BALLB (H) SYLLABUS

Family Law – II

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UNIT-I

Joint Hindu Family

Concept of Hindu 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 that 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.

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 ***Yagnapurusholasji* v. *Vaishya***,[1] 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 named their Aryan brethren 'Hindus'. Dr. Radhakrishnan has also observed that the Hindu civilisation is so called since its 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.

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[1] AIR 1966 SC 1119

To Whom Hindu Law Applies:

Hindu law applies to all the persons who are Hindus but there is still no precise definition of the term Hindu either in any statute or in any judicial pronouncement. However, the question as to who is a Hindu can be understood in a different way. It can be taken as to whom the Hindu law applies.

Hindu law applies to the following categories of persons:-

1. Any person who is a Hindu. Jain, Sikh or Buddhist;
2. Any person who is born of Hindu Parents;
3. Any person who is not a Muslim, Christian, Parsi or Jew and who is not governed by any other law.

On the basis of the description of persons as above it can be said that following persons are Hindus:-

1. Hindu by Religion: Following two types of persons fall in this category:

i) **Followers of Hindu Religion:** Any person who follows Hindu religion either by practising it or by professing it is a Hindu. An attempt to define Hindu in terms of religion was made by the Supreme Court in ***Shastri* v. *Muldas,***[2]. The Court through Gajendragadkar J. said that "beneath the diversity of philosophic thoughts, concepts and ideas expressed by Hindu philosophers who started different philosophical schools lie certain broad concepts which can be treated as basic. The first among these basic concepts is the acceptance of the Vedas as the highest authority in religious and philosophical matters. This concept necessarily implies that all the systems claim to have drawn their principles from a common reservoir of thought enshrined in the Vedas. The other basic concept which is common to the system of Hindu philosophy is that all of them accept this view of the great world rhythm; vast periods of creation, maintenance and dissolution follow each other in endless succession. It may also be said that all the systems of Hindu philosophy believe in re-birth and pre-existence". This judgment of the Supreme Court gives a good working elaboration of Hindu religion in positive terms. But it is equally true that any definition of the 'Hindu' in terms of religion will always be inadequate.

[2] AIR 1966 SC 1119.

ii) Converts and Reconverts to Hinduism: Under the codified Hindu law any person converted to Hinduism, Jainism, Buddhism or Sikhism is a Hindu. The Supreme Court in ***Perumal* v. *Poonuswami***,[3] observed that a person may be a Hindu by birth or by conversion. No formal ceremony of purification or expiation is necessary to effectuate conversion. But at the same time a mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him to a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism. But, a bona fide intention to be converted to the Hindu faith accompanied by conduct unequivocally expressing that intention may be a sufficient evidence of conversion.

A person who is a reconvert to Hinduism, Jainism, Buddhism or Sikhism is also a Hindu. A person who ceases to be a Hindu by converting to a non-Hindu religion will, again, become Hindu if he reconverts to any of the four religions of Hindu.

2. Hindu by Birth: Following persons are deemed to be Hindus by birth:

I. When both the parents are Hindu: Children born of Hindu parents are Hindus. Such a child may be legitimate or illegitimate. It is also immaterial that such a child does or does not profess, practice or has faith in the religion of its parents.

II. When one Parent is Hindu: When one of the parents of a child is Hindu and he is brought up as a member of Hindu family, he is a Hindu. It is clear by the explanation (b) of Section 2(1) of Hindu Marriage Act, 1955 that child's religion is not necessarily that of the father. F or instance a child is born of Hindu mother and Muslim father. The child is brought up as a Hindu. Subsequently, mother converts to Islam. Nonetheless the child is Hindu. In Ram Prasad v. Dahin Bibi,[4] is a good example on the point.

3. Persons who are not Muslims, Christians, Parsis or Jews: The codified Hindu law lays down that a person who is not a Muslim, Christian, Parsi or Jew is governed by Hindu law, unless it is proved that Hindu law is not applicable to such a person. Those persons who are atheists or who believe in all faiths or in conglomeration of faiths may fall under this class. Under the codified Hindu law such persons will be Hindus for the purpose.

[3] AIR 1971 SC 2352.
[4] AIR 1924 Pat. 420.

Therefore, the modern Hindu law is a body of rules of personal law applicable to Hindus as well as several non-Hindu communities. In the modern Hindu law all those persons to whom Hindu law applies are called “Hindus”.

A Hindu joint family consists of the common ancestor and all his lineal male descendants upon any generation together with the wife or wives (or widows) and unmarried daughters of the common ancestor and of the lineal male descendants. The existence of the common ancestor is necessary for bringing a joint family into existence, for its continuance common ancestor is not a necessity.

According to Sir Dinshah Mulla, “A joint Hindu family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. A daughter ceases to be a member of her father's family on marriage, and becomes a member of her husband's family.

A joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily joint not only in estate, but also in food and worship. The existence of joint estate is not an essential requisite to constitute a joint family and a family, which does not own any property, may nevertheless be joint. Where there is joint estate, and the members of the family become separate in estate, the family ceases to be joint. Mere severance in food and worship does not operate as a separation.

The property of a joint family does not cease to be joint family property belonging to any such family merely because the family is represented by a single male member who possesses rights which an absolute owner of a property may possess. It may even consist of two females members. There must be at least two members to constitute Joint Hindu family. A single male or female cannot make a Hindu joint family even if the assets are purely ancestral.

In ***Narenderanath* v. *Commissioner of Wealth Tax***, the Supreme Court held that the expression 'Hindu undivided family' in the wealth Tax Act used in the sense in which a Hindu joint family is understood in the personal law of Hindus and a joint family may consist of a single male member and his wife and daughters and there is nothing in the scheme of the Wealth Tax Act to suggest that a Hindu undivided family as assessable unit must consist of a least two male members.

In ***Commissioner of Income Tax* v. *Gomedalli Lakshminarayan*** there was a joint family consisting of a father and his wife and a son and his wife, the son being the present assessee. On the death of father the Question raised is whether the assessee is to be assessed as an individual

or as a member of the joint Hindu family, It was held that the son's right over the property is not absolute because two females in the family has right of maintenance in the property, therefore the income of the assessee should be taxed as the income of a Hindu undivided family.

In ***Anant* v. *Shankar*** it was held that on the death of a sole surviving coparcener, a Hindu Joint Family is not finally terminated so long as it is possible in nature or law to add a male member to it. Thus there can also be a joint family where there are widows only.

Schools of Hindu Law

The codified Hindu law lays down uniform law for all Hindus where, there is no scope for existence of schools and these have relevance only in respect of the uncodified areas of Hindu Law. Now we shall discuss the property status of Hindu women under these schools. The Schools of Hindu law emerged with the emergence of the era of commentaries and digests. The commentators put their own gloss on the ancient texts, and their authorities having been received in one and rejected in another part of India, the schools with conflicting doctrines arose. There are two main schools of Hindu law:

(1) Mitakshara[5]

(2) Dayabhaga[6]

These two Schools do not see eye to eye with each other on several points, e.g. the constitution of the coparcenary, the time when the a Hindu gets interest in the joint family property, the time when the coparcenary comes into existence, the nature and the extent of interest that each coparcener has in the joint property, the power he has in respect of disposing of his own interest in it, the definition and mode of the partition of the joint family, etc.

Mitakshara School:

The *Mitakshara* School owes its name to *Vijneshwara's* commentary on the *Yajnavalkya* Smriti by the name of "Mitakshara". Mitakshara is commentary on *Yajnavalkya Smiriti* by *Vijananeshwara*[7] as told to him by his Guru *Visvarupa*[8] and written in the later half of the

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[5] *Mitakshara* school owes its name to *Vijneshwara's* commentary on the *Yajnavalkya Samriti* by name of *Yajnavalkya Samriti* but it is also a digest of practically all the leading *Samriti's* and deals with all titles of Hindu Law. Kane places the date of composition of the Mitakshara between A.D. 1100-1200. [Kane, P.V., *History of Dharamastra* 2nd ed. 609 & 709 (1968)].

[6] The *Dayabhaga* owes its origin to *Jimutavahana.,* Kane places the date the date of composition of the *Dayabhaga* between 1090-1130 A.D. [P.V. Kane, *History of Dharamshastra* 609 & 709 (1981)].

[7] An Ascetic also bearing the name of Vijnana Yogin of Kalyanpura in the present Hyderabad state. He was contemporary of King Vikramaditya 1076-1127 AD.

[8] Rajkumar Sarvadhikari, (*Tagore Law Lectures, 1880),* The Principles of Hindu law of Inheritance 331 (1882).

eleventh century. It is also called Riju Mitakshara Tika or Riju Sam Mitakshara or *ParMitakshara*. *Vijananeshwara*, in the introduction to his commentary, mentions that the Code of *Yajnavalkya* was explained to him by his Guru Visvarupa in a hard and diffused language and the same has been abridged by him in a simple and concise style. This school prevails in the whole of India except Bengal and Assam.[9]

The *Mitakshara* School bases its law of inheritance on the *principle of propinquity.* It means that one who is nearer in blood relationship succeeds. The principle, when applied, would mean that, for instance, sons and daughters would succeed to the property equally and simultaneously as they are equally near to their deceased parent. But the *Mitakshara* did not give full effect to the principle, and limited it by two subsidiary rules:

(a) Exclusion of females from inheritance, and

(b) Preference of agnates over cognates.

In *Mitakshara* law property is divided into two classes' unobstructed heritage or *apratibandh daya* and obstructed heritage or *sapratibandh daya.* The property in which the son, grandson and great grandson had a birthright was called unobstructed heritage, which means that without any obstruction the male issue had a right by birth. This was also called the doctrine of son's right by birth in joint family property where each son on his birth acquired an equal interest with his father in the joint family property.[10] On the other hand the property in which, the right accrued not by birth but on the death of the last owner without leaving male issue was called obstructed heritage.[11] The unobstructed heritage devolved by the rule of survivorship, the obstructed heritage by succession.

Sub-divisions of *Mitakshara School*: The *Mitakshara* School is sub-divided into four minor schools:

a) Benaras School: It covers practically the whole of Northern India except Punjab where the *Mitakshara* law has, on certain points been considerably modified by custom. If nothing is known about their origin, Hindus residing in the Districts of Madhya Pradesh will be governed by the Benaras School. If the origin is known to be from north

[9] The *Mitakshara* is not merely a running commentary on the *Yajnavalkya Smriti* but it is also a digest of practically all the leading *Smrities,* and deals with all titles of Hindu law.

[10] This doctrine is no longer applicable as now by virtue of the Amendment of 2005 both son and daughter acquire an equal interest by birth in the coparcenary property in the Mitakshara joint family.

[11] It was called obstructed heritage, because the accrual of the right to it was obstructed by the existence of the owner.

or east, and not from Maharashtra or Gujarat, then also the Benaras School will be applicable to them.

b) **Mithila School:** It prevails in Tirhut and certain districts in the northern part of Bihar.

c) **Bombay School:** It covers western India including the whole of the old Presidency of Bombay, now Maharashtra as also the Berar.

d) **Dravida School:** It covers Southern India including the whole of the old presidency of Madras.

e) These sub-schools differ between themselves in some matters of detail relating particularly to adoption and inheritance. All these sub-schools acknowledge the supreme authority of the *Mitakshara*.

Dayabhaga School:

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

Under the *Dayabhaga* School, the distinction between unobstructed and obstructed heritage does not exist as the principle of son's birth right is not recognized and all properties devolve by succession on the all properties devolve by succession on the demise of the father. So long the father is alive, he is the master of all properties whether ancestral or self acquired. *Dayabhaga* coparcenary comes into existence for the first time on the death of the father. When sons inherit their father's property, they constitute a coparcenary. And if son dies leaving behind a widow or daughter without a son, then she will succeed and become a coparcener. Thus under *Dayabhaga* school a coparcenary could consist of males as well as females. The only difference between a male and a female coparcener was that the property in the hands of a female coparcener was her limited estate and after her death the property passed not to the heirs, but to the next heir of the male from whom she inherited.

The peculiarity of schools of Hindu law is that if a Hindu governed by a school migrates to another religion (where different school has jurisdiction), he will continue to be governed by his own school, unless he gives up his school and adopts the law of the place where he has settled. In the modern Hindu law, schools have relevance only in respect of the uncodified Hindu law; they have lost all their relevance in regard to the codified Hindu law.[12] Another important aspect of Hindu law is that a person will be governed by custom if he is able to establish a custom applicable to him, even though such a custom is in derogation to Hindu law. Although the codified Hindu law overrides all rules and customs of Hindu law, yet such has been the impact of custom that in certain areas custom has been expressly saved.[13]

Distinction Between Mitakshara And Dayabhaga Schools

The distinguishing features of the two principal schools of Hindu law, i.e., *Mitakshara* and *Dayabhaga* may be summarized as follows: A Joint Hindu family under the *Dayabhaga* is, like a *Mitakshara* family, normally joint in food, worship and estate. In both systems, the property of the joint family may consist of ancestral property, joint acquisitions and of self-acquisitions thrown into the common stock. In fact, whatever be the school of Hindu law by which a person is governed, the basic concept of a Hindu joint family in the sense of who can be its members is just the same. *Mitakshara* and *Dayabhaga* Schools thus remain the primary Schools of law and differ on the following basic aspects:

A. Foundation of Coparcenary: According to the *Mitakshara* law, the foundation of a coparcenary is first laid on the birth of a son. Thus, if a Hindu governed by the *Mitakshara* law has a son born to him, the father and the son at once become coparceners.

According to the *Dayabhaga* law, the foundation of a coparcenary is laid on the death of father. So long as the father is alive, there is no coparcenary in the strict sense of the word between him and his male issue. It is only on his death leaving two or more male issues that a coparcenary is first formed.

B. Inheritance: The doctrine of *sapinda* relationship is insisted upon by the *Mitakshara* whereby community of blood is to be preferred to community in offering of religious oblations and which is the governing factor whereby under the *Mitakshara* law, the right to inherit arises.

[12] Paras Diwan, *Family Law* 11 (2012).
[13] Paras Diwan, *Modern Hindu Law* 56 (2012).

Under the *Dayabhaga*, the right to inherit arises from spiritual efficiency, i.e., the capacity for conferring spiritual benefit on the names of paternal and maternal ancestors.

C. Incidents of Joint family: According to the *Mitakshara* law, each son acquires at his birth an equal interest with his father, and on the death of the father, the son takes the property, not as his heir but by survivorship. According to the *Dayabhaga* School, the son's rights arise for the first time on the father's death by which he takes such of the property as is left by the father, whether separate or ancestral, as heir and not by survivorship. Under the *Mitakshara* law, there is a presumption that until the contrary is proved, the joint family continues to be joint. There is a very great difference in the legal positions of the members of the *Mitakshara* and *Dayabhaga* joint families. The right of a *Mitakshara* coparcener is like that of a joint-tenant whose interest, until partition, is undefined and passes by survivorship to the other coparcener, except when he leaves male issue. The right of a *Dayabhaga* coparcener is that of a tenant-in-common.[14]

Accordingly, under the *Dayabhaga* law, where a family consists of the father, son and grandsons, the father is the absolute owner even of the property that has devolved on him from his father and of its income. None of the sons can interfere with the father's title to or control over the family property or his enjoyment of its income. Thus, though the father and sons may be described as a family, there is little significance in describing such a family as an 'undivided family'. Accordingly, after the death of a *Dayabhaga* father, his successors may live as a Hindu joint family; they merely own the inherited property as joint property, that is to say, as tenants-in-common but do not form a joint family. A joint family amongst brother, under the *Dayabhaga* School of law, is a creation not of law but of a desire to live jointly. The income in *Mitakshara* family belongs to all the members as a group and no member is entitled to claim absolute right in respect thereof. According to *Jimutavahana,* his wife or sons or daughters had no ownership in his property during his lifetime for "sons have not ownership while the father is alive and free from defect." Ownership of wealth is however, vested in the heirs "by the death of their father," when they become co-heirs and can claim partition. It is on this basis that *"Dayabhaga"* (partition of heritage) has been expounded by *Jimutavahana*. According to him, "since any one coparcener is proprietor of his own wealth, partition at the choice even of a single person is hence deducible." The heritage does not, therefore, become the joint property of the heirs, or the

[14] *CWT* v. *Gouri Shankar Bhai* (1968) 68 ITR 345 (Cal).

joint family, on the demise of the last owner, but becomes the fractional property of the heirs in well defined shares.[15]

As a corollary of this doctrine, negating the son's right by birth, is another peculiar doctrine of the Bengal school, that of what is called the 'fractional ownership' of the heirs, contrasted with the doctrine of 'aggregate ownership' expounded by all the other Schools: That is why "partition" in *Dayabhaga* is defined as an act of particularising ownership and is not the Act of fixing diverse ownerships on particular parts of an aggregate of properties as in *Mitakshara*.

This is why *Mitakshara* is designated as the school of "aggregate ownership" while *Dayabhaga* is known as the school of "fractional ownership."[16]

Right to partition: According to *Dayabhaga* law, sons do not acquire any interest by birth in the ancestral property and they cannot demand a partition of such property from the father as they can do under the *Mitakshara* law where they take interest in property by birth.

Share in property: The essence of a coparcenary under the *Mitakshara* law is unity of ownership but under the *Dayabhaga* law it is unity of possession. Every coparcener takes a defined share in the property, and he is the owner of that share. That share is defined immediately the inheritance falls in. It does not fluctuate with births and deaths in the family. Even before partition, any coparcener can say that he is entitled to particular share, one-third or one-fourth.[17]

Alienation of Property: Until the passing of the Hindu Succession Act, 1956, no member of a *Mitakshara* family was entitled to dispose of his interest in the Hindu joint family property by will, the power has now been granted by Section-30 of that Act. If the property is alienated by the Karta of Hindu joint family without any legal necessity or for the benefit of the minors, it is only voidable and not void.[18]

Under the modern Hindu law the difference between the schools is no longer tenable and we have one uniform law of succession for all Hindus, to whatever school or sub-school they may belong.

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[15] This concept of fractional ownership has been stated as follows by Krishna Kamal Bhattacharya in *"Law Relating to the Joint Hindu Family"* with reference to the doctrine of negation of the son's right by birth.

[16] Gopalchandra Sarkar Sastri, *Hindu Law* 465 (1998).

[17] *CIT* v. *Balai Chandra Paul* (1976) 105 ITR 666 (Cal).

[18] *R.C. Malphani* v. *C.I.T.* (1994) 2 GLR 392 (Gau).

In *Ceylon- Attorney-General of Ceylon v. A. R. Arunachalam Chettiar* case a father and his son constituted a joint family governed by Mitakshara School of Hindu Law. 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 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 son.

In *Gowli Buddanna v. Commissioner of Income-Tax*, Mysore a family consisting of father, his wife, his two unmarried daughters and his adopted son. After the death of father question arises whether the sole male surviving coparcener of the Hindu joint family, his widowed mother and sisters constitute a Hindu undivided family within the meaning of the Income tax Act? In this case it was held by the court property of a joint family does not cease to belong to the family merely because the family is represented by a single coparcener who possesses rights which an owner of property may possess.

The property which yielded the income originally belonged to a Hindu undivided family.

In *Moro Vishvanath v. Ganesh Vithal* plaintiffs and defendants are descendants of one Udhav. The defendants are all fourth in descent from him. The plaintiffs, however are, some fifth, and others sixth in descent from him. The question, however, whether, assuming them to be undivided, the plaintiffs are entitled to sue at all for a partition according to Hindu Law, is one of considerable importance and difficulty. It was urged that Plaintiffs cannot claim from the defendants any partition of property descended from that common ancestor. It was held that upon a consideration of a the authorities cited, it seems to me that it would be difficult to uphold the appellants' contention that a partition could not, in any case be demanded by descendants of a common ancestor, more than four degrees removed, of property originally descended from him.

Suppose a coparcenary consisted originally of A, B, C, D, E, F, G and H, with A as the common ancestor. Suppose A dies first, then B, then C, then D, and then E, and that G has then a son I, and H has a son J and J has a son K. On E's death the coparcenary will consist of F,G,H,I,J and K. Suppose that G,H and J die one after another , and the only survivors of the joint family are F,I and K. Are I and K coparceners with F? Yes, though I is fifth in descent from A, and K is sixth in descent from A. The reason is that either of them can demand a partition of the family property from Here the coparcenary consists of three Collaterals, namely, F,I and K.

The essence of a coparcenary under Mitakshara law is 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. His interest is a fluctuating interest, capable of being enlarged by deaths in the family, and liable to be diminished by births in family. It is only on partition that he becomes entitled to 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 summarized the position and observed that the coparcenary property is held in collective ownership by all the coparceners in a quasi-corporate capacity. The incidents of coparcenary are:

1 The lineal male descendants of a person upto 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 and

6 the interest of a deceased member passes on his death to the surviving coparceners.

Every coparcener and every other member of the joint family has a right of maintenance out of the joint family property. The right of maintenance subsists through the life of the member so long as family remains joint. No female can be a coparcener under Mitakshara law. Even wife, though she is entitled to maintenance.

Difference between Joint Hindu Family and Coparcener

1 In order to constitute a Joint Hindu family the existence of any kind of property is not required whereas in Coparcenary there exists a ancestral property.

2 Joint Hindu families consist of male and female members of a family whereas in Coparcenary no female can be a coparcener.

3 Coparcenars are members of the Joint Hindu Family whereas all the members of Joint Hindu family are not Coparcenars.

Dayabhaga School on Coparcenar and Joint Hindu Family:

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 such 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 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 the Dayabhaga law. The father can dispose of 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 coparcenar takes a defined share in the property, and he is owner of that share. It does not fluctuate with birth and deaths in family.

b. Formation and Incident under the coparcenary property under Dayabhaga and Mitakshara Coparcenary - The system of copartionary

Formation of Mitakshara coparcenary - A single person cannot form a coparcenary. There should be at least two male members to constitute it. Like a Hindu joint family, the presence of a senior most male member is a must to start a coparcenary. A minimum of two members are required to start and to continue a coparcenary. Moreover, the relation of father and son is essential for starting a coparcenary. For example, a Hindu male obtains a share at a time of partition from his father and then gets married. Till the son is born, he is the sole male in this family, but he alone will not form a coparcenary. On the birth of his son, a coparcenary comprising of him and his son, will come into existence. When this son gets married, and a son is born to him, the coparcenary will comprise the father F, his son S, and his grandson SS.

SS’S

When a coparcenary is started, the senior most male member, with his son, that is, lineal male descendant, till four generations (inclusive of him) of male line will form a coparcenary. If there is a lineal male descendant in the fifth generation, he will be the member of the joint family, but will not be a coparcener as he is removed from the senior most male member by more than four generations.

When all the coparceners die, leaving behind only one of them, the surviving coparcener is called the sole surviving coparcener. As a minimum of two male members are required to form a coparcenary, a sole surviving coparcener cannot form a coparcenary all by him.

Why is coparcenary limited? The coparcenary is limited to three generations of lineal male decadence of the last holder of the property owner. According to the tenets of Hinduism, only descendants up to three generations can offer spiritual ministrations to the common ancestor. Besides, only males can be coparceners because the females invariably leave the father's house and assume domestic duties as they enter in the husband's home.

Unmarried women, until 1956 only had the right of maintenance from the joint property, which included only the marriage expenses. The 1937 legislation allowed a widow to move into the shoes of her deceased husband and inherit his share. However, she does NOT become a coparcenary to this joint property.

Doctrine of revertioners: Hindu Succession Act, 1956: - for the first time, the widow got full rights in her husband's property S. 14 of the Act 2005 Act -daughters, by birth, got coparcenary rights.

Women as coparcenary: Under Mitakshara coparcenary, women cannot be coparceners. A wife, under Hindu law, has a right of maintenance out of her husband's property. Yet she is not a coparcener with him. Even a widow succeeding to her deceased husband's share in the joint family, under the Hindu Women's (right to property) Act, 1937, is not a coparcenary.

Unity of possession and community of interest - One of the basic features of coparcenary is unity of possession, and community of interest. All the coparceners jointly own the coparcenary property and till a partition takes place, and their shares are specifically demarcated, no one can claim ownership over any specific item of the coparcenary property. The proceeds of undivided family are enjoyed by its members as till a partition takes place, they hold everything jointly. Coparcenary property suggests ownership by one group collectively, and enjoyment and possession of it by not only this group exclusively, but by the joint family members who are outside this group.

Doctrine of survivorship: The shares of the coparceners are not specific and are subject to change with the births and deaths of the coparceners, in the family. Under the traditional or the classical law, on the death of the coparcener in a joint family, his interest in the family property is immediately taken by those coparceners who survive him, and thus, he leaves nothing behind

out of his interest in the coparcenary property for his female dependants. This phenomenon is called the doctrine of survivorship. On birth, he takes an interest, enjoys it during his life time, but leaves nothing for his female dependants on his death. In Dayabhaga system, one is entitled to succeed the property after the death of the male holder. Till then, he is just an heir.

Notional Partition: The 1956 Act brought some changes in the coparcener system. Notional partition was taken into consideration to compute and demarcate the shares. i.e. Father and 2 sons 1/3rd each, though not specified as to what the specific exact division is.

Commencement of coparcenary: One of the primary differences between Mitakshara and Dayabhaga Law is the commencement or the starting of coparcenary itself. Under the Mitakshara law, the starting point of the coparcenary is the birth of the son in the family of a person, who after inheriting the property from his father, or paternal grandfather, or paternal great-grandfather or obtaining property on partition hold it as a sole surviving coparcener. For example, in a coparcenary consisting of a father F, and his two sons A and B, A demands a partition, takes his share and then gets married, when a son is born to him, he will form a coparcenary with his son. Thus, the birth of a son is the starting point or reviving point of Mitakshara coparcenary.

In complete contrast to it, under the Dayabhaga Law, the father so long as he is alive, holds the property as a sole or exclusive owner of it. On his death, if he is survived by two or more sons, they inherit the property, and form a coparcenary. It is the death of the father that becomes the starting point of the formation of coparcenary, under the Dayabhaga Law.

Notional Partition – It was generally felt that radical reform was required in Mitakshara Law of coparcenary and that where one of the coparceners died, it was necessary that in respect of his undivided interest in the coparcenary property, there should be equal distribution of that share between his male and female heirs, and particularly between his son and daughter. The Hindu Women's (Right to Property) Act, 1937 conferred new rights on the widows of coparceners.

The initial part of section 6 of the 1956 Act does not interfere with the special rights of those who are members of Mitakshara coparcenary, except to the extent that it seems to ensure the female heirs and daughter's son, specified in Class I of the schedule, a share in the interest of a coparcener in the event of his death by introducing the concept of a notional partition immediately before his death, and carving out his share in the coparcenary property, as of that date. The section proceeds first by making provision for the retention of the right of survivorship and then engrafts on that rule the important qualification enacted by the provision. The proviso

operates only where the deceased has left surviving him a daughter's son, or any female heir specified in Class I of the schedule.

Illustrations – A and his son B are members of a Mitakshara coparcenary. A dies intestate. Surviving him is his only son B. His undivided interest in the coparcenary property will devolve upon B by survivorship as clearly envisaged in the initial part of the section and not by succession.

A and his sons B and C are members of a Mitakshara coparcenary. A dies intestate in 1958. Surviving him is his widow A1 and his two sons. B and C continue to be members of the joint family. A's undivided interest in the coparcenery property will not devolve by survivorship upon B and C, but will devolve by succession upon A1, B, and C.

The amending act of 2005 is an attempt to remove the discrimination as contained in the amended section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu mitakshara coparcenery property as the sons have. Simultaneously, section 23 of the Act, as disentitles the female heir to ask for partition in respect of dwelling house wholly occupied by a joint family, until a male heir chooses to divide their respective shares therein, has been amended by the amending Act of 2005. As a result, the disabilities of female heirs were removed. This great step and is the product of 174th report of the Law Commission of India.

If P dies, leaving behind a mother M, and two sons A and B, and three daughters, E, F, G, how would the property devolve? - 1/6th each. If P dies, leaving behind a mother M, and a son S, and two daughters B and D, how would the property devolve – 1/4th each? P dies, leaving behind a widow W, and his mother M, and his two sons, A and B. – 1/4th each. P dies, leaving behind his mother M, and his two widows A and B, and a son S.- 1/3rd, 1/6th, 1/6th, and 1/3rd resp. P dies, leaving behind a son A and a daughter B of a pre-deceased SS, and two sons C, E and a daughter F of a predeceased daughter D. Triple succession. P dies, leaving behind his two widows A and B, his mother M, two widows C and D and a son S of a pre-deceased son and two daughters E and F and a son G of a predeceased daughter.

Under the old Hindu law, conversion by a Hindu to another religion was a disqualification, which was removed by the Caste Disabilities Removal Act, 1850. Under the Act, conversion does not disqualify an heir from inheriting the property of the intestate, but descendants of a convert are disqualified from inheriting the intestate.

Thus, the children of the convert and descendants of the children are disqualified, but if at the time of death of the intestate, any one of them is a Hindu, he is not disqualified. Succession to the property of a convert is regulated by the personal law applicable to the convert after his conversion. The provision of S. 26 may be explained by some illustrations:

An intestate dies leaving behind two sons A and B, and a grandson SS, from a pre-deceased son, who had converted to Islam before SS was born to him. SS is disqualified, and the entire property is inherited by A and B.

P had three sons A, B, and C. C converted to Christianity on 1.1.1979. P died on 1.1.1982. C will get the property (CDRA) P had three sons, A, B and C. A son R was born to C on 1.1.1976. On 1.1.1978, C converted to Islam. On 1.1.1979, after his conversion, S, a daughter was born to him. C died on 1.1.1980. P dies on 1.3.1982.

Agnates – A person is said to be an agnate of another if the two are related by blood, or adoption only through males. S. 8 of the Hindu Succession Act, 1956 does not give the list of agnates, or state the order in which they are entitled to succeed, but S. 12 of the HSA lays down certain rules of preference, which are determinative of order of succession among agnates, and S. 13 lays down certain rules for determining that order by computation of degrees, both of ascent and descent. In accordance with the rules laid down in S. 12, agnates and cognates may conveniently be divided into the following subcategories or grades:

Agnates: Agnates who are descendants – They are related to the intestate by no degree of ascent. Such, for instance, are son's son's son's son, and son's son's son's daughter. Agnates who are ascendants – They are related to the intestate only by degrees of ascent and no degrees of descent. Such, for instance, are father's father's father and father's father's mother.

Agnates who are collaterals – They are related to the intestate by degrees, both of ascent and descent, such, for instance, are father's brother's son, and father's brother's daughter.

Cognates – A person is said to be a cognate of another if the two are related by blood or adoption, but not wholly through males. They may be related through one or more females. Thus, a mother's brother's son and brother's daughter's daughter are cognates. The three categories of cognates are:

Cognates who are descendants – Such, for instance are son's daughter's son's son, and daughter's son's son's son.

Cognates who are ascendants – Such for instance, are father's mother's father, and mother's father's father.

Cognates who are collaterals – They are related to the intestate by degrees, both of ascent and descent. Such, for instance, are Father's sister's son and Mother's brother's son.

Computation of degrees – Application of the rules of preference governing order of succession laid down in S. 12 involves computation of the degrees of relationship between the intestate and his agnates or cognates. That relationship is to be reckoned from the intestate to the heir in terms of degrees with the propositus (intestate) as the starting point. There is no rule of discrimination or preference between male and female heirs, and both, male and female relatives by blood or adoption are treated equally. The computation of degrees of ascent or descent is to be so made that it is inclusive of the intestate. The relationship must be reckoned from the propositus to the heir on terms of degrees with the propositus as the terminus aquo (S. 13(ii). The other rule is that every generation constitutes a degree, either ascending or descending (S. 13(iii).

Rules of preference – The order of succession among agnates or cognates is governed by three rules of preference, laid down in S. 12, which are common to both the categories of heirs. In order to determine which of the two or more claimants in the category of agnates or of cognates, recourse must be taken to rule 1 and 2, laid down in S. 12, and initially to rule 1. When one competing heir is not entitled to be preferred to the other under rule 1 or 2, they take simultaneously, under Rule 3.

Rule 1 – This rule is pivotal and enacts that, of two heirs, the one who has fewer or no degrees of ascent is preferred. Illustration – If the two competing heirs are two collateral agnates, that is, brother's son's daughter, (father's son's son's daughter), and b) paternal uncle's son (father's father's son's son). The former, who has only 2 degrees of ascent, is to be preferred to the latter that has three degrees of ascent.

Rule 2 – This rule enacts that where the number of degrees of ascent is the same, the one who has fewer or no degrees of descent is preferred. Illustration – The competing heirs are two collateral agnates, a) brother's son's daughter (father's son's son's daughter), and b) brother's son's son's daughter (father's son's son's son's daughter). Again, the former is to be preferred,

because, in spite of having two degrees of ascent, each, the former has only three degrees of descent compared to the latter's .

Rule 3 – This rule enacts that where neither heir is entitled to be preferred, under rule 1 or two, they take simultaneously. Illustration – The competing heirs are two agnates, a) son's son's son's son, and b) son's son's son's daughter. There are no degrees of ascent, and the number of degrees of descent is the same in case of both, and both stand in the same degree of descent. Therefore, neither heir is entitled to be preferred.

Illustration 2 – The competing heirs are two cognates, a) daughter's son's son, and b) son's daughter's son. The position is similar, to that of illustration 1 and they take simultaneously.

Property of a female Hindu to be her absolute property (S. 14 of HSA, 1956) prior to the coming into force of this Act, a woman's ownership of property was hedged in by certain delimitations on her right of disposal and also on her testamentary power in respect of that property. The restrictions imposed by Hindu Law on the proprietary rights of a woman depended on her status as a maiden, as a married woman, and as a widow. The rule laid down in Subsection 1 has very wide and extensive application, and the act overrides the old law on the subject of Stridhana in respect of all property possessed by a female, whether acquired by her before or after the commencement of the Act, and this section declares that all such property shall be held by her as full owner. The Act confers full heritable capacity on the female heir, and this section dispenses with the traditional limitations on the powers of a female Hindu to hold and transmit property.

The word acquired in subsection 1 is to be given the widest possible meaning, and the interpretation of the expression 'possessed', in the initial part of the section appears to have been deliberately used by the legislature. The Supreme Court expressed, in the context of property, possessed by a female Hindu, "obviously mean that the property must be in possession of the female concerned at the date of the commencement of the Act". The possession might have the either actual or constructive or in any form recognized by law.

The word 'possessed' is used in this section in a broad sense, and as pointed out by the Supreme Court, it means "the state of owing or having in one's hand all power". It did not mean actual, physical possession or personal occupation of the property by the female, but maybe possession in law.

Inheritance, how to be allotted among sharers (Hanafi law)

The sharers receive their respective shares according to the following rules:

Father – When there is a child or child of a son, how low so ever, the father takes 1/6th. But, where there is a child, or child of a son, how low so ever, the father inherits as a residue.

True Grandfather (from the father's side, i.e. father's father) – Grandfather can never take any share where there is father , but where there is no father , but there is a child, or child of a son, how low so ever, the true grandfather takes 1/6th.

Husband – takes 1/4th of his wife's estate, where there are children, or child of a son, how low so ever, and a moiety, that is, half when there are none of the above relations.

Widow– The widow takes 1/8th of her husband's estate, where there is a child, or child of a son HLS, and a fourth where there are none. In case of two or more wives, the share is not increased. The wives divide the share equally amongst themselves.

Mother – Mother, when co-existing with the child, or the propositus, or a child of a son HLS, or two or more brothers or sisters, whether full, consanguine or uterine, takes 1/6th. Where there are no children, nor sons' children, and only one brother or sister, the mother will take one third with the widow,

True grandmother – Grandmothers, both maternal and paternal can never take any share of the property, when there is a mother nor can paternal grandmothers inherit when there is a father, or nearer true-grandmother, either paternal or maternal, or an intermediate true-grandfather. The share of a maternal grandmother is one sixth, and the same share belongs to the paternal grandmother. The share is not increased in case of two or more true grandmothers.

Daughter – When there is no son, and there is only one daughter, she takes a moiety (half of the property as a legal share). Where there is no son, and two or more daughters, they together take 2/3rd of property. If a daughter co-exists with a son, she inherits as a residuary, the son getting twice than that of the daughter.

Son's daughter – Where only one and no child or son's son or other lineal male descendant, she gets half. B) When two or more, and no child or son's sons, or other lineal male descendants, she takes two-third. C) When coexisting with one daughter and no son, or son's son, or other lineal male descendant, she gets one-sixth.

Uterine brother - When two or more, they take one-third provided there is no child or child of a son, HLS, or father, or true grandfather Uterine sister – The uterine sister takes, like the uterine brother. Full sister, where only one and no child, child of a son HLS or father, or true grandfather, or daughter or son's daughter, or full brother, she takes half, but when two or more, they jointly take two third of the inheritance. With the full brother, she becomes a residuary.

Manu Smriti – Manu's law (not written by him, but an anonymous person). Yagnavalkya Narada (Nepali saint, not the one who said 'narayana narayana'). Therefore, mitakshara was a commentary written on Yagnavalkya, which became the law in the whole of India, except Bengal, parts of Bihar, and Orissa. Dayabhaga – Digest on Hindu Law, written by Saint Jimut Vahan. Coparcenary property is never inherited, but always goes by doctrine of survivorship. Survivorship – In a coparcenary, whoever survives, takes the property. Testamentary disposition of the coparcenary property was not allowed by the classical law. Survivorship cannot be applied to separate property, or property after partition. Anything acquired with the help of joint family funds takes the character of joint family.

Property. Illustration – A person uses joint family funds to improve upon his personal property. The latter assumes the character of joint family, if the funds were not taken with the intention of a loan.

Hindu Gains of Learning Act, 1930: If a person is educated out of joint family property, his salary is separate property (before this Act, there was a lot of confusion over the issue, and the court on one occasion, even held that the salary is joint property).

The first legislative inroad in the classical concept of coparcenary came in 1937. This enactment was to improve the rights of those who became members of a joint family by marriage. It was found out that even though women were entitled to maintenance out of the coparcenary property, it was seen that the surviving coparceners were quick in taking the property, but did not provide maintenance. In order to deal with this problem, the legislature came up with the H W Rt to property Act, saying that the widow would step into the shoes of the deceased coparcener, and hold that property till their death. This was only for those who entered the family by marriage (and not daughters). This implied that the application of doctrine of survivorship was put on hold and postponed as long as the widows were alive (or remarried).

Hindu Succession Act, 1956 – Under this Act, several inroads were made into the classical concept of coparcenary. In case the coparcener wanted to make a testamentary disposition of his

share, he was allowed to do so. Before this Act, a coparcener had to ask for a partition before he could testamentary dispose off his share. Therefore, the undivided share could not be disposed off before the partition. S. 30 of the HSA provided for such disposition. If any member died as part of Mitakshara undivided coparcenary, his share in the undivided property would go by intestate succession under the act, and not by survivorship, if he left behind any female heirs, specified in Class I of the schedule. Laws of inheritance would apply to such property, and not survivorship.

In Kerala, the entire concept of joint family was abolished in 1975-76.

In Andhra Pradesh, unmarried daughters were introduced as coparceners, in 1985.

In Tamil Nadu, an identical Act was passed in 1989.

Maharashtra and Tamil Nadu followed suit in 1994.

Hindu Succession (Amendment) Act, 2005 – Daughters made coparceners.

No application of doctrine of survivorship for Hindu Male Coparceners. Survivorship has expressly been retained for female coparceners. Therefore, if a female coparcener died, it was ensured that the property would not go to her husband, but back to the coparceners in her father's home.

In classical law, at the time of partition, the women who had entered the family, by marriage were entitled to get an equal share. However, this was the case only in the three sub-schools of Mitakshara, i.e. Benares, Mithila, and Bombay. In the Dravida School, this was not allowed.

Each of them takes the property as their separate property. Therefore, if in a family of Father, Mother, and three sons, in case of partition, father and mother [2] will take 1/5th each as their separate property.

Indian Succession Act, 1925:-

Originally passed in 1865, and consolidated in 1925.

Majority of the Christian Population (except Goa, Daman & Diu etc.) All those persons who marry under SMA, and the property of the issue of such marriage, except to Hindus after 1976 (after *Indira Gandhi v. Maneka Gandhi) 1976* – Two Hindus marrying under SMA, succession to their issues, shall NOT be governed by the ISA. ISA is based on Roman and English principles. If a man or a woman dies, the scheme does not change, i.e. the sex of the intestate is irrelevant. No recognition of joint family property; only separate property is recognized. No discrimination b/w agnates and cognates. The following order of preference is followed.

(i) Father.

(ii) Mother, Brother, Sister.

(iii)Kindred – grandparents and their children up to the 2nd level.

No difference b/w half blood, full-blood and uterine relations. However, illegitimate children are not recognized (S. 100).

General Comment – In case of succession, one has to see from the perspective of the deceased to see which law will apply, and not from the point of view of the heir.

MUSLIM LAW – Residuaries – Muslim Law Class 2 Agnatic heirs (residuaries or asabat) – Agnatic heirs in preference is generally used to the misleading term 'residuaries'. Residue and 'residuary' gives an impression that what is left of the property after the share of Class I heirs are satisfied, according to their specification, but it is not true because the bulk of the property remains as residue. This important class belongs to son, father (in few cases), brother, paternal uncle, etc., who are important male relations and expected to get more.

Classification of these heirs is recognitions of Pre-Islamic customs, and Class I is given preference, owing to the respect in Koran. Else, the bulk of the property devolves to agnatic heirs, the persons whose rights were always recognized by tribal law.

Classes of agnatic heirs – The male heirs in the list of residuaries, who are heirs in their own rights:

Son

This class of residuaries derives their right from another. They are 4 females: Daughter in the right of son, The son's daughter HLS as a residuary in the right of son's son, HLS Full sister in the right of full brother, and consanguine sister in the right of consanguine brother. This class becomes a residuary with others in certain circumstances full sister, and consanguine sister, when they succeed with daughters and son's daughter, HLS.

Parsi Law Of Succession– Division of intestate's property among widow, widower, children and parents– Legislative change and its effect – Section 57 has been substituted in place of S. 51, which was incorporated in the Statute by the Act of 1939, by the amending Act of 1991 wef from December 9, 1991. Accordingly, in case a Parsi dying before 9th Dec, 1991, his property shall be distributed in accordance with the law at the time of his death. But the new law will be applicable when the intestate died on or after 9 dec, 1991. Drastic changes have been made in the matter of distribution of property of a Parsi intestate by the amending Act of 1991.

The right of the widower is recognized for the first time. The daughter's share shall now be equal to that of a son and widow or widower as the case may be. Distribution of shares under Sub sec 1 is subject to the rule contained in sub sec. 2. The rule enacted in clause A of sub section 1, may be conveniently explained in the following way:

Consider a situation in which there are four children and a widow/widower. The widow or the widower as the case may be, and each child shall receive equal shares. Thus, each of them in the above case shall get 1/5th of the Estate.

Clause (b) deals with the manner of inheritance, where there is no surviving widow or widower. In that event, the distribution shall be made among the children in equal shares. Subsection (2) – the distribution of shares in accordance with sub sec (1), shall be varied when the intestate Parsi dies leaving one or both parents, in addition to children or widow or widower and children. In that event, the estate of the deceased shall be so divided that the parents of each of the parents shall receive a share equal to half of the share of each child.

Division of intestate's predeceased lineal descendant's share – the rule enacted in different clauses of S. 53 provides how the intestate's predeceased lineal descendant's share shall have to be distributed. The principle in this regard is that if any child had predeceased intestate, the share of the child, which such child would have taken, if he were alive at the time of the intestate's death shall be in accordance with clauses (a), (b), (c) or (d).

If the predeceased child was a son, and he died leaving widow and children, then his share shall be divided in accordance with S. 51(1A).

This clause deals with a case where the pre-deceased's lineal descendant was a daughter. Her share shall go to her surviving children only. Her husband shall not inherit from her.

Parsi Intestate Succession -

Relatives specified in Part I, schedule II are

Father and mother,

Brothers and sisters, and Lineal descendants of such of them,

Paternal and Maternal grandparents,

Children of Paternal and maternal grandparents and the lineal descendants of such of them.

Paternal and Maternal grandparents' parents

Paternal and maternal grandparents' parent' children and the lineal descendants.

Part II of Schedule II (s. 55)

Father and mother,

Brothers and sisters, and lineal descendants

Paternal and maternal grandparents

Children of paternal and maternal …

Paternal

Paternal and …

Half brothers and sisters and their lineal descendants (not uterine) Widows of brother or half brother or sister or half sister

Law of Domicile – The domicile of a person is that place or country in which his habitation is fixed without any present intention of shifting there-from. According to Halsbury, a person's domicile is that country in which he has, or is deemed to have his permanent home. Domicile is generally identified with home, but whereas a person may have no home, or more than one, the law requires him to have a one and only domicile. Domicile may be acquired in three ways, namely

By birth,

By choice,

By operation of law: A married woman acquires the domicile of her husband if they don't have the same one. Nationality and domicile are the two terms which connote entirely different concepts in the realm of private international law. A man may have one nationality and a different domicile; a man may change his domicile without changing his nationality. Sub sec (1) of S. 5 of the ISA lays down that succession to the immovable in India shall be regulated by the law of India, wherever such person may have had the domicile at the time of his death. The term 'immovable property' has not been defined in the Act. Accordingly, the definition of immovable property as given in the General Clauses Act shall be taken for the purpose of S. 5(1) of the Act. Immovable property includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the Earth.

Sub. 1 lays down that Succession to the immovable property in India shall be governed by the law of India. This is in conformity with the rules of International law that succession to immovable property of an intestate is determined by the Lex Loci reisitae, that is, by the law of the land and not by the domicile of the owner.

Sub (2) – Succession to movables –The term ‘movable proeprty’ has also not been defined in the Act. In terms of the definition provided in the General Clauses Act, movable property means property of every description, except immovable property. Succession the movable property of the deceased is regulated by the law of the country, in which the deceased had his domicile at the time of his death. The suits of movables is a domicile of the owner and accordingly, if a person whose domicile is not in India, dies leaving movable property in India, the administration of that property and its application is to be regulated by the law of India. Lex domicillee.

A has three children, John, Henry and Mary. John died, leaving four children, and Mary died leaving behind one A left no child, but left 8 grandchildren, and two children of a deceased grandchildren. 8X1/9, 2X1/18 A has three children, John Mary and Henry. John dies leaving four children, and one of John’s children dies, leaving two children. Mary dies, leaving one child. A afterwards, dies intestate.

A dies intestate, survived by his mother and two brothers of the full-blood John and Henry, and a sister Mary, by half blood. = 1/4th each. = S. 43.

A, the intestate leaves his mother, his brothers John and Henry, and also one child of a deceased sister, Mary, and two children of George, a deceased brother of the half blood. 4X1/5th, 2X1/10th.

Hindu Law – An intestate Hindu Female dies, leaving behind the following relations: (a) Son S, (b) Daughter D, (c) Pre-deceased daughter’s two sons, P and Q, (d) Pre-deceased son’s two sons, A, B, and a daughter DD, and (e), husband H. Son-1/5th , Daughter-1/5th, P,Q => 1/10th each, (d) 3X1/15th each, (e) 1/5th. An intestate Hindu female dies, leaving behind the following relations: (a) brother B, (b) two sisters, S and SS, (c) Pre-deceased Brother’s two sons, P and Q, (d) Pre-deceased Sister’s daughter D, (e) Step-mother M, (f) Paternal Uncle U, and (g) Stepfather F. Paternal uncle, and stepfather do not get anything. The rest get 1/6th, distributed by representation.

Karta of Joint Family:

Position, Powers and privileges; Alienation of property by Karta

Concept of Karta in Hindu Joint Family

In a Hindu Joint Family, the Karta or Manager occupies a pivotal and unique place in that there is no comparable office or institution in any other system in the world. His office is independent of any other and hence his position is termed as sui generis.

POSITION

Who can be a Karta?

Senior-most Male Member: The senior-most male member of the family is entitled to this position and it is his right. His right is not subject to any agreement or any other understanding between the coparceners. He may be aged, infirm or ailing, yet if he is still alive, then he shall be entitled to Kartaship.

But once the Karta dies, the position passes to the next senior-most male member; it may be the uncle, or brother or son.

Junior Male Member: By agreement between the coparceners, any junior male member can be made a by agreement between the coparceners, any junior male member can be made a Karta. In this case, withdrawal of the coparcener's consent is allowed at any point of time.

Female Members as Karta: Regarding the issue of female members of a family assuming Kartaship, there has been considerable amount of discussion in the Supreme Court of India as well as the High Courts. The Nagpur High court once held that though a mother is not a coparcener, she can be the Karta in absence of male members. But the Supreme Court reversed the Nagpur High Court's findings in another judgment and declared that no female member can assume Kartaship whatsoever.

To put an end to this controversy, few States namely, Kerala, Andhra Pradesh & Karnataka have amended their succession laws so that equal rights are provided to females as compared to the males in the family.

Characteristics of a Karta: Karta's position is sui generis. As had been explained earlier, his position/ office are independent and there is no comparable office in any system in the world.

He has unlimited powers and even though he acts on behalf of other members, he is not a partner or agent.

He manages all the affairs of the family and has widespread powers.

Ordinarily he is accountable to no one. The only exception to this rule is if charges of misappropriation, fraud or conversion are leveled against him.

He is not bound to save, economise or invest. That is to say that he need not invest in land if the land prices are about to shoot up, and hence miss out on opportunities etc. He has the power to use the resources as he wishes, unless the above mentioned charges are leveled against him.

He is not bound to pay income of joint family in any fixed proportion to other members. This means that the Karta need not divide the income generated from the joint family property equally among the family members. He can discriminate one member from another and is not bound to treat everyone impartially. Only responsibility is that he has to pay everyone something so that they can avail themselves of the basic necessities such as food, clothing, shelter, education etc.

Apart from all the unlimited powers that are bestowed upon the Karta, he also has liabilities thrust on him.

Karta's Liabilities: Karta has to maintain all the members of the joint family properly. If there is any shortfall in his maintenance, then any of the members can sue for maintenance.

He is responsible for marriage of all the unmarried members in the family. Special emphasis is laid with respect to daughters in this case.

In case of any partition suit, the Karta has to prepare accounts.

He has to pay taxes on behalf of the family.

Karta represents the family in all matters including legal, religious and social matters.

Powers of Karta: The powers of a Karta are divided into two parts:

Power of Alienation: The most important case with respect to Karta's power of alienation is *Rani v. Shanta*. The Karta has very limited powers with respect to alienation of the joint family property. The Karta can alienate the joint family property only with the consent of the coparceners. Alienation can be done only for three purposes:

Legal Necessity: The term "legal necessity" has not been expressly defined in any law or judgment. It is supposed to include all those things which are deemed necessary for the members of the family. "Necessity" is to be understood, not in the sense of what is absolutely indispensable, but what would be regarded as proper and reasonable. If it is shown that family's need was for a particular thing, and if property was alienated for the satisfaction of that particular need, then it is enough proof that there was a legal necessity.

A few illustrative cases are:

a) Food, shelter and clothing.

b) Marriage (second marriages are not considered a legal necessity).

c) Medical care.

d) Defense of person accused of a crime (exception to this rule is murder of a family member).

e) Payments of debts, taxes etc.

f) Performance of ceremonies (like marriage, grihapravesham).

g) Rent etc.

Privileges

Benefit of Estate: Karta, as a prudent manager, can do all those things which are in furtherance of the family's advancement, to prevent probable losses, provided his acts are not purely of speculative or visionary nature. The last clause means that the property cannot be converted into money just because the property is not yielding enough income.

Indispensable Duties: This term implies the performance of those acts which are religious, pious or charitable. Examples of indispensable duties are marriages, grihapravesham etc. In this case there is a requirement to differentiate between alienation made for indispensable duties and gifts for charitable purposes. The difference lies in the fact that in the former case while discharging indispensable duties, the Karta has unlimited powers in the sense that he can alienate the entire property for that purpose. But in the case of gifts for charitable purposes, only a small portion can be alienated.

Note: If the alienation is not made for any of the three purposes, then the alienation is not void but voidable at the instance of any coparcener.

Powers of Karta:

These powers of the Karta are almost absolute. There are nine powers in all and each of them has been dealt with in brief below:

Powers of Management: It is an absolute power. The Karta may mismanage or may discriminate between members and cannot be questioned on such aspects. But the Karta cannot deny maintenance and occupation of property to any member altogether. The check on his powers in this case is the power of "partition" vested in the coparcener.

Right to Income: All incomes of the joint family property should be brought to the Karta and it is for the Karta to allot funds to members and to look after their needs and requirements.

Right to Representation: The Karta represents the family in all matters legal, social and religious. His acts are binding on the family.

Power of compromise: The Karta has the power to compromise in all disputes relating to the family property or management. His acts are binding on the members of the family; but in case of a minor, it has to be approved by the court under O.32, Rule 7, C.P.C. The compromise made

by the Karta can be challenged in court by any of the coparceners only on the ground of malafide.

Power to refer a dispute to Arbitration: The Karta has the power to refer any dispute with respect to family property or management to an arbitration council and the decision is binding on the family.

Power of Acknowledgement: The Karta can acknowledge any debt due to the family or pay interest on a debt or make part or full payment of principal etc. But the Karta has no power to acknowledge a time-barred debt.

Power to Contract Debts: The Karta has implied authority to contract debts and pledge the credit and property of the family. His decision is binding on the members of the joint family.

Loan on Promissory Note: When the Karta takes a loan for family purposes and executes a promissory note, and then the other members may be sued as well even if they are not parties to the note. But the members are liable to the extent of their shares whereas the Karta is personally liable on the note.

Power to enter into Contracts: The Karta has the power to enter into contracts which are binding on the family.

Burden of Proof: If the alienation is challenged in court of law, then it is for the alienee to show that there was a legal necessity. In effect, he has to show two aspects:

a) Proof of actual necessity.

b) Proof that he made a bonafide enquiries about the existence of legal necessity and that he did all that reasonable to satisfy himself of the existence of the necessity.

Thus this presentation has discussed all the important aspects with respect to Karta in a joint Hindu family, viz., who can be a Karta, the characteristics, liabilities, powers and finally the burden of proof in case of a challenge.

Debts – Doctrine of pious obligation and antecedent debts

The DOCTRINE OF PIOUS OBLIGATION is not based on any necessity for the protection of third but is based on the pious obligation of the sons to see their father's debts paid. *(Sat Narain v. Sri Kishen Das, 63 LA. 384: A. I.R. 1936 P.C. 277).* The doctrine of pious obligation under which sons are held liable to discharge their father's debts is based solely on religious consideration.

It is thought that if a person's debts are not paid and he dies in a state of indebtedness, his soul may have to face evil consequences, and it is the duty of his sons to save him from such evil consequences. The basis of the doctrine is thus spiritual and its sole object is to confer spiritual benefit on the father.

It is not intended in any sense for the benefit of the creditor. The doctrine inevitable postulates that the father's debts which it is the pious obligation of the sons to repay must not be avyavaharika. If the debts are not vyavahrika, or are avyavaharika, the doctrine of pious obligation cannot be invoked. *(Luhar Amrit Lai Naggi V. Doshi Jayantilal Jethlal, A.I.R. 1960 S.C. 964).*

The doctrine of pious obligation applies (or the liability of the sons to pay father's debts exits) during the life time as well as the death of the father. *Muniswami v. Kuitty, A.I.R. 1933 Mad. 708 and Thadi Murali Mohan Reddi v. Medapati Gangaraju, 197 I.C. 199: A.I.R. 1941 Mad. 772 (F.B.)]*.

The creditors can proceed against the entire joint family properly for the debt of the father (grandfather and great grandfather included) during his life time and after his death provided that debt is not tainted with illegality or immorality. If the debt is so tainted there is no liabil-ity on the on the son for its payment. It should, however, be noted that the son cannot be sued alone during the father's life-time.

The Vanniya Tamil Christains of Chitur Taluk are governed by the Mitakshara School of Hindu law in regard to inheritance and succession. The son of a member of such community gets by birth an interest in ancestral property owned by the father. The doctrine of pious obligation applied and the son in bound to discharge his father's debts not tainted by illegality or immorality.

The doctrine of pious obligation is not merely a religious doctrine but has passed by the realm of law. It is a necessary and logical corollary to the doctrine of the right of the son by birth to a share of the ancestral property, and both these conceptions are correlated.

The liability imposed on the son to pay the debt of his father is not a gratuitous obligation thrust on him by Hindu law but is a salutary counterbalance to the principle that the son from the moment of his birth acquires along with his father an interest in joint family property, it is therefore, not possible to accept the argument that, though the community of Vanniya Tamil

Christians of Chittur Taluk is governed as a matter of custom by the Mitakshara School of Hindu law, the doctrine of pious obligation is not applicable.

(*Anthonyswami v. Chinaswami Koundan, A.I.R. 1970 S.C. 223: (1969) 2 S.C.W.R. 706)*. The doctrine of pious obligation is an integral part of the Mitakshara School of Hindu law. It is in consonance with Justice, equity and good conscience and is not opposed to any principle of Christianity.

In V. *Narasimhulu v. V. Ramayya, A.I.R. 1979, A.P. 36* it has been laid down that a father as a manager of a joint family can mortgage the family property and incur debts. He represents the family as a whole, when be incurs the liability. The sons cannot impeach the mortgage unless the debt is for illegal or immoral purposes. The sons are bound to pay the debt by virtue of the terror of pious obligation.

There was conflict of opinion between the High Courts of India on the point whether any pious obligation on the sons to pay the debts of the father exists in the life-time of the father or whether the pious obligation arises for the first time after the father's death. The difference of judicial opinion has been set at rest by the decision of the Privy Council in the leading case of *Brij Narain Rai v. Mangla Prasad, 51 I.A. 129 A.I.R. 1924 P.C. 50.* Their Lordships of the Privy Council held that the sons were liable for the father's debts, whether the father was alive or dead when the liability attached. This decision modified the old Hindu Law, on that point. According to ancient Hindu Law this liability of the sons did not arise until after the death of the father.'

Under the law, as it now stands, the obligation of the sons is not a personal obligation existing irrespective of the receipt of any assets it is a liability to the assets received by him in his share of the joint family property or to his interest in the same. The obligation exists whether-the sons are major or minor or whether the father is alive or dead. If the debts contracted by the father are not immoral or irreligious, the interest of the sons in the coparacenary property can always be made liable for such debts.

It has been further held that to saddle the sons with this pious obligation to pay their father's debts, it is not necessary that the father should be the manager or karta of the joint family or that the family must be composed of the father and his sons and no other member. It is also not necessary that the sons should be made parties to the money suit or to the execution proceedings. *(Sidheswar Mukherjee v. Bhubneshwar Prasad Narian Singh. 1954 A.L.J. 54: (1954) S.C.R. 177: A.I.R. 1953 S.C. 487).*

The pious obligation of the sons to discharge the father's debts lasts only so long as the liability of the father subsists. The son's liability is neither joint nor joint and several. An illustration can be given in order to elucidate the point. Suppose the father is adjudged insolvent for the debt incurred which release the father from the debt. As no suit can be filed against the father in respect of debts, none can be maintained against the sons in respect of that debt.

The son in not liable for a debt contracted by the father after partition. But the son is liable after partition for a debt contracted by the father before partition. (*Annabhat v. Shivappa 110 I.C. 269 : A.I.R. 1928 Bom. 252 ; Bankey lal v. Durga Prasad, 135 I.C. 139 : A.I.R. 1931 All. 512 ; Subramania v. Sabapati 51 Mad. 361 : A.I.R. 1928 Mad. 657 F.B. : (firm Govindram Dwarkadas v. Nathulal, A.I.R. 1937 Nag. 45 etc.).*

After partition it is necessary that he creditor should institute the suit against the father as well as against the son so that the decree can be executed against the son. *(Firm Govindram Dwarkadas v. Nathulal, I.L.R. 1938 Nag. 10 and Atul Krishna Roy v. Nandji (1935) 14 Pat. 732 F.BL A.I.R. 1935 Pat. 275).*

In the Case of *Panna Lal v. Naraini, A.I.R. 1952 S. C. 170,* the Supreme Court has held that a son is liable even after partition for the pre-partition debts of his father which are not immoral or illegal and for payment of which no arrangement was made at the time of the partition of the joint family property.

It has further held that a decree passed against the separated sons as the legal representatives of the deceased father in respect of a debt incurred before partition can be executed against the shares obtained by such sons at the partition and this can be done in execution proceedings and it is not necessary to bring a separate suit for the purpose.

According to the Supreme Court the major-ity decision in Atul *Krishna Roy v. Nandji, 14 Pat. 732* over-looked the point that Sec. 47 C.P.C. could have no application when the decree against the father was sought to be executed against the suns during his life-time and consequently the liabil-ity of the latter must have to be established in an independent proceedings. In cases under Sec. 50 and 52 C.P.C., on the other hand, the decree would be capable of being executed against the suns as legal representatives of their father.

Antecedent Debt

"Antecedent" literally means prior or preceding in point of time, but the words "antecedent debt" as used in Hindu Law implies two things, (a) antecedent in time, and (b) antecedent in fact in

nature, that is to say, the debt must be truly independent of and not part of the transaction impeached. Lord Dunedin defined the antecedent debt as "antecedent in fact as well as in time". Thus, two conditions are necessary—

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

(b) The debt must be prior in fact.

The Supreme Court re-affirmed that the "antecedent debt" means antecedent in fact as well as in time, that is to say, that the debt must be truly independent of and not part of the transaction impeached. The debt may be incurred in connection with a trade started by the father. The privilege of alienating the whole of joint family property for payment of an antecedent debt is the privilege only of the father, the grand-father and great grand-father qua the son or grand-son only.

Where the father executed a simple mortgage and total consideration of Rs. 10,000/- was received by the mortgagor in which Rs. 7,000/- was received in installments and Rs. 3,000/- at the time of mortgage. Rs. 7,000/- was advanced on express condition that a mortgage would be executed later. In this case it was held, that the amount of Rs. 7,000/- was not an antecedent debt so as to fasten the liability on sons of mortgagor.

Thus, it is now well settled that the father of Hindu joint family enjoys full right to sell or mortgage the joint family property including the son's interest therein to discharge antecedent debt. A sale of joint family property, which is made to discharge a debt taken at that very time or as a part of the sale transaction, is not valid because the debt in this case is not an antecedent debt.

Thus, the father has got the power to sell or mortgage the joint family property for the payment of the debt, may it be for his personal benefit. It would be binding on sons, provided—(a) the debt was antecedent to the alienation, and (b) It was not contracted for an immoral purpose. In *Brij Narain v. Mangala Pd*. the Privy Council laid down the following propositions:—

1. The Karta of a joint family except for legal necessity cannot alienate the joint property nor can mortgage it.

2. If a decree has been passed for the payment of the debt it can be executed against the entire estate, provided the son and the father living jointly.

3. He cannot mortgage the joint family property unless the mortgage was done for the payment of some antecedent debt.

4. “Antecedent debt” means a debt which is prior in time as well as in fact.

5. The fact that the father is alive or dead does not affect the liability.

1. Alienation by Father:

The father of a joint family may sell or mortgage joint family property including the son’s interest in the property to discharge a debt contracted by him for his personal benefit, provided the following two conditions are satisfied:—

(a) The debt, for which alienation is made, must be antecedent in time.

(b) The debt must not have been taken for an illegal or immoral purpose.

The Kerala High Court has held that in absence of a plea that the debt, for the discharge of which a Hindu father has alienated the ancestral property was vitiated by illegality or immorality, the sale is not liable to be challenged, if it is shown that it has been executed for the discharge of the antecedent debt of the father.

If the alienation has been shown to have been made by the father for the payment of an antecedent debt, the son can still get rid of it, provided he is able to prove that the debt was tainted with illegality or immorality. The burden of proving both these facts is not on the alienee but on the son himself.

2. Moral Obligation:

It is also a moral duty of the sons to pay the debt of the father as they inherit the property from him. One, who inherits the estate of another, must pay such other’s debt. A Hindu heir is, therefore, liable to pay the debts of the deceased out of the assets; he has inherited from the deceased. The liability is moral and therefore absolute irrespective of the fact that the debt was incurred for moral or immoral purposes. The successor is bound to pay his ancestor’s immoral debts out of such property.

3. Legal Obligation:

Besides religious and moral duties, there is also a legal obligation to pay back the debt secured by the father. With respect to a money debt of the father, sons may be bound by proper proceedings taken in a Court of law by a creditor against the father, although the sons are not made parties to the suit. The whole family property is liable for debts, incurred for the benefit of the family, by the father as manager. Reasonable interest on such debt is also payable by the family.

UNIT-II:
Partition
A. Meaning, Division of right and division of property

Partition means bringing the joint status to an end. On partition, the joint family ceases to be joint and nuclear families or different joint families come into existence. There are members of the joint family who can ask for partition and are entitled to a share also. There is another category of the members of the joint family who have no right to partition but, if partition takes place, they are entitled to share. A reunion can be made only between the parties to partition.

(a) What is partition?
(b) Subject matter of partition.
(c) Partition how effected.
(d) Persons who have a right to claim partition and who are entitled to a share.
(e) Rules relating to division of property.

B. Persons who are entitled to Demand the Partition

The partition of a joint Hindu family may take place at the instance of the following persons:

1. Sons and Grand-Sons:

Under the Mitakshara Law, the right of a son, a grand-son and a great grand-son as well as every other adult member of the coparcenary, can demand a partition even against the consent of the others. The Bombay High Court in a case has said that a son is not entitled to ask for a partition in the life-time of his father without his consent, when the father is not already separate from his own father or brothers and nephews.

But this view no longer stands valid. The Bombay High Court in a later case accepting the authority of the Supreme Court in *Puttorangamma v. Rangamma* held that a suit for partition and separate possession of ancestral joint family properties by one of the coparceners is maintainable even if their father is joint with his brother and is not willing and does not consent to such a partition.

The Delhi High Court clearly maintained that a son can demand partition during the lifetime of his father without any hindrance. This view was again supported by the Bombay High Court in its latest pronouncement.

2. After-Born Sons:

After-born sons can be classified under two heads. Firstly, those born as well as begotten after the partition and secondly, those born after partition but begotten before it. A son in his mother's womb is treated in law in existence and is entitled to re-open the partition to receive a share equal to that of his brothers.

In the case of a son born as well as begotten after partition, if his father has taken a share for himself and separated from the other sons, then the after-born son is entitled to his father's share at the partition and also his separate property to the exclusion of the separated sons and is not entitled to re-open the partition.

3. Illegitimate Sons:

An illegitimate son among the three upper classes does not have any vested interest in the property and therefore, cannot demand a partition, although he is entitled to maintenance out of his father's estate. The Madras and Allahabad High Courts have held that an illegitimate son of a Sudra may enforce a partition against his illegitimate brothers but not against his father or his father's coparceners. The Bombay High Court has also taken the same view but the Calcutta High Court has taken an opposite view.

The share of an illegitimate son is half of what he would have got had he been a legitimate son and according to others; his share is half of that of a legitimate son. The Madras High Court in a case held that after the institution of the partition suit, the father can still fix the shares of his illegitimate sons. He can exercise this right according to his discretion so long as the partition has not become final.

4. Widows:

A widow, though not a coparcener under Mitakshara law could still claim a partition of the joint estate under the Hindu Womens' Right to Property Act, 1937. Mere partition of the estate between two widows does not destroy the right of survivorship of each to the properties allotted to the other. The party, who asserts that there was an arrangement, by which the widows agreed to relinquish the right of survivorship, must establish it by clear and cogent evidence.

5. Adopted Son:

An adopted son like a natural born son would be entitled to demand a partition any time after adoption. But where a son has been adopted by the parents and a natural son is begotten subsequently, although the adopted son was to be treated at par with wife the natural son yet the quantum of his share in the joint family property differed in different schools.

In Bengal, he took 1/3rd share, in Banaras he took 1/4th and in Bombay and Madras he took 1 /5th share of the property. The Hindu Adoption and Maintenance Act, 1956 has done away with the discrimination and enabled the adopted son to get a share equal to that of natural born son on partition.

6. Minor Coparcener:

A minor coparcener is also entitled to affect a partition in case the joint status does not remain beneficial to his interest. He cannot file the suit himself but any other person on his behalf can file such a suit. His minority or the minority of other members of the family would not be a hindrance to affect a partition by him. If the partition has already taken effect detrimental to his interest, he could challenge it on attaining majority.

7. Alienee:

An alienee of a coparcener's interest, if such an alienation is valid, has a right to demand partition. In *Smt. Kailashpati Devi v. Smt. Bhuwaneshwari Devi*, the Supreme Court held that the purchaser of joint family property from a member of a joint Hindu family may have the right to file a general suit for partition against the members of the joint family and that may be the proper remedy for him to adopt to effectuate his purchase. An execution purchaser of a member's interest and purchaser of the same for value in Bombay and Madras is entitled to demand partition in the rights of that member.

8. Female Sharers:

The term "female sharers" include three types of females, namely, (1) the wife, (2) widowed mother, and (3) paternal grand-mother. These female sharers cannot demand a partition but, however, entitled to get their share when the joint family property is actually divided on partition. Where a suit for partition filed by a coparcener has been withdrawn, the female sharer will not be entitled to continue the suit or to press a demand of his share.

If the suit has been dismissed for any other reasons, the mother would not be entitled to demand partition in the property. The mother and the grand-mother would be entitled to get a share on partition only when the partition is effected between the sons and grand-sons. The female sharers would not be entitled to any share in the property merely by the fact that a suit for partition has been filed or a preliminary decree has been obtained in the suit. So long the actual partition is not affected; there is no question of allotment any share to them.

Section 23 of the Hindu Succession Act, 1956 postpones the right of female heirs to claim partition of the dwelling house until male heirs choose to divide their respective shares therein.

After passing Hindu Succession (Amendment) Act, now the position has been changed, now Section 23 of the principal Act has been omitted by Hindu Succession (Amendment) Act. Now daughters have the same rights as sons to reside in and to claim for partition of the parental dwelling house.

C. Partition how effected; Suit for partition

If a partition is affected orally, it can be subsequently recorded by a memorandum. If affected in writing, then, it requires registration. In India, until recently the term "partition" had come to be synonymous with the wrenching separation of near and dear, with wailing mothers and weeping wives, with stone faced men carrying trunks of belongings into a waiting vehicle.

More recently, however, a partition has come to be recognized as a very effective means of dividing properties amongst siblings or cousins who no longer feel the need to remain/reside in close proximity to one another.

By metes and bounds

A partition is a means by which several joint owners of a piece of property divide that property as between themselves into separate demarcated and delineated extents. Such partitions are known as partitions "by metes and bounds".

A partition of the properties of a joint family may be effected either orally or in writing. If a partition is effected orally, it can be subsequently recorded by means of a memorandum. If a partition is effected in writing, then, it requires registration.

An instrument of partition is defined by the law as any instrument whereby co-owners of any property divide or agree to divide such property in severalty. The definition of this term is very wide and has been taken to include within its fold even a partition decree passed by a civil court, or an award of partition by an arbitrator. It would be useful to remember here that the memorandum or record of a pre-existing oral partition would not fall within the scope of the term "instrument of partition", and would not therefore be liable for incidence of stamp duty.

An instrument of partition is required by law to be stamped. The stamp duty payable on an instrument of partition would depend upon the value of the largest of the separated shares involved at the partition.

For the sake of those readers who are interested in legal niceties and abstruse expositions of law, I add a footnote here that the Madras High Court has in one judgment held that the stamp duty payable as above is not upon the market value of the property suffering partition, but is upon the value set forth in the instrument itself. I also add that the correctness or otherwise of this judgment is awaiting a final decision by a Division Bench (this is the term used to refer to a Court having two Judges, and therefore, superior adjudicatory power to that of a Court having one Judge alone).

Partition through Court

Now, all of the above can be effected if the co-owners agree amongst themselves to partition the properties. What is to be done if one or more co-owners simply refuse to acquiesce in any kind of process for partitioning the properties?

The answer lies in the Courts. If you are being deprived of your lawful share in your father's or mother's property, and if your siblings are taking your share as well, or even a portion of your lawful entitlement, then, if all avenues and means of amicable resolution have failed, then, you can approach the Courts for redressed.

In such cases, you would file a suit for partition and separate possession of your share. The Government has, in its wisdom, granted a concessional court fee tariff for partition suits filed by persons who are in possession of the properties sought to be partitioned. Since a co-owner of properties is deemed to be in joint possession of all properties in which he or she has a co-ownership right, most people approaching the Court for the relief of partition would be entitled to the benefit of the concessional fee tariff.

While filing such a suit for partition, you would also be entitled to ask the persons who had been denying you of your lawful share, to compensate you for the period that you had been deprived of your lawful share. This compensation will be determined by the Court separately, once your lawful share has been ascertained. The name given for such compensation is "mesne profits" (pronounced as mean).

If you succeed in having your share ascertained, then, the Court will either carve your share out of the joint properties, or if such carving out cannot reasonably be done, then, the Court will sell the properties and give you your share in cash.

There are some exceptions to the above:

First, if the property in question is the sole dwelling house of the family and a male co-owner is in possession thereof, then, a female co-owner cannot seek partition of this dwelling house, but can instead seek a right of residence therein.

Second, when the property is being sold, the right of first refusal would be given to the co-owners.

These then, briefly put, are the rules governing partitions.

d. Re-opening of partition; Re-union

Legal Provisions Regarding the Re-union of Hindu Joint Family after Partition:-

Once a partition is effected as a general rule, it cannot be re-opened. However, there is an exception to this general rule which is based on a text of Vrihaspati who says, "He, who, being once separated, dwells again through affection with his father, brother or paternal uncle, is termed "reunited".

The Mitakshara, the Dayabhag and the Madras School of Hindu Law interpret the above text literally and hold that a member of a joint family once separated can reunite only with the father, brother and paternal uncle but not with any other relations.

According to Mithila and Mayukha Schools of Hindu Law, the words "father", "brother" and "paternal uncle" are used in an illustrative sense and a reunion can be effected between others provided they were parties to the original partition. The Supreme Court in *Bhagwan Dayal v. Reoti Devi* held that if a joint Hindu family separates, the family or any member of it may agree to reunite as a joint Hindu family, but such a reuniting is for obvious reasons, which would apply in many cases under the Law of the Mitakshara, of very rare occurrence, and when it happens it must be strictly proved.

To constitute a reunion there must be an intention of the parties to reunite in estate and interest. It is implicit concept of a reunion that there shall be an agreement between the parties to reunite in estate with an intention to revert to their formal status of members of a joint Hindu family. Such an agreement need not be express, but may be implied from the conduct of the parties alleged to have re-united. But the conduct must be of such an incontrovertible character that an agreement of reunion must be necessarily implied there from".

The Madras High Court in a case held that where reunion is between two parties of a joint family, one of whom was a party to preliminary partition and the other was the son of the second party to partition who had separated, the reunion between them was held to be valid.

The incident of reunion must be proved like any other event. Just as in absence of a clear proof of partition, having been effected it is presumed that the family is joint, so also, on a partition there is a presumption that the family is disjointed unless there is reunion among the members. The burden of proof of reunion is on the member who asserts it.

Reunion is possible between the parties to the preliminary partition. Therefore a reunion cannot be effected by an adopted grandson of a coparcener living with his father and holding the shares of his branch jointly.

Effect of Reunion:

The effect of reunion is to revert the united members to their status as members of joint Hindu family. But the separate property of a reunited coparcener does not pass by survivorship to the other reunited coparceners but passes by succession to his heirs according to special rules.

e. Points of similarity and distinction between the Mitakshara and the Dayabhaga Laws.

Mitakshara

1. The son gets a right by birth in the joint family property. In case he is adult, he can demand partition even during the life time of his father.
2. He has a say and can prevent his father from unauthorized alienation of ancestral properly.
3. A coparcener has no right to alienate his share in the joint family property. On his death without male issue, his interest survives to his brother.
4. The widow of the deceased coparcener cannot enforce partition. She has a right of maintenance.
5. The essence of a coparcenary is unity of ownership.

Dayabhaga

1. He has no right in the joint family property so long as his father is alive.
2. The father is absolute owner of the property and can deal with it the way he likes.
3. Each adult member male or female has a right to demand partition and can alienate his/her interest and on death his/her share will be inherited by his her heirs.
4. The widow becomes a coparcener with her husband's brother and can demand partition.
5. The essence is unity of possession and not ownership.

Unit:– III

Principles of Inheritance under Hindu and Muslim Law

a. The Hindu Succession Act, 1956 General rules of succession of a Hindu male and female dying intestate under the Hindu Succession Act section 15 of the Hindu Succession Act, 1956 which deals with general rules of Succession in the case of female Hindus dying intestate in view of the fact that there have been vast changes in the social scene in the past few years.

The Law Commission felt that where amendments have been made entitling a woman to inherit property from her parental side as well as from her husband's side, it is justified if equal right is given to her parental heirs with the heirs on her husband's side to inherit her property earned by her own skill, in case she dies intestate. Further, social justice demands that the women should be treated equally both in the economic and social sphere.

It is, in this context, the Commission proposed an amendment to section 15 of the Hindu Succession Act. To achieve the objective stated above, Report No. 207 has been submitted by me.

Scheme of Succession in the case of a Hindu Female

Section 15 of the Hindu Succession Act propounds a definite and uniform scheme of Succession to the property of a female Hindu who dies intestate. There are also rules set out in section 16 of the Hindu Succession Act which have to be read along with section 15 of the Act.

Section 16 of the Hindu Succession Act provides for the order of succession and the manner of distribution among heirs of a female Hindu.

Relevance of Source of Acquisition

The group of heirs of the female Hindu dying intestate is described in 5 categories as 'a' to 'e' of section 15(1) which is illustrated as under:

In a case where she dies intestate leaving property, her property will firstly devolve upon her sons and daughters so also the husband. The children of any pre-deceased son or daughter are also included in the first category of heirs of a female Hindu;

In case she does not have any heir as referred to above , i.e. , sons, daughters and husband including children of any pre-deceased sons or daughters (as per clause 'a') living at the time of her death, then the next heirs will be the heirs of the husband;

Thirdly, if there are no heirs of the husband, the property would devolve upon the mother and father;

Fourthly, if the mother and father are not alive, then the property would devolve upon the heirs of the father which mean brothers, sisters etc;

The last and the fifth category are the heirs of the mother upon whom the property of the female Hindu will devolve in the absence of any heirs falling in the four preceding categories.

This is the general rule of Succession, but the section also provides for two exceptions which are stated in sub-section (2). Accordingly, if a female dies without leaving any issue, then the property inherited by her from her father or mother will not devolve according to the rules laid down in the five entries as stated earlier, but upon the heirs of father. And secondly, in respect of the property inherited by her from her husband or father-in-law, the same will devolve not according to the general rule, but upon the heirs of the husband.

The basis of inheritance of a female Hindu's property who dies intestate would thus be the SOURCE from which such female Hindu came into possession of the property and the manner of inheritance which would decide the manner of devolution.

Self-Acquired Property - A Grey Area

The term 'property' though not specified in this section means property of the deceased inheritable under the Act. It includes both movable and immovable property owned and acquired by her by inheritance or by devise or at a partition or by gift or by her skill or exertion or by purchase or prescription. The section does not differentiate between the property inherited and self-acquired property of a Hindu female; it only prescribes that if a property is inherited from husband or father-in-law, it would go to her husband's heirs and if the property is inherited from her father or mother, in that case, the property would not go to her husband's, but to the heirs of the father and mother.

This section has not clearly enumerated and considered about succession of a female Hindu property where it is self-acquired. Or to put it this way, the Legislators did not contemplate that Hindu females would be in later years having self-acquired property and in certain cases, where her heirs in the first category fail, the property would devolve totally upon her husband's heirs who may be very remotely related as compared to her own father's heirs.

This is very aptly illustrated by the following illustration: - A married Hindu female dies intestate leaving the property which is her self-acquired property. She has no issue and was a

widow at the time of her death. As per the present position of law, her property would devolve in the second category, i.e. to her husband's heirs. Thus, in a case where the mother of her husband is alive, her whole property would devolve on her mother-in-law. If the mother-in-law is also not alive, it would devolve as per the rules laid down in case of a male Hindu dying intestate i.e. if the father of her deceased husband is alive, the next to inherit will be her father-in-law and if in the third category, the father-in-law is also not alive, then her property would devolve on the brother and sister of the deceased husband.

Thus, in case of the self-acquired property of a Hindu married female dying intestate, her property devolves on her husband's heirs. Her paternal and maternal heirs do not inherit, but the distant relations of her husband would inherit as per husband's heirs.

Conclusions

In the present scenario, when amendments are made to the effect that women have been entitled to inherit property from her parental side as well as from husband's side, it will be quite justified if equal right is given to her parental heirs along with her husband's heirs to inherit her property.

It is, therefore, proposed that in order to bring about a balance, section 15 should be amended, so that in case a female Hindu dies intestate leaving her self-acquired property with no heirs, as mentioned in clause 'a' of section 15, the property should devolve on her husband's heirs and also on the heirs of her paternal side.

B. Stridhan and Women’s estate

Stridhan means woman’s property. In the entire history of Hindu Law, woman’s rights to hold and dispose of property have been recognized.

Kinds of Woman’s Property

What is the character of property that is whether it is stridhan or woman’s estate, depends on the source from which it has been obtained. They are: ¾ Gifts and bequests from relations- Such gifts may be made to woman during maidenhood, coverture or widowhood by her parents and their relations or by the husband and his relation. Such gifts may be inter vivos or by will. The Dayabhaga School doesn’t recognize gifts of immovable property by husband as stridhan. ¾ Gifts and bequests from non-relations- Property received by way of gift inter vivos or under a will of strangers that is, other than relations, to a woman, during maidenhood or widowhood constitutes her stridhan. The same is the position of gifts given to a woman by strangers before the nuptial fire or at the bridal procession. Property given to a woman by a gift inter vivos or

bequeathed to her by her strangers during covertures is stridhan according to Bombay, Benaras and Madras schools. ¾ Property acquired by self-exertion, science and arts-A woman may acquire property at any stage of her life by her own self exertion such as by manual labour, by employment, by singing, dancing etc., or by any mechanical art. According to all schools of Hindu Law, the property thus acquired during widowhood or maidenhood is her stridhan. But, the property thus acquired during covertures does not constitute her stridhan according to Mithila and Bengal Schools, but according to the rest of the schools it is stridhan. During husband's lifetime it is subject to his control.

Property purchased with the income of stridhan- In all schools of Hindu Law it is a well settled law that the properties purchased with stridhan or with the savings of stridhan as well as all accumulations and savings of the income of stridhan, constitute stridhan. ¾ Property purchased under a compromise-When a person acquires property under a compromise; what estate he will take in it, depends upon the compromise deed. In Hindu Law there is no presumption that a woman who obtains property under a compromise takes it as a limited estate. Property obtained by a woman under a compromise where under she gives up her rights, will be her stridhan. When she obtains some property under a family arrangement, whether she gets a stridhan or woman's estate will depend upon the terms of the family arrangement. ¾ Property obtained by adverse possession- Any property acquired by a woman at any stage of her life by adverse possession is her stridhan. ¾ Property obtained in lieu of maintenance- Under all the schools of Hindu Law payments made to a Hindu female in lump sum or periodically for her maintenance and all the arrears of such maintenance constitute stridhan. Similarly, all movable or immovable properties transferred to her by way of an absolute gift in lieu of maintenance constitute her stridhan. ¾ Property received in inheritance- A Hindu female may inherit property from a male or a female; from her parent's side or from husband's side. The Mitakshara constituted all inherited property a stridhan, while the Privy Council held such property as woman's estate. ¾ Property obtained on partition- When a partition takes place except in Madras, father's wife mother and grandmother take a share in the joint family property. In the Mitakshara jurisdiction, including Bombay and the Dayabhaga School it is an established view that the share obtained on partition is not stridhan but woman's estate her absolute property, the female has full rights of its alienation. This means that she can sell, gift, mortgage, lease, and exchange her property. This is

entirely true when she is a maiden or a widow. Some restrictions were recognized on her power of alienation, if she were a married woman. For a married woman stridhan falls under two heads:

• The sauadayika (gifts of love and affection) - gifts received by a woman from relations on both sides (parents and husband).

• The non-saudayika- all other types of stridhan such as gifts from stranger, property acquired self-exertion or mechanical art.

Over the former she has full rights of disposal but over the latter she has no right of alienation without the consent of her husband. The husband also had the power to use it. On her death all types of stridhan passed to her own heirs. In other words, she constituted an independent stock of descent. In *Janki v. Narayansami*, the Privy Council aptly observed, "her right is of the nature of right of property, her position is that of the owner, her powers in that character are, however limited… So long as she is alive, no one has vested interest in the

General Principles of Inheritance under Muslim Law in India

Introduction

Succession to the properties of a deceased person may either be testamentary or intestate. The testamentary succession is called a legacy and takes place under a will. Intestate succession is called inheritance under which the legal heirs of the deceased succeed to his properties in well-defined shares fixed under the law. Upon the death of a Muslim, his properties are in the first instance, utilised for payment of his funeral expenses, government dues and his unpaid debts. In the second instance, the remaining property is succeeded by the legatees, if any, under the law of will. After making these payments, the remaining property, is called the heritable property. In the last instance, this heritable property is given to the legal heirs of the deceased so that they may inherit it in their respective shares.

The Muslim law of inheritance has got a dual basis. The whole body of rules relating to inheritance is based on (a) Quran and the traditions of the prophet and on (b) such Pre-Islamic customs which were approved by the prophet. Thus, besides new provisions, the Islamic system of inheritance incorporates also the Pre-Islamic customs of Arabia. New rule of inheritance have been formulated in the Quran and the traditions in an attempt to reform the Pre-Islamic customary law on inheritance, there is some influence of the Pre-Islamic custom.

Pre-Islamic Customs

Before the advent of Islam, the properties of a deceased used to devolve upon his heirs according to the customary practices prevalent in the Arab societies. But most of the customs were unreasonable, indiscriminate and against all notions of equityand justice. Female were treated as properties; therefore, they were not entitled to inherit any property from anyone. Even the closest female relations of a deceased Arab were not allowed to inherit his properties. The mother, wife, daughters and sisters were deprived of inheriting the property of a deceased Arab. On the other hand the sons, grandsons, father, brother, uncles, nephews and other male relations were always preferred. That, is to say, the customary rules were all in favour of the male relations of the deceased. Besides blood-relationship, the succession was also on the ground of adoption and contract. Some important pre-Islamic customs on inheritance are briefly stated as under:

1. Females and cognates had no rights of inheritance.
2. Normally, the nearest male agnates (person inheriting through males used to succeed to the properties of a deceased).
3. Descendants were preferred over parents and other ascendants.
4. Where the agnates were equally distant, the devolution of property among them was per-capita.

The Islamic Reforms

After the advent of Islam, new principles of inheritance were promulgated by Quran and tradition of the Prophet. The new rules reformed the customary law of inheritance and made it just and equitable. Females who were not entitled to inherit at all under the pre-Islamic customs, were given equal rights of inheritance. The Quran deals elaborately with the rules relating to inheritance. In Sura IV ayat 11 of the Quran provides:

“Allah chargeth you concerning (the provision for) your children to the male the equivalent of the portion of two females, and if there be women more than two, then thirds is two-thirds of the inheritance, and if there be one only then the half. And to his parents a sixth of the inheritance, if he have a son; and if he have no son and his parents are his heirs, then to his mother appertaineth the sixth, after any legacy he may have bequeathed, or debt (has been paid). Your parents or your children you know not which of them is nearer unto you in usefulness. It is an injunction from Allah.”

It may be noted that the Quran has introduced a new class of legal heirs constituting female and the aged parents. Under the customary law, the females and cognates were totally excluded from inheritance and the aged parents were also excluded in presence of the descendants in order to secure their rights of inheritance, these newly created heirs have specifically been mentioned in the Quran which also lays down their respective shares. It may be noted that the Quran is of divine origin; therefore neither the position nor the respective shares of these new heirs can be changed by any human agency. Some of the main reforms by the Islamic system of inheritance, may be summarised as under:

1. The females and the cognates are competent to inherit.
2. Husband and wife have been made each other's legal heir.
3. Parents and ascendants are entitled to inherit even in the presence of descendants.
4. Normally, the share of a female is half of the share of a male.

The 13 General Principles of Inheritance under Muslim Law are mentioned below:

(1) Nature of the Heritable Property:

Heritable property is that property which is available to the legal heirs for inheritance. After the death of a Muslim, his properties are utilised for the payment of funeral expenses, debts and the legacies i.e. wills, if any. After these payments, the remaining property is called heritable property. Under Muslim law, every kind of property may be a heritable property.

For purposes of inheritance, Muslim law does not make any distinction between corpus and usufruct or, between movable and immovable, or, corporeal and incorporeal property. Under English law, there is some difference in the inheritance of movable and immovable property.

But, under Muslim law there is no such distinction; any property, which was in the ownership of the deceased at the moment of his death, may be the subject-matter of inheritance.

Shia Law:

Under the Shia law, a childless widow is entitled to get her share (1/4) in the inheritance only from the movable property left by her deceased husband.

(2) Joint or Ancestral Property:

The concept of a joint family or of coparcenaries property (as is recognised under Hindu law) is not known to Muslims. Whenever a Muslim dies, his properties devolve on his heirs in definite share of which each heir becomes an absolute owner. Subsequently, upon the death of such heir, his properties are again inherited by his legal heirs, and this process continues.

Thus, unlike Hindu law, there is no provision for any ancestral or joint-family property. Accordingly, under Muslim law of inheritance, no distinction has been made between self-acquired and ancestral property. All properties, whether acquired by a Muslim himself or inherited by his ancestors, are regarded as an individual property and, may be inherited by his legal heirs.

(3) No Birth-Right:

Inheritance opens only after the death of a Muslim. No person may be an heir of a living person (*Nemoesthaeresviventis*). Therefore, unless a person dies, his heirs have no interest in his properties. Unlike Hindu law, the Muslim law of inheritance does not recognise the concept of 'right by birth' (*Janmaswatvavad*).

Under Muslim law, an heir does not possess any right at all before the death of an ancestor. It is only the death of a Muslim which gives the right of inheritance to his legal heirs.

As a matter of fact, unless a person dies, his relatives are not his legal heirs; they are simply his heir-apparent and have merely a 'chance of succession, (*spes successions*). If such an heir-apparent survives a Muslim, he becomes his legal heir and the right of inheritance accrues to him. If the heir-apparent does not survive a Muslim, he cannot be regarded an heir and has no right to inherit the property.

***Hasam AH* v. *Nazo*, (1889) I.L.R. 11 All. 456:**

A, who had a son, B, made a gift of his property to C. B, alleging that the gift was procured by undue influence, sued C in A's life-time on the strength of his right to succeed to A's property on A's death.

The Court held, dismissing B's suit, that the nature of right claimed by B was only a *spessuccessionis*, and that he had no cause of action till A died.

***Sumsuddin* v. *Abdul Hussein*, (1906) I.L.R. 31 Bom. 165:**

A, a Hanafi male, marries B, a Shia female. Sometime after the marriage, A gives one of his immovable properties to B in lieu of her dower, and agrees not to claim any share of it as her heir

on her death. B dies, leaving A and her father, C. C sues A to recover possession of the said property, alleging that A had agreed not to claim any share thereof on B's death.

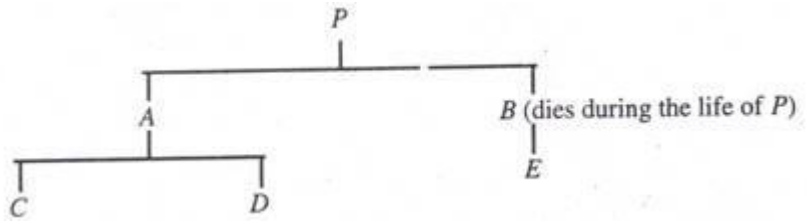
The relinquishment of a contingent right of inheritance by a Muslim heir is generally void in Muhammedan Law, In ***Abdul Kafoor*****v**. ***AbdurRazak***, (1958 Ii M.L.J. 492), it was, therefore, held dismissing C's suit, that the relinquishment by an heir apparent of his right of inheritance is invalid under Muhammedan law, the right of inheritance being merely a *spessuccessionis*.

A has a son, B, and a daughter C. A pays Rs. 1,000 to C and obtains from her a writing, whereby in consideration of Rs. 1,000 received by her from A, she renounces her right to inherit A's property. A then dies, and C sues B for her share (one-third) of the property left by A. B sets up in defence, the release passed by C to her father. Discuss whether C is entitled to her share in her father's estate.

Here, the release is no defence to the suit, and C is entitled to her share of the inheritance, as the transfer by her was merely a transfer of a *spessuccessionis*, and hence inoperative. But C is bound to bring into account the amount received by her from her father. (***Samsuddin*****v**. ***Abdul Hussein*** (1906) I.L.R. 31 Bom. 165)

(4) Doctrine of Representation:

Doctrine of representation is a well-known principle recognised by the Roman, English and Hindu laws of inheritance. Under the principle of representation, as is recognised by these systems of laws, the son of a predeceased son represents his father for purposes of inheritance. The doctrine of representation may be explained with the help of the diagram given below. P has two sons A and B. A has got two sons C and D and B has a son E.



During the life of P, his family members are his two sons (A and B), and three grandsons (C, D and E). Unfortunately, B pre-deceases P, i.e. B dies before the death of P. Subsequently, when P also dies, the sole surviving members of the family of P areA and three grandsons, C, D and E.

Under the doctrine of representation, E will represent his pre-deceased father B and would be entitled to inherit the properties of P in the same manner as B would have inherited had he been alive at the time of P's death.

But, Muslim law does not recognise the doctrine of representation. Under Muslim law, the nearer excludes the remoter. Accordingly, in the illustration given above, E will be totally excluded from inheriting the properties of P. Both, under Shia as well as under Sunni law, E has no right to inherit the properties of P. The result is that E cannot take the plea that he represents his pre-deceased father (B) and should be substituted in his place.

Under Muslim law, the nearer heir totally excludes a remoter heir from inheritance. That is to say, if there are two heirs who claim inheritance from a common ancestor, the heir who is nearer (in degree) to the deceased, would exclude the heir who is remoter. Thus, between A and E, A will totally exclude E because A is nearer to P in degree whereas, E belongs to the second degree of generation. The Muslim jurists justify the reason for denying the right of representation on the ground that a person has not even an inchoate right to the property of his ancestor until the death of that ancestor.

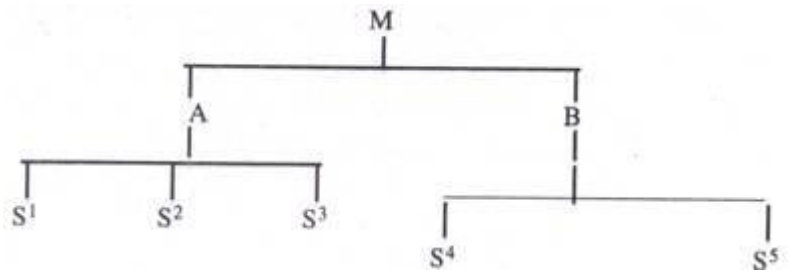
Accordingly, they argue that there can be no claim through a deceased person in whom no right could have been vested by any possibility. But, it may be submitted that non-recognition of principles of representation under the Muslim law of inheritance, seems to be unreasonable and harsh. It is cruel that a son, whose father is dead, is unable to inherit the properties of his grandfather together with his uncle.

(5) Per-Capita and Per-Strip Distribution:

Succession among the heirs of the same class but belonging to different branches may either be per-capita or per-strips. In a per-capita distribution, the succession is according to the ‘number of heirs’ (i.e. heads). Among them the estate is equally divided; therefore, each heir gets equal quantity of property from the heritable assets of the deceased.

On the other hand, in a per strip distribution, the several heirs who belong to different branches, get their share only from that property which is available to the branch to which they belong. In other words, in the stripital succession, the quantum of property available to each heir depends on the property available to his branch rather than the number of all the heirs.

Under Sunni law, the distribution of the assets is per-capita. That is to say an heir does not in any respect represent the branch from which he inherits. The per-capita distribution may be illustrated by the following diagram.



M has got two sons A and B. A has three sons, S^1, S^2 and S^3. B has two sons S^4 and S^5. When M dies there are two branches of succession, one of A and the other of B. Suppose, A and B both die before the death of M so that the sole surviving heirs of M are his five grandsons.

Now, under the per-capita scheme of distribution (as recognised under Sunni law) the total number of claimants (heirs) is five and the heritable property would be equally divided among all of them irrespective of the branch to which an heir belongs.

Therefore, each of them would get 1/5 of the total assets of M. It may be noted that under Sunni law the principle of representation is recognised neither in the matter of determining the claim of an heir, nor in determining the quantum of share of each heir.

Shia Law:

Under the Shia law, if there are several heirs of the same class but they descend from different branches, the distribution among them is per strip. That is to say, the quantum of property inherited by each of them depends upon the property available to that particular branch to which they belong. In the above-mentioned illustration, A and B constitute two branches, each having 1/2 of M's property. Both, A and B pre-decease M.

But, the quantum of property available to each of their branch would remain the same. Therefore, the surviving heirs of A namely, S^1, S^2, 5^3 would get equal shares out of 1/2 which is quantum of property available to the branch of A. Thus S^1, S^2 and S^3 would get 1/6 each. Similarly, the quantum of property available to the branch of B is also 1/2 but the descendants from this branch are only two. Accordingly, the 1/2 property of B would be equally shared by S^4 and S^5.

Therefore, 5^4 and S^5 would get 1/4 each. It is significant to note that for a limited purpose of calculating the share of each heir, the Shia law accepts the principle of representation. Moreover, under the Shia law this rule is applicable for determining the quantum of share also of the descendants of a pre-deceased daughter, pre-deceased brother, pre-deceased sister or that of a pre-deceased aunt.

(6) Female's Right of Inheritance:

Males and females have equal rights of inheritance. Upon the death of a Muslim, if his heirs include also the females then, male and female heirs inherit the properties simultaneously. Males have no preferential right of inheritance over the females, but normally the share of a male is double the share of a female.

In other words, although there is no difference between male and female heir in so far as their respective rights of inheritance is concerned but generally the quantum of property inherited by a female heir is half of the property given to a male of equal status (degree).

The principle that normally the share of a male is double the share of a female has some justification. Under Muslim law, while a female heir gets (or hopes to get in future) an additional money or property as her Mehr and maintenance from her husband, her male counterpart gets none of the two benefits. Moreover, the male heir is primarily liable for the maintenance of his children whereas, the female heir may have this liability only in an extraordinary case.

(7) A Child in the Womb:

A child in the womb of its mother is competent to inherit provided it is born alive. A child in embryo is regarded as a living person and, as such, the property vests immediately in that child. But, if such a child in the womb is not born alive, the share already vested in it is divested and, it is presumed as if there was no such heir (in the womb) at all.

(8) Primogeniture:

Primogeniture is a principle of inheritance under which the eldest son of the deceased enjoys certain special privileges. Muslim law does not recognise the rule of primogeniture and all sons are treated equally.

However, under the Shia law, the eldest son has an exclusive right to inherit his father's garments, sword, ring and the copy of Quran, provided that such eldest son is of sound mind and the father has left certain other properties besides these articles.

(9) Step-Children:

The step-children are not entitled to inherit the properties of their step-parents. Similarly, the step-parents too do not inherit from step-children. For example, where a Muslim H marries a widow W having a son from her previous husband, the son is a stepson of H, who is step-father of this son.

The step-father and step-son (or daughter) cannot inherit each other's properties. That step-child is competent to inherit from its natural father or natural mother. Similarly, the natural father and natural mother can inherit from their natural sons or daughters.

However, the step-brothers (or sisters) can inherit each other's properties. Thus, in the illustration given above, if a son (or daughter) is bom out of the marriage of H and W, the newly born child would be a step-brother (or sister) of the son from wife's previous husband.

These sons or daughters are competent to inherit each other's property. The step-brothers or sisters may either be, uterine or consanguine. Muslim law provides for mutual rights of inheritance between uterine and consanguine brothers or sisters.

(10) Simultaneous Death of two Heirs:

When two or more persons die in such a circumstance that it is not ascertainable as to who died first (i.e. who survived whom) then, both of them cease to be an heir for each other. In other words, where two or more heirs die simultaneously and, it is not possible to establish as to who died first then under Muslim law, all the heirs are presumed to have died just at one moment. The result is that such heirs are regarded as if they did not exist at all; the inheritance opens omitting these heirs.

For example, A and B are each other's legal heirs in such a manner that after the death of any one of them, the surviving person would inherit the property of the deceased one. But, both A and B die simultaneously say, in an aero plane crash, and it could not be established as to who survived whom. Under Muslim law, neither A would inherit B nor B would inherit A.

Thus, the legal heirs of A would inherit A's property as if there was no B at all. Similarly, the heirs of B would inherit B's property as if A did not exist at all?

(11) Missing Persons:

According to the texts of Hanafi law, a missing person was supposed to have been dead only after ninety years from the date of his birth; till then the inheritance of his properties did not open. But, now this rule has been superseded by Sec. 108 of the Indian Evidence Act, 1872 which provides as under:

"When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it".

Accordingly, where a Muslim is missing for at least seven years and if it could not be proved that he (or she) was alive then, that person is legally presumed to be dead and the inheritance of his (or her) properties opens.

It has been held by the courts that Hanafi rule of ninety years of life of a missing person was only a rule of evidence and not any rule of succession; therefore, this Hanafi rule must be taken as superseded by the provisions of Indian Evidence Act 1872.

(12) Escheat:

Where a deceased Muslim has no legal heir under Muslim law, his properties are inherited by Government through the process of escheat. State is regarded as the ultimate heir of every deceased.

(13) Marriage under the Special Marriage Act, 1954:

Where a Muslim contracts his marriage under the Special Marriage Act, 1954, he ceases to be a Muslim for purposes of inheritance. Accordingly, after the death of such a Muslim his (or her) properties do not devolve under Muslim law of inheritance. The inheritance of the properties of such Muslims is governed by the provisions of the Indian Succession Act, 1925 and Muslim law of inheritance is not applicable.

Obstacles to succession

There are certain impediments to succession: (1) Slavery, because a slave has no right to property. (2)

Homicide, a person killing another does not inherit from the latter, (3) Difference of religion, (4)

Difference of territorial jurisdiction either natural or constructive.

The Hanafi Law of Succession

The Sunni law recognizes three classes of heirs:

(1) Ashabul faraiz --The sharers whose shares or proportions have been fixed in the Quran. They take their specific portions and the residue is then divided among the Agnates.

(2) The Asabah or Agnates, also called by English writers as Residuaries.

(3) Dhauil-arham or Cognates or Uterine Relations. They are also called Distant kindred i.e. relations who do not fall in the category of sharers or Agnates.

The Sharers

The sharers or Ashabul-faraiz are altogether twelve in number - four males and eight females.

The four males are: (1) the father, (2) the grandfather or lineal male ascendant (when not excluded), (3) the uterine brothers, and (4) the husband.

The females are: (the) (1) wife, (2) daughter, (3) son's daughter or the daughter of a lineal male descendant howsoever low, (4) mother, (5) true grandmother, (6) full sister, (7) consanguine sister i.e. half-sister on the father's side, and (8) uterine sister i.e. half-sisters on the mother's side.

The Hanafis divide the ascendants for purposes of succession into two classes' viz., true and false. (The) true grandfather is an ascendant in whose line of relationship to the deceased no female intervenes. For example, a father's father is a true grandfather, whereas a mother's father is a false grandfather. A true grandmother is a female ancestor in whose line of relationship with the deceased no false grandfather intervenes. Thus a mother's mother or a father's father's mother are true grandmothers, whereas mother's father's mother is a false grandmother.

The shares of the sharers

1. **Father:** gets 1/6th when the deceased leaves a son or son's son or any other male line descendant.
2. **Father's father** or any other lineal male ascendant gets the share of the father i.e. 1/6th.
3. **Uterine brother**: When only one, and no child or the child of a son, father or true grandfather.....

1/6th. When two or more and no child or the child of a son or father or true grandfather ..... 1/3rd.

4. **Husband**:

(3) When the deceased leaves a child or the child of a son howsoever low..... 1/4th.

(4) Without them ..... 1/2 half.

5. **Widow:**

(1) When the deceased has left no child or the child of a son -

1/4th When there is no child or the child of a son-1/8th

6. **Daughter:**

(1) When only one and no son so as to render a residuary - 1/2.

(2) When two or more-2/3rd

7. **Sons:**

(1) When only one and no child or sons daughter: son or other male lineal descendant - 1/2.

(2) When two or more and no child or son's son or other male lineal descendant-2/3.

(3) When co-existing with one daughter and no son or son's son or other male lineal descendant-1/6. When there are two daughters, the son's daughters are excluded unless there happens to be with them a lineal male descendant of the same or lower degree. The son's daughters or the daughters of any lineal male descendant are excluded by a son or by a lineal male descendant nearer in degree than themselves.

8**. Mother:**

(1) When co-existing with a child of the propositus [the person immediately concerned] or a child of his or her son, or two or more brothers and sisters whether consanguine or uterine-1/6.

(2) When not-1/3.

9. **The grandmother -** However high when not excluded by a nearer true female ancestor-1/6.

10. **Full sisters** -

(I) When only one and no son or son's son, true grandfather, daughter, son's daughter or brother-1/2.

(2) When two or more and no such excluders-2/3.

11. **Consanguine sisters --**

(1) When only one and no excluder as above - 1/2.

(2) When one, and co-existing with one full sister-1/6.

(3) When two or more and no such excluder-1/3.

12. **Uterine sisters** - Get the same share as uterine brothers - 1/6.

All these shares are specified in the Quran. If it be found on assigning respective shares of the sharers that total of the shares exceeds unity, the share of each sharer is proportionally diminished by reducing the fractional shares to a common denominator and increasing the denominator so as to make it equal to the sum of numerators.

Asabah or Residuaries

This class of heirs is called asaba or residuaries because they take the residue after such of the sharers as are not excluded have been satisfied. They are divided into three classes:

(1) Residuaries in their own right;

(2) Residuaries in another’s right, and

(3) Residuaries together with another. Residuaries in their own right

To this class belong all (the) male relations in the chain of whole relationship, no female enters. They are divided into four subclasses:

(1) Parts of the deceased, i.e. his sons and grandsons howsoever low.

(2) His roots i.e. the ascendants, his father and true grandfather, how high so ever.

(3) The offspring of his father viz. full brothers and consanguine brothers and their lineal male descendants.

(4) Parts or offspring of the true grandfather, how high so ever, i.e., lineal male descendants, however remote, of lineal male ascendants, however remote.

Receiving another's rights

Residuaries in another's right are those females who as sharers are entitled to one-half or two-thirds and who become residuaries if they co-exist with their brothers. For example, if the heirs of a deceased person are his widow, brother and sister, the widow will get one-fourth, and of the remaining three-fourths the brother will get two portions and the sister one portion as residuaries. Residuary together with another is a female heir who becomes residuary because of her co-existing with another female heir, for instance, where there is a sister with a daughter.

If there be no residuary, the residue returns to the sharers by consanguinity in proportion to their shares.

Distant kindred

The next class of heirs is known as Dhauil-arham or distant kindred. They include the relations who are neither sharer not residuaries; they inherit only if there are no sharers or residuaries. Shafi'is and Malikis do not treat them as heirs at all. The distant kindred are divided into four subclasses:

(1) The offspring of the deceased viz

(a) The children of daughters and their descendants

(b) The children of son's daughters and their descendants howsoever low.

(2) The root of the deceased or his ascendants

(a) Male ascendants however remote, in whose line of relations to the deceased there occurs female and who are therefore called false grandfathers. e. g. [a] deceased's mother's father [or a] father's mother's father.

(b) Female ancestors technically called false grandmothers.

(3) The offspring of his parents viz. the daughters of full brothers and of full brother's sons, sister's children.

(4) The offspring of grandparents and other ascendants however remote.

(a) daughter of half paternal uncles by the father.

(b) Paternal aunts, full consanguine or uterine and their children.

(c) Daughters of full paternal uncles and their sons.

(d) Maternal uncles and aunts and their children.

(e) Paternal uncles by the mother.

The general order of succession is according to their classification, the first class occupying [the] first and so on.

Among the individuals of the various classes, succession is regulated by proximity to the deceased, the nearer in degree always excluding the more remote.

Exclusion

In order to regulate the number of relations who might inherit together, the doctrine of hujub or exclusion is applied. The son, father, husband, daughter, mother and the wife are never totally excluded. Exclusion is based on two principles.

(1) A person who is related to the deceased through another is excluded by the latter, for example, the father excludes the grandfather, brother and sister in the sun exclude the grandson and this principle is extended to the residuaries so as to give preference to the proximity of degree, for instance, a son excludes another son's son. Secondly, the closest in blood excludes the others. A relation of full blood always inherits in preference to a relation by the father only. Thus a brother excludes a consanguine brother or sister. There is an exception to the first rule, namely that the mother does not exclude brothers and sisters and the second rule is subject to the exception that uterine relations are not excluded on that ground.

(2) Exclusion may sometimes be partial. There is also a general rule that when the deceased leaves behind a male and a female heir of the same class and degree, the latter will get half of the former.

Section 3 (1) (j) - 'related' means related by legitimate kinship - Provided that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another, and any word expressing relationship or denoting a relative shall be construed accordingly.

Section 3 (2): In this Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females.

Section 4 (2): For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceiling or for the devolution of tenancy rights in respect of such holdings.

Section 6: Devolution of interest of Coparcenary property: When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act. Provided that, if the deceased has left surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara, coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Section 8: General Rules of Succession in the case of Males - The property of a male Hindu dying intestate shall dissolve according to the provisions of this Chapter - a) First, upon the heirs, being the relatives specified in class I of the schedule; b) Secondly, if there is no heir of class I, then upon the heirs, being relatives specified in Class II of the schedule. C) Thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and d) lastly, if there is no agnate, then upon the cognates of the deceased.

Section 15 : General Rules of succession in the case of female Hindus: 1) The property of a female Hindu dying intestate shall devolve - a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband, b) secondly, upon the heirs of the husband, c)thirdly, upon the mother and father, d) fourthly, upon the heirs of the father; and e) lastly, upon the heirs of the mother. 2) Notwithstanding anything contained in sub-section 1) - a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon other heirs referred to in sub-section 1) in the order specified therein but upon the heirs of the father.

Section 23 : Special Provision respecting dwelling houses: Where a Hindu intestate has left surviving his or her both male and female heirs specified in class I of the schedule and his or her

property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right to residence therein. Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separate from her husband or is a widow.

Section 30: Testamentary Succession - Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being to disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force and applicable to Hindus. Explanation - The interest of a male in a Mitkshara caparcenary property or the interest of a member of a tarwad, tavazhi, illom, Kutumba or kavaru in the property of the tarwad, tavazhi, illom, Kutumba or kavaru shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this (section).

Suggested Amendments by NCW

1. Proviso under Section 3 (1) (j) - 'related' means related by legitimate kinship with the following - 'Provided that illegitimate children whose paternity is know or has been established shall be deemed to e related to their mother and father, and their legitimate descendants shall be deemed to be related to them, and any word expressing relationship or denoting a relative shall be construed accordingly'.
2. Section 3 (2) which gives primacy to a male and expressly excludes the female should be deleted.
3. tarwad, tavazhi, illom, Kutumba or kavaru: Over-riding effect of Act - Section 4 (2) of the Act should be deleted.
4. Section 6: Devolution of interest of coparcenary property should be amended as follows:

In a joint Hindu family governed by Mitakshara law, the daughter of a coparcener shall be by birth become coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son inclusive of the right subjected to the same liabilities and disabilities in respect thereto as the son;

At a partition in such a Joint Hindu family the coparcenary property shall be so divided as to allot to each child the same share. Provided that the Share which a predeceased child would have got at the partition if he or she had been alive at the time of the partition, shall be allotted to the surviving child of such predeceased child; Provided further that the share allocable to the predeceased child of a predeceased son or of a predeceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or of such predeceased daughter, as the case may be;

any property to which a female Hindu becomes entitled by virtue of the provisions of clause (a) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition.

To ensure that the degrees of descent in representation in the case of males and females remain equal, the NCW recommended that Section 8 of the Act be amended as follows: Section 8: General rules of succession - The property of a Hindu dying intestate shall dissolve according to the provision of this chapter - a) Firstly, upon the heirs, being the relatives specified in Class I of the schedule; b) Secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in Class II of the schedule; c) Thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and d) Lastly, if there is no agnate, then upon the cognates of the deceased'.

Section 15: General Rules of Succession in the case of Female Hindus - Section 15 of the act should be deleted.

Section 23: Special provision respecting dwelling houses - ' where a Hindu intestate has left surviving his or her heirs specified in Class I of the schedule and his, or her property includes a dwelling house wholly occupied by Members of his or her family, then, notwithstanding anything contained in this Act, the rights of any such heir to claim partition of the dwelling house shall not arise unit widowed mother's rights (in case the deceased is a male intestate) have been settled.

Section 30: Testamentary succession - 'Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force and applicable to Hindus proved that bequests beyond one half of the property shall be void.

Explanation: The interest of a male in a Mitakshara caparcenary property or the interest of a Member of a tarwad, tavazhi, illom, Kutumba or Karvaru in the property of the tarwad, tavashi, illom, kutumba or kavaru shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section.

UNIT-IV
Muslim Law of Property
1. HIBA

Concept of Gift under Muslim Law

The concept of Gift, or Hiba in Muslim law has existed from the very inception of the religion, circa. 600 A.D. While Muslim Law has not been shown to recognise the differentiation of land into estates, it does recognise the difference between the ownership of the land and the right to enjoy it.

Unlike English Law, ownership comes only with the full deed of the land and not with the simple possession or temporary tenancy. Hiba is only one of the aspects covered by the Transfer of Property Act under the term 'gift'. It is the transfer of the property and all rights along with it, without expectation of any compensation.

The term Hiba has been defined in several aspects by the courts of India and, pursuant to this, the term has also been seen to exclude all nature of services, for services do not exist at the time of the promise- they can only be performed after the promise to perform is made, which implies that the same cannot fall under the definition of Hiba which requires the object to be in physical existence at the time of the gifting. It has been widely construed that the term mal has to apply to the object so gifted for the laws of Hiba to apply.

Surprisingly enough, all gifts are revocable before the actual transfer of property is made (i.e.) any person can unilaterally revoke his or her promise to gift before the promise is fulfilled. After possession, the laws of revocation differ between Sunni and Shi'a laws.

Introduction

Gift is a transfer of property where interest is transferred from one living person to another, without any consideration. It is a gratuitous and inter vivos in nature. This is the general definition that is accepted by all the religions, including Muslim law. As per the Muslim Law, a gift is called as Hiba.

Under English laws, right in property is classified by a division on the basis of immoveable and moveable (real and personal) property. Rights in land described as "estate" under English Law do not always imply only absolute ownership but it also includes rights which fall short of it and are limited to the life of the grantee or in respect of time and duration or use of the same.

Under Hindu Law, gift is regarded as the renunciation of the property right by the owner in the favor of donee. According to Jimutvahana, under Hindu law's concept of gift, ownership is not created by acceptance but by renunciation of the donor. But however Mitakshara school of hindu law considers acceptance as an important ingredient for gift. The donor can divest his interest by renunciation but cannot impose the same on the done if he is not ready to accept.

Under Muslim Law

The concept of Gift developed much during the period of 610 AD to 650 AD. In general, Muslim law draws no distinction between real and personal property, and there is no authoritative work on Muslim law, which affirms that Muslim law recognises the splitting up of ownership of land into estates. What Muslim law does recognize and insist upon, is the distinction between the corpus of the property itself (called as Ayn) and the usufruct in the property (as Manafi). Over the corpus of property the law recognises only absolute dominion, heritable and unrestricted in point of time. Limited interests in respect of property are not identical with the incidents of estates under the English law. Under the Mohammedan law they are only usufructuary interest (and not rights of ownership of any kind). Thus, in English law a person having interest in immoveable property for limited periods of time is said to be the "owner" of the property during those periods and the usufruct is also regarded as a part of the corpus. On the other hand, in Muslim law, a person can be said to be an "owner" only if he has full and absolute ownership. If the use or enjoyment of property is granted to a person for life or other limited period such person cannot be said to be an "owner" during that period. The English law thus recognises ownership of the land limited in duration while Muslim law admits only ownership unlimited in duration but recognises interests of limited duration in the use of property. This basically differentiates Muslim Law's concept of property and gift from that of English Law.

Under Muslim Law, the religion of the person to whom gift is made is not relevant. In India, there is a separate statute that governs the matters related to transfer of property. The Transfer of Property Act, 1882 under Chapter VII talks about gifts and the procedure for making the same. Yet as per section 129 of the Act, the Transfer of Property Act, 1882 does not apply to the Muslims making gift.

The conception of the term 'gift' as used in the Transfer of Property Act, 1882 is somewhat different from the practice under the Muslim Law. Under the Muslim Law a gift is a transfer of property or right by one person to another in accordance with the provisions provided under

Muslim law. Hiba (Tamlik al ain) , is an immediate and unconditional transfer of the ownership of some property or of some right, without any consideration or with some return (ewaz); and The term 'hiba' and 'gift' are often indiscriminately used but the term hiba is only one of the kinds of transactions which are covered by the general term 'gift'. The other types of gifts include Ariya (Tamlik al manafe), where only usufruct is transferred and Sadqah where the gift is made by the Muslim with the object of acquiring religious merit[v].

A Man may lawfully make a gift of his property to another during his lifetime; or he may give it away to someone after his death by will. The first is called a disposition inter vivos; the second, a testamentary disposition. Muhammadan law permits both kinds of transfers; but while a disposition inter vivos is unfettered as to quantum, a testamentary disposition is limited to one-third of the net estate. Muhammadan law allows a man to give away the whole of his property during his lifetime, but only one-third of it can be bequeathed by will.

The Hanafi lawyers define hiba as '*an act of bounty by which a right of property is conferred in something specific without an exchange*'. The Shias hold that '*a hiba is an obligation by which property in a specific object is transferred immediately and unconditionally without any exchange and free from any pious or religious purpose on the part of the donor'*. Muslim law allows a Muslim to give away his entire property by a gift *inter vivos*, even with the specific object of disinheriting his heirs.

Essentials of Hiba

Since Muslim law views the law of Gift as a part of law of contract, there must be an offer (**izab**), an acceptance (**qabul**), and transfer (**qabza**). In ***Smt. Hussenabi* v. *Husensab Hasan***,[19] a grandfather made an offer of gift to his grandchildren. He also accepted the offer on behalf of minor grandchildren. However, no express of implied acceptance was made by a major grandson. Karnataka HC held that since the three elements of the gift were not present in the case of the major grandchild, the gift was not valid. It was valid in regards to the minor grandchildren. Thus, the following are the essentials of a valid gift

1. A declaration by the donor

There must be a clear and unambiguous intention of the donor to make a gift. The person who declares that he is transferring his property through a gift is called Donor. The person in whose

[19] AIR 1989 Kant 218.

favour the gift is made is called Donee. Declaration is a statement which signifies the intention of transferor that he intends to make a gift.

Oral or Written:

The declaration may be oral or written. But a hiba may be made oral. Writing is not necessary. Under Muslim law, writing and registrations are not necessary for the validity of gift whether the property is movable or immovable. But according to section 123 of the Transfer of Property Act 1882 which provides that gift of immovable property must be in writing and registered it is not applicable to gift made by Muslim. In the famous case of ***Ilahi Samsuddin* v. *Jaitunbi Maqbul***[20] the Supreme Court held that under Muslim Law, declaration as well as acceptance of gift may be oral whatever may be nature of property gifted. When the gift is made in writing, it is known as *Hibanama*. This gift deed need not be on stamp paper and also need not be attested or registered.[21] Another famous case of ***Md. Hesabuddin* v. *Md. Hesaruddin,***[22] where the gift was made by a Muslim Woman to her son was not written on an ordinary paper and was not registered. TheGuahati High Court held that the gift was valid because under Muslim law writing and registration is not an essential condition for the validity of gift.

Express Declaration:

The declaration made by the donor should be clear. A declaration of Gift in ambiguous (multiple interpretation) words is void. In ***Maimuna Bibi* v. *Rasool Mian,***[23] the patna High Court, has held that while oral gift is permissible under Muslim law, to constitute a valid gift it is necessary that donor should divest himself completely of all ownership and dominion over subject of gift. His intention should be in express and clear words.

According to Macnaghten, "*A gift cannot be implie. It must be express and unequivocal, and the intention of donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void when he continues to exercise any act of ownership over it.*"

Free Consent

The declaration for the gift must be made voluntarily. Consent of the donor in making the gift must be a free consent. If the donor makes the gift under threat of force, coercion, undue influence or fraud the gift is not valid.

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[20] (1994) 5 SCC 476.
[21] *MahboobSaheb* v. *Syed Ismail,* AIR (1995) SC 1205.
[22] AIR 1984 Guahati, 41.
[23] AIR 1991 Pat 203.

Bona fide Intention

Gift must be made honestly, i.e. with a bona fide intention to give the property to the donee. A declaration of with an intention of defraud the creditors of the donor is voidable at the option of such creditors.

Competency of the Donor

Donor must be a competent person. Every Muslim is competent to make a gift if he has **capacity** as well as **right.**

Capacity

For a valid hiba, the donor must be (i) Adult, (ii) Sound Mind and (iii) Muslim.

(i) **Adult-:** At the time of making a gift the donor must be adult. He must have attained the age of majority i.e., must be of 18 years. If a minor under the supervision of the court of wards the majority is attained on the completion of 21 years. A gift by a minor is void.

(ii) **Sound Mind**-: The donor must also be of sound mind. An insane person has no capacity to understand the legal implications of his or her activities. However, a declaration of gift by a person of unsound mind during 'lucid interval' is lawful and the gift is valid.

(iii) **Muslim**-: At the time of making the declaration of gift, the donor must be a Muslim. Where the donor is a non-Muslim, the gift is not hiba. A gift made by a non-Muslim is regulated by the Transfer of Property Act, 1882 and rules of Muslim personal law are not applicable to it.

Right

Capacity alone is not sufficient. The donor must also have the right to make the gift. One may have the capacity, i.e. he may be Muslim, adult and of sound mind yet he cannot lawfully gift away the properties of others because he has no such authority.

2. Acceptance of gift-:

Gift must be accepted by the donee. Donee is that person in whose favour the gift is made. In the transfer of property by way of gift, the first step is the declaration of gift by the donor and the second is the acceptance by the done. Without acceptance a gift is not complete.

Competency of the Donee-:

The donee, in whose favour the property is gifted, may be any person in existence. For being a competent donee, the only essential requirement is that he or she must be in existence at the time of declaration. Donee may be a person of any religion, sex, age or state of mind. Thus a Muslim may make a lawful Hiba in favour of a Hindu or a Christian or any non-Muslim. Similarly, a Hiba in favour of a female or minor or an insane person is also valid.

Unborn Child-:

A Child in mother's womb is a competent donee provided it is born alive within 6 months from the date of declaration. A child in the mother's womb i.e., child *enventresa mere* is a person in existence. Therefore, the child in its mother's womb is a competent donee. If after the gift an abortion takes place or the child dies in the womb, the gift made becomes void.

Juristic Person-:

Juristic person are also competent donee and a gift can be made to them. In the eyes of law, the term 'person' means not only the human person but also includes a juristic person or legal person. For example, a corporation, registered firm, company and an University is a juristic person. A juristic person is legally presumed to be adult and of sound mind.

Minor and Insane-:

Gift to a minor or a person of unsound mind is valid. Therefore a minor or a person of unsound mind is a competent donee. A gift to a minor or to a person of unsound mind accepted by the guardian. For purpose of acceptance of a gift, the guardians of a minor or of insane person, are as under:

- Father
- Father's Executor
- Paternal Grand-Father
- Paternal Grand Father's Executor.

3. Delivery of possession by the donor and taking of the possession by the done-:

Delivery of possession is an act by which a donor puts the donee in possession of the property. Under Muslim law, a gift is complete only after the delivery of the possession. Therefore, the gift

takes effect from the date on which the possession of the property is delivered to the donee; not from the date on which the declaration was made. A delivery of possession may be either (i) actual or (ii) constructive.

1. **Actual Delivery of Possession:**

Where a property is physically handed over to the donee, the delivery of possession is actual. If the physical possession of a property is possible, its gift is not complete without actual delivery of possession. Generally, only the tangible properties may be actually delivered to the donee. A tangible property may be movable as well as immovable. For example jewels, money, vehicle etc. is tangible movable property and house, land etc. is tangible immovable property.

2. Constructive Delivery of Possession:

Constructive delivery of possession means a symbolic transfer of property. Delivery of possession is constructive if property is not actually delivered but the donor has done some act due to which it is legally presumed that the possession has been given to the donee. Where the property is of such a nature that its physical possession is not possible and it cannot be delivered actually, a constructive delivery of possession is sufficient to complete the gift. Constructive delivery of possession is sufficient to constitute a valid gift in the following two situations:

- Where the Property is intangible, i.e. it cannot be perceived through senses.
- Where the property is tangible, but it's actual or physical delivery is not possible.

Intangible Properties:

It is interesting to note that there are certain properties which have no physical existence i.e., they cannot be perceived through senses. Such properties are called intangible or incorporeal properties. Although an incorporeal property cannot be possessed, but it can be owned and its owner may make a lawful gift of it. Therefore, in the gifts of incorporeal properties, only constructive delivery of possession is possible which, under the law, fulfils the requirement of a valid gift.

When delivery of Possession is Not Necessary

Registration neither necessary nor sufficient

Under Muslim law, Registration is neither necessary, nor sufficient to validate the gifts of movable or immovable property. A gift of an immovable property made by any person in India, except a Muslim, is not valid unless it is in writing and is duly registered. According to Section

123 of the Transfer of Property Act, 1882 in the gift of movable properties, registration is not compulsory but in a gift of immovable property, registration is necessary irrespective of the valuation of the property. But section 129 of TPA specifically provides that the abovementioned provisions are not applicable to gift made by Muslim.

Constitutional Validity of Hiba

The question of whether the first exemption was constitutionally valid in regards to the right to equality (article 14 of the Indian Constitution) was rather rapidly solved by the Courts, validating the disposition on the grounds of 'reasonable classification.

It is enough to say that it is now well settled by a series of decisions of this Court that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation, and in order to pass the test of permissible classification, two conditions must be fulfilled, namely.

(1) That the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and,

(2) That differentia must have a rational relation to the object sought to be achieved by the statute in question.

The classification may be founded on different bases such as, geographical, or according to objects or occupations and the like. The decisions of this Court further establish that there is a presumption in favor of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional guarantee; that it must be presumed that the legislature understands and correctly appreciates the needs of its own people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds; and further that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.

It is well known that there are fundamental differences between the religion and customs of the Mahomedans and those of others, and, therefore the rules of Mahomedan law regarding gift are based on reasonable classification and the provision of Section 129 of the Transfer of Property Act exempting Mahomedans from certain provisions of that Act is not hit by Article 14 of the Constitution.

The most essential element of Hiba is the declaration, "I have given". As per Hedaya, Hiba is defined technically as:

"*Unconditional transfer of existing property made immediately and without any exchange or consideration, by one person to another and accepted by or on behalf of the latter*".

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

Subject Matter of Gift under Muslim Law

Now the question which we have in mind is what can be subject matter of Hiba, under Muslim law. As per the provisions of Transfer of Property Act, 1882, the subject matter of the gift must be certain existing movable or immovable property. It may be land, goods, or actionable claims. It must be transferable under s 6. But it cannot be future property. A gift of a right of management is valid; but a gift of future revenue of a village is invalid. These cases were decided under Hindu and Mohammedan law respectively but they illustrate the principle. In a Calcutta case, it was said that the release of a debt is not a gift, as a gift must be of tangible property. It is submitted that the release of a debt is not a gift as it does not involve a transfer of property but is merely a renunciation of a right of action. It is quite clear that an actionable claim such as a policy of insurance may be the subject of a gift It is submitted that in a deed of gift the meaning of the word 'money' should not be restricted by any hard and fast rule but should be interpreted having regard to the context properly construed in the light of all the relevant facts. Therefore in order to constitute a valid gift, there must be an existing property. In Mohammedan law any property or right which has some legal value may be the subject of a gift.

Under the Muslim law, following constitute the subject matter of Hiba.

1. It must be anything (moveable or immovable, corporeal or incorporeal) over which the right of property may be exercised or anything which exists either as a specific entity or an enforceable right, or anything designable under the term mal (property).
2. It must be in existence at the time when the gift is made. Thus, gift of anything that is to be made in future is void. For example, a donor makes a gift the fruits of his mango garden that may be produced this year. This gift is invalid since the mangoes were not in existence at the time of making the gift.

3. The donor must possess the gift.

4. A gift of a part of a thing which is capable of division is not valid unless the said part is divided off and separated from the property of the donor; but a gift of an indivisible thing is valid. For example, A, who owns a house, makes a gift to B of the house and of the right to use a staircase used by him jointly with the owner of an adjoining house. The gift of A's undivided share in the use of the staircase is not capable of division; therefore it is valid.

5. According to Hanafi law, the gift of an undivided share in any property capable of division is, with certain exceptions, incomplete and irregular (fasid), although it can be rendered valid by subsequent separation and delivery of possession. For instance, A makes a gift of her undivided share in certain lands to B, and the share is not divided off at the time of the gift but is subsequently separated and possession thereof is delivered to B, the gift although irregular (fasid) in its inception, is deemed valid by subsequent delivery of possession.

Exceptions: Gift of such undivided share is valid which is incapable of division:

a) Hiba by one co-heir to the other; For instance, A muslim woman died leaving a mother, a son, and a daughter. The mother made a gift of her unrealized one-sixth share jointly to the deceased's son and daughter. The gift was upheld by Privy Council.

b) Hiba of a share in free hold property in a large commercial town; For instance, A owns a house in Dhaka. He make a gift of one third of his house to B. The Property being situated in a large commercial town, the gift is valid.

c) Hiba of a share in a zimindari or taluka; According to Ameer Ali the doctrain of Musha was applicable only to small plots of land, and not to specific shares in large landed properties, like zamindaris. Thus, if A and B are co-sharers in a zamindari, each having a well –defined share in the rents of undevided land, and A makes a gift of his share to B, there being no regular partition of the zamindari, the gift is valid.

d) Hiba of a share in a land company

Muslim law recognizes the difference between the corpus and the usufructs of a property. Corpus, or Ayn, means the absolute right of ownership of the property which is heritable and is unlimited in point of time, while, usufructs, or Manafi, means the right to use and enjoy the

property. It is limited and is not heritable. The gift of the corpus of a thing is called Hiba and the gift of only the usufructs of a property is called Ariya.

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

Hence a critical scrutiny of concept of Gift under Muslim law, gives us the following instances regarding what can be subject matter of Hiba:

- Anything over which right of property may be exercised.
- Anything which may be reduced to possession.
- Anything which exists either as a specific entity or as an enforceable right.
- Anything which comes within the meaning of the word mal.

In ***Rahim Bux v Mohd. Hasen[xxvii]***, it was held that gift of services is not valid because it does not exist at the time of making the gift.

Kinds of Gifts

There are several variations of Hiba. These include [xxviii]:

- **HibabilIwaz**
- **Hiba ba Shartul Iwaz**
- **Sadkah**
- **Ariyat**

Hiba-Bil-Iwaz

'Hiba' means 'gift' and 'Iwaz' means 'consideration'. Hiba Bill waz means gift for consideration already received. It is thus a transaction made up of two mutual or reciprocal gifts between two persons. One gift from donor to donee and one from donee to donor. The gift and return gift are independent transactions. Threrfore, when both i.e., hiba (gift) and iwaz (retarn or consideration) is completed, the transaction is called hiba-bil-iwaz. For example, A make a gift of a cow to S and later B makes a gift of a house to A. If B says that the house was given to him by A by way of return of exchange, than both are irrevocable.

So a Hiba-Bill-Iwaz is a gift for consideration and in reality it is a sale. Thus, registration of the gift is necessary and the delivery of possession is not essential and prohibition against Mushaa does not exist. The following are requisites of Hiba bill Iwaz:

1. **Actual payment of consideration on the part of the donee is necessary**. In ***Khajoorunissa* v *Raushan Begam***, it was held that adequacy of the consideration is not the question. As long is the consideration is bona fide, it is valid no matter even if it is insufficient.
2. **A bona fide intention on the part of the donor to divest himself of the property is essential**.

Gift in lieu of dower debt – In ***Gulam Abbas v Razia***, the hon'ble High Court at Allahabad held that an oral transfer of immovable property worth more than 100/- cannot be validly made by a muslim husband to his wife by way of gift in lieu of dower debt which is also more than 100/-. It is neither Hiba nor HibabilIwaz. It is a sale and must be done through a registered instrument.

Hiba-Ba-Shartul-Iwaz

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

It has the following requisites -

- Delivery of possession is necessary.
- It is revocable until the Iwaz is paid.
- It becomes irrevocable after the payment of Iwaz.
- Transaction when completed by payment of Iwaz, assumes the character of a sale.

In general, HibabilIwaz and HibabaShartulIwaz are similar in the sense that they are both gifts for a return and the gifts must be made in compliance with all the rules relating to simple gifts.

Revocation of Gift

Although there is a tradition which indicates that the Prophet was against the revocation of gifts, it is a well-established rule of Muslim law that all voluntary transactions, including gifts, are revocable. The Muslim law-givers have approached the subject of revocability of gift from several angles.

From one aspect, they hold that all gifts except those which are made by one spouse to another, or to a person related to the donor within the degrees or prohibited relationship, are revocable.

The Hedaya gives the reasons thus[xxxii]: "*The object of a gift to a stranger is a return for it is custom to send presents to a person of high rank that he may protect the donor; to a person of inferior rank that the donor may obtain his services; and to person of equal rank that the donor may obtain an equivalent and such being the case it follows that the donor has the power of annulment, so long as the object of the deed is not answered, since a gift is capable of annulment"*.

The texts of Muslim law lay down a long list of gifts which are irrevocable. The contents of the list differ from school to school, and the Shias and the Sunnis have the usual differences. The Muslim law-givers also classify gifts from the point of view of revocability under the following two heads:

- Revocation of gifts before the delivery of possession
- Revocation of gifts after the delivery of possession.

Revocation of gifts before the delivery of possession:

Under Muslim law, all gifts are revocable before the delivery of possession is given to the donee. Thus, P makes a gift of his motor-car to Q by a gift deed. No delivery of possession has been made to Q. P revokes the gift.

The revocation is valid. In this case, it will not make any difference that the gift is made to a spouse, or to a person related to the donor within the degrees of prohibited relationship. The fact of the matter is that under Muslim law no gift is complete till the delivery of possession is made, and therefore, in all those cases where possession has not been transferred the gift is incomplete, and whether or not it is revoked, it will not be valid till the delivery of possession is made to the donee.

The revocation of such a gift, therefore, merely means that the donor has changed his mind and does not want to complete it by the delivery of possession. For the revocation of such gifts, no order of the court is necessary. Fyzee rightly says that this is a case of inchoate gift and it is not proper to apply the term revocation to such a gift.

Revocation after the delivery of possession:

Mere declaration of revocation by the donor, or institution of a suit, or any other action, is not sufficient to revoke a gift. Till a decree of the court is passed revoking the gift, the donee is entitled to use the property in any manner; he can also alienate it.

It seems that:

- all gifts after the delivery of possession can be revoked with the consent of the donee,
- Revocation can be made only by a decree of the court.

The revocation of a gift is a personal right of the donor, and, therefore, a gift cannot be revoked by his heirs after his death. A gift can also not be revoked after the death of the donee.

According to the Hanafi School with the exception of the following cases, a gift can be revoked even after the death of the donee.

According to the Hanafi School, with the exception of the following cases, a gift can be revoked even after the delivery of possession. The exceptions to the same are:

- When a gift is made by one spouse to another.
- When the donor and the donee are related within the prohibited degrees.
- When the donee or the donor is dead.
- When the subject-matter of the gift is no longer in the possession of the donee, i.e., when he had disposed it off by sale, gift or otherwise or, where he had consumed it, or where it had been lost or destroyed.
- When the value of the subject-matter has increased.
- When the identity of the subject-matter of the gift has been completely lost, just as wheat, the subject-matter of gift, is converted into flour.
- When the donor has received something in return (iwaz).

- When the object of gift is to receive religious or spiritual benefit or merit, such as sadaqa.

The Shia law of revocation of gifts differs from the Sunni law in the following respects: First, gift can be revoked by a mere declaration on the part of the donor without any proceedings in a court of law; secondly, a gift made to a spouse is revocable; and thirdly, a gift to a relation, whether within the prohibited degrees or not, is revocable.

Conclusion

The conception of the term gift and subject matter of gift has been an age old and traditional issue which has developed into a distinct facet in property law. Different aspects related to gift in property act and its distinction with the Mohammedan law and its implications has been the major subject matter of this article. In considering the law of gifts, it is to be remembered that the English word ‘gift’ is generic and must not be confused with the technical term of Islamic law, hiba. The concept of ‘hiba’ and the term ‘gift’ as used in the transfer of property act, are different. As we have seen in the project that Under Mohammedan law, to be a valid gift, three essentials are required to exist:

- Declaration of gift by the donor.
- An acceptance of the gift, express or implied, by or on behalf of the done.
- Delivery of possession of the subject of gift.

The English law as to rights in property is classified by a division on the basis of immoveable and moveable (real and personal) property. The essential elements of a gift are:

- The absence of consideration
- The donor
- The done
- The subject-matter
- The transfer; and the acceptance

Thus this striking difference between the two laws relating to gift forms the base of this project in understanding its underlying implications.

To conclude the researcher can say that, the gift is a contract consisting of a proposal or offer on the part of the doner to give a thing and acceptance of it by the donee. So it is a transfer of property immediately and without any exchange. There must be clear intention by the doner to transfer the possession to the doner for a valid gift. It can be revoked by the doner. And the provisions for the same have also been mentioned.

Death-Bed Gifts under Muslim Law (Marz-ul-maut)

Death-Bed Gifts (*Donatio Mortis Causa*):

Gifts made by Muslims during 'death-illness' (Marz-ul-maut) are regarded as wills. Where a Muslim makes any gift of his properties while on his death-bed, the legal effects of the transaction are not of a Hiba but of will.

There are two aspects of a gift made during death-illness; *in its formation it is a pure gift* but *in its legal consequences it is a will*. Describing the nature of a 'gift during death-illness' (*donatio mortis causa*) Buckley, L.J. observed that it is a gift of amphibious nature; not exactly a gift nor exactly a legacy but partaking of the nature of both.

The doctrine of death-bed gifts is based on the donor's state of mind at the time of the transfer. When a person makes a gift during death- illness, he intends to distribute his properties according to his own scheme giving up all the hopes for his life.

A person suffering from mortal-disease believes, beyond reasonable doubt that he would die very soon. With these apprehensions in mind, he attempts to give away his properties. The result is that although the transfer is inter-vivos but the idea behind such transfer is that it is likely to take place only after the donor's death.

Through a gift, a Muslim donor on his death-bed may transfer his properties without any restriction of its quantity although in its effects, the transaction is a will. This may frustrate the very purpose of one-third rule in respect of Muslim wills. Accordingly, in order to prevent the evasion of restrictions on the testamentary capacity of a Muslim, a death-bed gift is interpreted as a will.

Essentials of a Death-bed-Gift:

A gift during death-illness is a pure Hiba in its formation but after the donor's death it operates like a will. Therefore, the essential conditions for a gift during death-illness are: (i) there is a

valid and complete gift, and (ii) this gift is made during death-illness (Marz-ul-maut) of the donor.

(i) A valid and complete gift:

The only difference between a simple gift and a death-bed gift is that if a gift is made by a donor during his death-illness, the gift is testamentary; if it is made normally, the gift is inter vivos i.e. pure Hiba. Thus, in a death-bed gift all the essentials of a valid Hiba are necessary.

There must be declaration, acceptance and the actual or constructive delivery of possession. In brief, the gift must be valid in all respects according to the provisions of Muslim personal law.

(ii) Death-illness (Marz-ul-maut):

Death-illness is an illness which ultimately results in the death of a person. However, there must also be a reasonable apprehension in the mind of that person that he would die on account of that illness. In other words, any disease or ailment may be regarded as a death-illness if the person suffering from it believes that there are no chances of his survival. It is to be noted that the crucial test for Marz-ul-maut is the subjective apprehension of death in the mind of the donor.

The seriousness of the disease or apprehension of death caused in the minds of other persons is not relevant. Whether a disease is a death-illness or not depends upon the donor's state of mind rather than the gravity of that disease. According to Tyabji, for establishing the existence of death-illness following conditions are necessary:

(a) The illness must have caused death;

(b) There must have been proximate danger of death, so that there was preponderance of apprehension of death (i.e. at given time death is more probable than life);

(c) Some degree of subjective apprehension of death in the mind of sick person; and

(d) Some external indicia, chief among which are inability to attend to ordinary avocations.

There cannot be any objective criterion for determining the existence of death- illness. If a disease causes the death and the donor thought it highly probable that this illness would soon end fatally, it is death-illness. Whether an illness is mortal-illness or not is a question of fact and each case must be examined in the light of evidence produced before the court.

It has been held that paralysis is not a death-illness. In ***Mohammad Gulshere* v. *Mariyam***,[24] it was held by the Allahabad High Court that boils or corbuncle for long continuance for over a year may not cause apprehension of death, therefore, it cannot be regarded as death-illness.

Similarly, asthama, lingering consumption and sudden bursting of blood-vessels have not been regarded as death- illness. But, a rapid consumption, tumour in the stomach and tuberculosis of the last stage has been held to be death-illness.

A serious case of pneumonia was held to be a death-illness. In ***Abdul Hafiz* v. *Sahib Bi***,[25] an aged Muslim of over eighty years remained ill very seriously for four days. On the last day, i.e. just before his death, he made a gift.

It was held by Bombay High Court that the gift was made during a death- illness. The Court observed that what are required to be proved upon the preponderance of probabilities are whether the gift was made by the ailing person while under the apprehension of death and, that whether in such ailing he died. During the delivery of a child, the pains of child-birth may also be regarded as death-illness.

It is to be noted that a gift during Marz-ul-maut is established only where the donor dies. If the donor survives that illness, the transaction continues to be a gift.

Legal Consequences of Death-Bed Gifts:

Gifts made during mortal-disease have testamentary effects. That is to say, although the transaction may be constituted as a gift but, it would be interpreted like a will. In its operation, such a gift is governed by the Muslim law of wills. Accordingly, where the donee is a stranger or non-heir, he cannot get more than one-third of total assets without consent of the donor's legal heirs.

Where donee is one of the legal heirs of the donor, the consent of the remaining legal heirs is necessary even though the property given is less than one-third. However, if the donor is a Shia Muslim, a gift during death-illness is valid up to one-third even if the donee is an heir of the donor. To conclude, in the words of Wilson:

"A gift made in mortal sickness is so far regarded as a bequest that it cannot operate on more than one-third of the testator's net assets unless with the consent of all the heirs nor in favour of one heir without the consent of all heirs."

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[24] (1881) 3 All 731

[25] AIR 1975 Bom. 165

What is the Concept of Gift of Life-Interest or Life-Estate under Muslim Law?

Under the Sunni law, gift of the 'life-interest' or 'life estate' is not possible because a gift for life operates as an absolute gift. But, under Shia law, the gift of life-interest (or life-estate) is possible. Where a Shia donor makes a gift 'for life', the donee can enjoy the property during his life but after his death the property reverts back to donor or to donor's legal heirs.

Under Muslim law, whenever the term property is used in its general sense it means and includes its corpus as well as the usufruct. Therefore, ordinarily a transfer of property means transfer of the corpus together with all the beneficial interests (usufruct) of that property.

In other words, unless otherwise provided, in the transfer it is implied that the transferee would have all the incidental benefits i.e. usufruct. But technically, the ownership of the corpus i.e. the property itself may be distinguished from the ownership of the usufruct of that property.

For example, a garden is the corpus and is owned by its owner but its usufruct, that is to say, the producer of the garden (fruits and the flowers) may be allowed to be owned for sometime by another person. Thus, where the owner of a mango-grove sells only the mangoes to another person for one year, the purchaser gets the ownership in all the mangoes for one year but he does not get the ownership of the mango-grove as such.

As the owner of a property can sell the usufruct while retaining the property with him, he may also make a gift only of the usufruct for a specified duration. In such a case, the donee may not get any interest in the property but he may get the absolute interest in its produce or benefits for a specified duration.

This distinction between the ownership of a corpus and the ownership of an usufruct of a property has been the basis of validating a gift of life-interest under the Shia law in Nawazish Ali Khan's case given below:

Nawazish Ali Khan v. Ali Raza Khan[26]

Facts:

Nawab Nasir Ali Khan, a Shia Muslim, executed a will under which he appointed his nephew Fateh Ali Khan as the successor of his properties with all the powers, including the power of

[26] AIR 1948 PC 134

possession and enjoyment as owner provided he be alive. The Will further provided that after the death of Fateh Ali Khan, Mohd. Ali Khan would be the successor of the said properties.

After the death of this successor (i.e. Mohd. Ali Khan) testator's another nephew Hidayat Ali Khan was made the successor, provided he was alive. The Will further provided that the last successor (Hidayat Ali Khan) was authorised also to nominate his own successor of the said properties.

But Hidayat Ali Khan died before the death of Mohd. Ali Khan 'therefore, Mohd. Ali Khan became the last successor. And, under the power of appointment (given under the will to the last surviving Successor) he appointed Nawazish Ali Khan (son of Hidayat Ali Khan) to succeed after his death.

In the language of law, successive life interests were granted under this will and the last successor was given also the vested remainder.

This appointment was challenged by Ali Raza Khan who was a grandson of the testator Nawab Nasir Ali Khan. The questions to be decided in this case were:

(i) Whether the creation of successive life interests was valid under Muslim law and

(ii) Whether Muslim law recognises a vested remainder?

Decision:

The Privy Council held that if it is found that a gift has been made of limited interest; the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is postponed. In other words, gift of a limited or life interest is valid because it may be accepted as a gift of absolute interest in the usufruct of the property for a fixed period.

Regarding the second issue, namely, the validity of the power of appointment given to a life tenant, the Privy Council held that the power of appointment was not valid because no concept of 'vested remainder' is recognised under Muslim personal law.

The court observed that where an IthnaAsharia Shia testator bequeaths his property to A, B and C successively, and then provides that the last surviving devisee should have the power to nominate his successor from among the descendents of the three life tenants, such power was not known to any school of Muslim law as received in India.

Accordingly, it was held by the Court that Fateh Ali Khan and Mohd. Ali Khan took the life interests lawfully and after the death of Mohd. Ali Khan, the property should revert back to the

natural heir of the testator. Thus, Ali Raza Khan, being the grandson of Nawab Nasir Ali Khan (testator) was entitled to succeed the properties as a natural heir in preference to Nawazish Ali Khan.

Note:

It may be noted that the interest created in favour of the last two successors were contingent interests. Contingency was their survival at the death of the preceding successor. Being contingent interests, the interest of the last two successors were void. But neither of the parties to the litigation was interested in raising this point.

The reasoning and the law laid down in the above case was followed in another Shia case, ***Anjuman Ara* v. *Nawab Asif Kadar***,[27] where the Calcutta High Court, after analysing all the provisions of Muslim law on the point, observed:

"In the Mahammedan law, there is a clear distinction between the corpus or 'the substance' and the usufruct. Over the corpus that law recognizes only absolute, complete and indivisible ownership and there it countenances no detraction or limitation. In the usufruct however, limited interests can be created and the limitation may well be in point of time or duration, e.g. for life or for a fixed period."

It is interesting to note that the validity and enforceability of a gift of life interest has been recognised-also in a Sunni case. In ***Shaik Mastan Bi* v. *Shaik Bikari Sahab***,[28] which was a Sunni case, the Andhra Pradesh High Court held that although a Hanafi Muslim cannot make a gratuitous transfer of ownership of a property with limitation for the life of the donor "but when the absolute ownership is transferred to A, and only the enjoyment of the property is reserved to B, then both the gifts are valid.

In other words, the court held that limitations in the enjoyment of a property are permissible but limitations in the ownership are not allowed. According to Fyzee, normally Hiba is a gift of the corpus therefore, Hiba for life is not valid; Ariyat on the other hand, is gift of the usufruct, therefore, Ariyat for life is legal and permissible in the Hanafi law.

[27] (1955) 2 Cal. 109
[28] AIR 1958 AP 751

WILL

The law of wills is contained in Part–VI of the Indian Succession Act, 1925. All the provisions of Part–VI do not apply to Hindus, Buddhists, Sikhs and Jains. The provisions of this part which apply to Hindus, Buddhist, Sikh and Jains are enumerated in schedule III of the Act. But by virtue of section 30 of the Hindi succession Act, 1956, a Hindu, Buddhist, Sikh or Jaina may execute a will in accordance with the provisions of Indian Succession Act. Wills made by Muslims are governed by the Muhammadan Law. Generally, speaking the Indian succession Act, 1925 is applicable to all Indians other than Muslims. However certain provisions of the Act are not applicable to Hindus and apply only to non-Hindus such as Christians, Parsis and Jews.

Wills under Muslims Law:

Muslim law is founded upon Quran. Which is believed by Muslims to have existed from Eternity. The Quran is effectively the relevations of God which were made to Prophet Mohamad at different times. The Quran besides being the holy book for Muslims, also contains references to law which forms the basis of Shara. However, Quran is not a legal text as such and wherever the Quran is silent on aspects of law recourse is taken to the **Sunnat** and the **Hadis** which are respectively the acts and approvals of the Prophet and his sayings respectively.

Muslim Law is therefore a combination of relevations from God i.e., the Quran as also the sayings and actions of the Prophet in the form of the **Hadis** and the **Sunnat**.

Muslims can be broadly divided into three sects:

a. The followers of the Sunni School which would include the **Hanifis**, **Malikis**, **Shafis** and **Ambalis**.

b. The Shias which include within their fold the **Ismailyas**, **Zaidyas** and **Imamias**.

   The Ismailyas in turn include Khojas and Bohras. The Imamias include Akhabari and Usuli.

c. Motazila

The Muslim Law of Succession varies from sect to sect.

Who can make a Will under Muslim Law?

Under the Muslim Law, a Will may be made both by males and females. Will made by pardanashin women, is also valid but much stronger evidence is needed for obtaining a

probate of her Will. Will can be made by a minor also if it is ratified by him after his attaining age of majority i.e. age of 18 years where the minor has a natural guardian and 21 years where he has a guardian appointed by the Court. The testator must be sane at the time of making the Will.

Muslim's law limits the power of bequests to one-third of the net assets. The two-third must in any case be distributed according to rules of intestacy, unless there are no heirs at all claiming adversely to the legatees, which is a rather remote contingency. Thus, a Muslims can validly bequeath only one- third of his net assets, when there are heirs. The net assets are ascertained after payment of the funeral expenses of the deceased, his debts etc.

This rule is based on a tradition of the Prophet and the courts in India have enforced the rule from early times.[29] Where, however, there are no heirs or when all the heirs agree and give their consent the one-third limit may be exceeded.[30] If there are no heirs, testamentary power can be exercised over the entire property of the testator.[31] Where the bequest is in excess of the one-third of net assets, the consent of the heirs must be given after the death of the testator.[32]

Mode of Making Will by Muslims:

Muslims can make a Will in any manner showing a clear intention to make it. Thus they can make a Will orally or in writing or where there is inability to do so they can make the Will by signs. When a Muslim makes a Will in writing the Will needs neither signature nor attestation. The important factor in determining the validity of the Will is the existence of an unambiguous intention on the part of the testator and task of proving of an oral Will is much more difficult than that of written Will. It is, therefore, advised that Muslims should make the Will in writing.

In whose favour Muslims can make a Will:

Disposition by a Muslims in favour of any of his heirs not consented by all other heirs after his death is void. A bequest to a heir is not valid unless the other heirs consent to the bequest after the death of the testator. The policy of this law is to prevent the testator from interfering by Will with the course of devolution of property according to law among his heirs, although he may give specified portion as much as a third to a stranger. The reason that a bequest in favour of a heir would be an injury to other heir as it would reduce their share, and would consequently

[29] Sukunat Bivi v. Shaikh Waris ali,(1874) 22 WR 400.
[30] Allah Baksh v. Md. Umar. AIR 1992 Lah 444.
[31] Abdul Karim v. Abdul Qayum, ILR 28 All 324.
[32] Mohd. Adil Khan v. Batul. 91C 748.

induce breach of the ties of kindred. The bequests in excess of the bequeathable third and/or in favour of any heir, are validated and will be given effect to if after the testator‘s death the heirs whose; rights are affected by such dispositions consent thereto, expressly or impliedly.

In ***Salayjee* v. *Fatima Bibi***,[33] it was observed by their Lordships that the Mohammedan law does not allow a testator to leave legacy to any of his heirs unless the other heirs agree. It was further held that the burden of proving the consent was on party claiming under the Will. Thus there is no doubt that bequest under Mohammedan law to an heir even to the extent one-third cannot be upheld unless the other heirs consent to the, bequest after the death of the testator.

A bequest to a person entitled to succeed as heir to the prejudice of the other heirs is void in Mohammedan law. An unfair distribution would be an injury to the other heirs and induce a breach of ties kindred.[34] But a bequest in favour of an heir may be validated if other heirs give their consent. If only some of the heirs give their assent, it may bind their shares only.[35] The consent must be given after the death of the testator. If the heirs are minors at the time of testator‘s death, consent must be given only after attaining majority. A guardian is not competent to give consent on behalf of a minor.[36] A bequest may be made for the benefit of any institution or in favour of any person or jointly of more-than one capable of holding property provided that the legatee is in existence at the time of the testator‘s death. A bequest in favour of an unborn person is void unless such person is child in the womb and is born within 6 months of the date of the Will. The Shia Law, however, recognises the bequest to a child in the womb if it is born more than 6 months after the date of the Will but within the longest period of gestation from the date of the bequest.

When does a Muslim Will become Effective:

A Muslim will becomes effective and the title to the property bequeathed is completed only with the legatee‘s acceptance express or implied, after the death of the testator. If a legatee accepts a bequest after the death of the testator it is valid even if he may have rejected it during his life time. If however the legate survives the testator and dies without assenting to the Will the assent is presumed.

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[33] AIR 1922 PC 391.
[34] Abdul Rahman v. Uthumansa, AIR 1925 Mad 997.
[35] Salayjee v. Fatima, AIR 1922 PC 391
[36] Ghulam Mohammad v. Ghulam Hussain, ILR 54 All 93 (PC).

Acceptance of Will is presumed in case of infant or child in the womb unless it would cause injury to the legatee. The position under the Shia Law is that if a legatee rejects his share after testator‘s death without having accepted it during testator‘s life time, the legacy stands cancelled even if the legatee has taken possession of it. But if the legatee rejects after death or after acceptance, the legacy stands valid. The acceptance of the legacy may be made by the legatee‘s heirs in the event of a legatee dying without expressing assent and coming into possession of the legacy.

Abatement of Legacy by Muslims:

Where the legacy exceeds the limit permitted by the law, the legacy abates in the following manner:

The bequest will be divided into those for pious purposes and those for other purposes and a proportionately reduced portion will be allotted to each side. In the case of bequest for pious purposes, following priority shall follow:

I. Bequests for faraiz, that is, for the purposes of expiation ordained in the Quran. They, are (i) Haj (pilgrimage); (ii) Zakat (charity of a portion for the poor and (iii) expiation, e.g. for prayers missed. The priority will be in the same order.

II. Bequests for wajibat, that is, for purposes which are not expressly ordained but which are considered to be necessary and proper; for example, alms of fitr and charity on the day of breaking the fast.

III. Bequest for nawafil, that is, bequests of a voluntary nature, e.g., non-obligatory charity to the poor, the building of mosques or voluntary pilgrimage, etc. In the case of bequests made for secular purposes, priority not observed; they are reduced rateably.

Shia Law on Abatement of Legacies:

1. The governing principles for abatement of legacies made beyond permitted limits are as follows:
2. If a bequest is made partly for performance of incumbent and partly for discretionary duties and one - third is not sufficient for both, then if the heirs refuse their consent, the incumbent duties must be discharged from the general mass of the estate and the others from one-third of the remaining property in the order in which they are mentioned by the testator.

3. If a second Will clearly shows the intention of the testator to revoke the first Will, the second bequest shall alone take effect. Such an intention shall be presumed in the case of bequest of exactly one-third to two different persons.

If no such intention appears, bequests will be entitled to priority in the order in which they were made.

Let us explain these principles by Illustrations:

X bequeaths one-third of his property first to Y and then again bequeaths one-third of his property to Z. The heirs do not consent. The latter bequest will amount to a revocation of the former. Z will take one-third and Y will get nothing.

X first bequeaths one-third of his estate to Y and one-fourth to Z and finally one-sixth to W. The heirs do not consent the bequest. Y will take one -third but Z and W will nothing.

X bequeaths his property to the extent of one -ninth to Y, one-third to Z, five-ninth to W. The heirs do not consent to the bequest. Y will get one-ninth and Z only two-ninth (thus making up one-third) and W will get nothing.

Revocation of Will by Muslims:

A Muslim Will can be revoked expressly or impliedly by the testator. The revocation can be oral or in writing. In case it is in writing - signatures, _attestation etc. are not required. Further a subsequent Will will have the effect of revoking the previous Will. Revocation of the Will can also be inferred from the conduct of the testator. For example Mr. X has made a Will bequeathing his Car in favour of Y, yet subsequently he makes a gift of it to Z, the implication is that the bequest has been revoked. Under the Muslim Law a condition which derogates from the completeness of the grant is invalid. If such a condition is attached to the bequest, the bequest would take effect as if there were no conditions. The conditions shall be invalid but the bequest will not be affected. In case the beneficiary dies prior to the death of the testator the legacy is said to have lapsed and forms part of the estate of the testator. The legal heirs of beneficiary shall have no right in respect of the bequest. However, under the law applicable to Shias the legacy does not lapse on the death of the beneficiary prior to the death of testator. The legacy would be received by the heirs of beneficiary after the testator‘s death unless the testator has specifically revoked the bequest.

So long as the provisions of the Indian Succession Act, 1925 are not in conflict with the recognised canons of Muslim Law, the Act shall also apply to Wills made by Muslims.

WAQF

(i) Meaning, Kinds, Rights and Characteristics,

Meaning

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

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

Characteristics of a Valid Wakf

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

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

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

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

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

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

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

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

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

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

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

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

Dedication must be absolute and unconditional.

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

Kinds of Wakfs

A Wakf can be classified into two types -Public and Private. As the name suggests, a public Wakf is for the general religious and charitable purposes while a private Wakf is for the creators own family and descendants and is technically called Wakf alal aulad. It was earlier considered that to constitute a valid wakf there must be a complete dedication of the property to God and thus private wakf was not at all possible. However, this view is not tenable now and a private

wakf can be created subject to certain limitation after Wakf Validating Act 1913. This act allows a private wakf to be created for one's descendants provided that the ultimate benefits are reserved for charity. Muslim Law treats both public and private wakfs alike. Both types of wakf are created in perpetuity and the property becomes inalienable.

Wakf alal aulad

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

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

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

Quasi-public Wakf

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

Contingent Wakf

A wakf, the creation of which depends on some event happening is called a contingent wakf and is invalid. For example, if a person creates a wakf saying that his property should be dedicated to

god if he dies childless is an invalid wakf. Under Shia law also, a wakf depending on certain contingencies is invalid.

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

Conditional Wakf

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

Completion of wakf

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

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

In ***Garib Das v. M A Hamid***,[37] it was held that in cases where founder of the wakf himself is the first mutawalli, it is not necessary that the property should be transferred from the name of the donor as the owner in his own name as mutawalli.

Shia law -

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

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

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[37] AIR 1970 SC

The objectives of Wakf recognized in Islam as religious, pious and charitable include, though are not limited to, the following

Right of Waqf

Establishing, maintaining and fostering the educational institutions, hostels, libraries, sports facilities and so on. Awarding of scholarships so as to promote education.

Providing health care, relief and financial aid to all poor include the victims of communal riots and natural disasters.

Construction of Musafir Khanas and Marriage halls for community use.

Maintenance of Mosques, Dargahs, Graveyards and consolidation of Wakf properties.

Financial support to poor widows, indigent and physically handicapped persons; arranging the marriage of indigent girls and maintenance of divorced woman

Payment of salary to Imams and Muazzins as ordered by Supreme Court.

Objects and purpose

Benefits of Making a Waqf- Being generous are a spiritual investment.

From the Qur'an & Sunnah

Revival of a Sunnah. "He who revives an unpracticed Sunnah will get the reward of a hundred martyrs" (Mishkaat) Thawaab Jariyya – perpetual Thawaab until Qiyamah. The Prophet (SAW) said: "Verily charity appeases wrath of the Lord and removes pangs of death." (Tirmizi) Generosity purifies and rejuvenates the soul of the patron and consoles and supports the disadvantaged. Kindness enhances the relationship between Allah and the contributor. It promotes love, cooperation and welfare among members of the community. Not only does giving increase reward, it increases wealth. Charity awakens feelings of compassion. It reinforces the human bond with less fortunate people and strengthens theties of humanity and fraternity. "But those who give away their wealth out of genuine desire to please Allah, and out of their own inner certainty, are like a garden on a hillside. When heavy rain falls upon it, it yields up twice its normal produce. If no heavy rain falls on it, then a light drizzle will suffice, Allah sees all that you do."

Benefits – (Thawaab)

The benefits of establishing a waqf and the institution of a wqaf in South Africa cannot be measured in terms of rands and cents only. Insha Allah, the benefits will accrue to you, the Muslim ummah as a collective, the poor and disadvantaged in general, and, our country. You are

giving a “beautiful loan” (qard hassan) to Allah, for His pleasure. He will repay it to you in many ways. You are making a financial contribution which the Prophet (s.a.w.) said “will bring great reward to you”. It is a sadaqa jariya which brings you continuous thawaab until the day of Qiyama. Further, by making a waqf, you will get the thawaab for all the benefit your waqf will collectively bring to all those that benefit therefrom. The waqf has several benefits and advantages and you, as an individual, professional, or business, are contributing towards a major new initiative by:

Establishing shariah, a sunnah, and, a sahaba (r.a.) practice

- Creating a long term, massive, powerful community capital fund
- Establishing and supporting projects from wqaf revenues on a sustainable basis.
- Promoting a working unity of stakeholders
- Promoting independence and self-reliance
- Raising the self-esteem of the ummah
- Making dawah more meaningful
- Contributing towards poverty alleviation
- Developing leadership through projects at grassroots level
- Empowering Muslim, poor, and disadvantaged communities·
- Contributing towards becoming an empowered, influential, and benevolent community
- Contributing towards the growth and development of our country
- Leaving a legacy that future generations will be justly proud of
- Benefitting from the dues of the poor and disadvantaged
- Making history – you are part of a history making initiative
- Giving in jama’a, like salah in jama’a is better than giving or performing salah individually

Mosques – objects, kind, requisites

Mosque, Arabic masjid or jāmiʿ, any house or open area of prayer in Islam. The Arabic word masjid means “a place of prostration” to God, and the same word is used in Persian, Urdu, and Turkish. Two main types of mosques can be distinguished: the masjid jāmiʿ, or “collective mosque,” a large state-controlled mosque that is the centre of community worship and the site of Friday prayer services; and smaller mosques operated privately by various groups within society.

The first mosques were modeled on the place of worship of the Prophet Muhammad—the courtyard of his house at Medina—and were simply plots of ground marked out as sacred. Though the mosque as such has undergone many architectural changes, the building remains essentially an open space, generally roofed over, containing a miḥrāb and a minbar, with a minaret sometimes attached to it. The miḥrāb, a semicircular niche reserved for the imām to lead the prayer, points to the giblah, i.e., the direction of Mecca. The minbar, a seat at the top of steps placed at the right of the miḥrāb, is used by the preacher (khaṭīb) as a pulpit. In the early days of Islam the rulers delivered their speeches from the minbar. Occasionally there is also a maqsūrah, a box or wooden screen near the miḥrāb, which was originally designed to shield a worshiping ruler from assassins. Mats or carpets cover the floor of the mosque, where the ritual prayer (salat) is performed by rows of men who bow and prostrate themselves under the imām's guidance.

Outside the mosque stands the minaret (maʾdhanah), which was originally any elevated place but now usually a tower. It is used by the muezzin ("crier") to proclaim the call to worship (adhān) five times each day. A place for ablution, containing running water, is usually attached to the mosque but may be separated from it.

Beginning with Muhammad's own house, mosques came to be used for many public functions—military, political, social, and educational. Schools and libraries were often attached to medieval mosques (e.g., al-Azhar mosque in Cairo). The mosque also functioned as a court of justice until the introduction of secular law into many Islamic countries in modern times. Whereas many of the social, educational, and political functions of the mosque have been taken over by other institutions in modern times, it remains a centre of considerable influence. In some cases a maktab (elementary school) is attached to a mosque, mainly for the teaching of the Qurʾān, and informal classes in law and doctrine are given for people of the surrounding neighborhood.

The mosque differs from a church in many respects. Ceremonies and services connected with marriages and births are not usually performed in mosques, and the rites that are an important and integral function of many churches, such as confession, penitence, and confirmation, do not exist there. Prayer is performed by bows and prostrations, with no chairs or seats of any kind. Men stand in rows, barefooted, behind the imām and follow his movements. Rich and poor, prominent and ordinary people, all stand and bow together in the same rows. Women may participate in the prayers, but they must occupy a separate space or chamber in the mosque. No statues, ritual objects, or pictures are used in the mosque; the only decorations permitted are

inscriptions of Qurʾānic verses and the names of Muhammad and his Companions. Professional chanters (qurrāʾ) may chant the Qurʾān according to rigidly prescribed systems taught in special schools, but no music or singing is allowed.

Methods of creation of waqf

Creation of Wakf

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

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

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

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

Legal Consequences (Legal Incidents) of Wakf

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

Dedication to God- The property vests in God in the sense that nobody can claim ownership of it. In Md. Ismail vs. Thakur Sabir Ali AIR 1962, SC held that even in wakf alal aulad, the property is dedicated to God and only the usufructs are used by the descendants.

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

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

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

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

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

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

Revocation of Wakf

In India, once a valid wakf is created it cannot be revoked because nobody has the power to divest God of His ownership of a property. It can neither be given back to the wakif nor can it be sold to someone else, without court's permission.

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

Mutawalli

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

In ***Ahmad Arif* v. *Wealth Tax Commissioner***,[38] held that a mutawalli has no power to sell, mortgage, or lease wakf property without prior permission of the court or unless that power is explicitly provided to the mutawalli in wakfnama.

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

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

[38] AIR 1971, SC

Who can appoint a mutawalli - Generally, the wakif appoints a mutawalli. He can also appoint himself as a mutawalli. If a wakf is created without appointing a mutawalli, in India, the wakf is considered valid and the wakif becomes the first mutawalli in Sunni law but according to Shia law, even though the wakf remains valid, it has to be administered by the beneficiaries. The wakif also has the power to lay down the rules to appoint a mutawalli. The following is the order in which the power to nominate the mutawalli transfers if the earlier one fails - founder executor of founder mutawalli on his death bed the court, which should follow the guidelines - it should not disregard the directions of the settler but public interest must be given more importance. Preference should be given to the family member of the wakif instead of utter stranger.

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

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

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

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

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

Removal of a mutawalli -

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

By court- if he misappropriates wakf property. Even after having sufficient funds, does not repair wakf premises and wakf falls into disrepair. Knowingly or intentionally causes damage or loss to wakf property. In ***Bibi Sadique Fatima* v. *Mahmood Hasan,***[39] held that using wakf money to buy property in wife's name is such breach of trust as is sufficient ground for removal of mutawalli. He becomes insolvent.

[39] AIR 1978, SC

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

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

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