KLE LAW ACADEMY BELAGAVI

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STUDY MATERIAL

for

FAMILY LAW I

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UNIT–I:

The Concept of Dharma - Sources of Hindu Law – Ancient and Modern - Importance of Dharma Shastras on Legislation – Mitakshara and Dayabaga Schools of Hindu Law - Application of Hindu Law.

THE CONCEPT OF DHARMA

Hindu Law is a body of principles or rules called 'Dharma'. Dharma according toHindu texts embraces everything in life. According to the Hindus, 'Dharma' includes not only what is known as law in the modern sense of the term but all rules of good and proper human conduct.

We know that the word Dharma is related to Hindu law. Let me explain to you, the word "Dharma" according to Hindu Mythology means "duty". Looking at the contexts and the religious references Dharma has different meanings just like, the Buddhists believe that the word Dharma means only a universal law which is very much essential and the Jains and the Sikhs believe that it is only a religious path for the victory of the truth.

According to the Hindu Jurisprudence, Dharma means the duties in many ways. Just like the sociological duties, legal duties or spiritual duties. Through this context, we can say that Dharma can be referred to as the concept of justice.

One of the most explained meaning of Dharma is the responsibility. As mentioned above, meaning of Dharma depends upon different context and different religious philosophies. For instance, Buddhists explain Dharma as cosmic law whereas Jains and Sikhs uses Dharma to explain the path of religious practices.
Referring Dharma to Hindu Jurisprudence it means "responsibility in different aspects of life which explains it as either religious responsibility or social, legal and even spiritual duties.

Whereas some people understand Dharma as righteousness which enables moralistic interpretation. Legally speaking Dharma refers to the concept of justice. Hence there is no difference between Dharma and Law, but it is always understood as a religious and morale basis as well.

As referred to in the "Bhagwat Geeta", God creates a life using the principles of Dharma. They are patience, forgiveness, self-control, honesty, sanctity (cleanliness in the mind, body and soul), control of senses, reasons, knowledge, truthfulness and absence of anger. Accordingly, The salvation which means "Moksha" is the eternal Dharma for humans according to Hinduism.

Hindu epics like the Ramayana and Mahabharata also refers to Dharma. They say that executing one's Dharma is the right aim of every individual. And also at that time, the king was known as Dharmaraj because the main motive of the king was to follow the path of Dharma.

Despite the other schools of Jurisprudence, the Hindu Jurisprudence takes more care over the duties more than the rights. The nature of these Dharma changes from person to person. There are many duties of many people in this world like earlier, the king's duty was to uphold the religious law and the other hand a farmer's duty is to produce food, the doctor has to cure the people, the lawyers have to fight for justice. Being a highly religious concept in nature, Dharma is multi-faceted. It contains many laws and customs in a large range of subjects which is essential and needed to be followed by each and every person. For example, Manusmriti deals with religion, administration, economics, civil and criminal law, marriage, succession, etc.

A Hindu

The term 'Hindus' denotes all those persons who profess Hindu religion either by birth from Hindu parents or by conversion to Hindu faith.

In Yagnapurus dasji v. Muldas[AIR 1966 SC 1119], the Supreme Court accepted the working formula evolved by Tilak regarding Hindu religion that 'acceptance of vedas' with reverence, recognition of the fact that the number of Gods to be worshiped at large, that indeed is the distinguish feature of Hindu religion.

A person can be called as a Hindu, who:

- Is a Hindu by religion in any form.
- Is a Buddhist, Jaina or Sikh by religion.
- Is born from Hindu parents.
- Is not a Muslim, Parsi, Christian or Jews and are not governed under Hindu law.

The Supreme Court of India in the landmark case of Shastri vs Muldas expressly defined the term ‘Hindu’. This case is related to the Swami Narayan temple in Ahmedabad. There are a group of people called the Satsangi who were managing the temple and they restricted non-Satsangi Harijans to enter the temple. They argued that Satsangi is a different religion and they are not bound by Hindu Law. The Supreme Court of India held that the Satsangi, Arya Samajis and Radhaswami, all these belong to the Hindu religion because they are originated under Hindu philosophy.

Who are 'Hindus':

In the earliest time the term 'Hindu' had a territorial significance. It only denoted nationality. In fact the word 'Hindu' is of foreign origin. This designation came into existence with the advent of Greeks who called the inhabitants of the Indus valley as "Indoi" and later on this designation was
extended to include all persons who lived beyond the Indus valley. In the case of Yagnapurusholasjiv. Vaishya, the Supreme Court elaborately considered the question as to who are Hindus and what are the broad features of Hindus religion. The Supreme Court has observed that the word Hindu is derived from the word Sindhu, otherwise known as Indus river.
The Persians pronounced this word Hindu and namedtheir Aryan brethren'Hindus'. Dr. Radhakrishnan has also observed that the Hindu civil isation is so called sinceits original founders or earliest followers occupied the territory drained by the Sindhu (Indus) river system corresponding to the North West provinces in Punjab. This is recorded in Rig Veda, the oldest of the Vedas. The people on the Indian side of the Sindhu were called Hindus by the Persians and later Western invaders. That is the genesis of the word Hindu. Thus, the term Hindu had originally a territorial and not a creedal

significance. It implied residence in a well defined geographical area. Today, the term 'Hindu' has lost its territorial significance. It is also not a designation of nationality.

1.Hindu by Religion:

In this category two types of persons fall -

a)Those who are originally Hindus, Jains, Sikhs or Buddhist by religion, and

b)Those who are converts or reconverts to Hindu, Jain, Sikhs or Buddhist religion.

Any person who follows Hindu religion in any of its forms or development, either by practising it or by professing it, is a Hindu. However it is difficult to describe what is Hinduism.

Swaminarayana Sampradaya:

This sampradaya prevails in Maharastra and Gujarat, founded by Shajanand (called later Swami Narayan) a Brahmin by birth and the pupil of Ramanuj. The followers of this Sampradaya were called Satsangi. In Yagna - Purusdasji v Muldas. a question arose whether the followers of this Sampradaya came within the perview of Hindu or not. Their main argument was that theSwaminarayan Sampradaya, being a non-Hindu sect and the temple being also a non-Hindu temple, the HarUans had no right to enter it. This Sampradaya is different from Hindu Religion. So the provisions of Hindu Law are not applied to this temple. The Supreme Court decided that this Sampradaya was not different from Hindu Religion and the provisions are applied to this temple also.

2.Hindu by Birth:

A child whose both the parents were Hindus, Sikhs, Jains or Buddhists at the time of his birth, is regarded as Hindu. If one of the parents is Hindu and the other is Jain, Sikh or Buddhist, then also the child will be Hindu. It makes no difference that such child does or does not profess, practise or have faith in the religion of its parents. If after the birth, both or one of the parents become convert to another religion, the child will continue to be a Hindu, unless, in the exercise of parental right the child is also converted into the religion in which the parent or parents have converted (In case of legitimate child this right is on father, and in illegitimate case is on the mother).

A person child is brought up as a member of the tribe, community, group or family to which Hindu parent belonged at the time of his birth.

f both the parents of a child are not Hindu and the child is brought up as a Hindu, the child will not be Hindu unless he becomes converted Hindu.

3.Whoare not Muslims, Christians, Parsis or Jews:

Any person who is not a Muslim, Christian, Parsi or Jew and who is not governed by any other law, is governed by Hindu law, unless it is proved that
Hindu law is not applicable to such a person (Raj Kumar v/s Barbara). Those persons who are atheists or who believe in all faiths, or in conglomeration of faiths, may fall under this class.

4. Converts and Reconverts are also Hindus :

SC, in the case of **Peerumal v Poonuswami** AIR 1971, has held that a person can be a Hindu if after expressing the intention of becoming a Hindu, follows the customs of the caste, tribe, or community, and the community accepts him.
In **Mohandas vs Dewaswan board** AIR 1975, Kerala HC has held that a mere declaration and actions are enough for becoming a Hindu.

Hindu Concept of Law:

For the Hindus, law is a branch of dharma. Dharma pervades throughout the Hindu philosophical thought and the Hindu social structure. Law in this sense is considered as a branch of dharma. According to Manu "Dharma" is what is followed by those who are learned in Vedas and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affection. Further, Medhatithi, one of the early commentators on Manu, says that the term "dharma" stands for 'duty'. It signifies the sum total of religious, moral, social and legal duties. From this aspect, it has been said that Hindu system is a system based on duties.

Hindu law is a law which emanates from Smritis expounded in Sanskrit commentaries and digests. These Smriti texts do not make any clear-cut distinction between rules of law and rules of morality or religion. These rules of religion and morality were dealt with at one and the same place with the rules of law. In the case of Shri Balsu, the privy Council distinguished between mandatory (legal) rules and directory (moral)rules. The High Courts in India have tried to lay down some tests (See e.g. Ram Harakv.Jagan Nath,(1938) 53 All. 815

approved in Abhiraj v. Devendra, 1962 S.C. 351). On this basis an entire body of Hindu law has been built up. Even during the Mohammedan rule in the country, the Smriti law was continued to be fully recognised.

Hindu concept of law does not conform to the Austinian view. According to analytical jurists most of the rules of Hindu law would ell accepted that a rule of law to be called as such need not emanate from a determinate or particular authority and it need not be rules of law as the commands of Austin's sovereign, because they were obeyed by the people for whom they were made.

Hindu Law in Modern Times:

Hindu law as administered by the Courts of India is applied to Hindus, But, in fact, it is not the original Hindu law which is applicable to Hindus in India. It is an amended and modified law which has changed and altered a considerable portion. Original Hindu law does not apply to all the matters. It is subjected to alterations and modifications. Original Hindu law has been interfered with by the changing demands and needs of the society. For instance, the nature of Hindu marriage is materially altered by –

- The passing of the Hindu Marriage Act, 1955;
- Adoption among Hindus is governed by the Hindu Adoption and Maintenance Act, 19 56;
- For matters of succession there is the Hindu succession Act, 1956;
- Minors are dealt with by the Hindu Minority and Guardianship Act, 1956 etc.

SOURCES OF HINDU LAW

- The phrase "source of law" has several connotations.
- It may be the authority which issues rules of conduct which are recognized by Courts as binding.
- In this context, "source of law‟ means "the maker of law".
- It may mean the social conditions which inspires the making of law for the governance of the conditions. In this context it means „cause of law‟.
- It may also mean in its literal sense the material from which the rules and laws are known.
- In this sensethe expression means the "evidence of law‟ and it is in this sense that the expression "source of law‟ is accepted in Jurisprudence.

Sources of Hindu Law can be divided into two parts - Ancient and Modern.

1. ANCIENT SOURCES

Before the codification of Hindu Law, the ancient literature was the only source of the law. These sources can be divided into four categories:

1. Shruti

- It literally means that which has been heard. The word is derived from the root "shru" which means 'to hear'.
- In theory, it is the primary and paramount source of Hindu law and is believed to be the language of the divine revelation through the sages.
- The synonym of Shruti is veda.
- It is derived from the root "vid" meaning 'to know'.
- The term Veda is based on the tradition that they are the repository of all knowledge.

There are four Vedas namely,

- Rig Veda (containing hymns in Sanskrit to be recited by the chief priest),
- Yajurva Veda (containing formulas to be recited by the officiating priest),
- Sama Veda (containing verses to be chanted by seers)
- Atharva Veda (containing a collection of spells and incantations, stories, predictions, apotropaic charms and some speculative hymns).

Each Veda has three parts viz.

- Sanhita (which consists mainly of the hymns),
- Brahmin (tells us our duties and means of performing them) and
- Upanishad (containing the essence of these duties). The shrutis include the Vedas along with their components.

2. Smritis

- The word Smriti is derived from the root "smri" meaning 'to remember'. Traditionally, Smritis contain those portions of the Shrutis which the sages forgot in their original form and the idea whereby they wrote in their own language with the help of their memory.
  Thus, the basis of the Smritis is Shrutis but they are human works.

There are two kinds of Smritis viz

Dharma Sutras and Dharma Shastras. Their subject matter is almost the same. The difference is that the

- ✓ Dharmasutras are written in prose, in short maxims (Sutras) and the

- ✓ Dharmashastras are composed in poetry (Shlokas).

However, occasionally, we find Shlokas in Dharmasutras and Sutras in the Dharmashastras. In a narrow sense, the word Smriti is used to denote the poetical Dharmashastras.

The number of Smriti writers is almost impossible to determine but some of the noted Smriti writers enumerated by
Yajnavalkya (sage from Mithila and a major figure in the Upanishads) are Manu, Atri, Vishnu, Harita, Yajnavalkya, Yama, Katyayana, Brihaspati, Parashar, Vyas, Shankh, Daksha, Gautama, Shatatapa, Vasishtha, etc.

The rules laid down in Smritis can be divided into three categories viz.

- Achar (relating to morality),
- Vyavahar (signifying procedural and substantive rules which the King or the State applied for settling disputes in the adjudication of justice) and
- Prayaschit (signifying the penal provision for commission of a wrong).

3. Digests and Commentaries-

- After Shrutis came the era of commentators and digests. Commentaries (Tika or Bhashya) and Digests (Nibandhs) covered a period of more than thousand years from 7th century to 1800 A.D.

- In the first part of the period most of the commentaries were written on the Smritis but in the later period the works were in the nature of digests containing a synthesis of the various Smritis and explaining and reconciling the various contradictions.

- The evolution of the different schools of Hindu law has been possible on account of the different commentaries that were written by various authorities. The original source of Hindu law was the same for all Hindus. But schools of Hindu law arose as the people chose to adhere to one or the other school for different reasons.
- The Dayabhaga and Mitakshara are the two major schools of Hindu law.

- The Dayabhaga school of law is based on the commentaries of Jimutvahana (author of Dayabhaga which is the digest of all Codes) and the Mitakshara is based on the commentaries written by Vijnaneswar on the Code of Yajnavalkya.

4. Custom-

- Custom is regarded as the third source of Hindu law. From the earliest period custom ('achara') is regarded as the highest 'dharma'.
- As defined by the Judicial Committee custom signifies a rule which in a particular family or in a particular class or district has from long usage obtained the force of law.

(a) Local custom – these are customs recognised by Courts to have been prevalent in a particular region or locality.

(b) Class custom – these are customs which are acted upon by a particular class. Eg. There is a custom among a class of Vaishyas to the effect that desertion or abandonment of the wife by the husband abrogates the marriage and the wife is free to marry again during the life-time of the husband.

(c) Family custom – these are customs which are binding upon the members of a family. Eg. There is a custom in families of ancient India that the eldest male member of the family shall inherit the estates.

Deivanai Achi v. chidambaram (1954) Mad. 667

In the instant case it was held that in order to become legally sanctioned by law and binding on the people a custom must be continuous in practice, it should not be vague and ambiguous and should not oppose the well established public policy. A customary rule must be in the complete observation of society.

2. MODERN SOURCES

1. Justice, equityand good conscience

Occasionally it might happen that a dispute comes before a Court which cannot be settled by the application of any existing rule in any of the sources available. Such a situation may be rare but it is possible because not every kind of fact situation which arises can have a corresponding law governing it.

The Courts cannot refuse to the settle the dispute in the absence of law and they are under an obligation to decide such a case also. For determining such cases, the Courts rely upon the basic values, norms and standards of fair play and propriety.

In terminology, this is known as principles of justice, equity, and good conscience. They may also be termed as Natural law. This principle in our country has enjoyed the status of a source of law since the 18th century when the British administration made it clear that in the absence of a rule, the above principle shall be applied.

2. Legislations-

Legislations are Acts of Parliament which have been playing a profound role in the formation of Hindu law. After India achieved independence, some important aspects of Hindu Law have been codified. Few examples of important Statutes are The Hindu Marriage Act, 1955, The Hindu Adoptions and Maintenance Act, 1956, The Hindu Succession Act, 1956, The Hindu Minority and Guardianship Act, 1956, etc.

After codification, any point dealt with by the codified law is final. The enactment overrides all prior law, whether based on custom or otherwise unless an express saving is provided for in the enactment itself. In matters not specifically covered by the codified law, the old textual law contains to have application.

3. **Precedents-**

After the establishment of British rule, the hierarchy of Courts was established. The doctrine of precedent based on the principle of treating like cases alike was established. Today, the decisions of Privy Council are binding on all the lower Courts in India except where they have been modified or altered by the Supreme Court whose decisions are binding on all the Courts except for itself.

SCHOOLS OF LAW :

Due to the emergence of various commentaries on SMIRITI and SRUTI, different schools of thoughts arose. The commentary in one part of the country varied from the commentary in the other parts of the country.

School means rules and principles of Hindu Law which are divided into opinion. It is not codified. There are two Schools of Hindu Law:-

a) Mitakshara
b) Dayabhaga.

Mitakshara School prevails throughout India except in Bengal. It is a running commentary on the code of Yajnavalkya (Yajnavalkya Smriti).

Mitakshara is an orthodox School whereas the Dayabhaga is Reformist School.
The Mitakshara and Dayabhaga Schools differed on important issues as regards the rules of inheritance. However, this branch of the law is now codified by the Hindu Succession Act, 1956, which has dissolved the differences between the two. Now, the main difference between them is on joint family system.

Mitakshara- Rights in the joint family property is acquired by birth, and as a rule, females have no right of succession to the family property.

The right to property passes by survivorship to the other male members of the family.

Dayabhaga- Rights in the joint family property are acquired by inheritance or by will, and the share of a deceased male member goes to his widow in default of a closed heir.

MITAKSHARA SCHOOL

Mitakshara School:

- Mitakshara is one of the most significant schools of Hindu law
- It is a running editorial of the Smriti composed by Yajnvalkya.
- This school is relevant in the entire piece of India with the exception of West Bengal and Assam.
- The Mitakshara has a wide ward. Anyway, various pieces of the nation specialize in legal matters diversely due to the distinctive standard principles followed by them.

Mitakshara is additionally isolated into five sub-schools in particular

- Benaras Hindu law school
- Mithilalaw school
- Maharashtra law school
- Punjab law school
- Dravida or madras law school

These law schools go under the ambit of Mitakshara graduate school. They appreciate a similar basic guideline however vary in specific conditions.

Benaras school of hindu law

This law school goes under the authority of the Mitakshara graduate school and covers Northern India including Orissa. Viramitrodaya Nirnyasindhu vivada is a portion of its significant discourses.

Mithila school of hindu law

This law school practices its clout in the regional pieces of tirhoot and north Bihar. The standards of the graduate school win in the north. The significant analyses of this school are Vivadaratnakar, Vivadachintamani, smritsara.

Maharashtra or Bombay school of hindu law

The Maharashtra law school has the power to practice its locale over the regional parts including Gujarat Karana and the parts where there is the Marathi language are capably spoken. The fundamental specialists of these schools are Vyavhara Mayukha, Virmitrodaya, and so forth.

Madras school of hindu law

This law school will in general spread the entire southern piece of India. It additionally practices its specialists under Mitakshara graduate school. The primary specialists of this school are Smriti Chandrika, Vaijayanti, and so on.

Punjab school of hindu law

This law school was prevalently settled in east Punjab. It had built up its own traditions and conventions. The fundamental critiques of this school are viramitrodaya and it built up customs.

DAYABHAGA SCHOOL

- Dayabhaga school overwhelmingly won in Assam and West Bengal.
- This is additionally one of the most significant schools of Hindu laws.
- It is viewed as a summary of the main smritis.
- Its essential center was to manage parcel, legacy and joint family.
- As indicated, it was fused in the middle of 1090-1130 A.D

Dayabhaga school was planned with the end goal of annihilating the various foolish and counterfeit standards of legacy.

The prompt advantage of this new condensation is that it will in general evacuate all the deficiencies and impediments of the recently settled standards and consideration of numerous cognates in the rundown of beneficiaries, which was limited by the Mitakshara school.

The main features of this School are as follows:

- Sapinda relation is by pinda offerings.
- The right to Hindu joint family property is not by birth but only on the death of the father.
- The system of devolution of property is by inheritance. The legal heirs (sons) have definite shares after the death of the father.
- Each brother has ownership over a definite fraction of the joint family property and so can transfer his share.
- The widow has a right to succeed to husband"s share and enforce partition if there are no male descendants.
- On the death of the husband the widow becomes a co-parcener with other brothers of the husband. She can enforce partition of her share.

	Mitakshara	Dayabhaga

	i) Right of a son by birth in the ancestral property equal to the interest of his father.	i) A son is entitled to his ancestral property only on the death of his father. The father is the absolute owner of his property in his lifetime.
	ii) A son becomes coparcener right after his birth. His right is applicable to the property of his grandfather and grand-grandfather.	ii) A son becomes coparcener by death of his father. This right is not available within the property of his father, grandfather or grand- grandfather.
	iii) Everyone is entitled to the property as a unit. Their shares are not defined. They have only the commodity of ownership. There is joint-tenancy.	iii) Everyone‟s share is defined. There is tenancy-in-common.
	iv) One cannot transfer his share to the third party.	iv) One can transfer his share.
	v) The joint-property can be partitioned. In that case, it will be partitioned as it was in case of the father.	v) As the shares are defined, one can easily partition with his share.

Legislation and Hindu law

Legislation is a modern source of Hindu Law. It has been an important factor in the development of Hindu Law. Most of them are in the direction of reforming Hindu Law. In different parts of the country there were different rules and practices. It was difficult to find fixed principles of law on several Areas.

Many important acts have been passed which have effect of changing the religious nature of Hindu Law at several instances. Legislation has become at present potential source of law in India.

Important Legislations which have modified altered and supplemented the textual Hindu law are as follows.

1. The Hindu Inheritance Act, 1928
2. Child Marriage restraint Act, 1929
3. The Hindu gains of learning Act, 1930
4. The Hindu marriage Act, 1955
5. The Hindu Succession Act, 1956
6. The Hindu adoption and Maintanance Act, 1956
7. Hindu minority and guardianship Act, 1956
8. Hindu widow's re-marriage act, 1856
9. The Special marriage Act, 1872
10. The Indian Majority Act, 1875

UNIT – II

Marriage and Kinship - Evolution of the Institution of Marriage and Family- Law Prior to Hindu Marriage Act -A detailed study of Hindu Marriage Act, 1955 -Matrimonial Remedies - Maintenance and Alimony; Customary Practices and legislative provisions relating to dowry prohibition.

Evolution of the Institution of Marriage and Family

The Anglo-Saxon society saw the institution of marriage as a tool to establish strategic ties between two empires. In one of the books, Stephanie Coontz says, "You establish peaceful relationships, trading relationships, mutual obligations with others by marrying them." Marriage was no longer based on the consent of the woman and depended solely on the will of the male. So, marriage was basically based on the king's will and his desire to acquire the property.

Before 1858, taking a divorce was difficult and rare. The couple used to live in misery than take a divorce. The gates for divorce opened by certain laws introduced in India and other countries as well.

Law prior to Hindu Marriage

As early as the time of Rig Veda marriage has assumed the sacred character of a sacrament and sanction of religion had highlighted the character and importance of the Institution of marriage. Marriage could enable a person to discharge properly his religious and secular obligations.

In Hindu law marriage is treated as a Sanskara or a sacrament. It is the last of the ten sacraments enjoined by the Hindu religion for regeneration of men and obligated in case of every Hindu who does not desire to adopt the life of Sanyasi.

A great drawback of the existing law was that a Hindu could take another wife although he had a wife living, this and some other rules relating to the conditions of valid marriage called for substantial change in the law of marriage. The stage had been reached when codification at least of the law of marriage and succession had become virtually indispensable.

Hindu law strictly so called did not allow divorce except in certain communities in the lower social strata where it was permitted by custom and there was deep-rooted sentiment against any provision for divorce in the new legislation which was being forged. It may be some interest to note that some of the smritikaras although they did not deal with divorce in the sense it is now understood did declare that a woman could take a second husband in certain events. The celebrated test of Narada is if husband is missing or dead or retired from the world or impotent or degraded in these five calamities a woman may take another husband

Marriage whether considered as a sacrament or a contract give rise to status of husband and wife on parties to the marriage and a status of legitimacy on the children of the marriage. For valid marriage in most system of law two conditions are necessary they are follows:

a. Parties must have capacity to marry
b. They must undergo necessary ceremonies and rites of marriage.

Most systems even today insist on performance of some ceremonies of marriage religious or secular elaborate or simple. In ancient Hindu law eight forms of marriage prevailed of which only three were valid before 1955. They were Brahma, Gandharva and Asura.

Hindu refined the Institution of marriage and idealized it. The Hindu Marriage Act has simplified the law of marriage. The Hindu Marriage Act 1955 does not specifically provided for any form of marriage the Act calls marriage solemnized under the act as a Hindu

Marriage which may be performed in accordance with the Shastra rites and ceremonies and in accordance with the customs that prevail in the community to which bride or bridegroom belongs.

Harvinder Kaur v. Harmander Singh Choudhary In this case, the court rejected the plea that personal law was discriminatory towards Gender inequality in India. It also observed that introduction of Constitutional law into the home (referring to personal laws) was most inappropriate.

Forms of Hindu Marriage

The Hindu scriptures admit the following eight forms of marriage:

1. ***Brahma marriage:*** In this form of marriage the girl, decorated with clothes and ornaments, is given in marriage to a learned and gentle bridegroom. This is the prevalent form of marriage in Hindu society today.
2. ***Prajapatya marriage:*** In this form of marriage the daughter is offered to the bride-groom by blessing them with the enjoyment of marital bliss and the fulfillment of dharma.
3. ***Aarsh marriage:*** In this form of marriage a rishi used to accept a girl in marriage after giving a cow or bull and some clothes to the parents of the girl. These articles were not the price of the bride but indicated the resolve of the rishi to lead a house-hold life. According to P.K.Acharya, the word aarsh has been derived from the word rishi.
4. ***Daiva Marriage:*** In this form of marriage the girl, decorated with ornaments and clothes, was offered to the person who conducted the function of a Purohit in the yajna.
5. ***Asura marriage:*** In this form of marriage the bride-groom gets the bride in exchange for some money or articles given to the family members of the bride. Such a form of marriage was conducted in the case of marriage of Pandu with Madri.
6. ***Gandharva marriage:*** This form is marriage is the result of mutual affection and love of the bride and the bride-groom. An example of this type of marriage is the marriage of the King Dushyanata with Shakuntala. In this form of marriage, the ceremonies can be performed after a sexual relationship between the bride and the bride-groom. In

Taittariya Samhita it has been pointed out that this type of marriage has been so named because of its prevalence among the Gandharvas.

7. ***Rakshas marriage:*** This type of marriage was prevalent in the age when women were considered to be the prize of the war. In this type of marriage, the bride-groom takes away the bride from her house forcibly after killing and injuring her relatives.
8. ***Paisach marriage:*** This type of marriage has been called to be most degenerate. In this type, a man enters into a sexual relationship with a sleeping, drunk or unconscious woman. Such acts were regularised after the performance of a marriage ceremony which took place after the physical relationship between the man and woman.

Changes brought by Hindu Marriage Act, 1955

The passing of the Hindu Marriage Act, in 1955, has substantially modified the institution of marriage as recognised by the ancient Hindu law. This Act has brought about certain radical changes, the most important of which are as follows:

(1) The Act has declared that marriages amongst Hindus, Jains, Sikhs and Buddhists, are valid Hindu marriages in the eyes of the law. (See Section 2.)

(2) The Act has abolished the divergence between the Mitakshara and the Dayabhaga Schools in connection with the prohibited degrees of relationship for the purposes of a Hindu marriage. (See Section 3.)

(3) The Act also introduces monogamy for the first time amongst the Hindus, and provides for punishment for bigamy under the Indian Penal Code. (See Sections 5 and 17.)

(4) The Act abolishes the distinction between the marriage of a maiden and that of a widow.

(5) The Act also prescribes the minimum age for marriage, being 21 in the case of a boy, and 18 in the case of a girl. (See Section 5.) Ancient Hindu law did not prescribe any such age for marriage.

(6) The Act does not specifically recognise any particular form of the eight ancient forms of Hindu marriage. Rather, it merely lays down conditions of a valid Hindu marriage. (See Section 5.)

(7) The Act does not prescribe any particular ceremony for a valid Hindu marriage. It only provides that such a marriage can be solemnized in accordance with the

customary rites and ceremonies of any one of the parties to the marriage. (See Sections 5 and 7.)

(8) The Act provides, for the first time, for the registration of Hindu marriages. (See Section 8.)

(9) The Act also contains provisions for restitution of conjugal rights of the parties to a marriage. (See Section 9.)

(10) The Act also lays down grounds on which a judicial separation can be decreed by the Court. (See Section 10.)

(11) The Act lays down the grounds on which a divorce can be obtained by any of the parties to Hindu marriage. Further, the concept of divorce by mutual consent has also been introduced in the Act. (See sections 13, 13B and 14.)

(12) The Act also makes a provision for re-marriage, inasmuch as it provides that after a valid divorce, either party may marry again. (See Section 15.)'

(13) The Act also provides for maintenance pendente life and for expenses of legal proceedings. (See Section 24.)

(14) The Act also provides for permanent alimony and maintenance. (See Section 25.)

(15) The Act also makes provisions for the custody of children during the pendency of legal proceedings, as also after the passing of a decree. (See Section 26.)

ESSENTIALS OF VALID HINDU MARRIAGE

Section 5 of the Hindu Marriage Act, 1955 lists out the essential conditions for a valid Hindu Marriage.

Monogamous Relationship

Under section 5(i) of the Hindu Marriage Act, the first essential condition of a valid Hindu marriage is that neither party should have a living spouse at the time of marriage. Section 5(i) may read with Section 11,17 of the Hindu Marriage Act, 1955 which makes a Hindu guilty of the offence of bigamy under Section 491 of Indian Penal Code.

Sarla Mudgal vs. Union of India

Issues raised

- Whether a Hindu husband, married under Hindu law, by embracing Islam, can solemnise a second marriage?
- Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage *qua* the first wife who continues to be Hindu?
- Whether the apostate husband would be guilty of the offence under Section 494 of the IPC?

Arguments advanced from both the sides

Petitioners

All the petitioners collectively argued that the respondents converted themselves to Islam to circumvent the provisions of bigamy given under Section 494 IPC and facilitate their second marriage with other women.

Respondents

The respondents in all the petitions assert a common contention that once they convert to Islam, they can have four wives despite having a first wife who continues to be a Hindu. Thus, they are not subject to the applicability of the Hindu Marriage Act, 1955 and IPC.

The Court held that if a Hindu converts to Muslim and then have a second marriage, he can not do so, irrespective of the fact that polygamy is allowed in Islamic Law.

FreeConsent

Section 5(ii) of the Act provides that at the time of marriage neither party shall be incapable of giving free valid consent on the basis of unsoundness of mind, mental disorder and insanity (unfit for marriage and procreation of children). Free consent is a necessary element of a Hindu Marriage. A Hindu Marriage takes in contravention of this condition is not per se void but voidable under Section 12 (1) (b) of the Act.

Age

Under section 5(iii) of the Act, at the time of marriage the male shall be minimum 21 years of age and female 18 years of age. Any violation of the required age of this clause is not void. It is voidable at the instance of minor when he attains majority, but it is the breach of condition and is punishable with simple imprisonment which may extend to fifteen days, or with fine, or with both by Section 18(a) of the Act.

Prohibited-Relationship

Under section 5(iv) of the Act, neither parties shall fall under degrees of prohibited relationship except when such union is allowed by custom or usage. A marriage solemnized within the prohibited degrees of relationship would be void under Section 11 of the Act and is punishable for simple imprisonment which may extend upto one month, or with fine or with both by Section 18(b) of the Act. If a custom is prevailing it must be a valid custom under Section 3(a) of the Hindu Marriage Act. The marriage constituted within the degrees of prohibited relationship will only become legal and valid if there exists a valid custom.

Sapinda Relationship

Under section 3 (f)(ii) of the Act, two persons are said to be "sapindas" of each other if one is lineal ascendant of the other within the limits of sapinda relationship, or if they have a common lineal ascendant who is within the limits of sapinda relationship with reference to each of them. Sapinda marriages are prohibited and are liable for punishment as per section 18(b), unless when such union are allowed by custom or usage. Thus according to this section marriages between persons of blood relationship are void.

Some other essential provisions for a Hindu Marriage

Solemnization of Marriage (Section 7)

Section 7 of the Hindu marriage act 1955 states the solemnization of the Hindu marriage, a Hindu marriage may be performed by all the ceremonies and rituals of both the party or either anyone. It is concerned with the Saptapadi which means that taking seven rounds around the fire with their partner; after its completion marriage becomes complete and binding.

- Each party to the marriage declaring in any language shall be understood by each of the parties.
- Each party to the marriage shall put the ring upon any finger of the other.
- Tying of the Thali.

The marriage renders to be valid if it is performed between Hindu couples according to the customary ceremony and rituals of each party or any one of them. Any child born after performing the marriage according to this section will be legitimate. The beginning of the child before the dissolution of the marriage is not the cause to dissolve the marriage. It is one of the most important duties of the father to bring up the girl child, find a suitable boy for her and do Kanyadan for the girl. Girl leaves their gotra and enters into the gotra of the boy. It is

an unbreakable bond that is tied for the generation to generation. It is a sacrament, not a contract.

Ceremonies to be performed in a Hindu Marriage

Marriage in the Hindu religion is a sacred tie performed by certain ceremonies and rites which are necessary for a valid marriage. There are three important stages wherein certain ceremonies are to be performed.

- **Sagai** -Hindu engagement is an important pre-wedding ritual in Indian culture, it is a type of culture in which the bride and groom come face to face and are engaged with a religious bond by each other's families. The Hindu tradition of "Vagdanam" dates back to Vedic period where the groom's father gives their words to the bride's father that they will accept their daughter and will be responsible for their future well being. There are various terms which are used instead of engagement in different places like Mangi, Sagai, Ashirbad, Nishchayam etc.
- **Kanyadan**– The word kanyadan consists of two words- Kanya which is maiden or girl and daan which means donation. It is the donation of a girl. It is an age-old tradition where the bride's father presents his daughter to the groom, giving him responsibility for her future wellbeing. It is an emotional and sentimental laden ritual which recognizes the sacrifice a father makes in order to ensure her daughter's happiness. It is followed till now from the Vedic times. It is an integral part of traditional Hindu marriage.
- **Saptapadi**– Saptapadi is a very important and integral component of a typical Hindu marriage. It is an activity which is undertaken by the bride and groom in front of the fire god, where couples go around the sacred fire seven times while reciting certain vows. This movement is also known as phera. Fire or Agni is considered highly sacred in the Hindu religion, vows taken in front of the Agni are unbreakable. The god of fire, Agni deva is considered to be a witness to be solemnization of the marriage as well as a representative of the supremebeing to provide his blessing to the newlywed couple. Section 7 of the Hindu marriage act 1955 states the solemnization of the Hindu marriage, a Hindu marriage may be performed by all the ceremonies and rituals of both the party or either anyone. It is concerned with the Saptapadi which means that taking seven rounds around the fire with their partner; after its completion, marriage becomes complete.

Hanmuniya v. Virendra Kumar Singh Kushwaha

- Considering Sec 7 of the Hindu Marriage Act, 1955 the marriage performed in absence of customary rites and ceremonies of either parties to marriage is not valid. And Mere intention of the parties to live together as husband and wife is not enough. Further, there is no scope to include a woman not lawfully married within the expression of 'wife' in Section 125 of the Code should be interpreted to mean only a legally wedded wife.

Registration of Marriage (Section 8)
Section 8 states that:

- The state government is facilitating the provision as a proof to Hindu so that the person comes into a valid marriage with the prescribed manner.
- All the rules made in this section shall be laid before the state legislature as soon as May.
- Hindu marriage registrar has all the powers and reasonable time open for the inspection and collects evidence and certified them after the payment of a prescribed fee.

- **Seema v. Ashwani Kumar, AIR 2006 S.C 1158**

  The Supreme Court in this case directed the State Governments and the Central Government that marriages of all persons who are citizens of India belonging to various religious denominations should be made compulsorily registerable in their respective States where such marriages are solemnized. The Bench, comprising of Justice Arijit Pasayat and Justice S.H. Kapadia also directed that as and when the Central Government enacts a comprehensive statute, the same shall be placed before that Court for scrutiny.

Void Marriages (Section 11)
Any marriage solemnized after the commencement of the Hindu Marriage Act 1955, if it contravenes any of the provisions of this act, the marriage will be void. The marriage will have not any legal entity nor will it be enforceable.

Voidable Marriages (Section 12)

Any marriage solemnized after or before the commencement of this will be voidable on the following grounds:

- No sexual intercourse has been done after the marriage due to the impotence of the Husband.
- Marriage is in contravention of Section 5 (ii) of this Act which states that the bride shall attain the age of 18 and the groom shall attain the age of 21.
- There shall be a consent of the bride.
- If the husband has pregnant another woman other than the wife.
- The wife has filed a request for annulling the marriage.

Consummation of marriages means full and normal sexual intercourse between married person. A marriage is consummated by sexual intercourse. It consists in the penetration by the male genital organ into the female genital organ. Full and complete penetration is an essential ingredient of ordinary and complete intercourse. Partial, imperfect or transient intercourse of not Consummation. The degree of sexual satisfaction obtained by the parties is irrelevant. Consummation may be proved by medical evidence.

Impotency is the inability to have complete and normal sexual intercourse. It may arise from a physical defect in either partner or from a psychological barrier amounting to invisible repugnance on the part of one to sexual relations with that partner. Sterility is irrelevant and does not imply impotency. Absence of uterus in the body of the one's female partner does not amount to impotency but the absence of a proper vagina would mean impotency. Similarly organic malformation making a woman sexless would means impotency. If a husband fails to satisfy his wife's abnormal appetite for sex that cannot be regarded as impotency. Thus impotency means practical impossibility of consummation of marriage. Sexual intercourse which is incomplete occasionally does not amount to impotency. It includes discharge of healthy Semen containing living sperms in the case of men and discharge of menses in the case of women.

Matrimonial Reliefs under Hindu Marriage Act

1. Restitution]of Conjugal Rights: Section 9

2. Judicial separation: Section 10

3. For void marriages: Section 11
4. Voidable marriages for nullity of legally irregular marriages: Section 12
5. Divorce: Section 13

S. 9: Restitution of Conjugal Rights

The term 'Conjugal Rights' in literal sense means '*Right to stay together.* It is a general accepted norm that each spouse should act as a support to other in hard times, should be there to comfort and love the partner. But if any of the partner leaves the other without any reasonable or sufficient cause, then the aggrieved party can knock the doors of the court to seek justice.

When one spouse leaves the other or withdraws the company of the other without any reasonable reason, the aggrieved spouse may go to the court for seeking remedy.

The following three essentials have to be proved:-
1. The withdrawal by the respondent from the society of the petitioner (aggrieved party).
2. The withdrawal is without any reasonable or lawful ground.
3. The court must get satisfied with the truth of the statement made in the petition.

Sushil Kumari Dang v. Prem Kumar

Here, a petition for restitution of conjugal right is filed by the husband and the husband accuses his wife for adulterous conduct. Following which he filed another petition for judicial separation which shows the extent of his sincerity and interest in keeping the wife with him. So, the Delhi High Court set aside the decree of restitution granted by the lower court**.**

Constitutional Validity of Section 9

In *T. Saritha Vengata Subbiah v. State***,** the court had ruled that that S.9 of Hindu Marriage Act relating to restitution of conjugal rights as unconstitutional because this decree clearly snatches the privacy of wife by compelling her to live with her husband against her wish. In *Harvinder Kaur v. Harminder Singh***,** the judiciary again went back to its original approach and help Section 9 of Hindu Marriage Act as completely valid.

Saroj Rani v Sudarshan Kumar

In this case the constitutionality of Section 9 of Hindu Marriage Act was challenged. Petition was filed by the wife for a restitution of conjugal rights under Section 9 of the Hindu Marriage Act,1955. Her husband consenting to the passing of a decree for the same was passed.

After a period of 1-year husband filed a petition under Section 13 of the Hindu Marriage Act,1955 against the appellant for divorce on the ground that though one year had elapsed from the date of passing the decree for restitution of conjugal rights as no actual cohabitation had taken place between the parties. The Supreme Court upheld the constitutionality of Section 9 by saying that it serves a social purpose as an aid to the prevention of break-up of the marriage.

Itwari v. Asghari, AIR 1960 All. 684

The court held that Even in the absence of satisfactory proof of the husband's cruelty, the Court will not pass a decree for restitution in favour of the husband if, on the evidence, it feels that the circumstances are such that it will be unjust and inequitable to compel her to live with him.

Judicial separation: Section 10

Parties may separate from each other under a decree of the court know as judicial separation or under an agreement entered into by parties called consensual separation. As soon as a decree for judicial separation is passed, a husband or a wife is under no compulsion to live with his / her spouse. They are separated from bed and board. Basic marital rights are suspended. Nonetheless marriage subsists. Parties remain husband and wife. If anyone remarries, he or she will be guilty of bigamy. In the event of one of the parties dying, the other party will inherit the property of the deceased spouse. Judicial separation can be allowed only if marriage is valid.

The aggrieved party to the marriage may present a petition on any of the grounds stated in the provisions for divorce under Section 13 of the Hindu Marriage Act for a decree of judicial separation.

When separation comes to an end in case of -

Separation by agreement the moment parties revoke the agreement. Judicial separation on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

In a separation by agreement, actual separation is necessary. It must relate to present separation. All agreements for future separation are void, being against public policy. Separation agreements sometimes stipulate covenants not to seek restitution of conjugal rights. A covenant against restitution is enforceable, but courts are not bound by it.

If there is no cohabitation between the parties to the marriage for one year or more after the passing of the order for judicial separation, the parties then may apply for divorce.

Divorce:

Under Section 13 following are the grounds for divorce:

Adultery: The act of indulging in any sexual relationship, including intercourse outside marriage, is termed as adultery.

Hirachand Srinivas Managaonkar v. Sunanda, Hon'ble Supreme observed that in case where the adulterous nature of a spouse is proven the court may decree judicial separation which may further be moved towards a decree of divorce.

Cruelty: A spouse can file a divorce case when he/she is subjected to any mental and physical injury that causes danger to life, limb, and health like denying food, continuous ill-treatment, and dowry-related abuses, uncontrollable and unreasonable sexual acts.

Leading Case: *Dastane* v. *Dastane*

Five tests were laid down in determining whether a given conduct amounts to legal cruelty. They are the following:

1. The alleged acts constituting cruelty should be proved according to the law of evidence;
2. There should be an apprehension in the petitioner's mind of real injury or harm from such conduct;
3. The apprehension should be reasonable having regard to the socio-economic and psycho-physical condition of the parties;

4. The petitioner should not have taken advantage of his position;
5. The petitioner should not by his or her conduct have condoned the acts of cruelty

Suman Singh v. Sanjay Singh (Supreme Court)

In the case, the husband had pleaded 9 instances which, according to him, constituted "cruelty" within the meaning of Section 13(1)(i-a) of the Hindu Marriage Act entitling him to claim dissolution of marriage against the appellant. The court held that Few isolated incidents of long past and that too found to have been condoned due to compromising behavior of the parties cannot constitute an act of cruelty within the meaning of Section 13(1)(i-a) of the Hindu Marriage Act.

Mrs. Christine Lazarus Menezes v. Mr. Lazarus Peter Menezes (Bombay High Court)

The Court noted that if the Criminal Complaint filed by the appellant wife against her husband was false and was filed only to bring back her husband and consequent to which he was arrested and was in jail for about 7 days, it would constitute a clear case of cruelty by the wife against her husband.

Desertion: If one of the spouses voluntarily abandons his/her partner for at least two years, the abandoned spouse can file a divorce case on the ground of desertion. Two essentials required –
i. Factum of desertion (statement of desertion)
ii. Animus descidendi (intention to desert)

Conversion: In case either of the spouses converts himself/herself into another religion, the other spouse may file a divorce case.
In ***Suresh Babu v. Leela***, it was held that conversion to a non-Hindu religion does not automatically dissolved the marital bond but only provides the aggrieved spouse to move towards a court for a decree of divorce and in this relation the court admitted the decree of divorce.

Mental Disorder: A mental disorder can become a ground for filing a divorce if the spouse of the petitioner suffers from incurable mental disorder and insanity, and the petitioner cannot expect to stay together.

Pankaj Mahajan v. Dimple– In this case the appellant husband brought an evidence to show that the respondent wife was suffering from schizophrenia and asked for a divorce. The Hon'ble Supreme Court while discussing about insanity as a ground of divorce held that the husband should be granted a decree of divorce on this ground.

Leprosy: In case of a 'virulent and incurable' form of leprosy, a petition can be filed by the other spouse based on this ground. But this was the ground prior to the Personal Laws (Amendment) Bill, 2018**.** Leprosy has been removed as a ground for divorce as it is now a curable disease.

In ***Swarajya Lakshmi v. G.G. Padma Rao*** the Hon'ble Supreme Court while discussing about leprosy as a ground of divorce observed that in case of an incurable and virulent form of leprosy decree of divorce can be granted and based upon this reasoning granted a decree of divorce.

Venereal Disease: If one of the spouses is suffering from a severe disease that is easily communicable, a divorce can be filed by the other spouse. The sexually transmitted diseases like AIDS are accounted to be venereal diseases. Disease must be incurable.

In the case of ***Mr. X v. Hospital Z***[v], a doctor informed the fiancé about her soon to be husband's communicable venereal disease because of which she refused to marry him. In a suit filed before the Hon'ble Supreme Court it was held that this act of the doctor didn't violate Mr. X's privacy and was for a greater good. It was also held that in cases like this a divorce is permissible.

Renunciation: If a spouse renounces all worldly affairs by embracing a religious order, then other spouse may take a divorce.

Not Heard Alive: If a person is not seen or heard alive by those who are expected to be 'naturally heard' of the person for a continuous period of seven years, the person is presumed to be dead. The other spouse should need to file a divorce if he/she wants to remarry.

Differences between Judicial Separation and Divorce

1. In case of divorce, a spouse can file a suit only after 1 year of marriage (Exception is "extreme hardship") but for a judicial separation, there is no such time limit.

2. Both Divorce and Judicial Separation are two different steps in cases of dissolution of marriage wherein the former is preceded by the later.

3. Judicial Separation is only a temporary breakage of mutual rights whereas with divorce the marriage comes to an end with no further resolve.

4. In case of Divorce, all the grounds mentioned under Section 13 could be made a ground for divorce but in case of judicial separation under Section 10 of the Hindu Marriage Act, Conversion and Absence for a period of more than 7 years with no whereabouts cannot be made ground for a decree.

5. Lastly, in Judicial Separation the spouses do have an opportunity to re-conciliate but in a divorce, they lose this privilege as their relationship comes to a legal end.

Though Judicial Separation and Divorce legally have a similar character with almost similar means, but on considering their ends, they are poles apart.

Maintenance

Types of Maintenance under Hindu Laws

Under the Hindu maintenance laws, there are 2 types of maintenance that can be claimed by the wife. When the wife files a maintenance petition through her divorce attorney, the burden to declare his income shifts to the husband, who has the right to defend the maintenance petition.

The types of maintenance under Hindu laws are as follows:

1. Interim Maintenance: When the wife files a maintenance petition, the court may award her interim maintenance that the husband must pay from the date on which the

application was filed by the wife till the date of dismissal through her divorce law advocate. It is also known as Maintenance Pendente Lite and is paid so that the wife can pay for the legal expenses incurred by her. Interim maintenance is awarded by the court if the wife has absolutely no source of income to maintain herself. There are no laws that lay down the amount of this type of maintenance and it is completely upon the discretion of the court to determine how much maintenance is sufficient for the wife to sustain during the proceedings. Section 24 of the Hindu Marriage Act, 1955 lays down that both the husband and wife can file an application for interim maintenance through their divorce advocate.

2. Permanent Maintenance: Permanent maintenance is paid by the husband to his wife in case of divorce, and the amount is determined through a maintenance petition filed through a divorce law lawyer in India. Section 25 of the Act states that the court can order the husband to pay maintenance to his wife in form of a lump sum or monthly amount for her lifetime. However, the wife may not be eligible for maintenance if there are any changes in her circumstances.

Under Section 18 of the Hindu Adoption and Maintenance Act, 1956, a wife has the right to live separately from her husband without affecting her right to claim maintenance. Under this law, a wife can live separately from her husband in the following cases:

● The husband has deserted the wife without any reasonable cause.

● The husband has subjected the wife to cruelty.

● The husband is suffering from leprosy of virulent form.

● The husband has extra-marital affairs.

● The husband has converted to another religion. However, the wife is not entitled to claim maintenance in the following circumstances:

● She has ceased to be a Hindu by converting to another religion.

● She is guilty of adultery i.e. she is unchaste and indulged in physical relations with another man.

● She has remarried after the divorce. In determining the amount of maintenance the following has to be considered;

1. The net value of the estate of the deceased after providing for payment of debts.

2. The provision, if any made under a will of the deceased.

3. Degree of relationship with the dependant.

4. Reasonable wants of dependant.

5. No. of dependants

Calculation of Maintenance under Hindu Laws

The amount of maintenance to paid depends upon different factors. The courts rely on the provision of Section 23 of the Act while asserting the total maintenance that the husband needs to pay to his wife. The provision lays down the following factors that must be considered to fix a maintenance amount: ● The position and status of the husband and wife,

● Whether the wife has an actual claim for maintenance.

● If the wife is living separately, whether the reason to do so is justified.

● The wife‟s total property and income.

● The husband‟s total property, income generated from this property, and his other income.

● The total number dependents and their expenses borne by the husband. The personal expenses of the husband.

Quantum of maintenance

Maintenance covers not merely food, clothing and shelter, but also includes other necessities. The quantum and type of necessities covered within the scope of maintenance

may vary, depending on the status, financial position and number of dependents, etc and is at the discretion of the court. Antecedent to passing an order under Section 125, the court does take cognizance of the amount of maintenance already ordered under the personal law. The reasoning is based on the premise that the wife is entitled to live as per the standard and status of her husband.

Waraj Garg v. K.M. Garg, AIR 1978 Del. 296

It is true that under the Hindu law, it is the duty of the husband to maintain his wife, but the wife is not under a corresponding duty to maintain her husband. This also is due to the fact that normally the husband is the wage earner. If, however, the wife also has her own income it will be taken into account and if her income is sufficient to maintain herself the husband will not be required to pay her any maintenance at all.

Dowry prohibition

Introduction

AN APPROVED marriage among Hindus has always been considered a kanyadan, be it a Brahma, Daiva, Arsha or Prajapatya marrigc. The Dharmashastra also laid down that the meritorious act of kanyadan is not complete till the bridegroom was given a dakshina. The twin aspects of this great meritorious act of kanyadan were that the father after decking his daughter with costly garments and honouring her by presents of jewels1 gifted her to a bridegroom (who should be a suitable person, and the Dharmashastra went into details as to the qualifications and quality of the bridegroom) whom he also gave a present in cash or kind known as vardakshina. There can be no two opinions as to the fact that whatever presents or gifts were given to the daughter constituted her stridhan or separate property. Since vardakshina included ornaments, and clothes and cash, one opinion was that these also constituted the property of the bride. But this is an unnecessary twist—vardakshina was a present made to the bridegroom and obviously it constituted his property. Wc need not doubt that then the vardakshina was given out of love and affection and its quantum varied in accordance with the financial position of the bride. It was given voluntarily. It also appears to be clear that ornaments, clothes, cash and other properties given to the bride were also given voluntarily and constituted her separate property. They were given to her as a sort of security and provided her financial protection in adverse circumstances. These two aspects of the

Hindu marriage, gifts to the bride as also to the bridegroom, got entangled and later on assumed the frightening name of dowry, for obtaining of which coercion and, occasionally, force began to be used, and ultimately most Hindu marriages became a bargain.

In the course of time dowry became a widespread social evil, and has now assumed menacing proportions. Surprisingly, it has spread to other communities which traditionally were not taking dowry. Cases have come to public notice where brides, on account of their failure to bring the promised or expected dowry, have been beaten up, starved for days together, locked up in dingy rooms, tortured physically and mentally, strangulated or burnt alive or led to commit suicide. What is most surprising is that the spread of education has not helped in curbing the social evil of dowry, rather the educated youth has become more demanding as he, along with his parents wants to recover every paisa spent on his education—some even demand expenditure for sending him abroad for higher education. With a view to eradicating the rampant social evil of dowry from the Indian society, Parliament, in 1961, passed the Dowry Prohibition Act which applies not only to Hindus but also to all other communities.

The Act however did not prove effective and the evil of dowry continued to reign supreme. Several Indian states amended the Act of 1961 with a view to giving it teeth,2 though this also did not succeed to curb, much less eradicate, the dowry menace.

The Joint Parliamentary Committee3 opined that the failure of the dowry prohibition law was due to two reasons, viz., first, the Act4 excluded all presents (whether given in cash or kind) from the definition of dowry, unless given in consideration of marriage. It is almost impossible to prove that gifts or presents given at, before or after the marriage were in consideration of marriage. This is so because no giver of the present will ever come forward to say that it was in consideration of marriage, as giving of dowry is as much an offence as taking it; and second, the Act had no effective enforcement instrumentality. No court can take cognisance of a dowry offence except on a complaint made by a person within one year of the date of its commission. It was unrealistic to expect the bride, her parents or other relations to lodge a complaint. The parents are usually the victims of dowry. They are unwilling (and certainly reluctant) to come forward because of their apprehension that it may lead to victimisation of their daughter.

Section 2 of the Act now defines "Dowry" as:

Any property or valuable security given or agreed to be given either directly or indirectly

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person; at or before or after the marriage in connection with the marriage of the said parties.

The words "as consideration for! marriage", have been substituted by the words "in connection with the marriage".

Dowry offenders

Taking or giving of dowry or its abetment remain offences even after the amendment (section 3). Similarly, demanding of dowry by any person, directly or indirectly, from parents or guardian of the bride or bridegroom, is still an offence (section 4). Under the original Act the punishment for these offences was mild, the maximum being six months imprisonment or a fine which could not be beyond a sum of Rs. 5,000 or both. But it has now been enhanced and a minimum and maximum limit laid down. The minimum punishment for all these offences is six months and the maximum is two years imprisonment along with a fine extending to Rs. 10,000 or to an amount equivalent to the dowry given, taken or demanded, whichever is more, is to be awarded.

If these provisions are considered to have teeth, then they are blunted by another one which confers a discretion on the court to reduce the minimum punishment of six months, though in doing so the court is required to record in writing adequate and special reasons.

The Joint Committee opined that the giver of the dowry should not be treated as an offender as he is more a victim than an offender, and, further, when the giver is considered to be as much an offender as the taker, the prosecution of both taker or demander of dowry becomes difficult. In the words of the committee:

The parents do not give dowry out of their free will but are compelled to do so. Further, when both the giver and taker are punishable, no giver can be expected to come forward to make a complaint.

There is much substance in the observation. It is a unique law which considers the committer of the act as well as the person against whom the act is committed as offenders;

how can the punishment of the offender succeed if along with him the victim is also to be punished?

Cognizibility of dowry offences

There has been a strong public opinion m favour of making dowry offences cognizible. The Joint Parliamentary Committee observed :

The Committee feel that although they are in favour of the offences under the Act being made cognizible, there is an apprehension that it may lead to some harassment, particularly at the time of solemnization of marriage as the police have powers to make arrests without warrant in such cases. The Committee are, therefore, of the opinion that in order to ensure that no harassment is caused to the parties involved, the offences under the Act should be made cognizible subject to the condition that no arrest shall be made by the police officers without a warrant or an order of the Magistrate.

The dowry offences are non-compoundable. This means once a case goes to the court, the parties are not free to compromise. The offences relating to dowry are bailable. An agreement forgiving or taking dowry is declared void under section 5; it cannot be enforced in a court of law.

Trial of dowry offences

The Joint Committee was of the vic^/ that dowry offences being of a delicate nature should be tried by the family court. This recommendation, too, has not been accepted, and neither the amending Act nor the Family Court Act 1984 confer jurisdiction of any matter relating to dowry on the family court. The Act confers jurisdiction to try dowry offences only on a metropolitan magistrate or a magistrate of the first class.

Dowry prohibition officers

It is now accepted that one of the reasons for the failure of the Dowry Prohibition Act has been the absence of any proper and effective enforcement agency. The committee also noted this fact and suggested that there should be some machinery which can intervene whenever necessary and help in averting dowry tragedies by helping the dowry victims,

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Conclusion

In developing countries it is a unique paradox that social progress lags behind the law. Dowry is a deep-rooted evil and legislation alone cannot eradicate it. Legislation can only help the social movement for the eradication of dowry. We may here recall the words of Jawahar Lai Nehru: Legislation cannot by itself normally solve deep-rooted social problems. One has to approach them in other way too, but legislation is necessary and essential, so that it may give that push and have that educative factor as well as the legal sanctions behind it which help public opinion which is being formed to be give a certain shape.

BARS OF MATRIMONIAL RELIEF

The bars of matrimonial relief are based on the maxim:

“One Who Comes To Equity Must Come With Clean Hands”

There is no excuse to the petitioner by the court to take advantage of his own disability or wrong to the petitioner. The bars of matrimonial relief are:

Doctrine of Strict Proof

Taking advantage of once own wrong or disability

Accessory

Connivance

Condonation

Collusion

Delay

Any other legal ground.

The decree passed in disregard of the bars is a nullity

1. Doctrine of Strict Proof: (Burden and standard proof)

There are 3 situations usually arises in matrimonial laws just like in ordinary civil law case proceedings:

The defendant appears in the court and contests the claims of the plaintiff.

If the defendant won't appear before the court even after the service of summons, the court may decide it as exparte.

The defendant appears in the court of justice and admits the claims made by the plaintiff.

In a matrimonial proceeding, the petitioner must establish the ground of matrimonial remedies beyond all reasonable doubts in all the 3 situations.

Case law: Dasthane vs Dasthane:

The court laid down that, the untrue statement of proof not beyond all reasonable doubt. The petitioner must prove to this ground (mental harassment by the spouse) against the respondent beyond all reasonable grounds.

2. Taking Advantage of once own wrong/ Disability:

There is no legal ground why relief should be granted. If petitioner is directly or indirectly responsible for respondent wrongful act then, the petitioner cannot be granted.

According to section 23 (1)(a) of Hindu Marriage Act, the court bars grant of relief if the petitioner is in anyway taking advantage of his or her own wrong of disability for the purpose of such relief.

Eg: when a husband is guilt under his wife adultery then he cannot appeal for divorce.

3. Accessory:

Under the Hindu Marriage Act, Special Marriage Act and Indian Divorce Act, when a petition is filed on the ground of respondent's adultery accessory may be the trend.

It is a term of criminal law if a husband promotes people to have intercourse with his wife or keep a watch while his wife is having sex with a another third parson, or fetch his wife's name from the place where she had gone to commit adultery, he is an accessory. In India not a single case is reported on accessory. No single case is yet reported on "accessory"

4. Connivance:

It is the same as an accessory.

The difference between two is that, in accessory there is active participation by the petitioner in the guilt of the respondent while in connivance there is no such participation.

To constitute connivance, express, or implied consent is necessary. When the petitioner agrees with the proposal of the respondent to earn money by illicit intercourse, then the petitioner is guilty of the connivance. It is a bar for matrimonial relief to the offence of adultery only. In this indirectly husband gives an opportunity or gives consent to his wife.

5. Condonation:

Condonation is the reinstatement of the partners who have committed a matrimonial offence with the intention to repeat it in the future of his or her matrimonial position. It is a consequence of the acts.

Caselaw: Hearn v. Hearn:

Spouse continued to cohabite for ten years after adultery of the respondent though sexual intercourse did not take place even once it was considered as condonation.

Women are suffering from cruelty and after that also they are living or cohabiting in the same house with husband and subjected to humiliation against their wish in the hope that there will be improvement in the behavior of the husband and their relationship.

They prefer silence to exposure.

6. Collusion:

Under Sec.23 (1) (c) of Hindu Marriage Act, Under Sec. 34 (1) (d) of Special Marriage Act collusion was a bar to all matrimonial reliefs.

The act abolished collusion as a bar to the petitions for a declaration that a marriage is null and void under the Hindu Marriage Act but not in Special Marriage Act

7. Improper and unnecessary delay:

In Hindu Marriage Act, under Sec.23 (1) (d) Improper and unnecessary delay is a bar to relief in respect of all matrimonial causes

Caselaw: Niromo v. Nikka

There is 11 years delay in filing the petition by wife.

She gave an explanation that she kept quiet all along and had no intention to file the suit for her husband's harassment which began soon after she had got the property in inheritance from her father.

This was accepted as a reasonable explanation to delay.

8.Other legal grounds:

Under Sec.23 (1) (e) of Hindu Marriage Act,

It is a general bar which is applicable to all matrimonial remedies. The act of cruelty done without any intention is which causes injure or hurt the victim then it is considered as cruelty.

CONCLUSION

The Marriage law not only gives matrimonial reliefs, it has the provision to bars the matrimonial relief to the persons who are immoral in nature. The provision is to be used with due diligence in order not to left behind anyone.

UNIT–III

Hindu undivided family – Mitakshara Joint Family - Formation and Incidents - Property under both Schools – Kartha: His Position, Powers, Privileges and Obligations - Debts – Doctrine of Pious Obligation - Partition and Reunion –Religious and Charitable Endowment.

THE HINDU UNDIVIDED FAMILY

The HUF is a family structure that is prevalent in the Indian subcontinent. A HUF cannot come into existence through a contract. It automatically comes into being in a Hindu family. It consists of a Karta, who is the eldest male member of the family. The Karta manages the general affairs of the family. The descendants of the Karta are known as the coparceners. Often, the principal requirement for commencing a HUF is the existence of ancestral property.

The coparceners, by way of their rights, are entitled to a share of this property. A HUF is

usually involved in any form of business and has an income disposable to it. Hence, under section 2(31) of the Income Tax Act[i] of 1961[ii], the HUF is considered to be a person. It is taxed as a separate entity as well. The Karta must obtain a Permanent Account Number (PAN) and a bank account in the name of the HUF. This way, the tax liability of the family comes down. The tax slab rates that apply to an individual income tax assesses, also bind a HUF.

Various shastric laws have contributed to the characteristics of the Hindu Undivided family. It is closely related to the provisions of the Hindu Succession Act (1956)[iii] and the Hindu Marriage Act (1955)[iv].

According to Hindu Law, all the people in a HUF are lineal descendants of a common ancestry which is compulsory. The family here includes their wives and unmarried daughters, who are living together and do common things such as eat food, worship together and have a common estate/business. The female members such as windowed daughters who have returned to their father's home, daughters-in-law are part of a HUF. The daughter after her marriage becomes a member of her husband's HUF and ceases to be a member of her father's HUF. Members of a HUF are related to each other by blood, marriage, or adoption.

In the case of *Surjit Lal Chabra vs CIT*, it was made clear by the apex court that a 'Joint Family' and 'Hindu Undivided Family' are synonymous. The court further went on to clarify that a joint Hindu family consists of persons lineally descended from a common ancestor and includes their wives and unmarried daughters also. The daughters once married stop being a member of their husband's family.

HUF is a creation of law and it can't be created by an act of the parties, except in the case of reunion (*BhagwanDayal vs Reoti Devi*) or adoption (*Surjit Lal Chhabra*), where it comes into existence by the act of the parties.

It is a constantly changing body, its size increases with the birth of a male member in the family and decreases on the death of a family member. Females go and come into Hindu Undivided Family on marriage. A HUF can't be created under a contract. It is automatically created in a Hindu family. People of other religions such as Buddhists, Jains, and Sikhs are

not governed by the Hindu Law, but they are treated as a HUF under the Income-tax Act 1961.

DIFFERENT SCHOOLS UNDER THE HUF

The declassification of the HUF yields two different schools, namely Dayabhaga and Mitakshara. While the essence of a HUF remains rooted in these schools, there are minor differences.

There are two principal schools of Hindu Law. They are the Dayabhaga School and Mitakshara School. The Dayabhaga school of Hindu law runs in the area governed by the erstwhile state of Bengal i.e., Bengal, and Assam. The Mitakshara school of Hindu law prevails over the rest of India.

Unlike the Mitakshara law, in Dayabhaga law the HUF can't come into existence as an operation of law automatically, but it comes into existence by the voluntary decision of the legal heirs. In Mitakshara law the son/daughter (after the 2005 amendment to the Hindu Succession Act) gets a share in the family property on conception itself. In Dayabhaga law the son doesn't get a share in the family property by birth. As long as the father is alive, the son doesn't have any interest in the family property.

DAYABHAGA

He acquires it after the death of his father. The shares and responsibilities of each coparcener are well defined. The said property has to be divided physically, in case of a partition. However, an adult son cannot support or oppose any disposition of the property, as he does not exercise any control over it. The father has undeniable power over the property until his death. HUFs in Assam and Bengal follow this system.

In the Dayabhaga School, the allocation of property is extremely simple. If a man dies intestate, his sons get a proper part of his property. According to the Dayabhaga law, the sons do not acquire any interest by birth in ancestral property.

Their rights arise for the first time on the father's death. On the death, they take much of the property as if left by him, whether separate or ancestral, as heirs and not by survivorship. Since the sons do not take any interest in an ancestral property in their father's lifetime, there

can be no coparcenary in the strict sense of the word between a father and sons according to theDayabhaga law.

The father can dispose off ancestral property, whether movable or immovable, by sale, gift, will or otherwise in the same way as he can dispose of his separate property. Since sons do not acquire any interest by birth in ancestral property, they cannot demand a partition of such property from the father. A coparcenary under the Dayabhaga law could thus consist of males as well as females. Every coparcener takes a defined share in the property, and he is the owner of that share. It does not fluctuate with birth and deaths.

MITAKSHARA

All parts of India except Assam and Bengal follows this system. Coparcenary rights are awarded to the son by birth. He has the right to demand the partition of the property as he has equal rights on it as his father. He has the right to oppose any unauthorized disposition of the said property. However, there is no physical separation of the property during a partition. The coparceners of the HUF are allowed to have a definite numerical share of the property. There are four classifications under the Mitakshara school.

They are as follows:

- Dravidian school - prevalent in south India
- Maharashtra/ Bombay school - exists in Bombay
- Banaras school- Followed in Orissa and Bihar
- Mithila school - Exists in Uttar Pradesh and neighbouring areas

In the Mitakshara School, the allocation of parental property is based on the rule of possession by birth. Moreover, a man can leave his property at his will. The joint family property goes to the group known as the group known as coparceners. They are the people who belong to the next three generations.

Hence, the joint family property by partition can be, at any time, converted into a separate

property. Therefore, in Mitakshara School, sons have an exclusive right by birth in the joint family property.

The Mitakshara concept of coparcenary is based on the notion of the son's birthright in the joint family property. Though every coparcenary must have a common ancestor to start with, it is not to be supposed that every extant coparcenary is limited to four degrees from the common ancestor.

IMPORTANTJUDGEMENTS

In the case of Attorney General of Ceylon v. Arunachalam Chettiar a father and his son constituted a joint family governed by the Mitakshara School. The father and the son were domiciled in India and had trading and other interests in India.

The undivided son died and father became the sole surviving coparcener in a Hindu undivided family to which a number of female members belonged. In this case, the court said that the widows in the family including the widow of the predeceased son had the power to introduce coparceners in the family by adoption and that power was exercised after the death of the son.

MITAKSHARA JOINT FAMILY

In Mitakshara Joint Family Property son has a right over the property since the birth, even an illegitimate son or a widowed daughter has a right over the property of their father's Joint Family Property. Another feature is the right to Maintenance and right of survivorship which will be given to the unmarried daughters and other members respectively in the Joint Family. Under Mitakshara only Joint Family property will be acquired by the coparcenary by the concept of succession and survivorship.

In case **Board of Revenue v. Muthu Kumar** it was observed that when a son inherit the father's separate property, he will acquire it as a separate property even if he has a son under Section 8 of Hindu Succession Act. Whereas in Dayabhaga Joint Family Property son have no right over the properties by birth. Even the concept of Survivorship is not given to son and therefore there is no joint family between the son and the father. Under Dayabhaga it includes all the properties both selfacquired and joint family property will be devolve by succession

The essence of a coparcenary under Mitakshara law is the unity of ownership. The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by Mitakshara law, no individual member of that family, whilst it remains undivided, can predicate, of the joint and undivided property, that he, that particular member, has a definite share. The most appropriate term to describe the interest of a coparcener in coparcenary property is "undivided coparcenary interest".

If a Mitakshara coparcener dies immediately on his death his interest devolves on the surviving coparceners. The Supreme Court has summarised the position and observed that the coparcenary property is held in collective ownership by all the coparceners in a quasi-corporate capacity.

COPARCENARY AND THEIR PROPERTY:

The Coparcenary is a narrower institution and included under Joint Family. It only comprises a male member who had born in the family and acquires an interest in the Coparcenary property. To constitute a Coparcenary as a minimum two male members should be needed to start and continued for a longer time.

Joint Hindu family has unlimited members but Coparcenary is only limited to four generations of unlimited male members. The property acquired by a senior most male member is known as the last holder of the property. For E.g., the Coparcenary was consisting of father F, his son S1, and his son's son S2. All these have form Coparcenary and if the son died the Coparcenary will continue between the father and his grandson.

Sometimes all the coparceners died leaving behind only one, the surviving Coparcenaries known as Sole Surviving coparcener. If it will be not possible to add another coparcener then the property in his hand becomes separate property. The right to maintenance has to given to female members if they have.

In earlier times women cannot become coparceners but after the amendment in the Hindu Succession Act, 2005, daughters also become coparceners just like their brother from birth. Under classical law, if a coparcener dies then his share in the property was shifted to surviving coparceners but this Doctrine of Survivorship has abolished under the 2005 amendment. And now the property has divided through the Doctrine of Notional partition and the property had given to the deceased's legal heirs.

COPARCENARY UNDER MITAKSHARA SCHOOL OF JOINT FAMILY

Coparcenary idea under Hindu Law was mainly by the male member of the family where just children, grandsons and great-grandsons son who have a right by birth, who has an interest in the coparcenary property. No female of a Mitakshara coparcenary could be a coparcener but she will always be a part of the Joint Family. So under Mitakshara a son, son's son, son's son's son can a coparcenary i.e. father and his three lineal male descendants can be a coparcener.

FORMATION AND INCIDENT UNDER COPARCENARY PROPERTY

According to the Hindu Succession Act, 1956, the only son had a right to became a coparcener. The daughter had no right to enjoyed the status as a coparcener.

Under Mitakshara School of Hindu Law, the concept of coparcenary based on the notion of birthright. It consists of four-generation: great grandfather, grandfather, father and son.

A major breakthrough towards eradicating the gender inequality and discrimination and to prevent the gender biases that have been prevalent in Indian families, to improve the adverse condition of women in the society has been ensured with the enactment of Hindu Succession Amendment Act,2005.

In Shreya Vidyarthi v. Ashok Vidyarthi and Ors. , AIR 2016 SC

In this case, Apex Court held that of Hindu Succession Amendment Act,2005 was done keeping in mind and respecting the position of a female member, the daughter shall by birth become the coparcener in the same way as a son.

Daughter as a coparcener under Mitakshara School: Yes, the daughter also enjoys the status of Coparcener after the 'Hindu Succession Amendment Act, 2005'. According to Sec 6(1), the 'Hindu Succession Amendment Act, 2005' daughter become the coparcener by birth.

SECTION 6 IN THE HINDU SUCCESSION AMENDMENT ACT, 2005

Devolution of interest in coparcenary property. —

- On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, 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;

- be subject to the same liabilities in respect of the said coparcenary property as that of a son,

THE INCIDENTS OF COPARCENARY ARE:

1. The lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person
2. Such descendants can at any time work out their rights by asking for partition.
3. Till partition each member has got ownership extending over the entire property, conjointly enjoyment of the properties is common
4. As a result of such co-ownership, the possession and enjoyment of the properties is common
5. No alienation of the property is possible unless it is for necessity, without the concurrence of the coparceners
6. The interest of a deceased member passes on his death to the surviving coparceners.

PROPERTY UNDER BOTH THE SCHOOL

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

Property is classified into two types: (1) **Joint Hindu Family Property** (2) **Separate Property.** Joint-family Property is also known as 'Coparcenary Property and this property consists of (a) Ancestral Property (b) Property jointly acquired by the members of the Joint family. (c) Separate property of a member "thrown into the common stock." (d) Property acquired by all or any of the coparcener with the aid of joint family funds.

OBSTRUCTED PROPERTY

The property to which right accrues not by birth but on the passing of the final owner is called obstructed property. It is called obstructed since the accrual of the right to it is obstructed by the existence of the final owner. Hence the property devolving on parents,

brothers, nephews, uncles, etc. upon the passing of the last owner, is obstructed property. These relatives are not vested intrigued by birth. Their right to it arises only on the passing of the last owner.

Obstructed property rights gained by the owner after the succession of the final owner but there are some exceptional cases where the ownership passes by survivorship. The exception cases were mentioned below:

- Two or more than two sons, grandsons, and great-grandsons succeeding as heirs to the separate property of their paternal ancestor take as joint tenants with survivorship.
- Two or more grandsons of a daughter who is a member of a joint family succeed as heirs to their maternal grandfather as joint tenants with the right of survivorship.
- Two or more widows succeeding as heirs of their husband take as joint tenants with survivorship rights.
- Two or more daughters succeeding as heirs of their father take as joint tenants.

These are the only 4 conditions or exceptional circumstances in which ownership of the obstructed property transfers to another before the succession of the previous owner.

Illustration

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

UNOBSTRUCTED PROPERTY

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

descendants in whom the property vests, are called coparceners. Thus, the hereditary property in the hands of the final male owner is unobstructed.

Illustration

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

ANCESTRAL PROPERTY

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

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

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

JOINT FAMILY PROPERTY

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

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

KARTA

In the entire Hindu Joint Family 'Karta' or 'Manager' occupies a very important position. There is no office or institution in any other system of the world can be compared with it. He is a person with limited power but he possess such vast power with in ambit of joint family which nobody enjoys

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

equal to Karta in a Hindu Joint Family. The powers and position of a Karta are wider than any of the members of the Hindu Joint Family. No one can be compared with Karta among the other members of the joint family.

WHO IS A KARTA:-

Karta means manager of joint family and joint family properties. He is the person who takes care of day to day expenses of the family looks after the family and protects the joint family properties.

WHO CAN BE A KARTA?

SENIOR MOST MALE MEMBER

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

JUNIOR MALE MEMBER

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

Narendrakumar J Modi v. CIT 1976 S.C. 1953
Facts: - BaplalPurushottamdas Modi was the head of the HUF. Joint family possesses many immovable properties and carried business of various types such as money lending, etc. He executed a general power of attorney in favour of his 3rd son, Gulabchand on Oct 5, 1948. On Oct 22, 1954 Baplal relinquished his share. On Oct 24, 1954 the existing members of the family executed a memo of partition. However, the order accepting partition was not passed, the contention of the appellant was that Gulabchand couldn’t be a Karta because he is a junior member and other members of the family did not accept him as a Karta.

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

FEMALE MEMBER AS KARTA

In 2000, the 174th report of the 15th Law Commission recommended many amendments to correct the discrimination against women, which was the key issue before the commission, and this was the foundation for the Hindu Succession (Amendment) Act, 2005. Hindu Succession (Amendment) Act, 2005 turned the daughters of a family, who are governed by Mitakshara Law, coparceners in the HUF property and further gave them the right of survivorship via amended Section 6 (1) (a) and (b) of Hindu Succession Act, 1956. This amendment gave them equal rights as the sons. Although the 2005 amendment provides equal rights to daughters in the coparcenary as compared to the sons, an important question was still left unanswered - Can women or daughters be allowed to become managers or karta of the Hindu Undivided Family?

The landmark Delhi High Court judgement in Mrs. Sujata Sharma v Shri Manu Gupta[10] has, after the 2005 amendment to Hindu Succession Act, 1956 (the "HSA"), brought the next step to realising equality of women in the Hindu Undivided Family. The court found that while females have equal rights to HUF property (post HSA), they also have the right to manage the same property as Karta. Also, the court found no restrictions regarding a female Karta in Section 6, HSA.Thus, after demise of the father in a HUF, if the eldest is a daughter then she becomes the Karta of that same HUF, with the mother and siblings (if any) as members of the HUF.

Hence, married or unmarried daughters may not only claim coparcenary in HUF property but may also claim rights to manage the same HUF property as Karta, provided they are the eldest.

This means that just as a son can be a Karta, by virtue of being born the eldest, a daughter can also be a Karta given that she was born eldest. Also, even after being married a daughter retains her right to coparcenary and also the right to be Karta.

In fact, a woman may even be a de facto Karta in the family where she marries and a de jure Karta in her family of origin, provided that she is a widow and is the only major in the family she married into and is the eldest in her family of origin.With this judgement the equal rights of daughters in their HUF have been fully realised. Daughters would have the same rights and liabilities as sons regarding the HUF property for all means and purposes.

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

Sushila Devi Rampura v. Income tax Officer AIR 1959 Cal
It was held that where the male members are minors, their natural guardian is their mother. The mother can represent the HUF for the purpose of assessment and recovery of income tax.

Commissioner of Income Tax v. Seth Govind Ram AIR 1966 S.C. 2
After reviving the authorities it was held that the mother or any other female could not be the Karta of the Joint Family. According to the Hindu sages, only a coparcener can be a karta and since females cannot be coparceners, they cannot be the Karta of a Joint Hindu Family.
The amendment made in 2005 gives women equal rights in the inheritance of ancestral wealth, something reserved only for male heirs earlier. It indeed, is a significant step in bringing the Hindu Law of inheritance in accord with the constitutional principle of equality. Now, as per the amendment, Section 6 of the Hindu Succession Act, 1956 gives equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. The amendment was made because there was an urgent need for certainty in law.

CHARACTERISTICS OF KARTA

The characteristics of a Karta are:

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

POWERS OF A KARTA

Powers of Management

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

Rights to Income or Remuneration and Expenditure

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

Rights to Represent Joint Family

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

Dr. Gopal v. Trimbak AIR 1953 Nag 195
In this case, it was held that a manager/karta can contract debts for carrying on a family business/ thereby render the whole family property including the shares of the other family members liable for the debt. Merely because one of the members of the joint family also joins him, it does not alter his position as a karta.

Right to Compromise

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

Power to refer a Dispute to Arbitration

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

Power to Contract Debts

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

The karta of a non-business joint family also has the power to contract debts for family purposes. When a creditor seeks to make the entire joint family liable for such debts, it is necessary for him to prove that the loan was taken for family purposes, or in the ordinary course of business or that he made proper and bona fide enquiries as to the existence of need. The expression family purpose has almost the same meaning as legal necessity, benefit of estate, or performance of indispensable and pious duties.9The karta has an implied authority

to contract debts and pledge the credit of the family for ordinary purpose of family business. Such debts incurred in the ordinary course of business are binding on the entire family

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

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

Power to enter into Contracts

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

Power of Alienation

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

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

Legal Necessity

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

Dev Kishan Vs. Ram Kishan AIR 2002

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

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

Benefit of estate

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

Indispensable Duties

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

LIABILITIES OF A KARTA

- **Liability to maintain-** Karta is to maintain all the members of the Joint Family. If he does not maintain any member then he can be sued for maintenance and also can be asked for compensation.
- **Liability of render accounts-** As far as the family remains joint, Karta is not supposed to keep accounts of the family, but when partition takes place at that time he will be liable to account for family property. If any of the heir is not

satisfied with his accounts, then he can constitute a suit against Karta to bring the truth and to know any misappropriation is done by Karta or not.

- **Liability of recovery debts due to the Family-** He has the liability to realize the debts due to the family.
- **Liability to spend reasonably-** He has the liability to spend the joint family funds only for the family purposes.
- **Liability not to eliminate coparcenary property-** It is the liability of the Karta not to alienate the coparcenary property without any legal necessity or benefit to the state.
- **Liability not to start new Business-** It is the liability of the Karta not to start a new business without the consent of other coparceners.

Concept of Pious Obligation under the Hindu Law

'Pious obligation' means the moral liability of sons to pay off or discharge their father's non-avyavaharik debts. The debts borrowed may not be of legal necessity or for benefit of estate. Thus, if the father is the Karta of a Hindu joint family, he may alienate the coparcenary property for discharging the antecedent debts. The sons are under the obligation to recover such alienated property by repaying the debts.

The ancient doctrine of pious obligation was governed by Smriti law. There is a pious obligation on the sons and grandsons to pay the debts contracted by the father and grandfather. According to Privy Council this obligation extends to great grandsons also because all the male descendants upto three generations constitute coparcenary and every coparcener is under a religious obligation to pay the debt contracted by their ancestor, provided such debt was not taken for an immoral or unlawful purpose.

The concept of pious obligation has its origin in Dharmashastras, according to which non-payment of debt is a sin which results in unbearable sufferings in the next world. Hence the debts must be paid off in all circumstances provided it was not for immoral and illegal purposes. Vrihaspati has said, "If the father is no longer alive the debt must be paid by his sons. The father's debt must be paid first of all, and after that a man's own debts, but a debt contracted by the paternal grandfather must always be paid before these two events.

The Mitakshara has presented the entire proposition in stronger words. According to it when the father has gone abroad or is suffering from some incurable disease, the liability to pay the

debt contracted by him would lie on the sons and grandsons irrespective of the fact that the father had no property. There are reasons for fixing this liability on sons and grandsons. The liability to pay the debt is in the order, viz., in absence of father the son and in absence of son the grandson.

DOCTRINE OF PIOUS OBLIGATION

Joint families under Hindu Law are not limited to succession and a coparcenary system. The succeeding generation is also expected of some obligations, one of them being from the sons for the repayment of debts incurred by their father during his lifetime. Pious meaning religious, and under the doctrine of pious obligation, an expectation is casted on a son to repay his father's loan and debts from the part of the ancestral property he holds under a religious duty towards his religion. However, this duty ceases to exist when the debts are avyavaharika, i.e. incurred for immoral or illegal purposes.
As laid down by the Hon'ble Supreme Court in the case of 'Sidheshwar Mukherjee vs. Bhubneshwar Prasad Narain Singh', the doctrine finds its origin in the historical smiritis. It was held that non-payment of debts was a positive sin and thus to save the father from the consequences of such a sin in the afterlife, it was a son's duty to pay off the debts. However, under law, the position has been modified to an extent where a son is liable to pay off the debts only confining to the interest in the coparcenary property he holds. He cannot be otherwise made personally liable. Also, unlike the previous distribution where the son was liable to pay off the whole debt and the grandson and great-grandson only the principal amount, now all three generations are equally obligated to pay off the principal amount and interests.

Under the Hindu Law, a son is under a pious obligation to discharge his father's debts out of his ancestral property regardless of the possibility that he had not been profited by the debts, gave the debts are not avyavaharika. The sons get absolved from their obligation to discharge the debt of their father from the family assets just if the debt was one spoiled with immorality or illegality.

In Hindu law there are two commonly destructive principles, one the standard of autonomous coparcenary rights in the sons which is an episode of birth, providing for the sons vested ideal

in the coparcenary property, and the other the pious obligation of the sons to discharge their father's debts not spoiled with immorality or illegality, which lays open the entire estate to be seized for the installment of such debts. As indicated by the Hindu lawgivers his pious obligation to pay off the ancestors' debts and to mitigate him of the demise torments consequent on non-installment was irrespective of their acquiring any property, however, the courts dismiss this liability arising irrespective of acquiring any property and provided for this religious obligation a legal character.

Pious' means 'genuine, religious, dedicated, respectful. 'Pious obligation' means an obligation of a Hindu because of profound dedication to religion. Hindu law states that 'He who having gotten a sum loaned or the like does not reimburse it to the proprietor will be conceived henceforth in his creditors house a slave, a servant or a lady or a quadruped '. According to Hindu scriptures, it is the blessed obligation of a son to pay off or discharge his father's debts. The religious obligation is joined to the son as well as a grandson and to the considerable grandson also, on the ground that all the three are coparceners with others by their introduction to the world.

BURDEN OF PROOF OF THE DEBT

The obligation on son to pay off their father's personal debts is a religious obligation and on the off chance that they need to wriggle out of it? They can do as such just if the debts are polluted the son also need to show that loan boss had the notice or information that the debts was corrupted.

The Apex Court in *LuharMarit Lal Nagji v. Doshi JayantilalJethalal*, depending upon the judgments of the Privy Council alluded to (supra), articulated the principles thus : "the sons who challenge the alienations made by the father need to demonstrate that the precursor debts were immoral as well as that the purchasers had seen that they were so corrupted."

Ramasamayyan v. VirasamiAyyar ((1898) I.L.R. 21 Mad. 222)

Indeed, even where the home loan is not for legal necessity or for an installment of precursor debt, the lender can, in the execution of a home loan declare for the acknowledgment of a debt which the father is personally subject to reimburse, sell the estate without getting a personal pronouncement against him. After the sale has occurred, the son is bound by the sale, unless he shows that the debt was non-existent or was corrupted with immorality or illegality.

DEBTS OUTSIDE THE SCOPE OF THE DOCTRINE

Commercial Debts:

Commercial Debts was respected outside the regulation, as indicated by Old law. To the present law, it is the doctrine.(i.e. the son is subject to pay the commercial debts)

Suretyship Debts:

Liability arising out of suretyship by the father is not official on his son. Hence, it does not go inside the convention.

Gaming Debts:

Gaming Debts are outside the regulation according to the Old and New Laws. Eg: Debts caused by drinks, liquors and so forth.

Avyavaharika Debts:

As indicated by the Mitakshara, it is outside the doctrine. Cole rivulet translated it as "a debt for a cause disgusting to great morals".In other words, it is a debt for an illegal or immoral purpose.

PIOUS OBLIGATION AFTER THE AMENDMENT OF 2005

After the initiation of the Hindu Succession (Amendment ideal to continue against a son, grandson or incredible grandson for the recuperation of any debt due from his father, grandfather or awesome grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or extraordinary grandson to discharge any such debt. Bias of Pious Obligation Doctrine :What is left of the pious obligation convention after the

amendments in Hindu law is the injustice of the principle of pious obligation of the son to pay his father's debt, namely, even now the father amid his lifetime can estrange the joint family property of himself and of his son for the installment of his personal debts brought about by him which was neither necessary nor valuable for the family. This is the residue, which is neither justifiable nor reasonable. However, it is the legitimate and fair consequence of the inheritance of the son in the joint estate.

SOCIO-LEGAL IMPACT OF DOCTRINE OF PIOUS OBLIGATION

The socio-legal impact of the pious obligation teaching is not consistent with the present day jurisprudential trends in the field of exclusive jurisprudence. The Hindu law as stands changed by the various Acts favors the absolute right of ownership with regards to Hindu females; it can't stand to rationale and reason the at where the woman's restricted estate has been abolished the son's idea in the joint family property should be permitted to be taken away from the teaching of pious obligation. What is imperative in this respect is to change the pious obligation regulation into the absolute obligation and get it similarity with the Dayabhaga school of Hindu law because that has as of now been the impact of Chandersen's decision of the Supreme Court.

PARTITION UNDER HINDU LAW

In order to obtain insight into the process of re-opening of partition, it is vital to understand what the process of partition in itself entirely entails. A partition is a calculated division of family property amongst its members, thereby concluding the joint status of such family. Once the partition is successful, the particular family ceases to exist as a joint family and becomes a nuclear family. Through this process, various coparceners of property can attain their fixed shares as a coparcener.

The Mitakshara school of thought compares partition to be a severance of status or interest, amidst family. Mere division of property between coparceners does not amount to partition, but the complete severance of status of being a member of the joint family constitutes partition in its true sense. Furthermore, the process of partition can be administered in two methods:

Total Partition: Through this process, the family property in its entirety is divided in between all coparceners.

Partial Partition: The family may encounter a particular occurrence wherein only a few members of the joint family go out on partition while the others remain members of the family. In this case, the remaining members maintain joint status while those that leave get their share.

In order to satisfy prerequisites for either of the aforementioned processes, there is also a requirement of the fulfillment of two necessary conditions that give rise to partition. They are:

- Intention to separate from the rest of the family within the minds of members or member.
- External declaration of such intention to separate from the rest of the family. This declaration entails expressing the intention of partition vividly through verbal or written communication.

MODES OF PARTITION UNDER HINDU LAW

There can be several modes by which a partition (Modes of partition under Hindu Law) can undergo such as

- Partition by father during his lifetime: the Karta of the family take partition then it came into existence.

- Partition by suit: from the moment the suit is filed clearly indicates the intention to severance, then partition was held when the suit was instituted.
- Partition by agreement: from the date of signing the agreement, severance of status get started. And one more type of partition includes the agreement of arbitration in which all member of the joint family come into an agreement in which they appointed arbitrator that distributes or divide the property.
- Partition by notice
- Partition by will
- Oral partition
- Partition by one coparcener through his unilateral declaration.
- By conduct, when food, worship and business are different.
- Partition on death also called Notional Partition
- Partition on conversion and or by marrying a non-Hindu: if anyone converts their religion then automatically severance of interest take place from the date of conversion but they entitled to take their share from that property, and if a person married under special marriage act 1954 so then automatically severance of interest took place from the date of marriage but in this case also they entitled to get their share.

RE-OPENING OF PARTITION

Although, according to Hindu Law and as per the teachings of Manu, a partition once made stands to be irreversible and irrevocable. However, to cater to the public interest, certain exceptional situations have been allowed by law as cases under which an application to re-opening of partition can be applied.

- **Fraudulent Partition:** There are grounds to re-open partition in case a coparcener has unfairly obtained an advantage in the distribution of property through exercising fraudulent behaviour upon other coparceners. Such behaviour may include misrepresenting worthless assets as those with value, or concealment of property by

the person exercising said fraudulent behaviour. The affected coparcener in furtherance has a right to claim the reopening of partition thereby.

- **Person in the womb:** Considering how the right to partition is retained by sons, grandsons and great-grandsons, in case a son has been conceived at the time of partition and born after, he too can claim his right to property as a coparcener. In case the family members attain knowledge of such pregnancy, the partition has to be delayed until his birth, or, his share to the property needs to be reserved. In hindsight, however, where no such reservation is made to the son in the womb, he can demand for re-opening of partition after birth through any external representation.
- **Existence of Adopted Son or Sons**: Section 12 of Hindu Adoption and Maintenance Act, 1956 prescribes the right of adopted sons to be coparcener to property at the time of partition. Birth of biological son after adoption does not take away the right of an adopted son and therefore, in case he does not get his share of the property after partition, he can claim re-opening of partition through any representation.
- **Coparcener disqualified:** In some cases, a coparcener is held un-entitled to his share at the time of participation due to certain disqualification of technical restraint, in which case, he can re-open partition once said disqualification ceases to exist upon him.
- **Absence of valid Coparcener:** In case a coparcener holding right to share in the property is absent at the time of partition, and no share is allotted in his name, he too has a right to ensure re-opening of partition.
- **Coparcener in Minority:** If, at the time of partition, a coparcener being a minor does not have his interests accounted for, he has the option of re-opening partition. There is no requirement for there to have been fraud, misrepresentation or undue influence for a minor coparcener to re-open partition, in case the partition itself is proven to be unfair to the minor's interests and opposing his personal benefit.
- **Addition of Property after Partition:** In case some property is mistakenly or deliberately left out, lost or seized at the time of partition, the partition can be re-opened in case such properties re-surface. However, it is not necessary to re-open partition for their distribution; in the sense that, if they can be viably distributed within coparceners without re-opening of partition, there is no necessity in disturbing the prior process

REUNION

In furtherance of re-opening of partition comes the reunion of a family; a state in which the particular family members resume their status as a joint-family which had been lost after partition. A reunion is the only way in which the joint-status of family can be re-established amongst family members. However, only those members of the family that originally had joint status in the property are eligible to reunite with each other.

The primary prerequisite for administering reunion is the intention of parties to reunite in the estate as well as a common interest. That also entails that simply choosing to live under one roof without the intention of regaining joint status in property shall not constitute a valid reunion. It is also necessary that the communication is communicated vividly, with each separate coparcener giving individual consent to the reunion.

Once a family reunites, the foremost effect of such reunion is the resolution of reunited members to their prior status as members of a joint family under Hindu Law. In consequence, the property divided to each individual coparcener is also pulled back as a collective property of the joint family wherein the members also regain their status of undivided coparceners. A complete restoration of the family and its members along with their status is triggered by the reunion, so as to make sure that there is no legal difference within the family from before prior partition.

It is essential that parties have the intention to reunite in estate and interest again. A reunion can be made only between the parties who actually partitioned at that time. A reunion can only take place between father and sons, brothers and between paternal uncle and nephew.

It is not required to have the existence of the similar property which were separated since the reunion is for love and affection of family members with the desire of living together.

Religious and Charitable Endowments under Hindu Law

An endowment is generally a dedication of property of any kind for particular purposes, particularly charitable purposes. One may say that it is the dedication of property for a well defined religious or charitable purpose or for the benefit of the public or some section of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

The legal literature on this subject is very scanty. The reason seems to be that religious endowments were regulated by their own customs. Law on this subject is mostly judge-made law.

Gifts for religious or charitable purposes had their source in charity and a desire to acquire religious merit. They fall into two divisions: Ishta and Purtta: the former meant sacrifices and sacrificial gifts and the latter meant charities. The former led to heaven while the latter to emancipation or Moksha. This shows that charity is placed on a higher footing than religious ceremonies and sacrifices.

The definition of endowments recognised by the courts since long includes the properties set apart or dedicated by gift or devise for the worship of some particular deity or for the maintenance of a religious or charitable institution, or for the benefit of the public or some section of the public in the advancement of religion, knowledge, commerce, health, safety or for any other object beneficial to the mankind.

Amongst the **religious and charitable endowments**, hospitals, schools, univerisaties alms houses (for distribution of food to Brahmanas or poor), establishment of idols etc., are included. According to Raghvachariar an endowment is referred to as the setting apart of property for religious and charitable purposes in which there is a Karta and a specific thing which can be ascertained.

A disposition in India to be a public trust must be made with the purpose of advancement of either religion, knowledge, commerce, health, safety or other objects beneficial to the mankind.

Endowment is dedication of property for purposes of religion or charity, having both the subject and object certain and capable of ascertainment. A trust in the sense in which the expression is used in English Law is unknown in the hindu system, pure and simple. Human piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind and for all purposes considered meritorious in the Hindu social and religious system. The hindu law recognises dedication for establishment of the image of a deity and for maintenance and worship thereof. 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 endowment

CREATION OF ENDOWMENTS

A Hindu who is of sound mind, and not a minor, may dispose of his property by gift or by will for religious and charitable purposes such as the establishment and worship of an idol, feeding Brahmins and the poor, performance of religious ceremonies like Shraddha, durga puja and lakshmi puja, and the endowments of a university or an hospital.

No list of what conduces to religious merit in Hindu law can be exhaustive. But when any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit though lacking in public benefit, it must be shown to have a Shastric basis.

Endowments for religious purposes may be made under the Hindu law, cither by executing strust in the technical sense, that is to say, as understood in the english law, by transferring properties to trustees in a trust for a deity, or there may be a dedication, which means the transfer of property to a deity according to the Hindu Custom whereby the dedicator divests himself of his property for religious purposes in favour of a deity or for other religious or charitable purposes. Having regard to the true nature of the act of dedication of property to a Hindu deity, no acceptance is required, or can possibly be required, of the deity in order to complete the dedication .

No writing is necessary is create an endowment unless the endowment is to be created by a will. It is also not necessary that a trust be created for that purpose.

No religious ceremony such as Sankalp or Samarpan is necessary. All that is essential is that firstly, property in respect of which the endowment is made must be designated with precision. Secondly, the object or purpose of dedication should he clearly indicated and thirdly, the founder must effectively divests himself of all beneficial interest in the endowed property

Essentials of a valid religious or charitable Endowment

In order that a proper and legally enforceable endowment may be created, it is essential that it must fulfill all the essential requirements.

(I) Object- object for creating the endowment must be a valid religious or charitable object. The object must be in consonance with the provisions of Hindu Law. It must be definite.

(II) Dedication must be unambiguous and bonafide.

(III) Capacity of the Founder - The founder or settler should be capable under Hindu Law of creating an endowment in respect of the particular purpose which is the subject matter of endowment.
(IV) Purpose must be clearly Indicated- The settler should indicate with sufficient precision the purpose of the endowment and the property in respect of which it is made, and the endowment must comply with the requirements of law as regards the form in which it is to be made.
(V) Endowment must not infringe the provisions of any other law- The endowment must not be opposed to the provisions of any law for the time being in force, an infringement of which makes it void or voidable in law.
(VI) Dedication of property must be complete.

Hindu Religious and Charitable Endowments Act, 1951.

The Object Of The Hindu Religious And Charitable Endowment Act
The religious freedom is guaranteed by the Constitution so the intervention of the Government in the administration of religious institution through the Statutory Boards may seen paradoxical. There was no mention of temples in Vedic Collection of Hymns and Prayers. When fire was lit oblations were said to be made in the place there at. In later Brahmana period temples were Constructed for accommodation of images of gods. Charities began to flourish and valuable endowments such as landed properties for pious purposes were well established in later period the cult of religious worship developed and Gifts for religious and Charitable purposes were impelled by the desire to acquire religious merit. So the Hindu temples are founded, endowed and maintained generally for the benefit of general Hindu public.

Different Kinds of Endowments

(a) Public or private;
(b) Real or apparent;
(c) Absolute or partial;
(d) Religious or charitable;
(e) Valid or invalid.

Public and Private Endowment:

In order to ascertain the nature of the endowment as to whether it is public or private the subsequent conduct of the settler and use of the evidence of the property set apart by the public at large are to be considered. In fact when a temple is thrown open for public at large for worship, a valid inference can be drawn that a public trust has been intended to have been created. Where the outsiders along with the members of the family of the settler take part in worship in celebration of festivals in a temple as in public temples, the state of affairs point out to the public nature of the endowment.

In contrast private endowment is that in which the public has no ingress, as an endowment for the worship of the family deity of the settler. Where the property is kept separate safely for the worship of family deity by family members only, with which the public has nothing to do, it is a private endowment.

UNIT – IV

Inheritance and Succession

1. Historical perspective of traditional Hindu Law relating to Inheritance
2. Hindu Succession Act, 1956
3. Stridhana- Woman's Property
4. Amendments to Hindu Succession Act
5. Gifts and Testamentary Succession
6. Wills

Hindu Succession Act, 1956

Introduction:

The **Hindu Succession Act 1956** deals with property rights and inheritance. This act gives a broad view of who can be given the property and the rights available for both males and females while acquiring a property.

Section 2 of **Hindu Succession Act 1956** talks about the applicability of this law. This law is applicable to anyone who is a Hindu, Jain, Buddhist, Sikh by religion. Any person who is not a Muslim, Christian, Parsi or Jew by religion unless otherwise proven by law that this

particular person does not come under the ambit of this law. This section is not applicable to the Schedule tribes.

Important changes brought by Hindu Succession Act, 1956

The Hindu Succession Act, 1956, brought about many important changes in the Hindu intestate succession of properties apart from introducing a uniform law of succession among Hindus, in the entire territory of India, These important changes can be enumerated as follows:—

(1) Changes in the Hindu joint family:

Firstly, under the pre-existent law in the Hindu joint family, a coparcener could not write in respect of his interest or property in the family. But Section 30 of the Hindu Succession Act enables a coparcener to write a will in respect of his property. Secondly, on the death of coparcener, the principle of survivorship was recognised. So that the property went to other coparceners. The widow or the daughter or daughter's daughter of the pre-deceased coparcener cannot inherit his share in the joint family property. But under section 6 of Hindu Succession Act the widow, daughter etc., can inherit his share and so the principle of survivorship is indirectly abolished.

(2) Abolition of Sapindas Relationship:

The past sapindas relationship was totally abolished. In that place love and affection theory has come into the existence and as such both males and females could inherit the property of the deceased. It is based on the principles of justice.

The old law discriminated a male and female heir in the case of inheritance. Females were not at all given the right of inheritance and were totally excluded. But a limited right namely; widows estate or limited estate was given to the widows. By that they could neither sell nor gift the property.

After the widows death, the property will not go to her daughter or near relationship but will revert back to the relations of the deceased husband. Now this is totally abolished and females are equally entitled with the males in the inheritance of property.

(3) Removal of Disqualifications:

The pre-existent law disqualified the following persons from inheritance:

(a) Lunatics, (b) Idiots, (c) Unchaste widows. Now such disqualifications are abolished.

(4) Separate Property of Male Propositus:

Under the old law, simultaneous succession of different types of heirs was not recognised, e.g., when son was living the daughter, mother, father, etc., should not inherit. Succession of different types of heirs is partly recognised. Now the class I heirs namely, son, daughter, widow and mother can inherit the properties of deceased simultaneously and in equal proportion.

But in the simultaneous succession it is partly because only class I heirs can simultaneously inherit the property. The class II heirs, Agnates and Cognates cannot inherit when Class I heirs are existing. The old preferential succession is recognised in the succession of classes. Agnates will inherit in the absence of class I and II heirs, etc.

(5) Changes in Illegitimate Sons

Under the pre-existing law, the right of succession of illegitimate son varied from school to school. It also depended on the caste to which the parents belonged. But now illegitimate son is recognised only with reference to mother and not at all connected with father's property.

So the position of illegitimate son is simplified and he cannot claim as heir at all. In the same way, the illegitimate son of the legitimate son cannot claim any right to the grand-father or grand-mother's property. But the legitimate son of illegitimate son can claim right to the grand-mother's property alone.

(6) Consanguine and Uterine Blood Relations:

The heir-ship under the Succession Act is restricted to blood relations only. But consanguinity was recognised in the old law. A Hindu female could not have two husbands in her life time. So the prior Hindu Law did not recognise uterine blood relationship. But in the present Act, uterine relations are also recognised.

But both must be legitimate or adopted, it should not be illegitimate. Consanguine means one husband having more wives and the relationship of children among themselves is called consanguinity. Uterine relationship means wife having more than one husband and relationship of children among themselves in such a case.

(7) Others changes:

(1) The female heirs except in Bombay took only life estate. Now all females take absolute estate.

(2) In the previous law, the benefit of doctrine of representation was given only to sons, grandsons and great grandsons of the pre-deceased sons. But now this doctrine of representation is extended to daughters, children of pre-deceased daughters, daughters of pre-deceased sons and daughter of a pre-deceased son of a pre-deceased son etc.

(3) The previous degree relationship namely five degrees on the mother's side and seven degrees on the father's side marked the limits of cognatic relationship. But now the above limits are removed for cognates.

(4) In the same way, 14th degree of samonadakas marked the limits of agnate's relationship. Now the limit is completely removed.

(5) The Act has abolished impartible estates except those created by statute.

(6) The Act does not apply to properties of a person who married under the provisions of the Special Marriage Act, 1954.

(7) The Act does not apply to Mitakshara coparcenary property. But when coparcener dies leaving female heirs mentioned in class I of the Act or male relative of the claim claiming through such female relative, the property of the ancestor is subjected to rules of inheritance under the Act and the coparcenership is abolished.

(8) The Act abolished the difference between male and female heirs.

(9) The Act entitles a male Hindu to dispose of heir's interest in Mitakshara coparcenary property by will.

Kinds of Property under Hindu Succession Act 1956

According to **Hindu Succession Act 1956** there are two kinds of property

1. **Ancestral Property**– This kind of property is passed down from by four generations of the male lineage and the property should be undivided during this time.
2. **Self-acquired Property**– These kind of properties are bought by an individual with his own earning and without the assistance of family funds. The property which is acquired through a will is also a self acquired property.

Dipo v. Wassan Singh & Others

A person who has to inherit property from his immediate paternal ancestors up to 3 lines, holds it in coparcenary and to other relations he holds it and is entitled to hold it, as his absolute property. Hence, the property inherited by a person from any other relation becomes his separate property.

The scope of the Hindu Succession Act 1956 covers the division of ancestral property in a Hindu joint family. In a Hindu Joint family there are members and co-parceners.

Members And Co-Parceners

The basic structure of any Hindu joint family comprises of the Karta or the head of the family, his wife, his son, his daughter, daughter-in-law, son-in law, grandson etc. All of them are members of the family but not co-parceners.

In Case of Males

If a male dies intestate, the property would go to-

1. Class I heirs- this class basically consists of the deceased's wife, son, daughter. They would have the very first claim on the property.
2. Class II heirs- in the absence of the class I heirs, the property can be claimed by the class II heirs which consist of the deceased's father, sibling, sibling's children, living children's children.
3. Class III heirs- In the absence of class I and class II heirs the property can pass down to class III heirs which are called as Agnates or the distant blood relatives of the male lineage
4. Class IV heirs- In the absence of the class I, class II and agnates the property can be claimed by Cognates or the distant blood relative of the female lineage.

5. Son

The expression ’son’ can include both a natural born son or adopted son but does not include a stepson or illegitimate child. In Kanagavalli v. Saroja AIR 2002 Mad 73, the appellants were the legal heir of one Natarajan. Natarajan was earlier married to the first respondent, the second respondent was the son and the third respondent was the mother of Natarajan. The first respondent obtained a decree of restitution of conjugal rights but still no reunion occurred between them. The first appellant claimed to have married Natarajan in 1976 and the appellants 2 to 5 were born through them. Natarajan died afterwards. The suit was filed for declaration that the appellants were the legal heirs of the said Natarajan along with respondents 1 to 3, and they were entitled to the amounts due from the Corporation where Natarajan worked. The Court held that a son born of a void or voidable marriage that is declared to be annulled by the Court, will be a legitimate child and would thus inherit the property of his father. A son has absolute interest in the property and his son cannot claim birthright in it. Therefore, ‘son’ does not include grandson, but does include a posthumous son.

Daughter

The term ‘daughter’ includes a natural or adopted daughter, but not a stepdaughter or illegitimate daughter. The daughter of a void or voidable marriage annulled by the Court would be a legitimate daughter and thus would be eligible to inherit the father’s property. The daughter’s marital status, financial position etc is of no consideration. The share of the daughter is equal to that of the son.

Widow

The widow gets a share that is equal to that of the son. If there exists more than one widow, they collectively take one share that is equal to the son’s share and divide it equally among themselves. This widow should have been of a valid marriage. In the case of Ramkali v. Mahila Shyamwati AIR 2000 MP 288, it was held that a woman who was in a voidable or void marriage, and that marriage was nullified by the Court on the death of the husband, would not be called his widow and would not have rights to succeed to his property.

If the widow of a predeceased son, widow of a predeceased son of a predeceased son or the widow of a brother has remarried, then she shall not be given the term of 'widow', and will not have the inheritance.

If no one from the Class I heirs takes the property, then Class II heirs fall in line to get the property. In Kalyan Kumar Bhattacharjee v. Pratibha Chakraborty AIR 2010 (NOC) 646 (Gau), the property fell into the share of the defendant brother named Ranjit, who was unmarried. However, he became traceless and the property was divided amongst two other brothers in equal shares. The plaintiff's brother called Jagadish then executed a will in favour of both the plaintiff and died afterwards. However, the defendants then asked them to vacate the land, contending that *inter alia* that the land has been purchased in the name of three brothers; namely Jagadish, Ranjit and Kalyan, the defendant number 1. It was held that when a Hindu male is unmarried and he dies, and is not survived by a Class I heir, the Class II heirs would get the property.

Similarly, when in heirs in Class III and IV are there, the property would only go to them if no one from the Class II is present.

Class III heirs

This consists of the agnates of the deceased. Class III heirs only inherit the property when none form the earlier classes gets the property.

An agnate is a person who is related to the intestate only through male relatives. An agnate can be a male or a female.

Rules of preference among agnates

- Each generation is referred to as a degree. The first degree is intestate.
- Degrees of ascent mean ancestral or upwards directions.
- Degrees of descent means in the descendants or downwards direction.
- Where an agnate has both ascent and descent degrees, each has to be considered separately.
- An agnate having descent degree will be preferred over the one having ascent degree.

- When two agnates have ascent and descent degrees, the one having lesser number of ascent degrees will be preferred.

Class IV heirs

A cognate (Class IV) is someone who was related to the intestate through mixed relatives, in terms of sex. For example, an intestate's paternal aunt's son is his cognate, but his paternal uncle's daughter will be an agnate. Therefore, to sum up it can be said that the property of the Hindu male devolves in the following manner:

In Case of Females

If a female dies intestate, the property goes to-

1. The very first claim of the property would go to her husband, son, daughter.
2. In case of their absence, the property would go to the heirs of the husband.
3. The property would pass down to the parents of the deceased in absence of the above mentioned claimants.
4. The fourth claimants of the property will be the heirs of the father.
5. The fifth claimant of the property will be the heirs of the mother.

In the case of any property being inherited by a female Hindu by her father or mother and there is no son or daughter of the deceased (including a child of predeceased son or daughter), then it shall devolve in favour of the heirs of the father.

Similarly, in the case of any property being inherited by a female Hindu by her husband or her father in law, and there is no son or daughter of the deceased (including the child of a predeceased son or daughter), it shall devolve in favour of the heirs of the husband.

Cases Which Solved This Confusion

1. The case of ***Prakash & others vs Phulavati &others***, which came in 2016, dealt with the above question that whether this law will have a retrospective effect or no. This case was headed by a two judges bench Justice Anil Dave and Justice A K Goel in the Supreme Court and they held that the rights under this amendment would be available to those daughters whose fathers were living on the date of enforcement of this

amendment. This has been declared as a landmark judgement for it held that only living daughters of living co-parceners are entitled to the property.

2. The second case regarding the same question came up in 2018. In the case of ***Danamma vs Amar***, the Supreme Court was headed by a two judges bench- Justice AK Sikri and Justice Ashok Bhushan, this time held that the rights under the 2005 amendment would be applicable to the daughter even if the father is not alive on the enforcement date of the amendment, thus making both the daughters and sons equally liable for the property and this right is given to both of them since birth.
3. Even though in 2018, the judgement was passed in favor of daughters having equal rights over the father's property, there were still some confusions and confusions on whether to follow the 2016 judgement or the 2018 one. Finally, in 2020 the case of ***Vineeta Sharma vs Rakesh Sharma*** put an end to all the speculations surrounding the applicability of this amendment. The earlier cases were headed by a two judge bench but in this case it was headed by a three judge bench and they were Justice Arun Mishra, Justice Abdul Nazeer and Justice M.R Shah. The Supreme Court in this case clearly said that daughters and sons have an equal liability over a property and that this right is given to them since birth and whether the father is alive or dead, it doesn't affect the right of the daughter.

Conclusion

The case of ***Vineeta Sharma vs Rakesh Sharma*** was declared a landmark case as it finally settled the confusions regarding property rights. The current status of the law is that both the son and daughter have an equal liability and right over the property irrespective of whether the father was alive in 2005 or not and there will be equal division of the property. This amendment was instrumental in bringing a change in society and women's right.

Stridhan:

As indicated by the name itself 'Stridhan' means that 'Dhan of the 'Stri'. Thus, it literally means the woman's property.

Stridhan according to Smrities:

Manu enumerates the six kinds of Stridhan:

(1) Gifts made before the nuptial fire;

(2) Gifts made at the bridal procession from the residence of her parents to that of her husband;

(3) Gifts made in token of love;

(4) Gifts made by the father;

(5) Gifts made by the mother;

(6) Gifts made by the brother.

The first kind of Stridhan has been explained by Katyayana as adhyagni, or gift made before the nuptial fire. The second kind of Stridhan has been explained by Katyayana as those made through affection by her father-in-law and mother.

The third kind of Stridhan has been explained by Katyayana as those made through affection by her father-in-law and mother- in-law (pritidatta) and those made at the time of her making obeisance at the feet of the elders (padvandanika).

All the commentators, however, have agreed that the above enumeration by Manu was not exhaustive. Vishnu added the following to that list:

(1) Gift made by a husband to his wife on supersession, that is, on the occasion of his taking another wife (adhive danika).

(2) Gifts made subsequent to the marriage.

(3) Sulka or the gratuity for which a girl is given in marriage or the bride’s price.

(4) Gifts from sons and relations.

The second kind of Stridhan has been explained by Katyayana as those made after marriage by the relatives of her parents and the husband (anwadheyaka).

Katyayana's definition of adhyagni gifts before the (nuptial fire) and that of adhyavahanika (gifts as the bridal possession), it appears, are wide enough to include gifts from strangers prior to coverture.

But he expressly excludes from the category of Stridhan, gifts made by strangers during coverture, as also property ac-quired by a woman during coverature by mechanical arts, which he as, will be subject to the husband's dominion. The words "husband's dominion" evidently indicated the gains of arts and gifts from strangers either during maidenhood or during widow-hood were not excluded from being Stridhan. According to him the rest is pronounced to be Stridhana.

Thus according to the texts, expression, "Stridhan" was not used in its etymological sense of "female's property" and its only gifts obtained by a woman from her relations and her ornaments and apparel which constitute her stridhana and the only sorts of gifts from strangers which come under that denomination are presents before the nuptial fire and those made at the bridal pro-cession. Bur gifts did not obtain from strangers at any other time nor do her acquisitions by labour and skill constitute her Stridhana.

Vijnaneshwar, the author of Mitaskhara, in his commentary says:

"That which was given by the father, by the mother, by the husband or by the brother; and that which was presented by the maternal uncles and the rest at the time of wedding before the nuptial fire; and a gift on a second marriage or gratuity on ac-count of supersession; and, as indicated by the word adya (and the rest) property obtained by.

(1) Inheritance (2) Purchase,(3) Position, (4) Seizure, e.g., adverse possession, (5) Finding,

Judicial trend towards Stridhan:

In Pratibha Rani v. Suraj Kumar , the Supreme Court observed that Pratibha Rani was tormented and denied stridhana by her in-laws. Pratibha Rani's parents had fulfilled the demands of her in-laws by giving gold ornaments, Rs 60,000 cash and other items to her husband's family. Few days after marriage, her in-laws started harassing her for dowry and

kicked her out of the house along with her two minor children without providing any money for their survival. She had lodged two complaints against her husband and in-laws under Section 125 of the Code of Criminal Procedure, 1973.

The lower court favored her in the judgment but the High court reversed the judgment. Later, the apex court gave the judgment in her favor. The Supreme Court said that the joint holding of a stridhana property by husband does not constitute any co-ownership. The Court further said that a woman can file a suit against her husband if he denies returning stridhana property under Section 14 of the Hindu Succession Act, 1956, as well as under Section 27 of the Hindu Marriage Act, 1955. The Pratibha Rani case is the only remarkable judgment which discusses the concept of stridhana and the applicability of Section 405 of the Indian Penal Code, 1860.

In the case of Bhai Sher Jang Singh v. Smt. Virinder Kaur , Punjab & Haryana High Court stated that if a woman claims property, ornaments, money, etc. which were given to her at the time of marriage, then the husband and his family members are bound to return back such property. If they deny to return back the property, then they will have to face strict punishment. The Court held that Bhai Sher Jang Singh and his family had committed an offense under Section 406 for committing criminal breach of trust as they had dishonestly misappropriated the ornaments which were the stridhana that Virinder had given to her husband for safe-keeping.

In Santosh v. Saarswathibai , the ambit of Section 14(1) of HSA was expanded to include not only the land which is in the possession of the Hindu female, but also the land over which she has the right to possess.

Conclusion:

The enactment of the Hindu Succession Act is a welcome step towards strengthening the property rights of Hindu women. As a part of this Act, women are given certain privileges that have been denying them for decades. It is also a colossal step in the defense of women's rights, as it has abolished a woman's disability to gain and keep land as its absolute owner. Section 14 of the Hindu Succession Act, 1956 has definitely been a safety guard for the women especially the Hindu women. It has provided women with those rights, which were denied to her for centuries.

This section removes the disability of a female to acquire and hold property as an absolute owner and to convert any estate already held by a woman on the date of commencement of this act as a limited owner, into an absolute estate. In case of her death intestate, she becomes a fresh stock of descent and the property devolves by succession on her own heirs.

Gifts

Introduction

Gifts consist in the relinquishment (without consideration) of one's own right (in property) and the creation of the right of another. A gift is completed only on the other's acceptance of the gift.

What property may be gifted?

- Separate or self-acquired property whether governed by Mitakshara or Dayabhaga.
- All property whether separate or joint under the Dayabhaga law all ancestral property in the hands of a sole surviving coparcener impartible property
- impartible property, unless there is special custom prohibiting its alienation or terms of the tenure prohibiting its alienation
- stridhana property of a female which is a woman's absolute property
- Small portions of property inherited by a widow

Movable property inherited or obtained by way of a share on partition by a widow under the Mayukha and

Small portions of coparcenary property in the hands of a father

A gift under Hindu law need not be in writing. However, a gift under the law is not valid unless it is accompanied by delivery of possession of the subject of the gift from the donor to the donee.

However where physical possession cannot be delivered, it is enough to validate a gift if the donor has done all that he could do to complete the gift so as to entitle the donee to obtain possession.

Capacity to make a gift

Every Hindu Male or Female, who is not a minor and is of sound mind, can dispose of his property by gift or Will. The donor must be a major within the meaning of Section 3 of the Majority Act; if he is not, he cannot make a gift. A coparcener of Hindu joint family cannot make a gift of his undivided interest without the consent of all the other coparceners. However, he can make a Will of such property

Capacity of the donee to acquire:

A donee must be a person in actual existence or in contemplation of law when the gift or bounty is to take effect. The donee may be a minor or an idiot or one incapable of inheriting due to some per some personal disability.

Reservation of life interest. –

A gift of property is not invalid because the donor reserves the usufruct of the property to himself for life.

Conditions restraining alienation or partition

Where property is given subject to a condition absolutely restraining the donee from alienating it, or it is given to two or more persons subject to a condition restraining them from restraining it, the condition is void, but the gift itself remains good.

Revocation of gift

A valid gift once maid cannot be revoked but a gift made with the intent to defeat or defraud creditors is voidable at the option of the creditors.

Testamentary Succession

Testamentary Succession means succession of property by a WILL or TESTAMENT. As per Hindu Law, any male or female can make a Will to transfer his or her property or assets to anyone. The Will is treated as valid and enforceable by law.

An important point to note here is that the transfer of property happens as per provisions mentioned in the Will and not as per the inheritance law. However, if the Will is

invalid or illegal then the transfer or devolution of property happens as per the law of inheritance. Alternatively, Testamentary succession is also referred to as right of inheritance.

Proof of Death

Death must be proved in order to permit inheritance; the executor must ever precisely the date and place of death to obtain confirmation, and must prove this if challenged under the Registration of Births, Deaths and Marriages Act 1965 an extract from the Register of deaths is sufficient evidence of the death, but is not conclusive proof.

Unworthy Heirs

An unworthy heir is a person who has killed another, from whom the killer would stand to receive a right of succession. The unworthy heir will not be able to inherit from the estate if they are proven guilty of either murder or culpable homicide in a court of law. The case of Re Cripeen concerned a husband who, after killing his wife, was set to inherit her legacy which he would in turn bequeath to his mistress. The wife's family naturally objected and took the case to court, where it was ruled that the husband would be said to predecease the wife. Consequently her estate fell into intestacy and her family then succeeded her. The same shall apply in cases where the accused has been convicted of culpable homicide, for in the case of Smith Petitioner a wife was convicted of the culpable homicide of her husband, from whose estate the court ruled she should not benefit.

Common Terms related to Testamentary Succession under Hindu Law

It is important to understand the frequently used terms that might sound complicated but are easy to interpret. They are:

- Will – A legal declaration created by a person expressing clear intention or wish with regards to how his or her property and assets Will be transferred after death.
- Testator – A person who creates his or her Will.
- Executor – A person appointed by the Testator for executing the Will.
- Administrator – A person appointed by the Court for executing the Will.
- Attestation of Will – It is the process of signing the Will by two witnesses to verify the signatures of the executant.

- Codicil – A legal document made by Testator and signed by two witnesses for making minor changes in the Will that has already been executed.

- Probate – It is a documentary evidence of the appointment of the Executor and establishes the validity of the Will.

- Letter of Administration – A certificate granted by the Court for appointing an Administrator of the Will.

Why is having a Will Important?
Each person wishes that his legal heirs stay a part of the cohesive family even after his or her death and that there are no fights over property matters. After all, fair division of property is a sensitive matter. In today's times, if it is done properly, it can make long lasting relationships and if done otherwise, it breaks relations forever.

It is for this purpose, making a fair Will comes very handy. The testator must clearly document his or her desires with respect to the assets that his legal heirs would carry out after his or her death. The Will must clearly state how the testator's property Will be transferred, to whom it Will be transferred, how much share of property Will be transferred to different heirs and so on.

Generally, a very common question arises here as to what happens if a person dies without leaving a Will behind? In such cases, the division and transfer of property happens by way of law. This is called intestate succession.

UNIT – V

Law relating to Hindu Minority and Guardianship: Kinds of Guardians; Duties & Powers of Guardians; A detailed study of Hindu Adoption and Maintenance Act, 1956; Maintenance: Traditional Rights and Rights under Hindu Adoption & Maintenance Act 1956.

HINDU MINORITY AND GUARDIANSHIP

The Hindu Minority and Guardianship Act were established in the year 1956 as part of the Hindu Code Bills. This act extends to the whole of India except the State of Jammu & Kashmir and applies to Hindus domiciled in our country. This act was launched to enhance the rules under Guardians and Wards Act, 1890. Hindu Minority and Guardianship act was introduced to modernise the Hindu legal tradition and to codify certain parts of the laws relating to minority and guardianship among Hindus. This act serves explicitly to define guardianship relationships between minors and adults, as well as between the people of all ages and their respective property.

In the Hindu Dharamshastras, not much has been said about the guardianship. This was due to the concept of joint families where a child without parents is taken care of by the head of the joint family. Thus no specific laws were required regarding the guardianship. In modern times the concept of guardianship has changed from the paternal power to the idea of protection and the Hindu Minority and Guardianship Act, 1956 codifies the laws regarding minority and guardianship with the welfare of the child at the core.

Under the Hindu Minority and Guardianship Act, 1956 a person who is a minor i.e. below the age of Eighteen years is incapable of taking care of himself or of handling his affairs and thus requires help, support and protection. Then, under such a situation a guardian has been appointed for the care of his body and his property.

HISTORICAL BACKGROUND OF GUARDIANSHIP

The traditional mindset of the Guardianship revolves around the patriarchal society, the father was considered the sole guardian of the person and property of the child. The authority of the father in every aspect of the child’s life, including his/her conduct, education, religion and maintenance, was considered absolute and even the courts refused to interfere with the same. Mothers did not have any authority over children, since mothers did not have independent legal status; their identities being forged with that of their husbands upon marriage. As divorce became possible and mothers began to have independent legal existence and residence, their claim, if not right, to have custody of the children began to be recognized by the courts.

In Hindu law the broad principle is recognized from the Regime of the kingship where it was said that king is the supreme guardian [parenspatrie] of all the minors present in the state1 . No other sage except Narada who has mentioned parents i.e. mother and father as the guardians . It seems to be that law of guardianship haven't developed due to the reason that in the earlier time the joint family concept is very much in notion and minors of the family are in the guardianship of the Karta of the family then after went to schools/asharams for studies they have their Gurus are the guardians of that time-period till then they get the education.

LEGAL FRAMEWORK OF THE GUARDIANSHIP IN INDIA

Guardianship and wards Act, 1890- The guardianship and wards act, 1890 was a secular act which is answerable to the major issues of the guardianship and custody and it provide provisions irrespective of the religion, it is applicable to all the citizens of India. The Act is a complete Code laying down the rights and obligations of the guardians, procedure for their removal and replacement, and remedies for misconduct by them. It is an umbrella legislation that supplements the personal laws governing guardianship issues under every religion9Even if the substantive law applied to a certain case is the personal law of the parties, the procedural law applicable is what is laid down in the Guardians and Wards Act, 1890.

Sec-9. Court having jurisdiction to entertain application .

- (1) if the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

If the application is with respect of the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in the place where he has property.

If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly on conveniently by any other District Court having jurisdiction.

GWAct, 1890 authorizes the court to appoint a guardian for the person or property or both of a minor, if it is satisfied that it is necessary for the '**welfare of the minor**". It provided as; -

Power of the Court to make orders as to guardianship12 - Where the Court is satisfied that it is for the welfare of a minor that an order should be made- Appointing a guardian of his person or property or both, or declaring a person to be such a guardian the Court may make an order accordingly.

An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

Where a guardian has been appointed by will or other instrument or appointed or declare by the Court, an order under this section appointing or declaring another person to be guardian in his stand shall not be made until the powers of the guardian appointed or declare as aforesaid have ceased under the provision of this Act.

GUARDIANSHIP UNDER HINDU LAW

The Dharmashastras did not deal with the law of guardianship. During the British regime the law of guardianship was developed by the courts. It came to be established that the father is the natural guardian of the children and after his death, mother is the natural guardian of the children and none else can be the natural guardian of minor children. Testamentary guardians were also introduced in Hindu law: It was also accepted that the supreme guardianship of the minor children vested in the State as parenspatrie and was exercised by the courts. The Hindu law of guardianship of minor children has been codified and reformed by the Hindu Minority and Guardianship Act, 1956.

Guardianship of the person : Minor

Children Under the Hindu Minority and Guardianship Act, 1956, S. 4(a), minor means a person who has not completed the age of eighteen years. A minor is considered to be a person who is physically and intellectually imperfect and immature and hence needs someone's protection. In the modern law of most countries the childhood is accorded protection in multifarious ways. Guardian is "a person having the care of the person of the minor or of his property or both person and property." It may be emphasized that in the modern law guardians exist essentially for the protection and care of the child and to look after its welfare. This is expressed by saying that welfare of the child is paramount consideration. Welfare includes both physical and moral well-being.

POWER OVER MINOR'S PROPERTY

In general, a guardian may do all acts that are in the interest of the minor. A third party may deal safely with the guardian in this respect. However, this excludes fraudulent, speculative, and unnecessary deals. Before this act, a natural and testamentary guardian had the power to alienate the minor's property if it is necessary as determined by SC in Hanuman Prasad v. BabooeeMukharjee 1856. However, this rule has been restricted through sec 8, which mandates courts permission before alienating the minor's interest in the minor's property. Also, a guardian does not have any right over the joint family interest of a minor.

LIABILITIES OF A GUARDIAN

since the legal position of a guardian is fiduciary, he is personally liable for breach of trust

- He is not entitled to any compensation unless explicitly specified in a will.

- A guardian cannot take possession of minor’s properties adversely.
- Must manage the affairs prudently.
- Liable to render all accounts.

If the minor, after attaining majority, discharges the guardian or reaches a settlement of account, the guardian’s liability comes to an end.

RIGHTS OF A GUARDIAN:

A guardian has a right to:-

* Represent the minor in litigations.

*Get compensation for legal expenses from minor’s property.

*Sue the minor after he attains majority to recover expenses.

*Refer matters to arbitration if it is in the best interest of the minor.

REMOVAL OF A GUARDIAN

Court has the power to remove any guardian in accordance to section 13.

*Ceases to be a Hindu.

*Becomes hermit or ascetic.

*Court can remove if it finds that it is not in the best interest of the child.

Welfare of the minor is of paramount importance (Sec 13)

- While appointing or declaring a guardian for a minor, the count shall take into account the welfare of the minor.
- No person shall have the right to guardianship by virtue of the provisions of this act or any law relating to the guardianship in marriage if the court believes that it is not in the interest of the minor.

Statutory provisions:

Section 1(2) provides that this Act's jurisdiction extends to all Hindus domiciled in and out of the motherland.

Section 2 of the Act clarified that it has not enacted to derogate the Guardians and Wards Act of 1890, whereas it is an extension of the same.

As per **Section 3**, this Act applicable to the wholesome Hindu community no matter whether the minor is a legitimate or illegitimate child of a Hindu parent. Withal, any person who converts or reconverts to the Hindu religion is also within the ambit of the Act's definition.

Section 6 elucidates the concept of the natural guardians (inclusive of both body and property) and excludes step-mother and step-father from its definition. It recognizes the biological father as a natural guardian for the legitimate child and after him, the biological mother; whereas, it admits the biological mother as a natural guardian for the illegitimate child, and after her, it passes to the biological father. If the child of both categories is under the age of 5, then the mother would be the natural guardian.

If the minor girl is married, her husband is authorized to be a natural guardian under this Act.

Guardians may be of the following types :

1. Natural guardians,
2. Testamentary guardians, and

3. Guardians appointed or declared by the court.

There are two other types of guardians, existing under Hindu law,

1. de facto guardians, and
2. guardians by affinity.

NATURAL GUARDIANS

In Hindu law only three persons are recognized as natural guardians father, mother and husband, Father. "Father is the natural guardian of his minor legitimate children, sons and daughters." Section 19 of the Guardians and Wards Act, 1890, lays down that a father cannot be deprived of the natural guardianship of his minor children unless he has been found unfit. Me effect of Lh1s provision has been considerably whittled down by judicial decisions and by Section 13 of the Hindu Minority and Guardianship Act which lays down that welfare of the minor is of paramount consideration and father's right of guardianship is subordinate to the welfare of the child.

The Act does not recognize the principle of joint guardians. The position of adopted children is at par with natural-born children. The mother is the natural guardian of the minor illegitimate children even if the father is alive. However, she is the natural guardian of her minor legitimate children only if the father is dead or otherwise is incapable of acting as guardian

Section 6 of Act provides that the natural guardian consists of the three types of person:-

1. **Father:**Afather is the natural guardian in a case of a boy or unmarried girl, firstly the father and later mother is the guardian of a minor. Provided that upto age of five year mother is generally the natural guardian of a child5 .InEssakkayalnadder v. Sreedharan Babu, the mother of the minor was dead, but the father was not residing with his children, he is still alive, has not ceased to be a Hindu or renounced the world and has not been declared unfit. This does not authorize any other person to assume the role of natural guardian and alienate the minor's property.
2. **Mother:** The mother is the guardian of the minor illegitimate boy and an illegitimate unmarried girl, even if the father is alive and after her, the father7 . If the mother ceases to be a Hindu, her right of natural guardianship remains the same. The position also remains the same in case of an adopted child and not a natural born child. In a case Jajabhai v.

Pathankhan8 , where a mother and father had fallen out and were living separately and the minor daughter was under the care and protection of her mother, the mother could be considered as the natural guardian of minor girl. In Gita Hariharan v. Reserve Bank of India9 , the Supreme Court has held that under certain circumstances, even when the father is alive mother can act as a natural guardian. The term 'after' used in Section 6(a) has been interpreted as 'in absence of' instead 'after the life-time'.

3. Husband: Husband is the guardian of his minor wife.

In Gita Hariharan v. Reserve Bank of India and Vandana Shiva v. Jayanta Bandhopadhaya, the Supreme Court has held that under certain circumstances, even when the father is alive mother can act as a natural guardian. The term 'after' used in Section 6(a) has been interpreted as 'in absence of' instead 'after the life-time'. -

Rights of guardian of person. -The natural guardian has the following rights in respect of minor children:

(a) Right to custody, .

(b) Right to determine the religion of children,

(c) Right to education,

(d) Right to control movement, and

(e) Right to reasonable chastisement

These rights are conferred on the guardians in the interest of the minor children and therefore of each- of these rights is subject to the welfare of the minor children. The natural guardians have also the obligation to maintain their minor children.

TESTAMENTARY GUARDIANS

When, during the British period, testamentary powers were conferred on Hindus, the testamentary guardians also came into existence. It was father's prerogative to appoint testamentary guardians. By appointing a testamentary guardian the father could exclude the mother from her natural guardianship of the children after his death. Under the Hindu Minority and Guardianship Act, 1956, testamentary power of appointing a guardian has now been conferred on both parents.' The father may appoint a testamentary guardian but if mother survives him, his testamentary appointment will be ineffective and the mother will be the natural guardian. If mother appoints testamentary guardian, her appointee will become the

testamentary guardian and father's appointment will continue to be ineffective. If mother does not appoint, father's appointee will become the guardian. It seems that a Hindu father cannot appoint a guardian. of his minor illegitimate children even when he is entitled to act as their natural. guardian, as S. 9(1) confers testamentary power on him in respect of legitimate children. In respect of illegitimate children, Section 9(4) confers such power on the mother alone.

Under Section 9, Hindu Minority and Guardianship Act, testamentary guardian can be appointed only by a will. The guardian of a minor girl will cease to be the guardian of her person on her marriage, and the guardianship cannot revive even if she becomes a widow while a minor. It is necessary for the testamentary guardian to accept 'the guardianship.

Powers

According to **Section 9 (5)**, a **Testamentary guardian has** indistinguishable power just as Natural Guardian and can exercise all the powers that were vested in the Natural Guardian subject to restrictions of Act and the Will. The powers are the same except that power of TG to deal with property is also subject to restrictions imposed by the Will. Since the powers of the TG are similar to that of NG, it is relevant to know Section 8 of the Act. He has the power to alienate the minor’s property only for the minor’s benefit. But, he has to seek the permission of the Court before doing so.

GUARDIANS APPOINTED BY THE COURT

The courts are empowered to appoint guardians under the Guardians and Wards Act, 1890. The High Courts also have inherent jurisdiction to appoint guardians but this power is exercised sparingly. The Hindu Minority and Guardianship Act is supplementary to and not in derogation to Guardians and Wards Act.

Under the Guardians and Wards Act, 1890, the jurisdiction is conferred on the District Court: The District Court may appoint or declare any person as the guardian whenever it considers it necessary in the welfare of the child.' In appointing ,,a" guardian, the court takes

into consideration various factors, including the age, sex, wishes of the parents and the personal law of the child. The welfare of the children is of paramount consideration.

The District Court has the power to appoint or declare a guardian in respect of the person as well as separate property of the minor. The chartered High Courts have inherent jurisdiction to appoint guardians of the- person as well as the property of minor children. This power extends to the undivided interest of a coparcener.
The guardian appointed by the court is known as certificated guardian. Powers of Certificated guardians. Powers of certificated guardians are controlled by the Guardians and Wards Act, 1890. There are a very few acts which he can perform without the prior permission of the court.

There are two other types of guardians, existing under Hindu law,

1. de facto guardians, and
2. guardians by affinity.

DE FACTO GUARDIAN
A de facto guardian is a person who takes continuous interest in the welfare of the minor's person or in the management and administration of his property without any authority of law. Hindu jurisprudence has all along recognized the principle that if liability is incurred by one on behalf of another in a case where it is justified, then the person, on whose behalf the liability is incurred or, at least, his property, is liable, notwithstanding the fact that no authorization was made for incurring the liability.'

De facto guardianship is a concept where past acts result in present status. The term literally means 'from that which has been done.'
the de facto guardian was recognised in hindu law as early as 1856. The privy council in hanuman pd.[4] said that 'under hindu law, the right of a bona fide incumbrancer, who has taken a de facto guardian a charge of land, created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not affected by the want of union of the de facto with the de jure title

The term 'de facto guardian' as such is not mentioned in any of the texts, but his existence has never been denied in hindu law. In sriramulu, kanta[3]. Said that hindu law tried to find a solution out of two difficult situations : one, when a hindu child has no legal guardian, there would be no one who would handle and manage his estate in law and thus without a guardian the child would not receive any income for his property and secondly, a person having no title could not be permitted to intermeddle with the child's estate so as to cause loss to him. The hindu law found a solution to this problem by according legal status to de facto guardians.

Powers

Section 11 of the Hindu Minority and Guardianship Act, 1956 prohibits a *de facto* guardian to deal with the minor's property. According to Section 11 of the Act, "no person shall be entitled to dispose of, or deal with, the property of Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor." Now it has been well settled that *de facto* guardian is not equipped with the right to assume debt, or to gift a minor's property, or to make any reference to arbitration.

GUARDIANSHIP BY AFFINITY

In pre-1956 Hindu law there existed a guardian called guardian by affinity. The guardian by affinity is the guardian of a minor widow. Mayne said that "the husband's relation, if there exists any, within the degree of sapinda, are the guardians of a minor widow in preference to her father and his relations."' The judicial. pronouncements have also been to the same effect. The guardianship by affinity was taken to its logical end by the High Court in Paras Ram v. State . In this case the father-in-law of a minor widow forcibly took away the widow from her mother's house and married her for money to an unsuitable person against her wishes. The question before the court was whether the father-in-law was guilty of removing the girl forcibly. The Allahabad High Court held that he was not, since he was the lawful guardian of the widow.

POWERS OF THE GUARDIANS

Section 8(1) of the Hindu Minority and Guardianship Act, 1956 vests in the natural guardian the power to take all the actions that are necessary or reasonable and proper for the benefit of the minor or take any action to realise, benefit or protect minor's estate. A minor's estate means a minor's definite property and not his fluctuating indefinite interest in the joint Hindu family estate. Section 8 is in *parimateria* with sec 29 of the Guardianship and Wards Act, 1890.

POWERS OF NATURAL GUARDIAN.- Section 8

(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,-

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining the permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular-

(a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof.

(b) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and

(c) an appeal lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

(6) In this section, "Court" means the city civil court or a district court or a court empowered under section 4A of the Guardians and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

LIABILITIES OF THE GUARDIANS

1. The Guardian in carrying out the above mentioned powers can in no case bind the minor by a personal covenant. This means that though the guardian may impose a financial liability on the minor's estate yet cannot make him personally liable for the losses or the liabilities that arise later due to such contract.
2. Sub section 2 of Section 8 read with section 5 of the Hindu Minority and Guardianship act, 1956 supersedes the power vested in a natural minor to dispose of the immovable property of a Hindu minor. It is laid down explicitly that a natural guardian without the previous permission of the court-

- Can not Mortgage, or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor, or

- Can not Lease any part of such property for a term more than that of five years or for a term more than that of one year after the date from the minor's majority.

It has been expressly mentioned in the Section that no court shall grant permission in aforementioned conditions unless it is proven that there is a case of necessity or an evident advantage of the minor. Section 31 of the Guardians and Wards Act, 1890, shall apply to and in respect of an application for obtaining the permission of the court. Only a civil court or a district court or a court empowered under section 4A of the Guardians and Wards Act, 1890 within whose jurisdiction the property is situated or a part of the property is situated shall have the power to adjudicate upon the application. Where the property is being acquired by the guardian for the benefit of the minor, no permission of the court is necessary[4].

3. As per Sec 8(3) of the Hindu Minority and Guardianship Act, 1956, any disposal of the immovable property by a natural guardian contravening the conditions is voidable at the instance of the minor or any other person claiming under him. Where the property is sold by the guardian for the benefit of the minor even then can a minor challenge the transaction only after attaining the age of majority if it was done without the prior permission of the court[5].
4. The limitations are not only enforced on the natural guardians but also on the de facto guardians as per section 11 of the Hindu Minority and Guardianship Act, 1956. Strictly put, though a de facto guardian is nowhere defined in the law yet it is a person who hasn't been appointed by the court or through a testament or naturally but is a person who takes care of the guardian out of love and affection.
5. Section 12 of the Hindu Minority and Guardianship Act, 1956 has prohibited an appointment of a guardian for the minor who has undivided interest in the Hindu property which is being taken care of by an adult member of the family. Only the high court if it deems fit based on the facts of the case has the power to appoint a guardian for the same.
6. Sec 13 of the Act acts as a general principle of over every other provision mentioned in the act and states that all the decisions and all the appointments that are to be taken are to be done with the sole intention that is securing the welfare of the child.

RIGHTS OF A GUARDIAN

- Under Section 33 of the Hindu Minority and Guardianship Act the guardian of the ward in charge shall be entitled to such allowances for the care and pains in the execution of his duties.
- Under Section 13 of the Hindu Minority and Guardianship Act, a guardian must look after the health and education of the ward.
- Under Section 33A, the execution of the will by the guardian to his ward shall not take place without the guardian.
- Under Section 13, the property of the ward is to be handled carefully as a man of ordinary prudence would deal with.

Hindu Adoption and Maintenance Act, 1956

Adotion

Introduction

According to Hindu mythology, through a son one conquers the world, through a grandson one obtains the immortality, and through the great-grandson one ascends to the highest heaven. The desire to have a son among the Hindus is too much. It has been prevalent since Vedic period,' Those parents who had no son used to adopt a son. But the son could be adopted by the husband only as he was to inherit his father's property. Later on the widow had a right, under certain situations, to adopt a son, which was always deemed to be adoption to her deceased husband. This was known as 'doctrine of relation back'. Necessary implications were that the adoption of the son related back to the date of death of the husband. It created number of problems. Now the law of adoptions has been simplified after the commencement of the Hindu Adoptions and Maintenance Act, 1956.

The codified law has brought about several changes in the old law pertaining to adoptions among Hindus. The Act provides for adoption of boys as well as of girls. The unmarried woman can also adopt for herself A widow too has been extended the right to adopt in her own capacity a son or a daughter.

The main advantage of adoption is that a childless person can make somebody else's child as his own. It is not just to have a son but the adopted son must bear a reflection of the

natural son. In fact, adoption means transplantation of the child from the family of his birth to the adoptive family. The adoptive child severs his ties from the family of his birth and becomes a regular member of the family in which the child has been adopted.

Once the child is adopted, he can neither be given further in adoption nor can be reverted back to the family of his birth. The child is also prohibited to divorce his adoptive parents.

Capacity of a male Hindu to take in adoption:

Any male Hindu who is of sound mind and is not a minor (has completed the age of 18 years) has the capacity to take a son or a daughter in adoption. Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Where a decree of judicial separation has been passed between husband and wife, the consent of the wife would be necessary for the husband to adopt a child, because the decree of judicial separation did not bring the marriage to an end. In case of void marriage no consent of the wife is needed as she is not a lawllilly wedded wife and as such does not enjoy any legal status and rights. The consent can be implied or express. When the wife has participated in the ceremony of adoption without any objection then her consent shall be implied.

Capacity of a female Hindu to take in adoption:

Any female Hindu, (a) who is of sound mind, (b) who is not a minor, and (c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead / or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take a son or a daughter in adoption. Smt. Laliiha Ubhayakar v. Union of India,deals with the rights of a married woman to adopt a child. She challenged the vires of section 8 of the Act as it violates her right to equality under Art. 14 of the constitution of India. According to her section 8 of the Act permits the unmarried, divorcee and a widow to adopt a child for her whereas it does not permit the married lady to adopt. Thus she has been discriminated. The Court while rejecting her plea, made a distinction between adoption by individuals and adoption by family

and held that the classification was justified and reasonable. Thus, within the permissible limits of Art. 14 of the Constitution. The Court observed that under section 7 the husband also needs consent of his wife before adopting a child. Therefore, the adoption made by the married

spouses is adoption to the family and not to individual spouses. The law is made in such a way that permitting the wife to adopt separately without consent of husband or vice- versa does not destroy the harmony of the family. Who can give the child in adoption? No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption. If the father is alive, unless he is disqualified, he alone shall have the right to give the child in adoption but such right shall not be exercised save with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. The guardian can give the child in adoption when both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.

Persons who may be adopted:

No person shall be capable of being taken into adoption unless, (i) he or she is a Hindu; (ii) he or she has not already been adopted; (iii) he or she has not been married unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption; (iv) he or she has not completed the age of fifteen years unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.It is clear from the forgoing provisions mentioned at (iii) and (iv) that these conditions are not absolute prohibitions. These conditions can be relaxed if it is established that there is a custom or usage governing the parties to adopt a married child or a child who is more than 15 years of age.s

Other essential conditions for valid adoption:

a) If the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son’s son or son’s son’s son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

b) If the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son’s daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;

According to clauses (a) and (b) above a person has a right to adopt ‘a son’ and/or ‘a daughter’, meaning thereby that one cannot adopt more than one daughter and/or one son.

In Sandhya Supriya Kulkarni v. Union of India,’‘ an important issue was taken up. In the instant case it was demanded that the family should be allowed to adopt more than one female child. It was contended that under Ancient Hindu Law, the parents had a right to adopt only one male child. The Amending Act extended that right to adoption of a female child also.' What is the harm if the condition of adoption of only one child is relaxed particularly in case of adoption of abandoned children who are with orphanage or social institution? It is further contended, that if restriction is removed, such children will get parentage and home in adequate numbers. There is no risk involved in such adoptions as such adoptions are made under the supervision of the Court. This minimizes the probability of abuse or misuse. The Court refused to go into the merit of the contentions except observing, “we appreciate the urge and earnest desire in the appeal, but it revolves round the domain of legislative policy and its competence.” The Court further observed that the persons who are keen to serve the interests of child can have guardianship of a child under the Guardian and Wards Act without there being any restrictions on number.

The Court when requested to examine its constitutionality did not agree to it and observed that the Act with its mythological and secular mission has stood the test of time for around four decades and has conveniently withstood the assaults as attempted fromtime to time. Thus, it refrained from examining validity of the impugned provisions on the touchstone of Articles 14 and 21 of the Constitution of India.

c) In case of adoption of opposite sex, there must be age difference of 21 years. The adoptive father or mother must be elder by 21 years.

d) The same child may not be adopted simultaneously by two or more persons;

e) The child to be adopted must be actually “given and taken"’ in adoption by the parents or guardian concerned or under their authority ‘WA intent to transfer the child" from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption.

In Khagembam Sadhu alias Rabei Singh v. Khangembam Ibohal Singh the Imhal Bench of the Gauhati High Court had the occasion to examine the proof of adoption. In the present case it was established that the ‘giving and taking’ of adoption was performed at the house of adoptive father and that on same day ceremony of sacred thread and afternoon meals to clan members were also performed according to Manipur custom. The statement of the natural mother of adopted son, that adoptive father asked her to give her son in adoption and that she consented to said proposal, was accepted by the Court.

In Doctor Nahak v. Bhika Nahali the validity of the adoption was challenged. In this case the natural father pleaded that he had given his son in adoption whereas the person who was alleged to have taken the child in adoption denied it. The Orissa High Court held that normally, evidence of natural father who is to give is of great importance. Where, however, the person who is stated to have taken in adoption denies the adoption, clear evidence of giving and taking is necessary to be adduced to corroborate the natural father and clear circumstances which would lead to an inference that denial by the person to have taken in adoption is not correct, are to be brought to record. In this case, natural mother who is alive has not been examined. Trial Court has found that person who is related to both parties has not been examined. Explanation that he was suffering from gout was not accepted to be cogent since he could have been examined in Commission. Priest who was examined did not know the basic requirement of a Brahmin; other witnesses were also disbelieved for cogent evidence. Trial Court who had occasion to see the witnesses and assess their demeanor has disbelieved them for cogent reasons. Thus the High Court was also satisfied that the witnesses are not acceptable; therefore, no ‘giving and taking’has taken place. Where the ‘adoptive’ mother had been permitted by the adoptive son to live with him it was not considered to be sufficient proof of adoption.

In Prafulla Bala Mukherjee v. Satish Chandra Mukherjee the 'adoptive' mother sought a decree for declaration of absolute right, title and interest in respect of the property built by the adopted son and also a decree for perpetual injunction restraining his relatives from interfering with occupation and possession of the property. The Court held that mere fact that an allegedly adopted son allowed his 'adoptive' mother and her family to live in his house was no proof of adoption. On the contrary there were several facts to disprove adoption like the adopted son considering his natural mother as his mother till his own death, making her his nominee in the insurance policy, provident fond etc., performing the shradha ceremony of the real father and on his own death his shradha ceremony being performed by his brother.

I A child can be either adopted by the adoptive mother herself or by any person authorised by her through special power of attorney. All the formalities of giving and taking were performed between the natural parents of the child and the adoptive mother's \ attorney. The Punjab and Haryana High Court held it to be a valid adoption.

Registered deeds of adoption if produced in a Court:

Section 16 of the Act, lays down that whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.' In this connection it is earnestly desire that the registration should be made compulsory in every adoption. Thus without registered deed the adoption should be treated invalid. It will reduce litigation as well as check fake adoption claims.

The Effect of adoption:

According to section 12 of the Act, an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family; provided (a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth; (b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligation to maintain

relatives in the family of his or her birth; (c) the adopted child shall not divest any person of any estate which is vested in him or her before the adoption.

a) Coparcenary property rights of the child in the family of birth:

There appears to be some controversy about the property rights of the adopted child in the family of his birth, especially in the case of coparcenai^ property. There is difference of opinion among different writers as well as judicial approach adopted by different High Courts. The sole question for determination is whether the share of a coparcener in the Joint Hindu Family property governed by Mitakshara Law will 'vest' in that child or not. If it vests in him then he has lien on that property even after adoption otherwise the result will be different. According to one learned author' the undivided interest of a person in a Mitakshara coparcenary property will not be divested by adoption but will continue to vest in him even after adoption. Not only the self acquired property, property inherited by him from other persons and property held as a sole surviving coparcener in a IvHtakshara property, but also even the undivided interest of a male child in Mitakshara coparcenary would pass with him as if he had separated from the coparcenary. Such a view is expressed in Mayne's, 'Hindu Law and Usage' also.On the contrary Mulla^® opines that the proviso (b) relates only to such property, which was absolutely 'vested' in the adopted son prior to his adoption and not his undetermined and fluctuating interest as a coparcener in his natural family.

The Andhra Pradesh High Court in Yarlagadda Nayudcmma v. Govememnt of Andhra Pradesh,has held, "notwithstanding theadoption, a person in Mitakshara family has got a vested right even in the undividedproperty of his natural family which on adoption he continues to have a right over it do so. But there is an exception to this rule. Wlien anvone adopts a child, the parents who have eiven their child in adoption can enter into an aereetnent contrary to such a right so as to restrict the adoptive parent's riaht to dispose of their property. Such an agreement will be valid as per the provisions of section 13 of the Act.

Can money be paid in consideration of adoption?

There is complete prohibition on any kind of payment to be made in consideration of adoption. It is not sale of the child rather the child is given in adoption out of love and affection. Giving or taking of money in consideration of adoption has been completely prohibited. Any one who contravenes this provision shall be punishable with imprisonment,

which may extend to six months, or with fine or with both. The prosecution, under the Act. can be instituted only with the prior permission of the State government.

Case Laws:

Ankush Narayan v. Janabai

Court held that on adoption by a widow, the adopted son becomes the son of the deceased adoptive father and the position under the old Hindu law as regards ties in the adoptive family is not changed.

Guradas v. Rasaranjan

Adoption is made when the actual giving and taking had taken place and not when the religious ceremony is performed like Datta Homam. For a valid adoption, it would be necessary to bring on records that there has been an actual giving and taking ceremony.

Conclusion:

Person adopting has to carry it according to law, in order to avoid any complications. The limitations and important provisions are discussed in detail under the Act.