I

OPERATION OF HINDU LAW

§ 1. PERSONAL LAW: HINDUS

(1) Wherever the laws of India admit the operation of personal law, the rights and obligations of a Hindu are determined by Hindu law, that is, his traditional law, subject to the exception that any part of that law may be modified or abrogated by statute.

(2) The Hindus are divided into four castes,[1] namely:

(i) the Brahmins, or priestly caste;
(ii) the Kshatriyas, or warrior caste;
(iii) the Vaisyas, or agricultural caste; and
(iv) the Sudras.

The members of the first three castes are called twice-born or regenerate. The second birth or regeneration consists in the study of the *Vedas* or sacred literature and in the performance of *sanskaras* or sacraments. All these are denied to Sudras except the *sanskara* of marriage.[2]

The above classification was of considerable importance prior to the recent enactments. The classification, however, continues to be relevant in certain matters to be decided in accordance with the earlier law. In cases of adoption, the adopted son had to belong to the same caste as the adoptive father. In cases of marriage, according to one view, the parties to the marriage had both to belong to the same caste.

Scheduled Caste

In *Arumugam v Rajagopal*,[3] the Supreme Court of India explained the meaning of caste in the wider sense and not merely in the context of the four primary castes. After the Constitution came into operation, the

1 *Choutura v Subub* (1957) 7 MIA 18.
2 *Banerjee on Marriage and Stridhana*, fifth edn, pp 31, 37.
3 AIR 1976 SC 939.

question of what is caste, what is the connotation of scheduled caste and the implication of scheduled caste, has become of considerable importance and consequence.[4]

To further understand the implications of scheduled caste, reference is invited to the observations of the Supreme Court of India in *Indira Sawhney v Union of India*,[5] which has far-reaching implications inasmuch as it lays down various criteria for identification of backward classes.

Kayasthas

It has been held by the High Court of Calcutta that Kayasthas as a general rule are Sudras.[6] On the other hand, it has been held by the High Courts of Allahabad[7] and Patna,[8] that they are not Sudras, but belong to one of the three regenerate classes, probably Kshatriyas.

Marathas

There are three classes of Marathas in the Bombay state.[9]

Malayalam Brahmins

Malayalam Brahmins are governed by Hindu law and some of their rights have been regulated by the Kerala Nambudiri Act 1958.[10]

Conversions

Loss of caste: See § 7A infra.

Other Castes

For some other castes, see the cases discussed below.[11]

4 *Arumugam v Rajagopal* AIR 1976 SC 939; *Principal, Guntur Medical College v Mohan Rao* AIR 1976 SC 1904. Reference may also be made to *Khazan Singh v Union of India* AIR 1980 Del 60 and the cases cited there.

5 *Indira Sawhney v Union of India* AIR 1993 SC 477 (Mandal Commission Report).

6 *Raj Coomar Lall v Bisessur Dyal* (1884) 10 Cal 688; *Asita Mohan v Nerode Mohan* (1916) 20 CWN 901, on appeal (1920) 47 IA 140, 145, 24 CWN 794, 798, AIR 1920 PC 129; *Bhola Nath v Emperor* (1924) 51 Cal 488, 81 IC 70–9, AIR 1924 Cal 616; *Raj Nandini v Aswini Kumar* (1941) 1 Cal 457, AIR 1941 Cal 20 (Kayasthas).

7 *Tulsi Ram v Behari Lal* (1890) 12 All 328, 334.

8 *Ishwari Prashad v Rai Hari Prasad* (1927) 6 Pat 506, 106 IC 620, AIR 1927 Pat 145.

9 *Subrao v Radha* (1928) 52 Bom 497, 113 IC 497, AIR 1928 Bom 295 (Marathas).

10 *Govind Potti v Kesavan* AIR 1987 SC 2236.

11 *Raj Nandini v Aswini Kumar* (1941) 1 Cal 457; *Maharaja of Kolhapur v Sundaram* (1925) 48 Mad 1, 93 IC 705, AIR 1925 Mad 497 (Marathas); *Mokka Kone v Ammakuti Ammal* (1928) 51 Mad 1 (FB), AIR 1928 Mad 299 (Yadavas); *Durga Das Pan v Santosh Kumar Pan* (1945) 1 Cal 17 (Sadgopes); *Nagi v Rajkunwar* AIR 1956 Nag 138 (Komatis).

§ 2. APPLICATION OF HINDU LAW

The power of the courts of India to apply the Hindu law to Hindus is derived from and regulated by certain statutes of the British Parliament and by imperial and provincial legislation passed during the period of British rule, which unless altered or repealed, are to continue in force under the express provisions of art 372 of the Indian Constitution.

§ 3. EXTENT OF APPLICATION OF HINDU LAW

(1) The Hindu law as administered by the courts of India is applied to Hindus in some matters only.

(2) Throughout India, questions regarding succession, inheritance, marriage and religious usages and institutions, are decided according to Hindu law, except insofar as such law has been altered by legislative enactment.

(3) Besides the matters referred to above, there are certain additional matters in which Hindu law is applied to Hindus, in some cases by virtue of express legislation, and in others, on the principle of justice, equity and good conscience. These matters are adoption, guardianship, family relations, wills, gifts and partitions. As to these matters also, Hindu law is to be applied subject to such alterations as have been made by legislative enactment.

§ 4. ACTS MODIFYING AND ABROGATING RULES OF HINDU LAW

Fundamental and radical changes were made in 1955 and 1956 by the following Acts:

(1) The Hindu Marriage Act, 25 of 1955.
(2) The Hindu Succession Act, 30 of 1956.
(3) The Hindu Minority and Guardianship Act, 32 of 1956.
(4) The Hindu Adoptions and Maintenance Act, 78 of 1956.

The Hindu law had, prior to 1955, been modified and supplemented in certain respects by the following Acts:

(1) The Caste Disabilities Removal Act 1850.—According to the Hindu law and usage, if a Hindu renounces his religion, or is excluded from the communion of that religion, or is deprived of caste, such renunciation, exclusion or deprivation entails a forfeiture of his rights and property, and deprives him of his right of inheritance. The effect of the above-mentioned Act was that these consequences ceased to be enforced as law in the Courts of

British India.[12] The Act is also known as the Freedom of Religion Act.

(2) The Hindu Widows' Remarriage Act 1856.—This Act legalises the remarriage of Hindu widows in certain cases.

(3) The Indian Succession Act 1925, s 214 and Sch—III to the Act. These sections are dealt with in the chapter on Wills.

(4) The Native Converts' Marriage Dissolution Act 1866.—This Act enables a Hindu convert to Christianity to obtain a dissolution of marriage under certain circumstances.

(5) The Special Marriage Act, XLIII of 1954.

(6) The Transfer of Property Act, IV of 1882.—This Act supersedes the whole of the Hindu law as to transfer of property.

(7) The Indian Majority Act 1875.—This Act, which fixes the age of majority on completion of the eighteenth year, applies to Hindus, except in matters of marriage, divorce and adoption.

(8) The Guardians and Wards Act 1890.—This Act applies to Hindus in cases where a guardian has to be, or has been, appointed by the court.

(9) The Hindu Inheritance (Removal of Disabilities) Act 1928.—This Act limits the disabilities which excluded a Hindu from inheritance and from a share on partition.

(10) The Hindu Law of Inheritance (Amendment) Act 1929.—This Act admits the son's daughter, the daughter's daughter, the sister, and the sister's son, as heirs, next after the father's father and before the father's brother. This Act is now repealed by s 1 of the Hindu Succession Act 1956.

(11) The Child Marriage Restraint Act XIX of 1929.

(12) The Hindu Gains of Learning Act 1930.—This Act makes all acquisitions by means of learning the separate property of the acquirer.

(13) The Hindu Women's Rights to Property Act, XVIII of 1937.—Gives new rights of inheritance to widows, and strikes at the root of a Mitakshara coparcenary. This Act is now repealed by s 31 of the Hindu Succession Act, 30 of 1956.

(14) The Hindu Married Women's Right to Separate Residence and Maintenance Act 1946.—This Act is now repealed by s 29 of the Hindu Adoptions and Maintenance Act, LXXVIII of 1956.

§ 5. ENACTMENTS REFERRED TO IN § 2

For a statement in a tabular form of the enactments referred to in § 2 above, the courts to which they apply, and the extent to which the

12 *Khunni Lal v Gobind Krishna* (1911) 33 All 356, 38 IA 87, 10 IC 477; *Chidambaram v Ma Nyein Me* (1928) 6 Rang 243, AIR 1928 Pat 179.

Hindu law is to be administered by those courts, reference may be made to § 5 of the earlier editions of this work (12th edn).

§ 6. PERSONS GOVERNED BY HINDU LAW

The four new enactments of 1955 and 1956 stated in § 4 above, expressly mention the persons to whom they are applicable. §§ 6 and 7 are based on decisions of courts, relating to old uncodified Hindu law, determining persons governed by Hindu law and stating persons to whom Hindu law has been held not to be applicable. In *Yagnapurushdasji v Muldas*,[13] the Supreme Court explained who are Hindus and stated the broad features of the Hindu religion.

The Hindu law applies:

(i) not only to Hindus by birth, but also to Hindus by religion, ie converts to Hinduism;[14]

In *Perumal v Ponuswami*,[15] the Supreme Court pointed out that a person may be a Hindu by birth or by conversion. A mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism. However, a bona fide intention to be converted to the Hindu faith, accompanied by conduct unequivocally expressing that intention, may be sufficient evidence of conversion. No formal ceremony of purification is necessary to effectuate conversion.

In *Commissioner of Wealth-tax v R Sridharan*,[16] the son of a Hindu father and a Christian mother who were married under the Special Marriage Act 1954, was held by the Supreme Court to be a Hindu having

13 AIR 1966 SC 1119.

14 *Abraham v Abraham* (1863) 9 MIA 195, 243; *Jowala v Dharum* (1866) 10 MIA 511, 537; *Dagree v Pacotti* (1875) 19 Bom 783, 788; *Re Joseph Vadiar of Nazareth* (1872) 7 Mad HC 121; *Morarji v Administrator-General* (1929) 52 Mad 160, 111 IC 364, AIR 1928 Mad 1279; *Sahdeo Narain v Kusum Kumari* (1922) 50 IA 58, 2 Pat 230, 71 IC 769, AIR 1923 PC 21; *Palaniappa Chettiar v Alagan Chetti* (1921) 48 IA 539, 44 Mad 740, 64 IC 439, AIR 1922 PC 228; *Ganesh Mahto v Shib Charan Mahata* (1932) 11 Pat 139, 133 IC 165, AIR 1931 Pat 305 following (1928) 51 Mad 1, FB, 108 IC 760, AIR 1928 Mad 299; *Sunder Devi v Jhoboo Lal* AIR 1957 All 215 (inheritance to property of a Muslim woman converted to Hinduism). As to conversion, generally see *Chaturbhuj v Moreshwar* AIR 1954 SC 236. As to when change of religion can be inferred, see *Ganpat v Returning Officer* AIR 1975 SC 420; *D Neelima v Dean, PG Studies AP Agri University, Hyderabad* AIR 1993 AP 229 (on marriage a wife acquires caste or tribe of her husband and also *gotra* and sapindaship, ceasing all ties with her paternal family).

15 AIR 1971 SC 2352. In *Bhaiya Sher Bahadur v Ganga Baksh* (1913) 36 All 101, 115–116, 41 IA 1, 14, the Privy Council had left this question open. For object, nature and importance of rituals see *Seshammal v State of Tamil Nadu* AIR 1972 SC 1586 (meaning of Saivites and Vaishnavites).

16 (1976) 4 SCC 489; *K Devabalan v M Vijaykumari* AIR 1991 Ker 175.

regard particularly to the fact that the father had unequivocally declared that he and his son formed a Hindu Undivided Family (hereinafter referred to as 'HUF'. (Also see § 7 (4)).

(ii) to illegitimate children where both parents are Hindus;[17]

(iii) to illegitimate children where the father is a Christian and the mother is a Hindu, and the children are brought up as Hindus.

However, the Hindu law of coparcenary, which contemplates the father as the head of the family and the sons as coparceners by birth with rights of survivorship, cannot from the very nature of the case, apply to such children:[18]

(iv) to Jains,[19] Buddhists in India, Sikhs[20] and Nambudri Brahmins,[21] except so far as such law is varied by customs and to Lingayats, who are considered Sudras;[22]

(v) to a Hindu by birth who, having renounced Hinduism, has reverted to it after performing the religious rites of expiation and repentance.[23] Or even without a formal ritual of reconversion, when he was recognised as a Hindu by his community;[24]

(vi) to sons of Hindu dancing girls of the Naik caste converted to Mohammedanism, where the sons are taken into the family of the Hindu grandparents and are brought up as Hindus;[25]

17 *Re Ram Kumari* (1891) 18 Cal 264; *Dattaraya Tatya v Maha Bala* (1934) 58 Bom 119, 149 IC 821, AIR 1934 Bom 36.

18 *Myna Boyee v Qataram* (1961) 8 MIA 400.

19 *Sheo Singh v Dakho* (1978) 1 All 688, 5 IA 87 (adoption); *Chotay Lall v Chunnoo Lall* (1878) 4 Cal 744, 6 IA 15 (inheritance); *Sheokurabai v Jeoraj* (1920) 25 CWN 273, 275, 61 IC 481 (PC); *Rup Chand v Jambu Parshad* (1910) 37 IA 93, 6 IC 272 (adoption); *Bhagvandas v Rajmal* (1873) 10 Bom HC 241, 247 (adoption); *Thackersey v Hurbhum* (1884) 8 Bom 432, 453 (Jain temple); *Parshotam v Venichand* (1921) 45 Bom 754, 757, 61 IC 492, AIR 1921 Bom 147 (adoption); *Gateppa v Eramma* (1927) 50 Mad 228, 99 IC 503, AIR 1927 Mad 228 (adoption). *Bhikabai v Manilal* (1930) 54 Bom 780, 128 IC 628, AIR 1930 Bom 517 (alienation by Jain widow); *Jatwanti v Anandi Devi* (1938) 59 All 196, 173 IC 356, AIR 1938 All 62; *Suganchand v Mangibai* (1942) ILR Bom 467, 44 Bom LR 358, 20 IC 759, AIR 1942 Bom 185.

20 *Rani Bhagwan Koer v Bose* (1903) 31 Cal 11, 30 IA 249; *Inder Singh v Sadhu Singh* (1944) 1 Cal 235; *Bahadursingh v Dalipsingh* AIR 1950 MB 1. As to Jat Sikhs, see *Pritam Singh v Asst Controller of Estate Duty* 1979 PLR 342. As to conversion to Buddhism, see *Punyabrao v D P Mesharam* AIR 1965 SC 1179.

21 *Vishnu v Akkamma* (1911) 34 Mad 496, 6 IC 583; *Narayan Iyer v Moorthi Kenden* (1938) ILR Mad 897, AIR 1938 Mad 643; *Narayanan Namboori v K Rai Varma* AIR 1956 T-C 74 (Nambudri Malayalam Brahmins in Travancore-Cochin).

22 *Tirkangauda v Shivappa* (1943) Bom 706, 45 Bom LR 992, AIR 1944 Bom 40.

23 *Kusum v Satya* (1903) 30 Cal 999.

24 *Durga Prasada Rao v Sudarsanaswami* AIR 1940 Mad 515; *Rajagopal v Arumugam* AIR 1969 SC 101; *Arumugam v Rajagopal* AIR 1976 SC 939; *Guntur Medical College v Mohan Rao* AIR 1976 SC 1904.

25 *Ram Pergash v Mussammat Dahan Bibi* (1924) 3 Pat 152, 78 IC 749, AIR 1924 Pat 420.

(vii) to Brahmos;[26] to Arya Samajists;[27] and to Santhals of Chota Nagpur;[28] and also to Santhals of Manbhum[29] except so far as it is not varied by custom; and

(viii) to Hindus who made a declaration that they were not Hindus for the purpose of the Special Marriage Act 1872.[30]

Many persons of aboriginal tribes and origins have been absorbed into the Hindu faith and have come under the sway of Hindu law. It would seem to be the accepted position that Hindu law applies to tribal people living in the interior parts of the country, whose way of life, habits and culture have been influenced by Hindus generally so called and who profess Hinduism.[31] Naiks in Madhya Pradesh who were originally of Gond origin are governed by Hindu law.[32] Rajgonds are not Hindus, but the presumption is that they are governed by Hindu law, unless the contrary is shown.[33] That presumption was applied by the Nagpur High Court in *Raja Chattar Singh v Diwan Roshan Singh*.[34]

As to Kurmi Mahtons of Chota Nagpur, see *Mohari Mahto v Mokaram Mahto*[35] and the decisions cited there.

A person who is born a Hindu and has not renounced the Hindu religion, does not cease to be a Hindu merely because he departs from the standard of orthodoxy in matters of diet and ceremonial observances.[36] The acceptance of the *Granth Sahib* by the Udassis (a schismatic sect of Sikhs who remained within the fold of Hinduism; is in no way inconsistent with their continuing as Hindus.[37] A Hindu does not by becoming a Jati

26 *In the goods of Jnanendra Nath Roy* (1922) 49 Cal 1069.

27 *Mst Suraj v Attar* (1922) 1 Pat 706, 713–14, 67 IC 550, AIR 1922 Pat 378; *Iswar Radhakanta v Khetra* AIR 1949 Cal 253; *Shyamsunder v Shankar Deo* AIR 1960 Mys 27; *Shiva Nand v Shri Shankarji Maharaj* AIR 1984 All 55 (suit filed in the name of idol and also in his name by Manager-Aryasamajist).

28 *Chunka v Bhabani* (1945) 24 Pat 727; *Langa v Jiba* AIR 1971 Pat 185.

29 *Budhu v Dukhan* AIR 1956 Pat 123; *Langa v Jiba* AIR 1971 Pat 185 (aboriginal Santhals of village Kutchai are Hindus).

30 Also see § 7(4); *Vidyagavri v Naradas* AIR 1928 Bom 74; *Punyabrata Das v Monmohan Ray* AIR 1934 Pat 427; *Thukru Bai v Attavar* (1935) 58 Mad 1004, AIR 1935 Mad 653.

31 Reference may be made to *Dhanuragya v Sukra* AIR 1987 Ori 205.

32 *Nagi v Rajkunwar* AIR 1956 Nag 138; *Rafail Uraon v Baiha Uraon* AIR 1957 Pat 70.

33 *Dashrath Prasad v Lallosingh* AIR 1951 Nag 343, (1951) ILR Nag 873.

34 (1946) ILR Nag 159, AIR 1946 Nag 277.

35 AIR 1963 AP 466.

36 *Rani Bhagwan Koer v Bose* (1903) 31 Cal 11, 30 IA 249; *Ma Yait v Maung Chit* (1921) 49 Cal 310, 321, 48 IA 553, 562, 66 IC 609, AIR 1922 PC 197; *Ishwari Prasad v Rai Hari Prashad* (1927) 6 Pat 506, 106 IC 520, AIR 1927 Pat 145 (Kayasthas of Bihar).

37 *Mahant Basant v Hem Singh* (1926) 7 Lah 275, 94 IC 695, AIR 1926 Lah 100.

Vaishnava (a sect in Bengal not recognising the caste system) cease to be a Hindu.[38]

§ 7. PERSON TO WHOM HINDU LAW DOES NOT APPLY

The Hindu law does not apply:

(1) to the illegitimate children of a Hindu father by a Christian mother who are brought up as Christians,[39] or to illegitimate children of a Hindu father by a Mohammedan mother;[40]

The persons falling under this category are not Hindus either by birth or by religion. In § 6, cll (ii) and (iii), the mother is a Hindu, but not so here.

(2) to the Hindu converts to Christianity;

Succession to the estate of a Hindu convert to Christianity, who dies a Christian and intestate, is governed by the Indian Succession Act 1865, now the Indian Succession Act 1925. A person ceasing to be a Hindu in religion cannot, since the passing of the Act of 1865, elect to continue to be bound by Hindu law in matters of succession.[41] For decisions prior to 1865, see *Abraham v Abraham* and *Sri Gajapathi v Gajapathi*.[42]

The question whether a Hindu abandoned Hinduism and embraced Christianity is essentially one of fact, but may become a mixed question of law and fact.[43]

It is not settled whether the Hindu rule of survivorship is applicable to the families of native Christians, who continue to be joint even after conversion. Reference may be made to *Tellis v Saldanha*; *Jogi Reddi v Chinnabbi Reddi*;[44] and *Francis Ghosal v Gabri Ghosal*; *Kulada v Haripada*.[45]

In *Anthonyswamy v Chinaswamy*,[46] the Supreme Court held that the doctrine of pious obligation applies to the Tamil Vanniya Christian community and the son is bound to discharge his father's debts not

38 *Nalinaksha v Rajanikanta* (1931) 58 Cal 1392, 134 IC 1272, AIR 1931 Cal 741.
39 *Lingappa v Esudasan* (1904) 27 Mad 13 (maintenance).
40 *Charanjit Singh v Amir Ali Khan* (1921) 2 Lah 243, 248, 64 IC 892, AIR 1921 Lah 121.
41 *Kamawati v Digbijai Singh* (1921) 43 All 525, 48 IA 381, 64 IC 559, AIR 1922 Pepsu 14; *Dagree v Facotti* (1895) 19 Bom 783.
42 *Abraham v Abraham* (1863) 9 MIA 195, 241; *Sri Gajapathi v Gajapathi* 14 WR PC 33.
43 *See Arumugam v Rajagopal* AIR 1969 SC 101.
44 *Tellis v Saldanha* (1887) 10 Mad 69; *Jogi Reddi v Chinnabbi Reddi* (1929) 56 IA 6, 9–11, 52 Mad 83, 87–90, 114 IC 5, AIR 1929 PC 13.
45 *Francis Ghosal v Gabri Ghosal* (1907) 31 Bom 25; *Kulada v Haripada* (1913) 40 Cal 407, 417–18, 17 IC 257.
46 AIR 1970 SC 233.

tainted by illegality or immorality. The doctrine, it was observed, is not opposed to any principles of Christianity.

(3) to converts from the Hindu to the Mohammedan faith;

The succession to the estate of a convert from the Hindu to the Mohammedan faith is governed by the Mohammedan law, and not by the Hindu law. Khojas and Cutchi Memons, who are converts from Hinduism to Mohammedanism, and who, in accordance with their customs have hitherto been governed by the Hindu law of inheritance and succession, will hereafter be governed by the Muslim personal law, except where the questions relate to agricultural lands [vide Act XXVI of 1937 and *Mulla's Mahomedan Law*].

(4) to the property of any person professing the Hindu, Sikh or Jain religion who married under the Special Marriage Act, 3 of 1872 or the property of the issue of such marriage. These are governed by ss 32 to 48 of the Indian Succession Act. Also see s 21 of the Special Marriage Act 1954 and s 5(1) of the Hindu Succession Act 1956.

§ 7A. LOSS OF CASTE: RECONVERSION

The question of reconversion to Hinduism is of considerable importance and consequence, and particularly so in election cases, where the court has to determine whether a person can be regarded as a member of, for instance, scheduled castes.

In *Anbelgan v Devarajan*,[47] the case-law on the subject was critically examined and it was pointed out by the Supreme Court that the decisions on the subject clearly establish that:

> ...no particular ceremony is prescribed for reconversion to Hinduism of a person who has earlier embraced another religion. Unless the practice of the caste makes it necessary, no expiatory rites need be performed, and, ordinarily, he regains his caste unless the community does not accept him... . The practice of caste however irrational...is so deep-rooted...that its mark does not seem to really disappear...even after some generations after conversion.

47 AIR 1984 SC 411; *Kailash Sonkal v Maya Devi* (1984) 2 SCC 91. Reference may also be made to the series of decisions examined by the Supreme Court in the above decisions.

II

SOURCES OF HINDU LAW

§ 8. SOURCES OF HINDU LAW

The three main sources of Hindu *dharma* or law are: (1) the *Shruti*; (2) the *Smriti*; and (3) custom.

A practical division of the sources of Hindu law would be: (1) original texts of the *Dharmashastras*; (2) commentaries and digests; and (3) customs. Hindu law at the present day is the result of many ingredients. To these main sources, must be added for all practical purposes, the auxiliary indices, justice, equity and good conscience, judicial decisions, and legislative enactment modifying or abrogating the previously existing law.

The sources of Hindu law have been considered in the Introduction to this book.

§ 9. COMMENTARIES AS A SOURCE OF LAW

The law of the *Smritis* was empiric and regressive, and in course of time, several commentaries and digests (*nibandhas*) were written on it. The authority of the several commentators varied in different districts, and thus arose the schools of law, which are operative in different parts of India.

§ 10. JUDICIAL DECISIONS AS A SOURCE OF LAW

Judicial decisions on Hindu law are sometimes spoken of as a source of law.[1] Almost all the important points of Hindu law are now to be found in the law reports, and to this extent, it may be said that the decisions on Hindu law have superseded the commentaries. The decisions of the Privy Council and the Supreme Court are binding on all the courts of India, including the High Courts; but the decisions of any one High Court

1 *Saraswathi v Jagadambal* AIR 1953 SC 201, 204.

are not binding on any other High Court, though they are binding on the courts subordinate thereto.[2]

The Hindu law was at first administered by the English judges with the assistance of Hindu *pundits*. The institution of *pundits* as official referees of courts was abolished in 1868.

§ 11. MITAKSHARA AND DAYABHAGA SCHOOL

(1) 'The remote sources of the Hindu law (that is *Smritis*) are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose.'[3]

(2) There are two schools of law, namely, Mitakshara school and Dayabhaga school. Dayabhaga school prevails in Bengal; while Mitakshara school prevails in other parts of India.

(2A) For Marumakkattayam, Aliyasantana and Nambudri systems of law, see 'Introduction' to the book.

(3) Mitakshara is a running commentary on the Code of Yajanavalka. It was written by Vijnaneshwara in the later part of the 11th Century.[4] Dayabhaga is not a commentary on any particular code, but purports to be a digest of all codes. It was written by Jimutavahana in the beginning of the 12th Century.[5]

(4) Mitakshara is applicable throughout India except in Bengal, where Dayabhaga is of supreme authority. However, even in Bengal, Mitakshara is still regarded as a very high authority on all questions in respect of which there is no express conflict between Mitakshara and Dayabhaga, and the other works prevalent there.[6] Dayabhaga may also be referred to in a Mitakshara case on points on which the latter treatise is silent.[7]

(5) It is said that Mitakshara school is the orthodox school, and Dayabhaga school is the reformed school of Hindu law. Dayabhaga school is also called the Bengal School of Hindu law.

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2 *Korban Ally v Sharoda* (1884) 10 Cal 82; *Balaji v Sakharam* (1893) 17 Bom 555; *Amritlal v Jayantilal* AIR 1960 SC 964; *Dudh Nath v Sat Narain* AIR 1966 All 315 (FB).

3 *Collector of Madura v Mootoo Ramalinga* (1868) 12 MIA 397 at 435.

4 See 'Introduction' to the book.

5 See 'Introduction' to the book.

6 *Bhagwandeen v Myna Baee* (1867) 11 MIA 487 at 507–08; *Collector of Madura v Mootoo Ramalinga* (1868) 12 MIA 397 at 435; *Akshay v Hari Das* (1908) 35 Cal 721.

7 *Rai Bishenchand v Asmaida Koer* (1884) 6 All 560, 11 IA 164, 179; *Mahabir Prasad v Raj Bahadur Singh* (1943) 18 Luck 585, 203 IC 244, AIR 1943 Ori 27.

(6) The Bengal school differs from Mitakshara school in two main particulars, namely, the law of inheritance and the joint family system.

§ 12. SUB-DIVISIONS OF MITAKSHARA SCHOOL

(1) Mitakshara school is sub-divided into four minor schools; these differ between themselves in some matters of detail relating particularly to adoption and inheritance. All these schools acknowledge the supreme authority of Mitakshara, but they give preference to certain treatises and to commentaries which control certain passages of Mitakshara. This accounts for the differences between those schools.[8]

The sub-schools and the principal works, which supplement Mitakshara in each sub-school, are given in Table II.1

Table II.1

Benares school	Viramitrodaya.[9] Nirnayasindhu.[10]
Mithila school	Vivada Chintamani.[11] Vivada Ratnakara.[12] Madana Parijata.[13] Vyavahara Mayukha.[14]
Maharashtra or Bombay school (Western India)	Viramitrodaya. Nirnayasindhu.
Dravida or Madras school (Southern India)	Smriti Chandrika.[15] Parashara Madhaviya.[16] Saraswati Vilasa.[17] Vyavahara Nirnaya.[18]

(2) As regards authorities in Western India, Mitakshara ranks first and paramount in Maharashtra, Northern Kanara and the Ratnagiri district. In Gujarat, the Island of Bombay and the North Konkan, the Mayukha is

8 (1867) 11 MIA 487, 507–08.
9 See 'Introduction' to the book.
10 Ibid.
11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid.
15 Ibid.
16 Ibid.
17 Ibid.
18 Ibid.

considered as the overruling authority, where there is a difference of opinion between Mayakha and Mitakshara.[19]

The principle, however, adopted by the High Court of Bombay, and sanctioned by the Privy Council, is to construe the two works, so as to harmonise them with each other, wherever and so far as that is reasonably possible.[20] In Poona, Ahmednagar and Khandesh, the Mayukha is considered to be of equal authority with Mitakshara, but not capable of overruling it as in Gujarat, the Island of Bombay and the North Konkan.[21]

§ 13. WORKS ON ADOPTION

The two special works on adoption are the *Dattaka Mimansa* and *Dattaka Chandrika*. Generally speaking, they are equally respected throughout India, but where they differ, *Dattaka Mimansa* is preferred in Mithila and Benares, and *Dattaka Chandrika* in Bengal.[22]

With regard to these two works, their Lordships of the Privy Council said:

> Both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule.[23]

As to *Dattaka Chandrika*, it may be said that in Bengal there is a tradition that it is a literary forgery by Raghumani Vidyabhushana, who was the *Pundit* of Colebrooke, the celebrated English translator of numerous Sanskrit works on Hindu law. It is said that it was written to help a claim set up by an adopted son to a Raja in Bengal.

19 *Krishnaji v Pandurange* (1875) 12 Bom HC 65; *Lallubhai v Mankwarbai* (1878) 2 Bom 388, 418; *Sakharam v Sitabai* (1879) 3 Bom 353, 365; *Balkrishna v Lakshman* (1890) 14 Bom 605; *Jankibai v Sundra* (1890) 14 Bom 612 (Mahad is not within Northern Konkan); *Narbar v Bhau* (1916) 40 Bom 621, 36 IC 539, AIR 1916 Bom 206.

20 Per Teglang J, in *Gajabai v Shrimant Shahjirao* (1896) 17 Bom 114, 118 approved in *Bai Kesserbai v Hunsraj* (1906) 30 Bom 431, 442, 33 IA 176; *Bhagwan v Waruhai* (1908) 32 Bom 300, 312; *Mahabir Singh* (1943) 18 Luck, 585; AIR 1943 Ori 27.

21 *Bhagirthibai v Kahnujirao* (1887) 11 Bom 285, 294 (FB), *Bhaskar v Laxmibai* AIR 1953 Nag 326 (Kunbis from Maharashtra); *Kanaiyalal v Dhanji* AIR 1952 Kutch 18 (Kutch was regarded as part of Bombay); *Kammathi v Padmavathi* AIR 1952 Tr & Coch 501 (Gowda Saraswatha Brahmins of Travancore).

22 *Balusu v Balusu* (1899) 22 Mad 398; *Radha Moban v Hardai Bibi* (1898) 21 All 460, 465–66; *Bhagwan Singh v Bhagwan Singh* (1898) 21 All 412, 419; 26 IA 153, 161; *Puttu Lal v Parbati Kunwar* (1915) 37 All 359, 367; 42 IA 155, 161, 29 IC 617, AIR 1915 PC 15; *Collector of Madura v Moottoo Ramalinga* (1868) 12 MIA 397 at 437; *Laxman v Bayabai* (1955) ILR Nag 656, AIR 1955 Nag 241; *Anandi Lal v Onkar* AIR 1960 Raj 251; *Bodo v Dondo* AIR 1952 Ori 307 (Oriyas from the Madras area).

23 *Balusu v Balusu* (1899) 22 Mad 398, 411–12; 26 IA 113, 131–32

In *Abhiraj Kuer v Debendra Singh*,[24] the Supreme Court examined the text of Nandpandita in *Dattaka Mimansa*—'*Viruddha sambandho purto varjaneeyah*'—and held that it was merely recommendatory (reference, § 480 (3)).

§ 13A. PERSONAL LAW: RULE OF PRESUMPTION

A Hindu family residing in a particular state of India is presumed to be governed by the law of the place in which it resides.[25] The mere transfer, however, of a district to another presidency or state for administrative purposes, is not sufficient to affect the personal law of the residents in that district, unless and until it is shown in the case of any resident there that he had intended to change and has in fact changed his personal law.[26]

The rule that a Hindu family residing in a particular state is prima facie governed by the law of that place, is not founded on any doctrine affecting *lex loci*. The rule rests on personal law and status. In general, it may be said that in matters of status, there is no *lex loci* in India and every person is governed by the law of his personal status.[27]

§ 14. MIGRATION AND SCHOOL OF LAW

(1) Where a Hindu family migrates from one state to another, the presumption is that it carries with it its personal law, that is, the laws and customs as to succession and family relations prevailing in the state from which it came. However, this presumption may be rebutted by showing that the family has adopted the law and usage of the province to which it has migrated.[28]

24 AIR 1962 SC 351; *Vallabhalalji v Mahalaxmi Bahuji* AIR 1962 SC 356, 64 Bom LR 433.

25 *Ram Das v Chandra* (1893) 20 Cal 409; *Chandrakanto v Ram Mohini* AIR 1956 Cal 577.

26 *Somasekhara v Mahadeva* AIR 1936 PC 18, 38 Bom LR 317, 159 IC 1079, in appeal from (1930) 53 Mad 297, AIR 1930 Mad 496; *Chennamma v Srinivas* AIR 1971 Mys 28.

27 *Nataraja Pillai v Subbaraya Chettiar* 77 IA 33, (1950) ILR Mad 862, 1950 PC 32, (1950) 52 Bom LR 474; *Vasant Atmaram v Dattoba* (1955) 57 Bom LR 1026, (1955) ILR Bom 1021, AIR 1956 Bom 49; *Udebhan v Vikram* AIR 1957 MP 175; *Chandrakanto v Ram Mohini* AIR 1956 Cal 577; *Duggamma v Ganeshayya* AIR 1965 Mys 97.

28 *Srimati Parbati v Jagadis* (1902) 29 Cal 433, 29 IA 82; *Sorrendranath v Heeramonee* (1869) 12 MIA 81; *Arjun Singh v Virendra* AIR 1971 All 29; *Govind v Radha* (1910) 34 Bom 553, 7 IC 459; *Sarada Prasanna v Umakanta* (1923) 50 Cal 370, 77 IC 450, AIR 1923 Cal 485; *Benoy Krishna v State of West Bengal* AIR 1987 Cal 190 (even after generations until new domicile of choice is accepted) *Jagadamba v Satyanarayman* (1961) Mad 841, (1961) 2 Mad LJ 297; *Mailathi v Subbaraya* (1901) 24 Mad 650

continued on the next page

(2) It is the law existing at the time of migration that continues to govern the migrated members until it is renounced. It is the law in force in the state at the time of their leaving it, which continues to govern persons who have migrated to another state. Thus, they are affected by decisions of the courts of their state of origin, which declare the correct law of the state up to the time of their leaving it, but not by customs incorporated in its law after they have left it.[29]

These authoritative statements as regards the applicability of a particular school of law to a particular person, therefore, point to the conclusion that such assertions of applicability of a specific school of law would be inexorably dependant upon the pleadings and assertions of the parties, and the evidence adduced by them on such assertions.[30]

Illustrations

(1) A Hindu family migrates from the North-Western Provinces, where Mitakshara law prevails, to Bengal, where Dayabhaga law prevails. The presumption is that it continues to be governed by Mitakshara law, and this presumption may be supported by previous instances of succession in the family according to Mitakshara law after its migration and by evidence relating to ceremonies performed in

(migration by a Hindu widow from French India to British India); *Kulada v Haripada* (1913) 40 Cal 407, 17 IC 257; *Sukhbir Singh v Mangeisar Rao* (1927) 49 All 302, 100 IC 778, AIR 1927 All 252; *Babu Motising v Durgabai* (1929) 53 Bom 242, 114 IC 379, AIR 1929 Bom 57; *Basant Kumar Basu v Ramshanker Ray* (1932) 59 Cal 859; 138 IC 882; *Bijay Lal v Bhubaneswar Parbati v Jagadis* (1902) 29 Cal 433, 29 IA 82, AIR 1963 Cal 18; *Suganchand v Mangibai* (1942) Bom 467, 201 IC 759, AIR 1942 Bom 185; *Kachrulal v Nandlal* (1955) ILR Nag 618; *Naya v Motilal* AIR 1959 Bom 282, (1959) Bom 727, 60 Bom LR 1154; *Udebhan v Vikram* AIR 1957 MP 175 (Maharashtrian Telis in Madhya Pradesh, held governed by Mayukha); *Anjubai v Hemchandrarao* AIR 1960 MP 382 (Marathas settled in Chattisgarh in Madhya Pradesh held governed by the Bombay school); *Sitabai v Tuljabai* AIR 1963 MP 322 (Leva Patidar Kulmees from Gujarat); *Gigi v Panna* AIR 1956 Assam 100 (custom regarding matters of adoption among Marwaris); *Laxman v Gangabai* AIR 1955 MB 138 (Maharashtrian Brahamins resident in Malwa); *Brindaban v Chandubala* (1951) ILR 2 Cal 225; *Nathulal v Rangoba* (1951) ILR 2 Cal 225; *Nathulal v Rangoba* (1952) ILR Nag 597; *Pralhad v Damodhar* AIR 1958 Bom 79 (Agarwals in Berar); *Hirabai v Bhagirathibai* AIR 1969 MP 241 (Maharashtrian Mahars living in Nagpur and Berar); *Madhai Kumar v Sabi Bewa* AIR 1973 Pat 208; *Chitradevi v Chembagavalli* AIR 1999 Mad 38 (Mitakshara law of Tamil Nadu applicable, not of Pondicherry).

29 *Balwant Rao v Baji Rao* (1920) 47 IA 213, 48 Cal 30, 57 IC 545, AIR 1921 PC 59, *Saraswati v Debenara* AIR 1956 Pat 340 (migration before development of law in the state of origin); *Rukhmabai v Ramratan* (1951) ILR Nag 367, AIR 1951 Nag 350; *Pakul Majhi v Subhdra* AIR 1969 Ori 3.

30 *Diwan Singh v Bhanja Lal* AIR 1997 MP 210 (FB) relying upon *Ramdayal v Maneklal* AIR 1973 MP 222 (FB).

the family at marriages, births and *shraddhs*, showing that the family continued to be governed by Mitakshara law after its migration.[31] If the migration is proved, and it is also proved that the family followed the customs of Mitakshara school, it is not necessary to prove also that the family immigrated to Bengal after the establishment of Dayabhaga system of law.[32]

(2) A joint Hindu family, consisting of two brothers *A* and *B*, migrates from the North-Western Provinces to Bengal. *A* dies, leaving a widow *C*. The presumption being that this family continues to be governed by Mitakshara law, the joint property will, on *A*'s death, pass to his surviving brother *B*, and *C* will be entitled to maintenance only. However, if the family had renounced Mitakshara law and adopted Dayabhaga law, *A*'s share would pass to his widow *C*.[33]

A Maharashtrian family residing in Chhatisgarh, in Central Provinces, is presumed to have come as immigrant and if it retains its individuality as Maharashtrian, is governed by the Bombay interpretation of Mitakshara.[34] Similarly, a Rajput family migrated to Berar, and was proved to have retained its old manners and customs which had to be governed by the Benares school and not the Bombay School of Hindu law.[35]

In *Abdurahim v Halimabhai*,[36] their Lordships of the Privy Council said:

> Where a Hindu family migrates from one part of India to another prima facie they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate (from India) to another country (East Africa), and, being themselves Mohammedans (eg Memons), settle among Mohammedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made... The analogy is that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India. Of course, if nothing is known about a man except that he lived in a certain place, it will be assumed that his personal law is the law

31 *Prabati v Jagadis* (1902) 29 Cal 433, 452, 29 IA 82.
32 *Ramesh Chandra v Mohammed* (1923) 50 Cal 898, 79 IC 309, AIR 1924 Cal 383.
33 *Parbati v Jagadis* (1902) 29 Cal 433, 29 IA 82.
34 *Keshao Rao v Sadasheorao* (1938) ILR Nag 469, AIR 1938 Nag 163.
35 *Lalsingh v Vithal Singh* (1950) ILR Nag 62, AIR 1950 Nag 62.
36 (1916) 43 IA 35, 41, 18 Bom LR 635, 32 IC 413, AIR 1915 PC 86; *Ma Yait v Maung Chit Maung* (1921) 49 Cal 310, 48 IA 553, 564 IC 609, AIR 1922 PC 197.

which prevails in that place. In that sense only is domicile of importance.[37]

The law must be the family law as it was when they left. A judgment declaratory of law as having always been would bind: but it would be a different thing if subsequent customs became incorporated in the law.[38]

Raghuvanshis of Nandurbar

The Raghuvanshis of Nandurbar migrated from Oudh and settled in Khandesh and they are governed by the Benares School of Hindu law.[39]

Hindus of North Canara

The Hindus of North Canara are governed by the Bombay and not the Madras School of Hindu law.[40] Komits of Chanda district are governed by Mitakshara and not the Madras school of law.[41]

Yelmis of Berar

The Yelmis of Berar are governed by the Madras school of law.[42]

§ 15. CUSTOM AS A SOURCE OF LAW

Custom is one of the three sources of Hindu law. When there is a conflict between a custom and a text of the *Smritis*, the custom overrides the text: 'Under the Hindu system of law, clear proof of usage will outweigh the written text of the law.'[43] For further reference, see 'Introduction' to the book. *Rattigan's Digest of Customary Law* is regarded as authoritative on the subject of customs in Punjab.[44]

§ 16. THREE KINDS OF CUSTOMS

The Hindu customs recognised by the courts are: (1) local; (2) class; and (3) family customs.

37 *Balwant Rao v Baji Rao* (1920) 47 IA 213, 219, 48 Cal 30; 39, 57 IC 545, AIR 1921 PC 59, *Tula Ram v Shyam* (1927) 49 All 848, 86 IC 729, AIR 1921 PC 59; *Tula Ram v Shyam* (1927) 49 All 848, 86 IC 729, AIR 1925 All 648.

38 (1920) 47 IA 216, 222, 48 Cal 30, 43, 57 IC 545, AIR 1921 PC 59.

39 *Babu Motising v Durgabai* (1929) 53 Bom 242, AIR 1921 PC 59.

40 *Venkanna Narasinha v Laxmi* AIR 1951 Bom 57; *Manjapa v Lakshmi* (1890) 15 Bom 234; *Mahabaleshwar v Durgabai* (1896) 22 Bom 199; *Shantaram v Krishna* (1947) Bom 798, contra *Dattatraya v Laxman* (1941) 44 Bom LR 527; *Shantaram v Mahabaleshwar* (1947) 49 Bom LR 764.

41 *Ramlu v Vithal* (1947) ILR Nag 267.

42 *Mahadeo v Vyankammabai* (1947) ILR Nag 781.

43 *Collector of Madura v Mootoo Ramalinga* (1869) 12 MIA 397, 436; *Vannia Kone v Vennichi Ammal* (1928) 51 Mad 1, 108 IC 760, AIR 1928 Mad 299.

44 *Daya Singh v Dhan Kaur* AIR 1974 SC 665.

§ 17. ESSENTIALS OF A VALID CUSTOM

(1) A custom is a rule, which in a particular family or a particular class or community or in a particular district, has from long usage, obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly.[45] It is further essential that it should be established to be so, by clear and unambiguous evidence, for it is only by means of such evidence that the courts can be assured of its existence and of the fact that it possesses the conditions of antiquity and certainty on which alone its legal title to recognition depends.[46] It must not be opposed to morality or public policy, and it must not be expressly forbidden by the legislature.[47] It must not be in derogation of the fundamental rights of citizen to hold and dispose of property by absolutely prohibiting alienation of property even after actual division.[48] Where the evidence shows that the custom alleged was not followed in numerous instances, the custom could not be held to be proved.[49] A custom derives its force from the fact that it has, from long usage, obtained the force of law. It must be ancient; but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality.[50]

(2) It is incumbent on a party setting up a custom to allege and prove the custom on which he relies. Custom cannot be extended by analogy.

45 *Hurpurshad v Sheo Dyal* (1876) 3 IA 259, 285.

46 *Ramalakshmi v Sivanantha* (1872) 14 MIA 570, 585–86; *Siromani v Hemkumar* AIR 1968 SC 1299; *Pushpavathi v Visweswar* AIR 1954 SC 118, *Haribar Prasad v Balmiki Prasad* AIR 1975 SC 733. See as to evidence of custom *Gopalayyan v Raghupatiayyar* (1873) 7 Mad HC 250; *Mirabivit v Raghupatiayyar* (1873) 8 Mad 464; *Harnabab v Mandil* (1900) 27 Cal 379; *Rup Chand v Jambu Parsad* (1910) 32 All 247, 252, 37 IA 93, 6 IC 272; *Abdul Hussein Khan v Bibi Sona Dero* (1918) 45 Cal 450, 45 IA 10, 43 IC 306, AIR 1917 PC 181; *Ram Narain v Har Narinjan Kaur* (1923) 4 Lah 297, 76 IC 535, AIR 1924 Lah 116; *Vannia Kone v Vannichi Ammal* (1928) 51 Mad 1, 108 IC 760 , AIR 1928 Mad 299; *Bhikabai v Manilal* (1930) 54 Bom 780, 128 IC 628, AIR 1930 Bom 517; *Gulam Chand v Manni Lal* (1941) 16 Luck 302, 192 IC 643, AIR 1941 Ori 230; *Talasiram v Ramprasanna* AIR 1956 Ori 41; *Subramania v Kumarappa* AIR 1955 Mad 144, 1955 (1) MLJ 355; *Narayani Amma v Sankara Pillai* AIR 1961 Ker 149 (FB), (1960) ILR Ker 1366.

47 *Vannia Kone v Vannichi Ammal* (1928) 51 Mad 1; *Balusami v Balakrishna* AIR 1957 Mad 97.

48 *Sheikriyammada Koya v Administrator* AIR 1967 Ker 259 (custom prohibiting alienation even after actual division among *tavazhis* of a *tarwad*).

49 *Ishwarbai v Bhagwandas* AIR 1950 Sind 26.

50 *Gokal Chand v Parvin Kumari* AIR 1952 SC 231, 234, [1952] SCR 825; *Subbani v Nawab* (1941) 68 IA 1, (1941) Lah 154, 193 IC 436, AIR 1941 PC 21, 32.

It must be established inductively and not by a priori methods. Custom cannot be a matter of mere theory but must always be a matter of fact and one custom cannot be deduced from another.[51] It is a well-established law that custom cannot be enlarged by parity of reasoning, since it is the usage that makes the law and not the reason of the thing.[52]

In *Saligram v Munshi Ram*,[53] the Supreme Court was considering a case of custom under s 5 of the Punjab Laws Act.

(3) Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved, so as to bind the parties to the suit and those claiming through and under them; but the decision would not in that case be a satisfactory precedent, if, in any future suit between other parties, fuller evidence with regard to the alleged custom should be forthcoming.[54] A judgment relating to the existence of a custom is admissible to corroborate the evidence adduced to prove such custom in another case.[55] Where, however, a custom is repeatedly brought to the notice of the courts, the courts may hold that the custom was introduced into law without the necessity of proof in each individual case.[56]

Family Custom

In respect of family custom, the same principles are applicable, though, of course, in the case of a family custom, instances in support of the custom may not be as many or as frequent as in case of customs pertaining to a territory or to the community or to the character of any estate. In dealing with family customs, the consensus of opinion among members of the family, the traditional belief entertained by them and acted upon by them, their statements and their conduct would all be

51 *Saraswati v Jagdambal* [1953] SCR 939; *Thankamma v Narayan Pallai* AIR 1958 Ker 35 (FB); (1958) ILR Ker 108.

52 *Venkata Challamma v Cheekati* AIR 1953 Mad 571; *Deivanai v Chidambaram Chettiar* AIR 1954 Mad 657; *Narasayya v Ramchandrayya* AIR 1956 AP 209; *Thankamma v Narayana* AIR 1958 Ker 35 (FB).

53 AIR 1961 SC 1374.

54 *Chiman Lal v Hari Chand* (1913) 40 IA 156, 160, 40 Cal 879, 890, 19 IC 669; *Rup Chand v Jambu Parshad* (1910) 37 IA 93, 104, 32 All 247, 252, 6 IC 272; *Parshottam v Venichand* (1921) 45 Bom 754, 760, 761, 61 IC 492, AIR 1921 Bom 147; *Kasiviswanatham v Somasundaram* (1946) 51 CWN 374, PC.

55 *Mst Kesarbai v Somasundaram* (1946) ILR Nag 1, 71 IA 190.

56 *Munnalal v Rajkumar* AIR 1962 SC 1493, 1498; *Ujgar Singh v Jeo* AIR 1959 SC 1041; *Rama Rao v Rajah of Pittapur* (1918) 45 IA 18, 41 Mad 778, 47 IC 354, AIR 1918 PC 81; *Hemendra Nath Roy v Jnanendra* AIR 1935 Cal 702, 62 Cal LJ 49; *Banarsi Das v Sumat Prasad* (1936) 58 All 1019, 164 IC 1047, AIR 1936 All 641; *Suganchand v Mangibai* (1942) Bom 467, 201 IC 759, AIR 1942 Bom 185; *Kaliamma v Janardhanam* AIR 1973 SC 1134 (very small community in a small local area: decision should have been based on evidence).

relevant and it is only where the relevant evidence of such a character appears to the courts to be sufficient that a specific family custom pleaded in a particular case can be held to be proved.[57] Custom binding inheritance in a particular family has long been recognised in India.[58]

§ 18. DISCONTINUANCE OF CUSTOM

A family usage, like a local custom, must be certain, invariable and continuous, but it may be discontinued so as to let in the ordinary law. Well-established discontinuance of a family usage, whether it has arisen from accidental causes, or has been intentionally brought about by the concurrent will of the family, has the effect of destroying the custom; it is different however, in the case of a local custom, which is the *lex loci* binding on all persons within the local limits in which it prevails.[59]

§ 19. BURDEN OF PROOF OF CUSTOM

Where members of a family admittedly governed by the Hindu law, set up a custom derogatory to that law, the burden lies upon them to prove the custom.[60] In the case of a tribe or family, who were not originally Hindus, and have only adopted Hindu usages in part, if it is alleged by any member that a particular Hindu usage has been adopted by the tribe or family, the burden lies upon him to prove the usage.[61]

The Kurmi Mahtons of Chota Nagpur, though aboriginals in origin, have accepted the Hindu religion and Hindu social usage. The presumption in law will, therefore, be that they are governed by the Hindu law of succession and the party who alleges a special custom to the contrary, has to prove the same.[62]

57 *Pushpavathi Vijayaram v P Visweswar* AIR 1964 SC 118, 125, 126; *Haribar Prasad v Balmiki Prasad* AIR 1975 SC 733 (nature and quality of evidence, succession).

58 *Abdul Hussein Khan v Bibi Sona Dero* (1917) 45 Cal 450 at 460, 45 IA 10, 14, 43 IC 306, AIR 1917 PC 181.

59 *Rajkishen v Ramjoy* (1876) 1 Cal 186 at 196 (PC), *Sarabjit v Indarjit* (1905) 27 All 203; *Vannia Kone v Vannichi Ammla* (1928) 51 Mad 1.

60 *Bhagwan Singh v Bhugwan Singh* (1890) 21 All 412, 423; *Chandrika Bakhsh v Muna Kaur* (1902) 24 All 273, 29 IA 70; *Rup Chand v Jambu Prasad* (1910) 37 IA 93, 32 All 247, 6 IC 272; *Sahdeo Narain Deo v Kusum Kumari* (1923) 50 IA 59 at 62–64, 2 Pat 230, 71 IC 769, AIR 1923 PC 21; *Gurunath v Kamlabai* AIR 1955 SC 206; *Shamlal v Jiyabal* (1943) ILR Nag 678, AIR 1944 Nag 62; *Indramani Devi v Raghunath Bhanja* AIR 1961 Ori 9.

61 *Fanindra Deb v Rajeswar* (1885) 11 Cal 463 at 476, 12 IA 72 at 88; *Muhammad Ibrahim v Shaikh Ibrahim* (1922) 49 IA 119, 45 Mad 308, 67 IC 115, AIR 1922 PC 59; *Ramrudbarsingh v Dileshwar Singh* AIR 1965 Pat 117 (FB).

62 *Ganesh Mahto v Shib Charan Mahata* (1932) 11 Pat 139, 133 IC 165, AIR 1931 Pat 305.

§ 20. INVALID CUSTOM

No custom is valid if it is opposed to morality or public policy or to any express enactment of the legislature.[63]

§ 20A. PRINCIPLES OF EQUITY

Where there is no rule of Hindu law and no proof of existence of any custom, rules of justice, equity and good conscience will apply.[64]

63 *Balusami v Balakrishna* AIR 1957 Mad 971.
64 *Saraswathi v Jagadambal* AIR 1953 SC 201, 204.

III

GENERAL PRINCIPLES OF INHERITANCE

(LAW PRIOR TO THE HINDU SUCCESSION ACT 1956)

Note.—The Hindu Succession Act 1956 that came into force on 17 June 1956, has now codified the law of intestate succession among Hindus. It has brought about fundamental and radical changes in the law of succession, as will be seen from the Introductory Note to the commentary on that Act. Overriding application has been given to that Act, and in effect, it repeals all previous laws relating to intestate succession whether textual, customary or statutory. The Act, however, subject to a few exceptions, is not retroactive in its operation and succession to the property of a male or female Hindu, who died intestate before 17 June 1956, is governed by the previous law discussed in Chapters III–XI.

§ 21. LAW OF INHERITANCE

The 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 joint family system comes first in the historical order. The law of inheritance is of later growth and, in general, applies only to property held in absolute severalty by the last owner, as distinguished from property held by a Mitakshara joint family. However, after the Hindu Women's Rights to Property Act 18 of 1937, came into operation, the interest, which a Hindu governed by any school of law other than Dayabhaga or by customary law, had in joint family property, devolved upon his death on his widow. Moreover, after the coming into force of the Hindu Succession Act 1956, the position is governed by s 6 of that Act.

§ 22. TWO SYSTEMS OF INHERITANCE

There are two systems of inheritance amongst the Hindus in India namely, Mitakshara system and Dayabhaga system. Dayabhaga system prevails in

Bengal, while the Mitakshara system is applicable to other parts of India. The difference between the two systems arises from the fact that, while the doctrine of religious efficacy is the guiding principle under Dayabhaga school (§ 79), there is no such definite guiding principle under the Mitakshara School. Sometimes consanguinity, and at other times, religious efficacy has been regarded as the guiding principle (§ 36).

§ 23. INHERITANCE TO MALES AND FEMALES

Succession to *stridhana*, that is, property held absolutely by a female, is governed by rules different from those, which governed inheritance to the property of a male.

Chapters IV and VII deal with the inheritance to males according to Mitakshara school and Dayabhaga school respectively. Succession to *stridhana* is dealt with in Chapter X.

§ 24. MODES OF DEVOLUTION OF PROPERTY

(1) Mitakshara recognises two modes of devolution of property, namely, survivorship and succession. The rule of survivorship applies to joint family property, and the rules of succession apply to property held in absolute severalty by the last owner.

(2) Dayabhaga recognises only one mode of devolution, namely, succession. It does not recognise the rule of survivorship even in the case of joint family property. The reason is that while every member of a Mitakshara joint family has only an undivided interest in the joint property, a member of a Dayabhaga joint family holds his share in quasi-severalty, so that it passes on his death to his heirs, as if he was absolutely seized thereof, and not to the surviving coparceners as under Mitakshara law.

Illustrations

(1) *A* and *B*, two Hindu brothers, governed by the Mitakshara School of Hindu law, are members of a joint and undivided family. *A* dies leaving his brother *B* and a daughter. *A*'s share in the joint family property will pass to his brother, the surviving coparcener, and not to his daughter. However, if *A* and *B* were separate, *A*'s property would on his death pass to his daughter as his heir.

(2) *A* and *B*, two Hindu brothers, governed by Dayabhaga school, are members of a joint and undivided family. *A* dies leaving his brother *B* and a widow. *A*'s share in the joint family property will pass to his widow as his heir, exactly as if *A* and *B* were separate.

§ 25. FEMALE HEIRS

The law on inheritance by female heirs is not uniform. According to the Bengal, Benares and Mithila schools, there are only five females who can succeed as heirs to a male, namely: (1) the widow; (2) daughter; (3) mother; (4) father's mother; and (5) father's father's mother. To this list, three more were added by the Hindu Law of Inheritance (Amendment) Act 1929, namely, the son's daughter, daughter's daughter and sister. The Madras school recognises a large number of female heirs including the three mentioned in the Act of 1929, and the Bombay school a still larger number. Under the Hindu Women's Right to Property Act 18 of 1937, the widow of a predeceased son and the widow of a predeceased son of a predeceased son are among the heirs to a Hindu's separate property in all the schools.

§ 26. LIMITED ESTATE OF FEMALES

(1) Males succeeding as heirs, whether to a male or to a female, take the property absolutely.

(2) Females succeeding as heirs, whether to a male or to a female, take a limited estate in the property inherited by them, except in certain cases in the Bombay state.

If a separated Hindu under Mitakshara, or any Hindu under Dayabhaga, dies leaving a widow and a brother, the widow succeeds to the property as his heir, but the widow, being a female, does not take the property absolutely. She is entitled only to the income of the property. She can neither make a gift of the property nor can she sell, unless there is a legal necessity, either for the gift or for the sale. On her death, the property will not pass to her heirs, but to the next heir of her husband, ie, his brother.

(3) Section 14 of the Hindu Succession Act 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of all property acquired by her, whether before or after the commencement of that enactment.

§ 27. LAST 'FULL' OWNER AND 'FRESH STOCK OF DESCENT'

The last 'full' owner of property is one who held the property absolutely at the time of his death. Except in the case of *stridhana* and in certain cases in the Bombay presidency, the last full owner is always a male.

It is a 'full' owner who can become a fresh stock of descent. Since a female cannot (except as aforesaid) be a full owner of property, she cannot become a fresh stock of descent.

Illustration

A dies leaving a widow, a mother, a brother *B*, and a paternal uncle *C*. On *A*'s death, the widow succeeds to his property as his heir. She takes only a limited estate in the property. She is not the full owner of the property, and she cannot, therefore, became a fresh stock of descent. On her death, the property will revert to the next heir of the last full owner *A*, that is, the mother. The mother, again, does not take absolutely. She too, therefore, cannot become a fresh stock of descent, and on her death, the property will go not to her heirs, but to the next heir of the last owner *A*, that is *B*, *A*'s brother. However, *B*, being a male, takes the property absolutely. He becomes full owner of the property and he can, therefore, become a fresh stock of descent. On his death, the property will pass to his own heirs. Thus, if he leaves a widow, the property will pass to her, and not to *C*. However, since she takes a limited estate only, the property will, on her death, revert to the next heir of *B*, the last full owner. If that heir is *C*, the property will pass to him. *C*, being a male, will take the property absolutely and on his death it will pass to his heirs.

A woman's *stridhana* descends to her own heirs (see Chapter X).

§ 28. INHERITANCE NEVER IN ABEYANCE

(1) On the death of a Hindu, the person who is then his nearest heir becomes entitled at once to the property left by him. The right of succession vests in him immediately on the death of the owner of the property. It cannot, under any circumstance, remain in abeyance[1] in expectation of the birth of a preferable heir, where such heir was not conceived at the time of the owner's death.[2]

(2) Where the estate of a Hindu has vested in a person, who is his nearest heir at the time of his death, he cannot be divested of the property, except either by the birth of a preferable heir such as a son or a daughter,[3] who was conceived at the time of his death, or by adoption in certain cases of a son to the deceased.[4]

1 *Shakuntala Devi v Kaushalya Devi* (1936) 17 Lah 356, AIR 1936 Lah 124, 162 IC 718; *Srinivasa Rao & ors v Annadhanam Seshacharlu & ors* (1942) Mad 42, 198 IC 169, AIR 1942 Mad 106, (1941) 2 MLJ 406.

2 The statement of the law in § 28 was cited with approval by the Supreme Court in *Shrinivas v Narayan* [1955] SCR 1, 16, 57 Bom LR 678, AIR 1954 SC 379.

3 *Bayaya v Parvateya* (1933) 35 Bom LR 118, 144 IC 442, AIR 1933 Bom 126.

4 *Nilcomul v Jotendro* (1881) 7 Cal 178, 188; *Kalidas v Krishan* (1869) 2 Beng LR 103 (FB); *Tagore v Tagore* (1872) 9 Beng LR 377, 397; *Bamundoes v Tarinee* (1858) 7 MIA

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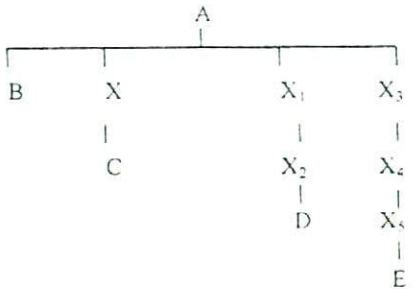
§ 29. DOCTRINE OF REPRESENTATION

A son or a grandson, whose father is dead, and a great-grandson, whose father and grandfather are both dead, all succeed simultaneously as one heir to the separate and self-acquired property of their paternal ancestor. The reason is that the grandson represents the rights of his father to a share and the great-grandson represents the rights both of his father and grandfather. This is the only case to which the doctrine of representation applies; it does not apply to any other case,[5] eg, the case of daughter.[6] Sons, grandsons, and great-grandsons inheriting together as aforesaid succeed to the estate of the deceased as coparceners [§ 31, Illust. (a)]. On a partition among them, they take per stirpes and not per capita.

Illustrations

(a) *A*, a male Hindu, dies leaving a son *B*, a grandson *C*, a great grandson *D*, and a great great grandson *E*, as shown in Table III.1.

Table III.1



On *A*'s death, his estate will pass to *B*, *C* and *D* as coparceners. If they continue joint, and if any one of them dies without leaving male issue, his share will pass to the survivors (§ 229). If they want to divide the estate, it will be divided into three

169, 184, 206; *Narasimha v Veerabhadra* (1894) 17 Mad 287; *Gordhandas v Bai Ramcoover* (1902) 26 Bom 449, 467; *Hira v Buta* (1919) 1 Lah LJ 56, 56 IC 256, AIR 1920 Lah 160; *Sooramma v Venkataratnam* (1951) 2 MLJ 664, AIR 1952 Mad 166 (a stillborn son is not regarded as a posthumous son).

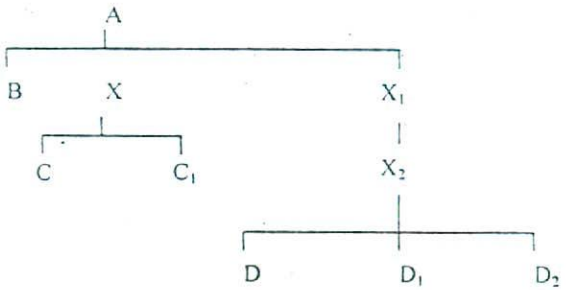
5 *Marudayi v Doraiswami* (1907) 30 Mad 348; *Sosbil Chand v Mangat Ram* (1954) ILR Punj 449.

6 *Mst Lorandi v Mst Nihal Devi* (1925) 6 Lah 124, 95 IC 701, AIR 1925 Lah 405; *Sosbil Chand v Mangat* (1954) Punj 449, AIR 1954 Punj 26 (widow). The doctrine does not apply to *stridhana* succession; *Krishnaswami v SS Chettiar* AIR 1955 Mad 702, (1955) 2 MLJ 541, nor does it extend to the case of a predeceased legitimate son of a Sudra; *Govindarajulu v Balu Ammal* AIR 1952 Mad 1, (1951) 2 MLJ 209.

equal parts, *B*, *C* and *D*, each taking one part. *B* alone is not entitled to inherit the whole property. *C* will take the share of his father X_1 and *D*, the share of his grandfather X_1. *E* is not entitled to any share at all, for he is more than four degrees removed from *A*, and the right of representation does not extend beyond four degrees.

(b) *A*, a male Hindu, dies leaving a son, *B*, two grandsons *C* and C_1, and three great-grandsons *D*, D_1, D_2 as shown in Table III.2.

Table III.2



A's property will be divided, if the heirs choose to divide it, into three equal parts, of which *B* will take one, *C* and C_1 will together take one, and *D*, D_1, D_2 will together take one. This is a division of the estate per stirpes. To divide it per capita, would be to divide it into six parts, and give one part to each of the six heirs.

Note.—If *B* had a son B_1, *B* would take the one third for himself and B_1, and it would become ancestral property in the hands of *B*, to which B_1's right would attach by birth.

(c) *A*, a separated male Hindu, dies leaving a brother *B*, and nephew *C*, being the son of a predeceased brother *D*. On *A*'s death, *C* claims half the estate alleging that had his father *D* been alive, he would have taken one-half and that he (*C*) is entitled to that half as representing his father. *C*'s claim must be rejected, for the right of representation is confined to the lineal male descendants of the deceased owner as stated in the section, and *C* is not such a descendant. *B* therefore is entitled to the whole estate as the nearest heir of *A*.

The position under Mayukha is somewhat different (see § 77).

§ 30. *SPES SUCCESSIONIS*

The right of a person to succeed as heir on the death of a Hindu is a mere *spes successionis*, that is, a bare chance of succession. It is not a

vested interest; he cannot, therefore, make a valid transfer of it.[7] For the same reason, any agreement entered into by him in respect of inheritance cannot bind persons who actually inherit when the succession opens.[8]

Illustration

A has a brother *B* and uncle *C*. *B* has a wife *D*. It is true that if *A* died, *B* would succeed as his nearest heir if he was then alive, but in the lifetime of *A*, *B* does not take any interest in *A*'s property. All that he is entitled to is a bare chance of succession. If he predeceases *A*, the heir on *A*'s death will be *C* and not his widow *D* (See illust (c) to § 29). *B* does not take any interest in *A*'s property in *A*'s lifetime, and he cannot transmit to his heir *D*, an interest which had not accrued to himself. For the same reason, a sale or a mortgage by *B* of the *spes successionis* is a nullity. Moreover, if he makes any contract with respect to inheritance in *A*'s lifetime, and predeceases *A*, and *C* succeeds as *A*'s heir, the agreement is not binding on *C*.

§ 31. CO-HEIRS

(1) According to Mitakshara school, two or more persons inheriting jointly take as tenants-in-common,[9] except the following four classes of heir, who take as joint tenants with rights of survivorship:

(a) two or more sons, grandsons, and great-grandsons, who are living as members of a joint family,[10] succeeding as heirs to the separate or self-acquired property of their paternal ancestor;[11]

7 See Transfer of Property Act 1882, s 6.

8 *Brojo v Gouree* (1870) 15 WR 70; *Babadur Singh v Mohar Singh* (1902) 24 All 94, 29 IA 1.

9 *Karuppai v Sankaranarayanam* (1904) 27 Mad 300; *Ram Bharosey v Ram Bahadur* (1948) 23 Luck 58.

10 The statement of law on the point has been altered by adding the words 'who are living as members of a joint family'.

11 Also see § 222 and notes thereunder. *Raja Jogendra v Nityanand* (1890) 18 Cal 151, 17 IA 128; *Madivalappa Irappa v Subbappa Shankreppa* (1937) Bom 906, 39 Bom LR 895, AIR 1937 Bom 438, 172 IC 184; *Shyam Bebari Singh v Rameshwar Prasad Sahu* (1941) 20 Pat 907, 198 IC 208, AIR 1942 Pat 213; *Gangadhar v Ibrahim* (1927) 25 Bom LR 197; *Marudayi v Doraisamy* (1907) 30 Mad 348. In *Hari Kishan v Rajeswar* (1952) Punj 134, AIR 1952 Punj 165, the Punjab High Court expressed the view that the rule applies only if the sons, grandsons and great-grandsons had not separated from the deceased. In *Raghu Sambhaji v Shantabai* (1957) 59 Bom LR 999, the Bombay High Court has followed the Punjab decision. Reference may be made to *Ranganatha v Kumaraswami* AIR 1959 Mad 253, (1959) Mad 298; *Girdharilal v Fatehchand* AIR 1955 MB 148 and § 222 and notes thereunder.

(b) two or more grandsons by a daughter, who are living as a member of a joint family, succeeding as heirs to their maternal grandfather.[12] The Madras High Court has held that in a property inherited by two or more daughter's sons from their maternal grandfather, there can be no right of survivorship and the daughter's sons take as tenants-in-common.[13] The decision in *Venkayyamma v Venkataramanayyamma* has been held to be no longer a binding authority on the nature and incidents of property inherited by daughter's sons from their maternal grandfather, (also see § 223(2) and notes thereunder);

(c) two or more widows succeeding as heirs to their husband;[14]

(d) two or more daughters succeeding as heirs to their father,[15] except in the Bombay state, where they take an absolute estate in severalty.[16]

(2) According to Dayabhaga school, two or more persons inheriting jointly take as tenants-in-common, except only (1) widows; and (2) daughters who take as joint tenants with rights of survivorship.

Illustrations

(a) A Hindu, who is possessed of separate property, dies leaving two sons *A* and *B*. *A* dies leaving a daughter *C*.

According to the Bengal school, *A* and *B* inherit as tenants-in-common, and, therefore on *A*'s death, his share in the property goes to his heir *C* by succession. According to Mitakshara school, *A* and *B* inherit as joint owners, who are living as members of a joint family. Therefore, if *A* dies without having partitioned the property, his undivided interest in the property will pass to his brother *B* by survivorship to the exclusion of his daughter *C*. However, if the property was partitioned between *A* and *B*, the share which came to *A* on partition would go to his heir *C* by succession. Assuming that *A* and *B* did not divide the property, and that *A* dies leaving a son, grandson, or a great-grandson, the undivided interest of *A* would pass to his son, grandson, or

12 *Venkayyamma v Venkataramanayyamma* (1902) 25 Mad 678, 29 IA 156; *Muhammad Husain Khan v Babu Kishva Nandan Sahai* (1937) 64 IA 250, (1937) All 655, 39 Bom LR 979, 169 IC 9, AIR 1937 PC 233; *Seri Ram v Chandramma* (1952) Hyd 45.

13 *Godavari Lakshminarasamma v Godavari Rama Brahman* (1950) 63 MLW 258, AIR 1950 Mad 680.

14 *Bhugwandeen v Myna Baee* (1860) 11 MIA 487.

15 *Chotay Lall v Chunno Lall* (1897) Cal 744, 6 IA 15; *Aumirtolall v Rajoneeka* (1875) 2 IA 113, 126, 15 Beng LR 10, 24; *Venkayyamma v Venkataramanayyamma* (1902) 25 Mad 678, 29 IA 156; *Chhattar Singh v Hukum Kunwar* (1936) 58 All 391.

16 *Vithappa v Savitri* (1910) 34 Bom 510, 7 IC 445.

great-grandson by survivorship, in preference to his undivided brother *B*. The reason is that the right of survivorship of male issue always prevails over that of a collateral with whom the deceased was joint.

(b) *A* Hindu dies leaving two widows *A* and *B*. According to both the schools, the widows succeed as joint tenants. On *A*'s death, therefore, her interest in the property will pass to *B* by survivorship (§ 43, No 4).

(c) *A* Hindu dies leaving two daughters *A* and *B*. According to both the schools, they succeed as joint tenants. On *A*'s death, therefore, her undivided interest in the property will pass to *B* by survivorship. It is different, however, in the Bombay state. In that state, *A* and *B* take an absolute estate in severalty, and not as joint tenants. Therefore, on *A*'s death, her one-half share will pass to her own heirs by succession. Thus, if *A* dies leaving a daughter, her share will go to her daughter, and not to her sister *B* (§ 43 No 5).

(d) *A* Hindu dies leaving two brothers. The brothers take as tenants-in-common and on the death of either of them, his one-half will pass to his heirs by succession. The same rule applies to uncles, nephews etc.

§ 32. SUCCESSION PER STIRPES AND PER CAPITA

Except in the two cases hereinafter mentioned, persons of the same relationship to the deceased take per capita, that is, the estate of the deceased is divided into as many shares as the number of heirs, each taking one share.

Exception I.—On a partition among them, the sons, grandsons and great-grandsons of a deceased male Hindu take per stirpes (§ 29).

Exception II.—Sons' sons, daughters' sons, and daughters' daughters, succeeding to *stridhana* take per stirpes.[17]

Brother's sons, uncle's sons, etc, take per capita. Thus, if a Hindu dies leaving two sons by one brother and three sons by another brother, the property will be divided into five equal parts, each taking one-fifth. This is division of the estate per capita. To divide it per stirpes would be to divide it into two equal parts, giving one part to the two sons of one brother, and the other part to the three sons of the other brother. The reason why they take per capita is that the brother's sons do not inherit as representing their father but in their own right as the nephews of the deceased (§ 29). Similarly, if a Hindu dies leaving one son by a paternal

17 See § 160; vide authorities cited under § 160.

uncle and two sons by another paternal uncle, the estate will be divided into three parts, each son taking one-third.[18]

Exceptions I and II both rest on special texts. For an illustration of Exception I, see § 29, Illust (b). For an illustration of Exception II, see Illust to § 160.

18 *Narsappa v Bharmappa* (1921) 45 Bom 296, 59

IV

ORDER OF INHERITANCE OF MALES ACCORDING TO MITAKSHARA LAW

(LAW PRIOR TO THE HINDU SUCCESSION ACT 1956)

Note.—Reference may be made to the Note to Chapter III.

§ 33. MITAKSHARA LAW OF INHERITANCE

The rules of inheritance laid down in Mitakshara are followed by the Bombay, Madras, Benares and Mithila schools, all the schools being sub-divisions of Mitakshara school. However, the rules of inheritance in force in the several states represented by these schools are not entirely the same. They differ in certain respects, namely:

(1) the order of inheritance as laid down in Mitakshara is not strictly followed in the Island of Bombay, Gujarat and the North Konkan. The reason is that in those places preference is given to the *Vyavahara Mayukha* of Nilkanta Bhatta on few points, where it differs from Mitakshara;

(2) as regards females, there are many who are recognised as heirs in the Bombay and Madras schools, but are not recognised as such in the Benares and Mithila schools (§§ 61–70).

§ 34. DEVOLUTION OF PROPERTY ACCORDING TO MITAKSHARA LAW

In determining the mode in which the property of a Hindu male, governed by Mitakshara law, devolves on his death, the following propositions are to be noted:

(1) where the deceased was, at the time of his death, a member of joint and undivided family, technically called coparcenary, his

undivided interest in the coparcenary property devolves on his coparceners by survivorship (see Act XVIII of 1937 and § 35);

(2) (i) even if the deceased was joint at the time of his death, he might have left self-acquired or separate property. Such property goes to his heirs by succession according to the order given in § 43, and not to his coparceners;[1]

(ii) if the deceased was at the time of his death, the sole surviving member of a coparcenary property, the whole of his property, including the coparcenary property, will pass to his heirs by succession according to the order given in § 43;[2]

(iii) if the deceased was separate at the time of his death from his coparceners, the whole of his property, however acquired, will pass to his heirs by succession according to the order given in § 43;[3]

(3) if the deceased was re-united at the time of his death, his property will pass to his heirs by succession according to the rule laid down in § 60 below.

Illustration

AB and his brother constitute a coparcenary. *AB* dies leaving a daughter. He leaves self-acquired property. He also leaves property inherited by him from his maternal uncle, which, according to law, is his separate property. The undivided interest of *AB* in the coparcenary property will pass to his brother as surviving coparcener, but his self-acquired and separate property will pass to his daughter as his heir.

§ 35. ACT 18 OF 1937

The Hindu Women's Rights to Property Act, XVIII of 1937 (amended by XI of 1938), introduced important changes in the law of succession. This short enactment, which came into force on 14 April 1937, is as under:

WHEREAS it is expedient to amend the Hindu law to give better right to women in respect of property:—

It is hereby enacted as follows:—

1. Short title and extent.—(1) The Act may be called the Hindu Women's Rights to Property Act 1937.

1 *Katama Natchiar v Rajah of Shivagunga* (1863) 9 MIA 539; *Sivagnana Tevar v Periasami* (1878) 1 Mad 312, 5 IA 61.

2 *Naqaltutchmee v Gopoo Nadaraja* (1856) 6 MIA 309.

3 *Doorga Persad v Doorga Konwari* (1878) 4 Cal 190, 202, 5 IA 149, 160.

(2) It extends to the whole of India[4] except Part B States.[5]

2. Application.—Notwithstanding any rule of Hindu law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate.

3. Devolution of property.—(1) When a Hindu governed by Dayabhaga School of Hindu law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate property, his widow,[6] or if there is more than one widow all his widows together, shall subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:

Provided that the widow of a predeceased son[7] shall inherit in the like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son:

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu law other than Dayabhaga School or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends on a single heir or to any property to which the Indian Succession Act 1925, applies.

4. Savings.—Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

5. Meaning of the expression 'die intestate'.—For the purposes of this Act, a person shall be deemed to die intestate in respect of all

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4 Unless expressly adopted, the Act cannot be applied to territories, which were outside British India when the Act was passed, *Bhanbai v Devji* AIR 1950 Kutch 43.

5 Hindus who had migrated from Part B States (formerly outside British India and settled in Part A states (in former Bitish India) were governed by the provision of the Act, even if they had retained their personal law. *Rukhmabai v Ramratan* (1951) ILR Nag 367, AIR 1951 Nag 350; *Pannalal v Sitabai* (1954) ILR Nag 30, AIR 1953 Nag 70; *Ratan Kumari v Sunder Lal* AIR 1959 Cal 787. Only properties in Part B States are excluded and not properties situated within the areas to which the Act applied and belonging to Hindus domiciled in Part B States, *Shripati v Fulibai* AIR 1981 Bom 224 (beneficial construction)

6 The expression 'widow' in the Act, though used in the singular, includes all the widows left by the deceased if there are more than one, *Bhiwra v Renuka* (1949) Nag 400; *Umayal Achi v Lakshmi Achi* AIR 1945 FC 25; (1945) FCR 1, (1945) 1 MLJ 108.

7 *Asarfa Kuer v Bhuneshwar Rai* AIR 1959 Pat 210, ILR 37 Pat 206.

property of which he has not made a testamentary disposition, which is capable of taking effect.

The Act was repealed by s 31 of the Hindu Succession Act 1956. Rights acquired and liabilities incurred under the Act are however not affected because of s 6 of the General Clauses Act, X of 1897.[8] In this context, it is essential to note the provisions contained in s 14 of the Act of 1956, which lay down a rule having some restrospective operation.

The Act came into force from 14 April 1937. As some difficulties were felt in the interpretation of the Act, it was amended on 8 April 1938 by Act 11 of 1938. The amending Act was made retroactive and operated from the date of the main enactment. The main enactment, as in terms stated in s 4, is not retrospective in operation and does not apply to the property of any Hindu, who dies intestate before the commencement of the Act.[9] Nor does it apply to the widow of any coparcener, who died before the Act came into force.[10]

The validity of the Act was questioned in some cases and it was held by the Federal Court that the Act did not operate to regulate succession to agricultural lands in the governor's provinces, or to a mortgagee's interest or a lessee's interest in such land,[11] but was not ultra vires as to other lands.[12] The validity of the Act was again upheld by the Federal Court in another case.[13] After the decision of the Federal Court relating to agricultural lands, some of the provinces extended the operation of the Central Act to succession to agricultural lands by passing suitable legislation.[14]

8 See ss 4 (b), 14 and 31 of the Hindu Succession Act 1956, and notes thereunder.

9 *Umayal Achi v Lakshmi Achi* AIR 1945 FC 25, (1945) FCR 1, (1945) 1 MLJ 108; *Lakhan Lal v Richu Mian* AIR 1960 Pat 181; *Jasoda Kuer v Phul Kuer* AIR 1958 Cal 600; *Mohari v Chukli* AIR 1960 Raj 82; *Ratan Kumari v Sunder Lal* AIR 1959 Cal 787.

10 *Moni Dei v Hadibadhu* AIR 1955 Ori 73 (FB), *Suraj Mal v Babu Lal* AIR 1985 Del 95 (s 14 of the Hindu Succession Act not attracted).

11 *Kotayya v Annapurnamma* (1945) Mad 777; *Ramaswami v Murugayyan* (1945) Mad 781, AIR 1945 Mad 191.

12 *Re* The Hindu Women's Rights to Property Act of 1937 and the Hindu Women's Rights to Property Amendment Act of 1938 and *Re* a special reference under s 213 of the Goverment of India Act 1935—(1941) FCR 72; *Anant Lal v Ram Adhar* 17 Luck 720, 198 IC 443, AIR 1943 Ori 216. For Coorg, see *PA Machiah v MB Ponnava* AIR 1973 Mys 1.

13 *Umayal Achi v Lakshmi Achi* (1945) FCR 1, AIR 1945 FC 25.

14 Bombay Act 17 of 1942. See *Soniram v Dwarkabai* (1951) 53 Bom LR 325, (1951) Bom 679, AIR 1951 Bom 94, Central Province and Berar Act 6 of 1942, Orissa Act 5 of 1944, Assam Act 13 of 1943, Uttar Pradesh Act 11 of 1942. This enactment was made retrospective in its operation. *Kailash Chandra v Shri Devi* AIR 1951 All 636. As to the application of the Madras Hindu Women's Rights to Property (Extension to Agricultural Lands) Act 26 of 1947; *Bappu Ayyar v Ranganayaki* (1955) 2 MLJ 302, AIR 1955 Mad 394. Reference may be made to the following cases, which were governed by the Federal Court decision and did not fall within the purview of the

continued on the next page

The measure was intended to redress disabilities and 'to give better rights to women'. It was ameliorative in character and enacted to carry out important social reform.[15] It introduced far-reaching changes in the law of succession and was obviously intended to give better rights to women by recognising their claim to fair and equitable treatment in certain matters of succession. However, unfortunately, the rules of devolution set out in the Act are so penned that there have arisen anomalies and a number of conundrums, and an attempt to resolve one difficulty has often caused misconception and equally great if not greater difficulties in other cases.[16]

The Act, in its consequence, touched many branches of Hindu law, such as joint family and partition, adoption, maintenance and disqualification from inheritance and illustrates how piecemeal legislation can result in contradictions and unexpected situations. It has raised problems, which do not admit of logically consistent answers,[17] and the difficulties found in interpreting the enactment have been pointed out in numerous decisions.[18] The Act was not a codifying enactment or even a general, amendment of the law of inheritance. Its proper construction required that it must be fitted into the context of the law existing at the time it was enacted[19] and read in the light of its ameliorative character and expressed intention to give better right to women.[20] In *Umayal Achi v Lakshmi Achi*,[21] the Federal Court observed: 'Its proper construction and operation must be determined with reference to conditions and contingencies likely to arise after its commencement.' The main features of the Act are:

Madras Hindu Women's Rights to Property. Extension to Agricultrural Lands Act 26 of 1947; *Parappa v Nagamma* (1954) Mad 183, AIR 1954 Mad 576; *FBT Sarojini Devi v Shri Krishna* (1945) Mad 61, AIR 1944 Mad 401; *Dhanam v Varadarajan* AIR 1953 Mad 176. Debt secured by mortgage of agricultural lands is 'property' under the Act and the widow is entitled to a share therein—*Subba Naicker v Nallammal* AIR 1950 Mad 192. Reference may also be made to *Hari Dass v Hukmi* AIR 1965 Punj 254; *Kashi Nath v Umapada* AIR 1968 Cal 83.

15 *Dagdu v Namdeo* (1954) Bom 1069, 56 Bom LR 513, AIR 1955 Bom 152.

16 *Shivappa v Yellawa* (1953) Bom 958, 55 Bom LR 658, AIR 1954 Bom 47; *Shyamu v Vishwanath* (1955) 57 Bom LR 807 (co-widows prejudicially affected); *Jana Gadi v Parvati Santosh* (1958) 60 Bom LR 553.

17 *Shivappa v Yellawa* (1953) Bom 958, 55 Bom LR 658, AIR 1954 Bom 47.

18 *Pannalal v Sitabai* (1954) ILR Nag 30, AIR 1953 Nag 70 (position of a Jain widow); *Parappa v Nagamma* (different modes of devolution); *Rathinasabapathy v Saraswathi* AIR 1954 Mad 307, (1953) MLJ 459.

19 *Ramaiya v Mottayya* AIR 1951 Mad 954; *Chinniah Chettiar v Sivagami Achi* AIR 1945 Mad 21; *Parappa v Nagamma* AIR 1954 Mad 576 (FB). The effect of the Act was not to confer larger rights on the widow then those enjoyed by her deceased husband as a coparcener.

20 *Dagdu v Namdeo* (1954) Bom 1069, 56 Bom LR 513, AIR 1955 Bom 152.

21 AIR 1945 FC 25, (1945) FCR 1, (1945) 1 MLJ 108; *Chandra Pal Singh v Bhagwati Devi* (1979) All LJ 427.

(1) in the case of separate property:
   (a) the widow along with the sons is entitled to the same share as the son;
   (b) a pre-deceased son's widow inherits in like manner as the son, if there is no son surviving of such predeceased son; and in like manner as a son's son, if there is surviving a son or son's son of such pre-deceased son;
   (c) the same provision applies *mutatis mutandis* to the widow of a pre-deceased son of a pre-deceased son;
(2) in the case of a Mitakshara joint family, the widow takes the place of her husband.

General Effects of the Act

The Act confers new rights on widows in modification of the previous law as laid down by the texts and interpreted by judicial decisions. The general effect of the Act is to put the three female heirs mentioned in sub-s (1) of s 3 on the same level as the male issue of the last owner along with the male issue or in default of them. Sub-section (1) deals with property over which a Hindu has a power of disposition by a testament. Such property, in the case of a Hindu governed by Dayabhaga school, is his separate property as well as ancestral property in his hands and his share in joint family property. Moreover, in case of a Hindu governed by Mitakshara, it means his separate property. Sub-section (2) of s 3 applies to his 'interest in joint family property' which, as pointed out later, would mean all other property in which he had, under Mitakshara law, interest at the time of his death. The Act puts the widow of a member of the joint family in the place of her deceased husband and the husband's interest in the joint family property under Mitakshara, though undefined, vests immediately upon his death on the widow and does not devolve by survivorship. Section 2 provides that, notwithstanding any rule of Hindu law or custom to the contrary, the provisions of s 3 shall apply where a Hindu dies intestate. Therefore, wherever the provisions of s 3 apply any other rule or custom of Hindu law that would otherwise have applied, ceased to govern the parties, then such rule or custom must be ignored as being superseded by the Act. Sub-section (4) of s 3 confers on the widow, the right of claiming partition of the joint family property, in the same way as any other coparcener entitled to do so under the general law.

The acquisition by the widow of the same interest as her deceased husband in the joint family property does not of itself disrupt Mitakshara joint family and the widow continues as before to be a member of the joint family. Her rights are augmented, but there is no immediate severance

of the joint family.[22] Though her position in the joint family may in many respects be analogous to that of any undivided male coparcener in the joint family, it would be a misnomer to call her a coparcener. All the High Courts and now the Supreme Court[23] are agreed that she does not by operation of the Act become a coparcener.[24] However, it would not be correct to describe her interest as inchoate or imperfect, till she claims partition.[25] She becomes entitled to the undivided interest of her deceased husband and takes 'the same interest as her husband' and not 'the same right as her husband'.[26] Moreover, when the deceased has left a son, she becomes entitled to be in the same position as the son. She may or may not choose to demand partition. Therefore, where she does not enforce partition and the joint family continues as before without any severance of the joint status, the incidents of the coparcenary continue to apply to all the members including the widow, with this reservation that her existence suspends the rule of survivorship. Moreover, even then the rule of survivorship continues to operate *quod* the other coparceners; and their interest as also the interest of the widow is liable to fluctuation by births and deaths in the joint family, which continues as before, but subject to her statutory right.[27] Moreover, founded on the same principle is the view expressed by a Full Bench of the Hight Court of Madhya Pradesh, that the widow who has under sub-s (2) of s 3 obtained interest in her husband's estate and holds the estate with her minor (unmarried) son, takes upon the death of the son, the whole estate by survivorship.[28]

On the same principle, the rights and powers of the *karta* of the joint family to deal with and alienate for legal necessity, the coparcenary

22 *Parappa v Nagamma* (1954) Mad 183; AIR 1954 Mad 576; *Kamal Kishore v Haribar* (1954) 30 Pat 357, AIR 1951 Pat 645; *Gangadhar v Subhashini* AIR 1955 Ori 135.

23 *Satrughan v Sabujpari* AIR 1967 SC 272; *Lakshmi Perumallu v Krishnavenamma* AIR 1965 SC 825.

24 *Parappa v Nagamma* (1954) Mad 183, AIR 1954 Mad 576; *Radha Ammal v IT Commissioner, Madras* (1950) 1 MLJ 399, AIR 1950 Mad 538; *Rathinasabapathy v Yellaw* (1953) 2 MLJ 459, AIR 1954 Mad 307; *Lakshmi Ammal v Ramachandra* AIR 1960 Mad 568, (1960) Mad 991; *Gangadhar v Subhashini* AIR 1955 Ori 35; *Shankar v Gangaram* (1952) Bom 485, (1952) 54 Bom LR 75; *Ramsaran v Bhagwat* AIR 1954 Pat 318; *Manicka v Arunachala* AIR 1965 Mad 1 (FB).

25 *Sankara Rao v Rajyalakshamma* AIR 1961 AP 241; *Chokalingam v Alamalu Ammal* AIR 1982 Mad 29.

26 *Dagdu v Namdeo* (1954) Bom 1069, 56 Bom LR 513, AIR 1955 Bom 152. The Madras and Bombay High Courts have held that the widow not being a coparcener is not entitled to become the *Karta* of the family—*Radha Ammal v CIT, Madras* AIR 1950 Mad 538; contra *CIT v Laxminarayan* (1948) ILR Nag 775, AIR 1949 Nag 128. In *Commissioner of IT v GS Mills*, the Supreme Court held that a widow cannot become the *karta* of the family; AIR 1966 SC 24.

27 *Seethamma v Veerana* (1950) Mad 1076, AIR 1950 Mad 785; *Kamalabala v Jivan Krishna* (1941) 2 Cal 32, 227 IC 291, AIR 1946 Cal 461.

28 *Bhondu v Ramdayal* AIR 1960 MP 51 (FB).

property, including the widow's interest, and represent all the members of the joint family to the outside world continue as before.[29] The position of *karta* remains unaffected as long as there is no partition and the position of the widow is somewhat analogous to that of a male coparcener in the family. The *karta*, though he is entitled to exercise his ordinary powers under the ordinary law, is not competent to make a gift to the property belonging to the family and the widow is entitled to challenge any unjustified alienation, if her interest is sought to be defeated.[30] Moreover, even where the joint family, after the death of her husband, consists of herself and a sole surviving coparcener, the latter cannot make a gift of the entire property because the widow's existence would prevent the vesting of all the coparcenary interest in him.[31] The widow has, during her lifetime, all the powers, which her husband had, save that her interest is limited to a widow's estate. She can alienate her widow's interest in her husband's share; she can even convey her interest in the same for necessity or other binding purposes. She can ask for partition and separate possession of her husband's share. In case she asks for partition, her husband's interest would be worked out having regard to the circumstances obtaining in the family on the date of partition. If she divides herself from the other members of the family during her lifetime, on her demise, the succession would be traced to her husband on the basis that the property was his separate property. If there is no severance, it would devolve by survivorship to other members of the joint Hindu family.[32]

Where property devolves on a widow and the property was the separate property of her husband, she takes in it the same share as a son. This is by inheritance under s 3(1). The interest that she acquires in a case where the husband was a member of a joint family does not devolve on her survivorship. All the High Courts are agreed on this, but

29 *Ahuja v Rameshwarlal* AIR 1971 Raj 269; *Seethamma v Veerana* AIR 1950 Mad 785; *Radha Ammal v IT Commissioner, Madras* (1950) 1 MLJ 399, AIR 1950 Mad 538 (she cannot ask for accounts); *Shivappa v Yellawa* (1953) Bom 968, 55 Bom LR 659, AIR 1954 Bom 47; *Mahadu v Gajarabai* AIR 1954 Bom 442, (1954) Bom 885, 56 Bom LR 387; *Parvathamma v Subbadramma* AIR 1963 AP 236; *Fathamunnisa Begum v Rajagopalacharilu* AIR 1977 AP 24; *Fatech Chand v Bhusban Prakash* AIR 1957 All 801; (Suit by *karta* against third party).

30 *Shivappa v Yellawa* AIR 1954 Bom 47, (1953) Bom 958, 55 Bom LR 659; *Ramaligam v Ramalakshmi* AIR 1958 Mad 228, (1958) Mad 7, (1957) 2 Mad LJ 382; *Lakshmi Ammal v Ramachandra* AIR 1960 Mad 568, (1960) Mad 991 (dissenting from *Rathinasabapathi v Saraswathi* AIR 1954 Mad 307; *Papayamma v Gopalakrishnamurthy* AIR 1969 AP 341.

31 *Shivappa v Yellawa* (1953) Bom 958, 55 Bom LR 659, AIR 1954 Bom 47; *Harekrishna v Jujesthi* AIR 1956 Ori 73; *Ramsaran v Bhagwat* AIR 1954 Pat 318; *Tukaram v Matburbhai* AIR 1973 Bom 37.

32 *Parappa v Nagamma* (1954) Mad 183, AIR 1954 Mad 576 (FB); *Ramaswami v Lakshmamma* AIR 1963 AP 199; *Rup Raut v Basudeo Raut* AIR 1962 Pat 436.

there was difference of opinion on the question whether she can be said to have acquired her interest in such property by inheritance, till the conflict was set at rest by the Supreme Court in *Lakshmi Perumallu v Krishnavenamma*.[33] The Supreme Court held that such interest is neither by survivorship nor by inheritance, but a special type of interest, which is the creation of statute.[34]

According to this view, it is not necessary for the widow to take out a succession certificate for enforcing any claim or right of the husband, which devolves on her under the Act.[35]

The interest of the widow arises not by inheritance, nor by survivorship, but by statutory substitution. Her interest in the property is the limited interest known as Hindu women's estate, but the Act gives her the same power to claim partition as a male owner has. A widow of a coparcener is invested by the Act with the same interest that her husband had at the time of his death in the property of the coparcenary. She is thereby introduced into the coparcenary, and between the surviving coparceners of the husband and the widow so introduced, there arises community of interest and unity of possession. However, the widow does not on that account become a coparcener. By reason of statutory substitution of her interest in the coparcenary property in place of her husband, the right which the other coparceners had under the Hindu law of Mitakshara school of taking that interest by the rule of survivorship, remains suspended so long as that estate enures. If the widow after being introduced into the family to which her husband belonged, does not seek partition, on the termination of her estate, her interest will merge into the coparcenary property. However, if she claims partition, she is severed from the other members and her interest becomes a defined interest in the coparcenary property, and the right of the other coparceners to take that interest by

33 AIR 1965 SC 825.

34 *Jai Ragi v Deputy Director of Consolidation* (1973) All LJ 670; *Jadaobai v Puranjal* (1944) Nag 832, 219 IC 158, AIR 1944 Nag 243; *Jugalkishore v Wardhasa* (1955) ILR Nag 446, AIR 1955 Nag 166; *Mt Rajendra Bati v Mungalal* AIR 1953 Pat 129; *Siveshwar v Har Narain* (1944) 23 Pat 760, AIR 1945 Pat 116; *Kedar Nath v Rada Shyam* AIR 1953 Pat 81; *Sabujpari v Satrughan* AIR 1958 Pat 405; *Bhagobai v Bhaiyalal* AIR 1957 MP 29; *Saradambal v Subbaram* (1942) Mad 630, 201 IC 152, AIR 1942 Mad 212; *Rathinasabapathy v Saraswati* AIR 1954 Mad 307; *Natarajan v Perumal* AIR 1943 Mad 246, (1942) 2 MLJ 668, 206 IC 356; *Shankar v Gangaram* (1952) 54 Bom LR 75; *Napappa v Mukumbe* (1951) Bom 442, AIR 1951 Bom 308, 53 Bom LR 177; *ILT Development v Kotayya* AIR 1955 AP 135; *Ratan Kumari v Sunder Lal* AIR 1959 Cal 787; *Chhotki v Chandra Prakash* AIR 1964 Raj 32; *Harekrishna v Jujeshi* AIR 1956 Ori 73; *Gangadhar v Subhashini* AIR 1955 Ori 35; *Keluni Devi v Jagabandhu Naik* AIR 1958 Ori 47.

35 *Natarajan v Perumal* (1942) MLJ 668, 206 IC 356, AIR 1943 Mad 246; *Gangadhar v Subhashini* AIR 1955 Ori 35; *Rakhmabai v Gangaram* (1952) 54 Bom LR 75; *ILT Development v Kotayya, Chhotki v Chandra Prakash* AIR 1964 Raj 32. The contrary view was taken in *Jadaobai v Puranmal* (1944) ILR Nag 832, AIR 1944 Nag 243.

survivorship will stand extinguished. If she dies after partition or her estate is otherwise determined, the interest in coparcenary property, which has vested in her, will devolve upon the heirs of her husband. To effect such partition, it is not necessary that there should have been actual division of interest by metes and bounds. Mere severance of status is enough.[36]

There is nothing in the Act to show that the widow takes in the joint family property, a defined and divided share, as if the husband had separated from the joint family at the time of his death. The Act vests in the widow immediately upon his death, the undefined and fluctuating interest in the joint family property, which he himself had till the moment of his death. She will, therefore, get a share of the joint family property as at the date of demand by her for partition or at the date of partition at the instance of any coparcener, as the case may be, and not a share of property as at the date of death of her husband.[37]

Under the law prior to the Act, the widow of a person governed by Mitakshara had only a right of maintenance in respect of coparcenary property in which the husband had interest. In respect of separate property left by her husband, she had only the right of maintenance when the husband has left a son, grandson or a great-grandson. She could inherit his separate property only in the absence of these immediate heirs. All this was changed and her rights were augmented as pointed out above. As to the effect of adoption by her, see *Rani Lachhmi Kunwar v Shiam Singh*.[38]

The Bombay High Court has taken the view that unchastity[39] of a widow would not operate as a bar to her right to inherit or acquire any interest in her husband's property under the Act. The Madras, Calcutta and Mysore High Courts hold the contrary view.[40] As under prior law, so under the Act, a widow on remarriage forfeits her right to her deceased husband's property.[41]

36 *Satrughan v Sabujpari* AIR 1967 SC 272; *Lakshmi Perumallu v Krishnavenamma* AIR 1965 SC 825.

37 *Nagappa v Mukumbe* AIR 1951 Bom 309; *Parappa v Nagamma* (1954) Mad 183 (FB); AIR 1954 Mad 576; *Bhondu v Ramdayal* AIR 1960 MP 51. Reference may also be made to the cases on the point collected in the above-mentioned cases. As to presumption of death under s 108 of the Evidence Act, and the rule that there is no presumption in any such case as to the precise date of death, reference may be made to *R Gopala Pathar v Jayalakshmi Ammal* AIR 1984 Mad 340.

38 AIR 1949 All 786.

39 *Akoba Laxman v Sai Genu Laxman* AIR 1941 Bom 204.

40 *Ramaiyya v Motayya* (1952) Mad 187, AIR 1951 Mad 954 (FB); *Kanaiial v Pannasashi* AIR 1954 Cal 588; *Appa Saheb v Gurubasawwa* AIR 1960 Mys 79.

41 *Manabai v Chandanbai* (1954) ILR Nag 727, AIR 1954 Nag 284.

Agricultural Property

As already pointed out, it was held by the Federal Court[42] that the word 'property' in s 3 does not include agricultural lands.[43] Legislation was thereafter passed in many provinces extending the operation of the Central Act to succession to agricultural lands, with the result that the three female heirs mentioned in the Act could also succeed in case of such lands.[44]

Section 3(1)

'When a Hindu governed by Dayabhaga...dies intestate leaving any property'

Sub-section (1) of s 3 speaks of 'any property'. The expression prima facie includes all forms or types of interest answering the description of 'property' in law. The property must be heritable property, in respect of which question of succession may legitimately arise. It has been held by the Supreme Court that shebaitship is property within the meaning of the Act.[45]

'When a Hindu governed by any other school...dies intestate leaving separate property'

Speaking generally, the effect of the Act, so far as it relates to a person governed by Mitakshara, is to put the three female heirs—his widow, the widow of a predeceased son and the widow of a predeceased

42 *Re* the Hindu Women's Rights to Porperty Act of 1937 and the Hindu Women's Rights to Property Amendment Act of 1938 and *Re* a special reference under s 213 of the Goverment of India Act 1935—(1941) FCR 72; *Anant Lal v Ram Adhar* 17 Luck 720, 198 IC 443, AIR 1943 Ori 216. For Coorg, *PA Machiah v MB Ponnava* AIR 1973 Mys 1.

43 Agricultural land has been held to include a mango grove—*Sarojini Devi v Subrahmanyam* (1945) Mad 61, AIR 1944 Mad 401.

44 Bombay Act 17 of 1942. See *Soniram v Dwarkabai* (1951) 53 Bom LR 325, (1951) Bom 679, AIR 1951 Bom 94, CP and Berar Act 6 of 1942, Orissa Act 5 of 1944, Assam Act, 13 of 1943, UP Act 11 of 1942. This enactment was made retrospective in its operation—*Kailash Chandra v Shri Devi* AIR 1951 All 636. As to the application of the Madras Hindu Women's Rights to Property (Extension to Agricultural Lands) Act, 26 of 1947, see *Bappu Ayyar v Ranganayaki* (1955) 2 MLJ 302, AIR 1955 Mad 394. Reference may be made to the following cases, which were governed by the Federal Court decision and did not fall within the purview of the Madras Hindu Women's Rights to Property (Extension to Agricultrural Lands) Act, 26 of 1947. *Parappa v Nagamma* (1954) Mad 183, AIR 1954 Mad 576; *FBT Sarojini Devi v Shri Krishna* (1945) Mad 61, AIR 1944 Mad 401; *Dhanam v Varadarajan* AIR 1953 Mad 176. Debt secured by mortgage of agricultural lands is 'property' under the Act and the widow is entitled to a share therein—*Subba Naicker v Nallammal* AIR 1950 Mad 192. Reference may also be made to *Hari Dass v Hukmi* AIR 1965 Punj 254; *Kashi Nath v Umapada* AIR 1968 Cal 83.

45 *Angurbala v Debarata* [1951] SCR 1125, (1952) 2 Cal 209, AIR 1951 SC 293.

son of a predeceased son—mentioned in s 3, on the same level as the male issue of the last owner along with the male issue or in default of them.

The expression '*separate property*' in s 3(1) was interpreted by the Federal Court in *Umayal Achi v Lakshmi Achi*,[46] and it was held that it has been used in a narrow and limited sense so as to exclude not merely the interest that the last owner may have had in the joint family property, but also to exclude from the operation of the sub-section, property acquired by him on partition and property which devolved on him as a sole surviving coparcener. That decision was quoted with approval by the Supreme Court in the decision referred to above. In *Manohalal v Bhuribai*, the Supreme Court expressed the view that property held by a sole coparcener in a family, does not become his 'separate property' so long as there is a woman in the family, who can bring to existence a new coparcener by adoption.[47] There has been some divergence of judicial opinion as to the effect of the Federal Court decision.

Following that decision, it was held in the under-mentioned cases by the High Courts of Nagpur,[48] Patna[49] and Allahabad[50] that the share received by a father on partition between him and his son or sons, was not his 'separate property' and on his death, it was passed to the son or sons in preference to his widow. On the other hand, it has been held by the High Court of Orissa that in case of a share obtained by a father on such partition, his widow is entitled to inherit the entire interest to the exclusion of the divided son.[51] The view was taken that in such a case, the property which fell to the share of the father was not his separate property for the purpose of s 3(1), but was a joint family property within the meaning of s 3(2), and after the death of the father, his widow became entitled to that entire share to the exclusion of the divided son. In *Subramanian v Kalayanaram*, a case decided by the High Court of Madras, the view was taken that if the property, which a coparcener obtains at a family partition with his son is not separate property within the meaning of s 3(1), it must be deemed to be an 'interest in Hindu joint family property' within the meaning of sub-s (2) of the section.[52] In another decision the same High Court has expressed its agreement

46 AIR 1945 FC 25, (1945) 1 MLJ 108.
47 AIR 1972 SC 1369.
48 *Bhaoorao v Chandrabhagabai* (1948) ILR Nag 465, AIR 1949 Nag 108.
49 *Trisul v Daman* AIR 1957 Pat 441; *Khatrani v Tapeshwari* AIR 1964 Pat 261 (FB).
50 *Manbhari v Bishun* AIR 1958 All 769, *Seshamma v Ramakoteswara* AIR 1958 AP 280.
51 *Visalamma v Jagannadha Rao* AIR 1955 Ori 160; *Pandab Panigrahi v Laxmi* AIR 1979 Ori 64.
52 AIR 1957 Mad 456.

with the view taken by the High Court of Orissa.[53] The High Court of Andhra Pradesh has held that property received by a coparcener by virtue of a deed of settlement is not separate property.[54]

There seems little doubt that the expressions 'separate property' and 'interest in Hindu joint family property' are used in juxtaposition in sub-ss (1) and (2); the sub-sections which deal with all property left by such owner. The same conclusion was reached on the vexed question in a decision of a single Judge of the Bombay High Court.[55] A Division Bench of that High Court has expressed agreement with that view and held that the property left by a Hindu male obtained at a partition between such male and other members of a family where the partition was between a father and a son, or between a father and the other members of the family, is covered by sub-s (2).[56] The question whether in such a case, the widow is entitled exclusively to the property left by the husband or must share it equally with his divided son or sons, was not decided in the Madras and Bombay cases referred to immediately above.[57] The Madhya Pradesh High Court[58] and the Madras High Court[59] have now expressed their agreement with the view taken by the High Court of Orissa.[60]

Section 3(2)

'When a Hindu governed by Mitakshara dies having at the time of his death an interest in a Hindu joint family property'

The effect of the rule laid down in this sub-section is to put the widow of a member of a joint family in the place of the deceased husband, and the husband's interest in the joint family property under Mitakshara vests in her immediately upon his death and does not devolve by survivorship.

The expression 'separate property' used in sub-s (1) and 'interest in a Hindu joint family property' used in this sub-section must be read in juxtaposition and that between them, the two sub-sections deal with all the properties left by such owner. All cases, therefore, where the last

53 *Onnamalai v Seethapathi* AIR 1961 Mad 90; *Commissioner of Income Tax v Thiagarajan* AIR 1964 Mad 58. Reference may be made to *Venkatasubramania v Easwara Iyer* AIR 1966 Mad 266.

54 *Lakshmamma v Kondayya* AIR 1961 AP 505.

55 *Jana Gadi v Parvati Santosh* (1958) 60 Bom LR 553.

56 *Parvati v Janabai* AIR 1961 Bom 77.

57 AIR 1957 Mad 456; *Jana Gadi v Parvati Santosh* (1958) 60 Bom LR 553.

58 *Jhangalu Shivacharan v Pancho Bai* AIR 1968 MP 172.

59 *Onnamalai Ammal v Seethapathi* AIR 1961 Mad 90; *Commissioner of Income-tax v Thiagarajan* AIR 1964 Mad 58.

60 *Visalamma v Jagannadha Rao* AIR 1955 Ori 160.

owner died leaving property other than his self-acquired property, must in view of the decision of the Federal Court,[61] it is submitted, falls under this section. In this context, it may be noted that the sub-section has adopted the Hindu conception that a widow is the surviving half of the deceased husband and introduced the *fictio juris* that she continues the legal persona of her husband. Of course, this does not mean that the husband is for all purpose to be deemed to be alive till the widow claims partition or files a suit for working out her rights. No difficulty arises where the husband was at the time of his death, a member of a joint family and died leaving him surviving his widow and undivided coparceners. In any such case, if there was no son, the widow could immediately become entitled to the same interest in the property, which the husband himself had on partition would have taken. Moreover, if there was a son, who was a member of the joint family, the widow would be entitled to the same share as the son. Difficulty, however, arises where the husband held property, which was ancestral and was survived by the widow and a son or sons who had separated from him. Question arises whether in any such case, the widow is entitled exclusively to the property left by the husband or must share it equally with his divided son or sons. The High Courts of Orissa[62] and Madras,[63] as already mentioned, have taken the view that in such a case, the widow is entitled to inherit the entire interest to the exclusion of the divided son or sons and the High Court of Bombay has left the question open. Serious difficulties have already arisen and, even though the law has been altered after the passing of the Hindu Succession Act 1956, will continue to arise particularly when rights of third parties, who are alienees of any property, are involved and questions of title have to be decided. These are some of the problems, which have arisen because of the extreme difficulty of fitting in any piecemeal legislation howsoever beneficial, in the integrated and complicated structure of Hindu law.

Reference may be made to notes under s 14 of the Hindu Succession Act 1956 for the effect of that section on the interest taken by a Hindu widow in joint family property under this section.

Quantum of Share on Partition The quantum of interest to which a widow is entitled under this sub-section, is to be determined as on the date on which she seeks to enforce partition under sub-s (3).[64] The share, which devolves on a widow of a deceased coparcener, is not a fixed and

61 *Umayal Achi v Lakshmi Achi* [1945] FCR 1, AIR 1945 FC 25.
62 *Visalamma v Jagannadha Rao* AIR 1955 Ori 160.
63 *Onnamalai Ammal v Seethapathi* AIR 1961 Mad 90; *Commr of Income-tax v Thiagarajan* AIR 1964 Mad 58.
64 *Lakshmi Perumallu v Krishnavenamma* AIR 1965 SC 825.

determinate share, but what she takes is the 'same interest as he himself had'. Therefore, until there is partition, she cannot predicate the particular fraction of her share, for it is likely to increase or decrease by birth or death of other coparceners.[65] Her share would include a share in accretions to the joint family property till partition is effected.[66]

Prior to the Act, a widow was entitled to a share on partition among her sons in her capacity as a mother (except in Madras). It has been held in a number of cases, that after the Act, the widow cannot claim a double share on partition between the sons, one in her capacity as a widow and another as a mother.[67] Under the prior law, *stridhana* acquired by a female from her husband or father-in-law was taken into account when a share was allotted to her on partition amongst the sons. The share she gets under s 3(2) is not affected by any rule of Hindu law to the contrary and it has been held in a Nagpur case that such *stridhana* received by her would not be deducted from her share on partition.[68]

Section 3(3)

'Limited interest known as a Hindu woman's estate...shall have the right of claiming partition'

Sub-section (3) expressly declares that the interest devolving upon a widow under s 3 is a limited interest known as 'Hindu woman's estate'. This expression has been interpreted to mean Hindu widow's estate.[69]

On a plain reading of sub-ss (2) and (3), it is clear that the widow, on her husband's death in a joint family, gets the same interest that her husband had, with the limitation that the interest is not absolute but is limited in the manner of a Hindu widow's estate. It would not be correct to equate the interest which she gets with the share a widow used to get under the orthodox law at a partition between her sons.[70] It is also clear that having confined the interest devolving upon her to a widow's limited estate, the legislature was at pains to stress that nonetheless she was to have the same right of partition as a male coparcener would have. It follows that all the incidents of a widow's estate should attach to the interest which devolves on her by virtue of the express statutory estate created in her favour with the added right to claim partitions as its

65 *Nagappa v Mukumbe* (1951) Bom 442, AIR 1951 Bom 309, 53 Bom LR 442; *Shivappa v Yellawa* (1953) Bom 958, AIR 1954 Bom 47; *Gangadhar v Subhashini* AIR 1955 Ori 135; *Tukaram v Gangi* AIR 1957 Nag 28; *Ramchandra v Ramgopal* AIR 1956 Nag 228 (crucial date for determining interest is when right to partition is exericised); *Suryanarayana v Sugunavathi* AIR 1961 AP 939.

66 *Gangadhar v Subhashini* AIR 1955 Ori 135.

67 *Shyamu v Vishwanath* (1955) Bom 890, 57 Bom LR 807, AIR 1955 Bom 410; *T Sarojini Devi v Sri Krishna* AIR 1944 Mad 401, (1945) Mad 61; *Indu Bhusan v Mrityunjoy* (1946) 1 Cal 128.

68 *Hanuman v Tulsabai* AIR 1956 Nag 63.

69 *Dagadu v Namdeo* (1954) Bom 1069, 56 Bom LR 513, AIR 1955 Bom 152.

70 *Bepin Behary v Lakshsona* AIR 1959 Cal 27, 30.

outstanding feature. It has accordingly been held that she can alienate her interest in the coparcenary property for legal necessity;[71] and her interest is liable to be attached and sold in execution of a decree obtained against her.[72] Although, she cannot alienate the property without legal necessity, she can alienate her own restricted interest to enjoy the property during her lifetime. The alienee in such a case can enjoy the property during her lifetime and is also by virtue of that right entitled to claim partition.[73]

Prior to the enactment, a widow-mother could not herself claim partition unless the sons chose to effect severance of the joint status. In Madras, no female heirs got a share on such partition and in Bengal, a sonless stepmother did not have the right to claim a share on a partition among the sons of her deceased husband. This sub-section has the effect of putting the widow in the same position as a son in the matter of claiming partition.

The right to claim partition given to a widow under this sub-section does not negative her right to claim maintenance. It is only an enabling right and she may ask for maintenance instead of partition.[74] However, she cannot enforce both the rights simultaneously.[75] The share she gets on partition, it has been held, is in lieu of maintenance and if she can get a share in all the coparcenary property including agricultural lands, her right to maintenance would cease.[76] The right of claiming partition conferred upon a widow under the Act is personal to her. The right being personal, would come to an end on her death, if no partition had taken place.[77] It has been held in a number of cases that if she died pending a suit for partition, her undivided interest would devolve by survivorship and would not go to her husband's heirs as reversioners.[78] An alienee of the widow's interest for legal necessity can, however, claim the right to partition of the joint family property even after her death.

71 *Harekrishna v Jujesthi* 1956 AIR Ori 73; *Pem Mahton v Bandhu Mahto* AIR 1958 Pat 20.

72 *Thimmi Ammal v Venkatarama* AIR 1960 Mad 347.

73 *Dagadu v Namdeo* (1954) Bom 1069, 56 Bom LR 513, AIR 1955 Bom 152; *Prem Mahton v Bandhu Mahto* AIR 1958 Pat 20; *Suryanarayana v Suguavathi* AIR 1961 AP 393; *Mahipat Missir v Ganpat Sah* AIR 1963 Pat 277; *Kunja Sahu v Bhagabon* AIR 1951 Ori 35; *Bhagabat Prasad v Haimabati Devi* AIR 1990 Ori 70.

74 *Rathinasabapathy v Saraswathi* AIR 1954 Mad 307, (1953) 2 Mad LJ 459; *Gajavalli Ammal v Narayanaswami* AIR 1962 Mad 187; *Varabalamma v Ammathalli* AIR 1959 AP 590.

75 The position was different when she could not get a share of agricultural lands—*Parappa v Nagamma* (1954) ILR Mad 183, AIR 1954 Mad 576.

76 *Shyamu v Vishwanath* (1955) ILR Bom 890, AIR 1955 Bom 410; *T Sarojini Devi v Sri Krishna* (1945) Mad 61, AIR 1944 Mad 401.

77 *Alamelu Ammal v Chellammal* AIR 1959 Mad 100 (FB), (1959) Mad 106.

78 *Shyamu v Vishwanath* AIR 1955 Bom 410; *Subba Rao v Krishna Prasadam* (1954) Mad 227, AIR 1954 Mad 227; *Kachra Khan v Khant Ram* AIR 1953 Sau 175; *Shankar v Gangaram* (1952) Bom LR 75; *Nagappa v Mukambe* (1951) Bom 442, 53 Bom LR 117, AIR 1951 Bom 309.

Husband's Death *Pendente Lite* In view of the peculiar status created for the widow under the Act, entitling her to claim partition in her own right, the sons cannot represent her interest. Therefore, where a husband dies pending a suit or appeal, his widow must be substituted as a party in his place. Otherwise, the suit or appeal would abate.[79] Where a coparcener dies pending a suit brought against the individual members of the joint family and not in a representative capacity, the interest of the deceased coparcener cannot be represented by the other members and his widow must be brought on record.[80] Where a coparcener brings a suit of partition and dies *pendente lite*, his widow can continue the suit as representing her husband.[81]

Interest Liable to Attachment and Sale in Execution The interest devolving on a widow under s 3(2) is liable to attachment and sale in execution of a decree obtained against her.[82] Where a creditor has obtained a decree against a coparcener in his lifetime, he can execute it against the interest devolving on the widow. The rule of survivorship, which operates in case of the death of a widow, who dies before there is any partition of the joint family property, does not have the effect of defeating the rights of any creditor of the deceased coparcener. The creditor can proceed against the interest, which devolved on the widow for satisfaction of such liability.[83]

Devolution of Interest on the Death of the Widow The Act is silent as to what is to be the devolution of the interest of the widow upon her death. The separate property of her husband inherited by her would, it is clear, devolve upon her husband's heirs as reversioners. Moreover, in case of joint family property, it would seem, having regard to the provisions of s 3 and the scheme and object of the Act, that if she dies without any partition having taken place, her interest in the property would pass by survivorship to the coparceners, though, the decisions on the subject cannot be said to be quite uniform. It would also seem that if she sought partition and divided herself from the joint family, the property taken by her would, on her death, pass to her husband's heirs as reversioners. Prior to the decision of the Supreme Court, there were conflicting decisions of various High Courts on the' point.

The High Court of Madhya Bharat has taken the view that the interest taken by the widow is like the interest of her husband, an undivided

79 *Dhanukha v Saudagar* (1955) 32 Pat 1003, AIR 1955 Pat 240; *Sarju Singh v Ramsaroop* AIR 1955 Pat 155; *Jugal Kishore v Wardhasa* AIR 1955 Nag 166; *Ramnath Ramgopal* AIR 1951 Nag 434; *Shivrajsingh v Gaurishankar* AIR 1961 MP 147.

80 *Awadh Behari v Jhaman Mahton* AIR 1953 Pat 324.

81 *Shankar v Gangaram* (1952) Bom 485, 54 Bom LR 75, AIR 1952 Bom 127.

82 *Thimi Ammal v Venkatarama* AIR 1960 Mad 347.

83 *Saradambal v Subbarama Ayyar* (1941) 2 MLJ 287, 201 IC 301, AIR 1942 Mad 272; *Siveshwar v Har Narain* (1944) 23 Pat 760, 219 IC 405, AIR 1945 Pat 116; *Co-op Society of Patur v Vasant* AIR 1946 Nag 317; *Shankar v Gangaram* (1952) Bom 485, 54 Bom LR 75, AIR 1952 Bom 127.

interest in the joint family property, and even though she is entitled to file a suit for partition, the interest does not get separated, at any rate until the suit for partition is filed by her.[84] The High Court of Orissa has held that the interest of the widow succeeding to her husband's interest in coparcenary property goes to the heirs of her husband after her, in the absence of any coparcener living at the time of her death.[85] A Full Bench of the Madras High Court[86] has held that if the widow divided herself from the other members of the family during her lifetime, on her demise, the succession would be traced to her husband on the basis that the property was his separate property. If there was no severance, it would devolve by survivorship to other members of the joint family. A Full Bench of the Patna High Court has also taken the same view.[87] A Full Bench of the Bombay High Court also took the same view in *Ranu Thaku v Santu Goga*.[88] This view was dissented from in a decision of the Madhya Pradesh High Court, where it was held that on the death of a widow who has taken on partition her husband's share, there is a reversion of the property to the coparcenary.[89]

The Supreme Court has finally held that if the widow in such a case died after partition of her estate, the interest in the coparcenary property, which has vested in her, will devolve upon the heirs of the husband.[90]

Upon the death of a widow governed by Dayabhaga law, the share which she inherited from her husband under s 3 of the Act devolves on the husband's heirs under the Hindu law as modified by the Act, as if he died simultaneously with her. Similarly, the share which the widow of a predeceased son gets under the Act, devolves after her death upon the heirs of her father-in-law.[91]

Reference may be made to notes under s 14 of the Hindu Succession Act 1956, for the effect of that section on the interest taken by a Hindu widow under this section.

§ 35A. HINDU LAW WOMEN'S RIGHTS ACT (MYSORE ACT 10 OF 1933)

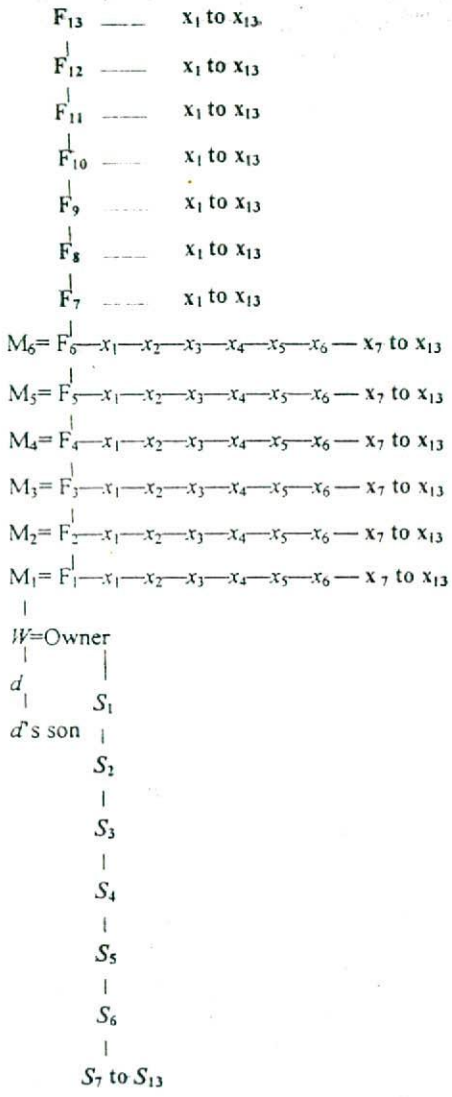
Reference may be made to *Nagendra Prasad v Kempananjamma*.[92]

84 *Laxman v Gangabai* AIR 1955 MB 138.
85 *Harekrisna v Jujesthi* AIR 1956 Ori 73; *Keluni Devi v Jagadambhu Naik* AIR 1956 Ori 47.
86 *Parappa v Nagamma* (1954) Mad 183; AIR 1954 Mad 576 (FB).
87 *Khatrani v Tapeshwari* AIR 1964 Pat 261 (FB).
88 AIR 1968 Bom 1 (FB); *Manda v Pandurang* AIR 1968 Bom 340 (remarriage of widow after partition).
89 *Bhagobai v Bhaiyalal* AIR 1957 MP 29.
90 *Satrughan v Sabujpari* AIR 1967 SC 272.
91 *Kamalabala v Jiban* (1946) 2 Cal 32; AIR 1946 Cal 461; *Provash Chandra v Prokash Chandra* (1946) 2 Cal 164.
92 AIR 1968 SC 209; *Shankaramma v Madappa* AIR 1977 Kant 188.

§ 36. PROPINQUITY, THE GOVERNING FACTOR

Under Mitakshara, the right to inherit arises from propinquity, that is, proximity of relationship.[93] Under Dayabhaga, it arises from spiritual

Table IV.1



Note.—For explanation of the table, see § 41.

93 *Lallubhai v Cassibai* (1881) 5 Bom 110, 121, 7 IA 212, 234; *Adit Narayan v Mahabir*

continued on the next page

efficacy, that is, the capacity for conferring spiritual benefit on the manes of paternal and maternal ancestors (s 79).

Though under Mitakshara, the right to inherit does not arise from the right to offer oblation, the test to be applied, when a question of preference arises in, the case of *sagotra sapindas*, the capacity to offer oblation,[94] but, in the case of *bhinnagotra sapindas*, the 'primary test' is 'propinquity in blood'[95] and, 'when the degree of blood relationship furnishes no certain guide,' the test is the capacity for conferring spiritual benefit.[96]

Different Meaning of Sapinda in Mitakshara and Dayabhaga

In *Buddhu Singh v Lattu Singh*,[97] the Lordships of the Privy Council said:

> It is well settled by the decisions of the Board in *Lallubhai Bappoobhoy v Cassibai*[98] and *Ramchandra*'s case,[99] that under Mitakshara the *sapinda* relationship arises 'between two people though their being connected by particles of one body,' namely, that of the common ancestor, in other words, from community of blood in contradistinction to Dayabhaga notion of 'community in the offering of religious oblation'.

The doctrine of spiritual benefit is explained in §§ 79–87.

Illegitimate Offspring

The general principle of Hindu law is to limit heirship to a legitimate issue. The rules of inheritance relating to *sapindas*, *samanodakas* and

Prasad (1921) 48 IA 86, 95, 6 Pat LJ 140, 60 IC 251, AIR 1921 PC 53; *Vedachela v Subramania* (1921) 18 IA 349, 354, 44 Mad 753, 64 IC 402, AIR 1922 PC 33; *Parot Bapalal v Mehta Harilal* (1895) 19 Bom 631; *Babu Lal v Nanku Ram* (1895) 22 Cal 339; *Suba Singh v Sarafraz* (1897) 19 All 215 (FB); *Subramanya v Siva Subramanya* (1894) 17 Mad 316; *Appandai v Bagubai* (1910) 33 Mad 439, 444, 5 IC 280; *Chinnasami v Kunju Pillai* (1923) 35 Mad 152; *Pichandi v E Ramaswami* AIR 1971 Mad 206 (father's father's son's son's daughter's son and second husband's son of mother of the *propositus*—latter preferred).

94 *Bhyah Ram Singh v Bhyah Ugur Singh* (1872) 13 MIA 373, 392; *Buddha Singh v Lattu Singh* (1915) 42 IA 208, 217, 227, 228, 37 All 604, 613, 623, 624, 30 IC 5, AIR 1915 PC 70.

95 *Balasurbrahmanya Pandva Thalaiwar v Subbayya Tevar* (1938) 65 IA 93, (1938) Mad 551, 40 Bom LR 704, 172 IC 724, AIR 1938 PC 34.

96 *Vedachela v Subramana* (1921) 48 IA 349, 41 Mad 753, 64 IC 402, AIR 1922 PC 33; *Jatindranath Ray v Nagendranath Ray* (1931) 58 IA 72, 59 Cal 576, 135 IC 637, AIR 1931 PC 268; *Ademma v Hanuma Reddi* (1938) Mad 260, AIR 1937 Mad 967.

97 (1915) 42 IA 208, 217, 37 All 604, 613, 30 IC 529, AIR 1915 PC 70.

98 (1880) 5 Bom 110, 121, 7 IA 212, 234.

99 *Ramchandra v Vinayak* (1914) 41 IA 290, 298, 42 Cal 384, 404, 25 IC 290, AIR 1914 PC 1.

bandhus are based upon marriage and legitimate descent. They can only be departed from in favour of an illegitimate offspring on the basis of some well-established principles. Reference may be made to *Sadu Ganaji v Shankerrao*, decided by the High Court of Nagpur,[1] where it was observed that there is no text or statutory provision to cover a case of succession to *stridhana* of a Sudra woman, where the question is whether an illegitimate son of a predeceased daughter of the woman succeeds in preference to the husband of the woman. There is a text in favour of an illegitimate son of a Sudra. There is no text dealing with the share of an illegitimate daughter or an illegitimate grandson or any other illegitimate relation. It was held that the illegitimate son of the daughter was not entitled to succeed in preference to her husband.

§ 37. *GOTRAJA SAPINDAS* AND *BHINNA-GOTRA SAPINDAS*

(1) Mitakshara divides *sapindas* of blood relations into two classes, namely:

(a) *gotraja sapindas*, that is, *sapindas* belonging to the same *gotra* or family as the deceased; and

(b) *bhinna gotra sapindas*, that is, *sapindas* belonging to a different *gotra* or family from the deceased.

Gotraja sapindas are all agnates, that is, persons connected with the deceased by an unbroken line of male descent, as for instance, a son's son, a son's son's son or brother's son. If challenged, the identity of *gotra*[2] and the continuity of the lineage, not broken by an adoption into another *gotra*[3] must be established. *Bhinna gotra sapindas* are all cognates, that is, persons related to the deceased through a female, such as sister's son, a brother's daughter's son, etc. *Bhinna gotra sapindas* are called *bandhus* in Mitakshara, and are commonly known by that name.

(2) *Gotraja sapindas* are sub-divided into two classes, namely: (a) *sapindas* technically so called; and (b) *samanodakas*.

It will be seen from the above that the word '*sapinda*' is used in Mitakshara in two senses. In its larger sense, it means a person having the same *pinda* or community of particles of the same body with the deceased, that is, a blood relation. In its narrower sense, the sapindaship ceases with the fifth degree on the mother's side and the seventh degree

1 AIR 1955 Nag 84.

2 *Jadunath Kuar v Bisheshar Bakhsh Singh* (1932) 59 IA 173, 36 CWN 1073, 136 IC 747, AIR 1932 PC 142.

3 *Lal Hari Har Pratap Baksh Singh v Raja Bajrang Bahadur Singh* (1938) 9 Luck 121, 144 IC 529, AIR 1933 Ori 197.

on the father's side. That is, a person is said to be the *sapinda* of another if, when he is related through his father, he is not more than seven degrees from the common ancestor, and when related through the mother, not more than five degrees from the common ancestor.[4] In this sense, as there are no females in the pedigree of a *gotraja sapinda*, the *sapindas* include blood relation to the seventh degree only reckoned from and inclusive of the deceased as defined in § 39.

In the following sections of this chapter, the word '*sapinda*' is used in its narrower sense.

§ 38. THE CLASSES OF HEIRS

(1) There are three classes of heirs recognised by Mitakshara, namely:

(a) *gotraja sapindas*;
(b) *samanodakas*; and
(c) *bandhus*.

(2) The first class succeeds before the second, the second succeeds before the third.

§ 39. *GOTRAJA SAPINDAS*

The *gotraja sapindas* of a person, according to Mitakshara, are:[5]

(i) His six male descendants in the male line; ie, his son, son's son's son, etc. being S_1 to S_6 in Table IV.1.

(ii) His six male ascendants in the male line, the wives of the first three of them, and probably also of the next three; ie, his father, father's father, father's father's father, etc, being F_1 to F_6 in the table and their wives, that is M_1 to M_6, being the mother, father's mother, father's father's mother, etc.

(iii) The six male descendants in the collateral male line of each of his male ascendants; ie, x_1 to x_6 in the line of F_1, being his brother, brother's son, brother's son's son, etc; x_1 to x_6 in the line of F_2, being his paternal uncle, paternal uncle's son, etc; x_1 to x_6 in the line of F_3, being his paternal grand-uncle, paternal grand-uncle's son, etc; x_1 to x_6 in the line of F_4; x_1 to x_6 in the line of F_5; and x_1 to x_6 in the line of F_6.

(iv) His wife, daughter, and daughter's son.

4 *Mitakshara*, Chap III, v 53, quoted in *Ramchandra v Vinayak* (1914) 41 IA 290, 42 Cal 384, 408, 25 IC 290, AIR 1914 PC 1.

5 *Sarkar's Hindu Law*, Seventh edn, p 97; *Sarvadhikari's Principles of Hindu Law of Inheritance*, 2nd edn, p 530; *Bhyah Ram v Bhyaj Ugur* (1870) 13 MLA 373, 373, 394; *Rohan Kumar v Lachhman* AIR 1976 Pat 287.

The *sapindas* are 57 in number as shown below:

S_1 to S_6	6
F_1 to F_6 and their wives M_1 to M_6	12
x_1 to x_6 in each of the six lines from F_1 to F_6	36
wife, daughter and daughter's son	3
	57

It will be seen that the *sapinda* relationship extends to seven degrees reckoned from and inclusive of the deceased, this being the Hindu mode of counting degrees. It is six degrees, if you exclude the deceased. The wife becomes a *sapinda* of the husband on marriage. The daughter's son is not a *gotraja sapinda*, he is a *bandhu*, for he is related to the deceased through a female. For the purpose of succession, however, he is ranked with *gotraja sapindas*.

A *sapinda*, according to Mitakshara, means a persons connected with the same *pinda* or body. (see § 36).

In the case of the sons of a prostitute, there can be no *gotraja sapinda* relationship between them or their agnate male descendants as the father is unknown.[6]

§ 40. *SAMANODAKAS*

The *sapinda* relationship, as stated above, extends to seven degrees reckoned from and inclusive of the deceased. the *samanodakas* of a person include all his agnates from the 8th–14th degree.[7]

The samanodakas are shown in the Table IV.1 in thick-block type. They are 147 in number up the 14th degree only; they are:

S_7 to S_{13} in the descending line	7
F_7 to F_{13} in the ascending line	7
x_7 to x_{13} in each of six collateral lines from F_1 to F_6, 7×6 =	42
x_1 to x_{13} in each of the 7 collateral lines F_7 to F_{13}, 13×7 =	91
	147

Samanodakas are those male relations of a Hindu to whom he offers oblations of water while performing the *shraddha* ceremony (see § 80).

6 *Krishna Mudaliar v Marimuthu Mudaliar* (1940) Mad 109, AIR 1939 Mad 862, (1939) 2 MLJ 423.

7 *Atmaram v Baitrao* (1935) 62 IA 139, 155 IC 330, AIR 1935 PC 57 approving *Narain v Chandi* (1887) 9 All 467; *Rama Row v Kuttya* (1917) 40 Mad 654, 659, 34 IC 294, AIR 1917 Mad 871 and disapproving *Devkore v Amritram* (1885) 10 Bom 372; *Ram Baran v Kamla Prasad* (1910) 32 All 594, 6 IC 698.

§ 41. TABLE OF *GOTRAJA SAPINDAS* AND *SAMANODAKAS*

Table IV.1 is a table of *gotraja sapindas* and *samanodakas*.[8]

The thick black lines show where the *sapinda* relationship ends, and the *samanodaka* relationship begins.

The *samanodakas* are shown in thick black type; the rest are *sapindas*.

W is the widow of the deceased owner, *d* is his daughter and *d*'s son is his daughter's son.

S_1 to S_{13} are the son, the son's son, the son's son's son, etc, of the deceased.

F_1 to F_{13} are his father, father's father, father's father's father etc.

M_1 to M_6 are his mother, father's mother, father's father's mother etc.

x_1 to x_{13} in the line of F_1 are his brother, brother's son, brother's son's son, etc.

x_1 to x_{13} in the line of F_2 are his paternal uncle, paternal uncle's son, paternal uncle's son's son, etc.

x_1 to x_{13} in the line of F_3 are his paternal grand-uncle, paternal grand-uncle's son, etc and so on in the remaining lines from F_4 to F_{13}.

The table does not include female heirs recognised in the Bombay state.

F_1 to F_{13} is the ascending line; S_1 to S_{13} is the descending line; x_1 to x_{13} are the 13 collateral lines.

§ 42. SUCCESSION IN THE BOMBAY STATE

The rules of inheritance in force in the Bombay state differ in some respect from those in force in the Benares, Mithila and Madras schools. Again, in those parts of the Bombay state, where the Mayukha is the prevailing authority, that is, the island of Bombay, Gujarat and the North Konkan, the rules of inheritance are in some respects different from those prevailing in other parts of the state. The order of succession in the Bombay state is given separately in chapter VI (§§ 71–77).

§ 43. ORDER OF SUCCESSION AMONG *SAPINDAS*

The *sapindas* succeed in the following order:

1–3 Son, grandson (son's son) and great-grandson (son's son's son), and (after 14 April 1937) widow, predeceased son's widow, and predeceased son's predeceased son's widow.

8. This table is an enlargement of the table given in *Sarvadhikari's Principles of the Hindu Law of Inheritance*, second edn, p 527.

A son, a grandson whose father is dead, and a great-grandson whose father and grandfather are both dead, succeed simultaneously as single heir to the separate or self-acquired property of the deceased with rights of survivorship.[9]

After 14 April 1937, a widow takes the same share as a son. The widow of a predeceased son inherits in like manner as a son, if there is no son surviving of such predeceased son; and in like manner as a son's son, if there is surviving a son or son's son of such predeceased son. The same rule applies *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(i) Take Per Stirpes

The son, grandson and great-grandson take per stirpes and not per capita (see § 29 and illustration thereto).

(ii) Son Born After Partition

Where there has been a partition between a father and his sons, and a son is subsequently born to him, such son takes not only the share of the father in the joint property obtained by him on partition, but the whole of the property acquired by the father before or after partition to the exclusion of the divided son.[10] *A* and his two sons, *B* and *C*, constitute together a joint family. *B* and *C* separate from *A*. After the division, a son *D* is born to *A*. *A* and *D* remain joint. *A* then dies leaving *D*. *D* is entitled not only to *A*'s separated share of the joint property, but to the whole of *A*'s self-acquired property (see § 310).

(iii) Divided and Undivided

Where there are sons by different wives, it often happens that the sons by one wife take their share of the joint property from the father and separate from him, and the father continues joint with the sons by his other wife. Suppose now that the father dies leaving self-acquired property, some acquired before and some after partition, who is entitled to the property? According to a Full Bench decision of the Allahabad High Court,[11] and rulings of other High Courts,[12] the undivided sons and their

9 See § 31, Illust (a) and § 32. *Marudayi v Doraisami* (1907) 30 Mad 348; *Gangadhar v Ibrahim* (1923) 47 Bom 556, 72 IC 307, AIR 1923 Bom 265.

10 *Nawal Singh v Bhagwan Singh* (1882) 4 All 427, 429.

11 *Mst Ram Dei v Mst Gyarsi* 1949 All 160 (FB).

12 *Fakirappa v Yellappa* (1898) 22 Bom 101; *Nana v Ramchandra* (1909) 32 Mad 377, 2 IC 510; *Viravan v Srinivasachariar* (1921) 44 Mad 499, 503–504, 64 IC 944, AIR 1921 Mad 168 (FB); *Narasimbam v Narasimbam* (1932) 55 Mad 577, 137 IC 765, AIR 1932 Mad 361; *Badri Nath v Hardeo* (1930) 5 Luck 649, 123 IC 861, AIR 1930 Ori 77. (The case of *Kunwar Bahadur v Madho Prasad* (1918) 17 All LJ 151, 49 IC 620, AIR 1919 All 223, relied upon in *Badri Nath*'s case does not support the decision in that case); *Ambika v Jamuna Prasad* (1942) 17 Luck 72; *Satrughan Prasad v Sudip*

continued on the next page

branches succeed to the whole of such property to the exclusion of the divided sons and their branches (see §§ 31 and 223).

(iv) Adopted Son

Adoption confers upon the adoptee the same rights and privileges in the family of the adopter as the legitimate son, subject to certain qualifications (see §§ 494 and 497). In Andhra, an *illatom* son-in-law is a boy incorporated in the family with a view to give the daughter in marriage and is customarily recognised as an heir in absence of a natural born son.[13]

(v) Illegitimate Sons

The illegitimate sons of a Brahman, Kshatriya or Vaisya are entitled to maintenance and not to any share of the inheritance.[14]

The illegitimate son of a Sudra, however, is entitled to a share of the inheritance provided: (1) he is the son (*putra*) of a *dasi*, that is, a Hindu concubine in the continuous and exclusive keeping of his father at the time of his birth;[15] and (2) he is not the fruit of an adulterous or incestuous intercourse.[16] It is not necessary that his mother should remain a permanent concubine till the day of his father's death.[17] A Brahmin mistress of a Sudra does not become a Sudra herself and their son is not

Narain AIR 1955 Pat 408, ILR (1955) Pat 298; *Vishweshwarlal v Bhuramal* AIR 1968 Raj 277; *Inder Narayan v Rup Narayan* AIR 1965 MP 107; *Girdharilal v Fatehchand* AIR 1955 MB 148.

13 *P Lakshmi Reddy v L Lakshmi Reddy* AIR 1957 SC 314; P *Venkateswarlu v Raghavulu* AIR 1957 AP 604.

14 See *Mitakshara*, Ch I, s 12, v 3. *Roshan Singh v Balwant Singh* (1902) 22 All 191, 27 IA 51; *Chooturya v Sadub Purbulad* (1857) 7 MIA 18; *Hiralal Laxmandas v Meghraj Bhickchand* (1938) Bom 779, AIR 1958 Bom 433; *Mothey Anja Rama v Narayana Rao* (1952) SCJ 507, (1952) 2 MLJ 342, AIR 1953 SC 433 (factors to be considered in fixing maintenance).

15 *Lingappa v Esudasan* (1904) 27 Mad 13 (a Christian woman is not a *dasi*); *Sitaram v Ganpat* (1923) 25 Bom LR 429, 73 IC 412, AIR 1923 Bom 384 (a Mohammedan woman is not a *dasi*); *Mahabir Prasad v Raj Bahadur Singh* (1943) 18 Luck 585 (Thakur woman).

16 *Rahi v Govind* (1876) 1 Bom 97; *Sadu v Baiza* (1880) 4 Bom 37; *Gangabai v Bandu* (1916) 40 Bom 369, 32 IC 986, AIR 1916 Bom 283; *Ram Kali v Jamma* (1908) 30 All 508; *Rajani Nath Das v Nitai Chandra Dei* (1921) 48 Cal 643, 63 IC 50, AIR 1921 Cal 820 (FB) overruling *Narain v Rakhal* (1876) 1 Cal 1. *Kirpal v Sukurmoni* (1882) 19 Cal 91 and *Ram Saran v Tek Chand* (1901) 28 Cal 194. See *Bai Nagubai v Bai Monghibai* (1926) 52 IA 153, 50 Bom 604, 96 IC 20, AIR 1926 PC 73 (on appeal from (1923) 47 Bom 401, 69 IC 291, AIR 1923 Bom 190); *Manickchand v Bhagwandas* AIR 1964 Bom 353; *Shibu v Pandu* AIR 1967 J&K 81. The illegitimate son of a Sudra, who is the offspring of an adulterous or incestuous intercourse is entitled to maintenance only (§ 551). Reference may also be made to *Gopala Rao v Sitharamamma* AIR 1965 SC 1970.

17 *Uderam v Thagga* (1949) ILR Nag 248.

a *dasiputra*.[18] It is not necessary to constitute a woman a *dasi* that she should not have been a married woman.[19] She may be a widow when the illicit relationship begins,[20] or she may even be a married woman when such relationship begins, provided that in the latter case, the relationship has ceased to be adulterous when the son is conceived, as where the husband dies before conception.[21] The condition that the connection should not be adulterous or incestuous in not to be found in the texts; it seems to have been imposed on grounds of general morality.[22] Nor is it necessary that a marriage could have taken place between the boy's father and his mother.[23] He is not however, entitled to full rights of inheritance. The text of Mitakshara bearing on the subject is as follows:[24]

> The son begotten by a *Sudra* on a female slave obtains a share by the father's choice or at his pleasure. However, after (the demise of) the father, if there be sons of wedded wife, let these brothers allow the son of the female slave to participate for half a share; that is, let them give him half (as much as is the amount of one brother's) allotment.

The above text refers to the property of a separated householder.[25]

In *Ajit Kumar v Ujayar Singh*,[26] the Supreme Court summarised the law pertaining to the rights of inheritance of an illegitimate son to his putative father's self-acquired property. Relying upon this decision, the Andhra Pradesh High Court has held that an illegitimate son is entitled to an equal share with natural sons, but cannot ask for partition during the father's lifetime. In *Kamulammal v Visvanathaswami*,[27] the above text

18 *Ramchandra Doddappa v Hanamnaik Dodnaik* (1936) 60 Bom 75, 37 Bom LR 920, 160 IC 99, AIR 1936 Bom 1; *Bachubhai v Dhanlaxmi* AIR 1961 Guj 141; *Gontra Mongal Chandra v Dhirendra Nath* (1976) Cal 129.

19 (1876) 1 Bom 97; *Subramania v Rathnavelu* (1918) 41 Mad 44, 47, 42 IC 556, AIR 1918 Mad 1346; *Ramchandra v Sadashiva Rao* AIR 1968 Mys 85.

20 (1916) 40 Bom 369, 32 IC 986, AIR 1916 Bom 283.

21 *Tukaram v Dinkar* (1931) 33 Bom LR 289, 131 IC 883, AIR 1931 Bom 221; *Mt Daulat Kuar v Bishundeo Singh* (1940) 19 Pat 382, 189 IC 883, AIR 1940 Pat 310. Reference may also be made to *Tatayya v Nakaraju* AIR 1958 AP 611.

22 *Soundarajan v Arunachalam* (1916) 39 Mad 136, 151, 33 IC 858, AIR 1916 Mad 1170 (FB).

23 (1916) 39 Mad 136, 33 IC 858, AIR 1916 Mad 1170 (FB); *Rajani Nath Das v Nitai Chandra Dei* (1921) 48 Cal 643 IC 50, AIR 1921 Cal 820 (FB).

24 *Mitakshara*, Ch I, s 12, verse 2.

25 *Ranoji v Kandoji* (1885) 8 Mad 557, 561. Cf *Deivanai Achi v Chidambaram Cheettiar* AIR 1954 Mad 657, 671, (1955) 1 MLJ 120.

26 AIR 1961 SC 1334, 1337; *Sadashiv v Bala* AIR 1972 Bom 164; *Raghavendra Rao v Rajeshawara Rao* (1974) 2 Andh WR 245; *Rasala Surya Prakasrao v Venkateswararao* AIR 1992 AP 235 (also see notes under s 16 of the Hindu Succession Act).

27 (1923) 50 IA 32, 46 Mad 167, 71 IC 643, AIR 1923 PC 8 (disapproving); *Kesaree v Samardhan* (1873) 5 NWP 9; *Chellammal v Ranganathan* (1911) 34 Mad 277, 12 IC 247; (1916) 40 Bom 369, 32 IC 986, AIR 1916 Bom 283.

was interpreted by the Privy Council to mean that an illegitimate son takes one-half of what he would have taken if he was legitimate, that is to say, the illegitimate son takes one-fourth (1/2 x 1/2), and the legitimate son takes three-fourth. If a Sudra dies leaving one legitimate son and six illegitimate sons, then if the six illegitimate sons were legitimate, they would each take 1/7; being illegitimate, each of them will take 1/2 of 1/7, that is, 1/14 and the six together will take 3/7, and the remaining 4/7 will go to the legitimate son.[28] This interpretation placed on the relevant text by the Privy Council has been accepted by the Supreme Court.[29]

Where there is no legitimate son, the illegitimate son is entitled to a moiety only of his father's estate when there is a widow, daughter or daughter's son. Where there is no legitimate son, but a daughter or daughter's son, the illegitimate son takes one-half of the whole estate, and the other half goes to the daughter, or to the daughter's son, as the case may be.[30] According to the Privy Council decision in *Kamulammal*'s case referred to above, the half share which an illegitimate son takes is a half of that which he would have taken had he been legitimate. Applying that test, it is clear that had the illegitimate son been legitimate, he would have taken the whole estate to the exclusion of the daughter; being illegitimate, he takes one-half of the whole estate, and the daughter or daughter's son, as the case may be, takes the other half.[31] If there be no widow, daughter, or daughter's son, the illegitimate son takes the whole estate.[32] An adopted son stands on the same footing as the legitimate son.[33]

Where an illegitimate son and widow of the deceased Sudra inherit his property in equal shares and the widow thereafter dies, the illegitimate son, by operation of the doctrine of reverter, becomes entitled to the other half share taken by the widow.[34] The share allotted to the illegitimate son under Mitakshara in not in lieu of maintenance; it is in recognition of his status as a son.[35]

The legitimate son and the illegitimate son inherit their father's property as coparceners with a right of survivorship and necessarily the right to claim partition of the self-acquired as well as ancestral property left by

28 *Maharaja of Kolhapur v Sundaram* (1925) 48 Mad 1, 93 IC 705, AIR 1925 Mad 497.
29 *Gur Narain Das v Gur Tabal Das* [1952] SCR 869, 875, (1952) 2 MLJ 251, AIR 1952 SC 225.
30 *Shesgiri v Girewa* (1890) 14 Bom 282; *Meenakshi v Appakutti* (1910) 33 Mad 226, 4 IC 299; *Annayyan v Chinnan* (1910) 33 Mad 366, 5 IC 84.
31 *Karuppayee v Ramaswami* (1932) 55 Mad 856, 137 IC 645, AIR 1932 Mad 440.
32 *Sarasvati v Mannu* (1879) 2 All 134; Mitakshara, Chap 1, see 12, para 1.
33 *Maharaja of Kolhapur v Sundaram* (1925) 48 Mad 1, 93 IC 705, AIR 1925 Mad 497.
34 *Ajit Kumar v Ujayar* AIR 1961 SC 1334; *Kruppayee v Ramaswami* AIR 1932 Mad 440.
35 *Vellaiyappa Chetty v Natarajan* (1931) 55 Mad 1, 58 IA 402, 134 IC 1084, AIR 1931 PC 294.

the father belongs to them.[36] Thus, if a Sudra dies leaving a legitimate son *A*, and an illegitimate son *B*, and *A* dies before partition without leaving a male issue, *B* will take *A*'s share by survivorship to the exclusion of *A*'s daughter, mother or other heir.[37]

The right of an illegitimate son of a Sudra to inherit to his father is not merely a personal right; it passes on his death to his legitimate issue. Thus, if a Sudra *A* has a legitimate son *B* and an illegitimate son *C* and *C* predeceases *A*, leaving a legitimate son *D*, then on *A*'s death, *D* will take a moiety of the share of *B*, that is, *B* will take 3/4, and *D* will take 1/4, that being the share of his father *C*. However, it would seem that an illegitimate son of a predeceased legitimate son of a Sudra is not entitled to succeed on the ground of representation.[38]

Where, on partition between a legitimate son and an illegitimate son, property is allotted to the widow, the illegitimate son can claim, on the widow's death, a share in the property allotted to her, as it stands on the same footing as property inherited from her husband.[39]

The illegitimate son of a Sudra inherits only to his father, he has no claim to inherit to collaterals. Thus, if a Sudra dies leaving a legitimate son *A* and an illegitimate son *B*, they will both inherit their father's property as coparceners. If they divide the property, *A* will take 3/4 and *B* will take 1/4. If *A* dies after partition, his share will pass to his own heirs, but in no case to *B*, *B* not being amongst his heirs. *B* can inherit to his father alone, and not to his father's legitimate sons, nor his father's brothers nor any other collaterals.[40] If *A* dies while he is joint with *B* without leaving a male issue, his share would go to *B* by survivorship. However, *A*'s separate property would pass to his own heirs, and not in any case to *B*. On the same principle, if a Sudra dies leaving an illegitimate son of his father and a half brother, the half brother is entitled to succeed, the illegitimate son being excluded from all collateral succession.[41] Moreover, just as an illegitimate son is not entitled to inherit to collaterals, so a collateral is not entitled to inherit to him. Thus, if a Sudra dies leaving a legitimate son *A* and an illegitimate son *B*, and *A* dies leaving

36 See cases noted in *Apparao v Narasimha Rao* AIR 1962 AP 515.

37 See § 312. *Raja Jogendra v Nityanund* (1891) 18 Cal 151, 17 IA 128 (on appeal from (1885) 11 Cal 7021); approving *Sadu v Baiza* (1884) 4 Bom 37; *Gur Narain Das v Gur Tabal Das* [1952] SCR 869, (1952) 2 MLJ 251, AIR 1952 SC 225.

38 *Govindarajulu v Balu Ammal* (1951) 2 MLJ 209, AIR 1952 Mad 1 (case-law considered).

39 *Bhagwantrao v Punjaram* (1938) ILR Nag 255, 174 IC 201, AIR 1938 Nag 1.

40 *Shome Shankar v Rajesar* (1899) 21 All 99; *Subramania v Rathnavelu* (1918) 41 Mad 44, 42 IC 556, AIR 1918 Mad 1346 (FB); *Ayiswaryanandaji v Sivaji* (1926) 49 Mad 116, 92 IC 928, AIR 1926 Mad 84; *Raj Fateh Singh v Baldeo v Singh* (1928) 3 Luck 416, 109 IC 310, AIR 1928 Ori 233.

41 *Dharma v Sakharam* (1920) 44 Bom 185, 55 IC 306, AIR 1920 Bom 205.

a leaving a legitimate son *C*, and *B* dies without leaving any relations, *C*, who is collateral, is not entitled to succeed to *B*'s property.[42]

The son of a *zamindar* born of the *katar* form of marriage among the Tanwars or Kanwars (Sudra) is illegitimate and is not entitled to the *zamindari* in preference to the *zamindar's* cousin.[43] The only question raised before the Judicial Committee was as to the validity of the marriage. The other point was conceded obviously because the *zamindari* was impartible and the cousin took by survivorship (see § 587). The illegitimate son is not entitled to succeed to the *stridhana* of his father's wife.[44]

There can be no coparceners between a Sudra father and his illegitimate sons. However, it has been held by the High Court of Bombay that on the father's death, they hold the property inherited by them from him as coparceners and none of them can dispose of his interest in it by will.[45]

(vi) Son Born of Anuloma Marriage

Under the Hindu law as administered in the Bombay State, the marriage of a Brahman male with a Sudra woman is an *anuloma* marriage and is valid. A son born of such a marriage is legitimate, but he is entitled only to one-tenth share in the estate of his father. As regards the estate of his uncle also, he is entitled not to the whole of it, but only to a one-tenth share in it.[46]

4 Widow

(i) Widow's estate

The widow takes only a limited interest called the widow's estate in the estate of her husband (§ 176). On her death, the estate goes not to her heirs, but to the next heirs of her husband, technically called reversioners.[47] She is entitled only to the income of the property inherited by her. She has no power to dispose of the *corpus* of the property except in certain cases (§§ 178–80). She may, however, alienate her life interest in the estate. Section 14 of the Hindu Succession Act 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of all property acquired by her whether before or after the commencement of the enactment.

42 *Zipru v Bomtya* (1922) 46 Bom 424, 64 IC 975, AIR 1922 Bom 176.
43 *Ram Saran Singh v Mahabir v Sewak Singh* (1934) 61 IA 106, 147 IC 667, AIR 1934 PC 74.
44 *Ayiswaryanandaji v Sivaji* (1926) 49 Mad 116, 92 IC 928, AIR 1926 Mad 84.
45 *Shamu v Babu Aba* (1928) 52 Bom 300, 100 IC 116, AIR 1928 Bom 153; *Packiriswamy v Doraswamy* (1931) 9 Rang 226, 271–72, 132 IC 817.
46 *Natha v Mehta Chhotalal* (1931) 55 Bom 1, 130 IC 17, AIR 1931 Bom 89.
47 See §§ 168, 170. *Bhagwandeen v Myna Baee* (1867) 11 MIA 487.

(ii) Unchastity

An unchaste widow was not entitled, under Hindu law to inherit to her husband. However, once the husband's estate has vested in her (which could only happen if she was chaste at the time of her husband's death), it was not divested by unchastity after her husband's death.[48] It has been held in a decision of the Bombay High Court[49] that the effect of the Hindu Women's Rights to Property Act 1937, was to remove the bar of unchastity because the Act applied notwithstanding any rule of Hindu law or custom to the contrary. The Calcutta High Court[50] and the Madras High Court[51] have taken the contrary view.

(iii) Re-marriage

The re-marriage of a widow, though legalised by the Hindu Widow's Re-marriage Act 1856, divests the estate inherited by her from her deceased husband. By her second marriage, she forfeits the interest taken by her in her husband's estate, and it passes to the next heirs of her husband as if she were dead (s 2 of the Act).[52] In *Pandurang v Sindhu*, the High Court of Bombay explained the effect of s 2 of the Act read with s 14 (1) of the Hindu Succession Act 1956.[53] The reason for the rule laid down in s 2 is that a widow succeeds as the surviving half of her husband, and she ceases to be so on re-marriage. However, a widow does not by re-marriage loses her right to succeed to the estate of her son[54] or her daughter,[55] by her first husband. A Full Bench of the High Court of Madhya Pradesh had held that a widow is upon her re-marriage divested

48 *Moniram v Keri Kolitani* (1880) 5 Cal 776, 7 IA 115; *Sellam v Chinnammal* (1901) 24 Mad 441; *Gangadhar v Yellu* (1912) 36 Bom 138, 12 IC 714; *Jadho Nagu v Jadho Gangu* AIR 1958 AP 19.

49 *Akoba v Sai Genu* (1941) Bom 438, AIR 1941 Bom 204, (1941) 43 Bom LR 338.

50 *Kanailal v Pannasashi Mitra* (1953) 58 CWN 743, AIR 1954 Cal 588.

51 *Ramayya v Motayya* (1952) Mad 187, AIR 1951 Mad 954 (FB).

52 *Mussadi v Mst Chando* AIR 1956 HP 45; *Setabi Dei v Ramdhani* AIR 1966 Cal 60. It must be proved that necessary ceremonies of marriage were performed at the time of the remarriage—*Indrapati v Deputy Director of Consolidation* AIR 1980 All 186.

53 AIR 1971 Bom 413.

54 *Akora Suth v Boreani* (1869) 2 Beng LR 199 (AC); *Chamar Haru v Kashi* (1902) 26 Bom 388; *Basappa v Rayava* (1905) 29 Bom 91 (FB); *Ramaswamy v E Thevar* AIR 1972 Mad 314. In *Pichandi v E Ramaswami* AIR 1971 Mad 204, the competing heirs were father's father's son's son's daughter's son and the second husband's son of the mother of the *propositus*. The latter was preferred. Also see § 54 *Atma bandhus*, Entry no. 27. Also see § 43–47 (iv)—Mother. *Lakshmana v Siva* (1905) 28 Mad 425; *Kundan v Secretary of State* (1926) 7 Lah 543, 96 IC 865, AIR 1926 Lah 673; *Pannalal v Harna Bai* AIR 1950 Hyd 37; *Fagunswami Dasi v Dhum Lal* AIR 1951 Cal 269, (1951) 2 Cal 76 (third marriage); *Thyamma v Giryamma* AIR 1960 Mys 176; *Chinti v Harminder* AIR 1987 HP 56 (customs).

55 *Bhiku v Keshav* (1924) 26 Bom LR 235, 80 IC 512, AIR 1924 Bom 360.

of her husband's property, which she has already obtained by inheritance to her son. She does not, however, forfeit self-acquired property of the son which she has inherited.[56] The Supreme Court has, however, held that a widow does not divest the right of inheritance to her deceased husband's portion of property on partition by virtue of her remarriage. This is, however, subject to the fact that she was a widow when the partition opened and the widow had re-married subsequently.[57]

Section 2 of the Hindu Widow's Re-Marriage Act 1856, does not apply to estate legally and wholly acquired by the widow, for example, where under the husband's will, she is permitted to re-marry or where an absolute estate is conferred on her. The question would be one of construction in any such case.[58] For further reference, see *Sankaribala v Asita Baran.*[59]

Does a Hindu widow who has ceased to be a Hindu before her re-marriage, for example, by conversion to Mahommedanism, forfeits her right to her husband's property? According to the Calcutta,[60] Madras,[61] Bombay[62] and Patna[63] High Courts, the widow forfeits her rights to her husband's property. The Allahabad High Court holds a contrary view.[64]

There is a conflict of opinion as to whether a widow who is entitled to re-marry by the custom of the caste to which she belongs, forfeits her interest in her husband's estate by re-marriage. It has been held by the High Court of Allahabad and the Chief Court of Oudh, that she does not; by the other High Courts, that she does.[65] The Allahabad view is that if the marriage of a Hindu widow takes place under an ancient custom existing before 1856, when the Hindu Widow's Re-marriage Act was passed, the question whether or not she is divested of her interest in the estate of her previous husband depends upon that custom and that custom alone. In other words, she would be divested of her interest only if such forfeiture is proved to be an incident of the custom itself and not otherwise.[66] The mere fact that there is a practice of re-marriage after 1856, would not necessarily be indicative of any ancient custom existing

56 *Bhondu v Ramdayal* AIR 1960 MP 51.
57 *Gajodhari Devi v Gokul* AIR 1990 SC 46.
58 *Thangavelu Asari v Lakshmi Ammal* AIR 1957 Mad 534; *Sankaribala v Asita Barani* AIR 1977 Cal 289.
59 Supra.
60 *Matungini v Ram Rutton* (1892) 19 Cal 289 (FB).
61 *Vitta v Chatakondu* (1918) 41 Mad 1078, 48 IC 50, AIR 1919 Mad 854 (FB).
62 *Raghunath Shankar v Lakshmibai* (1935) 59 Bom 417, 37 Bom LR 150, 157 IC 658, AIR 1935 Bom 298.
63 *Mussammat Suraj v Attar* (1922) 1 Pat 706, 67 IC 550, AIR 1922 Pat 378.
64 *Abdul Aziz v Nirma* (1913) 35 All 466, 20 IC 335.
65 *Gjodhara Devi v Gokul* AIR 1990 SC 46.
66 *Bhola Umar v Mt Kausilla* (1933) 55 All 24, 140 IC 631, AIR 1932 All 617; *Jileba v Parmesra* AIR 1950 All 700. See the cases cited in § 563.

before the Act; such a custom has to be proved by the party relying on it.[67]

(iv) Two or More Widows

Two or more widow succeeding as co-heirs to the estate of their deceased husband take as joint tenants with rights of survivorship and equal beneficial enjoyment. Thus, if a Hindu dies leaving two widows *A* and *B*, they are entitled as between themselves to an equal share of the income, and on the death of either of them, the other is entitled to the whole of the income by survivorship. Though, co-widows take as joint tenants, none of them has right to enforce an absolute partition of the estate against the others, so as to destroy their right of survivorship. However, they are entitled to obtain a partition of separate portions of the property, so that each may enjoy her equal share of the income accruing therefrom, and the court may, in a suit by any one of them, pass a decree for separate possession and enjoyment. Each can deal as she pleases with her own life-interest, but she cannot alienate any part of the *corpus* of the estate by gift or will, so as to prejudice the right of the survivor or a future reversion. If they act together, they can burden the reversion with any debts contracted, owing to legal necessity, but one of them acting without the authority of the other, cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her lifetime.[68] However, the right of survivorship may be relinquished by agreement between the widows. Such an agreement may be effected orally and without a registered instrument.[69] Also see *Premshankar v Taradevi*.[70]

67 *Bhola Umar v Kausilla* (1936) 58 All 1034, 169 IC 504, AIR 1937 All 230.

68 *Bhugwandeen v Myna Baee* (1867) 11 MIA 487; *Karpagathachi v Nagarathinathachi* AIR 1965 SC 1752; *Commr of IT v Indira* AIR 1960 SC 1172; *Sri Gajapathi Nilamani v Radhamani* (1877) 1 Mad 290, 4 IA 212; followed in *Chhittar v Gaura* (1912) 34 All 189, 13 IC 320; *Mst Sundar v Parbati* (1889) 12 All 51, 16 IA 186; *Gauri Nath Kakaji v Gaya Kaur* (1928) 55 IA 399, 111 IC 485, AIR 1928 PC 251; *Appalasuri v Kannamma* (1926) 90 IC 881, AIR 1926 Mad 6; *Mt Gaya Dei v Mt Tulsha Devi* (1935) 10 Luck 587, 154 IC 125, AIR 1935 Ori 296; *Jainarayan v Hiru* (1933) 12 Pat 778, 146 IC 322, AIR 1933 Pat 464; *Dulbin Parbati Kuer v Baijnath Prasad* (1935) 14 Pat 518; *Sivanancha v Thirunamakarsu* AIR 1951 Tr & Coch 26; *Chanderjit Das v Debi Das* (1953) 1 All 437, AIR 1951 All 522; *Vaijnath v Dagdudas* AIR 1954 Hyd 65; *Swaroop Narain v Bhanwar Kunwar* AIR 1967 MP 152 (no adverse possession); *Ghellammal v Valliammal* AIR 1978 Mad 21; *BSD Mahamandal v Premkumar* AIR 1985 SC 1102.

69 See § 181(C). *Latchumammal v Gangammal* (1911) 34 Mad 72, 7 IC 858.

70 AIR 1980 MP 171.

Co-widows being entitled to the estate of their husband jointly with the incident of survivorship as mentioned above, it follows that if one of them re-marries, her interest would pass to the other.[71]

Where a Hindu dies leaving only one widow, she can alienate her life-interest in the property inherited by her from her husband, but she cannot alienate the *corpus* of the property except for legal necessity. An alienation of the *corpus* except for legal necessity does not bind the next heirs of her husband who succeed to his estate after the widow's death. Thus, if a Hindu dies, leaving a widow and a brother, and the widow sells or mortgages the *corpus* of the estate without legal necessity, the sale or mortgage bind only her life-interest. On her death, her husband's brother would succeed to the estate as his heir, and he would not be bound by the sale or mortgage, the same having been made legal necessity (§§ 181 to 181B, 185).

Where a Hindu dies leaving two or more widows, and they are in joint possession of the estate, any one of them may alienate her undivided interest in her husband's property. If anyone of the widows is in possession of a separate portion of the property, whether it be by mutual agreement between them or under a decree of the court, she may alienate her share of the income, which is derived from that portion. However, in either case, the alienation cannot take effect or have validity beyond her lifetime. It is good only for her life, and on her death, her interest in the property goes to the co-widow by survivorship. She cannot alienate her interest so as to defeat the right of survivorship of the co-widow. That can only be done with the consent of the co-widow.[72] Thus, it is possible for two co-widows, by an agreement among themselves to make an absolute partition of their joint estate, so as to extinguish the right of survivorship inter se.[73] However, any alienation on the strength of such arrangement will not affect the rights of the reversioners in anyway.[74]

Two or more widows cannot by any agreement between them affect the rights of the ultimate reversioners.[75]

71 *Baratilal v Bindabai* AIR 1963 MP 122.

72 *Bhugwandeen v Myna Baee* (1867) 11 MIA 487; *Hari Narayan v Vitai* (1907) 31 Bom 560; *Rammakkal v Ramasami* (1899) 22 Mad 522; *Nagarathnathachi v Karpagathachi* AIR 1962 Mad 482; *Janoki Nath v Mothuranath* (1883) 9 Cal 580; *Durga Dat v Gita* (1911) 33 All 443, 449, 9 IC 498; *Nandi v Sarap Lal* (1917) 39 All 463, 40 IC 71, AIR 1917 All 179.

73 *Karpajathachi v Nagarathnathachi* AIR 1965 SC 1752; *Bindumati v Nar Vada Prasad* AIR 1977 SC 394.

74 *Hazarilal v Halkulal* (1948) ILR Nag 662.

75 *Sri Gajapati v Pusapati* (1893) 16 Mad 1, 19 IA 184; *Mahadevappa v Basagawada* (1904) 29 Bom 346; *Vadali v Kotipalli* (1903) 26 Mad 334; *Subbammal v Avudaiyammal* (1907) 80 Mad 3.

4A Predeceased son's widow, widow of predeceased son of predeceased son (see § 35).

5 Daughter

(i) Priority Among Daughters

Daughters do not inherit until all the widows are dead. As between daughters, the inheritance goes first to the unmarried daughters,[76] next, to daughters who are married and 'unprovided for', ie, indigent, and lastly, to daughters who are married and are 'enriched', ie, possessed of means.[77] A married daughter may be a widow.[78] No member of the second class can inherit while any member of the first class is in existence, and no member of the third class can inherit while any member of the first or the second class is in existence. The rule about one married daughter excluding the other married daughter from inheritance comes into operation, only if one daughter is indigent and the other is possessed of wealth. It does not apply where both the daughters are financially well off and well placed in life.[79] The rules of preference are those stated above and there is no rule of preference that a daughter who is without issue is to be preferred to one with issue.[80] Nor is there any rule that a daughter who is married to an idol and leads the life of a prostitute is to be preferred to her married sisters.[81]

(ii) Survivorship

Two or more daughters of a class take the estate jointly as in the case of widows, with rights of survivorship.[82] Any one daughter may alienate her life-interest in the property, but not so as to affect the rights of

76 *Jamnabai v Khimji* (1890) 14 Bom 1, 13; *Gobind v Ram Adhin* (1933) 8 Luck 182, 140 IC 556, AIR 1933 Ori 31; *Bayava v Parvateva* (1933) 35 Bom LR 118, 144 IC 442, AIR 1933 Bom 126.

77 *Manki v Kundan* (1925) 47 All 403, 87 IC 121, AIR 1925 All 375; *Totawa v Basawa* (1899) 23 Bom 229; *Audh Kumari v Chandra Dai* (1879) 2 All 561; *Danno v Darbo* (1882) 4 All 243; *Savitribai v Sidu* (1945) Nag 871. Reference may also be made to *Dewala v Rupsir* AIR 1960 MP 35; *Latabati Palrani v Dhubani* AIR 1966 Ori 73 (each case may depend on its own facts); *Sarala Bala v Banamali* AIR 1964 Ori 140.

78 *Rajrani v Gomati* (1928) 7 Pat 820, 111 IC 673, AIR 1928 Pat 466.

79 *Shivprasad v Jankibai* (1953) Bom 219, (1952) 54 Bom LR 940, AIR 1953 Bom 321.

80 *Rajamma v Padmavatamma* (1952) ILR Mad 668, AIR 1951 Mad 1047.

81 See § 147. *Saraswathi Ammal v Jagadambal* [1953] SCR 939, (1953) 1 MLJ 697, AIR 1953 SC 201.

82 *Aumirtolall v Rajoneekant* (1875) 2 IA 113, 126, 15 Beng LR 10, 24. What is applicable to co-widows is equally applicable to daughters—*BSD Mahamandal v Prem Kumar* AIR 1985 SC 1102; *Karpagathachi v Nagarathinathachi* AIR 1965 SC 1752; *Chhattar Singh v Hukum Kunvar* (1936) 58 All 391; *Surendranath Basu v Radha Rani Debi* (1940) 2 Cal 41.

survivorship of other daughters.[83] Moreover, like widows, daughters may enter into any agreement regarding their respective rights in their father's estate, provided such agreement does not prejudice the rights of reversioners.[84] They may divide the estate merely with a view to convenient enjoyment, retaining the right of the survivor to take the whole on the death of one of them, or they may agree that the right of survivorship should be extinguished as between themselves.[85] The agreement may be effected orally and without a registered writing.[86]

(iii) Limited Estate

The daughter takes a limited interest in the estate of her father corresponding to the widow's estate. On her death, the estate passes not to her heirs, but to the next heirs of her father[87] (see § 169). The next heirs of the father are called reversioners. As to Bombay state, see note (iv) below.

Where an unmarried daughter of the deceased inherits one half of the property of her father, and the deceased had died prior to coming into force of the Hindu Succession Act, the daughter inherits only a limited estate which, according to the rules of Mitakshara succession, would pass on to the next male heir of the deceased on such daughter's death and the sister of such deceased unmarried daughter cannot claim any share in such property.[88]

Section 14 of the Hindu Succession Act 1956, subject to certain qualification, confers full heritable capacity on a female heir in respect of the entire property acquired by her whether before or after the commencement of the enactment.

(iv) In the Bombay State

Rules (ii) and (iii) do not apply in the Bombay state (see § 72, No 7). *A* has two daughters *B* and *C*. *B* has a daughter *D*. On *A*'s death, his estate will go to *B* and *C*. In places other than the Bombay state, they each take a 'woman's estate' with rights of survivorship. Therefore, on *B*'s death, her interest in the estate will go, not to her daughter *D*, but her sister *C* by survivorship. In the Bombay state, however, it is different.

83 *Kanni v Ammakannu* (1900) 23 Mad 504; *Yelumalai Chetty v Natesachari* (1945) Mad 35; *Pathumma Beebi v Krishna Asari* AIR 1961 Ker 247; *Subbiah Chetty v Veerajinow* AIR 1979 Mad 85.

84 *Kailash v Kashi* (1897) 24 Cal 339; *Alamelu v Balu* (1920) 43 Mad 849, 26 IC 455, AIR 1915 Mad 103; *Karpagathachi v Nagarathinathachi* AIR 1965 SC 1752.

85 *Sundarasiva v Vijamma* (1925) 48 Mad 933, 91 IC 40, AIR 1925 Mad 1267.

86 As to Bombay state, see note (d). (1920) 43 Mad 849, 853, 26 IC 455, AIR 1915 Mad 103.

87 *Chotay Lall v Chunno Lall* (1879) 4 Cal 744, 6 IA 15; *Muttu v Dorasinga* (1881) 3 Mad 290, 8 IA 99.

88 *Palasseri Velayudhan v Palasseri Ithayi* AIR 1994 Ker 267.

There on *A*'s death, *B* and *C* will each take an absolute interest in a moiety of the estate so that on *B*'s death, her moiety will go to her heir *D*, and on *C*'s death, her moiety will go to her own heirs.

(v) Unchastity

Unchastity of a daughter is no ground for exclusion from inheritance[89] except that in Bombay, where if there is an unmarried daughter who is a prostitute and a married daughter who is chaste, the latter succeeds in preference to the former.[90] It may here be observed that under Mitakshara law, a widow is the only female who is excluded from inheritance by reason of unchastity.[91]

(vi) Illegitimate Daughter

The illegitimate daughter, even of a Sudra, has no rights of inheritance to her father.[92] However, she is entitled to inherit to her mother.[93] An illegitimate daughter is not, however, entitled to succeed to the collaterals of her mother.[94]

(vii) Exclusion by Custom

A daughter may be excluded from inheritance by special family or local custom.[95]

In the Makkathayee Ezhava community of the erstwhile State of Cochin, there is no custom entitling a daughter to any share along with the son in the property left by the deceased father.[96]

6 Daughter's son

(i) When Entitled to Succeed

The daughter's son is not entitled to succeed, if there be any daughter living and capable of inheriting.[97] A daughter's son is strictly a *bandhu* or *bhinna gotra sapinda*, being related to the deceased through a female,

89 *Adiyapa v Rudrava* (1880) 4 Bom 104; *Kojiyadu v Lakshmi* (1882) 5 Mad 149, 156.

90 *Tara v Krishna* (1907) 31 Bom 495; *Govind Bhawshet v Bhike Mahadeoshet* (1945) 5 FCR 1.

91 *Vedammal v Vedanayaga* (1908) 31 Mad 100.

92 *Bhikya v Babu* (1908) 32 Bom 562.

93 *Arunagiri v Ranganayaki* (1898) 21 Mad 40.

94 See §§ 163 and 164. *Pandurang v Administrator-General of Bombay* (1953) Bom 435, AIR 1953 Bom 127, (1952) 54 Bom LR 892.

95 *Bajrangi v Monokarnika* (1908) 30 All 1, 35 IA 1; *Parbati v Chandarpal* (1909) 31 All 457, 36 IA 125, 4 IC 25; *Balgobind v Badri Prasad* (1923) 50 IA 196, 45 All 413, 74 IC 449, AIR 1923 PC 70; *Raj-Bachan Singh v Bhanwar* (1929) 4 Luck 690, 118 IC 760, AIR 1929 Ori 296. In *Rajpati v Jagmoban* AIR 1952 All 309, the anomaly that can arise by operation of s 3 (a) of Act II [2] of 1929 was pointed out.

96 *Kamalaksby v Narayani* AIR 1968 Ker 123.

97 *Bajinath v Mahabir* (1878) 1 All 608; *Sant Kumar v Deo Saran* (1886) 8 All 365.

but he inherits with *gotraja sapindas* by virtue of express texts;[98] see note (v). He succeeds not as an heir to his mother, but as an heir to his own maternal grandfather.

(ii) Takes as Full Owner

The daughter's son takes the estate as full owner like any other male heir, and on his death, the succession passes to his heirs and not to the heirs of his maternal grandfather.[99]

(iii) Takes Per Capita

The daughter's son takes per capita, and not per stirpes. *A* has two daughters *B* and *C*. *B* has two sons, and *C* has three. *B* and *C* die in *A*'s life-time. *A* then dies leaving five grandsons. The estate will be divided into five shares, each grandson taking one share.

(iv) Where Daughter's Sons Are Joint

It was held by the Judicial Committee in 1902 that two or more sons by a daughter, living as members of a joint family, take the estate inherited by them from their maternal grandfather as joint tenants with rights of survivorship.[1] It is doubtful, how far this remains good law (see § 31 (1) (b) and § 223 (2)). However, sons by different daughters would take as tenants-in common, for there can be no coparcenary between sons by different daughters.[2] *A* dies leaving two grandsons *C* and *D* by different predeceased daughters. *C* dies living a widow. *C*'s interest in the estate will pass to her as his heir, and not to *D* by survivorship.

The daughter's son occupies a peculiar position in Hindu law. He is a *bhinna gotra sapinda* or *bandhu*, but he comes in before parents and other remote *gotraja sapindas*. The reason is that, according to the old practice, it was competent to a Hindu who had no son to appoint a daughter to raise up issue to him. Such a daughter, no doubt, was the lawful wife of her husband, but her son, called *putrika putra*, became the son of her father. Such a son was equal to an *aurosa* or legitimate son, and took his rank, according to several authorities, as the highest among the secondary sons. Although, the practice of appointing a daughter to raise up issue for her father became obsolete, the daughter's son continued to occupy the place that was assigned to him in the order of inheritance and even now he takes a place practically next after the male issue, the widow and the daughters being simply interposed during their

98 *Srinivas v Dandayudapani* (1889) 12 Mad 411.

99 *Muttu v Dorasinga* (1881) 3 Mad 290, 8 IA 99; *Muttuvaduganadha v Periasami* (1896) 19 Mad 451, 23 IA 128.

1 *Venkayyamma v Venkataramanayyamma* (1902) 25 Mad 678, 29 IA 156.

2 *Vythinatha v Yeggia* (1904) 27 Mad 382, 385.

respective lives.[3] 'In regard to the obsequies of ancestors,' says Mitakshara, 'daughter's sons are considered as son's sons'.[4]

Putrika Putraz In *Shyam Sunder v State of Bihar*,[5] the Supreme Court examined the relevant text in Sanskrit and decisions on the subject and held that the practice of appointing a daughter as *putrika* and of treating her son as *putrika putra* had become obsolete several centuries ago.

7 Mother[6]

(i) Mayukha Law

In cases governed by Mayukha, the father is preferred to the mother.[7]

(ii) Limited Interest

The mother takes a limited interest in the estate of her son corresponding to the widow's estate. On her death, the estate passes not to her heirs, but to her son's heirs.[8]

Section 14 of the Hindu Succession Act 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of the entire property acquired by her whether before or after the commencement of the Act.

(iii) Unchastity and Remarriage

Unchastity of a mother is no bar to her succeeding as heir to her son, nor does remarriage constitute any such bar.[9]

(iv) Stepmother

A stepmother is not entitled to inherit to her stepson.[10] In the Bombay state, however, she is an heir, for she is regarded there as a *sagotra*

3 In Bombay, the daughter takes not for life but absolutely. *Karuppai v Sankaranarayanan* (1904) 27 Mad 300, 311–12; *Babui Rita v Mal Puran* (1916) 1 Pat LJ 581, 38 IC 44, AIR 1916 Pat 8; *Ghanta China v Moparthi* (1947) 51 CWN 875, 883 (PC).

4 Mitakshara, Ch II, s 2, v 6.

5 AIR 1981 SC 178.

6 *Anandi v Hari* (1909) 33 Bom 404, 3 IC 745.

7 *Khodabbai v Babadhar* (1882) 6 Bom 541.

8 *Vrijbhukandas v Bai Parvati* (1908) 32 Bom 26; *Jullessur v Uggar* (1883) 9 Cal 725.

9 *Kasturi Devi v Deputy Director, Consolidation* AIR 1976 SC 2592; *Kojiyadu v Lakshmi* (1882) 5 Mad 149; *Vedammal v Vedanayaga* (1908) 31 Mad 100; *Dal Singh v Dini* (1910) 32 All 155, 5 IC 521; *Baldeo v Mathura* (1911) 33 All 702, 11 IC 43 (unchastity); *Basappa v Rayava* (1905) 29 Bom 91 (FB) (remarriage); *Bhondu v Ramdayal* AIR 1960 MP 51 (FB); *Thayamma v Giriyamma* AIR 1960 Mys 176; *Ramaswamy v E Thevar* AIR 1972 Mad 314; *Pichandi v E Ramaswami* AIR 1971 Mad 204. Also see § 43–4 (iii), Widow and § 54, *Atma Bandhu*, Entry 27.

10 *Pitra Kueri v Ujagir Rai* AIR 1958 All 101; *Rama Nand v Surgiani* (1894) 16 All 221; *Ramasami v Narasamma* (1885) 8 Mad 133; *Tabaldai v Gaya Pershad* (1910) 37 Cal

continued on the next page

sapinda but comes after the female heirs recognised in Bombay are exhausted.[11] See § 68 and *Anandi v Hari*.[12]

(v) Adoptive Mother

Mother includes adoptive mother, so that an adoptive mother, according to Mitakshara law, succeeds before the adoptive father. On the death of a son adopted in *dwyamushyayana* form, the adoptive mother and the natural mother both inherit equally as co-heiresses.[13]

8 Father

(i) Mayukha Law

In cases governed by Mayukha, the father succeeds before the mother. See above, 'mother,' note no 7.

9 Brother

(a) of the whole blood;
(b) of the half-blood.

(i) Whole Before Half-blood

Brothers of the whole blood succeed before those of the half-blood.[14] The half-brothers referred to here are sons of the same father by a different mother. Sons of the same mother by a different father are not entitled to succeed as 'brothers'.[15]

(ii) Takes Before Brother's Son

The brother succeeds before the brother's son.[16]

(iii) Mayukha Law

In cases governed by Mayukha, brothers of the half-blood share with the father's father.[17]

214, 5 IC 135; *Seethai v Nachiyar* (1914) 37 Mad 286, 22 IC 18, AIR 1914 Mad 30; *Navanitha Krihna v Collector of Tinnevelly* (1935) MWN 1001; *Chattar Singh v Roshan Singh* AIR 1946 Nag 277 (case from Central Province, where the *lex loci* is Benaras law); *Gorilal v Gopichand* AIR 1963 Raj 149.

11 *Kesserbai v Vallab* (1880) 4 Bom 188; *Russoobai v Zoolekhabai* (1895) 19 Bom 707; *Pannalal v Harna Bai* AIR 1950 Hyd 37.

12 (1909) 33 Bom 404, 3 IC 745.

13 *Basappa v Gurlingawa* (1933) 57 Bom 74, 142 IC 634, AIR 1933 Bom 137; *Kantawa v Sangangowda* (1942) Bom 303, 201 IC 633, AIR 1942 Bom 143.

14 *Anant Singh v Durga Singh* (1910) 37 IA 191, 32 All 363, 6 IC 787; *Mannalal v Ishwariprasad* (1966) Cal 447.

15 *Ekoba v Kashiram* (1922) 46 Bom 716, 60 IC 341, AIR 1922 Bom 27; *Chhinu v Kata* AIR 1972 Ori 153.

16 *Chinnaswami v Ponginanna Goundar* AIR 1957 Mad 40.

17 Chap V, s 8, para 20.

To the separate property of a person, all his brothers succeed, though some are joint with him as to other property and others are completely divided from him.[18]

10 Brother's son

(a) of the whole blood;
(b) of the half-blood.

(i) Takes Before Brother's Son's Son

The brother's son succeeds before the brother's son's son.[19]

(ii) Whole Blood Before Half-blood

Sons of brothers of the whole blood succeed before sons of brothers of the half-blood (see § 44).

(iii) Takes Per Capita

Brother's son takes per capita (§ 32).

Mitakshara, in discussing the place of the father's mother in the order of succession, say:

> No place, however, is found for her in the compact series of heirs from the father to the nephew...

She must, therefore, of course succeed immediately after the nephew.[20]

According to this text, as literally interpreted 'the compact series of heirs', that is the series of heirs first entitled to inherit, ends with the brother's son. However, it has been held by the Privy Council in *Buddha Singh v Lattu Singh*,[21] that the expression 'brother's son' in the above text includes 'brother son's son,' so that the compact series ends not with the brother's son, but with the brother's son's son (No 11), and the father's mother (No 12), takes not after the brother's son, but after the brother's son's son.

11 Brother's son's son

(i) See notes to No 10 above.

(ii) Whole Blood Before Half-blood

Grandsons of the whole brother take before the grandsons of the half-brother (see § 44).

18 *Shamrao v Krishnarao* (1941) ILR Nag 598, AIR 1941 Nag 297; *Deivanayagam v Subbiah* (1954) Mad 741, AIR 1954 Mad 727; *Karbiley v Hira* AIR 1952 All 229 (FB).

19 *Sher Singh v Basdeo Singh* (1928) 50 All 904, 110 IC 712, AIR 1928 All 612.

20 Mitakshara, Ch II, s 5, v 2.

21 (1915) 42 IA 208, 37 All 604, 30 IC 529, AIR 1915 PC 70 approving *Kalian Rai v Ram Chandra* (1902) 24 All 128; disapproving *Suraya v Lakshminarasamma* (1882) 5 Mad 291.

(iii) The brother's son's son takes per capita (§ 32).

(iv) The compact series of heirs under Mitakshara as interpreted by the Privy Council ends with the brother's son's son. See no. 10 above.

12 Father's mother.

13 Father's father.

13A Son's daughter.

(i) This is the place assigned to the son's daughter by the Hindu Law of Inheritance (Amendment) Act 2 of 1929. Before that Act, she was recognised as an heir only in Bombay [§ 55 (1)] and Madras [§ 56 (1)] states, where she ranked as a *bandhu*. Under the Act, she inherits as an heir in all places where Mitakshara law applies, and succeeds immediately after the father's father see note to no. 13D, 'Hindu Law of Inheritance (Amendment) Act 2 of 1929'.

(ii) Estate

The sons' daughter takes an absolute estate in Bombay [§170 (2)]. In Madras, she takes a limited estate (§ 168). She would also take a limited estate elsewhere.

Section 14 of the Hindu Succession Act 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of the entire property acquired by her whether before or after the commencement of that enactment.

13B Daughter's daughter

(i) This is the place assigned to the daughter's daughter by the Hindu Law of Inheritance (Amendment) Act 2 of 1929 and she comes before the sister.[22] Before this Act, she was recognised as an heir only in Bombay [§ 55 (1)] and Madras [§ 56 (1)] states, where she ranked as a *bandhu*. Under the Act, she inherits as an heir in all places where Mitakshara law applies, even in states where before the Act she was not an heir,[23] and succeeds next after the son's daughter (see note to no. 13D, 'Hindu Law of Inheritance (Amendment) Act 2 of 1929').

(ii) Estate

The daughter's daughter takes an absolute estate in Bombay [§ 170 (2)]. In Madras, she takes a limited estate (§ 168). She would also take a limited estate elsewhere (see also 13A).

13C Sister.

(i) This is the place assigned to the sister by the Hindu Law of Inheritance (Amendment) Act 2 of 1929. Before that Act, she was recognised as an

22 *Ben Madhu v Kalidas* (1949) Bom 722.

23 *Dalsingar Singh v Jainath Kuar* (1940) 15 Luck 229, 136 IC 753, AIR 1940 Ori 138.

heir only in Bombay (§ 64) and Madras states (§ 50). However, the Act is applicable even where the sister had not been previously recognised as an heir.[24]

As regards the Bombay state, she is expressly mentioned as an heir in Mayukha. She is not, however, expressly mentioned as such in Mitakshara, but her right as an heir has long been recognised [§ 64(1)]. Her place also in the order of succession has long since been established; she succeeds immediately after the father's mother, and before the father's father (§§ 65(1), 72(12), 77(12)). Her place in the order of succession is not affected by the Act, for the Act contemplates succession after the father's father, while her place as determined by a series of decisions since 1865, is immediately after the father's mother whether under Mitakshara or Mayukha.[25] A different view has however been taken in a later Bombay case and it has been held that the position of the sister under Mayukha law has been adversely affected by the Hindu Law of Inheritance Act.[26]

In the Madras state, the sister was ranked as a *bandhu* before the Act [§ 56(1)]. Under the Act, she succeeds next after the daughter's daughter.

In Punjab, as held by the Supreme Court, the Sikh Jats of Amritsar district are governed by Hindu law and under Hindu law of Inheritance (Amendment) Act 1929, the sister is an heir in preference to collaterals.[27]

(ii) Half-sister

The question, whether a half-sister gets the benefit of the Act has given rise to difference of opinion. The Privy Council held (thus settling the difference between the various High Courts), that the term 'sister' includes a half-sister; but a full sister and a half-sister do not take together. The latter takes only in default of the full sister.[28]

(iii) Estate

The sister takes an absolute estate in Bombay [§ 170(2)]. In Madras, she takes a limited estate (§ 168). She would also take a limited estate elsewhere. Section 14 of the Hindu Succession Act 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of the entire property acquired by her whether before or after the commencement of that enactment.

24 *Bindeshwari Singh v Baij Nath Singh* (1938) 13 Luck 380, 168 IC 733, AIR 1937 Ori 402; *Mt Rajpali Kunwar v Surju Rai* (1936) 58 All 1041 (FB), 163 IC 756, AIR 1936 All 507.

25 *Shidramappa v Neelavabai* (1933) 57 Bom 377, 144 IC 925, AIR 1933 Bom 272; *Virbhadrappa v Babu Virbhadrappa* (1946) ILR Bom 1003.

26 *Ben Madhu v Kalidas* (1949) ILR Bom 722.

27 *Ujagar Singh v Jeo* AIR 1959 SC 1041.

28 *Mt Sahodra v Ram Babu* (1943) 69 IA 145, 45 Bom LR 350, 206 IC 396, AIR 1943 PC 10.

(iv) In *Lala Duni Chand v Anarkali*, the Judicial Committee[29] held and it has also now been held by the Supreme Court[30] that the Act applies not only to the case of a Hindu male dying intestate on or after 21 February 1929, when it came into force, but also to the case of such a male dying intestate before that date, if, he was succeeded by a female heir who died after that date. In such a case, succession to the estate of the last male, who died intestate, does not open until the death of the life-estate holder. In consequence, the questions as to who is the nearest reversionary heir, or what is the class of reversionary heirs, falls to be settled at the date of the expiry of the ownership for life or lives and one most nearly related at that time to the last full owner becomes for life or lives entitled to the estate. However, the Act obviously does not apply where succession opened before the Act.[31]

13D Sister's son.

(i) This is the place assigned to the sister's son by the Hindu Law of Inheritance (Amendment) Act 2 of 1929. Before that Act, he ranked as a bandhu (§ 64, No 3). Under the Act, he succeeds next after the sister.

(ii) Hindu Law of Inheritance (Amendment) Act 2 of 1929

This Act applies only to cases 'subject to the law of Mitakshara.' The expression 'law of Mitakshara' includes all sub-divisions of Mitakshara law including Mayukha and excludes the law of Dayabhaga.[32] The material section is s 2, which is as follows:

> A son's daughter, daughter's daughter, sister, and sister's son shall in the order so specified, be entitled to rank in the order of succession next after a father's father (no. 13) and before a father's brother (no. 14): Provided that a sister's son shall not include a son adopted after the sister's death. The Act came into force on 21 February 1929. See 13C (iv) above.

The Act applies to Jains in Gujarat governed by Mayukha, the sister's son is therefore preferred to father's sister.[33]

29 *Lala Duni Chand v Mt Anar Kali* (1946) 73 IA 187, 51 CWN 223, AIR 1946 All 748; *Smt Shakuntala Devi v Kaushalya Devi* (1936) 17 Lah 356, 162 IC 718, AIR 1936 Lah 124; *Mt Sattan v Janki* AIR 1936 Lah 139, 163 IC 480; *Bindeshwari Singh v Baij Nath Singh* (1938) 13 Luck 380, 168 IC 733, AIR 1937 Ori 402; *Pokhan Dusadh v Must Manoa* (1937) 16 Pat 215 (FB), 167 IC 17, AIR 1937 Pat 117; *Jitendra Pratap v Bhagwati Prasad* AIR 1956 Pat 457; *Mt Rajpali Kunwar v Surju Rai* (1936) 58 All 1041 (FB), 163 IC 756, AIR 1936 All 507; *Lakshmi v Anantharama* (1937) Mad 948, FB, 171 IC 7, AIR 1937 Mad 699.

30 *Fateh Bibi v Charan Das* AIR 1971 SC 789 (sister's son).

31 *Kanhaiya Lal v Mt Champa Devi* (1935) 153 IC 545, AIR 1935 All 203.

32 *Ben Madhu v Bai Mahakore* AIR 1950 Bom 66.

33 *Ambabai v Keshav Bandochand* (1941) Bom 250, 195 IC 172, AIR 1941 Bom 253, 43 Bom LR 114.

In ascertaining the heirs of a maiden's father—they being her heirs in respect of her *stridhana*, when she dies leaving neither brother, mother nor father—Act II of 1929 is not applicable. However, see further under § 147.

13E Half-sister's son

This is the place which should be given to the half-sister's son according to the Act (see note under Half-sister above).

14 Paternal uncle.

15 Paternal uncle's son (see § 32).

16 Paternal uncle's son's son

He succeeds before 20.[34]

Whole blood and half-blood

See § 44 and notes thereto.

17 Father's father's mother.

18 Father's father's father.

19 Father's paternal uncle.

20 Father's paternal uncle's son.

21 Father's paternal uncle's son's son.

22 Brother's son's son's son.[35]

23 Uncle's son's son's son.

Following the reasoning of the Privy Council in *Buddha Singh v Lattu Singh*,[36] the Madras High Court held that the father's paternal uncle's son's son (x_3 in the third line of Table IV.1 should be preferred to the great-grandson of the grandfather (x_4 in the second line of the table).[37] The decision implies that he would be also preferred to the great-grandson of the father (x_4 in the first line of the table), who will also be postponed to the paternal uncle's son's son (x_3, in the second line of the table).[38]

So far as the ancestors and descendants are concerned, the further continuation of the table is of no practical importance. As to collaterals beyond this stage, it is difficult to see that one claimant can be superior

34 *Buddha Singh v Lattu Singh* (1915) 42 IA 208, 37 All 604, 30 IC 529, AIR 1915 PC 70.

35 *Venilal v Parjaram* (1896) 20 Bom 173.

36 (1915) 42 IA 208, 37 All 604, 30 IC 529, AIR 1915 PC 70.

37 *Soobramiah v Nataraja* (1930) 53 Mad 61, 127 IC 113, AIR 1930 Mad 534.

38 *Venkateswara Rao v Adinarayana* (1935) 58 Mad 323, 154 IC 923, AIR 1935 Mad 129.

to another in the capacity to confer spiritual benefit. The rules of preference will then probably be:

(1) he who claims through a nearer ancestor will be preferred to one claiming through a remoter ancestor;

(2) in the line of any ancestor, the nearer excludes the more remote.

§ 44. WHOLE BLOOD AND HALF-BLOOD

(1) A *sapinda* of the whole blood is preferred to a *sapinda* of the half-blood. This preference, however, is confined to *sapindas* of the same degree of descent from the common ancestor; it does not apply to *sapindas* of different degrees.[39]

In Uttar Pradesh,[40] Bengal[41] and Madras,[42] this rule applies not only to brothers and brothers' sons, but to remoter *sapindas*. It has now been held by the Privy Council that the rule applies to all Mitakshara schools[43] and the Bombay cases[44] holding a different view are overruled. The Punjab case[45] holding a view similar to Bombay must also be regarded as overruled.

Thus, a paternal uncle of the whole blood is entitled to succeed in preference to a paternal uncle of the half-blood, they being *sapindas* of the same degree of descent. However, a paternal uncle of the half-blood is entitled to inherit in preference to the son of a paternal uncle of the whole blood, the former being nearer *sapinda* of the deceased than the latter.

According to the customary law of Kumaon, applicable to the Khasas, if a man dies sonless, his brothers do not inherit as brothers, but as sons of the father to whom the estate reverted on the sonless man's death. When the nephews or cousins succeed, they take their father's share, ie per stirpes and not per capita.[46] However, this principle does not apply to the Manrals.[47]

39 *Suba Singh v Sarafraz* (1897) 19 All 215 (FB); *Ganga Sahai v Kesri* (1915) 42 IA 177, 37 All 545, 30 IC 265, AIR 1915 PC 81. Reference may be made to *Waman Govind v Gopal Baburao* AIR 1984 Bom 208 212 (FB).

40 (1897) 19 All 215 (FB).

41 *Sham Singh v Kishun Sahai* (1907) 6 Cal LJ 190.

42 *Nachiappa v Rangasami* (1915) 28 Mad LJ 1, 26 IC 757, AIR 1915 Mad 1088 (FB).

43 *Garudas v Laldas* (1933) 60 IA 189, 142 IC 807, AIR 1933 PC 141; *Kalagouda v Annagouda* AIR 1962 Mys 65.

44 *Samat v Amra* (1882) 6 Bom 34 397; *Vithalrao v Ramrao* (1900) 24 Bom 317; *Sagunu v Sadashiv* (1902) 26 Bom 710, 715; *Shankar Baji v Kashinath* (1927) 51 Bom 194, 100 IC 430, AIR 1927 Bom 97.

45 *Hira Nand v Maya Das* (1894) Punj Rec no. 83.

46 *Tula Ram v Shyam Lal* (1924) 49 All 848; *Gangi Sah v Harlal Sah* (1939) All 122.

47 *Lachhan Singh v Jhagar Singh* (1939) All 406, AIR 1939 All 437.

SAMANODAKAS

§ 45. ORDER OF SUCCESSION AMONG *SAMANODAKAS*

Failing all *sapindas*, the inheritance passes to *samanodakas*, the nearer line excluding a remoter kinsman in the same line.[48]

BANDHUS

§ 46. *BANDHUS*

(1) On failure of *sapindas* and *samanodakas*, but not until then, the inheritance passes to *bandhus*.[49]

(2) The *gotraja sapindas* and *samanodakas* of a Hindu are all agnates, that is, persons connected with him by an unbroken line of male descent. The *bandhus* or *bhinna gotra sapindas* are all cognates, that is, persons connected with him through a female or females. The *bandhus* of a person are his blood relations connected through females who have passed into other families or *gotras*.[50]

(3) Every *bandhu* must be related to the deceased through at least one female. He may, however, be related to him through two females or even more than two.[51]

Mitakshara (Ch 2, s 6, para 1) mentions three classes of *bandhus*, namely: (1) *atma bandhus*, that is, one's own *bandhus*; (2) *pitri bandhus*, that is, the father's *bandhus*, and (3) *matri bandhus*, that is, the mother's *bandhus*, and enumerates the following nine relations as *bandhus*:—

I Atma Bandhus

1 Father's sister's son
2 Mother's sister's son
3 Mother's brother's son

The word 'son' is used in a generic sense and includes son's son.[52]

II Pitri Bandhus

4 Father's father's sister's son

48 See §§ 40 and 44. *Sarvadhikari's Hindu Law of Inheritance*, second edn , p 687.
49 *Ram Baran v Kamla Prasad* (1910) 32 All 594, 6 IC 698.
50 *Vedachela v Subramania* (1921) 48 IA 349 354, 44 Mad 753, 64 IC 402, AIR 1922 PC 33.
51 *Krishna v Venkatarama* (1906) 29 Mad 115; *Venkatagiri v Chandra* (1900) 23 Mad 123; *Parot Bapalal v Mehta Harilal* (1895) 19 Bom 631.
52 *Adit Narayan v Mahabir Prasad* (1921) 48 IA 86, 6 Pat LJ 140, 60 IC 251, AIR 1921 PC 53, where it was held that a mother's sister's son's son is an *atma bandhu*.

5 Father's mother's sister's son
6 Father's mother's brother's son

III Matri bandhus

7 Mother's father's sister's son
8 Mother's mother's sister's son
9 Mother's mother's brother's son

Reference may be made to the undermentioned decisions as regards *bandhus* expressly mentioned in Mitakshara.[53]

Besides the nine relations enumerated in Mitakshara, the following relations have been held to be *bandhus*, namely:

1 Sister's son[54]

Under the Hindu Law of Inheritance (Amendment) Act 2 of 1929, the sister's son inherits with *gotraja sapindas*, and succeeds next after the sister (see § 43, No 13D).

2 Half-sister's son[55] but not a sister's stepson[56]
3 Brother's daughter's son[57]
4 Daughter's son's son[58]
5 Sister's son's son[59]
6 Daughter's daughter's son[60]
7 Sister's daughter's son[61]
8 Father's sister's son's son[62]
9 Father's sister's daughter's son[63]
10 Mother's father[64]

53 *Girdhari Lall v Bengal Government* (1869) 12 MIA 448; *Muthusami v Simambedu* (1896) 19 Mad 405, 23 IA 83.
54 *Amrita Kumari v Lakhinarayan* (1868) 2 Beng LR, 28 (FB); *Cholikani v Vencata* (1871) 6 Mad HC 278; *Raghunath v Munnan Misr* (1898) 20 All 191.
55 *Subbaraya v Kylasa* (1892) 15 Mad 300.
56 *Saminatha v Angammal* (1922) 45 Mad 257, 65 IC 736, AIR 1922 Mad 46.
57 *Mussamutt Doorga Bibee v Janki* (1873) 10 Beng LR 341.
58 *Krishnayya v Pichamma* (1888) 11 Mad 287; *Sheobarat v Bhagwati* (1895) 17 All 523; *Tirumalachariar v Andal* (1907) 30 Mad 406.
59 *Balusami v Narayana* (1897) 20 Mad 342.
60 *Tirumalachariar v Andal* (1907) 30 Mad 406; *Ajudhia v Ram Sumer* (1909) 31 All 454, 2 IC 376; *Rampbal v Pan Mati* (1910) 32 All 640, 7 IC 292; *Kalimuthu v Ammamuthu* (1934) 58 Mad 238, 153 IC 107, AIR 1934 Mad 611.
61 *Umaid Babadur v Udoi Chand* (1881) 6 Cal 119 (FB); *Sham Devi v Birbhadra Prasad* (1921) 43 All 463, 62 IC 432, AIR 1921 All 178.
62 *Haribar v Ram Daur* (1925) 47 All 172, 82 IC 1032, AIR 1925 All 17.
63 *Parot Bapalal v Mehta Harilal* (1895) 19 Bom 631; *Venkatagiri v Chandru* (1900) 23 Mad 123; *Krishna v Venkatarama* (1906) 29 Mad 115.
64 *Chinnammal v Venkatachala* (1892) 15 Mad 421.

11 Maternal uncle[65]
12 Grandfather's son's daughter's son[66]
13 Great grandfather's son's daughter's son[67]
14 Great great grandfather's son's son's daughter's son[68]
15 Father's father's father's daughter's son[69]
16 Father's father's sister's son's son[70]
17 Father's mother's brother[71]
18 Father's maternal grandfather's daughter's son[72]
19 Mother's mother's brother's son's son[73]
20 Mother's mother's brother's daughter's son[74]
21 Mother's sister's son's son[75]
22 Mother's father's adopted son[76]
23 Mother's father's grand nephew[77]
24 Father's sister's son's daughter's son[78]
25 Mother's paternal grandfather's daughter's son's son[79]
26 Mother's paternal grandfather's son's son's son
27 Father's father's maternal grandfather's son's son[80]

§ 47. RULES FOR DETERMINING HERITABLE *BANDHUS*

Are all the blood relations of a person connected through a female, heritable *bandhus* or *bhinna gotra sapinda*?

The question naturally arises whether the term '*sapinda*' in this connection, is used in the general sense (§ 36) or the narrower sense (§ 37). In other words, whether all the relations connected by community of particles of the same body (whatever the degree of relationship to and

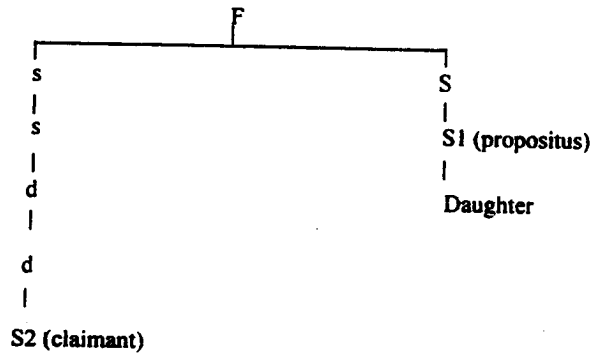
65 *Muthusami v Simambedu* (1896) 19 Mad 405, 23 IA 83; *Vedachela v Subramania* (1921) 48 IA 349, 44 Mad 753, 64 IC 462, AIR 1922 PC 33.
66 *Tirath Ram v Mst Kahan Devi* (1920) ILR Lah 588, 595–96, 60 IC 101, AIR 1921 Lah 149.
67 *Ram Sia v Bua* (1925) 47 All 10, 84 IC 360, AIR 1924 All 790; *Parmanandas v Parbhudas* (1912) 14 Bom LR 630, 16 IC 591.
68 *Manik Chand v Jagat Settani* (1890) 17 Cal 518.
69 *Krishna v Venkatarama* (1906) 29 Mad 115.
70 *Setburama v Ponnammal* (1889) 12 Mad 155; *Chamanlal v Ganesh* (1904) 28 Bom 453.
71 *Girdhari Lall v Bengal Government* (1869) 12 MIA 448.
72 *Ananda Bibee v Nownit Lal* (1883) 9 Cal 315, 327.
73 *Ratnasubbu v Ponappa* (1882) 5 Mad 69.
74 *Babu Lal v Nanku Ram* (1895) 22 Cal 339.
75 *Adit Narayan v Mahabir Prasad* (1921) 48 IA 86, 6 Pat LJ 140, 60 IC 251, AIR 1921 PC 53; *Bai Vijli v Bai Prabhalakshmi* (1907) 9 Bom LR 1129.
76 *Padma Kumari v Court of Wards* (1881) 8 IA 229, 8 Cal 302.
77 8 IA 229, 8 Cal 302.
78 *Kesar Singh v Secretary of State* (1926) 49 Mad 652, 95 IC 651, AIR 1926 Mad 881.
79 *Chengiah v Subbaraya* (1930) 58 Mad LJ 562, 128 IC 172, AIR 1930 Mad 555.
80 *Kasa v Vinayak* (1947) ILR Bom 770.

from a common ancestor may be) are entitled to inherit as *bandhus*, or only those who are connected within certain specified degrees.

In *Ramchandra v Vinayak*,[81] the judicial committee held that the term '*bandhus*' was used in Mitakshara 'in a restricted and technical sense'.

In that case, the relationship between the deceased and the claimant was as appears from the following table:

Table IV.2



After the death of the last male owner (S1), his daughter enjoyed the property. On her death without issue, the claimant (S2) claimed the property. He traced his relationship to the common ancestor through his mother. If the narrower sense of the term '*sapinda*' is adopted, he is beyond five degrees (vide explanation below) and he is not entitled to inherit. It was accordingly argued on his behalf that any person related through a female is a heritable *bandhu*, and there is no restriction as to degrees, it was also contended that the narrower sense of '*sapinda*' in Mitakshara, Chap III, is confined to prohibition in respect of marriage and has nothing to do with inheritance. The judicial committee did not accept the contention.

When the claimant claims through a male, according to the restricted sense of the term '*sapinda*', he must be within seven degrees. The Allahabad and Bombay High Courts have held that, even when the claimant traces his relationship through his father, heritable bandhuship ceases with the fifth degree.[82] It is submitted that, in such a case, the rule of seven degree would apply.

81 *Ramchandra v Vinayak* (1914) 41 IA 290, 312, 42 Cal 384, 420, 25 IC 290, AIR 1914 PC 1.

82 *Brij Moban v Kishun Lal* (1938) ALJ 670, AIR 1938 All 443; *Hanmant Ramaji v Vasudeo Hanmant* (1943) Bom 465, 206 IC 152, AIR 1943 Bom 89; *Kasa v Vinayak* (1947) Bom 770.

The general conclusion arrived at in *Ramchandra v Vinayak* that 'the *sapinda* relationship, on which the heritable right of collaterals is founded, ceases in the case of the *bhinna gotra sapinda* with the fifth degree from the common ancestor',[83] is applicable only to cases where the claimant claims through his mother. This is the view of Venkatasubba Rao J in *Kesar Singh v Secretary of State for India*.[84] He said:

> I have said in the course of this judgment that in the case of *bandhus*, *sapinda* relationship ceases beyond the fifth from the mother and the seventh from the father. This is repeatedly referred to in the judgment of the judicial committee in *Ramachandra v Vinayaka*.

Explanation

(i) The five degrees, according to the Hindu mode of computation, are to be calculated from and inclusive of the deceased in the case of ascendants and descendants of the deceased, and from and inclusive of the common ancestor in the case of descendants of the common ancestor.

The father's father's son's son's daughter's daughter's son is not heritable *bandhu* for he is in the sixth degree from the common ancestor, that is, the father's father.[85]

For the same reason, the father's father's son's son's son's daughter's son is not a heritable *bandhu*;[86] so also the great great grandfather's great grandson's daughter's son is not a heritable *bandhu*.[87] In these cases, as the claimants trace their descent through their mother, the *sapinda* relationship ceases with five degrees.

Cases of claimants claiming through the fathers being more than five degrees, but not more that seven degrees, have not come up for decision before the courts. The following special cases may be noted. It is assumed that there is no difficulty as to the number of degrees on the owner's side:

83 (1914) 41 IA 290, 312, 42 Cal 384, 420, 25 IC 290, AIR 1914 PC 1; *Kartar Singh v Niranjan Singh* AIR 1955 Pepsu 79.

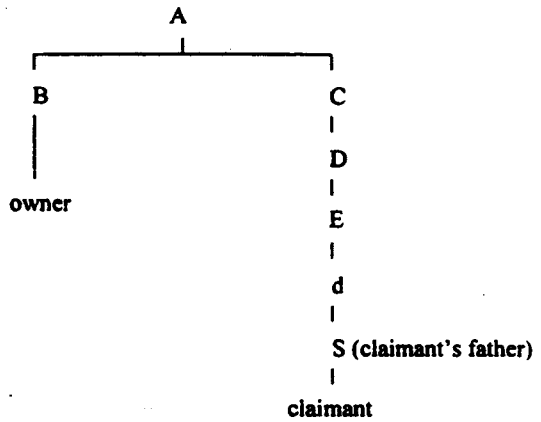
84 (1926) 49 Mad 652, 689, 95 IC 651, AIR 1926 Mad 881.

85 (1914) 41 IA 290, 42 Cal 384, 25 IC 290, AIR 1914 PC 1.

86 *Shib Sahai v Saraswati* (1915) 37 All 583, 30 IC 903, AIR 1915 All 409. The decision is correct, but the mode of computation adopted in the case is, it is submitted, incorrect. This has now been recognised in *Ram Sia v Bua* (1925) 47 All 10, 84 IC 360, AIR 1924 All 790.

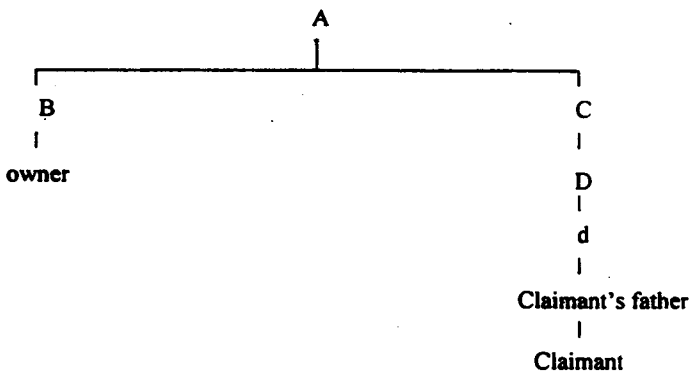
87 *Ram Parshad v Idu Mal* (1932) 13 Lah 249, 134 IC 122.

Table IV.3



In this case, the claimant (tracing his relationship through his father) is not more than seven degrees from the common ancestor; and may, at first sight, be regarded as a heritable *bandhu*. However, *S* (his father) who claims through his mother is more than five degrees from *A*, and is not a heritable *bandhu*. To hold that the claimant is a *bandhu* and *S*, his father, is not a heritable *bandhu*, is an anomaly. The sapindaship of the claimant in such a case is described as a sapindaship by frog's leap.[88] He is not a heritable *bandhu*.

Table IV.4



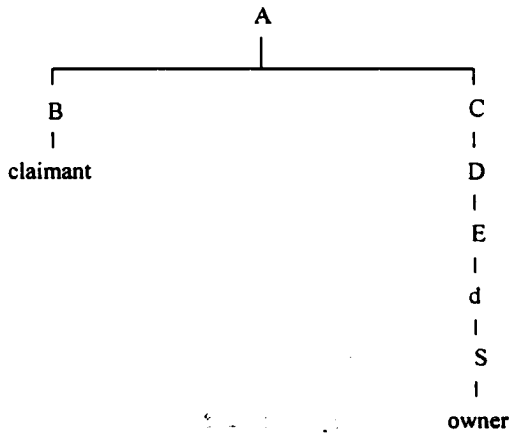
88 *Dr Sarvadhikari's Principles of Hindu Law*, second edn, p 592.

In this case, the claimant (claiming through his father) is within seven degrees. His father (claiming through his mother) is not beyond five degrees. Both are heritable *bandhus*.

Explanation (ii)

'In order to entitle a man to succeed to the inheritance of another, he must be so related to the latter that they are *sapindas* of each other';[89] in other words, the right of inheritance accrues to a *bandhu*, if the late owner and the person claiming the inheritance were related as *sapindas* to each other.

Table IV.5



Due to the principle of mutuality, the diagrams in the preceding rule will hold good, if the owner and claimant are interchanged. Thus, the first diagram becomes the accompanying diagram, by the principle of mutuality. Just as the claimant in tale IV.3 is a *sapinda* by frog's leap and is not a heritable *bandhu*, similarly, the owner in the table IV.5 is a *sapinda* by frog's leap and is not a heritable *bandhu* of the claimant. Therefore, by the rule mentioned in this paragraph, the claimant is not a heritable *bandhu* of the owner.

However, if the interchange is made in table IV.4, the result is that the owner is a heritable *bandhu* of the claimant. Therefore, the claimant is also a heritable *bandhu* of the owner.

89 *Ramchandra v Vinayak* (1914) 41 IA 290 312, 42 Cal 384, 25 IC 290, AIR 1914 PC 1; *Umaid Bahadur v Udai Chand* (1881) 6 Cal 119 (FB); *Babu Lal v Nanku Ram* (1895) 22 Cal 339.

Explanation (iii)

Is there any other principle limiting heritable *bandhus*? There are two views on this matter.

(a) Dr Sarvadhikari, noticing the fact that the nine *bandhus* enumerated in Mitakshara are descendants from common ancestors, who are members of the following four families, namely:

- the family of the propositus and his agnate ancestors, eg, one's father's sister's son, one's father's father's sister's son;
- the family of the mother's agnate ancestors, eg, one's mother's sister's son, one's mother's brother's son, one's mother's father's sister's son;
- the family of the father's mother's agnate ancestors, eg, one's father's mother's sister's son and one's father's mother's brother's son;
- the family of the mother's mother's agnate ancestors, eg, one's mother's mother's sister's son and one's mother's mother's brother's son,

In addition, applying the principle of mutuality, infers that the propositus must be a descendant of a common ancestor, who is a member of the following families, namely; (i) claimant's agnate family; (ii) claimant's mother's agnate family; (iii) claimant's father's mother's agnate family; (iv) claimant's mother's mother's agnate family, this is to say, the claimant must be either:

(a) a member of the families 2, 3, 4; or
(b) a daughter's son; or
(c) a daughter's son's son; or
(d) a daughter's daughter's son.

] of an agnate member of the four families 1, 2, 3 and 4.

Accordingly, the following four kinds of descendants are excluded:

1 **~~Daughter's daughter's son's son~~**[90]—This is only an *obiter dictum*. The actual decision related to daughter's daughter's son.

2 **Daughter's son's son's son**[91]—Only one judgment is based on Dr Sarvadhikari's reasoning. The reasons given by the other judge are different. The decision cannot be regarded as of much weight:[92] The decision assumes that the *bandhus* should be found only in the above-mentioned four families.

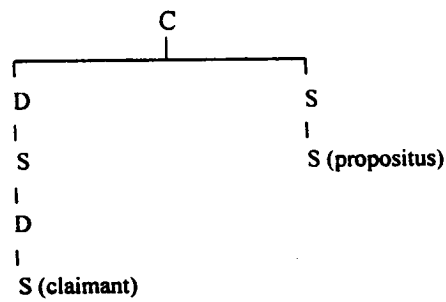
3 **Daughter's son's daughter's son**—As discussed in *Gajadhar Prasad v Gauri Shankar*.[93]

90 *Umaid Bahadur v Udai Chand* (1880) 6 Cal 119.
91 *Chinna Pichu v Padmanabha* (1921) 44 Mad 121, 59 IC 690, AIR 1921 Mad 671.
92 *Lowji v Mithabai* (1900) 2 Bom LR 842.
93 (1932) 54 All 698, 138 IC 561, AIR 1932 All 417.

4 **Daughter's daughter's daughter's son**—That is, there cannot be three females between a common ancestor and the claimant or the propositus.

(b) According to the second view, Mitakshara merely enumerates the first cousins of the *propositus*, of his father and his mother. It was not intended to limit heritable bandhuship to particular individuals or to descendants of particular families, or to certain kinds of descendants in these families. None of the ancient texts support such limitation. The definition of a *bandhu* as a *bhinna gotra sapinda*, even adopting the narrower meaning of the term '*sapinda*', does not involve such limitation. The judicial committee has held (§ 46) that the enumeration of the *bandhus* in Mitakshara is not exhaustive. Then why should one infer by implication that the families in which *bandhus* are to be found—families not mentioned as such by Vijnaneshwara—are exhausted by the enumeration of the *bandhus*? Similarly, why should the enumeration be considered exhaustive as to the type of descendants in these families? Accordingly, it was held in *Kesar Singh v Secretary of State*, by the High Court of Madras, that the father's father's daughter's son's daughter's son was a heritable *bandhu*.[94] The following table explains the relationship of the claimant with the *propositus* in that case:

Table IV.6

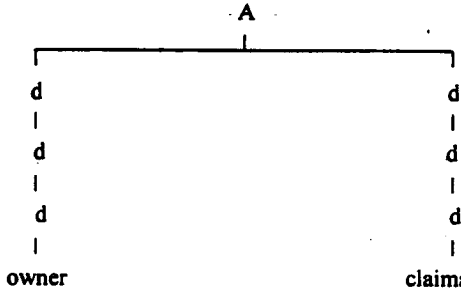


In the above table, *C* represents the common ancestor. *S* represents the son and *D* the daughter. Here the claimant claims relationship through his mother and is fifth in descent from the common ancestor *C*. The *propositus* traces relationship through his father and is third in descent from the common ancestor, *C*, that is, within seven degrees from him. The test of degree is thus satisfied. Upon the same facts, the test of mutuality is also satisfied. No other test of limitation is essential.

94 (1926) 49 Mad 652, 95 IC 651, AIR 1926 Mad 881.

According to this view, there may be three females intervening between the common ancestor and the claimant *propositus*, that is, in the line of ascent or line of descent. For example, in the accompanying table IV.7, the owner and claimant are each within five degrees and each is *sapinda* of the other. Here, the claimant is a heritable *bandhu*, though there are six females intervening between him and the owner.

Table IV.7



The 'line theory' of Dr Sarvadhikari has been rejected by a Full Bench of the Madras High Court in *Seelam Nagamma v Reddam*,[95] and the decision of the Allahabad Full Bench in *Gajadhar v Gauri Shankar*,[96] has been expressly dissented from. The same view has been taken by the Calcutta High Court in *Panchu Gopal v Bata Mall*,[97] and by the Bombay High Court in *Kasa v Vinayak*.[98] The view propounded by Dr Sarvadhikari thus appears to be unsupportable.

§ 48. WHO ARE HERITABLE *BANDHUS*

We are now in a position to enumerate the heritable *bandhus* whichever view—that of Madras or Allahabad—ultimately prevails. In each particular case, it is enough to see: (1) whether he is a *sapinda* in a narrower sense; and (2) whether there is mutuality between the owner and the claimant. If the Madras view prevails, all other conditions are immaterial. If the Allahabad view is accepted; (3) he must belong to one of the four types of descendants and he must be descended from an agnate member of any of the four families[99] and must be within five degrees of the common ancestor. The last clause also represents the Bombay view.

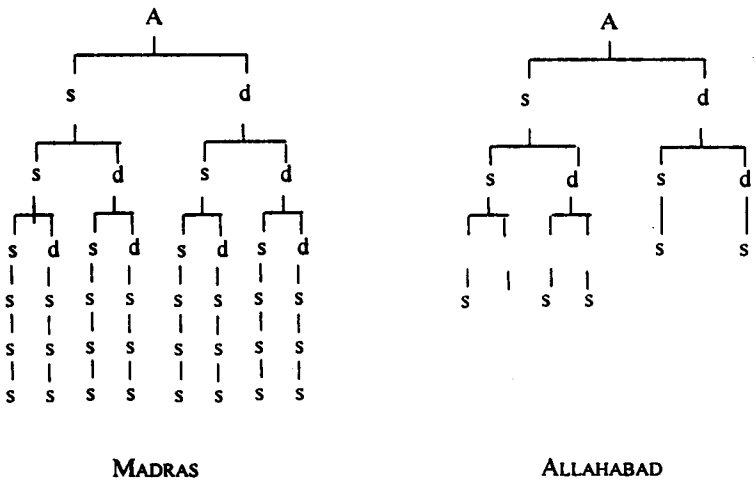
95 (1943) Mad 759 (FB).
96 (1932) 54 All 698, AIR 1932 All 417.
97 AIR 1949 Cal 157.
98 (1947) Bom 770.
99 *Gajadhar Prasad v Gauri Shankar* (1932) 54 All 698, 138 IC 561, AIR 1932 All 417.

In the following Table IV.8, the males(s) are all *bandhus* of the *propositus*, *A* being a cognate ancestor of his.

In the diagrams, *sapindas* by frog's leap are excluded. *A*'s daughter's son's daughter's son shown in the Madras diagram was recognised in *Kesar Singh*'s case[1] but not in *Gajadhar v Gauri Shankar*.[2] *A*'s son's son's daughter's son's son shown in the Madras diagram is not now held to be an heir in *Brij Mohan v Kishun Lal*.[3]

If *A* is an agnate ancestor of the owner, all the s's on the extreme left are *gotraja sapindas*. The others are *bandhus*.

Table IV.8



§ 49. THREE CLASSES OF *BANDHUS*

Three classes of bandhus have already been mentioned [§ 46 (4)].

Atma bandhus may be subdivided into:

1 owner's cognate descendants;
2 father's cognate descendants; of these
3 the sister's son has gone higher up by legislation;
4 cognate descendants of father's father, and mother's father and his descendants, and ancestor and collaterals.

Pitri bandhus may be subdivided into:

1 (1926) 49 Mad 652, 95 IC 651, AIR 1926 Mad 881.
2 (1932) 54 All 698, 138 IC 561, AIR 1932 All 417.
3 (1938) ALJ 670, AIR 1938 All 443, 128.

1 father's father's father's cognate descendants;
2 father's mother's father's and his descendants;

Matri bandhus may be subdivided into:

1 mother's father's father and his descendants;
2 Mother's mother's father and his descendants.

All the above *bandhus* should satisfy the limit of degrees.

§ 50. RULES FOR DETERMINING ORDER OF SUCCESSION AMONG MALE *BANDHUS*—FIRST RULE LAID DOWN BY THE JUDICIAL COMMITTEE

In *Muthusami v Muthukumarasami*,[4] the claimants were: (1) mother's half-brother; and (2) father's father's sister's son. The Madras High Court in the course of the judgment[5] laid down four propositions. The first proposition defines *bandhu*. The second proposition lays down that the three classes *atma bandhus*, *pitri bandhus* and *matri bandhus* succeed in the order in which they are named. Accordingly, the mother's half brother who was an *atma bandhu* was preferred to the rival claimants who were *pitri bandhus*. This judgment was affirmed by the Privy Council. Thus, the first rule we get relating to the order of succession among the bandhus is: (1) *atma bandhus* (one's own *bandhus*) succeed before *pitri bandhus* (father's *bandhus*); and (2) *pitri bandhus* succeed before *matri bandhus* (mother's *bandhus*).

Illustrations

(a) The mother's father's daughter's son's son (mother's sister's grandson), (§ 54, no. 25), being an *atma bandhu*, is entitled to succeed in priority to the mother's father's father's daughter's son (mother's paternal aunt's son) (§ 54, no. 6) who is a *matri bandhu*.[6]

(b) Father's sister's daughter's son being an *atma bandhu* is entitled to succeed in priority to paternal grandfather's sister's son, who is a *pitri bandhu*.[7]

It is important to note, as observed by the Privy Council, that rule (1) is not dependent on individual propinquity or on the efficacy of offerings to the deceased.[8]

4 (1896) 19 Mad 405, 23 IA 83.
5 *Muttusami v Muttukumarasami* (1893) 16 Mad 23.
6 *Adit Narayan v Mahabir Prasad* (1921) 48 IA 86, 6 Pat LJ 140, 60 IC 251, AIR 1921 PC 53.
7 *Krishna Ayyangar v Venkatarama Ayyangar* (1906) 29 Mad 115.
8 *Adit Narayan v Mahabir Prasad* (1921) 48 IA 86, 95, 60 IC 251, AIR 1921 PC 53.

§ 50A. DESCENDANTS PREFERRED TO THOSE WHO ARE NOT DESCENDANTS

We have seen (§ 49) that *atma bandhus*, may be divided into: (1) descendants of the *propositus*; (2) those who are not descendants.

No case of rival claimants, one being a descendant and the other not, has come up before the judicial committee. The Bombay and Madras High Courts have held that the descendants of the *propositus* are entitled to preference over those who are not descendants. In *Dattatraya v Gangabai*,[9] the rival claimants were a son's daughter's son and the father's daughter's daughter. The claim of the latter would be disallowed in Madras on the ground that all female *bandhus* rank after male *bandhus*, and in any other state, on the ground that no female *bandhus* are recognised. However, this ground for rejecting the claim is not available in Bombay, where female *bandhus* are recognised (§ 56). The sister's daughter's claim was rejected on the ground that she was a collateral, her rival claimant being a descendant of the *propositus*. In a Madras case, in which the succession opened before the passing of Act II of 1929, the rival claimants were: (1) daughter's daughter's son; and (2) sister's son. It was held that the former was entitled to preference.[10]

§ 51. SECOND AND THIRD RULES LAID DOWN BY THE JUDICIAL COMMITTEE

In *Vedachela v Subramanian*[11] the claimants were: (1) a maternal uncle (appellant); and (2) a paternal aunt's son's son (respondent). The Madras High Court held that the latter who is a *bandhu ex parte paterna* was entitled to succeed in preference to the former who was a *bandhu ex parte materna*. On appeal, the judicial committee reversed the judgment of the High Court. Their Lordships observed:

> In the absence of any express authority varying the rule, the propositions enunciated in *Muttusami v Muttukumarasami*,[12] which on appeal was affirmed by the Judicial Committee,[13] furnish a safe guide.

9 (1922) 46 Bom.541, 77 IC 17, AIR 1922 Bom 321.

10 *Kalimuthu v Ammamuthu* (1935) 58 Mad 238, 153 IC 107, AIR 1934 Mad 611.

11 (1921) 48 IA 349, 364, 44 Mad 753, 767, 64 IC 402, AIR 1922 PC 33; *Laxman v Gangabai* AIR 1955 MB 138.

12 (1893) 16 Mad 23, 30.

13 *Muthuswami v Sunambedu* (1896) 23 IA 83, 19 Mad 405; *Chengiah v Subbaraya* (1930) 58 Mad LJ 562, 128 IC 172, AIR 1930 Mad 555, where the rival claimants are both *matri bandhus*.

Reference may also be made to *Gowardhan v Dwarku*, where a half brother of the mother was preferred to a father's brother's daughter.[14]

The first two propositions have been already stated (§ 50). The next two propositions are:

(3) That the examples given therein are intended to show the mode in which nearness of affirnity is to be ascertained;

(4) That as between *bandhus* of the same class, the spiritual benefit they confer upon the *propositus* is, as stated in the Viramitrodaya, a ground of preference.

In *Jatindranath Ray v Nagendranath Ray*,[15] in which the parties were governed by the Benares School of Mitakshara, the contest was between the mother's sister's son and the father's half-sister's son, both *atma bandhus* and the latter was preferred to the former on the ground of the superior spiritual efficacy of the *pinda* offered by him. In that case, their Lordships of the Privy Council observed as follows:

> No doubt, propinquity in blood is the primary test, but...the Viramitrodaya brings in the conferring of spiritual benefits as the measure of propinquity where the degree of blood relationship furnishes no certain guide.

From the above two cases, we get the following rules:

(i) propinquity in blood or nearness in degree gives a ground of preference;[16]

(ii) when it fails (and not until then), the conferring of spiritual benefit is a ground of preference.[17]

It looks as if the phrases 'nearness in degree', 'propinquity in blood', and 'degree of blood relationship' are used in the ordinary sense of the steps between the claimant and the *propositus* and not in the technical sense of ancient Hindu lawyers. If so, the decision noted below is also an obvious case.[18]

Spiritual Efficacy as a Ground of Preference Among *Bandhus*

In the last mentioned case, their Lordships observed:[19]

14 AIR 1963 Punj 398.

15 (1932) 59 Cal 576, 58 IA 372, 135 IC 637, AIR 1931 PC 268; *Kaliammal v Muthu Pillai* AIR 1966 Mad 118.

16 *Balasubramanya Pandya Thalaivar v Subbayya Thevar* (1938) 65 IA 93, (1938) Mad 551, 40 Bom LR 704, 172 IC 724, AIR 1938 PC 34; *Debi Das v Mukat Behari Lal* (1943) All 31, 207 IC 17, AIR 1943 All 177 (an obvious case).

17 *Ademma v Hanuman Reddi* (1938) Mad 260, AIR 1937 Mad 967.

18 *Sobadra v Shri Thakur Beharji Maharaj* (1943) All 155, 206 IC 81, AIR 1943 All 87.

19 *Jatindranath Ray v Nagendranath Ray* (1932) 59 Cal 576, 584, 58 IA 372, 135 IC 637, AIR 1931 PC 268, 271.

Applying it to the parties in the present appeal, it is obvious that the respondents offer the full cake to the paternal grandfather and great grandfather of the *propositus*, while the appellant offers it to his maternal grandfather, great grandfather and great great grandfather. Thus, no doubt the appellant offers three cakes and the respondents only two. However, the *propositus* participates only in oblations made to his three immediate paternal ancestors and not in those made to his maternal ancestors.[20] ...Apart from this, it seems to be well established that cakes offered to the paternal ancestors are of superior efficacy to those offered to maternal ancestors. This was laid down by a Full Bench of the Calcutta High Court in *Guru Gobind Shaha Mandal v Anand Lal Ghose Mazumdar*.[21] Their Lordships must, therefore, hold that the offerings made by the respondents confer a greater spiritual benefit upon the *propositus* than those made by the appellant, and that, taking this as a measure of propinquity, the respondents must be held to be the preferential heirs.

§ 52. FOURTH RULE LAID DOWN BY THE JUDICIAL COMMITTEE

Bandhus ex parte paterna and bandhus ex parte materna.—It has been held by the High Courts of Madras[22] and Bombay,[23] that *bandhus ex parte paterna* (ie, on the father's side), take before *bandhus ex parte materna* (ie, on the mother's side). The fourth rule approved by the judicial committee is that *bandhus ex parte paterna* are preferred to *bandhus ex parte materna*. This rule must be applied only after the first three rules fail to furnish a guide.

In *Vedachela*'s case,[24] the judicial committee disapproved of the application of the rule where a different result would follow by reason of nearness in degree or superior efficacy. In the case of such a conflict, the rule in this section ought not to be applied: where there is no such conflict, or where the other rules fail to furnish a guide, this rule may be applied. This is how the decision in *Balusami v Narayana*[25] was distinguished by the judicial committee.[26] There is nothing in the judgment of the judicial committee in that case to suggest that the rule of preference for *bandhus ex parte paterna* is not applied in any case. On the contrary,

20 *Dr Sarvadhikari's Principles of Hindu Law*, first edn, pp 817–18.
21 (1870) 5 Beng LR 15, 39, 13 WR 49 (FB).
22 *Sundrammal v Rangasami* (1895) 18 Mad 193; *Balusami v Narayana* (1897) 20 Mad 342.
23 *Saguna v Sadashiv* (1902) 26 Bom 710, 715.
24 (1922) 48 IA 349, 44 Mad 753, 64 IC 402, AIR 1922 PC 33.
25 (1897) 20 Mad 342.
26 *AS Vedachela Mudatiar v Subramania Chettiar* (1922) 48 IA 349, 359, 44 Mad 753, 761, 762, 64 IC 402, AIR 1922 PC 33.

in *Jatindranath Ray v Nagendranath Ray*,[27] which was governed by the Benares School of Hindu law, their Lordships observed that the rule was supported by a considerable volume of authority, such as Mayne,[28] and Gopalchandra Sarkar,[29] who lay down the rule that as between *bandhus* of the same class and equal in degree, one related on the father's side is to be preferred to one related on the mother's side. Also *Bhattacharya's Commentaries* seems to have taken the same view.[30] The contest in *Jatindranath Ray's* case was between the father's half-sister's son and the mother's sister's son. Both were *atma bandhus* in equal degree of propinquity to the last owner. The father's half-sister's son was entitled to succeed in preference to the mother's sister's son, if the rule of preference of *bandhus ex parte paterna* were to be applied. He was also entitled to succeed if the test of spiritual efficacy were adopted. Their Lordships, however, thought that 'the safer test' was that of spiritual efficacy, and decided on that ground in favour of the father's half-sister's son.

In the light of the two decisions of Judicial Committee, the decision of the Madras High Court in *Sundarammal v Rangasami*,[31] is open to the comment that it did not give proper effect to the propositions enunciated in *Muthusami's* case referred to in §§ 50 and 51. However, the decision in *Balusami v Narayana*,[32] is still good law. The actual decision was arrived at by the application of the principles: (1) the nearer line excludes the more remote; and (2) *bandhus ex parte paterna* are preferred to the *bandhus ex parte materna*. Neither comparison of degrees nor spiritual efficacy gives a different result. It is submitted that the decision is correct though different reasons might have been given.

§ 53. ADDITIONAL RULES LAID DOWN BY THE HIGH COURTS

Leaving the case of descendants as settled for all practical purposes (§ 50A) on the principle that the nearer line excludes the more remote, the further question arises whether it can be applied as between collaterals of different lines. The question is of great practical importance and may frequently arise, among *atma bandhus*.

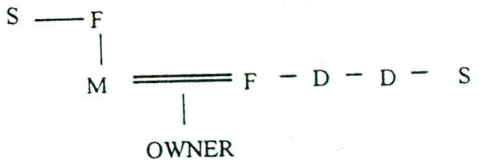
We have already seen (§ 49) that *atma bandhus*, who are not descendants, may be divided into; (1) father's cognate descendants or father's line;

27 (1931) 58 IA 372, 59 Cal 576, 135 IC 637, AIR 1931 PC 268.
28 Mayne, *Hindu Law*, 9th edn, s 579.
29 *Gopalchandra Sarkar, Hindu Law*, 7th edn, p 574.
30 *Hindu Law*, second edn, p 460.
31 (1895) 18 Mad 193.
32 (1897) 20 Mad 342.

(2) Maternal grandfather and descendants of maternal and paternal grandfathers. The lines of grandfathers, being equal in degree, may be regarded as one line.

When the rival claimants belong to these two different lines, the question arises whether the principle that the nearer line excludes the more remote applies to them. Where the claimants are equally removed from the *propositus*, it is reasonable that the rule should apply. However, it may be possible that the claimant in the nearer line is more remotely removed than the claimant in the remoter line as in the following table:

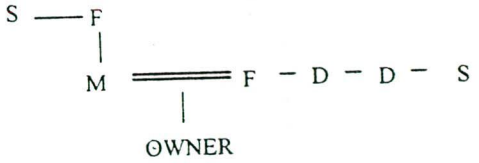
Table IV.9



In such a case who is the preferable heir? Though the actual point has not arisen before the Madras High Court, the trend of the decisions is in favour of holding that the nearer line excludes the more remote.[33]

A contrary decision has been arrived at by the Patna High Court, where the rival claimants were related as in the following table:

Table IV.10



It was held by a majority of three that the maternal uncle is entitled to succeed.[34] The point has not arisen before the judicial committee or the other High Courts. The Allahabad High Court has touched upon it but left it open, as it did not arise for decision.[35]

All other considerations being equal, the claimant who is separated by only one female link is to be preferred to one who is separated by two

33 *Balusami v Narayana* (1897) 20 Mad 342; *Kalimuthu v Ammamuthu* (1935) 58 Mad 238, 246, 153 IC 107, AIR 1934 Mad 611.

34 *Umashankar v Msst Nageshwari* (1918) 3 Pat LJ 663, 48 IC 625, AIR 1918 Pat 1.

35 *Sobadra v Shri Thakur Behariji Maharaj* (1942) ALJ 732, (1943) All 55, 206 IC 81, AIR 1943 All 87.

such links.[36] Another mode of expressing it is that two steps in cognateness are inferior to only one step in cognateness and one in agnateness.[37]

It has thus been held that a daughter's son's son is to be preferred to a daughter's daughter's son.[38] The mother's brother's son is preferred to mother's sister's son in Madras[39] and Allahabad[40]. The Bombay High Court refused to follow the above rule and held that both were entitled to take equally.[41] The decision seems to be of doubtful authority, and, it is submitted, required reconsideration. If it is supported on any doctrine peculiar to Bombay, it has to be confined to Bombay. Following the same rule, it has been held by the High Court of Allahabad,[42] that the father's father's daughter's son's son (§ 54) is to be preferred to the father's daughter's daughter's son (§ 54, No 7). It is submitted that this case was erroneously decided. It was decided before the decisions of the judicial committee in *Vedachela v Subramania*[43] and *Jatindranath Ray v Nagendranath Ray*.[44] The rule in this paragraph should not be applied before the earlier rules have been tested.

Only when they fail to furnish a guide, should we proceed to this rule. If we apply the test of nearness in degree laid down by the judicial committee, the result would be different.

§ 53A. A SUM-UP OF RULE

A summing up of the rules as to the order of succession among the male *bandhus* has been attempted by the Madras High Court.[45] They are to be applied in the order in which they are stated.

1 *Atma bandhus* succeed in preference to *pitri bandhus* and *matri bandhus*.

2&3 Among *atma bandhus*, the nearer line excludes the more remote. This is sub-divided into:

(i) descendants are preferred to ancestors and collaterals;

(ii) father's descendants take before the descendants of grandfathers.

4 *Pitri bandhus* succeed before the *matri bandhus*.

36 *Tirumalachariar v Andal Ammal* (1907) 30 Mad 406.
37 *Rami Reddy v Gangireddi* (1925) 48 Mad 722, 87 IC 609, AIR 1925 Mad 807.
38 (1907) 30 Mad 406.
39 (1925) 48 Mad 722, 87 IC 609, AIR 1925 Mad 807; *Appandai v Bagubali* (1910) 33 Mad 439, 5 IC 280, must be regarded as overruled.
40 *Ram Charan Lal v Rahim Baksh* (1916) 38 All 416, 34 IC 108, AIR 1917 All 486.
41 *Rajappa v Gangappa* (1923) 47 Bom 48, 77 IC 219, AIR 1922 Bom 420.
42 *Sham Devi v Birbhadra Prashad* (1921) 43 All 463, 62 IC 432, AIR 1921 All 178.
43 (1922) 48 IA 349, 44 Mad 753, 64 IC 402, AIR 1922 PC 33.
44 (1931) 58 IA 372, 59 Cal 576, 135 IC 637, AIR 1931 PC 268.
45 *Kalimuthu v Ammamuthu* (1935) 58 Mad 238, 245, 153 IC 107, AIR 1934 Mad 611.

5 Among the *bandhus* of the same or equal lines, the nearer excludes the more remote. If rule 5 is to be applied before rule 3, the decision in *Uma Shankar v Nageshvari*[46] (vide s 53) would be correct. However, if rule 3 is to be first applied, it is incorrect.

6 If the rule of nearness in blood fails to furnish a guide, he who confers a superior spiritual benefit is preferable to one who confers an inferior spiritual benefit or none.

7 When all the above rules do not work, *bandhus ex parte paterna* are preferred to *bandhus ex parte materna.*

8 All other things being equal, a claimant who is related to the *propositus* through the intervention of two females, is to be postponed to one who is related through the intervention of only one female.

§ 53B. THE LAST RULE LAID DOWN BY THE JUDICIAL COMMITTEE

Where we come to two equal claimants after the application of the above rules, one of them is of whole blood and the other is of half-blood, the former is preferred to the latter.[47]

§ 54. ORDER OF SUCCESSION AMONG BANDHUS

The following is the order of succession among *bandhus* (see Table § 54.1.1), based on rules in §§ 50–53A.

I Atma bandhus

Descendants

1 Son's daughter's son
Preferred in Bombay to father's daughter's daughter, on the principle that both being equally removed from the deceased, the one in the direct line of descent should be preferred to the one in a collateral (§ 50A).

2 Daughter's son's son (inferior to 1 in spiritual benefit)
Preferred by the Madras High Court to No 3[53].

3 Daughter's daughter's son
Preferred by the Madras High Court to sister's son in a case before the Act of 1929,[48] and therefore, preferable to No 4.

46 (1918) 3 Pat LJ 663, 48 IC 625, AIR 1918 Pat 1.

47 *Jatindranath Ray v Nagendranath Ray* (1931) 58 IA 372, 59 Cal 576, 135 IC 637, AIR 1931 PC 268.

48 *Kalimuthu v Ammamuthu* (1935) 58 Mad 238, 153 IC 107, AIR 1934 Mad 611.

4 Lower descendants are not of practical importance

Father's descendants.

5 Father's son's (=brother's) daughter's son

6 Father's daughter's (=sister's) son's son
Preferred by the Madras High Court to No 18[49] and by the Allahabad High Court to No 27.[50]

7 Father's daughter's daughter's son
Preferred by the Allahabad High Court to no. 20.[51]

8 Father's son's son's daughter's son

9 Father's son's daughter's son's son

*10 Father's daughter's son's son's son

11 Father's son's daughter's daughter's son

*12 Father's daughter's son's daughter's son

*13 Father's daughter's daughter's son's son

*14 Father's daughter's daughter's daughter's son

14A Lower descendants of father who are *bandhus* in Madras but not in Allahabad

15 Mother's father (=maternal grandfather)

Descendants of Grandfather

16 Mother's father's son (=maternal uncle)
He succeeds before No 17[52] and before No 19.[53]

17 Father's father's daughter's (=father's sister's or half-sisters) son
He succeeds before No 18[54] and before No 19 (§ 51).

18 Mother's father's son's son
He succeeds before No 19. (The decision in Bombay, holding that both take equally is either doubtful or must be limited to Bombay (§ 53).

19 Mother's father's daughter's son

49 *Balusami v Narayana* (1897) 20 Mad 342, 348.

50 *Debi Das v Mukat Behari Lal* (1943) All 131, 207 IC 17, AIR 1943 All 177.

51 *Sabodra v Shri Behariji Moharaji* (1943) All 155, 206 IC 81, AIR 1943 All 87. See also the decision of the Chief Court of Karachi in *Tejumal v Mulchand* (1946) ILR Kant 467.

52 *Balasubrahamanya Pandya Thalaivar v Subbayya Tevar* (1938) 65 IA 93, (1938) ILR Mad 551, 40 Bom LR 704, 172 IC 724, AIR 1938 PC 34; *Sakharam v Balakrishna* (1925) 49 Bom 739, 94 IC 817, AIR 1925 Bom 451 must be regarded as overruled *Virangauda Lingangauda v Yelappa Shidappa* (1943) Bom 259, 205 IC 328, AIR 1943 Bom 56.

53 *Mohandas v Krishnabai* (1881) 5 Bom 597.

54 *Ademma v Hanuman Reddi* (1938) Mad 260, AIR 1937 Mad 967.

20 Father's father's son's daughter's son[55]
21 Mother's father's son's son's son
22 Mother's father's son's daughter's son
23 Father's father's daughter's son's son
It is submitted that the decision in *Sham Devi v Birbhadra Prasad* is erroneous (§ 53).[56]
24 Father's father's daughter's daughter's son
25 Mother's father's daughter's son's son
26 Mother's father's daughter's daughter's son
27 Father's father's son's son's daughter's son.

In *Pichandi v E Ramaswami*, the competing heirs were father's father's son's son's daughter's son and the second husband's son of the mother of the *propositus* and the latter was preferred.[57]

28 Mother's father's sons's son's daughter's son
29 Father's father's son's daughter's son's son
*30 Father's father's daughter's son's son's son
31 Father's father's son's daughter's daughter's son
*32 Father's father's daughter's son's daughter's son
*33 Father's father's daughter's daughter's son's son
*34 Father's father's daughter's daughter's daughter's son
*35 Mother's father's son's son's son's son
36 Mother's father's son's daughter's son's son
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38 Mother's father's son's daughter's daughter's son
*39 Mother's father's daughter's son's daughter's son
*40 Mother's father's daughter's daughter's son's son
*41 Mother's father's daughter's daughter's daughter's son
42 Father's father's son's son's daughter's son's son
*43 Father's father's son's daughter's son's son's son
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*45 Father's father's son's daughter's daughter's son's son
46 Father's father's daughter's son's daughter's son's son
*47 Father's father's daughter's daughter's son's son's son
*48 Father's father's daughter's daughter's daughter's son's son
*49 Mother's father's son's son's son's son's son
50 Mother's father's son's son's daughter's son's son

55 The decision in *Sundrammal v Rangasami* (1895) 18 Mad 193 must be regarded as overruled. Reference may be made to *Kalimmal v Muthu Pillai* AIR 1966 Mad 118, where it is pointed out that in *Madras*, a male *bandhu* is entitled to preference over a female *bandhu*, even though the female *bandhu* is nearer in degree (see the entries in that case).

56 *United Provinces Through Deputy Commissioner Hardoi v Kanhaiyalal* (1941) 16 Luck 551, 192 IC 131, AIR 1941 Ori 337, (1921) 43 All 463.

57 AIR 1971 Mad 204.

*51 Mother's father's son's daughter's son's son's son
*52 Mother's father's daughter's son's son's son's son
*53 Mother's father's son's daughter's daughter's son's son
54 Mother's father's daughter's son's daughter's son's son
*55 Mother's father's daughter's daughter's son's son's son
*56 Mother's father's daughter's daughter's daughter's son's son
*56A Seven descendants of father's father, a degree lower (sons of Nos 42–48)
*56B Eight descendants of mother's father, a degree lower (sons of Nos 49–56).

*These are held to be heirs in Madras, but are held not to be heirs in Allahabad according to *Gajadhar Prasad*'s case.

According to the Patna view, no. 15 will come between No 3 and No 4; No 16 between no. 5 and No 6; nos. 17, 18 and 19 between No 8 and no. 9.

Number 28 is placed above nos. 29 to 35 on account of his spiritual efficacy. It must be admitted that the result is highly anomalous. It is futile to discuss it unless the case actually arises.

II Pitri bandhus

1 Father's maternal grandfather
2 Father's maternal grandfather's son
3 Father's paternal grandfather's daughter's son
4 Father's maternal grandfather's son's son
5 Father's maternal grandfather's daughter's son
6 Father's paternal grandfather's son's daughter's son
7 Father's paternal grandfather's daughter's son's son
8 Father's maternal grandfather's son's son's son
9 Father's paternal grandfather's daughter's daughter's son
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56 Father's maternal grandfather's daughter's daughter's son's son's son's son
57 Father's maternal grandfather's daughter's daughter's daughter's son's son's son.

III Matri *bandhus*

1 Mother's paternal grandfather[58]
2 Mother's maternal grandfather
3 Mother's paternal grandfather's son
4 Mother's maternal grandfather's son
5 Mother's paternal grandfather's son's son
6 Mother's paternal grandfather's daughter's son[59]
7 Mother's maternal grandfather's son's son
8 Mother's maternal grandfather's daughter's son
9 Mother's paternal grandfather's son's son's son
10 Mother's paternal grandfather's son's daughter's son
11 Mother's paternal grandfather's daughter's son's son. He is preferred to no. 17[60]
12 Mother's maternal grandfather's son's son's son
13 Mother's paternal grandfather's daughter's daughter's son
14 Mother's maternal grandfather's son's daughter's son
15 Mother's maternal grandfather's daughter's son's son
16 Mother's maternal grandfather's daughter's daughter's son
17 Mother's paternal grandfather's son's son's son's son
18 Mother's paternal grandfather's son's son's daughter's son
19 Mother's paternal grandfather's son's daughter's son's son
20 Mother's paternal grandfather's daughter's son's son's son
21 Mother's maternal grandfather's son's son's son's son

58 *Krishnayya v Pichamma* (1888) 11 Mad 287.
59 *Adit Narayan v Mahabir Prasad* (1921) 48 IA 86, 60 IC 251, AIR 1921 PC 53.
60 *Chengiah v Subbaraya* (1930) 58 Mad LJ 562, 128 IC 172, AIR 1930 Mad 555.

22 Mother's paternal grandfather's son's daughter's daughter's son
23 Mother's paternal grandfather's daughter's son's daughter's son
24 Mother's paternal grandfather's daughter's daughter's son's son
25 Mother's maternal grandfather's son's son's daughter's son
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62 Mother's maternal grandfather's daughter's son's daughter's son's son's son

63 Mother's maternal grandfather's daughter's daughter's son's son's son's son

64 Mother's maternal grandfather's daughter's daughter's daughter's son's son's son.

The above lists are prepared on the basis of the decision and dictum in *Kesar Singh*'s case.[61] But nos. 14A and 42-56B of the *atma bandhus*, nos. 28–57 of the *pitri bandhus*, nos 33–64 of the *matri bandhus* would be excluded by *Brij Mohan*'s case[62] and a few others by *Gajadhar Prasad*'s case[63].

61 (1926) 49 Mad 652, 95 IC 651, AIR 1926 Mad 381.
62 (1938) ALJ 670, AIR 1938 All 443.
63 (1932) 54 All 698, 138 IC 561, AIR 1932 All 417.

§ 55. *BANDHUS* WHO ARE DESCENDANTS OF REMOTER ANCESTORS

The *bandhus*, whose order of succession is given in § 54, are all descendants of the great grandfathers, the grandfathers and father of the *propositus*. It may become necessary to consider the position in regard to the descendants of ancestors higher than the great grandfathers, vide Table 54.1.1.

The first question that arises in respect of such *bandhus* is whether they fall under the heading '*Pitri bandhus*' and '*Matri bandhus*' or have to be classified into other classes. The importance of such a question may be illustrated thus: Suppose the two rival claimants are: (1) a descendant of mother's father's father and, therefore, admittedly a *matri bandhu*; and (2) a cognate descendant of father's father's father's father. If the latter must be regarded as a *pitri bandhu*, he will be preferred to the former according to the decision in *Muthusami v Muthukumarasami*.[64] However, it will be noticed that he is descended from an ancestor higher than the ancestor through whom the first claimant traces descent and he does not appear among the *pitri bandhus* mentioned in § 49. If he falls under a different class, which has to be given a different name such as *pitri-pitri bandhus*, he, being descended from a remoter ancestor and not being a *pitri bandhu*, must yield to his rival.

The question has never arisen before the courts and may never arise. An instance of such a person being regarded as a *bandhu*, but without any rival claimant is that of the father's father's father's son's son's daughter's son.[65] Several judges in India have expressed the opinion that it is not possible to divide all *bandhus* into the three classes as mentioned in Mitakshara [§ 46(4)]. Mitakshara itself does not say that all *bandhus* fall into three classes. Like the individual *bandhus*, the classes mentioned in it may be regarded as illustrative and not as exhaustive. The opposite view is stated in the second proposition of the Madras High Court in *Muttusami v Muttukumarasami*[66] which runs thus: '(2) That, as stated in the text of *Vridha Satatapa* or *Baudhayana*, they are of three classes.....'

It is true that the four proposition laid down in that case were generally approved in appeal in *Vedachela v Subramania*[67] by the judicial committee. However, in none of these cases, was it necessary to deal with the question and too much should not be attached to such general approval. It is submitted that *bandhus* descended from the higher ancestors should be classed into: (1) *pitri-pitri bandhus*; (2) *pitri-matri bandhus*; (3) *matri-pitri bandhus*; and (4) *matri-matri bandhus*; and similarly, for

64 (1896) 19 Mad 405, 23 IA 83.
65 *Manick Chand v Jagat Settani* (1890) 17 Cal 518.
66 (1893) 16 Mad 23, 30.
67 (1922) 48 IA 349, 359, 44 Mad 753, 64 IC 402, AIR 1922 PC 33.

descendants of remoter ancestors.[68] It is on the assumption that all *bandhus* fall into three classes that some of the reasoning of the Allahabad High Court in *Gajadhar Prasad v Gauri Shankar*[69] is based.

§ 56. FEMALE *BANDHUS* IN BOMBAY AND MADRAS

The *bandhus* mentioned in § 54 above are all males. Mitakshara nowhere expressly mentions female *bandhus*. The nine instances there given are all instances of male *bandhus*. The Benares and Mithila schools follow the strict letter of Mitakshara, and do not recognise females as *bandhus*. In Bombay and Madras, however, certain females are recognised as *bandhus*.

Every female other than the daughter in Madras, and other than the daughter, sister and father's sister in Bombay, who rank above *bandhus*, and, if she were a male would have been an heir, that is, who is related to the *propositus* by birth, within the limits of degrees for *bandhus* is regarded as a heritable *bandhu*.

IN BOMBAY	IN MADRAS
Brother's daughter.[70] Sister's daughter.[71] Paternal uncle's daughter.[72] Paternal grandfather's sister's son's daughter.[73]	Brother's daughter.[74] Brother's son's daughter.[75] Father's brother's daughter.[76]

It has been held by a Full Bench of the Bombay High Court,[77] overruling earlier decisions of the same court, that it is not the correct

68 *Umashankar v Mussamat Nageshwari* (1918) 3 Pat LJ 663, 48 IC 625, AIR 1918 Pat 1; *Rami Reddi v Gangi Reddi* (1925) 48 Mad 722, 87 IC 609, AIR 1925 Mad 807, 809, 810, *Kalimuthu v Ammamuthu* (1935) 58 Mad 238, 153 IC 107, AIR 1934 Mad 611.

69 (1932) 54 All 698, 138 IC 561, AIR 1932 All 417.

70 *Bal Krishna v Ramkrishna* (1921) 45 Bom 353, 59 IC 771, AIR 1921 Bom 189.

71 *Dattatraya v Gangabai* (1922) 46 Bom 541.

72 *Kenchava v Girimallappa* (1924) 51 IA 368, 48 Bom 569, 82 IC 966, AIR 1924 PC 209 (postponed to father's sister's son).

73 *Bai Vijli v Bai Prabhalakshmi* (1907) 9 Bom LR 1129.

74 *Venkatasubramaniam v Thayarammah* (1898) 2 Mad 263.

75 *Jagannadhan v Adilakshmi* (1940) HLR Mad 734, AIR 1940 Mad 545.

76 *Fakula Majhi v Subhadra* AIR 1969 Ori 3 (case of Madras law). In Madras, a father's brother's daughter succeeds as *bandhu* when the deceased has not left any other male heir; *Jagannadhan v Adilaxmi* AIR 1940 Mad 545.

77 *Kisan Dhondu v Shevantabai* (1949) 52 Bom LR 327, AIR 1950 Bom 254; overruling *Balkrishna v Ramkrishna* (1920) 22 Bom LR 1442 and *Girimallappa v Kenchava* (1920) 45 Bom 768.

rule, that according to Mitakshara law as applied in the Bombay state, a male *bandhu* is to be preferred to a female *bandhu*, even though the latter is nearer in degree. The first test to apply is to determine in which particular class a *bandhu* falls among the classes enumerated in Mitakshara, and preference should always be given to the class enumerated earlier over those mentioned subsequently. The next test to apply would be to find out as to which of the *bandhus* is nearer in degree in a particular class. If a female *bandhu* is nearer in relation, she should be preferred to a remote male *bandhu*. If the rival claimants are equally related, then only the principle of religious efficacy should be applied and in that case, a male can be preferred to a female.

In Madras and Andhra Pradesh,[78] a male *bandhu* is entitled to preference over a female *bandhu*, even though the female *bandhu* is nearer in degree.[79] Under the Hindu Law of Inheritance (Amendment) Act 2 of 1929, the son's daughter, the daughter's daughter and the sister inherit with *gotraja sapindas*, the son's daughter succeeding immediately after the father's father, the daughter's daughter next after her, and the sister next after the daughter's daughter (see § 43, nos. 13A, 13B and 13C). In Bombay, the sister has a higher place even before the Act and retains it. As to half-sister, see § 43, 13C(2).

The female relations mentioned above are regarded as *bandhus* on the ground that 'any relative who is also a cognate may be treated as coming within the definition of *bhinna gotra sapinda*, and that the term *sapinda*, as used in Chap II, s vi of Mitakshara, includes females'.[80]

In Madras, such females come after all the male *bandhus*.[81] For the order in Bombay see § 74. Amongst themselves, they succeed in the order of propinquity.

§ 56A. HEIRS OF AN ILLEGITIMATE SON

When the illegitimate son of a woman dies leaving his mother but no nearer heirs, she is entitled to succeed as heir in accordance with the general principles of Hindu law.[82] The illegitimate sons of a prostitute, though by different fathers, are entitled to succeed to each other. Similarly, the legitimate son of one of such sons is entitled to succeed to them, and also to their legitimate sons.[83] So if *A* and *B* are son and daughter

78 *Gurukul v Sundaramma* (1975) AP LJ 145.

79 *Kalimmal v Muthu Pillai* AIR 1966 Mad 118.

80 *Balamma v Pullayya* (1895) 18 Mad 168, 170.

81 *Narasimma v Managammal* (1890) 13 Mad 10; *Rajah Venkata v Rajah Surenani* (1908) 31 Mad 321; *Lekshmana Iyer v Punnu Ammal* AIR 1952 Tr & Coch 317.

82 *Jagarnath Gir v Sher Bahadur Singh* (1935) 57 All 85, 153 IC 1078, AIR 1935 All 329. Certain observations in this case were commented on in *Sadu Ganaji v Shankerrao* (1955) ILR Nag 467, AIR 1955 Nag 84.

83 *Visvanatha v Doraiswami* (1925) 48 Mad 944, 91 IC 193, AIR 1926 Mad 289.

of a woman living in adultery and *A* dies leaving *B* but no legitimate heirs, *B* is entitled to succeed to *A*.[84]

The decisions on the subject were reviewed in a recent case by the Madras High Court.[85] Also, see observations of Devadoss J in *Visvanatha v Doraiswami*.[86]

The illegitimate son of a Sudra being an heir to his father, the father also is an heir to him, provided of course, the illegitimate son dies without leaving any issue, widow or mother.[87]

Note.—§§ 57 and 58 below are not affected by the Hindu Succession Act 1956, because it cannot be said that provision is made in that Act for succession covered by §§ 57 and 58.[88]

§ 57. PRECEPTOR, DISCIPLE AND FELLOW-STUDENT

(1) In default of kindred, the property of a deceased Hindu, who became an ascetic (hermit), even though he be a Sudra, passes to his preceptor; if there be no preceptor, to his disciple; and if there be no disciple to his fellow-student. In determining who is a preceptor, a disciple or fellow-student, the court will only consider the imparting of purely religious instruction.[89]

(2) Entrance of a Hindu into a religious order generally operates as a civil death.[90] The man who becomes an ascetic severs his connection with the members of his natural family and being adopted by his preceptor becomes, so to say, a spiritual son of the latter. The other disciples of his *guru* are regarded as his brothers, while the co-disciples of this *guru* are looked upon as uncles and this way a spiritual family is established on the analogy of a natural family.[91]

In the Madras case referred to above, it was held that the disciple of an ascetic Sudra, who left no kindred, was entitled to succeed to his estate so as to prevent it escheat to government.[92]

Under the Bengal school of law, a *dikshaguru* who is not a person who gives *upanayan*, cannot be regarded as *acharya* or preceptor and is not entitled to succeed to the property of this disciple in default of kindred.[93]

84 *Dattatraya v Matha Bala* (1934) 58 Bom 119, 114 IC 821, AIR 1934 Bom 36.
85 *State of Madras v Ramanatha Rao* (1960) ILR Mad 800, AIR 1960 Mad 436 (*Matri bandhus* entitled to succeed).
86 (1925) 48 Mad 944, 946, 91 IC 193, AIR 1926 Mad 289.
87 *Subramania v Rathnavelu* (1918) 41 Mad 44, 42 IC 556, AIR 1918 Mad 1346 (FB).
88 See s 4 of the Hindu Succession Act 1956.
89 *Sambasiva v Secretary of State for India* (1921) 44 Mad 704, 63 IC 659, AIR 1921 Mad 537.
90 For essentials of initiation into *sanyasa ashram*, see § 111, and cases cited there.
91 See § 111. *Sital Das v Sant Ram* AIR 1954 SC 606, 613.
92 *Mitakshara*, Ch 2, s 7.
93 *Sadananda v Harinam* AIR 1950 Cal 179.

In *Tiruvenkatacharier v Andalamma*, the Andhra Pradesh High Court had to consider whether the avocation of *Sishya Sancharam* was an office of property and whether it was heritable and partible. It had also to consider whether earnings from this avocation constitute joint family property.[94]

§ 58. HERMITS AND MEMBERS OF RELIGIOUS ORDERS

The heir to the property of a hermit (*vanaprastha*) is his spiritual brother belonging to the same hermitage, to that of an ascetic (*sanyasi*) a virtuous pupil, and to that of a student in theology (*brambachari*) his religious preceptor. These heirs are entitled to succeed in preference to the kindred of the deceased. This rule applies only to members of the twice-born classes. It does not apply to Sudras, unless some usage or custom to that effect is proved.[95] It has now been held by the Supreme Court[96] that where usage is established, according to which a Sudra can enter into a religious order in the same way as in the case of the twice-born classes, such usage would be given effect to.

The heirs mentioned in § 57 are not entitled to succeed except in default of kindred.[97] The present section deals exclusively with succession to the property of members of religious orders who belong to the twice-born classes. *Sanyasis* are members of the twice-born classes.[98] The heirs enumerated in this section are entitled to succeed in priority to the kindred of the deceased.

§ 59. ESCHEAT

(1) On failure of all the heirs mentioned above, the government takes by escheat.[99] Where the government claims by escheat, the onus lies on

94 AIR 1969 AP 303.

95 *Ramdas v Baldevdas* (1915) 39 Bom 168, 26 IC 607, AIR 1914 Bom 116 (*sanyasi*); *Dharamapuram v Virapandiyam* (1899) 22 Mad 302 (Sudra); *Collector of Decca v Jagat Chunder* (1901) 28 Cal 608 (claim of preceptor's preceptor allowed as proved by custom); *Harish Chandra v Atir Mahmud* (1913) 40 Cal 545, 18 IC 474 (Sudra); *Somasundarum v Vaithilinga* (1917) 40 Mad 846, 41 IC 546, AIR 1918 Mad 794 (Sudra); *Sobhddi v Gobind* (1924) 46 All 616, 80 IC 579, AIR 1924 All 742. However, see *Krishna Singh v Mathura Ahir* AIR 1972 All 273. See the decision of the Supreme Court in *Krishna Singh v Mathura Ahir* affirming the decision of the Allahabad High Court.

96 *Krishna Singh v Mathura Ahir* AIR 1980 SC 707.

97 *Mitakshara*, Chapter 2, s 8; see § 111 below.

98 (1915) 39 Bom 168, 174, 26 IC 607, AIR 1914 Bom 116; *Sital Das v Sant Ram* AIR 1954 SC 606, 613; *Gulabrao v Nagorao* (1952) Nag 591, AIR 1952 Nag 102 (requirements of a person taking *sanyas*).

99 *Collector of Masulipatam v Cavaly Vankata* (1860) 8 MIA 500; *Ram Chandra v Man Singh* AIR 1968 SC 954.

the government to show that the last proprietor dies without heirs.[1] The onus lies heavily on a party who contends that there was absence of any heir of the deceased. Ordinarily, the court is slow in accepting the plea of escheat and will only do so after being satisfied that all the essential conditions for escheat, for instance, public notice by the government, are completely fulfilled.[2]

(2) An estate taken by escheat is subject to the trusts and charges, if any, previously effecting the estate,[3] eg, maintenance of widows,[4] and mortgages created by a widow for legal necessity,[5] but not to unauthorised alienations by widow.[6]

For further reference, see s 29 of Hindu Succession Act 1956.

Succession After Reunion

§ 60. ORDER OF SUCCESSION AMONG REUNITED MEMBERS

In Madras, it has been held that the share of a reunited member survives to the other members of the reunited family like the share of a member of a normal joint family.[7]

In Calcutta, the opinion has been expressed that the principle of survivorship applies to reunited coparceners.[8]

The Madras High Court has expressed the opinion that a reunited son has a preferential right of inheritance to one who remains separate.[9]

The following is the order of succession according to *Viramitrodaya*:

1-3 Son, grandson, and great-grandson
4 Reunited whole brother
5 Reunited half-brother and separated full brother[10]
6 Reunited mother
7 Reunited father
8 Any other reunited copartner
9 Half-brother not reunited

1 *Girdhari Lall v Bengal Government* (1868) 12 MIA 448, 10 WR 31 (PC); *Ganpat v Secretary of State* (1921) 45 Bom 1106, 1110, 62 IC 109, AIR 1921 Bom 138; *United Provinces through Deputy Commissioner, Hardoi v Kanhaiyalal* (1941) 16 Luck 551, 192 IC 131, AIR 1941 Ori 337; *State of Madras v Ramanatha Rao* AIR 1960 Mad 436.
2 *State of Bihar v Radha Krishna Singh* AIR 1983 SC 684.
3 (1860) 8 MIA 500, 527.
4 *Gulab Koonwar v Collector of Benares* (1847) 4 MIA 246, 258.
5 *Cavaly Vancata v Collector of Masulipatam* (1867) 11 MIA 619.
6 (1860) 8 MIA 500, 527.
7 *Samudrala v Samudrala* (1910) 33 Mad 165, 3 IC 741.
8 *Jasoda v Sheo* (1890) 17 Cal 33; *Sham v Court* (1873) 20 WR 197.
9 *Nana v Ramchandra* (1909) 32 Mad 377, 382, 383, 2 IC 519.
10 *Ramasami v Vankatesam* (1893) 16 Mad 440.

10 Mother not reunited
11 Father not reunited
12 Widow
13 Daughter
14 Daughter's son
15 Sister.

Subject to the above, the succession goes to the *sapindas*, *samanodakas* and *bandhus* in the order and according to the rules set forth in §§ 43, 45 and 50.[11] As to reunion, see §§ 342–44.

The order of succession, according to the *Smriti Chandrika*, is as follows:

1 Son, grandson, great-grandson
2 Reunited full-brother
3 Separated full-brother
4 Reunited half-brother
5 Reunited father or paternal uncle
6 Separated half-brother
7 Father
8 Mother
9 Virtuous widow
10 Sister
11 *Sapindas*
12 *Samanodakas*.

According to Mayukha, the reunited member has in every case preference over the unreunited. However, when there are separated full-brothers and reunited half-brothers, uncles and the like, the separated full-brother, etc, takes equally with the reunited half-brother, etc. After the brother, the mother takes, then father, then the widow, then the sister, then the daughter, and after her the nearest *sapinda*.[12]

11 *Sarkar's Hindu Law*, seventh edn, p 587.
12 See *Ghose's Hindu Law*, third edn, pp 625–26.

V

FEMALE HEIRS

LAW PRIOR TO THE HINDU SUCCESSION ACT 1956

Note.—Reference may be made to the Note to Chapter III.

§ 61. FEMALE HEIRS: BENGAL SCHOOL

According to the Bengal school, the only females recognised as heirs in that school, to a male, are: (1) the widow; (2) the daughter; (3) the mother; (4) the father's mother; and (5) the father's father's mother.[1]

§ 61A. FEMALE HEIRS: MITAKSHARA SCHOOL

(1) Before the Hindu Law of Inheritance (Amendments) Act 1929, the only females recognised as heirs in the Benares[2] and Mithila schools were: (i) the widow; (ii) the daughter; (iii) the mother; (iv) the father's mother; and (v) the father's father's mother.[3]

Accordingly, it had been held in Lahore that a sister's son's daughter is not an heir.[4]

The Madras school[5] held that the brother's daughter, sister's daughter, brother's son's daughter, father's sister are also heirs in the Madras state (§ 56). The Bombay school has gone much further, and it includes in the list of female heirs not only the heirs recognised in the Benares, Mithila and Madras schools, but also widows of *gotraja sapindas* (§ 68). The recognition of widows of *gotraja sapindas* as heirs in Bombay has been

1 *Guru Gobind v Anand Lal* (1870) 5 Beng LR 15, 37, FB.
2 *Jagan Nath v Champa* (1906) 28 All 307; *Srimati Krishna v Bhaiya-Rajendra* (1927) 2 Luck 43, 104 IC 155, AIR 1927 Ori 240; *Jang Bir v Mst Jamna* (1931) 12 Lah 534, 135 IC 593, AIR 1932 Lah 37 (sister not an heir).
3 *Lallubhai v Cassibai* (1880) 5 Bom 110, 118, 7 IA 212, 231.
4 *Rameshwar v Mst Ganpati Devi* (1937) Lah 525, 166 IC 753, AIR 1936 Lah 652.
5 *Balamma v Pullayya* (1895) 18 Mad 168, 170.

accorded by the Privy Council on the ground of usage.[6] However, the widows of *bandhus* are not recognised as heirs anywhere; for instance, a sister's son's widow.[7]

(2) Under the Hindu Law of Inheritance (Amendment) Act 1929, which came into force on 21 February 1929, the son's daughter, the daughter's daughter, and the sister (§ 43, nos 13A to 13C) rank as heirs in all parts of India where Mitakshara law prevails. Before the Act, they ranked as heirs only in the Bombay (§ 56) and Madras (§ 56) states.

Before the Act, both the son's daughter and the daughter's daughter ranked as *bandhus* in Bombay and Madras. Under the Act, however, they both inherit as *gotraja sapindas* (§ 43), nos 13A and 13B. As regards the sister, she succeeded in Bombay immediately after the paternal grandmother, and in Madras, she succeeded as a *bandhu*. As regards her place in the order of inheritance in Bombay, the Act effects no change and she will succeed immediately after the paternal grandmother as she did before the Act (§ 65). In Madras, however, she will, since the Act, succeed immediately after the daughter's daughter's daughter (§ 43, nos 13A–13C).

§ 62. FEMALE HEIRS IN BENARES AND MITHILA

The only females recognised as heirs in the Benares and Mithila schools before the Hindu Law of Inheritance (Amendment) Act of 1929 were: (1) the widow; (2) the daughter; (3) the mother; (4) the father's mother; and (5) the father's father's mother. No other female was recognised as an heir.[8] Under the Act, the son's daughter, the daughter's daughter, and the sister also rank as heirs (§ 43, nos 13A, 13B and 13C).

§ 63. FEMALE HEIRS IN MADRAS

The Madras school recognises not only the widow, daughter, mother, father's mother, and father's father's mother as heirs, but also the females mentioned in § 56. This includes the son's daughter, daughter's daughter and sister, who are now expressly named as heirs in the Hindu Law of Inheritance (Amendment) Act 2 of 1929 (see § 61 A). The Madras school does not admit the widows of *gotraja sapindas* as heirs.[9]

6 (1880) 5 Bom 110, 7 IA 212, 237.

7 *Rameshwar v Mst Ganpati Devi* (1937) Lah 525, 166 IC 753, AIR 1936 Lah 652.

8 *Tirath Ram v Mst Kahan Devi* (1920) 1 Lah 588, 593–94, 60 IC 101, AIR 1921 Lah 149; *Mst Suja Devi v Jagiri Mal* (1920) 1 Lah 608, 59 IC 124, AIR 1920 Lah 514.

9 *Balamma v Pullaya* (1895) 18 Mad 168 (widow of great-grandson of great-grandfather of the deceased not an heir); *Kanakammal v Ananthamathi* (1914) 37 Mad 293, 25 IC 901, AIR 1915 Mad 18 (brother's widow not an heir).

§ 64. FEMALE HEIRS IN BOMBAY

The Bombay school recognises not only the widow daughter, mother, father's mother, and father's father's mother as heirs, but also the following females:

(1) Sister, whether of the whole or half-blood. The sister is considered a *sapinda* by virtue of her affinity to her brother. She is also considered a *gotraja sapinda* as having been born in her brother's *gotra* or family.[10] The sister is now expressly mentioned as an heir in the Hindu Law of Inheritance (Amendment) Act 2 of 1929 (§ 43 (13C)).

The Mayukha expressly names the sister as an heir. Mitakshara does not name the sister, but certain commentators of repute do so.[11]

The paternal uncle's daughter is not a *gotraja sapinda*,[12] but a *bandhu* (§ 56).

(2) Father's sister, whether of the whole or half-blood—see § 74.

(3) The widows of predeceased *gotraja sapindas*, that is, of *sapindas* and *samanodakas*,[13] but not widows of *bandhus* or *bhinna gotraja sapindas*.[14] Thus, the son, the father, the brother, the brother's son, the paternal uncle, the paternal uncle's son, are all *gotraja sapindas* of the deceased. Therefore, according to the Bombay decision, the son's widow,[15] the step-mother (father's widow),[16] the brother's widow,[17] the brother's son's widow,[18] the paternal uncle's widow,[19] and the widow of the paternal uncle's son,[20] are all *sagotra sapindas* and inherit necessarily before the *bandhus*. The above list is not exhaustive, but merely illustrative (see § 68). The widows of *gotraja sapindas* are recognised as heirs in the Bombay state only. They were not regarded as heirs elsewhere.[21]

10 See § 66. *Kesserbai v Valab* (1880) 4 Bom 188.

11 See above.

12 *Krishnabai v Keshav* (1920) 22 Bom LR 1162, 59 IC 511, AIR 1920 Bom 237.

13 *Lallubhai v Cassibai* (1980) 5 Bom 110, 7 IA 212; *Lakshmibai v Jayram* (1869) 6 Bom HC 152.

14 *Vallabhdas v Sakarbai* (1901) 25 Bom 281.

15 *Roopchand v Poollchand* (1824) 2 Bom 670.

16 (1880) 4 Bom 188, 208.

17 *Nahalchand v Hemchand* (1885) 9 Bom 31.

18 *Madhavram v Dave* (1897) 21 Bom 739.

19 *Rachava v Kalingapa* (1892) 16 Bom 716; *Raghunath Shanka v Laxmibai* (1935) 59 Bom 417, 37 Bom LR 150, 157 IC 658, AIR 1935 Bom 298.

20 (1880) 5 Bom 110, 7 IA 12.

21 *Ananda Bibee v Nownit Lal* (1883) 9 Cal 515, 317–22; *Blamma v Pullayya* (1895) 18 Mad 168; *Thayammal v Annamalai* (1896) 19 Mad 35; *Kanakammal v Ananthamathi* (1914) 37 Mad 293, 25 IC 901, AIR 1915 Mad 18; *Soshil Chand v Mangal Ram* AIR 1954 Punj 26, (1954) Punj 49.

Act XVIII of 1937 made the widow of a predeceased son and the widows predeceased son's predeceased son heirs throughout India except under the Dayabhaga school.

A *gotraja sapinda* is one born in the *gotra* or family of the deceased. The expression *'sagotra sapinda'* means of the same *gotra* and includes females that enter the *gotra* of the deceased by marriage.

(4) Female *bandhus* mentioned in § 56 above—These include the son's daughter and daughter's daughter, both of whom are expressly mentioned in the Hindu Law of Inheritance (Amendment) Act 2 of 1929. However, they inherit with *gotraja sapindas* (§ 43, nos. 13 A and 13B).

§ 65. SISTER'S PLACE AS AN HEIR IN THE BOMBAY STATE

(1) A sister is an heir in the Bombay state (§ 64 (1)), and she inherits immediately after the paternal grandmother both under the Mayukha and Mitakshara as interpreted in Bombay.[22] Her place in the order of succession is not affected by the Hindu Law of Inheritance (Amendment) Act 2 of 1929 (§ 43 (13C)), (also see § 72 (12) and § 77 (12)).

Both under the Mayukha and Mitakshara as interpreted in Bombay state, a sister does not take before a full-brother's son.[23] In cases governed by Mayukha, she takes even before a half-brother,[24] and the half-brother's son,[25] but not in cases governed by Mitakshara.[26]

The sister takes before a paternal uncle,[27] a paternal uncle's son,[28] a paternal uncle's son's son,[29] or a more remote paternal male relative.[30] She also takes before a son's widow,[31] a stepmother,[32] a brother's widow[33]

22 *West and Buhler's Digest, Bombay*, 4th edn, 109–10; *Venayeck v Luxumeebaee* (1864) 9 MIA 516 in appeal from 1 Bom HC 117 (a Mayukha case); *Lallubhai v Mankuvarbai* (1878) 2 Bom 388 421, 445–46; *Kesserbai v Valab* (1880) 4 Bom 188; *Vithaldas v Jeshubai* (1880) 4 Bom 219, 221; *Bhagwan v Wanubai* (1908) 32 Bom 300.

23 *Mulji v Cursandas* (1900) 24 Bom 563.

24 *Sakharam v Sitabai* (1879) 3 Bom 353.

25 (1908) 32 Bom 300; *Hari Annaji v Vasudev* (1914) 38 Bom 438, 441, 23 IC 944, AIR 1914 Bom 134.

26 See §§ 72 and 77. West and Buhler, 4th edn, 105–106; *Muyi v Corsandas* (1900) 24 Bom 563, 573, 579; *Hari Annaji v Vasudev* (1914) 38 Bom 438, 23 IC 944, AIR 1914 Bom 134.

27 *Trikam v Natha* (1912) 36 Bom 120, 12 IC 359 (half-sister in Mayukha).

28 (1864) 9 MIA 520; in appeal from 1 Bom HC 117.

29 *Biru v Khandu* (1880) 4 Bom 214.

30 *Dhondu v Gangabai* (1879) 3 Bom 369.

31 *Vithaldas v Jeshubai* (1880) 4 Bom 219, 221.

32 *Lakshmi v Dada* (1879) 4 Bom 210.

33 *Rudrapa v Irava* AIR 1904 28 Bom 82.

or paternal uncle's widow[34] all of whom are widows of *gotraja sapindas* (§ 68). She also succeeds in preference to a paternal step-grandmother.[35]

(2) Sisters take absolute estates in severalty, and not as joint tenants in Bombay.[36]

§ 66. HALF-SISTER AS AN HEIR IN THE BOMBAY STATE

A half-sister is an heir in the Bombay state and she inherits, in cases governed by Mitakshara, immediately after the full-sister[37] and in cases governed by Mayukha after the half-brother.[38] Her place in the order of succession is not affected by the Hindu Law of Inheritance (Amendment) Act 2 of 1929 (§ 43 (13C)).

A half-sister takes before a stepmother,[39] a paternal uncle,[40] or a paternal uncle's widow.[41]

§ 67. FATHER'S SISTER AS AN HEIR IN THE BOMBAY STATE

See § 74.

§ 68. WIDOWS OF *GOTRAJA SAPINDAS* AS HEIRS IN THE BOMBAY STATE

The succession of widows of *gotraja sapindas* (§ 64(3)) is governed by the under-mentioned rules:

(i) no widow of a *gotraja sapinda* can inherit until after 'the compact series of heirs' ending with the brother's sons,[42] nor until after the sister and half-sister;[43]

(ii) subject to the above rule and provided that there is no existing male *gotraja sapinda* within the six degrees of the line to which her husband belonged,[44] the widow of a *gotraja sapinda* stands in the same place as her husband, if living, would have occupied;

34 (1880) 4 Bom 188.
35 *Lingangowda v Tulsawa* (1915) 17 Bom LR 315, 28 IC 588, AIR 1915 Bom 48.
36 *Rindabai v Anacharya* (1891) 15 Bom 206.
37 *West and Buhler's Digest, Bombay,* 2nd edn, p 186; *Jana v Rakhma* (1919) 43 Bom 461, 52 IC 8, AIR 1919 Bom 12.
38 (1880) 4 Bom 188, 207–09.
39 See above.
40 (1912) 36 Bom 120, 12 IC 359.
41 (1880) 4 Bom 188.
42 *Nahalchand v Hemchand* (1885) 9 Bom 31, 34 (note).
43 *Vithaldas v Jeshubai* (1880) 4 Bom 219, 221. Note that the son's widow is the first in the series of widows of *gotraja sapindas*.
44 *Lallubhoi v Cassibai* (1880) 5 Bom 110, 7 IA 212, in appeal from 2 Bom 388; *Rachava*

continued on the next page

(iii) where the contest lies between the widow of a *gotraja sapinda* representing a nearer line and a male *gotraja sapinda* representing a remoter line, the former inherits by preference over the latter;[45]

(iv) widows of *gotraja sapindas* may succeed to the estate of a male or to that of a female. In the former case, they take a widow's estate; in the latter, an absolute estate (§§ 17(2), 17(2));

(v) a widow who has remarried is not entitled to inherit as a *gotraja sapinda* in the family of her first husband.[46] However, unchastity at the time when the succession opens is not a disqualification to inherit as a *gotraja sapinda*.[47]

The series of heirs beginning with the son and ending with the brother's son is called the compact series of heirs'. No widow of a *gotraja sapinda* can inherit before any of these heirs.[48] Nor can she inherit before the sister or half-sister.[49]

A son is in the nearest male *gotraja sapinda* of the deceased owner; therefore, the first in the series of widows of *gotraja sapindas* is the son's widow.[50] Then comes the grandson's widow, and then the great-grandson's widow.

The male next after the great-grandson is the daughter's son. However, he is not a *gotraja sapinda*, for he belongs to a different *gotra* or family. The next male is the father. The male *gotraja sapindas* of the deceased in his father's line are his: (1) brother; (2) brother's sons; (3) brother's son's son; (4) brother's son's son's son; (5) brother's son's son's son's son; and (6) brother's son's son's son's son's son. The father's line begin with the father and ends with the brother's son's son's son's son. The father being with the first in his line, the step-mother (father's widow) is the first in the series of widow of *gotraja sapindas* in the father's line, and she takes before the brother's widow who is the second in the said series. However, she is not entitled to inherit, if there exists any lineal descendant of the father as far as the sixth degree, that is, if there be a brother, a brother's son, a brother's son's son, a brother's son's son's son, a brother's son's son's son's son or a brother son's son's son's son's son (see cl (ii) of this section).

Suppose now that the contest is between a brother's widow and a paternal uncle. The husband of the brother's widow, that is, the brother,

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v Kalingapa (1892) 16 Bom 716, 720; *Kashibai v Moreshwar* (1911) 35 Bom 389, 11 IC 560; *Basangavda v Basangavda* (1915) 39 Bom 87, 127 IC 167, AIR 1914 Bom 202; *Ambaidas v Jijibhai* (1912) 14 Bom LR 261, 14 IC 979 (a Mayukha case).

45 (1892) 16 Bom 716, 718, (1915) 39 Bom 87, 27 IC 167, AIR 1914 Bom 202.

46 *Pranjivan v Bai Bhikhi* (1921) 45 Bom 1247, 63 IC 947, AIR 1921 Bom 57.

47 *Akoba Lasman v Sai Genu* (1941) Bom 438, 197 IC 157, AIR 1941 Bom 204.

48 (1885) 9 Bom 31, 34 (note).

49 (1880) 4 Bom 219, 221.

50 See above.

belongs to the father's line and the paternal uncle belongs to the father's father's line, that is, a remoter line. The brother's widow is therefore entitled to succeed before the paternal uncle (see cl (iii) of this section. Also, see the undermentioned case.)[51]

§ 69. WIDOWS OF *SAMANODAKAS* AS HEIRS IN THE BOMBAY STATE

The widows of predeceased *samanodakas* (§ 40) are held to be heirs in the Bombay state.[52]

§ 70. DAUGHTERS OF DESCENDANTS, ASCENDANTS AND COLLATERALS AS HEIRS IN THE BOMBAY STATE

The female descendants of the *propositus* and of his ancestors are *bandhus* in the Bombay state (§ 56).

51 *Lallubhoi v Cassibai* (1880) 7 IA 212, 237, 5 Bom 110, 124.
52 *Lakshmibai v Jayram* (1869) 6 Bom HCAC 152.

VI

ORDER OF SUCCESSION TO MALES IN THE BOMBAY STATE

LAW PRIOR TO THE HINDU SUCCESSION ACT 1956

Note.—Reference may be made to the Note to Chapter III.

§ 71. SUCCESSION IN THE BOMBAY STATE

The order of succession to males in the Bombay state is different from that in other parts of India where Mitakshara law prevails. The difference arises from the fact that the Bombay school recognises as heirs, certain females who are not recognised as heirs in other parts of India (§§ 64–70).

(2) In the Bombay state itself, there is a difference between the order of succession in cases governed by Mayukha (§ 12 (2)).

§ 72. ORDER OF SUCCESSION IN CASES GOVERNED BY MITAKSHARA

The following is the order of succession to males among *sapindas* in the Bombay state in cases governed by Mitakshara:

1–6 Son, son's son (whose father is dead) and son's son's son (whose father and grandfather are both dead). These inherit simultaneously. Under Act XVIII of 1947, the widow, the predeceased son's widow, and the widow of a predeceased son of a predeceased son, are also recognised as heirs (see § 43). See notes to § 43 nos 1–4.

7 Daughter
See § 43, no 5, notes (i), (iv)–(vii).

In the Bombay state, daughters do not take as joint tenants with benefits of survivorship, but they take as tenants-in-common. Further, a

daughter in that state does not take a limited estate in her father's property, but takes the property absolutely. Thus, if a Hindu governed by the Bombay school dies leaving two daughters, each daughter takes an absolute interest in a moiety of her father's estate, and holds it as her separate property, and on her death her share will pass to her own heirs as her *stridhana* (§ 170).[1]

8 Daughter's son.
See notes to § 43, no. 6.

9 Mother.
See notes to § 43, no. 7. As to a stepmother see no. 27.

10 Father

11 Brother:
(i) of the whole blood;
(ii) of the half-blood.

A brother of the full blood succeeds before a brother of the half-blood (see notes to § 43, no. 9; see also § 44).

12 Brother's son:[2]
(i) of the whole blood;
(ii) of the half-blood.

Sons of brothers of the whole blood succeed before sons of brothers of the half-blood (see notes to § 43, no. 10; see also § 44).

13 Grandmother (father's mother).
See note to no. 14.

14 Full sister.

Her place in the order of succession is not affected by the Hindu Law of Inheritance (Amendment) Act 2 of 1929 (§ 43(13C)), see §§ 64(1) and § 65).

15 Half-sister.

See § 43, no 13C and §§ 64(1) and 66.

The Three Remote Descendants of the Deceased

16 Great-great-grandson.

It is not settled whether nos 16, 17 and 18 succeed before or after no. 19. In *Appaji v Mohan Lal*,[3] the question was raised, but not decided.

17 Great-great-great-grandson.

1 *Bhagirthibai v Kahnujirav* (1887) 11 Bom 285; *Gulappu v Tayava* (1907) 31 Bom 453; *Vithappa v Savitri* (1910) 34 Bom 510, 7 IC 445.

2 *Nahalchand v Henchand* (1885) 9 Bom 31 (takes before brother's son's widow).

3 (1930) 54 Bom 564, 611, 127 IC 385, AIR 1930 Bom 273 (FB).

18 Great-great-great-great-grandson.

Widows of Four Male Lineal Descendants of the Deceased

19 Great-grandson's widow.
20 Great-great-grandson's widow.
21 Great-great-great-grandson's widow.[3]
22 Great-great-great-great-grandson's widow.

The Four Remote Descendants of the Brother

23 Brother's son's son.

He does not succeed before but succeeds after the son's widow (a) (no 17).

24 Brother's son's son's son.
25 Brother's son's son's son's son.
26 Brother's son's son's son's son.

Widows of Father, Brother and Brother's Descendants

27 Step-mother.[4]
28 Brother's widow.[5]
29 Brother's son's widow.[6]
30 Brother's son's son's widow.
31 Brother's son's son's son's widow.
32 Brother's son's son's son's son's widow.
33 Brother's son's son's son's son's son's widow.

Father's Father and His Six Descendants

34 Father's father.
34A Son's daughter.
34B Daughter's daughter.
34C Sister's son.

For 34, 34A, 34B and 34C, see § 43, nos. 13A, 13B and 13D.

35 Paternal uncle:
(i) of the whole blood;
(ii) of the half-blood.
36 Paternal uncle's son.

He takes before no 42.[7]

4 *Rakhmabia v Tukaram* (1887) 11 Bom 47 (takes before half brother's widow; *Rusoabai v Zoolekhabai* (1895) 19 Bom 707 (takes before the paternal uncle's son).
5 *Basangavda v Basangavda* (1915) 39 Bom 87, 27 IC 167, AIR 1914 Bom 202 (takes before the paternal uncle's sons).
6 *Madhavram v Dave* (1897) 21 Bom 739.
7 *Rachava v Kalingapa* (1892) 16 Bom 716.

37 Paternal uncle's sons's son.

He takes before no 42.[8]

38 Paternal uncle's son's son's son.
39 Paternal uncle's son's son's son's son.
40 Paternal uncle's son's son's son's son's son.

Widows of Father's Father and His Six Descendants

41 Father's stepmother.
42 Paternal uncle's widow.

She takes before father's sister.[9]

43 Paternal uncle's son's widow.
44 Paternal uncle's son's son's widow.
45 Paternal uncle's son's son's son's widow.
46 Paternal uncle's son's son's son's son's widow.
47 Paternal uncle's son's son's son's son's son's widow.

The Third Agnate Female and the Third Agnate Male Ancestor and the Latter's Six Descendants

48 Father's father's mother.
49 Father's father's father.
50 Father's paternal uncle.
51 Father's paternal uncle's son.
52 Father's paternal uncle's son's son.
53 Father's paternal uncle's son's son's son.
54 Father's paternal uncle's son's son's son's son.
55 Father's paternal uncle's son's son's son's son's son.

Widows of Father's Father's Father and His Six Descendants

56 Father's father's step-mother.
57 Father's paternal uncle's widow.
58 Father's paternal uncle's son's widow.
59 Father's paternal uncle's son's son's widow.
60 Father's paternal uncle's son's son's son's widow.
61 Father's paternal uncle's son's son's son's son's widow.
62 Father's paternal uncle's son's son's son's son's son's widow.

The Remaining Sapindas and Their Widows

63–70 The fourth agnate female and the fourth agnate male ancestor and the latter's six descendants, one after another.[10]

8 *Kashibai v Moreshwar* (1911) 35 Bom 389.
9 *Raghunath Shankar v Laxmibai* (1935) 59 Bom 417, 157 IC 658, 37 Bom LR 150, AIR 1935 Bom 298.
10 *Ambaidas v Jijibhai* (1912) 14 Bom LR 261, 14 IC 971.

71–77 Widows of *gotraja sapindas* nos 64 to 70, one after another.

§ 73. ORDER OF SUCCESSION AMONG *SAMANODAKAS*

Failing *sapindas* and their widows (§ 72), the inheritance goes to *samanodakas* according to the rules stated in § 45 above.

§ 74. ORDER OF SUCCESSION AMONG *BANDHUS*

Failing *samanodakas* the inheritance passes to *bandhus* according to the rules laid down in §§ 46 to 54 and 56 above. As regards the succession of *bandhus*, there is no difference between Mitakshara and Mayukha.[11]

Father's Sister

According to § 56, the father's sister should be a *bandhu*, but according to Mayukha, she is a *gotraja sapinda*; she comes in before *bandhus* but after all the *gotraja sapindas*,[12] for instance, a father's paternal uncle's son,[13] or the paternal uncle's widow.[14] It is not clear whether, under Mitakshara, as interpreted in Bombay, she is a *gotraja sapinda* or a *bandhu*. However, she is not more remote than a *bandhu*.[15]

In *Saguna v Sadashiv*,[16] it was held that the father's half-sister, though a female, being a *bandhu ex parte paterna* is entitled to preference over the mother's brother, who though a male, is a *bandhu ex parte materna*.

This leads us to the question as to what are the principles to be applied in a contest between a male *bandhu* and a female *bandhu*. In *Balkrishna v Ramkrishna*,[17] it was held that a mother's sister's son should be preferred to a brother's daughter. This decision is in direct conflict with the previous decision, which was not cited either in the arguments or in the judgment. In *Kenchava v Girimallappa*,[18] the Privy Council left the question open and held that the father's sister's son (a male *bandhu ex parte paterna*) is to be preferred to the father's brother's daughter (a female *bandhu* of the same degree).

In *Bai Vijli*'s case,[19] a mother's sister's son, who is an *atma bandhu*, was preferred to a father's father's sister's son's daughter who is a *pitri bandhu*.

11 *Parot Bapalal v Mehta Harilal* (1895) 19 Bom 631.
12 *Vijiarangam v Lakshuman* (1871) 8 Bom HCOC 244, 261, 263.
13 *Ganesh v Waghu* (1903) 27 Bom 610.
14 *Raghunath Shankar v Laxmi Bai* (1935) 59 Bom 417, 37 Bom LR 150, 157 IC 658, AIR 1935 Bom 298.
15 *Saguna v Sadashiv* (1902) 26 Bom 710.
16 See above
17 (1920) 45 Bom 353, 59 IC 771, AIR 1921 Bom 189.
18 (1924) 51 IA 368, 376–77, 48 Bom 569, 82 IC 966, AIR 1924 PC 209.
19 *Bai Vijli v Bai Probhalakshmi* (1907) 9 Bom LR 1129.

§ 75. STRANGERS AS HEIRS

See §§ 57 and 58.

§ 76. ESCHEAT

See § 59.

§ 77. ORDER OF SUCCESSION IN CASES GOVERNED BY MAYUKHA

The following is the order of succession to males in cases governed by Mayukha:[20]

1–6 Same as § 72.

7 Father.

8 Mother.

See notes to § 72, no. 7 and notes to § 43, no 7.

9 Full brothers along with sons of full brothers who are dead.

This rule does not go beyond brothers and brother's sons.[21] Hence, an uncle's son's son's son does not take equally with, but is postponed to, an uncle's son's son.[22] As to the place of the half-brother, see no. 13.[23]

10 Full brother's son.

With the brother's son ends 'the compact series of heirs'. In default of brother's sons, the inheritance passes to *gotraja sapindas*, the first amongst them being the paternal grandmother (no 11).[24]

11–12 Same as § 72.

13 Father's father and half-brother, in equal shares.[25]

This is obsolete.[26] It is highly probable that the High Court of Bombay will in cases governed by Mayukha adopt the same order of succession as that in cases governed by Mitakshara, at least after no. 12. The order of succession after no. 12 will probably be: (1) half-brother; (2) half-sister; and the (3) half-brother's son. The order of succession will thenceforth be the same as that in cases governed by Mitakshara as interpreted in Bombay, that is, as in §§ 72–76. As to the father's sister, see § 74.

20 *Mayukha*, Ch IV, s 8.

21 *Chandrika Baksh v Muna Kunwar* (1902) 29 IA 70, 74, 24 All 273, 280. Reference may also be made to *Bai Nani v Manilal* (1978) 19 Guj LR 4 (case law discussed).

22 *Haribhai v Mathur* (1923) 47 Bom 940, 77 IC 224, AIR 1924 Bom 140.

23 *Mayukha*, Ch IV, s 8, v 20.

24 *Mayukha*, Ch IV, s 8, v 8.

25 *Vithalrao v Ramrao* (1900) 24 Bom 317, 338.

26 *Sakharam v Sitabai* (1879) 3 Bom 353; *Kesserbai v Valab* (1880) 4 Bom 188, 207–08.

VII

ORDER OF INHERITANCE TO MALES ACCORDING TO DAYABHAGA OR BENGAL SCHOOL

LAW PRIOR TO THE HINDU SUCCESSION ACT 1956

Note.—Reference may be made to the Note to Chapter III.

§ 78. HERITABLE PROPERTY

The property of a deceased Hindu governed by Dayabhaga law passes by succession, including his share in undivided property.[1]

Dayabhaga of Jimutavahana is the leading treatise of the Bengal school (see 'Introduction'). The present chapter deals with the order of succession according to Dayabhaga.

According to Mitakshara law, the interest of a deceased coparcener passes on his death to other members of the coparcenery by survivorship. Dayabhaga law does not recognise the right of survivorship as between coparceners.

§ 79. SPIRITUAL BENEFIT THE GOVERNING DOCTRINE

Succession according to the Bengal school is governed by the capacity for conferring spiritual benefit.[2] Spiritual benefit, however, is not always the guiding principle of inheritance, and in cases not contemplated by

1 *Durga Nath v Chintamoni* (1904) 31 Cal 214.

2 *Guru Gobind v Anand Lal* (1870) 5 Beng LR 15 (FB); *Tagore v Tagore* (1872) 9 Beng LR 377, 394, 47 IA Sup 64; *Digumber v Moti Lal* (1883) 9 Cal 563 (FB). Also see *Akshay Chandra v Hari Das* (1908) 35 Cal 721, 726 (Vaishnavas); *Toolsee Dass v Luckhymoney* (1900) 4 CWN 743; *Shambo Chandra v Kartick Chunder* (1927) 54 Cal 171, 174, 97 IC 845, AIR 1927 Cal 11; *Nalinaksha v Rajanikant* (1931) 58 Cal 1392, 134 IC 1272, AIR 1931 Cal 741.

Dayabhaga, the doctrine of propinquity as propounded in Mitakshara may be applied.

It may be observed that in most cases, spiritual efficacy and propinquity run on the same lines. The result is that the same persons who are heirs under Dayabhaga law are also heirs under Mitakshara law. However, all persons who are heirs under Mitakshara law are not heirs under Dayabhaga law. Dayabhaga excludes many cognates recognised as heirs by Mitakshara. Cognates are persons related to the deceased through a female.

§ 80. DOCTRINE OF SPIRITUAL BENEFIT

The foundation of the doctrine of spiritual benefit is the *parvana sradha* ceremony.

In the course of the ceremony, the performer presents three different kinds of offerings to his deceased ancestors, namely: (1) *pinda* or an entire cake, called and undivided oblation; (2) *pinda-lepas* or remnants of the *pinda* which cling to the hand while mixing the ingredients of which the *pindas* are composed, called divided oblation; and (3) libations of water.

The *pinda* is offered to the three immediate paternal ancestors, that is, the father, the grandfather and the great-grandfather, and the three immediate maternal ancestors, that is, the maternal grandfather, the maternal great-grandfather and the maternal great-great-grandfather. The *pinda-lepas* are offered to the three paternal ancestors next above those to whom the *pinda* is offered. The libations of water are offered to the seven paternal ancestors next above those to whom *pinda-lepas* are offered. He who offers a *pinda* and he to whom a *pinda* is offered are the *sapindas* of each other. He who offers *pinda-lepas* and he to whom they are offered are the *sakulyas* of each other. He who offers libations of water and he to whom they are offered are the *samanodakas* of each other.

However, this does not exhaust the list of *sapindas*, *sakulyas* and *samanodakas*. For a deceased Hindu does not merely benefit by oblations, which are offered to him; he also participates in the benefit of oblations offered to the paternal ancestors to whom he himself was bound to offer while he was alive.[3] The result is that persons connected by oblations presented to common ancestors become the *sapindas*, *sakulyas* and *samanodakas* of one another according to the nature of the oblation presented to them. This accounts for a large number of other relations who are recognised as *sapindas*, *sakulyas* and *samanodakas*, reference may also be made to *Dr Sarvodhikari's Principles of Hindu Law*.[4]

3 *Guru Gobind v Anand Lal* (1870) 5 Beng LR 15, 37 (FB).

4 *Dr Sarvodhikari's Principles of Hindu Law*, 2nd edn, pp 701, 705.

§ 81. THREE CLASSES OF HEIRS

The three kinds of offerings referred to in the preceding section give rise to three classes of heirs according to Dayabhaga law, namely: (1) *sapindas*; (2) *sakulyas*; and (3) *samanodakas*.

The *sapindas* succeed before the *sakulyas*, and the *sakulyas* succeed before the *samanodakas*.[5]

§ 82. *SAPINDAS*

A Hindu governed by Dayabhaga law is the *sapinda*:

(1) of those to whom he is bound to offer a *pinda* while he is alive;

In this group are included his three immediate paternal ancestors, being his father, grandfather and the great-grandfather, and his three immediate maternal ancestors, being his maternal grandfather, maternal great-grandfather, and maternal great-great-grandfather—altogether six relations.

(2) of those who, on his death, are bound to offer a *pinda* to him;

In this group are included those persons to whom he stands in the relation of father, grandfather and great-grandfather, namely, his son, grandson and great- grandson, and those persons to whom he stands in the relation of maternal grandfather, maternal great-grandfather and maternal great-great-grandfather, namely, his daughter's son, son's daughter's son and grandson's son—altogether six relations.

(3) of those who are bound to offer a *pinda* to the ancestors to whom he is bound to offer a *pinda*, those ancestors being his three immediate paternal ancestors and his three immediate maternal ancestors; and all of them are his *sapindas*.[6]

The third set of *sapindas* may be divided into four groups as follows:

Firstly, the brother,[7] brother's son, brother's son's son, paternal uncle, paternal uncle's son, paternal uncle's grandson, paternal granduncle, paternal granduncle's son and paternal granduncle's grandson—altogether nine relations.

The brother is bound to offer three *pindas*, one to each of the three paternal ancestors of the deceased, they being also his paternal ancestors. The brother's son is bound to offer two *pindas*, one to his grandfather, that is, the owner's father, and the other to his great-grandfather, that is,

5 *Guru Gobind v Anand Lal* (1870) 5 Beng LR 15, 38 (FB); *Digumber Roy v Moti Lall* (1883) 9 Cal 563, FB.

6 *Guru Gobind v Anand Lal* supra; *Aswin Kumar v Fulkumari* 77 Cal WN 153.

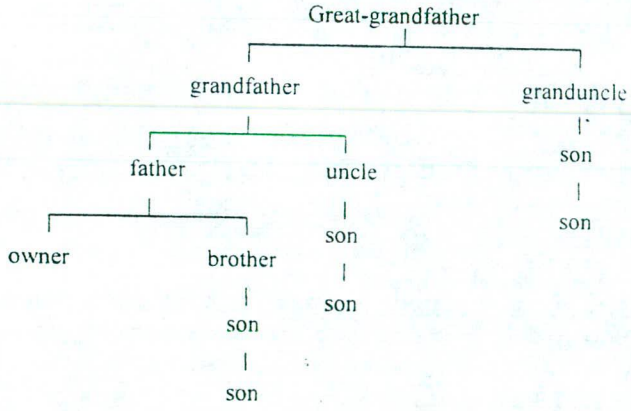
7 For instance, *Moolchand v Renuka Devi* AIR 1973 Raj 63.

the owner's grandfather. The uncle and uncle's son are bound each to offer two *pindas*, one to each of the paternal ancestors of the deceased, namely, his grandfather and great-grandfather, who are also their grandfather and great-grandfather. The remaining five relations are bound each to offer one *pinda*, the brother's son's son to the owner's father, the uncle's son's son to the owner's grandfather, and the granduncle, his son and grandson each one *pinda* to the owner's great-grandfather. This is a case whether some or all of the three paternal ancestors of the deceased are also the paternal ancestors of the nine relations mentioned above as will be seen from Table VII.1.

Secondly, sister's son, father's sister's son's grandfather's sister's son, brother's daughter's son, brother's son's daughter's son, paternal uncle's daughter's son, paternal grand-uncle's daughter's son, paternal uncle's son's daughter's son, paternal grand-uncle's son's daughter's son—altogether nine relations.

Note.—The sister's son offers three *pindas*, one to each of the three paternal ancestors of the deceased, they being his own maternal ancestors. The father's sister's son and the paternal uncle's daughter's son offer each two *pindas*, one to each of the two paternal ancestors of the deceased, namely, his grandfather and great-grandfather, they being their maternal ancestors. The brother's daughter's son offers two *pindas*, one to the father and the other to the grandfather of the deceased, they being his maternal ancestors.

Table VII.1



The remaining five relations each offer one *pinda* to one or other of the three paternal ancestors of the deceased, that ancestor being their maternal ancestor. This is the case where some or all of the paternal

ancestors of the deceased are the maternal ancestors of the nine relations mentioned above. These are *bandhus ex parte paterna* of Mitakshara school.

Thirdly, the maternal uncle, maternal uncle's son, maternal uncle's grandson, maternal grand-uncle, maternal grand-uncle's son, maternal grand-uncle's grandson, maternal great-grand-uncle, maternal great-grand-uncle's son, maternal great-grand-uncle's grandson—altogether nine relations.

Note.—The maternal uncle offers three *pindas*, one to each of the three maternal ancestors of the deceased, they being his own paternal ancestors. The maternal uncle's son, the maternal granduncle, and the maternal granduncle's son, each offer two *pindas* to two out of the three maternal ancestors of the deceased, these ancestors being their paternal ancestors. The remaining five relations each offer one *pinda* to one or other of the three maternal ancestors of the deceased, that ancestor being their paternal ancestor. This is a case where some or all of the maternal ancestors of the deceased are the paternal ancestors of the nine relations mentioned above. These are *bandhus ex parte materna* of Mitakshara school.

Fourthly, maternal aunt's son, maternal grandaunt's son and maternal great-grandaunt's son, maternal uncle's daughter's son, maternal uncle's sons daughter's son, maternal granduncle's daughter's son, maternal granduncle's son's daughter' son; maternal great-granduncle's daughter's son, maternal great-granduncle's son's daughter's son—altogether nine relations.

Note.—The maternal aunt's son offers three *pindas*, one to each of the three maternal ancestors of the deceased, they being also his maternal ancestors. The maternal grandaunt's son, the maternal uncle's daughter's son, and the maternal granduncle's daughter's son each offer two *pindas* to two out of the three maternal ancestors of the deceased, these ancestors being also their maternal ancestors. The remaining five relations each offer one *pinda* to one or other of the three maternal ancestors of the deceased, that ancestor being also their maternal ancestor. This is a case where some or all of the three maternal ancestors of the deceased are also the maternal ancestors of the nine relations mentioned above. These relations also are *bandhus ex parte materna* of Mitakshara school.

It will thus be seen that there are in all 48 male *sapindas*. To these, are to be added the five female *sapindas* mentioned in the next section. The total number of *sapindas* is thus, 53.

Since *sapindas* succeed before *sakulyas*, and since the *sapindas* enumerated above comprise also of several relations called *bandhus* in Mitakshara, it is clear that *bandhus* also succeed before *sakulyas*. According to Mitakshara law, *bandhus* do not succeed until after the *samanodakas*. This is the main point of distinction between succession according to

Dayabhaga law and succession according to Mitakshara law. In other respects, it will be found that the order of succession according to Dayabhaga law, though arrived at by the application of rules based upon the doctrine of spiritual benefit, is more or less the same as in Mitakshara law (see § 95).

§ 83. FEMALE *SAPINDAS*

There are five female *sapindas* according to Dayabhaga law, namely the widow, the daughter, the mother, the father's mother and the father's father's mother. No other female is recognised as an heir by the Bengal school.

The stepmother is not an heir. Nor is a paternal stepgrandmother.[8] There are no female heirs in the class either of *sakulyas* or *samanodakas*.

The wife is the *sapinda* of her husband for in the absence of male issue, she performs the funeral obsequies. The mother, the father's mother, and father's father's mother are *sapindas*, for they share in the *pindas* or cakes offered to their respective husbands. The daughter is a *sapinda*, for though she herself does not offer any *pinda*, her son does so (see § 61).

§ 84. *SAKULYAS*

A Hindu governed by Dayabhaga law is the *sakulya*: (1) of those to whom he is bound to offer *pinda-lepa* while he is alive; (2) of those who on his death are bound to offer *pinda-lepa* to him; and (3) of those who are bound to offer *pinda-lepa* to those whom he offers the *pinda-lepa*, and all of them are his *sakulyas*.

The *sakulyas* are all males. They are:

(1) First, the fourth, fifth and sixth paternal male ancestors of the owner, being F_4, F_5 and F_6, in the Table IV.1.

(2) Secondly, his fourth, fifth and sixth male descendants in the male line, that is S_4, S_5 and S_6 in the said Table IV.1; and

(3) Thirdly, the six male descendants in the male line of the fourth, fifth and sixth paternal male ancestors, and the fourth, fifth and sixth male descendants in the male line of his father, grandfather, and great-grandfather, that is x_1 to x_3 in the line of F_4, F_5 and F_6 and x_4 to x_6 in the lines F_7 to F_8, in all 27 relations.

The total number of *sakulyas* is thus 3 + 3 + 27 = 33.

Mitakshara does not recognise *sakulyas* as a distinct class; they are merged in the group of *gotraja sapindas*.

8 *Bimal Chandra v Mahadeb* AIR 1957 Cal 684.

The *sakulyas* are all agnates, that is, persons connected with the deceased by an unbroken line of male descent. None of them is a cognate, that is, a person related to the deceased through a female. However, some of the *sapindas* of the Bengal school, as we have seen, are agnates while some are cognates. The *samanodakas* also, as we shall presently see, are all agnates.

According to Dr Sarvadhikari,[9] the following nine cognate relations are also *sakulyas*, namely:

1–3 The daughter's son of F_4, his son and his son's son;
4–6 The daughter's son of F_5, his son and his son's son;
7–9 The daughter's son of F_6, his son, and son's son.

§ 85. *SAMANODAKAS*

A Hindu governed by Dayabhaga law is the *samanodakas*: (1) of those to whom he is bound to offer libations of water; (2) of those who on his death are bound to offer libations of water to him; and (3) of those who are bound to offer libations of water to those whom he offer the libations; and all of them are his *samanodakas*.

The *samanodakas* like *sakulyas* are all males. They include all agnatic relations from the eighth to the fourteenth degree, and are 147 in number (see notes to § 40, '*Samanodakas*').

§ 86. PRINCIPLES GOVERNING PRECEDENCE AMONG *SAPINDAS*

The order of succession among *sapindas* is governed by the following principles:

(1) Those who offer a *pinda* to the deceased are preferred to those who accept it from the deceased.

Thus the son, the grandson and the great-grandson offer oblations to the deceased, and the father, the grandfather and the great-grandfather receive oblations from the deceased; therefore, the son, the grandson, and the great-grandson succeed before the father, the grandfather, etc. The son, the grandson and the great-grandson, all inherit as one heir, for the oblations offered by them are of equal spiritual value.

(2) Those who offer oblations to both paternal and maternal ancestors are preferred to those who offer oblations only to the paternal ancestors.

Therefore, relations of the whole blood are preferred to those of the half-blood. A full-brother offers oblations both to the paternal and maternal

9 *Dr Sarvadhikari's Principles of Hindu Law*, second edn. p 718.

ancestors of the deceased, they being his own paternal and maternal ancestors. However, a half-brother offers oblations only to the paternal ancestors of the deceased, and not to the maternal ancestors of the deceased, his mother and the deceased's mother being different persons.

(3) Those who offer a *pinda* to the paternal ancestors of the deceased are preferred to those who offer it to his maternal ancestors.

(4) Those who offer a larger number of cakes of a particular description are preferred to those who offer a less number of cakes of the same description; and where the number of such cakes is equal, those who offer them to nearer ancestors are preferred to those who offer them to more distant ancestors.[10]

It is important to note that a person who offers one oblation to the father of the deceased owner is preferred to another who offers two oblations to the grandfather and the great-grandfather. Hence, the grandnephew ranks before the paternal uncle.[11]

§ 87. PRINCIPLES GOVERNING PRECEDENCE AMONG *SAKULYAS* AND *SAMANODAKAS*

The order of succession among *sakulyas* and *samanodakas* is governed by principles similar to those which apply to *sapindas*.[12]

§ 88. ORDER OF SUCCESSION AMONG *SAPINDAS*

The *sapindas* of the Bengal school are divided into two classes, namely: (1) *sapindas ex parte paterna*; and (2) *sapindas ex parte materna*. Numbers 1 to 32, except the five females, namely, nos 4, 5, 8, 14 and 20, are *sapindas ex parte materna*. Numbers 33 to 53 are *sapinda ex parte materna*. *Sapindas ex parte paterna* do not succeed until after *sapindas ex parte paterna*. The five females nos 4, 5, 8, 14 and 20 succeed by virtue of special texts.

The *sapindas* succeed in the following order:

1–3 Son, grandson and great-grandson.[13] Illegitimate son of a Sudra by a Brahmin concubine.[14]

4 Widow.[15]

10 *Guru Gobind v Anand Lal* (1870) 5 Beng LR 15 (FB); *Gobind v Mahesh* (1874) 15 Beng LR 35; *Pran Nath v Surrut Chundra* (1882) 8 Cal 460; *Hurl Das v Bama Churn* (1888) 15 Cal 780; *Braja Lal v Jiban* (1899) 26 Cal 285.

11 (1882) 8 Cal 460.

12 (1870) 5 Beng LR 15, 39 (FB).

13 *Makhan Lall v Susbama Rani* AIR 1953 Cal 164, 57 CWN 81; *Chota Nagpur Banking Association v Ramapati* AIR 1964 Pat 321.

14 *Mongal Chandra v Dhirendra Nath* AIR 1976 Cal 129.

15 *Durga Nath v Chintamoni* (1904) 31 Cal 214.

See notes to § 43. Also see Hindu Women's Right to Property Act 1937.

5 Daughter.[16]

Priority Amongst Daughters

The unmarried daughter succeeds first; then the married daughter who has or is likely to have a male issue.

Daughters who are barren or are widows without male issue; or are mothers of daughters only are excluded from inheritance,[17] though their re-marriage is permitted in the castes to which they belong and though they may be of childbearing age.[18] Thus, it has been held that a married daughter having a son,[19] and even a daughter's son[20] exclude a childless widowed daughter. However, where, during the lifetime of the father, the son-in-law was willing and competent to adopt and has actually adopted after the father's death, the daughter is entitled to inherit.[21]

Unchastity

An unchaste daughter in Bengal is not entitled to inherit to her father. However, once the estate has vested in her, it cannot be divested by subsequent unchastity.[22] As to other matters, see notes to § 43, 'Daughter'.

6 Daughter's son.

The daughter's son's son is not an heir under Dayabhaga School of Hindu law.[23] The reason given in Dayabhaga is that he is not the giver of a funeral oblation; the oblation ceases with the daughter's son.[24]

7 Father.

8 Mother

An unchaste mother in Bengal is not entitled to inherit to her son. However, once the estate has vested in her, it cannot be divested by subsequent unchastity.[25]

9 Brother:

(i) of the whole blood;

(ii) of the half-blood.

16 *Sankar Dome v Kalidasi Dasi* AIR 1970 Cal 461.

17 *Denode v Purdhan* (1865) 2 WRCR 176; *Radha v Rajab Ram* (1866) 6 WR 147; *Sheodutta v Akali Bhumijani* AIR 1953 Pat 374.

18 *Binodini v Sustbee* (1921) 48 Cal 300, 57 IC 740, AIR 1921 Cal 295; *Srimati Pramila v Chandra Shekhar* (1921) 43 All 450, 60 IC 777, AIR 1921 All 122.

19 48 Cal 300, 57 IC 740, AIR 1921 Cal 295.

20 43 All 450, 60 IC 777, AIR 1921 All 122.

21 *Umakanta Bhattacharjee v Bedbati Debi* (1942) 1 Cal 299, AIR 1942 Cal 265.

22 *Ranananda v Rajkishori* (1895) 22 Cal 347; *Sundari v Pitambari* (1905) 32 Cal 871.

23 *Nepaldas v Probbas Chandra* (1925) 30 CWN 35, 90 IC 499, AIR 1926 Cal 460.

24 Dayabhaga, XI, 2, 2. See notes to § 43, 'Daughter's Son'.

25 *Ramnath v Durga* (1879) 4 Cal 550.

10 Brother's son:
   (i) of the whole blood;
   (ii) of the half-blood.
11 Brother's son's son:
   (i) of the whole blood;
   (ii) of the half-blood.
12 Sister's son.[26]
13 Paternal grandfather.
14 Paternal grandmother.
15 Paternal uncle.
16 Paternal uncle's son.
17 Paternal uncle's son's son.
18 Father's sister's son.
19 Paternal great-grandfather.
20 Paternal great-grandmother.
21 Paternal granduncle.
22 Paternal granduncle's son.
23 Paternal granduncle's son's son.
24 Father's father's sister's son.

Then come, consistently with the opinion expressed in the undermentioned cases[27] the following eight cognate relations, namely:

25 Son's daughter's son.
26 Son's son's daughter's son.
27 Brother's daughter's son.[28]
28 Brother's son's daughter's son.[29]
29 Paternal uncle's daughter's son.[30]
30 Paternal uncle's son's daughter's son.
31 Paternal granduncle's daughter's son.
32 Paternal granduncle's son's daughter's son.

Dr Sarvadhikari[31] places nos 25 and 26 immediately after nos 6 and 27 and no 28 immediately after nos 12 and 29 and no 30 immediately after no 18, and nos. 31 and 32 immediately after no 24.

Next comes the maternal relations of the deceased.

33 Maternal grandfather.

26 A sister's stepson is not an heir as there is no blood relationship—*Lalit Mohan v Province of West Bengal* (1955) 60 Cal WN 359.

27 *Gobind Prosad v Mohesh Chunder* (1875) 15 Beng LR 35; *Hari Das v Bama Churn* (1888) 15 Cal 780, 789–94; *Pran Nath v Surut Chundra* (1882) 8 Cal 460, 463–64.

28 *Digumber v Moti Lal* (1883) 9 Cal 563 (FB).

29 (1882) 8 Cal 460.

30 *Guru Gobind v Anand Lal* (1870) 5 Beng LR 15 (FB); *Braja Lal v Jiban* (1899) 26 Cal 285.

31 *Dr Sarvadhikari's Principles of Hindu Law*, second edn, p 709.

34 Maternal uncle.[32]
35 Maternal uncle's son.[33]
36 Maternal uncle's son's son.
37 Mother's sister's son.
38 Maternal great-grandfather.
39 Maternal great-grandfather's son.
40 Maternal great-grandfather's grandson.
41 Maternal great-grandfather's great- grandson.
42 Maternal great-grandfather's daughter's son.
43 Maternal great-great-grandfather.
44 Maternal great-great-grandfather's son.
45 Maternal great-great-grandfather's grandson.
46 Maternal great-great-grandfather's great-grandson.
47 Maternal great-great-grandfather's daughter's son.

The maternal great-great-grandfather's daughter's son's son is not an heir under Dayabhaga law.[34] He is an heir under Mitakshara law: (see § 54, no 94)

48–49 Son's daughter's son and son's son's daughter's son of the maternal grandfather.
50–51 Son's daughter's son and son's son's daughter's son of the maternal great-grandfather.
52–53 Son's daughter's son and son's son's daughter's son of the maternal great-great-grandfather.

Dr Sarvadhikari[35] places nos 48 and 49 immediately after no 37, nos 50 and 51 immediately after no 42 and nos 52 and 53 immediately after no 47.

Note that nos 12, 18, 24, 25–32, and 33–53 are *bandhus* according to Mitakshara school, and they do not succeed until after the *samanodakas* of that school.

§ 89. ORDER OF SUCCESSION AMONG *SAKULYAS*

Failing all *sapindas*, the inheritance according to Dayabhaga system passes to *sakulyas*, according to the order to be deduced from the rules laid down in § 86.

§ 90. ORDER OF SUCCESSION AMONG *SAMANODAKAS*

Failing all *sapindas* and *sakulyas*, the inheritance passes to *samanodakas*, according to the order to be deduced from the rules in § 86.

32 *Padmakumari v Court of Wards* (1882) 8 Cal 302, 8 IA 229.
33 *Rani Srimuty Dibeab v Koond Lata* (1847) 4 MIA 292.
34 *Shambo Chandra v Kartick Chunder* (1927) 54 Cal 171, 97 IC 11.
35 *Dr Sarvadhikari's Principles of Hindu Law*, 2nd edn, p 710.

§ 91. PRECEPTOR, DISCIPLE AND FELLOW-STUDENT

On failure of all the heirs of the deceased, his preceptor, pupil and fellow student are in their order entitled to take the estate. If there is none of these, the inheritance passes, according to Dayabhaga, to person bearing the same *gotra* or family name (see § 57 and notes thereto).

As to succession to hermits and members of a religious order, see § 58 above and Dayabhaga, Ch 11, s 6, paras 35–36. The Indian Succession Act 1956 does not touch this class.

§ 92. ESCHEAT

On failure of all these heirs, the government takes by escheat[36] (see § 59).

§ 93. FEMALE HEIRS: BENGAL SCHOOL

The only females recognised as heirs in the Bengal school are: (1) widow; (2) daughter; (3) mother; (4) father's mother; and (5) father's father's mother.[37]

Succession After Reunion

§ 94. ORDER OF SUCCESSION AMONG REUNITED MEMBERS

It would seem that according to Dayabhaga, the order of succession to the estate of a reunited member is the same as that of the estate of an undivided member, with this exception that as between claimants of equal degree, one who is reunited is to be preferred to one who is not reunited, so that a reunited brother would be preferred to a brother who was not reunited, and a reunited uncle would be preferred to an uncle who was not reunited. The preference arising from reunion is not confined to the reunited members themselves, but extends also to their descendants, so that even the son of a reunited brother would be preferred to the son of a separate brother.[38]

The only persons who can reunite according to the Bengal school are: (1) the father and son; (2) brothers; (3) uncle and nephew.

36 *Collector of Masulipatam v Cavaly Vincata* (1860) 8 MIA 500.
37 *Guru Gobind v Anand Lal* (1870) 5 Beng LR 15, 36–37 (FB).
38 *Akshay v Hari* (1908) 35 Cal 721; *Abhai Churn v Mangal Jana* (1892) 19 Cal 634.

VIII

POINTS OF DIFFERENCE BETWEEN MITAKSHARA AND DAYABHAGA SUCCESSION

LAW PRIOR TO THE HINDU SUCCESSION ACT 1956

Note.—Reference may be made to the Note to Chapter III.

§ 95. POINTS OF DISTINCTION BETWEEN THE MITAKSHARA AND THE DAYABHAGA SYSTEMS OF INHERITANCE

The following are the main points of distinction between Mitakshara and Dayabhaga systems of inheritance:

(1) the Bengal school divides heirs into three classes, namely: (1) *sapindas*; (2) *sakulyas*; and (3) *samanodakas*. The *sapindas* of the Bengal school are the *sapindas* of Mitakshara school within four degrees only, plus *bandhus* of Mitakshara school, but not all the *bandhus*. The *sakulyas* of the Bengal school are the *sapindas* of Mitakshara school from the fifth to the seventh degree. The *samanodakas* of the Bengal school are the same as those of Mitakshara school, that is, agnatic relations from the eighth to the fourteenth degree;

(2) generally speaking, under Dayabhaga law, no *bandhu* or cognate can inherit while there is any *gotraja sapinda* or *samanodaka* in existence. Under Dayabhaga law, cognates come in with the agnates, and they inherit before *sakulyas* and *samanodakas*;

(3) cognatic heirs under Mitakshara law are limited in number compared with those under Dayabhaga law. Every person, who is a cognatic heir under Dayabhaga law, is also a cognatic heir under Mitakshara law, but there are some relations who are

cognatic heirs under Mitakshara law, but are not recognised as such under Dayabhaga law. The doctrine of spiritual efficacy, which is the governing principles of succession under Dayabhaga law, accounts for the exclusion of the latter;

(4) '*sapinda*' according to Mitakshara, means a person connected through the same *pinda* or body; according to Dayabhaga, it means a person connected through the same *pinda* or funeral cake presented to the manes of ancestors at the *parvana sraddha* ceremony (see § 80).

IX
EXCLUSION FROM INHERITANCE AND PARTITION



LAW PRIOR TO THE HINDU SUCCESSION ACT 1956

Note.—Reference may be made to the Note to Chapter III.

§ 96. UNCHASTITY

A widow who is unchaste at the time of her husband's death is not entitled to inherit his estate, but once the husband's estate has vested in her, which could only be if she was chaste at the time of her husband's death, it cannot be divested by her subsequent unchastity.[1]

Where the widow of a joint owner is given a widow's estate on her husband's death under a family arrangement, such an estate is not divested by her subsequent unchastity in the absence of any provision to that effect.[2] Reference may also be made to the Hindu Women's Rights to Property Act 1937, and the Note to Chapter III.

There is a difference of opinion between Mitakshara and Dayabhaga schools as to whether the unchastity of any other female heir excludes her from inheritance. According to Mitakshara law, the only female liable to exclusion from inheritance by reasons of unchastity is the widow.[3]

1 ***Moniram v Keri Kolitani*** (1880) 5 Cal 776, 7 IA 115; ***Sellam v Chinnammal*** (1901) 24 Mad 441; ***Gangadhar v Yellu*** (1912) 36 Bom 138, 12 IC 714; ***Jadbo Nagu Bai v Jadbo Gangu Bai*** AIR 1958 AP 19.

2 ***Lakhmi Chand v Anandi*** (1935) 62 IC 250, 57 All 672, 37 Bom LR 849, 157 IC 869, AIR 1935 PC 180.

3 See § 43, 'widow', and Note 2. ***Advapa v Rudrava*** (1880) 4 Bom 104; ***Tara v Krishna*** (1907) 31 Bom 495, 510; ***Kottyadu v Lakshmi*** (1882) 5 Mad 149; ***Vedammal v Vedanayaga*** (1908) 31 Bom 100; ***Dal Singh v Dini*** (1910) 32 All 155, 5 IC 520; ***Baldeo v Mathura*** (1911) 33 All 702, 11 IC 43 (mother); ***Ram Pergash v Mussammat Daban Bibi*** (1924) 3 Pat 152, 78 IC 749, AIR 1924 Pat 420 (daughter).

According to Dayabhaga law, the condition of chastity applies not only to the widow, but also to other female heirs, such as daughter and mother, to the same extent as it does to a widow (§ 88).[4]

Unchastity excludes a female from inheriting to a male, but not to a female. It is, therefore, not a bar to inheriting *stridhana*, even according to Dayabhaga law.[5]

§ 97. CHANGE OF RELIGION AND LOSS OF CASTE

Change of religion and loss of caste which at one time were grounds of forfeiture of property and of exclusion from inheritance ceased to be so after the passing of the Caste Disabilities Removal Act 1850.[6]

The Act applies only to protect the actual person who either renounces his religion, or has been excluded from the communion of any religion or has been deprived of caste. Consequently, where the property of a Mohammedan converted from Hinduism has passed according to Mohammedan law to his descendants, Hindu collaterals cannot claim by virtue of the Act to succeed under Hindu law.[7]

Once a person has changed his religion and his personal law, that law will govern the rights of succession in his children.[8]

Illustrations

(a) *A* and his son *B* are members of a joint Hindu family. *A* becomes a convert to Mohammedanism. *A*, does not by his conversion, forfeit his interest in the joint family property. The only effect of the conversion is that it operates as a separation of the family, and one-half of the property vests immediately in *A*, and the other half in *B*.[9]

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4 *Ramchandra v Rajkishori* (1895) 22 Cal 347 (daughter); *Sundari v Litambari* (1905) 32 Cal 871 (daughter); *Ramnath v Durga* (1879) 4 Cal 550 (mother). In *Charu Priya v Roma Kanta* AIR 1964 Assam 106, the Assam High Court has held that even according to Dayabhaga school, the condition of chastity applies only to the widow and not to any other female. This view is contrary to the view taken by the Calcutta High Court in the above-mentioned cases.

5 *Nagendra v Benoy* (1903) 30 Cal 521; *Angammal v Venkata* (1903) 26 Mad 509.

6 *Khunni Lal v Gobind* (1911) 33 All 356, 38 IA 87, 10 IC 477 reversing SC in 29 All 487, (1924) 3 Pat 152; 78 IC 749. See also *Subbaraya v Ramasami* (1900) 23 Mad 171.

7 *Mihir Sen Singh v Maqbul Hasan Khan* (1930) 57 IA 313, 52 CLJ 551, 128 IC 268, AIR 1930 PC 251, affirming (1928) 3 Luck 154, 107 IC 890, AIR 1929 Ori 138 and disapproving *Bhagwant Singh v Kalka* (1889) 11 All 100; *Vaithilinga v Ayyaborai* (1927) 40 Mad 118, 37 IC 793, AIR 1918 Mad 430 (conversion to Christianity); *Chidambaram v Mis Nyein Me* (1928) 6 Rang 243, 111 IC 2, AIR 1928 Rang 179; *Rupa v Sardar Mirza* (1920) 1 Lah 376, 55 IC 410, AIR 1920 Lah 276 is no longer good law.

8 (1930) 57 IA 313, 52 CLJ 551, 128 IC 26, AIR 1930 PC 251.

9 *Khunni Lal v Gobind* (1911) 33 All 356, 38 IA 87, 10 IC 477; *Gobind v Abdul* (1903) 25 All 546, 573.

(b) A married Hindu becomes a convert to Mohammedanism, and marries a Mahommedan wife and has children by her. The persons entitled to his estate on his death are his Mohammedan wife and children, and not his Hindu wife.[10]

(c) *A* and *B* are two Hindu brothers separate in estate. *B* becomes a convert to Mohammedanism. After *B*'s conversion, a son *C* is born to him who also is a Mohammedan. *B* dies leaving *C*. Afterwards, *A* dies leaving a widow. On *A*'s death, his widow succeeds to his property. After the widow's death, *C* claims *A*'s property as his nephew. *C* is not entitled to succeed to the property.

It may here be noted that the provisions of the Bengal Regulations VII of 1832 were to the same effect as those of Act XXI of 1850.

§ 98. PHYSICAL AND MENTAL DEFECTS: DISQUALIFIED HEIRS

(1) Under the texts as interpreted by the courts, the following defects, deformities and diseases exclude an heir from inheritance:

(a) blindness,[11] deafness, and dumbness,[12] provided the defect is both congenital and incurable;

(b) want of any limb or organ, if congenital. This includes the case of a person who is lame,[13] or has no nose or tongue. It also includes the case of congenital impotence;

(c) lunacy. This need not be congenital or incurable to exclude the heir from inheritance. It is enough if it exists at the time when the succession opens;[14]

(d) idiocy, provided it is complete and absolute.[15] Idiocy is, of course, congenital;

10 *Chedambaram v Ma Nyein Me* (1928) 6 Rang 243, 111 IC 2, AIR 1928 Rang 179.

11 *Mobesh Chunder v Chunder Mohun* (1875) 14 Bengal LR 273 Dayabhaga case; *Murarji v Parvatibai* (1876) 1 Bom 177; *Umabai v Bhavu* (1876) 1 Bom 557; *Gunesbwar v Durga Prasad* (1917) 44 IA 229, 45 Cal 17, 42 IC 849, AIR 1917 PC 146; *Pudiava v Pavanasa* (1922) 45 Mad 949, 69 IC 313, AIR 1923 Mad 215, FB; *Fakimath v Krushnachandra Nath* AIR 1954 Ori 176.

12 *Vallabbram v Bai Hariganga* (1867) 4 Bom HCAC 135; *Savitribai v Bhaubat* (1927) 51 Bom 50, 100 IC 586, AIR 1927 Bom 103; *Bharmappa v Ujjangavda* (1922) 46 Bom 455, 65 IC 216, AIR 1922 Bom 173; *Anukul Chandra v Surendra* (1939) 1 Cal 592.

13 *Venkata v Purushottam* (1903) 26 Mad 133.

14 *Muthammal v Subramaniaswami Devastbanam* [1960] 2 SCR 729; *Baboo Bodhanarain v Omrao* (1870) 13 MIA 520; *Koer Goolab Singh v Kurun Singh* (1871) 14 MIA 176; *Deo Kisben v Budh Prakash* (1883) 5 All 509, FB; *Wooma Persbad v Grish Chunder* (1884) 10 Cal 639; *Ram Singh v Bhani* (1916) 38 All 117, 32 IC 127, AIR 1916 All 47; *Muthusami v Meenammal* (1920) 43 Mad 464, 55 IC 576, AIR 1920 Mad 652; *Bapuji v Dattu* (1923) 47 Bom 707, 73 IC 279, AIR 1923 Bom 425.

15 *Tirumamagal v Ramaswami* (1863) 1 Mad 214; *Surti v Narain Das* (1890) 12 All 530; *Ran Bijai v Jagatpal* (1891) 18 Cal 111 (PC).

(e) leprosy, when it is of such a virulent type that it is incurable and renders him unfit for social intercourse. It need not be congenital;[16]

(f) other incurable diseases.[17]

(2) Under the Hindu Inheritance (Removal of Disabilities) Act 1928, no person, other than a person who is, and has been from birth, a lunatic or idiot, is excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity, or physical or mental defect. The Act came into force on 20 September 1928. It is not retrospective.

The Act does not apply to any person governed by Dayabhaga School of Hindu law (the Act is set out in Appendix II). Under the Act, the only defects which disqualify an heir from inheritance or from a share on partition are congenital lunacy and congenital idiocy.

§ 99. MURDER

A murderer, even if not disqualified under Hindu law from succeeding to the estate of the person murdered, is so disqualified upon the principles of justice, equity and good conscience. Further, no title to the estate of the person murdered can be claimed through the murderer. He should be treated as non-existent, when the succession opens on the death of his victim; he cannot be regarded as a fresh stock of descent.[18]

P dies leaving his mother *C*, a son *H* and a daughter *K* and his father's brother and his father's sister's son *G*. On *P*'s death, his mother *C* succeeds to his property for the ordinary Hindu widow's estate. *H* is the next reversioner. *H* murders *C* and is sentenced to transportation for life. Who is entitled to succeed to the estate of *P*? Not *H*, because he is the murderer. Is *H*'s sister *K* entitled to succeed? No, because she could only claim through *H*, the murderer. *H* should be regarded as non-existent at the date of *C*'s death, so that the next heir to *P*'s estate is his father's sister's son *G*. *G* is therefore entitled to succeed to *P*'s estate.[19]

16 ***Ramabai v Harnabai*** (1924) 51 IA 177, 48 Bom 363; 80 IC 193, AIR 1924 PC 125; ***Ananta v Ramabai*** (1876) 1 Bom 554; ***Ranagayya v Thanikachalla*** (1896) 19 Mad 74; ***Koyaorbana v Subbanaya*** (1915) 38 Mad 250; 19 IC 690; AIR 1916 Mad 470; ***Karali v Asbutosh*** (1923) 50 Cal 604, 75 IC 474, AIR 1923 Cal 331. See also ***Man Singh v Gaini*** (1918) 40 All 77, 43 IC 62, AIR 1918 All 377.

17 (1915) 38 Mad 250, 19 IC 690, AIR 1916 Mad 470.

18 ***Kenchava v Girimallappa*** (1924) 51 IA 368, 48 Bom 569, 82 IC 966, AIR 1924 PC 209, affirming 45 Bom 768, 61 IC 294, AIR 1921 Bom 270 (paternal aunt); ***Vedanayga v Vedammal*** (1904) 27 Mad 591 (mother); ***Vedammal v Vedanayaga*** (1908) 31 Mad 100 (mother); ***Shah Khanam v Kalandhar Khan*** (1900) Punj Rec No 74 (half mother); ***Mst Jind Kuar v Indar Singh*** (1922) 3 Lah 103, 67 IC 526, AIR 1922 Lah 293; ***Mata Badal v Bijay Bahadur*** AIR 1956 All 707.

19 ***Kenchava v Girimallappa*** (1924) 51 IA 368, 48 Bom 569, 82 IC 966, AIR 1924 PC 209.

The test of disqualification is whether the title is traced through the murderer.[20] The result is that not only is the murderer excluded from inheritance, but also his son, his sister,[21] or any other person claiming heirship through him. In Bombay, the wife of a murderer is not disentitled from succeeding to the estate of the murdered man. The reason is that she does not derive title through her husband, but succeeds in her own right as *gotraja sapinda*.[22] The Bombay High Court has also held that there could be no exclusion from inheritance or right to partition, if there is no question of the murderer of his son taking advantage of the murder.[23]

§ 100. DISABILITY AS EXCLUDING FEMALES

The disabilities, which exclude a male from inheritance also, exclude a female from inheritance.[24]

§ 101. EFFECT OF DISABILITY

Where an heir is disqualified, the next heir of the deceased succeeds as if the disqualified person were dead.[25] The disqualified person transmits no interest to his heir.[26]

Illustrations

(a) *A* dies leaving an insane son and a daughter. The daughter will take the inheritance as if the son were dead.

(b) *A* dies leaving two brothers *B* and *C*. *C* is insane and has a son *D*. *B* alone will inherit, for *D* is the nephew of the deceased, and a nephew cannot inherit while a brother is in existence.

§ 102. DISQUALIFICATION ONLY PERSONAL

The disability is purely personal, and does not extend to the legitimate issue of the disqualified heir.[27] Nor does it extend in cases governed by the Bombay School of Hindu law, to his wife or widow.[28] However,

20 *Mata Badal v Bijay Bahadur* AIR 1956 All 707; *Nakchhed Singh v Bejay Bahadur* AIR 1953 All 759, (1953) ALJ 609.
21 (1924) 51 IA 368, 48 Bom 569, 82 IC 966, AIR 1924 PC 209.
22 *Gangu v Chandrabhagabai* (1908) 32 Bom 275.
23 *Adiveppa v Veer Bhadrappa* (1947) Bom 518.
24 *Bahubai v Manchhabai* (1864) 2 Bom 5.
25 *Baboo Bodhnarain v Omreo* (1870) 13 MIA 520.
26 *Musst Budha Koer v Musst Sobodra Kuer* (1931) 11 Pat 35, 132 IC 865, AIR 1991 Pat 267.
27 *Mitakshara*, Chapter II, s 10.
28 *Gangu v Chandrabhagabai* (1908) 32 Bom 275.

adopted sons of disqualified heirs are not entitled to this heritable right.[29]

Illustrations

(a) *A* dies leaving a son *B* who is insane from birth, and a grandson by *B*. The grandson will succeed to *A* as *A*'s heir.

(b) *A* dies leaving a son *B* who is an idiot, a grandson, who is the adopted son of *B* and a daughter. The daughter will inherit *A*'s estate. A son adopted by a disqualified heir is not entitled to succession.

(c) A Hindu governed by the Bombay School of Hindu law, dies leaving as his only heir, a brother who is disqualified from inheriting, and the brother's wife. The brother's wife inherits to the deceased, though the brother is disqualified. (See §§ 64 and 68).

§ 103. DISABILITY ARISING AFTER SUCCESSION

Property that has once vested in a person by inheritance is not divested by a subsequently supervening disability.[30]

§ 104. REMOVAL OF DISABILITY AFTER SUCCESSION HAS OPENED

Where the disability is removed subsequent to the opening of the inheritance, the right to inheritance revives, but not so as to divest the estate already vested in another person.[31]

Illustrations

(a) *A* dies leaving a son who is insane and a widow. On *A*'s death the widow succeeds to the estate as his heir. The insanity is cured during the widow's life. The estate being vested in the widow, the son is not entitled to it during her lifetime. After the widow's death, however, the son as the nearest heir of *A*, is entitled to succeed to the estate, so that if *A* has left a brother also, the son, and not the brother will succeed.

(b) *A* dies leaving a son *X*, who is insane and a brother *B*. On *A*'s death, *B* succeeds to the estate. The lunacy is cured during *B*'s lifetime, *X* cannot recover the estate from *B* for it is vested in

29 *Mitakshara*, Chapter II, s 10, para 11.

30 *Deo Kishen v Budh Prakash* (1883) 5 All 509 (FB); *Shibu v Puttamma* (1891) 14 Mad 289 294; *Abilakh v Bhekhi* (1895) 22 Cal 864.

31 *Mitakshara*, Chapter II, s 7; *Deo Kishen v Budh Prakash* (1883) 5 All 509 (FB).

B. Also, on *B*'s death, the estate will pass to *B*'s heirs, and not to *X*, for *B* took as full owner, so that if *B* dies leaving a son, it will pass to his son. However, if *B* leaves no other heir than *X* (his brother's son). *X* will succeed to the estate not as the heir of *A*, but as the heir of *B*, the result is that where the estate of the father has passed to a full owner, a son whose disability has been removed, cannot claim it as his father's heir, and he loses all his rights to it as such. It is different however, where the estate has passed to a widow or other limited heir, who takes only a widow's interest as in Illust (a).

§ 105. AFTER-BORN SON OF DISQUALIFIED HEIR

Where, after the succession has opened, a son is born to a disqualified heir, the son is not entitled to inherit so as to divest the estate already vested in another.[32]

Illustration

A dies leaving a son *B* who is insane, a widow, and a nephew. On *A*'s death, the widow inherits the estate. The widow then dies, and the nephew succeeds to the estate as *A*'s heir. A son *C*, is then born to *B*, and he claims the estate from the nephew. He is not entitled to the estate, for it became vested in the nephew on the death of the widow.

Exclusion From Partition

§ 106. DISABILITY AND PARTITION

Disability, which excludes a person from inheritance also, excludes him from a share of the joint family property on partition.[33] Where a member of a joint family had no congenital disqualification and therefore had acquired by birth an interest in the joint family property, a later supervening disqualification, while it might debar him from claiming a partition, would not prevent him from acquiring the whole property by survivorship.[34] A Full Bench in Madras has held that even when the disqualification is congenital, the same result follows.[35] There may be

32 *Kalidas v Krishna* (1869) 2 Bengal LR, 103 (FB); *Deo Kisben v Budh Prakash* (1883) 5 All 509 (FB); *Pawadiswa v Venkatesh* (1908) 32 Bom 455.

33 *Ram Sahye v Lalla Lalljee* (1882) 8 Cal 149; *Ram Soonder v Rain Sahye* (1882) 8 Cal 919.

34 *Muthusami v Meenammal* (1902) 43 Mad 464, 55 IC 576; *Mt Dilraj Kuari v Rikbeswar Ramdube* (1934) 13 Pat 712, 151 IC 419, AIR 1934 Pat 373 (lunacy); *Moolchand v Chabia Devi* (1937) All 825, 170 IC 833, AIR 1927 All 605 (FB) (leprosy).

35 *Kesava v Govindan* 1946 Mad 452 (FB).

such a severance of the joint status as would put an end to the right of succession by survivorship.[36] But if the other coparceners separate their shares and disrupt the joint family, the lunatic member may become separate owner of his share.[37]

§ 107. LUNACY AND PARTITION

The High Court of Calcutta[38] held that a member of a joint family, who was not born a lunatic, but is a lunatic at the time of partition, is not entitled to claim his share by partition. This is also the opinion of the High Court of Allahabad.[39]

The Federal Court of India examined the law on the point and held that although a person who is insane at the time when partition takes place cannot claim a share in the joint family properties, yet the texts of Hindu law make it clear that his rights remain in abeyance and are revived on the malady being cured. A coparcener, on his supervening insanity, may not exercise his will to effect a severance of the status; but that does not prevent the other coparceners from disrupting the coparcenery, if they so choose, and these rights can be exercised even if the family consist only of one sane and one insane member.[40]

Under the Hindu Inheritance (Removal of Disabilities) Act 1928, such a person not having been a lunatic from birth is entitled to a share. It has been held that by virtue of the operation of this Act, a suit by a next friend of a coparcener of unsound mind to enforce partition is maintainable:[41]

§ 108. REMOVAL OF DISABILITY REOPENS PARTITION

A coparcener, who is excluded from a share on partition by reason of a disability, is entitled, on removal of the disability, to the same rights as a son born after partition.[42]

§ 109. A DISQUALIFIED COPARCENER HAVING SONS

Where a son is born to a disqualified coparcener after the death of the ancestor, he is not, according to the Bombay decisions,[43] entitled to take

36 *Venkateswara v Manikyammal* (1935) 69 Mad LJ 410, AIR 1935 Mad 775.
37 See § 38. *Bhagwati Saran Singh v Parmeshwari Nadan Singh* (1942) All 518, 202 IC 227, AIR 1942 All 267 affirmed in *Rameshwari v Bhagwati* (1949) 11 FCR 715.
38 (1882) 8 Cal 149, (1882) 8 Cal 919.
39 *Bhagwati Sran Singh v Parmeshwari* (1942) All 518, 202 IC 227, AIR 1942 All 267.
40 *Rameshwari Nadan v Bhagwati* (1949) 11 FCR 715, AIR 1950 FC 142.
41 *Vedavyas Rao v Narayan Rao* AIR 1962 Mys 18; reference may also be made to *Parameshwaram v Parameswaram* AIR 1961 Mad 345; *Pakkiriswamy v Krishnaswamy* AIR 1973 Mad 36.
42 See § 310; *Mitakshara*, Chapter II s 10, paras 6–7.
43 *Bapuji v Pandurang* (1882) 6 Bom 616; *Pawadewa v Venkatesh* (1908) 32 Bom 455.

a share by divesting the coparcener in whom the ancestor's share vested on his death. The High Court of Madras has arrived at a contrary conclusion.[44] Following the principle of this decision, the same High Court has held that an idiot (even where the idiocy is congenital), who marries and has children, is a coparcener with his father (though he cannot claim a share by partition) and that a will executed by the father during the lifetime of the son is invalid.[45] The Supreme Court has now confirmed the latter view.[46]

A, his son *B*, and his brother *C*, are members of a Mitakshara joint family. *B* is insane. *A* dies, and on his death, his undivided coparcenery interest passes to his brother *C* by survivorship. After *A*'s death, a son is born to *B*. *B*'s son sues *C* to recover the half-share of his grandfather *A* in the joint family property. He is entitled to the share.

Under Mitakshara law, as applied in Madras prior to the coming into operation of the Hindu Inheritance (Removal of disabilities) Act 1928, the Supreme Court held that a disqualified heir who was congenitally a deaf-mute, became by birth a coparcener with his father and on the death of his father without other male issue, ancestral property vested in him as the sole surviving coparcener.

Miscellaneous

§ 110. MAINTENANCE OF DISQUALIFIED HEIRS

Where a person is excluded from inheritance on account of a disability, he and his wife and children are entitled to maintenance out of the property which he would have inherited but for the disability and where he is excluded from a share on partition, he and his wife and his children are entitled to have a provision made for their maintenance out of the joint family property.[47]

§ 111. ADOPTION OF RELIGIOUS ORDER

Where a person enters into a religious order renouncing all worldly affairs, his action is tantamount to civil death, and it excludes him altogether from inheritance and from a share on partition.[48]

44 *Krishna v Sami* (1886) 9 Mad 64 (FB).

45 *Amrithammal & ors v Vallimayil Ammal* (1942) Mad 807, 203 IC 648, AIR 1942 Mad 693.

46 *Kamalammal v Venkatalakshmi* AIR 1965 SC 1349.

47 *Ram Sahye v Lalla Laljee* (1882) 8 Cal 149; *Ram Soonder v Ram Sahye* (1882) 8 Cal 919; *Mitakshara*, Chapter II, s 10.

48 *Teeluck v Shama* (1964) 1 WR 209; *Avadesh Kumar v Shiv Shankar* AIR 1985 All 104 (modes of proof).

All property, which belongs to such a person at the time of renunciation, passes immediately on his renunciation to his heirs, but property acquired by him subsequent to the renunciation, passes to his spiritual heirs (§ 58). A person does not become a *sanyasi* by merely declaring himself a *sanyasi* or by wearing clothes ordinarily worn by a *sanyasi*. He must perform the ceremonies necessary for entering the class of *sanyasis*, without such ceremonies, he cannot become dead to the world.[49]

Sudras

According to the orthodox *Smriti* writers, a Sudra cannot legitimately enter into a religious order.[50] Although, the strict view does not sanction or tolerate ascetic life of the Sudras, it cannot be denied that the existing practice all over India is quite contrary to such orthodox view and any such usage would be given effect to.[51] In cases, therefore, where any usage is established, according to which a Sudra can enter into a religious order in the same ways, as in case of the twice-born classes, such usage would be given effect to by the court.[52]

49 *Bladeo Prasad v Arya Pritt Nidhi Sabha* (1930) 52 All 789, 124 IC 761, AIR 1930 All 643; *Kondal Row v Swamulavaru* (1917) 33 Mad LJ 63, 40 IC 535, AIR 1918 Mad 402; *Ramdhan v Dalmir* (1909) 14 CWN 191, 2 IC 385; *Satynarayana v HRE Board* AIR 1957 AP 824; *Rammakrishan Rao v Srinivasarao* AIR 1960 AP 449; *Madhusudhan v Gobind* AIR 1965 Ori 54, reference may also be made to the decision of the Supreme Court in *Krishna Singh v Mathura Ahir* supra; *Babu Lal v Moti Lal* AIR 1984 All 378 (not heard of for more than 30 years); *Ramchandra v Balla Singh* AIR 1986 All 193.

50 *Harish Chandra v Attr Mahmud* (1913) 40 Cal 545, 18 IC 474; *Somasundram v Vaithilinga* (1917) 40 Mad 846, 41 IC 546, AIR 1918 Mad 794.

51 *Krishna Singh v Mathura Ahir* AIR 1972 All 273.

52 *Krishna Singh v Mathura Ahir* AIR 1980 SC 707.

X

WOMEN'S PROPERTY: PART I—*STRIDHANA*

LAW PRIOR TO THE HINDU SUCCESSION ACT 1956

Note.—The subject of *stridhana* is by far the most difficult branch of Hindu law. The difficulty of the subject may be gauged from what Jimutavahana says in Dayabhaga, after finishing his discourse on *stridhana*: 'Thus has been explained the most difficult subject of succession to a childless woman'.

Section 14 of the Hindu Succession Act 1956, subject to certain qualifications, now confers full and heritable capacity on a female heir in respect of all property acquired by her whether before or after the commencement of that Act, with the result that by retroactive operation of that section, she holds the property in her possession as full owner and not as a limited owner. Male and female heirs are now treated as equal without any distinction. The restraints and limitations on the powers of a female heir have ceased to exist even in respect of existing property. The underscoring of the rights of women to be in *equali juria* under the constitution finds concrete shape in the Act of 1956. This chapter has been divided into the following heads:

I *stridhana* according to the *Smritis*, the commentaries and the judicial decisions (§§ 112–23);
II peculiar features of *stridhana* (§ 124);
III enumeration of *stridhana* (§§ 125–40);
IV rights of a woman over her *stridhana* (§§ 141–44);
V succession to *stridhana* (§§ 145–57);
VI rules common to all the schools (§§ 158–65).

I. *Stridhana* According to the *Smritis*, The Commentaries And The Judicial Decisions

§ 112. DIFFERENT MEANINGS OF *STRIDHANA*—THE WORD '*STRIDHANA*' IS DERIVED FROM

stri, ie woman, and *dhana*, ie property. It means literally, woman's property. It is used, however, in different senses in different schools. In order to understand the precise meaning of *stridhana* according to the various schools, it is necessary to know what kind of properties were recognised as *stridhana* in the Smritis, that is to say, by the *rishis* or sages of antiquity (§ 8).

§ 113. *STRIDHANA* ACCORDING TO THE *SMRITIS*, THAT IS, THE SACRED WRITINGS OF *RISHIS* OR SAGES OF ANTIQUITY

Manu enumerates six kinds of *stridhana*:[1]

1. gifts made before the nuptial fire, explained by Katyayanna to mean gifts made at the time of marriage, before the fire which is the witness of the nuptial (*adhyagni*);
2. gifts made at the bridal procession, that is, says Katyana, while the bride is being led from the residence of her parents to that of her husband (*adhyabahanika*);[2]
3. gifts made in token of love, that is, says Katyayanna, those made though affection by her father-in-law and mother-in-law (*pritidatta*), and those made at the time of her making obeisance at the feet of elders (*padavandaika*);
4. gifts made by father;
5. gifts made by the mother; and
6. Gifts made by the brother (Manu, IX, 194).

All the commentators have agreed that the above is not an exhaustive enumeration of *stridhana*.

To the above list, Vishnu adds:

1. gifts made by a husband to his wife on supersession, that is, on the occasion of his taking another wife (*adhivedanika*);
2. gifts, subsequent, that is, says Katyayanna, those made after marriage by her husband's relations or her parent's relations (*anwadheyaka*);

1 Manu, IX, 194.

2 *Vinod Kumar v State of Punjab* (1982) 84 PLR 337, (FB) (dowry articles and traditional presents given at the wedding).

3 *sulka*, or marriage-fee, a term which is used in different senses in different schools (see §§ 147, 150, 152–54);
4 gifts from sons and relations.

Vishnu does not make any specific mention of gifts made at the bridal procession.

Katyayana mentions the same six kinds of *stridhana* as Manu, and he defines the first three enumerated by Manu, and 'gifts subsequent' and '*sulka*' mentioned by Vishnu. Those definitions have already been given above except that of *sulka*.

It is of importance to note that Katyayana's definition of *adhyagni*, ie gifts before the nuptial fire, and that of *adhyavahanika*, ie gifts at the bridal procession, are wide enough to include gifts from strangers. These definitions have been accepted by all the schools including Dayabhaga school with the result that they all recognise gifts from strangers whether they are made before the nuptial fire or at the bridal procession as *stridhana*. However, Katyayana expressly excludes from the category of *stridhana*, gifts made by strangers during coverture, as also property acquired by a woman during coverture by mechanical arts. Thus, he says:[3]

> The wealth which is earned by mechanical arts, or which is received through affection from a stranger, is subject to her husband's dominion. The rest is pronounced to be *stridhana*.

Gifts from strangers referred to in the above text are, of course, exclusive of gifts made before the nuptial fire and at the bridal procession. Such gifts are undoubtedly *stridhana*.

The words, 'subject to her husband's dominion,' indicate that the text cited above is evidently not applicable to gains of art or to gifts from strangers either during maidenhood or during widowhood. The said words refer to acquisitions and gifts from strangers during coverture. Therefore, acquisitions and gifts from strangers during maidenhood or widowhood would constitute *stridhana*.

It is not necessary to note the definitions of *stridhana* given by Narada, Apastamba, Vyasa, and Devala, except that Devala took 'food and vesture' as constituting a woman's *stridhana* (§ 119).[4]

It may be observed that almost all the *Smriti* writers mention ornaments given by a husband to his wife as her *stridhana*.

Yajnavalkya defines *stridhana* thus:

> What was given (to a woman) by the father, the mother, the husband, or a brother, or received by her before the nuptial fire, or presented to her

3 Katyayana, cited in Dayabhaga, Chapter IV, s 1, para 19.
4 *Colebrooke's Digest*, Book V, pp 471, 478.

on her husband's marriage to another wife, and the rest (*adya*) is denominated *stridhana*. So, that which is given by kindred, as well as her marriage fee (*sulka*) and anything bestowed after marriage.[5]

Though there are about 80 different *rishis* (sages) or writers of *Smritis* (institutes), the tests as stated by the below named eight *rishis* are the only ones to which reference is made by the Commentators in their disquisitions on the definition of *stridhana*. Those eight sages are: (1) Manu; (2) Narada; (3) Vishnu; (4) Katyayana; (5) Apastamba; (6) Vyasa; (7) Devala; and (8) Yajnavalkya.

Summarising the *Smriti* texts, we may say that it is only the gifts obtained by a woman from her relations and her ornaments and apparel which constitute her *stridhana*, and that the only sorts of gifts from strangers which came under that denomination are presents before the nuptial fire and those made at the bridal procession. However, neither gifts obtained from strangers at any other time, nor her acquisitions by labour and skill, constitute her *stridhana*.[6] This is *stridhana* in its technical sense. The Mayukha calls it technical *stridhana*; it comprises only those kinds of property, which are expressly called *stridhana* by the old sages or *Smriti* writers.

§ 114. *STRIDHANA* ACCORDING TO THE COMMENTATORS (§§ 115–20)

It is well-established that whatever may be the law intended to be laid down by the *Smriti* writers, that law must be sought for in the writings of the commentators. In determining what is *stridhana* according to a particular school, the court has to look to what the commentators, who were authorities in that particular school, have said on the subject.[7]

It is not open to a judge to put his own interpretation on the *Smriti* texts. If the texts have received a particular interpretation in a particular school, and that interpretation has been accepted as the law of that school, he must take it as the law of that school and administer it as such.[8]

§ 115. *STRIDHANA* ACCORDING TO MITAKSHARA

The following is the definition of *stridhana* as given by Vijnaneshwara in Mitakshara:

5 Note particularly the word '*adya*' in the above definition.
6 See *Banerjee's Hindu Law of Marriage and Stridhana*, fifth edn, p 327.
7 *Salemma v Lutchmana* (1898) 21 Mad 100, 102.
8 § 9; *Collector of Madura v Mootoo Ramalinga* (1868) 12 MIA 397, 436.

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

(1) inheritance;
(2) purchase;
(3) partition;
(4) seizure, eg, adverse possession; and[9]
(5) finding;

and this is *stridhana* according to Manu and the rest.

It will thus be seen that the first portion of the above definition is a reproduction of the definition of *stridhana* as given by Yajnavalkya. The second part of the above definition is the expansion by Vijnaneshwara of the word '*adya*' which occurs in Yajnavalkya's definition of *stridhana*, so as to include in *stridhana*, five distinct kinds of property, which were not recognised as *stridhana* by the early sages. Neither Manu nor the other sages ever recognised those kinds of property as *stridhana*. Manu recognised only six kinds of *stridhana*, but this Vijnaneshwara explains by saying that all that was meant by Manu's text is that the number cannot be less than six, not that it cannot be more than six. And, further, he expressly says that the term '*stridhana*' conforms in its import with its etymology, and is not technical. The result is that according to Mitakshara, property of any description belonging to a woman is *stridhana*. It may be a gift from relations or a gift from strangers,[10] or it may be property acquired by inheritance, or property obtained on partition. It may be her earning or it may be property acquired by her from any other source.[11]

Vijnaneshwara and other great commentators, who followed him, succeeded in effecting a beneficial change in the archaic *Smriti* law and placed women almost on a footing of equality with men as regards the capacity to hold property.[12]

§ 116. *STRIDHANA* ACCORDING TO THE BOMBAY SCHOOL

We next turn to the four divisions of Mitakshara school (§12). It will be seen that some of them adopted the Mitakshara definition while others did not.

9 *Subramaniam v Arunachelam* (1905) 28 Mad 17.
10 *Salemma v Lutchmana* (1898) 21 Mad 100, 103–05.
11 *Mitakshara*, Chapter II, s 11, paras 2–4.
12 See above. It may just as well be noted here that since the decision of the Privy Council in 1912 (§ 122), the whole of Vijnaneshwara's 'expansion' has been discarded.

The Mayukha, which is held in high esteem in the town of Bombay, Gujarat and North Konkan, would seem to adopt the definition of *stridhana* as given in Mitakshara (§ 115).

For the purposes of succession, Mayukha divides *stridhana* into two classes, namely: (1) technical; and (2) non-technical.

Technical *stridhana* refers to the kinds of property expressly recognised as *stridhana* by the old sage (§ 113), that is to say; (1) gifts from relations made at any time; and (2) gifts from strangers, if made before the nuptial fire or at the bridal procession. Non-technical *stridhana* comprises every other kind of property belonging to a woman. This is a classification peculiar only to the Mayukha.[13] It is not followed in any other part of the Bombay state, where Mitakshara alone is the governing authority.

§ 117. *STRIDHANA* ACCORDING TO THE BENARES SCHOOL

The *Viramitrodaya*, a commentary held in high esteem in the Benares *school*, adopts and supports the definition of *stridhana* given in Mitakshara.

§ 118. *STRIDHANA* ACCORDING TO THE MADRAS SCHOOL

The *Smriti Chandrika* enumerates certain kinds of property recognised as *stridhana*, being the kinds of property recognised as *stridhana* by the *Smriti* writers. The *Prashara Madhaviya* puts its own interpretation on the suppletive term '*adya*' in the text of Yajnavalkyas, and says that it refers to property purchased by a woman with gifts made to her at the bridal procession, etc.

In determining the question whether a particular kind of property is *stridhana* or not, the court should follow the comprehensive definition to *stridhana* given in Mitakshara and hold that it is *stridhana*, unless it is shown that the above-mentioned and other commentators are unanimous in holding that it is not *stridhana*.[14] It has accordingly been held by that court, following the definition of *stridhana* given in Mitakshara, that money given absolutely to a woman for her maintenance, and purchases made with such money, constitute her *stridhana* and descend to her heirs.[15] Similarly, it has been held that gifts from strangers, though made during coverture, constitute her *stridhana*, there being no consensus of opinion among the commentators that such gifts are not to be regarded as *stridhana*.[16] As to wife's earning, the same court has expressed a

13 *Mayukha*, Chapter I, s 10, paras 1–2 and 26.
14 *Salemma v Lutchmana* (1898) 21 Mad 100, 103–04.
15 *Subram v Arunchelam* (1905) 28 Mad 1.
16 (1898) 21 Mad 100.

strong opinion that they are her *stridhana* and descendible to her heirs.[17] A similar opinion has been expressed as to property acquired by a woman by 'seizure'; that is, adverse possession, and that acquired by finding.[18] Property inherited by a woman, however, stands on a different footing, for as to that it has been settled by a long line of decisions that it is not *stridhana* according to the Madras school. As to property obtained by a woman on partition, no question can arise in the Madras school as to whether or not it is *stridhana*, for the practice of alloting shares of a woman on partition has become desolate in the Madras state.[19] This completes the list of additional sorts of *stridhana* specifically enumerated in Mitakshara (§ 115). In fact, the tendency of the Madras High Court is to follow Mitakshara in determining whether a particular kind of property is *stridhana* or not. Even as to rule of succession to *stridhana*, that court has followed Mitakshara where the commentaries are silent,[20] or do not at all agree with each other.[21]

The position, then, as regards the Madras school, as far as the Madras decisions go, is it that Mitakshara definition of *stridhana* is to be applied in every case, unless the commentaries prevalent in that school unanimously exclude the kind of property in question from the category of *stridhana*. Since the decision, but of the Privy Council, in 1912 (§ 122), the whole of Vijnaneshwara's 'expansion' (§ 115) has been discarded, and such of the Madras decisions which recognised as *stridhana*, any description of property comprised in the 'expansion', cannot now be accepted as good law.

§ 119. *STRIDHANA* ACCORDING TO THE MITHILA SCHOOL

The *Vivada Chintamani* is the leading authority of the Mithila school. This work also does not give any definition of *stridhana*, but it enumerates 11 kinds of property, namely:

1–6 the six kinds as enumerated by Manu and defined by Katyayana (§ 113);
7–9 gifts made on supersession, gifts subsequent, and *sulka* (§ 113);
10 ornaments; and
11 'food and vesture' mentioned by Devala and interpreted to mean 'funds appropriated to a woman's support' (§ 113).

17 (1898) 21 Mad 100.
18 (1905) 28 Mad 17.
19 *Subramanian v Arunchelam* (1905) 28 Mad 18.
20 *Salemma v Lutchmana* (1898) 21 Mad 100, 104.
21 *Raju v Ammani* (1906) 29 Mad 358; *Muthappudayan v Ammani* (1898) 21 Mad 58. Also see (1898) 21 Mad 100, 103–05.

Gifts from strangers made before the nuptial fire and at the bridal procession are also recognised as *stridhana*.[22]

§ 120. *STRIDHANA* ACCORDING TO DAYABHAGA OR BENGAL SCHOOL

To understand the definition of *stridhana* as given in Dayabhaga, it is important to note the following two propositions, which have been accepted by all Mitakshara sub-schools:

(a) every kind of *stridhana* belonging to a woman passes on her death to her heirs;
(b) but every kind of *stridhana* cannot be disposed of by a woman at her pleasure.

The only kinds of *stridhana*, which she can dispose of at her pleasure and without her husband's consent, are gifts from relations. She cannot dispose of any other kind of *stridhana* such as gifts from strangers, or property acquired by her by mechanical arts, without the husband's consent (§ 143).

Jimutavahana rejects the definition of *stridhana* given in Mitakshara, and defines *stridhana* in these words:

> That alone is *stridhana* which she (a woman) has power to give, sell, or use independently of her husband's control.

The result is, it may be said:

(1) affirmatively that all gifts from relations constitute *stridhana*, except a gift of immovable property made by the husband; and that gifts from strangers also constitute *stridhana*, if made before the nuptial fire or at the bridal procession;
(2) negatively, that the following properties are not *stridhana*, namely:
  (i) property inherited by a woman;
  (ii) property obtained by her on partition;
  (iii) gifts from strangers, except those made before the nuptial fire or at the bridal procession; and
  (iv) property acquired by her by mechanical arts.[23]

22 *Bhugwandeen v Myna Baee* (1867) 11 MIA 487, 511; *Vivada Chintamani, PC Tagore's Translations*, pp 256–63.

23 Dayabhaga, Chapter IV, s 1. *Ram Gopal v Narain* (1906) 33 Cal 315, 319–20; it makes no difference that the kind of property was not known to Hindu law when the commentary was written.

§ 121. DISTINCTION BETWEEN MITAKSHARA *STRIDHANA* AND DAYABHAGA *STRIDHANA*

In *Sheo Shankar v Debi Sahai*,[24] their Lordships of the Privy Council referring to the term *stridhana* said:

> The Bengal School of lawyers have always limited the use of the term narrowly, applying it exclusively, or nearly exclusively, to the kinds of woman's property enumerated in the primitive sacred texts. The author of Mitakshara and some other authors (that is of the *Viramitrodaya* and the Mayukha) seem to apply the term broadly to every kind of property which a woman can possess, from whatever source it may be derived.

§ 122. THE PRIVY COUNCIL AND MITAKSHARA *STRIDHANA*

(1) Property inherited by a woman.—A woman may inherit the ordinary property of male, ie of her husband, father, son, etc. She may also inherit the *stridhana* of a female, ie, of her mother, mother's mother, or daughter. Both these kinds of inherited property are *stridhana* according to Mitakshara (§ 115), but the Privy Council has held as to both these kinds of property, that they are not *stridhana*. In one set of cases before that tribunal, the question was whether property inherited by a widow from her husband, that is property inherited by a woman from a male, was her *stridhana*. Their Lordships held that it was not, and that on her death, it passed not to her heirs, but to the next heir of her husband.[25] In the other set of cases, the question was whether *stridhana* inherited by a daughter from her mother, that is property inherited by a woman from a female, was her *stridhana*. Their Lordships held that it was not, and that it did not descend to her (daughter's) *stridhana* heirs, but to the next heir of the mother.[26]

The cases referred to above were cases from the Benares school. The law as now settled in the Madras, Mithila and Bengal schools is the same, that is to say, that the property inherited by a woman, whether from a male or from a female, does not constitute her *stridhana*. (§§ 168–69). According to the Bombay school, however, it becomes her *stridhana* in

24 (1903) 25 All 468; 30 IA 202 205–06.

25 *Bhugwandeen v Myna Baee* (1867) 11 MIA 487; *Mst Takur Deybee v Rai Baluk Ram* (1866) 11 MIA 140.

26 *Sheo Shankar v Debi Sahai* (1903) 25 All 468, 30 IA 202 as explained in *Subramanian v Arunachelam* (1905) 28 Mad 1, 9–12; *Ram Kali v Gopal Dei* (1926) 48 All 648, 652–53, 96 IC 757; AIR 1926 All 557 and *Hukum Chand v Sital Prasad* (1928) 50 All 232, 236–37, 107 IC 244, AIR 1928 All 52; *Sheo Pertab v The Allahabad Bank* (1903) 25 All 476, 30 IA 209; *Gaya Din v Badri Singh* (1943) All 230.

all cases, except where the property is inherited by a widow, mother, or other female, who enters the *gotra* (family) of the deceased by marriage (§§ 170–71). This rule is firmly established in Bombay by a long current of decisions and it remains unaffected by the decisions of the Privy Council referred to above.[27]

(2) Share Obtained by a Widow on Partition.—As to the share obtained by a widow on partition of the joint family property, it has been held by the Privy Council in *Debi Mangal Prasad v Madhadeo Prasad*,[28] that it is not her *stridhana* even under Mitakshara law. The actual point decided in that case was that there was no substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition.[29] It does not therefore pass on her death to her *stridhana* heirs, but reverts on her death to the next heirs of her husband in the absence of an express agreement amongst the co-sharers to the contrary.

It will be noted that property acquired by a woman by inheritance and that acquired by her on partition are two of the five additional sorts of *stridhana* comprised in Vijnaneshwara's 'expansion' of '*adya*' (§ 115). As to both these, it has been held by the Privy Council that they do not constitute her *stridhana* in such sense that on her death, it passes to her *stridhana* heirs. The true view would now appear to be that the whole of Vijnaneshwar's expansion has been discarded.

§ 123. DAYABHAGA AND BOMBAY SCHOOL

To say of a property possessed by a woman that it is her *stridhana*, is the same thing as saying that she is the full owner thereof. To say that *stridhana* of Dayabhaga school is less comprehensive than that of the Bombay school, is equivalent to saying that Dayabhaga school does not recognise the full ownership of women in as many kinds of property as the Bombay school; but though this is so, females governed by Dayabhaga school possess an advantage which females subject to Mitakshara law do not. While according to Mitakshara law, the interest of a coparcener in ancestral property passes on his death to his coparceners by survivorship, according to Dayabhaga law, it passes on to his heir by succession. The result is that according to Mitakshara law, a widow, daughter, mother, etc

27 See § 130; *Sheo Pertab v The Allahabad Bank* (1903) 25 All 468, 474, 30 IA 202; *Balwant Rao v Baji Rao* (1920) 47 IA 213, 223, 48 Cal 30, 57 IC 545, AIR 1921 PC 59; *Bhau v Raghunath* (1906) 30 Bom 229, 236–37; *Gadadhar v Chandrabhagabai* (1893) 17 Bom 690, 708 (FB); *Kasserbai v Hunsraj* (1906) 30 Bom 431, 452.

28 (1912) 34 All 234, 39 IA 121, 14 IC 1000.

29 *Kamla Devi v Bachulal* AIR 1957 SC 434, 440.

can never succeed to ancestral property, so long as a single coparcener is in existence; while according to Dayabhaga law, their succession is not impeded by the existence of any coparcener. Thus, if two brothers *A* and *B* are joint, and *A* dies leaving a widow, or a daughter, or a mother, according to Mitakshara law, *A's* interest in the joint property will pass on his death not to his widow, or daughter or mother, but to *B* by survivorship, while according to Dayabhaga law, it will pass to his widow, daughter or mother as the case may be, though, it may be noted, none of them takes as a full owner (§§ 177–80).

II. Peculiar Features of Stridhana

§ 124. PECULIAR FEATURES OF *STRIDHANA*

A Hindu female may acquire property from various sources. She may acquire it by gift, or by inheritance, or on partition. She may also acquire it by her own labour and skill. However, all property acquired by her is not *stridhana*. Whether a particular kind of property is *stridhana* or not, depends on:

(1) the source from which the property was acquired;
(2) her status at the time of acquisition, ie, whether she acquired it during maidenhood, coverture, or widowhood; and lastly;
(3) the school to which she belongs.

What is *stridhana*, and what is not according to the different schools, we have already stated in § 123 and the earlier sections. We shall elucidate this subject still further by treating it from a practical point of view, ie, by enumerating all possible descriptions of property that may be lawfully acquired by a Hindu female and dealing with each one of these descriptions separately in separate sections and stating which of them is *stridhana* and which is not according to the different schools (§§ 125–35). In the meantime, it may be asked, what is the practical importance of the distinction between property, which is *stridhana*, and property, which is not *stridhana*? The answer is that the distinction is important in two ways; first, as regards succession and secondly, as regards the power of alienation.

Stridhana of every description belonging to a woman passes on her death to her heirs (§§ 145–57). It is not so with regard to woman's property, which is not *stridhana*.

Stridhana belonging to a woman is property of which she is the absolute owner, and which she may dispose of at her pleasure, if not in all cases during coverture, in all cases during widowhood (§§ 141–44). However, a woman is not the absolute owner of property, which is not

her *stridhana*, nor can she dispose of it at her pleasure even during widowhood. She is merely a qualified owner of such property; in other words, she takes only a limited interest in the property, the nature and extent of which depend on the character of the property.

III. Enumeration of Stridhana

§ 125. SOURCES OF WOMAN'S PROPERTY

A Hindu female may acquire property from diverse sources. Several descriptions of property that may be lawfully acquired by a Hindu female are:

(1) gifts and bequests from relations (§ 126);
(2) gifts and bequests from strangers (§ 127);
(3) property obtained on partition (§ 128);
(4) property given in lieu of maintenance (§ 129);
(5) property acquired by inheritance (§ 130);
(6) property acquired by mechanical arts (§ 131);
(7) property obtained by compromise (§ 132);
(8) property acquired by adverse possession (§ 133);
(9) property purchased with *stridhana* or with savings of income of *stridhana* (§ 134); and
(10) property acquired from sources other than those mentioned above (§ 135). Bequests stand on the same footing as gifts.[30]

§ 126. GIFTS AND BEQUESTS FROM RELATIONS

Property given or bequeathed[31] to a Hindu female, whether during maidenhood, coverture, or widowhood, by her parents and their relations or by her husband and his relations[32] is *strïdhana* according to all the schools, except that Dayabhaga does not recognise immovable property given or bequeathed by a husband to his wife as *stridhana*.[33]

Gifts from Relations

Gifts from relation constitute 'technical' *stridhana* (§ 113). These gifts bear various names according to the occasion on which they are made. The names are:

(1) *adhyagni*, ie, gifts made before the nuptial fire;

30 *Judoo Nath v Bassunt Commar* (1873) 19 WR 264.

31 (1873) 19 WR 264 (bequest from father); *Damodar v Parmanandas* (1883) 7 Bom 155 (bequest from husband); *Basanta Kumari v Kamikshya* (1906) 33 Cal 23, 32 IA 181 (bequest from brother); *Atul v Sanyasi* (1905) 32 Cal 1051 (bequest from son).

32 *Sambasiva v Venkataswara* (1908) 31 Mad 179, also see § 226.

33 See § 120. Dayabhaga, Chapter 4, s 1, paras 18 and 21; *Venkata v Venkata* (1877) Mad 281 286–87.

(2) *adhyavahanika*, ie, gifts made at the bridal procession;
(3) *padavandanika*, ie, gift made to a woman when she makes obeisance at the feet of elders;
(4) *anwadheyaka*, ie, gifts made after marriage;
(5) *adhivedanika*, ie, gifts made on supersession;
(6) *sulka*, ie, gratuity or marriage fee;
(7) *pritidatta*, ie, gifts of affection made by the father-in-law or mother-in-law;
(8) *bhartridatta*, ie, gifts from the husband.[34]

§ 127. GIFTS AND BEQUESTS FROM STRANGERS

A gift may be received by a Hindu female from a stranger, that is, from one who is not a relation: (1) during maidenhood; or (2) at the time of marriage; or (3) during coverture; or (4) during widowhood.

(1) Property given or bequeathed to a Hindu female by strangers during maidenhood is her *stridhana*, according to all the schools.[35]
(2) Property given by stranger to a Hindu female before the nuptial fire or at the bridal procession is *stridhana* according to all the schools. Such property, like property given by relations, constitutes 'technical' *stridhana* (§ 113).
(3) Property given or bequeathed by strangers to a Hindu female coverture is *stridhana* according to the Bombay, Benares, and Madras[36] schools (§§ 116–18), but not according to the Mithila and Dayabhaga schools (§ 119–20).

Even according to Dayabhaga, such property becomes her *stridhana* after her husband's death, as appears from the fact that Dayabhaga recognises the ownership of the wife in such property even during coverture, though it says it is not her *stridhana*, because it is subject to her husband's control.

Dayabhaga School

Dayabhaga first cites the text of Katyayana relating to gifts from strangers and acquisitions by mechanical arts quoted above, and then says: 'He (the husband) has a right to take it, even though no distress exists. Hence, though the property is hers, it does not constitute *stridhana* because she has no independent power over it'.[37]

34 The above terms are explained in § 113. See § 401, 'Gifts and bequests to widows, daughters, and other females'.
35 *Dayabhaga*, Chapter 4, s 1, paras 1 and 20; *Venkata v Venkata* (1877) Mad 281, 286.
36 *Salemma v Lutchmana* (1898) 21 Mad 100—a case of service *inam* enfranchised by government in favour of a married woman during coverture.
37 *Dayabhaga*, Chapter IV, s 1, para 20.

The meaning of the above text is that though the ownership of the property is in the wife, it is not her *stridhana* for, according to Dayabhaga definition of *stridhana*, that alone is *stridhana*, which a woman can dispose of independently of her husband's consent.

Mithila School

It is difficult to say whether according to the Mithila school, a gift from a stranger received during coverture becomes the *stridhana* of the wife on her husband's death. The trend of modern decisions is to follow Mitakshara, unless the special commentaries of the school in question expressly declare that a particular kind of property is not *stridhana*.

(4) Property given[38] or bequeathed[39] to a Hindu female during widowhood is her *stridhana*. Where a father made a gift of certain properties to his widowed daughter for life with remainder to his heirs, the rents and profits accruing from such properties, including all accumulations thereof are her *stridhana*, though the corpus is not.[40]

§ 128. SHARE ON PARTITION

(1) According to Dayabhaga school, where a share is allotted to a mother or father's mother on partition of joint family property, it is given to her by way of provision for her maintenance for which the family property is bound. It is not, therefore, her *stridhana*, and it does not pass on her death to the *stridhana* heirs, but reverts to the sons or grandsons out of whose portion it was taken out.[41]

(2) Even in cases governed by Mitakshara, the Privy Council have held in *Debi Mangal v Mahadeo Prasad*,[42] that a share allotted to a mother on partition is not her *stridhana*, but stands on the same footing as property inherited by her from her husband,[43] and that on her death, it passes not to her *stridhana* heirs, but to the sons or grandsons.

38 *Brij Indar v Janki Koer* (1877) 5 IA 1, 1 Cal LR 318 (property acquired by a widow under a sanction from government, which conferred upon her a full proprietary and transferable right in the property is her *stridhana*. It was a Mitakshara case, but Dayabhaga has been freely cited in the judgment of the Privy Council).

39 *Bai Narmada v Bhagwantrai* (1881) 12 Bom 505.

40 *Mohini Mohan Basu v Rashbihari Ghose* (1937) 2 Cal 97, 169, AIR 1937 Cal 229.

41 *Sorolah v Bhoobun* (1888) 15 Cal 292; *Hridoy Kant v Behari Lal* (1906) 11 CWN 239; *Hemangini v Kedarnath* (1889) 16 Cal 758, 16 IA 115; *Sani Bhusan v Hari Narayan* (1921) 48 Cal 1059 1065–66, 66 IC 705, AIR 1921 Cal 202; *Hira Lal Mandal v Sankar Lal Mandal* (1938) 2 Cal 250.

42 (1912) 34 All 234, 39 IA 121, 14 IC 1000 reversing 32 All 22, 105 IC 322, AIR 1927 All 679.

43 *Bhagwantrao v Punjaram* (1938) Nag 255, 174 IC 201, AIR 1938 Nag 1; *Sital Prasad v Sri Ram* AIR 1944 Luck 450.

(3) According to the Mithila school, the share allotted to a woman on partition is not *stridhana*.[44]

(4) As regards the Madras school, the practice of allotting a share to females on partition has becomes obsolete. No question can, therefore, arise in that school as to whether such share is *stridhana* or not (§ 118).

As to the share allotted to a mother on partition, reference may be made to the *Bhugwandeen v Myna Baee*, decided according to the Benares school.[45]

Where a deed of partition confers in terms of an absolute estate upon the mother in the share allotted to her, she takes the share as her *stridhana*.[46] In *Debi Mangal Prasad*'s case, the Privy Council said:

> ...of course, the members of a joint family effecting a partition may agree that a portion of the property shall be transferred to the widow by way of absolute gift, as part of her *stridhana*, so as to constitute a provision for her *stridhana* heirs; but in the absence of any such intention, their Lordships do not feel justified in putting property acquired by a widow, on a partition of the joint estate, upon a footing different from that on which property coming to her by way of inheritance has been placed.

In a later case, where a share was given by the stepsons to their stepmother and the agreement provided that she was to be responsible for a definite share of the debts, their Lordships of the Privy Council held that the stepmother took an absolute interest in the share allotted to her.[47]

§ 129. PROPERTY GIVEN IN LIEU OF MAINTENANCE

Money paid to a Hindu female periodically for her maintenance (*vritti*), and the arrears of such maintenance, or a lump sum of money given to her in lieu of maintenance, constitute *stridhana* according to all the schools.[48] So does the immovable property transferred to a woman by way of absolute gift in lieu of maintenance.[49]

44 See § 119. *Krishna Lal v Nandeshwar* (1919) 4 Pat LJ 38 45, 44 IC 146, AIR 1918 Pat 91 (share allotted to grandmother).

45 (1867) 11 MIA 487 514.

46 *Bolye Chund v Khetterpaul* (1873) 11 Bengal LR 459.

47 *Sahab Rai v Shafiq Ahmad* (1927) 31 CWN 972, 101 IC 426, AIR 1927 PC 101.

48 *Doorga v Teju* (1866) WR Mis 53 (gift of money by son to mother for maintenance); *Court of Wards v Mohessur* (1871) 16 WR 76 (Dayabhaga case); *Nellaikumaru v Maraathammal* (1876) 1 Mad 166; *Subramanian v Arunchelam* (1905) 28 Mad 1; *Manilal v Bai Rewa* (1893) 17 Bom 758; *Gunpat Rao v Ram Chunder* (1889) 11 All 296, (1905) 28 Mad 1; *Janardhan v Sonalai* (1942) Nag 16, 198 IC 293, AIR 1942 Nag 30.

49 *Debi Mangal Prasad v Mahadeo Prasad* (1912) 34 All 234, 39 IA 121, 131, 14 IC 1000.

It does not make any difference whether the maintenance is awarded during coverture[50] or during widowhood. Nor does it make any difference that it is awarded under an agreement between the parties or by a decree of the court.[51] The transfer of property given absolutely in lieu of maintenance is not void under s 6 of the Transfer of Property Act.[52]

§ 130. PROPERTY ACQUIRED BY INHERITANCE

(1) A woman may inherit the ordinary property of a male such as her husband, father, son and the rest. She may also inherit the *stridhana* of a female such as her mother, daughter, and the rest.

(2) According to Dayabhaga school, as well as the Benares, Mithila, and Madras schools, property inherited by a woman whether from a male or a female, does not become her *stridhana*. She takes only a limited interest in the property (§§ 177–80), and on her death, the property passes not to her heirs, but to the next heir of the person from whom she inherited it (§§ 168–69).

If the property is inherited from a male, it will pass to his *sapindas*, *sakulyas* and *samanodakas*, if the parties are governed by Dayabhaga law (§§ 88–90), and to his *sapindas*, *samanodakas* and *bandhus* if the parties are governed by Mitakshara law (§§ 43–50). Moreover, if the property is inherited from a female, it will pass to the next *stridhana* heirs of such female (§§ 145–57).

Illustration

A Hindu dies leaving a widow and a brother. The widow will inherit his property as his heir. She takes only a limited interest in the property, ie, she can enjoy only the income of the property. She cannot alienate the property except in the cases mentioned in §§ 178–79. On her death, the property will pass not to her *stridhana* heirs, but to the next heir of her husband, ie, his brother. The same rule applies where a female inherits property from her father, son, son's son, or son's son's son, ie, where she inherits it as daughter, mother, grandmother or great-grandmother respectively. As to property inherited from a female, see the Illustration to § 169.

(3) According to the Bombay school, property inherited by a woman from a female becomes her *stridhana* in all cases. She can dispose of it by act *inter vivos* (that is, by sale, mortgage, gift, etc) or by will, and on

50 *Manilal v Bai Rewa* (1893) 17 Bom 758.

51 See above and *Gnpat Rao v Ram Chunder* (1905) 28 Mad 1.

52 *Dhup Nath v Ram Charitra* (1932) 54 All 366, 138 IC 556, AIR 1932 All 366.

her death intestate, the property passes to her *stridhana* heirs (§ 171). As regards property inherited by a female from a male, the Bombay school divides females heirs into two classes, namely:

(a) those who are introduced into the *gotra* or family of the deceased owner by marriage, such as the deceased's wife, mother, father's mother, etc; and

(b) other female heirs, being females born in the family, such as the daughter, sister, brother's daughter, sister's daughter, etc.

Property inherited by a female who belongs to class (a) does not become her *stridhana*. She takes only a limited interest in such property, and on her death, it passes to the next heir of the male from whom she inherited it.

Property inherited by a female who belongs to class (b) becomes her *stridhana* in all cases. She can dispose of it by an Act *inter vivos* or by will and on her death it passes to her own *stridhana* heirs (§ 170).

The result is, as regards property acquired by inheritance, that according to Dayabhaga, Benares, Mithila, and Madras schools, it does not become *stridhana* in any case, while according to the Bombay school, it becomes *stridhana* in all cases except where it is inherited by the deceased's widow, mother, or other female relation who entered his *gotra* (family) by marriage.[53]

Females Who Enter the *Gotra* of a Hindu by Marriage

These are his wife, his father's wife (his mother), his father's father's wife (his grandmother), his father's father's father's wife (his great-grandmother), and the wives of other ascendants; also the wives of collaterals, a class of heirs recognised in the Bombay school only, namely his brother's wife, his nephew's wife, his uncle's wife, his cousin's wife etc (§ 68). In short, the females who enter the *gotra* of a Hindu by marriage are his own wife, and the wives of all his *sapindas* and *samanodakas*.

Females Born in the Family

Turning now to the other females heirs in the Bombay state, that is, females other than those who enter the *gotra* of a person by marriage, it will be seen that they are either females born in his *gotra* or the daughters of such females. Thus, a daughter, sister (father's daughter), niece (brother's daughter) are 'daughters born in the *gotra*'; while a daughter's daughter, sister's daughter, etc are the daughters of 'daughters born in the *gotra*'. Property inherited by these female heirs from any male member of the *gotra* in which they are born, becomes their *stridhana*.

53 The Illustration to §§ 170 and 171 may be read.

Thus, a daughter inheriting to a father, a sister inheriting to a brother, a niece inheriting to an uncle, all take the property absolutely as their *stridhana*. They can dispose of it in any way they like and on their death, it passes to their own *stridhana* heirs.

§ 131. PROPERTY ACQUIRED BY MECHANICAL ARTS

A Hindu female may acquire property by mechanical arts or otherwise by her own exertions during maidenhood, or she may do so during coverture, or during widowhood.

(1) Property acquired by a Hindu female by mechanical arts or otherwise by her own exertions during maidenhood or widowhood is *stridhana* according to all the schools (§ 127 sub-§ (1), notes).

(2) Property acquired by a Hindu female by mechanical arts or otherwise by her own exertions during coverture is *stridhana* according to the Bombay, Benaras, and Madras[54] schools (§§ 119–20).

The note to § 127, sub-§§ (1) and (3) may be read. Mechanical arts include spinning, painting, etc.

§ 132. PROPERTY OBTAINED BY COMPROMISE

As to properties obtained by a woman under a compromise or a family arrangement, there is no presumption that she takes only a life estate. What estate she takes depends on the terms of the deed and other circumstances.[55]

In a case, one of two brothers living jointly died and his share was claimed by right of survivorship by the other brother, while the widow claimed it as hers. The matter was referred to arbitration and under the award, certain property was allotted to her. The Privy Council held, that she took an absolute estate in the property allotted to her on the ground that there were no words in the awards to narrow her interest.[56] Property obtained by a woman under a compromise in consideration of her giving up her rights in relation to her *stridhana* is *stridhana* according to all the schools.[57] Property obtained by a widow under a compromise with

54 *Salemma v Lutchmana* (1896) 21 Mad 100; *Muthu Ramakrishna v Marimuthu* (1915) 38 Mad 1036, 24 IC 363, AIR 1914 Mad 128 (property acquired by husband and wife by joint trade).

55 *Pandit Aya Shankar Tewari v Mst Chandrawati* (1935) 10 Luck 35, 150 IC 519, AIR 1934 Ori 265.

56 *Nathu Lal v Babu Ram* (1936) 63 IA 155; 38 Bom LR 462, 151 IC 33, AIR 1936 PC 103.

57 *Sowdaminee Dossee v Administrator General of Bengal* (1893) 20 Cal 433, 438–39, 443, 20 IA 12; *Sambasiva v Venkataswara* (1908) 31 Mad 179.

her adopted son, is her absolute property.[58] Where a daughter, not an heir by custom, obtains property from a reversioner by a compromise, it is her *stridhana*.[59]

§ 133. PROPERTY OBTAINED BY ADVERSE POSSESSION

Property acquired by a Hindu female, whether during coverture[60] or widowhood,[61] by adverse possession, becomes her *stridhana* according to all the schools (see § 211).

A Hindu female executes a deed of gift of her *stridhana* in favour of her daughter, but the deed is not registered. The daughter enters into possession of the property. In such a case, if the mother dies after the daughter's possession has become adverse, the daughter is entitled to the property as her *stridhana*, the same having been acquired by adverse possession, and on her death, it will pass to her heirs. However, if the mother dies before 12 years of adverse possession, leaving the daughter as her heir, and the daughter continues in possession, her possession after her mother's death is the possession of an heir, and she takes a limited interest in it, and on her death, the property will pass not to her heirs, but to the next *stridhana* heirs of the mother.[62]

§ 134. PROPERTY PURCHASED WITH *STRIDHANA*

Property purchased by a woman with her *stridhana*, and the savings of the income of *stridhana*, constitute *stridhana* according to all the schools.[63]

It does not make any difference that the property purchased is immovable property (§ 177). Nor does it make any difference that it was purchased by her in the exercise of a right of pre-emption, though, she could not have claimed the right had she not been in possession of her husband's property, which adjoined the property purchased by her. If it was purchased with her *stridhana*, it is her property.[64] The mere fact that she could not have acquired the property had she not been in possession of her husband's estate does not make it part of her husband's estate.[65]

58 *Parshottam v Keshavlal* (1932) 56 Bom 164, 137 IC 561, AIR 1932 Bom 213.

59 *Rai Rajeshwar v Har Kishen* (1933) 8 Luck 538, 150 IC 346, AIR 1938 Ori 170.

60 *Parshottam v Keshavlala* (1932) 56 Bom 164, 137 IC 561, AIR 1932 Bom 213.

61 *Rai Rajeshwar v Har Kishen* (1933) 8 Luck 538, 150 IC 346, AIR 1938 Ori 170.

62 See § 169. *Mohini Chunder v Kashi Kant* (1897) 2 CWN 161–62.

63 *Sham Koer v Dab Koer* (1902) 29 Cal 664, 29 IA 132; *Mohini Chunder v Kashi Kant* (1897) 2 CWN 161; *Sheon Singh v Ramchandra Bai* AIR 1957 MB 138.

64 *Dhurjati v Ram Bharos* (1930) 52 All 222, 121 IC 701, AIR 1930 All 109. *Atchanna v Appanna* AIR 1967 AP 147.

65 *Luchman v Kalli Churn* (1873) 19 WR 292 (PC); *Venkata v Venkata* (1880) 2 Mad 333, PC affirming *Venkata v Venkata* (1877) 1 Mad 281; *Nellikumaru v Marakathmmal* (1876) 1 Mad 166; *Subramanian v Arunchelam* (1905) 28 Mad 1.

Where the main estate was in the hands of a receiver appointed under a decree and the widow was only receiving a pension, purchases of properties made by the widow out of her savings would be her *stridhana* and would pass to her *stridhana* heirs.[66]

If a woman obtains property in exchange for property, which is her *stridhana* or advances money, which forms her *stridhana* on a mortgage, or takes an assignment of leasehold property with her *stridhana*, all such property constitutes her *stridhana*.

§ 135. PROPERTY ACQUIRED FROM OTHER SOURCES

Reference has been made to these where necessary in §§ 126–34.

We have already stated in § 124 that *stridhana* has two peculiarities to it namely: (1) that the woman has absolute power of disposal over it, except in certain cases during coverture; and (2) that it follows a special order of succession. We shall deal with the first of these in §§ 141–44 and with the second in § 145–64. The question whether a particular kind of property is *stridhana* or not, becomes important only when the question arises as to her power to dispose it of.

§ 136. *STRIDHANA* BY CUSTOM

The widow of a separated Hindu, who dies without leaving male issue may, by custom, inherit his estate as *stridhana*.[67]

In *Mahna Singh v Thaman Singh*, the parties were Jains governed by Mitakshara law.

§ 137. MAIDEN'S PROPERTY

It is clear from what has been stated in the foregoing sections that except property inherited by her, all property of a maiden, however acquired, whether by way of gift or bequest from relations or from strangers, or by mechanical arts or otherwise by her own exertions, constitutes her *stridhana*.

§ 138. PROPERTY ACQUIRED DURING WIDOWHOOD

It follows from what has been stated in the preceding sections, that all property of a widow acquired by her during widowhood (whether by way of gift or bequest from relations or from strangers, or by mechanical

66 *Sri Ram v Jagdamba* (1921) 43 All 374, 61 IC 3, AIR 1921 All 11 (FB).

67 *Mahna Singh v Thaman Singh* (1931) 11 Lah 393, 128 IC 293, AIR 1930 Lah 1010.

arts, or by way of maintenance, or by adverse possession, or under a compromise), constitutes her *stridhana* except:

(i) according to the Bombay school, property inherited by her as a widow, mother, grandmother, etc, and, according to other schools, all property inherited by her in any capacity (§ 130); and

(ii) property obtained by her on partition (§ 128).

See § 127 and notes thereto, and also §§ 129, 131–33.

§ 139. UNCHASTITY

Unchastity does not disqualify a woman from inheriting *stridhana* property.[68]

§ 140. PRESUMPTION AS TO PROPERTY FOUND IN WIDOW'S POSSESSION

Where a widow is found in possession of property of the acquisition of which no account is given, then the mere fact that her husband died possessed of considerable property raises no presumption that the property found in her possession was originally that of her husband.[69] Nor is there any presumption that the money with which a widow in possession of her husband's estate makes a purchase of property came out of the savings from her husband's estate.[70] Generally, where a woman has been in possession of property, there is no presumption that she had only a limited estate in it.[71]

IV. Rights of A Woman Over Her Stridhana

§ 141. TEXTS BEARING ON THE SUBJECT

The whole law relating to the rights of women over their *stridhana* has been evolved from the following four texts, of which the first three are the texts of Katyayana, and the last is the text of Narada:

(1) 'What a woman, either after marriage or before it, either in the mansion of her husband or of her father, receives from her lord or her parents is called *saudayika*, ie, a gift from affectionate

68 *Mst Ganga v Ghasita* (1875) 1 All 46; *Nogendra v Benoy Krishan* (1903) 30 Cal 521; *Anagammal v Venkata* (1903) 26 Mad 509.

69 *Diwan Ram Bijai v Indrapal* (1899) 26 Cal 871, 26 IA 226; *Ganpat v Secretary of State* (1921) 45 Bom 1106, 62 IC 109; AIR 1921 Bom 138; *Narayana v Krishna* (1885) 8 Mad 214; *Chowdrani v Tariny Kanth* (1882) 8 Cal 545.

70 *Baikunth Nath v Jai Kishun* (1929) 51 All 341, 113 IC 266, AIR 1929 All 449.

71 *Balo v Parbati* (1940) All 371, 190 IC 634, AIR 1940 All 385.

kindred; and such a gift having by them been presented through kindness, that the woman possessing it may live well, is declared by law to be her absolute property. The absolute exclusive dominion of women over such a gift is perpetually celebrated; and they have power to sell or give it away as they please, even though it consists of lands and houses. Neither the husband, nor the son, the father, the brother, has power to use or to alienate the legal property of a woman.'[72]

(2) 'The wealth which is earned by mechanical arts or which is received through affection from a stranger is subject to her husband's dominion.'[73]

(3) 'What a woman has received as a gift from her husband, she may dispose it off at pleasure after his death, if it be movable; but as long as he lives, let her preserve it with frugality or she may commit it to his family.'[74]

(4) 'Property given to her by her husband through pure affection she may enjoy at her pleasure after his death, or may be given away except land or houses.'[75]

It follows from the above texts:

(i) that during maidenhood, a Hindu female can dispose off her *stridhana* of every description at her pleasure;

(ii) that during coverture, she can dispose off only that kind of *stridhana* which is called *saudayika*, ie, gifts from relations except those made by the husband;

(iii) that during widowhood, she can dispose off her *stridhana* of every description at her pleasure including movable property given by the husband, but not immovable property given by him.

When we turn to judicial decisions on the subject, we find that the distinction between *saudayika*, ie, gifts from relations, and non-*saudayika* is still maintained, but the distinction between *saudayika* given by the husband and that given by other relations no longer stands. Instead, we have now a simple rule for all kinds of *saudayika* based upon the distinction between an absolute grant and a limited grant. In order to determine whether *saudayika*, that is property given to a female by her relations, can be disposed of by her at her pleasure, the rule now adopted by our courts is to ascertain whether the gift passes an absolute

72 Katyayana, *Colebrooke's Digest*, Book V, p 475.
73 Katyayana, cited in Dayabhaga, Chapter IV, s 1, para 19
74 Katyayana, *Colebrooke's Digest*, Book V, p 477.
75 Narada, *Colebrooke's Digest*, Book V, p 476.

estate or limited estate. If the gift passes an absolute estate, she can dispose of the property at the pleasure whether the gift be from her husband or other relations. However, if the gift passes a limited estate only in the property, eg, a life-estate, she cannot alienate the property, though she may alienate her life-estate. Thus, if *A* gives property to his daughter for life, and the remainder to his nephew on the death of his daughter, the daughter takes only a life-estate. She can therefore alienate the *corpus* of the property, though she may alienate her life interest. We now proceed to state the rules on the subject, so far as they are settled by judicial decisions.

§ 142. RIGHTS OVER *STRIDHANA* DURING MAIDENHOOD

There is no limitation to the power of a Hindu female to dispose of her *stridhana* during maidenhood, whatever be the character of the *stridhana*, there are no qualifications attaching, except the disqualification to her by reason of minority.

So long as a Hindu maiden is a minor, she cannot alienate her property except through her guardian, nor can she dispose of it by will. Note that the texts cited in § 141 refer only to the case of a married woman.

§ 143. RIGHTS OVER *STRIDHANA* DURING COVERTURE—*SAUDAYIKA* AND NON-*SAUDAYIKA*

The power of a woman to dispose of her *stridhana* during coverture depends on the character of the *stridhana*. For this purpose, *stridhana* is divided into two classes, namely: (1) *saudayika*, and (2) other kinds of *stridhana*. *Saudayika* means, literally, a gift made through affection. It is a term applied to gifts made to a woman at, before, or after marriage, by her parents and their relations, or by her husband and his relations. In other words, it means gifts from relations as distinguished from gift from a stranger.[76] It also includes bequests from relations.[77]

Saudayika Alienable at Pleasure

A woman has absolute power of disposal over her *saudayika stridhana* even during coverture. She may dispose of it by sale, gift, will, or in any

76 *Muthukaruppa v Sellethammal* (1916) 39 Mad 298, 26 IC 785, AIR 1915 Mad 475; *Babu v Raghunath* (1906) 30 Bom 299; *Rajamma v Varadarajulu* AIR 1957 Mad 198.

77 *Damodar v Parmanandas* (1883) 7 Bom 155 (bequest from husband); *Judoo Nath v Bussunt Commar* (1873) 11 Beng LR 286 295 (bequest from father).

other way she pleases, without the consent of her husband.[78] Her husband has no control over it. He cannot bind her by any dealings with it.[79] However, he can 'take' it in case of distress as in a famine, during illness or imprisonment. This right to take the wife's property is personal to him and if he does not choose to take it, it cannot be taken by his creditors in execution of a decree against him.[80] The word 'take' in the text of Yajnavalkya does not mean 'physical taking', but means 'taking and using.' Hence, if the husband takes his wife's property in circumstances such as the above, but does not actually use it or dispose off it in his lifetime, his creditors are not entitled to it after his death.[81]

Property inherited by a married daughter from her parents is her '*saudayika*' *stridhana*, and she can dispose it off in any way she likes even during coverture, and no consent of her husband is necessary to validate any act of alienation,[82] The contrary view taken in *Bhau v Raghunath* is no longer good law. [83]

Stridhana Other than Saudayika

Saudayika stridhana, can be disposed of by a woman at her pleasure and without the consent of her husband. As regards *stridhana* other than *saudayika*, at times referred to as non-*saudayika stridhana*, eg, gifts from strangers, property acquired by mechanical arts, etc, the rule is that she has no power to dispose it off during coverture without the consent of her husband. It is subject to her husband's dominion, and he is entitled to use it at his pleasure even if there be no distress. In a case where, though the wife was not living with the husband for 20 or 25 years, she was living in a separate room in a temple and the husband lived in the same temple, it was held that she was under coverture and the rule was applied.[84] The rule was, however, not applied to the husband

78 *Venkata v Venkata* (1880) 2 Mad 333, PC (affirming *Venkata v Venkata* (1877) 1 Mad 281) (gifts of movables from husband); *Munia v Puran* (1883) 5 All 310 (immovable property acquired from brother); *Bhau v Raghunath* (1906) 30 Bom 229; *Sham Shivendar v Janki Koer* (1909) 36 Cal 311, 36 IA 1; *Emperor v Sai Narain* (1931) 53 All 437, 130 IC 693, AIR 1931 All 265; *Venkaraddi v Hanmantgowda* (1933) 57 Bom 85, 41 IC 682, AIR 1932 Bom 559; *Rajamma v Varadarajulu* AIR 1957 Mad 198; *Hanmant v Rango* AIR 1961 Mys 206 (decree for arrears of maintenance).

79 *Mohima Chunder v Durga Monee* (1875) 23 WR 184 (PC).

80 *Tukaram v Gunaji* (1871) 8 Bom HCAC 129.

81 *Nammalwar v Thayarammal* (1927) 50 Mad 941, 105 IC 793, AIR 1927 Mad 1031.

82 *Gajanan v Pandurang* (1950) Bom 386; 52 Bom LR 238; AIR 1950 Bom 178, FB. (This was the view taken by Sen J in *Dhondrappa v Kasabai* (1948) Nag 936).

83 (1906) 30 Bom 229; *Salemma v Lutchmana* (1898) 21 Mad 100, 105.

84 *Sarubai Balakdas v Narayandas Bairagi* (1943) Bom 314, 209 IC 620, AIR 1943 Bom 224.

and wife who had drifted apart and the wife was not under the control of the husband.[85] The *non-saudayika stridhana* referred to above is subject only to her husband's control and not to the control of any other person. After the husband's death, her power to dispose of it becomes absolute, and she may dispose of it by act *inter vivos* or by will.

When it is said that *stridhana* other than *saudayika* (gifts from relations), cannot be disposed of by a woman without her husband's consent, it is meant that in her lifetime, she cannot sell it, or make a gift of it, or bequeath it by her will, or otherwise deal with it without her husband's consent. On her death, whether she dies before,[86] or after her husband, it passes to her *stridhana* heirs.

§ 144. RIGHTS OVER *STRIDHANA* DURING WIDOWHOOD

A Hindu female has during widowhood, absolute power of disposal over every kind of *stridhana*, whether acquired before or after her husband's death.[87] A Hindu widow can also, of her own will, put restrictions on her rights on *stridhana* property, as she is the full owner of *stridhana* property.[88]

V. Succession to Stridhana

§ 145. SUCCESSION TO MAIDEN'S PROPERTY

Succession to a woman's *stridhana* varies according to the fact whether she was married or unmarried, and the same was in an approved or unapproved form. It also varies according to the source from which the *stridhana* came. The rules of descent, again, are different in different schools. But the schools do not differ as to succession to the property of a maiden.[89] A maiden's property, according to all the schools, passes in the following order:

(1) uterine brother;
(2) mother;
(3) father;

85 *Shantabai v Ramchandra* AIR 1960 Bom 408, (1959) Bom 1120, 61 Bom LR 627; *Bhagwanlal v Divali* AIR 1925 Bom 445.

86 *Salamma v Lutchmana* (1898) 21 Mad 100; *Banerjee's Hindu Law of Marriage and Stridhana*, 5th edn, pp 382–83 (as to gifts from strangers and property acquired by mechanical arts).

87 *Brij Indar v Janki Koer* (1877) 1 Cal LR 318, 325, 5 IA 115; *Venkata v Venkata* (1877) 1 Mad 281, 286.

88 *BT Govindappa v B Narasimhaiah* AIR 1991 SC 1969.

89 *Annagouda v Court of Wards* [1952] SCR 208, 54 Bom LR 395, AIR 1952 SC 60.

(4) father's heirs in order of propinquity;[90] eg, the full sisters of the maiden's father were preferred to the half sister;[91]

(5) kinsmen of the deceased herself, ie, her mother's heirs in order of propinquity.

Father's Heirs in Order of Propinquity

In Bombay state, a father's sister is entitled to succeed to a maiden's *stridhana* in preference to the father's male *gotraja sapindas* five or six degrees removed;[92] see §§ 56 and 74. However, in Madras, a sister is a *bandhu* (§ 56), and hence in that state, the father's male *gotraja sapindas*, eg, his paternal uncle's sons, would be preferred to his sister.[93]

Under Mitakshara law, as applied by the High Court of Calcutta, a sister (father's daughter) and a sister's son (father's daughter's son) are entitled to succeed to a maiden's *stridhana* in preference to a father's brother's son.[94]

It has been held by the Privy Council, that as under Mitakshara law, the *stridhana* property of a maiden dying without leaving uterine brothers or parents goes to her father's heirs in the order laid down for succession to the property of a male, a *sagotra sapinda* of the father within seven degree is to be preferred to a nearer *bhinna gotra sapinda*.[95] For custom prevalent in Manipur for divorced women, according to Dayabhaga, see *MP Singh v Ariban*.[96]

§ 146. SUCCESSION TO *SHULKA*

(1) The term '*shulka*' is differently interpreted in different schools (see §§ 147, 150, 152–54). According to the Benares, Bombay, Madras and Mithila schools, *shulka* passes in the following order:

1 uterine brother;
2 mother; in default of these, it is conceived that it passes to:
3 father;
4 father's heirs, that is, his *sapindas*, *samanodakas* and *bandhus*.

90 *Annagouda v Court of Wards* [1952] SCR 208 (paternal uncle's son in preference to sister's sons); *Janglubai v Jetha* (1908) 32 Bom 409, 413; *Shamarao v Raghunandan* (1939) Bom 228, AIR 1939 Bom 194.

91 *Shakuntalabai v The Court of Wards* (1942) Nag 629, 199 IC 379, AIR 1942 Nag 57; reference may also be made to the following cases—*Janglubai v Jetha* (1908) 32 Bom 409; *Kamala v Bhagirathi* (1915) 38 Mad 45, 156 IC 939, AIR 1916 Mad 925.

92 *Tukaram v Narayan* (1912) 36 Bom 339, 14 IC 438 (FB).

93 *Sundaram v Ramasamia* (1920) 43 Mad 32, 52 IC 821, AIR 1921 Mad 728.

94 *Dwarka Nath v Sarat Chandra* (1912) 39 Cal 319, 11 IC 872.

95 *Chhaterpati v Luchmidhar* 25 Pat 649, PC, AIR 1946 PC 189, 51 CWN 121, 73 IA 231.

96 AIR 1975 Gau 26.

(2) According to Dayabhaga, *shulka* passes in the following order:

1 whole brother;
2 mother;
3 father;
4 husband.

A. Succession to *stridhana* according to Mitakshara

§ 147. SUCCESSION TO *STRIDHANA* ACCORDING TO MITAKSHARA

For the purpose of succession, Mitakshara divides *stridhana* (§ 115) into two classes, namely:

(1) *shulka*, which is defined as gratuity for which a girl is given in marriage; and
(2) other kinds of *stridhana*.

(1) Shulka

Shulka devolves in the order mentioned in § 146, sub-§ (1).

(2) Other Kinds of *Stridhana*

Stridhana other than *shulka*, passes in the following order:

(i) unmarried daughter; She takes before a married daughter. The rule applies to Jains in the absence of a special custom;[97]
(ii) married daughter who is unprovided for;[98]
(iii) married daughter who is provided for;[99]
(iv) daughter's daughter;[1]
(v) daughter's son;
(vi) son;[2]
(vii) son's son.[3]

97 *Jaiwanti v Anandi Devi* (1938) All 196, 173 IC 356, AIR 1938 All 62.

98 *Srimati Wooma Daee v Gokoolanund* (1878) 3 Cal 587, 5 IA 40; *Kammathi v Padmavati* AIR 1952 Tr & Coch 501; also see cases cited under § 43, no 5 note (t) at p 125. Also see *Sarala Bala v Banamali* AIR 1964 Ori 140.

99 *Totawa v Basawa* (1899) 23 Bom 299.

1 *Matru Mal v Mehri Kunwar* (1940) All 416, 89 IC 600, AIR 1940 All 311; *Subramanian v Arunchelam* (1905) 28 Mad 1 (daughter's daughter takes before daughter's sons); *Amarjit v Algu* (1929) 51 All 478, 13 IC 765, AIR 1929 All 71.

2 *Karuppai v Sankaranarayanan* (1904) 27 Mad 300 (two or more sons takes as tenants-in-common).

3 *Sham Bihari Lal v Ram Kali* (1923) 45 All 715, 75 IC 495, AIR 1924 All 15 (daughter's daughter is a nearer heir than son's son); *Ram Kali v Gopal Dei* (1952) 48 All 648, 96 IC 757, AIR 1926 All 557; *Hukun Chand v Sital Prasad* (1928) 50 All 232, 107 IC 244, AIR 928 All 52.

If there be none of these, in other words, if the woman dies without leaving any issue, her *stridhana*, if she was married in an approved form,[4] goes to her husband,[5] and, after him, to the husband's heirs in order of their succession to him (see note (1) below); [6] on failure of the husband's heirs, it goes to her blood relations in preference to the government.[7] However, if she was married in an unapproved form,[8] it goes to her mother, then to her father, and then to the father's heirs (see note (2)), [9] and then to the husband's heirs in preference to the Government.[10]

In a case, the Supreme Court referred to § 147(2) above and expressed the view that the daughter of a predeceased sons of a Hindu woman married in an approved form is not entitled to succeed to her *stridhan* other than *shulka*, in preference to the son of the brother of her deceased husband.[11] Before this, there were conflicting decisions of various High Courts.

Inherited Property

Property inherited by a female can be *stridhana* only in the Bombay school, and that too in the cases specified in § 130, sub-§ (3). How does this kind of *stridhana* devolve in Bombay? The answer is that if the case is governed by Mitakshara, it devolves in the order given in sub-§ (2) above, and if it is governed by Mayukha, it devolves in the order given in § 151, cl II. See §§ 170–71.

1. Husband and his Heirs

Where the marriage is in an approved form, the *stridhana* goes, in default of issue, to the husband and his heirs, ie, it descends in the same way as if it had belonged to the husband himself. The husband's heirs are not enumerated in Mitakshara. They may, however, be ascertained

4 *Gurdial v Bhagwan Devi* (1927) 8 Lah 366, 101 IC 850, AIR 1927 Lah 441.
5 *Bhimacharya v Ramcharya* (1909) 33 Bom 452, 3 IC 750 (husband takes before his son by another wife).
6 *Bai Kesserbai v Hunsraj* (1906) 30 Bom 431, 451, 33 IA 176; *Javitri v Gendan Singh* (1927) 49 All 779, 102 IC 167, AIR 1927 All 767; *Jodha v Darbari Lal* (1927) 2 Luck 612, 104 IC 193, AIR 1927 Ori 339; *Srimati Krishana v Bhaiya Rajendra* (1927) 2 Luck 43, 89–90, 104 IC 155, AIR 1927 Ori 240.
7 *Kanakammal v Ananthanathi* (1914) 37 Mad 293, 25 IC 901, AIR 1915 Mad 18; *Ganpat v Secretary of State* (1912) 45 Bom 1106, 62 IC 109, AIR 1921 Bom 138.
8 *Janglubai v Jetha* (1908) 32 Bom 409, 412–13.
9 *Raju v Ammani* (1906) 29 Mad 358 (sister as father's daughter takes before sister's sons); *Chunilal v Surajram* (1909) 33 Bom 433, 3 IC 765; *Govind v Savitri* (1919) 43 Bom 173, 47 IC 883, AIR 1918 Bom 93 (sister before paternal uncle).
10 *Chandulal Asharam v Bai Kashi* (1939) Bom 97.
11 *Shamlal v Amar Nath* AIR 1970 SC 1643.

from § 43. Following the lines of the order, they are given the woman's *stridhana*, as successive heirs after the husband.[12]

1 his (husband's) son by another wife, ie, the deceased woman's stepson; [13]
Note.—The illegitimate son is not entitled to succeed to the *stridhana* of his father's wife;[14]
2 his grandson by another wife;[15]
3 his great-grandson by another wife;
4 his other wives;[16]
5 his daughter by another wife, ie, the deceased woman's step-daughter;[17]
6 the son of his daughter by another wife, ie, stepdaughter's son;
7 his mother (but in cases governed by Mayukha, the father);
8 his father (but in cases governed by the Mayukha, the mother);
9 his brother;[18] but in cases governed by Mayukha, the full brother succeeds along with sons of full brothers who are dead (see § 77 and notes to no 9)).
10 his brother's sons;
then his other *sapindas*, then his *samanodakas*, and then his *bandhus*.[19]

According to the Bombay School, the widows of *gotraja sapindas* would also be heirs (§ 68).

2. Father and his Heirs

When the marriage is in an unapproved form, the *stridhana* goes, in default of issue, not to the husband and his heirs, but to the mother, father, and father's heirs, as the case of *stridhana* belonging to a maiden (§ 145). The reason is that a woman married in an unapproved form is deemed to continue to belong to her father's family, because in such a marriage, there is no giving away of the bride by the father to the

12 *Krishnaswami Chettiar v SS Chettiar* (1956) ILR Mad 324, AIR 1955 Mad 702, 704–05 (the doctrine of representation has no application to *stridhana* succession).
13 *Chunilal v Surajram* (1909) 33 Bom 452, 3 IC 750 (stepson takes after the husband).
14 *Ayiswaryanandaji v Siwaji* (1926) 49 Mad 116, 92 IC 928, AIR 1926 Mad 84.
15 *Gojabai v Shrimant Shahjirao* (1893) 17 Bom 114.
16 *Krishnai v Shripati* (1906) 30 Bom 333 affirming co-widow's right to succeed; *Kesserbai v Hunsraj* (1906) 30 Bom 431, 33 IA 176 (co-widow takes before husband's brother and his nephew).
17 *Nanja v Sivabagvathachi* (1913) 36 Mad 116, 12 IC 128 (co-wife's daughter before father's brother's son).
18 *Parmappa v Shiddappa* (1906) 30 Bom 607 (full-brother takes before half-brother).
19 *Ganeshi Lal v Ajudhia Prasad* (1906) 28 All 345 (husband's sister's son takes before the deceased woman's sister's son).

bridegroom.[20] The successive heirs after the father would be the deceased woman's brother, brother's sons, stepmother,[21] sister, sister's sons, grandmother, paternal uncle, and her father's other *sapindas, samanodakas* and *bandhus.*

3. Presumption as to Form of Marriage

When the question arises as to whether a marriage was in an approved or in an unapproved form, the presumption is that it was in an approved form, unless the contrary is proved.[22]

4. Preference of Female Issue to Male Issue

As regards *succession*, to *stridhana* it should be noted, that according to the Mitakashara, it goes to the female issue of the deceased woman in preference to the male issue (see sub-§ (2)).

5. Issue Born of a Woman by Adulterous Intercourse

Issue means issue born in lawful wedlock. Therefore, if a woman dies leaving a husband and a son born of her by adulterous intercourse, the husband is entitled to succeed to her *stridhana* in preference to the son.[23]

6. Married and Unmarried Daughter's Daughter

There is no distinction between married and unmarried daughter's daughters as there is in the case of daughters.[24]

B. Benares School

§ 148. SUCCESSION TO *STRIDHANA*—BENARES SCHOOL

Succession to *stridhana* according to the Benares school is governed entirely by the law as expounded in Mitakshara and set forth in § 147.

C. Bombay School

§ 149. SUCCESSION TO *STRIDHANA*—BOMBAY SCHOOL

The Mayukha is of paramount authority in the island of Bombay, Gujarat and Northern Konkan. In other parts of Bombay state, the authority of

20 *Janglubai v Jetha* (1908) 32 Bom 409, 413.

21 *Dubbin Parbati Kuer v Baijnath Prasad* (1935) 14 Pat 518.

22 *Jagannath v Runjit Singh* (1898) 25 Cal 354; *Bijay Lal v Bhubaneswar* AIR 1963 Cal 18; *Authikesavulu v Ramanujam* (1909) 32 Mad 512, 3 IC 541; *Chuni Lal v Surajram* (1909) 33 Bom 433, 3 IC 765; *Jagannath v Narayan* (1910) 34 Bom 553, 7 IC 459 (even among Sudras belonging to a respectable family).

23 See § 163 *Jagannath v Narayan* (1910) 34 Bom 553, 7 IC 459.

24 *Ram Kali v Gopal Dei* (1926) 48 All 648, 96 IC 757, AIR 1926 All 557.

Mitakshara is supreme (§ 12). The result is that in cases governed by Mitakshara succession to *stridhana*, it is governed by the rules laid down in Mitakshara (§ 147), while in cases governed by the Mayukha, it is governed by the rules laid down in Mayukha and set forth in the next two sections.

§ 150. CLASSIFICATION OF *STRIDHANA*—MAYUKHA LAW

For the purpose of succession, Mayukha divides *stridhana* into two classes, namely:

(i) technical or proper; and
(ii) non-technical or improper.

(i) Technical *stridhana* is confined to gifts and bequests from relations made at any time, and gifts from strangers made before the nuptial fire or at the bridal procession (§ 113). It is sub-divided, for the purpose of succession, into four classes, namely:
  (a) *shulka*, which is defined as property given as equivalent of household utensils, of beasts of burden, of milch cattle, or ornaments;
  (b) *yautaka*, ie, gifts made to woman at the time of her marriage, while seated with her husband on one seat;
  (c) *bhartridatta*, ie, property given or bequeathed to a woman by her husband; and *anwadeyaka*, ie, property given or bequeathed to a woman subsequent to her marriage by her relations or by her husband's relations;[25] and
  (4) other kinds of technical *stridhana* (§§ 116 and 126).

(ii) Non-technical *stridhana* includes property inherited by a woman[26] in cases where she takes such property as *stridhana* (§ 130), the earnings of the woman, the maintenance (if any) fixed for her,[27] property given or bequeathed to her by a stranger,[28] excepting that given before the nuptial fire and at the bridal procession and other kinds of property not including in technical *stridhana*.

§ 151. SUCCESSION TO *STRIDHANA*—MAYUKHA LAW

The Mayukha prescribes different lines of descent for the four classes of technical *stridhana* (§ 150), and a further different line of descent for non-technical *stridhana*, in all five different lines.

25 *Gopal Chandra v Ram Chandra* (1901) 28 Cal 311; *Ram Gopal v Narain* (1906) 33 Cal 315; *Basanta v Kamikshya* (1906) 33 Cal 23, 32 IA 181. All these are Dayabhaga cases.

26 *Vijiarangam v Lakshuman* (1871) 8 Bom HCOC 244.

27 *Manilal v Bai Rewa* (1893) 17 Bom 758.

28 *Bai Narmada v Bhagwantrai* (1888) 12 Bom 505.

I. Succession to Technical *Stridhana*

Succession to technical *stridhana*:

(1) *Shulka* [§ 150 (1)] devolves in the order mention in § 146, sub-§ (1).

(2) *yautaka* [§ 150 (2)] goes to unmarried daughters.[29]
It is suggested by an eminent writer that it should go in default of unmarried daughters, to married daughters and their issue as under Mitakshara (see § 147) and, if there be none of these, then to the relations specified in cl III of this section.[30]

(3) *Bhartridatta* (gift or bequest from husband), and *anwadheyaka* (gift from relations subsequent to marriage), pass in the following order:[31]
   (a) sons and unmarried daughters, taking together in equal shares,[32] failing unmarried daughters;
   (b) sons and married daughters, taking together in equal shares, failing sons and daughters;
   (c) daughter's issue, ie, daughter's daughters and daughter's sons (§ 160);
   (d) son's sons (§ 160);
   (e) failing these, the persons mentioned in cl III below;

(4) other kinds of technical *stridhana* (§§ 116 and 126) pass in the following order:
   (a) unmarried daughters;
   (b) married daughters who are not provided for;
   (c) married daughters who are provided for;
   (d) daughter's issue, ie, daugther's daughters and daughter's sons (§ 160);
   (e) sons;
   (f) son's sons (§ 160);
   (g) failing these, the persons mentioned in cl III below.

II. Succession to Non-technical *Stridhana*

Non-technical *stridhana*, ie, *stridhana* other than the four kinds of *stridhana* mentioned above (§ 150), passes in the following order:[33]

(1) sons;
(2) son's sons (§ 160);

29 *Ashabai v Haji Tyed* (1885) 9 Bom 115, 126.
30 *Banerjee's Hindu Law of Marriage and Stridhana*, 5th edn, p 402.
31 See above.
32 *Dayaldas v Savitri Bai* (1910) 34 Bom 385, 6 IC 533.
33 *Manilal v Bai Rewa* (1893) 17 Bom 758; *Bai Faman v Jagjivan Das* (1917) 41 Bom 618, 41 IC 277, AIR 1917 Bom 229 (sons take before grandsons).

(3) son's son's sons;
(4) daughters;
(5) daughter's sons (§ 160);
(6) daughter's daughters (§ 160);
(7) failing these, the persons mentioned in cl III below.

Property inherited by a female can be *stridhana* only in the Bombay school, and that too only in the cases specified in § 130, sub-§ 3. Such property, in cases governed by Mayukha, devolves as non-technical *stridhana*.[34]

III. Succession to *Stridhana* Where No Issue

Where a woman dies without leaving any issue, her *stridhana* of every description (except *shulka*) goes, if her marriage took place in an approved form, to her husband, and failing him, to her heirs in her husband's family, who, however, are no other than her husband's heirs (mentioned in note (1) to § 147). However, if the marriage took place in an unapproved form, it goes to her mother, then to her father, and then to her father's heirs.[35]

Non-technical *Stridhana*

Mitakshara prescribes only one line of succession for all kinds of *stridhana* except *shulka*. The Mayukha draws a distinction between technical and non-technical *stridhana*. As to *bhartridatta* and *anwadheyaka*, it is to be observed that according to the Mayukha, it goes to the male and female issue together, while non-technical *stridhana* goes first to the male issue, and then to the female issue. Mitakshara draws no such distinction. According to that authority, non-technical *stridhana*, like technical, goes first to the female issue.[36] In a Bombay case,[37] under Mitakshara, where a woman, married in an approved form, succeeded to her mother's *stridhana* property and then died without leaving any descendants or any heir in her husband's family, but leaving a brother and a sister it was held that: (1) the property should go to her father's heirs; and (2) that the brother and sister took equally. The first part of the decision is correct, but it is submitted that the second part is not and the learned judge ought to have held that the brother took in preference to the sister.

34 *Manilal v Bai Rewa* (1893) 17 Bom 758, 768.
35 See § 147, note (2); *Kesserbai v Hunsraj* (1906) 30 Bom 431, 451, 33 IA 176, 197; *Laxman v Gangabai* AIR 1955 MB 138, 142.
36 *Jankibai v Sundra* (1890) 14 Bom 612; *Gulappa v Tavawa* (1907) 31 Bom 453.
37 *Vithal Tukaram v Balu Bapu* (1936) 60 Bom 671, 38 Bom LR 520, 164 IC 268, AIR 1936 Bom 283.

Where the Woman Dies Childless

It will be observed on comparing § 147 (2) with cl III of this section that when a woman dies childless, and the marriage was in an approved form, her *stridhana*, according to Mitakshara, goes to her husband's heirs while under Mayukha, it goes to her heirs in her husband's family. Notwithstanding this seeming dissimilarity between the language of Mitakshara and Mayukha, the heirs both under the Mitashara and the Mayukha are the same.[38] The reason is that a woman's heirs in her husband's family are no other than her husband's heirs[39] These are enumerated in note (1) to § 147.

D. Madras School

§ 152. SUCCESSION TO *STRIDHANA*—MADRAS SCHOOL

The *Smriti Chandrika* recognises technical *stridhana* only, in other words, it confines *stridhana* to gifts from relations made at any time, and gifts from strangers if made before the nuptial fire or at the bridal procession (§ 118). It does not recognise non-technical *stridhana*.

Like Mayukha, the *Smriti Chandrika* divides *stridhana*, ie, technical *stridhana*, into four classes, namely:

(1) *shulka*;
(2) *yautaka*;
(3) *bhartridatta* and *anwadheyaka*; and
(4) other kinds of technical *stridhana*:
   (a) *shulka*, devolves in the order mentioned in § 146, sub-§ (1);
   (b) *yautaka* passes to:
      (i) unmarried daughters; and then to
      (ii) sons;
   (c) *bhartridatta* and *anwadheyaka* pass to sons and daughters, all inheriting together in equal shares. Daughters include maiden daughters and married daughters whose husbands are alive, but not widowed daughters;
   (d) other kinds of technical *stridhana* pass in the following order:
      (i) maiden daughters and married daughters,[40] who are not provided for, all taking in equal shares;

38 *Vijiarangam v Lakshuman* (1871) 8 Bom HCO CJ 244. See particularly, remarks of West J, where he compares both Mitakshara and Mayukha law bearing on the subject of *stridhana*.

39 *Janglubai v Jetha* (1907) 32 Bom 409, 413; *Gojabai v Shrimant Shahajirao* (1893) 17 Bom 114, 118.

40 *Rajamma v Padmavatamma* (1952) Mad 668, AIR 1951 Mad 1047.

(ii) married daughters who are provided for;
(iii) daughter's daughters (§ 160);
(iv) daughter's sons (§ 160);
(v) sons;
(vi) son's sons (§ 160).

If the woman dies without leaving a issue, her *stridhana* of all descriptions (except *shulka*) passes, if she was married in an approved form, to her husband, and if she was married in an unapproved form, to her mother, and then to her father. There is no provision in *Smriti Chandrika* for a case in which there is a failure of husband or mother and father. However, the *Parashara Madhaviya* cites a text of *Brihaspati*, which is supposed to give a right of succession to certain relations named therein, immediately after the husband or father as the case may be (see § 153).

As to *yautaka*, *bhartridatta* and *anwadheyaka*, it will be observed that the *Smriti Chandrika* makes no provision for the case in which there is a failure of sons and daughters.

Having noted the order of succession according to the *Smriti Chandrika*, we proceed to consider the judicial decisions on the subject. Before doing so, however, it may be noted that according to Mitakshara, *stridhana* of every description (excepting *shulka*) goes, first, to daughters, then to daughters' children, and it is only on failure of these that it goes to sons.

1 *Yautaka*, ie, gifts made at the time of marriage.—There is no recent decision as to succession to *yautaka*.

2 *Bhartridatta*, ie, gift or bequests from the husband, and *anwadheyaka*, ie, gifts from relations made after marriage.—These two kinds of *stridhana* pass, according to the *Smriti Chandrika*, to sons and daughters jointly, but according to Mitakshara, they pass to daughters in the first instance. The Madras High Court has preferred the order of succession given in Mitakshara.[41]

3 The Madras High Court has held that where a woman dies without leaving issue, her *stridhana* devolves according to Mitakshara.[42]

4 The Madras High Court, following Mitakshara, has recognised as *stridhana* certain kinds of property, which come within the category of non-technical *stridhana*, namely property given to a woman for her maintenance,[43] and gifts from strangers though

41 *Muthappudayan v Ammani* (1898) 21 Mad 58 (gift from father after marriage); *Bhujanga v Ramayamma* (1884) 7 Mad 387 (gift from husband of immovable property).

42 See § 147. *Raja v Ammani* (1906) 29 Mad 358; *Nanja v Sivabagyathiachi* (1913) 36 Mad 116, 12 IC 128.

43 *Subramanian v Arunachelam* (1905) 28 Mad 1.

made during coverture,[44] and has held that they pass according to Mitakshara.

E. Mithila School

§ 153. SUCCESSION TO *STRIDHANA*—MITHILA SCHOOL

The *Vivada Chintamani*, which is one of the leading authorities of the Mithila school, recognises technical *stridhana* only; in other words, it confines *stridhana* to gifts from relations, and to gifts from strangers if made before the nuptial fire at the bridal procession. It does not recognise non-technical *stridhana* (§ 119).

For the purpose of succession, it divides *stridhana* into three classes, namely:

(1) *shulka*, which is defined as property received by a woman at the time of her marriage, where the marriage has been celebrated in an unapproved form;
(2) *yautaka*, defined in § 150; and
(3) technical *stridhana* of other descriptions.

Shulka devolves in the order mentioned in § 146 (1).

Yautaka passes to unmarried daughters. Failing these; it is conceived that it passes to married daughters, then to daughter's daughters, and then to daughter's sons, as in Mitakshara.[45]

Technical *stridhana* of other descriptions passes to sons and unmarried daughters, all taking together in equal shares. Failing these, it is conceived that it passes to sons and married daughters jointly, then to daughters' daughters, and to daughters' son.

If the woman dies without leaving any issue, her *stridhana* (except *shulka*) devolves as under Mitakshara (§ 147).

It has been so held by the High Court of Calcutta in a case from Mithila,[46] though in a subsequent case,[47] the same court took a different view.[48] The Patna High Court has followed the earlier Calcutta case and dissented from the later case.[49]

44 *Salemma v Luchmana* (1898) 21 Mad 100.
45 *Kamla Prasad v Murli Manohar* (1934) 13 Pat 550, 152 IC 446, AIR 1934 Pat 398.
46 *Buchha v Jugmon* (1886) 12 Cal 348.
47 *Mohun Pershad v Kishen* (1894) 21 Cal 344.
48 Reference may also be made to *Kesserbai v Hunsraj* (1906) 30 Bom 431 445–51, 3 IA 176, 190–97, where the text of Brihaspati is fully discussed.
49 *Kamla Prasad v Murli Manohar* (1934) 12 Pat 550, 152 IC 446, AIR 1934 Pat 398.

F. Dayabhaga School

§ 154. CLASSIFICATION OF *STRIDHANA*

Stridhana according to Dayabhaga school (§ 120) may be divided, for the purpose of succession, into four classes:

(1) *shulka*, ie, a present to induce the bride to go to her husband's house. *Shulka* devolves in the order mentioned in § 145, sub § (2);

(2) *yautaka*, ie, gifts made at the time of marriage. This term has been interpreted by the High Court of Calcutta as including not only gifts made before the nuptial fire (§ 113, sub-§ (1)), but gifts made during the continuance of the marriage ceremonies,[50] ie, the ceremonies beginning with *shraddha* and ending with that of prostrating before the husband.[51] It is conceived that it includes gift from strangers made before the nuptial fire and at the bridal procession;

(3) gifts and bequests from the father made after marriage. (gifts made by relations after marriage is called *anwadheyaka*. The present class relates to *anwadheyaka* from father);

(4) *ayautaka*, ie, gifts and bequests from relations made before or after marriage. This class includes gifts and bequests from the father made before marriage, but not those made after marriage. The later come under the third class. Gifts from the father at the time of marriage fall within the second class.

§ 155. SUCCESSION TO *YAUTAKA*

Yautaka (§ 154(2)) passes in the following order:

(1) unbetrothed daughters;
(2) betrothed daughters;
(3) married daughters who have,[52] or are likely to have, sons;
(4) barren married daughters and childless widowed daughters taking together in equal shares;
(5) sons;
(6) daughter's sons (§ 160);
(7) son's sons (§ 160);
(8) son's son's sons;
(9) stepsons;

50 *Bistoo Pershad v Radha Soonder* (1871) 16 WR 115.

51 See *Raghunandana's Dayattattwa*, *GC Sastri's Translation*, Chapter IX, 15.

52 The expression 'married daughters who have a son', includes a 'widowed daughter having a son'; *Charu Chunder v Nobo Sun* (1891) 18 Cal 327.

(10) stepson's sons;
(11) stepson's son's sons.

If there be none of these, the succession depends upon the form of marriage. If the deceased was married in an approved form, the *yautaka* passes to the following heirs in succession, namely:

(1) husband;
(2) brother;
(3) mother;
(4) father.

If she was married in an unapproved form, it passes in the following order namely:

(1) mother;
(2) father;
(3) brother;
(4) husband.

If there be none of these, the successive heirs are:

(5) husband's younger brother;
(6) husband's brother's son;
(7) sister's son;[53]
(8) husband's sister's son;
(9) brother's son;
(10) daughter's husband.

The heirs beginning with the husband's younger brother and ending with the daughter's husband are heirs mentioned in a text of Brihaspati, as to which see the observations of the Privy Council in *Kesserbai v Hansraj*,[54] which was a case from the Bombay state governed by Mayukha law. See § 153, last paragraph.

(11) husband's *sapindas*, *sakulyas* and *samanodakas*;
(12) father's kinsmen.

§ 156. GIFTS AND BEQUESTS FROM FATHER AFTER MARRIAGE

Property given or bequeathed by the father after marriage passes in the same order as *yautaka* (§ 55) with this difference that:

53 Sister's son includes stepsister's son; *Dasharathi v Bipin Behari* (1905) 32 Cal 261; *Shashi Bhushan v Rajendra Nath* (1913) 40 Cal 82, 15 IC 225 (stepsister's son excludes daughter's son of great-grandson of great-great-grandfather of deceased's husband).

54 See § 153, last paragraph. (1906) 30 Bom 431, 441–52, 33 IA 176, 190–97

(i) sons take before married daugthers, and not after them as in the case of *yautaka*;[55] and that

(ii) where the woman dies without leaving any issue, the four immediate heirs take, not in either of the two orders given in § 155 but in the following order, namely:

(1) brother;[56]
(2) mother;[57]
(3) father;
(4) husband.

In the case of *pritidatta stridhana*, *kanya* or the maiden daughter is the successor in the first instance, and under Dayabhaga law, *kanya* does not, however, mean or include a stepdaughter, and consequently in case of conflict between husband's brother and stepdaughter, the former succeeds.[58]

§ 157. SUCCESSION TO *AYAUTAKA*

Ayautaka [§ 154 (4)] passes in the following order:

(1) sons[59] and maiden[60] daughters,[61] taking together in equal shares;
(2) married daughters, who have, or are likely to have, sons;
(3) sons's son (§ 160);
(4) daughter's sons (§ 160); daughter's son does not include stepdaughter's son;[62]
(5) barren married daughters and childless widowed daughters.

The above order is according to Dayabhaga. According to Dayabhaga, in first group of heirs to succeed to the *ayautaka* property of a woman are her descendants, and the co-wife's son does not come under this category; on failure of descendants, the property goes to her kindred, ie, her brother, mother and father. On a competition between stepson and mother, the mother succeeds. The stepson, if he is an heir at all,

55 *Prosanno Kumar v Sarat* (1909) 36 Cal 86.
56 *Gopal Chandra v Ram Chandra* (1901) 28 Cal 311 (brother takes before husband).
57 *Ram Gopal v Narain* (1906) 33 Cal 315 (mother takes before husband).
58 *Pravashini v Jogeswar* (1950) 55 CWN 61, AIR 1951 Cal 375.
59 Sons of a predeceased son of a widow cannot, on her death, succeed when her other sons are living; *Prakash Chandra v Nandrani Debi* (1951) 1 Cal 581.
60 It has been held that a maiden (*kumaree*) daughter means one not only unmarried but also unbetrothed; *Sreenath v Surbo* (1868) 10 WR 488. If so, a betrothed daughter would take after the sons and unbetrothed daughters, but before married daughters.
61 *Basania v Kamikshya* (1906) 33 Cal 23, 32 IA 181; *Sankara Dome v Kalidasi Dasi* AIR 1970 Cal 461 (husband's daughter by another wife gets preference over husband's brother's son's sons).
62 *Krishnabibari v Sarojinee* (1933) 60 Cal 1061, 347 IC 473, AIR 1933 Cal 858.

would come after the husband.[63] The brother is preferential heir to a stepson.[64]

If there be none of the above relations, *ayautaka* passes to the following heirs in succession, irrespective of the marriage, namely:

(1) brother;
(2) mother;
(3) father;
(4) husband;
(5) husband's younger brother;[65]
(6) husband's brother's son;
(7) sister's son;
(8) husband's sister son;
(9) brother's son.

In the absence of the earlier preferential heirs, succession to *ayautaka stridhana* goes first to the brother of full blood, in the absence of brothers to the mother, in her absence to the father, and failing all these to the husband. The stepbrother does not come in this class of heirs at all, and the principle of religious benefit has nothing to do with determination of heirship.[66]

A brother's son is preferred to a stepdaughter's son,[67] as the latter is not included in the term 'daughter's son'. Step-daughter's son comes under (11) below:

(10) daughter's husband;
(11) husband's *sapindas*, *sakulyas* and *samanodakas*;
(12) father's kinsmen.

VI. Rules Common to All Schools

§ 158. ESCHEAT

On failure of her husband's heirs, the *stridhana* of a widow goes to her blood relations in preference to the government.[68]

63 *Chamatakari v Narendra* (1947) 1 Cal 173.
64 *Kenaram v Maniklal* (1953) 2 Cal 178.
65 Succeeds before the deceased woman's step-brother; *Debiprasanna v Harendra* (1910) 37 Cal 863, 6 IC 534. Also see *Kalipada Dutta v Tarapado Rakshit* AIR 1984 Pat 23; *Banerjee v Banerjee* ILR 28 Pat 75 (discussion of original text).
66 *JP Banerjee v B Banerjee* (1949) 28 Pat 75.
67 *Krishnabihari v Sarojinee* (1933) 6 Cal 1061,147 IC 473, AIR 1933 Cal 858.
68 *Kanakamnal v Ananthamathi* (1914) 3 Mad 293, 25 IC 901, AIR 1915 Mad 18; *Ganpat v Secretary of State* (1921) 45 Bom 1106, 62 IC 109, AIR 1921 Bom 138; *Kundan v Secretary of State* (1926) 7 Lah 543, 96 IC 865, AIR 1926 Lah 67.

§ 159. *STRIDHANA* HEIRS TAKE AS TENANTS-IN-COMMON

Two or more *stridhana* heirs inheriting *stridhana* together, take as tenants-in-common without benefit of survivorship, even if they are members of a joint family.[69]

Illustration

A female Hindu dies leaving two sons who are members of a joint family. The sons inherit the *stridhana*. They take as tenants-in-common, and not as joint tenants. The result is that on the death of either of them, his share of the *stridhana* will pass to his heirs, and not to the survivor.

§ 160. *STRIDHANA* HEIRS TAKE PER STIRPES

Stridhana heirs in the second generation, ie, son's son's daughter's sons, and daughter's daughters, take per stirpes, and not per capita.[70]

§ 161. WHERE *STRIDHANA* HEIR IS A MALE

A male inheriting *stridhana* takes it absolutely, and on his death, it passes to his heirs.

Stridhana heirs are either males, such as sons, daughter's sons, son's sons, etc, or they are females, such as daughter, daughter's daughters, etc.

§ 162. WHERE *STRIDHANA* HEIR IS A FEMALE

According to the Bombay school, a female inheriting *stridhana* takes it absolutely, and on her death, it passes to her heirs (§ 171).

According to all other schools, a female inheriting *stridhana* takes a limited interest in it, and on her death, it passes not to her heirs, but to the next *stridhana* heir of the female from whom she inherited it (§ 169).

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69 *Bai Parson v Bai Somli* (1812) 3 Bom 424, 15 IC 774; *Karuppai v Sankaranarayanan* (1905) 27 Mad 300; *Jagannath v Narayan* (1910) 34 Bom 553, 558, 7 IC 459.

70 *Mitakshara*, Chapter II, s 2, para 16; Mayukha, Chapter 4, s 10, para 21; *Smriti Chandrika*, Chapter 9, s 3, para 26; *Banerjee's Hindu Law of Marriage and Stridhana*, 5th edn, pp 411, 421. See also *Karuppai v Sankaranarayanan* (1904) 27 Mad 300, 308 and *Nagesh v Gunirao* (1893) 17 Bom 303, 305–06.

§ 163. ILLEGITIMATE CHILDREN: SUCCESSION TO *STRIDHANA*

(1) The illegitimate children of a Hindu woman are not excluded from inheritance to their mother's *stridhana*.[71] However, when a woman dies leaving both legitimate and illegitimate children, the legitimate children are preferred to the illegitimate.[72] The Full Bench of Madras High Court has taken a different view and overruled its earlier decision. [73]

(2) The illegitimate sons of a Hindu woman are entitled to succeed to each other.[74] However, an illegitimate daughter's daughter cannot succeed to her grandmother's *stridhana*.[75]

(3) The illegitimate son of a daughter of a Sudra woman cannot succeed to the latter's *stridhana* in preference to the husband of the latter.[76]

See note (5) to § 147. Also see § 43, no. 5 'daughter', note (vi).

§ 164. SUCCESSION TO PROPERTY OF DANCING GIRLS (*NAIKINS*) AND PROSTITUTES

Though prostitution, according to the Hindu law, entails degradation and loss of caste, it does not sever the tie which connects the prostitute to her kindred by blood, nor does it sever the tie of kindred between her and the members of her husband's family when she becomes a prostitute after marriage. Consequently, the property of a prostitute devolves as if it were her *stridhana*, so that her brother, her sister, her brother's son and other relation by blood, and her husband, her stepson and her husband's other *sapindas* are entitled to inherit to her.[77]

Under the Bengal School of Hindu law, a sister is not heir to the *stridhana* property of her degraded sister.[78] It has been held by the

71 [*Ghose's Hindu Law*, third edn, p 763; *Arunagiri v Ranganayaki* (1898) 21 Mad 40; *Dundappa v Bhimawa* (1921) 45 Bom 557, 59 IC 561, AIR 1921 Bom 137 (Sudra)]; *Sunder Devi v Jhaboo Lal* AIR 1957 All 215 (Muslim mistress of a Hindu converted to Hinduism); *Y Venkanna v N Narayanamma* (1953) 1 MLJ 697, AIR 1954 Mad 136.

72 *Meenakshi v Muniandi* (1915) 38 Mad 1144, 25 IC 957, AIR 1915 Mad 63 (legitimate son preferred to illegitimate daughter); *Jagannath v Narayan* (1910) 34 Bom 553, 559, 7 IC 459. Reference may also be made to *Sudarshan v Suresh* AIR 1960 Pat 45.

73 *Narayani v Gowindaswami* AIR 1975 Mad 275 (FB).

74 *Myna Boyee v Ootaram* (1861) 8 MIA 400; *Mayna Bai v Uttaram* (1864) 2 Mad HC 196.

75 *Meenakshi Ammal v Murugayya Mooppanar* (1940) Mad 739, 191 IC 60, AIR 1940 Mad 463, (1940) 1 MLJ 288.

76 *Sadu Ganaji v Shankerrao* AIR 1955 Nag 84.

77 *Subbaraya v Ramasami* (1900) 23 Mad 171 (stepson); *Narain Das v Tirlok* (1907) 29 All 4 (husband); *Hiralal v Tripura* (1913) 40 Cal 650, 19 IC 129, FB (brother's son); *Narayan v Lakshman* (1927) 51 Bom 784, 106 IC 87, AIR 1927 Bom 456. See also *Adyapa v Rudrava* (1880) 4 Bom 104.

78 *Sarna Moyee v Secretary of State* (1897) 25 Cal 254; *Chandra Bala v Province of Bengal* 54 CWN 940, AIR 1950 Cal 473.

Madras High Court, that when a *dasi* leaves a *dasi* daughter as well as a married daughter, both of them would take the mother's property in equal shares.[79] (For adoption of daughters by *naikins* (dancing girls), see § 487.)

Where a married woman becomes a prostitute after her husband's death and dies leaving a son born in lawful wedlock and a daughter born in prostitution, the legitimate son excludes the illegitimate daughter.[80]

The sons of a dancing woman, though by different fathers, are entitled to succeed to each other. Similarly, the legitimate son of one of such sons is entitled to succeed to them and to their legitimate sons.[81]

In the absence of any custom, succession to a *dasi* (dancing girl) must be governed by the rule of propinquity as a rule of justice, equity and good conscience and her *dasi* daughters and married daughters will succeed to her property in equal shares.[82]

Where a woman of the 'dancing girl' caste does not follow her traditional calling, but marries and leads the life of an ordinary married woman and reverts to her original calling after widowhood, it has been held that her position is not different from that of an unchaste married woman and her property devolves on her heirs according to ordinary Hindu law, ie, when it descends to daughters, they take only a limited estate and a mortgage by them does not bind the reversions.[83]

Illustrations

(a) *A* and *B* are the two sons of a prostitute by different fathers. *A* dies leaving *B*. *B* is entitled to succeed to *A*.

(b) *A* and *B* are the two sons of a prostitute by different fathers. *A* dies leaving a legitimate son *C*. Then *B* dies leaving *C*. *C* is entitled to succeed to *B*.

(c) *A* and *B* are the two sons of a prostitute by different fathers. *A* dies leaving a legitimate son *C*. Then *B* dies leaving a legitimate son *D*. Then *D* dies leaving *C*. *C* is entitled to succeed to *D*. The same principle applies to the remote legitimate descendants of *A* and *B*.

§ 165. CONTRACTS BY MARRIED WOMAN

A Hindu wife is competent to contract and the amount due by her in respect of her contractual liability can be recovered from her *stridhana*.[84]

79 *Jagadambal v Saraswati Ammal* (1950) Mad 755.

80 *Meenakshi v Muniandi* (1915) 38 Mad 1144, 25 IC 957, AIR 1915 Mad 289.

81 *Visvanatha v Doraiswami* (1925) 48 Mad 944, 91 IC 193, AIR 1926 Mad 289.

82 *Saraswathi Ammal v Jagadambal* [1953] SCR 939, (1953) 1 MLJ 697.

83 *Balasundaram v Kamashi Ammal* (1937) Mad 257, AIR 1936 Mad 958.

84 *Nathubhai v Javher* (1876) 1 Bom 121; *Govindji v Lakmidas* (1880) 4 Bom 318; *Narotam v Nanka* (1882) 6 Bom 473.

XI

WOMEN'S PROPERTY: PART II— PROPERTY ACQUIRED BY A WOMAN BY INHERITANCE

LAW PRIOR TO THE HINDU SUCCESSION ACT 1956

Note.—Reference may be made to the Note to Chapter X.

This chapter has been discussed under the following heads:

I Devolution of property inherited by females—§§ 168–73.
II Power of female heirs over inherited property—§§ 174–99.
III Remedies against unauthorised acts of widows and other unlimited heirs—§§ 202–10.

Section 14 of the Hindu Succession Act 1956, subject to certain qualifications, now confers full and heritable capacity on a female heir in respect of all property acquired by her whether before or after the commencement of the Act, with the result that by retroactive operation of that section, she holds the property in her possession as full owner and not as a limited owner.

§ 166. PROPERTY INHERITED BY MALES

When a male succeeds as heir, whether to a male or to a female, he becomes full owner of the property inherited by him, and the property at his death passes to his heirs. The only recognised exception to this rule is where property is inherited by a Hindu governed by the Mitakshara law from his father, paternal grandfather or great-grandfather.

Illustrations

(a) A male Hindu dies leaving a brother. The brother will succeed to his property, and he will take it as full owner and on his

death, it will pass to his heirs. (This is an illustration of property inherited by a male from a male).

(b) A female Hindu, who is possessed of *stridhana*, dies leaving a son. The son, as *stridhana* heir, will succeed to the property, and he will take it as full owner thereof, and on his death, it will pass to his heirs. (This is an illustration of property inherited by a male from a female).

Except in the cases mentioned in the section, a Hindu male inheriting property, whether from a male or a female, have all the powers of a full owner over that property. He can sell it, or dispose of it by gift or by will, at his pleasure. Further, he becomes a fresh stock of descent, that is to say, the property at his death passes to his heirs. The rule of Hindu law is different in the case of property inherited by female heirs, as will be seen presently.

§ 167. PROPERTY INHERITED BY FEMALES

The present chapter deals with property inherited by females from males as well as females. It may be considered under the three heads mentioned above.

I. Devolution of Property Inherited By Females

§ 168. PROPERTY INHERITED BY FEMALES FROM MALES IN TERRITORIES OTHER THAN BOMBAY STATE

(1) According to the Bengal school, the only females who can inherit the property of a male are: (1) the widow; (2) daughter; (3) mother; (4) father's mother; and (5) father's father's mother (§ 61).

(2) Before the Hindu Law of Inheritance (Amendment) Act 1929, the only females who could inherit to a male were the five mentioned in sub-§ (1). By that Act, three more females were constituted as heirs, namely, the son's daughter, daughter's daughter and sister.

(3) The Madras school recognises not only the said five female heirs, but others and also, being those mentioned in § 56. These include the son's daughter, daughter's daughter and sister, who are expressly mentioned as heirs in the Act of 1929. The only difference is that while before the Act they succeeded as *bandhus*, under the Act, they inherit with *gotraja sapindas*. (see § 43, nos 13A, 13B, 13C and § 61A).

(4) According to the Bengal, Benares, Mithila and Madras schools, every female, whether she be a widow,[1] daughter,[2] mother,[3] father's mother,[4] or father's father's mother, who succeeds as heir to the property of a male, takes only a limited estate in the property inherited by her, and on her death the property passes not to her heir, but to the next heir of the male from whom she inherited it (as to Bombay school, see § 170).

The son's daughter, daughter's daughter, and sister, who are expressly mentioned as heirs in the Hindu Law of Inheritance (Amendment) Act 1929, also take a limited estate, according to these schools, in the property inherited by them from the last male owner.

Illustrations

(a) *A*, a Hindu male governed by the Bengal school of Hindu law, dies leaving a widow and a brother. On *A*'s death, the widow succeeds as her heir. The widow then dies leaving a daughter's daughter. The widow's *stridhana* will pass to the daughter's daughter as her *stridhana* heir, but the property inherited by her from her husband *A* will pass to the next heir of her husband, namely his brother.

(b) *A*, a Hindu male governed by the Benares school of Hindu law, dies in 1928 leaving a daughter and a paternal uncle. On *A*'s death, the daughter succeeds as his heir. The daughter then dies leaving a daughter. The daughter's *stridhana* will pass to her daughter as her heir, but the property inherited by her from her father *A* will pass to the next heir of her father, namely, his paternal uncle. If *A*'s daughter dies in 1930, after the Hindu Law of Inheritance (Amendment) Act 1929, came into force, the daughter's daughter, and not the uncle, will succeed to *A*'s estate as *A*'s heir. (Vide notes to §§ 43, 13 (C)).

According to all the schools other than the Bombay school, a female inheriting to a male (§ 168) or to a female (§ 169) is not a full owner of the property inherited by her. Her power to deal with the property

1 *Collector of Masulipatam v Cavaly Vencata* (1861) 8 MIA 529; *Mst Thakur Devhee v Rai Baluk Ram* (1867) 11 MIA 140; *Bhugwandeen v Myna Baee* (1866) 11 MIA 487.

2 *Chotay Lall v Chunnoo Lall* (1878) 4 Cal 744, 6 IA 15; *Mutta v Dorasinga* (1881) 3 Mad 290, 8 IA 99; *Venkayyammma v Venkataramanayyamma* (1902) 25 Mad 678, 29 IA 156, *P Venkateswarlu v D Chinna Raghavulu* AIR 1957 AP 604.

3 *Bachiraja v Venkatappadu* (1865) 2 Mad HC 88; *Kutti v Radakrishna* (1875) 8 Mad HC 88, *Jullessur v Uggur* (1883) 9 Cal 725; *Hemlatta v Goluck Chunder* (1842) 7 SD 108 (new edn 127); *Subbiah Chetty v Veerajinnu Ammal* AIR 1978 Mad 85.

4 *Phukar Singh v Runjit Singh* (1878) 1 All 661.

is limited. She cannot alienate it except for legal necessity. Nor does she become a fresh stock of descent. At her death, the property passes not to her heirs, but to the next heirs of the last full owner. (For survivorship as between daughters, see § 43, n 5, note (2).)

Custom

A Hindu widow may by custom be entitled to her husband's property absolutely.[5]

Jains

According to the custom prevailing in Uttar Pradesh and Bengal, a Jain widow takes an absolute interest in the self-acquired property of her husband inherited by her,[6] however, in Uttar Pradesh, the same is not in the ancestral property left by him.[7]

Mithila Law

It is not correct to say that according to *Vivada Chintamani*, which is the authority of the Mithila school, when a mother succeeds to the property of her deceased son, the property goes after her death to her husband's heirs. It goes to her son's heirs.[8]

§ 169. PROPERTY INHERITED BY FEMALES FROM FEMALES IN TERRITORIES OTHER THAN THE BOMBAY STATE

According to the Bengal, Benares, Mithila and Madras schools, the rule laid down in § 168, sub-§ (3), as to property inherited by a female from a male, applies also to property inherited by her from a female. Consequently, a female inheriting property (*stridhana*) from a female takes only a limited estate in such property, and at her death, the property passes not to her heirs, but to the next *stridhana* heir of the female from whom she inherited it.[9]

5 *Krishna Bai v Secretary of State* (1920) 42 All 555, 57 IC 520, AIR 1920 All 101 (Bikaner).

6 *Sheo Singh v Dakho* (1878) 5 IA 87, (1876) 1 All 688; *Shimbhu Nath v Gayan Chand* (1894) 16 All 379; *Harnabh v Mandil* (1900) 27 Cal 379.

7 *Pahar Singh v Shamsher Jang* (1931) 29 All LJ 314, 133 IC 785, AIR 1931 All 695; *Allah Diya v Sona Devi* (1942) All 745, 204 IC 133, AIR 1942 All 331.

8 *Ram Khelawan v Lakshmi* AIR 1950 Pat 194, (1949) 28 Pat 1008.

9 As to Bombay school, see § 171. *Sheo Shankar Lal v Debi Sahai* (1903) 25 All 468, 30 IA 202 (daughter succeeding to her mother) explained in *Subramanian v Arunachelam* (1905) 28 Mad 1, 9–12; *Lal Sheo Pertab v Allahabad Bank* (1903) 25 All 476, 30 IA 209, *Venkatarama Krishna v Bhujanga* (1896) 19 Mad 107; *Virasangappa*

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§ 170. PROPERTY INHERITED BY FEMALE FROM MALES IN THE BOMBAY STATE

(1) Besides the five females who can inherit to a male in all schools; namely: (1) the widow; (2) daughter; (3) mother; (4) father's mother; and (5) father's father's mother, the Bombay school recognises other females as heirs namely, daughters of descendants, and ascendants and collaterals within five degrees, and widows of *gotraja sapindas*. These include the three females specifically mentioned as heirs in the Hindu Law of Inheritance (Amendment) Act 1929, namely, the son's daughter, the daughter's daughter, both these being daughters of descendants, and the sister, she being a daughter of an ascendant (father).

(2) As regard property inherited from males, female heirs under the Bombay school are divided into two classes, namely:

(i) those who come into the *gotra* of the deceased owner, by marriage, ie, the wife of the deceased and the wives of his *sapindas* and *samanodakas* (§ 68); and

(ii) those who are born in the *gotra* of the deceased owner, but pass by marriage into a different *gotra*, and their daughters. This class includes a daughter, son's daughter, daughter's daughter, sister, niece, grandniece, father's sister, and the like.[10]

The son's daughter, daughter's daughter, and sister are expressly mentioned as heirs in the Hindu Law of Inheritance (Amendment) Act 1929 (see § 43, nos 13A, 13B and 13C).

Females coming under class (i), such as widow,[11] mother,[12] father's mother,[13] father's father's mother, and widows of *gotraja sapindas*,[14] , eg son's widow,[15] brother's widow, uncle's widow, etc, take a limited estate in the property inherited by them from males, and on their death, the

v Rudrappa (1896) 19 Mad 107; *Virasangappa v Rudrappa* (1896) 19 Mad 110; *Raju v Ammani* (1906) 29 Mad 358; *Janakisetty v Miriyala* (1909) 32 Mad 521, 3 IC 281; *Huri Doyal v Girish Chunder* (1890) 17 Cal 911; *Jogendra v Phani* (1916) 43 Cal 64, 33 IC 810, AIR 1916 Cal 928; *Sham Biharilal v Ram Kali* (1923) 45 All 715, 75 IC 495, AIR 1924 All 15; *Matru Mal v Meberi Kunwar* (1940) All 416, 189 IC 600, AIR 1940 All 311; *P Venkateswarlu v D Chinna Raghavulu* AIR 1957 AP 604; *Soma v Brij Lal* AIR 1965 Punj 110; *Subbiah Chetti v Veerajinnu* AIR 1979 Mad 85.

10 See notes to § 130, *West and Buhler Digest*, Bombay, fourth edn, p 120, fn (n); *Tuljaram v Mathuradas* (1881) 5 Bom 662, 670, 672.

11 *Bhaskar v Mahadev* (1869) 6 Bom HCOC 1.

12 *Vrijbhukandas v Bai Parvati* (1908) 32 Bom 26; *Narsappa v Sakharam* (1869) 6 Bom HC AC 215; *Vinayak v Lakshmibai* (1861) 1 Bom HC 117.

13 *Dhondi v Radhabai* (1912) 36 Bom 546, 16 IC 343; *Madhavram v Dave* (1897) 21 Bom 739, 744.

14 *Lalloobhai v Mankuvarbai* (1878) 2 Bom 388 *affirmed subnom*; *Lallubai v Cassibai* (1881) 5 Bom 110, 7 IA 212, (1897) 21 Bom 739.

15 *Gadadhar v Chandrabhagabai* (1882) 17 Bom 690 (FB).

property passes not to their heirs, but to next heir of the male from whom they inherited it.[16] And this is so, even if such a female succeeds immediately after the death of another female who was the widow of a *gotraja sapinda* and who had previously inherited the property (see Illust (2)).

Females coming under class (ii), such as a daughter,[17] son's daughter, daughter's daughter, sister,[18] father's sister, niece,[19] grandniece,[20] sister's daughter and the like, take the property inherited by them from males absolutely, ie, they become full owners thereof. Such property becomes *stridhana* in their hands, so that in cases governed by the Mitakshara law,[21] it passes to the *stridhana* heirs mentioned in § 147, cl (2), and in cases governed by the Mayukha,[22] it passes to the *stridhana* heirs mentioned in § 151, cl II.

Illustrations

(1) A male Hindu, governed by the Bombay school, dies leaving a daughter. On his death, the daughter succeeds to the property as his heir. She takes the estate absolutely. She can dispose of it by gift or will. If she dies intestate, the property will go to her *stridhana* heirs, and not to the next heirs of her father. Thus, if she dies leaving a son and a daughter, then if she is governed by Mitakshara law, the property will pass to her daughter, and if she is governed by Mayukha, the property will pass to her son (contrast this with Illust (b) to § 168).

(2) *N* and *H* are divided brothers. *H* dies leaving a son *T*. Then *N* dies leaving a widow *J*. Then *T* dies leaving a widow *M*. Then *J* dies and on her death *M* succeeds to *N*'s property as *N*'s

16 *Bhau v Raghunath* (1906) 30 Bom 229, 237, per Jenkins CJ.

17 *Balwant Rao v Baji Rao* (1920) 47 IA 213, 48 Cal 30, 57 IC 545, AIR 1921 PC 59, *Pranjivandas v Devkuvarbai* (1859) 1 Bom HC 130; *Haribhai v Damodarbhat* (1879) 3 Bom 171; *Bulakhidas v Keshavlal* (1882) 6 Bom 85; *Babaji v Balaji* (1881) 5 Bom 660; *Bhagirthibai v Kahnujirav* (1887) 11 Bom 285; *Jankibai v Sundra* (1890) 14 Bom 612; *Gulappa v Tayawa* (1907) 31 Bom 453; *Vithappa v Savitri* (1910) 34 Bom 510, 7 IC 445; *Jawahir Lal v Jarau Lal* (1924) 46 All 192, 79 IC 861, AIR 1924 All 350 (Nagar Brahmans).

18 *Vinayak v Laskhmibai* (1861) 1 Bom HC 117; affirmed in *Venayeck v Luxemeebaee* (1864) 9 MIA 516; *Rindabai v Anacharya* (1891) 15 Bom 206.

19 *Madhavram v Dave* (1897) 21 Bom 739, 744.

20 *Tuljaram v Muthuradas* (1881) 5 Bom 662.

21 *Gulappa v Tayawa* (1907) 31 Bom 453.

22 *Vijiarangam v Lakshuman* (1871) 8 Bom HCOC 244. So much of this decision as lays down that the property will descend as if the daughter was a male is no longer law, having regard to the decision in *Manilal v Bai Rewa* (1893) 17 Bom 758, which was approved by the Privy Council in *Kesserbai v Hunsraj* (1906) 30 Bom 431, 33 IA 176.

brother's (*H*'s) son's (*T*'s) widow. Here, *M* inherits the property of *N*, a male and she inherits it as a widow of a *gotraja sapinda*. She therefore takes only a limited estate though she succeeds immediately after the death of another female *J*. *J* as *N*'s widow, took only a Hindu widow's estate. She could not, therefore, be a fresh stock of descent. What *M* inherits is not the property of *J*, but of her husband *N*.[23]

According to the Bombay school, two or more daughters, sisters, or nieces, take an absolute estate in severalty, and not as joint tenants.[24] Any one of them may, therefore, alienate her share by sale or gift or give it by will.

It will be seen from what has been stated above, that in the Bombay state, the general leaning is in favour of women's proprietary capacity. In other parts of India, the principle is that property inherited by a woman cannot stay in the family into which she has married, but must revert in every case to the family in which she was born.

§ 171. PROPERTY INHERITED BY FEMALES FROM FEMALES IN THE BOMBAY STATE

(1) According to the Bombay school, a female inheriting property from a female takes it absolutely, ie, she becomes full owner thereof. Such property becomes *stridhana* in her hands, so that in cases governed by Mitakshara, it passes to the *stridhana* heirs mentioned in § 147, cl (2), and in cases governed by Mayukha, it passes to the *stridhana* heirs mentioned in § 151, cl II (see Illust (1)).

(2) The same rule applies to a female inheriting from a female as the widow of a *gotraja sapinda* (see Illust (2)).

Illustrations

(1) *A*, a Hindu male, governed by the Bombay school, dies leaving a daughter and mother. The daughter succeeds to *A*'s property as his heir. Being a daughter, she takes the property absolutely (§ 170), and on her death it will pass to her *stridhana* heir. Suppose now that the daughter dies a maiden, leaving her father's mother as her only heir. The father's mother will take (§ 145) the property absolutely as *stridhana* under the present section with

23 *Madhavram v Dave* (1897) 21 Bom 739.

24 *Vithappa v Savitri* (1910) 34 Bom 510, 7 IC 445; *Rindabai v Anacharya* (1891) 15 Bom 206.

power to dispose it off by gift or will, and on her death intestate, the property will pass to her *stridhana* heirs.[25] (Note that a father's mother inheriting to her grandson takes a limited estate, and on her death the property passes not to her heirs, but to the next heirs of the grandson. In the case given in the illustration, she inherits to her granddaughter. Contrast this with the illustration to § 169.)

(2) *A*, a Hindu male, governed by the Bombay school, dies leaving a son *S*, and a widow *W*, of a predeceased son. On *A*'s death, *S* succeeds to his estate. Then *S* dies leaving a daughter *D*. *D* as a daughter, takes an absolute estate in the property of her father *S*. *D* dies a maiden. On her death, *W* succeeds to her estate as the nearest *sapinda* of *D*'s father. *S*, being *D*'s father's brother's widow (§ 145). *W* takes an absolute interest in *D*'s property, though she inherits as the widow of a *gotraja sapinda*, ie, as *D*'s uncle's widow.[26]

(3) *P* died in 1890. In 1904, his widow *U* adopted *B*. A suit between *U* and *B* was compromised, *U* being given a life interest in the immovable property and the remainder being vested in *B*. *B* died in 1916 leaving his widow *L* who died in December 1916, and an infant daughter who died in January 1917. Here, when *B* died, his widow *L* took a limited estate in his property. When *L* died, his infant daughter succeeded to it absolutely and *U* succeeded to her under the rule in this section. *U*, therefore, takes an absolute estate in the remainder belonging to *B*. This added to her life estate, makes her the absolute owner of the property. It must be observed that *U* does not succeed to *B* but to his infant daughter.[27]

§ 172. SHARE ALLOTTED TO A WOMAN ON PARTITION

The share allotted to a wife, mother or father's mother on partition is not her *stridhana*, unless it was given absolutely to her, and it descends on her death not to her heirs, but to the sons or grandsons out of whose portion it was taken (see § 128).

25 *Gandhi Maganlal v Bai Jadab* (1900) 24 Bom 192 (FB) (case of grandmother inheriting grandaughter's *stridhana*); *Parshottam v Keshavlal* (1932) 56 Bom 164, 137 IC 56, AIR 1932 Bom 213; *Bhau v Raghunath* (1906) 30 Bom 229, 236–37.

26 *Narayan v Waman* (1922) 46 Bom 17, 63 IC 1001, AIR 1922 Bom 134.

27 *Parshotam Bechardas v Keshavlal Dalpatram* (1932) 56 Bom 164, 137 IC 561, AIR 1932 Bom 213.

§ 173. DELETED.

II. Power of Female Heirs Over Inherited Property

§ 174. LIMITED HEIRS

(1) According to the Bengal, Benares, Mithila and Madras schools every female who succeeds as an heir, whether to a male or to a female, takes a limited estate in the property inherited by her (§§ 168–69).

(2) In the Bombay state, every female who succeeds as an heir to a female, takes the property absolutely (§ 171). However, as regards property inherited from a male, those females who by marriage have entered into the *gotra* (family) of the deceased owner, take a limited estate, while other female heirs take absolutely.[28]

It follows from what has been stated above that the following females, inheriting from a male, take a limited estate according to all the schools, namely: (1) widow; (2) mother; (3) father's mother; and (4) father's father's mother. The daughter takes absolutely in the Bombay school; in every other school, she takes a limited estate. The son's daughter, daughter's daughter, and sister, who are expressly mentioned as heirs in the Hindu Law of Inheritance (Amendment) Act 1929, also take absolutely in the Bombay school; in every other school, they take a limited estate.

(3) Females who take a limited or restricted estate in property inherited by them are hereinafter called 'limited heirs'.

§ 175. REVERSIONERS

(1) The heirs of the last full owner, who would be entitled to succeed to the estate of such owner on the death of a widow or other limited heir, if they be then living, are called 'reversioners'. A reversioner may be a male or a female.[29]

(2) *Interest of reversioners.*—The interest of a reversioner is an interest expectant on the death of a limited heir and is not a vested interest. It is a *spes successionis* or a mere chance of succession within the meaning of s 6, Transfer of Property Act 1882. It cannot, therefore, be sold, mortgaged or assigned, nor can it be relinquished. A transfer of a *spes successionis* is a nullity, and it has no effect in law.[30]

28 *Gandhi Maganlal v Bai Jadab* (1900) 24 Bom 192, 214 (FB).

29 *Moniram v Keri Kolitani* (1880) 7 IA 115, 154, 5 Cal 776, 789–90; *Sham Sunder v Achhan Kunwar* (1899) 21 All 71, 25 IA 183.

30 *Janki Ammal v Narayanaswamui* (1916) 43 IA 207, 209, 39 Mad 634, 638, 37 IC 161, AIR 1916 PC 117; *Venkatnarayana v Subbammal* (1915) 42 IA 125, 128, 38 Mad 406, 410–11, 29 IC 298, AIR 1915 PC 124; *Amrit Narayan v Gaya Singh* (1918) 45 IA 35,

continued on the next page

The widow as guardian of a minor reversioner and not as representing the estate, cannot enter into a compromise or agreement to refer disputes to arbitration, so as to affect the minor's rights when the estate comes into the minor's possession.[31] However, the interest of a reversioner is an interest within the meaning of s 174, Bengal Tenancy Act and the reversioner is a person 'interested' within the meaning of s 17 of the same Act.[32]

(3) Where there are several reversioners entitled successively to succeed to an estate held for life by a Hindu widow, no one or such reversioners can be said to claim through or derive his title from another reversioner, but each derives his title from the last full owner.[33]

Illustrations

(a) A Hindu *A*, dies leaving a widow, a brother, a son of that brother, and an uncle. Here, the brother, his son, and the uncle are all reversioners. The brother is the 'next' or 'presumptive' reversioner. The other reversioners are 'remote' or 'contingent' reversioners. If the brother dies in the widow's lifetime, his son becomes the 'next' reversioner. Suppose now that the brother dies first, and then the widow, in that case, the brother's son will succeed to *A*'s estate, not as the heir of his father, for *A*'s property never vested in his father, but as the heir of his uncle, *A*.

ILR 45 Cal 590, 44 IC 408, AIR 1917 PC 95 (renunciation); *Jagan Nath v Dibbo* (1909) 31 All 53, 1 IC 818; *Nund Kushore v Kanee Ram* (1902) 29 Cal 355; *Annada v Gour Mohan* (1921) 48 Cal 536, 65 IC 27, AIR 1921 Cal 501; *Manickam v Ramalinga* (1906) 29 Mad 120; *Muthuveeru v Vythilinga* (1909) 32 Mad 206, 3 IC 476; *Pindiprolu v Pindiprolu* (1907) 30 Mad 486; *Ramchandar v Kallu* (1908) 30 All 497; *Bhana v Guman* (1918) 40 All 348, 44 IC 629, AIR 1918 All 184; *Gangabai v Hari Ganesh* (1921) 45 Bom 1167, 62 IC 680, AIR 1921 Bom 446; *Dhoorjeti v Dhoorjeti* (1907) 30 Mad 201 (renunciation); *Mst Bhagwati v Jagdam* (1921) 6 Pat LJ 604, 621–22, 62 IC 933, AIR 1921 Pat 260; *Harnath Kaur v Indar Bahadur Singh* (1923) 50 IA 69, 45 All 179, 71 IC 629, AIR 1922 PC 403 (limitation); *Annada Mohan v Gour Mohan* (1923) 50 IA 239, 50 Cal 929, 74 IC 499, AIR 1923 PC 189 (limitation); *Thakur prasad v Mst Dipa Kuer* (1931) 10 Pat 352, 365, 134 IC 129, AIR 1931 Pat 442. See also *Ma Yati v Mahomed* (1927) 5 Rang 145, 102 IC 690, AIR 1927 Raj 165.

31 *Amrit Narayan Singh v Gaya Singh* 45 IA 35, 45 Cal 590, 44 IC 408; *Mst Har Narain Kunwar v Sajjan Pal Singh & ors* (1940) All 719, (1940) Kant 366, 190 IC 184, 67 IA 386, AIR 1940 PC 181.

32 *Susheelasundaree v Bishnupada De* (1933) 60 Cal 636, 146 IC 641, AIR 1933 Cal 622.

33 *Bhagwanta v Sukhi* (1900) 22 All 33 (FB); *Babadur Singh v Moban Singh* (1901) 29 IA 8–9, 24 All 94; *Lala Soni Ram v Kanhaiya Lal* (1915) 40 IA 74, 35 All 227, 19 IC 291; *Srimuty Manokarani Debi v Haripada* (1914) 18 CWN 718, 24 IC 311, AIR 1914 PC 164; *Rangaswami v Nachiappa* (1919) 46 IA 72, 83–84, 42 Mad 523, 536, 50 IC 498, AIR 1918 PC 196.

(b) A Hindu *F*, dies leaving a widow *A*, a mother *B*, a father's mother *C*, and a father's brother *D*. Here, there are three reversioners to whom two, namely *B* and *C* are females, and one, namely, *D*, is a male. On *F*s death, his widow *A* will succeed to his property. On *A*'s death, *F*s property will revert or pass to *F*s next heir *B*, if she is then living. On *B*'s death, *F*s property will revert to his next heir *C*, if she is then living. On *C*'s death, *F*s property will revert or pass to *D*, if he is living. *D*, however, will take the full property as full owner and on his death, it will pass to his own heirs and not to *F*s heirs.

Spes successionis

Under the Hindu law, the death of the female owner opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to possession. In her lifetime, however, the reversionary right is a mere possibility or *spes successionis*.[34] His right becomes concrete only on her demise; until then, it is mere *spes successionis*.[35] No effect can be given to a contract for sale of a reversion made by a reversioner before the reversion has fallen in, although, the reversioner succeeds to the reversion on the widow's death.[36] Further, the interest of a reversioner being a mere *spes successionis*, he is not entitled to redeem a mortgage of the estate, executed by the widow's husband, in the lifetime of the widow.[37] In a case, at the request of a Hindu widow, who had mortgaged her husband's property to pay off her husband's debts, the plaintiff, her daughter who was the immediate reversioner, paid off the mortgage debt. The mortgagee delivered over to her the mortgage deed with an endorsement of satisfaction upon it, and she was given possession of the mortgaged property. However, she was later on dispossessed by the sons of her deceased sister in whose favour the widow had executed an unregistered deed of gift. It was held,

34 *Venkatanarayana v Subbammal* (1915) 42 IA 125, 128, 38 Mad 400, 410, 411, 29 IC 298, AIR 1915 PC 124; *Lakshmi v Anantharama* (1937) Mad 948 (FB), 171 IC 7, AIR 1937 Mad 699; *Ramaswamy v Arumanayagam* AIR 1955 TC 20; *Subbareddi v Govindareddi* AIR 1955 AP 49; *Smt Shakuntala Devi v Kaushalya Devi* (1936) 17 Lah 356, 162 IC 718, AIR 1936 Lah 124. Reference may be made to *Ram Chander v Ganeshdas* AIR 1984 SC 42 (claim for apportionment in respect of acquired property—reversioner not entitled to make claim).

35 *Amrit Narayan v Gaya Singh* (1918) 45 IA 35, 39, 45 Cal 590, 603, 44 IC 408, AIR 1917 PC 95.

36 *Jaganadha v Prasada Rao* (1916) 36 Mad 554, 29 IC 241, AIR 1916 Mad 579; *Ramgopal v Gurbux Singh* AIR 1955 Punj 215.

37 *Chhotey Singh v Surat Singh* (1930) 5 Luck 691, 12 IC 211, AIR 1938 Ori 294. Vide in this connection, the observations of Ray CJ in *Mitra v Gurubari* AIR 1950 Ori 150.

on a suit brought by the plaintiff against her sister's sons, for recovery of possession of property, that although as a reversioner, pure and simple, the plaintiff could not claim any right of subrogation, yet she was entitled to a possessory lien, both as a matter of law and equity on the strength of which she could claim to recover property from the defendants, who were mere trespassers.[38]

Jats

Among Jats, who have migrated to the District of Meerut from the Punjab, there exists a custom by which reversioners, irrespective of degree, succeed equally to the last male owner, each branch of the family taking its share *per stirpes*.[39]

Burden of Proof

It is incumbent on a plaintiff seeking to succeed to property as a reversioner to establish affirmatively the particular relationship which he puts forward. He is also bound to satisfy the court that to the best of his knowledge, there are no nearer heirs.[40]

§ 176. WIDOW'S ESTATE

A widow or other limited heirs is not a tenant-for-life, but is owner of the property inherited by her, subject to certain restrictions on alienation, and subject to its devolving upon the next heir of the last full owner upon her death.[41] The whole estate is for the time vested in her, and she represents it completely.[42] As stated in a Privy Council case,[43] 'her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited; but so long as she is alive no one has any vested interest in the succession.' The principles relating to the nature of a widow's estate were reiterated by the Supreme Court in the undermentioned cases.[44]

38 *Mitra v Gurubari* AIR 1950 Ori 150.

39 *Dharam Singh v Hira* (1922) 44 All 390, 65 IC 828, AIR 1922 All 141.

40 *Rama Row v Kuttiya* (1917) 40 Mad 654, 34 IC 294, AIR 1917 Mad 872; *Javitri v Gendan Singh* (1927) 49 All 779, 102 IC 167, AIR 1927 All 767; *Mt Barro v Narain Prasad* (1938) 13 Luck 167, AIR 1937 Ori 243.

41 *Bijoy Gopal v Krishna* (1907) 34 Cal 329, 34 IA 87, 91–92.

42 *Moniram v Keri Kolitani* (1880) 5 Cal 776, 789, 7 IA 115, 154; *Jagdish Prasad v Shreedharpant* AIR 1955 All 625.

43 *Janaki Ammal v Narayanasami* (1916) 43 IA 207, 209, 39 Mad 634, 637, 37 IC 171, AIR 1916 PC 117; *Kalishankar Das v Dhirendra Nath* [1955] 1 SCR 467.

44 *Jaisri v Rajdewan* AIR 1962 SC 83; *Gogula Gurumurthy v K Ayyoppa* AIR 1974 SC 1702, 1705; *Jagat Singh v Teja Singh* AIR 1970 P&H 309.

A widow under the Hindu law takes a special and qualified estate, and she has a limited power of disposition of her husband's property. The restrictions on her power of alienation are inseparable from her estate, and their existence does not depend on that of heirs capable of taking on her death. If, for want of heirs, the right to the property passes to the government, the government has the same power that an heir would have of protecting its interests by impeaching any unauthorised alienation by the widow.[45]

The estate taken by a Hindu widow in property inherited by her from her husband is called 'widow's estate', or 'woman's estate'. The estate taken by every other limited heir is similar in its incidents to a widow's estate. The incidents of a widow's estate are set forth in §§ 177–201, (see Note at the beginning of this Chapter and s 14, Hindu Succession Act 1956).

A widow or other limited heir does not take merely an estate for life, for, as will be seen presently, she can, in certain cases, dispose of the whole estate inherited by her which she could not do if she were a mere life-tenant. What vests in her is not mere life-estate, but the whole estate. Further, she represents the estate completely, and it is for this reason that in certain cases, a decree passed against her with reference to property inherited by her, binds not only herself, but also the reversioners, though the reversioners were not parties to the suit. In other words, the estate of a Hindu widow is an absolute one, subject to certain restrictions.

Incidents of widow's estate

The expression '*stridhana*' predicates an absolute estate; the expression 'widow's estate' implies a limited estate. A female takes an absolute estate in her *stridhana*, but she takes a qualified estate in property inherited by her except in certain cases governed by the Bombay school (§ 173). When she takes a qualified estate, it is said that she takes a widow's estate. The following is a brief statement of the peculiar features of a widow estate:

(1) The estate taken by a widow in property inherited by her from her husband may best be described by saying that she is the owner thereof, except that she cannot sell the corpus of the property or mortgage it, or make a gift of it, or grant leases thereof for a long term, or otherwise alienate it, unless it be for legal necessity or for the benefit of the estate or with the consent of the next reversioners. Where alienation is made by her for

45 See § 185A *Collector of Masulipatam v Cavaly Vencata Dhirendra Nath* (1861) 8 MIA 529, 553; *Kalishankar Das v Dhirendra Nath* [1955] 1 SCR 467, 479, AIR 1954 SC 505. Also see *Natvarlal v Dalubhai* [1954] SCR 339, 355, 356, 56 Bom LR 447, AIR 1954 SC 61.

legal necessity or with the consent of the next reversioners, it passes an absolute estate to the alienee to the same extent as alienation made by full owner (§§ 178–85).

A widow inheriting her husband's property takes it and holds it as his legal representative. Rents accruing from it are to be considered as part of his estate and as such are liable to pay his debts and to be attached in execution of simple money decree obtained against him.[46]

(2) Subject to the above restrictions on alienation, she holds the property absolutely, and she completely represents it. She may, therefore, institute suits in respect of the property, and she may be sued in respect thereof, and decrees passed against her as representing the estate in respect of debts of other transactions binding on the estate, are binding not only on her, but on the reversioners, though the reversioners are not parties to the suit (§ 199).

(3) If she is dispossessed of any portion of the property by a third person, she can use to recover it, but if she fails to sue and allows the possession of such person to become adverse to her, the reversioners are not affected by such adverse possession, for they succeed not as her heirs, but as her husband's heirs, and they may, therefore, sue for possession within 12 years from the date of her death (§ 201).

Where a widow or other limited female owner sues for arrears of profits against a sharer and obtains a decree and executes it, but on appeal, the amount is reduced, the liability to refund is personal to her and does not attach to the estate so as to bind the reversioner after her death.[47]

(4) She can sell her life interest in the property or mortgage it or make a gift of it to anyone she likes. She is entitled to the whole income of the property. She may spend the income in any way she likes. She is neither bound to pay her husband's debts, nor is she bound to maintain the members of her husband's family, or to perform their marriage ceremonies out of the income. She can throw the burden of all these charges on the corpus of the property, and sell or mortgage the same to meet those expenses, such expenses being regarded in law as legal necessities.[48]

(5) The entire estate being vested in her, she is entitled to manage the same. However, she must manage it, as a prudent owner

46 *Phool Kunwar v Rikhi Ram* (1935) 57 All 714, 153 IC 865, AIR 1935 All 261.
47 *Kishan Lal v Muhammad Ishaq* (1938) All 761 (FB), 176 IC 509, AIR 1938 All 426.
48 See §§ 177–81. *Debi Dayal v Bhan Pertap* (1904) 31 Cal 433.

would do. She must neither commit waste nor do any act injurious to the reversion (§ 198).

(6) The limitations imposed upon her estate are not imposed upon her for the benefit of reversioners. They are inseparable from her estate, so that even if there be no reversioners, she cannot alienate the corpus of the property except for a legal necessity. If she does alienate it without legal necessity, then if there be no reversioners, the alienation may be set aside by the government taking the property by escheat.[49]

(7) A widow cannot by any act or declaration of her own, while retaining possession of her husband's estate, give her possession or estate a character different from that attaching to the possession or estate of a Hindu widow.[50]

The incidents of the estate taken by other limited heirs, such as the mother, father's mother, daughter (except in the Bombay school), are similar to those of the widow's estate.

§ 177. INCOME AND SAVING FROM INCOME

A widow or other limited heir is not a trustee for the reversioners.[51] She has absolute power of disposal of the income of the property inherited by her. She is not bound to save the income. She may spend the whole income upon herself, or give it away as she likes during her life.[52]

The law as to the right of a widow or other limited heir to accumulations of the income of the estate of the last male holder may be considered under six heads namely:

(1) accumulations of income, which accrued during the life of her husband or other male whom she succeeds;
(2) accumulations of income after his death and before delivery of the estate to her;
(3) accumulations of income of the estate made by her personally;
(4) arrears of income and income held in suspense;
(5) accumulations of income where the income is given to her by her husband by deed or will;
(6) enlargement of estate inherited by a widow.

49 *Collector of Masulipatam v Cavaly Vencata* (1860) 8 MIA 520; *Kundan v Secretary of State* (1926) 7 Lah 543, 96 IC 865, AIR 1926 Lah 673.

50 *Sham Lall v Amarendro* (1896) 23 Cal 460, 473; *Kanni Ammal v Ammakannu* (1900) 23 Mad 504. See also *Brij Indar v Janki Koer* (1877) 5 IA 1, 1 CLR 318; *Kashi Prasad v Inda Kunwar* (1908) 30 All 490.

51 *Viraraju v Venkataratnam* (1939) Mad 226.

52 Also, see § 127(4). *Hurrydoss v Srremurty Uppoornah* (1856) 6 MIA 434; *Biswanath v Khantomani* (1870) 6 Beng LR 747; *Grose v Amritamayi* (1869) 4 Bengal LROC 1, 40–41; *Sarat Chandra v Charusila* (1928) 55 Cal 918, 112 IC 508, AIR 1928 Cal 794.

(1) Accumulations which accrued during the husband's life

Accumulations which accrued during the husband's life form part of the corpus of the estate. They are accretions to the estate, and the widow succeeds to both for a woman's estate.[53]

(2) Accumulations between death and delivery and afterwards realised by the limited owner

Cases have arisen in which possession of the estate has been withheld from the widow, and the estate together with accumulations of income is eventually handed over to her long after her husband's death; or in which the corpus of the estate is bequeathed by the husband to others, but there is an intestacy as to the income and the income which has accumulated owing to litigation or other causes is handed over to the widow long after the husband's death. As these accumulations accrue after the husband's death, the widow does not take them by succession. She takes them as she would have taken the income itself had she been let into possession at once, ie, as *stridhana*,[54] and she may spend them as she chooses.

However, the question still remains whether, if she keeps them distinct for some time, she is entitled to deal with and dispose of the accumulations as she would have been entitled to do with the income, if she has been let into possession at once and there had been no accumulation. This question should be determined by the intention of the widow to treat the accumulations as accretions to the estate or as her own absolute property. If she does nothing to indicate an intention to make the fund received, or the interest on it, part of her husband's estate (which was in other hands) or to justify the inference that she wished it to revert to her husband's heirs, the fund is her *stridhana*, which she may dispose of by deed or will. However, if she does indicate which intention or does any act to justify such inference, she takes only a widow's estate in the fund, and she cannot dispose of it except for legal necessity, and on her death, it passes to her husband's heirs. This was the view taken by the Judicial Committee in *Sawdamini Dasi v Administrator-General of Bengal*.[55]

53 *Chandrabulee v Brody* (1868) 9 WR 584, 585; *Sreemutty Soorjeemoney Dossee v Denobundoo* (1862) 9 MIA 123; *Sreemutty Sooreemoney Dossee v Denobundoo* (1857) 6 MIA 526.

54 *Sreemutty Sorjeemoney Dosee v Denobundoo* (1862) 9 MIA 123, 138–39; *Isri Dut v Hansbutti* (1883) 10 Cal 324, 335, 10 IA 150.

55 (1892) 20 IA 12, 20 Cal 433 (estate in hands of exector—settlement by widow of accumulations upheld).

(3) Accumulations made by the widow personally

The widow is not bound to make any savings, but if she does make savings, the question arises whether she has the same power of disposal of the savings as she has of the income, or whether the savings are to be treated as accretions to the estate, ie, as part of the corpus of the estate, so as to be subject to the same restraint on alienation as the corpus itself (§ 178).

Thus, if she invests the savings in the purchase of land or securities, and makes no endeavour or attempt for the purpose of distinguishing the original estate from the after-purchases, but deals with the after-purchases in the same manner as the original estate, it is an indication of intention on her part to treat the after-purchases as accretions to the original estate, and she cannot alienate them for any purpose which would not justify alienation of the original estate. However, if there is no evidence of any dealing on her part which would show that she intended to treat the after-purchases as accretions to her husband's estate, then the savings are her *stridhana* which she may dispose of by deed or will, and on her death intestate, they will pass to her *stridhana* heirs.[56]

> Her absolute power of disposition over the income derived from such limited estate being now fully recognised, it is only reasonable that, in the absence of any indication of her intention to the contrary, she must be presumed to retain the same control over the investment of such income. The mere fact that the properties thus acquired by her are managed and enjoyed by her without any distinction, along with properties inherited from her husband, can in no way affect the presumption. She is absolutely entitled to the income derived from both sets of properties.[57]

In the ultimate analysis, the result must depend on the facts and circumstances of each case, which should be determined in the light of the observations approved by the Supreme Court mentioned above.

In a case, a widow inherits landed property in a village from her husband, and with the savings of the income of that property she

56 *Isri Dut v Hansbutti* (1883) 10 Cal 324, 337, 10 IA 150; *Sheolochun v Saheb Singh* (1887) 14 Cal 387, 393–94, 14 IA 63; *Nirmala v Deva Narayan* (1928) 55 Cal 269, 276, 104 IC 284, AIR 1927 Cal 868; *Dulhin Parbati Kuer v Baijnath Prasad* (1935) 14 Pat 518, 155 IC 213, AIR 1936 Pat 200; *Tustu Charan v Kali Kumar* AIR 1957 Cal 122; *Sitaju v Bijendra* (1949) 28 Pat 447, AIR 1951 Pat 356; *Sumantrabai v Rishabhkumar* (1953) Nag 69, AIR 1952 Nag 295; *Haribarsingh v Deonarayan* (1954) Nag 692, AIR 1954 Nag 319; *Neelamma v Bhimamma* AIR 1982 Kant 307. Reference may particulary be made now to *Sitaji v Bijendra Narain* AIR 1954 SC 607.

57 The Supreme Court in *Gogula Gurumurthy v K Ayyappa* AIR 1974 SC 1702, 1706 quoting with approval from *Akkanna v Venkayya* (1902) 25 Mad 351.

purchases other lands in the same village. Long after the purchase, she makes gift both of the original estate and the after purchases to one and the same person (being the daughter in that case), only reserving to herself a life-interest in part of them. It has been held that the after-purchases constitute accretions to the estate, which she has no power to alienate except for a purpose which would justify alienation of the original estate.[58] It has similarly been held, that where the widow erects buildings on land belonging to the husband's estate,[59] or deposits money belonging to her husband's estate with a banker, upon the understanding that the interest at the end of every year shall be added to the principal and the amalgamated sum should be treated as a fresh deposit,[60] the buildings and accumulations of the interest must be deemed to be accretions to the estate, and descendible to the husband's heirs.

In *Sheolochun Singh v Saheb Singh*,[61] their Lordships said:

> Where a widow comes into possession of the property of the husband, and receives the income and does not spend it, but invests it in purchase of other property, their Lordships think that, prima facie, it is the intention of the widow to keep the estate of the husband as an entire estate, and that the property purchased would, prima facie, be intended to be accretions to that estate. There may be, no doubt, circumstances which would show that the widow had no such intention, that she intended to appropriate the savings in another way.

On the other hand, if she advances the savings made by her on a mortgage of land and subsequently assigns the mortgage for value,[62] or purchases land with the savings and not very long after the purchase mortgages it as her own and afterwards makes a gift of it,[63] or purchases land with the savings and soon after the purchase makes a gift of it,[64] the subsequent acquisitions cannot be treated as accretions to the original estate, her conduct in all these cases being consistent only with an intention to treat them as her own absolute property.

In *Akkanna v Venkayya*,[65] the High Court of Madras observed with reference to the dictum in *Sheolochun Singh v Saheb Singh*:

58 *Isri Dut v Hansbutti* (1883) 10 Cal 324, 10 IA 150; *Sheolochun v Saheb Singh* (1887) 14 Cal 387, 14 IA 63.

59 *Venkata v Surenani* (1908) 31 Mad 321.

60 *Narayan v Suppiah* (1920) 43 Mad 629, 58 IC 639, AIR 1920 Mad 983.

61 (1887) 14 Cal 387, 393, 14 IA 63; *Nabakishore v Upendrakishore* (1922) 42 Mad LJ 253, 74 IC 612, AIR 1923 PC 563.

62 *Akkanna v Venkayya* (1902) 25 Mad 351.

63 *Wahid Ali v Tori Rama* (1913) 35 All 551, 21 IC 91.

64 *Keshav v Maruti* (1922) 46 Bom 37, 62 IC 954, AIR 1922 Bom 144.

65 (1902) 25 Mad 351.

This was only dictum which must be understood with reference to the facts and circumstances of that case which it was held indicated that it was the intention of the widow to keep the estate entire, and that the same should descend in one line of succession.

In a case, where the widow purchased a house, and within less than four months sold the property, it was held by the Allahabad High Court, that it is for the person who alleges that she meant to keep the property as her *stridhana* to prove that it is so.[66] It is submitted that this decision is inconsistent with the principle approved of by the Supreme Court.

Where the widow lends part of her savings on mortgage to the next reversioner, and afterwards obtains a decree against him for the amount of the loan and takes proceedings in execution, but dies pending execution, the person entitled to proceed with the execution is her *stridhana* heir, her conduct manifesting a clear intention to treat the decretal amount representing the savings as her own absolute property.[67] A purchase of property by a widow out of the savings of the income in the names of another person affords an indication of an intention to treat the property as her own.[68] Where there is nothing to indicate the intention of a limited owner about the immovable properties acquired by her out of the savings of the property of the last male rolder, the presumption is that she intended to keep them at her absolute disposal.[69]

When a woman's *stridhana* was inherited by her two minor daughters, but was managed for them by their guardians, who purchased some additional property out of its income and one of the daughters dies before obtaining possession of the estate, her share of the property purchased was held to belong to her absolutely as *stridhana* and descended to her heir and not to the other daughter.[70]

(4) Income held in suspense or unrealised by the limited heir

A widow or other limited heir may not have recovered the rents of the estate inherited by her, or she may have obtained decrees for arrears of rent and may not have realised them, or she may have recovered the arrears of rent and realised the decree, but may not have invested the amount. In cases such as these, the question arises whether on her death, the arrears of income or decrees held by her or the income held

66 *Bhagwan Das v Bittam* (1945) All 148.
67 *Sita Ram v Dulam* (1919) 41 All 350, 50 IC 372, AIR 1919 All 38.
68 *Nirmala v Deva Narayan* (1928) 55 Cal 269, 275, 104 IC 284, AIR 1927 Cal 868.
69 *Prabhakar v Sarubai* (1943) Nag 779, 208 IC 211, AIR 1943 Nag 253.
70 *Kailasantha Mudaliar v Vadivanni* (1935) 58 Mad. 488, AIR 1935 Mad 740.

in suspense constitute her *stridhana* or whether they constitute 'savings' or 'accumulations.'[71]

(5) Accumulations of income granted by husband by deed or will

Where by a deed or will, the husband grants the income of his property to his wife for her life, and the corpus is given to others, the savings from such income and the property purchased out of such savings are her *stridhana*, and they pass to her *stridhana* heirs.[72]

(6) Enlargement of estate inherited by a widow

The estate inherited by a widow from her husband may be enlarged otherwise than by savings from the income. Thus, it may be enlarged by action of government, or by compromise with the superior owner,[73] or otherwise.[74] In such cases, the enlarged estate is still a widow's estate.[75]

The enlargement is no more that an accretion to her husband's estate; it does not change the character of the estate so as to convert the widow's estate into *stridhana*. It has been held in the undermentioned cases that a female heir derives no stronger title from the fact that the Inam Commissioner has enfranchised in her name property inherited from a male, and has given a new title deed in her name. In *Venkata v Veerabhadrayya*, the Judicial Committee held that when *karnam* service lands have been enfranchised, a quit rent being imposed in lieu of the service, and an *inam* title deed is granted comprising the lands to the holder of the office, his representatives and assigns, the lands are his separate property, and are not subject to any claim for partition by other members of the family. Following the principle of this decision, the High Court of Madras has held that where a similar enfranchisement takes

71 *Venkatadri v Parthasarathi* AIR 1925 PC 105; *Sreemurty Puddo v Dwarka Nath Biswas* (1876) 25 WR 335, 341; *Balasubramanya v Subbayya* (1938) Mad 551, 65 IA 93, AIR 1938 PC 34; *Sarat Chandra v Charusila* (1928) 55 Cal 918, 112 IC 508, AIR 1928 Cal 794; *Surendra Nath Basu v Radha Rani Debi* (1940) 2 Cal 415, 187 IC 108; *Sarnam v Raja Bisheswar* (1930) 5 Luck 608, 25 IC 161, AIR 1931 Ori 66.

72 *Srimati Krishna v Bhaiya Rajendra* (1927) 2 Luck 43, 82–89, 104 IC 15, AIR 1927 Ori 240 (legacy); *Bhugbutti Das v Bholanath* (1875) 2 IA 256, 25 WR 168; *Isri Dutt v Hansbutti* (1883) 10 Cal 324, 336, 10 IA 150; *Subramanian v Arunachelam* (1905) 28 Mad 1.

73 *Vangala v Vangala* (1906) 28 Mad 13; *Kashi Prasad v Inda Kunwar* (1908) 30 All 490; *Subbaroya v Aiyaswami* (1909) 32 Mad 86, 1 IC 749; *Ram Shankar v Lal Bahadur* (1926) 1 Luck 98, 92 IC 637, AIR 1926 Ori 277.

74 *Chandrakisor v Upendra Chandra* (1923) 37 Cal LJ 319, 74 IC 612, AIR 1923 Cal 563 (purchase by widow of rights of tenants in occupation of her husband's estate).

75 (1921) 48 IA 244, 44 Mad 643, 61 IC 667, AIR 1922 PC 96; *Palaniyandi v Velayudam* (1929) 52 Mad 6, 112 IC 320, AIR 1929 Mad 93; *Bharosa Shukul v Monbasi Kuer* (1932) 54 All 1014, 143 IC 259, AIR 1932 All 690.

76 (1921) 48 IA 244, 44 Mad 643, 61 IC 667, AIR 1922 PC 96.

place in favour of a widow of *karnam* service lands and a similar title is given to her, she takes an absolute interest in the lands. When the widow, at her husband's wish, rounded off the property by acquiring another portion and treated both as one, it was held that a case of accretion had been established and she could not alienate the acquired property as if it were her own.

§ 177A. ACQUISITION OF NEW PROPERTY FROM SALE PROCEEDS OF PROPERTY LEFT BY HUSBAND

Where a widow sells the entire property left by her husband and from the sale proceeds acquires new property, the property so acquired partakes of the nature of her husband's estate.[77]

§ 177B. DOCTRINE OF BLENDING

The doctrine of blending, which applies in case of coparceners, where property is thrown into common stock (§ 227) cannot be involved in regard to property held by a Hindu female (eg, widow) as a limited owner.[78]

§ 178. LIMITED POWER OF DISPOSAL OF IMMOVABLE PROPERTY

To uphold an alienation by a widow or other limited heir, of the corpus of immovable property inherited by her, it should be shown:[79]

(1) that there was legal necessity (§§ 181–82);[80] or
(2) that the alienee, after reasonable inquiry as to the necessity, acted honestly in the belief that the necessity existed (§§ 181–82); or
(3) that there was such consent of the next reversioners to the alienation as would raise a presumption that the transaction was a proper one (§ 183); or
(4) that it was surrender by her of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of alienation (§ 197).

77 *Tod Singh v Begam Bai* AIR 1960 MP 64; *Ayyongouda v Godigeppagouda* AIR 1940 Bom 200.

78 *Malessappa Bandeppa v Desai Mallappa* (1962) 2 SCJ 589.

79 *Debi Prosad v Golap Bhagat* (1913) 40 Cal 721, 752, 753, 19 IC 273 (FB); *Rangasami v Nachiappa* (1919) 42 Mad 523, 46 IA 72, 50 IC 498, AIR 1918 PC 196.

80 *Fateh Singh v Raghubir Sahai* (1938) All 904 (FB) (relates to usufructuary mortgage rights inherited by widow).

Where any one of the first three positions is established, the alienation may be of the whole or any part of the estate; but where the fourth alone is proved, then the alienation must be of the whole estate.

A widow or other limited heir has no power to dispose of the corpus of immovable property inherited by her except in the four cases mentioned above.

A widow may alienate her husband's property to pay debt incurred by her for legal necessity, though that debt is barred at the time of alienation.[81]

§ 179. LIMITED POWER OF DISPOSAL OF MOVABLE PROPERTY

In territories other than the Bombay state, a widow or other limited heir has no greater power of disposal over movable property inherited by her than over immovable property, and she cannot dispose of it by deed or will.[82] The same is the law in Bombay state in cases governed by the Mitakshara.[83] However, in cases governed by Mayukha, it has been held that she can dispose of movable property inherited by her by act inter vivos, that is, by sale, gift or otherwise,[84] but not by will, and what remains of the property at her death descends to the next heirs of the last full owner.[85] So also movable property obtained by a Hindu widow in a partition with her son stands on the same footing as movables acquired by inheritance, and therefore, may be disposed of by her during her lifetime unrestricted by any rights of other persons.[86]

§ 180. NO POWER TO DISPOSE OFF INHERITED PROPERTY BY WILL

A widow or other limited heir cannot in any case dispose of by will property inherited by her or any portion thereof, whether the property be movable or immovable.[87]

81 *Darogi Rai v Basdeo Mahto* (1937) 16 Pat 45, 166 IC 555, AIR 1937 Pat 40; *Ratilal v Indravadan* AIR 1966 Guj 133.

82 *Bhugwandeen v Myna Baee* (1867) 11 MIA 487 (Benares); *Durga Nath v Chintamoni* (1904) 31 Cal 214 (Bengal); *Buchi v Jagapathi* (1885) 8 Mad 304 (Madras).

83 *Pandharinath v Govind* (1908) 32 Bom 59.

84 *Bechar v Bai Lakshmi* (1863) 1 Bom HC 56; *Bhagirthibai v Khanujirav* (1887) 11 Bom 285, 297.

85 *Chamanlal v Doshi Ganesh* (1904) 28 Bom 453; *Gadgadhar v Chandrabhagabai* (1893) 17 Bom 690; *Harilal v Pranvalavdas* (1892) 16 Bom 229.

86 See, ss 2 and 3(3), Hindu women's Rights to Property Act 1937; *Chamanlal v Bai Parvati* (1934) 58 Bom 246, 150 IC 854, AIR 1934 Bom 151.

87 *Thakoor Deyhee v Rai Baluk Ram* (1866) 11 MIA 139; *Gadadhar v Chandrabhagabai*

continued on the next page

§ 181. ALIENATIONS BY WIDOW

A widow or other limited heir has no power to alienate the estate inherited by her from the deceased owner for the following purposes, namely:

(I) religious or charitable purposes (§181A);
(II) other purposes amounting to legal necessity (§ 181B).

For purposes of the first class, she has a larger power of disposition than for purpose of the second class.[88]

A surrender by a Hindu widow in favour of the next reversioner is not an alienation of her husband's estate.[89]

§ 181A. ALIENATION BY WIDOW FOR RELIGIOUS OR CHARITABLE PURPOSES

(1) *Extent of power of alienation.*—A widow or other female heir may alienate the estate for certain religious or charitable purposes. These may be divided into two classes, namely:

(a) the performance of the obsequial ceremonies of the deceased owner mentioned in cl (i) below, and the payment of his debts mentioned in cl (iv) below; [90]
(b) the performance of religious ceremonies of persons other than the deceased owner mentioned in cl (ii) below, and religious or charitable acts which are supposed to conduce to the spiritual welfare of the deceased owner mentioned in cl (iii) below.

The first class relates to acts, which are essential and obligatory. The second class relates to acts, which although not indispensable or obligatory, are still for pious purposes, which are conducive to the benefit of the soul of the deceased. With reference to the first class of acts, the powers of the Hindu female, who holds the estate are wider than in respect of the acts, which are simply pious. As regards acts of the first class, if the income of the estate or the estate itself is not sufficient to cover the expenses, she is entitled to sell the whole of it. As regards the second class, she can alienate a small portion only of the estate for the pious

(1893) 17 Bom 690; *Durga Nath v Chintamoni* (1903) 31 Cal 214; *Narsimha v Venkatadri* (1884) 8 Mad 290; *Sarat Chandra v Charusila* (1928) 55 Cal 918, 112 IC 508, AIR 1928 Cal 794; *Tirath Ram v Khan Devi* (1920) 1 Lah 588, 60 IC 101, AIR 1921 Lah 149; *Jagdeo Singh v Mussammal Raja Kuer* (1927) 6 Pat 788, 103 IC 482, AIR 1927 Pat 262; *Shambhu Dayal v Basdeo* AIR 1970 All 525.

88 *Collector of Masulipatam v Cavaly Vencata* (1861) 8 MIA 529, 551.

89 *Kasubai v Chandrabhaga* (1947) Nag 455.

90 *Ashutosh v Chidam* (1930) 57 Cal 904, 126 IC 263, AIR 1930 Cal 351.

or charitable purpose she may have in view;[91] the expense that is allowable as regards this class of acts must be limited by a due regard to the entire bulk of the estate, and may even be totally disallowed, where it is not warranted by the circumstances of the family.

In *Kamla Devi v Bachulal Gupta*,[92] the Supreme Court observed that one of the principles which clearly emerged from the decisions on the subject was that a Hindu widow in possession of the estate of her deceased husband can make an alienation for religious acts, which are not essential or obligatory, but are still pious observances which conduce to the bliss of the deceased husband's soul. In case of essential or obligatory acts, if the income of the property or the property itself is not sufficient to cover the expenses, she is entitled to sell the whole of it; but for acts which are pious and which conduce to the bliss of the deceased husband's soul, she can alienate a reasonable portion of the property.

To justify alienation for a religious or charitable purpose, it is not necessary to show any 'benefit to the estate,' or to prove any 'pressure on the estate', such as is necessary in the case of alienation for other purposes (§ 181B (1)).[93]

What are religious or charitable purposes?

The religious or charitable acts for which an alienation may be made are as follows:

(i) performance of the funeral[94] and *shraddha* ceremonies[95] of the deceased owner. These acts are essential and obligatory;[96]

Thus, a widow may alienate property inherited by her from her husband for the performance of the funeral and *shraddha* ceremonies of the husband. Similarly, a daughter succeeding as heir to her father may alienate property inherited by her for the performance of similar ceremonies of the father.[97] So, debts incurred by a daughter for the *shraddha* ceremony of her father, while the widow is alive, are on the same footing as debts

91 *Sardar Singh v Kunj Behari Lal* (1922) 44 All 503, 511, 49 IA 383, 391, 69 IC 36, AIR 1922 PC 261; *Kashirao v Motiram* (1951) Nag 284.

92 AIR 1957 SC 434, 443; *Sheo Kuer v Nathuni* AIR 1976 SC 709.

93 *Collector of Masulipatam v Cavaly Vencata* (1861) 8 MIA 529, 551; *Ram Surat v Hitandan* (1931) 10 Pat 474, 134 IC 137, AIR 1931 Pat 330; *Nandlal v Hari Prasad* AIR 1955 Pat 251.

94 *Ratanchand v Javherchand* (1898) 22 Bom 818; *Lakshminarayana v Dasu* (1888) 11 Mad 288.

95 *Srimohan v Brijbehary* (1909) 36 Cal 753, 2 IC 152.

96 *Sheo Kuer v Nathuni* AIR 1976 SC 709.

97 *Raj Chunder v Sheeshoo* (1865) 7 WR 146.

incurred by the widow. Such debts bind the daughter when she succeeds as reversioner.[98]

However, this principle applies only to a widow or other limited owner or a donee from her in lawful possession. Where the property has devolved from the last owner upon his mother and after her death, a person without lawful title enters into possession of the property, and incurs expenses for the funeral ceremonies of the mother, such person cannot claim a charge on the estate for the expenses so incurred against the reversioner;[99]

(ii) performance of religious ceremonies of persons whose ceremonies the deceased owner was bound to perform, as for instance, the *shraddha* of the husband's mother,[1] and where a daughter inherits to her father, the performance of her mother's *shraddha*.[2] These ceremonies are not essential or obligatory;

(iii) religious or charitable acts which conduce to the spiritual welfare of her husband.[3] These acts are not essential or obligatory;

No mathematical limit can be fixed to the power of alienation of a widow of her husband's property for the purpose of religious acts, which conduce to his spiritual benefit. The question whether the property dedicated or alienated constitutes a reasonable proportion of the whole estate must depend upon the facts and circumstances of each case.[4]

In *Sheo Kuer*'s case, the Supreme Court held that an *arpanama* in favour of deity in respect of one-fifth land of her estate was valid.

Alienation by a widow to pay off debts incurred by her for the *upanayana* ceremony (investiture with the sacred thread) and marriage of her daughter's son will be upheld, provided the debts are reasonable according to the ordinary notions of a Hindu.[5]

98 *Daroga Rai v Basdeo Mahto* (1937) 16 Pat 45, 166 IC 555, AIR 1937 Pat 40.

99 *Nand Rani v Krishna Sahai* (1935) 57 All 997, 156 IC 23, AIR 1935 All 698.

1 *Chowdry Junmejoy v Russomoyee* (1868) 11 Bengal LR 418; *Ramcoomar v Ichamoyi* (1881) 6 Cal 36.

2 *Srimohan v Brijbehary* (1908) 36 Cal 755.

3 *Collector of Masulipatam v Cavaly Vencata* (1861) 8 MIA 529, 551; *Raj Lukhee Debea v Gokool Chunder* (1866) 13 MIA 209; *Sardar Singh v Kunj Behari Lal* (1922) 44 All 503, 511, 49 IA 383, 391, 69 IC 36, AIR 1922 PC 261 affirming (1919) 41 All 130, 48 IC 847, AIR 1918 All 40; *Vuppuluri Tatayya v Garimilla* (1911) 34 Mad 288, 6 IC 240; *Khub Lal v Ajodhya* (1915) 43 Cal 574, 31 IC 433, AIR 1916 Cal 792; *Rabidat v Mst Jawali* (1946) All 580 (FB); *Mahalakshamma v Machamma* AIR 1961 AP 263.

4 *Sri Ram v Chandeshwar Prasad* (1952) 31 Pat 417, AIR 1952 Pat 438; *Nathuni Prasad v Kachnar Kuer* AIR 1965 Pat 160.

5 *Venkatasubba Rao v Ananda Rao* (1934) 57 Mad 772, 155 IC 79, AIR 1934 Mad 432.

Following this and other decisions, it has been held that an alienation of husband's property by a widow for meeting the marriage expenses of her daughter's son would be binding on the reversioners, provided the limited owner acted with the best of motives and without extravagance.[6]

The first set of religious acts referred to above relates to the performance of the ceremonies referred to in cl (i) above, and the payment of debts referred in cl (vi) below.[7] Both these are for religious purposes, which a widow is bound to carry out at any expense to the estate as laid down in *Sardar Singh*'s case. These are absolute necessities. The second set of religious acts comprises the ceremonies referred to in cl (ii) above, and religious or charitable acts, which conduce to the spiritual welfare of the husband mentioned in cl (iii). For these purposes, the widow can make a gift of or alienate only a reasonable portion of the estate as laid down in *Kamla Devi*'s case and other cases cited below.[8] An endowment by a widow for the upkeep of *thakurdwara* out of all proportion to the estate, was held not to be binding on the reversioners, though they raised no objection to the construction of the *thakurdwara*.[9] The gift may be of movable property, or it may be of immovable property. The circumstance that the widow has sufficient income to provide for the observances without alienation of the estate is immaterial, for the income is her property.[10] Almost all cases under this head relate to acts conducing to the spiritual welfare of the husband. The following are instances of such acts:

(a) pilgrimages for the spiritual benefit of her husband and in performance of her duty to his soul, eg, pilgrimage to Gaya for performing her husband's *shraddha*;[11]

6 *Parisa Mudaliar v Nataraja* AIR 1950 Mad 337, (1950) 1 Mad LJ 90. Also see § 181 B (iv), and see *Kamala Devi*'s case AIR 1957 SC 434. (gift on the occasion of marriage of daughter).

7 *Ashutosh v Chindam* (1930) 57 Cal 904, 126 IC 263, AIR 1930 Cal 351.

8 *Panachand v Manoharlal* (1918) 42 Bom 136, 3 IC 729, AIR 1917 Bom 155 (gift of four-fifths of the estate held invalid); *Rama v Ranga* (1885) 8 Mad 552; *Bhaskar v Mahadeo* (1869) 6 Bom HCOC 1, 13; *Ram Kawal v Ram Kishore* (1895) 22 Cal 506; *Kunj Bihari Lal v Laltu Singh* (1919) 41 All 130, 48 IC 847, AIR 1918 All 40; *Ram Charan v Girjanandani Devi* AIR 1959 All 473; *Thakurji v Parmeshwar Dayal* AIR 1960 All 339; *Thakur Indraj Bux v Thakur Sheo Naresh* (1927) 2 Luck 713, 104 IC 676, AIR 1927 Ori 450; *Thakur Prasad v Musammat Dipa Kuer* (1931) 10 Pat 352, 134 IC 129, AIR 1931 Pat 422; *Chandradip Rai v Mahip Rai* AIR 1960 Pat 112.

9 *Mst Tulsha v Lachman Prasad* (1943) 18 Luck 501, 204 IC 68, AIR 1943 Ori 109.

10 *Sardar Singh v Kunj Behri Lal* (1922) 44 All 503, 49 IA 383, 69 IC 36, AIR 1922 PC 261.

11 *Muteeram v Gopal* (1873) 11 Bengal LR 416; *Darbari Lal v Gobind* (1924) 46 All 822, 80 IC 31, AIR 1924 All 902.

(b) performance of Gaya *shraddha* of the husband;[12] or pilgrimage to Pandharpur,[13] but not a second pilgrimage to Gaya;[14]

(c) a gift to the Temple of Jagnnath at Puri for *bhog* (food offerings) to the deity and for the maintenance of the priests there 'for the salvation of my husband and his family members and my won salvation';[15]

(d) a gift made by a daughter at the time of performing her father's *shraddha* on the occasion of the Pushkaram, a peculiarly holy event among the Hindu;[16]

(e) a gift for erecting and maintaining a temple for the benefit of the soul of the husband, though it may be also for the benefit of her soul;[17]

(f) a gift for the excavation and maintenance of a tank to be attached to a temple founded by the husband;[18]

(g) a gift for the construction of a tank pursuant to her husband's wishes;[19]

(h) a gift to the husband's *purohit* (priest) on the occasion of her visit to Gaya;[20]

(i) a gift by way of *suphal sankalpa* to a priest of Gaya;[21]

(j) a gift to a family deity;[22]

(k) a gift of a small portion of the estate by a Hindu widow to an educational institution has been held to be valid by the East Punjab High Court on the ground that it is not

12 *Maniruddin v Amintuddin* AIR 1956 Pat 142; *Ram Dulare v Batul* AIR 1976 All 135 (*shraddha* and also for her maintance and repairs of houses).

13 *Ganpat v Tulsiram* (1912) 36 Bom 88, 12 IC 271.

14 *Gur Prasad v Ram Sukh* AIR 1952 All 938. In Bombay and Calcutta cases cited, a pilgrimage to Benares was held not to be a pilgrimage for the spiritual benefit of the deceased. It is submitted that there can be no general rule about Benares or any other holy place and each case must turn on its own facts; *Shripati Raoji v Vishwanath* (1955) Bom 1033, AIR 1955 Bom 457, 57 Bom LR 840; *Hari v Bairand* (1909) 13 CWN 544, 547, 1 IC 434. Reference may also be made to *Sudhir Chandra v Jagadish Chandra* AIR 1959 Ori 112.

15 *Sardar Singh v Kunj Bihari Lal* (1922) 44 All 503, 49 IA 383, 69 IC 36, AIR 1922 PC 261.

16 *Tatayya v Garimilla* (1911) 34 Mad 288, 6 IC 240.

17 *Thakur Indraj Bux v Thakur Sheo Naresh* (1927) 2 Luck 713, 104 IC 676, AIR 1927 Ori 450.

18 *Khub Lal v Ajodhya* (1916) 43 Cal 574, 31 IC 433, AIR 1916 Cal 792.

19 *Ram Surat v Hiranandan* (1931) 10 Pat 474, 134 IC 137, AIR 1931 Pat 330.

20 *Gobind v Lakhrani* (1921) 43 All 515, 63 IC 221, AIR 1921 All 109; *Ishwar v Babunandan* (1925) 47 All 563, 571, 88 IC 193, AIR 1925 All 495 (gift to a family priest set aside as it was of a large proportion of the estate).

21 *Baldeo Prasad v Fateh Singh* (1924) 46 All 533, 79 IC 654, AIR 1924 All 933.

22 *Madan Mohan v Rakhal Chandra* (1930) 57 Cal 570, 124 IC 327, AIR 1930 Cal 73.

unrelated to the desire of rendering spiritual welfare of her husband.[23]

However, is not competent to a Hindu widow to alienate any portion of her husband's property for her sole's spiritual benefit. Hence, the following gifts have been held to be invalid:

(a) a gift by a widow to a favoured idol made 16 months after her husband's death without any reference to him or his funeral ceremonies;[24]

(b) a gift to the *pujari* (worshipper) of a temple established by her husband's mother for which no provision was made by the deceased himself in his lifetime;[25]

(c) a feast given by a widow on her return from pilgrimage;[26]

(d) a gift for building *dharamsala* about 16 years after her husband's death, there being nothing to show that the intention was to confer spiritual benefit on her deceased husband;[27]

(e) a gift for the construction of a temple and installation of idols for her own welfare and salvation in the next world,[28] and a dedication of property to the idols installed in such temple;[29]

(f) a gift to her own *guru* nine years after her husband's death.[30]

(iv) payment of debts of the deceased owner, even though barred by limitation whether during his lifetime or after his death.[31] Payment of these debts is essential and obligatory.

23 *Prithi Pal v The Sikh Educational Society for Women* AIR 1951 Simla 175.

24 *Puran Dai v Jai Narain* (1882) 4 All 482, 484.

25 *Ram Kawal v Ramkishor* (1895) 22 Cal 506. The property alienated was, moreover, about one-third of the whole.

26 *Makhan Lal v Gayan Singh* (1911) 33 All 255, 9 IC 199.

27 *Sham Devi v Birbhadra* (1921) 43 All 463, 62 IC 432, AIR 1921 All 178; *Munshi Lal v Shiv Devi* (1923) 4 Lah 336, 78 IC 266, AIR 1924 Lah 137.

28 *Bishen Bayal Singh v Musammat Jaisari Kuer* (1918) Pat 323, 48 IC 746, AIR 1917 Pat 4; *Kalandi v Sadhu* AIR 1967 Ori 74 (performance of her obsequies).

29 *Thakur prasad v Musammat Dipa Kuer* (1931) 10 Pat 352, 134 IC 129, AIR 1931 Pat 442; *Kashirao v Motiram* (1951) Nag 284, AIR 1951 Nag 460.

30 *Har Mitra v Raghubar* (1928) 3 Luck 645, 110 IC 618, AIR 1928 Ori 342.

31 *Ashutosh v Chidam* (1930) 57 Cal 904, 126 IC 263, AIR 1930 Cal 351; *Bhala v Parbhu* (1878) 2 Bom 67; *Chimnaji v Dinkar* (1887) 11 Bom 320; *Kondappa v Subba* (1890) 13 Mad 189; *Udai Chunder v Ashutosh* (1893) 21 Cal 190; *Santu Ram v Mst Dodan Bai* (1928) 9 Lah 85, 103 IC 706, AIR 1927 Lah 657; *Tulshi Prasad v Jugmohan Lal* (1935) 57 All 422, 152 IC 92, AIR 1934 All 1048; *Mt Mallan v Paranatma Das* (1936) 17 Lah 588, 166 IC 421, AIR 1936 Lah 558; *Kammi v Popur* AIR 1950 Hyd 50; *Vinayak v Md Hanif* AIR 1953 Nag 281, AIR 1954 Nag 11; *Rattan Devi v Jagadhar Mal* AIR 1956 Punj 46; Cf *Wamanrao v Shantabai* (1953) Nag 413, AIR 1952 Nag 317.

A widow or other limited female heir is not bound to pay the principal amount of the last male owner's debts, for the income belongs wholly to her.[32] She is only bound to pay the interest on the same out of the surplus of her income. When an alienation is made to pay off the principal and interest of a debt of the last male owner, it is not for a binding purpose so far as the interest is concerned, when she could have paid if off from her income, but if the proportion of the interest to the whole of the principal amount of the debt is small (eg, one-fifth) the whole alienation will be upheld.[33]

The act being a religious act of the first class, there is no restriction on her power of alienation and she may sell the whole estate for that purpose.[34] She may even pay a debt barred by limitation, but she is not entitled to pay a time-barred debt, which was repudiated by her husband.[35] However, where a Hindu widow mortgages property to pay off the time-barred debt of her husband, and later on executes another mortgage to pay off the claim under the prior one, which had by that time become time-barred, the last mortgage is not binding on the reversioner, as it was executed only to pay off her time-barred debt.[36] A daughter-in-law also is under a moral obligation to pay the time-barred debt of her father-in-law and she may alienate his property for the payment of such debts.[37] However, it has been held that a mother who has succeeded to her son's estate, is not under any obligation to pay a time-barred debt of her husband, though the estate to which she has succeeded originally, belonged to her husband; and alienation, therefore, of any part of the estate for the payment of such debt is not binding on the reversioner.[38] Where a widow has paid her husband's debts with her money in his lifetime, the presumption is that the payment was voluntary; she cannot therefore sell her husband's property after his death to pay herself the amount.[39] A widow is not entitled to pay off her husband's debts incurred by him when he was a minor, so as to bind the reversioners of his estate.[40]

32 *Ramsami v Mangaikarasu* (1895) 18 Mad 113, 119–20; *Debi Dayal v Bhan Pertap* (1904) 31 Cal 433, 443.

33 *Jagannadham v Vighneshwarudu* (1932) 55 Mad 216, 134 IC 810, AIR 1932 Mad 177.

34 *Ashutosh v Chidam* (1930) 57 Cal 904, 126 IC 263, AIR 1930 Cal 351.

35 *Bhagwat v Nivritti* (1915) 39 Bom 113, 27 IC 346, AIR 1914 Bom 245; Cf *Anganna v Ayyasami* (1953) 1 MLJ 304, AIR 1953 Mad 106 (son's time-barred debt).

36 *Chandrika Prasad v Bhagwan Das* (1940) 15 Luck 167; *Raja Rao v Chiranjeevulu* AIR 1955 Ori 17.

37 *Bhau v Gopala* (1887) 11 Bom 325.

38 *Sheo Ram v Sheo Ratan* (1921) 43 All 604, 63 IC 279, AIR 1921 All 163; Cf *Lakshminarasayya v Papayya* AIR 1955 AP 97.

39 *Bhawani v Himmat* (1911) 33 All 342, 10 IC 274, PC; affirming *Himmat v Bhawani* (1908) 30 All 352.

40 *Bajrang Singh v Govind Prasad* (1936) 11 Luck 11, 154 IC 841, AIR 1935 Ori 373.

Widow not in possession

A widow or other female heir who is not in possession of the estate, but is entitled to maintenance only, cannot burden the estate with any expense for religious or charitable purposes.[41] The court should, in fixing the maintenance, take into consideration the necessary religious expenses which she has to undergo,[42] and if that has not been done she may apply in the suit in which the decree for maintenance was passed for an increase of maintenance so as to provide for those expense.

§ 181B. ALIENATION BY WIDOW FOR LEGAL NECESSITY—EXTENT OF POWER OF ALIENATION

The power of a widow or other limited heir to alienate the estate inherited by her for purposes other than religious or charitable is analogous to that of a manager of an infant's estate as defined by the Judicial Committee in *Hunooman Persaud v Musamat Babooee* (§ 242, note (1)).[43] That power is a limited and qualified one; it can only be exercised rightly 'in a case of need or for the benefit of the estate' (sub-§ (3)). However, where the alienation is one that a prudent owner would make in order to benefit the estate, a bona fide alienee is not affected by the previous mismanagement of the estate. 'The actual pressure on estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded'. If the alienation is for purposes of legal necessity or for the benefit of the estate, it binds not only her interest in the estate, but the whole body of reversioners.[44] The principles relating to the widow's power to alienate property were reiterated by the Supreme Court in *Jaisri v Rajdewan*.[45]

The touchstone of the authority is necessity.[46] The word 'necessity,' when used in this connection has a somewhat special, almost technical meaning. It does not mean actual compulsion, but the kind of pressure, which the law recognises as serious and sufficient.[47] The receipt even of

41 *Ramabai v Dattatraya* (1931) 33 Bom LR 1244, 135 IC 491, AIR 1931 Bom 497.

42 *Baisni v Rup Singh* (1890) 12 All 558; *Devi Persad v Gunwant Kuar* (1895) 22 Cal 410.

43 (1856) 6 MIA 393; *Komeswar Pershad v Run Bahadur* (1881) 6 Cal 843, 8 IA 8; *Sheela Devi v Mohan Sarup* AIR 1987 SC 1072.

44 *Collector of Masulipattam v Cavaly Vencata* (1861) 8 MIA 529, 550–51; *Sham Sunder v Acchhan Kunwar* (1898) 25 IA 183, 189, 192, 21 All 71, 80, 83. Widow dying before completion of sale—Doctrine of part performance applied—*Ranchhod v Manubhai* (1954) Bom 194, (1953) 55 Bom LR 890, AIR 1954 Bom 153.

45 AIR 1962 SC 83, (1962) SCJ 578. Also see *Rani v Shanta Bala* AIR 1971 SC 1028 (strained financial circumstances); *Subhash Chandra v Kalyani* AIR 1999 Gau 96 (no evidence of legal necessity—sale set aside).

46 *Sham Sunder v Achhan Kunwar* (1898) 25 IA 183, 192, 21 All 71, 83.

47 *Ramsumran Prasad v Shyam Kumari* (1922) 49 IA 342, 346, 1 Pat 741, 745, 69 IC 71, AIR 1922 PC 356.

full value for property sold by her, where there is no pressure on the estate, will not justify the sale; otherwise, every transaction with a limited heir for full value would be valid.[48]

Purposes of legal necessity

The following purposes have been held to amount to legal necessity for which alienation may be made:

(i) costs of taking out probate, or letters of administration, or a succession certificate in respect of the estate of the deceased owner;[49]

(ii) payment of arrears of government revenue and of decrees for rent accrued due after death of the deceased owner, provided she had no funds when she mortgaged or sold the property to pay the revenue or the decrees, and the mortgage or sale was absolutely necessary in order to discharge the debt, which if not discharged, would have resulted in a forcible sale of the property.[50] If there is an actual existing necessity, the circumstance that the necessity was brought about by the mismanagement of the widow does not vitiate the mortgage or sale, unless it is shown that the mortgagee or purchaser himself contributed to the mismanagement (§ 182).

Arrears of government revenue and of rent due by the deceased owner himself constitute his debts, and they fall under § 181A(2) (iv), and they are payable out of his estate. However, arrears of revenue and rent accrued due in respect of her husband's property after his death, must be paid out of the gross income;[51]

(iii) maintenance of herself,[52] and of persons whom the deceased owner was bound to maintain, such as his mother, paternal grandmother, unmarried daughters, and the like,[53] or paying off debts incurred for family expenses.[54]

48 *Ravaneshwar v Chandi Prasad* (1916) 43 Cal 417, PC, 36 IC 499, AIR 1915 Cal 57 affirming same case (1911) 38 Cal 721, 750, 12 IC 931; *Chandrakishore v Upendra Chandra* (1923) 37 Cal LJ 319, 74 IC 612, AIR 1923 Cal 563.

49 *Srimohan v Brijbehary* (1909) 36 Cal 753, 2 IC 153.

50 *Jagannath v Gur Charan* (1929) 4 Luck 279, 114 IC 783, AIR 1929 Ori 422; *Rameshwar v Parvabati* (1914) 19 CWN 313, 25 IC 84, AIR 1915 Cal 141; *Srimohan v Brijbehary* (1909) 36 Cal 753, 2 IC 153; *Ganesh Lal v Khetra Mohan* (1926) 53 IA 134, 5 Pat 585, 95 IC 839, AIR 1926 PC 56; *Jiban v Brojo Lal* (1903) 30 Cal 550, 30 IA 81; *Ghansham v Badiya Lal* (1902) 24 All 547; *Lakshman v Radha Bai* (1887) 11 Bom 609.

51 *Jagannath v Gur Charan* (1929) 4 Luck 279, 282–83, 114 IC 783, AIR 1929 Ori 422; *Ishwari v Babunandan* (1925) 47 All 563, 88 IC 193, AIR 1925 All 495.

52 *Sadashiv v Dhakubai* (1881) 5 Bom 450; also *Ramsumran Prasad v Shyam Kumari* (1922) 49 IA 342, 346, 1 Pat 741, 745, 69 IC 71, AIR 1922 PC 356; *Uma Kanta v Satya Charan* AIR 1965 Cal 189; *Ratilal v Indravadan* AIR 1966 Guj 133.

53 *Darbari Lal v Gobind* (1924) 46 All 822, 80 IC 31, AIR 1924 All 902.

54 *Venkatasubba Rao v Ananda Rao* (1934) 57 Mad 772, 155 IC 79, AIR 1934 Mad 432.

No hard and fast rule can be expected on the question whether a widow in possession of very little property left by her husband can or cannot sell the same for her future maintenance. It would be difficult to say with exactitude that she has no such power since ultimately each case must depend on its own facts and circumstances;[55]

(iv) marriages of relations of the deceased owner, such as his daughter's son's daughter, daughter's daughter, grandson's daughter,[56] paternal uncle's son's daughter,[57] and other, which is a burden on the estate.

A daughter inheriting to her father or mother may defray the marriage expenses of her own daughter or daughter's daughter out of the estate, if the father of the girl to be married, is a man of no means and is unable to defray those expenses.[58] No hard and fast rule can be laid down as to the amount of marriage;[59]

(v) gift by a widow to her daughter on the occasion of her marriage or at her *gauna* ceremony,[60] also a gift to her son-in-law on the occasion of the daughter's marriage,[61] or a gift by way of marriage customary present called *bhat*, on the occasion of the marriage of her niece (husband's sister's daughter,[62] provided that in each case the gift is of a reasonable amount. However, there is no rule that the daughter is entitled to no more than 1/4th share of her deceased father's estate on the occasion of her marriage.[63]

55 *Neelambal v Rajarathnam* AIR 1956 Mad 336, FB; *Ram Dulare v Batul Bibi* AIR 1976 All 135.

56 *Ramcoomar v Ichamoyi* (1880) 6 Cal 36; *Debi Dayal v Bhan Pertap* (1904) 31 Cal 433; *Makhan v Gayan* (1911) 33 All 255, 9 IC 199; *Ganpat v Tulsiram* (1912) 36 Bom 88, 12 IC 271 (betrothal of daughter); *Bhagwati v Ram Jatan* (1923) 45 All 297, 73 IC 648, AIR 1924 All 23; *Mahadeo Prasad v Musammat Dhanraj* (1926) 1 Luck 477, 95 IC 574, AIR 1926 Ori 425; *Krishnamachariar v Ramabadran* (1952) Mad 318, AIR 1952 Mad 706; Cf *Narainbati v Ramdhari* (1916) 1 Pat LJ 81, 34 IC 277, AIR 1916 Pat 178. Also see *Cf Lacchan Puranik v Fulkunwar* AIR 1961 MP 239.

57 *Baijnath Rai v Mangla Prasad* (1926) 5 Pat 350, 90 IC 732, AIR 1926 Pat 1.

58 *Rustom Singh v Moti Singh* (1896) 18 All 474; *Rajagopalachariar v Sami Reddi* (1926) 50 Mad LJ 221, 93 IC 49, AIR 1926 Mad 517; *Kamal Prasad v Lalji Prasad* (1930) 9 Pat 721, 127 IC 842, AIR 1930 Pat 600; *Srinivasa Rao v Annadhanam Seshacharulu* (1942) Mad 42, 198 IC 169, AIR 1942 Mad 106.

59 (1923) 45 All 297, 299, 73 IC 648, AIR 1924 All 23; (1926) 1 Luck 477, 95 IC 574, AIR 1926 Ori 425; *Churaman v Gopi Sahu* (1910) 37 Cal 1, 5–6, 1 IC 945.

60 (1909) 37 Cal 1, 1 IC 945; *Jawala Ram v Hari* (1924) 5 Lah 70, 80 IC 680, AIR 1924 Lah 429; *Udai Dat v Ambika Prasad* (1927) 2 Luck 412, 100 IC 503, AIR 1927 Ori 110.

61 *Ramasami v Bengidusami* (1898) 22 Mad 113; *Ram Sumran v Govind Das* (1926) 5 Pat 646, 99 IC 789, AIR 1926 Pat 582.

62 *Gulab Devi v Banwari Lal* (1940) All 555, 190 IC 202, AIR 1940 SC 403, (1940) ALJ 464. This case seems to go too far, though the plaintiff's action in questioning the alienation seems to be without any grace, as it was for her own daughter's marriage.

63 *Krishna Pratap Singh v Prembada Kunwar* (1942) All 708, 203 IC 97, AIR 1942 All 365, (1942) ALJ 487.

In *Kamla Devi v Bachulal Gupta*,[64] the Supreme Court reviewed a number of decisions on the subject of gift of reasonable portion of property to a daughter on marriage and held that it was competent to a widow to make a gift of a reasonable portion of the estate of her husband to her daughter as a marriage dowry in pursuance and fulfilment of an ante-nuptial agreement, even though the gift was made two years after the marriage ceremony.

In the above-mentioned case, the gift was of immovable property of the value of Rs 19,000, which was about 1/4th of the property allotted to her share out of the estate of her deceased husband. Two of the principles accepted by the Supreme Court as emerging from the decisions on the subject were:

Gifts by a widow of landed property to her daughter or son-in-law on the occasion of the marriage or any ceremonies connected with the marriage are well-recognised in Hindu law, if a promise is made of such a gift for or at the time of the marriage, that promise may be fulfilled afterwards and it is not essential to make a gift at the time of the marriage, but it may be made afterwards in fulfilment of the promise, provided the condition that the gift must be a reasonable portion of the property is satisfied.

Alienation by widow for 'the benefit of the estate'

Besides legal necessity, a widow or other limited heir may alienate the estate 'for the benefit of the estate' (see § 243A). An alienation of property to meet the costs of litigation necessary for preserving the estate is alienation 'for the benefit of the estate'.[65] So too is alienation for making necessary repairs to properties belonging to the estate; so also is an exchange of land for effective management of the estate.[66] However, alienation for developing or improving the properties is not one 'for the benefit of the estate', though it may bring additional income, and it does not bind the reversioners.[67] Selling off specified property on the ground

64 AIR 1957 SC 434.

65 *Karimuddin v Gobind Krishna* (1909) 31 All 497, 36 IA 138, 3 IC 795; *Debi Dayal v Bhan Pertap* (1904) 31 Cal 433; *Jagdat Singh v Rawat* (1929) 4 Luck 26, 112 IC 238, AIR 1929 Ori 364; *Maniklal v Kisni* (1941) Nag 135, 192 IC 798, AIR 1941 Nag 78; *Sura Prasad v Makhna Devi* (1945) All 465; *Beni Madho v Ram Kuer* AIR 1954 Pat 451; *Ananto Mohini v Khalil Sahu* AIR 1954 Ori 107 (criminal case against slanderers).

66 *Kanhaiya Singh v Ram Kisto* AIR 1964 Pat 254.

67 *Hurry v Gonesh* (1884) 10 Cal 823; *Ganap v Subbi* (1908) 32 Bom 577; *Makhan v Gayan* (1911) 33 All 255, 9 IC 199. In *Dayamani v Srinibash* (1906) 33 Cal 842, the circumstances were special; *Sundermani Devi v Rupei Dei* AIR 1956 Ori 16 (sale of a dilapidated house van, an act of prudent management).

of apprehension and danger to the widow and her dependent children may not amount to a sale for the benefit of the estate.[68] In the ultimate analysis, the question must turn on the facts and circumstances of each case having regard to the principles stated above.[69]

§ 181C. ALIENATION FOR LEGAL NECESSITY BY ONE WIDOW WITHOUT CONSENT OF OTHER WIDOWS

If a Hindu dies leaving two widows, they succeed as joint tenants with a right of survivorship, but they can partition the property so that each may separately enjoy an equal share of the income (§ 43, no 4, note (4)). No agreement to partition is however possible if one of the widows is a minor, and there is no legal guardian to act on her behalf.[70]

If they act together, they can alienate the corpus of the estate for debt contracted for necessity, but one of them cannot prejudice the right of survivorship of the other by alienations, even though for a legal necessity, save by the consent of the other, or possibly save where that consent has been applied for and unreasonably withheld. The mere fact that a partition has taken place between them does not imply a right to prejudice the claims of the survivor.[71] The arrangement between the two widows may be of such a character that each may relinquish her right of survivorship as to the portions of the estate held by the other. In such a case, the alienation (with or without legal necessity and without the consent of the other) cannot be questioned by the other, but it will not bind the reversioners.[72]

A Hindu dies leaving two widows *A* and *B* and leaving two properties *X* and *Y*. The widows divide the properties so that *A* obtains possession

68 *Hazarilal v Jugal Kishor* AIR 1999 MP 104.

69 For instance, see *Nasirabad Urban Co-op Bank v Gyan Chand* AIR 1980 Raj 73 (revival of family business, only source of livelihood of the family). Reference may be made to *CIT v Gurprit Singh* [1983] 139 ITR 48.

70 *Kasubai v Chandrabhaga* (1947) Nag 455.

71 *Gajapati v Pusapati* (1892) 19 IA 184, 16 Mad 1; *Gauri Nath v Gaya Kuar* (1928) 55 IA 399, 111 IC 485, AIR 1928 PC 251; overruling *Jai Narain v Munna Lal* (1928) 50 All 489, 107 IC 699, AIR 1928 All 92. See also *Vallura v Sasapu* (1925) 49 Mad LJ 479, 90 IC 881, AIR 1926 Mad 6; *Krishna Pratap Singh v Prembada Kunwar* (1942) All 708, 203 IC 97, AIR 1942 All 365, (1942) ALJ 487; *Chanderjit Das v Debi Das* (1953) 1 All 437, AIR 1951 All 522; *Rajasekaran Pillai v K Phillipose* AIR 1954 T-C 101. Also see *B S D Mahamandal v Prem Kumar* AIR 1985 SC 1102 (what is applicable to co-widows is equally applicable to daughters also). Reference may also be made to *Brahmavarta Sanathan Dharam Mahamandal v Prem Kumar* (1985) 3 SCC 350.

72 *Dulhin Parbati Kuer v Baijnath Prasad* (1935) 14 Pat 518, 155 IC 213, AIR 1936 Pat 200; *Ammani Ammal v Perisami Udayan* (1923) 45 Mad LJ 1, 74 IC 58; *Beni Madho v Ram Kuer* AIR 1954 Pat 451. Also see *Karapagathachi v Nagarathinathachi* AIR 1965 SC 1752.

or property *X*, and *B* of property *Y*. *A* afterwards mortgages property *X* for debts contracted by her for a legal necessity, and puts the mortgagee in possession. On *A*'s death, *B* is entitled to possession of property *X* from the mortgagee.

The same principles apply to two or more daughters.[73]

§ 181D. ALIENATION BY WIDOW MAY BE BY WAY OF MORTGAGE OR SALE

Where a case of necessity exists, the widow or other limited heir is not bound to raise money on her personal security.

She may sell the property or mortgage it. She is not bound to mortgage it, if a mortgage would be more prejudicial to her than a sale by reducing her income to a greater extent.[74] Even if a mortgage would have been more beneficial than a sale, still if she and the purchaser are both acting honestly, the sale cannot be set aside on the ground solely that she ought to have mortgaged and not sold.[75] Where there is a mortgage subsisting on the property, the question whether the widow could sell it in discharge of the liability, is a question which must be determined on the facts of each case, there being no absolute prohibition against her effecting a sale in a proper case. What has to be determined is whether the act is one, which can be justified as that of a prudent owner managing his or her own property. It was held by the Supreme Court, after reiterating the principles relating to the subject, that a sale by the widow of property which is subject matter of a usufructuary mortgage cannot be said to be beyond her powers, though the case may be one where the mortgagee cannot sue to recover the amount due on the mortgage.[76] If the property has been mortgaged, but the income of the property is not sufficient to pay the interest on the mortgage-debt, she may sell the property even before the debt is due, if in the circumstances this is a proper, though not a necessary course to take. 'A widow, like a manager of a family, must be allowed a reasonable latitude in the exercise of her powers, provided she acts fairly to her expectant heirs.'[77]

73 See § 31. *Yelumala Chetty v Natesachari* (1945) Mad 35.

74 *Singam v Draupadi* (1908) 31 Mad 153; *Bal Krishna v Hira Lal* (1919) 41 All 338, 345, 50 IC 74, AIR 1919 All 406.

75 *Phoolchand v Rughoobuns* (1869) 9 WR 108; *Nabakumar v Bhabasundari* (1867) 3 Bengal LR (ACJ) 375; *Kamalini v Himangshu* AIR 1956 Cal 211 (a Hindu widow has certainly the duty to see that the reversion is not unneccessarily lost).

76 *Jaisri v Rajedewan* AIR 1962 SC 83, (1962) 1 SCJ 578; *Ramjee Rai v Gopal Ahir* AIR 1963 Pat 34.

77 *Venkaji v Vishnu* (1894) 18 Bom 534, 536. See also *Niamat Rai v Din Dayal* (1927) 54 IA 211, 8 Lah 597, 101 IC 373, AIR 1927 PC 121 (powers of manager).

§ 182. BURDEN OF PROOF OF NECESSITY: EVIDENCE

Those who deal with a person who has only a limited interest in the property and who proposes to dispose of a larger interest, are prima facie bound to make out the facts which authorise such disposition. The power of a widow or other limited heir to sell or mortgage the estate inherited by her is a limited and qualified power. She is at perfect liberty to dispose of her own life-interest in the estate, but if she proposes to alienate the corpus of the estate either by way of sale or mortgage, the purchaser or mortgagee is bound to inquire into the necessity for the sale or mortgage. If the sale or mortgage is impeached, the burden lies on him to prove:

(a) either that there was legal necessity in fact;[78] or
(b) that he made proper and bona fide inquiry as to the existence of the necessity, and did all that was reasonable to satisfy himself as to the existence of the necessity.[79]

If he proves that there was necessity in fact, the alienation will be upheld, although, the necessity was brought about by the mismanagement of the limited heir,[80] unless it is shown that he himself contributed to the mismanagement.[81]

Even if he fails to prove that there was a necessity in fact, the alienation will be upheld, if he proves that he made such inquiry as aforesaid, and that the facts represented to him were such as, if true, would have justified the transaction (Illust (1)).

In no case, however, is he bound to see that the money paid by him is applied to meet the necessity. The reason is that he can rarely have the means of controlling the actual application, unless he himself enters on the management.[82] The same rule applies to a transferee from an alienee (Illust (2)).[83]

78 *Bajrang Singh v Govind Prasad* (1936) 11 Luck 11, 154 IC 841, AIR 1935 Ori 373.
79 *Ramanand Lal v Damodar Das* (1941) All 820, 199 IC 369, AIR 1942 All 110, (1942) ALJ 94.
80 *Rai Rajeshwar Bali v Har Kishen Bali* (1933) 8 Luck 538, 150 IC 346, AIR 1933 Ori 170; *Amruti Dei v Saradamoni* AIR 1950 Ori 143.
81 *Birendra Nath v Domon Chandra* ILR (1953) 1 Cal 208, AIR 1952 Cal 473.
82 *Hunooman Persaud v Mussamat Babooee* (1856) 6 MIA 393; *Cavaly Vencata v Collector of Masulipatam* (1867) 11 MIA 619; *Kameswar Pershad v Run Bahadur* (1881) 6 Cal 843, 8 IA 8; *Hurro Nath v Randhir Singh* (1891) 18 Cal 311, 18 IA 1; *Amarnath v Achan Kuar* (1892) 14 All 420, 19 IA 196; *Maheshar v Ratan Singh* (1896) 23 Cal 766, 23 IA 57; *Sham Sunder v Achhan Kunwar* (1899) 21 All 71, 25 IA 183; *Dharam Chand v Bhawani* (1898) 25 Cal 189, 24 IA 183; *Bhagwat Dayal v Debi Dayal* (1908) 35 Cal 42, 35 IA 48; *Ghansham Singh v Badiya Lal* (1902) 24 All 547; *Ram Bilas v Ramchander* AIR 1954 Pat 455.
83 *Obala Kondama v Kandasami* (1923) 51 IA 145, 47 Mad 181, 79 IC 961, AIR 1924 PC 56; *Patha Pedda Elliah v Palagiri Gangamma* AIR 1957 AP 776.

Illustrations

(1) *A*, a Hindu widow, whose husband has left collateral heirs (reversioners) alleging that the property held by her as such is insufficient for her maintenance, agrees to sell a field, part of such property, to *B*. *B* satisfies himself by honest and reasonable inquiry that the income of the property is not sufficient for *A*'s maintenance and that the sale of the field is necessary, and acting in good faith, buys the field from *A*. The sale is binding not only on the widow, but on the reversioners, even if it turns out that there was no necessity in fact to sell the property (see the Transfer of Property Act 1882, s 38, and § 244).

(2) A Hindu governed by the Madras school of Hindu law dies leaving a daughter and her (daughter's) son. The daughter succeeds to his property for a woman's estate. Litigation ensues in respect of the estate between the daughter and a grandnephew *M* of the deceased. A compromise is arrived at between the daughter and *M*, whereby the estate of the deceased is divided equally between them. *M* knew that he had no honest claim to the estate. *M*, than mortgages the property that came to his share to *K*, the mortgage deed stating that the property had been transferred to *M* under the compromise. The daughter's son sues *M* and *K* for a declaration that the compromise and the mortgage are not binding on him. The compromise between the daughter and *M* is set aside as not binding on the daughter's son. Is *K* in any better position than *M*? The Judicial Committee has held that he is not. *K* had noticed that *M* took from one who was a limited heir, and he was therefore bound to inquire whether the compromise was valid but he had failed to do so. 'Here there is no proof either of necessity or of inquiry validating the compromise'. The mortgage to *K* also was therefore held not to be binding of the daughter's son. The provisions of ss 89 and 96 of the Indian Trusts Act 1882, do not apply such a case.[84]

What the Alienee Must Prove

One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making, and also that the alienation was justified by necessity,

84 *Obala Kondama v Kandasami* (1923) 51 IA 145, 47 Mad 181, 79 IC 961, AIR 1924 PC 56.

or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity.[85]

In order to sustain an alienation by a Hindu widow of the corpus of her husband's estate, it must be shown, either that there was legal necessity for the alienation, or, at least, that the grantee was led on reasonable grounds to believe that there was.[86]

Lapse of time does not affect the question of onus of proof regarding necessity, except in so far as it might give rise to a presumption of acquiescence, or save the alienee from adverse inferences arising from the scanty proof, which might be offered on his behalf.[87]

Recitals of Necessity

Recitals in mortgages or deeds of sale of the existence of necessity are admissible in evidence,[88] but they are no evidence by themselves of the act.[89] To substantiate the allegation of the existence of necessity, there must be some evidence *aliunde*.[90] The reason is that the alienee, to protect his interest, may get false recitals to be made.[91] However, when by effluxion of time, evidence independent of the recitals becomes unavailable, a recital of necessity, consistent with probability and the circumstances, assumes greater importance; it is clear evidence of a representation to the purchaser, and, when evidence of actual inquiry by him has become impossible, the recital, coupled with circumstances which justify a reasonable belief that an inquiry would have confirmed its truth, is sufficient evidence to support the deed.[92]

85 *Bhagwat Dayal v Debi Dayal* (1908) 35 Cal 420, 35 IA 48, 57–58.

86 *Amarnath v Achan Kuar* (1892) 14 All 420, 429, 19 IA 196, 202; *Kalishanker Das v Dhirendra Nath* (1955) 1 SCR 467, 480, [1954] 2 MLJ 351, AIR 1954 SC 505.

87 *Ravaneshwar v Chandi Prasad* (1911) 38 Cal 721, 12 IC 931 affirmed in (1915) 43 Cal 417, 36 IC 499, AIR 1915 PC 57; *Subramaniam v Chelikani* (1950) 1 MLJ 527.

88 *Banga Chandra v Jagat Kishore* (1915) 43 IA 249, 44 Cal 186, 36 IC 420, AIR 1916 PC 110; *Darbari Lal v Gobind* (1924) 46 All 822, 826, 80 IC 31, AIR 1924 All 902.

89 *Bed Nath v Rani Rajeshwari Devi* (1938) 13 Luck 357, 168 IC 725, AIR 1937 Ori 406; *Kalika Prasad v Jhenjho Kuer* AIR 1964 Pat 241.

90 *Brij Lal v Inda Kunwar* (1914) 36 All 187, 23 IC 715, AIR 1914 PC 38; *Biswanath v Kayastha Trading Corpn* (1929) 8 Pat 450, 119 IC 405, AIR 1929 Pat 422; *Raj Lukhee Dabia v Gokool Chunder* (1869) 13 MIA 209, 3 Bengal LR 57 PC. See also *Vasonji v Chanda Bibi* (1915) 37 All 369, 376, 29 IC 781, AIR 1915 PC 18; *Debendranath Sharma v Nagendranath Datta* (1933) 60 Cal 1158, 149 IC 522, AIR 1933 Cal 900; *Hari Satya v Mahadev* AIR 1983 Cal 76.

91 *Muhammad v Brij Bihari* (1924) 46 All 656, 82 IC 5, AIR 1924 All 939.

92 *Banga Chandra v Jagat Kishore* (1916) 43 IA 249, 44 Cal 186, 36 IC 420, AIR 1916 PC 110; *Ram Narain v Nandrani* (1928) 50 All 823, 114 IC 868, AIR 1929 All 128; *Thakur Singh v Mst Uttam* (1929) 10 Lah 613, 118 IC 449, AIR 1929 Lah 295; *Rai Rajeshwar Bali v Har Kishen Bali* (1933) 8 Luck 538, 150 IC 346, AIR 1933 Ori 170; *Somnath v Ambika Prasad* AIR 1950 All 121; *Venkateswar Rao v Lakshminarasimha Rao* (1974) 2 AWR 183.

The Supreme Court pointed out that the recitals may be used to corroborate other evidence of the existence of legal necessity and that the weight to be attached to them varies according to the circumstances of the case. Where the evidence which could be brought before the court and is within the special knowledge of the person who seeks to set aside the sale is withheld, such evidence being normally not available to the alienee, the recitals go to his aid with greater force and the court may in an appropriate case raise an inference against the party seeking to set aside the sale.[93]

The absence of a recital of necessity in a deed of sale does not vitiate the sale. The necessity may be proved by other evidence.[94]

Lapse of time

Where a long period (82 years) has elapsed since the sale took place, it is not reasonable to expect such full and detailed evidence of the circumstances which gave rise to the sale as in the case of an alienation at a more recent date, and presumptions are permissible to fill in the details which have been obliterated by time.[95] However, apart from allowing presumptions to fill in details in the evidence which have been obliterated by time, lapse of time does not alter the incidence of the burden of proof, nor does it dispense with evidence direct or circumstantial of justifying necessity.[96] On an overall consideration of the facts, if it is found that the sale consideration had been utilised for satisfaction of antecedent debts and the purchaser had also satisfied himself as regards the legal necessity of the alienor, a belated challenge (12 years, in the case) could not be entertained.[97]

Rate of Interest

See notes to § 244 under the same head.

93 *Rani v Shanta Bala* AIR 1971 SC 1028.

94 *Womesh Chander v Digumbure* (1865) 3 WR 154.

95 *Chintamanibhatla v Rani of Wadhwan* (1920) 47 IA 6, 43 Mad 541, 55 IC 538, AIR 1920 PC 64; *Ravaneshwar v Chandi Prasad* (1915) 43 Cal 417, 36 IC 499, AIR 1915 PC 57; affirming (1911) 38 Cal 721, 12 IC 931; *Ram Narain v Nandrani* (1928) 50 All 823, 114 IC 868, AIR 1929 All 128; *Thakar Singh v Mst. Uttam* (1929) 10 Lah 613, 118 IC 449, AIR 1929 Lah 295; *Piari Lal v Sundar Singh* (1922) 44 All 756, 68 IC 805, AIR 1922 All 436; *Babulal v Maniklal* (1941) Nag 124, 192 IC 826, AIR 1941 Nag 79.

96 *Subramanyam v Chelikani* (1950) Mad 1953, AIR 1950 Mad 514, (1950) 1 MLJ 527; dissenting from the statement of law made by Leach. CJ in *Govindu v Venkatapathi* (1947) Mad 105; *Mukabasappa v Hamantappa* (1953) 55 Bom LR 223; *Venkateswara Rao v Venkatasiva Rao* AIR 1957 AP 945; *Sohan Lal v Chhagan Lal* AIR 1957 Raj 355; Cf *Sumantrabai v Rishabhkumar* AIR 1953 Nag 69, AIR 1952 Nag 295.

97 *Gangadharan v Janardhana* AIR 1996 SC 2127.

Burden of Proof

'Consent decree' involving Alienation to Mortgagee

It has been held by a Full Bench of the Madras High Court that where a widow who mortgaged her husband's property is sued by the mortgagee, and the suit is compromised by a transfer of the property by the widow absolutely in consideration of the mortgage debt, the burden of proving that the compromise was valid and binding on the reversioners is on the mortgagee purchaser.[98] Reference may also be made to the undermentioned decision of the Privy Council.[99] Also see ill (2).

§ 183. ALIENATION BY WIDOW WITH CONSENT OF REVERSIONERS ie FOR PRESUMPTIVE LEGAL NECESSITY

(1) When the alienation of the whole or part of the estate by a Hindu widow or other limited heir is to be supported on the ground of legal necessity, then if such necessity is not proved *aliunde* and the alienee does not prove inquiry on his part and honest belief is the necessity, the consent of such reversioners as may fairly be expected to be interested to dispute the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one.[1]

Mere consent of the next reversioners does not validate alienation; it is only of evidential value. It is no conclusive proof of the existence of legal necessity. It raises a presumption of the existence of legal necessity. As the matter rests in presumption only, the actual reversioner at the widow's death is not precluded from questioning the alienation, but the burden lies upon him to show that there was no legal necessity for the

98 *Tirupatiraju v Venkayya* (1922) 45 Mad 504, 57 IC 479, AIR 1922 Mad 131, FB.

99 *Ramasumran Prasad v Shyam Kumari* (1926) 49 IA 342, 349–50, 1 Pat 741, 749, 29 IC 71, AIR 1922 PC 356.

1 *Rangasami v Nachiappa* (1919) 46 IA 72, 42 Mad 523, 50 IC 498, AIR 1918 PC 196; *Bajrangi Singh v Manokarnika* (1908) 30 All 1, 35 IA 1; overruling *Ramphal Rai v Tula* (1884) 6 All 116; *Debi Prasad v Golap Bhagat* (1913) 40 Cal 721, 19 IC 273, FB; *Vinayak v Govind* (1901) 25 Bom 129; *Pilu v Babaji* (1910) 34 Bom 165, 4 IC 584; *Ramkrishna v Tripurabai* (1911) 13 Bom LR 940, 12 IC 529; *Bijoy Gopal v Girindra Nath* (1914) 41 Cal 793, 805, 23 IC 162, AIR 1914 PC 128; *Moti v Laldas* (1917) 41 Bom 93, 37 IC 945, AIR 1916 Bom 85; *Ghisiawan v Mussammat Raj Kumari* (1921) 43 All 534, 63 IC 556, AIR 1921 All 33 (presumption rebutted); *Bhup Singh v Jhamman Singh* (1921) 44 All 95, 64 IC 630, AIR 1922 All 619; *Darbari Lal v Govind* (1924) 46 All 822, 80 IC 31, AIR 1924 All 902 (presumption not rebutted); *Muhammad Salid v Kunwar Darshan* (1928) 50 All 75, 103 IC 116, AIR 1927 All 835; *Ramamurty v Bhimasankararao* (1938) Mad 688, 178 IC 784, AIR 1938 Cal 433; *Allah Diya v Sona Devi* (1942) All 745, 204 IC 133, AIR 1942 All 321, (1942) ALJ 443; *Sharm Singh v Hakim* AIR 1950 EP 1; *Munga Kuer v Domari* (1955) ILR 34 Pat 317.

alienation (Illust (a)).[2] When he adduces no evidence to rebut the presumption, he must fail.[3] The mere fact that the consent was given for a consideration does not negative the presumption.[4] If the consenting reversioner himself is the actual reversioner, he will be precluded by his consent from questioning the alienation (§ 191) unless he can show that his consent was obtained by misrepresentation of the facts.[5] When the presumption, that the alienation was justified by legal necessity, had been displaced, there is no presumption that any of the items constituting the consideration were justified by legal necessity and the onus of proving legal necessity for any item is on the alienee.[6] The consent of one of several reversioners does not raise the presumption of the existence of legal necessity.[7] Where alienation is made without the consent of the next reversioner, the burden lies on the alienee to show that the transaction was one for legal necessity (§ 182).

(2) The quantum of consent necessary to raise this presumption depends upon the facts of each particular case. Ordinarily, the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible. In any case, there should be such concurrence of the members of the family as suffices to raise a presumption that the transaction is a fair one and one justified by Hindu law. The consent may be given at the time of alienation or it may be given even after alienation (Illust (c)).[8]

The consent to have any effect must be given with full knowledge of the circumstances[9] and of the effect of the transaction and with an intelligent intention to consent to such effect. Mere attestation of a deed not necessarily import consent to alienation effected by it.[10]

2 *Muhammad Said v Kunwar Dursban* (1928) 50 All 75, 103 IC 116, AIR 1927 All 835; *Ramamurty v Bhimasankararao* (1938) Mad 688, 178 IC 784, AIR 1938 Cal 433.

3 *Rai Bajrang Bahadur Singh v Rameshar Bux Singh* (1937) 12 Luck 684, 166 IC 113, AIR 1937 Ori 189.

4 *Bajrangi Singh v Manokarnika* (1907) 30 All 1, 35 IA 1; *Ambika Prasad v Chandramani* (1929) 8 Pat 396, 117 IC 867, AIR 1929 Pat 289.

5 *Harendra Nath Mukherji v Hari Pada Mukherji* (1938) 2 Cal 492.

6 *Indarjit Singh v Jaddu* (1933) 55 All 157, 144 IC 108, AIR 1933 All 169.

7 *Chanderjit Das v Debi Das* (1953) 1 All 437, AIR 1951 All 522.

8 (1907) 30 All 1, 35 IA 1; approving *Radha Shyam v Joy Ram* (1890) 17 Cal 896; *Raj Lukhee Dabea v Gokool Chunder* (1869) 13 MIA 209, 3 Bengal LR 57 (PC); *Sham Sunder Lal v Achhan Kunwar* (1898) 21 All 71, 25 IA 183, (1914) 41 Cal 793, 23 IC 162, AIR 1914 PC 128; (1913) 40 Cal 721, 19 IC 273.

9 *Harendra Nath Mukherji v Hari Pada Mukherji* (1938) 2 Cal 492; *Ram Dulare v Batul Bibi* AIR 1976 All 135 (attestation by the reversioner).

10 *Sham Sunder v Achhan Kunwar* (1898) 25 IA 183, 189, 21 All 71, 80; *Hari Kishan v Kashi Pershad* (1914) 42 IA 64, 42 Cal 876, 27 IC 674, AIR 1914 (PC) 90; *Banga Chandra v Jagat Kishore* (1916) 43 IA 249, 255, 44 Cal 186, 199, 36 IC 420, AIR 1916

continued on the next page

The 'next' reversioners are persons who would be entitled to succeed to the estate of the last full owner, if the widow has died at the moment of the alienation. They are also called 'next presumptive reversioners' or 'immediate' reversioners. The more remote reversioners are called in some cases 'contingent', in some cases 'subsequent,' and in some cases 'distant' reversioners.

Where the next reversioner is a female, as for instance, a daughter, her consent alone is not sufficient to validate alienation, whether she takes a limited estate,[11] or an absolute estate as in Bombay.[12]

In such a case, the consent both of the female reversioners and the immediate male reversioner is necessary to validate the alienation (Illust (b)).[13] However, though her consent alone would not validate the transaction so as to bind the reversion, it would preclude her from impugning the validity or the alienation on the principle stated § 191.[14]

The consent of a female reversioner cannot be regarded as affording the slightest presumption that the alienation was a justifiable one. The reason is that by Hindu law, all women are supposed to be in a state of dependence. Alienation with the consent of a female reversioner and a distant male reversioner will not bind the immediate male reversioner.[15]

(3) Alienation made with the consent of the reversioners may be of the whole or of a part of the estate; it need not be of the whole estate.[16]

Reference may be made to the decision of the Privy Council in *Rangaswamy*'s case.[17]

(4) The alienation must be one for consideration, eg, a sale, mortgage or a lease.[18] Except in the cases mentioned in § 179, § 181A (2)(iii), and § 181B (2)(v), a gift by a widow or other limited heir of the whole or

PC 110; *Thakur Prasad v Mst Dipa Kuer* (1931) 10 Pat 352, 362, 134 IC 129, AIR 1931 Pat 442; *Har Mitra v Raghubar* (1928) 3 Luck 645, 110 IC 618, AIR 1928 Ori 342; *Rajammal v Sabapathi* (1945) Kant 260, PC.

11 *Bepin Behari v Durga Charan* (1908) 35 Cal 1086; *Koor Goolab Singh v Rao Kurun Singh* (1871) 14 MIA 176.

12 *Varjivan v Ghelji* (1881) 5 Bom 563 (daughter); *Vinayak v Govind* (1901) 25 Bom 129, 134–35 (sister); *Pilu v Babaji* (1909) 34 Bom 165, 4 IC 584 (daughter). But see *Mallik Saheb v Malikarjunappa* (1914) 38 Bom 224, 22 IC 292, AIR 1914 Bom 187, where it was assumed that a daughter's consent was sufficient.

13 (1881) 5 Bom 563; (1901) 25 Bom 129, 134–35; Contra *Krushna Behera v Fakir Mahakud* AIR 1953 Ori 290.

14 *Akkawa v Sayadkhan* (1927) 51 Bom 475, 102 IC 232, AIR 1927 Bom 260.

15 *Muhammad v Brij Bihari* (1924) 46 All 656, 82 IC 5, AIR 1924 All 939.

16 *Rangasami v Nachiappa* (1919) 46 IA 72, 81–84, 42 Mad 523, 533–36, 50 IC 498, AIR 1918 PC 196; *Munga Kuer v Domari* (1955) ILR 34 Pat 317.

17 (1919) 46 IA 72, 42 Mad 523, 50 IC 498, AIR 1918 PC 196;. *Pulin Chandra v Bolai Mandal* (1908) 35 Cal 939; *Vinayak v Govind* (1901) 25 Bom 129, where a sale of a portion only was upheld.

18 *Bijoy Gopal v Girindra Nath* (1914) 41 Cal 793, (PC); 23 IC 162, AIR 1914 PC 128 (lease for 60 years, held valid).

any part of the estate inherited by her to a third person (ie, a person other than the next reversioner), is not binding on the actual reversioner, even if made with the consent of the next reversioner. The consent of the next reversioner, though it affords good evidence of legal necessity in the case of an alienation for consideration, cannot possibly afford such evidence in the case of a gift, there being no room for the theory of legal necessity in the case of a gift.[19]

A gift of the entire estate to the next reversioner or reversioners amounts to surrender, and is good on that ground (§ 197). However, a gift, though it is of the entire estate, to some only some of several reversioners without the consent of the rest,[20] or a gift of part of the estate though it be in favour of the whole body of reversioners,[21] does not amount to surrender. It is a gift, pure and simple, and it cannot be supported as alienation under this section.[22] It stands on the same footing as a gift to a stranger, and it may be avoided by the actual reversioner at the widow's death.

A deed of gift of a part of the estate in favour of the next reversioner, where there is only one such reversioner, followed by a deed of sale by him of that part to a third party, may be supported as 'alienation with the consent of the next reversioner' under this section, if two documents are so connected as to form one transaction, ie, a transaction of sale.[23] A conveyance of the whole estate by a widow and the next reversioner jointly to a stranger is valid, but alienation by a widow to a stranger and the next reversioner is not valid, especially if the reversioner is a minor.[24]

The High Court of Calcutta has held that a gift of the entire estate by a widow to a third person with the consent of the whole body of the next reversioners, may be supported as a surrender under § 197; such a gift, in the view of that court, amounts in effect to two transactions, namely: (1) a surrender in favour of the next reversioners, which would vest the estate in them; and (2) a gift by them of the estate to the third

19 *Rangasami v Nachiappa* (1919) 46 IA 72, 85, 42 Mad 523, 537, 50 IC 498, AIR 1918 PC 198; *Pilu v Babaji* (1909) 34 Bom 165, 4 IC 584; *Bakhtawar v Bhagwana* (1910) 32 All 176, 5 IC 270; *Abdulla v Ram Lal* (1912) 34 All 129, 12 IC 129; *Khawani Singh v Chet Ram* (1917) 39 All 1, 37 IC 86, AIR 1917 All 341; *Harihar v Udai Nath* (1923) 45 All 260, 74 IC 113, AIR 1923 All 190 (next reversioner an insolvent—gift made to his son with his consent—gift held bad—creditor's claim upheld); *Bindeshwari v Har Narain* (1929) 4 Luck 622, 127 IC 20, AIR 1929 Ori 185.

20 *Khawani Singh v Chet Ram* (1917) 39 All 1, 37 IC 86, AIR 1917 All 341; *Raghunandan Singh v Tulshi Singh* (1924) 46 All 38, 75 IC 244, AIR 1924 All 315.

21 *Pilu v Babaji* (1909) 34 Bom 165, 4 IC 584; *Lachhman Das v Chubra Mal* AIR 1952 Pepsu 5.

22 See (1919) 46 IA 72, 42 Mad 523, 50 IC 498, AIR 1918 PC 196.

23 *Muhammad Said v Kunwar Darshan* (1928) 50 All 75, 103 IC 116, AIR 1927 All 835.

24 *Bala v Baya* (1936) 60 Bom 211, 38 Bom LR 1087, 166 IC 771, AIR 1937 Bom 43.

person.[25] On the other hand, it has been held by some other High Courts that such a gift is not validated even if made with the consent of the whole body of the next reversioners, and that though it may be binding on the widow and the consenting reversioners, it is not binding on the actual reversioner on the widow's death nor on a son subsequently adopted by her.[26] The question arose in a Privy Council case,[27] but their Lordships expressed no opinion on it, the transaction having been set aside on the ground that the consent of the next reversioner was not proved. In *Mummareddi v Pitti Durairaja*, their Lordships of the Supreme Court expressed considerable doubt about the correctness of what has been described as the Bengal doctrine and observed that it may become necessary at some time to reconsider the whole law on the subject.[28]

(5) Alienation made by a widow without legal necessity and without the consent of the reversioners does not bind the reversioner;[29] it binds only her interest in the property (§185).

In *Rangaswami v Nachiappa*,[30] a gift was made by a widow to the nearest reversioner, who was the cousin of the last owner. The gift was only of a portion of the property. Their Lordships of the Privy Council held that the transaction being a gift, it could not possibly be held to be evidence of the alienation for value for purposes of necessity, so as to bind the actual reversioner. Nor could it be supported as surrender (§197), for surrender must be of the whole estate, and the gift in that case was only a part of the estate.

In *Mummareddi v Pitti Durairaja*,[31] a widow purported to surrender her estate by executing a deed of release in favour of her daughter and son-in-law. It was held by the Supreme Court, that such a transaction could not be treated as surrender in favour of the female heir and a transfer by the latter to the stranger and that the transaction was not binding upon the ultimate reversioners.

25 *Nobokishore v Hari Nath* (1884) 10 Cal 1102, FB; explained in *Rangaswami v Nachiappa* (1919) 46 IA 72, 80–81, 42 Mad 523, 533, 50 IC 498, AIR 1918 PC 196; *Radhashyam v Hari Pada* AIR 1962 Cal 100.

26 *Tukaram v Yesu* (1931) 55 Bom 46, 129 IC 591, AIR 1931 Bom 100. Also see *Mahalu Shidappa v Shankar Dadu* (1953) 55 Bom LR 301, (1953) ILR Bom 1231, AIR 1953 Bom 357; *Mauji Lal v Jagnandan Ram* AIR 1953 All 78.

27 *Narayanaswami Ayyar v Rama Ayyar* (1930) 57 IA 305, 53 Mad 692, 128 IC 261, AIR 1930 PC 297.

28 [1951] SCR 655, 663–66.

29 *Harendra Nath Mukherji v Hari Pada Mukherji* (1938) 2 Cal 492. Also see *Laxmi Prasad Singh v Kunai Singh* (1944) All 484.

30 (1919) 46 IA 72, 85, 42 Mad 523, 537, 50 IC 498, AIR 1918 PC 196.

31 *Mummareddi v Pitti Durairaja* [1951] SCR 655.

Referring to the decision rendered in *Mummaredi*'s case, the Allahabad High Court held in *Manvendra Singh v Rameshwar Dayal*,[32] that where a widow acquires property as widow's estate and not as an absolute owner and if she gifts such property to her daughter's son without joining the daughter, the donee merely got a limited interest during the donor's lifetime and on death of the donor, it would revert to the next reversioner of the last male owner. The next reversioner, however, becomes a full owner by virtue of s 14 of the Hindu Succession Act, on its coming into force.

Illustrations

(a) A Hindu dies leaving a widow, three brothers, and a paternal uncle. He leaves three houses. The widow sells one of the houses of *X* with the consent of all the brothers. Here, the brothers constitute the next reversion, while the uncle is a remote reversioner. The sale having been made with the consent of the brothers, it is binding on the whole reversion including the actual reversioner. The result is that if all the brothers die in the lifetime of the widow, and the uncle succeeds to the estate on the widow's death, the sale will bind him, though he was not a consenting party to it unless he proves that there was no legal necessity for the sale and that the purchaser did not bona fide believe that there was such necessity (see sub-§ (1)).

(b) *A* dies leaving a widow, a daughter, a brother and a paternal uncle. The widow succeeds to the estate of *A* as his heir. She then sells the property with the consent of her daughter. After the death of the daughter and the brother, the uncle disputes the sale. Here, the consent having been given by a female reversioner, there is no presumption that the sale was for legal necessity. The burden, therefore, lies on the purchaser to show that the sale was for legal necessity, or that he made proper and bona fide enquiry and had satisfied himself as to the existence of the necessity. However, if *A*'s brother had consented to the sale, the burden would have been on the uncle to show that there was no legal necessity and that no such enquiries had been made by the purchaser (see sub § (2)).

(c) A Hindu dies leaving a widow and four male relations who are then the next reversioners. The widow, without the consent of the reversioners, executes several deeds of sale one after another of portions of her husband's estate to her son-in-law. Sometime

32 *Manvendra Singh v Rameshwar Dayal* AIR 1991 All 291. Also see notes under s 14 of the Hindu Succession Act.

afterwards, all the reversioners pass in writing to the widow ratifying the sale to the son-in-law and agreeing not to dispute their validity. The sales are binding not only on the consenting reversioners, but also on the actual reversioners, unless it is shown by the actual reversioners that the transactions were not proper. It is immaterial that the consent was given after the execution of the deeds (see sub-§ (2)).[33]

§ 184. EFFECT OF ALIENATION MADE FOR LEGAL NECESSITY OR WITH CONSENT OF NEXT REVERSIONER

Alienation made by a widow or other limited heir of property inherited by her for justifying necessity, or with the consent of the next reversioners as stated in § 183, passes an absolute estate in the property to the alienee. It is not only binding on her, but also on the reversioners, including reversioners subsequently born,[34] or adopted.[35]

§ 184A. DOCTRINE OF PART-PERFORMANCE

The doctrine of part-performance contained in s 53A of the Transfer of Property Act, is applicable to alienation by a widow for legal necessity. The words 'claiming under him' in that section can apply to a reversioner on a fair and liberal construction of the same.[36]

§ 185. EFFECT OF ALIENATION MADE WITHOUT LEGAL NECESSITY AND WITHOUT CONSENT OF NEXT REVERSIONER

Alienation made by a widow or other limited heir of property inherited by her without legal necessity and without the consent of the next reversioners is not binding on the reversioners, but it is nevertheless binding on her so as to pass her own interest (that is life-interest to the alienee).[37]

33 *Cook in oven v Manokarnika* (1908) 30 All 1, 35 IA 1.

34 *Vinayak v Govind* (1901) 25 Bom 129.

35 *Rajkristo v Kishore* (1865) 3 WR CR 14; *Pilu v Babaji* (1909) 34 Bom 165, 4 IC 584; *Ramkrishna v Tripurabai* (1911) 13 Bom LR 940, 12 IC 529.

36 *Ranchhod v Manubhai* (1954) Bom 194, AIR 1954 Bom 153, (1953) 55 Bom LR 890 differing from *Bhupal Chandra v Jagad Bhushan* (1943) 1 Cal 56 and agreeing with *Balaram v Kewalram* AIR 1940 Nag 396, 191 IC 885. Also see *Bobba Suramma v Chandramma* AIR 1959 AP 568.

37 *Ramchandra v Bhimrav* (1877) 1 Bom 577; *Chidambaramma v Husainamma* (1916) 39 Mad 565, 30 IC 101, AIR 1916 Mad 347; *Dhanji v Dhuma* (1924) 26 Bom LR 277, 80 IC 234, AIR 1924 Bom 382; *Gowardhan Das v Viru Mal* (1920) 1 Lah 48, 55 IC 847, AIR 1920 Lah 397; *Salah Mohmed v Gulab* AIR 1970 J&K 164.

Even as regards reversioners, it is not absolutely void, but voidable at their option. They may affirm it, or treat it as a nullity without the intervention of a court, and they show their election to do the latter by commencing an action to recover possession of the property.[38] In such a case, they are not entitled to mesne profits for a period before the exercise of the election.[39]

The persons entitled to impeach unauthorised alienation by a widow or other limited heir are obviously the next reversioners. It is not the law, however, that reversioners alone can impeach such alienations. Any person, who has an interest in the succession, is entitled to impeach them eg, the government taking by escheat.[40] One who is an alienee from a lessor who has a chance of succession on the death of the widow would be a person interested in avoiding a transfer made by the widow, but his right to impeach the transfer would come to an end on the death of his transferor prior to the death of the widow.[41] A stranger to the reversion, eg, a mortgagee from a widow cannot impeach alienation made by the widow.[42]

A Hindu widow *A* mortgages a house forming part of her husband's estate to *M* (who is not a reversioners). She then conveys the house by way of gift to *G*. After the widow's death, *G* sues *M* for redemption. *M* contends that the gift is invalid (§ 183 (4)) and that *G* is not therefore entitled to redeem. Is *M* entitled to challenge the gift? No, because he is a stranger to the reversion.[43]

As to the remedies of reversioners in cases of unauthorised alienations, see § 205. As to limitation, see §§ 208–09.

38 *Bijoy Gopal v Krishan* (1907) 34 Cal 329, 34 IA 87; *Ramgouda v Bhausaheb* (1927) 54 IA 396, 52 Bom 1, 105 IC 708, AIR 1927 PC 227; *Kondama Naicker v Kandasami Goundar* (1923) 51 IA 145, 47 Mad 181, 79 IC 961, AIR 1924 PC 56; *Sivanancha v Thirunamakarast* AIR 1951 Tr & Coch 26. In *Modhu Sudan v Rooke* (1897) 25 Cal 1, the alienation was affirmed; *Mahubub Usman v Vithal* (1954) 56 Bom LR 221, (1954) ILR Bom 586, AIR 1954 Bom 311 (reversioner transferred the property ignoring alienation by limited owner, held this showed intention to avoid the alienation); *Jagadindra Nath v Ulangini Dasi* AIR 1955 Cal 312 (over act indicating intention to avoid).

39 See § 130. *Mohanlal v Jagjiwan* (1938) Bom 292, 40 Bom LR 394, 176 IC 76, AIR 1938 Bom 298.

40 See § 176 *Thakur Prasad v Musammat Dipa Kuer* (1931) 10 Pat 352, 359–62, 134 IC 129, AIR 1931 Pat 442; *Maharaja Kesho Prasad v Chandrika* (1923) 2 Pat 217, 228, 68 IC 394, AIR 1923 Pat 122; *Sitaram v Khandu* (1921) 45 Bom 105, 59 IC 480, AIR 1921 Bom 413; *Jhari v Bijai* (1923) 45 All 613, 616, 74 IC 865, AIR 1924 All 109.

41 *Pannalal v Harna Bai* AIR 1950 Hyd 37.

42 As to suits by reversioners see § 207. *Sitaram v Khandu* AIR 1921 Bom 413; *Bipat Mohton v Kulpat Mahton* (1934) 13 Pat 182, 153 IC 439, AIR 1934 Pat 498; *Ajodhia Prasad v Mt. Sanjhari Kuer* (1931) 6 Luck 710, 139 IC 631, AIR 1932 Ori 342; *Mangilal v Barkatulla* AIR 1956 All 118.

43 *Sitaram v Khandu* (1921) 45 Bom 105, 59 IC 480, AIR 1921 Bom 413.

Escheat

Even if there are no reversioners, a widow, or other limited heir cannot alienate property inherited by her without legal necessity. Such alienation will not bind the government, where the government is entitled to the property by escheat in default of reversioners.[44]

Tenant Dying Without Heir

A landlord to whom the holding of a tenant reverts on the tenant's death without leaving heirs, is entitled to challenge an unauthorised alienation made by the tenant, where the tenant is a Hindu widow or other limited heir.[45]

§ 186. LEASE BY WIDOW

A widow or other limited heir may in the exercise of her power of management (§ 198) grant leases of properties belonging to the estate. However, she has no power to grant a permanent lease or a lease for a long term so as to bind the reversion, unless it is justified by legal necessity,[46] or it is for the benefit of the estate,[47] or made with the consent of the next reversioners.[48]

Apart from such necessity, benefit or consent, to create a new and fixed rent for all time, though such rent be adequate at the time of fixing it, in lieu of giving the estate the benefit of an augmentation of a variable rent from time to time, is a breach of duty on the part of the widow.[49]

Such a lease, however, is not voidable at the option of the reversioners. It does not come to an end at the death of the widow; it is valid until:

44 *Collector of Masulipatam v Cavaly Vencata* (1861) 8 MIL 529; *Kundan v Secretary of state* (1926) 7 Lah 543, 96 IC 865, AIR 1926 Lah 673.

45 *Prasad Nath v Ambica Prasad* (1930) Pat 515, 117 IC 630, AIR 1930 Pat 407.

46 *Sankar Nath v Bijoy Gopal* (1908) 13 CWN 201 (lease for 60 years); *Bijoy Gopal v Girindra Nath* (1914) 41 Cal 793, 23 IC 162, AIR 1918 PC 128 (lease for 60 years); *Chandrakisor Datta Majumdar v Kumar Upendra Chandra Chaudhuri* (1923) 37 CLJ 319, 74 IC 612, AIR 1923 Cal 563; *Surendra Nath v Iswar Mahji* AIR 1974 Cal 216.

47 *Bijoy Gopal v Girindra Nath* (1914) 41 Cal 793, AIR 1918 PC 128 (lease for 60 years).

48 See above. *Sankar Nath v Bijoy Gopal* (1908) 13 CWN 201; *Upendra Nath v Bindesri* (1915) 20 CWN 210, 32 IC 468, AIR 1916 Cal 483; *Dayamani v Srinbash* (1906) 33 Cal 842 (permanent lease).

49 *Shibessouree Devia v Mothooranath Acharjo* (1869) 13 MIA 270 (permanent lease by a *Mahant*); *Raghubir Singh v Jethu* (1923) 2 Pat 171, 70 IC 290, AIR 1923 Pat 130; *Sant Prasad v Charitar Singh* AIR 1951 Pat 539; *Sheodutta v Akali Bhumikani* AIR 1953 Pat 374.

it is set aside.[50] A permanent lease is not justified even if it is granted to improve the land. The expression 'for the benefit of the estate' has reference to the preservation and the protection of the estate, and not to its improvement.[51]

Raiyati Settlement by a Widow

A widow may make a *raiyati* settlement provided the transaction is fair and bona fide.[52]

If a widow is appointed as a *lumbardar*, then no co-sharer can challenge a lease of *Khudkasta* lands by her, unless he can prove that it was not an act of ordinary village management. A reversioner is not in a better position.[53]

§ 187. ALIENATION BY WIDOW WITH LEAVE OF COURT UNDER THE INDIAN SUCCESSION ACT 1925, S 307

Where a widow or other limited heir obtains letters of administration, and then obtains leave of the court under s 307 of the Indian Succession Act 1925, to alienate the property, she can confer on the alienee an absolute title to the property irrespective of necessity or of the consent of reversioners. The reason is that the alienee is entitled to trust to the order of the court and he is not bound to go behind it.[54]

§ 188. EQUITIES ON SETTING ASIDE ALIENATIONS BY WIDOW

Where an alienation made by a widow or other limited heir without legal necessity, and without the consent of the next reversioners is set aside, the question arises whether the alienation should be set aside in its entirety or upon terms and conditions. The following is the result of the decisions on the subject:

(1) It has been held in Bombay that when a sale is set aside, the court may direct, as a condition of setting aside the sale, the

50 *Modhu Sudan v Rooke* (1897) 25 Cal 1, 24 IA 164; *Bijoy Gopal v Krishna* (1907) 34 Cal 329, 34 IA 87; *Upendra Kishore v Nobo Kishore* (1918) 23 CWN 64, 48 IC 993, AIR 1919 Cal 746.

51 See § 243A. *Ganap v Subhi* (1908) 32 Bom 577. The decision in *Dayamani v Srinibash* (1906) 33 Cal 842 turned on the special facts of the case.

52 *Biswanath v Ram Prasad* (1913) 10 Pat 572, 133 IC 617, AIR 1933 Pat 389.

53 *Ghasiram v Girdhari* (1942) Nag 680, 195 IC 603, AIR 1942 Nag 306.

54 *Kamikhya v Hari Churn* (1899) 26 Cal 607; *Annoda v Atul* (1919) 23 CWN 1045, 54 IC 197; *Chuni Lal Haldar v Srimati Makshada* (1919) 23 CWN 652, 52 IC 309, AIR 1919 Cal 2.

return of the purchase money if the money is still intact at the death of the widow.[55] However, see sub-§ (3).

It would seem that a strong case based on equitable considerations would have to be made out, before the court will impose any of the terms or conditions discussed in this paragraph. In *Natwarlal v Dadubhai*,[56] the Supreme Court expressed the following view:

> Assuming that the court has the power to impose conditions on the reversioners' right to recover possession during the lifetime of the widow on considerations of equity, justice and good conscience in proper cases, and to prevent the widow, by her own act, from prejudicing the interests she has created, no such equitable considerations arise in favour of persons who have come upon the land as trespassers and claim title by adverse possession.

(2) It has been held by the Judicial Committee that where a Hindu widow sells property inherited by her from her husband, without legal necessity, and the purchaser believes in good faith that he is absolutely entitled thereto and makes any improvement in the property, the court may, in setting aside the sale, direct the reversioner to pay the purchaser the amount extended by him on such improvements as have enhanced the market value of the property.[57] The case was one from Lahore where the Transfer of Property Act 1882, does not apply, but the decision, it seems, would have been the same even if the case had been one under the Act (see sub-§ (3)).

The principal of the above decision was followed by the High Court of Bombay in a case of a mortgage by a widow without legal necessity,[58] though in an earlier case, the court refused to allow the mortgagee even to remove the structure erected by him on the land after it was destroyed by floods.[59] In Allahabad, it has been held that whether the case be one of mortgage,[60] lease,[61] or gift,[62] if the transfer is not one for legal necessity,

55 See sub-§ (3). *Someshwar v Someshwar* (1923) 47 Bom 1, 67 IC 658, AIR 1923 Bom 16.

56 [1954] SCR 339, 359, 56 Bom LR 447, AIR 1954 SC 61.

57 *Kidar Nath v Mathu Mal* (1913) 40 Cal 555, 18 IC 946 (PC), (cost of erection of temple not allowed but purchaser allowed, to remove the materials); *Raja Rai Bhagwat v Ram Ratan* (1921) 20 ALJ 26, 65 IC 69, AIR 1922 PC 91 (PC), where there was partial necessity for the sale.

58 *Shiddappa v Pandurang* (1923) 47 Bom 696, 72 IC 626, AIR 1923 Bom 385, however, see *Ramappa v Yellappa* (1928) 52 Bom 307, 1091 IC 532, AIR 1928 Bom 150.

59 *Vrijbhukandas v Dayaram* (1908) 32 Bom 32.

60 *Honsraj v Mst Somni* (1922) 44 All 665, 67 IC 314, AIR 1922 All 194 (mortgagee allowed to remove structures).

61 *Rajrup Gopi* (1925) 47 All 430, 432, 87 IC 44, AIR 1925 All 261.

62 *Raghunandan v Tulshi Singh* (1924) 46 All 38, 75 IC 244, AIR 1924 All 315.

the transferee is not entitled to any compensation for the improvements made by him, even if the improvements were such as have enhanced the market value of the property. The ground of the decision being that s 51 of the Transfer of Property Act 1882, does not apply to alienations made by a Hindu widow without legal necessity. That section, it has been said:

> ...applies only to the case of a transferee of the immovable property who makes any improvement in the property, believing in good faith that he is absolutely entitled thereto. However, in the case of a Hindu widow, a person dealing with her would ordinarily know that she has only a life-interest and he can reasonably be expected to make inquiries as to whether there was any legal necessity for the mortgage and whether the widow had any right to make the transfer. The mortgagee cannot be said here to have acted in good faith in dealing with such a widow, so as to affect more than her life interest.[63]

The question, whether an alienee from a Hindu widow is entitled to compensation for money spent upon the property, cannot be raised in a declaratory suit by reversioners during the lifetime of the widow. It is premature to raise it in such a suit. It can only be raised after the widow's death in a suit by reversioners for possession.[64]

(3) It has been held by the Judicial Committee that where a gift is made by a widow of property inherited by her from her husband, to a stranger and the donee sells the property, and the purchaser effects improvements believing in good faith that he was the owner, he is entitled, if the gift is set aside, to the alternative rights mentioned in s 51 of the Transfer of Property Act 1882, namely, to be paid by the plaintiff at whose instance the gift is set aside, the value of the improvements, or to require the plaintiff to sell his interest in the property to him.[65]

Mesne Profits

In a suit by a reversioner to set aside alienation made by a Hindu widow, mesne profits can be awarded to the reversioner from the date of the widow's death, even though such an alienation cannot be described as absolutely void. Even in cases where the decree for possession in favour of the reversioner is conditional, on his depositing the amount which has been found to have been used for the benefit of the estate,

63 See sub-§ (3); *Honsraj v Mst Somni* (1922) 44 All 665, 667, 67 IC 314, AIR 1922 All 194.

64 *Rup Narain v Gopal Devi* (1909) 36 Cal 780, 36 IA 103, 3 IC 382.

65 *Narayanaswami Ayyar v Rama Ayyar* (1930) 57 IA 305, 53 Mad 692, 128 IC 261, AIR 1930 PC 297.

mesne profits can be awarded to the reversioner, if he is ordered to pay interest on the amount payable to the alienee.[66]

§ 189. PURCHASE-MONEY APPLIED BY WIDOW IN PART ONLY TO PURPOSES OF LEGAL NECESSITY

Cases frequently arise in which property inherited by a widow from her husband is sold by her for legal necessity, but the whole of the price is not proved to have been applied to purposes of necessity, and the sale is challenged by the reversioners on that ground. In such cases, if the sale itself is justified by legal necessity, and the purchaser pays a fair price for the property sold, and acts in good faith and after due inquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been applied to purposes of necessity, would not invalidate the sale, the purchaser not being bound to see to the application of the price. If the above conditions are satisfied, the sale must be upheld unconditionally, whether the part not proved to have been applied to purposes of legal necessity is considerable or small.[67]

It is wrong in such cases to draw a distinction, as was done by the Allahabad High Court, between the case where the part not proved to have been applied to purposes of necessity is considerable and the case where such part is small; and in the former case, to pass a decree setting aside the sale conditionally upon the reversioner paying to the purchaser the part proved to have been applied to purposes of necessity, and in the latter case, to pass a decree upholding the sale conditionally upon the purchaser paying to the reversioners the price not proved to have

66 *Mummareddi v Pitti Durairaja* [1951] SCR 655, AIR 1952 SC 109.

67 *Suraj Bhan Singh v Sah Chain Sukh* (1928) 32 CWN 117, 105 IC 257, AIR 1927 PC 244 (price Rs 19,000–Rs 1,622 not proved to have been applied to purposes of necessity—sale upheld unconditionally); following *Krishna Das v Nathu Ram* (1927) 54 IA 79, 49 All 149, 100 IC 130, AIR 1927 PC 37 (a case of sale by manager—price Rs 3,500–Rs 500 not proved to have been applied to purposes of necessity—sale upheld unconditionally); *Ram Gopal Ghose v Bullodep Bose* (1864) WR (Sp No) 385 (one-third of the price not proved to have been applied to purpose of necessity—sale upheld unconditionally); *Luchmeedhar Singh v Ekbal Ali* (1867) 8 WR 75 (price Rs 65,000–Rs 14,000 not proved to have been applied, etc—sale upheld unconditionally); *Chatranarayan v Uba Kunwari* (1868) 5 Bengal LR 201 (price Rs 995–Rs 321 not proved to have been applied, etc—sale upheld unconditionally); *Kamikaprasad v Srimati* (1870) 5 Bengal LR 508 (sale upheld unconditionally); *Felaram v Bagalanand* (1910) 14 CWN 895, 6 IC 207 (permanent lease on a *selami* of Rs 125–Rs 25 not proved to have been applied etc—lease upheld unconditionally); *Medai Dalavoi v Nainar Tevan* (1922) 27 CWN 365, 74 IC 604, AIR 1922 PC 307 (price Rs 5, 300–Rs 712 not proved to have been applied, etc—sale upheld unconditionally); *Naman Lal v Har Bhagwan* (1921) 2 Lah 357, 66 IC 362, AIR 1922 Lah 317 (sale upheld unconditionally); *Bal Krishna v Hira Lal* (1919) 41 All 338, 50 IC 74, AIR 1919 All 406 (price Rs 19, 500–Rs 11, 725 not proved to have been applied, etc—sale upheld unconditionally).

been so applied.[68] Where the sale was only partially justified by legal necessity, the sale may be set aside conditionally on the reversioner paying to the purchaser that portion of the consideration money which was justified by legal necessity.[69] The leading case on the subject of alienation for necessity is *Hunooman Persaud v Mst Babooee*,[70] decided by the Judicial Committee in 1856. The question in that case was as to the extent of the power of the mother as manager of the estate of her minor son to mortgage the estate. The principles laid down in that case (see note (1) to § 242) have been applied also to alienations by a Hindu widow, of property inherited by her husband and to alienations of joint family property by the manager of a joint Hindu family.

The principles to be derived from the cases decided by the Judicial Committee may be stated thus. If a sale by a Hindu widow of property inherited by her from her husband is sought to be set aside by the reversioner, and part of the price is proved to have been applied to purposes of necessity, then, if the suit is brought during the widow's lifetime, the decree should be one declaring the right of the reversioner to the property on the death of the widow, and declaring also that the purchaser is entitled to a charge on the property only for the amount proved to have been so applied.[71] If the suit is brought after the widow's death, the decree should be one setting aside the sale and directing the purchaser to deliver possession to the reversioner and to pay to him the balance of mesne profits from the date of the widow's death, after deducting therefrom the amount proved to have been applied to purposes of necessity with interest thereon.[72] However, if the amount proved to have been applied to purposes of necessity exceeds the amount of mesne profits, the decree should be one setting aside the sale and for possession conditionally upon the reversioner paying to the purchaser the difference between the two sums.[73]

68 *Jainarain v Bhagwan* (1922) All 683, AIR 1922 All 321; *Sanmukh v Jagarnath* (1924) 46 All 531, 831 IC 838, AIR 1924 All 708; *Daulat v Sankatha* (1925) 47 All 355, 86 IC 91, AIR 1925 All 324; *Gobind Singh v Baldeo Singh* (1903) 25 All 330; *Ram Dei v Abu Jafar* (1905) 27 All 494; *Dwarka Ram v Jhulai* (1923) 45 All 429, 72 IC 134, AIR 1923 All 248; *Ramanand Lal v Damodar Das* (1941) All 820, 199 IC 369, IR 1942 All 110; *Sumantrabai v Battibai* (1956) ILR Nag 48, AIR 1955 Nag 299. Also see *Ram Dulare v Batul Bibi* AIR 1976 All 135 (where property cannot be sold in parts).

69 See § 245 and notes where the matter is fully discussed; *Shantikumar Pal v Mukund Lal Mandal* (1935) 62 Cal 204, 156 IC 209, AIR 1935 Cal 20.

70 (1856) 6 MIA 393; *Tirbeni Sahai v Ramsingh* (1938) 13 Luck 230, 167 IC 925, AIR 1937 Ori 361.

71 *Mohomed Shumsool v Shewukran* (1874) 14 Bengal LR 226, 2 IA 7.

72 *Deputy Commissioner of Kheri v Khanjan Singh* (1907) 29 All 331, 34 IA 72. See also *Collector of Masulipatam v Cavaly Vencata* (1861) 8 MIA 529, 555–56; *Doorga Persad v Doorga Konwari* (1878) 4 Cal 190, 204, 5 IA 149; *Madho Mohapatra v Bhikari Panda* AIR 1964 Ori 26.

73 *Bhagat Dayal v Debi Dayal* (1908) 35 Cal 420, 429–30, 35 IA 48.

A widow is not always bound to sell exactly for the amount for which there is legal necessity, and the courts have to see in each case whether, having regard to the circumstances, the alienation was a proper one. It would manifestly be impossible and possibly prejudicial to the interest of the estate, if the widow were held to be bound in every instance to sell the property for payment of a debt that is due from her husband, for exactly the sum due to the creditor.[74]

§ 190. ESTOPPEL: ELECTION BY REVERSIONER

(1) An alienation by a widow of her husband's estate without legal necessity or an invalid surrender is not altogether void, but only voidable by the next reversioner. He may affirm it, or he may treat it as a nullity (§ 185). If he elects to affirm it, he will be precluded from exercising his right to avoid it and from questioning the transaction.[75] The election may be made after the reversion has fallen into possession, or even before.[76]

(2) The above rule applies not only to male, but also to female reversioners.[77]

§ 190A. ESTOPPEL: ELECTION: RATIFICATION

In a case, the Supreme Court referred to the three types of cases that may arise for consideration in dealing with a reversioner's challenge to the widow's alienation: (1) estoppel (properly so called); (2) election in the strict sense of the term whereby the person electing takes a benefit under the transaction; and (3) ratification, ie, agreeing to abide by the transaction.[78]

A presumptive reversioner coming under any one of the aforesaid categories is precluded from questioning the transaction. The Supreme

74 See notes to § 181D. *Naman Lal v Har Bhagwan* (1921) 2 Lah 357, 66 IC 362, AIR 1922 Lah 317; *Bal Kishna v Hira Lal* (1919) 41 All 338, 50 IC 74, AIR 1919 All 406; *Felaram v Bagalanand* (1910) 14 CWN 895, 6 IC 207.

75 *Ramgouda v Bhausaheb* (1927) 54 IA 396, 402, 52 Bom 17, 5 IC 708, AIR 1927 PC 227; *Ram Bharose v Bhagwan Din* (1944) 19 Luck 37; *Ganga Baksh v Madho Singh*, infra.

76 *Rangasami v Nachiappa* (1919) 46 IA 72, 42 Mad 523, 50 IC 488, AIR 1918 PC 196; *Akkawa v Sayad Khan* (1927) 51 Bom 475, 485–86, 102 IC 232, AIR 1927 Bom 260; *Patan Dei v Santoo Prasad* (1944) Luck 557. However, see *Virayya v Bapayya* (1946) Mad 276; *Ganga Bakhsh v Madho Singh* AIR 1955 All 288 (FB); *Krishana Reddi v Yaganti Reddi* (1954) 2 Mad LJ (Andhra) 251. However, a reversioner, who has transferred his interest in the property, cannot thereafter affirm the alienation by the limited owner to the detriment of the purchaser; *Thayammal v Rangaswami* (1955) 2 Mad LJ 426, AIR 1956 Mad 15.

77 *Akkawa v Sayad Khan* (1927) 51 Bom 475, 485–86, 102 IC 232, AIR 1927 Bom 260; *Patan Dei v Santoo Prasad* (1944) Luck 557.

78 *Shanmugam Pillai v K Shanmugam Pillai* AIR 1972 SC 2069.

Court in the above decision also considered the position of reversioners who were minors at the time of the challenged transaction.

§ 191. ALIENATION MADE BY WIDOW WITH CONSENT OF REVERSIONER, WHETHER BINDING ON HIM AND ACTUAL REVERSIONER

(1) A reversioner, whether a male or female,[79] who consents to an alienation by a widow or other limited heir made without legal necessity, or to an invalid surrender, and transferees from him, are precluded from disputing the validity of the alienation,[80] though he may have received no consideration for his consent.[81] It is immaterial that the alienation is by way of gift (see Illust (a) and (b)). Also see § 193 (1) pt 2.

However, if the actual reversioner at the widow's death be a different person, he is not precluded from questioning the alienation, though even as regards him, the alienation will stand good unless he proves that the transaction was one without legal necessity (§ 183 (1)). The actual reversioner, even if he were the son of the consenting reversioner, is not bound by his father's consent,[82] unless the consent was given for a consideration and the son enjoyed the benefit of it.[83]

79 *Akkawa v Sayad Khan* (1927) 51 Bom 475, 102 IC 232, AIR 1927 Bom 260; *Patan Dei v Santoo Prasad* (1944) Luck 557.

80 See illust (a) and (b) *Basappa v Fakirappa* (1922) 46 Bom 292, 64 IC 214, AIR 1922 Bom 102; explaining *Bai Parvati v Dayabhai* (1920) 44 Bom 488, 58 IC 266, AIR 1920 Bom 355; *Bhausaheb v Ramgauda* (1923) 25 Bom LR 813, 76 IC 937, AIR 1923 Bom 471; *Fateh Singh v Thakur Rukmini* (1923) 45 All 339, 72 IC 8, AIR 1923 All 387, FB; *Akkawa v Sayad Khan* AIR 1927 Bom 260; *Babu Singh v Rameshwr Bakhsh* (1923) 7 Luck 360, 135 IC 881, AIR 1932 Ori 90; *Jiwan Singh v Misri Lal* (1896) 18 All 146, 23 IA 1 (transfer confined to widow's estate); *Rup Narain v Gopal Devi* (1909) 36 Cal 780, 36 IA 103, 3 IC 382 (transfer confined to widow's estate); *Baburao v Tukaram* (1931) 33 Bom LR 235, 131 IC 660, AIR 1931 Bom 208; *Ram Bharose v Bhagwan Din* (1944) 19 Luck 37; *Mst Lakhpati v Bisram* (1950) All 91; *Munga Kuer v Domari* (1955) ILR 34 Pat 317; *Jagannath v Rupnarain* AIR 1960 Pat 564. *Ramakottayya v Viraraghavayya* (1929) 52 Mad 556; *Subba Reddi v Govindon Reddi* AIR 1961 AP 430; *Subbamma v Krishana Murty* AIR 1967 AP 8.

81 *Ramakottayya v Viraraghavyya* (1929) 52 Mad 556, 119 IC 156, AIR 1929 Mad 502.

82 *Rangasami v Nachiappa* (1919) 42 Mad 523, 535, 536, 46 IA 72, 83, 84, 50 IC 498, AIR 1918 PC 196. See also *Ramgouda v Bhausaheb* (1927) 54 IA 396, 402–403, 52 Bom 1, 7, 107 IC 708, AIR 1927 PC 227, where part of the alienation was in favour of the father; *Thakur Prasad v Musammat Dipa Kuer* (1931) 10 Pat 352, 134 IC 129, AIR 1931 Pat 442; *Baburao v Tukaram* (1931) 33 Bom LR 285, 131 IC 650, AIR 1931 Bom 208, the plaintiffs who claimed to set aside a gift to which their stepmother had consented were not the reversionary heirs of the deceased owner; *Debendranath Sharma v Nagendranath Datt* (1933) 60 Cal 1158, 149 IC 522, AIR 1933 Cal 900.

83 Illustration (c). Also see § 192. *Vinayak v Govind* (1901) 25 Bom 129, 136, 141. See also *Bahadur Singh v Ram Bahadur* (1923) 45 All 277, 71 IC 405, AIR 1923 All 204.

(2) A reversioner who takes from a widow a mortgage of the alienated property is not on that ground precluded from questioning the alienation on the widow's death.[84]

Illustrations

(a) A Hindu widow executes a deed of gift of a portion of her husband's property to *D*. *F*, who is then the nearest reversioner joins in the deed. After the widow's death, *F*, alleging that the gift is invalid (§ 183 (4)) sues *D* for possession of the property. *F* having consented to the gift is estopped from disputing the validity of the gift.[85]

(b) *A* dies leaving a mother *M* and two male relations *F* and *G*, who are then the nearest reversioners. On *A*'s death, *M* succeeds to the estate of her son. *M* executes a deed of gift of a portion of her son's property in favour of a family idol. *F* joins in the deed of gift. *G* sues *M* and the donee for a declaration that the alienation is invalid, and a decree is passed declaring that the gift is void beyond *M*'s lifetime. After *M*'s death, *F* sues the donee for possession of his one-half share in the property comprised in the gift. *F* is bound by his consent, and he is precluded from challenging the validity of the gift, though the gift was declared invalid in *G*'s suit and though *G* would be entitled to recover his one-half share from the donee.[86]

(c) *A* Hindu dies leaving a widow *R*, a sister *B*, and *B*'s son *V*. *R* sells a portion of her husband's property with *V*'s consent. The sale is effected to obtain necessary funds for *V*'s marriage. *V* then marries, and a son *G* is born to him. After the sale, *B* dies, then *V*, and then *R*, the widow. After *R*'s death, *G*, who is then the actual reversioner, sues the purchaser for possession of the property sold to him. It is proved that there was no legal necessity for the sale. It is not proved that *B* consented to the sale. Upon these facts, the High Court of Bombay held that *G* was bound by the consent of his father *V*.[87]

(d) *A* dies leaving a mother *M*, and paternal cousin *R*, and a remoter paternal cousin *P*. On *A*'s death, *M* succeeds to his estate as his

84 See Illust (d) *Rangasami v Wachiappa* (1919) 42 Mad 525, 537–39, 46 IA 72, 85–87, 50 IC 498, AIR 1918 PC 196. It is submitted that *Mahadeo Prasad v Mata Prasad* AIR 1922 All 297 was not correcly decided.

85 *Basappa v Fakirappa* (1922) 46 Bom 292, 64 IC 214, AIR 1922 Bom 102; *Akkawa v Sayad Khan* (1927) 51 Bom 475, 102 IC 232, AIR 1927 Bom 260; *Munga Kuer Domari* (1955) ILR 34 Pat 317.

86 *Fateh Singh v Thakur Rukmini* (1923) 45 All 339, 72 IC 8, AIR 1923 All 387, FB.

87 *Vinayak v Govind* (1901) 25 Bom129, 136, 141; See in this connection *Bahadur Singh v Ram Bahadur* (1923) 45 All 277, 71 IC 405, AIR 1923 All 204.

heir. *M* executes a deed of gift of a portion of her son's property to *R*, who is then the nearest reversioner (the gift is therefore bad in law, § 183 (4)). Afterwards, *R* dies and his estate vests in *X*. *X* mortgages to *P*, the property given by *M* to *R*. Then *M* dies. After *M*'s death, *P*, who is then the actual reversioner, claims the property given by *M* to *R* and mortgaged by *X* to *P*. *P* is entitled to recover the property. The fact that he took a mortgage of the property does not preclude him from claiming it as a reversioner. 'At the time of the mortgage the plaintiff (*P*) did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift'.[88]

§ 192. FAMILY ARRANGEMENT: COMPROMISE BY WIDOW—REVERSIONER PARTY TO AND BENEFITING BY THE TRANSACTION

Where a widow or other limited heir enters into a family arrangement,[89] or into a compromise which involves an alienation of the estate,[90] the reversioner who has been a party to and has benefited by the transaction is precluded from questioning the alienation; and so are his descendants.[91] There is no question in a case of this kind of a transfer of *spes successionis* by the reversioner. The reversioner, being a party to the transaction, cannot repudiate it.

Where a widow entered into a compromise with the presumptive reversioner and she was accepted as absolute owner of a portion of the properties and she gave up her claim in the remaining properties, it was held by the Supreme Court that the presumptive reversioners, who themselves ultimately became the reversioners were estopped from challenging the transaction. It was held that the settlement could also be considered as a family arrangement binding on the parties.[92]

88 *Rangasami v Nachiappa* (1919) 46 IA 72, 87, 42 Mad 523, 50 IC 498, AIR 1918 PC 196.

89 Illustration (a) and (b) *Musammat Hardei v Bhagwan Singh* (1919) 24 CWN 105, 50 IC 812, AIR 1919 PC 27; *Pulliah Chetti v Vardarajulu* (1908) 31 Mad 474; *Barati Lal v Salik Ram* (1916) 38 All 107, 31 IC 919, AIR 1915 All 441; *Chablu v Parmal* (1919) 41 All 611, 51 IC 919, AIR 1919 All 371; *Ramgouda v Bhausaheb* (1927) 54 IA 396, 52 Bom 1, 105 IC 708, AIR 1927 PC 227; *Sunder Sahu v Chamra Sahu* AIR 1954 Ori 80.

90 Illustration (c) *Kanhai Lal v Brij Lal* (1918) 45 IA 118, 40 All 487, 47 IC 207, AIR 1918 PC 70.

91 *Ramgouda v Bhausaheb* (1927) 54 IA 396, 52 Bom 1, 105 IC 708, AIR 1927 PC 227; *Bindeshri Tewari v Lakhan Tewari* (1941) All 763, 198 IC 13, AIR 1942 All 12, (1941) ALJ 587; *Bachchu Singh v Harbans Singh* AIR 1953 All 213; *Krishna Reddi v Yaganti Reddi* (1954) 2 MLJ (Andhra) 251.

92 *Krishna Behari Lal v Gulabchand* AIR 1971 SC 1041.

The court leans strongly in favour of family arrangements to bring about harmony in a family and do justice to its various members and avoid future disputes. In the case of a family arrangement, it is not necessary that there should have been any previous dispute as to the rights of the parties.[93]

The expression 'family' in the context of family arrangement is not to be understood in a narrow sense of being a group of persons, who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. It is sufficient if the dispute is between near relations.[94] The subject of family arrangement is further dealt with under § 248B.

Illustrations

(a) A Hindu governed by the Benaras school of Hindu law dies leaving a widow and three daughters, *D*, *M* and *H*, and grandsons by *D* and *H*. The widow claims an absolute title to certain properties which the daughters allege belonged to their father. An arrangement is then arrived at between the widow and daughters, whereby certain properties are given to the grandsons and certain other properties are divided among the daughters as their absolute property. The daughters and grandsons enter into immediate possession of their lots, and they deal with their shares as absolute owners. *H* executes a mortgage of her share. *M* sells one of the properties which came to her share to *R*. After the death of the widow and of *H* and *M*, *D* brings a suit against *R* for recovery of possession of the property sold to him by *M*, alleging that the property belonged to her father, and that on the death of her mother and sisters, she became the sole heir of her father and was entitled to possession. Upon these facts, it was held by their Lordships of the Privy Council that *D*, who was a party to the arrangements, could not be allowed to repudiate it and impeach a sale made on the faith of it. Their Lordships said:

93 See above; *Shanmugam Pillai v K Sanmugam Pillai* AIR 1972 SC 2069; *Sahu Madho Das v Pandit Mukund Ram* [1955] 2 SCR 22; *Pokhar Singh v Dulari* (1930) All 52 716, 125 IC 1, AIR 1930 All 687; *Buchi Bai v Nagpur University* (1946) ILR Nag 433; *Chanderjit Das v Debi Das* (1953) 1 All 437, AIR 1951 All 522. Also see *Pullaiah v Narasimham* AIR 1966 SC 1836; *M N Aryamurthi v Subbaraya* AIR 1972 SC 1279. Reference may be made to cases cited under § 248B.

94 *Krishna Beharilal Lal v Gulabchand* AIR 1971 SC 1041; *Ram Charan Das v Girija* AIR 1966 SC 323, 328; *T Ramayammal v T Mathummal* AIR 1974 Mad 321 (wife and daughter under void marriage). Also see *Harprasad v Jagmohan* AIR 1973 Ori 227.

> ...whether this arrangement is binding on the grandsons cannot be determined in this suit, and on that question their Lordships express no opinion. However, the plaintiff at all events is bound by her own agreement; and in view of this fact, and of the favour shown by the courts to family arrangemens and the long period of time which has elapsed since the arrangement was made, she cannot now be allowed to repudiate the agreement and to impeach a sale which was made upon the faith of it.[95]

(b) A Hindu died in 1846, leaving a widow, who survived until 1912, and a daughter. On the death of the widow, *A* had succeeded to the estate. In 1868, the widow had alienated nearly the whole property by three deeds executed and registered on the same day. By the first deed, she gave a property to her brother, by another, she sold half of another property to *A*, and by the third she sold the other half of that property to her son-in-law. The signature on each of the deeds was attested by the two other alienees. *A*, who survived the widow for six years, did not seek to set aside any of the alienations. After his death, his son and grandsons brought a suit to recover the whole property. It was held that the three deeds were to be regarded as forming one transaction entered into by all the persons interested in the properties, and that *A*, and consequently the plaintiffs, were precluded from disputing the two alienations now sought to be set aside, the alienations being by the widow were avoidable, not void, and *A* being precluded from questioning them, it was not necessary to consider whether he could deal validly with his reversionary interest. In the judgment, their Lordships said:

> Their Lordships consider that the decision of this case depends upon how far the three documents can be taken as separate and independent, or so connected as to form one transaction...Their Lordships conclude that all the circumstances strongly point to the three documents being part and parcel of one transaction by which a disposition was made of (the husband's) estate such as was likely to prevent disputes in the future and therefore for the best interest of all the parties...If some person other than *A* had been at the death of the widow, the nearest heir of her husband, it might have been open to him to question all or

95 *Mussammat Hardei v Bhagwan Singh* (1919) 24 CWN 105, 109, 50 IC 812, AIR 1919 PC 27.

any of the three deeds, but, *A* himself being a party to and benefiting by the transaction evidenced thereby was precluded from questioning any part of it. Nor is it other than a most notable circumstance that he did not, after (the widow's) death, essay to do so.[96]

(c) *A* and *B* are two Hindu brothers governed by the Benares school of Hindu law. *A* dies leaving a widow *P*. On *A*'s death, *B* enters into possession of the family property, claiming it by right of survivorship. *P* contends that her husband *A* was separate from *B*, and she adopts *K* to her husband. *K* is *P*'s husband's sister's son. *B* dies leaving a widow *R*, a daughter and *K*. On *B*'s death, his estate devolves on his widow *R*. On the widow's death, it would pass to the daughter as a limited heir, and on her death, *K*, if his adoption is valid, would succeed as a reversioner. The daughter is the next or presumptive reversioner, and *K* is a remote or contingent reversioner.

B's widow, *R*, institutes two suits, one for a declaration that her husband was the owner of the entire joint family property, and another for a declaration that *K*'s adoption is invalid. A compromise is then entered into by which the property is divided between *B*'s widow, *R*, her daughter and *A*'s widow, *P*, and *K*'s adoption is recognised. *P* transfers the property, which she got under the compromise to *K* as her adopted son. *K* is a party to the compromise.

Then the daughter dies, and then the widow, *R*. On the death of *R*, *K* claims *B*'s property as *B*'s reversionary heir. Upon these facts, it was held by their Lordships of the Privy Council that *K* was precluded from claiming as a reversioner.[97]

Reversioner's Son: Whether Compromise Binding on Him

It has been held by the High Court of Allahabad, that where a reversioner is a party to a compromise and obtains some property under the compromise, his son, if he enters into possession of the property after his father's death and enjoys possession thereof in succession to his father, is precluded from repudiating the compromise and from claiming as a reversioner.[98]

96 *Ramgouda v Bhausaheb* (1927) 54 IA 396, 401–02, 52 Bom 1, 105 IC 708, AIR 1927 PC 227; *Birendra Nath v Shibaram* AIR 1952 Cal 473, (1953) 1 Cal 208.

97 *Kanhai Lal v Brij Lal* (1918) 45 IA 118,123, 40 All 487, 47 IC 207, AIR 1918 PC 70.

98 See also Illust (c). *Bahadur Singh v Ram Bahadur* (1923) 45 All 277, 71 IC 405, AIR 1923 All 204.

§ 193. COMPROMISE AND FAMILY ARRANGEMENT BY WIDOW—REVERSIONER NOT A PARTY—BINDING ON REVERSIONER, THOUGH NOT A PARTY, IF TRANSACTION BONA FIDE

(1) A compromise in the nature of a family arrangement entered into by a widow or other limited heir binds the reversioners, though they may not be parties thereto, provided it amounts to a bona fide settlement of disputes in respect of the estate.[99]

Even if it is not in the nature of a family arrangement, a compromise entered into by her bona fide for the benefit of the estate, and not for her personal advantage, binds the reversioners quite as much as a decree against her after litigation, though they may not be parties to the transaction.[1] In either cases, the fact that the compromise involves an alienation of the estate does not effect its validity.

An alienation which is the result of a compromise, or the mode by which a compromise is carried into effect, falls within the power of the holder of a Hindu woman's estate, either as being an alienation, which is to be deemed to be induced by necessity, or as being in a parallel position to an alienation induced by necessity.[2] The question whether a compromise is a bona fide settlement of a disputed right between the parties depends in the substance of the transaction, and in order that it may bind the estate, it should be a prudent and reasonable act.[3]

99 See Illust (a). *Khunni Lal v Gobind Krishna* (1911) 33 All 356, 38 IA 87, 10 IC 477; *Hiran Bibi v Sohan Bibi* (1914) 18 CWN 929, 24 IC 309, AIR 1914 PC 44; *Upendra Nath v Bindesri Prosad* (1915) 20 CWN 210, 32 IC 468, AIR 1916 Cal 843; *Brendra Nath v Shibaram* AIR 1952 Cal 473, (1955) 1 Cal 208; *Bihari Lal v Daud Husain* (1913) 35 All 240, 18 IC 721. In the following cases, it was held that the compromise did not bind the actual reversioners, *Himmat Bahadur v Dhanpat Rai* (1916) 38 All 335, 35 IC 148, AIR 1917 All 481 (no bona fide dispute and no bona fide settlement); *Kanhaiya Lal v Kishori Lal* (1916) 38 All 679, 35 IC 683, AIR 1916 All 38 (probably no longer law)—see *Ramsumran Prasad v Shyam Kumari* (1922) 49 IA 342, 1 Pat 741, 69 IC 71, AIR 1922 PC 356; *Janak Kishori v Babu Debi Prasad* (1917) 2 PLJR 370, 39 IC 750, AIR 1917 Pat 490 (compromise by a widow of her claim as a legatee under her husband's will); *Anup Narayan v Mohabir Prasad* (1918) 3 PLJR 83, 42 IC 95, AIR 1917 at 86 (compromise not for the benefit of the estate); *Narain Singh v Raj Kumar* (1922) 44 All 428, 66 IC 82, AIR 1922 All 217 (compromise not for the benefit of the estate); *Mst Bhagwati v Jagadam* (1921) 6 PLJR 604, 621–22, 67 IC 597, AIR 1922 Pat 352 (no doubtful claim); *Pullayya v Appanna* AIR 1957 AP 846; *Thiagarajan v Ganesan* AIR 1973 Mad 411 (family arrangement relating to properties of a religious endowment).

1 See Illust (b). *Ramsumran Prasad v Shyam Kumari* (1922) 49 IA 342, 1 Pat 741, 9 IC 71, AIR 1922 PC 356; approving *Mohendra Nath v Shamsunnessa* (1915) 21 Cal LJ 157, 27 IC 954, AIR 1915 Cal 629; *Raoji Rupa v Kunjalal Hiralal* (1930) 57 IA 177L, 55 Bom 455, 123 IC 709, AIR 1930 PC 163.

2 *Ramsumram Prasad v Shyam Kumari* (1922) 1 Pat 741, 745–46, 49 IA 342, 69 IC 71, AIR 1922 PC 356; *Babulal v Maniklal* (1941) Nag 124, 192 IC 826, AIR 1941 Nag 79.

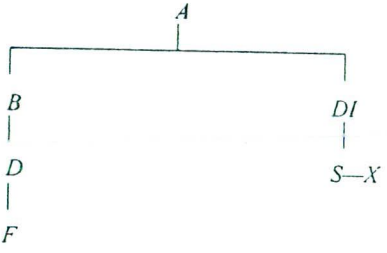
3 *Mst Phool Kuer v Mst Pem Kuer* [1952] SCR 793, AIR 1952 SC 207; *Karuppa Udayar v Sellamuthu Udayar* (1956) 2 MLJ 250; *Arjun Singh v Virendra* AIR 1971 All 29.

A reversioner would be precluded from questioning the alienation on any such ground, if he has in fact elected to assent to the transaction and received benefit under it in circumstances inviting the application of the doctrine of election or ratification.[4] The cases on the subject show that the rule of estoppel also has been involved in such cases. In *Subbu Chetty's Family Charities v Raghava Mudaliar*, the Supreme Court pointed out that the principle of election or estoppel or ratification must be applied with due circumspection and held that the mere fact that the reversioner has received some benefit under the transaction or has not challenged the validity of the transaction when it took place, cannot bar his rights as a reversioner when reversion in his favour falls open.[5]

(2) Alienation by way of compromise entered into between a limited owner and a person who had no bona fide claim at all to the estate when the compromise was entered into does not bind the reversioners.[6] However, if the compromise is a bona fide one, entered into by the widow with a rival claimant for the benefit of the husband's estate, it would bind the reversioners. The widow cannot, however, by such compromise with a person claiming adversely to the estate, convert her limited estate into absolute estate in some of the properties.[7] Where a presumptive reversioner sued to set aside a gift by a widow and a compromise was entered into by which a portion of the estate was transferred to him, it was held that the compromise was not binding on the actual reversioner.[8]

Illustrations

Table XI.1



4 *Sahu Madho Das v Mukund Ram* [1955] 2 SCR 22. Also see *Ekkari Ghosh v Chittarekha* AIR 1958 Cal 447.

5 [1961] 3 SCR 624, 632.

6 *Obala Kondama v Kandasami* (1924) 51 IA 145, 47 Mad 181, 79 IC 961, AIR 1924 PC 56, *Baijrath Rai v Mangla Prasad* (1926) 5 Pat 350, 90 IC 732, AIR 1926 Pat 1; *Mathukumalli Ramayya v Uppalapati Lakshmayya* (1943) Mad 1, 202 IC 1, 69 IA 110, AIR 1942 PC 54.

7 *Perireddi v Venkatraju* (1947) Mad 681.

8 See § 182, Illust (2). *Mt Rajpali Kunwar v Surju Rai* (1936) 58 All 1041 (FB), 163 IC 756, AIR 1936 All 507, *Mathukumalli Ramayya v Uppalapati Lakshmayya* (1943) Mad 1, 202 IC 1, (1942) ALJ 392, 69 IA 110, AIR 1942 PC 54.

(a) *A* has a son *B*, who is joint with him. *A* adopts the Mohammedan faith, but the management of the joint property remains with him. *B* then dies leaving a daughter *D*. Then *A* dies, leaving his granddaughter, *D*, and a son *S* by a predeceased daughter *DI*. On *A*'s death, *D* claims the whole of the joint family property on the ground that *A*'s conversion operated as a forfeiture of his rights in the property and that the property became immediately on *A*'s conversion, the property of *B*. *S* claims the property as *A*'s daughter's son. A compromise is then arrived at between the parties under which *D* obtains 8½ annas of the joint property and *S* gets 7½ annas. *S* then alienates his shares to *X*. After *D*'s death, her son, *F*, claiming to be the reversionary heir to his grandfather, *B*, brings a suit against *X* to recover from him the property transferred to him by *S*. It is contended on behalf of *F* that *D*, as *B*'s daughter, took only a limited interest in the property, and that she had therefore no authority, in the absence of legal necessity, to alienate the 7½ annas share in favour of *S*.

On the above facts, it was held by the Privy Council that the compromise was binding upon *F* and that he was not entitled to recover the property from *X*. Their Lordships said:

> The true test to apply to a transaction which is challenged by the reversioners as an alienation not binding on them is, whether the alienee derives title from the holder of the limited interest or life tenants. In the present case, *Khairati Lal S* acquired no right from the daughter *D* of Daulat *B*, for the 'compromise', to use their Lordships' language in *Rani Mewa Kwar v Rani Hulas Kwar*,[9] is based on the assumption that there was an antecedent title of some kind in the parties as the agreement acknowledges and defines what that title is.[10]

(b) A Hindu died leaving a widow and a paternal uncle's son. Prior to his death, the deceased had brought a suit for a sale of certain properties mortgaged to him. The suit was continued by the widow, and she obtained a decree for Rs 1,47,000. Six of the mortgaged properties were then put up for sale by auction, and the widow, having leave to bid, bought them for Rs 65,075. The mortgagors filed a petition in objection to the sale. The widow entered into a compromise with the mortgagors, one of the terms of the compromise being that the sale should be set aside. It was

9 (1875) 1 IA 166.

10 *Khunni Lal v Govind Krishana* (1911) 33 All 356, 38 IA 87,102–03, 10 IC 471; Also *Hiran Bibi v Sahan Bibi* AIR 1914 PC 44.

contended in a suit brought by the paternal uncle's son against the widow, the mortgagors and certain persons to whom the properties were soid under the compromise that as the widow had purchased at the auction, the transaction was an alienation of immovable property and therefore could not only be justified by strict proof of necessity. Upon the facts the Judicial Committee held that the compromise was bona fide and for the benefit of the estate, and that the widow had power to enter into the compromise.[11]

This section relates to cases of compromise to which the reversioners are not parties. § 192 deals with cases of compromise to which the reversioners are parties. As to burden of proofs in cases of compromise, see notes to § 182 'Burden of Proof: 'Consent Decree' involving alienation to mortgagee'.

§ 194. COMPROMISE BY WIDOW OF CLAIMS MADE BY NEXT REVERSIONER

Where a widow in possession of her husband's estate has entered into a compromise of a claim made by the next reversioner in respect of the estate, and the compromise is in the circumstances a family settlement which is prudent and reasonable, it is binding upon the estate (that is, the whole body of reversioners).[12] A mere device, however, between the widow and the next reversioner to divide the estate between them cannot be supported on the ground of a family arrangement.[13]

§ 194A. WIDOW'S POWER OF ALIENATION FOR PAYMENT OF TRADE DEBTS

A widow or other limited heir may alienate or change the estate for payment of debts properly incurred by her in connection with the business inherited by her from the deceased owner.[14] If the business involves the purchase and re-sale of immovable property, she may in the course of business, sell properties so purchased by her. No question of legal necessity arises in such a case.[15]

11 *Ramsumran Prasad v Shyam Kumari* (1922) 49 IA 342, 1 Pat 741, 69 IC 71, AIR 1922 PC 356.

12 *Mata Prasad v Nageshar Sahai* (1925) 52 IA 398, 47 All 883, 91 IC 37, AIR 1925 PC 272 (compromise of suit).

13 *Thakur Prasad v Musammat Dipa Kuer* (1931) 10 Pat 352, 134 IC 129, AIR 1931 Pat 442. Reference may, however, also be made to *Krishnakanta v Renubala* 79 CWN 341.

14 *Sham Sundar v Acchhan Kunwar* (1898) 21 All 71, 25 IA 183. See also *Amarnath v Achan Kuar* (1892) 14 All 420, 19 IA 196.

15 *Pahalwan Singh v Jiwan Das* (1919) 42 All 109, 59 IC 162, AIR 1920 All 345.

§ 195. UNSECURED DEBTS INCURRED BY WIDOW FOR LEGAL NECESSITY

Debts contracted by a widow or other female heir may be ordinary debts incurred for purposes amounting to a legal necessity, eg, marriage of her daughter, or they may be trade debts.

As regards ordinary debts incurred for a legal necessity, there is a conflict of opinion whether if the debts are not secured by a mortgage or a charge on the estate, the estate is liable in the hands of the reversioners after the widow's death.

It has been held by the High courts of Madras,[16] and Allahabad,[17] that the estate is not liable in such a case, the reason given being that a creditor who has accepted the personal liability of a widow, is not entitled to proceed against the estate. On the other hand, it has been held by the High Court of Calcutta,[18] that the debt being incurred for a legal necessity, the estate is liable even if no mortgage or charge is created on the estate. In a later Calcutta case,[19] where necessary repairs were executed to a house inherited by a daughter from her father, it was held that the estate of the father was liable, though no charge had been created, the ground of the decision being that the estate had benefited by the repairs. A Full Bench of the Bombay High Court has followed the Calcutta High Court, dissenting from other High Courts and overruling its own earlier decision.[20] This is also the view taken in Nagpur.[21] However, if the creditor wishes to proceed against the estate, he must frame his suit in a proper manner;[22] for if the suit is filed against the widow personally and not as representing the estate, only the widow's interest can be proceeded against in execution.[23]

As regards trade debts, it has been held that such debts properly incurred by a widow on the credit of the assets of the business inherited by her from her husband are recoverable after her death out of the assets

16 *Ramasami v Sellattammal* (1882) 4 Mad 375. See also *Regella v Nimushakavi* (1910) 33 Mad 492, 5 IC 271.

17 *Dhiraj Singh v Manga Ram* (1897) 19 All 300 (money borrowed by widow for marriage expenses of granddaughter—no writing). However, see *Suraj Prasad v Makhana* (1945) All 465, which seems to overrule this case.

18 *Ramcoomar v Ichamoyi* (1881) 6 Cal 36 (money borrowed by widow for marriage expenses of granddaughter—no writing).

19 *Hurry v Gonesh* (1884) 10 Cal 823.

20 *Dhond Yeshwant v Mishrilal Surjmall* (1936) 60 Bom 311, 38 Bom LR 6, 160 IC 1046, AIR 1936 Bom 59 (FB).

21 *Raghoappa v Balappa* (1939) Nag 347.

22 *Anandrao v M T Annapurnaabai* (1937) Nag 1, AIR 1937 Nag 299.

23 *Vasant Rao v Beharilal* (1938) Nag 382, AIR 1938 Nag 225; *Sheikh Ghasit Mian v Thakur Panchanan Singh* (1936) 15 Pat 798, 166 IC 594, AIR 1937 Pat 58.

of the business, as against the reversioners who have succeeded thereto, even in the absence of a specific charge on the estate.[24]

A widow who borrows on a simple bond may bind the estate by subsequently creating a mortgage on the estate for payment of the debt comprised in the bond.[25] As to alienations for trade debts see § 194A.

§ 196. ACKNOWLEDGEMENT OF DEBTS BY WIDOW

It was provided by s 3 of the Limitation (Amendment) Act 1927, that an acknowledgement signed, or a payment made, in respect of any liability, by a widow or other limited heir, shall be valid acknowledgment or payment, as the case may be, as against a reversioner succeeding to such liability.[26]

§ 197. SURRENDER OF ESTATE BY WIDOW—SURRENDER MUST BE OF THE WHOLE ESTATE

An alienation by a widow or other limited heir of the estate inherited by her may be validated if it can be shown to be a surrender of her whole interest in the estate,[27] in favour of the nearest reversioner, if there be only one, or of the whole body of reversioners, if there be more than one,[28] at the time of the alienation. In such circumstances, the question of necessity does not fall to be considered (Illust (a)–(d) and (f)). However, the surrender must be a bona fide surrender, and not a device to divide the estate with the reversioner.[29]

24 *Sakrabhai v Maganlal* (1992) 26 Bom 206; *Pahalwan Singh v Jiwan Das* (1918) 42 All 109, 59 IC 162, AIR 1920 All 345.

25 *Bhup Singh v Jhamman Singh* (1922) 44 All 95, 65 IC 724, AIR 1922 All 169.

26 Now see s 21 (3)-(a) of the new Limitation Act 36 of 1963. For the view taken before the Amendment Act of 1927, see *Soni Ram v Kanhaiya Lal* (1913) 40 IA 74, 35 All 227, 19 IC 291 affirming 32 All 33, 3 IC 725.

27 *Mathukumalli Ramayya v Uppalapati Lakhshmayya* (1943) Mad 1, 202 IC 1, 69 IA 110, AIR 1942 PC 54; *Nallaya v Angaiyammal* AIR 1964 Mad 260.

28 *Manjaya v Sheshgiri* (1925) 49 Bom 187, 85 IC 20, AIR 1925 Bom 129.

29 *Rangasami v Nachiappa* (1919) 46 IA 72, 84, 42 Mad 523, 537, 50 IC 498, AIR 1918 PC 196; *Bhagawat Kowr v Dhanukdhari Prashad Singh* (1919) 46 IA 259, 271, 47 Cal 466, 483, 53 IC 347, AIR 1919 PC 75; *Sureshwar v Maheshrani* (1920) 47 IA 233, 48 Cal 100, 57 IC 325, AIR 1921 PC 107; *Behari Lal v Madho Lal* (1892) 19 Cal 236, 19 IA 30, *Rangappa v Kamti* (1908) 31 Mad 366; *Pilu v Babaji* (1910) 34 Bom 165, 4 IC 584; *Moti v Laldas* (1917) 41 Bom 93, 371 IC 945, AIR 1916 Bom 85; *Kawani Singh v Chet Ram* (1917) 39 All 1, 37 IC 86, AIR 1917 All 341; *Sham Rathi v Jaichha* (1937) 39 All 520, 40 IC 117, AIR 1917 All 300; *Diltor Koer v Harku Singh* (1917) 2 PLJR 578, 41 IC 631, AIR 1917 Pat 538; *Chunder v Sarnamoyi* (1894) 22 Cal 354; *Thakur Prasad v Mst Dipa Kuer* (1931) 10 Pat 352, 134 IC 129, AIR 1931 Pat 442; *Ram Karan v Baidka Singh* AIR 1954 Pat 545; *Ashalata v Amiya Kumar* AIR 1958 Cal 71.

It must be noted that surrender by the widow and acceptance by the reversioner are not matters of contract. The estate vests in the reversioner by operation of law without any act of acceptance by the reversioner.[30] A sale of the estate for consideration cannot be regarded as a surrender.[31] If there are two or more widows, the surrender must be by all of them.[32]

Though it is open to a widow to surrender the estate to the next reversioner even where the latter is a female heir (§ 197 (2)), a widow cannot validly surrender in favour of the next female heir and her husband jointly.

The husband would be a stranger in this context.[33] A valid surrender cannot be made in favour of anybody except the nearest reversioner, if there be one, or of the whole body of reversioners.[34]

The omission, due to ignorance or to oversight, of a small portion of the whole property, does not affect the validity of the surrender when it is otherwise bona fide.[35]

The principle on which the whole transaction rests is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date. Now, there cannot be a widow who is partly effaced and partly not so, and consequently there can be no surrender or renunciation of part of the estate.[36] The surrender may be effected by any process having that effect, provided that a bona fide and total renunciation of the widow's right to hold the property. Thus, a compromise between a widow and the next reversioner may operate as a surrender.[37] It is not even necessary that the limited owner shall

30 *Natvarlal v Dadubhai* [1954] SCR 339, AIR 1954 SC 61.

31 Illustrations (e), (h) and (i). *Shantikumar Pal v Mukund Lal Mandal* (1935) 62 Cal 204, 156 IC 209, AIR 1935 Cal 20.

32 *Dullhin Parbati Kuer v Baijnath Prasad* (1935) 14 Pat 518.

33 *Mummareddi v Durairaja Naidu* [1951] SCR 655.

34 *Phool Kuer v Pem Kuer* [1952] SCR 793 (nearest reversioner and his son—invalid), *Ramachandra v Srideviamma* AIR 1976 Kant 217 (nearest reversioner and his son—invalid); *Ram Charan v Giranandini* AIR 1959 All 473.

35 *Gopal Singh v Ujjar Singh* [1955] 1 SCR 86, AIR 1954 SC 579, 581; *Haribhai Annaji v Narayan Hari* (1938) Bom 723; *Radhashyam v Hari Pada* AIR 1962 Cal 100; *Brajeshwaree Dasee v Mano Ranjan Datta* (1937) 1 Cal 590, 171 IC 626, AIR 1937 Cal 167. Also see *Ramayya v Bapananma v Haripada* AIR 1962 Cal 100; *Brejeshware Dasee v Mano Ranjan Datta* (1937) 1 Cal 690, 171 IC 626, AIR 1937 Cal 167. Also see *Ramayya v Bapanamma* (1937) Mad 248, 166 IC 153, AIR 1937 Mad 146; *Venkata Satyanarayana v A Lakshmi* AIR 1977 AP 415.

36 *Rangasami v Nachiappa* (1919) 46 IA 72, 79–80, 42 Mad 523, 532, 50 IC 498, AIR 1918 PC 196. Also see *Kamlabai v Sheo Shankar* AIR 1958 SC 914.

37 See ill (d). *Bahagwat Kowr v Dhanukadhari* (1919) 46 IA 259, 271, 47 Cal 466, 483, 53 IC 347, AIR 1919 PC 75; *Sureshwar v Maheshrani* (1920) 47 IA 233, 48 Cal 100, 57 IC 325, AIR 1921 PC 107; *Chinnaswami v Appaswami* (1919) 42 Mad 25, 48 IC 147, AIR 1919 Mad 865; *Angamuthu v Varatharajulu* (1918) 42 Mad 854, 53 IC 386, AIR 1920 Mad 627; *Rama Nana v Dhondi* (1923) 47 Bom 678, 76 IC 607, AIR 1923 Bom 432; *Ram Adhar v Ram Manohar* (1923) 45 All 610, 73 IC 990, AIR 1924 All 114.

purport to transfer the property to the next reversioner.[38] Again, the surrender need not be effected by a single transfer of all the properties at the same time. It may consist of successive transfers, provided the result at the end is a complete effacement of the widow.[39] The Bombay High Court has held that surrender is possible and valid, even if the estate of the widow is in the possession of an adverse claimant, who has completed his title to it by adverse possession.[40]

The Patna High Court has held that a deed of surrender is really a deed of gift and not a deed of release for purposes of stamp.[41] The Calcutta High Court has however expressed doubts on the propriety of this view. It has held, that a deed of surrender does not in law or fact purport to transfer any property. The widow merely withdraws herself from the estate and the next heir steps into the inheritance as a matter of law. At any rate, if it is not in the form of a deed of gift, it does not require to be stamped and attested as such.[42]

Transfer

If a widow attempts to transfer any property to the next reversioner, and if the transfer is void by reason of any law, no title is conferred upon the transferee, even though she may have an intention to make a valid surrender.[43]

It has been held in a case decided by the Patna High Court that surrender not being a transfer, is not hit by the doctrine of *lis pendens*.[44]

Surrender by Widow Coupled with a Provision for Her Maintenance

Where disputes arise between a widow and the next reversioner as to title to her husband's property, and a compromise is entered into, whereby the widow relinquishes her right of succession to the property in consideration of a small portion of the property being set apart for her maintenance for life, the compromise is a bona fide surrender of the whole estate, and not a device to divide it with the next reversioner.[45]

38 *Prem Narain v Hansraj* (1946) All 837.
39 *Maru v Hanso* (1926) 48 All 485, 95 IC 543, AIR 1926 All 413.
40 *Nartwarlal v Dadubhai* (1949) Bom 869.
41 *Re Khetramoni Debya* (1937) 17 Pat 95 (FB), 172 IC 847, AIR 1938 Pat 33.
42 *Karunamoyee v Maya Moyi* AIR 1948 Cal 84; *Thiruvenkidaswami v Pallani Pmal* AIR 1961 Mad 291.
43 *Pandu Mari Lote v Shripati* (1954) Bom 169, AIR 1953 Bom 428, (1953) 55 Bom LR 647 (FB). Also see *Hardeo Singh v Kaushilla Kunwar* (1954) ALJ 562.
44 *Jullam Missir v Pradip Missir* AIR 1958 Pat 115.
45 Illustrations (d) and (e). *Sureshwar v Maheshrani* (1920) 47 IA 233, 48 Cal 100, 57 IC 325, AIR 1921 PC 107; *Naru v Tai* (1923) 47 Bom 431, 76 IC 265, AIR 1923 Bom 191; *Hem Chunder v Sarnamoyi* (1894) 22 Cal 354 (not good law, correct view—

continued on the next page

This decision was treated as an authority in a Bombay case for the proposition that a surrender may be total in spite of a provision for the maintenance of the widow surrendering the estate. The surrender amounts to effacement by the widow from the husband's estate, and relying on this doctrine, it was decided by a Full Bench of the High Court of Andhra Pradesh that a widow after surrendering her estate,[46] in favour of the next reversioner, cannot claim maintenance out of the estate in the hands of the surrenderee, if there was no such arrangement between the parties, and where there is such an arrangement, she cannot seek revision of the terms of the arrangement.[47] Where the estate consisted of 231 acres of land and the widow reserved 42 acres thereout for her maintenance and purported to surrender the rest to her daughter, the next reversioner, it was held that the transaction did not amount to a valid surrender.[48] Where the widow purporting to surrender her estate reserved a life interest for herself, the Privy Council held that there was no valid surrender.[49] Where an estate was small and the income was just sufficient for the maintenance of the widow and the deed of surrender stipulated that the entire income after the payment of land revenue should be paid to her, it was held that no valid surrender was possible and that it was therefore invalid.[50] When a surrender by a Hindu widow of the entire estate in favour of the next reversioner forms an integral part of an arrangement, under which certain named relatives of the widow receive the major portion of the property by transfer from the reversioner and only a small portion of the property is left to the latter, it was held that the surrender was not bona fide at all.[51] However, from the mere circumstance that other documents such as maintenance deed in favour of the widow and a gift deed in favour of another were extended by the

alienation wholly void); *Kanuram v Koshi Chandra* (1909) 14 CWN 226, 21 IC 660 (a decision of doubtful authority); *Challa Subiah v Paluri* (1908) 31 Mad 446 (surrender of entire interest to reversioner—transfer back by reversioner of one-third to widow's brother pursuant to agreement at time of surrender—surrender held valid); *Rangappa v Kamti* (1908) 31 Mad 366 (not good law—commented on adversely by PC in (1919) 46 IA 72, 84, 42 Mad 523, 537, 50 IC 498, AIR 1918 PC 196); *Sitanna v Viranna* (1934) 57 Mad 749, 148 IC 828, AIR 1934 PC 105, where the widow reserved only six acres of land for her maintenance; *Rami Reddi v Rasamma* AIR 1955 AP 232 (FB); *Ashalata v Amiya Kumar* AIR 1958 Cal 71.

46 *Rama Nana v Dhondi Murari* (1923) 47 Bom 678, 76 IC 607, AIR 1923 Bom 432; dissenting from *Adiveppa v Tontappa* (1920) 44 Bom 255, 55 IC 369, AIR 1920 Bom 345, *Krishna Bhatarba v Baban Rambhau* (1944) Bom 287.

47 *V Kondamma v V Seshamma* AIR 1957 AP 156.

48 *Gangadhar v Prabhudha* (1932) 56 Bom 410, 140 IC 884, AIR 1932 Bom 62.

49 *Behari Lal v Madho Lal* (1891) 19 IA 30, 19 Cal 236.

50 *Anant Nilkanth v Lala Rupnarayan* (1945) Nag 698.

51 *Chundru Akkamma v Obundru Brahmadu* (1950) 1 MLJ 750, AIR 1950 Mad 617; reference may also be made to *Venkateswarlu v Challayia* AIR 1953 Mad 551, (1953) 1 MLJ 167 which was dissented from in *Kuppanna v Perumma* AIR 1960 Mad 154, (1960) Mad 115; *Ram Prasad v Sital Prasad* AIR 1965 Pat 47.

surrenderee on the same day, it may not be inferred that the surrender was only a device to divide the property, if the facts considered as a whole show that the transactions were bona fide.[52] The court has to consider all the surrounding circumstances, the extent of the estate given to the widow, the status of the widow and also the nature and effect of the understanding arrived at between the parties. The mere fact that the document is described as a *karar* will not affect the substance of the transaction, nor will the fact that the transaction took place at the instance of the then reversioner be determinative of the matter.[53]

Motive

The widow's motive in making a surrender is immaterial. Therefore, surrender by her cannot be called into question on the ground of improper motive.[54]

Surrender in Favour of Female Reversioners

A surrender of the estate may be made even in favour of a female reversioner.[55] Surrender, however, to a female reversioner does not enlarge the estate of such reversioner, however, merely accelerates it. It does not confer on the female reversioner any larger estate than the limited and qualified estate to which she would have succeeded had she survived the limited heir.[56]

The estate vests in her as a limited owner, and on her death, it passes to the next reversioner. It cannot, however, revert to the widow, for the widow, has by the surrender completely effaced herself.[57] A widow may surrender the estate in favour of the next male reversioner with the consent of an intermediate female reversioner,[58] but, in such a case, the intermediate reversioner cannot reserve for herself a substantial part of the property or stipulate for any benefit except what is necessary for her maintenance. If she does so, the surrender is invalid and does not bind the actual reversioners. In such a case, a remote reversioner may file a suit for declaration to that effect.[59]

52 *Boddu Veeraiah v Aripirala Venkata* AIR 1968 AP 276.

53 *Chinnamarappa v Narayammal* AIR 1966 Mad 169 (charge for maintenance).

54 *Challa Subbhiah v Paluri* (1908) 31 Mad 446; *Subbalakshami v Narayana Ayyar* (1935) 58 Mad 150, 152 IC 391, AIR 1934 Mad 535; *Venkateswarlu v Challaiya* AIR 1953 Mad 551, (1953) 1 MLJ 167.

55 *Sitanna v Viranna* (1934) 57 Mad 749, 148 IC 828, AIR 1934 PC 105.

56 See Illust (g). *Bhapal Ram v Lachma Kuar* (1889) 11 All 253; *Bepin Behari v Durga Charan* (1908) 35 Cal 1086, 1090; *Rup Ram v Rewati* (1910) 32 All 582, 6 IC 541.

57 *Sartaji v Ramjas* (1924) 46 All 59, 79 IC 25, AIR 1924 All 166. However, see *Chengappa v Buradagunta* (1920) 43 Mad 855, 60 IC 135, AIR 1921 Mad 246.

58 *Sheo Sankar Dayal v Kamalabati* 1950 Nag 589. Also see *Sumantrabai v Rishabhkumar* (1953) Nag 69, AIR 1952 Nag 295.

59 *Janki Nath Ray v Jyotish Chandra Achariya Choudhuri* 1941 1 Cal 234, 193 IC 419, AIR 1941 Cal 41.

Surrender in Favour of Female Reversioners in Bombay

The provisions of sub-§ (2) do not apply to such females in Bombay, as they take an absolute interest in property inherited by them from a male, eg, the daughter, daughter's daughter, and the like. A surrender to such a female passes the whole estate absolutely to her (see ill (h)).

Gift of Whole Property to a Third Party with Consent of the Next Reversioner

There is a conflict of opinion whether a gift by a widow of her entire interest in the whole estate to a stranger with the consent of the next reversioner can be supported as a surrender so as to bind the actual reversioner at the widow's death (§ 183 (4)).

Where Surrender Follows Prior Alienations

Where a portion of the estate was validly alienated by the widow for legal necessity (such as discharge of husband's debts) and the remaining estate was then surrendered, it was held that the surrender was valid.[60] Where a widow alienates a portion of the estate inherited by her from her husband without legal necessity and subsequently surrenders the whole of her interest in the estate to the next reversioner, the surrender itself is valid. However, there was a difference of judicial opinion as to whether the reversioner in such a case is entitled to claim immediate possession of the portion alienated or he must wait for possession until the death of the widow. In *Natvarlal v Dadubhai*,[61] the Supreme Court held that although the widow herself was incapable of disputing the title of the alienee or of the person who has title against her by adverse possession, a like disability did not attach to the reversioner, as the latter does not derive title from the widow even in case of surrender. The reversioner does not take the property subject to the rights created by the widow. The reversioner in such a case is entitled to immediately

60 *Ramayya v Bapanamma* (1937) Mad 248, 156 IC 153, AIR 1937 Mad 146.

61 [1954] SCR 339, AIR 1954 SC 61. The Supreme Court examined a number of decisions set out below: *Subbamma v Subramanyam* ILR 39 Mad 1035; *Sunderasiva v Vivamma* (1925) 48 Mad 93, 91 IC 401, AIR 1925 Mad 1267; *Thripurasundara Rao v Kotayya* AIR 1951 Mad 753; *Arunachala v Arumuga* AIR 1953 Mad 550. However, see *Biliga Laxminarayana Rao v Fernandes* (1956) 2 MLJ 211; *Lachmi v Lachho* (1927) 49 All 334, 100 IC 764, AIR 1927 All 258. However, see *Raghuraj v Babu* AIR 1952 All 875; *Basudeo v Baidyanath* AIR 1935 Pat 175. However, now see *Ram Karan v Baidka Singh* AIR 1954 Pat 545. Also see *Julam Missir v Pradip Missir* AIR 1958 Pat 115; *Ram Krishana v Kausalya* 40 CWN 208. However, see *Prafulla v Bhabani* 52 Cal 1018, 91 IC 897, AIR 1926 Cal 121; *Natvaralal v Dadubhai* (1949) 51 Bom LR 803, AIR 1950 Bom 55 (FB); *Kaliaperumal v Kuppayee Ammal* AIR 1963 Mad 110. Also see *Venkatasatyanarayana v A Lakshmi* AIR 1977 AP 415, and see *Lalji Maitra v Shyam Behari* AIR 1979 All 279 (position of reversioners).

recover possession of the property from that person as heir of the last male holder.

The contrary view taken by the Madras High Court and accepted by the Allahabad and Patna High Courts was commented upon and the view taken by the Calcutta and Bombay High Courts was referred to with approval by the Supreme Court in that case.

In the above case decided by the Supreme Court,[62] and in a number of decisions of the Privy Council, it has been reiterated that:

> ...the whole doctrine of surrender is based upon the analogy or legal fiction of the widow's death. The widow's estate is an interposed limitation or obstruction, which prevents or impedes the course of succession in favour of the heir of her husband. It is open to the widow by a voluntary act of her own to remove this obstruction and efface herself from the husband's estate altogether. If she does, the consequence is the same as if she died a natural death and the next heir of her husband then living step in at once under the ordinary law of inheritance.

It was also pointed out by the Supreme Court in that case that a surrender is not really an act of alienation of the widow of her rights in favour of the reversioner. The reversioner does not occupy the position of a grantee or transferee, and does not derive his title from her. It is the self-effacement by the widow that forms the basis of surrender and not the *ex facie* transfer by which such effacement is brought about.

Surrender Followed by Adoption

It has been held by a Full Bench of the Bombay High Court,[63] overruling some of its earlier decisions to the contrary,[64] that a valid surrender made by a Hindu widow of her husband's estate to the next reversioner can be defeated by a subsequent adoption by her of a son to her husband. The effect of the adoption will divest the estate of the surrenderee. In an earlier decision of that court, it had been held that a partial surrender being invalid, the right of the surrenderee would be defeated.[65]

62 [1954] SCR 339, AIR 1959 SC 61.

63 *Bahubali v Gundappa* (1954) Bom 1026, 56 Bom LR 501 (FB); *Vishnu Pandu v Mahadu* (1950) Bom 874, AIR 1951 Bom 170; *Tukaram v Gangi* AIR 1957 Nag 28; Contra *Venkateswarlu v Challiya* 1953 1 MLJ 167, AIR 1953 Mad 551.

64 *Rama Nana v Dhondi* (1923) 47 Bom 678, 76 IC 607, AIR 1923 Bom 432; *Yeshwanta v Antu* 1934) 58 Bom 521, 154 IC 252, AIR 1934 Bom 351; *Krishna v Baban* (1944) Bom 287, AIR 1945 Bom 24, (1944) 46 Bom LR 634; *Shantaram v Keru Krishna* (1948) Bom 369, AIR 1948 Bom 381, (1948) 50 Bom LR 283.

65 As to rights of the adopted son, see § 509. Also see § 509A. *Pilu v Babaji* (1910) 34 Bom 165, 4 IC 584.

Limitation

A surrender operates *eo instanti* to clothe the reversioner with the right to impugn the widow's act of alienation as laid down by the Supreme Court in *Natvarlal v Dadubhai*.[66] In a later case, it has been held by the High Court of Andhra Pradesh,[67] disagreeing with a decision of the Allahabad High Court,[68] that since the surrenderee is entitled to recover immediate possession, his suit to recover any property belonging to the estate from an alienee is governed by art 144 and not art 141 of the Limitation Act.[69]

Illustrations

(a) A Hindu dies leaving a widow and a daughter's son. The widow surrenders her estate in four out of the five properties inherited by her from her husband to the daughter's son. The surrender is not valid, for it is a surrender only of a portion of the estate.[70]

(b) A Hindu dies leaving a widow, a daughter and a daughter's son. The widow executes a deed in favour of her daughter's son, whereby she reserves a life-interest for herself in her husband's property, and declares that after her death, the property should go to the daughter's son. This is not a valid surrender, for it is not a surrender of the widow's entire estate in the property.[71]

(c) A dies leaving a mother *M*. *M* succeeds to *A*'s properties for a woman's estate. She then transfers by way of gift a portion of the properties inherited by her to *R* who was then the nearest reversioner. The alienation is not valid, as it is not a surrender of *M*'s entire interest in the whole estate.[72]

(d) A Hindu dies in 1872 leaving a widow and a nephew. The nephew claimed the property as sole survivor of the joint family and applied for a certificate to collect debts due to the estate of *A*. The widow opposed the application and alleged a partition. The court found that the alleged partition had not taken place and granted the certificate to the nephew. This decision, being given only on a question of representation, did not preclude the widow from raising the question of title again in a suit properly

66 [1954] SCR 339, 56 Bom LR 447, AIR 1954 SC 61.

67 *Venkateswara Rao v Venkatasiva Rao* AIR 1957 AP 945; *Veeraju v Venkayya* AIR 1960 AP 222. Reference may also be made to *Biliga Laxminarayana v Fernandes* AIR 1957 Mad 90.

68 *Raghuraj Singh v Babu Singh* AIR 1957 All 875.

69 Now see art 65 of the new Limitation Act 1963.

70 *Pilu v Babaji* (1910) 34 Bom 165, 4 IC 584.

71 *Behari Lal v Madho Lal* (1891) 19 Cal 236, 19 IA30.

72 *Rangasami v Nachiappa* (1919) 46 IA 72, 42 Mad 523, 50 IC 498, AIR 1918 PC 196.

instituted for that purpose; however, the widow accepted the decision and by an agreement made in 1874, she recognised the nephew's title, and was granted by him a maintenance allowance, which she continued to receive until her death in 1904. The nephew died in 1894, and the estate passed under his will to *B*. In 1907, *D* claiming as the reversionary heir sued *B* to recover the estate. It was held by the Judicial Committee that the widow's agreement of 1874, in conjunction with her acceptance of maintenance till 1904, amounted to a complete relinquishment of the estate to the nephew, then the next reversioner and that *D*'s claim accordingly failed. Their Lordships of the Privy Council said that there was in this case a complete self-effacement by the widow which precluded her from asserting any further claim to the estate.[73]

(e) A Hindu dies leaving a widow and four daughters. By his will, he bequeaths his immovable property to the daughters. On his death, the daughters take possession of the property under the will. The next reversioner sues the widow and daughters to set aside the will. The parties enter into a compromise, by which the daughters give up their rights under the will, the widow surrenders all rights of succession to the immovable property, and the plaintiff who by the surrender becomes entitled as next reversioner transfers half of the property to the daughters and the plaintiff and the daughters each give a small portion of the land to the widow for her life. The compromise is a bona fide surrender of the whole estate, and not a device to divide it with the next reversioner. In the course of the judgment, the Judicial Committee said:

> Is it then a device to divide the property between the lady and the reversioner? It is here that the fact of the arrangement being a compromise becomes of importance. Once the bona fide is admitted, we have the situation of a context under which, if decision were one way, the estate was carried to the daughters away from the family, and a litigation in the course of which the estate would probably be much diminished. The situation made it a perfectly good consideration for the woman in order to avoid these results to consent to give up her own rights by surrender... The conveyance of small portions of land to the widowed mother was unobjectionable as it was only for maintenance'.[74]

73 *Bhagwat Koer v Dhanukdhari Prashad Singh* (1919) 46 IA 259, 47 Cal 466, 53 IC 347, AIR 1919 PC 75.

74 *Sureshwar v Maheshrani* (1920) 47 IA 233, 238, 48 Cal 100, 57 IC 325, AIR 1921 PC 107.

(f) The widows of the late male owner who were each getting Rs 625 a month as maintenance from the Court of Wards, which was managing the property, executed a deed by which they purported to surrender all their rights in the property inherited from their husband to the next reversioner, the latter agreeing to pay to the widows Rs 2,000 per month for maintenance, the sum in case of default to be a charge upon the estate. The Privy Council, observing that there was no necessity for the surrender and that in 48 Cal 100, the giving of a small portion of the estate to the widow for her maintenance was not objectionable, held the surrender to be void in law.[75]

(g) A Hindu governed by the Benares school of Hindu law dies leaving a widow, a daughter and a paternal uncle's son. The widow surrenders her interest in the property inherited by her to her daughter. The surrender is valid, however, since a daughter, according to the Benares school, takes a limited estate, the surrender will not enlarge her estate, in other words, she will not take the property absolutely. The effect of the transaction is simply to accelerate the daughter's succession to the property and to entitle her to immediate possession. On the death of the daughter, the property will pass to the uncle's son.[76] It will not revert to the widow though she may then be alive.

(h) A Hindu governed by the Bombay school dies leaving a widow, a daughter and a nephew. In March 1911, the widow executes a deed of gift of the whole estate inherited by her husband in favour of her daughter. [A daughter in Bombay takes an absolute estate in the property inherited by her from her father, therefore, sub-§ (2) does not apply]. In December 1912, the daughter transfers the whole estate back to the widow absolutely. The daughter dies in 1915 leaving a daughter. In April 1916, the widow makes a gift of the entire estate to her granddaughter. On the death of the widow the nephew claims the estate as the reversionary heir. The gift to the granddaughter is valid and the nephew is not entitled to the property. The Court said: 'It cannot be suggested in the present case that in 1911, when the widow was in bad health, and her widowed daughter was staying with her, it was intended to be merely a device to divide the estate with the reversioner'.[77]

(i) A Hindu widow surrenders the whole of her estate to the next reversioner. At the same time, the next reversioner transfers it back to the widow, and declares that she is the absolute owner

75 *Man Singh v Nowlakhbati* (1926) 53 IA 11, 5 Pat 290, 94 IC 830, AIR 1926 PC 2.
76 *Bhupal Ram v Lachma Kuar* (1888) 11 All 253.
77 *Naru v Tai* (1922) 47 Bom 431, 437, 76 IC 265, AIR 1923 Bom 191.

thereof, and the widow in her turn transfers part of the estate to the next reversioner. In is found that there was no dispute of any kind between the parties, and the sole object was to convert the widow's estate into an absolute estate in consideration of a transfer of part of the estate to the next reversioner. The transactions are not binding on the son of the next reversioner, and he is entitled to avoid alienation of the estate purported to have been made by her as the absolute owner thereof.[78]

§ 198. WIDOW'S POWER OF MANAGEMENT AND INVESTMENT

A widow or other limited heir is entitled to manage the estate inherited by her. Her power to manage the estate is similar to that of a manager of an infant's estate as defined by the Privy Council in *Hunooman Persaud v Mussumat Babooee*.[79] 'A widow like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers, provided...she acts fairly to the expectant heir'.[80] The Court will not interfere with her management, unless there is danger to the estate from the manner in which she is dealing with it.[81]

If the husband has left debts, the widow is not bound to apply the income of the estate in discharge of the principal, but is bound to pay out of the surplus of her net income, only the interest.[82] She is entitled to sell or mortgage the estate for the payment of the debts. The net income is of or from her own exclusive property as widow, and she is not bound either to save or apply it for the benefit of the reversioners. At the same time she is not entitled to ignore the charges which are legally payable out of the gross income such as the *peishcush* and maintenance due to other members of the family and thereby add to the debts left by the husband so as to prejudice the reversioners.[83]

The widow is entitled to invest monies forming part of her husband's estate in such securities as she thinks proper so as to realize the highest interest. She is not bound to invest in government securities. She may lend the monies on a mortgage. The court must take care not to interfere with or restrict her in the full enjoyment of her rights as conferred upon her by law in order to prevent a *possible* danger.[84]

78 *Thakur Prasad v Musammat Dipa Kuer* (1931) 10 Pat 352, 134 IC 129, AIR 1931 Pat 442.
79 (1856) 6 MIA 393; *Kameswar Pershad v Ram Bahadur* (1880) 6 Cal 843, 8 IA 8.
80 *Venkaji v Vishnu* (1894) 18 Bom 534, 536.
81 See § 204. *Hunydoss v Sreenutty Uppoomah* (1856) 6 MIA 433.
82 *Jagannadha v Vighneswaradu* (1932) 55 Mad 261, 134 IC 881, (32) AM 177.
83 *Ramasami Chetti v Mangaikarsu* (1895) 18 Mad 113, 119–20; *Debi Dayal Sahoo v Bhan Pertap Singh* (1904) 31 Cal 433, 443.
84 *Biswanath v Khantomani* (1870) 6 Beng LR 747–51; *Kunjammal v Malsayappa Iyer* (1956) 2 Mad LJ 67.

If the property consists of a quarry, she may work the quarry, and apply the proceeds for her own purposes, provided she does not exhaust the land.[85]

§ 199. DECREE AGAINST WIDOW WHEN BINDING ON REVERSIONERS

A widow or other limited heir represents the whole estate in legal proceedings relating thereto. Therefore, a decree passed against her and a sale of the estate in execution of such decree and is binding not only on her, however, on the reversioners, even though they were not parties to the suit, provided:

(1) the suit was in respect of a debt or other transaction binding on the estate;[86] and

(2) the decree was passed against her as representing the estate, and not in her personal capacity,[87] 'unless', as laid down by their Lordships of the Privy Council in the *Shivagunga* case,[88] 'it could be shown that there had not been a fair trial of the right in that suit'. This does not mean that the suit should have been contested to the end as was erroneously held in the under-mentioned cases.[89]

The widow is entitled to compromise the suit, and a decree passed against her, though on a compromise or on an award, binds the reversioners as much as a decree in a suit contested to the end, provided

85 *Subba Reddi v Chengalamma* (1899) 22 Mad 126.

86 *Jugul Kishore v Jotendro Mohun* (1884) 10 Cal 985, 11 IA 66; *Jhari v Bijai* (1923) 45 All 613, 74 IC 865, AIR 1924 All 109. See also *Devji v Sambhu* (1900) 24 Bom 135; *Veerbadra v Marudaga* (1911) 34 Mad 188, 8 IC 1072.

87 *Katama Natchiar v Raja of Shivagunga* (1863) 9 MIA 539, 543, 608 (decree on ground personal to the widow); *Nugender v Kaminee* (1867) 11 MIA 241; *Baijun v Brij Bhookun* (1876) 1 Cal 133, 2 IA 275; *Partap Narain v Trilokinath* (1884) 11 IA 197, 207, 11 Cal 186; *Hari Nath v Mothurmohun* (1894) 21 Cal 8, 20 IA 183 (decreee against daughter res judicata); *Risal Singh v Balwant Singh* (1918) 45 IA 168, 40 All 593, 48 IC 553, AIR 1918 PC 87 (res judicata); *Ghelabhai v Bai Javer* (1913) 37 Bom 172, 17 IC 866; *Tirupatiraju v Venkayya* (1922) 45 Mad 504, 67 IC 479, AIR 1922 Mad 131 (FB) (not sued in representative character); *Sulbi v Ramkrishnabhatta* (1918) 42 Bom 69, 43 IC 233, AIR 1917 Bom 11; *Bai Kanku v Bai Jadav* (1919) 43 Bom 869, 53 IC 164, AIR 1919 Bom 146 (decree against widow on ground personal to herself); *Pramatha Nath v Bhuban Mohan* (1922) 49 Cal 45, 64 IC 980, AIR 1922 Cal 321 (res judicata); *Lalit Mohan v Davamoyi* (1927) 45 CLJ 404, 105 IC 469, AIR 1927 PC 41 (personal decree against daughter); *Bishan Dayal v Lakshmi Narayan* AIR 1967 All 370.

88 *Katama Natchiar v Rajaj of Shivagunga* (1863) 9 MIA 539, 543, 608.

89 *Mohaderi v Baldeo* (1908) 30 All 75; *Sheo Narain v Khurgo* (1882) 10 Cri LR 337; *Rajlakshmi v Katyayani* (1911) 38 Cal 639, 672, 674, 12 IC 464; *Jeram v Veerbai* (1903) 5 Bom LR 885, 887; *Ram Sarup v Ram Dei* (1907) 29 All 239, 241.

the compromise was entered into by her bona fide for the benefit of the estate and not for her personal advantage. This rests on the fundamental principle that a compromise entered into by a Hindu widow bona fide for the benefit of the estate, and not for her own personal advantage, binds the reversioners as much as a decree against her after litigation.[90] It is necessary that such compromise should be reasonable and prudent.[91]

The suit being against the widow in a representative character, ie, as representing her husband's estate, a decree passed against her operates as res judicata against the whole body of reversioners under the Code of Civil Procedure, s 11, Expl 6A. A decree against the widow in respect of a transaction entered into by her husband binds her as well as the reversioners.[92] A decree against the widow in respect of debts contracted for the purpose of carrying on a money-lending business inherited from her husband would not be a mere personal decree but, would bind the reversionary estate.[93] However, a decree passed against a widow personally, though it be in respect of debt incurred for legal necessity, does not bind the estate; a sale, therefore, in execution of such a decree can pass no more that the life-interest of the widow.[94]

In *Ramsumran Prasad*'s case,[95] their Lordships of the Privy Council discussed the principle underlying the widow's authority to compromise. It follows from what has been stated above that a decree on an award,[96] and even a consent decree,[97] would bind the reversioners if the

90 *Ramsumran Prasad v Shyam Kumari* (1922) 49 IA 342, 1 Pat 741, 69 IC 71, AIR 1922 PC 356, approving *Mohendra Nath v Shamsunnessa* (1915) 19 CWN 1280, 1285, 27 IC 954, AIR 1915 Cal 629; *Subbammal v Avudaiyammal* (1907) 30 Mad 3 (admission of debt by widow-decree on admisision); *Bhogaraju v Addepalli* (1912) 35 Mad 560, 564–65, 12 IC 123; *Gur Nanak v Jai Narain* (1912) 34 All 385, 14 IC 814 (appeal filed by widow withdrawn); *Mata Prasad v Nageshar Sahai* (1925) 52 IA 398, 47 All 883, 91 IC 370, AIR 1925 PC 22 (compromise of suit between widow and next reversioner).

91 See § 193. *Kaliammal v Sundarammal* (1949) Mad 171.

92 *Madivallappa Irappa v Subbappa Shanjkarappa* (1937) Bom 906, 39 Bom LR 895, 172 IC 184, AIR 1937 Bom 458.

93 *Barda Prasad Saha v Krishana Chandra Shaha* (1934) 38 CWN 33, 151 IC 268, AIR 1934 Cal 414.

94 *Kallu v Faiyaz* (1908) 30 All 394; *Jugul Kishore v Jotindro* (1884) 11 IA 66, 73, 10 Cal 985; *Lalit Mohun v Dayamoyi* (1927) 29 Bom LR 759, 105 IC 469, AIR 1927 PC 41 (personal decree against daughter); *Vasant Rao v Beharilal* (1938) Nag 382, AIR 1938 Nag 225; *Sheik Ghasit Mian v Thakur Panchanan Singh* (1936) 15 Pat 798, 166 IC 594, AIR 1937 Pat 58; *Anandrao v Anuaprnabai* (1937) Nag 1, AIR 1937 Nag 299; *Mallikarjungowada-Rudragowda v Venkawa Ramachandrappa* (1940) Bom 628, 191 IC 286, 42 Bom LR 600.

95 *Ramsumran Prasad v Shyam Kumari* (1922) 49 IA 342, 346, 1 Pat 741, 746, 69 IC 71, AIR 1922 PC 356; *Moihendra Nath v Shamsunnessa* (1915) 21 CLJ 157, 163, 27 IC 954.

96 *Shib Deo v Ram Prasad* (1924) 46 All 637, 644–46, 87 IC 938, AIR 1925 All 79. See *Rama v Daji* (1919) 43 Bom 249, 48 IC 125, AIR 1918 Bom 85.

97 *Subbammal v Avudaiyammal* (1907) 30 Mad 3.

compromise were for the benefit of the estate. An ex parte decree also may bind the reversioners.[98] The principle has been applied in a suit by a widow where the question was whether certain adoption was valid or not and the widow represented the estate.[99]

A consent decree in a suit against a widow by her husband's brothers to recover property in her hands on the allegation that it is joint family property, in which she accepts that position and is satisfied with maintenance only, does not bind the reversioners. The reason is that the rule in this section applies only to a widow who represents her husband's estate. The moment she admits that the property is joint, she ceases to represent the estate.[1] A widow sued to recover properties belonging to her husband and obtained a decree. In appeal, the matter was settled and a consent decree was passed by which a portion of the properties was adjudged to the opposite party, who executed the consent decree and obtained possession. The reversioners then obtained a declaration that the consent decree did not bind them. The widow then field another suit to recover the properties allotted to the opposite party by the consent decree, which failed. It was held by the Privy Council that the last decree did not affect the reversioners.[2]

A decree against a widow for mesne profits on accounts of trespass committed by her in her personal capacity can only be executed against her personally and not against her husband's estate.[3] However, where cess was due in respect of the husband's estate and the estate in the hands of the widow was sold under the Public Demands recovery Act, it was held that only the widow's interest passed to the purchaser.[4] Where the widows sued to set aside a sale of the husband's property for arrears of revenue, obtained a decree in the trial court and got possession, but the decree was set aside on appeal, and the widows became liable for mesne profits and costs, and a portion of the estate in their possession was sold in execution of the decree, it was held that the entire estate passed under the sale.[5]

Even in a case where the decree might have been executed against the whole interest in the estate including the reversion, if what was

98 *Sarju Prasad v Mangal* (1925) 47 All 490, 492, 87 IC 294, AIR 1925 All 339.

99 *Urbasi v Chandra Dharua* AIR 1957 Ori 201 and the other cases cited there.

1 *Nirman Bahadur v Fateh Bahadur* (1930) 52 All 178, 126 IC 337, AIR 1929 All 963.

2 *Sreemathi Rajlakshmi Dasee v Bhola Nath Sen* (1938) 65 IA 365, (1938) 2 Cal 653, AIR 1938 PC 254.

3 *Maharajadhiraj Kameshwar Singh Bahadur v Beni Madho Singh* (1932) 11 Pat 430, 134 IC 425, AIR 1931 Pat 422.

4 *Mt Ramjhari Kuer v Sheonarain Singh* (1934) 13 Pat 297, 155 IC 750, AIR 1934 Pat 609.

5 *Dulhin Parbati Kuer v Baijnath Prasad* (1935) 14 Pat 518.

actually sold, was described as the interest of the judgment-debtor, as a widow, only her interest passed.[6]

Burden of Proof

In *Ramsumran Prasad*'s case,[7] their Lordships kept it open whether in a case of compromise of a suit by a widow, the burden lies absolutely and without qualification upon the reversioners impeaching the compromise to show that the compromise was not for the benefit of the estate. As to debts binding on the estate, see § 195.

§ 200. DECREE IN REVERSIONER'S SUIT AGAINST WIDOW AND *RES JUDICATA*

When in a suit by the next reversioner against a widow, relative to her deceased husband's estate, an issue is finally determined, the issue is res judicata in any subsequent suit by another reversioner. It is not material that the palintiff in the second suit does not claim through the plaintiff in the first.[8]

§ 201. ADVERSE POSSESSION AGAINST WIDOW NOT ADVERSE AGAINST NEXT REVERSIONER

A person who has been in adverse possession for 12 years or upwards, of property inherited by a widow from her husband by any act or omission on her part, is not entitled on that ground to hold it adversely as against the next reversioner on the widow's death.

The next reversioner is entitled to recover possession of the property, if it is immovable, within 12 years from the date of the widow's death under art 141 of Sch I of the Indian Limitation Act 1908, and if it is movable, within six years from that date under art 120 of that Act.[9]

6 *Nagendra Bala Dasee v Panchanan Mourie* (1933) 60 Cal 1236, 149 IC 1053; AIR 1934 Cal 162.

7 (1922) 49 IA 342, 1 Pat 741, 69 IC 71, AIR 1922 PC 356.

8 See §§ 199 and 210. *Mata Prasad v Nageshar Sahai* (1925) 52 IA 398, 47 All 883, 91 IC 370, AIR 1925 PC 272 (consent decree); *Venkatanarayana v Subbammal* (1915) 42 IA 125, 38 Mad 406, 29 IC 298, AIR 1915 PC 124; *Bansidhar v Dulhatia* (1925) 47 All 505, 87 IC 235, AIR 1925 All 483.

9 *Runchordas v Parvatibai* (1899) 23 Bom 725, 26 IA 71; *Jaggo Bai v Utsava Lal Bai* (1929) 56 IA 267, 51 All 439, 117 IC 498, AIR 1929 PC 166; *Bankey Lal v Raghunath* (1929) 51 All 189, 112 IC 801, AIR 1928 All 561; *Aurabinda Nath v Manorama* (1928) 55 Cal 903, 112 IC 496, AIR 1928 Cal 670, is no longer good law; *Badrinarayan v Narayansingh* (1943) Nag 213, 206 IC 335, AIR 1943 Nag 193; *Nathulal v Rangoba* AIR 1952 Nag 133; *Govind Ballkrishna v Ramchandra* (1952) Bom 621, (1952) 54 Bom LR 263, AIR 1952 Bom 395.

The rule, as was pointed out by the Supreme Court,[10] does not rest entirely upon the particular provision of art 141. It is in accordance with the principles of Hindu law and the general principal that as the right of the reversioner is in the nature of a *spes successionis* and he does not trace that title through or from the widow, it would be manifestly unjust if he has to lose his rights by the negligence or sufference of the widow. Nor can there be any estoppel under s 41 of the Transfer of Property Act against the reversioner by the reason of the widow's conduct.[11]

However, where a decree founded upon adverse possession has been obtained against the widow in her lifetime, the next reversioner is barred and he does not get the benefit of art 141 of the Limitation Act.[12]

A Hindu belonging to the Sudra class died in 1849 leaving a widow, *A*. In 1862, *A* adopted *B* as a son to her husband and put him in possession of the properties inherited by her from her husband. At that date, there was no person who could give *B* in adoption and the adoption was invalid. *B* died in 1864. On his death, his nephew, claiming as his heir, entered into possession of the properties. The nephew dies in 1881. On his death, the nephew's mother *M* entered into possession of the properties and held them until 1884, when *A* forcibly ejected her. In 1887, *M* brought a suit against *A* for possession of the properties. In 1892, a decree was passed for possession in favour of *M*, the court holding that though *B*'s adoption was invalid, *M*'s claim for adverse possession for 12 years was established. *A* died in 1902. In 1905, the plaintiffs claiming to be the reversionary heirs of the original deceased, sued *M* for possession of the properties. The High Court dismissed the suit. On appeal to the Judicial Committee, it was held that the principle of the *Shivgunga* case (see § 199) applied and the decree of 1892 against the widow (*A*) was binding upon the reversioners, the decree having been passed after a fair trial of the suit, and the appeal was dismissed.[13]

III. Remedies Against Unauthorised Acts of Widows and Other Limited Heirs

§ 202. REVERSIONERS AND THEIR RIGHTS

A reversionary heir, although having those contingent interests which can be differentiated little, if at all, from *spes successionis* (§ 175), is recognised

10 *Kalipada Chakraborti v Palani Bala Devi* [1953] SCR 503, AIR 1953 SC 125; *Ram Kristo v Dhankisto* AIR 1969 SC 204.

11 See § 209. *Shambu Prasad v Mahadeo Prarsad* (1933) 55 All 554, 144 IC 293, AIR 1933 All 493; *Chaturbhuj v Sarbeshwar* AIR 1967 Pat 138.

12 Now see arts 65 and 113 of the new Limitation Act 1963. *Shivagunga* case (1863) 9 MIA 539; *Veithialinga v Srirangath* (1925) 52 IA 322, 48 Mad 883, 92 IC 85, AIR 1925 PC 249.

13 *Vaithialinga v Srirangath* (1925) 52 IA 322, 48 Mad 883, 92 IC 85, AIR 1925 PC 249.

by courts of law as having a right to demand that the estate be kept free from danger during its enjoyment by the widow or other limited heir. He may therefore sue to restrain a widow or other limited heir from committing waste or injuring the property (§ 204). The reason why such a suit by a reversionary heir is allowed is that the suit by her is in a representative character on behalf of all the deposited by her husband in the Post Office Savings Bank which directed her to renew the Post Office Cash Certificate of her husband or otherwise invest amounts due on them after maturity.[14]

No injunction can be granted to restrain a widow or other limited heirs from making an unauthorised alienation of the estate, which she represents. Mere alienation in not a waste. In such a case, the proper remedy is to bring a suit for a declaratory decree as stated in the next section.[15]

§ 205. DECLARATORY SUIT IN CASE OF UNAUTHORISED ALIENATIONS

(1) Where a widow or other limited heir alienates property inherited by her in contravention of the provisions of § 178, the next reversioner, though he has no interest higher than a chance of succession, may institute a suit in her lifetime for a declaration that the alienation is not binding on the reversion, and if the facts are proved, the court may pass a decree declaring that the alienation is not valid beyond the lifetime of the limited heir.[16]

The position and rights of the reversioners in such a case were summarised by the Supreme Court in *Radha Rani v Hanuman Prasad.*[17]

The Supreme Court has held that if a Hindu widow alienates property without legal necessity, the alienee could not acquire any right by adverse possession against the reversioners during the lifetime of the alienor.[18] Such a declaratory suit is not affected by the Hindu Succession Act 1956.[19]

14 See § 179. *Sheo Das Pandey v Mst Ram Kali* (1936) 11 Luck 508, 158 IC 301, AIR 1936 Ori 4.

15 See § 202. *Isri Dut v Hansbutti* (1884) 10 Cal 324, 332, 10 IA 150.

16 See §§ 175, 202. As to limitation, see § 208. *Goolab Singh v Kurun Singh* (1871) 14 MIA 176; *Jumoona v Ramasoondari* (1876) 1 Cal 289, 3 IA 72; *Isri Dut v Hunsbutti* (1884) 10 Cal 324, 10 IA 150; *Saudagar Singh v Pradip Singh* (1918) 45 IA 21, 45 Cal 510, 43 IC 484, AIR 1917 PC 196; Specific Relief Act 1877, s 42, ill (e); *S Ambalagaran v Neelamegam* AIR 1956 Mad 160 (deed of settlement with a trespasser); *Bhagwati Charan v Hirday Singh* AIR 1952 Pat 160.

17 AIR 1966 SC 216.

18 *Kalawatibai v Soiryabai* AIR 1991 SC 1581.

19 *Radha Rani v Hanuman Prasad* AIR 1966 SC 216, (s 14); *Rakhey Krishan v Shiva Shankara* AIR 1973 SC 2405.

(2) The reversioners, however, are not bound to institute a declaratory suit. They are not obliged to take any action in the lifetime of the limited heir. They may wait until the estate vests in them on her death, and then sue the alienee for possession of the property.[20]

If a widow, without the consent of the reversioners, alienates her husband's property for purposes not sanctioned by law, the reversioners are entitled to bring a declaratory suit against her.[21]

It was held by a Full Bench of the Andhra High Court,[22] that a suit by a reversioner for a declaration of the invalidity of an alienation by a person claiming to be the adopted son of the last male owner is maintainable during the lifetime of the female limited owner. The omission to bring a declaratory suit, however, does not stand in the way of the nearest reversioner recovering possession of the property on the death of the female limited owner, by a suit filed within the time prescribed by art 141 of the Limitation Act.

§ 206. WILL BY WIDOW OF PROPERTY INHERITED BY HER FROM HER HUSBAND

The execution of a will by a widow or other limited heir purporting to dispose of property in which she takes a limited interest affords, as a general rule, no sufficient reason for granting a declaratory decree.[23]

The reason is that a will made by a limited heir purporting to dispose of property inherited by her from a male does not operate as an alienation of the property. It is no more that an assertion, and a declaratory suit does not lie for the setting aside of a mere assertion.[24] For the same reason, where a widow executes a deed by which she acknowledges that *AB* is the next reversioner, which in fact he is not, the court will refuse to entertain a suit for a declaration by a person claiming to be the next reversioner, that the deed is not binding on the estate.[25] However, where a widow claims property which really forms part of her husband's estate as her absolute property, alleging that she got it under a will of her

20 As to limiation, see § 209. *Bijoy Gopal v Krishna* (1907) 34 Cal 329, 34 IA 87; *Mesraw v Girjanundan* (1908) 12 CWN 857; *Raghubir Singh v Jethu* (1923) 2 Pat 171, 70 IC 290, AIR 1923 Pat 130; *Anant Bahadur Singh v Ashtabhuja Bux Singh* (1957) ALJ 55; *Purna Chanadra v Gouri Pada* AIR 1967 Cal 512 (fraud and collusion).

21 See § 202 and notes. As to the effect of a decree in a declaratory suit, see § 210. *Isri Dut Koer v Hunsbutti Koerain* (1883) 10 Cal 324, 332–33, 10 IA 150, 156–57.

22 *Jainkamma v Mattareddi* AIR 1956 AP 141.

23 *Thakurain Jaipal v Bhaiya Indar* (1904) 31 IA 67, 26 All 238; *Umrao Kunwar v Badri* (1915) 37 All 422, 29 IC 302, AIR 1915 All 252; *Ganga v Kanhai Lal* (1919) 41 All 154, 47 IC 222, AIR 1918 All 15; *Das Mal v Ram Chand* (1923) 4 Lah 116, 76 IC 946, AIR 1923 Lah 406.

24 *Rajah Nilmoney Singh v Kally Churn* (1874) 23 WR 150.

25 *Das Mal v Ram Chand* (1923) 4 Lah 116, 76 IC 946, AIR 1923 Lah 406.

husband's brother who had treated the property as his own, a suit will lie at the instance of the next reversioner for a declaration that the property belongs to the husband's estate and that she has no more that a widow's estate in it.[26]

§ 207. WHO MAY SUE FOR INJUNCTION OR FOR DECLARATORY DECREE

It is not the law that anyone who may have a possibility of succeeding on the death of a widow or other limited heir can maintain a suit for an injunction or for a declaratory decree; for otherwise, every one in the line of succession however remote, would have a right to sue. The right to sue rests in the first instance with the next reversioner.

The reversioner next after him is not entitled to sue,[27] unless:

(i) the next reversioner refuses without sufficient cause to institute proceedings, or has concurred in the act alleged to be wrongful, or has colluded with the limited heir, or is precluded from suing by his own act or conduct,[28] or is from poverty not in a position to sue;[29] or

(ii) according to the Calcutta,[30] Madras,[31] and Patna[32] decisions, the next reversioner is herself a female and entitled to a limited interest only. The same view has been taken by the Allabahad High Court in some cases;[33] in other cases, it has been held that

26 *Surayya v Subbamma* (1920) 43 Mad 4, 53 IC 498, AIR 1920 Mad 361.

27 *Rani Anand Kunwar v The Court of Wards* (1881) 6 Cal 746, 8 IA 14; *Meghu Rai v Ram Khelawan* (1913) 35 All 326, 9 IC 814 *Gumanan v Jahangira* (1918) 40 All 518, 46 IC 186, AIR 1918 All 393; *Abinash v Harinath* (1905) 32 Cal 62 (not good law on the point of limitation, see § 208); *Mst Viranwali v Kundan Lal* (1928) 9 Lah 106, 112 IC 35, AIR 1928 Lah 267; *Shankar v Ragboba* (1939) Nag 383; *Matru Mal v Mehri Kunwar* (1940) All 416, 189 IC 600, AIR 1940 All 311, (1940) ALJ 403, 13 IR 106; *Lalta Prasad v Dwarka Prasad* (1941) All 598, 195 IC 492, AIR 1941 All 313, (1941) ALJ 392; *Raja Seetla Baksh Singh v Babu Surendra Bikram Singh* (1943) 18 Luck 521, 205 IC 585, AIR 1943 Ori 68.

28 *Kooer Goolab Singh v Rao Kurun Singh* (1871) 14 MIA 176; *Rao Kurun Singh v Nawab Mahomed* (1871) 14 MIA 187, 193; *Bakhtawar v Bhagwana* (1910) 32 All 176, 5 IC 270 (gift with consent of next reversioner); *Raja Dei v Umed Singh* (1912) 34 All 207, 13 IC 632; *Ghisiawan v Mst Raj Kumari* (1921) 43 All 534, 63 IC 556, AIR 1921 All 33 (sale with consent of next reversioner); *Bhikaji v Jogannath* (1873) 10 Bom HC 351 (waiver).

29 *Mata Prasad v Nageshar Sahai* (1925) 52 IA 398, 47 All 883, 91 IC 370, AIR 1925 PC 272.

30 *Abinsh v Harinath* (1905) 32 Cal 62.

31 *Chidambara v Nallammal* (1910) 33 Mad 410, 5 IC 164.

32 *Ramyad v Rambhilhara* (1919) 4 PLJR 734, 54 IC 357, AIR 1920 Pat 514; *Nathuni Missir v Ratna Kuer* AIR 1963 Pat 337.

33 *Balgobind v Ramkumar* (1884) 6 All 431; *Lakhpati v Rambodh* (1915) 37 All 350, 352, 29 IC 218, AIR 1915 All 255.

the mere fact that the next reversioner is a female does not give any right of suit to the more distant reversioner, unless it be shown that she was acting in collusion with the widow or other limited heir whose act is impeached.[34]

Parties to Suit

Where the plaintiff brought the suit claiming to be the next reversioner, and the whole case was tried by the lower courts, which declared that the alienation by the widow was not valid beyond her lifetime, and in second Appeal, the High Court found that on account of Act 2 of 1929, the plaintiff was not the nearest reversioner, a sister's son having come into existence after the institution of the suit, it was held that the suit ought not to be dismissed however, the case should be sent back for disposal, after making the sister's son a party and getting a proper guardian appointed for him.[35] Reference may be made to the undermentioned cases.[36] Reference may also be made to the undermentioned decision of the Supreme Court.[37]

Where a suit is brought by the next reversioner, there is nothing to preclude a remote reversioner from joining or asking to be jointed in the suit, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow,[38] as for instance, an attempt to compromise the suit with the widow in appeal after the lower court had passed a decree granting the declaration prayed for in the suit.[39]

34 *Ishwar v Janki* (1893) 15 All 132; *Madri v Malki* (1884) 6 All 429; *Gumanan v Jahangira* (1918) 40 All 518, 46 IC 186, AIR 1918 All 393. See also *Tekchand v Soman Singh* (1916) Punj Rec No 27, 34 IC 831, AIR 1916 Lah 265. Reference may, however, be made to *Deoki v Jwala Prasad* (1928) 50 All 678, 113 IC 737, AIR 1928 All 216.

35 *Lakshmi v Anantharama* (1937) Mad 948, 171 IC 7, AIR 1937 Mad 699. Reference may also be made to *Kani Bewa v Krushna* AIR 1953 Ori 39; *Sheoduta v Akali Bhumijani* AIR 1953 Pat 374; *Bhagatam v Bhakluram* AIR 1963 MP 56.

36 *Rani Anand Kunwar v The Court of Wards* (1881) 6 Cal 764, 772–73, 8 IA 14; *Meghu Raj v Ram Khelawan* (1913) 35 All 326, 19 IC 814; *Jhandu v Tarif* (1915) 37 All 45, 27 IC 892, AIR 1914 PC 34; *Sita Saran v Jagat* (1927) 49 All 815, 102 IC 296, AIR 1927 All 811; *Mst Viranwali v Kundan Lal* (1928) 9 Lah 106, 112 IC 35, AIR 1928 Lah 267; *Samanatha v Luxman* AIR 1962 Ori 38. Reference may be made to *Sudehaiya v Ram Dass* AIR 1957 All 270. Also see *Suraj Mal v Nathwa* (1923) 45 All 255, 76 IC 983, AIR 1923 All 161. As to minor who is the next reversioner see *Kali Charan v Bageshra* (1925) 47 All 929, 89 IC 374, AIR 1925 All 585.

37 *Radha Rani v Hanuman Prasad* AIR 1966 SC 216. *Kalawatibai v Sairyabai* AIR 1991 SC 1581.

38 *Venkatanarayana v Subbommal* (1915) 42 IA 125, 38 Mad 406, 29 IC 298, AIR 1915 PC 124.

39 *Gokulananda Harichandan v Iswar Chhotrai* (1936) 15 Pat 379, 166 IC 342, AIR 1937 Pat 11.

§ 208. DECLARATORY SUITS AND LIMITATION

(1) A suit by a reversioner for a declaration that an alienation made by a widow or other limited heir is void except for her life, must be brought within 12 years from the date of the alienation (Indian Limitation Act 1908, Sch I, art 125).[40]

A distinction must be made in respect of other suits by a reversioner. It has been held by the Patna High Court that a suit by a Hindu for a declaration that the alienations made by a Hindu female, who has a life estate by virtue of a transfer or grant inter vivos or by virtue of a bequest are void and are not binding on him as the next reversioner of the last male owner is governed by art 120 and not by art 125.[41]

(2) Such a suit is a representative suit on behalf of all the reversioners, then existing or thereafter to be born, and all of them have however, a single cause of action, which arises on the date of alienation. Hence, if no suit is brought by the existing reversioners within 12 years, and their right to sue is barred by limitation, reversioners thereafter born are equally barred.[42]

The ground of the decision was that the right of the next reversioner to bring a declaratory suit is based on the danger to the inheritance common to all the reversioners, presumptive and contingent alike, and there is therefore one cause of action common to them all.[43]

The High Court of Calcutta has held that what bars the next reversioner does not bar the contingent reversioner.[44]

§ 209. REVERSIONER'S SUIT FOR POSSESSION AND LIMITATION

A suit by reversioners, entitled to succeed to the estate on the death of a widow or other limited heir, for possession of immovable property from an alienee from her must be brought within 12 years from her

40 *Yagnanarayana v Lakshminaryana* (1951) 1 MLJ 502, AIR 1952 Mad 495 and cases there cited. Also see *Venkaymma v Verrayya* AIR 1957 AP 280.

41 *Kanhya Lal Missir v Mst Hira Bibi* (1936) 15 Pat 151, 163 IC 940, AIR 1936 Pat 323 differing from *M Nandan v Wazira* (1927) 8 Lah 215; *Mt Vidyawati v Mt Rahmat Bi* AIR 1937 Lah 760.

42 *Varamma v Gopaladasayya* (1918) 41 Mad 659, 46 IC 202, AIR 1919 Mad 911, FB; approved and *ratio decidendi* followed in *Kesho Prasad v Sheo Pargash* (1922) 44 All 19, 29, 64 IC 248, AIR 1922 All 301, FB; *Chhaganram v Bai Motigavri* (1890) 14 Bom 1900; *Jamnabai v Dharsey* (1902) 4 Bom LR 893 (adoption); *Chiragh Din v Abdullah* (1925) 6 Lah 405, 90 IC 1022, AIR 1925 Lah 654.

43 See § 202. *Mata Prasad v Nageshar Sahai* (1925) 32 IA 398, 410–11, 47 All 883, 893–94, 91 IC 370, AIR 1925 PC 272.

44 *Abinash v Harinath* (1905) 32 Cal 62; *Das Ram v Tirtha Nath* (1924) 51 Cal 101, 108–109, 81 IC 522, AIR 1924 Cal 481.

death (the Indian Limitation Act 1908, Sch I, art 141), and of movable property, within six years from that date.[45]

Now see arts 65, 109 and 113 of the new Limitation Act 1963.

The reversioner may sue for possession without suing to have the alienation set aside. The reason is that he is entitled to treat the unauthorised alienation as a nullity without the intervention of any court.[46]

Article 141, Sch I of the Indian Limitation Act, referred to in this section, provides a period of 12 years for a suit for possession of immovable property by a Hindu, entitled to possession of such property on the death of a Hindu female. In an award arising out of a dispute between a widow and her husband's brothers, certain properties were given to her for maintenance, and it was provided that she should forfeit her right to the properties, if she became unchaste. The widow became unchaste in 1910 or 1912 and died in 1929. It was held that a suit brought in 1932, ie, within 12 years after her death was in time under art 141 on the ground that the reversioners are entitled to waive the benefit of forfeiture.[47] For an application of art 141, see § 210. As to commencement of the period of limitation when there is surrender of the estate after alienation, see the undermentioned case.[48]

§ 210. DECREE IN SUIT BETWEEN NEXT REVERSIONER AND ALIENEE AND *RES JUDICATA*

A suit by the next reversioner against the widow or other limited heir and an alienee from her for a declaration that the alienation is not binding on the reversioner is a representative suit on behalf of all the reversioner, and a decree fairly and properly passed in such a suit, whether it is for or against the next reversioner, operates as res jucicata between not only the next reversioner, but, the whole body of reversioners on the one hand, and the alienee and his representatives on the other.[49]

45 See § 205(2). *Bijoy Gopal v Krishna* (1907) 34 Cal 329, 34 IA 87; *Runchordas v Parvatibai* (1899) 23 Bom 725, 26 IA 71; *Ram Dei v Abu Jafar* (1905) 27 All 494; *Rakhmabai v Keshav* (1907) 31 Bom 1; *Mummareddi v Pitti Durairaja* [1951] SCR 655; *Govind Balkrishna v Ramchandra* (1952) Bom 621, (1952) 54 Bom LR 263, AIR 1952 Bom 395; *Sitaram Singh v Bhikni Devi* AIR 1960 Pat 452 (defendant claimed to be adopted son); *Manvendra Singh v Rameshwar Dayal* AIR 1991 All 291 (reversioner in possession with donor since donee's rights cease on death of donor, reversioner's rights not barred by time).

46 *Bijoy Gopal v Krishna* (1907) 34 Cal 329, 34 IA 87; *Obala Kondama v Kandasami* (1923) 51 IA 145, 152, 47 Mad 181, 189, 79 IC 961, AIR 1924 PC 56.

47 *Rashik Lal v Radha Dulaiya* (1937) All 424, 169 IC 586, AIR 1937 All 268.

48 *Veeraju v Venkayya* AIR 1960 AP 222.

49 *Kesho Prasad v Sheo Pragash* (1924) 51 IA 381, 46 All 831, 82 IC 962, AIR 1924 PC 247, (decree for next reversioner) affirming (1922) 44 All 19, 64 IC 248, AIR 1922

continued on the next page

This principle applies also when a creditor obtains a decree against a widow and attaches properties inherited by her from her husband; in such a case, if the reversioner brings a suit for the release of the property on the ground that debts were not incurred for legal necessity and therefore not binding on the reversion, a fresh suit by him for a declaration that the sale of the property in execution is not binding on him is res judicata.[50]

Illustrations

(a) A Hindu dies leaving a widow, a brother, and a paternal uncle. The widow sells property inherited by her from her husband to *A*, and delivers possession of the property to him. The brother, as next reversioner, sues the widow and *A* for a declaration that the sale is not valid beyond the widow's lifetime, and a decree is passed in favour of the brother. After the decree, the widow dies, and then the brother. The uncle demands possession of the property from *A*, however, *A* fails to deliver possession. The uncle sues *A* for possession. *A* is precluded from contending that the sale was valid, and the uncle is entitled to possession.

(b) If in the case put in ill (a), the brother's suit is dismissed and the alienation is upheld, the uncle will be precluded from bringing a fresh suit against *A* for a declaration that the alienation is not binding on him. The decree of dismissal operates as res judicata against the uncle, who is the ultimate reversioner, though he was not a party nominee to the brother's suit, and the alienee is entitled to the benefit of the decree. It may seem hard at first sight that a decree against the next reversioner, whose interest is merely presumptive and may never mature as when he dies before the widow, should operate as res judicata against the ultimate reversioner at the widow's death, for the decree might have been obtained by fraud or collusion. However, the hardship is not real, for the decree in such a case may be set aside at the suit of the ultimate reversioner.[51]

A decree against the next reversioner in respect of alienation by the widow of property *X* to *A* does not bar a suit by the reversioner in respect of an alienation of property *Y* to *B*.[52]

All, FB; *Pramatha v Bhuban* (1922) 49 Cal 45, 64 IC 980, AIR 1922 Cal 321 (decree against next reversioner); *Khair Muhammad v Umar* (1924) 5 Lah 421, 84 IC 477, AIR 1925 Lah 89 (decree against next reversioner).

50 *Mst Seethabai v Hari* (1938) Nag 498, AIR 1938 Nag 401.

51 *Kesho Prasad v Sheo Pragash* (1924) 51 IA 381, 46 All 831, 82 IC 962, AIR 1924 PC 247.

52 *Thakar Singh v Mst. Uttam* (1929) 10 Lah 613, 118 IC 449, AIR 1929 Lah 295.

For the reason of the rule contained in this section, see § 202. The same principle applies to a suit by the next reversioner for a declaration that an adoption is invalid. If a decree is passed against him, it is binding on the ultimate reversioner.[53] The matter is governed by the Code of Civil Procedure 1908, s 11, Expl 6, which relates to *res judicata* in a representative suit. As to decree against limited heirs, see § 199.

§ 211. ADVERSE POSSESSION BY WIDOW

(1) Property acquired by a Hindu widow or other limited heir by adverse possession (Indian Limitation Act 1908, Sch I, art 144), of which she took and retained possession absolutely in her own right, for 12 years or upwards is her *stridhana*, and she may dispose of it by deed or will; on her death intestate, it descends to her *stridhana* heirs.[54] However, if the property acquired by adverse possession was claimed and held by her not in her own right, but as a widow representing her husband's estate, it is not her *stridhana*. It is an accretion to her husband's estate, and in it she takes no more than a widow's estate, and it descends on her death to her husband's heirs.[55]

The position would be the same, even if she was under a mistaken belief that her husband was dead.[56] The possession of a person who is not the widow of the last male owner, but, is the widow of another member of the family is prima facie adverse, however, if she claims the estate only by inheritance, she must be deemed to be claiming only a limited estate.[57] Thus where a Hindu widow in the enjoyment of her husband's estate as heir remarried and had thereby forfeited her title to the estate, but, continued in possession without asserting any change in the character of her possession, she acquires title by prescription only to

53 *Chiruvolu v Chiruvolu* (1906) 29 Mad 390, FB; *Gokulanand Harichandan v Iswar Chhotrai* (1936) 15 Pat 379, 166 IC 342, AIR 1937 Pat 11.

54 *Lachhan Kunwar v Monorath Ram* (1895) 22 Cal 445, PC; *Varada Pillai v Jeevarathnammal* (1920) 43 Mad 244, 46 IA 285, 53 IC 901, AIR 1919 PC 44; *Bansidhar v Dulhatia* (1925) 47 All 505, 87 IC 235, AIR 1925 All 483; *Rikhdeo v Sukhdeo* (1927) 49 All 713, 102 IC 175, AIR 1928 All 45; *Suraj Balli v Tilakdhari* (1928) 7 Pat 163, 107 IC 151, AIR 1928 Pat 220; *Mst Muluka v Pateshar* (1926) 1 Luck 273, 295–96, 96 IC 672, AIR 1926 Ori 371; *Hira Mal v Ronqui Ram* (1955) ILR Punj 1120; *Satyanarayana v Veerraju* AIR 1959 AP 79, FB; *Sampat v Surajmat* AIR 1959 Bom 504; *Tilakdhari Rai v Parina Rai* AIR 1963 Pat 356.

55 *Lajwanti v Safa Chand* (1924) 51 IA 171, 5 Lah 192, 80 IC 788, AIR 1924 PC 121; *Patipal Singh v Rampal Singh* (1940) 15 Luck 112, 185 IC 157, AIR 1940 Ori 63; *Hiralal v Rongiram* AIR 1951 Simla 11; *Chattar Singh v Roshan Singh* (1946) Nag 159; *Gaya Deen v Amrauti* (1956) ILR 1 All 195; *Jagarnath v Deputy Director, Consolidation* AIR 1977 All 176.

56 *Bibhabati v Ramendra* (1947) 1 Cal 32, PC.

57 *Chandrabali Pathak v Bhagwanprasad Pande* (1944) All 533.

a widow's estate and not to an absolute estate.[58] Now see art 65 of the new Limitation Act 1963.

It has accordingly been held that where a Hindu dies leaving a son and a widow, and the widow who is entitled to maintenance only out of her husband's estate, takes and retains possession of property belonging to her husband's estate adversely to the son, the property is her *stridhana*, unless it is clearly shown that when she took possession, she professed to do it as claiming only the limited estate of the widow. 'The son having the title, she could not take possession excluding him, unless she intended to take an adverse possession, a possession to which she was not in any way entitled'.[59] Similarly, where a widow takes possession of the estate of her husband's uncle to which her husband's grandsons are entitled,[60] or takes possession of the estate of her husband's brother to which the brother's heirs are entitled,[61] and holds it adversely against the rightful heirs, the property is her *stridhana*. In a Privy Council case, where a Hindu widow executed a deed of gift of property which she held absolutely under a will from her husband, in favour of her daughter, which was not valid as the deed was not registered, however, the daughter remained in adverse possession of the property for upwards of 12 years, it was held that the property was her *stridhana* and that it did not pass on her death to her father's heirs.[62] It has been held in a number of cases that where a Hindu female, who has no right to a property, obtains and holds possession of it for the requisite period, the presumption is that she intended to prescribe for an absolute title, unless it is shown that she wanted to hold it as a limited owner.[63]

(2) The possession of a portion of the joint family estate by the widow of a member of a joint Hindu family governed by Mitakshara law, as of right, for 12 years or upwards, as for instance, where mutation has been effected in her name and she remains in continuous possession, bars the claims of the other members of the family.[64]

The reason is that on the death of an undivided member of a joint family, the joint family property passes to the other members of the

58 *Parbati v Ram Prasad* (1932) 7 Luck 320, 141 IC 831, AIR 1933 Ori 92; *Bharmanna v Shiragondappa* AIR 1959 Mys 81.

59 *Lachhan Kunwar v Manorath Ram* (1895) 22 Cal 445, 449, (1925) 47 All 505, 87 IC 235, AIR 1925 All 483.

60 *Rikhdeo v Sukhdeo* (1927) 49 All 713, 102 IC 175, AIR 1928 All 45.

61 *Suraj Balli v Tilakdhari* (1928) 7 Pat 163, 107 IC 151, AIR 1928 Pat 220.

62 *Varotha Pillai v Jeevarathammal* (1920) 46 IA 285, 43 Mad 244, 53 IC 901; *Mst Maluka v Pateshar* (1926) 1 Luck 273, 96 IC 672, AIR 1926 Ori 371.

63 *Udai Pratap v Narotam* (1946) 21 Luck 143; *Thailambal Ammal v Kesavan Nair* AIR 1957 Ker 86.

64 *Pandit Adya Shankar Tivari v Mst Chandrawat* (1935) 10 Luck 35, 150 IC 519, AIR 1934 Ori 265; *Bhagwan Das v Krishen Lal* AIR 1956 J&K 36.

family by survivorship, and the widow is not entitled to anything more than maintenance out of the joint family property; her possession, therefore, would be adverse to the other members, unless it was in lieu of maintenance under an arrangement with them.[65] However, a widow having obtained possession of property under an arrangement with her husband's brothers granting her a widow's estate, cannot by any act or declaration of her own acquire title by prescription.[66]

65 See § 133. *Sham Koer v Dah Koer* (1902) 29 IA 132, 29 Cal 664; *Satgur Prashad v Kishore Lal* (1919) 46 IA 197, 42 All 152, 55 IC 486, AIR 1919 PC 60; *Uman Shankar v Mst Aisha* (1923) 45 All 729, 74 IC 869, AIR 1924 All 88; *Kalicharan v Piari* (1924) 46 All 769, 83 IC 754, AIR 1924 All 740. Also see *Gaya Deen v Amrauti* AIR 1955 All 630.

66 See § 176 (7). *Rashik Lal v Radha Dulaiya* (1937) All 424, 169 IC 586, AIR 1937 All 268.

XII

Joint Hindu Family Coparceners and Coparcenary Property—Mitakshara Law

Note.—The Hindu Succession Act 1956, has brought about some radical changes in the law of succession without abolishing the joint family and joint family property. It does not interfere with the special rights of those who are members of a Mitakshara coparcenary. It is, however, essential to note that s 6 of that enactment recognises the rights upon the death of coparcener of certain of his preferential heirs to claim an interest in the property that would have been allotted to him if there had in fact been a partition immediately before his death. The cardinal doctrine of Mitakshara law that property inherited by a Hindu from his father, father's father, or father's father's father is ancestral property (unobstructed heritage) as regards his own male issue, that if his son, grandson and great-grandson and that his male issues acquire an interest in it from the moment of their birth and they become coparceners with their paternal ancestor in such property immediately on their birth has been vitally affected by s 8 of that Act. Another doctrine of Mitakshara law that a coparcener in a joint family cannot make a valid gift or bequest of his interest in the coparcenary property so as to defeat the right off the other members to take by survivorship, is partly abolished to the extent that it is now competent to such a coparcener to dispose off by will (s 30) his undivided interest in the coparcenary property. See ss 6, 8 and 30 of that Act and notes thereunder for the extensive and far reaching effect of the new legislation upon the subject after that Act came into force.

This chapter has been discussed under the following heads:

I Coparceners—§§ 212–17.
II Coparcenary property—§§ 218–34.
III Management and enjoyment of coparcenary property—§§ 235–54.
IV Alienation of coparcenary property—§§ 255–57.
V Alienation of undivided coparcenary interest—§§ 258–66.
VI Setting aside alienations—§§ 267–70.

I. Coparceners

§ 212. JOINT HINDU FAMILY

(1) A joint Hindu family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters.[1] A daughter ceases to be a member of her father's family on marriage, and becomes a member of her husband's family.

Reference may be made to notes under s 6 of the Hindu Succession Act 1956, and s 16 of the Hindu Marriage Act 1955, for the position and rights in a joint Hindu family of a son or daughter born of a marriage, which is void or voidable under the latter enactment, and who is to be deemed to be a legitimate child of the parents.

(2) The 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.[2] 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.[3] 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.[4]

Possession of joint family property is not a necessary requisite for the constitution of a joint Hindu family. Hindus get a joint family status by birth, and the joint family property is only an adjunct of the joint family.[5]

(3) A joint or undivided Hindu family may consist of a single male member and widows of deceased male members. 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 (coparcener) who possesses rights which an absolute owner of a property may possess. Thus, for instance, a joint Hindu family may consist of a male Hindu, his wife and his unmarried daughter.[6] It may similarly consist of a male Hindu and the widow of his deceased brother.[7] It may consist of a male Hindu and his wife. It may even consist of two female members. However, there must be at least two members to constitute it.

1 *Commissioner of Income-tax v Luxminarayan* (1935) 59 Bom 618, 37 Bom LR 692, 159 IC 424, AIR 1935 Bom 412; *Melagiriyappa v Lalithamma* AIR 1961 Mys 152.

2 *Sri Raghunada v Brozoa Kisbor* (1876) 1 Mad 69, 89, 3 IA 154.

3 *Janakiram v Nagamony* (1926) 49 Mad 98, 103, 115, 93 IC 662, AIR 1926 Mad 273; *Laldas v Motibai* (1908) 10 Bom LR 175; *Pandit Mohan Lal v Pandit Ram Dayal* (1941) 16 Luck 708, 194 IC 61, AIR 1941 Ori 331.

4 *Chowdhry Ganesh Dutt v Jewach* (1904) 31 IA 10.

5 (1926) 49 Mad 98, 103, 115, 93 IC 662, AIR 1926 Mad 273.

6 *Gowli Buddanna v CIT, Mysore* AIR 1966 SC 1523; *Sitabai v Ramchandra* AIR 1970 SC 343; *Narendranath v WT Commissioner* AIR 1970 SC 14.

7 *Sitabai v Ramchandra* AIR 1970 SC 343; *Commissioner of Wealth-tax v Champa Kumari* AIR 1972 SC 2119.

An unmarried male Hindu on partition does not by himself alone to constitute a Hindu undivided family.[8]

The basis of the rule that there need not be at least two male members to constitute a Hindu undivided family is that the joint family property does not cease to be such, simply because of the 'temporary reduction of the coparcenary unit to a single individual'; the character of the property remains the same.[9] The existence of at least one male member is essential for constituting a joint family with other members.[10]

There can be a smaller Hindu undivided family within a larger undivided family.

§ 213. HINDU COPARCENARY

A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property.[11] These are the sons, grandsons and great-grandsons of the holder of the joint property for the time being, in other words, the three generations next to the holder in unbroken male descent (see § 217). The above propositions must be read in the light of what has been stated in the note at the top of this chapter.

To understand the formation of a coparcenary, it is important to note the distinction between ancestral property and separate property. Property inherited by a Hindu from his father, father's father or father's father's father, is ancestral property. Property inherited by him from other relations is his separate property. The essential feature of ancestral property is that if the person inheriting it has sons, grandsons or great-grandsons, they become joint owner's coparceners with him. They become entitled to it due to their birth.[12] These propositions also must be read in the light of what has been stated in the note at the top of this chapter.

Illustrations

(a) Prior to the coming into force of the Hindu Succession Act 1956, if *A* who had a son *B* inherited property from his father, it became ancestral property in his hands, and *B* became a

8 *Krishna Prasad v CIT, Bangalore* AIR 1975 SC 498.

9 *Attorney General of Ceylon v AR Arunachalam Chettiar* AIR 1957 Cal 540 (PC); *Sitabai v Ramchandra* AIR 1970 SC 343.

10 *Mangala v Jayabai* AIR 1994 Kant 276.

11 See the decisions cited in the preceding footnotes. Reference may be made on this point to *Surjit Lal Chhaabda v CIT, Bombay* AIR 1976 SC 109; *Commr of Income-tax v Luxminarayan* (1935) 59 Bom 618, 37 Bom LR 692, 159 IC 424, AIR 1935 Bom 412.

12 *Sundar Lal v Chhittar Mal* (1907) 29 All 1; *Anandrao v Vasantrao* (1907) 9 Bom LR 595 (PC).

coparcener with his father. Though *A* as head of the family was entitled to hold and manage the property, *B* was entitled to an equal interest with his father *A*, and to enjoy it in common with him. *B* could, therefore, restrain his father from alienating it except in the special cases where such alienation was achieved by law, and he could enforce partition of it against his father. On his father's death, *B* took the property by right of survivorship and not by succession.

(b) It is, however, the other way as to separate property. A person was the absolute owner of the property inherited by him from his brother, uncle etc. His son did not acquire any interest in it by birth and on his death, it passed to the son not by survivorship but by succession. Thus, if *A* inherited property from his brother, it was his separate property, and it was absolutely at his disposal. His son *B* acquired no interest in it by birth and could not claim a partition of it, nor could he restrain *A* from alienating it. The same rule applied in case of self-acquired property of a Hindu, who died prior to the coming into force of the Hindu Succession Act 1956. It is however, important to note that separate or self-acquired property, once it descends to a male issue of the owner, became ancestral in the hands of the male issue who inherited it. Thus, if *A* owned separate or self-acquired property, it passed on his death to his son *B*, as his heir. However, the result of the separation of the doctrine of ancestral property and a son taking interest in it simply by his birth, was that if *B* had a son *C*, the latter (*C*) took an interest in it by reason of his birth and became a coparcener with *B* in respect of the same. *C* could restrain *B* from alienating it, and could enforce a partition of it against B. This doctrine has been materially affected by operation of s 8 of the Act of 1956, as will be noticed in notes under this section.

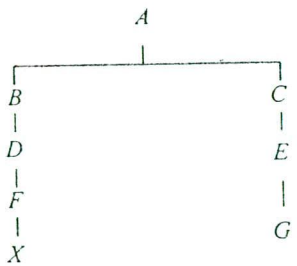
(c) It would have made no difference in the above ills (a) and (b), whether the son or sons of *A* or *B* as the case may be, were in existence at the time when *A* or *B* inherited the property from their respective fathers or were born after the date of such inheritance. The doctrine of ancestral property applies also to such cases (see § 223(1)).

(d) If, however, *A* or *B* (in Illust (a) or (b)) who had inherited property from their respective fathers who died after s 8 of the Hindu Succession Act 1956 came into force, the partition has become materially affected as pointed out in notes under that section. All property, other than coparcenary property, separate or self-acquired of *A* or *B*, now devolves upon their respective heir by operation of that section and such heirs take their shares of

the properties as absolute owners. Even in respect of coparcenary property, the deceased has interest. Section 6 of the Act now applies as therein indicated, and the position has become materially affected.

Ancestral property is a species of coparcenary property. As stated above, if a Hindu inherits property from his father, it becomes ancestral in his hands as regards his son. In such a case, it is said that the son becomes a coparcener with the father as regards the property so inherited, and the coparcenary consists of the father and the son. However, this does not mean that coparcenary can consist only of the father and his sons. It is not only the sons, but also the grandsons and great-grandsons, who acquire an interest by birth in the coparcenary property. Thus, if *A* inherits property from his father and he has two sons *B* and C, they both become coparceners with him as regards the ancestral property. If *B* has a son *D*, and *C* has a son *E*, the coparcenary will consist of the father, sons and grandsons, namely *A*, *B*, *C*, *D*, and *E* as shown in the accompanying in Table XII.1. Further, if *D* has a son *F* and *E* has a son *G*, the coparcenary will consist of the father, sons, grandsons, and great-grandsons, in all it will consist of seven members. However, if *F* has a son *X*, *X* does not become a coparcener, for a coparcenary is limited to the head of each stock, and his sons, grandsons, and great-grandsons. *X* being the great-great-grandson of *A*, cannot be a member of the coparcenary so long as *A*, the holder of the joint property, is alive.

Table XII.1



§ 214. FORMATION OF COPARCENARY

(1) The conception of a joint Hindu family constituting a coparcenary is that of a common male ancestor with his lineal descendants in the male line within four degrees counting from and inclusive of such ancestor (or three degrees exclusive of the ancestor). No coparcenary can commence without a common male ancestor, though after his death, it may consist of collaterals, such as brothers, uncles, nephews, cousins, etc.

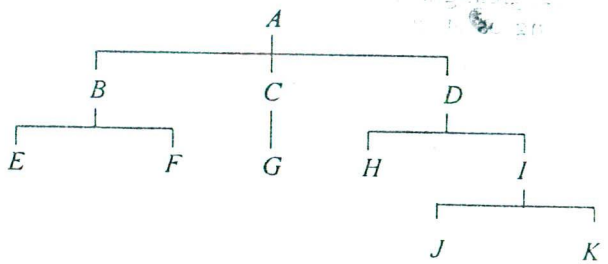
(2) A coparcenary is purely a creature of law; it cannot be created by act of parties, save in so far that by adoption a stranger may be introduced as a member thereof.[13]

(3) No female can be a coparcener, although a female can be a member of a joint Hindu family (see § 217).

Illustration

Table XII.2 shows a coparcenary consisting of several families, *A* with his three sons *B*, *C* and *D*, and their sons and grandsons constitute the 'main' family. *B* with his two sons *E* and *F*, *C* with his son *G*, *D* with his sons *H* and *I* and his grandsons *J* and *K*, and *I* with his sons *J* and *K*, constitute 'branch' families. All the families have one common ancestor *A*. Each branch family has also its own head, namely *B*, *C*, *D* and *I*. On *A*'s death, the coparcenary will consist of the three brothers, *B*, *C* and *D* and their male issue. On the death of *B* and *C*, the coparcenary will consist of *D*, his nephews *E*, *F* and *G* and his male issue *H*, *I*, *J* and *K*.

Table XII.2



Genesis of Coparcenary

A coparcenary is created in the following manner: A Hindu male *A*, who has inherited no property at all from his father, grandfather, or great-grandfather, acquires property by his own exertions. *A* has a son *B*, *B* does not take any vested interest in the self-acquired property of *A* during *A*'s lifetime, but on *A*'s death, he inherits the self-acquired property of *A*. If *B* has a son *C*, *C* takes a vested interest in the property by reason of his birth, and the property inherited by *B* from his father *A* becomes ancestral property in his (*B*'s) hands, and *B* and *C* are coparceners as regards the property. If *B* and *C* continue joint, and a son *D* is born to

13 *Sudarsanam v Narasimhulu* (1902) 25 Mad 149, 154–57: *Bhagwan Dayal v Reoti Devi* AIR 1962 SC 287. Also see § 228A.

C, he enters the coparcenary by the mere fact of is birth. Moreover, if a son *E* is subsequently born to *D*, he too becomes a coparcener.

Composite Family

As regards what is described in the South as a 'composite family', reference may be made to the undernoted cases.[14]

§ 215. COPARCENARY NOT LIMITED TO FOUR DEGREES FROM COMMON ANCESTOR

Though every coparcenary must have a common ancestor to start with, it is not to be supposed that every extant coparcenary is limited to four degrees from the common ancestor. A member of a joint family may be removed more than four degrees from the common ancestor (original holder of coparcenary property), and yet he may be a coparcener. Whether he is so or not depends on the answer to the question whether he can demand a partition of the coparcenary property. If he can, he is a coparcener, otherwise not. The rule is that partition can be demanded by any member of a joint family who is not removed more than four degrees from the last holder, however remote he may be from the common ancestor or original holder of the property.

When a member of a joint family is removed more than four degrees from the last holder, he cannot demand a partition, and therefore, he is not a coparcener (Illust (a) and (b)). On the death, however, of the last holder, he would become a member of the coparcenary, if he was fifth in descent from him, and would be entitled to a share on partition, unless his father, grandfather and great-grandfather had all predeceased the last holder. The reason is and here we have another important rule bearing on the subject in hand that whenever a break of more than three degrees occurs between any holder of property (*A* in Illust (c)) and the person who claims to enter the coparcenary after his death (*E* in Illust (c)), the line ceases in that direction (ie, the direction of *C*, *D1* and *E* in Illust (c)) and the survivorship is confined to those collaterals and descendants (*D* in Illust, (c)) who are within the limit of four degrees (Illust (c)).[15]

Illustrations

(a) *A* inherits certain property from his father *X*. He has a son *B* and a grandson *C*, both members of an undivided family. *A*, *B* and *C* are coparceners. A son *D* is then born to *C*. *D* becomes a

14 *Subbayya v Sitaramamma* AIR 1959 AP 86; *Venkatasubba Reddi v Pitchamma* AIR 1960 AP 263; *Veerapa Naidu v Venkaiah* AIR 1961 AP 534.

15 *Moro Vishvanath v Ganesh* (1873) 10 Bom HC 444; *Yenamala v Yenumula* (1870) 6 Mad HC 93.

coparcener by birth with *A*, *B* and *C*. Subsequently, a son *E* is born to *D*. *E* is not a coparcener, for being fifth in descent from *A*, he cannot demand a partition of the family property. On *A*'s death, however *B* will become the head of the joint family and *E* will step into the coparcenary as the great-grandson of *B*, though he is fifth in descent from *A*, the older. Likewise, on *B*'s death, *F* (*E*'s son) will step into the coparcenary as the great-grandson of *C*, the head of the family for the time being, though he is sixth in descent from *A*, the original holder.

Table XII.3

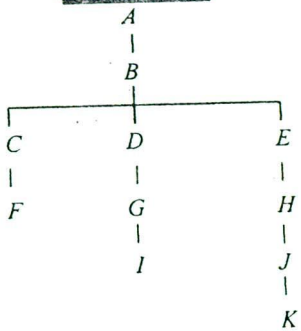
A
|
B
|
C
|
D
|
E
|
F

Note that the property inherited by *A* from his father is ancestral in his hands. He is not the owner of the property, he is entitled merely to hold and manage the property as the head of the family for and on behalf of the family. The ownership of the property is in the joint family consisting of himself and his three descendants *B*, *C* and *D*. They are all co-owners, or, as the expression goes, coparceners.

(b) 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 *F*. Here the coparcenary consists of three collaterals, namely, *F*, *I* and *K*.[16]

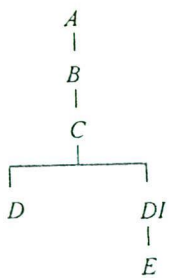
16 *Moro Vishvanath v Ganesh* (1873) 10 Bom HC 444.

Table XII.4



(c) *A* inherits certain property from his father *X*. *A* has a son *B*, a grandson *C*, two great-grandsons *D* and *D1*, and a great-great-grandson *E* by *D1*, all members of a joint family. Here *A*, *B*, *C*, *D*, and *D1* are coparceners, *E* is not, being more than four degrees removed from *A*. Suppose *B* dies first. The coparcenary will now consist of *A*, *C*, *D* and *D1*. The death of *B* does not introduce *E* into the coparcenary, for *A* being still alive, his great-great-grandson cannot be a coparcener with him. Suppose *C* dies next. The coparcenary will now consist of *A*, *D* and *D1*. The death of *C* does not introduce *E* into the coparcenary, for *A* being still alive, his great-grandson cannot be a coparcener with him. Suppose *D1* dies next. The coparcenary will consist of *A* and *D*. The death of *D1* does not introduce *E* into the coparcenary, for *A* being still alive, this great-great-grandson cannot be a coparcener with him. Suppose *A* dies next, *D* now becomes the sole surviving coparcener, and the joint family property will pass to *D* by survivorship. The death of A does not introduce E into the coparcenary. The reason is that at the time of *A*'s death, *E*'s father (*D1*), his grandfather (*C*) and his great-grandfather (*B*), were all dead.

Table XII.5



§ 216. UNDIVIDED COPARCENARY INTEREST

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, one-third or one-fourth.[17] His interest is a fluctuating interest, capable of being enlarged by deaths in the family, and liable to be diminished by births in the family.[18] It is only on a partition that he becomes entitled to a definite share. The most appropriate term to describe the interest of a coparcener in a coparcenary property is 'undivided coparcenary interest'. The nature and extent of that interest is defined in § 235. The rights of each coparcener, until a partition takes place, consist in a common possession and common enjoyment of the coparcenary property. As observed by the Privy Council in *Katama Natchiar v Rajah of Shivagunga*:[19]

> ...there is community of interest and unity of possession between all the members of the family, and upon the death of any one of them, the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession.

The latter part of this proposition must now be read in the context of ss 6 and 30 of the Hindu Succession Act 1956, in cases where those sections are applicable.

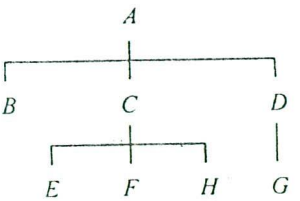
The Supreme Court has summarised the position and observed that the coparcenary property is held in collective ownership by all the coparceners in a quasi-corporate capacity. The incidents of coparcenary are, first, the lineal male descendants of a person upto the third generation, acquire on birth ownership in the ancestral properties of such person. Secondly, that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition, each member has got ownership extending over the entire property conjointly with the rest; fourthly, that as a result of such co-ownership, the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it is for necessity, without the concurrence of the coparceners; and sixthly, that the interest of a deceased member passes on his death to the surviving coparceners.[20]

17 *Appovier v Rama Subba* (1886) 11 MIA 75, 89.
18 *Sudarsan v Narasimhulu* (1902) 25 Mad 149, 154, 156.
19 (1863) 9 MIA 539, 543, 611.
20 *State Bank of India v Ghamandi Ram* AIR 1969 SC 1330, 1333.

Illustration

Suppose a family consisting of *A* and his sons *B* and *C*; on a partition each will take one-third. However, if *D* was born while the family remained joint, each would take one-fourth. Suppose the family still to remain undivided; on the death of *A*, the possible shares of the three sons would be enlarged to one-third; and if *B* were subsequently to die without issue, the shares of *C* and *D* would be enlarged to one-half, as *C* and *D* married, their sons *E*, *F* and *G* would enter into the family, they acquire an interest in the property, but that interest again would be shifting interest, depending on the state of the family. If *C* were to die leaving only two sons *E* and *F* and they claimed a partition against *D*, *E* and *F* would each take one-half of one-half, and *D* would take the other half. However, if *H* had previously been born, *E*, *F* and *H* would each take one-third of one-half, ie, one-sixth each. If they put off their claim for a division until *D* and *G* had both died, *E*, *F* and *H* would each take one-third of the whole.[21]

Table XII.6



Note that on a partition between *C* and *D* after the death of *A* and *B*, *C* would take one-half and *D* would take the other half. If *C* is dead, his issue *E*, *F* and *H* will take per stirpes as regards *D*, ie, they will take the one-half share of C, and *D* will take the other half, but as regards each other, they will take per capita, ie, each will take an equal one-sixth share.

The interest of a coparcener in an undivided Mitakshara family is not individual property.[22] However, the interest of a coparcener in an undivided Dayabhaga family is individual property.[23]

21 *Mayne's Hindu Law*, 11th edn, 265A.

22 *Gharib Ullah v Khalak Singh* (1903) 25 All 407, 30 IA 165.

23 See § 279. *Sreemutty Soorjeemony Dossee v Denobundoo* (1857) 6 MIA 526, 553.

§ 217. FEMALES CANNOT BE COPARCENERS

No female can be a coparcener under Mitakshara law.[24] Even a wife, though she is entitled to maintenance out of her husband's property, and has to that extent an interest in his property, is not her husband's coparcener.[25] Nor is a mother a coparcener with her sons,[26] neither a mother-in-law with her daughter-in-law.[27] There can be no coparcenary between a mother and daughter among *devadasis*.[28] Nor could a widow succeeding under the Hindu Women's Rights to Property Act to her husband's share in a joint family be a coparcener.[29] Also, see s 6 of the Hindu Succession Act 1956.

II. Coparcenary Property

§ 218. OBSTRUCTED AND UNOBSTRUCTED HERITAGE

Mitakshara divides property into two classes, namely, *apratibandha daya* or unobstructed heritage, and *sapratibandha daya* or obstructed heritage. (1) Property in which a person acquires an interest by birth is called unobstructed heritage, because the accrual of the right to it is not obstructed by the existence of the owner.

Thus, property inherited by a Hindu from his father, father's father, or father's father's father, but not from his maternal grandfather,[30] is unobstructed heritage as regards his own male issue, ie, his son, grandson and great-grandson.[31] His male issues acquire an interest in it from the moment of their birth. Their right to it arises from the mere fact of their birth in the family, and they become coparceners with their paternal

24 *Commr of Income-tax v Mills* AIR 1966 SC 240; *Pushpa Devi v Commissioner of Income-tax* (1977) SC 2230; *Rajendra Nath v Shiv Nath* AIR 1971 All 448; *Desappa Setty v Vedavathamma* AIR 1972 Mys 283; *Rameshwar Ministry v Babulal Ministry* AIR 1991 Pat 53; *IT Commr, Bihar v Sandhya Rani Datta* AIR 2001 SC 1155 (coparcenary of females alien concept to Hindu law).

25 *Punna Bibee v Radha Kissen* (1904) 31 Cal 476; *Srimati Sabitri v Mrs FA Savi* (1934) 13 Pat 359, 145 IC 1, AIR 1933 Pat 306.

26 *Hira Singh v Mst K Mangla* (1928) 9 Lah 324, 330, 106 IC 877, AIR 1928 Lah 122; *Sital Prasad v Sri Ram* (1944) Luck 450.

27 *Commr of Income-tax v Pannabai* (1943) Nag 458, AIR 1913 Nag 160.

28 *Gangamma v Kuppammal* (1938) Mad 789, AIR 1939 Mad 139.

29 Also see s 6 of the Hindu Succession Act 1956. *Seetha Bai v Narasimha* (1945) Mad 568; *Maguni Padhano v Lakananidhi* AIR 1956 Ori 1 (mother cannot act as a de facto manager or *karta*); *Radharam v Jang Bahadur* (1945) 20 Luck 305; *Seethamma v Veerana* (1950) Mad 1076.

30 *Muhamad Husain v Babu Kishava Nandan Sahai* (1937) 64 IA 250, (1937) All 655, 39 Bom LR 979, 169 IC 1, AIR 1937 PC 223; *Om Prakash v Sarvjit Singh* AIR 1995 MP 92 (property inherited from person other than father, father's father, or father's father's father is obstructed heritage).

31 *Mst Sirtaji v Algu Upadhiya* (1937) 12 Luck 237, 163 IC 935, AIR 1936 Ori 331.

ancestor in such property immediately on their birth, and in such cases ancestral property is unobstructed heritage.

Property, the right to which accrues not by birth but on the death of the last owner without leaving a male issue, is called obstructed heritage. It is called obstructed, because the accrual of right to it is obstructed by the existence of the owner.

Thus, property which devolves on parents, brothers, nephews, uncles, etc, upon the death of the last owner, is obstructed heritage. These relations do not take a vested interest in the property by birth. Their right to it arises for the first time on the death of the owner. Until then, they have a mere *spes successionis* or a bare chance of succession to the property, contingent upon their surviving the owner.[32]

(2) Unobstructed heritage devolves by survivorship; obstructed heritage, by succession. There are, however, some cases in which obstructed heritage is also passed by survivorship (reference may be made to §§ 31 and 222 and notes thereunder).

Illustration

A inherits certain property from his brother. *A* has a son *B*. The property is obstructed in *A*'s hands. *B* does not take any interest in it during *A*'s life. After *A*'s death, *B* will take it as *A*'s heir by succession. The existence of *A* is an obstruction to the accrual of any rights in the property to *B*.

§ 219. UNOBSTRUCTED HERITAGE NOT RECOGNISED BY DAYABHAGA

The distinction between obstructed and unobstructed heritage is peculiar only to Mitakshara school.

According to Dayabhaga, all heritages are obstructed, for, according to the doctrines of that school, no person, not even a son, takes an interest by birth in the property of another. Dayabhaga does not recognise the principle of survivorship. It recognises only the right of succession and this right accrues for the first time on the death of the last owner. The Privy Council, however, has applied the doctrine of survivorship to property jointly inherited by two or more widows and two or more daughters ever in cases arising under Dayabhaga law (§ 31).

§ 220. CLASSIFICATION OF PROPERTY

Property, according to the Hindu law, may be divided into two classes, namely: (1) joint family property; and (2) separate property.

32 *Mitakshara*, A Ch I, s 1, v 3.

Joint family property may be divided, according to the source from which it comes, into:

(1) ancestral property (§§ 223–25); and
(2) separate property of coparceners thrown into the common coparcenary stock (§ 227).

Property jointly acquired by the members of a joint family, with the aid of ancestral property, is joint family property. Property jointly acquired by the members of a joint family without the aid of ancestral property may or may not be joint family property; whether it is so or not, is a question of fact in each case (§ 228). The term 'joint family property' is synonym with 'coparcenary property'. 'Separate' property includes 'self-acquired' property (§§ 222, 231).

§ 221. INCIDENTS OF JOINT FAMILY OR COPARCENARY PROPERTY

Joint family or coparcenary property is that in which every coparcener has a joint interest and a joint possession.[33] The incidents of a coparcenary were summarised in the undermentioned decision of the Supreme Court.[34] The following are the main incidents of joint family or coparcenary property, it:

(a) devolves by survivorship, not by succession (§ 229)—This proposition must now be read in the context of ss 6 and 30 of the Hindu Succession Act 1956, in cases where those sections are applicable;
(b) is the property in which the male issue of the coparceners acquire an interest by birth.

The joint family property must be distinguished from the joint property of the English law. The joint property of the English law devolves like joint family property by survivorship. However, the male issues of the joint tenants do not acquire any interest in it by birth. Two complete strangers may be joint tenants according to English law, but in no conceivable circumstance could they constitute a joint Hindu family, or hold property as a joint Hindu family. The fundamental principle of a joint Hindu family is the tie of sapindaship, without which it is impossible to form a joint Hindu family.[35]

Joint family property is purely a creation of Hindu law, and those who own it are called coparceners. The rights of coparceners are set forth in

33 *Katama Natchiar v The Raja of Shivagunga* (1863) 9 MIA 539, 543, 611.
34 See § 216. *State Bank of India v Ghamandi Ram* AIR 1969 SC 1330.
35 *Karsandas v Gangabai* (1908) 10 Bom LR 184.

§ 235. The distinction between joint family property and joint property comes into prominence only in two kinds of cases, namely, the case dealt with in § 223, sub-§ (2) (property inherited from maternal grandfather), and that dealt with in § 228 (joint acquisitions). After leaving § 228, we shall use the expression 'joint property' as equivalent to 'joint family property'.

§ 222. INCIDENTS OF SEPARATE OR SELF-ACQUIRED PROPERTY

A Hindu, even if he be joint, may possess separate property. Such property belongs exclusively to him. No other member of the coparcenary, not even his male issue, acquires any interest in it by birth. He may sell it,[36] or he may make a gift of it, or bequeath it by will, to any person he likes.[37] It is not liable to partition,[38] and, on his death intestate, it passes by succession to his heirs, and not by survivorship to the surviving coparceners.[39]

Explanation.—The expression 'male issue' in this and subsequent sections means and includes sons, son's sons, and son's son's sons.

Reference may be made to the undermentioned decision of the Supreme Court where Mitakshara texts on the subject have been considered.[40]

It is now settled law that a father who is joint with his sons may sell his self-acquired property, even though such property may be immovable. The father may sell such property without the concurrence of the sons.[41] He may make an unequal distribution of such property among his sons,[42] and he may make a gift of it to one son to the entire exclusion of the other son.[43]

36 *Muddun Gopal v Ram Buksh* (1863) 6 WR 71.

37 *Rao Balwant Singh v Rani Kishori* (1898) 20 All 267, 25 IA 54 (gift); *Nagalingam v Ramachandra* (1901) 24 Mad 429; *Subbaya v Surayya* (1887) 10 Mad 251; *Somasundara v Ganga* (1904) 28 Mad 386; *Bawa Misser v Raja Bisheo* (1868) 10 WR 287; approved in *Bisheo v Bawa* 20 WR 137 (PC); *Sital v Madho* (1877) 1 All 394; *Baboo Beer Pertap v Rajender* (1867) 12 MIA 139; *Nana Narain v Huree Punth* (1862) 9 MIA 96; *Purshotam v Vesudeo* (1871) 8 Bom HCOC 196.

38 *Lochun Singh v Nemotharee Singh* (1873) 20 WR 170; *Yamunabai v Manubai* (1899) 23 Bom 608.

39 *Katama Natchiar v Rajah of Sivaganga* (1863) 9 MIA 539, 543, 613.

40 Mitakshara Placitum 27, Ch I, Sec 1, Placitum 9, Ch I, Sec 5. These texts were considered by the Supreme Court in *Arunachala Mudaliar v Muruganatha* [1954] SCR 243, AIR 1953 SC 495.

41 *Muddun Gopal v Ram Buksh* (1863) 6 WR 71.

42 *Bawa Misser v Raja Bisheo* (1868) 10 WR 287.

43 *Sital v Madho* (1877) 1 All 394.

§ 223. ANCESTRAL PROPERTY

(1) *Property inherited from paternal ancestor.*—All property inherited by a male Hindu from his father,[44] father's father or father's father's father, is ancestral property. The essential feature of ancestral property according to Mitakshara law is that the sons, grandsons and great-grandsons of the person who inherits it, acquires an interest, and the rights attached to such property at the moment of their birth. Thus, if *A* inherits property, whether movable or immovable, from his father or father's father, or father's father's father, it is ancestral property as regards his male issue.[45] If *A* has no son, son's son, or son's son's son in existence at the time when he inherits the property, he holds the property as absolute owner thereof, and he can deal with it as he pleases. However, if he has son's, sons' sons or sons' sons' sons in existence at the time, or if a son, son's son or son's son's son is born to him subsequently, they become entitled to an interest in it by the mere fact of their birth in the family, and *A* cannot claim to hold the property as absolute owner nor can he deal with the property as he likes.[46] The position has been materially affected after s 8 of the Hindu Succession Act 1956, came into force.[47]

A father cannot change the character of joint family property into absolute property of his son by merely marking a will and bequeathing it or part of it to the son as if it was the self-acquired property of the father. In the hands of the son, the property will be ancestral property and the natural or adopted son of that son will take interest in it and be entitled to it by survivorship, as joint family property.[48] However, an affectionate gift of his self-acquired property by a father is not *ipso facto* ancestral property in the hands of the son.[49]

A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, son's sons, and son's son's sons, but as regards other relations, he holds it, and is entitled to hold it, as his absolute property. The result is that if a person inheriting property from another one of his three immediate paternal ancestors has

44 *Kundanbai v Satya Narayan* (1950) Nag 491.

45 *Mst Sirtaji v Algu Upadiya* (1937) 12 Luck 273, 163 IC 935, AIR 1936 Ori 331. In the State of Pondicherry, the sons did not acquire any interest in any such property by birth—*Pandurangan v Sarangapani* AIR 1982 Mad 372.

46 *Jugmohandas v Mangaldas* (1886) 10 Bom 528; *Raja Ram Narain v Pertum Singh* (1873) 11 Beng LR 397; *Chuttan Lal v Kallu* (1911) 33 All 283, 8 IC 719 (alienation before birth).

47 See notes under s 8 of the Hindu Succession Act 1956. Also see the Illust (a)–(d) under § 213.

48 *Valliammai Achi v Nagappa Chettiar* AIR 1967 SC 1153.

49 *Arunachala Mudaliar v Muruganatha* [1954] SCR 243, AIR 1953 SC 495; *Ramkali Pardip Kumar* AIR 1980 P&H 345; *Sourindra Narayan Bhanja Deo v Spl Officer* AIR 1994 Ori 19.

no son, son's son, or son's son's son, the property is his absolute property, and no relations of his are entitled to any interest in it in his lifetime.[50]

Property inherited by a Hindu male from his father, father's father, or father's father's father, is ancestral as regards his male issue, even though it was inherited by him after the death of a life-tenant.[51] Thus, if a Hindu settles the income of his property on his wife for her life, and the property after her death passes to his son as his heir, it is ancestral property in the hands of the son as regards the male issue of such son.

Illustrations

(a) *A* inherits certain property from his father. *A* has a son *B*. The property so inherited is ancestral in *A*'s hands, and it must be held by him in coparcenary with *B*. *B* can enforce partition of it against *A*, in which event he will be entitled to one-half. If *B* continues joint with his father, the whole property will pass to him by survivorship on the father's death.

(b) *A* inherits two immovable properties from his father. *A* has no son, son's son, or son's son's son in existence at the time. *A* can alienate the properties at his pleasure. Suppose *A* alienates one of the properties, and a son *B*, is subsequently born to him, *B* cannot claim any interest in the property alienated by *A* before his birth, but as regards the other property which still remains with *A*, *B* acquires an interest in it by birth, and *A* must thenceforth hold it in coparcenary with *B*.

(c) *A* inherits certain properties from his father. *A* has no son, grandson, or great-grandson, but he has a brother (or a paternal uncle). The brother (or uncle) does not take any interest in the property by birth. As regards the brother or uncle, the property inherited by *A* is his separate property. *A* may therefore sell or mortgage it,[52] or make a gift of it to any one he likes, or he may dispose of it by will.

Where a number of sons inherit their father's self-acquired property, they hold it as joint family property, if at the time of his death, they are

50 *Ajoodhia v Kasee* (1872) 4 NWP 31; *Janki v Nand Ram* (1889) 11 All 194–98 (FB); *Bejai Bahadur v Bhupindar* (1895) 17 All 456, 22 IA 139; *Dipo v Wassam Singh* AIR 1983 SC 846, 847–48; *Arjan Singh v Pingle Devi* AIR 1993 HP 34; *Om Prakash v Sarvjit Singh* AIR 1995 HP 92.

51 *Nanabhai v Achratbai* (1888) 12 Bom 122, 133; *Beni Parshad v Puran* (1896) 23 Cal 262, 273.

52 *Baijnath v Maharaj Bahadur* (1933) 8 Luck 28, 137 IC 814, AIR 1932 Ori 158.

living as members of a joint family.[53] A different view has been expressed in a recent decision of the Madras High Court.[54]

Property Acquired by Adverse Possession

Property acquired by a father by adverse possession would not be ancestral property in his hands (if unconnected with any other ancestral property in his hands) and his sons would not take interest in it by birth. He can dispose of such property and convey full title to the purchases as if it were his self-acquired property.[55]

(2) *Property inherited from maternal grandfather.*—In an earlier decision, the Privy Council held,[56] that such property would be joint property but in the later decision their Lordships held[57] that such property is not ancestral property.

A maternal uncle is not an ancestor, and it has accordingly been held that property inherited from a maternal uncle is not ancestral property.[58]

No such question can arise if the daughter takes an absolute estate as in Bombay, for her sons would then succeed to that property not as the heirs of their maternal grandfather, but as the *stridhana* heirs of their mother.[59]

(3) *Property inherited from collaterals—property inherited from females.*—Excluding the case of property inherited from a maternal grandfather, it may be said that the only property that can be called ancestral property is property inherited by a person from his father, father's father or father's father's father. Property inherited by a person from any other relation is his separate property, and his male issues do not take any interest in it by birth. Thus, property inherited by a person from collaterals, such as a brother, uncle, etc, or property inherited by him from a female, eg, his mother, is his separate property.[60]

53 *Syam Behari Singh v Rameshwar Prasad Sahu* (1941) 20 Pat 904, 198 IC 208, AIR 1942 Pat 213; *Mst Ram Dei v Mst Gyarse* (1949) All 160 (FB).

54 Also see s 31. However, now see s 10 of the Hindu Succession Act 1956. *P Periasami v Pat Periathambi* AIR 1980 Mad 33.

55 *Janarethbee v Pralhad* AIR 1978 Bom 229.

56 *Venkayamma v Venkataramanayamma* (1902) 25 Mad 678, 29 IA 156.

57 *Muhammad Husain Khan v Babu Kishya Nandan Sahai* (1937) 64 IA 250, (1997) All 655, 39 Bom LR 979, 169 IC 1, AIR 1937 Pat 233. The decision in *Vythinatha Ayyar v Yeggia Narayana* (1903) 27 Mad 382 must be regarded as overruled and those in *Jamna Prasad v Ram Partab* (1907) 29 All 677 and *Bishwanath v Ganjadhar* (1918) 3 Pat LJ 168, 43 IC 370, AIR 1917 Pat 146 must be regarded as approved *Seri Ram v Chandramma* AIR 1952 Hyd 45.

58 *Karuppai v Sankaranarayanan* (1904) 27 Mad 300.

59 See §§ 147 (2) and 15 (11). See ss 14, 15 and 16 of the Hindu Succession Act 1956; *Manibhai v Shankerlal* (1930) 54 Bom 323, 125 IC 433, AIR 1930 Bom 296.

60 *Baboo Nund Coomar v Razeeooddeen* (1873) 10 Beng LR 183; *Raj Kishore v Madan Gopal* (1932) 13 Lah 491, 143 IC 249, AIR 1932 Lah 636; *Madanlal Phulchand Jain*

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(4) *Share allotted on partition.*—The share, which a coparcener obtains on partition of ancestral property, is ancestral property as regards his male issue. They take an interest in it by birth,[61] whether they are in existence at the time of partition or are born subsequently.[62] Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate, and if the coparcener dies without leaving a male issue, it passes to his heirs by succession.[63] Reference may also be made to notes under § 8 of the Hindu Succession Act 1956 and the Supreme Court and High Court decisions as to ancestral property cited there.

Where the share allotted to a coparcener on partition consists of property which is subject to a mortgage, the fact that he subsequently clears it from the mortgage by his own self-acquisitions, does not alter the character of the property. The unencumbered property remains ancestral, and this male issue acquires an interest in it by birth.[64] It is otherwise, where the mortgage has been foreclosed, and the mortgaged property is subsequently purchased by the coparcener with his own self-acquisitions.[65] Similarly, when on partition, if a male member is allotted property specifically for the purposes of discharging family debts, such property retains its ancestral character and is therefore joint property *qua* his male issue.[66]

(5) *Property obtained by a gift or will from paternal ancestor.*—Where a Hindu, instead of allowing his self-acquired or separate property to go by descent, makes a gift of it to his son, or bequeaths it to him by will, the question arises whether such property is the separate property of the son, or whether it is ancestral in the hands of the son as regards his (son's) male issue. This question has been answered in different ways by different High Courts,[67] with the result that there is a considerable diversity of judicial opinion.

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v State of Maharashtra AIR 1992 SC 1254; *M Shanmugha Udayar v Sivanandam* AIR 1994 Mad 123 (widow's son succeeding to widow's estate on partition, such son inherits the property as his separate property and his sons cannot claim any partition of such property, since it is the father's separate property); *Vijaya College Trust v Kurata Co-op Arecant* AIR 1995 Kant 35.

61 *Lal Bhadur v Kanhaiya Lal* (1907) 29 All 244, 34 IA 65; *Chatturbhooj v Dharamsi* (1885) 5 Bom HCOCJ 128; *Rulla Ram v Amar Singh* AIR 1994 HP 102 relying on AIR 1987 SC 558 and AIR 1986 Pat 1753.

62 *Adurmoni v Chowdhry* (1878) 3 Cal 1, 8, where the son was born after partition.

63 *Bejai Bahadur v Bhupindar* (1895) 17 All 456, 22 IA 139.

64 *Visalatchi v Annasamy* (1871) 5 Mad HC 150.

65 *Balwant Singh v Rani Kishor* (1898) 20 All 267, 25 IA 54; *Ratan Lal v Ramesh* AIR 1979 All 296 (on construction held ancestral and not separate).

66 *M Shanmugha Udayar v Sivanandan*, AIR 1994 Mad 123..

67 *Muddun Gopal v Ram Buksh* (1863) 6 WR 71 (gift); *Hazari Mall v Abanimath* (1912) 17 CWN 280; 18 IC 625. However, see *Mukti Prakash v Smt Iswari* AIR 1920 Cal 746;

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The question was considered by the Supreme Court in *Arunachala Mudaliar v Muruganatha.*[68]

In *Arunachala Mudaliar v Muruganatha,*[69] the Supreme Court, after a consideration of the texts on the subject and the variant opinions of the High Court took the view that the question was primarily one of intention of the donor or the testator to be gathered from the terms of the deed of gift or will. If there are no clear words describing the kind of interest intended to be given the court would have to collect the intention from the language of the document taken along with the surrounding circumstances in accordance with the established canons of construction. The material question in such cases would be whether the grantor really wanted to make a gift of the property to his son, or the apparent gift was only an integral part of a scheme to partition the same. There is no presumption that he intended the one or the other.

A, who had three sons, after giving certain properties to his wife and other relations, provided that the properties in Schedules *A*, *B* and *C* of the will, which were his self-acquired properties, shall be taken by his eldest, second and third sons respectively, and that the sons shall enjoy the properties allotted to them with absolute rights and with powers of alienation such as gift, exchange, sale, etc from son to grandson hereditarily. It was held that the property bequeathed to the sons was not ancestral property in their hands vis-a-vis their own male issues.[70] A gift of property made by a father to his son on the occasion of the son's marriage is not ancestral property in the hands of the son and it is his separate property.[71]

Tara Chand v Reeb Ram (1866) 3 Mad HC 50 (will); *Velayudhan v Commissioner of Income Tax, Madras* (1947) 2 MLJ 49, AIR 1948 Mad 318; *Jagmohandas v Mangaldas* (1886) 10 Bom 528 579 (will); *Nanabhai v Achratbai* (1888) 12 Bom 122; *Pursotam v Janki Bai* (1907) 29 All 354 (will); *Rameshar v Rukmini* (1909) 14 Oudh cases 244, 12 IC 770; *Mst Brijt Kunwar v Rao Bahadur Pandit Sankata Prasad* (1929) 5 Luck 400, 123 IC 849, AIR 1930 Ori 39; *Megh Raj v Relu* AIR 1951 Pepsu 138; *Lal Ram Singh v Deputy Commissioner of Partabgarh* (1923) 50 IA 265, 45 All 596, 76 IC 922, AIR 1923 PC 160 (question was left open by the Judicial Committee). *Bhagwat Shukul v Mt Kaporni* (1944) 23 Pat 599; *Syd Abdul Wajid v Vishwanathan* AIR 1950 Mys 33.

68 [1954] SCR 243, AIR 1953 SC 495; *Parthasarthi v IT Commissioner* AIR 1967 Mad 227.

69 [1954] SCR 243, AIR 1953 SC 495; *Sidramappa v Babajappa* AIR 1962 Mys 38 (insurance policy—premiums paid by father); *Penukka v Kelukutty* AIR 1959 Ker 212; *Srinath Tewary v Ramsurat Devi* AIR 1959 Pat 116; *Karuppa Gounder v Palaniammal* AIR 1963 Mad 245, (1963) Mad 434. Reference may also be made to *Ram Parkash v Radhe Shyam* AIR 1963 Punj 338; *KR Ramaswami Rao v Premabai* AIR 1988 Kant 116; *Sourindra Narayan Bhanja Deo v Spl Officer* AIR 1991 Ori 19.

70 *Arunachala Mudaliar v Muruganatha* [1954] SCR 243, AIR 1953 SC 495.

71 *Muddun Gopal v Ram Buksh* (1863) 6 WR 71, 73; *Adhar Chandra v Nobin Chandra* (1907) 12 CWN 103.

(6) *Accretions.*—Accumulations of income of ancestral property,[72] property purchased or acquired out of income or with assistance of ancestral property,[73] the proceeds of sale of ancestral property, and property purchases out of such proceeds,[74] or obtained in lieu of such property,[75] are ancestral property.

It is well-established that sons, grandsons and great-grandsons acquire a vested interest not only in the income and accretions of ancestral property, which accrued after their birth, but also in the income and accretions, which accrued prior to their birth.[76]

§ 224. CHARACTER OF FATHER'S AND SON'S INTEREST IN ANCESTRAL PROPERTY

Under Mitakshara law, each son upon his birth, takes an interest equal to that of his father in ancestral property, whether it be movable or immovable. It is very important to note that the right which the son takes at his birth in the ancestral property is wholly independent of his father. He does not claim through the father, and, therefore, a transfer is allowed by law (§ 257), cannot affect the interest of the son in the property.[77] However, the father has a special power of disposal of ancestral property for certain purposes specified in §§ 225, 226 and 295.

Authority of Father

Under Mitakshara law, there is no distinction between the rights of a father and his sons as regards ancestral property, except that the father can dispose of: (1) ancestral property; whether movable or immovable, for the payment of his debts; (2) ancestral movable property for the purposes specified in § 225; and (3) ancestral immovable property for the purposes specified in § 226. Further, the father so long as he is capable, is the head and manager of the family. He is entitled to the possession of the joint property. He directs the concerns of the family within itself and represents it to the world. However, as regards substantial proprietorship, he has no greater interest in the joint property than any of his sons. If the property is ancestral, each son by birth acquires an interest equal to that of the father. Moreover, in the same manner, his

72 *Ramanna v Venkata* (1888) 11 Mad 246; dissented from in *Sivaramakrishna v Kaveir Ammal* AIR 1955 Mad 705, 1956 ILR Mad 649.

73 *Lal Bahadur v Kanhaiya Lal* (1907) 29 All 244, 34 IA 65; *Umrithnath v Goureenath* (1870) 13 MIA 65; *Umrithnath v Goureenath* (1870) 13 MIA 542; *Venkataramayya v Krishana Rao* AIR 1963 AP 305.

74 *Krishanasami v Rajagopala* (1895) 18 Mad 73, 83.

75 *Maya Ram v Satnam Singh* AIR 1967 Punj 353.

76 *Isree Persad v Nasib Kooer* (1884) 10 Cal 1017, 1021; *Jugmohandas v Mangaldas* (1886) 11 Mad 246.

77 *Anandrao v Vasantrao* (1907) 9 Bom LR 595 at Pat 597 (PC); affirming (1904) 6 Bom LR 925.

grandson and great-grandsons take an interest on their respective births in the rights of their fathers who represent them, and therefore in unascertained shares of the entire property.

§ 225. GIFT BY FATHER WITHIN REASONABLE LIMITS OF ANCESTRAL MOVABLES

Although, sons acquire by birth rights equal to those of a father in ancestral property, both movable and immovable, the father has the power of making within reasonable limits, gifts of ancestral movable property without the consent of his sons for the purpose of performing 'indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth'.[78]

A 'gift of affection' may be made to a wife, to a daughter, and even to a son. However, the gift must be the property within reasonable limits. A gift of the whole, or almost the whole, of the ancestral movable property to one son to the exclusion of other sons, cannot be upheld as a 'gift through affection' prescribed by the text of law.[79]

In Madras, it has been held that a disposition may be made of a small portion of the property in favour of a daughter or other female member even by will, provided the father obtains the consent of his sons to such disposition.[80] However, the correctness of this decision is open to question, for no member of a joint family, not even a father, can dispose off even his own coparcenary interest by will, though the other coparceners may consent to the disposition (§ 256). The soundness of the decision was questioned in a later Madras case of *Subbarami v Ramamma*.[81] In that case, a father who was joint with this minor son, bequeathed by his will, certain family properties to his wife for her maintenance. There was no question of consent, the son being a minor. It was held that the will was invalid and inoperative as against the son, although, it would have been a proper provision if made by the father by a gift during his lifetime. However, now see s 30 of the Hindu Succession Act 1956.

78 *Mitakshara*, Chap I, sec 1, para 27.

79 *Lakshaman v Ramchandra* (1881) 5 Bom 48, 7 IA 181; affirming (1876) 1 Bom 561 (gift to son set aside); *Nand Ram v Mangal* (1909) 31 All 359, 1 IC 797 (gift to son set aside); *Bachoo v Mankorebai* (1907) 31 Bom 373, 34 IA 107, affirming (1905) 29 Bom 51 (gift to daughter of Rs 20,000 made out of income, upheld, the total value of the property being from Rs 10 to Rs 15 lakhs); *Ramalinga v Narayana* (1922) 49 IA 168, 45 Mad 489, 68 IC 451, AIR 1922 PC 201 (gift to daughter set aside as it was a considerable portion of the property); *Hanmantappa v Jivabai* (1900) 24 Bom, 547, 552, 555 (gift to daughter-in-law upheld); *Madhusudan v Ramji* (1920) 5 Pat LJ 516, 57 IC 341, AIR 1920 Pat 114 (provision before marriage for maintenance of son-in-law and therefore, also of the daughter, upheld).

80 *Appan Patra v Srinivasa* (1917) 40 Mad 112, 40 IC 118, AIR 1918 Mad 531.

81 *Subbarami v Ramamma* (1920) 43 Mad 824, 59 IC 681, AIR 1920 Mad 637.

§ 226. GIFT BY FATHER OR OTHER MANAGING MEMBER OF ANCESTRAL IMMOVABLE PROPERTY WITHIN REASONABLE LIMITS

A Hindu father or other managing member has power to make a gift within reasonable limits of ancestral immovable property for 'pious purposes'. However, the alienation must be by an act inter vivos, and not by will.[82] A member of a joint family cannot dispose of by will a portion of the property even for charitable purposes, and even if the portion bears a small proportion to the entire estate.[83] However, now see s 30 of the Hindu Succession Act 1956.

In the undermentioned case,[84] the Supreme Court examined the whole question and held that it was competent to a father to make a gift of immovable property to a daughter, if the gift is of a reasonable extent having regard to the properties held by the family. The emphasis here is on gift of a reasonable extent. If, on the facts, it is found that the gift was not within reasonable limits, such a gift would not be upheld.[85] In another decision, the Supreme Court considered the question of the extended meaning given in numerous decisions to the expression 'pious purposes'.[86] In later cases, the Supreme Court observed: 'We see no reason to extend the scope of the words "pious purposes" beyond what has already been done in the two decisions of this Court' and rejected

82 *Gangi Raddi v Tamini Raddi* (1927) 54 IA 136; 140, 50 Mad 421, 425; 101 IC 79; AIR 1927 PC 80; *Gopal Chand v Babu Kunwar* (1843) 5 SDA Pat 24; *Raghunat v Gobind* (1886) 8 All 76 (provision for family idol); *Ramalinga v Sivachidambara* (1919) 42 Mad 440, 49 IC 742, AIR 1919 Mad 809 (gift to an idol of a temple on the occasion of the donor's father's funeral); doubting *Rathnam v Sivasubramania* (1893) 16 Mad 353 (gift of a silver vehicle to a temple); *Palwanna Nadar v Annamalai Ammal* AIR 1957 Mad 330; *Rathinasabapathy v Saraswathi* AIR 1954 Mad 307; (1953) 2 MLJ 459; *Sri Thakuri v Nanda* (1921) 43 All 560, 63 IC 546, AIR 1921 All 333 (gift to an idol); *Kalu v Barsu* (1985) 19 Bom 803 (gift to plaintiff as worshipper of a deity—gift not upheld); *Taloba v Tarabai* (1957) 59 Bom LR 633; *Amar Chandra v Saradamayee* (1930) 57 Cal 39, 123 IC 660, AIR 1929 Cal 787. See also *West and Buhler Digest*, Bombay, fourth edn p 204, note (l), and p 686, note (g); *Haridas v Devkuvarbai* (1926) 50 Bom 443, 449, 97 IC 820, AIR 1926 Bom 408 (gift to daughter upheld on the ground that the son had consented to it); *Dhondiram v Bhagubai* AIR 1956 Hyd 118; *Lalta Prasad v Sri Mahadeoji* (1920) 42 All 461, 58 IC 667, AIR 1920 All 116.

83 *Jawahar Lal v Shri Thakur Radhur Rahdha Gopalji Maharaj* (1945) All 177; *MSBY Board v Subramania* AIR 1973 Mad 277.

84 *Guramma v Mallappa* AIR 1964 SC 5, 10—in favour of helpless sister; *Sampoornammal v Rajendran* AIR 1980 Mad 239; *Meenakshamma v NC Nanjudappa* AIR 1993 Kant 12; *Gurusamy Naiker v G Jayaraman* AIR 1996 Mad 212.

85 *Puramma v Chikkarangappa* AIR 1989 Kant 63 (gift by father's *arishina kumkum* not upheld).

86 *Kamla Devi v Bachulal Gupta* AIR 1957 SC 434 (see § 181B at p 235).

the contention that a husband could make any such gift of ancestral property to his wife out of affection on the principle of pious purposes.[87]

The rationale behind certain dispositions of coparcenery properties is the protection of interests of the other members of the coparcenary. When the gift itself is found to be invalid it being an impermissible one under Hindu law, consent for such a gift by other coparceners will not validate the gift.[88]

A gift to a daughter, which is challenged as one which is invalid or unreasonable, must be proved by the father as being reasonable and bona fide.[89] It has been held by the High Court of Madras that a father has no power to make a gift of ancestral immovable property to his wife to the prejudice of his minor sons. However, it has been held by the same court[90] and the High Court of Orissa,[91] that he can make a gift of a small portion of ancestral immovable property to his daughter at or after her marriage, if the extent of the gift is reasonable and particularly if she is in poor circumstances. In an Allahabad case,[92] the court refused to hold a gift by a father to his daughter's father-in-law, of a share in a village, though it was transferred to him as the marriage portion of the daughter. A gift to a stranger is equally invalid and the other members of the family, while in possession, need not sue to set it aside.[93] A father has no power to make a gift of even his undivided interest in the joint family property to his concubine, and such a gift would not become validated by the subsequent disruption of the family.[94] A son, who is a coparcener, cannot make a gift of family property in favour of his mother.[95]

§ 227. PROPERTY THROWN INTO COMMON STOCK

(1) Property which was originally the separate or self-acquired property of a member (coparcener) of a joint family may, by operation of the doctrine of blending, become joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning

87 *Perunalakkal v Kummaresan* AIR 1967 SC 569.

88 *Thimmaiah v Ningamma* AIR 2000 SC 3529 (case of gift to daughter after the coming into force of the Hindu Succession Act 1956).

89 *Rayakkal v Subbanna* (1892) 16 Mad 84; *Sivaganana v Udayar* AIR 1961 Mad 356 (marriage gift to second wife).

90 *Sundaramayya v Sitamma* (1912) 35 Mad 628, 10 IC 56 (gift of 8 out of 200 acres upheld).

91 *Tara Sahuani v Raghunath* AIR 1963 Ori 59.

92 *Ganga v Prithi Pal* (1880) 2 All 635.

93 *Riasat Ali v Iqbal Rai* (1935) 16 Lah 659, 157 IC 75, AIR 1935 Lah 827.

94 *Nagaratnamaba v Kunuku Ramayya* AIR 1968 SC 253.

95 *Tirupurasudari v Kalyanaramana* AIR 1973 Mad 99; *Meenakshy v Vellakutty* AIR 1991 Ker 148.

all separate claims upon it. A clear intention to waive his separate rights must be established.[96] It will neither be inferred from the mere fact of his allowing the other members of the family to use it conjointly with himself nor from the fact that the income of the separate property was used to support a son,[97] or from the mere failure of a member to keep separate accounts of his earnings.[98] So also acts of generosity or kindness should not be construed as admissions of legal obligation.[99] Separate property thrown into the common stock is subject to all the incidents of joint family property.[1]

(2) Similarly, where members of a joint family, who have control over the joint estate, blend with that estate property in which they have separate interests, the effect is that all the property so blended becomes joint family property.[2]

(2a) The basis of the doctrine is the existence of coparcenary and coparcenary property, as well as the existence of the separate property of a coparcener. The doctrine cannot be applied to the case of a Hindu

96 *Venkata Reddi v Lakshmama* AIR 1963 SC 1601, (1964) 1 SCJ 45; *Narayana Raju v Chanaraju* AIR 1968 SC 1276; *K V Narayanan v K V Ranganadhan* AIR 1976 SC 1715; *R Selvaraj v R Radhakrishna* AIR 1976 Mad 156; *B Subba Reddy v Bom Nagi Reddi* AIR 1973 AP 184 (mere description as 'our property' is not enough); *Raj Kishore v Madan Gopal* (1932) 13 Lah 491, 143 IC 249, AIR 1932 Lah 636; *Chinna Venkata v Venkata Rama* AIR 1957 AP 93; *D Sadasiva v Bom Rattain* AIR 1958 AP 145; *Venkataraju v Yedukondalu* AIR 1958 AP 147 (the burden of proving such blending is a heavy one); *Subramania v Commr of Income-tax* AIR 1955 Mad 623; *Sankaranarayanan v Official Receiver* AIR 1977 Mad 171 (burden of proof on *karta*); *Bipra Charan v Mohan Sundar* AIR 1960 Ori 109; *Mulam Chand v Kanchhendilall* AIR 1958 MP 304; *Pratap Kishore v Gynanendranath* AIR 1951 Ori 313; *Narayanan v Krishnan* AIR 1955 Tr & Coch 199; *Venkatasubramania v Easwara Iyer* AIR 1966 Mad 266; *Mahalaxmiamma v Radhakrishna Rao* AIR 1968 Mys 229; *Mohan Rao v Satyanarayana* AIR 1972 AP 233 (self-acquired property shown by manager as of joint family—no explanation); *Nanak Chand v Chander Kishore* AIR 1982 Del 520; *Meenakshi v Vellakutty* AIR 1991 Ker 148.

97 *Gopal v Kesheosa* (1936) Mad 65, 165 IC 350, AIR 1936 Mad 185.

98 *Vythianatha v Varadaraja* (1938) Mad 698, AIR 1938 Mad 841.

99 *Appalaswami v Suryanarayanamurti* (1948) Mad 440 (PC); *R Selvaraj v R Radhakrishna* AIR 1976 Mad 156.

1 *Lal Bahadur v Kanhaiya Lal* (1907) 29 All 244, 34 IA 65; *Suraj Narain Lal v Ratan Lal* (1917) 44 IA 201, 40 All 159, 40 IC 988, AIR 1917 PC 12; *Radhakant Lal v Nazima Begum* (1918) 45 Cal 733, 45 IC 806, AIR 1917 PC 128 (property inherited from brother thrown into common stock); *Lala Muddun Gopal v Khikhinda Koer* (1891) 18 Cal 34, 18 IA 9; *Krishnaji v Moro Mahadeo* (1891) 15 Bom 32, 39–40; *Tribhovandas v Yorke Smith* (1897) 21 Bom 349; *Gopalsami v Chinnasami* (1884) 7 Mad 458 (property inherited from maternal grandfather thrown into common stock); *Tottempudi v Tottempudi* (1904) 27 Mad 228; *Rampershad v Sheochurn* (1866) 10 MIA 490, 505; *Hurpurshad v Sheo Dyal* (1876) 3 IA 259, 26 WR 55; *Shanker Bakhsh v Hardeo Baksh* (1889) 16 Cal 397, 16 IA 71.

2 *Rajani Kant Pal v Jaga Mohan Pal* (1923) 50 IA 173, 50 Cal 439, 73 IC 252, AIR 1923 PC 57.

female, who has acquired immovable property from her father for she is not a coparcener.[3]

A Hindu female cannot be a coparcener and the doctrine of blending cannot apply to her. This was re-affirmed by the Supreme Court.[4]

(2b) The act by which the coparcener throws his separate property into the common stock is a unilateral act and the matter of individual volition. As soon as he declares his intention to treat his self-acquired property as that of the joint family, the property assumes the character of joint family property.

(3) The above rules apply also to brothers living together and forming a joint family governed by Dayabhaga.[5]

(4) The doctrine of blending, on which this paragraph is founded, cannot be involved concerning property held by a Hindu female as a limited owner.[6]

Illustrations

(a) Three Hindu brothers *A*, *B* and *C*, lived together as members of a joint family in their ancestral house at Nagothna, the house being the only property left by the father. Subsequently, *A* and *B* went to Baroda and got employment as clerks. *C* remained at home to look after the family affairs. Both *A* and *B* remitted money from time to time to *C* for the support of the family living at Nagothna. *C* applied the income towards the support of the family, and with the savings from such remittances, he purchased certain immovable property in his own name. *A* and *B* sued *C* to recover possession of the property from *C*, alleging that it was their self-acquired property. It was held, that the property was the self-acquired property of *A* and B, and they were entitled to it to the exclusion of *C*, unless it appeared that the property had been treated by *A* and *B* as joint family property. As there was no finding on the point, the High Court referred the following

3 *Mallesappa v Mallappa* AIR 1961 SC 1268; *Shantanu Kumar Das v Bairagi Charan Das* AIR 1995 Ori 300 (joint property purchased in the name of a female member, presumption that it is joint property does not arise).

4 *Pushpa Devi v Commr of Income-tax* AIR 1977 SC 2230. Though she cannot blend her separate property with the joint family property, she can make a gift of such property to the joint family as pointed out in this decision. Reference may also be made to *Satyendra Kumar v CIT* [1983] 140 ITR 840; *Vasant v Sakharam* AIR 1983 Bom 495.

5 (1923) 50 IA 173, 50 Cal 439, 73 IC 252, AIR 1923 PC 57.

6 *Mallesappa v Mallappa* AIR 1961 SC 1268. The observations of the Supreme Court in *Surjit Lal v CIT, Bombay* AIR 1976 SC 109 has to be read in the context of Income-tax law.

issue to the lower court, namely, whether as a fact *A* and *B* had voluntarily thrown the property into the joint stock with the intention of abandoning all separate claims upon it.[7]

(b) A joint Hindu family, consisting of a father and his three sons, owns certain villages, which are the joint property of the family. The father as the head of the family opens an account with a banker, with whom he deposits from time to time, the income arising from the villages. The father also earns a large sum of money every year and these are also deposited by him with the banker in the same account. There is nothing to show that he discriminated between the income of the joint properties and his personal income. On the other hand, the evidence shows that he blended them both in one general account. Upon these facts, it was held by the Privy Council that the self-acquisitions of the father must be treated as joint family property, and that he had no power, therefore, to dispose them by his will.[8]

Precondition for Blending

As can be seen from r (2a), the existence of coparcenary property is essential for blending of a coparcener's separate property with the coparcenary property, since, if there is no coparcenary property, there can obviously be no blending or throwing of self-acquired property into the common stock.[9]

The doctrine of blending of properties cannot be stratched, so as to include properties inherited by a male coparcener from his relations on the maternal side.[10] Such properties would be his separate properties and cannot therefore form a part of the corpus of the coparcenery property. This is, unless, by evidence, it is established that such separate property has been thrown into the common stock and has been treated as joint property.

Separate Property and Limitation

Where a coparcener discontinues his possession of property belonging to him separately in favour of the joint estate, his right to claim the property as separate may be barred by limitation.[11]

7 *Krishnaji v Moro Mahadev* (1890) 15 Bom 32.
8 *Lal Bahadur v Kanhaiya Lal* (1906) 29 All 244, 34 IA 65.
9 *Jupudi Venkata v Jupudi Kesava* AIR 1994 AP 134.
10 *Subramania Reddi v Venkatsubba Reddi* AIR 1999 SC 1116.
11 *Vasudeva v Maguni* (1901) 24 Mad 387, 28 IA 81; *Babaji v Jivaji* (1930) 32 Bom LR 314, 127 IC 204, AIR 1930 Bom 333.

House Built on Ancestral Land with Separate Funds

If a member of a joint family builds a house on ancestral land with his own moneys, the other members have a claim on him only for compensation for their share of the land.[12]

§ 228. PROPERTY JOINTLY ACQUIRED

(1) Where property has been acquired in business by persons constituting a joint Hindu family by their joint labour, the question arises whether the property so acquired is joint family property or whether it is merely the joint property of the joint acquirers, or whether it is ordinarily partnership property. If it is joint family property, it will pass by survivorship, but the male issue of the acquirers do not take interest in it by birth (§ 221, sub-§ (2)). If it is partnership property, it is governed by the provisions of the Indian Partnership Act 1932, so that the share of each of the joint acquirers will pass on his death to his heirs, and not by survivorship.

(2) If the property so acquired is with the aid of joint family property, it becomes joint family property.[13]

(3) If the property so acquired is acquired without the aid of joint family property, the presumption is that it is the joint property of the joint acquirers,[14] but this presumption may be rebutted by proof that the persons constituting the joint family acquired the property not as members of a joint family, but as members of an ordinary trade partnership resting on contract, in which case, the property will be deemed to be partnership property.[15]

In the absence of any proof of partnership, property jointly acquired by the members of a joint family without the aid of joint family property is, as stated above, to be presumed to be joint. However, is it also to be presumed to be joint family property? It was at one time held by the High Court of Bombay that property jointly acquired without the aid of joint family property was not joint family property and that the male issue of the joint acquirers did not acquire an interest in it by birth, unless it was thrown into the common stock.[16] In later cases, however,

12 *Vithoba v Hariba* (1869) 6 Bom HC (AC) 54; *Periakaruppan v Arunachelam* (1927) 50 Mad 582, 102 IC 290, AIR 1927 Mad 676 (house built by sole surviving coparcener—subsequent adoption by him—adopted son held entitled to one-half share in the land); *Gyarsibai v Jamnalal* AIR 1973 MP 75.

13 *Umrithnath v Goureenth* (1870) 13 MIA 542; *Lal Babadur v Kanbaiya Lal* (1907) 29 All 244, 34 IA 65; *Krishnan v Kanhaiya Lal* (1907) 29 All 244, 34 IA 65; *Krishnan v Rangachari* AIR 1965 Mad 340; *Purnabai v Ranchhoddas* AIR 1992 AP 270.

14 *Chandrabhagv v Anandrao* (1939) ILR Nag 293.

15 *Rampershad v Sheo Churn* (1866) 10 MIA 490, 506; *Gopalasami v Arunachelam* (1904) 27 Mad 32; *Chaturbhooj v Dharamsi* (1885) 9 Bom 438, 445; *Samalbhai v Someshvar* (1881) 5 Bom 38; *Ganpat v Annaji* (1899) 23 Bom 144.

16 *Chatturbhooj v Dharamsi* (1885) 9 Bom 438, 445.

it has been held that such property must be presumed to be joint family property,[17] and this has been followed in Lahore,[18] Nagpur[19] and Oudh.[20] In Madras, it has been held that property so acquired must be presumed to be joint family property,[21] unless the acquirers intended to hold the property as co-owners between themselves, in which case it would be their joint property.[22] Reference may be made to § 228.[23]

Bhumidari land purchased with funds contributed by the members of the family would be presumed to be joint family property.[24]

§ 228A. JOINT ACQUISITIONS BY SOME MEMBERS

So long as a family remains as undivided family, two or more members of it, whether they are members of different branches or of one and the same branch of the family can have no legal existence as a separate independent unit; but all the members of a branch or of a sub-branch, can form a distinct and separate corporate unit within the larger corporate family and hold property as such. However, the law does not recognise some of the members of a joint family belonging to different branches or even to a single branch, as a corporate unit. Any acquisition of property by some such persons could be held by them only as co-sharers or co-tenants and the property would pass by inheritance and not survivorship.[25]

§ 229. SURVIVORSHIP—DEVOLUTION OF THE DECEASED COPARCENER'S INTEREST

On the death of a coparcener, his interest in the coparcenary property does not pass by succession to his heirs. It passes by survivorship to the other coparceners, subject to the rule that where the deceased coparcener leaves a male issue, they represent his rights to a share on partition,[26] and are his sole legal representatives for purposes of execution of money

17 *Laldas v Motibai* (1908) 10 Bom LR 175; *Haridas v Devkuvarbai* (1926) 50 Bom 443, 97 IC 820, AIR 1926 Bom 408 (property jointly acquired by father and sons); *Karsondas v Gangabai* (1908) 32 Bom 479.

18 *Sanwal Das v Kure Mal* (1928) 9 Lah 470, 109 IC 779, AIR 1928 Lah 224.

19 *Sitalprasad v Ramprasad* (1944) ILR Nag 17.

20 *Lachmi Narain v Musaddi Lal* (1942) 17 Luck 327, 197 IC 247, AIR 1942 Ori 155.

21 No such presumption arises where the business is carried on by some only of the members of the joint family—*Sudarsanam v Narasimhulu* (1902) 25 Mad 149.

22 *Sudarsanam v Narasimhulu* (1902) 25 Mad 155–56.

23 *Sidha Sahoo v Jhuma Dei* AIR 1977 Ori 45.

24 *Ram Chander v Dy Director of Consolidation* AIR 1978 All 157.

25 *Bhagwan Dayal v Reoti Devi* AIR 1962 SC 287, 304.

26 *Katama Natchiar v Rajah of Shivagunga* (1863) 9 MIA 539, 543, 615; *Mst Lakhpati v Parmeshwar* (1930) 5 Luck 631, 125 IC 414, AIR 1931 Ori 108.

decrees passed against him.[27] The rule of survivorship here stated was modified by the Hindu Women's Rights to Property Act 1937. It is now subject to the provisions of ss 6 and 30 of the Hindu Succession Act of 1956, in cases where those sections are applicable (see § 35 and ss 6 and 30 of the Act of 1956, and notes thereunder for their effect upon the rights of coparceners and coparcenary property).

Where a property is acquired jointly by two brothers and such acquisition purports to be on behalf of the joint family, and when one of such brothers is not heard of for a period of more than seven years, it cannot be presumed that the missing brother's wife became entitled to his half share under the Hindu Women's Right to Property Act. In these circumstances, the rights to the missing brothers share of the property will devolve on the surviving coparcener, as per the rules of survivorship and the widow will not be competent to convey any interest in the property in question.[28]

The right of a coparcener to take by survivorship is defeated in the following cases:

(i) where the deceased coparcener has sold or mortgaged his interest, in states, where such sale or mortgage is allowed by law (§ 259);

(ii) where the interest of the deceased coparcener has been attached in his lifetime in execution of a decree against him. A mere decree obtained by a creditor, not followed up by an attachment in the lifetime of the debtor, will not defeat the right of survivorship, unless the judgment-debtor, stood in the relation of father, paternal grandfather or great-grandfather to the surviving coparceners (§§ 289, 292(4)). This rule must be read subject to the provisions of ss 6 and 30 of the Hindu Succession Act 1956, in cases where those sections are applicable;

(iii) where the interest of the deceased coparcener has vested in the official assignee or receiver on his insolvency (§ 265).[29] On the annulment of insolvency, the interest which vested in the official receiver reverts under s 37 of the Provincial Insolvency Act in the insolvent, and if on that date he is not alive, it goes to his heirs under the law.[30]

What passes to the male issue is not a share, but the right to have a share on partition. Suppose *A* and *B* are two brothers, and that *A* has a son *C* and *B* has a son *D*. On *A*'s death, his undivided interest will pass to the surviving coparceners, *B*, *C* and *D*. *C* cannot, while the family

27 *Sheo Gopal v Firm Ganesh Das Ram Gopal* (1938) 13 Luck 241, 168 IC 268, AIR 1931 Ori 327.

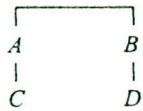
28 *N Jayalakshmi Ammal v R Gopala Pathar* AIR 1995 SC 995.

29 *Fakirchand v Motichand* (1883) 7 Bom 438.

30 *Lakshmanan Chettiar v Srinivasa Iyengar* (1937) Mad 203, 166 IC 378, AIR 1937 Mad 131.

remains joint, claim for himself a moiety of the income alleging that it represents his father's share. However, if the family comes to a partition, *C* will take one-half of the property, that being his father's share and *B* and *D* will take the other half (see § 321).

Table XII.7



According to Mitakshara law, as applied in the Bombay and Madras states, a coparcener can sell or mortgage his interest in the coparcenary property, but not according to that law as applied in Bengal and the Uttar Pradesh (§ 260). Therefore, in Bombay and Madras, if a coparcenary consists of *A* and *B*, and *A* sells his interest to *X*, and then dies, *B* cannot claim *A*'s interest by survivorship. That interest has passed to *X* by purpose. However, no Hindu governed by Mitakshara law can dispose of by gift, his undivided interest in coparcenary property, in any part of India (§ 258).

Illustration

A and *B* are coparceners. *C* obtain a decree against *A* and attaches *A*'s interest in the coparcenary property. *A* then dies. *A*'s interest having been attached in his lifetime *B* is not entitled to that interest by survivorship (see § 289). *C* is entitled to have *A*'s interest sold in execution even after *A*'s death. However, if *C* had merely obtained a decree against *A*, and no attachment had been levied on *A*'s interest in *A*'s lifetime, *A*'s interest would pass to *B* by survivorship, unless *A* happened to be *B*'s father or grandfather or great-grandfather, in which case *C* could attach *A*'s interest even after *A*'s death (the Code of Civil Procedure 1908, ss 50 and 53). See § 289 below.

As to charge created by the deceased coparcener, see *Vithaldas v Gurulingappa*.[31]

§ 230. SEPARATE PROPERTY

Property acquired in any of the following ways is the separate property of the acquirer; it is called 'self-acquired' property, and is subject to the incidents mentioned in § 222 above:

31 *Vithaldas v Garulingappa* AIR 1972 Mys 127.

(1) *Obstructed heritage.*—Property inherited as obstructed heritage (*sapratibandha daya*), ie, property inherited by a Hindu from a person other than his father, father's father, or father's father's father (see §§ 218, 222 and 223 sub-§ (2)).

(2) *Gift.*—A gift of a small portion of ancestral movable property made through affection by a father to his male issue, is his separate property (§ 225).[32]

(3) *Government grant.*—Property granted by government to a member of a joint family is the separate property of the donee,[33] unless it appears from the grant that it was intended for the benefit of the family.[34]

(4) *Property lost to family.*—Ancestral property lost to the family, and recovered by a member without the assistance of joint family property (see § 232). Property acquired by a father by adverse possession is his separate property and not ancestral property.[35]

(5) *Income of separate property.*—The income of separate property and purchases made with such income.[36]

(6) *Share on partition.*—Property obtained as his share on partition by a coparcener who has no male issue (see § 223 (4)).

(7) *Property held by sole surviving coparcener.*—Property held by a sole surviving coparcener, when there is no widow in existence who has power to adopt.[37]

(8) *Separate earnings.*—Separate earnings of a member of a joint family (§ 231).

(9) *Gains of learning.*—All acquisitions made by means of learning are declared by the Hindu Gains of Learning Act 1930, to be the separate property of the acquirer (§ 231A).

Separate Property is Also Called Self-acquired Property

Self-acquired property, in its technical sense, means property obtained by a Hindu without any detriment to ancestral property. As to property described in cll (1)–(3) and (5) of this section, it is clear that it cannot be said to be acquired at the expense of the patrimony of ancestral estate. Such property is, therefore, self-acquired in the technical sense of the term. As to property described in cl (4), it is a question of fact as to whether it constitutes self-acquired property or not. In practice,

32 As to gifts and bequests of separate property by a father to his sons see § 223, sub-§ (5). See § 255, and the cases cited therein.

33 *Katama Natchiar v Rajah of Shivagunga* (1863) 9 MIA 539, 543, 610.

34 *Sri Mahant Govind v Sitaram* (1899) 21 All 53, 20 IA 195.

35 *Jamarathbee v Pralhad* (1978) Mah LJ 204.

36 *Krishnaji v Moro Mahadev* (1891) 15 Bom 373, 34 IA 107.

37 *Bachoo v Mankorebai* (1907) 31 Bom 32.

the expression 'self-acquired' property is used as referring to property acquired by Hindu by his own exertions without the assistance of family funds.

Insurance Policy

Question sometimes arises whether the proceeds of a life insurance policy effected by a coparcener on his life is joint family property or separate property of the coparcener. The test to be applied in any such case is not whether the policy was taken out by the coparcener for the benefit of his wife and children but whether he did so without detriment to the joint family funds.[38] If, however, there are indications that the policy was intended to be the separate asset of the insuring coparcener and treated by the coparceners as such, different considerations may arise, and this apart from any general presumption which may or may not be permissible in such cases.

§ 230A. NON-STATE PRIVATE PROPERTIES OF AN ERSTWHILE RULER

In case of a ruler of a princely state, the non-state private properties belonging to such ruler would be of his absolute ownership and the incidents of coparcenary cannot be attributed to such property and no one except the holder of such properties would have any right over the properties. Such properties would neither lose the character of absolute properties even on the death of such ruler as an ordinary citizen of India,[39] nor would de-recognition of such ruler have the effect of divesting him of the non-state private properties in his hands. Such properties would retain the character of absolute ownership in the hands of the erstwhile ruler.[40]

§ 231. SEPARATE EARNINGS—GAINS OF SCIENCE

The income of a member of a joint family is his separate property, if it has been obtained:

(a) by his own exertions; and

38 *Parbai Kuer v Sarangdhar* AIR 1960 SC 403. Reference may be made to *Venkata Subbarao v Lakshminarasamma* AIR 1954 Mad 222 and the observations of the Supreme Court on the same in the above-mentioned case. Reference may also be made to *Karuppa Gounder v Palaniammal* (1963) 1 MLJ 86, (1963) Mad 434, AIR 1963 Mad 245; *Narayanalal v Controller, Estate Duty* AIR 1969 AP 188.

39 *Shantadevi Pratapsingh v Pratapsingh Sangramsingh* AIR 1996 Guj 72 (see the decisions cited therein).

40 *Jagat Singh v Bhawani Singh* AIR 1996 Del 14.

(b) without 'any detriment to the father's estate', ie, without the aid of joint family property.[41]

However, it is joint family property, if it has been earned at the expense of joint family property.[42]

The principle adopted by the Privy Council in *Gopal Chand*'s case,[43] that 'in considering whether gains are possible, there is no valid distinction between the direct use of joint family funds and a use which qualifies the member to make the gains by his own efforts' cannot now be accepted as valid. The decisions on the subject of the Supreme Court mentions in *Dhanwatey v CIT*,[44] appear to be somewhat conflicting. In a later decision, the Supreme Court examined the subsidiary principles emerging from the decisions and observed that the broader principle that emerged is whether the remuneration received by the coparcener in substances though not in form was one of the modes of return made to the family because of the investment of the family funds in the business, or whether it was a compensation made for the services rendered by the individual coparcener. If it is the former, it is the income of the Hindu Undivided Family, but if the later, then it is the income of the individual coparcener.[45]

For instance, gifts to the *purohit* for private services rendered by him are his separate property.[46] Income from practice of a hereditary profession

41 *KS Subbiah Pillai v Commr of Income-tax* AIR 1999 SC 1220 (commission earned by *karta* by own exertions and qualification); *Somasundara v Ganga* (1904) 28 Mad 386; *Rajamma v Ramakrishnayya* (1905) 29 Mad 121 (insurance premium paid out of self acquired property—insurance money held to be separate property). Also see *Sivaramakrishnan v Kaveri Ammal* AIR 1955 Mad 705, (1956) ILR Mad 649. In *Mangal Singh v Harkesh* AIR 1958 All 42, the Allahabad High Court has taken the extreme view that however small the aid of the joint family property may be, property acquired by a member becomes joint family property. Also see *Venkatasubramania v Eswara Iyer* AIR 1966 Mad 266; *Mahalaxmiamma v Radha Krishna Rao* AIR 1968 Mys 229; *Chetti Balakrishnamma v Chetti Chandrasekhar Rao* AIR 1991 Ori 332 (property acquired by brother by joint labour without aid of joint family property is self-acquired property).

42 *Tottempudi v Tottemudi* (1904) 27 Mad 228; *Somasundara v Ganga* (1904) 28 Mad 386; *Rajamma v Ramakrishnayya* (1906) 29 Mad 121 (insurance premium paid out of self-acquired property—insurance money held to be separate property); *Manicka Mudaliar v Thangavelu* (1963) Mad 955, AIR 1964 Mad 35 (managing agency given in view of holding of shares in company acquired from family funds).

43 *Gopal Chand v Hukum Chand* (1921) 48 IA 162.

44 *Dhanwatey v CIT* AIR 1968 SC 683; *Commissioner of IT v Kalu Babu* AIR 1959 SC 1289; *Lakshmi Chand v Ishroo Devi* AIR 1977 SC 1694.

45 *Raj Kumar Singh v CIT* [1970] 78 ITR 128. Also see *CIT v Thyagraja Mudaliar* [1983] 140 ITR 128.

46 *Hanso Pathak v Harmandil Pathak* (1934) 56 All 1026, 151 IC 11, AIR 1934 All 851. But *Yajamaniki* income received by a hereditary *panda* may belong to joint family, if the services are rendered jointly by the members in exercise of family right—*Shibram v Tularam* AIR 1980 Pat 23.

like that of a hereditary priest is not joint family property. When a member of the joint family educates himself with the help of government stipend and earns money by his own exertion, the fact that money so earned is utilised by him for meeting necessaries of the joint family would not give rise to any presumption either that the acquisitions were out of the income of the joint property or that he intended to throw all his earnings into the joint stock.[47] A member of a joint family can pre-empt the property of the family sold by the manager, provided he does it out of his separate funds and intends to keep it as his separate property.[48] The consent by a member of a joint family to the sale of family property by the manager does not make him vendor and he can pre-empt the property.[49]

As to property acquired by a member out of his self-acquired fund and also with aid of some ancestral property see *Mangal Singh v Harkesh*.[50]

§ 231A. GAINS OF LEARNING—GAINS OF SCIENCE

By the Hindu Gains of Learning Act, it is provided that notwithstanding any custom, rule or interpretation of the Hindu law, no gains of learning shall be held not be to be the exclusive and separate property of the member of the joint family who acquires them merely by reason of:

(a) his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of joint funds of his family, or with the aid of the funds of any member thereof; or

(b) himself or his family having, while he was acquiring such learning been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.

'Learning' is defined in the Act as meaning education, whether elementary technical, scientific, special or general, and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or a vocation in life.

'Gains of learning' are defined as meaning all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of the Act, and whether such acquisitions be the ordinary or the extraordinary result of such learning.

Before the Hindu Gains of Learning Act 1930, it was established law that income earned by a member of a joint family by the practice of a

47 *Subramonia Pillai v Padmanabha* AIR 1950 Tr & Coch 52 (FB).

48 *Ram Naresh v Mst Ganga Dei* (1944) Luck 257.

49 *Hewanchal Singh v Ajodhiya Singh* (1929) 4 Luck 370 (FB).

50 AIR 1958 All 42; *Bhagwant Singh v IT Commr* AIR 1959 Punj 594; *B Subba Reddy v B Nagireddi* AIR 1973 AP 184.

profession or occupation requiring special training was joint family property, if such training was imparted at the expense of joint family property.[51]

§ 232. RECOVERY OF ANCESTRAL PROPERTY LOST TO THE FAMILY

Where the members of a joint family have been wrongfully dispossessed or adversely kept out of possession of joint property for a long time, and such property is subsequently recovered by an individual member of the family without the assistance of joint funds, then, if the property is recovered by the father, he takes the whole as his separate or self-acquired property, whether it be movable or immovable. However, if it is recovered by any other member of the family, then, if the property be movable, he takes the whole as his separate or self-acquired property, but if it be immovable, he takes one-fourth first as reward for the recovery, and the remainder has to be equally divided among all the coparceners including the recoverer.[52]

§ 233. PRESUMPTION AS TO COPARCENARY AND SELF-ACQUIRED PROPERTY

Where a suit is brought by a Hindu to recover property, alleging that it is his self-acquired property, and the defendant contends that it is joint family property, or where a suit is brought by a Hindu on partition of property, alleging that it is joint family property and the defendant contends that it is his self-acquired property, the question arises upon whom the burden of proof lies. The following are the leading rules on the subject:

(1) *Presumption that a joint family continues joint.*—Generally speaking, 'the normal state of every Hindu family is joint.

51 *Metharam v Revachand* (1918) 45 IA 41, 45 Cal 666, 44 IC 269, AIR 1917 PC 105 (broker and money-lender); *Gokal Chand v Hukum Chand Nath Mal* (1921) 48 IA 162, 2 Lah 40, 60 IC 379, AIR 1921 PC 35 (Indian Civil Service); *Lakshman v Jamnabai* (1882) 6 Bom 255 (pleader and sub-judge); *Pauliem v Pauliem* (1877) 1 Mad 252, 4 IA 109; *Chalakonda v Chalakonda* (1864) 2 Mad HC 56 (dancing girl); *Durvasula v Durvasula* (1872) 7 Mad HC 47 (pleader); *Boologam v Swornam* (1882) 4 Mad 330 (dancing girl); *Bai Manchha v Narotamdas* (1868) 6 Bom HCA 1 (*vakil*); *Dhunookharee v Gumpat* (1868) 11 Beng LR 20, 10 WR 122; *Jugmohandas v Mangaldas* (1886) 10 Bom 528 (mill manager); *Krishnaji v Moro Mahadev* (1891) 15 Bom 32 (*karkun*); *Lachmin Kuar v Debi Prasad* (1898) 20 All 435 (army contractor); *Durga Dat v Ganesh Dat* (1910) 32 All 305, 5, IC 400 (astrologer).

52 *Bajaba v Trimbak* (1910) 34 Bom 106, 4 IC 255; *Visalathi v Annasamy* (1870) 5 Mad HC 150; *Bissessur v Seetul Chunder* (1868) 8 WR 13 confirmed in 9 WR 69 SC; *Sham Narain v Rughooburdyal* (1878) 3 Cal 508, 511; *Jugmohandas v Mangaladas* (1886) 10 Bom 528, 551; *Bolakee v Court of Wards* (1870) 14 WR 34; *Naraganti v Vankatachalapati* (1882) 4 Mad 250, 259.

> Presumably every such family is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption'.[53] However, see footnote.[54] In other words, 'given a joint Hindu family, the presumption is, until the contrary is proved, the family continues joint'.[55] The presumption of union is the greatest in the case of father and sons.[56]

The presumption is stronger in the case of brothers than in the case of cousins, and the further one goes from the founder of the family, the presumption becomes weaker and weaker.[57] The reason is that 'brothers are for the most part undivided; second cousin are generally separated';[58] and third cousins are for the most part separated.[59]

In What Cases Does the Above Presumption Apply?

The presumption that a Hindu family continues to be joint is mainly available when the question arises whether a specific property which was admittedly joint at one time has continued to be joint family or it has ceased to be joint by virtue of a separation. If a joint family possessed property, which was admittedly joint, the presumption would be that the property continues to be joint, and the burden would lie upon the member who claims it as his separate property to prove that there was a partition and that he got it on such partition.[60] When the existence of a joint family is not disputed, property held by the family would obviously assume the character of joint family property, strengthening the above presumption based on admitted facts as to jointness.[61] The presumption is peculiarly strong in the case of brothers,[62] but almost nil in the case

53 *Neelkisto Deb v Beerchunder* (1869) 12 MIA 523, 540; *Naragunty v Vengama* (1861) 9 MIA 66, 92; *Rewaun Persad v Radha Beeby* (1846) 4 MIA 137, 168; *Mst Cheetha v Miheen Lall* (1867) 11 MIA 369; *Mst Bhagwani v Mohan Singh* (1925) 29 CWN 1037, 88 IC 385, AIR 1925 PC 132 (PC); *Jugal Kishore v Gobind Singh* AIR 1992 Pat 128.

54 *Shankarrao v Vithalrao* AIR 1989 SC 879 (presumption as to jointness, held, stood rebutted on the facts of the case). Also see *Naresh Kumar v Lalli Prasad* AIR 1989 All 202 (plea as to business started with joint family funds refuted).

55 *Nageshar Baksh Singh v Ganesha* (1920) 47 IA 57, 70 42 All 368, 381, 56 IC 306, AIR 1920 PC 46; *Raghubardayal v Ramdulare* (1928) 6 Rang 367, 111 IC 839, AIR 1928 Rang 206; *Pandit Mohan Lal v Pandit Ram Dayal* (1941) 16 Luck 708, 194 IC 661, AIR 1941 Ori 331; *Chito Mahto v Lila Mahto* AIR 1991 Pat 186 (in absence of a document or any other settlement, presumption that properties are ancestral arises).

56 *Malak Chand v Hira Lal* (1936) 11 Luck 449, 157 IC 945, AIR 1935 Ori 510; *Indranarayan v Roop Narayan* AIR 1971 SC 1962, 1967.

57 *Yellappa v Tippanna* (1929) 56 IA 13, 1953 Bom 213, 114 IC 13, AIR 1929 PC 8.

58 *Moro Vishvanath v Ganesh* (1873) 10 Bom HC 444, 468.

59 *Yellappa v Tippanna* AIR 1929 PC 8.

60 *Prit Koer v Mahadeo Pershad* (1895) 22 Cal 85, 21 IA 134.

61 *Sher Singh v Kamdoor Singh* AIR 1997 SC 1333.

62 *Nageshar Baksh Singh v Ganesha* (1920) 47 IA 57, 42 All 368, 381, 56 IC 306, AIR 1920 PC 46.

of third and fourth cousins.[63] Mutation entries may not by themselves be evidence of severance.[64]

Even when a Hindu undivided family has ceased to be such in law, it may be deemed to be an undivided family for the purposes of the Income Tax Act of 1922 under s 25A of that Act.[65] (Now see s 171 of the Income-tax Act 43 of 1961).

(2) *No presumption that a joint family possesses joint property.*—There is no presumption that a family, because it is joint, possesses joint property or any property.[66] When in a suit for partition, a party claims that any particular item of the property is joint family property,[67] or when in a suit for a mortgage, a party contends that the property mortgaged is joint family property,[68] the burden of proving it rests on the party asserting it.

To render the property joint, the plaintiff must prove that the family was possessed of some property, with the income of which the property could have been acquired,[69] or from which the presumption could be drawn that all the property possessed by the family is joint family property,[70] or that it was purchased with joint family funds, such as the proceeds of sale of ancestral property,[71] or by joint labour. None of these alternatives is a matter of legal presumption. It can only be brought to the cognisance of a court in the same way as any other fact, namely, by

63 *Yellapa v Tippanna* (1929) 56 IA 13, 53 Bom 213, 114 IC 13, AIR 1929 PC 8; *Binod Jena v Abdul Hamid Khan* AIR 1975 Ori 159.

64 *Bharat Singh v Bhagirathi* AIR 1966 SC 405; *Padan Mallik v Sakhia* AIR 1978 Ori 132 (names of widows and others jointly recorded).

65 *Sardar Bahadur Sardar Indra Singh v Commr of Income-tax, Bihar & Orissa* (1943) 22 Pat 55, 206 IC 609, AIR 1943 AP 169.

66 *Shrinivas v Narayan* [1955] SCR 157, Bom LR 678, AIR 1954 SC 379; *Narayanaswami v Ramakrishna* AIR 1965 SC 289; *Baikuntha Nath v Sashi Bhusan* AIR 1972 SC 2531; *Kamalakant Gopalji v Madhavji Meghji* (1935) 59 Bom 573, 37 Bom LR 405, 158 IC 145, AIR 1935 Bom 343.

67 *Annamalai Chetty v Subramanian Chetty* (1929) 31 Bom LR 280, 113 IC 897, AIR 1929 PC 1; *Jogi Reddi v Chinnabbi Reddi* (1929) 56 IA 6, 52 Mad 83, 114 IC 5, AIR 1929 PC 13, is not an authority for the proposition in the text. The suit was by the plaintiff against his brothers and his sister's son, who was a Christian, and the context was as to certain property standing in the name of the sister's son—*Krishna Kumar v Kayastha Pathshala* AIR 1966 All 570.

68 *Rai Shadi Lal v Lal Bahadur* (1933) 35 Bom LR 308, 142 IC 739, AIR 1933 PC 85.

69 *Venkatramayya v Seshamma* (1937) Mad 1012, 170 IC 107, AIR 1937 Mad 538; *Vyathianatha v Varadaraja* (1938) Mad 696, AIR 1938 Mad 841; *Janakiamma v Chinnarao* (1945) Mad 378; *Chanderdeb v Nandji* AIR 1950 Pat 33; *Radha Pandiani v Sarat Chandra* AIR 1985 Ori 222 (settlement of land with member of joint family as occupant tenant—no evidence of any nucleus).

70 *Kamala Kant Gopalji v Madhavji Meghji* AIR 1935 Bom 343.

71 *Ram Nath v Chiranji Lal* (1935) 57 All 605 (FB), 155 IC 132, AIR 1935 All 211; *Baikuntha Nath v Sashi Bhushan* AIR 1972 SC 2531.

evidence.[72] There is at times undiscriminated use of the expression 'presumption' in this context. It is to be understood to indicate those presumptions of fact, which may be said to arise in considering whether the burden of proof has or has not been discharged by a party. It is not as if there is any general solvent for all cases.

Where it is established or admitted that the family possessed some joint property which, from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and the burden shifts to the party alleging self acquisition to establish affirmative that the property was acquired without the aid of the joint family. However, no such presumption would arise, if the nucleus is such that with its help, the property claimed to be joint could not have been acquired. In order to give rise to the presumption, the nucleus must be such that with its help, the property claimed to be joint could have been acquired.

Whether the evidence adduced by a party is sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made, is one of the facts depending on the nature and extent of the nucleus. An important element for consideration is the income which the nucleus yielded. A family house in the occupation of the members and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small, might conceivably produce substantial income, which may well form the foundation of the subsequent acquisitions. These are not abstract questions of law, but questions of fact to be determined on the evidence in the case.[73] The wide proposition that once the ancestral nucleus is proved

72 *Shiu Golam v Baran* (1868) 1 Beng LR (AC) 164; *Mooljit v Gokuldas* (1884) 8 Bom 154; *Nanabhai v Achratbai* (1888) 12 Bom 122 (no presumption that property is ancestral); *Toolseadas v Premji* (1889) 13 Bom 61; *Dwarkaprasad v Jamnadas* (1911) 13 Bom LR 948; *Ram Krishan v Tunda Mal* (1911) 33 All 677, 100 IC 543; *Daji v Laxman* (1927) 29 Bom LR 122, 100 IC 937, AIR 1927 Bom 110; *Sanwal Das v Kure Mal* (1928) 9 Lah 470, 109 IC 779, AIR 1928 Lah 224; *Mst Brij Kurnwar v Rai Bahadur Pandit Sankata Prasad* (1929) 5 Luck 400, 123 IC 849, AIR 1930 Ori 39 (no presumption that property is ancestral).

73 *Shrinivas Krishnarao v Narayan* [1955] SCR 1, 8; *Narayanaswami v Ramakrishna* AIR 1965 SC 289; *Ram Chander v Dy Director of Consolidation* AIR 1978 All 157; *Venkatasubramania v Eswara Iyer* AIR 1966 Mad 266; *S Krishnan v K Narayana Iyer* AIR 1986 Ker 267; *Manohari Devi v Choudhaury Sibanana Das* AIR 1983 Ori 135 (property standing in the name of two wives of the *karta*); *Dal Chand v Babu Ram* AIR 1981 All 335 (the analogy of a *benami* transaction would be misconceived in the context of a Hindu coparcenary); *Janabai Ammal v TAS Palani Madaliar* AIR 1981 Mad 62 (family not in possession of sufficient and adequate nucleus); *Dandappa Rudrappa Hampali v Renukappa* AIR 1993 Kant 148 (family nucleus being a question of fact can be proved by either direct or indirect evidence).

or admitted, the onus on the member to prove that the property acquired was his self-acquisition, cannot be accepted as correct. The existence of some nucleus is not the sole criterion to impress the subsequent acquisitions with family character. What is to be shown is that the family had as a result of the nucleus, sufficient surplus income from which the subsequent acquisitions could be made. Alternatively, this may be shown from the nature and relative value of the nucleus itself. This is the second phase in the onus of proof, which lies on the person who sets up the family character of the property.[74]

Where, however, the existence of the nucleus is shown and no other source of income is disclosed, the presumption may be made that the nucleus was sufficient to enable the property to be acquired.[75] Such being the presumption, if any member of the family claims any portion of the property, as his separate property, the burden lies upon him in any such case to that it was acquired by him in circumstances which would constitute it as separate property.

He may do so by showing that the income of the existing ancestral property was employed in other ways,[76] or was kept intact.[77] If he adduces no evidence, the presumption that the property was joint family property, must prevail.[78] The mere fact that it was purchased in his name and that there are receipts in his name respecting it does not render the property his separate property,[79] for all that is perfectly consistent with the notion of its being joint property. However, if, in addition to the fact that certain property stands in the name of one of the members, *AB* there be these further facts, namely that some other member of the family had acquired separate property with their own moneys and dealt with it as their own without reference to the rest of the family, and that *AB* was allowed by the family to appear to the world to be the sole owner, the presumption

74 *Shrinivas v Narayan* [1955] SCR 1; *Mudigowla v Ramchandra* AIR 1969 SC 1076; *Ramakrishna v Vishnumoorthy* AIR 1957 Mad 86; *Babubhai Girdharai v Ujamlal Hargovandas* (1937) Bom 708, 39 Bom LR 846, 171 IC 623, AIR 1937 Bom 446; *Karoo Singh v Ujagar Singh* AIR 1954 Pat 524; *Rajmal Mishrimal v Rajmal Khemchand* AIR 1954 MB 28; *Chandradasi v Kanai Lal* AIR 1955 Cal 206, 58 CWN 980; *Kameshwar Nath v Raghubir* AIR 1964 Pat 290; *Jagat Krishna v Ajit Kumar* AIR 1964 Ori 76; *Tribeni Mishra v Rampujan* AIR 1970 Pat 13; *Kasturchand v Kapurchand* AIR 1975 MP 136; *Kandaswami v Gopal Chettiar* (1975) 2 Mad LJ 184 (property standing in the name of female member or manager).

75 *Shrinivas v Narayan* [1955] 1 SCR 1, AIR 1954 SC 379; *Mallappa Girimallappa v R Yellappa Gouda* AIR 1959 SC 906; *Bhagwant Kishore v Bishambhar* AIR 1950 All 54; *Darshan Singh v Parbhu Singh* (1946) All 130; *Parmanand v Sudama Ram* AIR 1994 HP 87.

76 *Sher Muhammad Khan v Ramaratan* (1938) Nag 233, 172 IC 572, AIR 1938 Nag 87.

77 *Appalaswami v Suryanarayamurti* (1948) Mad 440 (PC), 52 CWN 505.

78 *Madho Tewari v Mata Din Tewari* (1935) 10 Luck 61, 149 IC 244, AIR 1934 Ori 293.

79 *Purna Bai v Ranchhoddas* AIR 1992 AP 270 (case law discussed) (no presumption of self-acquisition in absence of proof).

that the property is joint is weakened, and the burden of proving that it is joint will lie on those who allege that it is joint.[80] There is no presumption in case of property standing in the name of female members.[81]

In the case of a *karta* or a manager, who managed the family affairs, or was in possession of sufficient joint family assets, the onus would be on such *karta* to prove that the acquisition made by him was without the aid of such joint family assets.[82]

Illustration

A and his two sons, *B* and *C*, lives as members of a joint family. It is proved that in the year 1890, the father had in his hands, a considerable nucleus of ancestral property. In the year 1895, the father purchased certain immovable property in his own name, and bequeaths it by his will to *B*, alleging in the will that it was his self-acquired property. Upon these facts, the presumption is that the property was purchased by the father out of the income of ancestral property, and the property is therefore joint. The burden of proving that the subsequently acquired property was the separate property of the father, lies on him who alleges that it was his separate property, ie, it lies on *B*.[83] The statement in the father's will that the property was his self-acquired property is not evidence upon the question whether the property was joint or self-acquired.[84]

(3) A member of a joint family, who engages in trade can make separate acquisitions of property for his own benefit; and unless it can be shown that the business grew from a nucleus of joint family property, or that the earnings were blended with joint

80 *Dhurm Das v Shama Soondri* (1843) 3 MIA 229, 240; *Gopeekrist v Gungapersaud* (1854) 6 MIA 53 (purchase in name of son); *Prankishen v Mothooramohun* (1865) 10 MIA 403, 411–12; *Umrithnath v Goureenath* (1870) 13 MIA 542; *Stree Raja Yamuula v Yamumula* (1870) 13 MIA 533; *Bodh Singh v Gunesh Chunder* (1874) 12 Beng LR (PC) 317; *Bissessur Lall v Luchmussur Singh* (1879) 5 Cal LR 477, 479, 6 IA 233, 236; *Gajendar v Sardar Singh* (1896) 18 All 176; *Abbidat Singh v Ragho* (1926) 1 Luck, 1, 91 IC 976, AIR 1926 Oudh 77; *Johnston v Gopal Singh* (1931) 12 Lah 546, 555–56, 133 IC 628, AIR 1931 Lah 419. See *Atar Singh v Thakur Singh* (1908) 35 IA 206, 35 Cal 1039.

81 *Nagayasami v Kochadai* AIR 1969 Mad 329 and cases there cited; *Budhia v Raghu* AIR 1973 Ori 85, *Krishnan v Shanmugham* (1975) 2 Mad LJ 73; *Pattusami v Mullaiammal* (1976) 2 Mad LJ 225; *Krishnan v Shanmugham* (1976) 2 Mad LJ 184; *Manohari Devi v Choudhury Sibanana Das* AIR 1983 Ori 135.

82 *Dandappa Rudrappa Hampali v Ranukappa* AIR 1993 Kant 148; *N Shanmugha Udayar v Sivananda* AIR 1994 Mad 123; relying upon *Mallesappa v Mallappa* AIR 1961 SC 1268 and *Parma Nand v Sudama Ram* AIR 1994 HP 87.

83 *Lal Bahadur v Kanhaiya Lal* (1907) 20 All 244, 34 IA 65.

84 *Tottempudi v Tottempudi* (1904) 27 Mad 228; *Venkata Chenchayya v Ramalingam* AIR 1957 AP 744.

family estate, they remain his self-acquired property.[85] Once however it is proved that the old family firm was joint or started with a nucleus of joint property, it is for the plaintiff who alleges it to be separate to prove it.[86]

(4) Where it is proved or admitted that a partition has already taken place, the burden lies upon him who alleges that a portion of the family property is still joint property.[87] There is no presumption that property which is acquired by a member after severance, must be regarded as acquired for the family even if he has been in possession of family property. If rents and profits of such property are received by him, he would be liable to account for the same but the funds do not become impressed with any trust in favour of the other members.[88]

In case of properties, which are admittedly coparcenary properties till the date they are partitioned, such properties must be held to be joint family properties, but any property acquired by a coparcener after a severance of status cannot be accredited to and clubbed with the joint family properties. This is because there can be no presumption that property acquired by a member after severance of status must be regarded as having been acquired for the family.[89]

(5) Onus, however, as a determining factor of the whole case, can only arise if the court finds the evidence pro and con so evenly balanced that it can come to no definite conclusion. Then, the onus will determine the matter. However, if the court after hearing and weighing the evidence comes to a definite conclusion, the need for placing the onus does not arise.[90] In other words, the question of onus, at the close of a case, only becomes important if the circumstances are so ambiguous that a definite conclusion is impossible without resort to it.[91]

85 See § 234(4). *Annamalai Chetty v Subramanian Chetty* (1929) 31 Bom LR 280, 115 IC 897, AIR 1929 PC 1; *Jagmohan v Ranchhoddas* (1945) Nag 892; *Venkataramayya v Venkataramappa* (1953) 1 MLJ 508, AIR 1953 Mad 723 (financial assistance from joint family funds for starting independent business not regarded as nucleus); *Naim Singh v Tikam Singh* AIR 1955 All 388; *S Anup Singh v Sardani Hanbans Kaur* AIR 1958 Punj 116; *Mallakarjuniah v Kanniah* AIR 1961 Mys 64; *Syed Abdul Wajid v R Vishwanathan* AIR 1950 Mys 33 (FB). Also see *Official Assignee v Neelambal* AIR 1933 Mad 920; *Deonarain v Agyan Ram* (1927) 31 CWN 533, 101 IC 249, AIR 1927 PC 52.

86 *Durga Prasad v Ghanshyam Das* 53 CWN 118 (PC).

87 *Vinayak v Dattoo* (1901) 25 Bom 367.

88 *Aryamurthi v Subbaraya* AIR 1972 SC 1279.

89 *Kondiram v Krishna* AIR 1995 SC 297; *Puranbashi Mishra v Rajkumari* AIR 1995 Ori 284.

90 *Robins v National Trust Co* (1927) App Cas 515, 520.

91 *Sime Darby & Co v Official Assignee* (1928) 30 Bom LR 290, 107 IC 233, AIR 1928 PC 77; *Yellappa v Tippanna* (1929) 56 IA 13, 53 Bom 213, 114 IC 13, AIR 1929 PC 8.

§ 234. ANCESTRAL BUSINESS AND ITS INCIDENTS

(1) In Hindu law, a business is a distinct heritable asset. Where a Hindu dies leaving a business, it descends like other heritable property to his heirs. If he dies leaving a male issue, it descends to him. In the hands of the male issue, it becomes joint family business, and the firm which consists of the male issue becomes a joint family firm. The joint ownership so created between the male issue is not an ordinary partnership arising out of a contract, but a family firm created by the operation of law.[92] Therefore, the rights and liabilities of the coparceners constituting the family firm are not to be determined by exclusive reference to the provisions of the Indian Partnership Act 1932, but must be considered also with regard to the general rules of Hindu law which regulate the transactions of joint families.[93]

A Hindu joint family business does not cease to be so if in addition to the heirs of the deceased owner, it is also owned by his daughter married to a *gharjamai* and by other members and relations who are de facto members of the family; provided the proceeds of such business are utilised for the legitimate expenses of the family.[94]

Points of Distinction Between a Partnership and a Joint Hindu Family Firm

(i) In a joint family business, no member of the family can say that he is the owner of one-half, one-third or one-fourth. The essence of joint Hindu family property is unity of ownership and community of interest, and the shares of the members are not defined.[95]

(ia) *Dissolution by death.*—A joint family firm is not dissolved by the death of a coparcener.[96] An ordinary partnership is dissolved by the death of a partner.

(ii) *Right to accounts.*—A coparcener is not entitled, on severing his connection with the family firm, to ask for accounts of past profits and losses (§ 238).[97] It is otherwise in the case of a partner.

(iia) The pattern of accounts of a joint Hindu family business is different from those of a partnership. In the case of the former, the

92 *Lala Baij Nath Prasad v Ram Gopal Lachmi Narayan* (1938) 1 Cal 369; *Gulab Chand Lala v Manni Lal Lala* (1941) 16 Luck 302, 192 IC 643, AIR 1943 Ori 230.

93 *Ramlal v Lakhmichand* (1861) 1 Bom HC App Li; *Nachiappa v Muthukarruppan* (1946) Mad 858.

94 *Nibaran Chanda Shaha v Lalit Mohan Brindoban Shaha* (1938) 2 Cal 368.

95 *Nanchand Gangaram v Sadalge* AIR 1976 SC 835.

96 *Samalbhai v Someshwar* (1881) 5 Bom 38; *Re Haroon Mahomed* (1890) 14 Bom 189, 194; *Lala Baij Nath Prasad v Ram Gopal Lachhmi Narayan* (1938) 1 Cal 369.

97 *Samalbhai v Someshwar* (1881) 5 Bom 38; *Ganpat v Annaji* (1899) 23 Bom 144. As to the rights of a minor coparcener; see *Damodardas v Uttamram* (1893) 17 Bom 271, 279.

shares of the individual members in the profits and losses are not worked out while they have to be worked out in the case of partnership accounts.[98]

(iii) *Power to contract debts.*—The manager of a joint family has an implied authority to contract debts and pledge the credit and property of the family for the ordinary purposes of the family business.[99] Such debts, if incurred in the ordinary course of business, are binding on the family property, including the interest of the minor coparceners therein.[1] Nevertheless, the manager alone has such authority; no other coparcener has it.[2] In the case of an ordinary partnership, any partner can bind his coparceners by debts incurred in the ordinary course of the partnership business (s 19, Indian Partnership Act 1932). Also see § 240.

(iv) *Extent of liability for debts.*—In case of an ordinary partnership, it is not only the share of each partner in the partnership property which is liable for the payment of the partnership debts, but the separate property of each partner is also liable. In the case of debts contracted by a manager, in pursuance of his implied authority in the ordinary course of the family business, there is a distinction between the liability of a manager and the liability of his coparceners. The manager is liable not only to the extent of his share in the joint family property, but being a party to the contract, he is liable personally, that is to say, his separate property is also liable, However, as regards the other coparceners, they are liable only to the extent their interest in the family property, unless, in the case of adult coparceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality only to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or one

98 *Nanchand Gangaram v Sadalge* AIR 1976 SC 835, 842.

99 *Ramlal v Laksmichand* (1861) 1 Bom HC App Li; *Bemola v Mohun* (1880) 5 Cal 792; *Rampartab v Foolibai* (1896) 20 Bom 767, 777–79; *Sakrabhai v Maganlal* (1902) 26 Bom 206, 215; *Morrison v Verschayle* (1901) 6 CWN 429; *Ram Krishna v Ratan Chand* (1931) 58 IA 173, 53 All 190, 132 IC 613, AIR 1931 PC 136, *Bishen Singh v Kidar Nath* (1921) 2 Lah 159, 62 IC 800, AIR 1921 Lah 61; *Mt Champa v Official Receiver, Karachi* (1934) 15 Lah 9, 144 IC 636, AIR 1933 Lah 901.

1 *Ram Nath v Chiranji Lal* (1935) 57 All 605 (FB), 155 IC 136, AIR 1935 All 221.

2 *Krishna v Krishnasami* (1900) 23 Mad 597, 600.

3 *Gokal Chand v Hukam Chand-Nath Mal* (1921) 48 IA 162, 174, 2 Lah 40, 52, 60 IC 379, AIR 1921 PC 35; *Chalamayya v Varadayya* (1899) 22 Mad 166; *Samalbhai v Someshwar* (1881) 5 Bom 38; *Sakrabhai v Maganlal* (1902) 26 Bom 206, 215, FB; *Baldeo v Bobarak* (1902) 29 Cal 583; *Gokal v Amarchand* (1907) 9 Bom LR 1289; *Jabarmal v Chetram* (1915) 39 Bom 715, 28 IC 538, AIR 1915 Bom 115; *Shiv Bhagwan v Onkarmal* (1952) 54 Bom LR 330, AIR 1952 Bom 365; *Shamrao v Sarasvatibai* AIR 1954 Nag 38, (1953) Nag 364; *Shiv Charan Das v Hari Ram* (1936) 17 Lah 395, 170 IC 418, AIR 1937 Lah 247; *VRCTVR Chettiar v CAPC Chettiar* (1936) 14 Rang 122, 162 IC 184, AIR 1936 Rang 160; *Rm LMLU Alagammal Ashi & ors v Vr PLM Palaniappa Chetiar & ors* (1940) Mad 1012, AIR 1940 Mad 580; *Kishan Gopal v Suraj Mal* AIR 1964 Raj 218.

which they have subsequently ratified;[3] and, in the case of minor coparceners, unless the contract has been ratified by them on attaining majority.[4]

(iva) *Liability for torts.*—The sons who inherited a mining lease from their father were held liable for damages to the buildings above the mine, caused by the working of the mine by the father, but only to the extent of effects of the joint family in their hands.[5]

(v) *Minors.*—In the case of an ordinary partnership, where a partner is a minor, his share alone in the partnership property is liable for the partnership debts.[6] His separate property is not liable, unless he accepts the partnership on attaining the age of majority (s 30, Indian Partnership Act 1932). The same rule applies to the case of minor coparceners, ie, the manager can pledge the family property including the minor's interest therein for the purposes of the family business.[7] However, the minor is liable to the extent only of his interest in the family property;[8] his separate property is not liable for the payment of debts contracted by the manager, unless the minor accepts the partnership on attaining majority.[9]

(2) *New business.*—In *Sanyasi Charan Mandal v Krishnadhan Banerji*,[10] a Dayabhaga case, the Judicial Committee held that the manager of a joint family cannot impose upon a minor member of the family, the risk and liability of a new business started by himself and other adult members. On the ground that the reasons for the decision equally govern Mitakshara families as well, this principle has been applied to them by the Indian High Courts,[11] and so also, in *Benares Bank Ltd v Hari Narain*,

4 See cl (v) and § 240 (4). *Re Haroon Mahomed* (1890) 14 Bom 189; *Official Assignee v Palaniappa* (1918) 41 Mad 824, 49 IC 220, AIR 1919 Mad 690. See also cases cited in the preceding note.

5 *Ambalal Khora v Bihar Hosiery Mills Ltd* (1937) 16 Pat 545, 172 IC 19, AIR 1937 AP 657.

6 The share of which s 247 of the Contract Act speaks, is no more than a right to participate in the property of the firm after its obligations have been satisfied—*Sanyasi Charan Mandal v Krishnadhan Banerji* (1922) 49 IA 108, 49 Cal 560, 67 IC 124, AIR 1922 PC 237.

7 *Ramlal v Lakshmichand* (1861) 1 Bom HC App Li; *Rangunathji v Bank of Bombay* (1910) 34 Bom 72, 2 IC 173; *Sanka v Bank of Burmah* (1911) 35 Mad 692, 694–96, 11 IC 79; *Sanyasi Charan v Asutosh* (1915) 42 Cal 225, 233, 26 IC 836, AIR 1916 Cal 482.

8 *Chockalingam v Muthukaruppan* (1938) Mad 1019, AIR 1938 Mad 849.

9 See note below, 'Minor's Share'. *Bishambhar v Fateh Lal* (1907) 29 All 176; *Joykisto v Nittayanund* (1878) 3 Cal 738; *Rampartab v Foolibai* (1896) 20 Bom 767, 777–79 (business inherited by a minor carried on by his guardian); *Lutchmanen v Siva* (1899) 26 Cal 349; *Nunna v Chidaraboyina* (1903) 26 Mad 214.

10 (1922) 49 IA 108, 49 Cal 560, 67 IC 124, AIR 1922 PC 237.

11 *Vithal v Shivappa* (1923) 47 Bom 637, 72 IC 659, AIR 1923 Bom 265; *Inspector Singh Karak Singh* (1928) 50 All 776, 112 IC 881, AIR 1928 All 403; commented upon in *Jagat Narain v Mathura Das* (1928) 50 All 969, 116 IC 484, AIR 1928 All 454;

continued on the next page

by the Judicial Committee. [12]

Where a father was carrying on brokerage business in agricultural commodities and the son was doing similar business, though the commodities were not exactly identical, it was held that the latter business was not a new business.[13] The extension of a joint family business for the manufacture of articles, *ejusdem generis* with the articles previously manufactured, ie, when the class of persons who manufacture the one usually manufacture the other, is not a new business.[14] A family carrying on trade in a particular commodity may legitimately extend it to another commodity, and whether such extension would amount to a new business or not depends upon the nature or type of the extended business and not on the particular commodities it deals with. If the family is a trading family and the extended business is not more hazardous or speculative than the one previously existing, it may not be regarded as a new business.[15] Even where the father is the manager, he is not entitled to mortgage the joint family estate in order to provide money for one of his sons to start a new business. Such a mortgage is wholly invalid against minor coparceners.[16]

Some of the senior members of a joint family took a lease of some lands and later on executed a mortgage as security for the payment of rent. Default having been made in the payment of the rent, the mortgagee brought a suit on the mortgage and in execution of the decree made in the suit, some of the property was purchased by an auction purchaser. The latter having sued for possession, it was held that as the transaction was a prudent venture and for the benefit of the family, the mortgage was binding on the family.[17]

As regards the adult members, it has been held that the manager cannot impose even upon them, the risk and liability of a new business

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Biswanath Singh v Kayastha Trading Corporation (1929) 8 Pat 450, 119 IC 405, AIR 1929 AP 422. But see *Official Assignee v Palaniappa* (1918) 41 Mad 824, 835, 49 IC 220, AIR 1919 Mad 690; *Ram Nath v Chiranji Lal* (1935) 37 All 605, 155 IC 136, AIR 1935 All 221; *Jagmohan v Ranchhoddas* (1945) Nag 892.

12 *Benares Bank Ltd v Hari Naraian* (1932) 54 All 564, 59 IA 300, 137 IC 781, AIR 1932 PC 182; *Ram Krishna v Ratan Chand* (1931) 58 IA 173, 53 All 190, 132 IC 613, AIR 1931 PC 136.

13 *Bhagwan Singh v Beharilal* (1938) Nag 221, 172 IC 43, AIR 1937 Nag 237.

14 *Bahadursingh v Girdharilal* (1942) Nag 543, 200 IC 166, AIR 1942 Nag 39. But starting of a flour mill cannot be regarded as extension of an old money lending business—*Makhanlal v Harnarain* AIR 1960 MP 56.

15 *Desu Rattamma v Narayanarao* (1947) Mad 567, AIR 1947 Mad 252; *Agency Lal v Agency Lal* AIR 1951 All 400; *Prasanjit v United Commercial Bank* AIR 1979 Pat 151.

16 *Gurmukh Singh v Shiv Ram* (1936) 17 Lah 53, 157 IC 416, AIR 1935 Lah 482; *Ganesh Prasad Singh v Sheogobind Sahoo* (1937) 16 Pat 719, 173 IC 242, AIR 1938 AP 40.

17 *Chhoty Lal Chaudhury v Dalip Narain Singh* (1938) 17 Pat 386, AIR 1938 AP 562.

started by him,[18] unless the business is started or carried on with their consent, express[19] or implied,[20] or though started by the manager only, joint funds were afterwards utilised for the business to the advantage of the joint family or its continuance was found beneficial to the family,[21] or it was adopted as a family business by the other members who continued to enjoy the benefits of the same.[22] The rule laid down in *Benares Bank Ltd v Hari Narain*,[23] and in other cases of a like nature cannot apply to a new business started by the sole surviving coparcener of a Mitakshara family. Such business becomes from its origin, a family business and the minor members of the family born subsequently are not competent to say that the risk of the new business cannot be imposed on them. The risk and liability having been already taken by the family, the newcomers must share them along with other assets and liabilities of the family.[24]

It has been held in Madras, that where a joint family consists of father and sons, and the father starts a new trading business, the business must be deemed to be ancestral, and the sons, whether they be adults or minors, are liable for debts incurred in the business to the extent of their shares in the joint family property. [25] Further, that even if such business be not regarded as ancestral, the son's shares are liable for the debts incurred by the father in the business, and this liability arises out of the pious obligation of the sons to pay their father's debts. If this decision is deemed to be authority for the proposition that a new business, started by a father is ancestral for all purposes as regards his sons, then, it is submitted it is no longer good law.[26] When the sons merely extend some help to the father in business, it does not become joint family business,

18 *Babu Lal v Babu Lal* (1941) All 343, 195 IC 571, AIR 1941 All 194; (1941) ALJ 217; *Arakkal Rohini v AK Sethumadhavan* AIR 1978 Ker 119 (FB); *Sankaranarayanan v Official Receiver* AIR 1977 Mad 171.

19 *Tammireddi v Gangireddi* (1922) 45 Mad 281, 70 IC 337, AIR 1922 Mad 236; *Nathubhai v Chhotubhai* AIR 1962 Guj 68.

20 *Mahabir Prasad v Amla Prasad* (1924) 46 All 364, 97 IC 517, AIR 1924 All 379 (consent of adults to be presumed, if family maintained out of the profits).

21 *Ram Nath v Chiranji Lal* (1935) 57 All 605, 15 IC 136, AIR 1935 All 221.

22 *Budh Karam Chaukhani v Thakur Prasad Shah* (1942) 1 Cal 19, AIR 1942 Cal 311.

23 See above.

24 *Angney Lal v Angney Lal* AIR 1951 All 400; *Canara Banking Corp Ltd v SI Bank* AIR 1958 Mad 132; *Seeramaraju v Pullam Raju* AIR 1963 AP 403; Contra *Ganpatrai v Sukhdeoram* AIR 1938 Pat 335.

25 *Venkatasami v Palaniappa* (1929) 52 Mad 227, 117 IC 716, AIR 1929 Mad 153 (suit on mortgage and as to a portion of the amount, there was no antecedent debt). Reference may be made to *Shridharan v Murthi Bros* (1976) 1 Mad LJ 100 (new cotton business started by father, binding on sons).

26 *Benares Bank Ltd v Hari Narain* (1932) 53 IA 300, 54 All 564, 137 IC 781, AIR 1932 PC 182.

but after the sons grow up, the father and sons by their conduct, may make it apparent that it has become a joint family business.[27]

(3) *Partnership with outsiders.*—The principle is now well established that a joint Hindu family as such cannot be a partner in a firm, but it is competent to the manager or *karta* acting on behalf of the family to enter into a valid partnership with a stranger or with the *karta* of another family.[28] In *Kshetra Mohan v EPT Commissioner*,[29] the Supreme Court pointed out that when two *kartas* of different families constituted a partnership, the other members of the families do not become partners, though the *kartas* are accountable to their families. Not all members of the joint family, but only such of its members as have, in fact, entered into partnership with the stranger, become partners.[30] The manager, no doubt, is accountable to the family, but the partnership is exclusively one between the contracting members including the manager and the stranger. Such a partnership would be governed by the provisions of the Indian Partnership Act 1932, with the result that if the manager died, the partnership would be dissolved on his death. The surviving members of the family can neither claim to continue as partner with the stranger,[31] nor can they institute a suit for dissolution of the partnership, their position being no higher than that of sub-partners.[32] Nor can the stranger partner sue the surviving members as partners for the manager's share of the loss. His only remedy is to proceed against the manager's estate, if any.[33]

When a manager of a trading joint family enters into a partnership with strangers for the purpose of carrying on the same kind of business, the other members are liable to the extent of their interest in the family property.[34] On a partition between the members of a joint family, of which the manager is a partner with a stranger, the manager is bound

27 See note below, 'New Business'. *Kailashi v Shanker* (1945) All 135; *C Sundaram v Rukmani* AIR 1975 Mad 83, 83; *R Selvaraj v R Radhakrishna* AIR 1976 Mad 156.

28 *Ramlal v Lakhmichand* (1861) 1 Bom HC App Li; *Bhagwan Singh v Beharilal* (1938) Nag 221, 172 IC 43, AIR 1937 Nag 237.

29 *Commissioner of IT v Govindram Sugar Mills* AIR 1966 SC 24.

30 *Pichappa Chettiar v Chockalingam Pillai* (1934) 36 Bom LR 976 (PC), 150 IC 802, AIR 1934 PC 192; *Kshetra Mohan v EPT Commissioner* [1954] SCR 268, AIR 1953 SC 516; *Nawaneetdas v Gordhandas* AIR 1955 MB 113, 116; *Ramakrishna Transports v CIT* AIR 1968 AP 34.

31 *Sokkanadha v Sokkanadha* (1905) 28 Mad 344; *Commr of IT v Govindram Sugar Mills* AIR 1966 SC 24.

32 *Gangayya v Vankataramaih* (1918) 41 Mad 454, 43 IC 9, AIR 1918 Mad 37. As to the rights of the surviving coparceners, in case of death of the *karta* partner, as his representatives to recover the share of the deceased—*Gopi Nath v Satish Chandra* AIR 1964 All 53.

33 *Kharidar Kapra Co v Daya Kishan* (1921) 43 All 116, 58 IC 765, AIR 1921 All 306.

34 *Chocklingam v Muthukaruppan* (1938) Mad 1019, AIR 1938 Mad 849; *Tulsiram v Anni Bai* AIR 1963 Ori 11.

to realise his share of the partnership assets for the benefit of the family, and for distribution among the members thereof.[35] However, this, it is conceived, he cannot do until the term of the partnership has expired.

There can be a valid partnership between the *karta* of a joint Hindu family, as representing the undivided family on the one hand, and a member of the family in his individual capacity on the other. In such a case, the individual member retains his interest in the family property, and at the same time, enjoys the fruits of his investment and the benefit of his separate property, and for this purpose, it is not necessary for him to separate himself from the family.[36]

(3A) *Partnership between members of an undivided family.*—It is settled law that members of an undivided Hindu family can form a partnership without disturbing their status as members of the joint family and without disrupting the same just as they can acquire separate property or carry on independent business for themselves.[37]

(4) *Presumption as to business carried on by a member.*—There is no presumption that a business carried on by a member of a joint family is a joint family business. Even if a coparcener starts a business on the joint property, with the consent of other coparceners, and the other coparceners do not make any capital contribution to such business, it is held to be not a business started by the coparceners.[38] Nor is there any presumption that business carried on by such a member in partnership with a stranger in joint family business.[39] There is no presumption that a business standing in the name of or started by even a manager is joint family business,[40]

35 *Gangayya v Vankataramaiah* 41 Mad 454, 43 IC 9, AIR 1918 Mad 37; *Krishnan v Rangachari* AIR 1965 Mad 340 (modus operandi of granting relief).

36 *Lala Lachhman Das v Commr of Income-tax* (1947) 74 IA 277; *Chandrakant Manilal Shah v CIT, Bombay* AIR 1992 SC 66.

37 For instance, see *Ratanchand v IT Commissioner* AIR 1985 SC 1572; *Chandrakanta Manilal Shah v CIT Bombay* AIR 1992 SC 66 (following *CIT v Sir Hukumchand* AIR 1971 SC 383).

38 *Vadilal v Shah Khusahal* (1903) 27 Bom 157; *Re Haroon Mahomed* (1890) 14 Bom 189. See *Gray v Walkar* (1913) 40 Cal 523, 18 IC 753; *Gokal Chand v Hukam Chand-Nath Mal* (1921) 48 IA 162 171, 2 Lah 40, 49, 60 IC 379, AIR 1921 PC 35; *Chattanatha v Ramchandra* AIR 1955 SC 799; *Srinibas v Hariran* AIR 1950 Assam 195; *Parikshita v Sita Dei* AIR 1971 Ori 204; *Satchidananda Samanta v Ranjankumar* AIR 1992 Cal 222 (coparcener starting business on joint property with consent of coparceners—no capital contribution by others—not coparcenary business).

39 *Marza Mal v Rameshar* (1929) 51 All 827, 118 IC 145, AIR 1929 All 536; *Mangilal v IT Commissioner* AIR 1955 AP 366.

40 *Chattanatha v Ramchandra* [1952] 2 SCR 477, AIR 1955 SC 799 (it makes no difference in this respect that the manager is the father); *Naim Singh v Tikam Singh* AIR 1955 All 388; *Narayana Raju v Chamaraj* AIR 1968 SC 1276; *Lakshmi v Meenakshi* AIR 1974 Mad 294; *Dhandappa Rudrappa Hampali v Renukappa* AIR 1993 Kant 149.

but if the joint family funds are utilised in opening a new branch, then the new branch will be regarded as part of the old business.[41]

Minor's Share

The reason why even a minor's share is liable for payment of debts contracted by a manager in the course of the family business, is that, if it were otherwise, property in a family, firm which is recognised by the Hindu law to be a valuable inheritance, would become practically valueless to the family wherever a minor was concerned. The reason being that no one would deal with a manager, if the minor were to be at liberty on coming of age to challenge the trade transactions which took place during his minority.[42]

New Business

In *Sanyasi Charan Mandal v Krishnadhan Banerji*,[43] a Dayabhaga case, the joint family consisted of brothers and the new business was started by the adult brothers. In the course of the judgment, their Lordships said:

> The distinction between an ancestral business and one started like the present after the death of the ancestor as a source of partnership relations is patent. In the former case, these relations result by operation of law from a succession on the death of an ancestor to an established business, with its benefits and obligations. In the other, they rest ultimately on contractual arrangement between the parties.

The decision proceeds on the ground that a minor could not become a partner by contract (s 11, Indian Contract Act 1872), though he might be 'admitted to the benefits of the partnership' (s 30, Indian Partnership Act 1932), and since a new business could rest only on contractual arrangement, a minor could not be a partner in such business.

Whether a business is a new business is in each case a question of fact. The fact that it had ceased to be carried on for a few years in the grandfather's lifetime, does not make it a new business, if it is started by the father again.[44] Where a joint family carries on business in partnership with a stranger in a particular name, and the stranger retires, and on his retirement, the family carries on the same business in another name, it does not make it a new business.[45] Where the family never exported any

41 See § 240 and notes thereto. *Ram Nath v Chiranji Lal* (1935) 57 All 605, 155 IC 136, AIR 1935 All 221.

42 *Ramlal v Lakmichand* (1861) 1 Bom HC App Li Lxxii, Lxxiii.

43 (1922) 49 IA 108 114–15, 49 Cal 560, 567, 568, 67 IC 124, AIR 1972 PC 237.

44 *Damodaram v Bansilal* (1928) 51 Mad 711, 111 IC 297, AIR 1928 Mad 566.

45 *Ram Krishna v Ratan Chand* (1931) 58 IA 173, 53 All 190, 132 IC 613, AIR 1931 PC 136.

commodity to foreign countries, the starting of a business for exporting goods to foreign countries like America was held to be a new business and not an extension of the existing one.[46] Where, however, the father carried on business in moneylending, cloth and corn, and on his death, the business was discontinued for a while and later on the guardian of the infant son started business in cloth and *kirana* on behalf of the minor, it was held that the family being a trading family, this could be regarded as an extension of the existing business and not the starting of a new one.[47]

Trading Family: *Kulachara*

A distinction has to be drawn between a trading and a non-trading family. In the former case, where the business started by a member is not speculative, then the shares of his sons will be liable for the debts incurred by their father. Heredity in business is the touchstone and not necessarily the difference or novelty in the nature of the commercial undertaking.[48]

§ 234A. NOTICE OF SEVERANCE IN STATUS

Prima facie, when there is division in status of members of a joint Hindu family, no matter how brought about, there is no obligation on any member to publish a notice of such division. A person dealing with the manager of a joint family does so with the knowledge of the limitations on his powers. In *Nanchand Gangaram v Sadalge*,[49] the Supreme Court examined the relevant decisions on the subject and observed:

> It is, therefore, the duty of the creditor to ascertain after due inquiry whether the person making the acknowledgement still holds his representative capacity as *karta* of the family...if the creditor fails to make an inquiry and satisfy himself about the capacity of the executant to represent the family at the time of making the acknowledgement, he does so at his own peril. Disruption of the joint family status...puts an end to the representative capacity of the *karta* and any acknowledgement of a debt made by him after such disruption cannot save the creditor's claim from becoming time-barred against the other members.

46 *Desu Rattanma v Narayanarao* (1947) Mad 567, AIR 1947 Mad 252. For other instances, see *Shivramsa v Gurunathsa* (1956) 58 Bom LR 239.

47 *Angney Lal v Angney Lal* AIR 1951 All 400. For a discussion on the case-law on the subject; *Kulitalai Bank v Nagamanickam* AIR 1955 Mad 670, 673–75.

48 *Kumbakonam Bank v Shanmugam* AIR 1956 Mad 306, 308, 309; *Canara Banking Corporation Ltd v South Indian Bank Ltd* AIR 1958 Mad 132; *Parnachandrarao v Mallikharjuna Rao* AIR 1961 AP 247. Also see *Debilal v Damodar Das* AIR 1963 AP 270.

49 AIR 1976 SC 835, 843.

In such a case, the members of the joint family, who have done nothing to invite the operation of the rule of estoppel, cannot be held liable simply on the ground of absence of notice.[50]

III. Management and Enjoyment of Coparcenary Property

§ 235. RIGHTS OF COPARCENERS

(1) *Community of interest and unity of possession.*—No coparcener is entitled to any special interest in the coparcenary property, nor is he entitled to exclusive possession of any part of the property.[51] As observed by their Lordships of the Privy Council, 'there is community of interest and unity of possession between all the members of the family'.[52] This has been reiterated by the Supreme Court in numerous decisions.

(2) *Share of income.*—A member of a joint Mitakshara family cannot predicate at any given moment what his share in the joint family property is. His share becomes defined only when a partition takes place.[53] As no member, while the family continues joint, is entitled to any definite share of the joint property, it follows that no member is entitled to any definite share of the income of the property.[54] The whole income of the joint family property must be brought, according to the theory of an undivided family, to the common chest or purse, and there dealt with according to the modes of enjoyment by the members of an undivided family.[55]

It is competent to the manager to allot to any individual member, a portion of the family property to enable him to maintain himself out of its income. Any savings out of the income and investment of such savings will be the separate property of the member.[56]

(2a) *Joint possession and enjoyment.*—Each coparcener is entitled to joint possession and enjoyment of the family property. If any coparcener is excluded from joint possession or enjoyment, he is entitled to enforce his right by a suit. He is not bound to sue for partition.

There is no reason why a Hindu coparcener, who is excluded from the enjoyment of his joint rights, should be compelled at the instance of

50 The Supreme Court in the above case overruled the decision in *Kashiram v Bhaga* AIR 1945 Bom 511.

51 *Naranbhai v Ranchod* (1902) 26 Bom 141, 144.

52 *Katama Narbiar v Rajah of Shivagunga* (1863) 9 MIA 539, 543, 615.

53 *Appovier v Rama Subba Aiyan* (1866) 11 MIA 75, 89.

54 *Ganpat v Annaji* (1899) 23 Bom 144.

55 (1866) 11 MIA 75, 89.

56 *Bengal Insurance and Real Property Co Ltd v Velayammal* (1937) Mad 990, AIR 1937 Mad 571, 170 IC 279; *Ramayya Goundan v Kolanda Goundan & ors* (1940) Mad 322, AIR 1939 Mad 911, (1939) 2 MLJ 639; *Latchandhora v Chinnavadu* AIR 1963 AP 31 (income from property allotted to branches of the family for maintenance). Reference may also be made to *Kumaraswamy v Subba Gounder* AIR 1977 Mad 353.

the other coparceners and against his will to break up the joint family by bringing a suit for partition.[57] Where a coparcener is excluded from joint possession, the proper decree to pass is to declare his right possession, and further, to direct that he be put into joint possession. A mere declaratory decree is of no use.[58]

Unauthorised Acts

A coparcener has no right without the consent of the other coparceners, to erect a building on land belonging to the joint family or any portion thereof, so as to alter materially the condition of the property or to do anything with the property which would interfere with the joint enjoyment thereof. If he does so, he may be restrained by an injunction.[59] However, the remedy by way of injunction is not appropriate, if the act done is of such a character that the condition of the property is not materially altered thereby, as where a well is erected which does not interfere with the enjoyment of the property.[60] A contract of suretyship entered into by a coparcener, other than the manager, is void and cannot be ratified.[61]

Formation of Company

A transaction of forming a company, to hold the property of the family, with the consent of all adult coparceners, can be binding on all coparceners, if it can be shown to be to preserve the family property and for the benefit of the family.[62]

(3) *Exclusion from joint family property.*—Where a coparcener is excluded by other coparceners from the use or enjoyment of the joint property or any portion thereof, and the act of the defendants amounts to an ouster of the plaintiff from his enjoyment of the property, the court may, by an injunction, restrain the defendants from obstructing the plaintiff in the enjoyment of the property.[63]

Clear and strong evidence would be required before a person can be said to have suffered his own exclusion and acquiesced in the continuation of it without asserting his rights. Once a party establishes his claim to a share in the joint family property, the onus is on the opposite party

57 (1902) 26 Bom 141; *Ramchandra v Damodhar* (1896) 20 Bom 467.

58 (1902) 26 Bom 141, 145.

59 *Sheopersad v Leela Singh* (1874) 12 Beng LR 188; *Guru Das v Bijaya* (1898) 1 Beng LR AC 108; *Vithoba v Hariba* (1869) 6 Bom HCA 54; *Shadi v Anup Singh* (1890) 12 All 436; *Najju Khan v Imtiaz-ud-din* (1896) 18 All 115; *Mathu v Ammalu* AIR 1993 Ker 272.

60 *Biswambhar v Rajaram* (1869) 3 Beng LR Ap 67.

61 *Malak Chand v Hira Lal* (1936) 11 Luck 449, 157 IC 945, AIR 1935 Ori 510.

62 *Moraka Properties v Beharilal Morarka* AIR 1978 SC 300.

63 *Anant v Gopal* (1895) 19 Bom 269; *Soshi v Ganesh* (1902) 29 Cal 500, (1899) 23 Bom 144.

to establish exclusion to the knowledge of the claimant for the requisite period of limitation.[64]

Article 127 of the Indian Limitation Act 1908, provides a period of 12 years for a suit by a person excluded from joint family property to enforce a right to share therein from the date when the exclusion becomes known to the plaintiff. The fact that a coparcener voluntarily resides separately from the family and does not ask to be maintained by the family, does not amount to an exclusion from the joint family property,[65] nor does a refusal to partition, where there is no denial of the right to a partition.[66]

Illustrations

(a) *A* and *B* are member of a joint family. *A* prevents *B* from using a door or a staircase, which is the only means of access to the rooms in *B*'s occupation. *A*'s act amounts to ouster. He may, therefore, be restrained by an injunction from disturbing *B* in the use of the door or staircase.[67]

(b) *A* and *B* are members of joint family which owns a shop in Poona. *A* prevents *B* from entering the shop, inspecting the account books, and taking part in the management of the shop. *A* may be restrained by an injunction from excluding *B* from the joint possession and management of the shop.[68]

(4) Every coparcener in an undivided family is entitled to be maintained out of the family estate (see further § 543).

(5) *Right to enforce partition.*—Subject to the provisions of § 307, every adult coparcener is entitled to enforce a partition of the coparcenary property.

(6) *Alienation of undivided interest.*—No coparcener can dispose of his undivided interest in coparcenary property by gift (§ 258). Nor can he alienate such interest even for value except in Bombay, Madras and Madhya Pradesh (§§ 259–60).

(7) *Right of survivorship.*—Where a coparcener dies before partition of the coparcenary property, his undivided interest in the property devolves, not by succession upon his heirs, but by survivorship upon the surviving coparceners.[69] The modifications engrafted on this rule have been indicated in § 229, and the note at the beginning of this chapter.

64 *Marudanayagam v Sola Pillai* AIR 1965 Mad 200 and the cases cited therein; *Purna Bai v Ranchhoddas* AIR 1992 AP 270 (exclusion has to be proved).

65 *Sitalprasad v Ramprasad* (1944) Nag 17.

66 *Radhoba v Aburao* (1929) 56 IA 316, 53 Bom 699, 118 IC 1, AIR 1929 Cal 231. Now see art 110 of the new Limitation Act 1963.

67 *Anant v Gopal* (1895) 19 Bom 269; *Soshi v Ganesh* (1902) 29 Cal 500.

68 *Ganpat v Annaji* (1899) 23 Bom 144.

69 See § 229. *Katama Natchiar v Raja of Shivagunga* (1863) 9 MIA 539, 543, 615.

(8) *Manager.*—A coparcener, who is a manager has certain special powers of disposition over the coparcenary property which no other coparcener has (§§ 237–51).

Partition and Survivorship

The right to enforce a partition and the right to take by survivorship go hand in hand. In fact, as observed by the Privy Council, 'it is the right to partition which determines the right to take by survivorship'.[70]

Injunction

In disputes between members of a joint Hindu family relating to joint property, the exercise of the court's jurisdiction to grant relief by injunction should be confined to acts of waste, illegitimate use of the joint property and acts amounting to ouster.[71]

Joint Possession

The members of a joint family may agree between themselves without coming to a partition, to occupy, for their convenience, separate portions of the joint property. In fact, this is the general practice. It amounts to exclusive possession of the separate portion enjoyed by each member by the consent of all; it may be terminated and a completely new arrangement may be made, at any time, by the members of the family, if they think fit to do so.[72]

§ 236. MANAGER

Property belonging to a joint family is ordinarily managed by the father or other senior member for the time being of the family. The manager of a joint family is called *karta.*[73]

In *Union of India v Sree Ram,*[74] the Supreme Court observed: 'We are not prepared to express any definite opinion on the question whether there can be two *kartas* of a joint Hindu family'. It was also observed that the very idea of there being two *kartas* did not appear, prima facie, consistent with the concept of a *karta.* Two persons may look after the affairs of the joint family on the basis of the members of the family, clothing them with authority to represent the family, but that would not make them *kartas* of the family. Their power to represent the family would depend on the terms of the authority conferred on them.

70 *Venkayyamma v Venkataramayyamma* (1902) 25 Mad 678, 687.
71 *Anant v Gopal* (1985) 19 Bom 269.
72 *Sheopersad v Leela Singh* (1874) 12 Beng LR 188, 195.
73 *Suraj Bunsi Koer v Sheo Persad* (1880) 5 Cal 148, 165, 6 IA 88.
74 *Union of India v Shree Ram* AIR 1965 SC 1531.

It has been held by the Nagpur High Court, that a mother, though not a coparcener in the joint family, was in the absence of adult male members competent to act as manager of the family. Her acts as manager, if they are for legal necessity or of benefit to estate, would be binding on the joint family.[75] The Madras High Court and some other High Courts did not agree with the view that the mother can be regarded as a *karta*.[76] A wife cannot act a *karta* of the joint family on ground of her husband's absence.[77]

The Supreme Court has now held that only a coparcener can be the *karta* manager of a joint family. Since a widow or a mother is not a coparcener, she cannot be the manager of a joint family.[78] She cannot represent the family in a suit.[79] Since a widow cannot act as a *karta*, any alienation by the widow of coparcenary property is not permissible[80]

A minor can act as a *karta* of the joint family, through his natural guardian, his mother, where father's whereabouts are not known at the time.[81]

The joint and undivided family is the normal condition of the Hindu society. An undivided Hindu family is ordinarily joint not only in estate, but also in food and worship; therefore, not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members or by the manager to whom they have expressly or by implication delegated the task of regulation.[82]

So long as the members of a family remain undivided, the senior member of the family is entitled to manage the family properties; 'including even charitable properties'[83] and is presumed to be the manager until the contrary is shown.[84]

75 *Pandurang v Pandurang* (1947) Nag 299; *Commr of Income-tax v Luxminarayan* (1948) Nag 775.

76 *Radha Ammal v IT Commissioner* (1950) 1 MLJ 399, AIR 1950 Mad 538; *Rakhambir v Sitabai* (1952) Bom 455, AIR 1952 Bom 160, (1932) 54 Bom LR 55; *Maguni Padhano v Lokanandibi* AIR 1956 Ori 1. In a later case, it has been held by the Orissa High Court that under certain circumstances, a mother can exercise the posers of a manager; *Budhi Jena v Dhabai Naik* AIR 1958 Ori 7; *Lalta Devi v Basdeo* 78 All LJ 218; *Peddama v Gurunadham* (1973) 2 AP LJ 56.

77 *Sheogulam v Kisun Chaudhuri* AIR 1961 AP 212. But see *Budhi Jena v Dhobai Naik* AIR 1958 Ori 7 and also see *Trutia v Basudev Singh* AIR 1964 Ori 123.

78 *Commissioner of Income Tax v Govindram Sugar Mills* AIR 1966 SC 24. Also see *Kanji v Parmanand* AIR 1992 MP 208 and *Manglal v Jayabai* AIR 1994 Kant 276.

79 *Sahdeo Singh v Ramchabila Singh* AIR 1978 Pat 258.

80 *Kamala Kumari v Harekrishna* AIR 1998 Ori 196.

81 *Jaggernath Singh v Narayan* AIR 1965 AP 300.

82 *Sri Raghunada v Sri Brozo Kishoro* (1876) 1 Mad 69 81, 3 IA 154, 191.

83 *Thandavaraya v Shunmugam* (1909) 32 Mad 167, 169, 2 IC 34.

84 *Varada Bhaktavatsaludu & anor v Domojipurarn Venkata Narasimbha Rao* (1940) Mad 752, 191 IC 369, AIR 1940 Mad 530; *A Kunjipokkarukutty v A Ravunni* AIR 1973 Ker 192. Also see *Sarangapane v Parthiben* AIR 1992 Mad 203 (alienation by brother manager).

However, the senior member may give up his right of management, and a junior member may be appointed manager.[85] On the death of *karta*, the seniormost male adult member may be brought on record in execution proceedings.[86]

A son has no right against the will of his father to occupy any specific portion of the family property and if he does so, the father may sue to eject him from it.[87] If the son does not approve of the management of the family property by the father, his remedy is to ask for a partition of the property against the father.

It is not to be supposed that a member of a joint family, who is a manager, has a large proprietary interest or has large rights to enjoy the joint property than any other member. The only respect in which he has a superior right is that he has a power of disposition for causes recognised as just and proper under Hindu law of the whole family property, including the interest of the junior members.[88]

It is well-established that at times the other members of the family participate in the management of a joint family business. In any such case, it may be said that there can be more than one manager and the acts of each of them would be binding on the joint family including the minor members.[89]

§ 237. MANAGER'S POWER OVER INCOME

The manager, as the head of the family, has control over the income and expenditure, and he is the custodian of the surplus, if any. So long as he spends the income for the purposes of the family, he is not under the same obligation to economise or save as a paid agent or trustee would be. If he spends more than the other members approve, their remedy is to demand a partition.[90] On the other hand, he is liable to make good to them their shares of all sums, which he has misappropriated or which he has spent for purposes other than those in which the joint family was interested.[91]

The family purposes referred to above are the maintenance, education, marriage, *shraddha* and other religious ceremonies of the coparceners and of the members of their respective families. In taking accounts at the

85 *Mudit v Ranglal* (1902) 29 Cal 797. Also see *Narendrakumar v Commissioner of IT* AIR 1976 SC 1953.

86 *Chandradip v Jagannath* AIR 1978 Cal 157.

87 *Baldeo Das v Sham Lal* (1876) 1 All 77.

88 See § 242. *Nunna v Chidaraboyina* (1903) 26 Mad 214, 221; *Chindambaram v Subrmanian* AIR 1953 Mad 492, (1952) 2 MLJ 524.

89 *Chunnilal v Kalu* AIR 1966 Raj 208.

90 *Bhowani v Jaggernath* (1909) 13 CWN 309, 3 IC 241; *Tara Chand v Reeb Ram* (1866) 3 Mad HC 177.

91 *Abhaychandra v Pyari Mohan* (1870) 5 Beng LR 347, 349.

time of partition, no charge is to be made against any coparcener, because in consequence of his having a larger family to maintain than others, a larger share of the joint income was spent on his family. Such expenditure is considered to be the legitimate expenditure of the whole family.[92]

Manager Not an Agent

A manager is not an agent within the meaning of Chapter X of the Indian Contract Act 1872,[93] or of cl 12 of the Letter Patent.[94] His position is more like that of a trustee. However, it is not precisely the same as that of a trustee, for if it were so, he would be found to economise and save, as a trustee is, which, it has been held, he is not.[95]

§ 238. MANAGER'S LIABILITY TO ACCOUNT ON PARTITION

(1) In the absence of proof of misappropriation or fraudulent and improper conversion by the manager of a joint family estate, he is liable to account on partition only for assets which he has received not for what he ought or might have received, if the family money had been profitably dealt with.[96] Further, in the absence of any such proof, a coparcener seeking partition in not entitled to require the manager to account for his past dealings with the family property.[97] All that he is entitled to is an account of the family property as it exists at the time he demands a partition.[98]

92 (1870) 5 Beng LR 347, 349.

93 *Muhammad v Radhe Ram* (1900) 22 All 307, 317; *Sirkant Lal v Sidheshwari Prasad* (1937) 16 Pat 441, 170 IC 367, AIR 1937 AP 455.

94 *Annamalai v Marugesa* (1903) 26 Mad 544, 553, 30 IA 220, 228.

95 *Perrazu v Subbarayadu* (1921) 48 IA 280, 287–88, 44 Mad 656, 663, 61 IC 690, AIR 1922 PC 71.

96 (1921) 48 IA 280, 287–88, 44 Mad 656, 663, 61 IC 690, AIR 1922 PC 71; *Laxminarayan v Dinker* (1943) Nag 390, 205 IC 279, AIR 1943 Nag 101; *Ramanathan v Narayanan* (1955) 2 MLJ 414, AIR 1955 Mad 629; *Nepur Kuer v Sheochand* AIR 1961 Pat 57. Also see *Narayanaswami v Ramkrishna* AIR 1965 SC 289; *Appalnarasimha v Mahadevalla* AIR 1967 AP 247 case-law discussed (specific allegations should be made and proved before accounts can be reopened).

97 *Sukhdeo v Basdev* (1935) 57 All 949, 157 IC 1013, AIR 1935 All 594; *Bappu Ayyar v Renganayaki* (1955) 2 MLJ 302, AIR 1955 Mad 394 (onus of proof). Also see *Narayanaswami v Ramakrishna* AIR 1965 SC 289; *Damodar v Banamadi* AIR 1967 Ori 61; *Vishwa Nath v Prem Nath* AIR 1975 J&K 92.

98 *Parmeshwar v Gobind* (1916) 43 Cal 459, 33 IC 190, AIR 1916 Cal 500; *Balakrishna Damodardas v Muthusami* (1909) 32 Mad 271, 3 IC 879; *Damodardas Uttamram* (1893) 17 Bom 271; *Narayan v Nathaji* (1904) 28 Bom 201, 208; *Jugmohandas v Mangaldas* (1886) 10 Bom 528, 560–62, 581; *Konerrav v Gurr* (1881) 5 Bom 589, 595; *Ramnath v Goturam* (1920) 44 Bom 179–83, 54 IC 115, AIR 1920 Bom 236; *Jyotibati v Lakshmeshwar* (1929) 8 Pat 818, 120 IC 770, AIR 1930 AP 1; *Nepur Kuer*

continued on the next page

However, it is open to show that the expenditure which the manager alleges he has incurred, has not in fact been incurred, or that more properties are available for partition than those disclosed by him.[99]

(2) Since the institution of a suit for partition amounts to a severance of joint status, the manager is, from and after the date of such a suit, strictly bound to account for all receipts and expenses, and can take credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income, after deducting such expenses, is to be divided among the coparceners according to their shares.[1]

Form of Decree

As to the form of the decree, see *Jagmohandas v Mangaldas.*[2]

Minor Coparceners and Accounts

A distinction has been drawn in some cases between the rights of those members who were adults and those who were minors during the management, and it has been held that since minors could not be deemed to have consented to the management, they are entitled when they attain majority, to hold the manager liable not only for acts amounting to fraud, but also where the management has been grossly negligent and prejudicial to their interest. The presumption, however, being that in the absence of evidence the property available for partition is such as exists at the date of the suit for partition.[3] This distinction, it is submitted, cannot be sustained on principle. The liability to account must be the same whether the other coparceners were minors or adults during management.[4]

Special Agreement

By a special agreement between the coparceners, the manager may be rendered liable to account on the footing of an ordinary agent.[5]

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v Sheochand AIR 1961 AP 57; *Gopal v Trimbak* AIR 1953 Nag 195, (1953) Nag 130 (manager liable to account as a trustee from date of severance); *Ramanathan v Narayanan* AIR 1955 Mad 629.

99 See § 305. *Tammireddi v Gangireddi* (1922) 45 Mad 281, 70 IC 337, AIR 1922 Mad 236, (1916) 43 Cal 459, 33 IC 190, AIR 1916 Cal 500; *Manaharanlal v Jagiwanlal* (1951) Nag 937, AIR 1952 Nag 73.

1 *Sri Ranga v Srinivasa* (1927) 50 Mad 866, 873–74, 104 IC 472, AIR 1927 Mad 801; *Gopal v Trimbak* AIR 1953 Nag 195; *Vishwa Nath v Prem Nath* AIR 1975 J&K 92 (rent).

2 (1886) 10 Bom 528.

3 *Damodardas v Uttamram* (1893) 17 Bom 271, 278–79; *Chuckun v Poran* (1868) 9 WR 483.

4 *Sri Ranga v Srinivasa* (1927) 50 Mad 866, 873–74, 104 IC 472, AIR 1927 Mad 801.

5 *Raja Setrucherla v Raja Setrucherla* (1899) 22 Mad 470, 26 IA 167.

§ 239. MANAGER'S LIABILITY TO ACCOUNT OTHERWISE THAN IN A PARTITION SUIT

It has been held in Bengal, that any coparcener may, without bringing a suit for partition, require the manager to account for his dealings with the coparcenary property and the income thereof. If the manager refuses to render the account, he may be compelled by a suit to render such account.[6]

§ 240. POWER OF MANAGER TO CONTRACT DEBTS FOR FAMILY PURPOSE AND FAMILY BUSINESS

(1) *Implied authority to borrow money for family business* (vide §§ 234 (1) (iii), (iv), (v) and 270).

(2) *Implied authority to borrow money for family purposes.*—A joint Hindu family may have no business at all, and yet debts may be contracted by the manager for a joint family purpose (§ 243). Such debts are also binding on the other coparceners to the extent mentioned in the section referred to in sub-§ (1).[7] The liability of a coparcener in such a case does not cease by subsequent partition.[8]

When a sole surviving coparcener incurs a debt, he must be deemed to have done so in a representative capacity, ie, as representing a potential joint family, which is capable by expansion of comprising more than one member.[9]

(3) *Burden of proof of necessity for a loan for a family purpose or for family business.*—Where money has been borrowed by the manager on the representation that it is required for a family purpose,[10] or for family business,[11] and the lender seeks to render the whole family property

6 *Abbaychandra v Pyari Mohan* (1870) 5 Beng LR 347 (Mitakshara case); *Benoy Krishna Ghosh Chaudhuri v Amarendra Krishna Ghosh Choudhri* (1940) 1 Cal 183, 186 IC 546, AIR 1940 Cal 51 (a Dayabhaga case). See *Sreemuthy Sooyumeney Parsee v Denokundero Mullik* (1857) 6 MIA 526, 539–40, supra (a Dayabhaga case); *Satish Chandra v Binapani* AIR 1964 Pat 473.

7 *Gharibillah v Khalak Singh* (1903) 25 All 407, 414–15, 30 IA 165; *Dwarka Nath v Bungshi* (1905) 9 CWN 879 (a case under Dayabhaga law); *Chalamayya v Varadayya* (1899) 22 Mad 166.

8 *Bankey Lal v Durga Prasad* (1931) 53 All 868, FB, 135 IC 139, AIR 1931 All 512.

9 *Ramanathan Chettiar v SRM Ct M Firm* (1937) Mad 376, 168 IC 734, AIR 1937 Mad 345. Also see *Maharaja of Bobbili v Zamindar of Chundi* (1912) 35 Mad 108. Both are cases of adoption.

10 *Soiru Padmanabh v Narayanrao* 18 Bom 520; *Krishna v Vasudeo* (1897) 21 Bom 808, 815; *Sukur v Goury Pershad* (1880) 5 Cal 321; *Mela Mal v Gori* (1922) 3 Lah 288, 66 IC 485, AIR 1922 Lah 200; *Khazana Mal v Jagan Nath* (1923) 4 Lah 200, 74 IC 484; AIR 1924 Lah 44; *Sotam Ram v Parduman Ram* (1927) 8 Lah 673, 105 IC 785, AIR 1928 Lah 103.

11 *Ram Krishna v Ratanchand* (1931) 58 IA 173, 53 All 190, 132 IC 613, AIR 1931 PC

continued on the next page

including the shares of other members of the family liable for the debt, he is not entitled to a decree against the whole family property, unless he shows that there was a necessity for the loan, or that he made reasonable inquiry as to the necessity for the loan.[12] The mere existence of the business not being enough, or that it is for the benefit of the family.[13]

(4) *Promissory note passed by manager for family business in his own name.*—It has been held in several cases that where the manager of a joint family borrows money on a promissory note for a joint family business or to meet a joint family necessity, the other members of the joint family may be sued on the note, though, they are not parties to the note, but their liability is limited to their share in the joint family property,[14] unless they can be treated as contracting parties.[15] If the suit is filed before partition, the creditor may sue the manager only and seek for a declaration that the whole joint family property is liable or he may implead the other members also. After partition, he must implead the other members in order to enable him to proceed against the portions allotted to them.[16] In such cases, there is no presumption that the borrowing was for the purpose of the joint family business and the lender must prove it.[17] In Bombay, it has been held that the proper course in such a case is to sue the manager on the note and the other members on the pre-existing debt, the defenses open to the parties being distinct.[18]

Where the suit is by the endorsee of a promissory note, his remedy is against the maker only, unless the endorsement is so worded as to

136; following *Hunooman Persaud v Musammat Babooee* (1856) 6 MIA 393; *Nagendra v Amar Chandra* (1903) 7 CWN 725; *Ganpat Rai v Munni Lal* (1912) 34 All 135, 13 IC 34, (1923) 4 Lah 200, 74 IC 484, AIR 1924 Lah 44; *Girdhari Lal v Kisben Chand* (1924) 5 Lah 511, 85 IC 463, AIR 1925 Lah 240; *Vithal v Shivappa* (1923) 47 Bom 637, 72 IC 659, AIR 1923 Bom 265; dissenting from *Raghunathji v Bank of Bombay* (1910) 34 Bom 72, 2 IC 173.

12 *Mst Mauli v Brij Lal & ors* (1942) Lah 345, 205 IC 37, AIR 1943 Lah 33, FB; *Handa Das v Muralidhar* Pati AIR 1990 Ori 226.

13 *Ram Nath v Chiranji Lal* (1935) 57 All 605, FB, 155 IC 136, AIR 1935 All 221; *Mutsaddi Lal v Sakhir Chand* (1936) 17 Lah 311, AIR 1935 Lah 735; *Pramod Kumar v Damodar* AIR 1953 Ori 179.

14 *Krishna v Krishnasami* (1900) 23 Mad 597; *Baisnab v Ramdhan* (1906) 11 CWN 139; *Krishnanand v Raja Ram Singh* (1922) 44 All 393, 66 IC 150, AIR 1922 All 116; *Raghunath v Sri Narain* (1923) 45 All 434, 73 IC 1018, AIR 1923 All 424.

15 *Sirikant Lal v Sidheshwari Prasad* (1937) 16 Pat 441, 170 IC 357, AIR 1937 Pat 455; *Mustaddi Lal v Sakhir Chand* (1936) 17 Lah 311, AIR 1935 Lah 735.

16 *Pangudaya v Uthandiya* (1938) Mad 968, 177 IC 188, AIR 1938 Mad 774. See *Gendulal v Jangli* (1947) Nag 604.

17 *Abdul Majid Khan v Saraswathibai* (1934) 61 IA 90, 36 Bom LR 255, 147 IC 1, AIR 1934 PC 4; *Shamrao v Rajaram* AIR 1956 Nag 285.

18 *Vithalrao v Vithalrao* (1923) 25 Bom LR 151, 72 IC 242, AIR 1923 Bom 244. The point was raised in *Krishnasbet v Hari* (1896) 20 Bom 488.

transfer the debt and complies with the stamp law.[19] A decree passed against the manager of a joint family (who is not the father) on a promissory note executed by him, in his personal capacity, containing no direction that it shall be granted out of family property, cannot be executed against the family property.[20]

It has been held that where a decree has been obtained on such a note against the manager and a minor coparcener, it cannot be executed against the minor personally, his liability in law being confined only to his share in the joint family property, and that he cannot be arrested under such a decree either before or after he has attained majority.[21]

In a Patna case, there was a suit upon a handnote executed by the father as *karta* of a family. His sons and grandsons were made parties to the suit, and a decree obtained against all of them. In the execution proceedings, only some of the sons were made parties. The other sons were left out and so also were all the grandsons. It was held that on sale of a property in execution of the decree, the interest of the grandsons and those of the sons, who were not made parties, could not pass, for it could not be said that in such cases, the decree was against the father in his representative capacity.[22]

(5) *New business.*—As to the power of a manager to start a new business, see § 234(2).

Illustration

Three brothers *A*, *B* and *C*, managing members of a joint Hindu family, borrow money from *D* for purposes of the joint family business, and executed a promissory note in favour of *D*. After the death of *B* and *C*, *D* sues *A* and the sons of *A*, *B* and *C* on the note. *D* is entitled to a decree, enabling him to recover the money from the joint family property. He is also entitled to a personal decree against *A*, *A* being a contracting party, to enable him to proceed against the separate property of *A*. However, he is not entitled to a personal decree against the sons of *A*, *B* or *C* for they not parties to the note.

19 *Marutamuthu v Kadir Badsha* (1938) Mad 568 AIR 1938 Mad 377; *Ramanathan Chettiar v Muthuraman Naidu & ors* (1942) Mad 204, 210 IC 3, AIR 1942 Mad 161, (1941) 2 MLJ 816; *Ramakrishna v Sitaram* AIR 1962 AP 255. However, see *Sreenivasan v Rangachari* AIR 1953 Mad 815, (1953) 1 MLJ 595.

20 *Chippagiri Nagireddi v Venkadari Somappa* (1943) Mad 248, 204 IC 198, AIR 1943 Mad 1, (1942) 2 MLJ 691. However, see *Shanker Rao v Vinayak* AIR 1951 Nag 307, (1950) Nag 806; *Phool Chand v Lalit Kishore* AIR 1969 All 155; *Chakka Laxminarayana v Konnepati China Subbarao* AIR 1990 AP 164.

21 *Bishen Singh v Kidar Singh* (1921) 2 Lah 159, 62 IC 800, AIR 1921 Lah 61; *Jwala Prasad v Bhuda Ram* (1931) 10 Pat 503, 134 IC 420, AIR 1931 Pat 328.

22 *Deo Narain v Bibikhaton* AIR 1949 Pat 401.

Contribution

A manager has power to borrow money for a joint family purpose on the security of the family property. However, he may also borrow on his personal security. When he borrows money on his personal security, but for a family purpose, and spends it for the benefit of the family, he is entitled to contribution from the other members. The right to contribution arises when he expends the money and not on the date on which he repays the loan. Therefore, limitation runs against his claim from the former, and not from the latter date.[23]

Extent of Liability of Other Members

It is an elementary proposition of law, that *A* is not bound to pay a debt contracted by *B*, unless *B* has been authorised by *A* to incur the debt. It the case of a manager of a joint Hindu family, the manager has an implied authority to bind the other members by debts contracted by him, provided that in the case of a family business, the debts have been contracted by him for the ordinary purposes of the business, and, in other cases, the debts have been contracted for a family purpose. The authority of the manager, however, extends only to the family property; ie, if the manager borrows money within the scope of his authority, and the loan is not repaid, the creditor can proceed only against the family property, including the shares of the other members in the property, but the other members are not bound personally, so as to entitle the creditor to proceed against their separate property. The creditor can, ofcourse, proceed against the separate property of the manager, for the manager is the party to the contract. Likewise, he can proceed against the separate property of any other member, if he is a party to the contract, or if he subsequently ratifies the contract.

§ 241. GENERAL POWERS OF MANAGER OF JOINT FAMILY BUSINESS

Besides the power to contract debts for the family business (§ 240), the manager has the power of making contracts, giving receipts, and compromising (§ 248) or discharging claims ordinarily incidental to the business. Without a general power of that kind, it would be impossible to carry on the business.[24]

The principal question in a case decided by the Privy Council, was whether the managing members, who had entered into ordinary business contracts in their own names on behalf of the family, were entitled to

23 *Aghore Nath v Grish Chunder* (1893) 20 Cal 18.

24 *Kishan Prasad v Har Narain Singh* (1911) 33 All 272, 38 IA 45, 9 IC 739.

sue in their own names or whether the other members were necessary parties. It was held that they could sue in their own names.[25]

§ 242. ALIENATION BY MANAGER OF COPARCENARY PROPERTY FOR LEGAL NECESSITY

(1) The power of the manager of joint Hindu family to alienate joint family property is analogous to that of a manager for an infant heir as defined by the Judicial Committee.[26]

(2) The manager of a joint Hindu family has power to alienate for value, joint family property, so as to bind the interest of both adult and minor coparceners in the property, provided that the alienation is made for legal necessity (§ 243),[27] or for the benefit of the estate (§ 243A). A manager (not being the father) can alienate even the share of a minor coparcener to satisfy an antecedent debt of the minor's father (or grandfather) when there is no other reasonable course open to him.[28] It is not necessary to validate the alienation that the express consent of the adult members should have been obtained.[29]

In *Suraj Bunsi Koer v Sheo Proshad*,[30] the Judicial Committee stated that it was not clearly settled whether where an alienation is made by a manager for a legal necessity, but without the express consent of the adult coparceners, the alienation is binding on them. However, in later decisions of the same tribunal, the view taken is that if legal necessity is established, the express consent of the adult coparceners is not necessary.[31] As to alienation by manager for joint family business, see § 246.

25 (1911) 33 All 272, 38 IA 45, 9 IC 139.

26 See note (1) herein. *Hunooman Persaud v Musummat Babooee* (1856) 6 MIA 393.

27 *Daulat Ram v Mehr Chand* (1887) 14 IA 187, 196, 15 Cal 7; *Sham Sunder v Achhan Kunwar* (1898) 25 IA 183, 192, 21 All 71, 83; *Gharibullah v Khalak Singh* (1903) 25 All 407, 415–16, 30 IA 165–69; *Biswanath v Jagdip* (1913) 40 Cal 342, 17 IC 577; *Hunooman Persaud v Mst Babooee* (1856) 6 MIA 393; *Soorendro v Nundun* (1874) 21 WR 196; *Sadhu Saran v Brahmdeo* (1921) 6 Pat LJ 256, 61 IC 20, AIR 1921 AP 99 (taking a lease of property for the family).

28 *Dharmaraj Singh v Chandrasekhar Rao* (1942) Nag 214, 200 IC 595, AIR 1942 Nag 66, FB.

29 See § 528 and notes. *Sahu Ram v Bhup Singh* (1917) 44 IA 126, 130, 39 All 437, 443, 39 IC 280, AIR 1917 PC 61, (1898) 25 IA 183, 192, 21 All 71, 83. However, see (1903) 30 IA 165, 169, 25 All 407 415. As to Indian decisions, see *Chhotiram v Narayandas* (1887) 11 Bom 605 (consent presumed); *Miller v Ranga Nath* (1886) 12 Cal 389; 399 (express consent not necessary); *Mudit v Rangalal* (1902) 29 Cal 797 (express consent not necessary); *Pratap v Shiam Lal* (1920) 42 All 264, 265, 55 IC 37, AIR 1920 All 131 (express consent not necessary); *Karm Chand v Ram Labhaya* (1926) 7 Lah 476, 96 IC 443, AIR 1926 Lah 468.

30 (1879) 6 IA 88, 101, 5 Cal 148, 165.

31 *Sahu Ram v Bhup Singh* (1917) 44 IA 126, 130, 39 All 437, 443, 39 IC 280, AIR 1917 PC 61; *Sham Sunder v Achhan Kunwar* (1898) 25 IA 183, 192, 21 All 71, 83.

Where any such transaction has been entered into for legal necessity by a manager, it would be deemed to be on behalf of the family and would bind it. The position is not worsened by the fact that a junior member joins the transaction and the joining by him is abortive by reason of his minority.[32]

A manager has the power to alienate joint family property, when there is a legal necessity, in spite of the existence of a widow in the family, who has, under the Hindu Women's Rights to Property Act 1937, got an undivided interest in the property and is entitled to partition.[33]

(2a) Where a joint family consists of adults and minors, the mere fact that all the adult members, including the manager, have consented to the alienation is not proof of legal necessity. Such consent, however, may supply any lacuna that may exist in the evidence of legal necessity.[34]

(3) When an alienation is made by the manager without legal necessity, but with the consent of all other coparceners, they being all adults, the alienation is valid in its entirety.[35] If it is made without the consent of all, it would in Bombay and Madras, bind the shares of the consenting members. In West Bengal and Uttar Pradesh, where a coparcener cannot alienate even his own interest without the consent of all other coparceners, the alienation would not bind the shares either of the alienor or of the consenting members (§§ 257, 258, 268 and 269).[36]

(4) An alienation by the manager of a joint family made without legal necessity is not void, but voidable,[37] at the option of the other coparceners. They may affirm it or they may repudiate it,[38] but a creditor cannot repudiate it, there being no suggestion that it was in fraud of creditors.[39]

32 *Radha Krishnadas v Kaluram* AIR 1967 SC 574; *Gopalkrishnan v Venugopal* (1976) 2 Mad LJ 134.

33 *Mahadu Kashiba v Gajarabai* (1954) Bom 885, (1954) 56 Bom LR 387, AIR 1954 Bom 442.

34 *Salamat Khan v Bhagwat* (1930) 52 All 499, 131 IC 608, AIR 1930 All 379; *Kushi Ram v Mehr Chand* AIR 1950 EP 272.

35 *Kandasami v Somakanda* (1912) 35 Mad 177, 5 IC 922; *Shiv Shanker v Bhola* (1954) ILR Punj 368.

36 As to consent, see *Gongabai v Vamanaji* (1864) 2 Bom HC 301; *Miller v Runga Nath* (1886) 12 Cal 389, 399.

37 Also see *Raghubanchmani v Ambica Prasad* AIR 1971 SC 776.

38 *Subba Goundan v Krishnamachari* (1922) 45 Mad 449, 68 IC 869, AIR 1922 Mad 112; dissenting from *Kandasami v Somaskanda* (1912) 35 Mad 177, 5 IC 922. *Jagesar v Deo Dat* (1923) 45 All 654, 74 IC 931, AIR 1924 All 51; *Kashinath v Bapurao* (1940) Nag 573, 191 IC 241, AIR 1940 Nag 305; *Narasimham v Venkata Narasimham* (1973) AP 162 (sale by *karta* for marriage expenses of his own son—held not binding—could be avoided even by the minor son).

39 *Imperial Bank of Indian v Mt Maya Devi* (1935) 16 Lah 714, AIR 1935 Lah 867.

1. *Hunooman Persaud v Mussumat Babooee*[40]

The leading case on the subject of alienation for necessity is *Hunooman Persaud*'s case. In that case, their Lordships of the Privy Council said:

> The power of the manager for an infant heir to charge an estate not his own is under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. However, where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded...Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. However, they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under the circumstances, he is bound to see the application of the money...The purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution, but is himself deceived.

The question in *Hunooman Persaud*'s case was as to the extent of the power of a mother as manager of the estate of her minor son to alienate the estate. The case related to a mortgage created by the mother, but the same principles apply to a sale.[41] The principles laid down in that case have been held to apply to alienations by:

(a) the manager of a joint family acting on behalf of minor members of the family,[42] being the case dealt with in § 242;
(b) a Hindu widow and other limited heirs of property inherited by them from males (§§ 178–79);

40 (1856) 6 MIA 393, 423–24.

41 *Krishna Das v Nathu Ram* (1927) 54 IA 79, 84, 49 All 149, 100 IC 130, AIR 1927 PC 37.

42 *Soorendro v Nundun* (1874) 21 WR 196; *Baboo Kameswar Pershad v Run Bahadur* (1881) 6 Cal 843, 8 IA 8; *Sahu Ram v Bhup Singh* (1917) 44 IA 126, 130, 39 All 437, 443, 39 IC 280, AIR 1917 PC 61. See also *Re Dattatraya Govind Haldankar* (1932) 56 Bom 519, AIR 1932 Bom 537, *Krishnarajan v Doraswamy* AIR 1966 Ker 305 (sale by father).

(c) managers of religious endowments (§ 415); and
(d) managers of the estate of lunatics.[43]

2. Legal Necessity

See § 243.

3. Alienation 'For the Benefit of the Estate'

See § 243A.

4. Specific Performance of Contract of Sale Entered into by Manager

Where a manager enters into a contract for the sale of immovable property belonging to the joint family for a legal necessity, but subsequently refuses to complete the sale, the court may, in a suit decree specific performance of the contract, though some of the members of the joint family are minors.[44] However, not if the contract is for a purpose not binding upon the other coparceners and made without their concurrence.[45]

5. Lease: Licence

The alienation may be one by way of permanent lease,[46] or even of a lease for a term.[47] Where the practical effect of a licence is the same as that of a lease, it would be governed by the same rule.[48]

§ 243. WHAT IS LEGAL NECESSITY

The following have been held to be family necessities within the meaning of § 242:

43 *Goureenath v Collector of Monghyr* (1867) 7 WR 5; *Kanti Chunder v Bisheswar* (1898) 25 Cal 585.

44 *Hari Charan v Kaula Rai* (1917) 2 Pat LJ 513, 40 IC 142, AIR 1917 Pat 478, FB. As to the liability of a manager for damages for breach of contract where there is no legal necessity—see *Adikesavan v Gurunatha* (1917) 40 Mad 338, 39 IC 358, AIR 1918 Mad 315 (FB). See also *Jamsetji v Kashinath* (1902) 26 Bom 326, *Dhapo v Ram Chandra* (1935) 57 All 374, 154 IC 235, AIR 1934 All 1019, *Ramrao v Suganchandra* (1946) Nag 116. Reference may also be made to *Sankaralinga v Ratnaswami* (1952) Mad 508, AIR 1952 Mad 389. Where certain observations in the Bombay case cited above were considered. Also see *S K Butti v Shriram* (1953) Nag 579, AIR 1954 Nag 65; *Bhageran Rai v Bhagwan Singh* AIR 1962 Pat 319; *Nathuni Misra v Mahesh Misra* AIR 1963 Pat 146.

45 *Shamlal v Yesaram* (1634) Nag 866, AIR 1954 Nag 334; *Bageshwari Prasad v Deopati Kuer* AIR 1961 Pat 416.

46 *Basdeo v Muhammad* (1929) 51 All 285, 116 IC 491, AIR 1928 All 617.

47 *Haribhau v Hakim* AIR 1951 Nag 249.

48 See notes to §§ 243 and 244. *Pheku v Harish Chandra* (1954) 1 All 675, AIR 1953 All 406.

(a) payment of government revenue and of debts which are payable out of the family property;[49]
(b) maintenance of coparceners and of the members of their families;[50]
(c) marriage expenses of male coparceners,[51] and of the daughters of coparceners;[52]
(d) performance of the necessary funeral or family ceremonies;[53]
(e) costs of necessary litigation in recovering or preserving the estate;[54]
(f) costs of defending the head of the joint family,[55] or any other member[56] against a serious criminal charge;
(g) payment of debts incurred for family business or other necessary purpose. In the case of a manager other than a father, it is not enough to show merely that the debt is a pre-existing debt (§ 246).[57]

The above are not the sole indices for concluding as to whether the alienation was indeed for legal necessity, nor can the enumeration of criterion for establishing legal necessity be copious or even predictable. It must therefore depend on the facts of each case. When, therefore, property is sold in order to fulfil tax obligations incurred by a family business, such alienation can be classified as constituting legal necessity.[58]

49 *Gharib-ullah v Khalak Singh* (1903) 25 All 407, 414–15, 30 IA 165; *Muddit v Ranglal* (1902) 29 Cal 797.

50 See *Makundi v Sarabsukh* (1884) 6 All 417–21; *Vijay Ramraj v Vijayy Ananda* AIR 1952 All 564 (case under Madras Impartible Estates Act).

51 *Sundrabai v Shivnarayana* (1908) 32 Bom 81; *Bhagirathi v Jokhu* (1910) 32 All 575, 6 IC 465; *Gopalakrishnam v Venkatanarasa* (1914) 37 Mad 273, 17 IC 308, AIR 1914 Mad 432 overruling *Govindarazalu v Devarabbotla* (1904) 27 Mad 206; *Kameswara v Veeracharlu* (1911) 34 Mad 422, 8 IC 195. Also see *Kathaperumal v Rajendra* AIR 1959 Mad 409, (1958) 2 Mad LJ 183.

52 *Chhotiram v Narayanaas* (1887) 11 Bom 605, *Vaikuntam v Kallapiram* (1900) 23 Mad 512 (marriage of niece); *Veikuntam v Kallapiram* (1903) 26 Mad 497; *Ranganaiki v Ramanuja* (1912) 35 Mad 728, 11 IC 570; *Ram Charan Mihin Lal* (1914) 36 All 158, 22 IC 633, AIR 1914 All 23; *Sellappa v Suppan* (1937) Mad 906, 171 IC 216, AIR 1937 Mad 496.

53 *Nathuram v Shoma Chhagan* (1890) 14 Bom 562; *Lalla Ganput v Toorun* (1871) 16 WR 52.

54 *Miller v Runga Nath* (1886) 12 Cal 389.

55 *Beni Ram v Man Singh* (1912) 34 All 4, 11 IC 663; *Ramalingam v Muthayyam* (1914) 26 Mad LJ 528, 24 IC 356, AIR 1915 Mad 6; *Hanumat v Sonadhari* (1919) 4 Pat LJ 653, 52 IC 734, AIR 1920 Pat 708. However, see *Nathu v Dindayal* (1917) 2 Pat LJ 166, 39 IC 665, AIR 1917 Pat 504; *Said Ahmed v Raja Barkhandi Mahesh Pratap Narain Singh* (1933) 8 Luck 40, 139 IC 64, AIR 1952 Ori 255 where the next senior member executed the mortgage and it was held to be binding on the family.

56 *Ram Raghubar v Dip Narain* (1923) 45 All 311, 71 IC 749, AIR 1923 All 287; *Dhanukdhari v Rambirich* (1922) 1 Pat 171, 70 IC 391, AIR 1922 Pat 553.

57 *Chiranji Lal v Bankey Lal* (1933) 55 All 370, 142 IC 333, AIR 1933 All 273. Also see *Venkatiah v Kusum* AIR 1978 SC 179 (*tagai* loan).

58 *Mukesh Kumar v Col Harbans Waraiah* AIR 2000 SC 172.

It has been held by the Patna High Court that the mortgage of joint family property by the managing member to defray the marriage expenses of his daughter's daughter, when the father of the daughter was not indigent, is not justified by legal necessity.[59] The expenses of the second marriage of a member of the family have been held not to constitute legal necessity by the Madras High Court.[60] Gift of a small portion of the property for educational purposes is not legal necessity.[61] The selling of joint property by the *karta* or manager for the purpose of migrating to a new place for a better living has been held to be a sale for legal necessity.[62]

§ 243A. ALIENATION BY MANAGER FOR 'THE BENEFIT OF THE ESTATE'

There was a conflict of opinion as to the meaning of the words 'for the benefit of the estate' which occur in the judgment of the Judicial Committee in *Hunooman Persaud's* case referred to in note 1 to § 242. One view was that a transaction cannot be said to be for the benefit of the estate, unless it is of a defensive character calculated to protect the estate from some threatened danger or destruction.[63] Another view was that for a transaction to be for the benefit of the estate, it is sufficient, if it is such as a prudent owner, or rather a trustee, would have carried out with the knowledge that was available to him at the time of the transaction.[64] In *Balmukund v Kamla Wati*,[65] the Supreme Court observed that for a transaction to be regarded as for the benefit of the family, it need not be of a defensive character. In each case, the court must be satisfied from the material before it, that it was in fact such as conferred or was

59 *Malik Md Ibrahim v Harakh* (1947) 26 Pat 430. However, see *P Mudaliar v Nataraja* (1950) Mad 788.

60 *Patel v Lakkireddigari* (1947) Mad 379; *Bhagirathi v Jhoku* 32 All 575.

61 *Lilavatibai v Takappa* AIR 1948 Mad 301.

62 *Vanimisatti v Jayavarapu* AIR 1995 AP 105.

63 *Bhagwan Das Mahadeo* (1923) 45 All 390, 71 IC 950, AIR 1923 All 298; *Shankar v Bechu* (1925) 47 All 381, 86 IC 769, AIR 1925 All 333; *Inspector Singh v Kharak Singh* (1928) 50 All 776, 112 IC 881, AIR 1928 All 403.

64 *Jagat Narain v Mathura Das* (1928) 50 All 969, 116 IC 484, AIR 1928 All 454; *Tula Ram v Tulsi Ram* (1920) 42 All 559, 60 IC 3, AIR 1920 All 11; *Mahabir Prasad v Amla Prasad* (1924) 46 All 364, 70 IC 517, AIR 1924 All 379; *Nagindas v Mahomed* (1922) 46 Bom 312, 64 IC 923, AIR 1922 Bom 122; *Rugho v Zaga* (1929) 53 Bom 419, 118 IC 555, AIR 1929 Bom 251; *Nagendranath v Hemanta Kumari* (1956) ILR Cuttack 433.

65 AIR 1964 SC 1385 (the court may in a proper case, grant specific performance of the interest of the *karta*). Also see *Murarka Properties v Beharilal* AIR 1978 SC 300 (properties transferred to a company by consent of all adult members of the family—transaction held for the benefit of the family). Also, see *K C Kapoor v Radhika Devi* AIR 1981 SC 2128 (sale of dilapidated family property constituted an act of prudence—also conduct and relationship of parties).

reasonably expected to confer benefit on the family at the time it was entered into. Where adult members are in existence, the judgment is not to be of the manager of the family alone, but of all the adult members of the family including the manager.

The first authoritative exposition of the expression 'for the benefit of the estate' is to be found in *Palaniappa v Deivasikamony*.[66] The question in that case was as to the power of a *mahant* (head of a *math*) to alienate *debutter* land. In the course of the judgment the Judicial Committee observed:

> No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description 'benefit to the estate'. It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in connection, to be taken as benefits and what not.

For the relevant texts of Brihaspati and Mitakshara and discussion of the same, see the undermentioned cases.[67]

The manager of a joint family is not entitled to sell joint family land solely for the purpose of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, ie, the land itself. Such a sale is not 'for the benefit of the estate',[68] nor is the manager entitled to sell land simply for the purpose of purchasing other land.[69] A mortgage of family property for the purpose of solely purchasing another property,[70] or for the payment of

66 (1917) 44 IA 147, 155, 40 Mad 709, 718, 39 IC 722, AIR 1917 PC 33; and see *Jagat Narain v Mathura Das* (1928) 50 All 969, 116 IC 484, AIR 1928 All 454. Also see *Hari Singh v Umrao Singh* AIR 1979 All 65. See *Prasad v Govindaswami* AIR 1982 SC 84 (alienation must also be prudent—consideration was thoroughly inadequate). See *Dudh Nath v Sat Narain* AIR 1966 All 318, FB.

67 *Nagindas v Mahomed* (1922) 46 Bom 312, 316, 64 IC 923 AIR 1922 Bom 122; *Ragho v Zaga* (1929) 53 Bom 419, 426, 118 IC 555, AIR 1929 Bom 251. Also see *K C Kapoor v Radhika Devi* AIR 1981 SC 2128, (*kutumborthe*).

68 *Palaniappa v Deivasikamony* (1917) 44 IA 147, 156, 40 Mad 709, 719, 39 IC 722 AIR 1917 PC 33, *Vishnu v Ramchandra* (1923) 25 Bom LR 508, 73 IC 1017, AIR 1923 Bom 453.

69 *Nirmal Singh v Satnam* AIR 1960 Raj 313, 10 Raj 999. Reference may also be made to *Helava v Sesigowda* AIR 1960 Mys 231; *Surnendranath Das v Sudhir Kumar* AIR 1982 Ori 30 (homeland sold).

70 *Ram Bilas v Ramyad* (1920) 5 Pat LJ 622, 627, 58 IC 303, AIR 1920 Pat 441; *Sellappa v Suppan* (1937) Mad 906, 171 IC 216, AIR 1937 Mad 496; *Ramkaran Thakur v Baldeo Thakur* (1938) 17 Pat 168, 173 IC 292, AIR 1938 Pat 44.

premium for a lease of another property,[71] is not for the benefit of the estate. However, a sale of a house in a dilapidated condition, in respect of which a notice has been issued by the municipality to pull it down, is for the benefit of the estate.[72] Whether a transaction is beneficial to the estate, must depend on the facts and circumstances of the particular case.[73] A sale of joint family property, which is inconveniently situated and is unproductive, the purchase-money being invested in another property which is a sound investment;[74] or in family business,[75] is for the benefit of the estate. Moreover, it has been held that where a manager sells properties in order to migrate to another place and purchase lands there, which are more productive, the sale are for the benefit of the family, though, the burden of proof on the alienee is heavy.[76] A sale of such property will be upheld even if the price was subsequently lost to the family owning to the failure of the bank in which it was invested, provided the intention was to invest the price in another more productive immovable property, which the manager could look after.[77] Similarly, a mortgage of family property for the payment of price for the purchase of a share in a village in which the family already possessed a share is for the benefit of the estate.[78] A mortgage or sale, however, of family property for the purpose solely of pre-empting another property, is not ordinarily for the benefit of the estate.[79] A deed of exchange executed by a manager of the joint family with a view to defeat a suit for pre-emption, even though made for property of equal value, was held not to bind the other members of the family.[80] A mortgage for making

71 *Manna Lal v Karu Singh* (1919) 1 Pat LT 6, 39 Cal LJ 256, 56 IC 766, AIR 1919 PC 108.

72 *Nagindas v Mahomed* (1922) 46 Bom 312, 64 IC 923, AIR 1922 Bom 122. Reference may be made to *K C Kapoor v Radhika Devi* AIR 1981 SC 2128.

73 *Medikenduri v Venkatayya* AIR 1953 Mad 210; *Sengoda v Muthuvellappa* AIR 1955 Mad 531; *Sundarinani Devi v Rupei Dei* AIR 1956 Ori 16 (alienation by widow); *Jagdish Prasad v Shreedharpant* AIR 1955 All 625; *Rahda Krishna v Bhushan Lal* AIR 1971 J&K 62 (repairs); *Hetram v Bhudaram* (1974) Raj LW 204; *Pattamal v Nagarajan* (1977) 2 MLJ 286 (mortgaged property sold to avoid payment of interest and use balance in a business to augment income—*kulachar*). Also see *A Subramanium Asari v Jayadevan Nair* AIR 1985 Mad 372.

74 *Jado Singh v Nathu Singh* (1926) 48 All 592, 98 IC 773, AIR 1926 All 511.

75 *Jagmohan v Prag Ahir* (1925) 47 All 452, 87 IC 27, AIR 1925 All 618.

76 *D J Prasad v D V Subbaiah* AIR 1973 AP 214.

77 *Jagat Narain v Mathura Das* (1928) 50 All 969, 116 IC 481, AIR 1928 All 454.

78 *Beni Madho v Chander Prasad* (1924) 3 Pat 451, 83 IC 603, AIR 1925 Pat 189; *Shaikh Jan v Bikoo* (1928) 7 Pat 789, 116 IC 33, AIR 1929 Pat 130; *Sital v Ajabalal Mander* (1939) Pat 306.

79 *Shankar v Bechu* (1925) 47 All 381, 86 IC 769, AIR 1925 All 333; *Kishen Sahai v Raghunath* (1929) 51 All 473, 116 IC 488, AIR 1929 All 139; *Amrej Singh v Shambhu Singh* (1933) 55 All 1, 140 IC 509, AIR 1932 All 632; *Brij Mohan Lal v Sarabjit Singh* (1938) 13 Luck 597, 171 IC 286, AIR 1937 Ori 513.

80 *Balzor Singh v Raghunandan Singh* (1932) 54 All 85, 137 IC 191, AIR 1932 All 548.

additions to and improvements in the family house is for the benefit to the estate.[81] However, a mortgage for carrying on a speculative litigious suit is obviously not for the benefit of the estate.[82] Nor is a mortgage for the purpose of repurchasing or acquiring mortgage sights in the estate of a separated brother.[83] A mortgage by seven adult members of the family for acquiring property interests, the consolidation of which had the effect of converting them from mere tenants into landlords, is for the benefit of the estate.[84]

A gift by the manager of a joint family of a small portion of *zamindari* land purchased by him to a stranger, with the object of defeating a claim for pre-emption was held to be a transaction for the benefit of the family and therefore binding on the family.[85]

It is submitted that a transaction to be binding on the family must be one which not only confers a benefit upon the estate, but is necessary for its good management.[86]

Estoppel

As to estoppel in such cases, reference may be made to *KC Kapoor's* case, (pleading not strictly construed service issue has been hotly contested).

§ 244. BURDEN OF PROOF OF NECESSITY

Where the manager of a joint Hindu family sells or mortgages joint family property, the purchaser or mortgagee is bound to inquire into the necessity for the sale or mortgage, and the burden lies on the purchaser or mortgagee to prove either that there was a legal necessity in fact, or that he made proper and bona fide enquiry as to the existence of such necessity and did all that was reasonable to satisfy himself as to the existence of such necessity.[87]

An intending mortgagee cannot escape the duty of inquiring into the legal necessity for a mortgage, so as to bind the minor members of the

81 *Rantnam v Govindarajulu* (1878–81) 2 Mad 339, 341; *Ramrichpal v Bikaner Stores* AIR 1966 Raj 187 (reconstruction of '*kucha*' structure); *Gollamudi Siva Kumari v Indian Overseas Bank* AIR 1978 AP 37 (for family business of hotel).

82 *Bhagwan Das v Mahadeo* (1923) 45 All 390, 71 IC 959, AIR 1923 All 298.

83 *Hans Raj v Khushal Singh* (1933) 14 Lah 162, 138 IC 642, AIR 1932 Lah 420.

84 *Baijnath Prasad v Binda Prasad* (1938) 17 Pat 549, AIR 1939 Pat 97.

85 *Mohib Ali Khan v Baldeo Prasad* (1939) All 305.

86 *Hurry Mohun v Ganesh Chunder* (1884) 10 Cal 823, 830, FB; *Durgaprasad Barhai v Jewdhari Singh* (1935) 62 Cal 733

87 *Kesar Singh v Santokh Singh* (1936) 17 Lah 824. As to the duty of the alienee, see *Venkata Chenchayya v Ramalingam* AIR 1957 AP 744; *Shivashankar v Raghubansh* AIR 1967 AP 172 (alienation by limited owner); *Kumaraswami v Rajamanikkam* AIR 1966 Ker 266; *Monohari Devi v Choudhuri Sibnara Dass* AIR 1983 Ori 133.

joint family, by inducing the guardian to apply to the court for permission to raise a loan on mortgage and thus attempting to throw the responsibility on the court.[88] In general, as the power of the manager is a limited power, it is for the mortgagee to show that the transaction was within the authority of the manager.[89]

The existence of a necessary purpose is not the same as a legal necessity, for, there may be large resources, a large income making a loan unnecessary. The lender must show necessity for the loan.[90]

If the purchaser or mortgagee proves that there was a legal necessity in fact, the alienation will be upheld, even though the necessity was brought about by the previous mismanagement of the manager, unless it be shown that the purchaser or mortgagee himself contributed to the mismanagement.

Even if he fails to prove that there was a necessity in fact, the alienation will be upheld, if he proves that he made such inquiry as aforesaid.

However, a purchaser or mortgagee is not bound to see that the money paid or advanced by him is actually applied to meet the necessity. The reason is that he can rarely have the means of controlling and directing the actual application, unless he enters on the management himself.[91]

It has been held in a Madras case,[92] that though a lender, who has made bona fide enquiries, is not bound to see to the application of the money, yet if he makes a case that he knew that the borrowing was for a specific purpose, and that the money was utilised for that purpose, it is incumbent upon him to prove his allegations.

Debts for Family Business

As to burden of proof, see § 240 (3).

88 *Re Dattatreya Govind Haldankar* (1932) 56 Bom 519, 141 IC 697, AIR 1932 Bom 537.

89 *Suraj Bakhsh Singh v Kedar Nath* (1932) 7 Luck 505, 135 IC 379, AIR 1932 Ori 66.

90 *Ganpat Rao v Ishwar Singh* (1940) Nag 20, AIR 1938 Nag 816, *Babu Lal v Satya Narain Prasad* (1941) All 680, 197 IC 509, AIR 1941 All 372.

91 *Anant Ram v Collector of Etah* (1918) 40 All 171, 44 IC 290, AIR 1917 PC 188; *Hanooman Persaud v Mst Babooee* (1856) 6 MIA 393; *Soorendro v Nundun* (1894) 21 WR 196; *Lala Bunseedhur v Bindeseree* (1866) 10 MIA 454, 471; *Dalibai v Gopibai* (1902) 26 Bom 433; *Kaundhia Lal v Muna Bibi* (1898) 20 All 135; *Muddun Thakoor v Kantoo Lall* (1874) 14 Beng IR 187, 199 1 IA 321, 334; *Tula Ram v Tulshi Ram* (1920) 42 All 559, 60 IC 3, AIR 1920 All 11; *Chitamani v Satyabadi Kar* (1922) 1 Pat 715, 70 IC 226 AIR 1923 Pat 71; *Baijnath v Gokul* (1923) 45 All 718, 74 IC 498, AIR 1924 All 37, *Rodha Ram v Amar Chand* (1923) 4 Lah 208, 77 IC 333, AIR 1924 Lah 144; *Bed Nath v Rani Rajeshwari Devi* (1938) 13 Luck 357, 168 IC 725, AIR 1937 Ori 406; *Lalta v Avadh Naresh Singh* (1940) 15 Luck, 68, 185 IC 443, AIR 1940 Ori 59, *Dayaram v Kashiram* AIR 1964 MP 286; *Rulia v Jagdish* AIR 1975 Punj 335.

92 *Pethu Reddiar v Kandaswami* (1950) 1 MLJ 469, AIR 1950 Mad 560.

Alienation for Purposes of Family Business

See § 246.

Recital of Necessity

Recitals of legal necessity in mortgages or deeds of sale executed by the father or manager are admissible in evidence, but are not of themselves evidence of such a necessity without substantiation by evidence *aliunde*.[93] They may be corroborated by representation made by the borrower.[94] However, the recitals are admissions of the manager and they also amount to a representation about the need of the family, and where owing to the length of time, it is impossible to produce other evidence, they have evidentiary value also.[95]

Lapse of Time

See notes to § 182 under the same head.

Rate of Interest

Those who support a mortgage of joint family property made by its manager, must prove not only that there was necessity to borrow the principal, but that it was not unreasonable to borrow at such rate of interest and upon such terms as are provided by the mortgage.[96] If the rate of interest is exorbitantly high, although the security is ample, the court can properly infer that it was unnecessarily high, and can make a mortgage decree allowing a reduced rate.[97] Upon a written statement

93 *Biswanath Singh v Kayastha Trading Corporation* (1929) 8 Pat 450, 119 IC 405, AIR 1929 Pat 422; *Bed Nath Singh v Rani Rajeshwari Devi* (1938) 13 Luck 357, 168 IC 725, AIR 1937 Ori 406; *Nagayya v Chenganna* AIR 1957 AP 264.

94 *Rani v Santa Bala* AIR 1971 SC 1028 referred to under § 182; *Padam Singh v Reoti Saram* AIR 1929 All 481.

95 See cases under § 182. *Dwarka Ram v Bakshi Parnaw Prasad* (1935) 14 Pat 595, 156 IC 859, AIR 1935 Pat 178. See also *Murugesam v Manickavasaka* (1917) 44 IA 98. Reference may be made to *MB Fund Ltd v Devarajulu* AIR 1955 Mad 455; *Sivarama v Subramonia* AIR 1953 T-C 417.

96 *Jaipal Singh v Lachman Singh* (1934) 9 Luck 657; *Bajrang Singh v Govind Prasad* (1936) 11 Luck 11, 154 IC 841, AIR 1935 Ori 373.

97 *Nazir Begam v Rao Raghunath Singh* (1919) 41 All 571, 576, 46 IA 145, 149, 50 IC 434, AIR 1919 PC 12; *Ram Bujhawan Prasad v Nathu Ram* (1923) 50 IA 14, 20–21, 2 Pat 285, 290–91, 71 IC 933, AIR 1923 PC 37 (compound interest at 3 per cent per month payable with quarterly rests: reduced to simple interest at 1 per cent per month); *Radha Kishun v Jag Sahu* (1924) 51 IA 278 4 Pat 19, 80 IC 791, AIR 1924 PC 184; *Sunder Mull v Satya Kinker Sahana* (1928) 55 IA 85, 7 Pat 294, 108 IC 337, AIR 1928 PC 64 (interest and compound interest at 15 per cent per annum rate upheld); *Hurro Nath v Randhir Singh* (1891) 18 Cal 311, 18 IA 1; *Nand Ram v Bhupal Singh* (1912) 34 All 126, 13 IC 5; *Ram Khelawan v Ram Naresh* (1919) 41 All

continued on the next page

alleging that there was no legal necessity to execute the document sued on, the defendant, while admitting the necessity to borrow the principal, can contend that the rate of interest was unnecessarily high. A plea of no legal necessity for a loan in the written statement opens the door for a defendant to say that the rate of interest is excessive, though, there is no specific plea in the written statement that there was no necessity to borrow at so high a rate of interest.[98] The same rules apply to a mortgage by a Hindu widow or other limited owner of property inherited by her from the last full owner.[99]

The Judicial Committee has laid down that the authority of a manager to borrow was one to borrow 'upon reasonable commercial rates'.[1] This expression means, as their Lordships observed in a later case, such terms as can be arranged freely between borrower and lender in the circumstances of the particular case; no reference to the current rate of interest upon mercantile transactions is to be understood, especially if the parties belong to a community which is not a commercial community and the transaction is one which no one would call mercantile. In the same case, it was held that a previous borrowing upon terms as onerous as those in question, may be evidence that those terms are reasonable and proper.[2]

In Oudh, 12 per cent per annum was looked upon as a normal rate of interest, even where the security was abundant.[3]

§ 244A. DISCRETION OF MANAGER

The manager of a family has wide discretion in arriving at a conclusion as to legal necessity and as to in what way such legal necessity can be fulfilled best, by mortgage or sale. The discretion of the manager as

609, 51 IC 52, AIR 1919 All 268; *Premukhdas v Rambhujawan* (1919) 1 Pat LT 34, 52 IC 964, AIR 1920 Pat 678; *Bhikhi v Kodai* (1919) 41 All 523, 50 IC 814, AIR 1919 All 238; *Mahadeo v Bissessar* (1923) 2 Pat 488, 74 IC 695, AIR 1924 Pat 71; *Parmeshwar v Raj Kishore* (1924) 3 Pat 829, 80 IC 34, AIR 1925 Pat 59; *Sukh Lal v Murari Lal* (1926) 1 Luck 160, 95 IC 1019, AIR 1926 Ori 273; *Durgaprasad v Jewdhari Singh* (1935) 62 Cal 733, where 18 per cent compound interest with nine monthly rests was reduced to 18 per cent simple interest.

98 *Ram Bujhawan Prasad v Nathu Ram* (1923) 50 IA 14, 22, 2 Pat 285, 287, 71 IC 933, AIR 1923 PC 37; *Radha Kishun v Jag Sahu* (1924) 51 IA 278, 4 Pat 19, 80 IC 791, AIR 1924 PC 184.

99 *Radha Kishun v Jag Sahu* (1924) 51 IA 278, 4 Pat 19, 80 IC 791, AIR 1924 PC 184; *Amin Uddin* (1931) 29 All LJ 29, 133 IC 311, AIR 1931 All 203.

1 *Nazir Begam v Rao Raghunath Singh* (1919) 41 All 571, 576, 46 IA 145, 149, 50 IC 434, AIR 1919 PC 12; *Radha Kishus v Jag Sahu* (1924) 51 IA 278, 4 Pat 19, 80 IC 791, AIR 1924 PC 184.

2 *Sunder Mull v Satya Kinker Sahana* (1928) 55 IA 85, 7 Pat 294, 108 IC 337, AIR 1928 PC 64.

3 *Suraj Bakhsh Singh v Kedar Nath* (1932) 7 Luck, 505, 135 IC 379, AIR 1932 Ori 66.

regards legal necessity, is however not beyond the pale of scrutiny by the courts and can be subject to judicial review.

A coparcener cannot, however, ask for an injunction against alienation on the ground of the alienation not being for legal necessity.[4] The remedy of the suing coparcener being to pray for a partition of the joint family property and for recovery of possession of his share.[5]

§ 245. PURCHASE-MONEY OR MONEY RAISED ON MORTGAGE APPLIED BY MANAGER IN PART ONLY TO PURPOSES OF LEGAL NECESSITY

(1) *Sale.*—Cases frequently arise in which joint family property is sold by the manager of the family for legal necessity, but the whole of the price is not proved to have been applied to purposes of necessity, and the sale is challenged on the ground by the other members of the family. If the sale itself is justified by the legal necessity, and the purchaser pays a fair price for the property sold, and acts in good faith and after due inquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been applied to purposes of necessity would not invalidate the sale, the purchaser not being bound to see to the application of the price. If the above conditions are satisfied, the sale must be upheld unconditionally, whether the part not proved to have been applied to purposes of necessity, is considerable or not.[6] In *Radhakrishandas v Kauram*,[7] the Supreme Court considered the leading decisions of the Privy Council on the subject and expressed agreement with them (see § 189).

4 *Sunil Kumar v Ram Prakash* AIR 1988 SC 576.

5 *Nimiyappa v Ramaiah* AIR 1996 Kant 321 (case-law discussed).

6 *Krishan Das v Nathu Ram* (1927) 54 IA 79, 49 All 149, 100 IC 130, AIR 1927 PC 37 (price Rs 3,500—Rs 500 not proved to have been applied to purposes of necessity—sale upheld unconditionally); *Niamat Rai v Din Dayal* (1927) 54 IA 211, 8 Lah 597, 101 IC 373, AIR 1927 PC 121 (sale upheld unconditionally); *Masit Ullah v Damodar Prasad* (1926) 53 IA 204, 48 All 518, 98 IC 1031, AIR 1926 PC 105 (price Rs 18,400—Rs 2,000 not proved to have been applied to purposes of necessity—sale upheld unconditionally); *Gauri Shankar v Jiwan Singh* (1928) 30 Bom LR 64, 107 IC 4, AIR 1927 PC 246 (price Rs 4,000—Rs 500 not applied to purposes of necessity—sale upheld unconditionally); *Shyam Lal v Badri Prasad* (1929) 51 All 1039, 122 IC 744, AIR 1929 All 789; *Ram Sunder v Lachhmi* (1929) 51 All 430, 160 IC 605, AIR 1929 PC 143 (price Rs 10,767—Rs 3,033 not proved to have been applied for purposes of necessity—sale upheld unconditionally); *Achutanand v Surjanarain* (1926) 5 Pat 746, 95 IC 991, AIR 1926 Pat 427 (price Rs 750—Rs 200 not proved to have been applied etc—sale upheld unconditionally); *Suraj Bhan Singh v Sah Chain Sukh* (1927) 29 Bom LR 1385, (PC), 105 IC 257, AIR 1927 PC 244 (sale by widow); *Murli v Ghammar* (1929) 51 All 61, 121 IC 285, AIR 1930 All 22; *Johnston v Gopal Singh* (1931) 12 Lah 546, 133 IC 628, AIR 1931 Lah 419; *Kalipada v Purnabala* (1948) 2 Cal 485; *Gobindkar v Mohan* (1949) Ori 218; *Rulia v Jagadish* AIR 1973 Punj 335.

7 AIR 1967 SC 574. Also see *Gangadharan v Janardhana* AIR 1996 SC 2127.

In an Allahabad case,[8] where the sale was for Rs 6,000, which was a fair price, but the amount proved to have been applied for purposes of legal necessity was only Rs 3,281, and there was no evidence of any inquiry having been made by the purchaser as to the necessity for the loan, it was held that the sale itself was not one which was justified by legal necessity, and that it should be set aside conditionally on payment by the plaintiffs of Rs 3,281 to the purchaser.

A contract of sale may be justified by legal necessity, as where it is made for payment of a previous mortgage debt. However, it may be improvident and therefore, beyond the powers of the manager. In such a case, if the sale is completed at a time when it is deprived of all value as a solvent of the family's financial difficulties, the sale should be set aside but, if the purchase money has been applied by the manager in payment of the mortgage debt, the purchaser should have the full benefit of the mortgage.[9]

Although, there may be legal necessity justifying alienation, it is not open to a father or other manager to sacrifice family property for an inadequate consideration. A transfer in such cases is liable to set aside at the instance of other coparceners.[10]

(2) *Mortgage.*—It has been held in Oudh that the rule stated in sub-§ (1) applies only to sales, and not to mortgages. The reason given is that it is not always possible for the father (or manager) of a family to sell that share of property which will bring in the precise sum which is wanted to clear the debts which are binding, while in the case of a mortgage, he can borrow the precise amount required to meet the family necessity. The mortgage therefore can be redeemed on payment to the mortgagee of such sum only as was required for legal necessity.[11] The decision has been followed by the High Court of Patna.[12] In a case where the mortgage was for Rs 12,000 and it was found that there was justifiable necessity only for Rs 7,700, the Calcutta High Court held that there was

8 *Sri Nath v Jagannath* (1931) 52 All 391, 125 IC 230, AIR 1930 All 292. See *Lachhman Prasad v Sarmnam Singh* (1917) 39 All 500, 44 IA 163, 40 IC 284, AIR 1917 PC 41 (mortgage).

9 *Ram Charan v Bhagwan Das* (1926) 53 IA 142, 48 All 413, 95 IC 898, AIR 1925 PC 68.

10 *Kailash Nath v Tulshi Ram* (1946) All 457; *Dudh Nath v Sat Narain Ram* AIR 1966 All 315 (FB). Also see *Prasad v Govindaswami* AIR 1982 SC 84, (court must be satisifed that the father or manager acted like to prudent man); see *Onkar v Babu Ram* AIR 1981 All 120 (son liable to repay only amount that was essential); *Basavaraj v Kushal Chand* AIR 1992 Kant 393 (non alienating coparceners to refund proportionate amount of sale consideration).

11 *Thakar Jai Indira v Lal Khairati Lal* (1929) 4 Luck 107, 113 IC 489, AIR 1928 Ori 465.

12 *Dwarka Ram v Bakshi Parmanc Prasad* (1935) 14 Pat 595, 156 IC 859, AIR 1935 Pat 178; distinguishing *Hitendra v Sukhdeb* (1929) 8 Pat 558, 115 IC 886, AIR 1929 Pat 360.

no bona fide inquiry and granted a decree only for the latter sum with the corresponding interest.[13]

Illustration to sub-§ (1)

A joint Hindu family consists of a father and his minor sons. The father sells one of the joint family properties for Rs 3,500 out of which Rs 3,000 are paid to the creditors of the family. Afterwards the sons sue to set aside the sale on the ground that the surplus of Rs 500 was not applied to purposes of necessity. It is proved that the price was adequate and that the purchaser had made due inquiry as to the necessity for the sale. The mere fact that the surplus is not proved to have been applied to purposes of necessity is not a sufficient ground in law for setting aside the sale.[14] In this leading case on the subject, the Privy Council disapproved of the view taken by the Allahabad High Court,[15] and held that a sale of joint family property should not be set aside merely because a considerable part of the purchase money is not proved to have been applied to purposes of legal necessity. The real question to be considered is whether the sale itself was justified by legal necessity; if the purchaser has acted honestly and made due inquiry as to the existence of necessity for the sale, he is not bound to account for the application of the price. If the above conditions are fulfilled, the sale must be upheld. It was also held that on the same principle, a decree upholding a sale conditionally upon the purchaser paying a small part of the price not proved to have been applied to purposes of necessity, is also contrary to law; the sale must be upheld unconditionally. In this case,[16] The Judicial Committee adopted the principles laid down by the same tribunal in 1856 in *Hunooman Persaud v Musummat Baboee.*[17] Almost all the cases cited by the Judicial

13 *Durgaprasad Barhai v Jewdhari Singh* (1935) 62 Cal 733, 161 IC 595, AIR 1936 Cal 116.

14 *Krishan Das v Nathu Ram* (1927) 54 IA 79, 49 All 49, 100 IC 130, AIR 1927 PC 37.

15 *Gobind Singh v Baldeo Singh* (1903) 25 All 330 (sale by widow price Rs 3,299—Rs 376 not proved to have been applied to purposes of necessity); *Ram Dei v Abu Jafar* (1905) 27 All 494 (sale by widow—price Rs 2,995—Rs 445 not proved etc); *Jainarayan v Bhagwan* (1922) 44 All 683, 80 IC 1006, AIR 1922 All 321 (price Rs 375—Rs 101 not proved etc); *Dwarka Ram v Jhulai* (1923) 45 All 429 431, 72 IC 134, AIR 1923 All 248 (price of Rs 600—Rs 200 not proved etc); *Daulat v Sankhata* (1925) 47 All 355, 86 IC 91, AIR 1925 All 324 (price Rs 2,142—Rs 105 not proved to have been applied to purposes of necessity); *Lal Bahadur v Kamleshar* (1926) 48 All 83, 90 IC 988, AIR 1925 All 624, FB (price Rs 5,995—Rs 259 not proved to have been applied to purposes of necessity).

16 *Sri Krishn Das v Nathu Ram* (1927) 54 IA 79, 49 All 149, 100 IC 130, AIR 1927 PC 37.

17 (1856) 6 MIA 393, 423–24.

Committee in *Kishan Das v Nathu Ram*, as supporting their decision, were cases of sales by a Hindu widow. The point emphasised in both the cases was that the validity of a sale in such cases did not depend upon proof of the application of the price. The reason is that a bona fide purchaser for value is not bound to see the application of the price paid by him; if it were otherwise, he would himself have to enter on the management and direct and control the actual application of the money. Hence, it has been held that the mere fact that a considerable part of the price, eg, Rs 712 out of Rs 5,000,[18] or Rs 2,000 out of Rs 18,400,[19] or Rs 5,100 out of Rs 43,500,[20] or even one-third of the whole price,[21] is not proved to have been applied to purposes of necessity, is not a sufficient ground in law for setting aside the sale.

The decision in *Krishan Das v Nathu Ram* was followed by the same tribunal in *Niamat Rai v Din Dayal*.[22]

§ 246. ALIENATION BY MANAGER OF COPARCENARY PROPERTY FOR PURPOSES OF FAMILY BUSINESS

The power of a manager to carry on a family business necessarily implies a power to mortgage or sell the family property for a legitimate and proper purpose of the business. An alienation so made, is binding on the family property, including the interest of minor coparceners therein.[23] Further, the manager has authority to raise money not only to discharge debts arising out of the family business, but also money needed to carry it on. It is a matter for his decision whether the money necessary should be raised by mortgage or by a sale, and whether it was better to raise money to continue a business, which of late had not been profitable, or to close it down; it would be unreasonable to expect a lender or purchaser to investigate questions of that kind.[24] If the lender or purchaser

18 *Medai Dalavoi v Nainar Tavan* (1922) 27 CWN 365, 74 IC 604, AIR 1922 PC 307.

19 *Masit Ullah v Damodar Prasad* (1926) 53 IA 204, 48 All 518, 98 IC 1031, AIR 1926 PC 105.

20 *Niamat Rai v Din Dayal* (1927) 54 IA 211, 8 Lah 597, 101 IC 373, AIR 1927 PC 121.

21 *Ram Gopal Ghose v Bullodev Bose* (1864) WR 385.

22 See § 189 and notes. 54 IA 111, 8 Lah 597, 101 IC 373, AIR 1927 PC 121 (price Rs 43,500—debts discharged Rs 38,400).

23 *Ram Krishna v Ratan Chand* (1931) 58 IA 173, 53 All 190, 132 IC 613, AIR 1931 PC 136; *Ramlal v Lakshmichand* (1861) 1 Bom HC App Li; *Sham Sunder v Achhan Kunwar* (1899) 21 All 71, 83, 25 IA 183 192; *Khem Chand v Narain Das* (1925) 6 Lah 493, 89 IC 1022, AIR 1926 Lah 41; *Mahabir Prasad v Amla Prasad* (1924) 46 All 364, 79 IC 517, AIR 1924 All 379; *Narayanan v Muthiah* (1924) 47 Mad 692, 80 IC 654, AIR 1924 Mad 680; *Palanippa v A & F Harvey Ltd* AIR 1953 T-C 481.

24 *Niamat Rai v Din Dayal* (1927) 54 IA 211, 8 Lah 597, 101 IC 373, AIR 1927 PC 121.

acted honestly and with due caution, and made reasonable inquiries which led him to believe that a sufficient and real necessity for the raising of the money for the purposes of the family business did exist,[25] he is not bound to see to the application of the money.[26]

Where the alienation was made by a manager who was blind and deaf, and practically all the money which had been disallowed by the High Court had been borrowed by the fourth and fifth defendants, who were the eldest members of the family and the manager's right-hand men, their conduct in not giving evidence and remaining as defendants, while causing their sons to file the suit questioning the alienation, was held by their Lordships of the Privy Council to be strong corroborative evidence of legal necessity.[27]

A mortgage by the manager for enlarging a family business by the purchase of fresh stocks is binding on the family property including the interest of the minor coparceners therein, provided the transaction is one which a prudent owner would enter into having regard to all the circumstances of the case.[28]

A manager, in executing a mortgage for a legal necessity may, under s 69, Transfer of Property Act, confer, on the mortgagee, the right of sale without recourse to the court.[29]

§ 247. REFERENCE TO ARBITRATION BY MANAGER

A father,[30] or other manager has power to refer to arbitration, disputes relating to joint family property, provided such reference is for the benefit of the family. The other members of the family, including minors, are bound by the reference and by the award made upon it.[31]

The reference may be in respect of disputes between the family and an outsider of disputes between members of the family themselves, eg, as to shares on partition.

25 *Ram Nath v Chiranji Lal* (1935) 57 All 605, FB, 155 IC 136, AIR 1935 All 221.

26 *Ram Krishna v Ratan Chand* (1931) 58 IA 173, 53 All 190, 132 IC 613, AIR 1931 PC 136.

27 *Jagannath v Shri Nath* (1934) 56 All 123, 61 IA 150, 147 IC 903, AIR 1934 PC 55.

28 *Raj Kumar v Mohan Lal* (1931) 29 All LJ 219, 131 IC 872, AIR 1931 All 253.

29 *Paramanand Doss Chota Doss & Sons v Nannulal Kanji & ors* (1942) Mad 287, 201 IC 62, AIR 1942 Mad 232. As to new business, see § 234(2).

30 *Shantilal v Munshilal* (1932) 56 Bom 595, 139 IC 820, AIR 1932 Bom 498.

31 *Jagan Nath v Mannu Lal* (1894) 16 All 231; *Balaji v Nana* (1903) 27 Bom 287; *Dwarka Das v Krishan* (1921) 2 Lah 114, 121–24, 61 IC 628, AIR 1921 Lah 34; *Guran Ditta v Pokhar Ram* (1927) 8 Lah 693, 104 IC 202, AIR 1927 Lah 362; *Nanak Chand v Banarsi Das* (1931) 12 Lah 65, 126 IC 579, AIR 1930 Lah 425; *Kanshi Ram v Harnam Das* (1940) 21 Lah 599, 188 IC 493, AIR 1940 Lah 73.

§ 248. COMPROMISE BY MANAGER

A compromise entered into by the manager bona fide for the benefit of the family, binds the other members of the family including minors.[32]

However, where a suit relating to joint family property, to which a father and his minor sons are parties, is pending, and the father himself is the next friend or guardian *ad litem* of the minors, his powers are controlled by the provision of O 32 r 7 of the Code of Civil Procedure 1908, and he is debarred from entering into any compromise relating to the joint family property without leave of the court. The minors are not bound in such a case either by the compromise or by a consent decree in terms of the compromise.[33] The court may, in such a case, set aside the whole compromise.[34] A manager of a joint family is subject to O 32 r 1, 6 and 7 of the Code of Civil Procedure.[35]

§ 248A. MANAGER'S POWER TO GIVE VALID DISCHARGE FOR DEBTS

The manager has powers to give a valid discharge for a debt due to the joint family. Hence, if one of the members is a minor, he cannot claim the benefit of s 7 of the Limitation Act 1908.[36]

§ 248B. FAMILY ARRANGEMENT OR FAMILY SETTLEMENT

(In §§ 192 and 193, the subject of family arrangement and compromise by a widow has been dealt with). Family arrangement or family settlement, as it is sometimes termed, generally meets with approval of the court and the court always leans in favour of a transaction relating to any such arrangement, which ensures peace and goodwill among the family members. This does not rest on any special rule of Hindu law, but flows from general principles and policy of law. It is governed by a special equity peculiar to itself and where the terms are fair, taking into

32 *Pitam Singh v Ujgar Singh* (1878) 1 All 651; *Dwarka Das v Krishan* (1921) 2 Lah 114, 123–24, 61 IC 628, AIR 1921 Lah 34, *Dangal Ram v Jaimangal* (1926) 5 Pat 480, 93 IC 1051, AIR 1926 Pat 361; *Bhagwan Singh v Beharilal* (1938) Nag 221, 172 IC 48, AIR 1937 Nag 237.

33 *Ganesh Row v Tuljaram Row* (1913) 40 IA 132, 36 Mad 295, 19 IC 515.

34 *Venkata Row v Tuljaram Row* (1922) 49 IA 91, 45 Mad 298, 74 IC 765, AIR 1922 PC 69 (continuation of litigation in *Ganesh Row v Tuljaram Row* (1913) 40 IA 132, 19 IC 515).

35 *Fatmabi v Tukabai* (1945) Nag 242.

36 *Rati Ram v Nladar* (1919) 41 All 435, 49 IC 990, AIR 1919 All 209, *Bapu v Bala* (1921) 45 Bom 446, 59 IC 759, AIR 1921 Bom 289, *Supdu v Sakharam* (1928) 52 Bom 411, 110 IC 276, AIR 1929 Bom 13, *Varada Bhaktavatsaluda v Damojipurapu Venkata Narasimha Rao* (1940) Mad 752, 191 IC 369, AIR 1940 Mad 530.

consideration the circumstances of the case, the court makes every effort to recognise and sustain it.[37] Though, conflict of legal claims *in praesenti* or *in futuro* is generally regarded as a condition for the validity of a family arrangement, it is not necessarily so. Even bona fide dispute, present or possible, which may not involve future claims will suffice. Thus, for instance, members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement.[38] It is not necessary that the arrangement should be amongst all members of the family arrayed one against the other. The prime factor is that it should be in the interest of the family.

When a gift deed was executed in favour of an heir, for settlement of family disputes, the condition being that the donee would relinquish all rights of inheritance, the deed was construed as one of family arrangement.[39]

In England, family arrangements are viewed as arrangements governed by principles which are not applicable to dealing between strangers. The courts, when deciding the rights of parties under a family arrangement or a claim to upset such an arrangement considers what in the broadest view of the matter is most in the interest of the family and has regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters, which would be fatal to the validity of similar transactions between strangers, are not objections to the binding nature of family arrangements. A family arrangement can be such as the court would uphold, although, there were no rights in dispute and if sufficient motive for the arrangement was proved, the court would not consider the adequacy of consideration.[40]

37 Also see *K V Narayanan v K V Ranganadhan* AIR 1976 SC 1715 (in partition); *Commissioner of Wealth-tax v Vijayaba* AIR 1979 SC 982. Moreover, see *MN Aryamurthi v M L Subbaraya Setti* AIR 1972 SC 1279.

38 *Pullaiah v Narasimham* AIR 1966 SC 1836; *Ram Charan v Girja Nandini* AIR 1966 SC 323; *Tek Bahadur v Debi Singh* AIR 1966 SC 292 (compromise by parties in an earlier suit and decree). Reference may be made to *Shanmugam Pillai v K Shanmugam Pillai* AIR 1972 SC 2069; *Kale v Deputy Director of Consolidation* AIR 1976 SC 807; *Shambhu Prasad v Phool Kumari* AIR 1971 SC 1337. Also see cases cited under §§ 192, 193 above. See *Sant Bhushan Lal v Brij Bhushan Lal* AIR 1967 Del 137 (compromise in partition suit by next friend of minor); *Manu Biswal v Lata Biswalani* AIR 1965 Ori 13 (compromise in partition suit by manager of a branch); *Mania v Deputy Director Consolidation* AIR 1971 All 151; *Jokhan v Ram Deo* AIR 1967 All 212; *Laxmi Narayan v Banshi Lal* AIR 1965 All 522; *Mythili Nalini v Kowmari* AIR 1991 Ker 226 (not necessary to set up antecedent title).

39 *Damodaran Kavirajan v Rajappan* AIR 1992 Ker 397; *Lakshmi Ammal v Chakravarthi* AIR 1999 SC 3363 (compromise before panchayat—valid family arrangement).

40 *Halsbury's Laws of England*, 4th edn, § 304, p 137. Also see *Williams v Williams* (1867) 2 Ch App 294 (agreement dividing family property under a misapprehension of the rights of the parties, not induced by any party to the agreement).

The concept of 'family arrangement' in England has been accepted by courts in India, adopting the concept to suit the family set up in our country. The Supreme Court has generally taken a broad view of the matter and leaned heavily in favour of upholding any such arrangement. Moreover, it would seem from decided cases that any such arrangement would be upheld if it was entered into to allay disputes existing or apprehended and even any dispute or difference apart, if it was entered into bona fide to maintain peace or to bring about harmony in the family. Even a semblance of a claim or some other ground, as say affection, may suffice.[41] (Of course, the arrangement must be bona fide and its terms should be fair in the circumstances of the particular case). The mere circumstance that subsequently there was an attempt to resile from it or that there was any change of intention by any party or the parties to it to modify the arrangement would not affect the validity or binding nature of the arrangement. Of course, the arrangement must be bona fide and its terms should be fair in the circumstances of the particular case. If it is shown that the purported arrangement was from the inception not intended to be acted on, then it would be really no arrangement at all and cannot bind the parties nor would any family arrangement be given effect to as against a party or those claiming through him, if it was brought about by undue influence, coercion or fraud practised upon him.

It is not necessary that there can be a family arrangement only between members of a joint family. It can be entered into by members of any family, though in most cases, such arrangements are arrived at among members of a joint family. It may be noted that any such transaction is not the creation of an interest. In such an arrangement, ordinarily, each party takes a share or interest in the property by virtue of the independent title which is admitted to that extent by the other parties. However, every party who takes benefit under it, need not necessarily be shown to have, under the law, a claim to a share in the property. All that is necessary to show is that the parties are related to each other in some way and have a possible claim or even a semblance of a claim or some other ground as, say affection.[42]

The expression 'family' in the context of family arrangement, is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. It is sufficient, if the arrangement is between near relations (see notes under s 192).

41 *Ram Charan v Girija Nandini* AIR 1966 SC 323, 329.

42 Also see § 192. *Ram Charan v Girja Nandini* AIR 1966 SC 323, 329.

Family arrangement as such can be arrived at orally. It may be partly in writing and partly oral as evidenced by the conduct of the parties.[43] Its terms may be recorded in writing as a memorandum of what was agreed upon between the parties. The document which contains the arrangement does not require registration unless, by itself creates interest in immovable property. A memorandum is usually prepared as a record of what had been agreed upon so that there be no hazy notions about it in future. It is only when the parties reduce the family arrangement in writing, with the purpose of using that writing as proof of what they had arranged, and, where the arrangement is brought about by the document as such, that the document would require registration.[44] Moreover, in such a case, even if the document is not registered, it can be used for a collateral purpose, for instance for the purpose of showing the nature and character of possession of the parties in pursuance of the arrangement.[45]

A family arrangement can, as a matter of law, be implied from a long course of dealing between the parties. The conduct of various members of the family may be relevant to show that their acts, viewed as a whole, suggest the existence of such arrangement.[46]

For family arrangement of the nature of a partition created by 'will', reference may be made to § 345 and the undermentioned case,[47] and the decisions there cited.

Construction

As to construction of a document of family arrangement, reference may inter alia be made to *Lalji Maitra v Shyam Behari*.[48]

§ 249. ACKNOWLEDGEMENT AND PART PAYMENT OF DEBT BY MANAGER

It is competent to a manager to acknowledge a debt, or pay interest on a debt, or to make part payment of a debt, so as to extend the period

43 *Commissioner of Wealth Tax v Vijayaba* AIR 1929 SC 982 (agreement by assessee undertaking to pay younger son, if elder son fails to pay him).

44 *Ram Charan v Girja Nandini* AIR 1966 SC 323, 329; *Pullaiah v Narasimham* AIR 1966 SC 1836.

45 *Kale v Deputy Director of Consolidation* AIR 1976 SC 807. (analysis of the decision of the Supreme Court on the subject); *Jugal Kishore v Gobind Singh* AIR 1992 Pat 128 (arrangement for purposes of record or for future use, not necessary to register such document).

46 *Madho Das v Mukand Ram* AIR 1955 SC 481.

47 *Kuppuswami v Perumal* AIR 1964 Mad 291.

48 AIR 1979 All 379 (would not cover matters which could not be and were not in the contemplation of the parties).

of limitation, but he has no power to pass a promissory note so as to revive a debt barred by the law of limitation.[49]

A manager or a member cannot keep a debt alive against the other members of the family by making payment after partition.[50]

It was expressly provided by s 21 (3) (b) of the old Indian Limitation Act 1908, that for the purposes of ss 19 and 20, where a liability had been incurred by or on behalf of a Hindu undivided family as such, an acknowledgement or payment made by, or by the duly authorised agent of the manager of the family for the time being, should be deemed to have been made on behalf of the whole family.

Revival of Time-barred Debt

If the manager revives a time-barred debt by passing a promissory note, he alone is liable on the note.[51]

Admissions by Father

In the case of a Mitakshara father, who is the *karta*, an implied authority to make an admission for the benefit of his minor sons may very well be presumed.[52]

§ 250. RELINQUISHMENT OF DEBT BY MANAGER

The manager has no power to give up a debt due to the joint family.[53]

§ 251. PARTIES TO SUITS

(1) Where the manager of a joint family, having power to do so, enters into a transaction in his own name on behalf of the family, whether it

49 *Bhaskar v Vijalal* (1893) 17 Bom 512; *Dinkar v Appaji* (1896) 20 Bom 155; *Chinnaya v Gurunatham* (1882) 5 Mad 169; *Dalip Singh v Kundan Lal* (1913) 35 All 207, 18 IC 726; *Sadhu Saran v Brahmdeo* (1921) 6 Pat LJ 256, 260–61, 61 IC 20, AIR 1921 Pat 299; *Thakar Das v Mst Putli* (1924) 5 Lah 317, 82 IC 96, AIR 1924 Lah 611; *Nagarmal v Bajranglal* AIR 1950 PC 15; *Dasappa Setty v Vedavathamma* AIR 1972 Mys 283. However, he can renew a note, the time for filing a suit on which only expired during summer recess—*Subba Reddi v Venkataramayya* (1945) Mad 634.

50 Also see § 243 A. *Pangudaya v Uthandiya* (1938), Mad 968, 177 IC 188, AIR 1938 Mad 774; *Rengaswami Ayyangar v Sivaprakasam Pillai and ors* (1942) Mad 251, 198 IC 177, AIR 1941 Mad 925. Now see ss 18 and 19 of the new Limitation Act 1963.

51 *Thakar Das v Mst Putli* (1924) 5 Lah 317, 82 IC 96, AIR 1924 Lah 611. See s 25 (3) Indian Contract Act.

52 *Surendra Nath v Sambhunath* (1928) 55 Cal 210, 218, 104 IC 219, AIR 1927 Cal 870.

53 *Dasaratharama v Narasa* (1928) 51 Mad 484, 109 IC 329, AIR 1928 Mad 601.

be a contract,[54] or a mortgage,[55] or a sale,[56] he may sue or be sued alone in respect of that transaction. Where the mortgage by the manager extends to the entire interest of the family and is not confined to the manager's share, he must be deemed to have acted in the transaction on behalf of the family.[57] The other coparceners are not necessary parties to a suit on such a mortgage, as they are effectually represented by him,[58] and are bound by the decree in the suit.[59]

The above proposition is based upon two decisions of the Privy Council set out in Illust (1) and (2) below:

54 *Kishan Prasad v Har Narain Singh* (1911) 38 IA 45, 33 All 272, 9 IC 739 reversing 29 All 311 (moneylending transaction); *Ramnath v Ramrao* (1922) 46 Bom 358, 64 IC 966, AIR 1922 Bom 281 (promissory note); *Gangaram v Bapusaheb* (1922) 46 Bom 1022, 84 IC 508, AIR 1922 Bom 354 (rent-note); *Jagabhai v Rustamji* (1885) 9 Bom 311 (partnership agreement between manager and stranger to family); *Anant Ram v Channu Lall* (1903) 25 All 378 (partnership between manager and stranger to family); *Gopal Das v Badri Nath* (1905) 27 All 361 (goods sold and delivered); *Durga Prasad v Damodar Das* (1910) 32 All 183, 5 IC 767 (purchase of silver bars); *Ram Kishan v Ganga Ram* (1931) 12 Lah 428, 133 IC 116, AIR 1931 Lah 559. The decision to the contrary in *Seshan v Veera* (1909) 32 Mad 284, 4 IC 38 (account stated) and *Shamrathi v Kishan* (1907) 29 All 311, 314 (account stated), are no longer good law. The decision in *Alagappa v Vellian Chetti* (1895) 18 Mad 33 (contract of employment), may be supported on the ground that the single plantiff in that suit was not shown to be manager—see 38 IA 45, 53, 33 All 272, 278, 9 IC 739.

55 *Shro Shankar v Jaddo Kunwar* (1914) 41 IA 216, 220, 36 All 383, 386–87, 24 IC 501, AIR 1914 PC 136 affirming 33 All 71, 7 IC 902 (a case under s 85, Transfer of Property Act); *Hori Lal v Munman Kunwar* (1912) 34 549, 15 IC 126 (a case under O 34 r 1, CPC); *Madan Lal v Kishan Singh* (1912) 34 All 572, 15 IC 138 (ditto); *Ramkrishna v Vinayak* (1910) 34 Bom 354, 5 IC 967 (s 85, Transfer of Property Act); *Chimna v Sada* (1910) 12 Bom LR 811, 7 IC 990 (ditto); *Sheik Ibrahim v Rama Iyer* (1912) 35 Mad 685, 5 IC 967; *Raghunandan v Parmeshwar* (1917) 2 Pat LJ 306, 39 IC 779, AIR 1917 Pat 375 (a case under O 34, r 1, CPC); *Jag Sah v Ram Chandra* (1921) 6 Pat LJ 640, 63 IC 564, AIR 1921 Pat 377 (ditto); *Sheikh Abdul v Shib Lal* (1921) 6 Pat LJ 650, 63 IC 570, AIR 1922 Pat 252; *Bungsee v Soodist Lall* (1882) 7 Cal 739; *Ramayya v Venkataratnam* (1894) 17 Mad 122; *Pirthipal v Rameshwar* (1927) 2 Luck 288, 99 IC 154, AIR 1927 Ori 27 (foreclosure suit—O 34, r 1; CPC); *Madhusudan v Bhagwan* (1929) 53 Bom 444, 118 IC 788, AIR 1929 Bom 213. The decisions to the contrary in *Debi Prasad v Dharamjit* (1914) 41 Cal 727, 22 IC 570, AIR 1914 Cal 455; and *Ramchandra v Shripatrao* (1916) 40 Bom 248, 33 IC 771, AIR 1916 Bom 278, can no longer be upheld.

56 *Shro Shankar v Jaddo Kunwar* (1914) 41 IA 216, 36 All 383, 24 IC 504, AIR 1914 PC 136 (purchase of equity of redemption).

57 *Daulat Ram v Mehr Chand* (1888) 15 Cal 70, 14 IA 187; *Venkatesh v Kusum* AIR 1978 SC 1791 (*togai* loan); *Ramanathan Chettiar v S Rm M Ct M Firm* (1937) Mad 376, 168 IC 731, AIR 1937 Mad 345.

58 *Venkatanarayana v Somaraju* (1937) Mad 880 (FB), 171 IC 101, AIR 1937 Mad 610.

59 *Ramnathan Chettiar v S Rm M Ct M Firm* (1937) Mad 376, 168 IC 731, AIR 1937 Mad 345; *Bhagwan Singh v Beharilal* (1938) Nag 221, 172 IC 43, AIR 1937 Nag 237; *Buthawan v Hanuman* AIR 1953 Pat 173.

Illustrations

(1) *A* and *B* are managers of a joint family, which carries on the business of money-lenders. As such managers, they advance moneys belonging to the joint family to *C*, *A* and *B* are entitled to sue *C* on an acknowledgement passed to them by *C* in respect of the money dealings. The other coparceners are not necessary parties to the suit. Accordingly, the joinder of the other coparceners as plaintiffs, after the statutory period has expired, being unnecessary, does not prevent the suit as originally constituted from being in time.[60] However, after partition, the position of members is that of partners and all must sue.[61]

(2) *M* mortgages two immovable properties to *J*. He then borrows moneys from *H* and *D*, the managing members of a joint Hindu family, and executes a second mortgage of one of the properties to them. He also sells the equity of redemption of the other property to *H* and *D*, and executes a sale-deed in their favour. *J* sues *M*, *H* and *D* on his mortgage, and obtains a foreclosure decree against them. The other members of the joint family are not parties to the suit. *H* and *D* do not avail themselves of the right to redeem, and the decree is made absolute. The decree is binding on the other members of the family, and they are not entitled to sue *J* for redemption.[62]

A member who contends that the action of the manager was beyond his powers, is not properly represented by the manager and ought to be joined as a party if he wishes.[63]

It is not necessary that the manager, either when he sues or is sued, should be described as such in the pleadings. However, it is always advisable to do so. In a suit by the manager, where it is necessary in order to safeguard the interest of the defendants, to implead the other members of the family, the defendants may apply to bring them on record.[64]

(2) Where a transaction purports to have been entered into by two or more persons described as *kartas* or managers of the joint family, they must all join as plaintiffs in the suit.[65] However, it is not necessary that all

60 *Kishan Parsad v Har Narain Singh* (1911) 38 IA 45, 33 All 272, 9 IC 739.

61 *Bihari Lal v Pt Ram Chandra Sharma* (1942) 17 Luck 702, 200 IC 172, AIR 1942 Ori 335.

62 *Sheo Shankar v Jaddo Kunwar* (1914) 41 IA 216, 220, 36 All 383, 24 IC 504, AIR 1914 PC 136.

63 *Motiram v Lalchand* AIR 1937 Nag 121.

64 *Madhgouda Babaji v Halappa Balappa* (1934) 58 Bom 348, 151 IC 370, AIR 1934 Bom 178. However, see *Lilabati v Guruprosad* AIR 1947 Cal 259.

65 *Ramsebuk v Ramlall* (1881) 6 Cal 815; *Imran-ud-din v Liladhar* (1892) 14 All 524, both explained in 38 IA 45, 52 33 All 272, 277–78, 9 IC 739.

members of the family must join in the suit.[66] Reference may be made to *Union of India v Shree Ram* of the Supreme Court referred to under § 236.[67]

(3) Even if the suit be one of a contract, which is not in writing and signed by the manager, the manager may sue alone as representing the family.[68]

(4) There is a conflict of opinion whether, as regards immovable property belonging to a joint family, the manager is entitled as such to bring a suit to establish a right in respect of such property without making the other members of the family parties to the suit, it being held in some cases that he is,[69] and in others that he is not.[70] It would seem from a Privy Council decision that he is.[71]

A decree in a suit would bind all the members of a joint family, even though only some were parties, if the interest of those who are not parties are sufficiently and substantially represented by the others and if the common title of all is affected.[72]

As to suits on mortgage, see O 34 r 1, Code of Civil Procedure 1908.

(5) It seems that the manager of a joint Hindu family may sue or be sued as representing the family in respect of a transaction entered into by him as manager of the family or in respect of joint family property, and that a decree passed against him in such a suit would bind all other members of the family if, as regards minors, he acted in the litigation in their interest,[73] and, as regards adults, with their consent. The consent need not be express; it will be implied if they do not come and apply to be joined as parties to the suit,[74] but not if they applied to be made parties in order to contest the manager's action.[75] The fact that besides

66 *Gendalal v Nanalal* AIR 1956 MB 58.

67 AIR 1965 SC 1531.

68 *Bhola Roy v Jung Bahadur* (1914) 19 Cal LJ 5, 93, 22 IC 789, AIR 1914 Cal 681 (suit for rent).

69 *Arunachala v Vythialinga* (1883) 6 Mad 27 (right to drain water of plaintiff's village through defendant's village); *Md Sadik v Khedan Lall* (1916) 1 Pat LJ 154, 36 IC 197, AIR 1916 Pat 251 (suit to eject trespasser).

70 *Kattusheri v Vallotil* (1881) 3 Mad 234 (against lessees for possession); *Balkrishna v Municipality of Mahad* (1886) 10 Bom 32 (to remove encroachment—suit by a coparcener); *Hari Gopal v Gokaldas* (1888) 12 Bom 158 (suit in ejectment); *Balkrishna v Moro Krishna* (1897) 21 Bom 154 (suit in ejectment); *Kashinath v Chimanaji* (1906) 30 Bom 477 (declaration of right to immovable property); *Angamuthu v Kolondavelu* (1900) 23 Mad 190 (ditto).

71 See sub-§ (5). *Lingangowda v Basangowda* (1927) 54 IA 122, 51 Bom 450, 101 IC 44, AIR 1927 PC 56. Reference may also be made to (1911) 38 IA 45, 33 All 272.

72 *Kishan Lal v Ram Chandar* (1944) ILR All 338.

73 *Venkatanarayana v Somaraju* (1937) Mad 880, FB, 171 IC 101, AIR 1937 Mad 610. See *Budaraju Venkatarathna v Venkata Subbaiah* AIR 1950 Mad 136; *Shankarrao v Vinayak* (1950) Nag 806; *Ishar Singh v Gajadhar Prosad* AIR 1957 Pat 174; *T A Sankaralingam v T N Mani* AIR 1975 Mad 206.

74 *Guravayya v Dattatraya* (1904) 28 Bom 11.

75 *Motiram v Lalchand* (1937) Nag 366, 172 IC 192, AIR 1937 Nag 121.

the manager who is sued as such, some other members of the family also are added as parties, will not render the suit defective simply on the ground that some other minor member has not been joined. The suit can still be a representative suit.[76]

In *Lingangowda v Basangowda*,[77] their Lordships of the Privy Council observed:

> In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action, or bring an action, by his guardian before; and in each of these cases, therefore, the court looks to Explanation 6 of s 11 of the Code of Civil Procedure 1908, to see whether or not the leading members of the family has been acting either on behalf of minors in their interest, or if they are minors, with the assent of the majors.

There is no right in a minor or an adult member of the family to bring a suit to set aside a decree passed against the manager on the ground that he acted with gross negligence in the conduct of the suit.[78]

Where a right to bring a suit was possessed by a father and other members then living, and persons who were born later had also acquired the right before the right is barred by limitation, the right will continue up to three years after majority of the youngest of the sons.[79]

(6) A coparcener, who is not the managing member, is not entitled to sue alone as representing the family.

In *Alagappa v Vellian*,[80] the plaintiff who was a member of a joint family, entered into a contract with the defendant in his own name, whereby he appointed the defendant as manager of the family business *in moulmein*. The plaintiff sued the defendant for damages for breach of the contract of service. The Madras High Court held that the plaintiff alone was not entitled to sue. As to this case, see observations of the Privy Council in *Kishan Prasad v Har Narain Singh*.[81]

Where a promissory note was taken by a father, the son cannot sue on it during the father's lifetime, without proof of renunciation by the father amounting to civil death.[82] A suit was filed by all the members of a joint family on a promissory note executed in favour of one of the members. The defendant denied that the family was joint and contended

76 *Jaigobind v Nagesar* AIR 1953 Pat 326.
77 (1927) 54 IA 122, 125, 51 Bom 450, 453, 101 IC 44, AIR 1927 PC 56.
78 *Krishnamurti v Chidambaram* (1946) Mad 670.
79 *Avesh Kumar v Zakaul Hasnain* (1944) All 612.
80 (1895) 18 Mad 33.
81 (1911) 38 IA 45, 53, 33 All 272, 278, 9 IC 739.
82 *Krishnaji v Hanunaraddi* (1934) 58 Bom 536, 153 IC 800, AIR 1934 Bom 385.

that the suit was not maintainable. The court held: (1) that the family was joint; (2) the suit should be allowed to proceed by an appropriate amendment of the description of the plaintiffs; and (3) in any event, the suit was maintainable.[83]

Where a joint family carries on a business, the members of the family who are minors and who are not shown to have been admitted into the trading firm or to have taken any part in the business or exercised any control therein, need not be joined as plaintiffs in a suit to recover moneys due to the family trading firm.[84]

Death of Manager

On the death of a manager, pending a suit or appeal to which he is a party as representing the joint family, the coparcener succeeding him as manager may be brought on the record, and the suit or appeal proceeded with. It is not necessary to bring his sons on the record.[85]

Where one manager obtained a decree and, after realising a portion of the amount, disappeared, the next manager of the family is entitled to be brought on the record for the purpose of continuing the execution proceedings.[86]

Where a promissory note is taken by a manager but by a subsequent arrangement between the coparceners, he becomes entitled only to a portion of the amount due under it, he can recover only his share.[87] To such a suit, the other sharers must be joined as parties (as to suits on promissory notes signed by the manager alone, see § 240 (4)).

Illustrations

(1) Two brothers *L* and *R*, constitute a joint family. The joint family carries on business as moneylenders in the name of *R.C. S* borrows money from the firm. Then *R* dies leaving a minor son. After *R*'s death, there are further dealings between the firm and *S*. An account of the dealings is made up, and *S* passes a promissory note to the firm of *R.C.* for Rs 12,000. *L*, the surviving brother, sues *S* upon the note. *L* had three minor sons at the date of the suit, and one was born to him after the institution of the suit. None of them is a necessary party to the suit.[88]

83 *Chaudhri Atma Ram v Umar Ali* (1941) Lah 39, 190 IC 78, AIR 1940 Lah 256.

84 *Lutchmanen v Siva* (1899) 26 Cal 349; *Anant Ram v Channu Lal* (1903) 25 All 378; *Lalji v Keshowji* (1913) 37 Bom 340, 17 IC 193.

85 *Atma Ram v Banku Mal* (1930) 11 Lah 598, 125 IC 369, AIR 1930 Lah 561; *Ganeshram v Mangilal* (1953) Nag 248, AIR 1952 Nag 390. Reference may also be made to *Kedarnath v Khaitan Sons & Co* AIR 1959 Cal 368.

86 *Narain Sarup v Daya Shankar* (1938) All 425, 175 IC 390, AIR 1938 All 256.

87 *Gopalu Pillai v Kothandarama Ayyar* (1934) 57 Mad 1082, 153 IC 916, AIR 1934 Mad 529.

88 *Lutchmanen v Siva* (1899) 26 Cal 349, 355.

(2) If in the case put above, *L* and *R* were both dead at the date of the suit, all the sons of *L* and *R* must be joined as plaintiffs to the suit. [89]

§ 252. ADDING NEW PLAINTIFF AND LIMITATION

Where coparceners, who ought to have been joined as plaintiffs to a suit, are not made parties to the suit, the court may order that they be added as parties. However, if the suit as regards them would then be barred by limitation, the whole suit must be dismissed as time-barred.[90]

It has been held by the High Court of Bombay, that where a suit is brought by the manager of a joint family as representing the family (in that case the suit was for recovery of possession of family property), the question of the right of a manager to sue in that capacity is rather one of authority, if the other co-sharers are adults. That the right to insist on the other coparceners being brought on the record is for the benefit of the defendant so as to insure himself against further litigation, and is therefore dependent on the objection being taken at an early stage, the objection on the score of want of authorisation being one of a character which it would clearly be open to the defendant to waive. If the defendant takes objection to non-joinder of parties at a late stage of the suit, the objection may be disregarded and the suit proceeded with.[91] The same view has been taken by the High Court of Allahabad.[92] The High Court of Calcutta has held, purporting to follow the Bombay decision, that the addition even of a minor coparcener after the expiry of the period of limitation as plaintiff to a suit on a mortgage, is not fatal to the suit.[93]

Illustration

A and *B* are members of a joint family, which owns a house in Bombay. *A* alleging that *C* is in wrongful occupation of the house, alone sues *C* to recover possession of the house. The suit is instituted on 1 January 1911. The last date for instituting the suit is 15 August 1911. The suit comes for hearing on 1 September

89 *Kalidas v Nathu* (1883) 7 Bom 217.

90 See above; *Ramsebuk v Ram Lall* (1881) 6 Cal 815; *Seshan v Veera* (1909) 32 Mad 284, 4 IC 38; *Girwar v Makbunessa* (1916) 1 Pat LJ 468, 36 IC 542, AIR 1916 Pat 310 (s 22, Limitation Act 1908).

91 *Guravayya v Dattatraya* (1904) 28 Bom 11 (suit for possession of land) following *Hari Gopal v Gokaldas* (1888) 12 Bom. Also see *Devidas v Shrishailappa* AIR 1961 SC 1277.

92 *Pateshri v Rudra Narain* (1904) 26 All 528 (suit for possession); *Imdad Ahmad v Pateshri* (1910) 37 IA 60, 52 All 241, 6 IC 981. See also *Chetan Singh v Sartaj Singh* (1924) 46 All 709, 79 IC 1001, AIR 1924 All 908.

93 *Thakur Mani v Dai Rani* (1906) 33 Cal 1079, 1093. Now see s 21 of the new Limitation Act 1963.

1911. *C* contends at the hearing that *B* is a necessary party to the suit. Here *B* is obviously a necessary party to the suit, and if he were to be added as a plaintiff, the suit as regards him would be deemed to have been instituted on that date (s 22, Indian Limitation Act 1908), and this would clearly be after the expiration of the period of limitation for the institution of the suit. The suit must therefore be dismissed. However, if *A* was the manager and *B* was an adult at the date of the suit, the court could direct *B* to be joined as a plaintiff, even after the expiry of the statutory period, unless *C* objected to *B*'s non-joinder at an early stage of the proceedings.[94]

It will be seen from what is stated above, that the question as to who should be joined as plaintiffs, dealt with in the preceding section is important because of the provisions of s 22, Indian Limitation Act 1908.

§ 253. DECREE AGAINST MANAGER AND *RES JUDICATA*

A decree passed against the manager of a joint family as representing the family for a debt contracted by him for family necessities, or for the family business, or in respect of family properties, operates as res judicata under s 11, expl 6, Code of Civil Procedure, and is binding upon all the members of the family including minors, and it may be executed against the whole coparcenary property, although, the other members were not parties to the suit.[95] It is otherwise, if the decree is against the manager personally. A decree, even for a family debt, passed against the manager personally, cannot be executed against the whole coparcenary property, it can be executed only against his interest in the property.[96]

94 *Guravayya v Dattatraya* (1904) 28 Bom 11.

95 *Daulat Ram v Mehr Chand* (1888) 15 Cal 70, 14 IA 187; *Lingangowda v Basangowda* (1927) 54 IA 122, 51 Bom 450, 101 IC 44, AIR 1927 PC 56; *Sheo Shankar v Jaddo Kunwar* (1914) 41 IA 216, 36 All 383, 24 IC 504, AIR 1914 PC 136; affirming *Jaddo Kunwar v Sheo Shankar* (1911) 33 All 71, 7 IC 902; *Sheo Pershad v Saheb Lal* (1893) 20 Cal 453, 38 IA 45, 33 All 272, 9 IC 739; *Baldeo v Mobarak* (1902) 20 Cal 583; *Kunjan v Sidda* (1899) 22 Mad 461; *Hari v Jairam* (1890) 14 Bom 597; *Bhana v Chindhu* (1897) 21 Bom 616; *Kashinath v Chunaji* (1906) 30 Bom 477; *Sakharam v Devji* (1899) 23 Bom 372. In *Channa Basregowda v Rangegowda* AIR 1951 Mys 38, the manager and the adult member of a joint family were made defendants to a mortgage suit, and it was held that the adult members could be taken to represent their progeny, and the decree was binding on the entire family. In *Laxman v Vinayak* (1916) 40 Bom 329, 33 IC 956, AIR 1916 Bom 262, it was suggested that the rule laid down in this section applied only if the manager was the father, but this view is not correct. See also *Jahangir v Janardhan* (1947) All 218; *Gurbasappa v Vankat* AIR 1956 Hyd 146; *Ghassu Khan v Najar Ali* AIR 1957 Nag 91; *Kumaji Sare Mal v Kalwa Devadattam* AIR 1958 AP 261.

96 *Handa Das v Muralidhar Pati* AIR 1990 Ori 226; *Viraragavamma v Samudrala* (1885)

continued on the next page

It is not necessary, in order that a decree against the manager may operate as *res judicata* against coparceners, who were not parties to the suit, that the plaint or written statement should state in express terms that he is suing as manager or is being sued as a manager. It is sufficient if the manager is in fact suing or being sued as representing the whole family.[97]

Illustration

> *A*, *B*, and *C* are members of a joint family. *A* and *B* are the managing members. *A* and *B* borrow Rs 5,000 from *P* for the necessities of the family. *P* sues *A* and *B* as managers, and obtains a decree against them as such. The decree may be executed against the whole coparcenary property including *C*'s interest therein, though *C* was not a party to the suit, and even if *C* was a minor.[98]

Note.—In the above case, *P* is entitled also to a personal decree against *A* and *B*, they being parties to the contract. Such a decree will enable *P* to proceed against the separate properties also of *A* and *B*. However, *P* is not entitled to a personal decree against *C*, even if *C* was an adult, for *C* was not a party to the contract (see § 240).

Suit by or Against Manager in Representative Capacity

A suit by or against the manager will be deemed to be one brought by him or against him as representing the family, if the circumstances of the case show that he is the manager of the family and the property involved in the suit is family property.[99] It is not necessary, where the manager is the plaintiff that the plaint should state in distinct terms that he is suing as manager or where he is the defendant, that he is being sued as manager. A *karta* can represent the family effectively in a certificate proceeding, though he is not named as such.[1]

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8 Mad 208; *Guruvappa v Thimma* (1897) 10 Mad 316; *Sathuvayyan v Muthusami* (1889) 12 Mad 325; *Balbir Singh v Ajudhia* (1887) 9 All 142; *Ram Dayal v Durga Singh* (1890) 12 All 209; *Lachmi v Kunj Lal* (1894) 16 All 449; *Mela Mal v Gori* (1922) 3 Lah 288, 66 IC 485, AIR 1922 Lah 200.

97 See § 251(5). *Hori Lal v Munman Kunwar* (1912) 34 All 549, 15 IC 126; *Lalchand v Sheogovind* (1929) 8 Pat 788, 128 IC 331, AIR 1929 Pat 741; *Ram Kishan v Ganga Ram* (1931) 12 Lah 428, 133 IC 116, AIR 1931 Lah 559; *Pirthipal v Rameshwar* (1927) 2 Luck 288, 99 IC 154, AIR 1927 Ori 27; *Surendra Nath v Sambhunath* (1928) 55 Cal 210, 104 IC 219, AIR 1927 Cal 870.

98 *Baldeo v Mobarak* (1902) 29 Cal 583.

99 *Mulgund Co-opeartive Credit Society v Shidlingappa Iswararppa* (1941) Bom 682, 197 IC 428, AIR 1941 Bom 385, 43 Bom LR 807.

1 *Mani Sahoo v Lokanath* AIR 1950 Ori 140; *Lalchand v Seogobind* 8 Pat 788; *Hari Prasad v Lal Behari* 19 Pat 618 (FB).

Decree Dismissing Manager's Suit

The decree referred to in this section may be one dismissing the suit brought by the manager as plaintiff.[2]

Decree against Father for Injunction

A and his son *B* are members of a joint family. *A*'s neighbour *C* sues *A* for an injunction restraining *A* from tethering cows and storing fodder close to *C*'s premises, and a decree is passed against *A* The decree may be executed after *A*'s death against his son *B*, though the son was not a party to the suit.[3]

Order Under s 145, Criminal Procedure Code 1898

An adverse order passed under s 145, Criminal Procedure Code against the manager requiring him to deliver possession of a property to another person, binds the other members of the family, though they were not parties there.[4]

§ 254. DECREE AGAINST FATHER AS MANAGER AND *RES JUDICATA*

A decree obtained against the father as manager of a joint family is binding upon his sons, if in the case of minor sons, he was acting in the former litigation on their behalf in their interest,[5] and in the case of majors with the assent of the majors. Such a decree operates as res judicata by virtue of the provisions of expl VI, s 11, Code of Civil Procedure.[6]

IV. Alienation of Coparcenary Property

§ 255. WHO MAY ALIENATE COPARCENARY PROPERTY

The following persons alone have power to alienate coparcenary property, so as to pass a good title to the alienee:

(1) the whole body of coparceners, where they are adults;[7]

2 *Lingangowda v Basangowda* (1927) 54 IA 122, 51 Bom 450, 101 IC 44, AIR 1927 PC 56.

3 *Manilal v Kikabhai* (1931) 33 Bom LR 1118, 134 IC 968, AIR 1931 Bom 482; *Ganesh v Narayan* (1931) 55 Bom 709, 134 IC 961, AIR 1931 Bom 484.

4 *Venkatasomaraju v Vaabalaraju* (1929) 52 Mad 787, 122 IC 17, AIR 1930 Mad 48.

5 *Venkatanarayana v Somaraju* (1937) Mad 880, FB, 171 IC 101, AIR 1937 Mad 610. As to consent decree, see *Basant Lal v Rameshwar Prasad* AIR 1956 All 287.

6 See § 251(5). (1927) 54 IA 122, 51 Bom 450, 101 IC 44, AIR 1927 PC 56.

7 *Mahabeer Persad v Ramyad* (1874) 12 Beng LR 90, 94.

(2) the manager, to the extent mentioned in § 242;
(3) the father, to the extent mentioned in § 256;
(4) a sole surviving coparcener in the circumstances mentioned in § 257.

No other coparcener is entitled to alienate coparcenary property so as to bind the other coparceners unless he is authorised by them to do so.[8]

We are not dealing now with the power of a coparcener to alienate his own interest in coparcenary property. That subject is dealt with in §§ 258–260.

§ 256. ALIENATION BY FATHER

A Hindu father as such has special powers of alienating coparcenary property, which no other coparcener has. In the exercise of these powers he may:

(1) make a gift of ancestral movable property to the extent mentioned in § 225, and even of ancestral immovable property to the extent mentioned in § 226;
(2) sell or mortgage ancestral property, whether movable or immovable, including the interest of his sons, grandsons and great-grandsons therein, for the payment of his own debt, provided the debt was an antecedent debt and was not incurred for immoral or illegal purposes (§ 295).

Except as aforesaid, a father has no greater power over coparcenary property then any other manager,[9] ie, he cannot alienate coparcenary property except for legal necessity or for the benefit of the family (§ 242). This section must be read with what is stated under §§ 213–15.

Thus, a mortgage by the father for raising moneys for a speculative litigation, which is for his own benefit, is not for legal necessity and, there being no antecedent debt, such a mortgage is not binding on the sons' shares.[10]

Where a father was converted to Christianity and afterwards was reconverted to Hinduism, a mortgage by him during the minority of his sons does not bind the son's share, as the father became divided from

8 *Guruvappa v Thimma* (1887) 10 Mad 316; *Sheo Pershad v Saheb Lal* (1893) 20 Cal 453, 461; *Krishna v Krishnasami* (1900) 23 Mad 597, 600; *Puttoo Lal v Raghubir Prasad* (1934) 9 Luck 237, 147 IC 540, AIR 1933 Ori 535; *Gopinath v Jagannath* AIR 1969 Ori 18.

9 *Chinnayya v Perumal* (1890) 13 Mad 51; *Rayakkal v Subbanna* (1893) 16 Mad 84; *Bala v Balaji* (1898) 22 Bom 825; *Ninagareddi v Lakshmawa* (1902) 26 Bom 163 (gift to a concubine); *Rottala v Pulicat* (1904) 27 Mad 162; *Mahendra Singh v Attar Singh* AIR 1967 All 488.

10 *Ram Chandra v Jang Bahadur* (1926) 5 Pat 198, 90 IC 553, AIR 1926 Pat 17.

his son when he became a Christian and there could be no reunion with his son who was a minor.[11]

When the immovable property consists of *raiyati* interest in lands, a father, if he is unable to cultivate them, may surrender such interest and the surrender would be upheld, unless it is shown to be a dishonest transaction intended to prejudice the sons.[12]

The father is in all cases naturally, and in the case of minor sons, necessarily, the manager of the joint family (§ 236). As manager, he has the power to alienate coparcenary property, but only in the cases specified in § 242 above. As father, he has power to alienate coparcenary property in the cases mentioned in the present section. Beyond that, he has no power to alienate coparcenary property.

§ 257. ALIENATION BY SOLE SURVIVING COPARCENER

(1) A person who for the time being is the sole surviving coparcener, is entitled to dispose of the coparcenary property, as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it.

(2) As to dispositions by will, see § 368.

(3) As to the rights of a widow sharing her deceased husband's property under the Hindu Women's Rights to Property Act 1937, to challenge alienation by sole surviving coparcener of her husband, see *Ramalingam v Ramalakshmi*[13] and § 35.

V. Alienation of Undivided Coparcenary Interest

§ 258. GIFT OF UNDIVIDED INTEREST

According to Mitakshara law as applied in all the states, no coparcener can dispose of his undivided interest in coparcenary property by gift.[14] Such transaction being void altogether, there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to

11 *Vella Venkasubbayya v Vella Venkatramayya* (1944) Mad 33.

12 *Sheoprasad Sahu v Deocharan Sahu* (1934) 13 Pat 390, 151 IC 188, AIR 1934 Pat 212.

13 *Ramalingam v Ramalakshmi* AIR 1958 Mad 228, (1958) Mad 7, (1957) 2 Mad LJ 382.

14 *Baba v Timma* (1884) 7 Mad 357, FB; *Ponnusami v Thatha* (1886) 9 Mad 273; *Ramanna v Venkata* (1888) 11 Mad 246; *Rottala v Pulicat* (1904) 27 Mad 162; *Permanayakam v Sivaraman* (1952) Mad 835, AIR 1952 Mad 419, FB; *Salvalingam v Lingamurthy* AIR 1962 AP 173; *Uddaram v Ranu* (1875) 11 Bom HC 76; *Vendravandas v Yamunabai* (1875) 12 Bom HC 229; *Kalu v Barsu* (1895) 18 Bom 803; *Tatoba v Tarabai* (1957) 59 Bom LR 633; *Karunakar v Golak* AIR 1995 Ori 110 (transfer of undivided interest of coparcener void); *Babu Navel Gund v Gopinath* AIR 2000 Kant 27.

recover the transferred property.[15] He may, however, make a gift of his interest with the consent of other coparceners.[16]

As to disposition by will after the coming into operation of the Hindu Succession Act 1956, see s 30 of that Act and notes thereunder. Also see § 368.

Separate and self-acquired property

A coparcener may dispose of his separate or self-acquired property in any way he likes (§ 222).

§ 259. SALE OR MORTGAGE OF UNDIVIDED INTEREST IN BOMBAY, MADRAS AND MADHYA PRADESH

According to Mitakshara law as administered in Bombay and Madras states, a coparcener may sell, mortgage, or otherwise alienate for value, his undivided interest in coparcenary property without the consent of the other coparceners.[17] The same rule applies in Madhya Pradesh.[18]

When in a Hindu Undivided Family consisting of father, son and daughter, the father sold half of his share in the property to the daughter and it was proved that the sale was valid and not a sham one, the son's suit for injunction claiming the same properties as his absolute properties, was liable to be dismissed and the daughter would be entitled to a decree of partition.[19]

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15 *Venkatappaya v Raghavayya* AIR 1951 Mad 318.

16 Reference may be made to *T Venkatasubramna v Rattamma* AIR 1987 SC 1775. Also see *Tagore v Tagore* (1872) 9 Beng LR 377, 396 LR IA Sup Vol 47, 66.

17 *Tukaram v Ramchandra* (1869) 6 Bom HC AC 247; *Vasudev v Venkatesh* (1873) 10 Bom HC 139; *Fakirapa v Chanapa* (1873) 10 Bom HC 162; *Pandu v Goma* (1919) 43 Bom 472, 50 IC 765, AIR 1919 Bom 84; *Vital Butten v Yamenamma* (1874) 8 Mad HC 6; *Aiyyagari v Aiyyagari* (1902) 25 Mad 690, 703; *Nanjundaswami v Kanagaraju* (1919) 42 Mad 154, 49 IC 666, AIR 1919 Mad 500 (settlement on daughter in consideration of marriage); *Peramanayakam v Sivaraman* (1952) Mad 835, AIR 1952 Mad 419, FB; *Raghunath v Radhakrishna* AIR 1975 Ori 214; *Lakshman v Ramchandra* (1880) 5 Bom 48, 61 7 IA 181; *Panduranga v Bhagwandas* (1920) 44 Bom 341, 55 IC 544, AIR 1920 Bom 341; *Suraj Bunsi Koer v Sheo Persad* (1879) 5 Cal 148, 166, 6 IA 88, 101–2; *Balgobind Das v Narain Lal* (1893) 15 All 339, 351, 20 IA 116–25. See also *Subba v Venkatrami* (1915) 38 Mad 1187, 1191, 36 IC 983, AIR 1915 Mad 740 (specific performance); *Ganpati v Motiram* (1947) Nag 172; *Narayan v Nardeo* (1955) Nag 772, AIR 1955 Nag 208; *Rajanna v Dhondusa* AIR 1970 Mys 270.

18 *Syed Kasam v Jorawar Singh* (1922) 49 IA 358, AIR 1922 PC 353; *Bhojraj v Nathuram* (1917) 37 IC 498, 12 NLR 161, AIR 1916 Nag 25.

19 *Nallappa Gounder v Lakshmi* AIR 1993 Mad 78.

§ 260. SALE OR MORTGAGE OF UNDIVIDED INTEREST—OTHER STATES

According to Mitakshara law as administered in West Bengal and Uttar Pradesh, no coparcener can alienate even for value, his undivided interest without the consent of the other coparceners,[20] unless the alienation be for legal necessity (§ 242), or for payment by a father of antecedent debts (§ 295). The consent of the other coparceners is necessary, even if the alienation is made in favour of a coparcener.[21]

The same rule applies to cases governed by Mitakshara law as administered in Bihar and Orissa,[22] Punjab,[23] and in Oudh.[24] Also, see §§ 269(1) and 270(4).

However, the rigour of the rule has been relaxed in favour of alienees for value in Bombay, Madras and Madhya Pradesh (§ 261) and in favour of purchasers at an execution sale throughout India (§ 289). Reference may be made to the underimentioned decision.[25]

Lease

A lease stands on the same footing as a sale or mortgage.[26]

§ 261. RIGHTS OF PURCHASER OF COPARCENER'S INTEREST

According to Mitakshara law as applied in Bombay, Madras, Madhya Pradesh and some other states,[27] a coparcener may alienate his undivided interest in the entire joint family property, or his undivided interest in

20 *Madho Parshad v Mehrban Singh* (1891) 18 Cal 157, 17 IA 194; *Sadabart Prasad v Foolbash* (1869) 3 Beng LRFBR 31; *Kali Shankar v Nawab Singh* (1909) 31 All 507, 3 IC 909; *Balgobind Das v Narain Lal* (1893) 15 All 339, 351, 20 IA 116, 125; *Manna Lal v Karu Singh* (1919) 1 Pat LT 6, 56 IC 766, AIR 1919 PC 108; *Chandradeo v Mata Prasad* (1909) 31 All 176, 1 IC 479 (FB), *Shamboo v Ramdeo* AIR 1982 All 508. For other cases, see § 269.

21 *Chandar v Dampat* (1894) 16 All 369.

22 *Jwala Prasad v Maharajah Protab* (1916) 1 Pat LJ 497, 37 IC 184, AIR 1916 Pat 203; *Amar Dayal v Har Pershad* (1920) 5 Pat LJ 605, 58 IC 72, AIR 1920 Pat 433; *Krishnadeb v Jokhilal* AIR 1956 Pat 290.

23 *Piare v Ram* (1912) PR No 21, p 75, 11 IC 443; *Ralla Ram v Atma Ram* (1933) 14 Lah 584, 150 IC 184, AIR 1933 Lah 343.

24 (1891) 18 Cal 157, 17 IA 194; *Angraj v Ram Rup* (1931) 6 Luck 158, 127 IC 38, AIR 1930 Ori 284; *Puttoo Lal v Raghubir Prasad* (1934) 9 Luck 237, 147 IC 540, AIR 1933 Ori 535.

25 *Sumakurty v G Pannalal* AIR 1980 Ori 169 (shares of all coparceners sold—no interest survived).

26 *Jadu v Abdul* (1911) CWN 93, 11 IC 892.

27 *Syed Kasam v Jorawar Singh* (1922) 49 IA 358, AIR 1922 PC 353; *Bhojraj v Nathuram* (1917) 37 IC 498, 12 NLR 161, AIR 1916 Nag 25.

a specific property forming part of the joint family properties. However, he has no right to alienate, as his interest, any specific property belonging to the coparcenary, for no coparcener can before partition claim any such property as his own; if he does alienate, the alienation is valid to the extent only of his own interest in the alienated property.[28] According to Mitakshara law, as it prevails in West Bengal, Uttar Pradesh and some other states, no coparcener can alienate even his own undivided interest in the coparcenary property without the consent of the other coparceners. If he does so, the alienation is not valid even to the extent of his own interest in the property (§ 269). However, Mitakshara law, as administered in all the states, allows the sale of the undivided interest of a coparcener in execution of a decree against him (§ 289). This rule as regards no coparcener being competent to alienate his own undivided share in the coparcenary property, is relieved of its rigour in cases of sale by auction or such other eventuality and such sale would not be tainted with any infirmity.[29] The present section deals with the rights of the purchaser of a specific property, or of coparcener's interest in the specific property, as to possession and partition, whether the property has been sold by private treaty or in execution. Almost all the cases dealt with in this section relate to the sale of a specific property or the sale of the undivided interest of a coparcener in a specific property. The principles laid down in those cases apply *mutatis mutandis* to the case of a sale of the undivided interest of a coparcener in all joint family properties.

(1) *Right to joint possession in West Bengal, Uttar Pradesh and Madras.*—As regards the purchaser's right to joint possession, the Bombay decisions differ in certain respects from those of the other High Courts. We shall deal first, with the decisions of High Courts other that Bombay, and next, with Bombay decisions.

The purchaser of the undivided interest of a coparcener[30] in a specific property at a:

(i) sale in execution in West Bengal,[31] and Uttar Pradesh; or
(ii) private sale or a sale in execution in Madras;[32]

28 *Vitla Butten v Yamenamma* (1874) 8 Mad HC 6, 11; *Venkatachella Chinnaiya* (1870) 5 Mad HC 166, 171; *Patil Hari v Hakamchand* (1886) 10 Bom 363 (mortgage).

29 *Dropdi Devi v Jagdish* AIR 1989 Raj 110.

30 Reference may also be made to s 44 of the Transfer of Property Act.

31 *Deendayal v Jugdeep Narain* (1877) 3 Cal 198, 209, 4 IA 247; *Suraj Bunsi Koer v Sheo Persad* (1880) 5 Cal 148, 174, 6 IA 88; *Hardi Narain v Ruder Perkash* (1883) 10 Cal 626, 636–37, 11 IA 26.

32 *Maharaja of Bobbili v Venkataramanjula* (1916) 39 Mad 265, 267, 25 IC 585, AIR 1915 Mad 453; *Manjaya v Shanmuga* (1915) 38 Mad 684, 22 IC 555, AIR 1914 Mad 440 (private sale); *Jagdish v Rameshwar* AIR 1960 Pat 54; *Laxminarasamma v Ranganayakamma* AIR 1964 Ori 43.

does not acquire a right to joint possession with the other coparceners. Such a purchaser acquires merely the right to compel a partition, which the coparcener whose interest he has purchased might have compelled, had he been so minded, before the sale of his interest took place. That right can only be enforced by a suit for a general partition to which all the coparceners must be joined as parties.[33] The purchaser may, in such a suit, ask the court to allot to his vendor the specific property sold to him, and the court may allot that property to him if the interest of the other coparceners will not be prejudiced thereby (sub-§ 3).

Where the purchaser has not obtained possession, but claims the whole property as his own, the non-alienating coparceners may sue him for a declaration that he is entitled to no more than the undivided interest of the alienating coparcener. The proper decree to be passed in such a suit would be an order declaring that, by virtue of the sale, the purchaser acquired only the undivided share of the alienating coparcener in the property with such power of ascertaining the extent of such share by means of partition as the alienating coparcener possessed and confirming the possession of the other coparceners, subject to such proceedings as the purchaser may take to enforce his rights.[34] If the purchaser has obtained possession, the non-alienating coparceners are entitled to sue for and recover possession of the whole of the property for the benefit of the joint family including the vendor. The purchaser is not entitled in such suit to an order for partition, either of the specific property sold to him or of the joint family properties in general; he must, if he wants to realise his vendor's interest, bring a suit of his own for a general partition. Where a suit therefore is brought by the non-alienating coparceners for possession, the proper decree to be passed would be an order directing the purchaser to deliver possession to the plaintiffs of the whole property, and declaring that the purchaser is entitled to a declaration that he has acquired the undivided interest of his vendor in the property and that he is entitled to take proceedings to have that interest ascertained by partition.[35] However, to protect the purchaser, a further direction is

33 *Vitla Butten v Yamenamma* (1874) 8 Mad HC 6 (the executing court has no power to direct a partition); *Yelumalai v Srinivasa* (1906) 29 Mad 294; *Brij Lal v Durga* (1920) 1 Lah 134, 56 IC 254, AIR 1920 Lah 159; *V C Thani Chettiar v Dakshinamurthy* (1955) Mad 1278, AIR 1955 Mad 288 (nature of suit limitation); *Ganesh v Radhakrishnan* AIR 1969 Mad 416; *Laxminarasamma v Ranganayakammai* AIR 1964 Ori 43. Also see *Manikayala v Narasimhaswami* AIR 1966 SC 470; *Simapurty Satyanarayana v G Panalal* AIR 1980 Ori 169 (also see 'limitation' discussed under cl 3 therein).

34 *Suraj Bunsi Koer v Sheo Persad* (1880) 5 Cal 148, 174–75, 6 IA 88.

35 *Deendayal v Jugdeep Narain* (1877) 3 Cal 198, 209, 4 IA 247; *Baboo Hurdei Hurdei Narain v Ruder Perkash* (1883) 10 Cal 626, 637, 11 IA 26; *Subba v Krishnamachari* (1922) 45 Mad 449, 460–63, 68 IC 869, AIR 1922 Mad 112 (private sale); *Kandasamy*

continued on the next page

added that the execution of the decree, so far as it directs the purchaser to deliver possession to the plaintiffs, be stayed for a specified period, and if before the expiry of that period, the purchaser brings a suit for a general partition against the plaintiffs, then the stay should continue until the disposal of that suit, but if no such suit is brought within that period, then the stay of execution will stand cancelled.[36]

In *Ramasami v Venkatarama*,[37] however, the Madras High Court held, relying upon the observations of the Judicial Committee in *Ramkishore v Jainarayan*,[38] that when relief by way of general partition can be conveniently given to the purchaser in a coparceners suit for possession, as where all the coparceners are parties to the suit and the court is seized of the whole matter, the purchaser should not be driven to a separate suit (Illust (a)). Referring to this case, the same High Court said in later case:[39] 'The decision in 46 Mad 815 applies to cases where all the facts are before the court which would enable it to allow an alienee to retain the property and such a suit is practically a suit for partition.' Reference may also be made to the Full Bench decision of the same High Court in *Peramanayakam v Sivaraman*.[40]

Right to Joint Possession in Bombay

The following principles have been laid down with regard to the rights and remedies of the purchaser and the non-alienating coparceners, whether the sale be one by private contract or in execution of decree:[41]

(1) if the purchaser is a stranger, and has not obtained possession, he should not be given joint possession with the other coparceners, but should be left to his remedy of a suit for general partition;[42]

v Velayutha (1927) 50 Mad, 320, 328, 96 IC 993, AIR 1926 Mad 774 (private sale); *Medni Prasad v Nand Keshwar* (1923) 2 Pat 386, 85 IC 1014, AIR 1923 Pat 451 (sale in execution); *Papayamma v Gopalakrishnamurty* AIR 1969 AP 341.

36 *Kandasamy v Velayutha* (1927) 50 Mad 320, 328, 96 IC 993, AIR 1926 Mad 774; *N Narasimha Reddy v Krishnaiah* AIR 1975 AP 250; *Hanmandas v Valabhdas* (1919) 43 Bom 17, 25–26, 46 IC 133, AIR 1918 Bom 101. Reference may also be made to *Ramdayel v Manaklal* AIR 1973 MP 222 (FB); *Maharu v Dhansai* AIR 1992 MP 220 (alienating member not in exclusive possession—purchaser is invested with all rights and disabilities of the transferor, he can claim general partition).

37 *Ramasami v Venkatarama* (1923) 46 Mad 815, 75 IC 406, AIR 1924 Mad 81 (private sale). Also see *Sellappa v Masa* (1924) 47 Mad 79, 76 IC 1018, AIR 1924 Mad 297.

38 (1913) 40 Cal 966, 40 IA 213, 20 IC 958.

39 *Kandaswami Udayan v Velayutha Udayan* (1927) 50 Mad 320, 324, 96 IC 993, AIR 1926 Mad 774 (private sale).

40 *K Peramanayakam Pillai v ST Sivaraman* (1952) Mad 835, AIR 1952 Mad 419. Also see s 44, Transfer of Property Act.

41 *Bhau v Budha* (1926) 50 Bom 204, 206, 96 IC 166, AIR 1926 Bom 399 (where the earlier cases are collected).

42 *Pandurang v Bhaskar* (1874) 11 Bom HC 72; *Krishnaji v Sitaram* (1881) 5 Bom 496; *Balaji v Ganesh* (1881) 5 Bom 499; *Pandu v Goma* (1919) 43 Bom 472, 50 IC 765, AIR 1919 Bom 84; *Ishrappa v Krishna* (1922) 46 Bom 925, 931, 67 IC 833, AIR 1922 Bom 413.

(2) if the purchaser has obtained possession, the non-alienating coparceners are entitled to joint possession of the property with him, and if they sue for it, the court must decree joint possession to them;[43] the reason given is that the purchaser cannot, by obtaining a possession to which he was not entitled without partition, force on the other coparceners the necessity of bringing a suit for partition.[44] The proper decree to pass in such a case is one placing the plaintiff coparceners in joint possession with the purchaser. A mere declaration of the plaintiff's right to joint possession is not enough;[45]

(3) further, if the purchaser has obtained possession, the non-alienating coparceners may sue for recovery of possession of the whole of the property sold to him; in other words, they may sue for exclusive possession. However, the court is not bound, as in Madras, to eject the purchaser and decree exclusive possession to the plaintiffs, and it may in its discretion, declare that the purchaser is entitled to hold the property until partition, as a tenant-in-common with the other coparceners; in other words, the court may, in a proper case, allow the purchaser to remain in joint possession with the plaintiffs. Each case as to the property or otherwise, of allowing the purchaser joint possession, should be decided on its own facts.[46]

The court may not eject the purchaser, if he is a relative of the parties and has long been in possession, but may allow him to continue in joint possession with the other coparceners. If they do not like joint possession with the purchaser, their remedy lies in suing for a partition.[47] If the case is one in which joint possession should be allowed, the proper decree

43 *Mahabalaya v Timaya* (1875) 12 Bom HC 138 (coparceners suit for joint possession); *Babaji v Vasudev* (1876) 1 Bom 95 (ditto); *Kallapa v Venkatesh* (1878) 2 Bom 676; *Dugappa v Venkatramnaya* (1881) 5 Bom 493 (suit by coparceners for possession of entire property—held entitled only to joint possession with purchaser); *Patil Hari v Hakamchand* (1886) 10 Bom 363 (mortgagee with possession from one coparcener dispossessed by purchaser at a sale in execution of a decree against another coparcener—held mortgagee entitled to joint possession with purchaser); *Nana v Appa* (1896) 20 Bom 627 (suit by purchaser for exclusive possession—joint possession decreed); *Naranbhai v Ranchod* (1902) 26 Bom 141 (purchaser's suit for exclusive possession—suit dismissed by trial judge—decree reversed and suit remanded for inquiry whether purchaser should be awarded joint possession on the merits of the case); *Bhiku v Puttu* (1906) 8 Bom LR 99, 105–06.

44 (1906) 8 Bom LR 99, 106.

45 (1902) 26 Bom 141, 145.

46 *Bhau v Budha* (1926) 50 Bom 204, 96 IC 166, AIR 1926 Bom 399.

47 (1926) 50 Bom 204, 96 IC 166, AIR 1926 Bom 399.

to pass is one placing the plaintiffs in joint possession with the defendant purchaser. If the case is one in which joint possession should not be allowed, the proper decree to pass would be an order directing the purchaser to deliver possession of the whole property to the plaintiffs, and declaring that the purchaser has acquired the undivided interest of his vendor in the property and that he is entitled to take proceedings to have that interest ascertained by partition, with a further direction that the execution of the decree be stayed for a specified period. Moreover, if before the expiry of that period, the purchaser brings a suit for a general partition against the plaintiffs, then the stay should continue until the disposal of that suit, but if no such suit is brought within that period, then the stay of execution will be cancelled.[48]

Difference Between Madras and Bombay Views

The main point of difference between the Madras and Bombay High Court is that while in Madras, the purchaser is not entitled in any case to joint possession before partition, in Bombay, the court may, in its discretion, award joint possession to him. The reasons for this difference are as follows:

(a) according to the Bombay decisions, the purchaser from a coparcener is a tenant-in-common with the other coparceners.[49] A similar view was taken by the High Court of Madras in some of the earlier case, but that view has since been disapproved, and it has been held that the purchaser is not a tenant-in-common, but has only an equity to enforce his rights by partition.[50] The same view has been taken by the Patna High Court;[51]

(b) the Madras High Court[52] has interpreted the judgments of the Judicial Committee in the undermentioned cases,[53] as laying down the broad proposition that the purchaser in possession is liable to be ejected at the instance of the non-alienating coparceners. Commenting on this, Fawcett J said in a Bombay case that they

48 *Hanmandas v Valabhdas* (1919) 43 Bom 17, 25–26, 46 IC 133, AIR 1918 Bom 101.

49 See *Mubabalaya v Timey* (1875) 12 Bom HC 138, 110 which is the first Bombay case on the subject.

50 *Manjaya v Shanmuga* (1915) 38 Mad 684, 22 IC 555, AIR 1914 Mad 440; *Maharaja of Bobbili v Venkataramanjulu* (1916) 39 Mad 265, 25 IC 585, AIR 1915 Mad 453. Also see *Peramanayakam v Sivaraman* (1952) Mad 835, AIR 1952 Mad 419, FB; *Bhagwati Prasad v Ushadevi* AIR 1995 MP 205; *Hazarilal v Jugal Kishor* AIR 1999 MP 104.

51 *Bhubneshwar Prasad v Sidheswar* AIR 1949 Pat 309.

52 (1916) 39 Mad 265, 268–69, 25 IC 585, AIR 1915 Mad 453.

53 *Suraj Bunsi Koer v Sheo Persad* (1880) 5 Cal 148, 6 IA 88; *Hardi Narain v Ruder Perkash* (1883) 10 Cal 626, 11 IA 26; *Ramkishore v Jainarayan* (1913) 40 Cal 966, 40 IA 213, 20 IC 958.

were all cases from Bengal where one coparcener has no authority, without the consent of his coparceners, to alienate even his own undivided interest in coparcenary property, and that the Privy Council decisions do not amount to saying that in no case can the court properly allow a stranger-purchaser to remain in possession with the non-alienating coparceners.[54]

Reference may be made to the undermentioned decisions of the Supreme Court and the High Court of Andhra Pradesh.[55]

(2) *Right to partition.*—In Bombay[56] and Madras,[57] the purchaser of the undivided interest of a coparcener in a specific property belonging to the joint family is not entitled to a partition of that property alone, for his vendor himself could not have claimed it, unless the other coparceners consent to it. He can only enforce his rights by a suit for a general partition. In Allahabad,[58] and in Calcutta,[59] it has been held that the purchaser is entitled to a partition of the specific property without suing for a general partition, but these decisions are of doubtful authority.

The non-alienating coparceners, on the other hand, are entitled in Bombay,[60] Madras,[61] and Allahabad,[62] to sue the purchaser for partition of the alienated property without bringing a suit for a general partition. However, one of several non-alienating coparceners cannot sue the purchaser for his own share of the alienated property.[63]

Where a suit is brought by the non-alienating coparceners against the purchaser for partition only of the property alienated, as they are entitled to do, the purchaser is not entitled in that suit to counter-claim for a general partition. He must bring a suit of his own for general partition.[64]

54 *Bhau v Budhu* (1926) 50 Bom 204, 207–9, 96 IC 166, AIR 1926 Bom 399.

55 *Manikayala Rao v Narasimhaswami* AIR 1966 SC 470; *Sidheswar Mukherjee v Bhubaneshwar Prasad* AIR 1953 SC 487; *V Krishnaiah v N Narasimhareddy* AIR 1976 AP 395; *Thamanna Shethi v Appalaraju* AIR 1975 AP 208; *Bhagwati Prasad v Vshaderi* AIR 1995 MP 205.

56 *Udaram v Ranu* (1875) 11 Bom HC 76; *Murarrao v Sitaram* (1899) 23 Bom 184; *Shivmurdeppa v Virappa* (1900) 24 Bom 128; *Ishrappa v Krishna* (1922) 46 Bom 925, 67 IC 833, AIR 1922 Bom 413.

57 *Venkatarama v Meera* (1890) 13 Mad 275; *Palani v Masakonan* (1897) 20 Mad 243; *Manjaya v Shanmuga* (1915) 38 Mad 684, 22 IC 555. Also see *Venkatammal v S V Chettiar* AIR 1975 Mad 316.

58 *Ram Mohan v Mul Chand* (1906) 28 All 39.

59 *Tarinicharan Chakrabarti v Debendralal De* (1935) 62 Cal 655.

60 *Hanmandas v Valabhdas* (1919) 43 Bom 17, 26, 46 IC 133, AIR 1918 Bom 101; *Naro Gopal v Paragauda* (1917) 41 Bom 347, 355, 39 IC 23, AIR 1916 Bom 130.

61 *Venkatachella v Chinnaya* (1870) 5 Mad HC 166; *Chinna v Suriya* (1882) 5 Mad 196; *Subramanya v Padmanabha* (1896) 19 Mad 267; *Ibramsa v Theruvenkatasami* (1911) 34 Mad 269, FB 7 IC 559 (suit by purchaser from non-alienating coparcener).

62 *Ram Charan v Ajudhia* (1906) 28 All 50.

63 *Shyam Sunder v Jagarnath* (1923) 2 Pat 925, 74 IC 758, AIR 1923 Pat 590.

64 *Kandasamy v Velayutha* (1927) 50 Mad 320, 96 IC 993, AIR 1926 Mad 774

Where a suit has been brought by the non-alienating coparceners against the purchaser for partition only of the property alienated, and an unconditional decree is passed for partition of the alienated property and for delivery of their share to them, the share so delivered becomes the separate property of the non-alienating coparceners.[65] However, it would continue as joint, if the relief granted to the non-alienating coparceners is made conditional on their assenting to the results of a suit for general partition, which the alienee may offer to bring.[66]

The share allotted to the non-alienating coparcener is his separate property as between him and the alienating coparcener, but not as between him and his male issue.

(3) *Equitable rights of purchaser on partition.*—The alienee of a specific property or of the undivided interest of a coparcener in such property has on a general partition, an equitable right to have that property,[67] or his alienor's share in that property,[68] as the case may be, assigned to him, if it could be done without injustice to the other coparceners. However, there may be equities between the coparceners or liabilities attaching to the alienor's share, which may render it inequitable or impracticable to do so.[69] In such a case, the alienee is entitled to recover from his alienor, property of an equivalent value out of the properties allotted to the alienor for his share in substitution of the property alienated.[70] In making adjustments, the court will take the value of the properties at the time of the division and not at the time of the sale.[71]

It has been held by the Madras High Court in *Sabapathi v Thandavaroya,*[72] that such equitable relief by way of obtaining substituted property cannot be claimed by or granted to a purchaser at a court sale,

65 *Souri v Pachia* (1926) 49 Mad 483, 91 IC 868, AIR 1926 Mad 241.

66 See *Ramkishore v Jainarayan* (1913) 40 Cal 966, 40 IA 213, 20 IC 958; *Hanumandas v Valabhdas* (1919) 43 Bom 17, 46 IC 133, AIR 1918 Bom 101.

67 *Pandurang v Bhaskar* (1874) 11 Bom HC 72; *Udaram v Ranu* (1875) 11 Bom HC 76; *Aiyyagari v Aiyyagari* (1902) 25 Mad 690, 718–19 (FB); *Chinnu Pilliai v Kalimuthu* (1912) 35 Mad 47, 62, 9 IC 596, FB; *Dhulabhai v Lala Dhula* (1922) 46 Bom 28, 64 IC 115, AIR 1922 Bom 137; *Kandasamy v Velayutha* (1927) 50 Mad 320, 324 96 IC 993, AIR 1926 Mad 774; *Gurlingappa v Sabu* (1931) 33 Bom LR 141, 131 IC 886, AIR 1931 Bom 218.

68 *Venkatarama v Meera* (1890) 13 Mad 275, (1902) 25 Mad 690, 718–19, FB; *Manjaya v Shanmuga* (1915) 38 Mad 684, 22 IC 555, AIR 1914 Mad 440; *Sitamahalakshmi v Ramchandra* AIR 1957 AP 572; *Sethu Ramalinga v Veeraswami* AIR 1971 Mad 174. Also see *Ramakrishna v Suppayya* AIR 1965 Ker 77.

69 (1902) 25 Mad 690 718–19.

70 (1915) 38 Mad 684, 687, 22 IC 555, AIR 1914 Mad 440; *Sabapathi v Thandavaroya* (1920) 43 Mad 309, 310–11, 54 IC 515, AIR 1920 Mad 316. Also see *V C Thani Chettiar v Dakshinamurthy* AIR 1955 Mad 288, (1955) Mad 1278; *Peramanayakam v Sivaraman* AIR 1952 Mad 419, FB, (1952) Mad 835; *Narasimhaiah v Chikkathimmaiah* AIR 1954 Mys 115. See (1875) 11 Bom HC 76, 83; *Padmanabha Pillai v Abraham* AIR 1971 Ker 154.

71 *Virupaksha Reddi v Chanalal Siva Reddi* (1944) Mad 212.

72 (1920) 43 Mad 309, 54 IC 515, AIR 1920 Mad 316.

there being no warranty of title at such sale and no privity of contract between the auction purchaser and the judgment-debtor, and his decision was followed by the Bombay High Court in *Chidambargauda v Channappa*.[73] The view taken in these cases seems to be rather narrow. Neither the purchaser at a court sale nor one by private treaty, of the undivided interest of a coparcener in a joint Mitakshara family can acquire title to any specific property; both are entitled to equities, which can and should be granted, provided the purchaser is a purchaser for value. The correct view, it seems, has been taken by a Division Bench of the Bombay High Court,[74] which has refused to follow the two cases mentioned above and held that there is no distinction in this respect between a private purchaser and a purchaser at a court sale. A Full Bench of the Andhra Pradesh High Court has held that the equity which arises in the case of a first alienee is not available to the alienee from an alienee of a specific item of property from a coparcener, and the later alienee cannot maintain a suit for general partition claiming the allotment to him of that specific item.[75] Reference may also be made to the undermentioned decisions.[76]

The purchaser of joint family property from a member of the joint family may have the right to file a separate suit for partition against the members of the family and indeed that may be proper remedy for him to adopt to effectuate his purpose. No question of equities to be adjusted as between the parties, can, however, arise where the property purchased is the only property available for being partitioned.[77]

Limitation

There is no article of the Limitation Act, which specifically provides for a suit by an alienee from coparcener for general partition or for working out his equities in such suit. A suit for recovery of possession of immovable property by way of substitution by an alienee or transferee for consideration from a coparcener falls under art 144 of the old Indian Limitation Act 1908.[78] Reference may also be made to the undermentioned case.[79]

73 36 Bom LR 694, AIR 1934 Bom 329.

74 *Vasudeo v Kankochand* (1950) Bom 777, AIR 1951 Bom 226.

75 *Gurunadham v Venkata Rao* AIR 1959 AP 523 (FB); *Sethu Ramalinga v Veeraswami* AIR 1971 Mad 174. The position would be different if the first alienation was of the share of the coparcener in the entire joint family property; *Venkatammal v S V Chettiar* AIR 1975 Mad 316.

76 *Fatimunissa Begam v Abu Baker* AIR 1963 AP 119; *Venkata Subbayya v Srirangam* AIR 1956 AP 188.

77 *Kailash Pati Devi v Bhabaneswari Devi* AIR 1984 SC 1802. Also see *Simakurty v Satyanarayana* AIR 1980 Ori 169.

78 *Sitamahalakshmi v Ramachandra* AIR 1957 AP 572; *V C Thani Chettiar v Dakshinamurthy* AIR 1955 Mad 288; *Satyanarayana v Lakshminarayana* AIR 1963 AP 281. Now see art 65 of Limitation Act 1963.

79 *Manikayala v Narsimhaswami* AIR 1966 SC 470.

(4) *Right to sue for partition even after the vendor's death.*—The purchaser of the interest of a coparcener is not bound to sue for partition in the lifetime of the coparcener. He may sue after his death. The right which he has to a partition is not lost by the death of the coparcener.[80]

After the death of the alienating coparcener, the purchaser from him, suing for partition is not entitled to an equity that the property alienated should be allotted to the share of the alienating coparcener so as to be available to the purchaser.[81]

(5) *Share to which purchaser is entitled on partition.*—The share to which an alienee is entitled on partition is the share which the alienor was entitled at the date of alienation, and not at the date when the alienee seeks to reduce his interest into possession.[82] However, this principle applies only to the fraction representing the share of the alienor. As to the actual items of the property in which the purchaser is entitled to a share, it has been held that the family property as existing on the date of the suit, is to be taken.[83]

(6) *Right to mesne profits.*—The purchaser of the interest of a coparcener is not entitled to mesne profits between the date of his purchase and the date of his suit for partition.[84] The Supreme Court has held that a person who has purchased the interest of a member of the family in execution of a decree against him, is not entitled to institute a suit against the other coparceners for recovery of a share of the income of the family properties from the date of his purchase. He can work out his rights only by a suit for partition and his right to possession would commence only from a period when a specific allotment is made in his favour.[85]

It would seem that the right of such an auction purchaser to get mesne profits would not commence until allotment of specific portion to his share.[86]

80 (1902) 25 Mad 690.

81 *Namdeo v Mumtaz Begum* AIR 1964 Bom 101.

82 Illustrations (c) and (d). *Chinnu Pillai v Kalimuthu* (1912) 35 Mad 47 (FB); *Sakarchand v Narayan* (1951) Bom 217, 52 Bom 347, AIR 1916 Bom 130; and overruling *Gurlingapa v Nandapa* (1896) 21 Bom 797; *Kumaraswami v Rajamanikkam* AIR 1966 Ker 266. Reference may also be made to *MC Connamma v Aspinwal & Co* AIR 1988 Kant 99.

83 *Muthukumara Sathapathiar v Sivanarayana Pillai* (1933) 56 Mad 534, 141 IC 122, AIR 1933 Mad 158.

84 *Maharaja of Bobbili v Venkataramanjulu* (1916) 39 Mad 265, 25 IC 585, AIR 1915 Mad 435; *Trimbak v Pandurang* (1920) 44 Bom 612, 57 IC 582, AIR 1926 Bom 103.

85 *Sidheshwar Mukherjee v Bhubaneshwer Prasad* [1954] SCR 117. Also see *Manikayala Rao v Narasimhaswami* AIR 1966 SC 470; *Bhagwati Prasad v Ushadevi* AIR 1995 MP 205.

86 *Ganesh v Radhakrishnan* AIR 1969 Mad 416; *Sivaramamurthi v Venkayya* AIR 1934 Mad 364 must be taken to have been overruled by the Supreme Court decision cited above.

(7) *Right to sue for specific performance.*—If the coparcener, who has sold his interest, dies before completion of the sale, the purchaser is nevertheless entitled to specific performance of the agreement for sale.[87]

(8) *Purchaser takes subject to equities.*—The alienee of a single coparcener's interest takes such interest, subject to all changes, encumbrances and liabilities, affecting the coparcenary property or that interest.[88] Thus, the purchaser of the undivided interest of a son in joint family property takes that interest subject to the liability attaching to that interest to pay his father's personal debts not tainted with immorality[89] (§ 290).

(9) *Right to impeach previous alienations.*—See § 270(4).

Illustrations

(a) *A* and his son *B* are members of a joint family. *A* sells a certain item of the joint family property to *C*, the sale not being for legal necessity or for payment of antecedent debts, and puts *C* in possession. The value of the property alienated is less than the value of *A*'s share. There is no person interested in the joint family properties except *A* and *B*. *A* sues *B* and *C* for possession of the property. According to a Madras decision, it is competent to the court in such a case to declare that *C* is entitled to retain the property as the purchaser thereof, without driving him to the necessity of filing a fresh suit for partition.[90]

(b) *A* and *B* are members of a joint Hindu family. *C* is a *bhauband* (relation) of *A* and *B*. *B* sells his undivided share in one of the joint family properties to *C*. *C* enters into possession of the whole of that property, and continues in possession for several years. Subsequently, *A* sues *C* for exclusive possession of the property. In such a case, according to the Bombay rulings, the proper decree would be a decree putting *A* in joint possession with *C*, leaving *A* if he is not willing to continue in joint possession with *C*, to file a suit for partition.[91] According to the Madras rulings, the proper decree would be one directing *C* to deliver possession of the whole property to *A*, and declaring that *C* had acquired that undivided interest of *B* in the property with liberty to *C* to file a suit to have that share ascertained by a general

87 *Bhagwan v Krishnaji* (1920) 44 Bom 967, 58 IC 335, AIR 1920 Bom 104.

88 *Udaram v Ranu* (1875) 11 Bom HC 76; *Narayan v Nathaji* (1904) 28 Bom 201; *Venkureddi v Venku Reddi* (1927) 50 Mad 535, 538, 100 IC 1018, AIR 1927 Mad 472. Also see *Peramanayakam v Sivaraman* AIR 1952 Mad 419 (FB).

89 See § 290. (1927) 50 Mad 535, 100 IC 1018, AIR 1927 Mad 417. Also see *Re Official Assignee Madras v Venkayya* AIR 1965 Mad 60.

90 *Ramasami v Venkatarama* (1923) 46 Mad 815, 75 IC 406, AIR 1924 Mad 81.

91 *Bhau v Budha* (1926) 50 Bom 204, 96 IC 166, AIR 1926 Bom 399.

partition. The court may also stay execution for a fixed period to enable *C* to bring the suit.[92] The decree would be the same in form in Bombay, if the court held upon the facts of the case, that the purchaser should not be allowed joint possession with *A*.[93]

(c) *A* mortgages certain ancestral property to *M*. Subsequent to the mortgage, a son *B* is born to *A*. Thereafter, a partition takes place between *A* and *B*, and the mortgaged property is divided between them equally. *M* then sues *A* and *B* for a sale of the mortgaged property. *B* objects to a decree against his half share. *B*'s objection must be overruled and a decree passed for the sale of the whole property, as the father was entitled to the whole of the property at the date of the mortgage.[94] The same principle applies to sales.[95]

(d) *A*, *B* and *C* are members of a coparcenary. *A*'s interest in the coparcenary property is sold, and it is purchased by *P*. *B* dies after the sale. *P* then sues *A* and *C* for partition. *P* is entitled on partition not to one-half, but to one-third only, the latter being *A*'s share at the date of sale. *B*'s one-third share will pass to *A* and *C* by survivorship each taking one-sixth.

(e) *A*, a member of a joint family, sells one of the joint properties *x* to *B*. Afterwards, *A* sues his coparceners for partition, and another property *y* of an equal value is allotted to him on partition. Is *B* entitled to recover property from *A*? It has been held that he is. However, it has also been held that if *B* sells property *x* to *C*, and a partition subsequently takes place between *A* and his coparceners, and property *y* is allotted to *A* on partition, *C* is not entitled to recover property *y* from *A*, and that *C*'s only remedy is to sue *B* for damages for breach of warranty, the reason given being that *C* never bargained for that property.

Privy Council Rulings

The three leading Privy Council cases bearing on the subject dealt with in the present section are:

(1) *Deendyal v Jugdeep Narain*;[96]
(2) *Suraj Bunsi Koer v Sheo Persad*;[97]
(3) *Hari Narain v Ruder Perkash*.[98]

92 *Subba v Krishnamachari* (1922) 45 Mad 449, 68 IC 69, AIR 1922 Mad 112; *Kandasamy v Velayutha* (1927) 50 Mad 320, 96 IC 993, AIR 1926 Mad 774.
93 *Bhau v Budha* (1926) 50 Bom 204, 96 IC 166, AIR 1926 Bom 399.
94 *Chinnu Pillai v Kalimuthu* (1912) 35 Mad 47, 9 IC 596.
95 *Narp Gopal v Paragauda* (1917) 41 Bom 347, 39 IC 23, AIR 1916 Bom 130.
96 (1877) 3 Cal 198, 4 IA 247.
97 (1880) 5 Cal 148, 6 IA 88.
98 (1883) 10 Cal 626, 11 IA 26.

In cases (1) and (3), a money decree was obtained against the father, and his 'right, title and interest' in a specific property belonging to the family was sold in execution of the decree, the decree-holder himself being the purchaser. In both cases, the purchaser obtained possession of the whole property. The cases were governed by Mitakshara law as applied in Bengal, and the suit was brought by the sons to set aside the sale in its entirety, on the ground that the debt incurred by the father was without legal necessity, and the sale therefore was invalid and that it did not, according to Mitakshara law as applied in Bengal (§ 260), pass even the father's interest in the property, as the father himself could not have, according to that law, sold his interest. On the other hand, it was contended for the purchaser that the debt was contracted for a justifying necessity and that he was entitled to the whole property, including the sons interest. It was found in each case that the debt was incurred without legal necessity and it was held that the sale being one in execution of a decree (as distinguished from a voluntary sale), the purchaser acquired the father's interest in the property (§ 289). However, the purchaser did not acquire the sons' interest for what was attached and sold was the 'right, title and interest' of the father only in the property. The Judicial Committee accordingly passed a decree directing the purchaser to deliver possession of the whole property to the sons and declaring that the purchaser had acquired the interest of the father and was entitled to take proceedings to have that interest ascertained by partition.

Case (2) was also governed by Mitakshara law, as applied in Bengal. The suit in that case was brought against the father for a sale of a family property mortgaged by him, and a decree was passed for a sale of the property. The property was put up for sale and was purchased by a stranger. The sons had before the sale objected to the sale on the ground that the debt incurred by the father was for immoral purposes, but they were referred by the executing court to a regular suit. After the sale, the sons brought a suit to set aside the sale. The purchaser had not entered into possession of the property as in cases (1) and (3). It was found that the debt incurred by the father was for immoral purposes. The Judicial Committee held that the proper decree to be passed was an order declaring that the purchaser acquired the undivided interest of the father in the property with such power of ascertaining the extent of that interest by means of a partition as the judgment-debtor himself possessed before the sale, and an order confirming the possession of the sons subject to such proceedings to enforce his right as the purchaser might take.

The form of the decree in cases (1) and (3) applies where the purchaser has obtained possession of the property; that in case (2) applies where he has not obtained possession. The substance of these forms is set out in sub-§ (1) of the present section. Their application is not confined to

court-sales. They also apply to voluntary or private sales. It will be noted that in cases (1) and (3), the Judicial Committee directed the purchaser by their judgment, to deliver possession of the whole property to the sons, though they declared that the purchaser was entitled to the undivided interest of the father.

§ 262. POSITION OF COPARCENER WHOSE UNDIVIDED INTEREST HAS BEEN SOLD

Where the undivided interest of a coparcener has been sold, but there has been no partition either at the interest of the purchaser or the other coparceners, the sale does not affect the status of such coparcener in the family, nor does it extinguish his right to take by survivorship, the interest of other coparceners on their death.[99] Even if the other coparceners sue to set aside the sale and to recover their share of the property sold, it does not normally amount to a partition. Whether it does or not depends on the form of the plaint and the relief granted.[1]

§ 263. RIGHTS OF MORTGAGEE FROM A COPARCENER

(1) The principles laid down in § 261 apply *mutatis mutandis* to a mortgagee of joint family property from a coparcener.[2]

(2) Where a coparcener mortgages a specific property belonging to the joint family, or his undivided interest in such property, that property may at a partition between the coparceners, be allotted to another coparcener subject to the mortgage (as a part of the partition arrangement) or the latter takes the property free from the mortgage. In the former case, the other coparceners have in effect obtained the equity of redemption only and are liable in the first place to the mortgagee, who may sue them on the mortgage.[3] In the latter case, the mortgagee is entitled to recover his claim out of the substituted property, which falls to the share of the mortgagor at the partition, unless the partition is unfair and in fraud of the mortgagee;[4] and may follow it in the hands of a subsequent transferee

99 *Gurlingapa v Nandapa* (1897) 21 Bom 797, 803; *Subheti v Nokhesingh* (1946) Nag 699, AIR 1946 Nag 354. Reference may be made to *Anjaneyulu v Ramayya* AIR 1965 AP 117 (FB).

1 See Illust (d) to § 261. *Chimalakonda Ramasubbaraya Sastri v Ganapathiraju Venkata Appalanarasimharaju* (1940) Mad 405, 188 IC 700, AIR 1940 Mad 217.

2 *Sree Rajah Vasi Reddi Balachandrasekhara Varaprasad Bahadur Manne Sultan Garu v Lakshminarasimham and ors* (1940) Mad 913, AIR 1940 Mad 691.

3 *Atmaramrao v Bhupendranath* (1941) Nag 677, 194 IC 537, AIR 1940 Nag 149, (1940) NLJ 365.

4 *Muthia v Appala* (1911) 34 Mad 175, 6 IC 991; *Byjnath Lall v Ramoodeen* (1893) 1 IA 106, 21 WR 233; *Hem Chunder v Thako Moni* (1893) 20 Cal 533; *Shahebzada v Hills* (1908) 35 Cal 388; *Amolak v Chandan* (1902) 24 All 483; *Nagendra v Pyari Mohan* (1916) 43 Cal 103, 30 IC 420, AIR 1915 Cal 339.

unless the transfer is shown to be without notice.[5] In a proper case, the partition may be re-opened.[6]

§ 264(1) RENUNCIATION OR RELINQUISHMENT OF HIS SHARE

A coparcener may renounce his interest in the coparcenary property in favour of the other coparceners as body, but not in favour of one or more of them.[7] If he renounces in favour of one or more of them, the renunciation enures for the benefit of all other coparceners and not for the sole benefit of the coparcener or coparceners in whose favour the renunciation is made.[8] Such renunciation is not invalid, even if the renouncing coparcener makes it a condition that he would be paid something towards maintenance.[9] The renunciation or relinquishment must, of course, be genuine. If fictitious and not acted upon, it would not be operative as between the parties and partition can be claimed.[10] Reference may be made to § 328(6). In case of relinquishment by an unmarried copartner, his after-born son cannot claim partition.[11]

Also see *Thamamma Venkata Subamama v Thamba Rattamuna.*[12]

(2) *Construction of document.*—However wide and general the words in a deed of renunciation or relinquishment may be, the operation of the document must be restricted to the rights, which are in contemplation or in controversy between the parties and would not cover or comprehend rights which were not in their minds when it was executed.[13]

Illustrations

(a) *A*, *B*, *C* and *D*, four Hindu brothers, are members of a joint family. *A* and *B* execute a writing renouncing their interest in the joint property in favour of *C* alone. Subsequently, *C* sues *D* for partition of the joint property, and claims three-fourths of the property. According to the Madras High Court, *C* is entitled to three-fourths and *D* is entitled to one-fourth. According to the

5 *Kharag Narayan v Janki Raj* (1937) 16 Pat 230, 160 IC 906, AIR 1937 Pat 546.
6 *Lakshman v Gopal* (1899) 23 Bom 385.
7 *Peddavya v Ramalingam* (1881) 11 Mad 406. However, see *Sudarsanam v Narsimhulu* (1902) 25 Mad 149, 156, and compare *Appa v Ranga* (1883) 6 Mad 71, where there was no renunciation in fact. The renunciation, however, must be unequivocal if effect has to be given to it.
8 *Chandar v Dampat* (1894) 16 All 369; *Anandrao v Vasantrao* 17 MLJ 184, PC; *Subbana v Balasubba Reddi* (1945) Mad 610 (FB).
9 *Guruswami v Marappa* (1950) Mad 665, AIR 1950 Mad 140.
10 *Sri Chand v Om Prakash* AIR 1977 SC 1823.
11 *Sarathambai v Seeralan* AIR 1981 Mad 59.
12 *Thamamma Venkata Subamama v Thamba Rattamuna* AIR 1987 SC 294.
13 *Rajagopal Pillai v Pakhiam Ammal* AIR 1975 SC 895.

Allahabad High Court, the renunciation by *A* and *B*, though made in favour of *C* alone, enures for the benefit of both *C* and *D* and the property should be divided equally between *C* and *D*.

(b) In a Bombay case, it was held that where *X* has two sons, *A* and *B* and *A* has a son *C*, and *B* has a son *D*, a release by *A* of his interest in the coparcenary property in favour of his father *X* enures for the benefit of all the other coparceners including *A*'s son *C*.[14]

(c) In a later Bombay case, the facts were these: *A* had two sons *B* and *C*. *C* had a son *D*. *C* was of weak intellect; he lived separately and his father allotted to him property *X* being part of the joint family properties for his maintenance. After *A's* death, *B* entered into possession of properties *Y* and *Z* being the rest of the joint family properties. Afterwards *D* sued his uncle *B* and his father *C* for partition. *C* died pending the suit. It was held that all the three properties should be thrown into hotchpotch and divided equally between *B* and *D*.[15]

Both these decisions were affirmed on appeal by the Judicial Committee. No assignment of the co-sharer's interest in actionable claims is necessary when he retires from the membership of the family business and renounces his share therein.[16]

§ 265. INSOLVENCY OF MANAGER, FATHER OR OTHER COPARCENER

(1) *Insolvency of manager not being the father of the other coparceners.*— On the insolvency of the manager of a joint Hindu family governed by Mitakshara law, there vest in the official assignee or receiver:

(a) the separate property of the insolvent manager and his undivided interest in the joint family property; and

(b) it was held in the undermentioned cases[17] that the power of the managing member of a joint Hindu family to sell or mortgage the interest of the other coparceners for the satisfaction of joint family debts vests in the official assignee under s 52 (2) (b) of

14 *Wasantrao v Anandrao* (1904) 6 Bom LR 925, 947, affirmed on appeal to the Privy Council; *Subnom Anandrao v Vasantrao* (1907) 9 Bom LR 595; *Shirajirao v Vasantrao* (1909) 33 Bom 267, 2 IC 249; contrast *Sivagnana Tevar v Periasami* (1878) 1 Mad 312, 5 IA 61.

15 *Mukand v Balkrishna* (1927) 54 IA 413, 52 Bom 8, 105 IC 703, AIR 1927 PC 224.

16 *Brijmohan v Mahabeer* (1936) 63 Cal 194.

17 *Rangayya v Thanikachala* (1896) 19 Mad 74 (elder brother manager); *Sardarmal v Arantayal* (1897) 21 Bom 205 (uncle manager); *Nunna v Chidaraboyina* (1903) 26 Mad 214 (eight uncles' managers).

the Presidency Towns Insolvency Act. It was held however that as there is no provision corresponding to that of s 52 (2) (b) of the Presidency Towns Insolvency Act, on the insolvency of the manager, his power to sell the share of other members would not vest in the receiver.[18]

It is well-settled since the pronouncements of the Judicial Committee in *Sat Narain v Behari Lal*,[19] and *Sat Narain v Sri Kishen Das*,[20] that the power of the father, to sell the interest of his sons is not 'property' within the meaning of s 17 of the Presidency Towns Insolvency Act. It is not the property itself, but the power of the father relating to that property that would vest in and could be exercised by the Official Assignee under s 52(2)(b) of the Presidency Towns Insolvency Act.

Accepting the above principle, the question would be whether the power of the manager to sell the family property for joint debts could come within s 52(2)(b) of the Presidency Towns Insolvency Act.

Clause (b) speaks of 'the capacity to take proceedings for exercising all such powers in, or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge'. The expression 'own benefit' occurring in the clause means the exclusive for his benefit of the bankrupt. As the right of the manager to sell family property is not exclusively for his benefit but is for the benefit of all the members, the proper view to take would be that such power cannot vest in the receiver under s 52(2)(b) of the Presidency Towns Insolvency Act.[21]

(2) *Insolvency of father.*—On the insolvency of the father of a joint Hindu family governed by Mitakshara law, there vest in the official assignee or receiver the:

(a) separate property of the insolvent father and his undivided interest in the joint family property; and

(b) power which the father has to alienate the joint family property including the interest of his sons therein for paying his antecedent debts not contracted for an immoral purpose. In cases governed by the Presidency Towns Insolvency Act 1909, this power vests in the official assignee under s 52 (2) of the Act.[22] It does not

18 *Nori Ramasastrulu v Teluguntla Balakrishna Rao* (1943) Mad 83, 203 IC 507, AIR 1942 Mad 682 (FB).

19 52 IA 22.

20 63 IA 384.

21 Per Leach CJ in *Nori Ramasastrulu v Teluguntla* (1943) Mad 83 (FB); *Virupaksha v Chanalal* AIR 1943 Mad 652.

22 *Official Assignee of Madras v Ramchandra* (1923) 46 Mad 54, 68 IC 898, AIR 1923 Mad 55; *Re Sellamuthu Servai* (1924) 47 Mad 87, 80 IC 108, AIR 1924 Mad 411 (FB); *Sat Narain v Sri Kishen* (1936) 63 IA 384, (1936) 17 Lah 644, 38 Bom LR 1129, 164

continued on the next page

pass by survivorship to the son and it may be exercised by the official assignee or by the receiver after the father's death.[23] As to cases governed by the Provincial Insolvency Act 1920, the law on this point is now settled by legislation and the Provincial Insolvency (Amendment) Act 1948, which came into force on 12 April 1948, enacts as follows:

> Section 28(A)—'Insolvent's Property to comprise certain capacity—The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in order or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge.

Thus, there is no longer any distinction between the provisions of the Presidency Towns Insolvency Act, and those of the Provincial Act, in this respect and the change of law in the Provincial Act has expressly been made retrospective.[24] It was accordingly held by the Supreme Court that where a Hindu father, who has mortgaged the joint family property for an antecedent debt, which is not illegal or immoral, becomes insolvent and the receiver sells the property, the interest of his sons is affected to that extent since the Amendment Act of 1948 came into force, and the sons cannot redeem the property.[25]

(c) As the interest of the son does not vest in the official assignee or receiver, it may be attached even after the insolvency of the father by a creditor of the father, in execution of a decree obtained by him against the father or against the father and son in respect of a personal debt of the father, unless, it has been previously sold by the official assignee or receiver, and leave of the Insolvency Court is not necessary for attaching the son's share.[26] After attachment, the official assignee or receiver cannot exercise the power of sale as the father himself could not have done so (ill (a)); see § 295 (5). Where the son's share is attached after the insolvency of the father, the official procedure is to carry out execution proceedings in combination with the official assignee or receiver so that the entire property may be sold at the same time to the benefit both of the attaching creditor and

IC 6, AIR 1936 PC 277; *Re Balusami* (1928) 51 Mad 417, 112 IC 541, AIR 1928 Mad 735 (FB), (1903) 26 Mad 214 (s 30, Indian Insolvency Act 1848); *Wasudeo v Devidas* (1948) Nag 85 (FB).

23 *Faricband v Motichand* (1883) 7 Bom 438 (s 7, Indian Insolvency Act 1848 applied).

24 *Official Receiver of Ramnad v Devarayan* (1948) 2 MLJ 415.

25 *Cheruvu Nageswaraswami v Rajah Vadrevu Visvasundara Rao* [1953] SCR 894, AIR 1953 SC 370.

26 *Arunachalam v Sabaratnam* (1939) Mad 585.

the father's creditors.[27] Reference may be made to the undermentioned Full Bench decision of the High Court of Andhra Pradesh.[28]

(d) As in the case of the father, so in the case of the official assignee and receiver, the power to sell the son's share for paying the father's debts subsists if at all only so long as the family remains joint. After partition, the official assignee or receiver cannot sell the son's interest as the father himself could not have done so (§ 294 (4)). It has accordingly been held that if the son sues the father for partition of joint family property pending the insolvency of the father, the official assignee or receiver cannot sell the son's share. The institution of a suit for partition puts an end to the joint family status (§ 325 (1)) and with it, to the right also of the father to sell his son's share for his debts, and as a result, extinguishes the right (even if it can pass otherwise) also of the official assignee or receiver to sell the son's share for the father's debts.[29] However, though the official assignee or receiver cannot sell the son's share after the institution of a suit for partition, he can institute a suit against the son for realising debts due to the father's creditors and enforce the decree in such suit by selling the son's share or he may apply to be joined as a party in the son's suit for partition and by proper procedure can obtain a decree which he can execute against the son's share.[30] [Illust (b)].

(3) *Insolvency of other coparceners.*—On the insolvency of any other coparcener, his separate property and his interest in the joint family property vest in the official assignee or receiver and are available for the benefit of his personal creditors.[31] However, the creditors of the insolvent's father are not entitled to priority over those of the insolvent.[32] The purchaser of the undivided interest of the insolvent coparcener from the

27 *Allahabad Bank Ltd, Bareilly v Bhagwan Das* (1926) 48 All 343, 92 IC 309, AIR 1926 All 262 (Provincial Insolvency Act); (1925) 49 Bom 785, 89 IC 996, AIR 1925 Bom 416.

28 *S Jaganmohan Rao v U Babu Rao* AIR 1975 AP 278 (FB).

29 *Re Balusami Ayyar* (1928) 51 Mad 417, 112 IC 541, AIR 1928 Mad 735 (FB); *Kirshnamurthy v Sundaramurthy* (1932) 55 Mad 558, 138 IC 225, AIR 1932 Mad 381; *Sat Narain v Sri Kishen Das* 63 IA 384, 17 Lah 644, 38 Bom LR 1129, 164 IC 6, AIR 1936 PC 227. This case overrules the contrary decision of the Full Bench of the Allahabad High Court in *Bankey Lal v Durga Prasad* 53 All 868, 135 IC 139, AIR 1931 All 512 on this point.

30 Illustration (b); (1928) 51 Mad 417, 443, 467–68; 112 IC 541, AIR 1928 Mad 735, FB; *Chatrati Sriramamurthi v Official Receiever* AIR 1957 AP 692; *Bindya Wasini v Dharamnath Prasad* AIR 1968 Pat 378.

31 *Nunna v Chidaraboyina* (1903) 26 Mad 214, 221; *Lakshmanan Chettiar v Srinivas Iyengar* (1937) Mad 203, 166 IC 378, AIR 1937 Mad 131.

32 *Pr N Sm Chockalingam Chettiar v Official Assignee of Madras* (1943) Mad 603, 206 IC 482, 69 IA 157, AIR 1943 PC 15.

official assignee is like any other private purchaser and is not entitled to mesne profits prior to a suit for partition.[33]

Illustrations

(a) *A* and his son constitute a joint Hindu family. *A* is adjudged an insolvent on the petition of his personal creditors, and a receiver is appointed of his property. The family owns five immovable properties of which two are sold by the receiver. Afterwards, one of *A*'s personal creditors, who had obtained a decree against *A* and his son, attaches the son's share in the remaining three properties in execution of the decree. The attachment is valid and the creditor is entitled to sell the son's share in these properties in execution of his decree and apply the sale proceeds in payment of the judgment debt. The receiver has no right after the attachment to sell the son's share in those properties for the benefit of the general body of *A*'s creditors.[34]

(b) *A* and his sons constitute a joint Hindu family. *A* is adjudged an insolvent on the petition of his personal creditors, and his property vests in the official assignee. Pending *A*'s insolvency, *A*'s sons institute a suit against *A* for partition of the joint family properties. The official assignee cannot, after the institution of the suit, sell the son's shares in the joint family properties, though he may seize them to the execution of a decree that he may obtain against them in a regular suit to be filed by him against the sons in respect of the father's debts.[35] If the official assignee or receiver himself files a suit for partition against the sons after the insolvency of the father, and allows a decree to be passed allotting separate shares to the sons, and the sons take possession of their shares, he cannot afterwards apply to sell those shares for the benefit of the father's creditors.[36]

Insolvency Acts

See Indian Insolvency Act, 11 and 12 Vict c 21, ss 7 and 30 (repealed); Presidency Towns Insolvency Act 1909, ss 2(e), 17, 23 and 52; and Provincial Insolvency Act 1920, ss 2(d), 28, 28(A) and 37.

33 *Venkatarayudu v Sitaramakrishnayya* (1935) 58 Mad 126, 153 IC 368, AIR 1934 Mad 676.

34 *Gopalkrishnayya v Gopalan* (1928) 51 Mad 324, AIR 1928 Mad 479. The decision is not correct with respect to the first two items. Also see *M V Narayudu v T Subba Rao* AIR 1973 AP 113; *P G Rao v Andhra Bank Ltd* AIR 1973 AP 245.

35 *Re Balusami Ayyar* (1928) 51 Mad 417, 112 IC 541, AIR 1928 Mad 735 (FB).

36 *Trayambeshar v Babu Basant* (1930) 5 Luck 248, 123 IC 61, AIR 1930 Ori 36.

Joint Possession

According to the Madras High Court, the official assignee is entitled, on the insolvency of any coparcener, to joint possession with the other coparceners.[37]

Sat Narain v Behari Lal[38]

The plaintiff, who was the appellant before the Privy Council, filed his suit claiming a right of pre-emption over an adjoining house basing claim on the ground of contiguity. The defence was that as the father of the plaintiff, who was the *karta* of a joint plaintiff's interest in the property by virtue of which the right of pre-emption was claimed, vested in the official assignee, and hence no longer existed. The trial court negatived the defence and gave the plaintiff a decree. On appeal, a Full Bench of the Lahore High Court reversed that decision. The Privy Council reversed the decision of the Full Bench and restored the judgment of the trial judge with slight modification.

Their Lordship referred in their judgment to the provisions of ss 17 and s 2(e) of the Presidency Towns Insolvency Act, and held that as the father's power of disposal over the son's property was not absolute but conditional, on his having debts of a particular type, it could not be regarded as property as defined in s 2(e), which contemplates an absolute and unconditional power of disposal. 'It may be' so runs the judgment:

> ...that under the provisions of s 52 or in some other way, that property may in a proper case be made available for payment of the father's just debts; but it is quite a different thing to say that by virtue of his insolvency alone it vests in the Assignee, and no such provision should be read into the Act.

In the second case of *Sat Narain v Sri Krishen*,[39] it was expressly held by the Privy Council that the capacity of the father of a joint Hindu family governed by Mitakshara law, to exercise his power to sell the joint family estate to enforce the pious obligations of his sons to discharge untainted antecedent debts, vests in the official assignee under s 52(2)(b) of the Presidency Towns Insolvency Act; and although, such power could be exercised, subject to all the limitations under which it could be

37 Contra s 261. *Official Assignee v Ramachandra* (1923) 46 Mad 54, 68 IC 898, AIR 1923 Mad 55; *Venkatram v Chokkier* (1928) 51 Mad 567, 109 IC 516, AIR 1928 Mad 531.

38 (1925) 52 IA 22, 6 Lah 1, 84 IC 883, AIR 1925 PC 18; reversing *Beharilal v Sat Narain* (1922) 3 Lah 329, 69 IC 486, AIR 1923 Lah 1.

39 63 IA 384.

exercised by the father himself, it does not militate against the provisions of s 49(5) or of s 17 of the Presidency Towns Insolvency Act.

The position therefore is, on the insolvency of the father, the son's share as such does not vest in the official assignee. The decision which took that view must be held to be incorrect.[40] What vests in the assignee is the power to sell, and the power being exercisable for the personal benefit of the father, can be regarded as 'property' of the father himself and is recognised as such in the recent legislation.[41]

(4) Two or more members of a joint family may be adjudicated insolvents on a single petting, if they are liable on a joint debt and have committed a joint act of insolvency, but the joint family as such cannot be adjudicated insolvent.[42]

(5) See *Mulla's Laws of Insolvency.*

§ 266. JOINT FAMILY FIRM INSOLVENCY

A minor member of a joint family firm cannot as such be adjudged an insolvent.[43]

Illustration

A Hindu dies leaving a business. On his death, the business descends to his five sons, *A*, *B*, *C*, *D* and *E*. *E* is a minor. The firm is unable to pay its debts. *A*, *B*, *C* and *D* may be adjudged insolvents, but not *E*, as *E* is a minor. This proceeds on the analogy of the rule of English as well as Indian law, that an infant cannot be a partner and cannot be adjudicated an insolvent.[44] However, though *E* cannot be adjudged an insolvent, the official assignee succeeds on the insolvency of *A*, *B*, *C* and *D*, the managing members of the joint firm, to the right of a manager to alienate the joint family property including the share of minor coparceners for the payment of debts incurred in the course of the business.[45] When a new business is started by the

40 *Fakirchand v Motichand* (1883) 7 Bom 438.

41 See Provincial Insolvency Amendment Act 1948.

42 *Mahabir Prasad Poddar v Ram Tahal Mandar* (1937) 16 Pat 724, 172 IC 737, AIR 1937 Pat 665; *Pohlo Mal v Basant Ram* 1941 ILR Lah 55, 92 IC 532.

43 *Sanyasi Charan v Asutosh* (1915) 42 Cal 225, 26 IC 836, AIR 1915 Cal 482; *Re Harmraj Malji* (1883) 7 Bom 411, 413. See also *Re Nobodeep Chunder* (1886) 13 Cal 68.

44 (1915) 42 Cal 225, 26 IC 836, AIR 1915 Cal 482.

45 *Nunna v Chidaraboyina* (1903) 26 Mad 214; but see 42 Cal 225, 223–40, 26 IC 836, AIR 1915 Cal 482; *Mt Champa v Official Receiver, Karachi* (1934) 15 Lah 9, 144 IC 636, AIR 1933 Lah 901; *Bhola Prasad v Ramkumar Marwari* (1923) 11 Pat 399, 319 IC 31, AIR 1932 Pat 231. Reference, however must be made to notes under s 8 of the Hindu Succession Act 1956.

adult members of the joint family, the matter rests purely on contract, with the result that on the insolvency of *A*, *B*, *C* and *D*, the official assignee does not succeed to the rights of a manager of a joint family firm, but gets a right merely to recover the minor's share for the benefit of the creditors of the partnership, if the minor was admitted to the benefits of the partnership within the meaning of s 247 of the Contract Act.[46]

VI. Setting Aside Alienations

§ 267. SETTING ASIDE GIFTS

A coparcener, according to Mitakshara law, cannot make a gift of the coparcenary property, not even of his own interest in the property (§ 258). Therefore, where such a gift is made, and it is objected to by the other coparceners, the court will set aside the gift in its entirety. The gift is not valid even to the extent of the donor's interest in the property (§ 270 sub-§ (i), Illust (a)).

The above rule does not apply to gifts by a father of ancestral property to the extent mentioned in §§ 225 and 226.

When a coparcener makes a gift of his entire interest in favour of the sole remaining coparcener, such gift may be held to be valid either on the principle of renunciation or as a transfer with the consent of all the coparceners, the consent of the other coparcener, who is himself the donee, being presumed.[47]

§ 268. SETTING ASIDE SALES AND MORTGAGE IN BOMBAY AND MADRAS STATES

(1) Where a member of a joint family governed by Mitakshara law as administered in Bombay and Madras states, sells or mortgages more than his own interest in the joint family property, the alienation not being one for legal necessity (§ 242) or for payment by a father of an antecedent debt (§ 295), the other members or persons to whom their interests in the property have passed,[48] are entitled to have the alienation set aside to the extent of their own interest therein.[49] The alienation cannot be set

46 *Sanyasi Charan v Krishnadhan* (1922) 49 IA 108, 49 Cal 560, 67 IC 124, AIR 1922 PC 237 (business not ancestral, but new case government by s 247, Contract Act, and decided under that section—now s 30 of the Partnership Act).

47 *Ram Saran Singh v Prithipal* AIR 1950 All 224.

48 *Alla Venkataramanna v Palacherla Mangamma* (1944) Mad 867, AIR 1944 Mad 457.

49 *Marappa v Rangasami* (1900) 23 Mad 89; *Naro v Paragouda* (1917) 19 Bom LR 69, 39 IC 23, AIR 1916 Bom 130; *Ramappa v Yellappa* (1928) 52 Bom 307, 109 IC 532, AIR 1928 Bom 150.

aside in its entirety, for according to the law as prevailing in Bombay and Madras, a coparcener can alienate his own interest in the joint property. If any coparcener has consented to the alienation, the alienation will bind his interest also (§ 242(3)).

(2) *Equities on setting aside alienations.*—Where an alienation is not for legal necessity or for payment of an antecedent debt, and it is set aside at the instance of the other coparceners as regards their shares, there is no equity entitling the alienee to a refund of a proportionate part of the purchase money in respect of those shares.[50] Moreover, it has been held that even if a suit is brought by the sons for a partition and for setting aside an alienation made by their father, the sons are not, as a condition to recovering their share of the property, under a pious obligation to refund to the alienee their share of the consideration received by the father. The ground of the decision is that the pious obligation to pay the father's debts attaches only to a debt existing at the date of the suit, and that the consideration received by the father from the alienee is not in the first instance a debt due from the father; it becomes a debt only when the alienation is set aside and a decree is obtained by the alienee against the father for failure of consideration.[51]

The method of adjusting equities between alienee and non-alienating coparcener was explained in detail in a Full Bench decision of the Madras High Court.[52]

Equities on Setting Aside Alienations

The rule that a coparcener cannot make a gift of his share, cannot be evaded by making a sale at a grossly inadequate price.[53]

Improvements Made by Alienee

See § 185 (equities on setting aside alienation by widow), and *Ramappa v Yenappa.*[54]

Mesne Profits on Setting Aside Alienation

Where an alienation is set aside under this section, and the purchaser is in possession, he may be required to pay mesne profits from the date

50 *Virabhadra v Guruvenkata* (1899) 22 Mad 312. Also see *Prasad v Govindaswami* AIR 1982 SC 84; *Basavaraj v Kushal Chand* AIR 1992 Kant 393.

51 See the cases cited in § 269 (2). *Srinivasa v Kuppuswami* (1921) 44 Mad 801, 64 IC 689, AIR 1921 Mad 447; *Polavarapu, Lingayya and ors v Vippupturi Punnayya and ors* (1942) Mad 502, 198 IC 588, AIR 1942 Mad 183, FB. Also see *Satyanarayanamurthi v Satyanarayanamurthi* AIR 1966 AP 349 (sale justifiable in part for antecedent debt).

52 *Peramanayakam v Sivaraman* AIR 1952 Mad 419, AIR 1952 Mad 835.

53 *Rottala v Pulicat* (1904) 27 Mad 162.

54 *Ramappa v Yenappa* (1928) 52 Bom 307, 109 IC 532, AIR 1928 Bom 150.

on which the sale is repudiated by the other coparceners, but not from the date of sale, the sale being valid until it is repudiated.[55]

Partition—Shares on Partition—Mother

In a suit by a son for partition and separate possession of his share after setting aside the alienation of joint family property made by his father, alienation is not for a purpose binding upon the family consisting of the father, mother and sons.[56]

§ 269. SETTING ASIDE SALES AND MORTGAGES IN OTHER STATES

(1) Where a member of a joint family governed by Mitakshara law as administered in Bengal, Bihar and Uttar Pradesh, sells or mortgages the joint family property or any portion thereof without the consent of his coparceners, the alienation is liable to be set aside wholly unless it was for legal necessity (§ 242), or for payment by a father of an antecedent debt (§ 295) and it does not pass the share even of the alienating coparcener. The result is that if the alienation is neither for legal necessity nor for the payment of an antecedent debt, the other coparceners are entitled to a declaration that the alienation is void in its entirety.[57] Even in Punjab, where by custom, a son cannot claim partition against the

55 *Ramasami v Venkatarama* (1923) 46 Mad 815, 822, 75 IC 406, AIR 1924 Mad 81; *Gangabisan v Vallabhadas* (1924) 48 Bom 428, 432, 87 IC 703, AIR 1924 Bom 433; *Basavaraj v Kushal Chand* AIR 1992 Kant 393.

56 *Parappa v Mallappa* AIR 1956 Bom 332 (FB).

57 *Sadabart Prasad v Foolbash Koer* (1869) 3 Beng LR (FB) 31 (mortgage); *Madro Prashad v Mehrban Singh* (1891) 18 Cal 157, 17 IA 194 (sale); *Balgobind Das v Narain Lal* (1893) 15 All 339, 20 IA 116 (mortgage); *Chandradeo v Mata Prasad* (1909) 31 All 176, 208, 1 IC 479 (FB) (mortgage); *Kali Shankar v Nawab Singh* (1909) 31 All 507, 3 IC 909 (mortgage); *Narain Prasad v Sanam Singh* (1917) 44 IA 163, 39 All 500, 40 IC 284, AIR 1917 PC 41 (mortgage); *Anant Ram v Collector of Etah* (1918) 40 All 171, 44 IC 290, AIR 1917 PC 188 (mortgage); *Sahu Ram v Bhup Singh* (1917) 44 IA 126, 39 All 437, 39 IC 280, AIR 1917 PC 61 (mortgage); *Manna Lal v Karu Singh* (1920) 1 Pat LJ 6, 56 IC 766, AIR 1919 PC 108 (mortgage); *Ram Sahai v Parbhu Dayal* (1921) 43 All 655, 63 IC 358, AIR 1921 All 137 (sale); *Badam v Madho Ram* (1921) 2 Lah 338, 66 IC 19, AIR 1922 Lah 241 (sale by father); *Daya Ram v Harcharn Das* (1927) 8 Lah 678, 107 IC 78, AIR 1928 Lah 111 (sale by father); *Ramjee Rai v Gopal Ahir* AIR 1963 Pat 34; *Amar Dayal v Har Pershad* (1920) 5 Pat LJ 605, 58 IC 72, AIR 1920 Pat 433 (mortgage); *Ram Bilash v Ramyad* (1920) 5 Pat LJ 622, 58 IC 303, AIR 1920 Pat 441 (mortgage); *Mathura v Rajkumar* (1921) 6 Pat LJ 526, 62 IC 132, AIR 1921 Pat 447 (FB) (mortgage); *Angaraj v Ram Rup* (1931) 6 Luck, 158, 127 IC 38, AIR 1930 Ori 284 (suit for possession by mortgagee); *Malak Chand v Hira Lal* 1936 11 Luck 449, 157 IC 945, AIR 1935 Ori 510; *Makhanalal v Harmarain* AIR 1960 MP 56. Also see *Manoharlal v Dewanchand* AIR 1985 P&H 313 (FB).

father, the son is entitled to joint possession with the father when the alienation is set aside.[58]

It has been held in Allahabad and Patna, that the alienation can be impeached only by a coparcener other than the alienating coparcener or by a transferee who has acquired the interest of the entire joint family in the property alienated.[59]

The power of avoidance in such a transferee cannot be greater than that of the coparcenary body at the time of the transfer.[60]

(2) *Equities on setting aside alienations.*—Where in Bengal and Uttar Pradesh, an alienation is set aside in its entirety, the question often arises whether the alienee is entitled to any equity or charge on the alienors' share for the consideration paid by him to the alienor. It has been held by the Judicial Committee that he is not,[61] except perhaps in special circumstances such as those which existed in *Mahabeer Persad v Ramyad.*[62] In that case, the High Court of Bengal declared a charge on the shares of the mortgagors (being the father and his eldest son) in favour of the mortgagee on the ground that they had represented to him that they had power to charge the joint family property which, in fact they had not (Illust (1) and (3)). Moreover, it has been held by the same court that even where such circumstances exist, the equity (if any) arising out of them cannot be enforced, where the coparcener who made the alienation is dead and his share has passed by survivorship to the other coparceners, such as nephews, who are not liable for the personal debts and obligations of the deceased.[63] They take the share of the deceased in their right by survivorship, and are not affected by any such equity (Illust (2)).

58 See § 268. *Raj Kishore v Madan Gopal* (1932) 13 Lah 491, 143 IC 249, AIR 1932 Cal 636.

59 *Madan Lal v Gajendrapal* (1929) 51 All 575, 580, 116 IC 436, AIR 1929 All 243; *Madan Lal v Chiddu* (1931) 53 All 21, 23–26, 128 IC 829, AIR 1930 All 852; *Kharag Narayan v Janki Rai* (1937) 16 Pat 230, 169 IC 906, AIR 1937 Pat 546; *Shyam Behari Singh v Rameshwar Prasad Sahu* (1941) 20 Pat 904, 198 IC 208, AIR 1942 Pat 213; *Gomti v Rameshwardas* AIR 1971 Raj 211 (FB).

60 *Chandradeo v Mata Prasad* (1909) 31 All 176, 1 IC 479.

61 *Narain Prasad v Sarnam Singh* (1917) 44 IA 163, 39 All 500, 40 IC 284, AIR 1917 PC 41 (mortgage); *Arant Ram v Collector of Etah* (1918) 40 All 171, 176, 44 IC 290, AIR 1917 PC 188; followed in *Ram Sahai v Parbhu Dayal* (1921) 43 All 655, 63 IC 358, AIR 1921 All 137; *Amar Dayal v Har Pershad* (1920) 5 Pat LJ 605, 58 IC 72, AIR 1920 Pat 433.

62 (1874) 12 Beng LR 90 as explained in *Madho Parshad's* case (1890) 18 Cal 157, 160, 17 IA 194, and *Narain Prasad's* case (1917) 44 IA 163, 164, 165, 39 All 500, 504, 40 IC 284, AIR 1917 PC 41; *Mahabeer Persad's* case was followed in *Jamuna v Ganga* (1892) 19 Cal 401, 410, where the alienation was impeached by a stranger to the family who had succeeded to the rights of all the coparceners, including a coparcener who had not consented to the alienation. See also *Amar Dayal v Har Pershad* (1920) 5 Pat LJ 605, 58 IC 72, AIR 1920 Pat 433.

63 *Madho Parshad v Mehrban Singh* (1891) 18 Cal 157, 17 IA 194.

There is a conflict of opinion whether where a sale is effected by the father, and the suit is brought by the sons in their father's lifetime to set aside the sale, the sale not being one either for legal necessity or for the payment of an antecedent debt, the sons are entitled to a decree without refunding the whole or any part of the purchase money to the purchaser. The High Court of Calcutta has held that they are not entitled to a decree without refunding the whole of the purchase money. The reason given being that when immediately the sale is set aside, the purchaser would be entitled to recover the whole of the purchase money from the father, and it would thus become a debt due by the father for which the whole of the joint family property, including the property sold, would be liable by reason of the son's pious obligation to discharge the father's debt, unless it was contracted for an immoral purpose.[64] This view has been dissented from by the High Courts of Lahore,[65] Madras,[66] Allahabad[67] and Orissa.[68]

It has been held by the last mentioned courts that the pious obligation to pay the father's debt does not attach, except to a debt existing at the date of the suit, and the price received by the father from the purchaser is in no sense a debt owing by him to the purchaser. It becomes a debt only when the sale is set aside by the court, for it is only then that the purchaser is entitled to a refund of the price for failure of consideration. It has accordingly been held by those courts, that the sons are not, as a condition to recovering the property, under a pious obligation to refund any portion of the purchase money, and the sale must be set aside unconditionally.

(3) An alienation, which does not bind the share of the alienor himself cannot bind the share of a coparcener consenting thereto (§ 242 (3)).

Illustrations

(a) *A* and his son *B* are members of a joint family governed by Mitakshara law as administered in Allahabad. *B* mortgages his half share to *M* for his own personal benefit, without *A*'s consent and without legal necessity: *M* sues *A* and *B* for a decree for sale on the mortgage. The mortgage is void, and it cannot be enforced even against *B*'s share. However, *M* may obtain a money decree

64 *Kore Hasmant Rai v Sunder Das* (1885) 11 Cal 396. However, see *Modhaoo Dyal Singh v Golbur Singh* (1868) 9 WR 511.

65 *Daya Ram v Harcharan Das* (1927) 8 Lah 678, 107 IC 781, AIR 1928 Lah 111; *Badam v Maaho Ram* (1921) 2 Lah 338, 66 IC 19, AIR 1922 Lah 241.

66 *Srinivasa v Kuppuswani* (1921) 44 Mad 801, 64 IC 698, AIR 1921 Mad 447; *Sayanarayanamurthi v Satyanarayanamurthi* AIR 1966 AP 349.

67 *Madan Gopal v Sati Prasad* (1917) 39 All 485, 40 IC 451, AIR 1917 All 326; *Chandradeo v Mata Prasad* (1909) 31 All 176, 1 IC 479.

68 *Dhanurjay v Dhano Ganda* AIR 1968 Ori 179.

against *B* personally, and attach and sell *B*'s interest in the property in execution of the decree.[69] There were no special circumstances in this case to entitle *M* to a charge on *B*'s share for the money advanced by him to *B*.

(b) *A* and his brother's son *B* are members of a joint family governed by Mitakshara law as administered in Bengal. *A* sells his undivided interest in the joint family property to *P* for Rs 10,000 without the consent of *B* and without legal necessity. Afterwards, *A* dies, and his share passes by survivorship to his nephew *B*. After *A*'s death, *B* sues *P* to set aside the sale. The sale by *A*, though it was of his own share, is void and *B* is entitled to *A*'s share by survivorship. Even if there was an equity in *P*'s favour, *B* could not be affected by it. *B* takes *A*'s share in his own right by survivorship and is not liable for the personal debts of his uncle.[70]

(3) A joint family consists of three Hindu brothers and their sons, governed by Mitakshara law as administrated in Allahabad. The three brothers mortgage the joint family property without the consent of their sons and without legal necessity. The mortgage is void in its entirety. There being no special circumstances in the case, the mortgagee is not entitled to a charge even on the shares of the mortgages in the property.[71]

In the case of *Narain Prasad v Sarnam Singh* [Illust (3)], the Judicial Committee appear to confine the applicability of the rule to cases where an express representation has been made out. It was observed 'now whatever may happen when there are special circumstances such as there were in the case referred to, that is not the general law'. This decision was followed by the Judicial Committee in *Anant Ram v Collector of Etah*.[72] The result is that the rule can no longer be applied except in cases where special circumstances, such as an express representation, exist.

Lease

A lease stands on the same footing as a sale or mortgage.[73]

Mesne Profits on Setting Aside Alienation

Where the purchaser from a coparcener has entered into possession, he may be required to pay mesne profits from the date of repudiation of the sale by the other coparcener.[74]

69 *Balgobind Das v Narain Lal* (1893) 20 IA 116, 15 All 339.
70 *Madho Parsad v Mehrban Singh* (1891) 17 IA 194, 18 Cal 157.
71 *Narain Prasad v Sarnam Singh* (1917) 44 IA 163, 39 All 500, 40 IC 284, AIR 1917 PC 41.
72 (1918) 40 All 171, 44 IC 290, AIR 1917 PC 188.
73 *Jadu v Abdul* (1911) 16 CWN 93, 11 IC 892.
74 *Bhirgu Nath v Nar Singh* (1917) 39 All 61, 35 IC 475, AIR 1917 All 479.

§ 270. OBJECTIONS TO ALIENATIONS BY COPARCENERS EXISTING (BORN OR CONCEIVED) AT THE TIME OF THE ALIENATION

(1) Where an alienation is made by a coparcener in excess of his powers, it may be set aside to the extent mentioned in §§ 268 and 269, at the instance of any other coparcener, who was in existence at the time of the completion of the alienation.[75] It may also be set aside at the instance of any coparcener who, though born subsequent to the date of alienation, was in his mother's womb at the date of alienation; the reason is that under the Hindu law a son conceived is, in many respects, equal to a son born.[76]

Failure of one branch of the family to question validity of the alienation in a suit would not bar the right of the other branch for relief.[77]

Illustrations

(a) *A*, governed by Mitakshara law, makes a gift of certain ancestral property to *B*. *A* has no son at the date of the gift, but a son is born to him two months later. The gift may be set aside at the instance of the son, as he was in his mother's womb at the date of the gift. The transaction being a gift, it will be set aside altogether and not merely to the extent of the son's share.[78]

(b) *A* and his son *B* are members of a joint family governed by Mitakshara law. *A* sells certain joint family property to *C* including *B*'s interest therein, without *B*'s consent to pay an antecedent debt of his, not contracted for immoral or illegal purposes. The sale is valid in its entirety. It cannot be impeached by *B*, for it is made to pay his father's debts.[79]

At the Time of Completion of the Alienation

See Illust (a)–sub-§ (2), and the note appended to the illustration.

75 *Ponnambala v Sudarappayyar* (1897) 20 Mad 354; *Narain Das v Har Dayal* (1913) 35 All 571, 21 IC 830.

76 *Guramma v Mallappa* AIR 1964 SC 510, 66 Bom LR 284; *Sabapathi v Somasundaram* (1893) 16 Mad 76 (sale); *Ramanna v Venkata* (1888) 11 Mad 246 (gift); *Girdharee Lall v Kantoo Lall* (1874) 14 Beng LR 187, 1 IA 321; *Deo Narain v Ganga Singh* (1915) 37 All 162, 26 IC 871, AIR 1915 All 65; *Basayya v Balingayya* (1947) Bom 750; *Venkata Chenchayya v Ramalingam* AIR 1957 AP 744; *Tirupurasundari v Katyanaramana* AIR 1973 Mad 99; *Sant Ram v Mohinder Singh* AIR 1994 HP 109.

77 *Murarka Properties Pvt Ltd v Beharilal* AIR 1978 SC 300.

78 See § 267. *Ramanna v Venkata* (1888) 11 Mad 246.

79 See § 295. *Girdharee Lall v Kantoo Lall* (1874) 14 Beng LR 187, 1 IA 321.

Rights of a Son in his Mother's Womb

Under the Hindu law, a son begotten (or conceived, or in his mother's womb)—equal, in many respects, to a son actually in existence. Thus, a son in his mother's womb—and this also applies to a daughter—is entitled to inheritance, if born alive. He is also entitled to a share on partition. Further, he is entitled to take coparcenary property by survivorship as against a legatee of such property under his father's will. That is to say, just as a son living at the time of his father's death in entitled on his father's death to take coparcenary property by survivorship, so is a son who is in his mother's womb at the time of the father's death. The father cannot bequeath coparcenary property to a third person, so as to defeat the sons right of survivorship, whether the son was in existence at the time of his death or was in his mother's womb at the time (§ 256). Lastly, an alienation that can be impeached by a son actually existing at the time of alienation, can also be impeached by a son who was in his mother's womb at the time.

(2) **By after-born coparceners.**—An alienation of joint family property made by a father, there being no male issue in existence at the date of the alienation, is valid though made without legal necessity. Such an alienation cannot be objected to by a son born after the date of the alienation, on the ground that it was made without legal necessity.[80] However, an alienation made by a father, who has sons then living, not being one for legal necessity, or for payment of an antecedent debt, if made without their consent, may be set aside by one of those sons—partially or wholly according to the state in which the question arises (§§ 259 and 260).

If all the sons living at the time of the alienation predecease their father and no other son is born before the death of the last of them, so that the father remains the sole coparcener for some time, then the alienation is not liable to be impeached by after-born sons.[81] If, before the sons alive at the time of the alienation are all dead, another son is born, in the states referred to in § 260, the alienation may be set aside at the instance of the latter also,[82] unless before his birth, the former

80 *Bholanath v Kartick* (1907) 34 Cal 372; *Suraj Prasad v Makhan Lal* (1922) 44 All 382, 385, 66 IC 134, AIR 1922 All 51; *Bisweswar v Jaineswar* AIR 1968 Cal 213. See *Vilas v Vasantrai* AIR 1976 Guj 17.

81 *Hitendra v Sukhdeo* (1929) 8 Pat 558, 115 IC 886, AIR 1929 Pat 360; *Mukund Singh v Wazirruddin* (1933) 149 IC 506, AIR 1933 Lah 359; *Visweswar Rao v Surya Rao* (1936) 59 Mad 667, 163 IC 712, AIR 1936 Mad 440.

82 *Bunwari Lal v Daya Sunkar* (1909) 13 CWN 815, 822; *Tulsi Ram v Babu* (1911) 33 All 654, 1 IC 908; *Bhup Kunwar v Balbir Sahai* (1922) 44 All 190, 64 IC 885, AIR 1922 All 342; *Dwarka Das v Krishan* (1921) 2 Lah 114, 119–20, 61 IC 628, AIR 1921 Lah 34; *Bhagwat Prasad Bahidar v Debichand Bogra* (1941) 20 Pat 727; 199 IC 408, AIR 1942 Pat 99; *Narayan v Namdeo* (1955) Nag 772, AIR 1955 Nag 208; *Varada v Sriramulu* AIR 1953 Mad 894, (1953) 1 MLJ 31; *Vendataramayyua v Krishana Rao* AIR 1963 AP 305.

ratified it,[83] or their cause of action is lost by limitation.[84] However, in the states referred to in § 259, if the cause of action of the coparceners, who did not consent to the alienations is barred, the alienation becomes unimpeachable. If the coparcener is born before their right is barred, he becomes a coparcener with them in the property, the title to which is not yet lost by the adverse possession of the alienee and all of them can sue to recover their shares or the after-born coparcener alone can sue to recover his share. It is submitted that the principle of the decisions in the footnote 82 above applies to these states also; the only difference being that, in the states referred to in § 260, the whole alienation may be set aside whereas in the states in § 259, the plaintiffs can only recover their share or shares. However, an opposite view was taken in Bombay and Nagpur.[85] In a later decision of the Full Bench of the Bombay High Court, the earlier Bombay case was overruled.[86]

Illustrations

(a) *A*, governed by Mitakshara law, sells certain ancestral property to *B*, *A* has no son either born or begotten at the time of the sale. The sale is made without legal necessity. The sale is valid, though made without legal necessity, for the restriction that a coparcener should not sell coparcenary property without legal necessity applies only when there are other coparceners living at the time. Therefore, if a son *C* is born to *A* two years after the date of the sale, he cannot impeach the sale. Even if there was a son existing at the time of the sale, if the sale had been made with his consent, it would have been valid when made, and therefore not liable to be aside by *C*.

Note.—The above case assumes that there has been a complete transfer of the property to the purchaser. If the transfer is not complete, as where there is a mere agreement to sell, and a son is born before the sale is completed, the son is entitled to have the sale set aside in its entirety, if the parties are governed by Mitakshara law as applied in Bengal and Uttar Pradesh, and to the extent of the son's interest, if they are governed by that law as applied in Bombay and Madras (see sub-§ (1)).

83 *Chuttan Lal v Kallu* (1911) 33 All 283, 8 IC 719.

84 *Raju Ram v Luchmun* (1867) 8 WR 15, 21; *Lachmi Narain v Kishan* (1916) 38 All 126, 33 IC 913; *Ranodip Singh v Parmeshwar Prasad* (1925) 52 IA 69, 47 All 165, 86 IC 249, AIR 1925 PC 33; *Seshamma v Venkayya* AIR 1957 AP 386; *Kumaraswami v Rajamanikkam* AIR 1966 Ker 266 (limitation, estoppel, ratification).

85 *Kashinath v Bapurao* (1940) Nag 573, 191 IC 271, AIR 1940 Nag 305; *Gujrat Oil Mills & Mfg Co Ltd v Patel Shakarbhai* (1943) Bom LR 507, AIR 1943 Bom 239, (1943) Bom 423, 210 IC 122; *Bahadursingh v Girdharilal* (1942) Nag 543, 200 IC 166, AIR 1942 Nag 39.

86 *Shivaji v Murlidhar* (1954) Bom 794, (1954) 56 Bom LR 426 (FB), AIR 1954 Bom 386.

(a) *A*, who has a son *B*, sells certain ancestral property to *C* without *B*'s consent and without justifying necessity. *B* then dies. A year after *B*'s death, a son *D* is born, *D* cannot impeach the alienation.

(b) *A*, who has a son *B*, sells certain ancestral property to *C*, without *B*'s consent and without justifying necessity. Two years later, while *B* is living, another son *D* is born to *A*. In states referred to in § 260, the sale not being valid when it was made, *D* also is entitled to have it set aside. However, if the sale is ratified by *B* before the birth of *D*, *D* cannot object to the sale, for ratification validates a sale as much as consent. However, no ratification by *B* after *D*'s birth would deprive *D* of the right to object to the sale.[87]

(c) *A*, his son *B*, and *C* alleged to have been adopted by *A*'s paternal uncle as his son, are members of a joint family. During *B*'s minority, *A* and *C* divided the family property between them, *A* transferring certain family property to *C*. A son *D* is subsequently born to *A*. *B* and *D* sue *A* and *C* to recover from *C*, the property transferred to him by *A*, alleging that though *C* was treated by *A* as the adopted son of his uncle, his adoption was invalid, and he was not therefore entitled to any share of the family property. It is clear that if *C*'s adoption was not valid, the transfer to him of a portion of the family property would not be valid, unless it could be supported as a bona fide compromise of a disputed claim. Hence, in states referred to in § 260, *B* as well as *D* are entitled to impeach the alienation.[88]

In Illust (b) and (c), in the states referred to in § 259, if *B* files a suit on behalf of the family excepting the alienor, *D* may participate in the benefit of the decree as a member of the joint family.

(3) An alienation, valid when it was made, cannot be impeached by a son adopted after the date of alienation.[89]

(4) Where an alienation is made in Allahabad of joint family property by an individual coparcener as distinguished from the whole body of coparceners, the question arises as to who is entitled to impeach the alienation (§ 269).

The law as settled in Allahabad is:

(i) the right to impeach an alienation made by an individual coparcener is not confined to the non-alienating coparceners only. It may also be exercised by subsequent transferee, who has

87 *Tulsi Ram v Babu* (1911) 33 All 654, 10 IC 908; *Haroddott v Beer Narain* (1869) 11 WR 480.

88 *Ramkishore v Jainarayan* (1913) 40 Cal 966, 40 IA 213, 20 IC 958.

89 *Sudanand v Soorjoomonee* (1869) 11 WR 463; *Rambhai v Lakshman* (1881) 5 Bom 630; *Brij Raj Saran v Alliance Bank of Simla* (1936) 17 Lah 686, AIR 1936 Lah 946.

acquired by transfer or by limitation, the entire interest of the whole joint family in the property alienated;[90]

(ii) the alienor himself cannot impeach his own alienation; nor can a subsequent transferee by private contract of the interest only of the alienor. However, a purchaser, though it be of the alienor's interest alone, at a sale in execution of a decree against the alienor, is entitled to impeach a previous alienation made by the alienor;[91]

(iii) the reversionary heir to the estate of a non-alienating coparcener is also entitled to impeach an alienation made by another coparcener;[92]

(iv) a prior mortgagee of joint family property from a single coparcener is not entitled to impeach a subsequent sale of that property.[93]

Illustrations

(a) *A*, the manager of a joint family, mortgages joint family property to *B*. *A* then sells the property to *C*. *C* remains in possession of the property adversely to the whole family for upwards of 12 years. *C*, having acquired ownership of the whole property by adverse possession, is entitled to challenge the validity of the mortgage to *B* on the ground that it was made without legal necessity.[94]

(b) The father of a joint family executes a mortgage of joint family property. He then sells the property to meet an antecedent debt. The purchaser, being a transferee of the entire interest in the property, is entitled to impeach the mortgage on the ground that it was made without legal necessity.

(c) *A*, the manager of a joint Hindu family, executes a mortgage of joint family property. Subsequently, all the coparceners join in selling the property to *B*. *B*, being a transferee of the interest of all the coparceners, is entitled to impeach the mortgage on the ground that it was made without legal necessity.

90 *Muhammad v Mithu Lal* (1911) 33 All 783, 11 IC 220 (FB); *Inayat v Hardeo* (1923) 45 All 692, 74 IC 325, AIR 1924 All 29; *Madan Lal v Gajendrapal* (1929) 15 All 575, 116 IC 436, AIR 1929 All 243; *Madan Lal v Chi* (1931) 53 All 21, 128 IC 829, AIR 1930 All 852; *Ram Kishore v Baij Nath* (1928) 3 Luck 598, 113 IC 410, AIR 1928 Ori 287; *Kharag Narayan v Janki Rai* (1937) 16 Pat 230, 169 IC 906, AIR 1937 Pat 546; *Ram Nath v Sunderbai* (1948) Nag 310.

91 *Madan Lal v Chi* (1931) 53 All 21, 128 IC 829, AIR 1930 All 852.

92 *Sarju Prasad v Mangal* (1925) 47 All 490, 87 IC 294, AIR 1925 All 339; *Jaipal Singh v Lachman Singh* (1934) 9 Luck 657, 149 IC 543, AIR 1934 Ori 246.

93 *Durga Prasad v Bhajan* (1920) 42 All 50, 58 IC 487, AIR 1919 All 6.

94 *Muhammad v Mithu Lal* (1911) 33 All 783, 11 IC 220 (FB).

(d) *A* and his son *B* are members of a joint Hindu family. *A* executes a mortgage of joint family property to *C*. Thereafter, *A* dies. *B* dies next. On *B*'s death, his mother succeeds to the property for a widow's estate. *C* sues *B*'s mother on the mortgage and *D* succeeds to the property as the next reversionary heir of *B*. *D* is entitled to challenge the validity of the mortgage to *C* on the ground that it was made without legal necessity. However, a decree already obtained by *C* against the mother would be binding on *D* unless it was obtained by fraud or collusion.

(e) *A*, the manager of a joint Hindu family, executes a mortgage of joint family property to *B*. He then sells the property to *C*. *C* sues *B* for redemption. *B* is not entitled to impeach the sale on the ground that it was made without legal necessity.[95]

A female member of a family, who is not a coparcener, cannot impeach an alienation.[96] However, in case of widows governed by the Hindu Women's Rights to Property Act 1937, see notes under that Act.

According to some Privy Council rulings and a Full Bench ruling of the Allahabad High Court, an alienation made by a single coparcener neither for legal necessity nor for the payment of an antecedent debt is void. According to later decisions of that court, such an alienation is voidable (see § 269(1)). If it is voidable, it is valid until it is set aside. Most of the cases cited in sub-§ (4) proceeded on the footing that the alienation was voidable. This gave rise to the question as to whether the non-alienating coparceners alone were entitled to avoid it or others were equally entitled to do so. The answer is as stated in sub-§ (4). If the alienation is void, it confers no title on the alienee, and most of the difficulties which arise if the alienation is treated as voidable, especially where the alienation and the subsequent transfer are both made by the same coparcener, disappear altogether, and the subsequent transferee would be entitled to contend as a matter of course that the alienation is a nullity.[97]

§ 271. LIMITATION FOR SETTING ASIDE SALES

(1) The period of limitation for setting aside an alienation by a father of joint family property is 12 years from the date when the alienee takes possession of the property. [Sch 1, art 126, Limitation Act 1908].

If, however, the alienee has not taken possession, the only right of the son will be to obtain a declaration that the deed of alienation is invalid

95 *Sarju Prasad v Mangal* (1925) 47 All 490, 87 IC 294, AIR 1925 All 339.

96 *Mt Ram Dei v Mt Gyorsi* AIR 1950 All 76.

97 See the judgment of Chamier J in *Muhammad v Mithu lal* (1911) 33 All 783, 790–91, 11 IC 220 (FB).

and the limitation prescribed was six years under art 120 of the old Limitation Act.[98]

(2) The bar of limitation against an elder son, who was a major at the date of the alienation by the father does not operate as a bar against a younger son, who was then a minor and brings a suit to set aside the alienation within three years of his attaining majority.[99]

Illustration

A and his sons *B* and *C* are members of a joint Hindu family. In 1906, *A* sells one of the joint family properties to *D*, and delivers possession of the property to him. *B* was a major at the date of the sale. *C* was born in 1900 and he attained majority in 1918. *C* brings a suit against the father and *D* in 1919, ie, within three years of his attaining majority, to set aside the sale. If *B* had sued in 1919, his suit would have been barred. The failure of *B* to bring a suit within the period of limitation does not bar *C*'s suit.[1] (*C*'s suit, it will be noted, is not barred by limitation).

(3) However, if an elder son becomes the manager and so capable of giving a discharge, the bar against the elder son would bar the younger son as well.[2]

The cause of action in a suit to set aside the father's alienation arises when the alienee takes possession of the property. The period of 12 years is therefore to be counted from that date. That is the material date not only as regards the suit of a son in existence at that date, but also the suit as a son not in existence at that date. The extension of three years given by s 6 of the Limitation Act cannot be availed of by the sons not in existence at the time of the alienation.[3]

Illustration

A and his sons *B* and *C* are members of a joint Hindu family. In 1893, *A* sells one of the joint family properties to *D* and delivers possession of the property to him. In 1900, another son

98 *Chintaman v Bhagvan* AIR 1928 Bom 383. Also see *Bindeshri v Sital* (1927) All 702 which was a case under art 126. Now see art 109 of the new Limitation Act 1963.

99 *Jawahir Singh v Udai Parkash* (1926) 53 IA 36, 48 All 152, 93 IC 216, AIR 1926 PC 16 approving *Ganga Dayal v Mani Ram* (1909) 31 All 156, 1 IC 824 and disapproving *Vigneswara v Bapayya* (1893) 16 Mad 436; *Dordisami v Nodisami Saluvan* (1915) 38 Mad 118, 21 IC 410, AIR 1915 Mad 1201.

1 *Jawahir Singh v Udai Parkash* 53 IA 36, 48 All 152, 93 IC 216, AIR 1926 PC 16.

2 *Karan Singh v Mt Tetar Kuer* (1937) 16 Pat 422, FB, 170 IC 362, AIR 1937 Pat 435.

3 *Ranodip Singh v Panneshwar Prasad* (1925) 52 IA 69, 47 All 165, 86 IC 249, AIR 1925 PC 33; *Seshamma v Venkayya* AIR 1957 AP 386; *Venugopalashwamy v Vishweswara* AIR 1969 AP 24.

E is born to *A*. In 1920, *E* brings a suit against *D* to set aside the sale. The suit is barred as it is brought more than 12 years from the date on which *D* took possession. The period of limitation is not to be computed from the date of *E*'s birth. If it were to be computed from the date of *E*'s birth, the suit would not be barred, as it was brought within three years from his attaining majority.

Alienation by Grandfather: Limitation

A suit by a Hindu to set aside an alienation of joint family property made before his birth by his grandfather without any justifying necessity, is governed not by art 126 but by art 144. However, the same principles apply. If the suit is brought more than 12 years after the date of alienation, it is barred.[4]

Note.—It may be noticed that the maintainability of the suit was assumed by the judges and advocates (now see art 109 of the new Limitation Act 1963).

4 *Jivaji v Venkatesh Krishna* (1940) Bom 109, 187 IC 663, AIR 1940 Bom 136.