE SECOND SUIT ABOUT THE INCOMPLETENESS OF THE FIRST SUIT

In THIMMAPPA SHAMBUL v. RAMACHANDRA KRISHNA AND ANR. 1980(1) KLJ 329, it is observed that: "Plaintiffs withdrew from the earlier partition suit two properties on the representation of the defendants that permission of the Charity Commissioner was necessary for partition of those two properties. Subsequently plaintiffs applied to the Charity Commissioner and contested the matter upto the Revenue Appellate Tribunal and after final orders were obtained presented the present suit for partition of those two properties." It was held: "That the suit was not barred by Order 2, Rule 2 or Order 23, Rule 1 C.P.C." It was further observed that: "An acceptable explanation should be given in the second suit about the incompleteness of the first suit and if the explanation is satisfactory, the second suit is not barred."

Venkata Rao vs Narayana ILR 1994 KAR 387

... By consent of parties, the suit properties were intentionally and deliberately excluded from the purview of the earlier suit. As such, a second suit for partition thereof was clearly maintainable.

WHO ARE NECESSARY PARTIES AND PROPER PARTIES IN A PARTITION SUIT

THE HON'BLE MR.JUSTICE N. ANANDA of Karnataka High Court in the case of **Sri S K Vijayakumar vs Sri S K Ravikumar Decided on 18 February, 2013** In a suit for partition, array of parties as plaintiffs or defendants does not make any difference. In a suit for partition, plaintiff cannot be termed as dominus litis to abandon part of claim or delete parties. The learned trial Judge has ignored the settled principles of law.

In a decision reported in ILR 2012 KAR 4129

(in the case of S.K.Lakshminarasappa, since deceased by his L.Rs. Vs. Sri B.Rudraiah & others), court has held:- "59. In a partition suit, all co-parceners must be before Court either as plaintiffs or as defendants. Any co-parcener or co-sharer who sues for partition of property must

make the other co-parceners or co-sharers as defendants because the partition which is made in his favour is a partition against his co-parceners or co-sharers. Any decree which gives him a portion of property takes away all rights which they, i.e., the others co-parceners or co-sharers would otherwise have to that portion, and therefore, it is a decree against them and in his favour. A decree for partition made in a suit instituted by a member of Joint Hindu Family is therefore *res judicata* as between all who are parties to the suit. Besides the co-parceners, the wife, the mother, grand-mother or other legal heirs, are necessary parties to the suit when they are entitled to a share on a partition having succeeded to the estate of such co-parceners or co-sharers. When the partition is claimed as between branches of the family only, the heads of all the branches alone need be made parties. Of course, in such a case, it is open to the others to apply to be made parties. Those members of the family who are entitled to maintenance would be proper parties to a suit for partition. So too, the joinder of creditors and in particular decree holders as well as mortgages as defendants may be proper in cases where their claims are disputed. Every co-parcener and every purchaser

of the interest of a co-parcener is entitled to institute a suit for partition.

In Section 333 of Mulla's Hindu Law 17th Edition at page 537 dealing with the question as to who should be the parties to the suit, it is stated as under:-

a) The plaintiff in a partition suit should implead as defendants:-

- (i) the heads of all branches;
- (ii) females who are entitled to a share on partition;
- (iii) the purchaser of a portion of the plaintiff's share, the plaintiff himself being a coparcener;
- (iv) if the plaintiff himself is a purchaser from a coparcener, his alienor.

b) It is desirable that the following persons should be made parties; though not necessary parties, they are proper parties to such a suit:

- (i) a mortgage with possession of the family property or of the undivided interest of a coparcener;
- (ii) simple mortgagees of specific items of the family property;
- (iii) purchaser of the undivided interest of a coparcener;
- (iv) persons entitled to provision for their maintenance and marriage, that is, widows,

daughters, sisters and such like and distinguished heirs;

(v) any person entitled to maintenance from the family, the plaintiff may also plead any other coparcener or any person interested in the family property such as a mortgage or a lessee. Such a person may himself apply and be made a party."

PURCHASER OF UNDIVIDED SHARE - HIS ONLY RIGHT IS TO SUE FOR PARTITION OF THE PROPERTY

In **M.V.S. Manikayala Rao vs. M. Narasimhaswami & Ors.** [(AIR 1966 SC 470)], Court held: "Now, it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased."

PURCHASER OF UNDIVIDED SHARE - NOT ENTITLED TO POSSESSION

Peethani Suryanarayana & Anr. vs. Repaka Venkata Ramana Kishore & Ors. [2009 (2) SCALE 461], Court held: "It is also not in dispute that the appellants, being purchasers of undivided share in a joint family property, are not entitled to possession of the land that they have purchased. They have in law merely acquired a right to sue for partition"

PARTITION SUIT NOT NECESSARY TO SEEK A DECLARATION FOR SETTING ASIDE THE ALIENATION BUT IT IS SUFFICIENT TO SEEK ALIENATION NOT BINDING UPON HIS SHARE

A Division Bench of Court in the case of **GANAPATI SANTARAM BHOSALE v. RAMACHANDRA SUBBA RAO, ILR 1985 KAR 1115** has held that in a 'suit for partition by a Hindu coparcener, it is not necessary to seek a declaration for setting aside the alienation but it is sufficient to seek a share and possession thereof complying with a declaration that he is not bound by alienations or interest of others created in such properties which fall to his share.

PARTIAL PARTITION SUIT WHEN UNDER SEVERAL CIRCUMSTANCES MAINTAINABLE

In SAVITRI BAI v. DEVENDRA BALAPPA PATIL

1964 Mys.L.J. (Supp) 474 @ 475, dealing with the question as to when a suit for partial partition is maintainable, this Court has held thus at para-5: "It is a well settled rule that a suit for partition of property belonging to a Hindu joint family like a suit for partition of property belonging to more than one co-owner, must comprise all the properties which are available for partition or division. But it should be remembered that during a long period of time there has been a recognition by the Courts of many exceptions to that rule, and those exceptions are what are demanded by reason and justice. While the insistence on a claim for partition in the first suit of a property then unavailable for division or was outside the jurisdiction of the Court cannot have the support of reason, the refusal to entertain, the second suit when the non-inclusion of a property in the first was induced by mistake, accident, fraud or a like reason does not promote justice. The main purpose of the rule that normally there can be only one suit for partition between Hindus is to bestow on a partition the attribute of finality, but if there could be a partial partition by consent, which is permissible, the view that a

second suit for partition can never lie cannot be sound."

**Thukaram Vs. Sri. Sambhaji and Others
(MANU/KA /0498/1998 : ILR 1998 KAR 681)**

held that there is no partition by meets and bounds of the family properties. The present suit is filed in respect of the suit land only. There are other lands in other villages and also other house properties, which have not been included in the suit which are admittedly in the joint family properties. It is further held that the suit for partition would not be maintainable when suit is filed seeking partition of alienated item only, particularly when the joint family owned number of properties and non inclusion of all other properties belonging to the family in the plaint would be fatal. Continuing the suit against the property of the plaintiff, deleting other properties is fatal to the case of the defendants.

NECESSARY PARTIES OF PARTITION SUIT

In **Subbanna vs Kamaiah ILR 1988 KAR 786 MANU/KA/0235/1988** Karnataka High court observed: "In a suit for partition of the property of a Hindu joint family, necessary parties to the suit

are : (a) heads of all branches ; (b) females who are entitled to a share on partition ; (c) purchaser of the portion of the plaintiff's share in a case where the plaintiff himself is a coparcener; (d) if the plaintiff himself is a purchaser from a coparcener, his alienor and (e) in case the devolution of interest in Mithakshara coparcenary property has taken place as per Section 6 of the Hindu Succession Act, all those persons on whom the interest in the property has devolved. In a case where the devolution of interest in the property of a male Hindu has taken place in accordance with Section 8 of the Hindu Succession Act, all those heirs on whom the interest in the property has devolved upon.”

PURCHASERS IN PARTITION SUIT NECESSARY

A division Bench of Karnataka High Court, in the case of G.M.MAHENDRA .v. G.M.MOHAN & ANOTHER (2011(4) KCCR 2461) has reiterated that Order II Rule 2, C.P.C. would be applicable in cases where a suit for partition is filed by non-alienating coparceners. It is further held that non-including of purchasers will deny them the right of seeking equitable allotment.

IMPLEADING AS PARTY

**Mumbai International Airport Private Limited
v. Regency Convention Centre and Hotels
Private Limited and others, reported in
MANU/SC/0427/2010 : (2010) 7 SCC 417; -**

"15. The general rule in regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order 1, Rule 10(2) of Code of Civil Procedure ('Code' for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:
"10(2) Court may strike out or add parties-The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined,

whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

.....14. The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the question involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party. 15. A 'necessary party' is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the Court. If a 'necessary party' is not impleaded, the suit itself is liable to be dismissed. A 'proper party' is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively

and adequately adjudicate upon all matters in disputes in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance".

Kanaklata Das and others v. Naba Kumar Das and others, reported in MANU/SC/0041/2018 : AIR 2018 SC 682; "the plaintiff being dominus litis cannot be compelled to make any third party person as party to the suit, be that a plaintiff or the defendant, against his wish unless such person is liable to prove that he is a necessary party to the suit and without his presence, the suit cannot proceed and nor can be decided effectively. In other words, no person can compel the plaintiff to allow such person to become the co-plaintiff or defendant in the suit. It is more so when such person is unable to show as to how he is a necessary or proper party to the suit and how without his presence, the suit can

neither proceed and nor it can be decided or how is presence is necessary for the effective decision of the suit."

In the case of Kasturi v. Iyyamperumal and others, reported in MANU/SC/0319/2005 : AIR 2005 SC 2813.

"two tests are to be satisfied for determining the question who is necessary party. This tests are (I) there must be a right to some relief against such party in respect of the controversies involved in the proceedings (II) no effective decree can be passed in the absence of such party. From a plain reading of the expression, used in sub-rule (2), Order 1, Rule 10 of the CPC, "all the questions involved in the suit" it is abundantly clear that the legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies which may arise between the plaintiff/appellant and the defendants inter se or questions between the parties to the suit and a third party."

Vidur Impex and Traders Pvt. Ltd. and Ors. v. Tosh Apartments Pvt. Ltd. and Ors, reported in MANU/SC/0663/2012 : AIR 2012 SC 2925;

"The broad principles for impleading of parties are as under:

"1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the suit.

2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by Court.

3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

4. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.

5. In a suit for specific performance, the Court can order impleadment of a purchaser whose

conduct is above-board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

6. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the Court or the application is unduly delayed then the Court will be fully justified in declining the prayer for impleadment".

IN PARTITION SUIT RIGHTS OF PARTIES GET CRYSTALIZED ON THE DATE OF FILING OF SUIT

In **Subbanna vs Kamaiah** ILR 1988 KAR 786 (DB) - MANU/KA/0235/1988 Rights of parties as on date of filing unless subsequent changes in law specifically take away the rights vested. Normally excepting in certain exceptional circumstances, the rights of the parties to a suit or proceeding and, more so, in the case of a suit for partition get crystalised on the date of filing of the suit. In other words, the rights of the parties are to be determined on the factual and legal

position obtaining as on the date of the suit. Of course, in certain cases subsequent changes in law as well as in facts are to be taken into account even at the appellate stage also, if such changes have a direct bearing on the reliefs sought for in a suit or proceeding. But in a case where a right to claim a share accrues to a party on the date of filing of a suit, such a right cannot at all be defeated on the basis of a subsequent change in law or facts as long as such changes do not specifically take away the rights which came to be vested in a party. Partition according to Mitakshara law consists in a numerical divisions of the property. In other words, it consists in defining the shares of the coparceners in the joint properties, an actual division of the properties by metes and bounds is not necessary. The institution of a suit by a coparcener for partition of a joint family property is an undoubted and unequivocal intimation of his intention to separate himself from the rest of the joint family. Therefore, no sooner the suit is filed severance of joint status takes place. Once it happens, division of title takes place. The decree is necessary only to apply the division of title and for allotting definite properties according to the shares. As such, it is only consequential or the result of the

severance. Rule 9 of Order 1 of C.P.C., specifically provides that no suit shall be defeated by reason of the mis-joinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. A proviso has been added by Central Act 104 of 1976 to the effect that "nothing in this rule shall apply to non-joinder of a necessary party." But sub-rule (2) of Rule 10 of Order 1 C.P.C., empowers the Court to direct the plaintiff to add a person to the suit who ought to have joined whether as plaintiff or defendant whose presence before the Court is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. As on the date of filing of the suit for partition, the 6th respondent was an unmarried daughter became entitled to a share. The fact that the suit was pending for a long time and in the meanwhile the marriage of respondent-6 was performed did not and could not affect the right that had accrued to respondent-6 as an unmarried daughter because the partition in the Mitakshara sense of the joint family properties, took place on the filing of the suit for partition

when she was an unmarried daughter. Therefore, sixth respondent is a necessary party to the suit.

**UNMARRIED DAUGHTER AT THE TIME OF
FILING OF PARTITION SUIT DOES NOT LOOSE
HER RIGHT AFTER SHE MARRIES**

In **Subbanna vs Kamaiah** ILR 1988 KAR 786
(DB) - MANU/KA/0235/1988 - NANI BAI v.

GITABAI, MANU/SC/0112/1958 :
[1959]1SCR479 , the Supreme Court has held
thus : "Partition in the Mitakshara sense may be
only a severance of the joint status of the
coparcenary, that is to say, what was once a joint
title, has become a divided title though there has
been no division of any properties by metes and
bounds. Partition may also mean what ordinarily
is understood by partition amongst co-sharers
who may not be members of a Hindu
coparcenary. For partition in the former sense, it
is not necessary that all the members of the joint
family should agree, because it is a matter of
individual volition. If a coparcener expresses his
individual intention in unequivocal terms to
separate himself from the rest of the family, that
effects a partition, so far as he is concerned, from
the rest of the family. By this process what was a

joint tenancy has been converted into a tenancy in common. For partition in the latter sense of allotting specific properties or parcels to individual coparceners, agreement amongst all the coparceners is absolutely necessary."

Thus, partition according to Mitakshara law consists in a numerical divisions of the property. In other words, it consists in defining the shares of the coparceners in the joint properties, an actual division of the properties by metes and bounds is not necessary. The institution of a suit by a coparcener for partition of a joint family property is an undoubted and unequivocal intimation of his intention to separate himself from the rest of the joint family. Therefore, no sooner the suit is filed severance of joint status takes place. Once it happens, division of title takes place. The decree is necessary only to apply the division of title and for allotting definite properties according to the shares. As such, it is only consequential or the result of the severance. Therefore, as on the date of filing of the suit for partition, the 6th respondent was an unmarried daughter became entitled to a share. The fact that the suit was pending for a long time and in the meanwhile the marriage of respondent-6 was performed did not and could not affect the

right that had accrued to respondent-6 as an unmarried daughter because the partition in the Mitakshara sense of the joint family properties took place on the filing of the suit for partition when she was an unmarried daughter. Therefore, sixth respondent is a necessary party to the suit. If the words "At a partition" are interpreted to mean, actual partition by metes and bounds, it will defeat the very intendment of the enactment to confer better rights on female relatives. The best example of it is the instant case. If the suit had been decided immediately, the actual partition by metes and bounds would have taken place before the marriage of the 6th respondent was performed.

CHAPTER-21
JUDGEMENT AND DECREE

**COURTS BELOW OUGHT TO HAVE DECLARED
THE EXACT SHARE OF THE PLAINTIFF AND
PASSED A PRELIMINARY DECREE**

Mallappajaiah vs Muddanna (**ILR 1990 Kant 336**) No doubt the relief sought for by the plaintiff was not clear and it was not unambiguous. However, in a suit for partition the Court has to determine the share of the plaintiff in the suit properties to which he is entitled. Therefore, the Courts below ought to have declared the exact share of the plaintiff and passed a preliminary decree in respect of such share of the plaintiff.

**WITHDRAWL OF SUIT WITHOUT LIBERTY TO
FILE FRESH SUIT – DOES NOT AMOUNT TO
DECREE**

In a decision reported in **AIR 2007 SC 1575** (in the case of Kandapazha Nadar & Ors. -vs- Chitraganiammal & Ors.) the Supreme Court has held that, withdrawal of suit without liberty to file fresh suit, without any adjudication does not constitute decree and it does not debar

defendants from taking defence in second round of litigation.

**COURT CAN PASS MORE THAN ONE
PRELIMINARY DECREE IN PARTITION SUIT**

The Supreme Court in the case of Phoolchand v. Gopal Lal **1967 AIR 1470, 1967 SCR (3) 153** held as under: We are of the opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such

cases there is a decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the court. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which also preliminary and final decrees are passed. There is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility. In any case if two views are possible - and obviously this is so because the High Courts have differed on the question - we would prefer the view taken by the

High Courts which hold that a second preliminary decree can be passed, particularly in partition suits where parties have died after the preliminary decree and shares specified in the preliminary decree have to be adjusted. We see no reason why in such a case if there is dispute, it should not be decided by the Court which passed the preliminary decree, for it must not be forgotten that the suit is not over till the final decree is passed and the court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly in a partition suit due to deaths of some of the parties. Whether there can be more than one final Page 2125 decree does not arise in the present appeal and on that we express no opinion. We therefore hold that in the circumstances of this case it was open to the court to draw up a fresh preliminary decree as two of the parties had died after the preliminary decree and before the final decree was passed. Further as there was dispute between the surviving parties as to devolution of the shares of the parties who were dead and that dispute was decided by the Trial Court in the present case and thereafter the preliminary decree already passed was amended, the decision amounted to a decree and was liable to appeal.

We therefore agree with the view taken by the High Court that in such circumstances a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided the decision amounts to a decree. We should however like to make it clear that this can only be done so long as the final decree has not been passed. We therefore reject this contention of the appellant.

Channaveerappa Gowda vs. Renukappa Gowda: MANU/KA/1523/2014 - 2014 (4) AKR

711 - It is settled law that, in a partition suit, there can be more than one preliminary decree. If an event transpires after the preliminary decree which necessitates a change in shares, the Court can and should do so. If there is a dispute in that behalf, the order of the Court deciding that dispute and making variation in shares specified in the preliminary decree already passed in would be a second preliminary decree which would be liable to appeal. When after the preliminary decree some parties die and shares of other parties are thereby augmented, it would be

convenient to the Court and advantageous to the parties, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. It is based on the principle that a partition suit would not come to an end with the passing of a preliminary decree. The suit is not over till the final decree is passed. The Court has jurisdiction to decide all disputes that may arise after preliminary decree due to deaths of some of the parties. The reason being on account of the death of some of parties, the shares allotted to them in the preliminary decree, may devolve on other parties to the preliminary decree. In which event the preliminary decree becomes defective even before a final decree is passed. There is no mechanism to correct this error, which happens because of a subsequent event after the passing of the preliminary decree and before the final decree is passed, which is beyond anybody's control. In a partition suit, first a preliminary decree is passed declaring the rights of the parties in the schedule property. During the course of final decree proceedings, the court has jurisdiction to alter shares if it is occasioned by the death of one of the sharers. Notwithstanding the declaration of rights in the preliminary

decree, there may be more than one preliminary decree. If there is no dispute regarding some of the joint family properties, or the claim for partition is admitted by the defendants in respect of some of the suit schedule properties, then the Court can proceed under Order XII Rule 6 of CPC and pass preliminary decree in respect of such items at once. Thereafter, after contest yet another preliminary decree in respect of the other items of property. Similarly, there can be more than one Final Decree also.

The Apex Court in the case of **Ganduri Koteshwaramma and Another v. Chakiri Yanadi and Another** [MANU/SC/1216/2011 : (2011) 9 SCC 788] has held as under:-- 14. A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating

change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree redetermining the rights and interests of the parties having regard to the changed situation.

21. It is true that final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree.

The Apex Court in the case of **Prema v. Nanje Gowda and Others (MANU/SC/0607/2011 : (2011) 6 SCC 462)** has held as under:--

16. We may add that by virtue of the preliminary decree passed by the trial Court, which was confirmed by the lower appellate Court and the High Court, the issues decided therein will be deemed to have become final but as the partition suit is required to be decided in stages, the same can be regarded as fully and completely decided only when the final decree is passed. If in the interregnum any party to the partition suit

dies, then his/her share is required to be allotted to the surviving parties and this can be done in the final decree proceedings. Likewise, if law governing the parties is amended before conclusion of the final decree proceedings, the party benefited by such amendment can make a request to the Court to take cognizance of the amendment and give effect to the same. If the rights of the parties to the suit change due to other reasons, the Court ceased with the final decree proceedings is not only entitled but is duty bound to take notice of such change and pass appropriate order.

17. In this case, the Act was amended by the State legislature and Sections 6A to 6C were inserted for achieving the goal of equality set out in the Preamble of the Constitution. In terms of Section 2 of the Karnataka Act No. 23 of 1994, Section 6A came into force on 30.7.1994, i.e. the date on which the amendment was published. As on that day, the final decree proceedings were pending. Therefore, the appellant had every right to seek enlargement of her share by pointing out that the discrimination practiced against the unmarried daughter had been removed by the legislative intervention and there is no reason why the Court should hesitate in giving effect to

an amendment made by the State legislature in exercise of the power vested in it under Article 15(3) of the Constitution.

CHANGE OF LAW AFTER THE PRELIMINARY DECREE IS PASSED BEFORE PASSING OF THE FINAL DECREE

The Apex Court in the case of **S. Sai Reddy v. S. Narayana Reddy [MANU/AP/0044/1990 : 1991 (3) SCC 647]** dealing with the change of law after the preliminary decree is passed before passing of the final decree held as under:-- 7.....A partition of the joint Hindu family can be effected by various modes, viz., by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the court. When a suit for partition is filed in a court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which

determines shares does not bring about the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events. In the instant case, there is no dispute that only a preliminary decree had been passed and before the final decree could be passed the amending Act came into force as a result of which clause (ii) of Section 29-A of the Act became applicable. This intervening event which gave shares to respondents 2 to 5 had the effect of varying shares of the parties like any supervening development. Since the legislation is beneficial and placed on the statute book with the avowed object of benefitting women which is a vulnerable section of the society in all its strata, it is necessary to give a liberal effect to it. For this reason also, we cannot equate the concept of partition that the legislature has in mind in the present case with a mere severance of the status of the joint family which can be effected by an expression of a mere desire by a family member to do so. The partition that the legislature has in mind in the present case is undoubtedly a partition completed in all respects and which has brought about an irreversible situation. A preliminary decree which merely declares shares which are themselves liable to change does not

bring about any irreversible situation. Hence, we are of the view that unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act. Any other view is likely to deprive a vast section of the fair sex of the benefits conferred by the amendment. Spurious family settlements, instruments of partitions not to speak of oral partitions will spring up and nullify the beneficial effect of the legislation depriving a vast section of women of its benefits.

COURT HAS JURISDICTION TO DIRECT A PARTITION INTERSE AMONGST THE PLAINTIFFS

Court in **M. Kinhanna Alva and Ors. v. K.T. Alva and Ors. 1960 Mys.L.J. 847** held that where a preliminary decree in a partition suit allotted shares to the plaintiffs together and the remaining shares to the defendants, and did not provide for partition interse amongst the plaintiffs, the court has jurisdiction to direct a partition interse amongst the plaintiffs. It is a matter for the discretion of the court. It is not a matter of the right for the party to ask for such

allocation irrespective of the frame of the suit or the terms of the preliminary decree.

FINAL DECREE PROCEEDINGS AND ROLE OF PARTITION ACT

THE HON'BLE JUSTICE C ULLAL & THE HON'BLE JUSTICE H.N. Naghmohan Das, of Karnataka High Court in the case of Smt. Rukmani vs V. Uday Kumar Reported **in ILR 2008 KAR 13, 2008 (3) KarLJ 129**

A preliminary decree as we see declares the rights and the liabilities of the parties and after passing of preliminary decree for partition, declaring the rights of several parties interested in the property, the final decree proceedings will start by filing a petition/application under Order 20 Rule 18 CPC by any of the parties to the preliminary decree; Then the final decree Court shall proceed to divide and separate the shares as specified either under Section 54 or under Order 26 Rule 13 and 14 CPC. In the event of court Commissioner under Order 26 Rule 13 CPC submits a report stating that the schedule property is not partitionable, then in that event there was no provision empowering the court to sell the schedule property against the wishes of the

parties to the suit. The court has no power to sell the property even if the circumstances necessitate. Thus there is a gap and void in law. This gap and void in law came to be filled by enacting Section 2 and 3 of the Partition Act. The statement of objects and reasons of Partition Act, 1893 which reads as under: "....That section, however, only authorises the court to divide the property, and in some exceptional cases where an equal division is not practicable to award a money compensation for the purpose of equalising the value of the shares. But as the law now stands, the court must give a share to each of the parties and cannot direct a sale and division of the proceeds in any case whatever. Instances, however, occasionally occur where there are inseparable practical difficulties in the way of making an equal division, and in such cases the Court is either powerless to give effect to its decree or is driven to all kinds of shifts and expedients in order to do so. Such difficulties are by no means of very rare occurrence although in many cases where the parties are properly advised they generally agree to some mutual arrangement, and thus relieve the court from embarrassment. Therefore we are of the considered opinion that wherever tile property

cannot be divided and separated as specified under Section 54 or Order 26 Rule 13 CPC, the provision of Partition Act, 1893 will step in to resolve the controversy between the parties and to the benefit of shareholders to enjoy the fruits of decree. There may be cases not covered under Section 2 and 3 of the Partition Act, then the court has the discretionary power to adopt equitable method of owelty. In the instant case, the Court Commissioner submitted a report stating that the schedule property is not partitionable. Except three legal representatives out of four legal representatives of deceased defendant No. 5, all other parties to the suit are agreeable for sale of the schedule property and to distribute the sale proceeds among them as per their entitlement. Under the circumstances, the provisions of Partition Act, 1893 are applicable to the facts of the case.

RUKMINI AND OTHERS VS. UDAY KUMAR AND OTHERS reported in **ILR 2008 KAR 2013** to the effect that "where the Court passes a decree for partition of property or for any separate possession of shares of the parties interested in the property and hence the Court can further direct partition or separation to be made by metes

and bounds in terms of such declaration as per the provisions of Section 54 or under Order 26 Rule 13 of the Code of Civil Procedure. Let apart the final decree proceedings being continuation of the suit for partition, the partition suit in law is deemed to be pending until a final decree passed by the Court. A party to the preliminary decree is therefore entitled to file petition/application under Order 20 Rule 18 of the Code of Civil Procedure to draw the final decree in what is commonly known as Final Decree Proceedings".

WHETHER IT IS FINAL DECREE OR PRELIMINARY DECREE

Rachakonda Venkat Rao And Others v. R. Satya Bai (D) by L.R. And Another AIR 2003 SC 3322 : 2003 7 SCC 452 wherein it has been stated as follows:- "The compromise application does not contain any clause regarding future course of action which gives a clear indication that nothing was left for future on the question of partition of the joint family properties. The curtain had been finally drawn." After so stating, the Bench proceeded to observe as follows:- "The decree as a matter of fact leaves nothing for future. As noticed earlier in a

preliminary decree normally the court declares the shares of the parties and specifies the properties to be partitioned in the event of there being a dispute about the properties to be partitioned. After declaring the shares of the parties and the properties to be partitioned, the Court appoints a Commissioner to suggest mode of partition in terms of O. XXVI, R. 13, C.P.C. perusal of Order XXVI, R. 13 C.P.C. shows that it comes into operation after a preliminary decree for partition has been passed. In the present case, there was no preliminary decree for partition and, therefore, R. 13 of O. XXVI does not come into operation. If the plaintiffs considered the decree dated 13th July, 1978 as a preliminary decree, why did they wait to move the application for final decree proceedings for 13 years? The only answer is that the plaintiffs knew and they always believed that the 1978 decree was a final decree for partition and it was only passage of time and change in value of the properties which was not up to their expectations that drove plaintiffs to move such an application."

THE ENGROSSMENT OF THE DECREE ON STAMP PAPER WOULD RELATE BACK TO THE DATE OF THE DECREE.

**DR. CHIRANJI LAL (D) BY LRS. VS HARI DAS
(D) BY LRS. AIR 2005 SC 2564,**

Rules of limitation are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. There is no statutory provision prescribing a time limit for furnishing of the stamp paper for engrossing the decree or time limit for engrossment of the decree on stamp paper and there is no statutory obligation on the Court passing the decree to direct the parties to furnish the stamp paper for engrossing the decree. In the present case the Court has not passed an order directing the parties to furnish the stamp papers for the purpose of engrossing the decree. Merely because there is no direction by the Court to furnish the stamp papers for engrossing of the decree or there is no time limit fixed by law, does not mean that the party can furnish stamp papers at its sweet will and claim that the period of limitation provided under Article 136 of the Act would start only thereafter as and when the decree is engrossed thereupon. The starting of period of limitation for execution of a decree cannot be made contingent upon the engrossment of the decree on stamp paper. The

engrossment of the decree on stamp paper would relate back to the date of the decree.

**PRINCIPLES OF PROCEDURE IN PARTITION
SUIT AND COURTS DUTY TO CONTINUE FINAL
DECREE PROCEEDINGS 2009 SC**

**Shub Karan Bubna @ Shub Karan Prasad Bubna
Vs. Sita Saran Bubna & Ors. 2009 AIR 2863 =
2009 (14) SCR 40 = 2009 (9) SCC 689**

In regard to estates assessed to payment of revenue to the government (agricultural land), the court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by the court in regard to the shares of various parties and deliver the respective portions to them, in accordance with section 54 of Code.

Such entrustment to the Collector under law was for two reasons. First is that Revenue Authorities are more conversant with matters relating to agricultural lands. Second is to safeguard the interests of government in regard to revenue. (The

second reason, which was very important in the 19th century and early 20th century when the Code was made, has now virtually lost its relevance, as revenue from agricultural lands is negligible).

Where the Collector acts in terms of the decree, the matter does not come back to the court at all. The court will not interfere with the partitions by the Collector, except to the extent of any complaint of a third party affected thereby.

In regard to immovable properties (other than agricultural lands paying land revenue), that is buildings, plots etc. or movable properties: (i) where the court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds. (ii) where the division by metes and bounds cannot be made without further inquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner

is appointed (usually an Engineer, Draughtsman, Architect, or Lawyer) to physically examine the property to be divided and suggest the manner of division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree, (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions.

When the Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds.

It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.

As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary

decree does not have the effect of disposing of the suit.

The suit continues to be pending until partition, that is division by metes and bounds, takes place by passing a final decree.

An application requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under Article 136 of the Limitation Act) nor an application seeking a fresh relief (falling under Article 137 of Limitation Act). It is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion.

PASSING OF FINAL DECREE AT FIRST INSTANCE ITSELF

A.I.R.2003 SC 1608, in the case of Renu Devi vs. Mahendra Singh and others that under Order 20 Rule 18, it is not necessary to pass a preliminary decree, the court may pass preliminary decree if it is required. If the rights of the parties are finally determined and no further inquiry remains to be held for the purpose of completing the

proceedings in partition then there is nothing in law which prevents the court from passing a final decree in the very first instance.

THE PROCEEDINGS SHOULD BE CONTINUED BY FIXING DATES FOR FURTHER PROCEEDINGS TILL A FINAL DECREE IS PASSED

Shub Karan Bubna @ Shub Karan Prasad Bubna Vs. Sita Saran Bubna & Ors. 2009 AIR 2863

The Honourable Supreme Court has held that C.P.C. does not contemplate filing an application for final decree and when a preliminary decree is passed in a partition suit, the proceedings should be continued by fixing dates for further proceedings till a final decree is passed and it is the duty and function of the court and performance of such function does not require a reminder or nudge from the litigant. The mindest should be to expedite the process of dispute resolution."

WHERE THE PRELIMINARY DECREE HAD BEEN PASSED PRIOR TO THE COMMENCEMENT OF THE AMENDING ACT, THE FINAL DECREE PASSED AFTER SUCH

COMMENCEMENT, DAUGHTER WOULD BE ENTITLED TO A SHARE IN THE COPARCENARY PROPERTY

The Apex Court, in the case of S. Sai Reddy v. S. Narayana Reddy (1993)3 SCC 647, dealing with the question with regard to the daughter's share in coparcenary property, where, on facts, the partition had taken place prior to the commencement of the amending Act, answered the point concerning disentitlement of the daughter under clause (iv) of Section 29-A of the Hindu Succession (A.P. Amendment) Act, 1986 by observing that the said question will have to be determined on the basis of the date of passing of the final partition decree by metes and bounds and where the preliminary decree had been passed prior to the commencement of the amending Act, the final decree passed after such commencement, daughter would be entitled to a share in the coparcenary property under clause (ii) of the said Section 29-A and observed that since the legislation is beneficial and placed on the statute book with the avowed object of benefitting women who are a vulnerable section of the society in all its stratas, it is necessary to give a liberal effect to it.

Whether the change in the law will also affect pending appeals or not was the question considered by the Apex Court in the case of Lakshmi Narayan Guin & Ors. v. Niranjan Modak, [1985] 1 SCC 270; and the observations made at paragraph-9 are as under: That a change in the law during the pendency of an appeal has to be taken into account and will govern the rights of the parties was laid down by the court in Ram Sarup v. Munshi 1963 AIR 553, 1963 SCR (3) 858, which was followed by the Court in Mula v. Godhu 1971 AIR 89, 1970 SCR (2) 129. We may point out that in Dayawati v. Indeijit 1966 AIR 1423, 1966 SCR (3) 275, this Court observed: Ordinarily a court of appeal cannot take into account a new law, brought into existence after the Judgment appealed from has been rendered, because the rights of the litigants in an appeal are determined under the law in force at the date of the suit. Matters of procedure are however different and the law affecting procedure is always retrospective. But it does not mean that there is an absolute rule of inviolability of substantive rights, If the new law speaks in language, which, expressly or by clear intendment, takes in even pending matters, the Court of trial as well as the Court of appeal must

have regard to an intention so expressed, and the Court of appeal may give effect to such a law even after the judgment of the Court of first instance.

Finally, the Court held thus: On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge:

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.
2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.
3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.
4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field.

Thus, in the light of the above settled proposition of law laid down by the Apex Court and also by this Court in the aforementioned cases, I am of the view that the provision of Section 6-A(d) of the Karnataka Amendment Act, 1990 is repugnant to the Central Act of 2005 and as the Central Act is later in point of time, it will prevail over the State Act to the extent the provision of Section 6-A(d) of the State Act is repugnant or to the Central Act in so far as position of married daughter is concerned. In other words, as a result of substitution of Section 6 of the Principle Act by way of the Central Amendment Act of 2005, the State Act, which is earlier in point of time, cannot have any effect. Supremacy of the parliament, therefore renders Section 6-A(d) of the Karnataka Amendment Act, 1990, void.

As far as the apprehension that the flood gate would be opened, is concerned, I do not see any rational basis for the said apprehension for two reasons.

(1) The Central Act of 2005 clearly mentions that a daughter of coparcener shall by birth become a co- parcener in her right from the commencement of the Hindu Succession (Amendment) Act of 2005.

(2)The said Central Act of 2005 also mentions in proviso to Section 6(1) that nothing contained in the sub-section 6(1) shall affect or invalidate any disposition or alienation or including any partition or testamentary or disposition of property which have taken place before 20 day of December 2004.

Further, the object behind the Central Legislation also will have to be borne in mind and in the statement of "objects and reasons" to the Hindu Succession Amendment Act 2005 it has been clearly stated that having regard to the need to render social justice to women, it is proposed to remove the discrimination contained in Section 6 of the Hindu Succession Act of 1956 by giving equal rights to daughters amongst co-parcener's property as the sons have. It is this goal that has also led to Section 23 of the Principal Act being omitted by the Central Act of 2005.

Having thus arrived at the conclusion that the provision of Section 6-A(d) of the Karnataka Amendment Act 1990 is repugnant to the Central Act of 2005 and to the extent of repugnancy, the said provision of 6-A(d) is void and rendered ineffective, the question will arise as to from when the repugnancy of the State Act will come into effect.

APPOINTMENT OF RECEIVER OF JOINT FAMILY PROPERTIES

'PANCH SADACHAR' FOR THE COURTS EXERCISING EQUITABLE JURISDICTION IN APPOINTING RECEIVERS

Honourable Ramaswami, J of the Madras High Court in **T. Krishnaswamy Chetty v. C. Thangavelu Chetty, AIR 1955 Mad 430** have laid down five principles which it has described as 'Panch Sadachar' for the courts exercising equitable jurisdiction in appointing receivers. They are these:

(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute; it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit.

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm.

(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturb possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one, as the Court can hardly do

wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver.

(5) The Court on the application of a receiver looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disintitiled himself to the equitable relief by laches, delay, acquiescence etc."

In Muniammal v. Ranganatha Nayagar, AIR 1955 Mad 571, the same learned Judge reiterated the principles as here under:--

".....First of all, a plaintiff applying for the appointment of a Receiver must show prima facie that he has a strong case and good title to the property or a special equity in his favour and that the property in the hands of the defendant is in

danger of being wasted, it is not enough for the plaintiff to show that he has a fair question to raise as to the extent of the right alleged as in the case of a temporary injunction, but he must further and make out that he has a good 'prima facie' title requiring Court's protection and safeguarding pending litigation..... Secondly, where the property is in medio that is to say, in the possession of no one, a Receiver can readily be appointed. But where any one is in possession under a legal claim strong and compelling reasons are necessary for interfering with such possession..... Thus, the bona fide purchaser of the property--'bona fides' have to be presumed unless and until the contrary can be inferred--in dispute should not be disturbed by the appointment of a Receiver unless there is some substantial and compelling ground for such interference.

Where there is no apprehension of waste or danger a Receiver will not be appointed merely on the ground that the applicant apprehends difficulty in obtaining possession of the property in the event of success or in realising mesne profits or the opposite party is poor or woman..... Violently stated vague allegations constitute no substitute for vacuum of facts.

Thirdly, an application for the appointment of a Receiver should always be made promptly and delay in making it is a circumstance unfavourable to such an appointment. But of course the matter should be considered judicially in all its aspects before being disposed of as there may be legitimate reasons for preferring an application after delay..."

In Rasi Dei v. Bikal Maharana, AIR 1965 Orissa 20, Barman, J. had in mind the observations of Ramaswami, J. when the learned Judge observed:--

"The appointment of receiver is recognised as one of the harshest remedies which the law provides for the enforcement of rights and is allowable only in extreme cases and in circumstances where the interest of the person seeking the appointment of a receiver is exposed to manifest peril. Therefore, this exceedingly delicate and responsible duty has to be discharged by the Court with the utmost caution. The principles to be followed for appointment of receiver as laid down are these: Not only must the plaintiff show a case of adverse and conflicting claim to property, but he must show some emergency or danger or loss demanding immediate action and of his own right

he must be reasonably clear and free from doubt. The element of danger is an important consideration. An order appointing a receiver will not be made where it has the effect of depriving a defendant of a de facto possession since that might cause irreparable wrong. The high prerogative act of taking property out of the hands of one and putting it in pound under the order of the Judge ought not to be taken except to prevent manifest wrong imminently impending. Hence the Court should not appoint a receiver of property in the possession of the defendant who claim it by legal title, unless the plaintiff can show prima facie that he has a strong case and good title to the property. The Court must consider whether special interference with the possession of defendant is required, there being well founded fear that the property in question will be disputed or other irreparable mischief may be done unless the court gives protection. The mere circumstance that the appointment of a receiver will do no harm to anyone is no ground for appointing a receiver."

Vijay Kumar v. S.K. Thappar, AIR 1976 J & K 30 (at p. 33). It has been said therein:-- "A Court will not appoint a receiver against a bona fide

possessor with legal title save in exceptional circumstances as, for instance, when the property is in danger of being wasted, destroyed or lost. But where he has no legal right to possession as, for example, when he is a mere trespasser or one whose original entry was lawful and of right but whose right to the possession, has terminated, and he has refused or failed to quit despite demand, it is the duty of the court to interpose and appoint a receiver at the instance of the party having legal title to possession irrespective of the fact whether the possessor is guilty of waste, dissipation, or malversation or the fact that damages are recoverable from such possessor for use and occupation."

Girijadevi V. Kadadevamath vs Shiddheshwaraiah Madivalayya 2002 (5)

KarLJ 596 When, as a matter of fact a receiver had been appointed in the year 1989 for certain purposes and for preserving the available properties to the benefit of the plaintiff and others and when by subsequent order, the earlier order appointing receiver is modified only because the person who had been appointed as a receiver was not discharging his responsibilities properly, it is just and necessary that an alternative receiver is

appointed to continue to discharge such of those functions which had been entrusted to the earlier receiver. In this regard, the reasonings given by the learned Trial Judge that the parties are not diligent in prosecuting the suit and also the suit is likely to be concluded in the near future and therefore, there is no need for appointing an alternative receiver are totally irrelevant considerations and are not justifiable grounds to refuse appointment of an alternative receiver. The whole object of the provisions of Order 40, Rule 1 of the CPC which enables the Court to appoint a receiver is to ensure that the properties in dispute are taken care of in the absence of a proper person to look after the properties and also to preserve the properties for the benefit of the parties to the suit. This purpose could be achieved only by appointing an alternative receiver and not by refusing to appoint a receiver. If none of the parties have objected to the appointment of an alternative receiver, there is absolutely no ground on which the learned Trial Judge could have refused to appoint a receiver.

Aisamma v. Mohammad, (1967) 2 Mys LJ 586.

Govinda Bhat, J. as he then was, stated in the said case as:- "The expression 'just and

convenient' in Order 40, Rule 1, C.P.C. means that the Court should make appointment of a receiver for protection of rights or prevention of injury. The Court has to consider whether special interference with the possession of the party to the suit is required, there being well-founded fear that the property in question will be dissipated or that irreparable mischief may be done, unless the Court gives its protection. The discretion of the Court has to be exercised for the purpose of promoting ends of justice." "The fact that the Court has the discretion to appoint a Receiver for the property in suit, where it appears just and convenient, does not mean that the Court has to appoint a Receiver merely because the Court thinks it convenient; the expression 'just and convenient' means that the Court should make the appointment for protection of rights or prevention of injury. The Court has to consider whether special interference with the possession of the party to the suit is required, there being well-founded fear that the property in question will be dissipated or that irreparable mischief may be done, unless the Court gives its protection."

Muppanna vs State Of Karnataka, ILR 2007 KAR 3424, 2007 (6) KarLJ 80 The object of

appointment of receiver by the Civil Court is to preserve the property and for this purpose it has to manage the same. On cessation of the receiver appointed by the Court, the superintendence is withdrawn, which means, the person who held the land prior to appointment of receiver is entitled to enter the property and manage its affairs as he deems fit.

Harinagar Sugar Mills Ltd vs M. W. Pradhan

1966 AIR 1707, 1966 SCR (3) 948

In India, the scope of the receiver's power is governed by the express provisions of the Code of Civil Procedure. It is common place that a receiver appointed by court has no estate or interest himself and the scope of his Power is defined by the provisions of O.XL of the said Code and the specific- orders made by the Court thereunder. He is frequently spoken to as the "hand of the Court". In exercise of the power under the said cl. (d) if a court confers upon the receiver power to bring a suit to realise the assets which are the subject-matter of the suit, it cannot be denied that the said receiver can file suits to recover the debts forming part of the said assets.

In Kanhaiyalal v. Dr. D.R. Banali, AIR 1958 SC 725 at p. 729 it was observed: "A receiver appointed under 0.40 of the Code of Civil Procedure, unlike a receiver appointed under the insolvency Act, does not own the property or hold any interest therein by virtue of a title. He is only the agent of the Court for the safe custody and management of the property during the time that the Court exercises jurisdiction over the litigation in respect of the property."

In Chaitanya Naiko v. Kandhino Naiko and others, , AIR 1965 Ori 217, it was held that the Court will not as a general rule appoint a receiver in a partition suit between members of a joint family especially where the family property consists of immovable property and to appoint a receiver in such a case, special circumstances must be proved. However, a receiver may be appointed in a partition suit where there is a prima facie case of misappropriation by the manager of the family. But the Court in exercising its discretion must proceed with caution and examine all the circumstances keeping in view the legal principle that it should not appoint a receiver of property in possession of the defendant, who claims it by legal title, unless the

plaintiff can show prima facie that he has a strong case and good title to the property. The mere circumstances that the appointment of a receiver will do no harm to anyone is no ground for appointing a receiver. Moreover the Court should be cautious about putting a third party as a receiver of properties in the possession and enjoyment of members of a joint family and thereby disturbing their possession. It is further, necessary to consider whether such interference with the possession of a defendant is required. It is only if there is Well founded fear that the property in question will be dissipated or other irreparable mischief may be done that the Court gives its protection.

Rasi Dei vs Bikal Maharana And Ors. AIR 1965

Ori 20:- The appointment of receiver is recognised as one of the harshest remedies which the law provides for the enforcement of rights and is allowable only in extreme cases and in circumstances where the interest of the person seeking the appointment of a receiver is exposed to manifest peril. Therefore, this exceedingly delicate and responsible duty has to be discharged by the Court with the utmost caution. The principles to be followed for appointment of

receiver as laid down are these; Not only must the plaintiff show a case of adverse and conflicting claim to property, but he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. An order appointing a receiver will not be made where it has the effect of depriving a defendant of a de facto possession since that might cause irreparable wrong. The high prerogative act of taking property out of the hands of one and putting it in pound under the order of the Judge ought not to be taken except to prevent manifest wrong imminently impending.

Hence the Court should not appoint a receiver of property in the possession of the defendant who claim it by legal title, unless the plaintiff can show prima facie that he has a strong case and good title to the property. The Court must consider whether special interference with the possession of defendant is required, there being well founded fear that the property in question will be disputed or other irreparable mischief may be done unless the court gives protection. The mere circumstance that the appointment of a receiver

will do no harm to anyone is no ground for appointing a receiver.

Maharaj Jagat Singh vs Sawai Bhawani Singh And Ors. ILR 1991 Delhi 475

Thus it is clear that a receiver is to be appointed if there is no other adequate remedy in the facts and circumstances of the case. However, in order to get a receiver appointed, emergency or danger or loss calling for immediate action is to be established. It must also be apparent that the plaintiff has prima facie an excellent chance of succeeding in the suit. A receiver will not be appointed merely because it does no harm to appoint a receiver. A receiver ought not to be appointed where it has the effect of depriving a person of de facto possession as that might cause irreparable wrong. The conduct of parties making an application has to be free from blame and there must be a "well founded fear that in the absence of protection the property will be dissipated or irreparably lost".

Sreenivas Lad vs Ekanath And Ors. AIR 2005 Kant 405, 2005 (6) KarLJ 62

The principles of law as would emerge from the extensive case-law cited would be: "A receiver

may be appointed by Court when it appears to the Court just and convenient. The five principles upon which a Court can appoint a receiver are: (1) it is a matter resting in the discretion of the Court for the purpose of protecting the rights of all parties and the subject-matter; (2) the Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has an excellent chance of success in the suit; (3) not only the plaintiff must show a case of adverse and conflicting claims to property, but he must show some emergency or danger or loss, demanding immediate action and of his own rights he must be reasonably clear and free from doubt; (4) an order will not be made where it has the effect of depriving a defendant of a de facto possession since that might cause irreparable wrong; the position however may be different if the property is shown to be in media, that is to say, in the enjoyment of none; and (5) the Court should look to the conduct of the party who makes the application who must come to Court with clean hands.”

**Sreenivas Lad vs Ekanath And Ors. AIR 2005
Kant 405, 2005 (6) KarLJ 62**

The power to appoint a receiver is discretionary and the discretion has to be used in accordance with the principles on which judicial discretion must be exercised. The phrase "just and convenient" appearing in Order 40, Rule 1 of the CPC mean that the Court should appoint a receiver for the protection of the property or the prevention of injury, according to legal principles and not because the Court simply thinks convenient to do so. The phrase would denote what is practicable and what the interests of justice require. The discretion exercised should be sound and reasonable. Powers of the Court under Order 40, Rule 1 of the Code of Civil Procedure, 1908 is to be exercised to advance the cause of justice and what is "just and convenient" depends upon the nature of the claim and the surrounding circumstances, and in a manner with care, caution and restraint so as to subserve the ends of justice. The claim of the appellant to the suit relief is capable of being established only after a full-fledged trial of disputed facts. However, it is not in dispute that the appellant is not a total stranger laying claim to the suit properties without any basis. The allegations of a methodical concealment of the true and actual quantum of the income accruing

from the utilisation of the suit properties by recourse to several alleged methods, is not, however, established prima facie. At the same time, it is contended on behalf of the respondents having regard to the nature of business, namely the income of the firm earned through its mining lease, the accounts are necessarily transparent as the mineral extracted, transported and sold is strictly regulated statutorily and therefore the income of the firm is ascertainable at all times and hence it would be unnecessary even to seek accounts at this point of time at the instance of the appellant.

Vijai Kumar vs Smt. Kiran Devi And Ors. AIR 2007 Pat 166, In a plethora of other decisions various High Courts as well as the Hon'ble Apex Court decided the various issues with respect to the appointment of a receiver in a suit in view of the provisions of law and various case laws. Taking into account the specific provisions of law as well as the views expressed in various decisions as aforesaid, the Madras High Court passed a land mark judgment in case of T. Krishnaswamy Chetty v. C. Thangavelu Chetty and Ors. prescribing the five essential requirements for appointment of receiver. The

said five principles which were laid down by the said decision as 'Punch Sadachar' are as follows:

- (i) Appointment of a receiver pending a suit is a matter resting in the discretion of the court;
- (ii) No receiver should be appointed except upon proof that plaintiff has a very excellent chance of succeeding in the suit;
- (iii) Plaintiff must show some emergency or danger or loss demanding immediate action;
- (iv) Receiver should not be appointed where it has the effect of depriving a defendant of his 'de facto' possession; and
- (v) the court should look into the conduct of the party who makes application.

12. So far the first principle is concerned, it is well settled that the court considering the matter of receivership is exercising an equity jurisdiction and in such cases, the discretion of the court should not be arbitrary or absolute, rather it should be a sound and judicial discretion taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice and protecting the rights of the parties and the subject matter of the suit and also when there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.

13. So far the second principle is concerned, the appointment of Receiver cannot be legally equated with the issuance of an order of injunction. For an order of injunction prima facie case has to be shown, but in case of appointment of Receiver a prima facie case would not be sufficient, rather the plaintiff has to show that he has a very excellent chance of succeeding in the suit without which no order of appointment of Receiver can be passed.

14. So far the third principle is concerned, merely showing a case of adverse and conflicting claims to property will not suffice, rather the plaintiff has to show some emergency or danger demanding immediate action. In such a case the right of plaintiff must be reasonably clear and free from any doubt and in addition to that the element of danger to the suit property is very important in such matters and the Page 2967 court should appoint a Receiver only when there is a great and imminent danger demanding immediate relief.

15. So far the fourth principle is concerned, if a Receiver is appointed with respect to a property in which the defendant has a de facto possession, it would naturally amount to deprive the defendant from his right which might cause irreparable wrong. Hence in case of title only the

court should be very reluctant to disturb possession of a party by appointment of a Receiver. Receiver can be appointed only when the property is exposed to imminent danger and emergency and the person in possession has obtained it through fraud or force requiring interposition by Receiver for the security of the property.

16. So far the fifth principle is concerned, the court should usually refuse to interfere unless the conduct of the plaintiff is free from blame and he has come to the court with clean hands and has not been disentitled to the equitable relief by his/her laches, delay, acquiescence etc. A Receiver should not be appointed in supersession of a bona fide possessor of property in controversy and bonafides of possessor have to be presumed until the contrary is established.

FRAUD COMPROMISE DECREE CAN BE RE-OPENED

S.G.THIMMAPPA vs. T.ANANTHA AND OTHERS reported in AIR 1986 Kar.1

Compromise decree can always be challenged on the ground of fraud.

Apex Court's judgment in the case of **SANTOSH vs. JAGAT RAM AND ANOTHER** reported in **2010 AIR SCW 6540**. "(A) Specific Relief Act (47 of 1963), S.34 - Suit for declaration - That decree suffered by plaintiff in favour of defendant was fraudulent - Plaintiff illiterate widow - Written statement in that suit was filed on same day when plaint was filed - Evidence of plaintiff and defendants also recorded on same day - Judgment also made ready along with decree on same day - Appellate Court, however, instead of doubting such decree, believing Record-keeper of Court who produced files of summons - Caveat application got registered and summons sent on the basis of caveat application treating it to be independent proceedings which was contrary to S.148-A. Held that, decree obtained in such way was fraudulent decree."

Apex Court in **A.V. Papayya Sastry's case** stated **supra** reported in **MANU/SC/1214/2007 : (2007) 4 SCC 221** and contended that if any judgment, decree or order is obtained by playing fraud, the same has to be treated as nullity by every court, superior or inferior.

MANU/SC/0932/2013 : 2013 (12) SCC 649 in Esha Bhattacharjee's case stated supra, wherein it is held that it is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

The suit can be filed if any fraud has been committed in obtaining the judgment and decree and the said view has already been reiterated in the judgment reported **in MANU/SC/8463/2008 : (2009) 2 SCC 205 in Mahesh Yadav's case**, wherein the Apex Court has held that apart from the relief under Order 9 Rule 13 of Code of Civil Procedure or filing an appeal, the party can file a suit if any fraud has been committed. The Court in Naraindas's case stated supra reported in MANU/MP/0220/1992 : 1993 M.P.L.J. 1005 held that it is settled law that when the ex parte decree is passed, the defendant to get rid of the said decree can avail either of the four remedies, he may pray for review or he may apply for setting aside of the ex parte decree or he may file an appeal or he may also institute a suit on limited ground of fraud.

MANU/SC/0365/2013 : (2013) 11 SCC 296 in Ram Prakash's case would contend that if any order or judgment or decree has been obtained from the Court by playing fraud, it is always open to the Court to recall the order on the application of the person aggrieved and such power can also be exercised by the Appellate Court. It is also held in the above referred decision that in case of fraud, the very obtaining of such judgment and decree amounts to nullity and he may institute a suit on the ground of fraud.

PROPERTY CAN BE ADDED IN THE LIST OF PROPERTIES AFTER PRELIMINARY DECREE

S. Satnam Singh and Ors. vs. Surender Kaur and Ors.: MANU/SC/8431/2008 - AIR 2009 SC 1089 Whether a property can be added in the list of properties after a preliminary decree is passed in a partition suit is the question involved herein - Held, decree is defined to mean formal expression of adjudication - It conclusively determines rights of parties with regard to all or any of the matters in controversy in the suit - It may either be preliminary or final - It may partly be preliminary and partly be final - To determine whether an order is a decree or not, regards must

be given to pleadings of parties and proceedings leading upto passing of an order - Circumstances under which an order had been made would also be relevant - In partition suits, a preliminary decree has first to be passed and thereafter a final decree is passed for actual separation of shares - Preliminary decree passed in a partition suit is not a tentative decree - CPC provides for an appeal against preliminary decree - There is no bar to file an application for amendment of a decree - If a property was subject matter of pleadings and court did not frame an issue which it ought to have done, it may amend the decree - Court shall always be ready and willing to rectify mistake it has committed.

14. A 'decree' is defined in Section 2(2) of the Code of Civil Procedure to mean the formal expression of an adjudication which, so far as regards, the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It may either be preliminary or final. It may partly be preliminary and partly be final. The court with a view to determine whether an order passed by it is a decree or not must take into consideration the pleadings of the parties and the proceedings leading upto the passing of an order. The

circumstances under which an order had been made would also be relevant.

"15. For determining the question as to whether an order passed by a court is a decree or not, it must satisfy the following tests:

- "(i) There must be an adjudication;
- (ii) Such adjudication must have been given in a suit;
- (iii) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;
- (iv) Such determination must be of a conclusive nature; and
- (v) There must be a formal expression of such adjudication."

16. Before adverting to the rival contentions of the parties, it must be kept in mind the principle that ordinarily a party should not be prejudiced by an act of court. It must also furthermore be borne in mind that in a partition suit where both the parties want partition, a defendant may also be held to be a plaintiff. Ordinarily, a suit for partial partition may not be entertained. When the parties have brought on record by way of pleadings and/or other material that apart from the property mentioned by the plaintiff in his plaint, there are other properties

which could be a subject-matter of a partition, the court would be entitled to pass a decree even in relation thereto."

Phoolchand and Anr. v. Gopal Lal
MANU/SC/0284/1967 : [1967]3SCR153 , it

was held: 7. We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so, there is no reason why a second

preliminary decree correcting the shares in a partition suit cannot be passed by the court. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which also preliminary and final decrees are passed. There is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility.

Mool Chand and Ors. v. Dy. Director, Consolidation and Ors. MANU/SC/0507/1995 : AIR 1995 SC 2493 , stating: The definition of 'decree' contained in Section 2(2) read with the

provisions contained in Order 20, Rule 18(2) as also Order 26, Rule 14 of the Code indicate that a preliminary decree has first to be passed in a partition suit and thereafter a final decree is passed for actual separation of shares in accordance with the proceedings held under Order 26. There are, thus, two stages in a suit for partition. The first stage is reached when the preliminary decree is passed under which the rights of the parties in the property in question are determined and declared. The second stage is the stage when a final decree is passed which concludes the proceedings before the Court and the suit is treated to have come to an end for all practical purposes.

Venkata Reddy and Ors. v. Pethi Reddy
MANU/SC/0024/1962 : AIR 1963 SC 992 ,
wherein it was held: A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree - the decree which would be executable would be the final decree. But the finality of a decree or a decision

does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to Section 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree.

Kamalabai vs. Kasturibai:

MANU/KA/2822/2014 Whenever a partition is claimed in respect of joint family properties, it is necessary for the parties to include all the properties of the joint family and the sharers, seek the severance in the status of the joint family by claiming partition. In such suits, it is necessary to include all the properties for the

reason that in the final decree proceedings, adjustment of the shares of the parties is done on the basis of the principle of equity and to adjust the shares depending upon the nature of the properties, fertility of land etc., the Court requires inclusion of all the properties to work out equities as it may result in one of the shares, not getting share in each of the items of the portable properties and it may necessary for adjustment of conflicting rights and liabilities, as it is an essential requirement of partition. This would avoid even the multiplicity of the proceedings between the parties.

In Tukaram v. Sambhaji,
MANU/KA/0498/1998 : ILR 1998 Kar 681, the Karnataka High Court noted that: "It has been held that normally a suit instituted for partition should be one for partition of the entire joint family properties and all the interested co-sharers should be impleaded. The suit for partition of specified items can only be an exception The inclusion of all the joint family properties in the instant suit for partition was necessary and without bringing all the joint family properties into the hotchpot, the suit for partition of the shares of the members of the joint family in one

property which amounts to partial partition is not maintainable. This contention in the circumstances of the case, has force and the same has to be upheld."

Calcutta High Court, in **Satchidananda Samanta v. Ranjan Kumar Basu, MANU/WB/0032/1992 : AIR 1992 Cal 222**: "We are of the view that the general principle is that a co-sharer filing a suit for partition against the other co- sharers have to bring all the joint properties into the hotchpot, failing which a suit may be dismissed on the ground of partial partition ... proper equity in a suit for partition in that case will not be possible if all joint properties are not brought into the hotchpot."

Channaveerappa Gowda vs. Renukappa Gowda: MANU/KA/1523/2014 - 2014 (4) AKR 711 - However, this principle (preliminary decree can be drawn more than once) cannot be extended to include a property which was not the subject matter of the suit, at the time of passing of the preliminary decree. Variation of shares already declared in the property which is the subject matter of the suit is totally different from varying the subject matter of the suit. The reason

being that what is the share to which a party to a suit is entitled to in law is purely a question of law, whereas a share in a property is dependent on the nature of the property which is purely a question of fact, which is to be decided on the facts and circumstances of the case based on the evidence adduced. Therefore, once a preliminary decree is passed in respect of the subject matter of the suit, question of including or adding a property to the subject matter of the suit subsequently and claiming a share in respect of the property so included or added is not permissible in law. In respect of the said property a separate suit is maintainable, if sufficient cause is shown for its exclusion in the earlier suit for partition. However, on the ground final decree is not yet passed, the said property cannot be included in the suit after passing of the preliminary decree or a second preliminary decree cannot be passed nor can it be the subject matter of final decree proceedings. Further, if a property which was not the subject matter of a suit, were to be included at the stage of Final Decree Proceedings, evidence has to be recorded to decide whether it is a Joint Family Property or not and if the parties to the suit have share therein or not. By chance if a property belonging to the Joint

family could not be included in the suit, a second suit for partition of the property so left out is not maintainable. But if there are acceptable reasons for not including the property in the suit, a second suit for its partition would still be maintainable. The Court would also have no such power even u/s. 153 of CPC to include a property suo moto. A suit ordinarily means a Civil proceeding instituted by presenting a plaint. Coming to the case on hand, Order VI Rule 17 CPC provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings as may be necessary for determining the real question in controversy between the parties. The plaint, therefore, can be amended only at the instance of the plaintiff and the 1st defendant cannot seek to include a property in the plaint schedule. Sy. No. 51 measuring 3 acres 28 guntas is situated at Talale village, Huncha Hobli, Hosanagar Taluk was admittedly not included in the plaint. Nor did the 1st defendant make any attempt to bring the same to the notice of the court during the pendency of the suit and therefore this property could not form a part of the preliminary decree.

RECTIFICATION OF ERRORS IN DECREE

Niyamat Ali Molla Versus Sonargon Housing Cooperative Society Ltd. and others, MANU/SC/8029/2007 : (2007) 13 SCC 421

was dealing with the case where decree holder had sought detailed description of the suit property to be inserted in the decree. Plaintiff's application, so filed under Section 152 CPC having been allowed was subject matter of challenge before the Court. In the factual backdrop, Court held that Section 152 of the Code of Civil Procedure empowers the court to correct its own error in a judgment, decree or order from any accidental slip or omission. The principle behind the said provision is actus curiae neminem gravabit i.e. nobody shall be prejudiced by an act of court.

2004 (2) JCR 603 (Jharkhand) Amit Raut Vs.

Kanhai Rout: "6. when a Court passes a final decree without valuing the lands notionally for the purpose of effecting a division and proceeds to make allotment of shares without ensuring whether the shares intended to be allotted are equal in terms of value and commensurate with the share a sharer is entitled to in terms of the

preliminary decree, it necessarily means that a fundamental error has been committed in the matter of passing a final decree."

MANU/MH/1158/2004 : 2005 (2) Bom CR 640

Champalal Bansilal Vs. Additional

Commissioner: "8. The perusal of revisional order dated 30.8.1990 which is impugned in this petition clearly reveals that the revisional authority has found that most relevant point regarding the valuation of land involved in the partition has not been discussed anywhere by the Tahsildar in his order. The revisional authority further finds that there is no consideration of fertility of each land and its locational advantage or its non-agricultural potentiality by the Tahsildar, while making partition. The Additional Commissioner has found that this is a major flaw to partition done by the Tahsildar. The Additional Commissioner finds that the object behind the partition is not to allot equal share to each shareholder but as far as possible to allot each share-holder the property of equal value. The Additional Commissioner has concluded that the partition itself is defective and therefore, it was necessary to remand the matter to Tahsildar. Thus, it is clear that the Additional Commissioner

has applied his mind to the controversy and has found that the physical equal partition between the parties was not proper."

MANU/SC/0364/2002 : AIR 2002 SC 2068

M.L. Subbaraya Setty Vs. M.L. Nagappa Setty:

"29. It is correct that the only requirement is that property allotted to each co-sharer should bear approximately the same value as corresponds to his share."

MANU/SC/1018/2002 : AIR 2003 SC 351

Lakshmi Ram Bhuyan Vs. Hari Prasad Bhuyan:

"10. The operative part of the judgment should be so clear and precise that in the event of an objection being laid, it should not be difficult to find out by a bare reading of the judgment and decree whether the latter agrees with the former and is in conformity therewith. A self-contained decree drawn up in conformity with the judgment would exclude objections and complexities arising at the stage of execution.

11. ... It is for the Court, decreeing the suit, to examine the reliefs and then construct the operative part of the judgment in such manner as to bring the reliefs granted in conformity with the

findings arrived at on different issues and also the admitted facts.

12. The parties, the draftsman of decree and the executing Court cannot be left guessing what was transpiring in the mind of the Judge decreeing the suit or allowing the appeal without further placing on record the reliefs to which the plaintiff are held entitled in the opinion of the Judge.

14. How to solve this riddle? In our opinion, the successful party has no other option but to have recourse of Section 152 of CPC which provides for clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission being corrected at any time by the Court either on its own motion or on the application of any of the parties. A reading of the judgment of the High Court shows that in its opinion the plaintiffs were found entitled to succeed in the suit. There is an accidental slip or omission in manifesting the intention of the Court by couching the reliefs to which the plaintiffs were entitled in the event of their succeeding in the suit. Section 152 enables the Court to vary its judgment so as to give effect to its meaning and intention.

MANU/GH/0863/2009 : 2009 (5) GLT 610

Braja Kalita Vs. Bipin Chandra Kalita: "16. As noticed above, though the Plaintiff-decree holder in the plaint made an alternative prayer for recovery of khas possession besides the main prayer, i.e. for confirmation of possession by declaring their right, title and interest, the judgment passed by the second appellate Court is not clear as to whether the Plaintiffs suit has been decreed for confirmation of possession or for recovery of khas possession. The decree drawn pursuant to such judgment, therefore, naturally does not have the details of the relief granted except saying that the suit of the Plaintiff is decreed in full. Unless the said position is clarified by the second appellate Court in exercise of the jurisdiction under Section 152 Code of Civil Procedure as observed by the Apex Court in Lakshmi Ram Bhuyan (supra), the executing Court cannot direct issuance of the writ of delivery of khas possession to the Plaintiff-decree holder by evicting the Defendants-judgment debtors."

MANU/SC/0224/2009 : AIR 2009 SC 2136

Tilak Raj Vs. Baikunthi Devi wherein it has been observed as under:- "15. Since the court

exists to dispense justice, any mistake which is found to be clerical in nature should be allowed to be rectified by exercising inherent power vested in the court for sub-serving the cause of justice. The principle behind the provision is that no party should suffer due to bona fide mistake. Whatever is intended by the court while passing the order or decree must be properly reflected therein otherwise it would only be destructive of the principle of advancing the cause of justice. In such matters, the courts should not bind itself by the shackles of technicalities."

MANU/AP/0436/1997 : 1997 (2) ALT 474

Tandra Satyanarayana Rao Vs. Tandra Paparao

wherein it has been observed as under:- "5. In a suit for partition, every party to the suit is in the position of plaintiff and the preliminary decree has to specify not only the share of the plaintiff but also the shares of the parties interested in the property and it also enables the Court which passes the Decree to give such further directions as may be required. In the present case, though the learned District Munsif gave a specific finding under issue No. 6 that the petitioner herein is also entitled for 1/5th share in items 1 to 4 of A-Schedule, he failed to give effect to such finding

in the operative portion of the Judgment and consequently the preliminary decree passed in pursuance of such Judgment was also silent on that aspect. Such failure to mention the share of the petitioner in the operative portion as well as in the preliminary decree is only due to accidental slip or omission in giving effect to the specific finding arrived at in the Judgment. The Court is not only entitled but is bound to brush aside a mere technicality which stands in the way of justice and to amend such mistakes, slips or omissions as may appear in the Judgment or Decree, to preserve justice in order to give effect to the real and substantial right of the parties. The test to determine whether the slip or omission as contemplated under Section 152 C.P.C. is accidental or not is to see whether the Judgment and Decree as they stand represent the intention of the Judge at the time he passed the same. The minimum requirement to determine such question would be the presence of some material or indication in the Judgment that the Court had originally intended to provide or grant such relief which was, however, omitted in the operative portion of the Judgment. If there are any such errors arising from accidental slip or omission they can be corrected subsequently not only in

the Decree drawn but even in the Judgment pronounced and signed by the Court. In the present case, as already stated above, there was a specific finding given by the Court that the petitioner is entitled for 1/5th share in items 1 to 4 of A-Schedule family properties and the intention of the Presiding Officer for granting relief to the petitioner herein regarding his share in the family properties is quite evident from such specific finding given in issue No. 6. The subsequent omission to carry out such intention in the operative portion covered by issue No. 21 can therefore be said to be due to accidental slip or omission and in view of such omission, the preliminary decree was also silent about the share of the petitioner in the properties. Section 152 C.P.C. is intended only to cover such cases. Such mistakes in the Judgment and Decree can be amended even under the provisions of Section 151 and 153 C.P.C. in order to give effect to the intention of the Presiding' Officer as revealed from a over all perusal of the Judgment. Therefore, the lower Court has erred in rejecting the petition for such amendment of Judgment and Decree by observing that the omission in the operative portion of the Judgment and in the preliminary decree to mention about the share of the

petitioner cannot be said to be due to any accidental slip or omission and also holding that the only relief open to the petitioner is to file appeal or revision or a review petition to question such Judgment and Decree. Such finding of the lower Court is clearly erroneous and illegal and is, therefore, liable to be interfered with in the present revision."

MANU/SC/1098/2002 : AIR 2003 SC 643

Pratibha Singh Vs. Shanti Devi Prasad Motor and General Finance Ltd. Vs. Gautam Roy wherein it was held that power under Section 152 of the Code of Civil Procedure could be exercised to correct a decree if there was vagueness or omission therein to ensure that a successful plaintiff should not be deprived of the fruits of the decree.

M.V. "Vali Pero" v. Fernando Lopez,
MANU/SC/0395/1989 : (1989) 4 SCC 671,

where the Court held: "Rules of procedure are not by themselves an end but the means to achieve the ends of justice. Rules of procedure are tools forged to achieve justice and are not hurdles to obstruct the pathway to justice. Construction of a rule of procedure which promotes justice and

prevents its miscarriage by enabling the Court to do justice in myriad situations, all of which cannot be envisaged, acting within the limits of the permissible construction, must be preferred to that which is rigid and negatives the cause of justice. The reason is obvious procedure is meant to subserve and not rule the cause of justice. Where the outcome and fairness of the procedure adopted is not doubted and the essentials of the prescribed procedure have been followed, there is no reason to discard the result simply because certain details which have not prejudicially affected the result have been inadvertently omitted in a particular case. In our view, this appears to be the pragmatic approach which needs to be adopted while construing a purely procedural provision. Otherwise, rules of procedure will become the mistress instead of remaining the handmaid of justice, contrary to the role attributed to it in our legal system."

CHAPTER-22
LEGAL NECESSITY AND MINOR

**ALIENATION MADE BY THE FATHER FOR
DISCHARGING ANTECEDENT DEBTS WOULD
BE BINDING ON THE SONS**

In Fakirappa v. Venkatesh, 1976(2) Kar. LJ. 186 the validity of a sale by father for legal necessity was under challenge. A learned Single Judge of this Court dealing with the said issue, held: "An alienation made by the father for discharging antecedent debts would be binding on the sons irrespective of the fact that there was no other legal necessity or family necessity supporting it".

Lachhmi Narain and Anr. vs. Ram Sunder Lal and Anr. - PRIVY COUNCIL : MANU/PR/0121/1929 - AIR 1929 PC 143 - A Hindu father, who with his minor sons constituted a joint Hindu family, sold a part of the family property, on which as well as on another part there was a pre-existing mortgage. By means of the sale the mortgage debts were satisfied and a part of the mortgaged property was freed from mortgage and was saved to the family. About 14

years later, the sons brought a suit to recover possession of the property sold, on the ground that the sale by the father was invalid. Upon the findings (1) that the sale itself was one which was justified by legal necessity, (2) that due inquiries as to the necessity had been made by or on behalf of the purchaser before the sale was effected, (3) that the sale was for adequate consideration, and (4) that legal necessity was proved by the Defendant vendee to the extent of Rs. 7,744 out of a total price of Rs. 10,767, it was held that the sale must stand and that the fact that the Defendant vendee, after a long interval of time, was not able to prove conclusively how the surplus was applied by the vendor was not sufficient ground for setting aside the sale.

RADHAKRISHNADAS vs. KANURAM AIR 1957 SC 574 wherein the Supreme Court observed thus:- "Where an alienation, by way of sale of the family property made by a Hindu father is challenged by his sons on the ground of want of legal necessity then it is now well established that what the alienee is required to establish is legal necessity for the transaction and that it is not necessary for him to show that every bit of the consideration which he advanced was actually

applied for meeting family necessity. The reason is that the alienee can rarely have the means of controlling and directing the actual application of the money paid or advance by him unless he enters into the management himself."

RANI vs . SANTA BALA, MANU/SC/0366/1970

: [1971]2SCR603 wherein the Supreme Court held as follows:- "Legal necessity does not mean actual compulsion; it means pressure upon the estate which in law may be regarded as serious and sufficient. The onus of proving legal necessity may be discharged by the alienee by proof of actual necessity or by proof that he made proper and bona fide enquiries about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity. Recitals in a deed of legal necessity do not by themselves prove legal necessity. The recitals are, however, admissible in evidence, their value varying according to the circumstances in which the transaction was entered into. The recitals may be used to corroborate other evidence of the existence of legal necessity. The weight to be attached to the recitals varies according to the circumstances."

**LAXMAPPA AND ORS. v. BALAWA,
MANU/SC/0961 /1996 : AIR 1996 SC 3497** In

that case, the moral obligation theory was profounded and accepted. The following passage is worth to note: "The High Court has concluded that it was clear that the father was under an obligation to maintain the plaintiff-respondent. Seemingly, the High Court in doing so was conscious of the declaration made in the gift deed in which she was described as a destitute and unable to maintain herself. In that way, the father may not have had a legal obligation to maintain her but all the same there existed a moral obligation. And if in acknowledgment of that moral obligation the father had transferred property to his daughter then it is an obligation well-fructified. In other words, a moral obligation even though not enforceable under the law, would by acknowledgment, bring it to the level of a legal obligation, for it would be perfectly legitimate for the father to treat himself obliged out of love and affection to maintain his destitute daughter, even impinging to a reasonable extent on his ancestral property. It is duly acknowledged in Hindu law that the Karta of the family has in some circumstances, power to alienate ancestral property to meet an obligation of the kind. We

would rather construe the said paragraph more liberally in the modern context having regard to the state of law which has been brought about in the succeeding years. Therefore, in our view, the High Court was within its right to come to the conclusion that there was an obligation on the part of the father to maintain his destitute widowed daughter."

WHEN AN ALIENATION IS CHALLENGED AS BEING UNJUSTIFIED OR ILLEGAL IT WOULD BE FOR THE ALIENEE TO PROVE THAT THERE WAS LEGAL NECESSITY IN FACT OR THAT HE MADE PROPER AND BONA FIDE ENQUIRY AS TO THE EXISTENCE OF SUCH NECESSITY

In Sunil Kumar and Anr. v. Ram Parkash and Ors. (AIR 1988 SC 576) it was noted in paras 23 and 24 as follows: The managing member or karta has not only the power to manage but also power to alienate joint family property. The alienation may be either for family necessity or for the benefit of the estate. Such alienation would bind the interests of all the undivided members of the family whether they are adults or minors. The oft quoted decision in this aspect, is that of the

Privy Council in *Hanuman Parshad v. Mt. Babooee*, [1856] 6 M.I.A. 393. There it was observed at p. 423: (1) "The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the estate." This case was that of a mother, managing as guardian for an infant heir. A father who happens to be the manager of an undivided Hindu family certainly has greater powers to which I will refer a little later. Any other manager however, is not having anything less than those stated in the said case. Therefore, it has been repeatedly held that the principles laid down in that case apply equally to a father or. other coparcener who manages the joint family estate.. Although the power of disposition of joint family property has been conceded to the manager of joint Hindu family for the reasons aforesaid, the law raises no presumption as to the validity of his transactions. His acts could be questioned in the Court of law. The other members of the family have a right to have the transaction declared void, if not justified. When an alienation is challenged as being unjustified or illegal it would be for the alienee to prove that there was legal necessity in

fact or that he made proper and bona fide enquiry as to the existence of such necessity. It would be for the alienee to prove that he did all that was reasonable to satisfy himself as to the existence of such necessity. If the alienation is found to be unjustified, then it would be declared void. Such alienations would be void except to the extent of manager's share in Madras, Bombay and Central Provinces. The purchaser could get only the manager's share. But in other provinces, the purchaser would not get even that much. The entire alienation would be void. [Mayne's Hindu Law 11th ed. para 396].

In Sadasivam v. K. Doraisamy (AIR 1996 SC 1724) it was found that when the father has executed sale deed in favour of a near relative and the intention to repay debt or legal necessity has not been proved as a sham transaction.

SALE OF MINOR PROPERTY COURT PERMISSION NEEDED

Panni Lal vs Rajinder Singh And Anr 1993 (4) SCC 38, The provisions of section 8 of the Hindu Minority and Guardianship Act, 1956 are devised to fully protect the property (.if a minor, even from

the depredations of his parents. Section 8 empowers only the legal guardian to alienate a minor's immovable property provided it is for the necessity or benefit of the minor or his estate and it further requires that such alienation shall be effected after the permission of the Court has been obtained." It was difficult, therefore, to hold that the sale, by reason of the fact that the mother of the minor respondents signed the sale deed and the father attested it, was voidable, not void. The attestation of the sale deed by the father showed that he was very much existent and in the picture. If he was, then the sale by the mother, notwithstanding the fact that the father attested it, cannot be held to be sale by the father and natural guardian satisfying the requirements of section 8.

WHEN THE FATHER WAS ALIVE HE WAS THE NATURAL GUARDIAN AND IT WAS ONLY AFTER HIM THAT THE MOTHER BECAME THE NATURAL GUARDIAN

Jijabai Vithalrao Gajre vs. Pathankhan and ors., AIR 1971 S.C. 315. This was a case in which it was held that the position in Hindu law was that when the father was alive he was the

natural guardian and it was only after him that the mother became the natural guardian. Where the father was alive but had fallen out with the mother of the minor child and was living separately for several years without taking any interest in the affairs of the minor, who was in the keeping and care of the mother, it was held that, in the peculiar circumstances, the father should be treated as if nonexistent and, therefore, the mother could be considered as the natural guardian of the minor's person as well as property, having power to bind the minor by dealing with her immovable property.

**LEGAL NECESSITY SHALL BE ESTABLISHED
BY PURCHASER**

In Rani and Anr. v. Santa Bala Debnath and Ors., MANU/SC/0366/1970 : (1970) 3 SCC 722 Court held that: 10. Legal necessity to support the sale must however be established by the alienees. Sarala owned the land in dispute as a limited owner. She was competent to dispose of the whole estate in the property for legal necessity or benefit to the estate. In adjusting whether the sale conveys the whole estate, the actual pressure on the estate, the danger to be averted, and the

benefit to be conferred upon the estate in the particular instance must be considered. Legal necessity does not mean actual compulsion: it means pressure upon the estate which in law may be regarded as serious and sufficient. The onus of providing legal necessity may be discharged by the alienee by proof of actual necessity or by proof that he made proper and bona fide enquires about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity.

In Sri Kishun Das v. Nathu Ram
MANU/PR/0009/1926 : A. I. R. 1927 P. C. 37

: their Lordships of Privy Council laid down the principle as follows; "It would rather appear that in any case where the sale has been held to be justified but there is no evidence as to the application of a portion of the consideration, a presumption arises that it has been expended for proper purposes, and for the benefit of the family."

Manglu Meher and Ors. vs. Sukru Meher and Ors.: MANU/OR/0039/1950 - AIR 1950 Ori 217 It is necessary further to remark that while undoubtedly, the burden is upon the alienee, it

does not mean that if the alienee does not speak positively to the existence of the necessity or to his having made an inquiry, it must necessarily follow that he has to fail. As pointed out by their Lordships of the Privy Council in *Lakshmana v. Venkateswarlu* MANU/PR/ 0051/1949 : A. I. R. 1949 P.c. 278 : the burden of proof is not to be confused with the burden of adducing evidence. When the entire evidence is before the Court, and when on the evidence and the circumstances, the Court has no difficulty in arriving at a definite conclusion, the burden of proof recedes to the background and the person on whom the burden to prove lies is not to fail when a satisfactory conclusion can be reached in his favour on the existing material, merely because he has not himself adduced positive evidence. For instance in cases of this kind either the fact that the transaction was legally justified, or that there has been a fair and bona fide inquiry as to the existence of necessity for the transaction is one that may be possible to infer from the evidence and the circumstances in the case.

Marla Subrahmanyam vs. Chelikani China Soorayya: MANU/TN/0219/1950 - AIR 1950 Mad 514 (FB)-

In Kumarswami v. Narayanaswami MANU/TN/0223/1932 : AIR1932Mad762 , Venkatasubba Rao and Curgenven JJ. held following The Wadhwan Rani's case, 43 Mad. 541 : (A. I. R. (7) 1920 P. C. 64), that in the case of an old alienation presumption might serve to fill up gaps in the evidence, even in the absence of recitals of necessity in the deed of sale. Recitals of necessity would, as already stated, be evidence of representation made to the purchaser by the limited owner and of his having acted on the faith of such representation after due and bona fide enquiry. That is one mode of supporting the alienation. Presumptions to fill up gaps in the evidence regarding the necessity for the alienation which time has obliterated can be invoked apart from recitals. Even if there are no recitals, it can be shown by evidence aliunde that a sale was effected by the limited owner for a necessary purpose or for the benefit of the estate. In the case above cited there was evidence both direct and circumstantial that the widow sold the property for discharging her husband's mortgages and simple debts and for meeting her maintenance expenses.

In Venkayamma v. Sitaramaraju
MANU/TN/0049 /1937 : (1938) 1 MLJ 157 , in

addition to recitals in the sale deed, there were some evidence of necessity.

In *Thimmanna Bhatta v. Rama Bhatta* MANU/TN/0378/1937 : AIR1938Mad300 , Madhavan Nair and King JJ. followed the earlier decision in *Kumaraswami v. Narayanasami* MANU/TN/0223/1932 : AIR 1932 Mad 762 and upheld an alienation by a limited owner against the reversioners on the strength of the recitals in the sale deed, the consent of the presumptive reversioner and the evidence adduced regarding the necessity for the sale.

In Venkataramanayya v. Dejappa, 34 M. L. J. 319: (A. I. R. (5) 1918 Mad. 659) which related to the validity of a sale executed by the widow and mother of the last male owner Seshagiri Aiyar J. observed as follows : "The onus is undoubtedly on the purchaser to establish necessity. Lapse of time may enable the Court to consider the evidence let in by him favourably and to pay more attention to the recitals in the conveyance than would otherwise have been done."

Gauri Shankar vs. jiwan singh - PRIVY COUNCIL : MANU/PR/0162/1927 - AIR 1927 PC 246 - A sale of joint family property will not be set aside merely because a part of the proceeds is

not proved to bare been applied to purposes of necessity. The real question that has to be considered is this :-Whether the sale itself was justified by necessity. If the purchaser has acted honestly, if the existence of a family necessity for the sale is made out, and the price is not unreasonably low, he (the purchaser) is not bound to account for the application of the price.

CHILD IN THE WOMB AND HINDU LAW

In the case of **M.S. Subbakrishna and Ors. v. Smt. Parvathi and Anr. reported in ILR 2007 Kar 3939**, a Division Bench of this Court with regard to the scope of Section 20 of the Hindu Succession Act, 1956 has held as follows: 16. From a reading of Section 20 of the Act and the law laid down in different decisions referred to above, in our considered view, the following principles will emerge:

- i) A child in the womb is entitled to for a share in co-parcenary property of an undivided Hindu joint family.
- ii) The child is entitled for a share in the joint family property when born alive and not otherwise.

iii) On behalf of the child in the womb no partition suit is maintainable.

iv) In case of a partition of the joint family property by the father amongst his sons, even a son born after a partition arrangement can challenge the partition if the father has not retained separate share for himself exclusively.

v) In a partition if a share is allotted to the father, a son begotten or born after the partition is not entitled to have the partition reopened and to claim redistribution of the shares. But a child begotten after partition is entitled to succeed to the father's share and to his separate or self-acquired property to the exclusion of divided sons.

CHAPTER-23
PARTITION AND REGISTRATION

**MERE MEMORANDUM PREPARED AFTER THE
FAMILY ARRANGEMENT HAD ALREADY BEEN
MADE NOT COMPULSORILY REGISTRABLE**

Supreme Court in the case of Kale v. Dy. Director of Consolidation reported in **AIR 1976 SC 807**, the relevant portions of which are set out herein below:-- "10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:... (4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Hence also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the records or for information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immoveable properties and therefore, does not fall within the

mischief of Section 17(2)(sic) (Section 17(1)(b) of the Registration Act and is, therefore, not compulsorily registrable."

Deo Chand v. Shivram, (1969)3 SCC 330, has held that documents which affirm an oral partition, do not require registration.

Kale and Others v. Director of Consolidation and Others, 1976(3) SCC 119 , it is held that a family arrangement may even be oral and is not compulsorily registrable.

MEMORANDUM OF WHAT HAD TAKEN PLACE IS NOT A DOCUMENT WHICH WOULD REQUIRE COMPULSORY REGISTRATION UNDER SECTION 17 OF THE REGISTRATION ACT.

Tek Bahadur Bhujil vs. Debi Singh Bhujil and Others, AIR 1966 SC 292, the Supreme Court enunciated the law with regard to family arrangement as follows:- "12. Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon

between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there be no hazy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess. The document Exhibit 3 does not appear to be of such a nature. It merely records the statements which the three brothers made, each referring to others as brothers and referring to the properties as joint property. In fact the appellant, in his statement, referred to respondents 1 and 2 as two brother co- partners; and the last paragraph said: "We, the three brothers, having agreed over the above statement and having made our own statements in the presence of the Panch called by us, and signed and kept a copy of each of this document as proof of it." The document would serve the purpose of proof or evidence of what had been

decided between the brothers. It was not the basis of their rights in any form over the property which each brother had agreed to enjoy to the exclusion of the others. In substance it records what had already been decided by the parties. We may mention that the appellant and respondent No. 1, even under this arrangement, were to enjoy the property in suit jointly and it is this agreement of theirs at the time which has later given rise to the present litigation between the two. The document, to our mind, is nothing but a memorandum of what had taken place and, therefore, is not a document which would require compulsory registration under Section 17 of the Registration Act."

MERE LIST OF PROPERTIES ALLOTTED AT A PARTITION IS NOT AN INSTRUMENT OF PARTITION AND DOES NOT REQUIRE REGISTRATION

In AIR 1988 Supreme Court 881(Roshan Singh and others vs. Zile Singh and others), the Apex Court at paragraph 9 has held as follows: "9. It is well-settled that while an instrument of partition which operates or is intended to operate as a declared volition constituting or severing

ownership and causes a change of legal relation to the property divided amongst the parties to it, requires registration under S.17(1)(b) of the Act, a writing which merely recites that there has in time past been a partition, is not a declaration of will, but a mere statement of fact, and it does not require registration. The essence of the matter is whether the deed is a part of the partition transaction or contains merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well-settled that a mere list of properties allotted at a partition is not an instrument of partition and does not require registration. Section 17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right and there would be no necessity of registering such a document. Two propositions must therefore flow: (1) A partition may be effected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and

embodies all the terms of bargain, it will be necessary to register it. If it be not registered, S.49 of the Act will prevent its being admitted in evidence. Secondly evidence of the factum of partition will not be admissible by reason of S.91 of the Evidence Act, 1872. (2) Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered, to prove the fact of partition: See Mulla's Registration Act, 8th Edn., pp.54-57."

In A.I.R. 1970 Supreme Court 833 (Satish Kumar and others vs. Surinder Kumar and others), the Apex Court has held that private award affecting partition of immovable property worth more than Rs.100 requires registration. In the said decision, it has also held by the Apex Court that the award is not a mere waste paper but has some legal effect. It is final and binding on the parties and it cannot be said that it is the waste paper unless it is made a rule of the Court.

In A.I.R.2006 Supreme Court 1249 (N.Khosla vs. Rajlakshmi), the Apex Court has held that the declaration of pre- existing right which neither creates any right nor extinguish any right

in presenti or in futuro, so, award does not compulsorily requires registration under the Registration Act.

THERE WAS NEITHER A DIVISION IN STATUS NOR A DIVISION BY METES AND BOUNDS ITS TERMS RELATING TO SHARES WOULD COME INTO EFFECT ONLY IN THE FUTURE IF AND WHEN DIVISION TOOK PLACE – THIS DOES NOT REQUIRE REGISTRATION

In Maturi Pullaiah v. Maturi Narasimham(AIR 1966 SC 1836) Court held that: "Though conflict of legal claims in praesenti or in future is generally a condition for the validity of a family arrangement, it is not necessarily so. Even bona fide disputes, present or possible, which may not involve legal claims will suffice. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such 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, courts will more readily give assent to such an arrangement than to avoid it."

FACTS:- The properties were not ancestral properties but were acquired by Peda Venkaiah and, therefore, were his self-acquisitions, Narasimha was an able man, were as Venkatramaiah was just an ordinary unsophisticated agriculturist. Narasimha was helping his father during the latter's lifetime. The father, therefore, told the brothers that a larger share should be given to Narasimha, the extent of the share to be settled by their mother. After the death of the father, though Venkatramaiah was the de jure manager, the entire management of the estate was entrusted to Narasimha on a promise that his father's word would be respected. After the father's death, Narasimha was not only managing the properties, but also was in management of the moneylending business and the business at Eluru. A large portion of the family properties stood in the name of Narasimha. In 1931 Narasimha wanted to separate himself from the family and asked Venkatramaiah to specify the properties that could be given to him; but Venkatramaiah requested Narasimha to continue to live as before and represented that he would be given three-fifths share in the properties at the time of partition. Subsequently, when Narasimha again

insisted upon getting away from the joint family, Venkatramaiah presumably because Narasimha was indispensable for the proper management of the large family properties and the business and also because a large extent of the properties stood in the name of Narasimha, ... entered into an arrangement with the 1st defendant which was embodied in Ex. B-1(FAMILY ARRANGEMENT), ... Ex. B-1 records the directions given by the father, the request made by Venkatramaiah to Narasimha asking him to continue the management, the intention of Narasimha to separate himself from the joint family in 1931, the request made by Venkatramaiah to Narasimha to continue to manage the family properties for at least 6 more years and his promise to Narasimha to give him at the end of 6 years three-fifths share in the properties. It then proceeded to state that out of the family properties which belonged to them at that time and which might be acquired thereafter. Venkatramaiah should take 2 shares and Narasimha should take 3 shares. It is, therefore, clear that Narasimha contributed to the prosperity of the family. Their father, who acquired the properties before his death, gave a direction that Narasimha should be given a larger

share in the property. Narasimha, though a junior member of the family, on the promise given by the elder brother managed the properties sincerely and improved them. He was demanding partition and was asking his brother to give him a larger extent of property as directed by their father. There was also a possibility of Narasimha claiming the properties standing in his name as his own. The elder brother, Venkatramaiah, in the interests of harmony among the members of the family and for its benefit accepted the directions given by their father and on the advice of the mother agreed to give Narasimha three shares in the properties and to take 2 shares for himself therein. All the ingredients of a family arrangement as found in decided cases are satisfied in the present case. We, therefore, hold, agreeing with the lower Courts, that this was a family arrangement binding on the members of the family.

The next question turns upon the validity of Ex.B-1. Both the Courts held that Ex.B-1 did not require registration. Learned Counsel for the appellant contended that though in law Narasimha was entitled only to $1/2$ share, the document enlarged his share to $2/5$ and, therefore, it clearly affected immovable property

and hence it created a larger interest in the immovable property in favour of Narasimha within the meaning of Section 17(1)(b) of the Registration Act. The operative part of Ex. B-1 reads thus: Therefore out of our family property, i.e., property which belongs to us at present and the property which we may acquire in future, the 1st party of us and his representatives shall take two shares while the 2nd party of us and his representatives shall take three shares. We both parties, having agreed that whenever any one of us or any one of our representatives desires at any time that the family properties should be partitioned according to the above mentioned shares and that till such time our family shall continue to be joint subject to the terms stipulated herein entered into this agreement.

It is common case that this document did not bring about a division by metes and bounds between the parties. It did not also affect the interests of the parties in immovable properties in praesenti. What in effect it said was that that the parties would continue to be members of the joint Hindu family and that Narasimha would manage the family properties as before, and that when they effected a partition in future Venkatramaiah would get 2 shares and Narasimha would get 3

shares in the properties then in existence or acquired thereafter. There was neither a division in status nor a division by metes and bounds in 1939. Its terms relating to shares would come into effect only in the future if and when division took place. If so understood, the document did not create any interest in immovable properties in praesenti in favour of the parties mentioned therein. If so, it follows that the document was not hit by Section 17 of the Indian Registration Act.

**PARTITION DEED WHICH WAS MUTUALLY
ACTED UPON CANNOT BE QUESTIONED FOR
ITS NON-REGISTRATION 2005 SC**

Amteshwar Anand v. Virender Mohan Singh & Ors; (2006) 1 SCC 148 Section 17(1) of the Registration Act, 1908 in so far as it is relevant, requires under Clause (b) thereof, registration of "non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property". Sub section (2) of Section 17 creates exceptions to the mandatory requirements of Section 17(1) (b) and

(c). One of the exceptions made in Section 17(2) of the Registration Act 1908, is Clause (i). This exception pertains to "any composition deed." In other words all composition deeds are exempt from the requirement to be registered under that Act . The Composition Deed in this case was a transaction between the members of the same family for the mutual benefit of such members. It is not the appellants' case that the agreements required registration under any other Act. Apart from this, there is the principle that Courts lean in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds particularly when the parties have mutually received benefits under the arrangement . Both the courts below had concurrently found that the parties had enjoyed material benefits under the agreements. We have ourselves also re-scrutinized the evidence on record on this aspect and have found nothing to persuade us to take a contrary view.

PARTITION AMOUNTS TO TRANSFER FOR THE PURPOSE OF REGISTRATION ACT

Partition, specially among the coparceners, would be a "Transfer" for purposes of Registration Act or not has been considered in Nani Bai vs. Gita Bai

Kom Rama Gunge AIR 1958 So 706 and it has been held that though a partition may be effected orally, if the parties reduce the transaction to a formal document which was intended to be evidence of partition, it would have the effect of declaring the exclusive title of the coparcener to whom a particular property was allotted (by partition) and thus the document would fall within the mischief of Section 17 (1) (b) of the Registration Act under which the document is compulsorily registerable. If, however, that document did not evidence any partition by metes and bounds, it would be outside the purview of that Section. This decision has since been followed in Siromani & Anr. vs. Hemkumar & Ors. AIR 1968 SC 1299 and Roshan Singh & Ors. vs. Zile Singh & Ors. AIR 1988 SC 881.

UNREGISTERED PARTITION DEED - NOT ADMISSIBLE - SC

In the decision reported in **Bhagwan Das and Others v. Girja Shanker and Another, JT 2000 (Suppl.1) S.C. 246**, the appellant claimed exclusive possession of property on the basis of an unregistered partition deed and the respondents therein claimed possession along

with the appellants/ plaintiffs. The said unregistered partition deed was held to be inadmissible in evidence and the question was held in favour of the defendants/ respondents. In appeal, the Honourable Apex Court held that since the document relied on by the appellants therein was unregistered, it was rightly held by the High Court as inadmissible in evidence.

ADMISSIBILITY OF UNREGISTERED PARTITION DEED

Siromani v. Hemkumar, A.I.R.1968

S.C.1299: Of course, the document is admissible to prove an intention on the part of the coparceners to become divided in status; in other words, to prove that the parties ceased to be joint from the date of the instrument . .

Roshan Singh v. Zile Singh, A.I.R.1988

S.C.881 : It is well-settled that the document though unregistered can however be looked into for the limited purpose of establishing a severance in status, though that severance would ultimately affect the nature of the possession held by the members of the separated family co-tenants. . . . In any view, the document Exh. P-

12 is a mere list of properties allotted to the shares of the parties. It merely contains the recital of past events. It is, therefore, admissible in evidence.

D. Sambashivan vs. Usharani : MANU/KA/0682/2012 - 2012 (5) KarLJ 129 - A Division Bench of this Court held, in Umakant Rao vs Lalitabai, MANU/KA/0276/1988 : 1988(2) Kar.L.J. 155, that although a document effecting a partition was inadmissible because of non-compliance with Section 34 of the Stamp Act and Section 49 of the Registration Act, it could nevertheless be adverted to firstly, for the purpose of proving severance from the HUF, and secondly, for the determination of the extent or details of the movable and immovable properties then belonging to the HUF. In K.Amarnath vs Puttamma, MANU/KA/0251/2000 : ILR 1999 Kar 4634, this Court highlighted a salient difference between Section 34 of the Stamp Act and Section 49 of the Registration Act, namely, that an infraction of the former by insufficient stamping has the consequence of prohibiting the document from being considered; whereas non-compliance of Section 49 has diverse implications - (a) the document can be considered in a suit for

specific performance; (b) the document has evidentiary value to prove part performance of a contract for the purposes of Section 53A of the Transfer of Property Act; and (c) it can be read as evidence of a collateral transaction which is not itself required to be executed by a registered instrument provided always, that the instrument is, at the relevant time, duly stamped. Once the Court is satisfied that a memorandum contains the terms on which a partition of joint family property had already taken place, such document in fact is a recording of past transactions, an oral partition which had already been completed; the document would be received by it in evidence. It will justify reiteration that, a release deed or a relinquishment deed cannot be in favour of one or more members of a family to the exclusion of others. In other words, the releasor or relinquishor must simply walk away from or extinguish all claims to the family properties. Otherwise the transaction would partake the nature of a transfer necessarily requiring compliance of the Stamp Act as well as the Registration Act.

**IF THE RIGHTS ARE CREATED OR
EXTINGUISHED BY THE SAID DOCUMENT,
THE DOCUMENT REQUIRES REGISTRATION**

**Mangal Prasad vs Vth Additional District
Judge, AIR 1992 All 235**

If the document is a recognition of pre-existing right then it can be called the memo of partition but if the rights are created or extinguished by the said document, the document requires registration. In the present case for the first time by the document itself the entire property was divided by metes and bounds and the property jointly purchased by the two brothers was given in favour of one brother depriving the other brother of his share in the said property. This resulted in a situation that document created an exclusive right in respect of joint property in favour of one brother and the right of other brother was extinguished. Such a document clearly required registration and was insufficiently stamped. The trial court has rightly impounded the document. The submission of the petitioner's counsel that the document is only a memorandum of partition is not correct and the submission is belied by the language of the document itself. I am clearly of the opinion that by the impugned document itself

the property was divided between the two real brothers and a joint property was given in favour of one brother resulting in a situation where the rights in respect of a joint property were created in favour of one brother and the rights of the other brother extinguished in the said property. This is clearly a case where in the rights in respect of a property were created and extinguished. Such a document clearly requires registration.

FAMILY ARRANGEMENT MAY BE ORAL NO REGISTRATION IS NECESSARY

Supreme Court in Kale and Ors. v. Deputy Director of Consolidation and Ors., 1976 AIR 807, 1976 SCR (2) 202 wherein the Hon'ble Supreme Court has laid down as follows : "The family arrangement may be even oral in which case no registration is necessary. The registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of

the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and is therefore, not compulsorily registrable. The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same. Even if bona fide disputes, present or possible which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement".

The object of a family arrangement is to protect the family from long drawn litigation or perpetual strife which mars the unity and the solidarity of the family. A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal

distribution of wealth, instead of concentrating the same in the hands of a few, is a milestone in the administration of social justice. Where by consent of the parties a matter has been settled, the courts have learned in favour of upholding such a family arrangement instead of disturbing it on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect, the rule of estoppel is applied to shut out the plea of the person who being a party to the family arrangement, seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits.

(i) The family settled must be bona fide so as to resolve family disputes. (ii) It must be voluntary and not induced by fraud, coercion or undue influence; (iii) It may be even oral, in which case and registration is necessary; (iv) Registration is necessary only if the terms are reduced to writing but where the memorandum has been prepared after the family arrangement either for the purpose of record or for information of court, the memorandum itself does not create or extinguish any rights in immovable property and, therefore, does not fall within the mischief of s. 17(2) of the

Registration Act and is not compulsorily registrable; (v) The parties to the family arrangement must have some antecedent title, claim or interest, even a possible claim in the property which is acknowledged by the parties to the settlement. But, even where a party has no title and the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then, the antecedent title must be assumed and the family arrangement will be upheld by the courts; (vi) Where bona fide disputes are settled by a bona fide family arrangement, such family arrangement is final and binding on the parties to settlement.

UNDER HINDU LAW PARTITION NEED NOT BE EFFECTED ONLY BY REGISTRATION DEED

K Ramaswamy, B Hansaria Hon'ble Supreme Court in Digambar Adhar Patil v. Devram Girdhar Patil, **AIR 1995 SC 1728, 1995 (2) SCALE 802, 1995 Supp (2) SCC 428** wherein Hon'ble Supreme Court has held that under Hindu law, it is not necessary that the partition should be effected by a registered partition deed. Even a family arrangement is enough to effectuate the

partition between coparceners and to confer right to a separate share and enjoyment thereof.

COMPULSORILY REGISTRABLE PARTITION DEED

In NANI BAI v. GITABAI, , AIR 1958 SC 706

Supreme Court observed that: "Under the Mitakshara School of Hindu Law partition may be either (1) a severance of the joint status of the coparcenary by mere defining of shares but without specific allotments or (2) partition by allotment of specific properties by metes and bounds according to shares. The latter, if reduced to writing becomes compulsorily registrable under s. 17(1)(b) of the Indian Registration Act but the former does not.

ONLY REGISTERED PARTITION DEED BEFORE 20-12-2004 STRESSED UNDER 2005 AMENDMENT

Lokamani and Ors. vs. Mahadevamma and Ors.: MANU/KA/2915/2015 - ILR 2015 KAR 5095 - Section 6 of the Hindu Succession Act, 1956 came to be amended, conferring on the daughters of a co-parcener the status of co-

parcener giving equal right in the coparcenary property along with the son. - Explanation to sub-Section (5) of Section 6 of the Hindu Succession Act, 1956 categorically declares that nothing contained in Section 6 applies to a partition, which has been effected before 20th day of December 2004. In other words, if a partition had taken place in the family before 20th December 2004, by virtue of the amendment, a daughter cannot claim share in the co-parcenary property. Explanation to sub-Section (5) explains the meaning of partition for the purpose of Section 6. - Oral partition, palu-patti, unregistered Partition Deed are excluded from the purview of the word "partition" used in Section 6. It is only the partition effected by way of a registered Deed prior to 20 December 2004, which debar a daughter from staking an equal share with a son in a co-parcenary property. Admittedly there is no registered Partition Deed between Sannamadaiah and Mahadevappa, evidencing the alleged partition that took place in the year 2000. Even if there was a partition, oral or by an unregistered Partition Deed of the year 2000 as contended by the defendants, it cannot be treated as partition for the purpose of Section 6 and the rights of the daughters to claim an equal share as co-

parceners along with Sannamadai's son Mahadevappa remains unaffected.

COMPROMISE DECREE REGISTRATION DOES NOT DEPEND ON SUIT VALUATION SLIP

Addl. Distt. Sub-Registrar Siliguri vs. Pawan Kumar Verma and Ors.: MANU/SC/0454/2013

- The scheme for valuation for the purpose of registration would show that an instrument has to be valued in terms of the market value at the time of execution of the document. In the instant case, it appears that there was no such valuation in the Civil Court. The learned Civil Judge, as per annexure P3-Order dated 30.03.2001, directed the Sheristadar to assess the amount of stamp paper for the valuation of the suit property. The suit was instituted in the year 1999. The same was compromised in the year 2001. The Plaintiff filed stamp papers as per valuation of the Sheristadar in the suit on 03.08.2004 and the decree was presented for registration before the Additional Registrar on 23.05.2007. In view of the objection raised with regard to the assessment of market value for the purpose of registration, the Plaintiff sought for clarification leading to annexure P6-Order. However, without

reference to the court, it appears that the Collector made an independent assessment and that was what was struck down by the court. Once the court had made the exercise to fix the market value of a property, the same can be reopened or altered only in a process known to law. That is not the situation in the instant case where a partition suit was filed in the year 1999, compromised in the year 2001, stamp value assessed on the basis of suit valuation and the decree presented for registration in the year 2007. Market value for the purpose of Indian Stamp Act, 1899 is not the same as suit valuation for the purpose of jurisdiction and court fee. The procedures are different for assessment of the stamp duty and for registration of an instrument. The reference to the expression 'on the basis of any court decision after hearing the State Government' appearing in Rule 3 of The West Bengal Stamp (Prevention of Undervaluation of Instruments) Rules, 2001, would clearly show that the suit valuation cannot be automatically followed for the purpose of registration. The Suits Valuation Act, 1887 and The Indian Stamp Act, 1899 operate in different fields. However, going by the scheme of the Act and Rules as amended by West Bengal, we are of the

view that it will only be appropriate that in such situations where the registering authority has any difference of opinion as to assessment on the stamp duty of the instrument presented for registration on the orders of the court, it will only be appropriate that Registrar makes a back reference to the court concerned and the court undertakes a fresh exercise after affording an opportunity of hearing to the registering authority with regard to the proper value of the instrument for registration. The registering authority cannot be compelled to follow invariably the value fixed by the court for the purpose of suit valuation.

Dr. Chiranji Lal (D) by LRs. v. Hari Das (D) By LRs. , MANU/SC/0396/2005 : (2005) 10 SCC 746 the question arose whether a final decree becomes enforceable only when it is engrossed on the stamp paper. The three- Judge Bench dealing with the controversy has opined that Article 136 of the Limitation Act presupposes two conditions for the execution of the decree; firstly, the judgment has to be converted into a decree and secondly, the decree should be enforceable. The submission that the period of limitation begins to run from the date when the decree becomes enforceable, i.e., when the decree is engrossed on

the stamp paper, is unacceptable. The Bench, while elaborating the said facet, proceeded to lay down as under:- 24. A decree in a suit for partition declares the rights of the parties in the immovable properties and divides the shares by metes and bounds. Since a decree in a suit for partition creates rights and liabilities of the parties with respect to the immovable properties, it is considered as an instrument liable for the payment of stamp duty under the Indian Stamp Act. The object of the Stamp Act being securing the revenue for the State, the scheme of the Stamp Act provides that a decree of partition not duly stamped can be impounded and once the requisite stamp duty along with penalty, if any, is paid the decree can be acted upon.

25. The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon date of the engrossment of such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain, purview and control of a party. No date or period is fixed for furnishing stamp papers. No rule has been shown to us requiring the court to call upon or give any time

for furnishing of stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that period of limitation would remain suspended till stamp paper is furnished and decree engrossed thereupon and only thereafter the period of twelve years will begin to run would lead to absurdity. In *Yeshwant Deorao Deshmukh v. Walchand Ramchand Kothari* MANU/SC/0033/1950 : 1950 SCR 852 : AIR 1951 SC 16) it was said that the payment of court fee on the amount found due was entirely in the power of the decree holder and there was nothing to prevent him from paying it then and there; it was a decree capable of execution from the very date it was passed.

26. Rules of limitation are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. As abovenoted, there is no statutory provision prescribing a time limit for furnishing of the stamp paper for engrossing the decree or time limit for engrossment of the decree on stamp paper and there is no statutory obligation on the Court passing the decree to direct the parties to furnish the stamp paper for engrossing the decree. In the present case the Court has not passed an order directing the

parties to furnish the stamp papers for the purpose of engrossing the decree. Merely because there is no direction by the Court to furnish the stamp papers for engrossing of the decree or there is no time limit fixed by law, does not mean that the party can furnish stamp papers at its sweet will and claim that the period of limitation provided under Article 136 of the Act would start only thereafter as and when the decree is engrossed thereupon. The starting of period of limitation for execution of a partition decree cannot be made contingent upon the engrossment of the decree on the stamp paper.

CHAPTER-24

RIGHT TO PRE-EMPTION

RIGHT TO PRE-EMPTION UNDER PARTITION ACT – REGARDING DWELLING HOUSE

In the case of **Ghantesher Ghosh vs. Madan Mohan Ghosh and others (1996) 11 SCC 446** Court interpreting Section 4 of the Partition Act made the following observations : "In order to answer this moot question, it has to be kept in view what the legislature intended while enacting the Act and specially Section 4 thereof. The legislative intent as reflected by the Statement of Objects and Reasons, as noted earlier, makes it clear that the restriction imposed on a stranger transferee of a share of one or more of the co-owners in a dwelling house by Section 44 of the T.P. Act is tried to be further extended by Section 4 of the Partition Act with a view to seeing that such transferee washes his hands off such a family dwelling house and gets satisfied with the proper valuation of his share which will be paid to him by the pre-empting co-sharer or co-sharers, as the case may be. This right of pre-emption available to other co- owners under

Section 4 is obviously in further fructification of the restriction on such a transferee as imposed by Section 44 of the T.P. Act."

Court in the case of **Babu Lal vs. Habibnoor Khan (dead) by Lrs. And ors. 2000 (5) SCC 662** considering the applicability of Section 4 of the Act observed: "Therefore, one of the basic conditions for applicability of Section 4 as laid down by the aforesaid decision and also as expressly mentioned in the section is that the stranger-transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned. It is, of course, true that in the said decision it was observed that even though the stranger-transferee of such undivided interest moves an execution application for separating his share by metes and bounds it would be treated to be an application for suing for partition and it is not necessary that a separate suit should be filed by such stranger- transferee. All the same, however, before Section 4 of the Act can be pressed into service by any of the other co-owners of the dwelling house, it has to be shown that the occasion had arisen for him to move under Section 4 of the Act because of the stranger-

transferee himself moving for partition and separate possession of the share of the other co-owner which he would have purchased. This condition is totally lacking in the present case. To recapitulate, Respondent 1 decree- holder himself, after getting the final decree, had moved an application under Section 4 of the Act. The appellant, who was a stranger purchaser, had not filed any application for separating his share from the dwelling house, either at the stage of preliminary decree or final decree or even thereafter in execution proceedings."

PREMATURE APPLICATION UNDER SECTION 4 OF PARTITION ACT NOT MAINTAINABLE

Srilekha Ghosh vs. Partha Sarathi Ghosh AIR 2002 SC page 2500 "Applying the ratio in the aforementioned decided cases to the case in hand the position that emerges is that the last owner of the suit property left one male heir (son) and three female heirs (widow and two daughters) who succeeded to the suit property. The widow transferred her interest in the suit property by gift in favour of her two daughters, who in course of time got married; the two daughters filed the suit for partition of the suit property which was a

female dwelling house; the partition suit was decreed preliminary; at the stage of execution proceedings the petition has been filed by the male heir i.e. the brother of the plaintiffs claiming right of pre-emption to purchase the share of one of the sisters (plaintiff No. 2). In strict sense the provision of Section 4 of the Partition Act has no application in the case. Neither can the plaintiffs who are daughters be said to be strangers to the family nor is there any material to show that they have expressed their intention not to reside in the suit property or to transfer their interest in the same to a person who is a stranger to the family. It is also to be kept in mind that the plaintiffs have acquired interest in the property by gift from their mother. Therefore, they have stepped into the shoes of their mother. Under the circumstances the petition filed by the defendant under Section 4 of the Partition Act was not maintainable and was liable to be dismissed as premature. At the same time keeping in view the object and purpose of preserving unity of the family dwelling house for occupation of members of the family the plaintiffs cannot be given a right to transfer their interest in the family dwelling house in favour of a stranger. If they decide not to reside in the suit dwelling house and desire to transfer their

interest then they must make an offer to the defendant and if he is willing to purchase the interest of the sisters then he will be entitled to do so on payment of the consideration mutually agreed or fixed by the Court".

**BEFORE INVOKING PARTITION ACT
FOLLOWING CONDITIONS TO BE FULFILLED**

In the case of **Ghantesher Ghosh vs. Madan Mohan Ghosh and others (1996) 11 SCC 446**

In this case it has been held that before Section 4 can be invoked the following conditions must be fulfilled viz.:

- (1) A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;
- (2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;
- (3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned;
- (4) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put

forward his claim of pre-emption by undertaking to buy out the share of such transferee; and

(5) While accepting such a claim for preemption by the existing co-owner of the dwelling house belonging to the undivided family, the court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house.

It is also held that Section 4 has been enacted for the purpose of insulating the domestic peace of members of undivided family occupying a common dwelling house from the encroachment of a stranger transferee of the share of one undivided co-owner as the remaining co-owners are presumed to follow similar traditions and mode of life and to be accustomed to identical likes and dislikes and identical family traditions. It is held that the scheme seeks to

protect the family members from the onslaught on their peaceful joint family life by stranger-outsider to the family who may be having different outlook and mode of life including food habits and other social and religious customs. It is held that entry of such outsider in the joint family dwelling house is likely to create unnecessary disturbances not germane to the peace and tranquillity not only of the occupants of the dwelling house but also of neighbours residing in the locality. It is held that keeping these objects in view the right flowing from Section 4 cannot be restricted in its operation only up to the final decree for partition. It is held that crystallization of share may take place but separation and partition take place only by actual division by metes and bounds and delivery of possession of respective shares to the respective shareholders. It is held that this can be achieved only at the stage of execution of the final decree. It is held that only after execution, separation and partition the court would become functus officio. It is held that the provisions of Section 4 would, therefore, be available at all stages of the litigation till the litigation reaches its terminus by means of full and final discharge and satisfaction of the final decree for partition. It is held that if a stranger

transferee enters the arena of contest at any stage and seeks to get his share separated he can be said to be suing for partition and separate possession within the meaning of Section 4. It has been held that such a transferee may come on the scene prior to the final decree or he may come on the arena of contest even in execution proceedings as a transferee of the decretal right. It is held that in either eventuality it would be said that such a stranger is suing for partition.

PREFERENTIAL RIGHT GIVEN TO A HEIR OF HINDU UNDER SECTION 22 HSA

**Babu Ram vs. Santokh Singh (Deceased)
through his L.Rs. and Ors.:
MANU/SC/0396/2019 - AIR 2019 SC 1506 -**

When Parliament thought of conferring rights of succession in respect of various properties including agricultural holdings, it put a qualification on right to transfer to an outsider and gave preferential rights to other heirs with a designed object. Under Shastric Law, interest of a coparcener would devolve by principles of survivorship to which an exception was made by virtue of Section 6 of Act. If conditions stipulated in Section 6 were satisfied, devolution of such

interest of deceased would not go by survivorship but in accordance with provisions of Act. Since, right itself in certain cases was created for first time by provisions of Act, it was thought fit to put a qualification so that properties belonging to family would be held within family, to extent possible and no outsider would easily be planted in family properties. It was with this objective that a preferential right was conferred upon remaining heirs, in case any of heirs was desirous of transferring his interest in property that, he received by way of succession under Act. Preferential right given to an heir of a Hindu under Section 22 of Act was applicable even if property in question was an agricultural land.

The Act came into force on 17th June, 1956. Section 22 has remained unchanged since the enactment. While considering the effect of Section 22, Section 4(2) may also be required to be looked into. However, Section 4(2), as originally enacted has since then been omitted by the Hindu Succession (Amendment) Act, 2005 (Act 39 of 2005). Before such omission, Section 4 as originally enacted was as under: 4. Over-riding effect of Act. - (1) Save as otherwise expressly provided in this Act, - (a) Any text, Rule or

interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act; (b) Any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act.

(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provision of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.

Section 22 of the Act is as under:

22. Preferential right to acquire property in certain cases - (1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the

other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this Section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.- In this section, "court" means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf.

CHAPTER-25
DWELLING HOUSE

A FEMALE HEIR'S RIGHT TO CLAIM PARTITION OF THE DWELLING HOUSE DOES NOT ARISE UNTIL THE MALE HEIRS CHOOSE TO DIVIDE THEIR RESPECTIVE SHARES THEREIN, BUT TILL THAT HAPPENS THE FEMALE HEIR IS ENTITLED TO THE RIGHT TO RESIDE THEREIN

Narashimaha Murthy vs. Susheelabai (Smt.) & Ors, (1996) 3 SCC 644, Court considering the provisions of Section 23 of the Act in the light of Section 4(1) of Partition Act and Section 44 of the Transfer of Property Act made the following observations:

"Attention may now be invited to the last sentence in the provision and the proviso, for there lies the clue to get to the heart of the matter. On first impression the provision may appear conflicting with the proviso but on closer examination the conflict disappears. A female heir's right to claim partition of the dwelling house does not arise until the male heirs choose to divide their respective shares therein, but till that happens the female heir is entitled to the right to reside

therein. The female heir already residing in the dwelling house has a right to its continuance but in case she is not residing, she has a right to enforce her entitlement of residence in a court of law. The proviso makes it amply clear 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. On first impression, it appears that when the female heir is the daughter, she is entitled to a right of residence in the dwelling house so long as she suffers from any one of the four disabilities i.e. (1)being unmarried; (2) being a deserted wife; (3) being a separated wife; and (4) being a widow. It may appear that female heirs other than the daughter are entitled without any qualification to a right of residence, but the daughter only if she suffers from any of the aforementioned disabilities. If this be the interpretation, as some of the commentators on the subject have thought it to be, it would lead to a highly unjust result for a married granddaughter as a Class I heir may get the right of residence in the dwelling house, and a married daughter may not. This incongruous result could never have been postulated by the legislature.

Significantly, the proviso covered the cases of all daughters, which means all kinds of daughters, by employment of the words "where such female heir is a daughter" and not "where such female heir is the daughter". The proviso thus is meant to cover all daughters, the description of which has been given in the above table by arrangement. The word 'daughter' in the proviso is meant to include daughter of a predeceased son, daughter of a predeceased son of a predeceased son and daughter of a predeceased daughter. The right of residence of the female heirs specified in Class I of the Schedule, in order to be real and enforceable, presupposes that their entitlement cannot be obstructed by any act of the male heirs or rendered illusory such as in creating third party rights therein in favour of others or in tenancing it, creating statutory rights against dispossession or eviction. What is meant to be covered in Section 23 is a dwelling house or houses, (for the singular would include the plural, as the caption and the section is suggestive to that effect) fully occupied by the members of the intestate's family and not a house or houses let out to tenants, for then it or those would not be dwelling house/houses but merely in description as residential houses. The section protects only a

dwelling house, which means a house wholly inhabited by one or more members of the family of the intestate, where some or all of the family members, even if absent for some temporary reason, have the animus revertendi. In our considered view, a tenanted house therefore is not a dwelling house, in the sense in which the word is used in Section 23. The second question does not present much difficulty. On literal interpretation the provision refers to male heirs in the plural and unless they choose to divide their respective shares in the dwelling house, female heirs have no right to claim partition. In that sense there cannot be a division even when there is a single male. It would always be necessary to have more than one male heir. One way to look at it is that if there is one male heir, the section is inapplicable, which means that a single male heir cannot resist female heir's claim to partition. This would obviously bring unjust results, an intendment least conceived of as the underlying idea of maintenance of status quo would go to the winds. This does not seem to have been desired while enacting the special provision. It looks nebulous that if there are two males, partition at the instance of female heir could be resisted, but if there is one male, it would not. The emphasis

on the section is to preserve a dwelling house as long as it is wholly occupied by some or all members of the intestate's family which includes male or males. Understood in this manner, the language in plural with reference to male heirs would have to be read in singular with the aid of the provisions of the General Clauses Act. It would thus read to mean that when there is a single male heir, unless he chooses to take out his share from the dwelling house, the female heirs cannot claim partition against him. It cannot be forgotten that in the Hindu male-oriented society, where begetting of a son was a religious obligation, for the fulfillment of which Hindus have even been resorting to adoptions, it could not be visualized that it was intended that the single male heir should be worse off, unless he had a supportive second male as a Class I heir. The provision would have to be interpreted in such manner that it carries forward the spirit behind it. The second question would thus have to be answered in favour of the proposition holding that where a Hindu intestate leaves surviving him a single male heir and one or more female heirs specified in Class I of the Schedule, the provisions of Section 23 keep attracted to maintain the dwelling house impartible as in the

case of more than one male heir, subject to the right of re-entry and residence of the female heirs so entitled, till such time the single male heir chooses to separate his share; this right of his being personal to him, neither transferable nor heritable."

CHAPTER-26

SUCCESSION

MOTHERS CLAIM IN DECEASED SONS PROPERTY – EVEN IF SHE REMARRIED SHE IS HIS MOTHER

Mothers claim in deceased sons property is recognized by Mysore High court stating even if she is remarried she does not cease to be his mother. Thayamma case: **AIR 1960 Mys 176.**

TAHSILDAR HAS GOT POWER ONLY TO ISSUE SURVIVALSHIP CERTIFICATE AND NOT THE LEGAL HEIRSHIP CERTIFICATE

The Tahsildar has got power only to issue survivalship certificate and not the legal heirship certificate. Basavanni Shankar Ammanagi VS Smt. Keshavva And Ors case: **2002 (2) KarLJ 317A. ILR 2002 KAR 581** The Tahsildar has got power only to issue survivalship certificate and not the legal heirship certificate. If the second respondent contends that she is the class I heir of the deceased-Shivanand, she must get the order from the competent Court to

establish that she is the class I heir of the deceased. Therefore, the impugned order passed by the 5th respondent is not sustainable in the eye of law. The order passed by the 4th respondent holding that the appeal is not maintainable under the order passed by the Tahsildar is contrary to the relevant provisions of the Act. The appeal filed by the petitioner is maintainable and the order passed by the 5th respondent is not maintainable. Hence, the Assistant-Commissioner has committed an error in passing the impugned order declaring that the appeal filed by the petitioner is not maintainable.

WHEN SUCCESSION HAS BEEN ALREADY OPENED IN STATE AMENDMENT, CENTRAL AMENDMENT DOES NOT TAKE AWAY SUCH RIGHT 2006 SC

Sheela Devi & Ors. v. Lal Chand & Anr. [(2006 (8) SCC 581], held: "21. The Act indisputably would prevail over the old Hindu law. We may notice that Parliament, with a view to confer right upon the female heirs, even in relation to the joint family property, enacted the Hindu Succession Act, 2005. Such a provision was enacted as far back in 1987 by the State of

Andhra Pradesh. The succession having opened in 1989, evidently, the provisions of the Amendment Act, 2005 would have no application.” The principle of law applicable in this case is that so long a property remains in the hands of a single person, the same was to be treated as a separate property, and thus such a person would be entitled to dispose of the coparcenary property as the same were his separate property, but, if a son is subsequently born to him or adopted by him, the alienation whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations so made by his father before he was born or begotten, But once a son is born, it becomes a coparcenary property and he would acquire an interest therein.

THE HON'BLE MR.JUSTICE ANAND
BYRAREDDY of HIGH COURT OF
KARNATAKA in the case of **Swamy vs
Thimmamma Decided on 16 April, 2013**

Observed:- Relating to devolution of interest, the opening of a succession came to be considered as the focal point by the Supreme Court in the case of Sheela Devi & Ors. v. Lal Chand & Anr. (2006) 8 SCC 581 followed thereafter in the case of G.

Sekar v. Geetha & Ors. (2009) 6 SCC 99: (AIR 2009 SC 2649). It was held that the date of the opening of the succession was the relevant date and if succession opened prior to the amendment Act of 2005 the provisions of the amendment Act would have no application because rights under the succession would vest upon the successors from the date the succession opened. Paragraph 49 of the judgment in the case of G. Sekar v. Geetha & Ors. (2009) 6 SCC 99: (AIR 2009 SC 2649) extracts paragraph 21 of the judgment in the case of Sheela Devi (supra) and observes that the amendment Act had no application to the succession which opened prior to the coming into force of the Act despite the word "negative" therein.

SUCCESSION AND SURVIVORSHIP

Byamma vs. Ramdev: MANU/KA/0346/1990 - ILR 1991 KAR 3245 - 10. It is well settled that devolution of joint family property, which come to the hands of a son from his father or grand-father or great-grand-father as unobstructed heritage is governed by the Rule of Survivorship. A male coparcener acquires right to such property by

birth. This is different from property that may come to the hands of a coparcener in which he has no right by birth. This is what is known as obstructed heritage, and such property devolve by succession and not by survivorship. Such a distinction is well known in Hindu Law. Therefore, when Section 8(1)(d) of the Mysore Act refers to the properties passing on to a single coparcener by survivorship, it has reference to the ancestral properties which come to his hands upon partition or otherwise.

11. It is also well settled that if a coparcener dies, his interest devolves upon other coparceners by survivorship. As long as the joint family is in existence, all the coparceners jointly own all the properties. Each coparcener is a full owner of each property owned by the joint family. The effect of partition is severance of status and, as a consequence, each coparcener becomes entitled to separate possession and enjoyment of his share in the joint family properties. Partition by itself does not create a right because the right of a coparcener existed even before partition. It only brings about demarcation of his interest with a right to separate possession and enjoyment. It is therefore, not correct to state that when a coparcener, upon partition, gets his share in the

joint family properties, it does not come to him by survivorship. The right which accrues to the coparcener is by operation of the Rule of Survivorship and the partition only demarcates his share in the joint family properties. As observed earlier, unobstructed heritage always devolves by operation of the Rule of Survivorship and there is no exception to this Rule. It has therefore been held that where a father disposes of by a Will, his interest in the joint family properties in favour of his son, the properties in the hands of the son still retain the character of coparcenary property, and not self-acquired property.

Radha Bai vs. Ram Narayan and Ors.:

MANU/SC/1608/2019 - Sukhdeo had inherited ancestral property and was alive till 1965. The father of Appellant, Saheblal, predeceased him in 1957. Saheblal was the son of Janakram. Janakram died in 1982. During the life time of Janakram, in terms of Section 6 of the 1956 Act, Saheblal could not have succeeded to the property as he could claim only through Janakram. Janakram, however, was alive till 1982. If Saheblal himself had no claim in his own

rights, the question of Appellant, being his daughter, succeeding to the property does not arise. grand son or granddaughter is clearly excluded from heirs in Class-I. Saheblal himself was grand son of Sukhdeo, who predeceased Sukhdeo. After the demise of Sukhdeo in 1965, therefore, the ancestral suit property could be and came to be partitioned between Janakram and Pilaram in 1967. As a result of that partition, the suit property came to the exclusive share of Janakram in his individual capacity. He could, therefore, legitimately dispose of the same in the manner he desired and which he did in favour of his grandsons (Defendant Nos. 1 to 3 respectively) vide registered sale deed dated 21st July, 1979. Neither the stated partition of 1967 nor the registered sale deed in favour of Respondents (Defendant Nos. 1 to 3) dated 21st July, 1979 has been challenged. The relief sought in the suit as filed by the Appellant/Plaintiff is only for partition and awarding share to the Appellant/Plaintiff alongwith possession. Suffice it to observe that, the grand-daughter of Janakram (Appellant herein) could not have claimed a higher right than the right of her father Saheblal. after the death of Sukhdeo in 1965, the property devolved upon his two sons

Janakram and Pilaram. They succeeded to the ancestral property equally. They later effected partition in 1967, as a result of which, the property came to the exclusive share of Janakram. The father of Appellant, Saheblal, had predeceased his father Janakram and even his grandfather Sukhdeo. During the life time of Janakram, Saheblal could not have succeeded to the property and for the same reason, the Appellant being his daughter cannot be heard to claim any right higher than that of Saheblal.

Arshnoor Singh vs. Harpal Kaur and Ors.:

MANU/SC/0864/2019 - In present case, submission of Appellant is that, suit property was coparcenary property in which the Appellant had become a coparcener by birth. It was further submitted that since the suit property was coparcenary property, Dharam Singh could not have alienated it without legal necessity of the family, or benefit to the estate. It was further submitted that the Sale Deed dated 30th October, 2007 purportedly executed by Respondent No. 1 in favour of Respondent Nos. 2 & 3, during the pendency of the Suit, was hit by lis pendens. It is the admitted position that Inder Singh had inherited the entire suit property from his father

Lal Singh upon his death. As per the Mutation Entry produced by Respondent No. 1, Lal Singh's death took place in 1951. Therefore, the succession in this case opened in 1951 prior to the commencement of the Hindu Succession Act, 1956, when Inder Singh succeeded to his father Lal's Singh's property in accordance with the old Hindu Mitakshara law. Under Mitakshara law, whenever a male ancestor inherits any property from any of his paternal ancestors upto three degrees above him, then his male legal heirs upto three degrees below him, would get an equal right as coparceners in that property..... After the Hindu Succession Act, 1956 came into force, this position has undergone a change. Post - 1956, if a person inherits a self-acquired property from his paternal ancestors, the said property becomes his self-acquired property, and does not remain coparcenary property..... If succession opened under the old Hindu law, i.e. prior to the commencement of the Hindu Succession Act, 1956, the parties would be governed by Mitakshara law. The property inherited by a male Hindu from his paternal male ancestor shall be coparcenary property in his hands vis-À-vis his male descendants upto three degrees below him. The nature of property will remain as coparcenary

property even after the commencement of the Hindu Succession Act, 1956. In the present case, the succession opened in 1951 on the death of Lal Singh. The nature of the property inherited by his son Inder Singh was coparcenary in nature. Even though Inder Singh had effected a partition of the coparcenary property amongst his sons in 1964, the nature of the property inherited by Inder Singh's sons would remain as coparcenary property qua their male descendants upto three degrees below them..... In the present case, the entire property of Lal Singh was inherited by his son Inder Singh as coparcenary property prior to 1956. This coparcenary property was partitioned between the three sons of Inder Singh by the court vide a decree of partition dated 4th November, 1964. The shares allotted in partition to the coparceners, continued to remain coparcenary property in their hands qua their male descendants. As a consequence, the property allotted to Dharam Singh in partition continued to remain coparcenary property qua the Appellant. The suit property which came to the share of late Dharam Singh through partition, remained coparcenary property qua his son - the Appellant herein, who became a coparcener in the suit property on his birth i.e.

on 22.08.1985. Dharam Singh purportedly executed the two Sale Deeds on 01.09.1999 in favour of Respondent No. 1 after the Appellant became a coparcener in the suit property..... It is settled law that the power of a Karta to sell coparcenary property is subject to certain restrictions viz. the sale should be for legal necessity or for the benefit of the estate. The onus for establishing the existence of legal necessity is on the alienee..... In the present case, the onus was on the alienee i.e. Respondent No. 1 to prove that there was a legal necessity, or benefit to the estate, or that she had made bona fide enquiries on the existence of the same..... Respondent No. 1 has completely failed to discharge the burden of proving that Dharam Singh had executed the two Sale Deeds dated 1st September, 1999 in her favour out of legal necessity or for the benefit of the estate. In fact, it has come on record that the Sale Deeds were without any consideration. Dharam Singh had deposed before the Trial Court that he sold the suit property to Respondent No. 1 without any consideration. Respondent No. 1 had also admitted before the Collector, Ferozepur that the Sale Deeds were without consideration. Hence, the ground of legal necessity or benefit of the estate falls through..... As a consequence,

the Sale Deeds dated 1st September, 1999 are hereby cancelled as being illegal, null and void. Dharam Singh could not have sold the coparcenary suit property, in which the Appellant was a coparcener, by the aforesaid alleged Sale Deeds..... Since Respondent No. 1 has not obtained a valid and legal title to the suit property through the Sale Deeds dated 1st September, 1999, she could not have passed on a better title to Respondent Nos. 2 & 3 either. The subsequent Sale Deed dated 30th October, 2007 executed by Respondent No. 1 in favour of Respondent Nos. 2 & 3 is hit by the doctrine of lis pendens. The Sale Deed dated 30th October, 2007 executed by Respondent No. 1 in favour of Respondent Nos. 2 & 3 being null and void, is hereby cancelled..... The Plaintiff/Appellant being a male coparcener in the suit property, was vitally affected by the purported sale of the suit property by his father Dharam Singh. The Appellant therefore had the locus to file the Suit for a Declaration that the suit property being coparcenary property, could not have been sold by his father Dharam Singh without legal necessity, or for the benefit of the estate. As a consequence, the Appellant was entitled to move the Court for a Declaration that the two Sale Deeds dated 1st September, 1999

executed by his father Dharam Singh in favour of Respondent No. 1 were illegal, null and void..... The very fact that the Sale Deeds dated 1st September, 1999 were executed without any consideration, would itself show that the suit property was sold without any legal necessity. Being coparcenary property, it could not have been sold without legal necessity, or for the benefit of the estate..... The non-production of the Jamabandis would make no difference, as it did not affect the title/ownership of the suit property.

SALIENT FEATURES OF EVOLUTION OF LAW OF PARTITION AND SUCCESSION UNDER THE MITAKSHARA SCHOOL OF LAW

Justice B.V. Nagarathna of Karnataka High court in case of Balavant Rao and Ors. vs. Geeta and Ors.: MANU/KA/3504/2016 - ILR 2017 KAR 2882 -

(a) Prior to the codification of the rules regarding succession, under the traditional law, a Hindu family was ordinarily joint not only in estate but also in food and worship. Coparcenary property was an incidence of joint family estate as

distinguished from absolute or separate property of an individual coparcener. Coparcenary property devolved on the principle of survivorship as per the rules governing devolution of property by survivorship. The right of a male Hindu in coparcenary property was by birth.

(b) Under the Hindu Law of Inheritance (Amendment) Act, 1929 certain female members of the joint family were included in the order of succession by way of intestate succession. Subsequently, under the Hindu Women's Rights to Property Act, 1937, significant changes were effected in law concerning partition. In the princely State of Mysore, 1933 Act was enacted. The said Act conferred on the widow, the widow of a predeceased son and the widow of a predeceased son of a predeceased son, a right of inheritance to the deceased's property even when the deceased left a male issue and such persons were even allowed to claim partition, though they would take only a limited estate in the property of the deceased.

(c) The rule of devolution of property by a survivorship was further abridged by the enforcement of the Hindu Succession Act, 1956. Under Section 6 of the said Act, as it stood prior to 2005 amendment, if a male Hindu died after

the commencement of the Act having an interest in a Mitakshara coparcenary property, his interest in the property was to devolve by survivorship upon the surviving members of the coparcenary. But if the deceased left behind surviving a female relative specified in Class-I of the Schedule I to the Act, or a male relative specified in that Class who claimed through such female relative, the interest of the deceased in the Mitakshara coparcenary property would devolve by testamentary or intestate succession under the Act and not by survivorship. Thus, the rule of survivorship would come into play (i) when the deceased left behind him surviving a female relative specified in Class I, or a male relative specified in Class I, who claimed through such female relative in Class I, or (ii) when the deceased had made a testamentary disposition of his undivided share in the coparcenary property. Under Section 30 of the said Act, a coparcenary could make a testamentary disposition of his undivided interest in joint family property. A share of the deceased coparcenary in Hindu Mitakshara coparcenary property was deemed to be the share in the property. That would be allotted to him if a partition of that property had taken place immediately before his death. Thus,

a notional partition of coparcenary property before the death of a coparcener was contemplated under the section and the property would devolve on the heirs by way of succession and not by survivorship. While applying the principles of notional partition in a given case, one had to take into consideration the status of a person, who had separated himself from the coparcenary before the death of the deceased or the claim of any heir of such a person as explained in Explanation 2.

(d) Section 6 of the Act has now been amended by virtue of the Hindu Succession (Amendment) Act, 2005 under which, a daughter of a male Hindu governed by Mitakshara Law, leaving behind coparcenary property is considered to be a coparcener for the purpose of succession to his interest in the Mitakshara coparcenary property. In fact, the Section goes further to state that the daughter of a coparcener shall, by birth, become a coparcener in her own right in the same manner as the son; have the same rights in the coparcenary property as she would have had if she had been a son; and be subject to the same liabilities and disabilities in respect of the said coparcenary property as that of a son. A daughter, as a coparcener, can also dispose of her

right, title and interest in the coparcenary property by way of a testamentary disposition.

(e) Sub-section 3 of Section 6 pursuant to the amendment states that where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a joint Hindu family governed by Mitakshara Law shall devolve by testamentary or intestate succession, as the case may be, under the said Act and not by survivorship. The coparcenary property shall be deemed to have been divided as if a partition has taken place and the daughter is allotted the same share as is allotted to a son; the share of the predeceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or such pre-deceased daughter. Also, the share of the pre-deceased child of a pre-deceased son or a predeceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

(f) The Explanation states that the interest of a Hindu Mitakshara coparcener shall be deemed to

be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. This explanation is identical with Explanation-I of Section 6 prior to its amendment in the year 2005.

CONCLUSIONS AFTER COMPARING UNAMENDED SECTION 6 WITH AMENDED AFTER 2005

Supreme Court, in the case of Prakash vs. Phulavati [MANU/SC/1241/2015 : (2016) 2 SCC 36] - "17. The text of the amendment itself clearly provides that the right conferred on a 'daughter of a coparcener' is 'on and from the commencement of Hindu Succession (Amendment) Act, 2005'. Section 6(3) talks of death after the amendment for its applicability. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. **An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective. In the present case, there is neither any**

express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect. Requirement of partition being registered can have no application to statutory notional partition on opening of succession as per unamended provision, having regard to nature of such partition which is by operation of law. The intent and effect of the Amendment will be considered a little later. On this finding, the view of the High Court cannot be sustained.

18. Contention of the respondents that the Amendment should be read as retrospective being a piece of social legislation cannot be accepted. **Even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature. In the present case, the legislature has expressly made the Amendment applicable on and from its commencement and only if death of the coparcener in question is after the Amendment. Thus, no other interpretation is possible in view of express language of the statute.** The proviso keeping dispositions or alienations or partitions prior to 20th December, 2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to

the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when the main provision is applicable. Similarly, Explanation has to be read harmoniously with the substantive provision of Section 6(5) by being limited to a transaction of partition effected after 20th December, 2004. Notional partition, by its very nature, is not covered either under proviso or under subsection 5 or under the Explanation.

19. Interpretation of a provision depends on the text and the context. Normal rule is to read the words of a statute in ordinary sense. In case of ambiguity, rational meaning has to be given. In case of apparent conflict, harmonious meaning to advance the object and intention of legislature has to be given.

20. There have been number of occasions when a proviso or an explanation came up for interpretation. Depending on the text, context and the purpose, different rules of interpretation have been applied.

21. Normal rule is that a proviso excepts something out of the enactment which would otherwise be within the purview of the enactment but if the text, context or purpose so require a

different rule may apply. Similarly, an explanation is to explain the meaning of words of the section but if the language or purpose so require, the explanation can be so interpreted. Rules of interpretation of statutes are useful servants but difficult masters. Object of interpretation is to discover the intention of legislature.

22. In this background, we find that the proviso to Section 6(1) and sub-section (5) of Section 6 clearly intend to exclude the transactions referred to therein which may have taken place prior to 20th December, 2004 on which date the Bill was introduced. Explanation cannot permit reopening of partitions which were valid when effected.

23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation."

IF THE DEATH OF A COPARCENER HAS OCCURRED PRIOR TO THE 2005 AMENDMENT, THE LAW AS IT STOOD THEN WOULD APPLY IN THE MATTER OF SUCCESSION

Justice B.V. Nagarathna of Karnataka High court in case of Balavant Rao and Ors. vs. Geeta and Ors.: MANU/KA/3504/2016 - ILR 2017 KAR 2882 "...Principles to be borne in mind while interpreting an amendment to a piece of substantive law or legislation in the context of its having a prospective or retrospective operation could be referred to, in the background of two decisions of the Hon'ble Supreme Court.

a) In the case of Hitendra Vishnu Thakur vs. State of Maharashtra [MANU/SC/0526/1994 : (1994) 4 SCC 602] (Hitendra Vishnu Thakur), the Hon'ble Supreme Court in the context of substantive and procedural law has laid down the ambit and scope of an amending Act and its retrospective operation in the following terms:

"(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a

construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly-defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

b) Referring to the aforesaid decision in *Shyam Sunder vs. Ramkumar* [MANU/SC/0405/2001 : (2001) 8 SCC 24] (*Shyam Sunder*), it has been held that when a repeal of an enactment is followed by a fresh legislation, such legislation does not affect the substantive rights of the parties on the date of the

suit or adjudication of the suit, unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered, because the rights of the parties in an appeal are determined under the law in force on the date of the suit. However, according to Hon'ble Supreme Court, the above position in law would be different in matters which relate to procedural law, but so far as substantive rights of parties are concerned, they remain unaffected by the amendment in the enactment. Thus, while there is a presumption against retrospective operation of a statute dealing with substantive rights; where an amendment affects procedure, it is presumed to be retrospective, unless the amending Act provides otherwise. In that case, the Hon'ble Supreme Court was dealing with Panjab Pre-emption Act, 1913 as substituted by Haryana Act 10 of 1995, which is substantive law. It held that the amending Act being prospective in operation, did not affect the rights of the parties to the litigation on the date of adjudication of the pre-emption suit and the appellate court was not required to take into consideration the

substituted provision introduced by Section 15 of the amended Act.

Thus, the Hon'ble Supreme Court, in the aforesaid decisions has borne in mind the distinction between substantive law and procedural law in the context of the operation of an amending statute or provision. If a piece of substantive law is amended, then such a law would have prospective operation unless made retrospective, either expressly or by necessary intendment. The reason being that all vested rights prior to the amendment are protected and not divested pursuant to the amendment. Therefore, if the death of a coparcener has occurred prior to the 2005 amendment, the law as it stood then would apply in the matter of succession.

SUCCESSION UNDER SECTION 8 OF HSA BECOMES SEPARATE PROPERTY

Mallika and Ors. vs. Chandrappa and Ors.: MANU/KA/7032/2007 - ILR 2007 KAR 3216 -

Under traditional Hindu law, from the moment a son is born, he gets a share in his father's ancestral property and becomes a co-parcener, on accrual of that right by his birth in the family,

that position is affected and modified by Section 8 of the Hindu Succession Act 1956. Consequently, the property of the father who had separated from his family, on his death will be inherited and held by his sons in their individual capacity and son's son / sons will have no right therein as co-parceners.

Hon'ble Supreme Court in Uttam v. Saubhag Singh MANU/SC/0256/2016 : (2016) 4 Supreme Court Cases 68 has declared that the law, prior to the Hindu Succession (Amendment) Act, was that when a male Hindu died after the commencement of the Hindu Succession Act, his interest in Mitakshara co-parcenary property devolve by succession upon the surviving members of the co-parcenary, but for two exceptional circumstances. The two exceptions explicated by the Hon'ble Supreme Court are (a) when a male Hindu has disposed of his interest in the co-parcenary by a Will or other testamentary disposition, or (b) if the male Hindu is survived by a female relative specified in class-1 or by a male relative specified in that class claiming through such female relative. In the above two exceptional circumstances, the interest of the deceased male Hindu in a co-parcenary

would devolve by testamentary or intestate succession. If it is intestate succession, the interest of the dying male Hindu would devolve subject to the provisions of Section 8 of the Hindu Succession Act.

HINDU SUCCESSION ACT IN CASE OF ROYAL PROPERTIES EXPLAINED

Trijugi Narain vs. Sankoo:

MANU/SC/1742/2019 1. Preamble of the Succession Act states that, it is an Act to amend and codify the law relating to intestate succession amongst Hindus and as originally enacted did not profess to amend and codify the law relating to the nature of all the properties held by Hindus, with the exception of Section 14 of the Succession Act.

2. Section 4 of the Succession Act provides that the text, rule, interpretation, custom or usage of Hindu law will cease to have effect with respect to any matter for which provision is made in the Act and further any other law in force, which is inconsistent with the provisions of the Act, will cease to apply.

3. Section 6 of the Succession Act deals with devolution of interest of a Hindu male (and

daughter of a coparcener after amendment vide the Hindu Succession (Amendment) Act 2005) having interest in a Mitakshara coparcenary as distinct from a joint Hindu family.

4. Sections 8 and 9 of the Succession Act relating to the general Rules of succession in case of males and females, respectively, do not apply to a living person but apply on the succession opening on the death.

5. Similarly, Section 30 of the Succession Act which deals with testamentary succession and empowers a Hindu to dispose of any property by will in accordance with the provisions of the Indian Succession Act, 1925, does not ipso facto apply to a living person and applies in the event of the holder's death.

6. The provisions of the Succession Act, with the possible exception of Section 14 and some amendments vide the Hindu Succession (Amendment) Act 2005, do not apply unless the succession opens and, therefore, no legal rights of a living person would get affected.

7. Outside the limits of coparcenary, there is a fringe of persons, both male and female, who constitute the undivided or joint family which consists of lineal descendants from a former ancestor and includes their wives and unmarried

daughters. Joint Hindu family is, thus, a larger body consisting of group of persons who are united by the tie of sapindaship arising by birth, marriage or adoption. An individual who is a member of the joint Hindu family can hold separate or individual property and in addition, if he is a coparcener, have an interest in the coparcenary property of the joint Hindu family.

8. However, with the enforcement of the Succession Act with effect from 17th June 1956, any property inherited by an heir vide intestate succession in the event of death occurring after 17th June 1956 is absolute or individual property and not ancestral property.

Rule of primogeniture

9. An estate even if inherited and ancestral, partition of which is prohibited by custom and succession whereto is generally by the Rule of primogeniture is referred to as an 'impartible estate'. An impartible estate is essentially a creature of custom, though could also owe its origin to the term of a grant, a statute or a family settlement. By virtue of the Rule of primogeniture, the eldest or the first son succeeds to the property of the last holder to the exclusion of his younger brothers. It is, therefore, well established that an impartible estate is clothed with the

incidents of self-acquired and separate property. Impartible estate even if inherited and ancestral, is not held by the coparcenary as a part of the coparcenary property, as the coparceners or members of the joint Hindu family do not have the right to partition or right to restrain alienation. Any property belonging to the Ruler as a sovereign, which would devolve on succession by survivorship by application of the Rule of the primogeniture, would not bear an incidence of a coparcenary property. The property belonged to one person, that is, the sovereign Ruler as the very concept of sovereignty implies absolute authority, power and ownership that cannot be subjected to legal action of partition or injunction by another person. Consequently, estates/properties of the sovereign Ruler were impartible even though the property was ancestral.

SUCCESSION BY PERSONS ENTERING RELIGIOUS ORDER

Msgr. Xavier Chullickal vs. Raphael : 2017 (3) KLJ 167 - MANU/KE/0908/2017 - 6. It may be true that a Hindu ascetic or a Christian priest would sever his connection with the members of

his natural family on entering into a religious order as per the pristine Hindu Law or the Canon Law. The ascetic or the priest in that sense may be said to have suffered a civil death making him ineligible to inherit a property either by intestate succession or testamentary succession. But the scenario has changed after the enactment of the Hindu Succession Act, 1956 and the Indian Succession Act, 1925 which only governs the parties as regards inheritance and succession.

To borrow the words of Mr. Justice K.T. Thomas from *George Sebastian v. Molly Joseph* (MANU/KE/0003/1995 : 1994 (2) KLT 387 (F.B.)): "Where there is a statute governing the area, the statute has primacy over any personal law in that regard.....Personal law has relevance only to the above extent vis-à-vis the statutory law. In other words, personal law stands clipped to the extent statutory law has stepped."

The above decision was affirmed in *Molly Joseph v. George Sebastian* (MANU/SC/0035/1997 : 1997 (1) KLT 1 (SC)) to hold that Ecclesiastical Tribunal has no jurisdiction to annul a marriage as per Canon Law in the light of the Divorce Act, 1869. The Supreme Court in so doing observed as follows:-

"It is well settled that when Legislature enacts a law even in respect of the personal law of a group of persons following a particular religion, then such statutory provisions shall prevail and override any personal law, usage or custom prevailing before coming into force of such Act."

It necessarily follows that the rights of inheritance and succession to a Hindu ascetic or a Christian priest are governed by the Hindu Succession Act, 1956 or the Indian Succession Act, 1925 as the case may be.

7. The applicability of the Indian Succession Act, 1925 to all Indian Christians as defined in Section 2(d) thereof is settled by the decision in *Mary Roy v. State of Kerala* MANU/SC/0716/1986 : (1986 KLT 508 (SC) : AIR 1986 SC 1011). To quote from the above: "5. The Indian Succession Act, 1925 was enacted by Parliament with a view to consolidating the law applicable to intestate and testamentary succession. This Act being a consolidating Act replaced many enactments which were in force at that time dealing with intestate and testate succession including the Indian Succession Act, 1856. Part V of the Act relates to intestate succession and it consists of a fasciculus of sections beginning with S. 29 and going up to S.

56. The rules relating to testate succession are to be found in Part VI of the Act which comprises 23 Chapters commencing from S. 57 and ending with S. 191."

This principle has been followed in *Taluk Land Board v. Cyriac Thomas* (MANU/SC/0766/2002 : (2002) 8 SCC 29) and *Mathai Samuel v. Eapen Eapen* (MANU/SC/0996/2012 : (2012 (4) KLT 743 (SC) : AIR 2013 SC 532) and sets at rest the controversy as regards the applicability of the Indian Succession Act, 1925.

8. The Indian Succession Act, 1925 does not make any departure in the matter of inheritance or succession to a Christian priest or nun whether or not he/she has taken a vow of poverty, chastity and obedience. The Division Bench of the Karnataka High Court noticed this three decades ago in *Kempa Gowda v. Lucinda and others* (MANU/KA/0179/1985 : AIR 1985 Karnt. 231) wherein it was held as follows:- "9. The plaintiff is a Nun. She is devoted to religious life under certain vows and she lives in Convent. The case of the appellants is that because the plaintiff is a Nun, she is not entitled to any share in the suit properties. This contention, in our opinion, has no support of

reason. The plaintiff is no doubt, a Nun, but we find no statutory prohibition for her to claim legitimate share out of the estate of her father. The Indian Succession Act does not contain any such restraint. Nor there is any prohibition prescribed under ecclesiastical law. At any rate, no such law has been brought to our notice. We are, therefore, not inclined to accept the contention that the plaintiff is not entitled to any share in the suit properties merely because she is a Nun."

A learned single Judge of the Madras High Court echoed in similar lines in In the matter of the Indian Succession Act v. Rt. Rev. Casmir Gnanadesikan Archbishop of Madras, Mylapore MANU/TN/0366/1989 : (1990 (1) KLT 334 (Mad.)) as follows: "The Inheritance Law applicable to a person who dies as a Christian, is contained in Part V of the Indian Succession Act..... So, unless there is some other statute, enacting a different law of inheritance, applicable to Christian priest like the deceased in this case, only Part V of the Indian Succession Act has to be applied to find out who is the heir to the above deceased Fr. Jacob. No such different enactment was placed before me. Then, as per Part V of the

Indian Succession Act, the petitioner is admittedly not a heir of the deceased priest."

We are in perfect agreement with the decisions of the Karnataka High Court and Madras High Court that Indian Succession Act, 1925 does not make a departure in the case of a Christian priest or nun. There is absolutely no statutory prohibition for a Christian priest or nun in the matter of intestate or testamentary succession of property of course in his/her personal capacity.

CHAPTER-27
SCOPE OF MAINTENENCE EFFECT ON
PROPERTIES

HINDU SECOND WIFE NOT ENTITLED TO
MAINTENANCE UNDER 125 CRPC

Chella Rangamma vs. Chella Rangaiah :
MANU/ KA/9464/2019 - It is admitted that in the case on hand, the parties are governed by Hindu Law. As per the principles stated in the above case, the marriage of a second wife during the existence of the marriage of the first wife is a nullity under Section 11 of Hindu Marriage Act and it is void marriage, therefore, the second wife is not entitled to the benefit of Section 125 of Cr.P.C.

Quoted Citations

Apex Court in Badshah Vs. Sou. Urmila Badshah Godse and Another reported in **MANU/SC/ 1084/2013 : 2014 (1) G.L.H. 273** has held that where the marriage between the parties has been proved and it is also proved that by suppressing the factum of alleged first marriage, the second marriage was performed, for the purpose of claiming maintenance under

Section 125 Cr.P.C. such a woman is to be treated as legally wedded wife.

In the case of Basappa and Others Vs. Dyamawa and others reported **MANU/KA/1362/2015 : 2015 (4) AKR 421**, Court considered the similar situation and concurred with the finding recorded by the Court below that the petitioner has proved that she is the legally wedded wife of the respondent.

Kamala and Others Vs. M.R. Mohan Kumar in **Crl. A. 2368-2369/2009 decided by the Apex Court on 24/10/2018**. The Apex Court in para 15 of the judgment has observed that "when the parties lived together as husband and wife, there is a presumption that they are legally married couple for claim of maintenance of wife under Section 125 of Cr.P.C."

Yamuna Bhat Anantrao Vs. Anantrao Shivram Ahav reported in **AIR 1988 SC 644**, In this case the Apex Court considered as to the claim of the second wife to maintain petition under Section 125 Cr.P.C. seeking maintenance Sections 11 and 12 of Hindu Marriage Act, were considered by the Apex Court. The Apex Court has observed in para 3 that "3. For appreciating the status of a Hindu woman marrying a Hindu male with a living spouse some of the provisions

of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) have to be examined. Section 11 of the Act declares such a marriage as null and void in the following terms: "11. Void marriages-Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5." Clause (1)(i) of s. 5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. It was urged on behalf of the appellant that a marriage should not be treated as void because such a marriage was earlier recognised in law and custom. A reference was made to s. 12 of the Act and it was said that in any event the marriage would be voidable. There is no merit in this contention. By reason of the overriding effect of the Act as mentioned in s. 4, no aid can be taken of the earlier Hindu Law or any custom or usage as a part of that Law inconsistent with any provision of the Act. So far as s. 12 is concerned, it is confined to other categories of marriage and

is not applicable to one solemnised in violation of s. S(1)(i) of the Act. Sub-section (2) of s. 12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by s. 11 are void-*ipso-jure*, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose." In para 4 it is held as follows:- "4. The question, then arises as to whether the expression 'wife used in s. 125 of the Code should be interpreted to mean only a legally wedded wife not covered by s. 11 of the Act. The word is not defined in the Code except indicating in the Explanation its inclusive character so as to cover a divorcee. A woman cannot be a divorcee unless there was a marriage in the eye of law preceding that status. The expression must, therefore, be given the meaning in which it is understood in law applicable to the

parties, subject to the Explanation (b), which is not relevant in the present context." Lastly, in para 8 the Apex Court held as follows:- "We therefore, hold that the marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is not entitled to the benefit of s. 125 of the Code. The appeal is accordingly dismissed. There will be no order as to costs. During the pendency of the appeal in this Court some money was paid to the appellant in pursuance of an interim order. The respondent shall not be permitted to claim for its refund."

Nopany Investments (P) Ltd. vs. Santokh Singh : MANU/SC/8184/2007 - AIR 2008 SC 673 - Court in Sushil Kumar (Sunil) and Anr. v. Ram Prakash and Ors. MANU/SC/0521/1988 : [1988] 2 SCR 623 and Tribhovan Das Haribhai Tamboli v. Gujarat Revenue Tribunal and Ors. MANU/SC/0355/1991 : [1991] 2 SCR 802. Before we look at the views expressed by the High Court on this question, it would be pertinent to note the ratios of the two authorities cited before us. In Sushil Kumar (Sunil) and Anr. v. Ram Prakash and Ors, this court held as follows: In a Hindu family, the Karta or Manager occupies a

unique position. It is not as if anybody could become Manager of a joint Hindu family. As a general rule, the father of a family, if alive, and in his absence the senior member of the family, is alone entitled to manage the joint family property.

From a reading of the aforesaid observation of this court in *Sushil Kumar (Sunil) and Anr. v. Ram Prakash and Ors*, we are unable to accept that a younger brother of a joint hindu family would not at all be entitled to manage the joint family property as the Karta of the family. This decision only lays down a general rule that the father of a family, if alive, and in his absence the senior member of the family would be entitled to manage the joint family property. Apart from that, this decision was rendered on the question whether a suit for permanent injunction, filed by coparceners for restraining the Karta of a joint hindu family from alienating the joint family property in pursuance of a sale agreement with a third party, was maintainable or not. While considering that aspect of the matter, this court considered as to when could the alienation of joint family property by the Karta be permitted. Accordingly, it is difficult for us to agree with Mr. Gupta, learned senior counsel appearing for the appellant, that the decision in *Sushil Kumar*

(Sunil) and Anr. v. Ram Prakash and Ors. would be applicable in the present case which, in our view, does not at all hold that when the elder member of a joint hindu family is alive, the younger member would not at all be entitled to act as a manager or Karta of the joint family property.

In Tribhovandas's case, this court held as follows: The managership of the joint family property goes to a person by birth and is regulated by seniority and the karta or the manager occupies a position superior to that of the other members. A junior member cannot, therefore, deal with the joint family property as manager so long as the karta is available except where the karta relinquishes his right expressly or by necessary implication or in the absence of the manager in exceptional and extraordinary circumstances such as distress or calamity affecting the whole family and for supporting the family or in the absence of the father whose whereabouts were not known or who was away in remote place due to compelling circumstances and that his return within the reasonable time was unlikely or not anticipated.

From a careful reading of the observation of this court in Tribhovandas's case, it would be

evident that a younger member of the joint hindu family can deal with the joint family property as manager in the following circumstances:

- (i) if the senior member or the Karta is not available;
- (ii) where the Karta relinquishes his right expressly or by necessary implication;
- (iii) in the absence of the manager in exceptional and extra ordinary circumstances such as distress or calamity affecting the whole family and for supporting the family;
- (iv) in the absence of the father:
 - (a) whose whereabouts were not known or
 - (b) who was away in a remote place due to compelling circumstances and his return within a reasonable time was unlikely or not anticipated.

Therefore, in Tribhovandas's case, it has been made clear that under the aforesaid circumstances, a junior member of the joint hindu family can deal with the joint family property as manager or act as the Karta of the same.

Hon'ble Supreme Court in S. Nagalingam v. Sivagami reported in MANU/SC/0520/2001 : (2001) 7 SCC 487 submits that where solemnization of Hindu marriage constitutes two

essential ceremonies, namely 'homa' and saptapadi' (taking seven steps around the sacred fire), if the said two essential ceremonies were not performed the marriage was held to be void in the eye of law.

In a case reported in MANU/SC/0349/1970 : (1970) 3 SCC 129, Kulbhushan Kumar vs. Raj Kumari and Anr., it was held that 25% of the husband's net salary would be just and proper to be awarded as maintenance to the respondent-wife. The amount of permanent alimony awarded to the wife must be befitting the status of the parties and the capacity of the spouse to pay maintenance. Maintenance is always dependant on the factual situation of the case and the court would be justified in moulding the claim for maintenance passed on various factors.

In Smt. Dukhtar Jahan v. Mohammed Farooq, MANU/SC/0420/1987 : (1987) 1 SCC 624, the Court opined that proceedings under Section 125 of the Code, it must be remembered, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner.

Vimla (K.) v. Veeraswamy (K.),
MANU/SC/0719/1991 : (1991) 2 SCC 375,
 while discussing about the basic purpose under Section 125 of the Code, opined that Section 125 of the Code is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife.

A two-Judge Bench in **Kirtikant D. Vadodaria v. State of Gujarat and another,**
MANU/SC/1159/1996 : (1996) 4 SCC 479,
 while adverting to the dominant purpose behind Section 125 of the Code, ruled that: "While dealing with the ambit and scope of the provision contained in Section 125 of the Code, it has to be borne in mind that the dominant and primary object is to give social justice to the woman, child and infirm parents etc. and to prevent destitution and vagrancy by compelling those who can support those who are unable to support themselves but have a moral claim for support. The provisions in Section 125 provide a speedy remedy to those women, children and destitute parents who are in distress. The provisions in Section 125 are intended to achieve this special

purpose. The dominant purpose behind the benevolent provisions contained in Section 125 clearly is that the wife, child and parents should not be left in a helpless state of distress, destitution and starvation."

In Chaturbhuj v. Sita Bai,
MANU/SC/8141/2007 : (2008) 2 SCC 316,

reiterating the legal position the Court held:-
 "Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Veena Kaushal, MANU/SC/0067/1978 : (1978) 4 SCC 70 falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat, MANU/SC/0160/2005 : (2005) 3 SCC 63 [6]."

Nagendrappa Natikar v. Neelamma
MANU/SC/0248/2013 : 2013 (3) Scale 561, it

has been stated that it is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children.

SECOND WIFE AND GOVERNMENT EMPLOYEE

Shakuntala Devi (Smt.) Versus Executive Engineer, Electricity Transmission Ist U.P. Electricity Board, Allahabad and another
MANU/UP/0150/2001 : (2001) 1 UPLBEC

8691, while dealing with two wife's wherein the nomination was in favour of the second wife it was held that it cannot defeat the claim of the legally wedded wife, only legally wedded wife is entitled to retiral benefits, provident fund and appointment under Dying-in-Harness Rules.

In Rameshwari Devi Versus State of Bihar and others **MANU/SC/0043/2000 : 2000 (1) ESC**

577 (SC), where the Government servant being a Hindu having two wives died while in service, Supreme Court held that the second marriage was void under the Hindu law, hence, the second

wife having no status of widow is not entitled to anything, however, children from the second wife would equally share the benefits of gratuity and family pension as per law.

Kiran Devi vs. State of U.P. and Ors.:

MANU/UP/2629/2019 - 26. Thus, Hindus cannot contract marriage after the enforcement of the Hindu Marriage Act, if any of them is having a living spouse, the marriage would be a nullity and would also not be protected under the Conduct Rules, as well as, the pension rules, it therefore, follows that the "second wife" referred to under the Rules, 1961 would only include second wife whose marriage was otherwise permissible under the personal law or law prevalent at the time of marriage, but in the case of Hindus the second wife will have no right whatsoever, as the law prohibits second marriage, as long as, the government servant has a spouse living on the said date. Thus for harmonious construction of the Rules governing pension, wherever, the rule uses the expression 'wives', it has to be interpreted as per the law governing marriage as applicable to the government servant and in cases where the second marriage is void under the law, second

wife will have no status of a widow of the government servant. In the facts of the case in hand admittedly the second marriage was contracted after enforcement of the Hindu Marriage Act, therefore, the marriage is void. The second wife would have no right in law to claim family pension.

27. As regards, eligibility to family pension, the pension is to be disbursed as per the provisions of the Rules, 1961. The Rules clearly state that only eligible person is entitled to receive family pension but where pension awarded ceases to be payable on the death or marriage of the recipient or for any other reason, it will be regranted to the persons next lower in the order of family mentioned in sub-rule (4) of Rule 7. The Hindu second wife would not be eligible for family pension as long as the first wife is alive and has not remarried. There is no provision in the Rules for relinquishment of family pension in favour of another person. The fourth respondent would not fall within the definition of "family" of the employee.

Shanthalakshmi vs. The K.S.R.T.C reported in MANU/KA/2280/2017 observed that, "The provisions of Regulation 16 of the Karnataka

State Road Transport Corporation Servants (Conduct and Discipline) Regulations, 1971 reads as under: 16. Bigamous marriage:-(1) No Corporation servant shall enter into, or contract a marriage with a person having a spouse living; and 14 (2) No Corporation servant having a spouse living shall enter into, or contract, a marriage with any other person: Provided that the Corporation may permit a Corporation servant to enter into, or contract, any such marriage as is referred to in clause(1) and clause(2), if it is satisfied that; (a) such marriage is permissible under the personal law applicable to such Corporation servant and the other party to the marriage. (b) There is other ground for so doing. By a plain reading of the above said provision, it makes it clear that no Corporation servant shall enter into, or contract, a marriage with a person having a spouse living. No Corporation servant having a spouse living shall enter into, or contract, a marriage with any other person; provided that the Corporation may permit a Corporation servant to enter into, or contract, any such marriage as is referred to in Clause (1) and Clause (2) if it is specific that such marriage is permissible under the personal law applicable to such Corporation servant and the other party

to the marriage, there are other grounds for so doing."

Union of India and Another vs. Sri Thoushif reported in 2017 (1) Kar.L.J. 243 (DB) relying upon the judgment of the Hon'ble Supreme Court in the case of Rameshwari Devi vs. State of Bihar MANU/SC/0043/2000 : (2000) 2 SCC 431 at para-12 has held as under: It is by now we, settled that no Government Servant has any vested right for compassionate appointment. It is only out of compassion and to offer solace to the family for immediate financial support, the policy of compassionate appointment is to be considered. When there is no vested right with the Government servant for seeking compassionate appointment, it cannot be treated as an 'Estate' of any Government servant or estate of any person who was in employment to apply the law of succession as per the personal law of the respective Government servant. Ultimately, the application filed by the son of the second wife came to be dismissed.

Parvathamma vs. C. Subramanyam and Ors. Reported in MANU/KA/0458/2000 "Under Section 16 of the Hindu Succession Act, children

of void marriage are entitled to succeed to the estate of the deceased. Second wife could not be described the widow of the deceased, her marriage being void. The view taken by us finds due support from the judgment of the Supreme Court, though the Supreme Court has expressed this view under different set of facts. The principle laid down there would be applicable to the claim petition filed by the legal representatives under the Motor Vehicles Act as well. The question which required to be determined under both the Acts is as to who is entitled to succeed to the estate of the deceased. The subsequent marriage being void, the second wife would not be entitled to succeed to the estate of the deceased under the Hindu Succession Act and therefore could not be termed as legal representatives representing the estate of the deceased."

Hon'ble Supreme Court, inter alia in the case of **Raj Kumari and another -v- Krishna and others reported in MANU/SC/0397/2015 : AIR 2015 SC 2697 : (2015) 14 SCC 511** where it was held, among other things, as follows:- "13. Normally, pension is given to the legally wedded wife of a deceased employee. By no stretch of imagination can one say that the plaintiff Smt. Krishna was

the legally wedded wife of late Shri Atam Parkash, especially when he had a wife, who was alive when he married another woman in Arya Samaj temple, as submitted by the learned counsel appearing for the appellants. We are, therefore, of the view that the High Court should not have modified the findings arrived at and the decree passed by the trial court in relation to the pensionary benefits. The pensionary benefits shall be given by the employer of late Shri Atam Parkash to the present appellants in accordance with the rules and regulations governing service conditions of late Shri Atam Parkash." Further, the Hon'ble Supreme Court was pleased to hold, "Therefore, at least for the purpose of claiming maintenance under Section 125, Cr.P.C., such a woman is to be treated as the legally wedded wife."

CRUELTY IN MARRIAGE

Savitri Pandey v. Prem Chandra Pandey;
MANU/SC/0010/2002 : (2002) 2 SCC 73 has ruled thus:- "'Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without

that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to a host of authorities and the views of various authors, this Court in *Bipinchandra Jaisinghbai Shah v. Prabhavati* [MANU/SC/0058/1956 : AIR 1957 SC 176] held that if a spouse abandons the other in a state of temporary passion, for example, anger [pic]or disgust without intending permanently to cease cohabitation, it will not amount to desertion."

The term "mental cruelty" has been defined in the Black's Law Dictionary [8th Edition, 2004] as under: "Mental Cruelty - As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

The concept of cruelty has been summarized in Halsbury's Laws of England [Vol. 13, 4th Edition Para 1269] as under: "The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases

have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exists."

In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under: "Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse."

N.G. Dastane v. S. Dastane reported in MANU/SC/0330/1975 : (1975) 2 SCC 326 at

page 337, para 30 observed as under:- "The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent." Court observed that normally the burden lies on the petitioner to establish his or her plea that the respondent had meted out cruelty to the petitioner and that the standard of proof required in matrimonial cases under the Act is not to establish the charge of cruelty beyond reasonable doubt but merely one of weighing the various probabilities to find out whether the preponderance is in favour of the existence of the said fact alleged. As to what is the nature of cruelty that is necessary to be substantiated also, it has been pointed out that unlike the requirement under English law which must be of such a character as to cause danger to life, limb or health so as to give rise to a reasonable apprehension of such a danger, the courts under the Act in question has to only see whether the petitioner proved that the respondent has treated the petitioner with such cruelty as to cause a

reasonable apprehension in mind that it will be harmful or injurious to live together, keeping into consideration the resultant possibilities of harm or injury to health, reputation, the working-career or the like.

Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan & Anr. reported in MANU/SC/0682/1981 : (1981) 4 SCC 250, the Apex Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

Shobha Rani v. Madhukar Reddi reported in MANU/SC/0419/1987 : (1988) 1 SCC 105, the

Court had an occasion to examine the concept of cruelty. The word 'cruelty' has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(i)(a) of the Act in the context of human conduct or behavior in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act

complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or willful ill-treatment. "5. Each case may be different. We deal with the conduct of human beings who are no generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behavior, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty."

In Rajani v. Subramonian
MANU/KE/0001/1990 : AIR 1990 Ker. 1 the Court aptly observed that the concept of cruelty depends upon the type of life the parties are accustomed to or their economic and social conditions, their culture and human values to which they attach importance, judged by standard of modern civilization in the background of the cultural heritage and traditions of our society.

V. Bhagat v. D. Bhagat (Mrs.) reported in
MANU/SC/0155/1994 : (1994) 1 SCC 337, the

Court observed, in para 16 at page 347, as under:

"16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

..... it was observed that mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other and parties cannot reasonably also be expected to live together or that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It was also considered to be not necessary to prove that the mental cruelty is such as to cause injury to the health of the wronged party. That was a case wherein the husband filed a petition against the wife for divorce on the ground of adultery. In the written statement filed by the wife in the said proceedings, she alleged that the husband was "suffering from mental hallucination", that his was a "morbid mind...for which he needs expert psychiatric treatment", and that he was "suffering from paranoid disorder" etc., and that during cross-examination several questions were put to him suggesting that the petitioner and several members of his family including his grandfather were lunatics and that the streak of insanity was running in the entire family. It is in the said context this Court though held the allegations levelled against the wife were not proved the

counter allegations made by the wife against the husband certainly constituted mental cruelty of such a nature that the husband cannot reasonably be asked to live with the wife thereafter. The husband, it was also held, would be justified to say that it is not possible for him to live with the wife. In rejecting the stand of the wife that she wants to live with her husband, this Court observed that she was deliberately feigning a posture, wholly unnatural and beyond comprehension of a reasonable person and held that in such circumstances the obvious conclusion has to be that she has resolved to live in agony only to make life a miserable hell for the husband, as well."

Chetan Dass v. Kamla Devi reported in MANU/SC/0262/2001 : (2001) 4 SCC 250, para 14 at pp. 258-259, as under: "Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It

is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case."

In Savitri Pandey v. Prem Chandra Pandey reported in MANU/SC/0010/2002 : (2002) 2 SCC 73, the Court stated as under: "Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the

basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other."

Gananath Pattnaik v. State of Orissa reported in MANU/SC/0082/2002 : (2002) 2 SCC 619

observed as under: "The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. "Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behavior may amount to cruelty and harassment in a given case."

Court in Parveen Mehta v. Inderjit Mehta reported in MANU/SC/0582/2002 : (2002) 5

SCC 706 at pp. 716-17 [para 21] which reads as under: "Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behavior by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical

cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behavior is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

In A. Jayachandra v. Aneel Kaur reported in MANU/SC/1023/2004 : (2005) 2 SCC 22, the Court observed as under:

"The expression "cruelty" has not been defined in the Act. Cruelty can be physical or

mental. Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse, same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be

found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions,

customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But

before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or nonviolent."

Vinita Saxena v. Pankaj Pandit reported in MANU/SC/8038/2006 : (2006) 3 SCC 778 aptly observed as under: "As to what constitutes the required mental cruelty for the purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home.

If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer."

Rishikesh Sharma v. Saroj Sharma reported in MANU/SC/8607/2006 : 2006 (12) Scale 282,

Court observed that the respondent wife was living separately from the year 1981 and the marriage has broken down irretrievably with no possibility of the parties living together again. The Court further observed that it will not be possible for the parties to live together and therefore there was no purpose in compelling both the parties to live together. Therefore the best course was to dissolve the marriage by passing a decree of divorce so that the parties who were litigating since 1981 and had lost valuable part of life could live peacefully in remaining part of their life. The Court further observed that her desire to live with

her husband at that stage and at that distance of time was not genuine.

Naveen Kohli v. Neelu Kohli reported in MANU/SC/1387/2006 : (2006) 4 SCC 558 dealt with the similar issues in detail. Those observations incorporated in paragraphs 74 to 79 are reiterated in the succeeding paragraphs.

"74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

75. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been

wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

76. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist."

77. Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems than are sought to be solved.

78. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

79. When we carefully evaluate the judgment of the High Court and scrutinize its findings in the background of the facts and circumstances of this case, it becomes obvious that the approach

adopted by the High Court in deciding this matter is far from satisfactory."

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63. Human mind is extremely complex and human behavior is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behavior in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the

case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

64. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

In **Lachman Utamchand Kirpalani v. Meena alias Mota (MANU/SC/0128/1963 : AIR 1964 SC 40)**, the Supreme Court has held that

desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause.

In **Smt. Rohini Kumari v. Narendra Singh (MANU/SC/0484/1971 : AIR 1972 SC 459)**, the Supreme Court yet again held that desertion does not imply only a separate residence and separate living. It is also necessary that there must be a determination to put an end to marital relation and cohabitation.

In **Geeta Jagdish Mangtant v. Jagdish Mangtant (MANU/SC/0583/2005 : AIR 2005 SC 3508)**, the Supreme Court, after narrating the evidence available in the case, held that the conclusion is inevitable, that there was never any attempt on the part of the wife to go to husband's house, therefore, from this fact alone animus deserendi on the part of the wife is clearly established. She has chosen to adopt a course of conduct which proves desertion on her part and that it was without a reasonable cause. Such a course of conduct over a long period indicates total abandonment of marriage. It also amounts to willful neglect of the husband by the wife.

In a more recent judgment in the matter of **Malathi Ravi, M.D. v. B.V. Ravi, M.D.** **MANU/SC/0578/2014 : (2014) 7 SCC 640 : (AIR 2014 SC 2881)**, the Supreme Court has approved its earlier judgment on the point in the matter of Savitri Pandey v. Prem Chandra Pandey **MANU/SC/0010/2002 : (2002) 2 SCC 73 : (AIR 2002 SC 591)** and has reiterated the same view regarding desertion and the nature of proof required in law to establish the marital offence.

In Samar Ghosh vs. Jaya Ghosh, MANU/SC/1386/2007 : (2007) 4 SCC 511, a three-Judge Bench Court while considering Section 13(1)(i-a) of the Act laid down certain guidelines. The analysis and ultimate conclusion are relevant which reads as under:-

"98. On proper analysis and scrutiny of the judgments of this Court and other courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of "mental cruelty" within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in

one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years

will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of

marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

CONSTITUTIONAL RIGHTS TO WOMEN

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106. The Constitution of India not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the cumulative socio economic, education and political disadvantages faced by them. It is apt to refer to certain constitutional provisions which are significant in this regard:

- (i) Equality before law (Article 14)
- (ii) The State not to discriminate against any citizen on grounds only of religion, race caste, sex, place of birth or any of them (Article 15(ii))
- (iii) The State to make any special provision in favour of women and children (Article 15(3))
- (iv) The State to direct its policy towards securing for men and women equally the right to an adequate means of livelihood (Article 39(a)); and

equal pay for equal work for both men and women (Article 39(d))

(v) The State to make provision for securing just and humane conditions of work and for maternity relief (Article 42)

(vi) The State to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation (Article 46)

(vii) To promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of women (Article 51(A)(e))

(viii) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat to be reserved for women and such seats to be allotted by rotation to different constituencies in a Panchayat (Article 243D(3))

(ix) Not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level to be reserved for women (Article 243D(4))

(x) Not less than one-third (including the number of seats reserved for women belonging to the

Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a Municipality (Article 243T(3))

(xi) Reservation of offices of Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes and women in such manner as the legislature of a State may by law provide (Article 243T(4)).

107. Reservation under Articles 243D(3), D(4), T(3) and T(4) are meant to empower the woman politically.

108. Some Articles play a major role in the field of women empowerment. Article 15(3) empowers the State to make special provisions for them. The well-being of a woman is an object of public interest and it is to be achieved to preserve the strength and vigour of the race. This provision has enabled the State to make special statutory provisions exclusively for the welfare of women.

109. Article 39(a), requires the State to direct its policy towards securing that the citizens, men and women equally have the right to an adequate means of livelihood. Under Article 39(d), the State shall direct its policy towards

securing equal pay for equal work for both men and women. This Article draws its support from Article 14 and 16 and its main objective is the building of a welfare society and an equalitarian social order in the Indian Union. To give effect to this Article, the Parliament has enacted the Equal Remuneration Act, 1976 which provides for payment of equal remuneration to men and women workers and prevents discrimination on the ground of sex. Further, Article 39(e) is aimed at protecting the health and strength of workers, both men and women.

110. A very important and useful provision for women's welfare and well-being is incorporated under Article 42 of the Constitution. It imposes an obligation upon the State to make provisions for securing just and humane conditions of work and for maternity relief. Some of the legislations which promoted the objectives of this Article are the Workmen's Compensation Act, 1923, the Employees State Insurance Act, 1948, the Minimum Wages Act, 1948, the Maternity Benefit Act, 1961, the Payment of Bonus Act, 1965, and the like.

111. Conferment of equal status on women apart from being a constitutional right has been recognized as a human right.

Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty; MANU/SC/0245/1996 : 1996 AIR 922, 1996 SCC (1) 490, the Court observed that women have the right to be respected and treated as equal citizens. Accentuating on the concept, it proceeded to state thus:- "9. ...Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are mother, daughter, sister and wife and not playthings for centre spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world."

CHARGE ON PROPERTIES

In *Baburao v. Gopikabai* I.L.R. 1942 Nag 159 it was held that where judgment-debtor is also under a personal liability to pay maintenance, the fact that a charge is created as a security for

regular payments does not deprive the decree-holder of his ordinary right to execute the decree personally against the judgment-debtor.

Muppala Badari Narayana vs. Muppala Atchimamba: MANU/AP/0435/2010 - Section 27 of Hindu Adoptions and Maintenance Act, 1956 deals with maintenance when to be a charge and this provision specifies a dependant's claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased, by a decree of court, by agreement between the dependant and the owner of the estate or portion, or otherwise.

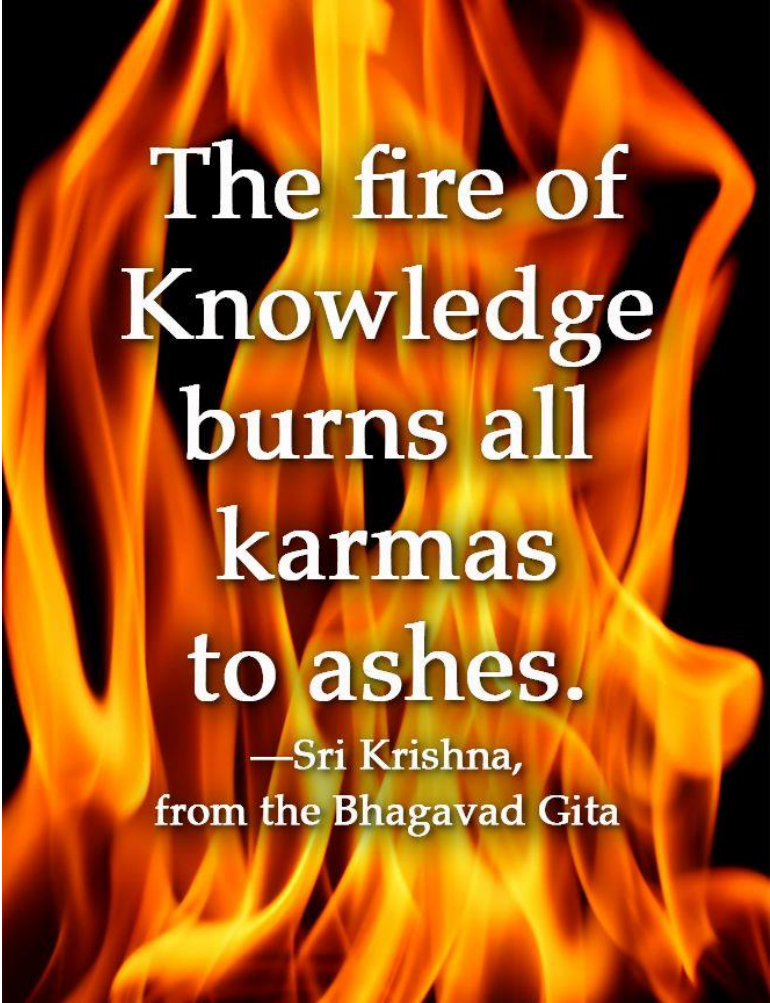
In Raghavan and Anr. v. Nagammal and Anr. MANU/TN/0322/1979 : AIR 1979 Mad 200 it was held that it is clear from Section 28 that a person whose right to maintenance is protected under the section must be a dependant. A dependant is defined in Section 21 of the Act. A wife is not taken in the definition of the word 'dependant'. Hence, the wife will not be entitled to have a charge over the properties of the husband for her maintenance and the same cannot be enforced against the property gifted by the

husband to his concubine. But a Hindu wife is entitled to have a charge on the property of her husband and to claim protection under Section 39 of the T.P. Act. Hence, the gift in favour of the concubine by the husband cannot avail against the right of the wife to have a charge for maintenance amount. The right of a Hindu wife to maintenance is also interlinked with her interest in her husband's property. It is not necessary that the right to maintenance should become crystallised in the form of a decree to enable the wife to proceed against the property in the hands of the husband or her transferees. Merely because at the time the gift deed was executed the wife had not obtained a decree for maintenance would not mean that she will not be entitled to enforce the right of maintenance against the property gratuitously transferred by the husband to the concubine.

In Kiran Bala Saha v. Bankim Chandra Saha
MANU/WB/0137/1967 : AIR 1967 Calcutta
603 it was held that where no relief was prayed for to create a charge of maintenance amount on estate of husband, it would not be right to travel beyond plaint, where property to be charged so

has not even been mentioned, thereby taking defendant completely by surprise.

In Ramaswamy Goundar and Anr. v. Baghvammal and Ors. MANU/TN/0303/1967 : AIR 1967 Madras 457 the learned Judge of the Madras High Court observed that where charge was claimed by Hindu wife in relation to maintenance claim against some property transferred by her husband, it will be unreasonable to create a charge over properties far out of proportion to the quantum of maintenance decreed in favour of wife and that it is but equitable that in first instance wife should be made to pursue properties still in hands of her husband and it is only when it is necessary for her to do so, she be permitted to proceed against transferred properties.



The fire of
Knowledge
burns all
karmas
to ashes.

—Sri Krishna,
from the Bhagavad Gita