XIII

Coparceners And Coparcenary Property Under Dayabhaga Law



Note.—The Hindu Succession Act 1956, which applies to Hindus governed by both the schools, has brought about some radical changes in the law of succession without abolishing the joint family and joint family property. As already noticed, the effect of that enactment is very far-reaching in case of a Mitakshara coparcenary. What has been stated in this chapter must now be read keeping in mind the effect of the relevant provisions of that Act of 1956. The general rules of succession laid down in that enactment, applicable in case of death of a male as well as female Hindu, have brought changes having some repercussions on the rights of coparceners and incidents of coparcenary property in case of persons governed by the Dayabhaga law. The effect of those rules have been pointed out in the following paragraphs.

§ 272. DISTINGUISHING FEATURES OF DAYABHAGA JOINT FAMILY

The conception of a coparcenary and coparcenary property according to the Dayabhaga law is entirely distinct from that of Mitakshara law. The object of this chapter is to state the points of distinction between Mitakshara law and Dayabhaga law, such has been noted in Dayabhaga and in judicial decisions.

§ 273. SONS DO NOT ACQUIRE ANY RIGHT BY BIRTH

According to Mitakshara law, each son acquires at his birth an equal interest with his father in all ancestral property held by the father, and on the death of the father, the son takes the property, not as his heir, but, by survivorship (§§ 224, 229).

According to Dayabhaga law, the sons do not acquire any interest by birth in ancestral property. Their rights arise for the first time on the father's death. On the death of the father, they take such property as is left by him, whether separate or ancestral, as heirs and not by survivorship.[1] Since the sons do not take any interest in ancestral property in their father's lifetime, there can be no coparcenary in the strict sense of the word between a father and sons according to Dayabhaga law, as regards ancestral property.

As a corollary of the above doctrine, negating the son's right by birth is the other peculiar doctrine of the Bengal school, what is called the 'fractional ownership' of the heirs, contrasted with the doctrine of 'aggregate ownership' expounded by the other schools.[2]

§ 274. ABSOLUTE POWER OF FATHER TO DISPOSE OFF ANCESTRAL PROPERTY

Since the sons do not, according to Dayabhaga law, acquire any interest by birth in ancestral property held by the father, the father can dispose of ancestral property, whether movable or immovable, by sale, gift, will or otherwise, in the same way as he can dispose of his separate property.[3]

According to Mitakshara, the powers of a father to dispose of ancestral property are limited (§ 258).

Section 30 of the Hindu Succession Act 1956, now enables a male Hindu in a Mitakshara coparcenary to dispose of by will, his interest in the coparcenary property. It also recognises in effect the right of a male Hindu governed by Dayabhaga law to dispose of by will his interest in coparcenary property.

§ 275. NO RIGHT OF PARTITION OR TO CALL FOR ACCOUNTS AGAINST FATHER

Since sons, according to Dayabhaga law, do not acquire any interest by birth in ancestral property, they cannot demand a partition of such property from the father (as they can under Mitakshara law), nor can they call for an account of the management thereof from the father as they can under Mitakshara law (§ 239). The father is the absolute owner

1 Dayabhaga, Chapter I, ss 11–31, 38, 44, 50, Chapter II, s 8.

2 *Commissioner of Wealth-tax v Bishwanath Chatterjee* AIR 1976 SC 1492, 1495.

3 *Ramkishore v Bhoobunmoyee* (1859) Beng Sudder Court 229, 250–51; *Debendra v Brojendra* (1890) 17 Cal 886. The same rule applies to property, the succession to which is governed by the law of primogeniture—*Uddoy v Jadublal* (1880) 5 Cal 113; *Narain v Lokenath* (1881) 7 Cal 461; *Kunja Behari v Gourhari* AIR 1958 Cal 105; *Patrik v Jhulon* AIR 1969 Mani 33.

of the property, and the property being his own, he can manage it in any way he likes.[4]

The rules as to the management of ancestral property by a manager, given in the last chapter, do not apply at all to a father under Dayabhaga law. The reason is that he is not a manager of ancestral property; he is the owner, and sole owner, thereof. Besides, the term 'manager' as used in Hindu law, refers to the manager of a coparcenary, and as stated in § 273, there can be no coparcenary according to Dayabhaga law between a father and sons even as regards ancestral property.

§ 276. CONCEPTION OF ANCESTRAL PROPERTY ACCORDING TO DAYABHAGA LAW

As under the Mitakshara law, so under Dayabhaga law, ancestral property is that which is inherited from a father, paternal grandfather or great-grandfather. Under Dayabhaga law, however, the male issue of the inheritor does not acquire any interest by birth in such property, as they do under Mitakshara law (§ 223, sub-§(1)).

§ 277. COPARCENERS ACCORDING TO DAYABHAGA LAW

According to Mitakshara law, the foundation of a coparcenary is first laid on the birth of a son. The son's birth is the starting point of a coparcenary according to that law. Thus, if a Hindu, governed by Mitakshara law, has a son born to him, the father and the son at once become coparceners.[5]

According to Dayabhaga law, the foundation of a coparcenary is which is laid on the death of the father. So long as the father is alive, there is no coparcenary in the strict sense of the word between him and his male issue. It is only on his death, leaving two or more male issues, that a coparcenary is first formed. In the previous editions of this book, the author had stated:

> The formation of a coparcenary does not depend upon any act of the parties. It is a creation of the law. It is formed spontaneously on the death of the ancestor. It may be dissolved immediately afterwards by partition, but, until then the heirs hold the property as coparcener.

These observations must obviously be read in the context of a father dying leaving two or more male issues, who would constitute a coparcenary, though of course, in their case there would be only unity of possession and not any unity of ownership.

4 Dayabhaga, Chapter I, ss 11–31, 38–44, 50, Chapter II, s 8. Reference may be made to *Makhan Lall v Sushama Rani* AIR 1953 Cal 164, 57 CWN 81.

5 *Laldas v Motibai* (1908) 10 Bom LR 175.

Before the Hindu Women's Rights to Property Act 1937, the male issues inherited his property, separate as well as ancestral, as his heirs, but, as between themselves, they held it as coparceners, and the property inherited from the deceased was coparcenary property. On the death of any one of the coparceners, his heirs succeeded to his share in the coparcenary property (§ 281), and they became members of the coparcenary. Such heirs, in default of male issue, could be his widow or widows, or his daughter or daughters. These two, though females, got into the coparcenary, representing the share of their husband or father as the case might be. A coparcenary under Dayabhaga law could thus consist of males as well as females. Under Mitakshara law, no female can be a coparcenary with male coparceners (§ 217). However, even under Dayabhaga law, a coparcenary could not start with females. Thus, if a person died leaving two or more widows, or two or more daughters, they could not constitute a coparcenary.

The effect of the Hindu Women's Rights to Property Act 1937, was not to abolish or disrupt the Dayabhaga joint family. However, the share of a coparcener in the coparcenary property (as in case of his separate property) devolved on his widow along with his male issue, and if he did not leave any male issue, his share devolved on his widow, daughter and other heirs as before.

The effect of the Hindu Succession Act 1956, is not to abolish or disrupt the Dayabhaga joint family. However, the share of a coparcener in the coparcenary property (as in case of his separate property), will devolve by succession according to the provisions of that Act upon the heirs there specified.

In case of a male Hindu governed by Dayabhaga school dying intestate and leaving ancestral property, of which, according to Dayabhaga law as interpreted by the courts, he was in the position of an absolute owner, such property also will (as in case of his separate or self-acquired property) devolve by succession according to the provisions of that Act upon the heirs there specified.

The question of the formation of a coparcenary by operation of law and as to who can be members of such coparcenary in case of a male Hindu governed by Dayabhaga school dying intestate, after the coming into operation of that Act, leaving separate or ancestral property and leaving him surviving as his heirs inter alia two or more male issues, will depend on the same principles on which under the previous law, a coparcenary could be formed consisting of males and females.

It must, however, be noted that the sons whether before or after the coming into existence or ratification of that Act, become tenants-in-common and not joint tenants in respect of property inherited by them

from their father.[6] It must also be noted that the joint family system or the coparcenary which prevails in Bengal, has to be carefully distinguished from the joint family or the coparcenary under the Mitakshara school. As pointed out by the Supreme Court in the above decision, the coparceners have only unity of possession, and not unity of ownership. Each coparcener takes a defined share in the property and is the owner of his share, and each such defined share belongs to the coparcener. Also see § 279, to which, reference was made by the Supreme Court.

Reference may also be made to notes under s 16 of the Hindu Marriage Act 1955, for the position and rights in a Dayabhaga coparcenary of a son or daughter born of a marriage, which is void or voidable under that enactment and who is to be deemed to be a legitimate child of the parents.

A, a Hindu governed by the Dayabhaga law, dies intestate leaving three sons *B*, *C* and *D*. The three brothers will inherit their father's property, and hold it as coparceners. If *B* dies leaving a widow, and *C* dies leaving a daughter, the widow and daughter will become coparceners with *D*.

Similarly, if *A* dies intestate leaving a son, a grandson, whose father is dead and a great-grandson, whose father and grandfather are both dead, they all will inherit the property left by *A* (§ 88), and hold it as coparceners.

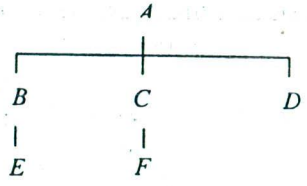
However, if *A* dies leaving only one son, the son cannot by himself constitute a coparcenary. *A* must leave him surviving at least two male issues for a coparcenary to be formed as between them.

It will be seen from what has been stated above, that a coparcenary under Dayabhaga law may consist of brothers, or uncles and nephews, or of cousins and the like but, it cannot consist of a father and sons, or of a grandfather and grandsons, or of a great-grandfather and great-grandsons. Thus, if *A* dies leaving three sons *B*, *C* and *D*, the brothers will be coparceners. If he dies leaving two grandsons, namely *E* and *F*, the cousins (*E* and *F*) will be coparceners. If he dies leaving a son *D* and two grandsons *E* and *F*, the uncle (*D*) with his nephews (*E* and *F*)

6 *Commissioner of Wealth-tax v Biswanath Chatterjee* AIR 1976 SC 1492, 1495–97. Also see *Commissioner of Wealth-tax v Guari Shankar* [1972] 84 ITR 699 (SC); also see the judgment of the High Court of Calcutta in the above case reported in 68 ITR 345, and see *Commissioner of Income Tax v Bani Rani Rudha* 59 ITR 216. Reference may also be made to *Charandasi Devi v Kanai Lal* AIR 1955 Cal 206; *Biswa Ranjan v Income Tax Officer* 47 ITR 927; *Commissioner* of *Income Tax v Balai Chandra* 105 ITR 666; See *Partha Talukdar v Nina Hardinge* AIR 1993 Cal 118 (held father's power over property absolute, relying on the above Supreme Court decision—suit for partition by first wife's son, not maintainable as he had accepted the position in income tax proceedings and as no claim for possession was made in the plaint).

will be coparceners. If he dies leaving *B*, *C*, *D*, *E* and *F*, the coparcenary will consist of *B*, *C* and *D* only. *E* and *F* do not take any share of the inheritance, as their fathers are alive. Moreover, they do not take by birth any interest in the property inherited by their respective fathers from *A* (§ 273). They are not therefore coparceners. However, if while the family is still joint, *B* dies leaving *E*, *E* will get into the coparcenary, taking *B*'s share.

Table XIII.1



§ 278. COPARCENARY PROPERTY

As under the Mitakshara law, so under the Dayabhaga law, coparcenary property may consist of ancestral property or of joint acquisitions, or of property thrown into the common stock, and accretions to such property[7].

§ 279. EACH COPARCENER TAKES A DEFINED SHARE

The essence of a coparcenary under the Mitakshara law is unity of ownership. On the other hand, the essence of a coparcenary under Dayabhaga law is unity of possession. It is not unity of ownership at all. The ownership of the coparcenary property is not in the whole body of coparceners. Every coparcener takes a defined share in the property, and he is the owner of that share. That share is defined immediately when inheritance falls in. It does not fluctuate with birth and deaths in the family. Even before partition, any coparcener can say that he is entitled to a particular share, one-third or one-fourth. Thus, if *A* dies leaving three sons, *B*, *C* and *D*, each son will take one-third, and each one will be the owner of his one-third share. The sons are coparceners in the sense that their possession of the property inherited from *A* is joint. It is the unity of possession that makes them coparceners. So long as there is unity of possession, no coparcener can say that a particular share of the property belongs to him; that he can say only after a partition.

7 See §§ 223, 227–28. *Sreemutty Soorjeemooney Dossee v Denobundoo* (1856) 6 MIA 526, 539; *Partha Talukdar v Nina Hardinge* AIR 1993 Cal 118 (self-acquired property thrown in common stock by father is coparcenary property).

Partition then, according to Dayabhaga law, consists in splitting up joint possession and assigning specific portions for the property to the several coparceners. According to Mitakshara law, it consists in splitting up joint ownership and in defining the share of each coparcener.

No doubt, a coparcenary under Mitakshara law also is characterised by unity of possession, however, that is only an appendage to the unity of ownership. Such being the case, it is not necessary to constitute a partition under that law, so that the unity of possession should also be destroyed and specific portions of the property assigned to the coparceners. It is quite enough if the unity of ownership is destroyed, and the share of each coparcener defined, so that any one coparcener can say that he is the owner of a definite share, one-third or one-fourth. Nothing further need be done. The members may continue joint in possession, however, the coparcenary is dissolved. Hence, the share of each members will, on his death, pass to his heirs. The members having separated, the principle of survivorship ceases to apply (§§ 322, 325).

§ 280. RIGHTS OF PURCHASER OF COPARCENER'S INTEREST IN EXECUTION

Since a coparcener under Dayabhaga law takes a defined share in the property, a purchaser at a court-sale of his share is entitled to be put into physical possession of that share.[8]

As to Mitakshara law, see § 289.

§ 281. NO RIGHT OF SURVIVORSHIP

As every coparcener under Dayabhaga law takes a defined share of the coparcenary property, his share will, on his death, pass to his heirs in the order mentioned in § 88, and not to his coparceners by survivorship.

§ 282. ABSOLUTE POWER OF COPARCENER TO DISPOSE OFF HIS SHARE

Since every coparcener under Dayabhaga law takes a defined share of the coparcenary property, it follows that a coparcener governed by that law, can alienate his share by sale or mortgage, or dispose of it by gift or will, in the same manner as he can dispose of his separate property.[9] On his death intestate, his share will go to his heirs.

8 *Koonwar Bijoy v Shama Soonduree* (1865) 2 WR (Mis) 30; *Eshan Chunder v Nund Coomar* (1867) 8 WR 239.

9 *Kounla v Ram Huree* (1827) 4 Beng Sel R 196 (new edn 247); *Anunchand v Kishen* (1805) 1 Beng Sel R 115 (new edn 153).

The right of a coparcener under Dayabhaga law to dispose of by will, his share of the coparcenary property, is also recognised in effect by s 30 of the Hindu Succession Act 1956.

It has been held that where the share of a coparcener governed by Dayabhaga law is sold in execution of a decree passed against him, the purchaser is entitled to be put into joint possession with the other coparceners.[10] Similarly, it has been held that a coparcener may lease out his share, and put his lessee in possession.[11]

§ 283. MANAGER AND HIS POWERS

It would seem that the powers of a manager under Dayabhaga law are the same as those of a manager under Mitakshara law.[12] He can contract a debt for a joint family purpose, and a decree passed against him for such a debt as manager will bind the other members, though they are not parties to the suit.[13] He can also mortgage the family property for the purposes of the family business.[14]

In a suit on a mortgage by two managing members of the family for a debt due by the family, the other members will not be liable until the remedy on the mortgage is exhausted. After the mortgaged properties are brought to sale, the other members may be liable.[15]

§ 284. ENJOYMENT OF COPARCENARY PROPERTY

Since every coparcener under Dayabhaga law takes a defined share of the coparcenary property, he is entitled to make use of the portion of the coparcenary property in his occupation as he likes.[16] He may even lease out his share, and put his lessee in possession.[17] However, he must not do any act which is injurious to the coparcenary property,[18] or which amounts to an infringement of the rights of the other coparceners. Thus, he cannot enter into possession of a specific portion of joint agricultural land without the consent of the other coparceners, and claim to cultivate it for his own benefit.[19] However, if he is in occupation of a specific

10 *Ranjanikanth v Ram Nath* (1884) 10 Cal 244.
11 *Ram Debul v Mitterjeet* (1872) 17 WR 420; *Macdonald v Lalla Shib* (1873) 21 WR 17.
12 *Balakrishana v Muthasami* (1909) 32 Mad 271, 274, 3 IC 878.
13 See § 253. *Dwarka Nath v Bungshi* (1905) 9 CWN 879.
14 See § 242. *Bemola v Mohun* (1880) 5 Cal 792.
15 *Sukhadakanta Bhattacharjya v Jogineekanta Bhattacharjya* (1933) 60 Cal 1197, 149 IC 878, AIR 1934 Cal 73.
16 *Eshan Chunder v Nund Coomar* (1867) 8 WR 239.
17 *Ram Debul v Mitterjeet* (1872) 17 WR 420.
18 *Gopee Kishen v Hein Chunder* (1870) 13 WR 322 (pulling down a common verandah).
19 *Stalkarti v Gopal* (1873) 20 WR 168.

portion of such land by consent, he may cultivate it in a proper course of cultivation, and appropriate the income for his sole use.[20]

§ 285. COPARCENER'S RIGHT OF PARTITION

As under Mitakshara law, so under Dayabhaga law, every adult coparcener has a right to call for a partition of the coparcenary property.[21]

§ 286. PRESUMPTIONS AS TO COPARCENARY PROPERTY

The presumptions with regard to joint family and joint family property, which apply to cases under Mitakshara law, would seem to apply also to cases under Dayabhaga law.[22]

However, there is no presumption under Dayabhaga law that property purchased by a son in his name in the father's lifetime and of which the son has been in possession since the purchase, is joint family property. The burden of proof in such a case lies on those who deny the ownership of the son.[23] Where the property purchased by one of the sons is a house, even though the father and the sons are living in it, the onus of proving that it was thrown into the common stock, or that they also contributed to the acquisition, is on the other sons.[24]

§ 287. CO-OWNERSHIP AND COPARCENARY PROPERTY

As mentioned herein, coparcenary property may consist of ancestral property, joint acquisitions, and property thrown into common stock and accretions to such property (§§ 223, 227–28). However, if the facts clearly establish that the property in dispute is the undivided property of joint owners, and if any of the incidents of coparcenary property as mentioned above are absent, the property cannot be characterised as coparcenary property. However, it would be the undivided property of co-owners or joint owners.

The above situation would depend on the fact analysed in the light of the incidents of coparcenary property and more particularly, the absence of the obvious as well as incidental trappings of coparcenary property as mentioned above.[25]

20 *Robert Watson & Co v Ramchund* (1891) 18 Cal 10, 21, 17 IA 110, 120.

21 *Sreemutty Soorjeemoney Dossee v Denobundoo* (1856) 6 MIA 526–539.

22 See § 233. *Charandasi Debi v Kanai Lal* AIR 1955 Cal 206, 58 CWN 980.

23 *Sarada v Mahananda* (1904) 31 Cal 448; *Ramesh Chandra v Hemendra* AIR 1949 Cal 519; also see *Kunja Behari v Gourhari* AIR 1958 Cal 105. Reference may be made to *Jugal Kishore v Narayan* AIR 1982 Cal 342.

24 *Hemchandra Ganguli v Matilal Ganguli* (1933) 60 Cal 1253, 149 IC 177, AIR 1934 Cal 68. Reference may also be made to *Kunja Behari v Gourhari Ram* AIR 1958 Cal 105.

25 *Municipal Council Mandasure v Fakirchand* AIR 1997 SC 1251.

XIV

DEBTS—MITAKSHARA LAW



Note.—The present chapter deals with the subject under Mitakshara law and Chapter XV deals with the subject under Dayabhaga law. The notes at the top of both the chapters may conveniently be read together. The Hindu Succession Act 1956, which applies to Hindus governed by both the schools, has brought about some radical changes in the law of succession without abolishing the joint family, coparcenary, and joint family property. The effect of that enactment is very far-reaching, having repercussions also on the rights of coparceners and their legal position. What has been stated in this chapter, must therefore, be read subject to the effect of the relevant provisions of the Act of 1956, and particularly to the effect of ss 6, 8 and 30 of the Act and on the concept of 'ancestral property'. Reference may be made to the rules founded on the interpretation and operation of s 8 to the effect that a son does not by birth acquire any right or interest in ancestral property, and that when a son inherits property of his father, he takes in as his separate property and not as joint Hindu family property, vis-à-vis, his own son or sons as held by the Supreme Court in its recent pronouncements. Reference may be made to notes under Chapter XII and under s 8 of the Hindu Succession Act. It will be noticed that the subject of 'debts' has been dealt with in this Chapter under the three heads categorised in § 287 below.

I. Liability of heirs for debts of ancestor—§ 288.
II. Undivided interest of coparcenary, when liable for his debts — § 289.
III. Liability of joint family property for father's debts—§§ 290–301.

§ 287. 'DEBTS'—THE SUBJECT MAY BE CONSIDERED UNDER THE FOLLOWING HEADS

I. liability of separate property for debts;
II. liability of the undivided interest of a coparcener for his debts;

III. liability of joint family property for father's personal debts:
   (i) where the property is sold in execution of a decree obtained against the father alone;
   (ii) where the property is alienated by the father for the payment of an antecedent debt.

Of Debts in General

A debt may be contracted by a Hindu male for his own private purpose, or it may be contracted by him for the purposes of the joint family. Debts contracted for joint family purpose have been dealt with in §§ 234, 240–44. This and the next chapter are confined to debts contracted by a Hindu for his own personal benefit.

A Hindu may possess separate property. He may also be entitled to an undivided interest in coparcenary property. The separate property of a Hindu, whether he is joint or separate, is liable for the payment of his debts both in his lifetime and after his death. His undivided coparcenary interest is not liable after his death, unless it was attached or sold in his lifetime. To this, however, there is an exception, where a father or paternal grandfather or paternal great-grandfather dies leaving private debts. In such a case, if the debts are not of an immoral character, the entire joint family property, including his son's undivided interest therein, is liable for the payment of his debts even after his death, though such interest may not have been attached in his lifetime. The reason is that a Hindu male is under a pious obligation to pay the private debts of his father, grandfather and great-grandfather, provided the debts are not of an immoral character. This is a special liability attached to sons, grandsons, and great-grandsons according to Hindu law, and it gave rise to several vexed questions, which have now been settled by decisions of the highest tribunals. This liability, however, is not a personal liability, ie, their separate property is not liable to pay the personal debts of the ancestor. Their liability is confined to their undivided interest in the joint family property.

I. Liability of Separate Property for Debts

§ 288. LIABILITY OF 'HEIRS' FOR DEBTS

As regards the liability of an heir of a deceased Hindu to pay the debts of the deceased, it is settled law that he is liable only to the extent of the assets inherited by him from the deceased. The heir is not personally liable to pay the debts of the deceased, not even if he be a son or a grandson.[1]

1 *Keval v Ganpati* (1884) 8 Bom 220; *Girdhalal v Bai Shiv* (1884) 8 Bom 309; *Udaram v Ranu* (1875) 11 Bom HC 76; *Sakharam v Govind* (1873) 10 Bom HC 361; *Lallu v Tribhuvan* (1889) 13 Bom 653.

Illustration

A had inherited the separate property of his father *F* on the death of *F* prior to the coming into force of the Hindu Succession Act 1956. A son *S* was born to *A* after that Act came into operation. By operation of § 8 of that Act, *S* did not take any interest by birth in that property. On the death of *A*, *S* inherited the same by succession as separate property left by *A* (§ 8). *S* is not personally liable to pay the debts of his deceased father *A*. He is liable to pay only out of that property, the debts left by *A*.

The 'heirs' mentioned in this paragraph include all persons upon whom the interest, in the Mitakshara coparcenary property, of a male Hindu, who dies after the commencement of the Hindu Succession Act 1956, devolves by testamentary or intestate succession as laid down in the proviso to s 6 of that enactment.

No distinction is made in this section between debts properly incurred by the deceased and debts incurred for an unlawful or immoral purpose, because the debts are to be paid not out of any joint family property, but out of the separate property of the deceased.

A Hindu father passes a promissory note to his creditor in respect of a debt barred by limitation. Afterwards, he dies leaving a son. He also leaves separate property. The son is bound to pay the creditor out of the separate estate of the deceased. He is not entitled to object on the ground that the note was in respect of a time-barred debt.[2]

II. Undivided Coparcener's Interest When Liable for His Debt

§ 289. UNDIVIDED COPARCENARY INTEREST, WHEN LIABLE FOR COPARCENER'S DEBT

(1) According to the Mitakshara law as applied in all the states, the undivided interest to a coparcener may be attached in his lifetime in execution of a decree against him for his personal debt.[3] If it is attached in his lifetime, it may be sold after his death irrespective of the fact that the order for sale was made in his lifetime,[4] or after his

2 *Narayanasami v Samidas* (1883) 6 Mad 293; *Ram Kishan v Chhedi* (1922) 44 All 628, 68 IC 235, AIR 1922 All 402. See s 25 (3) of the Indian Contract Act 1872.

3 *Deendyal v Jugdeep* (1877) 3 Cal 198, 4 IA 247; *Udaram v Ranu* (1875) 11 Bom HC 76; *Muneswari v Jugal Mohini* AIR 1952 Cal 368 (effect of attachment); *Bharamappa v Rudrappa* AIR 1955 Mys 13.

4 *Suraj Bunsi Koer v Sheo Persbad* (1879) 5 Cal 148, 174, 6 IA 88, 109; *Sheikh Karoo v Rameshwar Rao* (1921) 6 PLJR 451, 458, 62 IC 905, AIR 1923 Pat 143 (mortgage decree).

death.[5] However, it cannot be attached after his death (except where the coparcener is the father), for it then ceases to be his interest and passes to the other coparceners by survivorship.[6] It is only an attachment effected during the lifetime of the debtor that will prevent the accrual of his interest to his coparceners by survivorship. However, see sub-para (3) below.

(2) An attachment before judgment of the undivided interest of a coparcener, not followed by a decree in his lifetime, does not defeat the right of survivorship of the other coparceners.[7] It is not settled whether attachment before judgment operates to defeat the right of survivorship in cases where such attachment is followed by a decree in the lifetime of the defendant. The High Courts of Bombay[8] and Patna[9] have held that it does not. The High Court of Madras has held that it does. [10]

The ground of the Madras decision is that where a decree follows on an attachment before judgment, no reattachment is necessary; therefore, the mere passing of the decree renders the attachment before judgment as effective as an attachment after decree (see O 38, r 11, Code of Civil Procedure 1908). However, where the attachment comes to an end, the decree cannot be executed against coparceners who would get the property by survivorship.[11] However, see sub-para (3) below.

(3) The rules stated in this paragraph and the illustrations below must be read subject to the provisions of s 6 of the Hindu Succession Act 1956, and particularly to the proviso to the section in cases where that proviso is applicable. Reference may be made to notes under s 6 of that enactment. Reference may also be made to s 30 of that enactment which now permits a coparcener in a Mitakshara coparcenary to dispose of by will, his undivided interest in the coparcenary property. Reference may also be made to notes under s 8 of that enactment.

Illustrations

(a) *A* and his nephew *B* are members of a coparcenary. *A* is indebted to *C* in the sum of Rs 3,000. *C* may obtain a decree against *A*,

5 *Bithal Das v Nand Kishore* (1901) 23 All 106; *Faqir Chand v Sant Lal* (1926) 48 All 4, 89 IC 291, AIR 1926 All 157; See *Madho Parshad v Mehraban Singh* (1891) 17 IA 194, 197, 18 Cal 157, 161; *Sheo Maheep Bikram Singh v Mahant Thakur Das* (1940) 15 Luck 503, 187 IC 90, AIR 1940 Ori 200.

6 See *Suraj Bunsi Koer v Sheo Persad* (1879) 5 Cal 148, 6 IA 88; *Madho Parshad v Mehraban Singh* (1891) 17 IA 194, 197, 18 Cal 157, 161.

7 *Ramanayya v Rangappayya* 17 Mad 144; *Kalianna Goundan v Masayappa Goundan* (1943) Mad 397, 207 IC 579, AIR 1943 Mad 149.

8 *Subrao v Mahadevi* (1914) 38 Bom 105, 27 IC 330, AIR 1914 Bom 256; See also *Laxman v Vinayak* (1916) 40 Bom 329, 33 IC 956, AIR 1916 Bom 262.

9 *Sunder Lal v Raghunandan* (1924) 3 Pat 250, 83 IC 413, AIR 1924 Pat 465.

10 *Sankaralinga v Official Receiver* (1925) 49 MLJ 616, 92 IC 504, AIR 1926 Mad 72.

11 *Raja Asra v The Official Receiver of South Canara* (1948) Mad 701.

and may enforce it in *A*'s lifetime by attachment and sale of *A*'s undivided interest in the joint property. However, if *A*'s interest in the joint property is not attached in *A*'s lifetime, it cannot be attached after his death.

(b) *A* and his brother *B* are members of a coparcenary. *A* is indebted to *C* in the sum of Rs 3,000. *C* obtains a decree against *A* in *A*'s lifetime. Before any step is taken in execution of the decree, *A* dies leaving a widow and his brother *B*. He also leaves separate property worth Rs 2,000. Here *A*'s separate property will pass to his widow as his heir, and *C* may enforce the decree by attachment and sale of that property. However, he cannot attach *A*'s undivided interest in the coparcenary property for the balance of his debt, for that interest has passed to *B* by survivorship.

If, in the above case, no suit was instituted by *C* against *A* in *A*'s lifetime, *C* could institute a suit against *A*'s widow after *A*'s death, as his heir and legal representative, and obtain a decree against her, and enforce it by attachment and sale of *A*'s separate property inherited by her. However, he cannot bring a suit against *B* to recover his debt out of the coparcenary property. Similarly, if *A* dies after suit, but, before decree, *C* may continue the suit against *A*'s widow as his heir, and obtain a decree against her, and enforce it by attachment and sale of *A*'s separate property. However, he cannot proceed against *A*'s undivided interest in the joint property. That interest will pass to *B* who will take it by survivorship free from the burden of the debt.

(c) *A* and his brother *B* are members of a coparcenary. *A* is indebted to *C* in the sum of Rs 3,000. *C* obtains a decree against *A*, and in execution of the decree, gets *A*'s interest in the joint property attached. *A* then dies leaving *B*. The interest of *A* in the joint property, having been attached in *A*'s lifetime, may be sold in execution after *A*'s death. The point to be noted is that if the share of a coparcener is attached in his lifetime, it may be sold in execution after his death. The sale may take place after the death of the debtor, but the attachment must take place in the lifetime of the debtor.

(d) A coparcenary consists of a father and son. The son dies indebted to *C* in the sum of Rs 5,000. The son does not leave any separate property. *C* cannot proceed against the son's undivided interest in the coparcenary property. It would have been different if *C* had obtained a decree against the son, and attached his interest in the coparcenary property in his lifetime (a father is under no religious obligation to pay the debts of his son).[12]

12 *Undaram v Rantu* (1875) 11 Bom HC 76.

It will be seen from what has been stated above, that a person lending money to a Hindu, who has no separate property of his own, has no chance of recovering back his money, unless he obtains a mortgage or a charge on the undivided interest of the debtor in the joint family property (§§ 268, 269), or where he has not obtained such a mortgage or charge, he obtains a decree against the debtor and attaches his undivided interest in the joint family property in the lifetime of the debtor. It is, however, different where the debtor is a father, grandfather or great-grandfather (see §§ 290-294 and § 261).

III. Liability of Joint Family Property for Father's Debts

§ 290. PIOUS OBLIGATION OF SON, GRANDSON AND GREAT-GRANDSON TO PAY ANCESTOR'S DEBTS

(1) Where the son (this expression throughout includes son's sons and son's son's sons) are joint with their father, and debts have been contracted by the father in his capacity of manager and head of the family for family purpose (§ 240), the sons as members of the joint family, are bound to pay the debts to the extent of their interest in the coparcenary property (§§ 240–42).

Where the sons are joint with their father, and debts have been contracted by the father for his own personal benefit, the sons are liable to pay the debts, provided they were not incurred for an illegal or immoral purpose (§ 298). The liability to pay the debts contracted by the father, though for his own benefit, arise from an obligation of religion and piety (pious obligation), which is placed upon the sons under Mitakshara law to discharge the father's debts, where the debts are not tainted with immorality.[13] The fact that the father was not the *karta* or manager of the joint family, or that the family consisted of other coparceners besides the father and sons, does not affect the liability of the sons in any way. It exists irrespective of these facts.[14] The application

13 *Hunnoman Persaud v Musumat Babooee* (1856) 6 MIA 393, 412; *Girdharee Lall v Kantoo Lal* (1974) 1 IA 321, 14 Beng LR 187; *Suraj Bansi Koer v Sheo Persad* (1879) 5 Cal 148, 6 IA 88; *Muttayan v Zamindar of Sivagri* (1883) 6 Mad 1, 9 IA 128; *Vendatesh v Kusum* AIR 1978 SC 1791; *Maruthappan v Niraikulathan* (1937) Mad 943, 169 IC 292, AIR 1937 Mad 434; *Chokalingam v Muthukaruppan* (1938) Mad 1019, AIR 1938 Mad 892; *Jagmohan v Ranchhoddas* (1945) Nag 892; *Bithaldas v Chandratan* AIR 1955 Raj 39; *Lakshminarasayya v Papayya* AIR 1955 AP 97 (liability of heirs of the son), *Ramprasad Firm v Bai Reva* AIR 1970 Guj 269 (trade debts—sons of a deceased partner in a firm). Also see *Prasad v Goverdaswami* AIR 1982 SC 84.

14 *Sidheshwar Mukherjee v Bhubneshwar Prasad* [1954] SCR 177, (1953) 2 MLJ 789, AIR 1953 SC 487; *Lalta Prasad v Gajadhar Shukul* (1933) 55 All 283, 199 IC 181, AIR 1933

continued on the next page

of the doctrine of pious obligation extends to all debts not tainted by illegality or immorality and is not confined to only antecedent debts of the father.[15] A nephew is not under pious obligation to pay any such debt and is not affected by any alienation of the uncle for his personal debt even if his (nephew's father) father had only joined in execution of the sale.[16]

As regards the application of the doctrine of pious obligation to Thiyyas of Calicut, see *Arakkal Rohini v AK Sethumadh*, a case decided by the Kerala High Court.[17]

(2) The pious obligation of sons, grandsons and, great-grandsons to pay the ancestor's debts to the extent of their interest in the joint family property is not abrogated by the Hindu Succession Act 1956.[18]

(3) *Liability not personal.*—The liability of the son, grandson and great-grandson to pay the debts of their ancestor is not a personal one, ie, the father's creditor is not entitled to proceed against their person or their separate property. It is limited to their interest in the joint family property,[19] unless there is acceptance of personal liability in the course of judicial proceedings such as insolvency proceedings.[20]

Illustration

A coparcenary consists of a father and son. The father borrows Rs 5,000 from *C* for an immoral purpose. *C* may obtain a decree against the father and enforce it by attachment and sale of his interest in the joint family property in the father's lifetime. However, if the father's interest is not attached in his lifetime, it cannot be

All 235; *Virayya v Pardhasarathi Appa Rao* (1934) 57 Mad 190, 149 IC 188, AIR 1933 Mad 690; *Chootey Lal v Ganpat Rai* (1935) 57 All 176, 150 IC 411, AIR 1934 All 590, FB; overruling *Official Liquidator, UP Oil Mills Co Ltd v Jamna Prasad* (1933) 55 All 417, 143 IC 762, AIR 1933 All 334. This applies to Mithila also, where the law is the same as the law of Mitakshara except in a few matters—*Sourendra Mohan v Hari Prasad* (1926) 5 Pat 135, 91 IC 1033, AIR 1925 PC 280.

15 For instance, see *Himatlal v Rameshchandra* AIR 1983 Guj 7 (for antecedent debt see § 295).

16 *Prasad v Govindaswami* AIR 1982 SC 84.

17 *Arakkal Rohini v A K Sethumadh* AIR 1978 Ker 119, FB.

18 Reference may be made to *Nathubhai v Chhotubhai* AIR 1962 Guj 68.

19 *Peda Venkanna v Sreenivasa* (1918) 41 Mad 136, 142, 43 IC 225, AIR 1919 Mad 1175; *Sukheo v Makhusudan* (1931) 10 Pat 305, 132 IC 871, AIR 1931 Pat 177; *Bissessor Ram v Ramakant Dubey* (1934) 13 Pat 7, 151 IC 379, AIR 1934 Pat 187; *Devi Das v Jada Ram* (1934) 15 Lah 50, 147 IC 225, AIR 1933 Lah 857; *Maya Debi v Rajlakshmi* AIR 1950 Cal 1. The creditor can enforce this liability against any of the sons of the debtor—*Chandra Bhan v Misrimal* AIR 1955 Raj 11; *Appa Rao v Narasimha Murty* (1975) 2 Cut WR 589.

20 *Coimbatore Venkataramana Vilas Co Ltd v Official Receiver, Coimbatore* (1940) Mad 191, 186 IC 125, AIR 1940 Mad 30.

attached after his death, and it will then pass to the son by survivorship (see §§ 289 and 294 (6)).

(4) *Duration of liability.*—The pious obligation of the sons to pay the father's debts lasts only so long as the liability of the father subsists. If the debts are saved from limitation by the father's acknowledgment, the son is bound to pay,[21] even though the acknowledgment by the father is after a partition between the father and the son.[22] The son's liability is neither joint nor joint and several, as those terms are ordinarily understood in English law.[23]

Thus, if the father is adjudicated an insolvent for debts contracted by him, and he afterwards obtains his discharge, the effect of the discharge is to release the father from those debts. No suit can therefore be maintained against the father for those debts, and since no suit can be maintained against the father, none can be maintained against the sons in respect of those debts.[24] In a Full Bench decision of the High Court of Gujarat, it has been held that if a father is adjudged an insolvent, the pious obligation of his son for pre-partition debts of the father comes to an end.[25]

(5) *Liability exists even in father's lifetime.*—It is well-settled that the liability of the sons to pay the father's debts exists whether the father is alive or dead.[26] This liability exists even where by a custom in Punjab, the son cannot enforce partition during the father's lifetime.[27]

There also arose a conflict of opinion amongst various High Courts whether there was any pious obligation on the part of the sons to pay the father's debts in the lifetime of the father, or whether the obligation arose for the first time after the father's death. The conflict arose out of some observations of the Judicial Committee in *Sahu Ram*'s case.[28] In a later case, that of *Brij Narain Rai v Mangal Prasad*,[29] their Lordships of

21 *Lalta Prasad v Gajadhar Shukul* (1933) 55 All 283, 149 IC 181, AIR 1933 All 235.

22 *Mumiswami v Kutti* (1933) 56 Mad 833, 145 IC 404, AIR 1933 Mad 708; *Thadi Murali Mohana Reddi v Medapati Gangaraju* (1942) Mad 95, 197 IC 199, AIR 1941 Mad 772 (FB).

23 *Narayanan v Veerappa* (1917) 40 Mad 581, 35 IC 918, AIR 1917 Mad 989.

24 See above.

25 *Jayantilal v Shrikant* AIR 1980 Guj 67 (FB).

26 *Pannalal v Naraini* [1952] SCR 544, 553, (1952) 2 MLJ 83, AIR 1952 SC 170; *Brijnarain Raj v Mangla Prasad* (1924) 51 IA 129, 46 All 95, 77 IC 689, AIR 1924 PC 50; *Abdul Karim v Ram Kishore* (1925) 47 All 421, 86 IC 837, AIR 1925 All 327; *Badri Prasad v Madan Lal* (1893) 15 All 75, 79, FB; *Nan Bachchan v Sita Ram* AIR 1977 All 126; *Govind v Sakharam* (1904) 28 Bom 383, 389; *Ramasami Ulaganatha* (1899) 22 Mad 49–63; *Debendra v Fyzabad Bank* (1924) 3 Pat 63, 75 IC 63, 75 IC 53, AIR 1924 Pat 194; *Thimmegowda v Dyavamma* AIR 1954 Mys 93 (FB).

27 *Nihal Chand Gopal Das v Mohan Lal* (1932) 13 Lah 455, 135 IC 197, AIR 1932 Lah 211; *Anthonyswamy v Chinnaswamy* AIR 1978 SC 1791.

28 (1917) 44 IA 126, 39 All 437, 443–44, 39 IC 280, AIR 1917 PC 61.

29 (1924) 51 IA 129, 46 All 95, 77 IC 689, AIR 1924 PC 50.

the Privy Council held that the observations in *Sahu Ram*'s case referred to above, were not necessary for the decision of the case, and that the sons were liable for father's debts, whether the father was alive or dead when the liability attached.

(6) *Debt contracted by father after partition.*—The son is not liable for a debt contracted by the father after partition.

(7) *Liability of son after partition for debt contracted by father before partition.*—A son is liable, even after the partition, for the pre-partition debts of his father, which are not immoral or illegal and for the payment of which no arrangement was made at the date of the partition.[30]

Question, however, often arises: How is this liability to be enforced by the creditor?

(i) it is now held by all the courts in India that if the suit is filed against the father before partition, the son is liable for a debt contracted by the father before partition;[31]

(ii) however, if the suit is filed after partition against the father, the decree cannot be executed against the son.[32] The decree against the father after the partition cannot be taken to be a decree against the son and no attachment and sale of the son's separate share would be permissible under s 60 of the Civil Procedure Code. A separate and independent suit must be instituted against

30 *Pannalal v Narain* [1952] SCR 544, 553; *Jakati v Borkar* AIR 1959 SC 282; *Venkatesh v Kusum* AIR 1978 SC 1791 (tagai loan); *Sriramamurthi v Official Receiver* AIR 1957 AP 692; *Nathubhai v Choothabhai* AIR 1962 Guj 68; *Virdhachalam Pillai v Chaldean Bank* AIR 1964 SC 1425; *Ningappa v Vitheppa* AIR 1971 Mys 247; *Syaulu v Venkateshwarlu* AIR 1965 AP 318; *Hardwarilal v Dwarka Prasad* AIR 1974 Raj 101 (renewal after partition of preparation debt); *Vadarammal v Ambalal* AIR 1971 Mad 371; *Hanumayya v Venkata Narasimha* AIR 1965 AP 439 (adequate and sufficient provision).

31 *Kulada Prasad v Haripada* (1913) 40 Cal 407, 17 IC 257 (a case of partition constituted by conversion of son); *Hari Charan v Manakmall* AIR 1964 Cal 562; *Ramchandra v Kondayya* (1911) 24 Mad 55; *Jagannatha Rao v Viswesan* (1924) 47 Mad 621, 80 IC 228, AIR 1924 Mad 682; *Subramania v Sabapathy* (1928) 51 Mad 361, 110 IC 141, AIR 1928 Mad 657, FB; *Annabhat v Shivappa* (1928) 52 Bom 376, 110 IC 269, AIR 1928 Bom 232; *Bankey Lal v Durga Prasad* (1931) 53 All 868, FB, 135 IC 139, AIR 1931 All 512 (settling the conflict between the earlier decisions); *Atul Krishna Roy v Lala Nanadanji* (1935) 14 Pat 732, FB, 157 IC 53, AIR 1935 Pat 275 (overruling an earlier decision); *Jawahar Singh v Parduman Singh* (1933) 14 Lah 399, 141 IC 424, AIR 1933 Lah 116; *Firm Govindram Dwarkadas v Nathulal* (1938) Nag 10, 170 IC 724, AIR 1937 Nag 45; *Jageshwar v Manni Ram* (1927) 2 Luck 561, 101 IC 907, AIR 1927 Ori 180; *Raghunandan v Moti Ram* (1931) 6 Luck 497, FB

32 *Firm Govindram Dwarkadas v Nathulal* (1938) Nag 10, 170 IC 724, AIR 1937 Nag 45; *Ramayya v Venkamraju* (1954) Mad 834, AIR 1954 Mad 864, FB; *Kuppan Chettiar v Masa Goundan* (1937) Mad 1004, 169 IC 400, AIR 1937 Mad 424; *Krishnasami v Ramasami* (1899) 22 Mad 519; *Ramachandran v Ramachandra* AIR 1956 Mad 215; *Priya Shankar v Radhey Shiam* (1945) All 856; *Padmavatibai v Manilal* AIR 1959 Bom 141, (1959) Bom 81, 60 Bom LR 1015.

the son before his share can be reached. This was the view taken in a large number of cases, which recognised the liability of the son to pay the pre-partition debts of the father. In *Pannalal v Narain*,[33] the Supreme Court observed that the principles underlying those decisions were sound.

In *Pannalal*'s case, it was observed that the position had been correctly stated by the Nagpur High Court in *Jainarayan v Sonaji*.[34]

> To say a son is under pious obligation to pay certain debts is one thing; to say his property can be taken in execution is another. In our view, property can be attached and sold in execution if it falls within the kind of property that can be attached and sold. What that is, is found by looking at s 60. When one looks at s 60, one finds that the property in question should either belong to the judgment-debtor or he should have a disposing power over it. After partition, the share that goes to the son does not belong to the father and the father has no disposing power over it. Therefore, such property does not fall within s 60... It by no means follows that a son cannot be made liable. He could be made liable for his father's debts, if he had become a surety, he can be made liable under the pious obligation rule. In neither of the cases, could his liability take the form of having his property seized in execution and sold without any prior proceedings brought against him, leaving him to raise the question whether his liability as surety or under the pious obligation rule precluded him from claiming in execution.

It has been held in a Full Bench decision of the Gujarat High Court,[35] that during the pendency of insolvency proceedings against the father, in which he has been adjudged an insolvent, a pre-partition debt incurred by him, not tainted with immorality or illegality, is not recoverable out of the assets which have gone to his sons upon partition among them.

(iii) Another class of cases that falls under this head is where the suit in respect of a pre-partition debts is filed after partition but, the father dies pending the suit and his separated son has been brought on record as his legal representative. The question arises whether the liability of the sons under the pious obligation rule can be determined in execution proceedings or a separate suit has to be brought for this purpose. The position, here, would be

33 (1952) SCR 544, (1952) 2 MLJ 83, AIR 1952 SC 170.
34 [1938] Nag 136, AIR 1938 Nag 24, 29.
35 *Jayantilal v Shrikant* AIR 1980 Guj 67 (FB).

materially different from that under the proposition stated immediately above. In *Pannalal v Naraini*,[36] the Supreme Court expressed disapproval of the view taken by a majority of judges in a Full Bench decision of the Patna High Court *Atul Krishna v Lala Nandanji*,[37] and held that the remedy of the decree-holders in any such case against the share obtained by the son on partition lies in the execution proceedings and not by way of a separate suit. The son would in such proceedings be at liberty to show that the property in his hands is for certain reasons not liable to pay the debts of his father and all these questions would have to be decided by the executing court under s 47 of the Civil Procedure Code.

The questions to be determined by the executing court were indicated by their Lordships of the Supreme Court in *Pannalal*'s case.

(iv) Also, see § 292.

Grandfather's Share

Where a decree has been obtained against a Hindu, who was a member of a joint family consisting of himself, his father and his son, and the judgment-debtor and his father died soon after, it was held that the liability of the son to pay the father's decree-debt covers even the share of the judgment-debtor's father.[38]

§ 291. EXTENT OF LIABILITY OF GRANDSON AND GREAT-GRANDSON

The son is bound to pay the father's debt with interest. So also is the grandson.[39] It was at one time supposed that the pious obligation to pay ancestral debts did not extend beyond the grandson. However, it has not been held by the Privy Council that the great-grandson is bound to pay the great-grandfather's debts, and that his liability is co-extensive with that of the son and grandson.[40]

In *Chet Ram v Singh*,[41] the Judicial Committee observed, upholding the view expressed by the High Court of Allahabad,[42] that there was no pious obligation on the grandson to pay the debts of his grandfather, while his

36 [1952] SCR 544, (1952) 2 MLJ 83, AIR 1952 SC 170.
37 (1935) 14 Pat 732 (FB).
38 *Shrawan v Jangalya* (1945) Nag 409.
39 *Lachman Das v Khunnu Lal* (1897) 19 All 26 (FB); *Ladu v Gobardhan Das* (1925) 4 pat 478, 481–82, 86 IC 721, AIR 1925 Pat 470.
40 *Masit Ullah v Damodar Prasad* (1926) 53 IA 204, 48 All 518, 98 IC 1031, AIR 1926 PC 105; *Sheo Ram Durga* (1928) 3 Luck 700, 112 IC 288, AIR 1928 Ori 378 (FB).
41 (1922) 49 IA 228, 236, 44 All 368, 375–76, 67 IC 569, AIR 1922 All 247.
42 *Ram Singh v Chet Ram* (1919) 41 All 529, 51 IC 119, AIR 1919 All 415.

own father was living. However, his view must now be taken to have been superseded by the decision of the same tribunal in *Masit Ullah v Damodar Prasad*.[43] In that case, the joint family consisted of *A* and his son *B*. *A* sold an item of the joint family property to discharge a debt that was contracted by his grandfather. It was held that *B*'s interest in the property was bound by the sale, as the sale was made to liquidate his (*B*'s) great-grandfather's debt which *B* was under a pious obligation to pay.

A nephew is not liable for the debts of his uncle; therefore, if an uncle and nephew are members of a joint family, the nephew's interest in the joint property cannot be attached and sold in execution of a decree against the uncle.[44]

§ 291A. WIFE WHO HAS RECEIVED SHARE ON PARTITION

The doctrine of pious obligation cannot apply to the wife and it would seem that a wife who has received a share on partition between her husband and the sons cannot be liable to the creditor on the principles considered in the preceding paragraphs.[45]

§ 292. CREDITOR'S SUIT

(1) *Suit against father*.—In a case where the son is under a pious obligation to pay the father's debt, the creditor may sue the father alone and obtain a decree against him, and he may execute the decree by attachment and sale of the entire interest of the father as well as the son in the joint family property, and the sale will bind the son, though he was not made a party to the suit, unless the debt contracted by the father was for an immoral purpose. Even if the son was originally impleaded in the suit and the suit was afterwards withdrawn against him, the decree against the father can be executed against the son's interest in the joint family property.[46] In *Sidheshwar Mukherjee v Bhubneshwar*

43 48 All 518, 98 IC 1031, AIR 1926 PC 105.

44 *Ram Ratan v Lachman Das* (1908) 30 All 460; *Mathura v Rajkumar* (1921) 6 PLJR 526, 62 IC 132, AIR 1921 Pat 447, FB; *Hari Prasad v Sourendra* (1922) 1 Pat 506, 525–26, 66 IC 945, AIR 1922 Pat 450.

45 *Nathubhai v Chhotubhai* AIR 1962 Guj 68, 75, 76; but see *Keshav Nandan v Bank of Bihar* AIR 1977 Pat 185.

46 *Krishana v Sami* (1940) Mad 815, AIR 1940 Mad 544; *Kumbakonam Mutual Benefit Fund Ltd v C Ramaswami* (1947) Mad 99; *Sreeniwasan v Rangachari* AIR 1953 Mad 815; *Kumaj Sare Mal v Kalwa Devadattam* AIR 1958 AP 216; *Anantha Pai v Kesava Pai* AIR 1955 Tra & Co 249; *Pannalal v Narain* [1952] SCR 544, 553. The position would be different if the suit as against the son was dismissed on merits, *Maha Nirvani v Bindeshri Prasad* AIR 1952 All 337; *Ramkrishan Lal v Ugramohan Dass* AIR 1960 Pat 8. Of course, the rule cannot apply if the son has already parted with his interest in the property to a third party—*Jitan Mahto v Manji Rai* AIR 1964 Pat 240.

Prasad,[47] the Supreme Court held that the liability of the sons has its basis entirely in the relationship between the father and son and is in no way dependent upon the constitution of the family, either at the time when the debt was contracted, or when the obligation is sought to be enforced. A person who has obtained a decree against a member of a joint Hindu family for a debt due to him, is entitled to attach and sell the interest of his debtor in the joint family property, and, if the debt was not immoral or illegal, the interest of the judgment-debtor's sons also in the joint family property would pass to the purchaser by such sale even though the judgment-debtor was not the *karta* of the family and the family did not consist of the father and the sons only when the decree was obtained against the father and the properties were sold. It is not necessary that the sons should be made parties to the suit or the execution proceedings. This view was reaffirmed by the Supreme Court in *Jakati v Borkar*.[48]

The rule laid down by the Privy Council in *Mst Nanomi Baduasin*'s case,[49] is not restricted in its application to cases where the father was the head of the family and in that capacity could represent his sons in the suit or execution proceedings, for subject to the right of the sons to assert and prove that the debt contracted by their father was not such as would be binding on them under the Hindu law, the father, even if he was not the *karta*, could represent his sons as effectively in the sale on execution proceedings as he could do if he was the *karta* himself.

If there is partition after the decree, according to one view, the decree may be executed against the joint family property including the son's interest therein,[50] but the sons should be made parties to the execution proceedings and unless that is done, the father's interest alone would pass.[51] According to another view, the creditor should bring another suit against the sons, obtain a decree against them, which would be limited to the shares allotted to them on partition and then attach and sell the shares, unless the partition was not bona fide and was made with intent to defraud the general body of creditors, in which case, the decree may be executed against the joint family property.[52]

47 [1954] SCR 177.

48 AIR 1959 SC 282, 288.

49 (1885) 13 IA 1. Also see *Prasad v Govindaswamy* AIR 1982 SC 84.

50 *Kishan Sarup v Brijraj* (1929) 51 All 932, 955–56, 121 IC 257, AIR 1929 All 726; *Jageshwar v Manni Ram* (1927) 2 Luck 561, 101 IC 907, AIR 1927 Ori 180; *Nand Kishore v Madan Lal* AIR 1936 Lah 64 (decree before partition).

51 *Ganpatrao v Bhimrao* 52 Bom LR 154, AIR 1950 Bom 278, (1950) Bom 114.

52 *Kameshwaramma v Venkata Subba Rau* (1915) 38 Mad 1120, 24 IC 474, AIR 1914 Mad 328 (decree obtained before partition).

The last mentioned two decisions of the Bombay and Madras High Courts, as pointed out by the Supreme Court in *Jakati v Borkar*,[53] must be confined to their own facts. It was observed:

> It is true that the right of the father to alienate for payment a personal debt is ended by partition but...it does not affect the pious duty of the sons to discharge the debt of the father. Therefore, where after attachment and a proper notice of sale, the whole estate including the son's share, which was attached, is sold and the purchaser buys it understanding it to be the whole coparcenary estate, the presence of the sons *eo nomine* is not necessary, because they still have the right to challenge the sale on showing the illegal or immoral purpose of debt. It was held that the partition which had taken place after the decree and pending execution proceedings, did not relieve the sons of their pious obligation or their shares of their liability to be sold or be a means of reducing the efficacy of the attachment or impair the right of the creditor.

If there is a partition during the pendency of the suit against the father, either the son can be made a party and a decree would follow as in sub-§ (2), or the suit will proceed without the son and the decree will follow as above.[54]

Explanation.—The partition that a creditor may have to envisage must, it is said in many decided cases, be bona fide and not made with intent to defeat or defraud the creditors. In *Pannalal*'s case,[55] the Supreme Court pointed out that the expressions 'bona fide' and 'mala fide' have been frequently used in this connection in various decided cases are confusing.

> The use of such expressions far from being useful does not unoften lead to error and confusion. If by mala fide partition is meant a partition the object of which is to delay and defeat the creditors who have claims upon the joint family property, obviously this would be a fraudulent transaction not binding in law and it would be open to the creditors to avoid it by appropriate means. So also a mere colourable partition not meant to operate between the parties can be

53 AIR 1959 SC 282, 288. Also see *Devadattam v Union of India* AIR 1964 SC 880.

54 See *Raghunandan Pershad v Moti Ram* 6 Luck 497, 119 IC 449, AIR 1929 Ori 406, where the decree was in December 1926, the partition was in August. The date of the suit does not appear in the report, See also *Jawahar Singh v Parduman Singh* (1933) 14 Lah 399, 141 IC 424, AIR 1933 Lah 116, where the partition was in February 1927 but the date of the money decree against the father does not appear.

55 *Pannalal v Naraini* [1952] SCR 544, 558–59; *Kaushal Kishore v Ram Dev* AIR 1955 Punj 193. As to renewal of pre-partition debt by father; see *Hanumayya v Venkata Narasimha* AIR 1965 AP 439.

ignored and the creditor can enforce his remedies as if the parties still continued to be joint. However, a partition need not be mala fide in the sense that the dominant intention of the parties was to defeat the claims of the creditors; if it makes no arrangement or provision for the payment of the just debts payable out of the joint family property a liability of the sons for payment of the pre-partition debts of the father will still remain.

We desire only to point out that an arrangement for payment of debts does not necessarily imply that a separate fund should be set apart for payment of these debts before the net assets are divided, or that some additional property must be given to the father over and above his legitimate share sufficient to meet the demands of his creditors. Whether there is proper arrangement for payment of the debts or not, would have to be decided on the facts and circumstances of each individual case. We can conceive of cases where the property allotted to the father in his own legitimate share was considered more than enough for his own necessities and he undertook to pay off all his personal debts and release the sons from their obligation in respect thereof. That may also be considered to be a proper arrangement for payment of the creditor in the circumstances of a particular case. After all the primary liability to pay his debts is upon the father himself and the sons should not be made liable if the property in the hands of the father is more than adequate for the purpose. If the arrangement made at the time of partition is reasonable and proper, an unsecured creditor cannot have any reason to complain. The fact that he is no party to such arrangement is, in our opinion, immaterial.

In *Virdhachalam Pallai v Chaldean Bank*,[56] the father created a mortgage on property belonging to the joint family to discharge his antecedent debt and the respondent bank filed a suit on the mortgage, inter alia against the father and his minor son. There was a partition of the joint family properties subsequent to the mortgage and before filing of the suit by the bank. The mortgage was held binding on the son. The primary question for determination was the right of the secured creditor to proceed against the security, ignoring the partition. It was pointed out by the Supreme Court that the mortgage having been executed to secure an antecedent debt of the father, the bona fides of the partition had no crucial significance since the mortgage was binding on the son. It was added that the extent to which the question of bona fides could be

56 *Virdhachalam Pllai v Chaldean Bank* AIR 1964 SC 1425; *Pannalal v Narain* [1952] SCR 544, 558–59. As to adequate and sufficient arrangement, see *Hanumayya v Venkata Narasimha* AIR 1965 AP 439.

relevant, the onus was upon the son to establish that the partition was such as made proper and adequate provision for the discharge of the mortgage debt.

It may not be proper to say that a partition is not bona fide merely because it was entered into either pending the creditor's suit or after the decree in that suit, and with the object of avoiding attachment of the joint family property in execution of the decree in the creditor's suit.[57]

Where a partition between a father and son was not a mere colourable transaction and was in accordance with the proper shares in the property, is not liable to be impeached under s 53, Transfer of Property Act, although it was entered into with a view to prevent attachment of the son's share in execution of decrees obtained against the father after the partition. Only the father's share can be proceeded against.[58]

(2) *Suit against father and son.*—Under similar conditions, the creditor may sue both father and son, and obtain a decree against them for the debt due to him.[59] It is open to the son in such a suit to show that the debt was incurred by the father for an immoral purpose and to resist a decree against his share on that ground.[60] It is not necessary for the son to show that immoral purpose was known to the lender.[61] However, a distinct connection must be established between the debt and the father's immorality.[62] If he omits to do so, he will be precluded in execution proceedings from pleading that the debt was not binding on him on the ground that it was for an immoral purpose.[63]

The son may be joined as a party to a suit on a promissory note executed by the father alone.[64]

If there is a partition between the father and son after the debt has been incurred, however, before any suit is filed, the creditor can reach

57 *Re Balusami Ayyar* (1928) 51 Mad 417, 425, 112 IC 451, AIR 1928 Mad 735 (FB); *Subramania v Sabapathy* (1928) 51 Mad 361, 368, 110 IC 141, AIR 1928 Mad 657; *Gaya Prasad v Murlidhar* (1928) 50 All 137, 104 IC 406, AIR 1927 All 714; *Kishan Sarup v Brijraj* (1929) 51 All 932 936–37, 121 IC 257, AIR 1929 All 726; *Hirday Narain v Ram Das* AIR 1951 All 606; *Khanna and Hari Raj v Vishnu Datt* AIR 1960 Punj 548.

58 *Shwebo v Subbian alias Shanmugham Chettiar* (1945) Mad 138.

59 *Ramasami v Ulaganatha* (1899) 22 Mad 49, FB; *Narayanan v Veerrappa* (1917) 40 Mad 581, 582, 35 IC 918, AIR 1917 Mad 989; *Debendra v Fyzabad Bank* (1924) 3 Pat 63, 75 IC 53, AIR 1924 Pat 94.

60 *Sat Narain v Behari Lal* (1925) 52 IA 22, 6 Lah 1, 84 IC 883, AIR 1925 PC 18.

61 *Lakshmanaswami v Raghavacharyulu* (1943) Mad 717, 210 IC 98, AIR 1943 Mad 292. Reference may also be made to *Lubar Amrit Lal v Doshi Jayantilal* [1960] 3 SCR 842, 855–56.

62 *Brijmohan v Mahabeer* (1936) 63 Cal 194.

63 *Kulitalai Bank v Nagaimanickam* (1955) 2 MLJ 485, AIR 1955 Mad 670; *Krishnanand v Raja Ram* (1922) 44 All 393, 66 IC 150, AIR 1922 All 116.

64 See § 240 (4). *Ramasamayya v Virasami* (1898) 21 Mad 222, 224; *Narayanan v Veerappa* (1917) 40 Mad 581, 582, 35 IC 918, AIR 1917 Mad 989; *Ramphul Singh v Deg Narain* (1882) 8 Cal 517.

the share allotted to the son on partition only by a suit to which the son is party (vide § 290(7)(ii) and cases cited therein). Such a suit would in the ordinary course be one both against the father and the son. The decree against the father would be the usual decree, however, against the son, it would be limited to the share allotted to him on partition.

Even where the debt is a secured debt, the creditor may sue both father and son. If the mortgage is binding on the son also, being executed for an antecedent debt (§ 256 (2)), or other legal necessity (§ 242), a mortgage decree follows. However, if the mortgage was not effected for an antecendent debt or other legal necessity, there will be a mortgage degree in Madras and Bombay but, not in other states against the father but, a money decree against the son (§§ 259 and 260) conditional on the debt not being released by the sale of the father's share.[65] If there is a partition between the father and the son after the mortgage, the son is still liable to pay the debt, unless it is incurred for illegal and immoral purposes. In such a case, the son ought to be a party to the suit. As the father does not represent him, the equity of redemption in his share of the property would not be lost unless he is impleaded and is given an opportunity to redeem. If he is not impleaded in the suit against the father, there out to be another suit against him, other proceeding giving him an opportunity to redeem before he is deprived of his share. There can be no objection to the maintainability of such a suit. If he obstructs delivery of the property to the purchaser, he may be allowed an opportunity to redeem in those proceedings. In such cases, he must redeem the whole of the debt and not merely his own share.[66] The son himself may file a suit for a declaration that the mortgage is not binding on him (vide § 296(1)).

(3) *Son alone cannot be sued during father's lifetime.*—Where a debt has been contracted by the father for his personal benefit, he is primarily liable to discharge it. Such being the case, the son alone cannot be sued during the father's lifetime.[67] Nor can a son be rendered liable where the alienation does not bind the father's interest.[68]

(4) *Father dying pending suit against him.*—See § 290(6)(iii) and § 290(2).

(4A) *Suit against the son after father's death—there being no suit against the father.*—In such a case, the creditor may file a suit and obtain a decree against the son, and attach the entire interest of the father and son in the coparcenary property, and have it sold in execution of the

65 See § 256(2). *Kadasami v Kuppa* (1920) 43 Mad 421, 55 IC 320, AIR 1920 Mad 479. *Sami v Ponnammal* (1897) 21 Mad 28.

66 *Trimbak v Narayan Damodar* (1884) 8 Bom 481; *Hem Raj v Basheshar Das* (1933) 14 Lah 22, 147 IC 693, AIR 1933 Lah 253.

67 *Periasami v Seetharama* (1904) 27 Mad 243, 247 (FB).

68 *Muniswamy v Ramamurti* AIR 1970 Mad 406 (s 53, Provincial Insolvency Act).

decree. The son being under a pious obligation to pay the father's debts, he cannot claim the benefit of survivorship. It is assumed that the debt contracted by the father was not for an unlawful or immoral purpose. Such a suit may be filed and a decree obtained against the son, even if, at the time of the suit, the grandfather is living. The decree may be executed against the share of the father and the son in the ancestral property.[69]

(5) In the case of a money claim, there cannot be a second suit against the son after the father's death, where a decree had been obtained against the father during his lifetime.[70]

The decree can only be executed against the son, whether the son is regarded as being represented by the father or as a representative of the father within the meaning of s 53 of the Code of Civil Procedure (see § 294(c)). The Madras[71] and Allahabad decisions under the Code of Civil Procedure 1882, allowing a second suit against the son on the judgment debt are of no practical importance.

Where two brothers contracted a debt in respect of a joint family business, the creditor is entitled to a decree against them after their separation in status by a partition.[72]

§ 293. LIMITATION

(1) *Against father.*—Whether the suit is brought against the father alone to recover a debt contracted by him for his own personal benefit, the period of limitation for the suit is, in the case of an unsecured debt, three years from the date when the debt becomes due and payable (Limitation Act, Sch 1, arts 57, 58, 66, 67).

(2) *Against son.*—Judicial opinion on the point is not uniform.

It has been held by the High Court of Madras that whether the suit is brought both against the father and the son, or it is brought against the son after the father's death, there is only one cause of action which arises equally against father and son at the time when the debt is due and payable, and limitation runs equally against them from that date.[73] It has accordingly been held by that court that a suit against the son after the father's death is governed by the same article of the Limitation Act as would be applicable if the suit were brought against the father himself, the reason given being that the suit against the son is as much a suit on

69 See § 290 (2); *Devi Das v Jada Ram* (1934) 15 Lah 50, 147 IC 225, AIR 1933 Lah 857; dissenting from *Binda Prasad v Raj Ballabh* (1926) 48 All 245, 91 IC 785, AIR 1926 All 220.

70 *Venkatanarayana v Somaraju* (1937) Mad 880 (FB), 171 IC 101, AIR 1937 Mad 610.

71 *Periasami v Seetharama* (1904) 27 Mad 243 (FB).

72 *Ram Rakhan v Raja Lal* (1944) Luck 605.

73 *Mallesam v Jugala* (1900) 23 Mad 292 (FB).

a contract (ie, the father's contract of debt) as a suit against the father.[74] According to this view, the period of limitation, in the case on an unsecured debt, is three years from the date when the debt becomes due and payable (Limitation Act, Sch I, arts 57, 58, 66, 67). On the other hand, it has been held by the High Court of Allahabad that the son's liability is not governed by the same article as the father's liability, but, by art 120, the reason given being that the son not being a party to the contract, could not be sued by the contract. His liability arises from the pious obligation to pay the father's debt, and the only article applicable to the case is art 120. That article applies to suit for which no period of limitation is provided specially by the Act, and the period prescribed by that article is six years from the date when 'the right to sue accrues'. Though there is a difference of opinion between the two High Courts as to the period of limitation for a suit against the sons, they both have agreed that the starting point of limitation in respect of the liability both of the father and son is the same, namely, the date on which the debt becomes due and payable.[75] A Full Bench of the Calcutta High Court has held in a case in which a suit brought against the sons after the father's death, that the case was governed by art 120 of the Limitation Act, but, the question whether 'the right to sue' accrued on the date on which the debt incurred by the father becomes due and payable, or the date when the creditor after exhausting all his remedies against the father, finds that the debt or a portion of it is still unsatisfied, or the date of the death of the father, was left open.[76]

Now see art 113 of the new Limitation Act of 1963, which corresponds to residuary art 120 of the old Limitation Act 1908. In view of the fact that the residuary art 113 of new Limitation Act 1963, provides for a period of three years, the difference of opinion between the High Courts referred to above is not now of any importance.

(3) *Where debt is secured by a charge.*—Where a debt contracted by the father is secured by simple mortgage of joint family property or by a charge on such property created by him alone, and a suit is brought to enforce the mortgage or charge, then whether the suit is against the father alone, or both against father and son, or against the son after the father's death, the article of the Limitation Act governing the father's liability is art 132, which prescribes a period of 12 years from the date when the money sued for becomes payable. However, the son, not being a party to the mortgage, is not bound by the mortgage, and the art 132 does not apply to his case.

74 *Perisami v Seetharama* (1904) 27 Mad 243(FB).

75 *Narsingh v Lalji* (1901) 23 All 206. See *Maharaj Singh v Balwant Singh* (1906) 28 All 508, 516.

76 *Brijnandan v Bidya Prasad* (1915) 42 Cal 1068, 29 IC 629, AIR 1916 Cal 279.

He is liable, however, for the mortgage-debt *qua* debt, and his liability is governed, according to the Madras decision referred to in sub-§ (2), by one of the articles which prescribes a period of three years, and, according to the Allahabad and Calcutta decisions referred to in the same sub-section, by art 120, which prescribes a period of six years. According to the Madras decision, the mortgagee's suit against the son would be barred if brought more than three years after the accrual of the cause of action; according to the Allahabad and Calcutta decisions, it would be barred if brought more than six years after that date.[77]

§ 294. SALE OF COPARCENARY PROPERTY IN EXECUTION OF DECREE AGAINST FATHER ALONE

The law on the subject-matter of this para 295 was first expounded by the Privy Council in *Muddan Thakoor v Kantoo Lall*.[78] The judgment in that case was summarised by their Lordships in *Suraj Bunsi Koer v Sheo Persad* in following terms: [79]

(a) 'that where joint ancestral property has passed out of a joint family, either (1) under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt (§ 295): or (2) under a sale in execution of a decree for the father's debt (§ 294 C) his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchaser had notice that the debts were so contracted; and

(b) 'that the purchasers at an execution sale, being strangers to the suit, if they have no notice that the debts were so contracted, are not bound to make enquiry beyond what appears on that face of the proceedings.'

The following passage from the judgment of the Privy Council in *Mst Nanomi Baduasin v Modhun Mohan* has now become classical:[80]

Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On his important question of

77 *Brijnandan v Bidya Prasad* (1915) 42 Cal 1068, 29 IC 629, AIR 1916 Cal 279; *Chandradeo Singh v Mata Prasad* (1909) 31 All 176, 179, lines 4–10, 1 IC 479, FB. Now see art 62 of the new Limitation Act 1963.

78 (1874) 14 Beng LR 187, 1 IA 321.

79 6 IA 88, 106, 5 Cal 148, 171.

80 (1886) 13 Cal 21, 35, 13 IA 1, 17–18.

the liability of the joint estate there Lordship think that their is now no conflict of authority.

When the father became a Christian and was afterwards reconverted to Hinduism, a sale in execution of a money decree against him does not pass the minor son's share in the family property, as the joint family was broken up when the father became a convert and there can be no reunion with the minor son.[81]

§ 294A. SON'S REMEDIES BEFORE SALE

(1) A debt contracted by the father for his own personal benefit may be secured by a mortgage of a joint family property or it may be unsecured. In either case, the creditor may obtain a money decree against the father alone, and may attach and bring to sale the entire joint family property including the son's interest therein in execution of the decree. The sons, being under a pious obligation to pay the father's debt, cannot object to the attachment of their interest in the property on the ground that the debt was not for the benefit of the family. Nor can they object on the ground that they were not parties to the suit in which the decree was passed. Prima facie, a decree obtained against *A* cannot be executed by attachment and sale of *B*'s property. However, the position of sons in a joint Hindu family is, by reason of their pious duty to pay their father's debt, very different from that of an ordinary third party. The sons being under a pious obligation to pay the father's debt, the entire joint family property is liable to be attached and sold in execution of the decree against the father, unless they show that the debt for which the decree was passed was incurred by the father for an immoral or illegal purpose, or successfully challenge the existence of the debt on which the decree is based.[82]

There are two courses open to the sons. They may come in under O 21 r 58 of the Code of Civil Procedure 1908, and object to the attachment and sale on either of the grounds mentioned above, the party against whom the order is made will then, under O 21 r 63, be entitled to bring a suit in which the whole question as to whether there was a debt or not, or whether it was immoral or not, will be determined. If no such suit is filed within one year from the date of the order, the order will

81 *Vella Venkatasubbayya v Yella Venkataramayya* (1944) Mad 33.

82 *Lakshmadu v Ramuda & Ors* (1940) Mad 123, 187 IC 816, AIR 1939 Mad 867; *Maha Deo v Rambir Singh* (1945) Lah 67, FB; *Bhagat Ram v Ajudhia Parkash* AIR 1960 Punj 261. See *Surendra Nath v Saralia, Hindi Mahajani School* AIR 1950 EP 282 where it was held that where a creditor obtained a decree for debt against the father, the sons cannot question the existence of the debt except by showing that the decree was obtained by fraud or collusion. At any rate, the burden of proving non-existence of debt would be upon the sons. Also see § 292 *supra* and *Sidheswar v Bhubneshwar Prasad* [1954] SCR 177; *Udmiram v Balramdas* AIR 1956 Nag 76.

be conclusive.[83] The sons however, are not bound to proceed under O 21, r 58. They may bring a suit against the decree-holder for a declaration that they are not bound by the decree and for an injunction restraining the decree-holder from selling the entire property, but, their share will not be released from attachment, unless they show that the debt for which the decree was obtained was tainted with immorality,[84] and in such a suit, *ad volorem* court fees must be paid.[85] It has been held in Bombay that the decree-holder himself may apply under O 21, r 66(2)(e) of the Civil Procedure Code, to include the sons' interest in the proclamation of sale, and that the court may on such application deal with the sons' objection after giving notice to them.[86]

(2) In the case of a mortgage by the father of joint family property, the creditor may obtain a mortgage decree against the father alone. Where the property is put up for sale in execution of a mortgage decree, no attachment takes place as in the case of a money decree. The sale is held in such cases under the final decree for sale passed in the mortgage suit. However, the sale is always notified by proclamation under O 21, r 66, and the sons may at the time of sale, give public notice to all intending purchasers that there was in reality no debt owing from the father or that the debt for which the decree was passed, was contracted by the father for an immoral or illegal purpose. Where such notice is given and the property is purchased after such notice, though it may be by a stranger to the suit, the sale will be set aside, if the sons show, in a suit subsequently brought by them, that the debt was contracted for an immoral purpose; for the purchaser, though he may be a stranger to the suit, will then be taken to have had notice actual or constructive, of the son's objection to the result of the son's suit.[87] However, the sons are not bound to wait until the property is sold. They may bring a suit against the mortgage for declaration that they are not bound by the decree and for an injunction restraining the mortgage from selling the entire property.

83 *Indar Pal v The Imperial Bank* (1915) 37 All 214, 28 IC 593, AIR 1915 All 126, *Mohan Lal v Bala Prasad* (1922) 44 All 649, 69 IC 754, AIR 1922 All 310; *Hammant Kashinath v Ganesh Annaji* (1919) 43 Bom 612, 51 IC 612, AIR 1918 Bom 13; *Madhusudan v Ishwar Dayi* (1921) 48 Cal 341, 61 IC 25, AIR 1921 Cal 152; *Ram Rattan v Basant Rai* (1921) 2 Lah 263, 64 IC 121, AIR 1921 Lah 205. (See Limitation Act 1918, Sch I, art 11).

84 *Karam Singh v Bhup Singh* (1905) 27 All 16, FB; *Abdul Karim v Ram Kishore* (1925) 47 All 421, 86 IC 837, AIR 1925 All 327, *Sardari Lal v Bharat National Bank* (1931) 12 Lah 495, 130 IC 836, AIR 1931 Lah 716; *Pirthi Singh v Man Chand* (1435) 16 Lah 1077, 156 IC 539, AIR 1935 Lah 761.

85 *Vinayakarao v Manuwarbai* (1943) Nag 440, 202 IC 643, AIR 1943 Nag 70.

86 *Ramchandra v Bhagwant* (1929) 53 Bom 777, 121 IC 435, AIR 1929 Bom 465.

87 see § 294B(1), para 2. *Suraj Bansi Koer v Sheo Persad* (1878) 5 Cal 148, 173, 6 IA 88, 106 (debt held to be immoral), *Bhagbut Pershad v Girja Koer* (1888) 15 Cal 717, 724, 15 IA 99, 104 (debt held not to be immoral).

Where such a suit is brought, the question arises whether the son's suit must fail, unless they can establish that the debt for which the decree was passed was for an immoral purpose, as they have to do in a suit to set aside a money decree (see sub-§ (1)), or whether they are entitled to succeed if the mortgage was neither for legal necessity nor for the payment of an antecedent debt, without showing that the debt was contracted for an immoral purpose. It has been held in several cases that as in the case of a simple money decree, so in the case of mortgage decree, the sons are not entitled to go behind the decree, except for the purpose of showing that the debt was tainted with immorality.[88] The cases referred to above were prior in date to the Privy Council case of *Brij Narain v Mangala Prasad*,[89] decided in 1923. In that case, the Judicial Committee laid down five proposition (see note under § 295) of which the following three are material:

(1) the managing member of a joint undivided estate cannot alienate or burden the estate qua manager, except for purposes of necessity (see § 242);

(2) if he is the father and the other members are the sons, he may, by incurring debt, so long as it is not for a immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt (see § 294);

(3) if he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate (see § 295).

The Supreme Court has in a number of cases expressed agreement with the decision of the Privy Council in *Brij Narain*'s case and adopted the propositions laid down in the case.[90]

In *Faqir Chand v Hernam Kaur*, the Supreme Court had occasion to consider certain Full Bench decisions of High Courts on the meaning and effect of the second proposition in the Privy Council case about the effect of which there was difference of opinion. It was pointed out by the Supreme Court that:

(i) the son is under a pious obligation to pay all debts of the father, whether secured or unsecured. The second proposition applies not only to an unsecured debt but, also to a mortgage debt, which the father is personally liable to pay;

88 *Beni Madho v Basdeo Patak* (1890) 12 All 99; *Bhawani Baksh v Ram Dat* (1891) 13 All 516; *Pem Singh v Partab Singh* (1892) 14 All 179 (FB); See also *Chandradeo v Mata Prasad* (1909) 31 All 176, 1 IC 479; *Raja Raghunandan v Kumar* (1931) 10 Pat 124, 126 IC 377, AIR 1930 Pat 521.

89 (1924) 51 IA 129, 46 All 95, 77 IC 689, AIR 1924 PC 50.

90 *Faqir Chand v Haranam Kaur* AIR 1967 SC 717; Reference may be made to *Satha Pillai v Narayana Pillai* AIR 1974 Ker 173; *Bhagwan Dass v Bishan Chand* AIR 1974 P&H 7.

(ii) the second proposition applies in the case of a money decree for payment of debt before the sale is held and similarly, it also applies in the case of a mortgage decree and the son is not entitled to interfere with the execution of the decree or with the sale of the property in execution proceedings (unless he can show that the debt was non-existent or tainted with immorality or illegality).

Another question which came up for decision by the Supreme Court in *Faqir Chand*'s case was whether the son is entitled to impeach the mortgage of a joint family property made neither for legal necessity nor for payment of an antecedent debt, and if so, whether the remedy is available to him after the mortgagee has obtained a decree against the father on the mortgage. The question was answered in the affirmative overruling the contrary view taken by the High Court of Punjab.[91]

The Supreme Court held that in spite of passing of the preliminary or final decree for sale against the father, the mortgage will not, as before, bind the son's interest in the property, and the son will be entitled to ask for a declaration that his interest has not been alienated either by the mortgage or by the decree. It was observed that:

> ...the first proposition in *Brij Narain*'s case sets out the general rule regarding the powers of the managing member of a joint family to alienate or burden the estate. The second and third propositions lay down the special rule applicable when the managing member is the father, and deal specially with his powers to mortgage the estate for payment of his antecedent debt. Reading the first and the third proposition together, it will appear that a father, who is also the manager of the family has no power to mortgage the estate except for legal necessity or for payment of an antecedent debt.

In Oudh and Punjab,[92] it was held that the word 'debt' in the second proposition referred not only to a simple money debt, but also to a mortgage debt, and that the son's suit must fail unless they establish that the debt was for an immoral purpose. However, a Full Bench of the Allahabad High Court held that the word 'debt' in the second proposition contemplated a simple money debt, and not a mortgage debt; further, that having regard to the first and third propositions, a mortgage by the father could only be upheld if it was made either for a legal necessity

91 *Faqir Chand v Harnam Kaur* AIR 1961 Punj 325 (FB).

92 *Gauri Shankar v Jang Bahadur* (1924) 27 Oudh Cases 124, 79 IC 1008, AIR 1924 Ori 394; *Nand Lal v Umarai* (1926) 1 Luck 360, 93 IC 655, AIR 1926 Ori 321; *Faqir Chand v Harnam Kaur* AIR 1961 Punj 138, FB, (1960) 2 Punj 325 (FB); *Joginder Singh v The Punjab & Sindh Bank Ltd, Amritsar* (1940) 21 Lah 96, 186 IC 357, AIR 1939 Lah 585; *Nathu Lal v Phoolchand* AIR 1955 UP 6.

or for an antecedent debt, and in no other case, and that if the mortgagee failed to prove that the debt was contracted for either of those two purposes, the sons were entitled to have the mortgage decree set aside without showing that the debt was for immoral purposes.[93] It is important to note that the ruling in the above mentioned Full Bench case applied only where: (1) the suit was to set aside a mortgage decree; and (2) the suit was brought before sale. Reference may also be made to a Full Bench decision of the Madras High Court.[94] In a case, the Bombay High Court agreed with the Full Bench decision of the Allahabad High Court and differed from the Punjab High Court,[95] and the same view was taken by the Nagpur High Court in a still later decision.[96]

The above decision were prior to the Supreme Court's decision in *Faqir Chand*'s case and must be taken to have been overruled to the extent that they go contrary to what has been finally laid down in *Faqir Chand*'s case.

§ 294B. SON'S RIGHT AFTER SALE

(1) *Money decree against father.*—Where the father has contracted a debt for his own personal benefit, the creditor may obtain a money decree against the father alone, and may enforce the decree by attachment and sale of the entire coparcenary property, including the son's interest therein. The sons, though not parties to the suit, are bound by the sale by reason of their pious duty to pay their father's debt, and they cannot recover their share of the property unless they prove (and the burden lies upon them to prove) that the debt was contracted by the father for an immoral or illegal purpose. This rests on the theory that as the father can effect a sale without suit of the entire joint family property, including his son's interest therein, in favour of the creditor for the payment of antecedent debt (§ 295), so the creditor may legally procure a sale of it by suit.[97] The fundamental principle is that where joint family property is sold in execution of a decree,[98] though obtained against the father alone, and for a debt contracted by him for his own personal benefit, the sons cannot

93 *Jagdish Prasad v Hoshyar Singh* (1929) 51 All 136, 115 IC 775, AIR 1928 All 596, FB.

94 *Abtul Hameed v Provident Investment Co Ltd* AIR 1954 Mad 961, (1954) Mad 939, (1954) 2 MLJ 416; *Jagadesan v Saraswathi Ammal* AIR 1962 Mad 174, FB. Also see *Kalappa v Venkatesh* AIR 1962 Mys 260.

95 *Bharamappa Murdeppa v Hanmantappa Tippanna* (1943) Bom 568, AIR 1943 Bom 451.

96 *Ganpat v Rameshwar* (1946) Nag 741.

97 *Mst Nanomi Badiiasin v Modun Modhun* (1886) 13 Cal 21, 36, 13 IA 1; *Ramasamayyan v Virasami* (1898) 21 Mad 222, 224; *Kanhali v Keshava* (1888) 11 Mad 64, 76.

98 *Sawaminatha v Krishnaswami* (1947) Mad 471 (decree on a promissory note).

claim to recover their share of the property unless they show that the debt was contracted by the father to the knowledge of the lender[99] for an immoral or illegal purpose[1] and that the purchaser had notice that it was so contracted.[2]

A distinction has, however been made by the Judicial Committee between the case where the purchaser at the execution sale is a stranger to the suit and the case where he is the decree-holder himself. The two leading cases on the subject are *Muddun Thakoor v Kantoo Lal*[3] and *Suraj Bunsi Koer v Sheo Persad*[4] . It has been held by the Judicial Committee in those cases that where the purchaser is a stranger to the suit, the sons are not entitled to recover their share unless they prove: (1) that the debt was contracted for an immoral or illegal purpose; and also (2) that the purchaser had notice that it was so contracted. It is not necessary for the purchaser to show that he made inquiry before the sale as to the nature of the debt.

The purchaser in execution is not bound to go behind the decree,[5] or further back than to see that there was a decree against the father, and that the property sold was property liable to satisfy the decree, if the decree had been properly passed against the father. If he makes an inquiry to that extent and then purchases the property bona fide and for value, the sale is not liable to be set aside at the suit of the sons, and the purchaser is entitled to the entire property including the son's interest therein. 'Purchasers at an execution sale, being strangers to the suit, if they have no notice that the debts contracted for an immoral purpose were so, are not bound to make enquiry beyond what appears on the face of the proceedings.'

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99 *Sat Narain v Behari Lal* (1925) 52 IA 22, 6 Lah 1, 84 IC 883, AIR 1925 PC 18; *Minakshi Nayudu v Immudi* (1889) 12 Mad 142, 16 IA 1 (original creditor advanced the loan bona fide).

1 *Muddun Thakoor v Kantoo Lall* (1874) 14 Beng LR 187, 200, 1 IA 321, 334; *Suraj Bunsi Koer v Sheo Prasad* (1880) 5 Cal 148, 171, 6 IA 88, 106; *Muttayan Chettiar v Sangili* (1882) 6 Mad 1, 9 IA 128; *Bhagbut Pershad v Girja Koer* (1888) 15 Cal 717, 724, 15 IA 99, 105; *Minakshi v Immudi* (1889) 12 Mad 142, 16 IA 1; *Sripat Singh v Tagore* (1917) 44 Cal 524, 44 IA 1, 39 IC 252, AIR 1916 PC 220; *Brij Narain v Mangla Prasad* (1924) 51 IA 129, 46 All 95, 77 I C 689, AIR 1924 PC 50; *Karan Singh v Bhup Singh* (1905) 27 All 16, FB, See also cases cited in sub-ss (2), (3), (4) and (5); *Bhubaneshwar Prasad Narayan Singh v Bihari Lal* (1935) 14 Pat 436, 156 IC 350, AIR 1935 Pat 205; *Lakshmandas v Karunakaran* AIR 1957 Ker 126.

2 *Suraj Bunsi Koer v Sheo Persad* (1880) 5 Cal 148, 171, 6 IA 88, 106; *Bhagbut Pershad v Girja Koer* (1888) 15 Cal 717, 724, 15 IA 99, 105; *Jahan Singh v Hardat Singh* (1935) 57 All 375, 152 IC 487, AIR 1935 All 247; *Krishnaji v Vithal* (1888) 12 Bom 625.

3 (1874) 14 Beng LR 187, 1 IA 321.

4 (1880) 5 Cal 148, 171, 6 I A 88, 106; See also *Muttayan Chettiar v Sangili* (1882) 6 Mad 1, 9 IA 128, where it was held that the law in Madras state is not different.

5 In *Mahabir Prasad v Basdeo Singh* (1884) 6 All 234, 238, it was held that the decree must be read with the plaint, so that the purchaser will be deemed to have notice of the allegation in the plaint.

The above-mentioned decisions of the Judicial Committee have been followed in a number of cases.[6] The principle on which those decisions rest is that one has bona fide purchased joint family property under an execution, and bona fide paid a valuable consideration, is protected against the suit of the sons seeking to set aside the sale and to recover their share of the property.

However, it is different if the decree-holder is himself the purchaser. In that case, all that is necessary for the sons to prove, to entitle them to recover their share, is that the debt for which the decree was passed was contracted for an immoral purpose. It is not necessary for them to prove the further fact that the purchaser had noticed that the debt was so contracted. The reason is that where the purchaser is the decree-holder in the suit, he does not stand in the same position as a stranger to the suit, and he cannot therefore protect himself under the plea of being a purchaser without notice.[7] It is also well-established that even if the purchaser is a stranger to the suit, the sale will be set aside to the extent of the son's interest in the property, if before the sale took place, objection was taken by the sons that the debt for which the decree was obtained was contracted for an immoral purpose, and it is eventually proved that the debt was so contracted. The reason is that in such a case, the purchase will be taken to have had notice, actual or constructive, of the sons' objection, and, therefore, to have purchased with notice of the sons' claim and subject to the result of any suit that may be brought by the sons to recover their share of the property.[8]

The same principles apply where the sale is sought to be set aside on the ground that there was in reality no debt owing by the father and that the decree was obtained by collusion between the creditor and the father. In such a case, if the purchaser be the decree-holder himself, the sons must show, to entitle them to succeed, that there was no debt in

6 *Bhawani Bakhsh v Ram Dai* (1891) 13 All 216, 223; *Trimbak v Narayan* (1884) 8 Bom 481; *Maharaj Singh v Balwant Singh* (1906) 28 All 508, 518–19; *Krishnaji v Vithal* (1888) 12 Bom 625; *Jahan Singh v Hardat Singh* (1935) 57 All 357, 152 IC 487, AIR 1935 All 247; *Suryanarayana v Ganesulu* (1953) 2 MLJ 439, AIR 1954 Mad 203; *Girija Shankar v Nayan Chandra* AIR 1952 Assam 5.

7 *Luchman Dass v Giridhur* (1880) 5 Cal 855; *Ramphul Singh v Deg Narain* (1882) 8 Cal 517, 522; *Beni Parshad v Puran Chand* (1896) 23 Cal 262; *Natasayya v Ponnusami* (1893) 16 Mad 99, 103; *Ramasamaayyam v Virasami* (1898) 21 Mad 222; *Sripar Singh v Tagore* (1917) 44 IA 1, 44 Cal 524, 39 IC 352, AIR 1916 PC 220; *Trimbak Balakrishna v Narayan Damodar* (1884) 8 Bom 481 (the purchaser was the decree-holder's son); *Joharmal v Eknath* (1900) 24 Bom 343; *Ram Chandar v Muhammad* (1923) 45 Cal 545, 73 I C 656, AIR 1923 All 591.

8 *Suraj Bunsi Koer v Sheo Persad* (1878) 5 Cal 148, 6 IA 88, 106 (debt held to be immoral); *Bhagbut Persand v Girja Koer* (1888) 15 Cal 717, 724, 15 IA 99, 105 (debt held not to be immoral); *Mahabir Prasad v Basdeo* (1884) 6 All 234 (debt held to be immoral); See also *Maharaj Singh v Balwant Singh* (1906) 28 All 508, 518–19 (debt held to be immoral).

fact, and that is all that is necessary for them to prove.[9] However, if the purchaser be a stranger to the suit, the sons must show not only that there was no debt due by the father, but also that the purchaser had notice that there was such debt.[10]

The position, then, is that where joint family property is sold in execution of a decree against the father, and if the purchaser is the decree-holder himself, the sons are entitled to recover their interest merely by proof of immorality or non-existence[11] of debt. However, if the purchaser is a stranger to the suit, they cannot recover their share, unless they prove that the debt was contracted for an immoral or illegal purpose, and also that the purchaser had notice that it was so contracted.[12]

The distinction between the case where the purchaser is a stranger and where he is the decree-holder himself was, as stated above, laid down by the Judicial Committee in *Muddun Thakoor*'s case and *Suraj Bansi Koer*'s case. In some later cases, however, even where the purchaser was a stranger to the suit, the Judicial Committee appears to have laid down in general terms and without any reference to the necessity of notice, that the sons could successfully impeach a sale merely by proof of the immorality of the debt.[13] However, in all these cases, the fact of immorality had been disproved, so that the question could not have arisen. Thus, in *Mst Nanomi Baduasin v Madhun Mohun*,[14] which was one of such case, the Judicial Committee observed:

> All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale.

9 *Beni Parshad v Puran Ghand* (1896) 23 Cal 262; *Ramasamayyan v Virasami* (1898) 21 Mad 222; *Firm Pirthirajganeshdas v Kishunlal* (1946) 25 Pat 103.

10 *Beni Parshad v Puran Chand* (1896) 23 Cal 262, 274–75; *Mahabir v Basdeo Singh* (1884) 6 All 234, 238.

11 *Lakshmadu v Ramudu and ors* (1940) Mad 123, AIR 1939 Mad 867, 187 IC 816; *Maha Deo v Rambir Singh* (1945) Lah 67, FB.

12 Reference may be made to *Abdul Hameed v Provident Investment Co Ltd* AIR 1954 Mad 961, FB; and *Ajit Singh v Hem Raj* AIR 1956 Punj 139, where the question of limitation is considered. Also see *Jagadesan v Saravathi Ammal* AIR 1962 Mad 174, FB.

13 *Mst Nanomi Baduasin v Modhun Mohun* (1886) 13 Cal 21, 13 IA 1; *Bhagbut Pershad v Girija Koer* (188) 15 Cal 717, 724, 15 IA 99; *Minakshi v Immual* (1889) 12 Mad 142, 16 IA 1; *Mahabir Pershad v Mohesur Nath* (1890) 17 Cal 584, 17 IA 11.

14 (1886) 13 Cal 21, 36, 13 IA 118.

The debt in that case was held not to be immoral and the question of notice did not arise in *Sripat Singh v Tagore*,[15] their Lordships said:

> The property in question was joint property, governed by the Mitakshara law. By that law, judgment against the father of the family cannot be executed against the whole of the joint family property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event, it is open to execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone.

In this case also, it was found that the debt was not incurred for an immoral purpose; moreover, the decree-holder himself was the purchaser. In *Brij Narain v Mangla Prasad*,[16] their Lordships, after reviewing the earlier cases on the subject, laid down five propositions of which the second was as follows:

> If he is the father and other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

However, that was a case of mortgage executed by the father for the payment of an antecedent debt and the question of notice was not referred to either in argument or in the judgment. In India too, there have been cases in which it has been laid down that where the purchaser is a stranger to the suit, the sons can in a suit of their own, successfully impeach the sale to resist the purchaser's suit for possession merely by proof of the immorality of the debt. However, in these cases also, the fact of immorality had been disproved, and the question of notice did not therefore arise.[17]

Illustrations

(a) *A* and his son *B* are members of a joint family holding coparcenary property. *A* is indebted to *C* in the sum of Rs 5,000. *C* obtains a personal decree against *A* alone, and in execution of the decree, attaches the whole coparcenary property belonging to the joint family. *B* objects to the attachment of his interest in the

15 (1917) 44 Cal 524, 532, 44 IA 1, 4, 39 I C 252, AIR 1916 PC 220.

16 (1924) 51 IA 129, 139, 46 All 95, 104, 77 IC 689, AIR 1924 PC 50.

17 *Mata Din v Gaya Din* (1909) 31 All 599, 3 IC 24 (purchaser's suit for possession); *Dalip Narain v Parmaoti* (1920) 42 All 58, 67 IC 93, AIR 1920 All 310; *Gajadhar v Jadubir* (1925) 47 All 122, 85 IC 31, AIR 1925 All 180; *Narayanacharya v Narso Krishna* (1876) 1 Bom 262.

property on the ground that the money borrowed by his father *A* from *C* were borrowed for an immoral purpose. It is proved that the amount was borrowed for an immoral purpose. The court will set aside the attachment to the extent of the son's interest. Suppose now that *B* does not object to the attachment, and that the whole property including *B*'s interest is sold in execution of the decree, and it is purchased by *C*, the decree-holder, and *B* sues *C* to set aside the sale on the ground that the debt contracted by his father was for an immoral purpose. If the son succeeds in showing that the debt was so contracted, the sale will be set aside to the extent of the son's interest in the property. If the son fails to show that the debt was immoral, the sale will be upheld in its entirety. However, if the property is purchased by a stranger to the suit, the son cannot recover his share, unless he proves not only that the debt was contracted for an immoral purpose, but that the purchaser had notice that it was so contracted.

(b) *A* and his son *B* are members of a joint family holding coparcenary property. *C* obtains personal decree against *A* for Rs 5,000 borrowed by *A* from *C* for his personal benefit, but, not for an immoral purpose. *A* dies without paying the amount of the decree. *C* may, after *A*'s death, attach not only *A*'s share but also *B*'s share in the joint property, in other words, attach the entire joint family property, and have the same sold in execution of the decree. The debt not having been contracted for an immoral purpose, the son's right to take by survivorship gives way to the supreme obligation to pay the father's debt. However, if the debt was contracted for an immoral purpose, *C* could not, after *A*'s death, attach the interest either of *A* or *B*. The reason is that, as regard *A*'s interest, it will pass by survivorship to *B* [§ 289 (2)] and as regards *B*'s interest, it cannot be held liable, the debt being of an immoral character.

(2) *Mortgage decree against father.*—The above rules apply not only to a sale in execution of money decree against the father, but to a sale in execution of mortgage decree against him. This happens when the mortgage executed by the father is neither for legal necessity nor for the payment of an antecedent debt. If the mortgage is created either for legal necessity, or, for an antecedent debt not tainted with immorality, the mortgage itself binds the son's interest in the property. If the mortgage is neither for legal necessity nor for an antecedent debt, the mortgage as such is not operative on the son's interest, however, the sons are nevertheless under a pious obligation to pay the mortgage debt qua debt.

In such a case, if a decree is passed against the father on the mortgage for the sale of the whole of the mortgaged property, and the property is sold in execution of the mortgage decree, the sons, though not parties to the mortgage suit, are bound by the sale, unless they show that there was no debt owing by the father,[18] or that the debt in respect of which the mortgage was executed was incurred by the father to the knowledge of the lender[19] for an immoral or illegal purpose,[20] and that the purchaser not being the decree-holder, had notice that the debt was so incurred (vide cases cited under 294B(1), see § 296(1), cl ii). As to the son's remedies before sale, see § 294A. As to limitation, reference may be made to *Abdul Hameed v Provident Investment Co Ltd*, a Full Bench of the Madras High Court.[21]

Illustration

A joint family holding coparcenary property consists of a father and sons. The father mortgages certain immovable property forming part of the joint family properties to secure a loan raised by him. The loan is not raised either for legal necessity or for payment of an antecedent debt. The mortgagee sues the father alone and obtains a decree for sale of the mortgaged property. The property is sold in execution, and it is purchased by the mortgagee himself. The sons, being under a pious obligation to pay their father's debt, are bound by the sale unless they show that the debt was tainted with immorality. There is no distinction in such cases between a debt secured by a mortgage and an unsecured debt.[22] Had the mortgage been for family necessities or for the discharge of an antecedent debt, the mortgage itself would have bound the son's interest in the mortgaged property and the sale in execution would have passed the son's interest not by virtue of the decree, but by virtue of the mortgage.

18 *Ramasamayyan v Virasami* (1898) 21 Mad 222.

19 *Sat Narain v Behari Lal* (1925) 52 IA 22, 6 Lah 1, 84 IC 883, AIR 1925 PC 18.

20 *Suraj Bunsi Koer v Sheo Persad* (1878) 5 Cal 148, 6 IA 88; *Mst Nanomi Babuasin v Modhun Mohan* (1888) 13 Cal 721, 13 IA 1; *Bhagbut Pershad v Girja Koer* (1886) 15 Cal 717, 821, 724, 15 IA 99, 104, 105; *Lala Suraj Prosad v Golab* (1901) 28 Cal 517; *Jamna v Nain Sukh* (1887) 9 All 493, 494; *Beni Madho v Basdeo Patak* (1890) 12 All 99; *Bhawani Baksh v Ram Dai* (1891) 13 All 216; *Pem Singh v Partab Singh* (1892) 14 All 179 (FB); *Gajadhar v Jadubir* (1985) 41 All 122, 85 IC 31, AIR 1925 All 180; *Kunhali v Keshava* (1888) 11 Mad 64, 76; *Tribeni v Ramasray* (1931) 10 Pat 670, 136 IC 49, AIR 1932 Pat 80 (FB); *Jahan Singh v Hardat Singh* (1935) 57 All 357, 152 IC 487, AIR 1935 All 247; *Abdul Hameed v Provident Investment Co Ltd* (1954) Mad 939, AIR 1954 Mad 961; *Jagadesan v Saraswathi Ammal* AIR 1962 Mad 174 (FB).

21 *Abdul Hameed v Provident Investment Co Ltd*, (1954) Mad 939, AIR 1954 Mad 961.

22 *Gajadhar v Jadubir* (1925) 47 All 122, 85 IC 31, AIR 1925 All 180.

(3) *Execution purchaser's suit for possession.*—The rules laid down above apply also to a suit by a purchaser at an execution sale against the sons for possession of the property purchased by him.[23]

(4) *Burden of proving immorality of debt.*—Where in respect of their share, the sons claim to set aside a sale in execution of a decree against the father, the burden lies upon them to prove that the debt was contracted for immoral or illegal purpose.[24] It is not necessary for the purchaser to show that there was proper inquiry as to the purpose of the loan, or to prove that the money was borrowed in a case of necessity.[25]

The burden which lies upon the sons to prove the immorality of the debt is not discharged by showing that the father lived an extravagant and immoral life; there must be a distinct connection between the debt and the immorality set up by the sons.[26]

(5) *Construction of execution proceedings.*—It is stated above that where the father has contracted a debt for his own personal benefit, the creditor may obtain a decree against the father alone, and may enforce the decree by attachment and sale of the entire joint family property including the son's interest therein. However, though the creditor can in execution of his decree, sell the entire joint family property, he is not obliged to do so. He may put up only the father's interest for sale. If what is brought and sold is the father's interest alone, the purchaser is not, except in some cases in Bombay, entitled to the possession of any part of the property, and his only remedy is to bring a general suit for partition and for possession of the share which would be allotted to the father on such partition (§ 261 (1)). However, if what is brought and sold is the entire property, the purchaser is entitled to possession of the whole. It is therefore, important in each case, to inquire whether the sale passed the whole property including the son's interest therein, or only the father's interest in the property. The determination of this question depends mainly on the terms of the execution and sale proceedings, such as the application for execution, warrant of attachment, warrant of sale and sale certificate. The court will, in each case, look at the substance

23 *Trimbak v Narayan Damodar* (1884) 8 Bom 481; *Mada Din v Gaya Din* (1909) 31 All 599, 3 IC 24.

24 *Bhagbut Pershad v Girja Koer* (1888) 15 Cal 717, 724, 15 IA 99, 104; *Maddun Thakoor v Kantoo Lall* (1874) 14 Beng LR 187, 1 IA 3211; *Suraj Bansi Koer v Sheo Persad* (1878) 5 Cal 148, 6 IA 88; *Mst Nanomi Baduasin v Modhun Mohan* (1886) 13 Cal 21, 13 IA 1; *Bhawani Baksh v Ram Rai* (1891) 13 All 216; *Prem Singh v Pantab Singh* (1892) 14 All 179 (FB), *Brij Narain v Mangal Prasad* (1924) 46 All 95, 51 IA 129, 76 IC 689, AIR 1924 PC 50.

25 *Bhagbut Pershad v Girja Koer* (1888) 15 Cal 717, 724, 15 IA 99, 104.

26 *Bhagbut Pershad v Girja Koer* supra; *Ram Ratan v Basant Rai* (1921) 2 Lah 263, 64 IC 121, AIR 1921 Lah 205; *Jahan Singh v Hardat Singh* (1935) 57 All 357, 152 IC 487, AIR 1935 All 247; *Sydulu v Venkateshwarlu* AIR 1965 AP 318.

of the proceedings to see what the purchaser intended to buy and what he believed he was buying.[27] 'In cases of this kind it is of the utmost importance that the substance, and not the mere technicalities, of the transaction should be regarded'.[28] The price paid by the purchaser is also an element to be taken into consideration.[29]

The following are some of the principles culled from decided cases:

(i) 'if the expressions by which the estate is conveyed to the purchaser (in execution) are susceptible of application either to the entirety or to the father's coparcenary interest alone, the absence of the sons from the proceedings may be one material consideration. However, if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings';[30]

(ii) the words 'right, title and interest' are ambiguous. They refer to the father's interest only in the property or to the entire property. If it appears from the terms of the execution proceedings and from the intention of the parties that what was put up for sale and what was brought was the entire property, but, the property is described in the certificate of sale as 'the right, title and interest of the judgment-debtor,' the sale will nevertheless pass the entire property. The presence of the words 'right, title and

27 *Deendayal v Jugdeep Narain* (1877) 3 Cal 198, 4 IA 247; *Baboo Hurdey Narain v Ruder Perkash* (1883) 10 Cal 626, 11 IA 26; *Mst Nanomi Babusain v Modhun Mohun* (1886) 13 Cal 21, 13 IA 1; *Daulat Ram v Mehr Chand* (1888) 15 Cal 70, 14 IA 187; *Mahabir Pershad v Moheshwar Nath* (1890) 17 Cal 584, 17 IA 11; *Pettachi Chettiar v Sangili Vira Pandia* (1887) 10 Mad 214, 248, 14 IA 84, 85; *Simbhunath v Golap Singh* (1887) 14 Cal 572, 14 IA 77, *Bhagbut Pershad v Girja Koer* (1888) 15 Cal 717, 15 IA 99; *Minakshi v Immudi* (1889) 12 Mad 142, 16 IA 1; *Abdul Aziz v Appayasami* (1903) 27 Mad 131, 31 IA 1; *Sripat Singh v Tagore* (1917) 44 IA 1, 44 Cal 524, 39 IC 252, AIR 1916 PC 220; *Trimbak v Narayan Damodar* (1884) 8 Bom 481; *Sakharam Shet v Sitaram* (1887) 11 Bom 42; *Krishnaji v Vital* (1888) 12 Bom 625; *Maruti v Babaji* (1891) 15 Bom 87; *Cooverji v Dewsey* (1893) 17 Bom 718; *Timmappa v Narsinha* (1913) 37 Bom 631, 21 IC 123; *Hanmandas v Valabhdas* (1919) 43 Bom 17, 46 IC 133, AIR 1918 Bom 101; *Dayanand v Daji Narayan* (1926) 50 Bom 793, 97 IC 754, AIR 1926 Bom 548; *Kunhali v Keshava* (1888) 11 Mad 64; *Ramphul Singh v Deg Narain* (1882) 8 Cal 517, 527; *Beni Parshad v Puran Chand* (1896) 23 Cal 262; *Pem Singh v Partab* (1892) 14 All 179, FB; *Sudhakar v Gobardhan* AIR 1952 Ori 212; *Anantha Pai v Kesava Pai* AIR 1955 T-C 249.

28 *Sripat Singh v Tagore* (1916) 44 IA 1, 44 Cal 524, 39 IC 252, AIR 1916 PC 220; *Mahabir Pershad v Moheswar Nath* (1890) 17 Cal 584, 17 IA 11; *Cooverji v Dewsey* (1893) 17 Bom 718; *Dayanand v Daji Narayan* (1926) 50 Bom 793, 97 IC 754, AIR 1926 Bom 548.

29 *Simbunath v Golap Singh* (1887) 14 Cal 572, 14 IA 77; *Beni Parshad v Puran Chand* (1896) 23 Cal 262, 278; *Dayanand v Daji Narayan* (1926) 50 Bom 793, 799, 97 IC 754, AIR 1926 Bom 548.

30 *Mst Nanomi Babuasain v Modhun Mohun* (1886) 13 Cal 21, 36, 13 IA 1, 8. In *Deendyal v Jagdeep Narain* (1877) 3 Cal 198, 4 IA 247 also there was an ambiguity.

interest' in a sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold, and does not necessarily import that when the father of a joint family is the judgment-debtor, nothing is sold, but his interest as a coparcener.[31] However, if it is clear from the terms of the execution proceedings that what was put up for sale was the 'right and share' of the judgment-debtor alone in the property, the sale will pass only to the father's interest. The purchaser cannot claim the entire property merely because the decree-holder could have brought the whole property to sale, had he been so minded;[32]

(iii) the mere fact that no reference is made in the proclamation of sale to the son's interest, does not of itself afford a ground for holding that the son's interest did not pass at the sale;[33]

(iv) if the creditor sues the father alone, and a consent decree is obtained against the father, whereby the father agrees to pay a specified sum within a specified period and by way of security mortgages, his 'right, title and interest' in certain joint family property, and agrees that in the event of non-payment, the mortgaged property shall be sold by auction, and the property is afterwards sold, and a certificate of sale is issued to the purchaser stating that 'whatever right, title and interest the judgment-debtor had in the said property, being extinguished from the date of the sale, is transferred to the purchaser,' the purchaser is entitled to no more than the father's interest in the property. 'When a man conveys his right and interest, and nothing more, he does not prima facie intend to convey away also rights and interest presently vested in others, even though the law may give him the power to do so'. In such a case, if it is alleged by the purchaser that the sons assented to the decree and the mortgage, he should join them as parties to the execution proceedings;[34]

(v) where a mortgage is executed by the father of a joint family property, the court must take it that the entire property was

31 *Mahabir Pershad v Moheshwar Nath* (1890) 17 Cal 584, 17 IA 11; *Bhaghut Pershad v Girja Koer* (1888) 15 Cal 717, 721, 15 IA 99; *Mst Nanomi Babuasain v Modhun Mohun* (1886) 13 Cal 21, 13 IA 1; *Sakharam Shet v Sitaram* (1887) 11 Bom 42

32 *Deendyal v Jagdeep Narain* (1877) 3 Cal 198, 4 IA 247; *Baboo Hurdei Narain v Ruder Perkash* (1883) 10 Cal 626, 11 IA 26; *Pettachi Chettiar v Gangili Vira* (1887) 10 Mad 241, 14 IA 84; *Abdul Aziz v Appaysami* (1903) 27 Mad 131, 31 IA 1, *Krishnaji v Vithal* (1888) 12 Bom 625; *Maruti v Babaji* (1891) 15 Bom 87; *Timmappa v Narsinha* (1913) 37 Bom 631, 21 IC 123; *Hanmandas v Valabhdas* (1919) 43 Bom 17, 46 IC 133, AIR 1918 Bom 101, As to High Court circulars, see *Dayanand v Daji Narain* (1926) 50 Bom 793, 97 IC 754, AIR 1926 Bom 548 .

33 *Dayanand v Daji Narain* (1926) 50 Bom 793, 97 IC 754, AIR 1926 Bom 548.

34 *Simbhunath v Gopal Singh* (1887) 14 Cal 572, 14 IA 77, 83.

mortgaged, unless the sons show that what was mortgaged was the father's interest only,[35] or unless the mortgage itself purports to be one of the father's interest only.[36] Where the mortgage is of the entire property, and a decree is passed for sale of the property, the sale will pass the whole property to the purchaser, notwithstanding the words 'right, title and interest of the judgment-debtor' in the certificate of sale.[37]

§ 294C. EXECUTION OF DECREE AGAINST FATHER AFTER HIS DEATH

Where a decree has been passed against the father in respect of a debt incurred by him, and the father dies before the decree has been fully satisfied, the decree may be executed under s 53 of the Civil Procedure Code 1908, by attachment and sale of the ancestral property in the hands of the sons, as if such property were the property of the deceased father which had come to the hands of the sons as his legal representatives, unless the debt was incurred for an immoral purpose, the question has to be determined in execution proceedings, and not in a separate suit.[38] If the contention of the sons is that there is really no debt, the question cannot be enquired into in execution proceedings, but only in a regular suit.[39] It is assumed in this paragraph that the father and sons are members of a joint family holding coparcenary property.

This paragraph is based on ss 50 and 53 of the Civil Procedure Code 1908 (see Mulla's Civil Procedure Code, notes to s 53). No attachment is necessary where a final mortgage decree for the sale of the property has been passed against the father in his lifetime, the property in that case is sold under and by virtue of the decree without any previous attachment.[40]

Section 53 applies in the case of the sons of a judgment-debtor only and not in the case his brother.[41]

35 *Pem Singh v Partab Singh* (1892) 14 All 179 (FB); *Bhaghut Pershad v Girja Koer* (1888) 15 Cal 717, 721, 15 IA 99.

36 *Simbhunath v Gopal Singh* (1887) 14 Cal 572, 14 IA 77, 83.

37 *Trimbak v Narayan* (1884) 8 Bom 481.

38 Section 53, Code of Civil Procedure 1908; *Umed v Goman Bhaiji* (1896) 20 Bom 385; *Shivram v Sakharam* (1909) 33 Bom 39, 1 IC 459; *Amar Chandra v Sebak Chand* (1907) 34 Cal 642 (FB); *Sheikh Karoo v Rameshwar Rao* (1921) 6 PLJR 451, 460–62, 62 IC 905, AIR 1923 Pat 143 (mortgage-decree against father); *Narayan v Sagunabai* (1925) 49 Bom 113, 85 IC 181, AIR 1925 Bom 193.

39 *Lakshmadu v Ramudu and ors* (1940) Mad 123, AIR 1939 Mad 867, 187 IC 816.

40 *Sheikh Karoo v Rameshwar Sao* (1921) 6 PLJR 451, 62 IC 905, AIR 1923 Pat 143.

41 *Sheo Gopal v Firm Ganesh Das Ram Gopal* (1938) Luck 241, 168 IC 268, AIR 1937 Ori 327.

Section 53 does not apply to a case where the suit on mortgage by the father was filed against the sons and grandsons, but was dismissed against the latter. The share of the grandsons cannot be attached and sold, as it was not covered by the decree,[42] however, this principle cannot be availed of by sons and grandsons born later.[43]

Nor does s 53 apply to a case where the suit against the father is filed after partition.[44] If the father dies leaving sons and also his own father, and subsequently, the father's father dies, it has been held but the Allahabad High Court that the decree cannot be executed against the ancestral property in the hands of his sons.[45] However, this decision has been dissented from by the Punjab High Court.[46] It is submitted that the former case was incorrectly decided.

§ 295. SALE OR MORTGAGE OF COPARCENARY PROPERTY BY FATHER FOR PAYMENT OF ANTECEDENT DEBT

(1) *Antecedent debt.*— The father of a joint Hindu family may sell or mortgage the joint family property including the son's interest therein to discharge a debt contracted by him for his own personal benefit, and such alienation binds the sons, provided:

(a) the debt was antecedent to the alienation; and
(b) it was not incurred for an immoral purpose.[47]

The validity of an alienation made to discharge an antecedent debt rests upon the pious duty of the son to discharge his father's debt not tainted with immorality. The mere circumstance, however, of a pious obligation, does not validate the alienation. To validate an alienation so as to bind the son, there must also be an antecedent debt.[48] Generally, there is no question of legal necessity in such a case.[49] However, where

42 *Raja Ram v Raja Bakhsh Singh* (1938) 13 Luck 61, 40 Bom LR 277, 172 IC 5, AIR 1938 PC 7; *Umakant v Jitendra* AIR 1949 Pat 97.

43 *Raja Baksh Singh v Ram Swarup* (1944) Luck 481.

44 *Atul Krishna Roy v Lala Nandanji* (1935) 14 Pat 732 (FB); 157 IC 53, AIR 1935 Pat 275.

45 *Binda Prasad v Raj Belabh* (1926) 48 All 245, 91 IC 785, AIR 1926 All 220.

46 *Devi Das v Jada Ram* (1934) 15 Lah 50, 147 IC 225, AIR 1933 Lah 857.

47 *Sat Narain v Sri Kishen Das* (1936) 63 IA 384, 17 Lah 644, 38 Bom LR 1129, 164 IC 6, AIR 1936 PC 277.

48 *Brij Narain Raj v Mangal Prasad* (1924) 51 IA 129, 46 All 95, 77 IC 689, AIR 1924 PC 50, *Narain Prasad v Sarnam Singh* (1917) 44 IA 163, 39 All 500, 40 IC 284, AIR 1917 PC 41; *Jogi Das v Ganga Ram* (1917) 21 CWN 957, 42 IC 791, AIR 1917 PC 76, *Chet Ram v Ram Singh* (1922) 49 IA 228, 44 All 368, 67 IC 569, AIR 1922 PC 247 affmg, (1919) 41 All 529, 51 IC 119, AIR 1919 All 415; *Rajan V K Reddiar* AIR 1975 Mad 117.

49 *Rama Rao v Hanumantha* (1929) 52 Mad 856, 121 IC 837, AIR 1930 Mad 326.

the antecedent debts carried no compound interest and yet the mortgage effected by the father to discharge them provided for compound interest at a high rate with quarterly rests, to that extent, the onus is on the creditor to show that the loan could be obtained only on such terms and if no evidence is adduced, the lender has not discharged the burden.[50]

'Antecedent debt' means antecedent in fact as well as in time, ie, that the debt must be truly independent of and not part of the transaction impeached.[51] A borrowing made on the occasion of the grant of a mortgage is not an antecedent debt.[52]

To constitute a debt an 'antecedent' debt, it is not necessary that the prior and subsequent creditors should be different persons. All that is necessary is that the two transactions must be dissociated in time as well as in fact.[53] Hence, where a previous mortgage deed is renewed in favour of the same mortgagee, and the consideration for the subsequent mortgage deed is the amount due on the earlier one, the alienation would be one for an 'antecedent' debt,[54] unless the first debt was a mere device and was incurred merely for the sake of creating an antecedence in time and with a view to support the subsequent deed.[55]

In a suit for recovery of property, if the person who has sold property to satisfy an antecedent debt does not specifically plead as such, the opposition cannot effectively prove that the sale was not for an antecedent debt. Absence of pleadings, therefore, prejudicially affects persons challenging the sale. No finding can be arrived at by permitting the alienor to lead evidence in the absence of pleadings.[56]

50 *Bal Rajaram Tukaram v Maneklal Mansukhbhai* (1932) 56 Bom 36, 137 IC 717, AIR 1932 Bom 136.

51 *Brij Narain Raj v Mangal Prasad* (1924) 51 IA 129, 46 All 95, 77 IC 689, AIR 1924 PC 50. Reference may also be made to *Prasad v Govindasami* AIR 1982 SC 84 and the cases there cited.

52 *Chandradeo v Mata Prasad* (1909) 31 All 176, 190, 1 IC 479 FB; *Chaturbhuj v Govind Ram* (1923) 45 All 407 dissenting from *Nathu v Kundan Lal* (1911) 33 All 242, 8 IC 836 (mortgage to pay off pre-emption decree); *Shaikh Jan v Bikoo* (1928) 7 Pat 798, 116 IC 33, AIR 1929 Pat 130; *Buta Mal v Gopal Singh* (1930) 11 Lah 164, 122 IC 480, AIR 1930 Lah 1040.

53 *Ramkaran Thakur v Baldeo Thakur* (1938) 17 Pat 168, 173 IC 292, AIR 1938 Pat 44; *Bharatpur State v Sri Kishan Das* (1936) 58 All 804, FB; 162 IC 642, AIR 1936 All 327; *Thimmegowda v Dyavamma* AIR 1954 Mys 93, FB; *Kalappa v Venkatesh* AIR 1962 Mys 260.

54 *Gopal Das v Topan Das* (1935) 16 Lah 624.

55 *Ram Rekha Singh v Ganga Prasad* (1927) 49 All 123, 97 IC 514, AIR 1926 All 545, FB; *Badri Prasad v Madan Lal* (1893) 15 All 75, 80, FB; *Jai Narain v Mahabir Prasad* (1927) 2 Luck 226, 95 IC 857, AIR 1926 Ori 470; *Sheo Ram v Durga* (1928) 3 Luck 700, 108 IC 288, AIR 1928 Ori 378, FB; *Iqbal Singh v Jasmer Singh* (1934) 15 Lah 715, 153 IC 862, AIR 1934 Lah 296.

56 *Biranchi Narayan Hadu v Krushnapriya Devi* AIR 1991 Ori 55.

Where a mortgage was executed by the members of a joint family in favour of a stranger, who was a partner in a business with the family, in settlement of accounts of the firm, it was held that the debt being antecedent to the mortgage, the mortgage was binding on the son's share also.[57] Where a father received certain sums of money on behalf of his minor widowed daughter under a compromise decree and executed an indemnity bond undertaking to indemnify the defendants against all losses resulting from the minor plaintiff raising disputes after attaining majority, charging some immovable property belonging to the joint family, it was held that son's share was not liable, as there was no antecedence of debt.[58]

A security bond executed for payment of instalments of *kuri chit* cannot be said to be for antecedent debt.[59] Reference may be made to *Janardhana Malan v Gangadharan.*[60]

The antecedent debt may be an unascertained sum of money. It may be a debt incurred in connection with a trade started by the father.[61]

(2) *Burden of proving immorality of debt.*—It is for the alienee to prove that the antecedent debt existed or that after due inquiries he, in good faith, believed that it existed.[62] The burden is then shifted upon the sons to prove that the debt was contracted by the father for an immoral or illegal purpose,[63] and that the alienee had notice that the debt was so contracted.[64] It is not necessary for the alienee to show that he made

57 *Nachimuthu Goundan v Balasubramania Goundan* (1939) Mad 422.

58 *Alla Venkataramanna v Palacherla Mangamma and ors* (1944) Mad 867; *Suraj Bhan v Bodha Nand* AIR 1987 P&H 183 (religious and charitable trust created in Punjab).

59 *Narayana v Janaradhana* AIR 1974 Ker 108.

60 AIR 1983 Ker 178, FB; overruling *Achuthan v State Bank of Travancore* AIR 1975 Ker 47.

61 *Bal Rajaram Tukaram v Maneklal Mansukhbhai* (1932) 56 Bom 36, 137 IC 117, AIR 1932 Bom 136.

62 *Jamsetji v Kashinath* (1902) 26 Bom 326, 336–37; *Jamma v Nain Sukh* (1887) 9 All 493; *Chandradeo v Mata Prasad* (1909) 31 All 176, 198–99, 1 IC 479; *Sahib Singh v Girdhari Lal* (1923) 45 All 576, 73 IC 1024, AIR 1924 All 24; *Subramanya v Sadasiva* (1885) 8 Mad 75. See s 28, Transfer of Property Act 1887; *Venkata Chenchayya v Ramalingam* AIR 1957 AP 744; *Venkateswarlu v Venkata Narasimhan* AIR 1957 AP 557; *Tolaram v Veenjaraj* AIR 1957 Raj 256.

63 *Girdharee Lall v Kantoo Lall* (1874) 14 Beng LR 187, 1 IA 321; *Suraj Bansi Koer v Sheo Pershand* (1878) 5 Cal 148, 6 IA 88; *Balwant Singh v Clancey* (1912) 39 IA 109, 34 All 296, 14 IC 629 affirming 28 All 508; *Joharmal v Eknath* (1900) 24 Bom 343; *Natasayyan v Ponnusami* (1893) 16 Mad 99; *Rajkishore v Madan Gopal* (1932)13 Lah 491, 143 IC 249, AIR 1932 Lah 636.

64 *Suraj Bunsi Koer v Sheo Pershad* 6 IA 88, 106, 5 Cal 148, 171; *Darsu Pandey v Bikaramajit Lal* 3 All 125 (the first part of the decision that the recital in the sale deed is enough to prove the antecedent debt and other necessites is not correct, but the second part relating to immorality and notice is correct); *Hanuman Singh v Nanak Chand* 6 All 193, 199; *Lal Singh v Deo Narain Singh* 8 All 279, 282.

proper inquiry as to the purpose of the loan, or to prove that the money was borrowed for the benefit of the family.[65]

In *Lubar Amrit Lal v Doshi Jayantilal*,[66] the Supreme Court accepted the proposition that the burden lies on the sons, who challenge the alienation to prove not merely that the antecedent debt was immoral, but also that the alienee had notice that the debt was so contracted. The Supreme Court also pointed out that the decisions of the Privy Council on the subject made no distinction between an alienation made for the payment of the father's antecedent debt and an alienation made in execution of a decree passed against him, and in both cases, the sons must prove not only the immoral character of the antecedent debt, but also the knowledge of the alienee.

The proposition that 'where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes and that the purchaser had notice that they were so contracted' has been accepted by all the courts in India as the correct statement of the law on the point since 1879, when it was enunciated by the Privy Council in *Girdharee Lal v Kantoo Lal*[67] and *Suraj Bunsi Koer v Sheo Persbad Singh*.[68] In *Lubar Amrit Lal v Doshi Jayantilal* mentioned above, the Supreme Court accepted that proposition.

The burden, which lies upon the sons to prove the immorality of the debt, is not discharged by showing that the father lived an extravagant or immoral life; there must be a direct connection between the debt and the immorality set up by the sons.[69]

(3) *Alienation binds son's interest.*—If the debt is antecedent to the alienation, the alienation is valid in its entirety, and it will pass not only the father's, but also the son's interest in the property. Thus, if the

65 *Bhagbut Persbad v Girja Koer* (1888) 15 Cal 717, 724, 15 IA 99, 104; *Bapu Singh v Bibari Lal* (1908) 30 All 156; *Tulsi Ram v Bishnath Prasad* (1928) 50 All 1, 105 IC 885, AIR 1927 All 735.

66 [1960] 3 SCR 842.

67 (1874) 1 IA 321, 14 Beng LR 187.

68 (1880) 5 Cal 148, 6 IA 88.

69 *Sri Narain v Lala Raghubans* (1912) 17 CWN 124, 17 IC 729, PC; *Chintamanrav v Kashinath* (1890) 14 Bom 320; *Dattatraya v Vishnu* (1912) 36 Bom 68, 12 IC 949; *Sita Ram v Zalim Singh* (1886) 8 All 231; *Babu Singh v Behari Lal* (1908) 30 All 156; *Tulshi Ram v Bishnath Prasad* (1928) 50 All 1, 105 IC 885, AIR 1927 All 735; *Ralfia Ram v Balmokand* (1927) 8 Lah 117, 101 IC 830, AIR 1927 Lah 60; *Ulfat Rai v Tej Narain* (1927) 8 Lah 632, 106 IC 176, AIR 1928 Lah 83; *Raj Kishore v Madan Gopal* (1932) 13 Lah 491, 173 IC 249, AIR 1932 Lah 636; *Shankar Rao v Kanta Prasad* (1946) ILR Nag 844; *Udmiram v Balramdas* AIR 1956 Nag 76; Also see *Sydulu v Venkateshwarlu* AIR 1965 AP 318.

alienation is a sale of a joint family property, the whole property will pass to the purchaser. Again, if the alienation is a mortgage, the mortgagee may obtain a mortgage decree against the father alone for the sale of the whole of the mortgaged property including the son's interest therein, and the sale in execution of the decree will bind the interest both of the father and the sons in the property.

(4) *Alienation after partition.*—The father has no power to alienate his son's share after a partition between him and the son, although, the alienation may be in respect of a debt which was contracted before partition.[70]

(5) *Alienation after attachment of son's share.*—The father has no power to alienate his son's share, after it has been attached in execution of a decree. The decree may be one against the son in respect of a personal debt of the son, or it may be one against the father, or both against the father and the son, in respect of a personal debt of the father.[71]

(6) Whether a sale or mortgage executed by the father passes the whole family property or only the father's interest therein, depends on the terms of the deed.[72]

(7) If the alienations be one for legal necessity, it is not necessary, to bind the son's interest, to have recourse to the doctrine of antecedent debt.[73]

(8) The expression 'sons' in this section includes grandsons and great-grandsons. The expression 'father' includes grandfather and great-grandfather (see § 291). Reference may also be made to notes under s 16 of the Hindu Marriage Act 1955.

Illustrations

(a) The father of a joint family lost heavily in speculation in gold and silver, and to pay off the losses, borrowed money on the mortgage of the joint family property. The mortgagee obtained a decree on the mortgage and sought to execute it by sale of the mortgaged property. The sons and wife of the mortgagor then sued for a declaration that the decree was not binding, since the debt though antecedent, was immoral. It was held that the antecedent debt was immoral, but as the plaintiffs has failed to

70 *Rathna v Aiyanachariar* (1908) 18 MLJ 599; *Krishnasami v Ramasami* (1899) 22 Mad 519, 521.

71 *Subraya v Nagappa* (1909) 33 Bom 264, 2 IC 268.

72 *Pem Singh v Partab Singh* (1892) 14 All 179 (FB); *Simbhunath v Gopal Singh* (1887) 14 Cal 572, 14 IA 77; *Pettachi Chettiar v Sangili Vira* (1887) 10 Mad 241, 14 IA 84; *Bhagbut Pershad v Girja Koer* (1888) 15 Cal 717, 15 IA 99.

73 *Lal Bahadur v Ambika Prasad* (1925) 52 IA 443, 47 All 795, 91 IC 471, AIR 1925 PC 264.

prove that the mortgagee had notice of the immoral character of the debt, they were not entitled to succeed.[74]

(b) The father of a joint family borrows Rs 2,000 from *C* for his own use. Subsequently, he executes a mortgage of the joint family property to *C* to secure the debt. It is not proved that the money borrowed was used by the father for immoral purposes. The mortgage binds not only the father's, but also his sons' interest in the property. Here, the debt is antecedent of the mortgage in fact as well as in time.[75]

(c) The father of a joint family governed by the Mitakshara law as applied in Uttar Pradesh, mortgages the joint family property in 1883 to secure an advance made to him at the time of the execution of the mortgage. In 1910, the mortgagee sues the father and his son for a sale of the mortgaged property. It is proved that the money was borrowed by the father for his own personal benefit, and not for any family necessity. Here, the loan having been made at the time of the mortgage, there is no debt antecedent to the mortgage. The mortgage is therefore wholly invalid. It does not bind even the father's share in the property. Nor is the mortgagee entitled even to a personal decree against the father or the sons, the claim for such decree being barred by limitation.[76]

(d) *S* and his sons are members of a joint Hindu family governed by the Mitakshara law as interpreted in Uttar Pradesh. In 1905, *S* mortgages the joint family property to *A*. In 1907, *S* executes a second mortgage of the same property to *B*. In 1908, *S* executes mortgage of the property to *C* to pay off the earlier mortgages to *A* and *B*. *C* then sues *S* and his sons on the mortgage of 1908. It is not proved that the mortgages to *A* and *B* were executed by *S* for family necessity. Here, the mortgage to *C* having been made to pay off the antecedent debt due to *A* and *B*, it binds the whole property including the son's interest therein, and *C* is entitled to a decree for the sale of the entire property.[77] (*Note.*— It is unnecessary in such a case to inquire whether the mortgages to *A* and *B* were executed to pay off a debt antecedent to either of the two mortgages. The transaction impeached is the

74 *Lubar Amrit Lal v Doshi Jayantilal* [1960] 3 SCR 842, AIR 1960 SC 964.

75 *Madhusudan v Bhagwan* (1929) 53 Bom 444, 118 IC 788, AIR 1929 Bom 213.

76 *Sahu Ram v Bhup Singh* (1917) 44 IA 126, 39 All 437, 39 IC 280, AIR 1917 PC 61.

77 *Brij Narain Rai v Mangla Prasad* (1924) 51 IA 129, 46 All 95, 77 IC 689, AIR 1924 PC 50; *Anantu v Ram Prasad* (1924) 46 All 295, 78 IC 619, AIR 1924 All 465; *Bhim Singh v Ram Singh* (1924) 46 All 301, 84 IC 13, AIR 1924 All 309; *Gauri Shanker v Sheonandan* (1924) 46 All 384, 78 IC 911, AIR 1924 All 543; *Kanhaiya Lal v Niranjan Lal* (1925) 47 All 351, 86 IC 98, AIR 1925 All 367; *Kuldip v Ram Bujhawan* (1924) 3 Pat 425, 83 IC 385, AIR 1924 Pat 454.

mortgage to *C* and that mortgage was executed to pay off the antecedent debt secured by the mortgages to *A* and *B*.)

(e) The father of a joint family governed by the Mitakshara law executed a usufructuary mortgage of the joint family property to secure an advance then made to him for his own personal benefit. He then sold the equity of redemption to the mortgagee, the mortgage, being discharged out of the price and the balance paid to him. After the father's death, however, during the lifetime of his sons, his grandson sued the purchaser to recover the property from him. It was held by the Judicial Committee that there being no debt antecedent to the first alienation, namely the mortgage, the mortgage and the sale were both invalid.[78] This decision is clearly in conflict with the later decision in *Brij Narain*'s case and it can no longer be regarded as good law. The test now laid down in *Brij Narain*'s case is whether the transaction impeached, namely, the sale of the equity of redemption, was entered into to pay off a antecedent debt. There is no doubt that it was, the antecedent debt being the debt secured by the mortgage. If the case arose again, the sale would be treated as valid, as it was made to pay off an antecedent mortgage. Whether the mortgage itself was executed to pay off an antecedent debt is not material.[79]

(f) The father of a joint family governed by the Mitakshara law as administered in Uttar Pradesh executed a deed of mortgage in 1900 of joint family property. In 1906, he sold the property for Rs 13,000 of which Rs 1,400 was paid to the mortgagee, the rest of the mortgage debt having been discharged long prior to 1906. The balance of the purchase money was applied by the father to his own purposes. It was held by the Judicial Committee that the sale could not be supported as having been made to discharge an antecedent debt, and they upheld the decree of the Allahabad High Court setting aside the sale, upon the sons, who were the plaintiffs in the suit, paying Rs 1,400 to the purchaser.[80] See *Brig Narration Rae v Mangle Parsed*.[81] The leading case on the subject is *Brig Nara*'s case. In that case, the Judicial Committee, after observing that *Oahu Ram*'s case[82] must not be taken to decide more than what was necessary for the judgment, namely, that a

78 *Chet Ram v Ram Singh* (1922) 49 IA 228, 44 All 368, 67 IC 569, AIR 1922 PC 247.

79 It is now so held in *Anantu v Ram Prasad* (1924) 46 All 295, 296–97, 78 IC 619, AIR 1924 All 465.

80 *Jawahir Singh v Udai Prakash* (1926) 53 IA 36, 48 All 152, 93 IC 216, AIR 1926 PC 16.

81 (1924) 51 IA 129, 46 All 95, 77 IC 689, AIR 1924 PC 50.

82 (1917) 44 IA 126, 39 All 437, 39 IC 280.

debt created by the mortgage itself is not an antecedent debt, expressed their dissent from several dicta in that case, and laid down the following propositions:

(1) the managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity (see § 242);

(2) if he is the father and the other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt (see § 294);

(3) if he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate (see § 295);

(4) antecedent debt means antecedent in fact as well as in time, ie, that the debt must be truly independent of , and not part of, the transaction impeached (see § 295);

(5) there is no rule that this result is affected by the question whether the father who contracted the debt or burdened the estate, is alive or dead.

The law as stated above by the Privy Council has been expressly approved by the Supreme Court in the undermentioned cases.[83]

Antecedent

In *Sahu Ram*'s case, their Lordships of the Privy Council spoke of the doctrine of antecedent debt as having 'arisen from the necessity of protecting the rights of third persons'. In *Brij Narain*'s case, the doctrine is described as part of the doctrine of pious obligation. The latter view must be taken to supersede the former view.

There was at one time, a conflict of opinion as to the meaning of 'antecedent debt'. Those cases[84] were reviewed by the Privy Council in *Brij Narain Rai v Mangla Prasad* (see ill (4)). The test there laid down was whether the transaction impeached was entered into to pay off an antecedent debt, ie, a debt antecedent to the transaction (see the 4th proposition above).

83 *Panna Lal v Narain* AIR 1952 SC 170; *Virdhachalam Pillai v Chaldean Bank* AIR 1964 SC 1425.

84 *Chandradeo v Mata Prasad* (1909) 31 All 176, 190, 1 IC 479, FB (mortgage); *Ram Dayal v Ajudhia Prasad* (1906) 28 All 328 (sale); *Venkataramanayya v Venkataramana* (1906) 29 Mad 200, FB (mortgage); and see *Luchmun Dass v Giridhar* (1880) 5 Cal 855, FB; *Khalilul v Govind* (1893) 20 Cal 328, 346; *Kishun v Tipan Pershad* (1907) 34 Cal 735, 747; *Chintamanrav v Kashinath* (1890) 14 Bom 320, 324–25; *Dattatraya v Vishnu* (1912) 36 Bom 68, 12 IC 949.

Prior to the decision in *Brij Rai's* case, there was a conflict of opinion between various High Courts till the law was finally settled by the Privy Council in *Brij Narain Rai's* case as stated above.[85]

The antecedent must be real. The antecedent would be unreal if the father borrowed money on a promissory note with the object that it should form part of a mortgage to be subsequently executed by him.[86] Where no mortgage was intended at the time of advance of the loan, however, there was an agreement to execute a mortgage if and when called upon and a mortgage was subsequently executed, it was held that the mortgage was supported by antecedent debt.[87] *Mahabir v Sukh Ram* affords a good illustration of the above rule.[88]

There must be a real debt due by the father. Therefore, where the only prior debt was due by a third party and the father executed as surety, a hypothecation bond in favour of the creditor, it was held not to be binding on the son's share.[89]

Where a father, at the time of taking a mortgage, agrees to pay off a prior mortgage, the obligation so undertaken is an 'antecedent debt', which will support a mortgage of joint family property subsequently executed by the father in favour of the prior mortgagee in fulfillment of the obligation.[90]

It has been held that where the father mortgages joint family property to pay off a prior mortgage on his separate property, it cannot be said that the mortgage was one for the payment of antecedent debt.[91] In this case, the separate property consisted of property which was inherited by the father from his cousin and that property was mortgaged by the cousin during his lifetime.

Time-barred Debt

The antecedent debt may be a time-barred debt (see § 299(2)).

85 *Brij Narain v Mangla* (1919) 41 All 235, 35 IC 101, AIR 1919 All 324; *Ram Sarup v Bharat Singh* (1921) 43 All 703, 64 IC 763, AIR 1921 All 113; *Lakhu Mal v Bishen Das* (1922) 3 Lah 74, 66 IC 408, AIR 1922 Lah 291; *Armugham v Muthu* (1919) 42 Mad 711, 52 IC 525, AIR 1919 Mad 75 (FB); *Mathura v Raj Kumar* (1921) 6 PLJR 526, 62 IC 132, AIR 1921 Pat 447 (FB); *Hari Prasad v Sourendra* (1922) 1 Pat 506, 66 IC 945, AIR 1922 Pat 450.

86 *Ram Sarup v Bharat Singh* (1921) 43 All 703, 64 IC 763, AIR 1921 All 113.

87 *Venkataramaswami v Imperial Bank of India* (1939) Mad 7, FB.

88 (1942) All 498, 201 IC 415, AIR 1942 All 361.

89 *Ganga Saran v Ganeshi Lal* AIR 1939 All 225; *Kesar Chand v Uttam Chand* (1945) 72 IA 165.

90 *Chatar Sen v Raja Ram* (1938) All 58, 173 IC 916, AIR 1938 All 44.

91 *Nand Lal v Umrat* (1926) 1 Luck 360, 93 IC 655, AIR 1926 Ori 321.

What is a Debt

Unliquidated Damages

'Debt' ordinarily means a liquidated or ascertained sum of money as distinguished from unliquidated damages for breach of contract or for a tort. If a decree has been obtained against the father for damages for breach of contract or for a tort, the judgment-debt constitutes a debt within the meaning of this section. However, what if the amount of damages is not fixed by a decree or otherwise? Is the liability for damages a debt within this section? The question arose in a case before the Judicial Committee, but it was not decided.[92] That was a case of a breach of a contract by the father. It would seem on principle that a liability for damages constitutes a debt within this section; if the liability is antecedent to the alienation, the alienation will be binding on the sons, though the amount of damages is fixed on the very day on which the alienation is made.

Debt Due But Not Payable

A debt may be a antecedent debt, though the due date of payment has not yet arrived. Hence, alienation even before the due of payment would be alienation for an antecedent debt.[93]

Price Payable Under a Pre-emption Decree

A pre-emption decree does not carry any order for payment. It gives an option to the pre-emptor to obtain the property on making payment. There being thus no obligation to pay, the purchase money fixed by the decree does not constitute a debt.[94]

The father alone can alienate the son's share. In the case of a joint family, the privilege of alienating the whole of the joint family property for payment of an antecedent debt is the privilege only of the father, the grandfather and the great-grandfather. No other person has any such privilege. Hence, if a joint family consists of two brothers *A* and *B*, of whom *B* is a minor, *A* may alienate, if he so desires, his own share in the joint family property to pay off an antecedent debt of his father *F*, but, he has no power to alienate the share of his brother *B*, in the property, though *F* is also the father of *B*.[95] Similarly, if a joint family consists of *A* and his brother's son *B*, *B* being a minor, *A* may alienate his own share in joint family property to pay an antecedent debt of his

92 *Mian Karim Bakhsh v Dargah Pir* (1931) 35 CWN 1221, 133 IC 728, AIR 1931 PC 243.
93 *Damodaram v Bansilal* (1928) 51 Mad 711, 111 IC 297, AIR 1928 Mad 566.
94 *Kishen Sahai v Raghunath* (1929) 51 All 473, 116 IC 488, AIR 1929 All 139. See O 20 r 14, Code of Civil Procedure 1908.
95 *Anantu v Ram Prasad* (1924) 46 All 295, 78 IC 619, AIR 1924 All 538.

father *G*, but, he has no power to alienate *B*'s share to discharge that debt, though *G* is the grandfather of *B*.[96]

Specific Performance

The High Court of Bombay has held that a mere agreement to alienate any joint family property cannot be enforced against the son on the ground that the agreement was effected by the father for a consideration, which was formed by his own antecedent debts.[97]

§ 296. ALIENATION BY FATHER NEITHER FOR LEGAL NECESSITY NOR ANTECEDENT DEBT—SON'S LIABILITY

(1) It is clear from what has been stated above, that an alienation by the father of joint family property neither for a legal necessity nor for the payment of an antecedent debt, does not bind the son's interest in the property. In Bengal and Uttar Pradesh, it does not bind even the father's interest in the property (§§ 268, 269). However, though the alienation as such does not bind the son's interest, the son being under a pious obligation to pay his father's debt, not tainted with immorality, and the whole of the ancestral estate being liable for the payment of such debts, the alienee is entitled to realise the debt, ie, the money paid by the alienee to the father in consideration of the alienation, out of the entire ancestral estate.[98]

By far, the largest number of cases in which the above principle has been applied are cases of mortgage by the father of joint family property belonging to himself and his sons, where the mortgage is neither for legal necessity nor for payment of an antecedent debt. In such a case, the son himself may sue for a declaration that the mortgage is not binding on his share and if he proves that the debt was contracted for illegal or immoral purposes to the knowledge of the lender, he will be granted a declaration that the mortgage and the debt are not binding on

96 *Rameshra v Kalpu Rai* (924) 46 All 264, 84 IC 84, AIR 1924 All 465.

97 *Jaiprakash v Lilabai* AIR 1963 Bom 100.

98 *Sami Ayyangar v Ponnammal* (1898) 21 Mad 28; *Venkataramanaya v Venkataramana* (1906) 29 Mad 200 (FB); *Kadasami v Kuppu* (1920) 43 Mad 421, 55 IC 320, AIR 1920 Mad 479; *Ramasami v Ulaganatha* (1899) 22 Mad 49, FB; *Perisami v Seetharama* (1904) 27 Mad 243, FB; *Luchman Dass v Giridhur* (1880) 5 Cal 855 (FB); *Gunga Prosad v Ajudhia Pershad* (1882) 8 Cal 131; *Khalilul Rahman v Govind Pershad* (1893) 20 Cal 328; *Kishun Pershad v Tipan Pershad* (1907) 34 Cal 735; *Brijnandan v Bidya Prasad* (1915) 42 Cal 1068, 29 IC 629, 16 IC 279, FB; *Jamna v Nain Sukh* (1887) 9 All 493; *Chandradeo v Mata Prasad* (1909) 31 All 176, 194, 208, 1 IC 479, FB; *Kali Shankar v Nawab Singh* (1909) 31 All 507, 3 IC 909; *Narsingh v Lalji* (1901) 23 All 206; *Dattatraya v Vishnu* (1912) 36 Bom 68, 12 IC 949; *Chintamannav v Kashinath* (1890) 14 Bom 320; *Polavarapu Lingayya and ors v Vappuluri Punnayya and ors* (1942) Mad 502, 198 IC 588, AIR 1942 Mad 183; contra *Hiralal v Jagdish* AIR 1959 Raj 254, 8 Raj 850.

him.[99] In all these cases, the mortgage qua mortgagee cannot be enforced against the son's interest in the mortgaged property, and no mortgage decree for the sale of that interest can be passed against the son. However, the son is nevertheless under a pious obligation to pay the mortgage debt qua debt, if it was not contracted for an illegal or immoral purpose. The son may therefore be successfully sued for the father's debt, and the decree passed in such suit may be enforced in execution by sale of the entire ancestral estate including the son's interest therein.[1] Cases under this head may be divided into three classes, namely:

(i) where the suit to enforce the mortgage is brought both against the father and the sons;
(ii) where such suit is brought against the father alone;
(iii) where such suit is brought against the sons after the father's death.

(i) In dealing with these cases, it must be remembered that according to the law as administered in Madras and Bombay, a coparcener can mortgage his undivided interest in coparcenary property, and the mortgage binds his interest in the property (§ 268). In Bengal and Uttar Pradesh, no coparcener can mortgage even his own interest in the coparcenary property without the consent of the other coparceners, with the result that the mortgage does not bind even the mortgager's share in the property (§ 269).

Where a suit is brought against the father and sons on a mortgage executed by the father, neither for legal necessity nor for payment of an antecedent debt, the mortgage in Madras is entitled to: (1) a mortgage decree against the father for the sale of his interest; and (2) if the net proceeds of the sale of the father's interest are found to be insufficient to pay the amount due to the mortgagee, also to a decree against the father personally under O 34, r 6, of the Code of Civil Procedure 1908, and a decree for the sale of the entire joint family property including the sons' interest therein.[2] In Bombay, the mortgage decree directs a sale in execution of the entire joint family property including the son's interest therein, instead of directing a sale piecemeal as in Madras.[3] In Uttar Pradesh, the mortgage does not bind even the father's interest in the

99 *Krishnaji Lakshman v Vithal* (1888) 12 Bom 635.

1 *Kandasami v Kuppu* (1920) 43 Mad 121, 55 IC 320, AIR 1920 Mad 479; *Chandradeo v Mata Prasad* (1909) 31 All 176, 194, 1 IC 479 (FB). Also see *Mukkatira Devaiah v MP Raja Singh* AIR 1985 Kant 273, 275.

2 *Kadasami v Kappu* (1920) 43 Mad 412, 55 IC 320, AIR 1920 Mad 479; *Swami Swami Ayyangar v Ponnammal* (1898) 21 Mad 28; *Venkataramanaya v Venkataramana* (1906) 29 Mad 200 (FB), also see *Mukkatira Devaiah v M P Raja Singh* AIR 1985 Kant 273, 276.

3 *Dattatrya v Vishnu* (1912) 36 Bom 68, 2 IC 949; *Chintamanrav v Kashinath* (1890) 14 Bom 320.

property. Hence, no mortgage decree can be passed for the sale even of the father's interest. The only decree that can be passed is a money decree against the father and a decree for a sale in execution of the entire joint family property including the son's interest therein.[4] The result, it seems, should be the same in Bengal, but, it has been held that the mortgagee is entitled to a mortgage decree against the father for the sale of his interest in the property, and also to a decree, if the net proceeds of the sale of the father's interest be insufficient to pay the amount due to the mortgagee under the decree, for the sale of the son's interest in the entire joint family property so far as may be necessary to satisfy the amount due.[5] However, where the mortgagee asks for a money decree against the father only and not against the son, or where the suit was dismissed against the sons,[6] the decree cannot be executed against the son's interest in the joint family property.[7]

(ii) The next case is where the mortgagee sues the father alone. In such a case, the mortgagee may, at his option, obtain a simple money decree against the father for the whole of the mortgage debt, and have the entire joint family property, including the son's interest therein, sold in execution of the decree.[8] The sons, though not parties to the suit, are bound by the sale by reason of their pious duty to pay their father's debt and they cannot recover their share of the property unless they prove that the debt was contracted by the father for an immoral purpose (§ 294).

Besides, the mortagee may at his option, obtain a mortgate decree for the sale of the mortgaged property. In this case also, if the entire mortgaged property is sold in execution of the decree, the sons, though not parties to the suit, are not entitled to recover their share of the property unless the debt was contracted by the father for immoral purpose (see the cases cited in § 294 B (2)). This rule has not been altered by s 85, Transfer of Property Act 1882, now replaced by O 34 r 1, Code of Civil Procedure 1908.

4 *Kali Shankar v Nawab Singh* (1909) 31 All 507, 3 IC 909; *Chandradeo v Mata Prasad* (1909) 31 All 176, 208, 1 IC 479 (FB); *Jamna v Nain Sukh* (1887) 9 All 493; *Jai Narain v Mahabir Prasad* (1927) 2 Luck 226, 236, 95 IC 857, AIR 1926 Ori 470; *P A Maha Nirvani v Bindeshri Prasad* (1925) 1 All 109, AIR 1952 All 337.

5 *Kishun Pershad v Tipan Pershad* (1907) 34 Cal 735; *Luchman Dass v Girdhar* (1880) 5 Cal 855 (FB); *Ganga Prasad v Ajudhia Pershad* (1882) 8 Cal 131; *Khalilul Rahman v Govind Pershad* (1893) 20, 328; *Brijnandan v Bidyaprasad* (1915) 41 Cal 1068, 29 IC 629, AIR 1916 Cal 279 (FB).

6 *Kesho Ram v Mst Ram Dulari* (1942) 17 Luck 319, 196 IC 680, AIR 1942 Ori 9; *PA Maha Nirvani v Bindeshri Prasad* (1952) 1 All 109, AIR 1952 All 337.

7 *Jainarayan Mulchand v Sonaji* (1938) Nag 136, 174 IC 621, AIR 1938 Nag 24; *Bijai Raj Singh v Ram Padarath* (1936) 11 Luck 523, 58 IC 490, AIR 1936 Ori 139. See note below, 'Consideration of Calcutta Cases Referred to in the Section'.

8 Is the mortgagee entitled to sell the mortgaged property? See O 34 r 14, Code of Civil Procedure 1908.

The effect of the decisions since the passing of the Transfer of Property Act, is that where ancestral property belonging to a joint family has been sold in execution of a decree for sale on a mortgage executed by the father for his sole benefit, the son cannot maintain a suit for redemption of their interest in the property sold solely upon the ground that they had not been made parties to the suit of the mortgagee, nor is their position improved by the fact that the property at the execution sale was purchased by the mortgagee. Their suit must be based upon some ground, which would free them from liability as sons in a joint Hindu family to pay their father's debts, namely, the non-existence of the debt or the immoral character of the debt.[9]

(iii) Where the suit is brought by the mortgagee against the sons after the father's death, the mortgagee may obtain a money decree against the sons, which may be enforced by a sale of the entire joint family property, unless the suit against the sons is barred by limitation (§ 293 (2)).

He is also entitled, in Bombay[10] and Madras, to a mortgage decree limited to the father's interest in the mortgaged property, provided that the suit as a mortgage suit is not barred by limitation. In Uttar Pradesh, no mortgage decree can be passed against the father's interest, whether the father be alive or dead; it follows that if the suit against the sons is barred by limitation, the mortgagee has no remedy at all in respect of his claim.[11] There in no Calcutta decision bearing on the question whether a mortgage decree can be passed against the father's interest after his death.[12]

(2) *Where the debt is immoral.*—If the debt contracted by the father is tainted with immorality, the mortgagee is not entitled to proceed against the son's interest at all. All that he is entitled to, in Bombay and Madras, is mortgage decree limited to the father's interest in the mortgaged property, which, it seems, is also the case in Bengal. In Uttar Pradesh, a mortgage by the father of his own undivided interest without the consent of the sons does not bind even the father's interest in the property, and the mortgagee is not entitled to a mortgage decree limited

9 *Debi Singh v Jia Ram* (1903) 25 All 214, FB; *Lal Singh v Pulandar Singh* (1906) 28 All 182; *Balwant Singh v Aman Singh* (1911) 33 All 436, 9 IC 476; *Gajadhar v Jadurbir* (1925) 47 All 122, 85 IC 31, AIR 1925 All 180; *Narasimhulu v V Ramayya* AIR 1979 AP 36; *Ramasamayyan v Virasami* (1898) 21 Mad 222; *Palani v Bangayya* (1899) 22 Mad 207; *Ramkrishna v Vinayak* (1910) 34 Bom 354, 5 IC 867; *Jahan Singh v Hardat Singh* (1935) 57 All 357, 152 IC 487, AIR 1935 All 247; In *Bhawani Prasad v Kallu* (1895) 17 All 537, FB, the sons' suit was brought before sale. See also *Kanaiya Lal v Raj Bahadur* (1902) 24 All 211; *Lalla Suraj v Gulab Chand* (1901) 28 Cal 517. As to the son's remedy before suit, see § 294A(2).

10 *Chintamanrav v Kashinath* (1890) 14 Bom 320.

11 *Chandradeo Singh v Mata Prasad* (1909) 31 All 176, 179, 1 IC 479 (FB).

12 *Madho Parshad v Mehrban Singh* (1891) 18 Cal 157, 17 IA 194, which was a case of sale.

even to that interest. However, he may obtain a money decree against the father, which he may execute by a sale of the father's interest in the joint family estate.[13]

Consideration of Calcutta Cases Referred to in the Section

The principle that no mortgage decree can be passed against the sons in a suit on such a mortgage, was first laid down by the Full Bench of the Calcutta High Court in 1880 in the case of *Luchmun Dass v Giridhar*.[14] In later cases,[15] it was held that the Full Bench ruling in *Luchmun Dass*'s case was no longer good law since the Privy Council decisions.[16] A contrary view was again taken in some decisions, but they were subsequently overruled by a Full Bench of the same High Court in *Brijnandan v Bidya Prasad*,[17] and it was held that there was nothing either in the above-mentioned decisions of the Privy Council or in the provisions of s 85, Transfer of Property Act, to justify the view that a mortgage created by a father was operative as such against the sons, and that the decision in the Full Bench case that no mortgage decree can be passed against the sons, but, only a money decree, was still good law.

It has been stated above, that though according to Mitakshara law as administered in Bengal, the father cannot alienate his own undivided interest in the coparcenary property without the consent of his sons, the Calcutta High Court has held that the mortgagee is entitled to a mortgage decree against the father. The leading case on the subject is *Luchmun Dass v Giridhar*,[18] decided by a Full Bench in 1880. The facts of the case are stated in *Khalilul Rahman v Gobind Pershad*,[19] and the decree passed by the High Court after the Full Bench had returned the answers to the question submitted to them, is set forth on p 354 of the report. In *Luchmun Dass*'s case, the lower court had passed a mortgage decree for the sale of the father's interest, but it wholly dismissed the mortgagee's suit against the sons. In so doing, the court purported to follow an earlier ruling of the same High Court.[20] The question before the Full Bench was as to the extent of the liability of the sons in respect of the mortgage debt. There was no question as to whether a mortgage decree could be

13 Also see § 290 (2). *Shiva Nath v Tulsi Ram* (1926) 48 All 1, 89 IC 480, AIR 1925 All 801, see O 34 r 14, Code of Civil Procedure 1908.

14 (1880) 5 Cal 855, See *Jamna v Nain Sukh* (1887) 9 All 493, 494; *Kishun Pershad v Tipan Pershad* (1907) 34 Cal 735, 745–46.

15 *Maheshwar v Kishun* (1907) 34 Cal 184; *Sheo Narain v Mokshoda Das* (1913) 17 CWN 1022, 19 IC 878; *Bishwanath v Jagdip* (1913) 40 Cal 342, 17 IC 577, (1913) 17 CWN 1022, 19 IC 78.

16 (1886) 13 Cal 21, 36, 13 IA 1, (1888) 15 Cal 717, 721, 724, 15 IA 99.

17 (1915) 42 Cal 1068, 29 IC 629, AIR 1916 Cal 279, FB.

18 (1880) 5 Cal 855.

19 (1893) 20 Cal 328, 342–48.

20 *Bheknarain v Januk* (1877) 2 Cal 438.

passed against the father. On the question before them, the Full Bench held that no mortgage decree could be passed against sons, but the sons being under a pious obligation to pay the father's debt, their share was liable to be sold if the net sale proceeds of the father's interest were not sufficient to satisfy the mortgagee's claim in full.

§ 297. WHERE PURCHASE-MONEY APPLIED IN PART ONLY IN PAYMENT OF ANTECEDENT DEBT

It sometimes happens that joint family property is sold by the father of a joint family for the payment of an antecedent debt, but the whole of the price is not proved to have been applied in payment of such debt, and the sale is challenged by the sons on that ground. In such a case, if the sale was necessary to discharge the debt, 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 in payment of the debt, does not invalidate the sale, the reason being that the purchaser is not 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 in payment of the debt is considerable or small.[21]

The above principles have been laid down by the Judicial Committee in cases of sales by the manager of joint family property for legal necessity, but the same principles apply to cases of sale by the father for the payment of an antecedent debt.

In an earlier Privy Council case, where one property was sold for Rs 2,000, and Rs 338 was not proved to have been applied in payment of the father's debts, and another property was subsequently sold for Rs 2,000, and Rs 1,847 was not proved to have been applied in payment of the debts, their Lordships set aside both the sales conditionally on payment by the sons, who were the plaintiffs in the suit, to the purchaser of the sums actually applied in payment of the debts.[22] It is conceived that if such a case arose again, both the sales would be upheld if the conditions stated in the section were satisfied (see notes to §§ 189 and 245).

21 See §§ 189, 245. *Krishna Das v Nathu Ram* (1927) 54 IA 79, 49 All 149, 100 IC 130, AIR 1927 PC 37 (case of legal necessity); *Niamat Rai v Din Dayal* (1927) 54 IA 211, 8 Lah 597, 101 IC 373, AIR 1927 PC 121; *Masit Ullah v Damodar Prasad* (1926) 53 IA 204, 48 All 518, 98 IC 1031, AIR 1926 PC 105 (case of legal necessity); *Gokha Ram v Sham Lal* (1922) 3 Lah 426, 77 IC 174, AIR 1923 Lah 268 (antecedent debt); *Buta Mal v Gopal Singh* (1930) 11 Lah 164, 122 IC 480, AIR 1930 Lah 1040. The decision in *Sanmukh v Jagarnath* (1924) 46 All 531, 83 IC 83, AIR 1924 All 708 (antecedent debt is no longer good law, see the judgment in 54 IA 79 referred to above); *Bansilal v Shivlal* (1953) 55 Bom LR 350, (1953) Bom 1045, AIR 1953 Bom 361.

22 *Banwari Lal v Mahesh* (1918) 45 IA 284, 41 All 63, 49 IC 540, AIR 1918 PC 118.

§ 298. IMMORAL (*AVYAVAHARIKA*) DEBT

Sons, grandsons and great-grandsons are bound to pay all debts contracted by the father, grandfather or great-grandfather except the following debts:[23]

I. (1) debts for spirituous liquors;
(2) debts due for losses at play;
(3) debts due for promises made without consideration;
A promissory note for a time-barred debt is not a promise without consideration;[24]
(4) debts contracted under the influence of lust or wrath;
(5) debts for being surety for the appearance or for the honesty of another;[25]
(6) unpaid fines;[26]
(7) unpaid tolls; and
(8) any debt which is *avyavaharika*, which is rendered by Colebrooke as equivalent to a debt for a cause 'repugnant to good morals'.

II. The burden of proving that the debt was *avyavaharika* or illegal is on the son.[27]

Surety

According to Yagnavalkya, there are three classes of sureties: (1) for appearance; (2) for confidence; and (3) for payment.[28] Brihaspati adds a fourth class which is very much similar to the third and differs from it in this respect that whereas a surety for payment binds himself personally to pay the loan, in the other form, he undertakes to produce the property of the debtor, out of which the creditor may obtain satisfaction.[29] In the first two classes, the liability of the surety is purely personal and does not extend to sons except where the surety obtains a pledge from the debtor to ensure his safety, and in such cases, the creditor is entitled to realise his claim from the pledge even if the surety is dead. In the other two classes, ie, when the surety undertakes to pay off the debts or to produce the goods of the debtor, the sons are liable to discharge the obligation incurred by the father, but their liability extends to making

23 *Khalilu v Gobind* (1893) 20 Cal 328, 336, 337.
24 *Gajadhar v Jagannath* (1924) 46 All 775, 787, 80 IC 684, AIR 1924 All 551 (FB).
25 *Tukarambhat v Gangaram* (1899) 23 Bom 454, 456, 458. See also *Mahabir v Siri Narayan* (1918) 3 PLJR 396, 46 IC 27, AIR 1918 Pat 345, *Dandapani v Ghumsur* AIR 1956 Ori 144.
26 *Nhance v Hureeram* (1814) 1 Bom 84, 90.
27 For instance see *Sitaram v Radhabai* AIR 1968 SC 534 .
28 Yagnavalkya, Chapter II, v 53.
29 *Sen's Hindu Jurisprudence*, p 320.

good the principle of the loan and not the interest.[30] Under Mitakshara law, the grandsons are not liable in any case for debts contracted by their grandfather as surety.[31] The decision in *Narayan v Venkatacharya*[32] held that under the Mitakshara law, the grandson would be liable to pay the suretyship debt of the grandfather, in case the latter had received consideration for the same, is apparently based upon a misapprehension of the texts of Mitakshara which nowhere lay down a proposition of this kind.[33] The view of the Bombay High Court however receives some support from a text of Mayukha.[34] A guarantee given by the father for payment of rent by a tenant is a guarantee for payment of a debt,[35] and so is a guarantee for payment of money that may be decreed against a defendant in a suit.[36] A debt incurred by a father as a surety for payment of money is binding on the son as a mere money debt, but a hypothecation of the family property for such a debt is not binding on the property.[37] However, a surety bond hypothecating joint property, by which the father guarantees payment of loss that may be caused to the estate of a minor by misappropriation or waste by a guardian, is a bond for the honesty of another (see cl (5)), and is not binding on the sons;[38] unless the security bond is executed for a debt of the father;[39] If under such a bond, the property is sold, the son is entitled to recover his share therein.[40] If the surety bond is executed for payment of a debt due from a third party and the father undertakes no personal liability, the obligation is confined to the property, if any, that is charged by him for satisfaction of the claim. No question arises in such cases of the son's duty to pay the father's debt because of any pious obligation, as there is no debt due by the father.[41] However, it would be otherwise, if there was a personal

30 *Sitaramayya v Venkataramanna* 11 Mad 373; *Chettikulam v Chettikulam Kumara* 28 Mad 377; *Tukarambhat v Gangram*, 23 Bom 454; *Rasik Lal v Singheswar* 39 Cal 843; *Audilaxamma v Ragurami* AIR 1970 AP 158, FB; *Thangathammal v Arunachalam* AIR 1919 Mad 831.

31 *Sarwan v Kunji Lal* AIR 1951 MB 49; *Dwarka v Kishan Das* AIR 1955 All 675.

32 *Narayan v Venkatacharya* (1904) 28 Bom 408.

33 *Dwarka v Kishan Das* AIR 1955 All 675.

34 Mayukha, Chapter V, s. 3, VI.

35 *Maharaja of Benares v Ramkumar* (1904) 26 All 611.

36 *Mata Din v Ram Lakhan* (1930) 52 All 153, 120 IC 555, AIR 1930 All 87; *Malak Chand v Hira Lal* (1936) 11 Luck 449, 157 IC 945, AIR 1935 Ori 510.

37 *Thakur Satrohan Singh v Uma Dutt* (1936) 11 Luck 404, 157 IC 653, AIR 1935 Ori 455; *Malak Chand v Hira Lal* (1936) 11 Luck 449, 157 IC 945, AIR 1935 Ori 510.

38 *Kottapalli Lakshminarayana v Kanuparti Hanumantha Rao* (1935) 58 Mad 575, 154 IC 431, AIR 1935 Mad 144.

39 *Kesar Chand v Uttam Chand* (1945) 72 IA 165, (1945) 2 MLJ 160.

40 *Choudhuri v Hayagriba* (1931) 10 Pat 94, 138 IC 414, AIR 1932 Pat 162; *Krishna v Rama* AIR 1964 All 17.

41 *Lingbhat v Parappa* (1949) 52 Bom LR 846, AIR 1951 Bom 1. Otherwise where there is personal liability of the father.

liability of the father,[42] for standing surety against embezzlement by a *tahsildar* is not binding on the sons.[43] However, it has been held by the same High Court that the sons are liable for money borrowed by their father to enable his wife's cousin to refund money, which he had misappropriated or could not account for.[44]

Debt for a Cause Repugnant to Good Morals

The fundamental rule is that the sons are not liable for debts incurred by a father which are *avyavaharika*. Colebrooke translates it as 'debts for a cause repugnant to good morals'. Apararka explains it as not righteous or proper, and Balambhatti as not for the benefit of the family.[45] In *Jakati v Borkar*,[46] the Supreme Court observed that the translation of the term given by Colebrooke may well be taken to represent its correct meaning and that the term did not admit of a more precise definition. The relevant texts on the subject have been examined in numerous decisions. A very recent decision on the subject related to income tax.[47]

Where money was borrowed by the father for the purpose of defraying the expenses of the marriage of his concubine's granddaughter, it is *avyavaharika*, even if the concubine was in his continuous and exclusive keeping.[48]

A debt may arise out of a contract, as where money is borrowed by the father or it may arise out of an act which amounts to a criminal offence, eg, theft, or it may arise out of a tort or civil wrong.

Money borrowed by a father for payment to a Hindu woman as a bribe to induce her to take one of his sons in adoption, is an *avyavaharika* debt, and the sons are not liable for it.[49] So is money borrowed to pay a fine inflicted for a criminal offence.[50] The High Court of Madras has held that money borrowed to pay the cost of a suit in *forma pauperis*, brought by the father, knowing it to be false, is an *avyavahaharika* debt.[51] Such also would be a debt relating to litigation against son to deny the son's legitimate rights.[52] The Calcutta High Court has held that

42 *Hindustan Commercial Bank Ltd v Sohanlal* AIR 1970 P&H 67, FB; *Chhabirani Bai v Girdharilal* AIR 1976 MP 69. Also see *Prasanjit Mehta v United Commercial Bank Ltd* AIR 1979 Pat 151.

43 See cl (5). *Satya Charan v Satpir* (1919) 4 PLJR 309, 51 IC 791, AIR 1919 Pat 422.

44 *Benares Bank Ltd. v Jagdip* (1921) 6 PLJR 198, 62 IC 465, AIR 1921 Pat 9.

45 *Bai Mani v Usasfali* (1931) 33 Bom LR 130, 133, 136 IC 173, AIR 1931 Bom 229.

46 AIR 1959 SC 282, 286.

47 *JD Rao v ITO* AIR 1970 AP 426 (FB).

48 *Lakshmanaswami v Raghavacharulu* (1943) Mad 71, 210 IC 98, AIR 1943 Mad 292.

49 *Sitaram v Haribar* (1911) 35 Bom 169, 8 IC 625.

50 *Garuda Sanyasayya v Nerella Murthenna* (1918) 35 MLJ 661, 48 IC 740, AIR 1919 Mad 943.

51 *Kirit Singh v Chandra Kali Kaur* (1951) 30 MLJ 89, 41 IC 105.

52 *M Veeraraghaviah v M Chini Veeriah* AIR 1975 AP 350.

money borrowed by the father for litigation to set up an adoption is not an *avyavaharika* debt and that the sons are liable for it.[53] It has been held that the sons are liable to pay the costs of a suit decreed against the father, though the litigation was imprudent,[54] or the defence raised by him was dishonest.[55]

Where money is obtained by a father by committing a criminal offence, eg, theft, and a decree is passed against him for the money so obtained by him, the sons are not liable for the decretal amount.[56] The same rule applies in respect of money taken by a father and misappropriate under circumstances which constitute the taking itself a criminal offence,[57] eg, misappropriation by the father as a guardian of money belonging to the minor,[58] or a criminal breach of trust.[59] No decree can be passed against the sons of a stake-holder of a chit fund in respect of the latter's liability to a subscriber as the debt is illegal.[60] (See also *Sesha Ayyar v Krishna Ayyar*,[61] where it was held by a Full Bench that such a fund was a lottery by three judges out of five, and that its promoters were guilty of offences under both parts of s 294A of the Indian Penal Code). Where the father's debt was, at its inception, a just and true debt, the subsequent dishonest conduct of the father cannot affect its nature. Thus, when the father withheld a promissory note allotted in a partition decree to the opposite party, which he was directed to deposit in court, his conduct in first filing a forged note and then filing the real note after it was barred, cannot save the son's liability under the decree passed against the father for the loss.[62] Where a father is under a civil liability to account for money received by him, eg, as an administrator of the estate of a deceased person, or as a trustee, or as an agent or manager, and he fails to account for, and a decree is passed against him for money not accounted for by him, the sons are liable for the amount of the decree, though the father

53 *Khalilul v Gobind* (1893) 20 Cal 328.

54 *Paryag v Kasi* (1909) 14 CWN 659, 61 IC 258.

55 *Kirit Singh v Chandra Kali Kaur* (1951) 30 Pat 826, AIR 1951 Pat 587. The correctness of certain propositions in this decision was doubted in a more recent case of the same court—*Sudhansu v Mt Ramjhari* AIR 1957 Pat 115. The decision in *Kirti Singh*'s case was overruled by a Full Bench of the same High Court in *Sheodhar v Sitaram* AIR 1962 Pat 308. *Peerumal Chetty v Province of Madras* (1955) Mad 1179, AIR 1955 Mad 382 (court-fees).

56 *Pareman Dass v Bhattu* (1897) 24 Cal. 672.

57 *Mahabir Prasad v Basdeo Singh* (1884) 6 All 234; *McDowell & Co v Ragava* (1904) 27 Mad 71; *Jagannath v Jagal Kishore* (1926) 48 All 9, 89 IC 492, AIR 1926 All 89; *Bai Mani v Usasfali* (1931) 33 Bom LR 130, 136 IC 173, AIR 1931 Bom 229; *Perumal v Devarajam* AIR 1974 Mad 14.

58 *Bai Mani v Usasfali* (1931) 33 Bom LR 130, 136 IC 173, AIR 1931 Bom 229.

59 *Srimati Widyawanti v Jai Dayal* (1932) 13 Lah 356, 140 IC 220, AIR 1932 Lah 541.

60 *Muniyandia v Muthusami* (1939) Mad 70.

61 (1936) 59 Mad 562, 162 IC 68, AIR 1936 Mad 225.

62 *Hemraj alias Babu Lal and ors v Khem Chand and ors* (1943) All 727, 209 IC 344, 70 IA 171, AIR 1943 PC 142; *Loganathan v Naicker* AIR 1969 Mad 15.

may have retained the money dishonestly, provided the retention itself does not amount to a criminal offence, ie, the offence of criminal breach of trust or criminal misappropriation.[63] However, alienation of some family property by a father, who has utilised family money for his own purpose, cannot be said to relate to an *avyavaharika* debt.[64]

Where the receipt of the money was lawful at the time of the receipt, even the subsequent commission of an offence by the father does not save the son's liability.[65] The burden is on the sons to show that the retention itself amounted to a criminal offence.[66] When the removal of certain materials from a mortgaged house by the father amounted to a civil wrong and not a crime, a decree passed against the father personally, could be executed against the son, as the debt is not immoral.[67]

A Hindu father erects a dam, which obstructs the passage of water to the property of his neighbour. The court finds that the father had no right in law to erect the dam and a decree is passed against the father for damages. Are the sons liable for the amount of the decree? It has been held by the High Court of Bombay in *Durbar v Khachar*,[68] that they are not liable, the reason given being that such a debt is *avyavaharika*, ie, a debt which the father ought not, 'as a decent and respectable man', to have incurred. This interpretation on the word *avyavaharika* has not been accepted by the High Court of Calcutta. According to that court, the sons are liable for a decree against the father for damages on account of injury caused to crops by obstruction of a channel.[69] They are also liable for a decree against the father for mesne profits.[70] The view taken

63 *Natasayyan v Ponnusami* (1893) 16 Mad 99, 104; *Kanemar v Krishna* (1908) 31 Mad 161 (manager); *Gurunatham v Raghvalu* (1908) 31 Mad 472 (administrator); *Venkatacharyulu v Mohona* (1921) 44 Mad 214, 61 IC 530, AIR 1921 Mad 407 (agent); *Gursam Das v Mohan Lal* (1923) 4 Lah 93, 76 IC 907, AIR 1923 Lah 399 (manager); *Hanmant v Ganesh* (1919) 43 Bom 612, 51 IC 612, AIR 1918 Bom 13 (trustee); *Toshanpal v District Judge of Agra* (1929) 51 All 386, 112 IC 748, AIR 1928 All 582 (secretary of a school committee). See also *Jai Kumar v Gauri Nath* (1906) 28 All 718, 720; *Mohant Godadhar v Ghana Shyam Das* (1918) 3 PLJR 533, 47 IC 212, AIR 1918 Pat 391; *Venkateswara Temple v B. Radhakrishna* AIR 1963 AP 425, FB.

64 *Sri Ram v Farshadi Lal* AIR 1982 All 60.

65 *Alapati Anandarao and ors v The President, Co-operative Credit Society Pedatadepalli and ors* (1941) Mad 27, 191 IC 755, AIR 1940 Mad 828; *Sita Ram v Tarachand* AIR 1962 Raj 136.

66 *Toshanpal Singh v District Judge of Agra* (1934) 56 All 548, 61 IA 350, 151 IC 33, AIR 1934 PC 328.

67 *Hiradas v Jagannath* (1945) Nag 998.

68 (1980) 32 Bom 348.

69 *Chhakauri v Ganga* (1912) 39 Cal 802, 12 IC 609; See *Kirpal Singh v Balwant Singh* (1913) 40 Cal 288, 17 IC 666, PC, which turned upon a special custom of agriculturists in the Punjab.

70 *Peary Lal v Chandi Charan* (1906) 11 CWN 163; *Ramsubramania v Sivakami* AIR 1925 Mad 841; *Laxmi Pati Rao v Kristarao* 52 Bom LR 342, AIR 1950 Bom 356.

in *Durbar*'s case has also been disapproved by the High Court of Madras.[71] The High Court of Allahabad has also dissented from that view, and held that the sons are liable for money borrowed by the father to defend a suit for defamation,[72] or to defend himself against charges of forgery and fabrication;[73] also that they are liable for a decree against the father for damages for wrongfully cutting down trees.[74] The authority of the decision in *Durbar*'s case was treated as doubtful in a later Bombay case, where it was held that a debt contracted by father in a trade carried on by him in contravention of the Government Servant's Conduct Rules was not *avyavaharika*, the liability in such a case being merely civil as distinguished from criminal.[75]

In *Jakati v Borkar*,[76] the Supreme Court held that the liability of a father, who is a managing director of a co-operative bank, and who draws a salary or remuneration, incurred as a result of negligence in the discharge of his duties cannot be termed as 'repugnant to good morals'.

When a father purported to sell joint property for satisfaction of antecedent debts, and covenanted with the purchaser, that in case any dispute arose regarding the property, he would make good the loss, and the son obtained a decree from the court, that the sale was not binding on his share of the property, he could still be made liable for the debt of the father arising out of the covenant in the sale deed. To ascertain whether the debt of the father is tainted or not, the extent of hardship it imposes upon the sons is not a relevant consideration.[77]

The Patna High Court has held that the sons are liable for money borrowed by the father to meet the expenses of defending himself against a charge under the Cattle Trespass Act 1871,[78] but they are not liable for a decree passed against the father for damages for malicious prosecution;[79] nor for the costs of a suit dishonestly brought by the father on the basis of a fraudulent and collusive sale deed;[80] nor for mesne profits and costs awarded against the father, who had forcibly and wrongfully dispossessed a *math* of its properties.[81]

71 *Venugopala v Ramanadhan* (1914) 37 Mad 458, 14 IC 705, AIR 1914 Mad 654 (costs of litigation).

72 *Sumer Singh v Liladhar* (1911) 33 All 472, 19 IC 624.

73 See *Beni Ram v Man Singh* (1912) 34 All 4, 11 IC 663.

74 *Chandrika v Narain* (1924) 46 All 617, 79 IC 1036, AIR 1924 All 745.

75 *Ramkrishna v Narayan* (1916) 40 Bom 126, 31 IC 301, AIR 1915 Bom 280.

76 AIR 1959 SC 282.

77 *Ramamurthi v Kuppaswami* AIR 1950 Mad 621, (1950) 1 MLJ 499.

78 *Hanumat v Sonadhari* (1919) 4 PLJR 635, 62 IC 734, AIR 1920 Pat 708.

79 *Sunder Lal v Raghunandan* (1924) 3 Pat 250, 83 IC 413, AIR 1924 Pat 465; *Raghunandan Sahu v Badri Teli* (1938) All 330, 175 IC 607, AIR 1938 All 263.

80 *Darbeshwari v Raghunath* (1949) 28 Pat 165, AIR 1949 Pat 515.

81 *Sheodhar v Sitaram* AIR 1962 Pat 308 (FB).

Where money was borrowed by the father for assisting in the prosecution of a person accused of the murder of a member of the family, it was held that the debt, though not one for a legal necessity, was not illegal or immoral.[82] Where the father executed a mortgage of the ancestral properties and a major portion of the amount borrowed was spent in defending a criminal charge against him, it was held that the debt was binding on the son.[83]

Where the father has taken a lease for a term, but continued in possession after the expiry of the term, the sons are liable for the mesne profits, as the possession is not necessarily immoral.[84]

Commercial Debt

The text of Gautama, Chapter XII, s 41, to the effect that the sons are not liable for their father's commercial debts, has long become obsolete, and sons are now liable for simple money debts incurred by the father in the course of business, even though started by the father himself.[85] A debt incurred by the father in connection with buying and selling of shares, which resulted in loss, is not an immoral debt.[86] If a money decree is passed against the father alone for such debt, the sons cannot resist in execution.[87] Such debts, though speculative, are good as antecedent debts to support a further mortgage,[88] as they are not repugnant to good morals.[89]

Income-tax

Income Tax due from a father cannot be regarded as *avyavaharika* debt on the ground that the assessment was made on the basis of concealment of true income by the father.[90]

82 *Marudhappan v Niraikulathan* (1937) Mad 943, 169 IC 292, AIR 1937 Mad 434.
83 *Ananga Bhushan v Uchhab Sahu* AIR 1955 Ori 179.
84 *Pashupat Pratap Singh v Lalat Bahadur Singh* (1945) All 5.
85 See § 240. *Achutaramayya v Ramajee* (1926) 49 Mad 211, 92 IC 977, AIR 1926 Mad 323 (hardware trade); *Annabhat v Shivappa* (1928) 52 Bom 376, 110 IC 269, AIR 1928 Bom 232; *Venkateshwara Rao v Amunayya* AIR 1939 Mad 561.
86 *Gulalchand v Vadilal* AIR 1950 Kutch 78.
87 *Chotkao Singh v Hasan* (1930) 5 Luck 184, 119 IC 458, AIR 1929 Ori 458; *Pirthi Singh v Mam Chand* (1935) 16 Lah 1077, 156 IC 539, AIR 1935 Lah 761.
88 *Khem Chand v Narain Das* (1925) 6 Lah 493, 498, 89 IC 1022, AIR 1926 Lah 41; *Venkatasami v Palaniappa* (1929) 52 Mad 227, 117 IC 716, AIR 1929 Mad 153.
89 *Chotkao Singh v Hasan* (1930) 5 Luck 184, 119 IC 458, AIR 1929 Ori 458; *Kalwa Devadattam v Union of India* AIR 1958 AP 131.
90 *Radhakrishnam v Union of India* AIR 1959 Mad 71, (1959) Mad 181; Also see *JD Rao v ITO* AIR 1970 AP 426, FB (arrears of income tax in respect of separate business prior to partition).

§ 299. TIME-BARRED DEBT

The Hindu law does not recognise any rule of limitation for the recovery of debts. A Hindu, therefore, is bound according to that law to pay a debt owing by him, though it is barred by the statute of limitations; if he dies without paying the debt, his sons are under a moral and religious obligation to discharge the debt. However, a Hindu is not bound since the enactment of the Indian Limitation Act 1963, and the Acts which preceded it, to pay a time-barred debt, and it has accordingly been held that if the debt was barred against the father, the sons are no longer under a pious obligation to pay such debt.[91]

However, a Hindu father may, like any other debtor, pass a promissory note for a time-barred debt. Such a note constitutes a binding contract, having regard to the provisions of s 25(3) of the Indian Contract Act 1872, and it may be enforced against him, and after his death, against the sons. The sons, however, are liable only to the extent of the estate, whether ancestral or self-acquired, which has come to their hands on the father's death.[92] The liability in such a case does not rest upon any obligation, moral or religious, on the general principle of the Anglo-Indian law. Even if the sons themselves execute a promissory note for a time-barred debt of their father after the father's death, the note is available only against the ancestral or self-acquired property, which has come to their hands. There is nothing in s 25(3) of the Contract Act to render them personally liable on such a note.[93]

A time-barred debt, under the Hindu law, is not *avyavaharika*, ie, it is not immoral. It has accordingly been held that when the father alienates joint family property in consideration of a debt that is barred by the law of limitation, the alienation is binding on the sons.[94]

§ 300. DEBT CONTRACTED BY FATHER DURING MINORITY OR OTHER DISABILITY

A promissory note passed by the father for a debt contracted by him during his minority or while he was a ward of the Court of Wards is

91 *Subramania v Gopal* (1910) 33 Mad 308, 7 IC 898; *Gajadhar v Jagannath* (1924) 46 All 775, 728, 80 IC 684, AIR 1924 All 551, FB; *Achutanand v Surapnaram* (1926) 5 Pat 746, 753–54, 931 IC 991, AIR 1926 Pat 427. Reference may also be made to *Venabhatuni Kesharanarayana v Lakshmanadhani* AIR 1984 AP 45

92 *Narayanasami v Samidas* (1883) 6 Mad 293; *Ram Kishan v Chhedi Rai* (1922) 44 All 628, 68 IC 235, AIR 1922 All 402

93 *Asa Ram v Karam Singh* (1929) 51 All 983, 119 IC 109, AIR 1929 All 586

94 *Gajadhar v Jagannath* (1924) 46 All 775, 80 IC 684, AIR 1924 All 551, FB; *Jagdambika v Kali* (1930) 9 Pat 843, 129 IC 130, AIR 1931 Pat 40; *Parmanand Misir v Gur Prasad* (1936) 11 Luck 393, 157 IC 567, AIR 1935 Ori 500.

void,[95] and the son is under no pious obligation to pay it. The pious obligation, however, arises if the note is renewed by the father after attaining majority.[96]

§ 301. SUMMARY OF THE CHAPTER

(1) The separate property of a Hindu is liable for the payment of his debts in his lifetime as well as after his death (§ 288).

(2) The undivided interest of a coparcener in coparcenary property is always liable for the payment of his debts in his lifetime (§ 289).

(3) Sons, grandsons and great-grandsons are liable to pay the debts of their ancestor if they have not been incurred for an immoral or unlawful purpose. Their liability, however, is confined to their interest in the coparcenary property; it is not a personal liability so that a creditor of the ancestor cannot proceed against the person or against the separate property of the sons, grandsons or great-grandsons (also, see § 290 (2)).

(4) As sons, grandsons and great-grandsons are liable to pay the lawful debts of their ancestor to the extent of their interest in the coparcenary property, a creditor of the ancestor is entitled to attach and sell not only the interest of the ancestor, but also the interest of the sons, grandsons and great-grandsons in the joint family property in execution of a decree obtained by him against the ancestor alone (also see § 290 (2)).

(5) As sons, grandsons and great-grandsons are liable to pay the lawful debts of their ancestor to the extent of their interest in the coparcenary property, the ancestor can sell or mortgage not only his own interest, but the interest of the sons, grandsons and great-grandsons in the joint family property, to pay an antecedent debt of his own.

(6) The undivided interest of a coparcener in coparcenary property is not liable for payment of his debts after his death, if it has devolved by survivorship only upon collateral members of the coparcenary reference may be made to § 289 (3).

95 *Baldeo v Bindeshri* (1922) 44 All 388, 66 IC 128, AIR 1922 All 215.
96 *Ram Rattan v Basant Rai* (1921) 2 Lah 236, 64 IC 121, AIR 1921 Lah 205.

XV

DEBTS—DAYABHAGA LAW



Note.—As under the Mitakshara law, so under the Dayabhaga law, a debt may be contracted by a Hindu for purposes of the joint family or for his own private purposes. Debts contracted for joint family purposes have been dealt with in §§ 234, 240 and 244. The rules laid down in those paragraphs apply to cases both under the Mitakshara and the Dayabhaga law. The present chapter deals with the Dayabhaga law of debts contracted by a Hindu for his own private purposes. The Dayabhaga law of debts is very simple, for no question can arise under that law as to the special liability of sons and grandsons as it does under the Mitakshara law. The reason is that under the Dayabhaga law sons do not acquire by birth any interest in ancestral property as they do under the Mitakshara law (§§ 273–74). And, further, each coparcener under the Dayabhaga law takes a defined share in the coparcenary property, which he can deal with at his pleasure and which on his death, passes to his heirs and not to the surviving coparceners (§§ 279–82).

§ 302. DEBTS—BENGAL SCHOOL

(1) As under the Mitakshara law, so under the Dayabhaga law, the separate property of a Hindu is liable for the payment of his debts in his lifetime as well as after his death.

(2) As each coparcener under the Dayabhaga law takes a defined interest in the coparcenary property, which on his death passes not by survivorship to his coparceners, but, to his heirs by succession, such interest is liable for the payment of his debts not only in his lifetime but, also after his death, as assets in the hands of his heirs.

(3) Since sons, grandsons and great-grandsons do not under the Dayabhaga law acquire any interest by birth in ancestral property, the father can sell or mortgage the whole of the ancestral property in his hands for the payment of his debts, whatever may be the character of the debts.

On the death of a Hindu governed by Dayabhaga law, his separate property as well as his undivided interest in coparcenary property passes to his heirs and they become assets of the deceased in their hands. Therefore, if he dies leaving debts, the heirs are bound to pay the debts not only out of the separate property left by the deceased, but also out of his undivided interest in the coparcenary property. The heirs, however, are not personally liable for the debts of the deceased, not even if they be the sons, grandsons or great-grandsons of the deceased.[1]

1 Compare with § 288. *Abdul Rahman v Gajendra Lal* (1938) 1 Cal 132.

XVI

PARTITION AND REUNION—MITAKSHARA LAW

Note.—The rules relating to joint family and partition form part of the same branch of law. The Hindu Woman's Rights to Property Act 1937, in its consequence touched many branches of Hindu law, such as joint family and partition, maintenance, etc, and illustrated how piecemeal legislation can result in anomalies and unexpected situations. The general effect of that enactment in case of death of a coparcener in the joint family governed by Mitakshara law has been pointed out under § 35. 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. Speaking generally, it does not interfere with the special rights of those who are members of a Mitakshara coparcenary, however, it is important to note that s 6 of that enactment recognises the rights upon the death of a 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 and the principle of devolution as also the rules of partition considered in this chapter are affected to that extent. Certain provisions of the Hindu Adoption and Maintenance Act 1956, also have bearing on the rules relating to partition, and are discussed in this chapter. Reference may be made to that Act and s 6 of the Hindu Succession Act 1956, and notes thereunder for the changes brought about in the rules relating to partition by the new legislation. Reference may also be made to Notes under 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. This chapter has been discussed under the following heads:

I What property is divisible on partition—§§ 303–05.
II Persons entitled to a share on partition—§§ 306–18.

III Restraint against partition—§§ 319–20.
IV Allotment of shares—§ 321.
V Partition how effected—§§ 322–35.
VI Re-opening of partition—§§ 336–39.
VII Effect of partition—§§ 340–41.
VIII Reunion—§§ 342–44.
IX Partition created by so-called will—§ 345.

I. What Property is Divisible on Partition

§ 303. SUBJECT OF PARTITION

The only property that can be divided on a partition is coparcenary property (§ 221). Separate property cannot be the subject of partition (§ 222), nor can property, which by custom, descends to one member of the family to the exclusion of other members, eg, a *raj* or principality.[1]

Property Indivisible from its Nature

Where property is in its nature indivisible, as for instance, in the case of animals, furniture, etc, it may be sold and its value distributed; or it may be valued and retained by one coparcener exclusively and the amount credited to his share. In the case of a will, it may be enjoyed by the coparceners in turn or jointly.[2] Where a strip of land is reserved as a common passage by a decree in a suit for partition for the use of the coparceners, none of them is entitled to a partition of that strip.[3] Where a stockbroker's card is issued by the Stock Brokers' Association in the name of a coparcener, he must account for its value at the time of the partition.[4]

Idols and Places of Worship

Family idols and places of worship are not divisible (Manu, Chapter IX, verse 219). They may be held by the members in turns, or the court may direct possession to be given to the senior member with liberty to the other members to have access to them for the purpose of worship.[5] A

1 *Ramalakshmi v Sivamantha* (1872) 14 MIA 570; *Chindtamun v Nowlukho* (1876) 1 Cal 153, 2 IA 263; *Adrishappa v Gurushidappa* (1880) 4 Bom 494, 7 IA 162; *Kachi Kalitana v Kachi Yuva* (1905) 28 Mad 508, 32 IA 261; *Bodhrao v Nursing Rao* (1856) 6 MIA 426.

2 *Govind v Trimbak* (1912) 36 Bom 275, 6 IC 521.

3 *Shantaram v Waman* (1922) 47 Bom 389, 68 IC 682, AIR 1923 Bom 85. *Dina Nath v Mansa Ram* AIR 1973 P&H 253.

4 *Champaklal Chimanlal v Sodager Amubhai* (1944) Bom 619.

5 *Damodardas v Uttamram* (1893) 17 Bom 271; *Mitta Kunth v Neerunjun* (1874) 14 Beng LR 166; *Pramatha Nath v Pradyumna Kumar* (1925) 52 IA 245, 260, 52 Cal 809, 826, 87 IC 305, AIR 1925 PC 139.

thakurbari is not divisible.[6] Nor can a book keeping the record of *yajamans* be treated as divisible property, since neither *yajmans* nor a record of such *Yajmans* can be treated as property.[7] The High Court of Calcutta has held that in the absence of any dedication of a building for the worship of the family idol, the building should not be excluded from partition, merely because it is used for the worship of the idol. The court may, however, in such a case give an option to a coparcener or coparceners willing to maintain the building as a place of worship to buy it at a valuation.[8]

Right of Way

A right of way will be presumed to have remained joint, if there is no evidence that it was allotted to a particular member at the time of partition.[9]

Share Allotted on Partition

Where a coparcener, who is joint with his male issue, separates from his father, brothers, or other coparceners, the property allotted to him at the partition is separate property as regards the divided members, but ancestral as regards his male issue (§ 223, sub-§ (4)). Such property is, therefore, divisible as between him and his male issue, but the members, who have already separated, are not entitled to a share in it. If he dies without leaving a male issue, it will descend to his heirs.[10]

Mode of Allotment

The principle of partition is that if property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made. If, on the contrary, no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share which would fall to a coparcener by partition.[11]

§ 304. PROPERTY AVAILABLE FOR PARTITION

(1) In order to determine what property is available for partition, provision must first be made for joint family debts, which are payable out of the

6 *Madanmohan v Shaha* (1930) 57 Cal 570, 124 IC 327, AIR 1930 Cal 173; *Dukhi Dibya v Landi Dibya* AIR 1978 Ori 182.

7 *Heir of Barot Dansang Hirji v Barot Kanji Hirji* AIR 1999 Guj 27.

8 *Sachindra v Hem Chandra* (1931) 35 CWN 151, 132 IC 688, AIR 1931 Cal 573; *Rajcoomaree v Gopal* (1878) 3 Cal 514.

9 *Nathubhai v Bai Hansgavri* (1912) 36 Bom 379, 15 IC 818; *Dina Nath v Mansa Ram* AIR 1973 P&H 253.

10 *Kantama Natchiar v The Rajah of Shivaguna* (1863) 9 MIA 539, 543; *Sivagnana v Periasami* (1878) I Mad 312, 5 IA 61.

11 *Ashanullah v Kali* (1884) 10 Cal 675.

joint family property, personal debts of the father not tainted with immorality,[12] maintenance of dependent female members and of disqualified heirs, and for the marriage expenses of unmarried daughters.[13] Where a partition takes place between the sons, provision must also be made for the funeral ceremonies of the widow[14] and mother of the last male holder.[15] After this is done, an account must be taken of the joint family property in the hands of the manager and other members of the family, according to the rule laid down in the next following section (also see the note at the beginning of this chapter).

(2) *Marriage expenses, etc, in a suit for partition.*—As to the marriage expenses of male members of the family, it has been held by the Judicial Committee[16] that since the institution of a suit for partition by a member of a joint family effects a severance of the joint status of the family, a male member of the family, who is then unmarried, is not entitled to have a provision made on partition for his marriage expenses, although, he marries before the decree in the suit is made.

The case, however, of an unmarried daughter stands on a different footing. Her right to maintenance and marriage expenses out of the joint family property is in lieu of a share on partition; provision should accordingly be made for her marriage expenses in the decree.[17]

It is only for the marriage expenses of the father's daughters or sisters that provision should be made out of the joint family property. The marriage expenses of the son's daughters form only the liability of his branch and not of the whole joint family, unlike the case of the father's daughters.[18] Her marriage expenses should come out of her father's share. The same rule applies to the expenses of betrothal ceremonies of daughters. As regards the expenses of the thread ceremony of the members of the family, it has been held that provision should be made for them on partition.[19] (As to marriage expenses while the family is joint, see § 440. Also see the note at the beginning of this chapter).

12 *Venkareddi v Venku Reddi* (1927) 50 Mad 535, 100 IC 1018, AIR 1927 Mad 471; *Re Official Assignee v Venkayya* AIR 1965 Mad 60; *M Shanmugha Udayar v Sivanandam* AIR 1994 Mad 123.

13 *Strange's Hindu Law*, Vol II, p 313. *Mst Bholi Bai v Dwarka Das* (1924) 5 Lah 375, 84 IC 168, AIR 1925 Lah 32; *Vaikuntan v Kallapiran* (1900) 23 Mad 512.

14 *Vaidyanatha v Aiyasamy* (1909) 32 Mad 191, 200, 1 IC 408.

15 *Nand Rani v Krishna Sahai* (1935) 57 All 997, 156 IC 23, AIR 1935 All 698.

16 *Ramalinga v Narayana* (1922) 49 IA 168, 45 Mad 489, 68 IC 451, AIR 1922 PC 201, *Mst Bholi Bai v Dwarka Das* (1924) 5 Lah 375, 84 IC 168, AIR 1925 Lah 32, *Venkatarayudu v Sivaramakrishnayya* (1935) 58 Mad 126, 153 IC 368, AIR 1934 Mad 676.

17 *Rajagopala v Venkataraman* 51 CWN 829 (PC).

18 *Ramchandra v Seeniathal* (1955) Mad 732, AIR 1954 Mad 1011; *Subbayya v Ananta* (1930) 53 Mad 84, 121 IC 113, AIR 1929 Mad 586; *Sankaranarayanan v Official Receiver* AIR 1977 Mad 171.

19 *Jairam v Nathu* (1906) 31 Bom 54.

(3) It is settled law that it is only after provision is made for all these expenses, that what is described as 'taking of accounts' can take place. This expression is apt to be somewhat misleading, because as a general rule (apart from exceptions noted in the next section and § 238), this taking of accounts is not more than an inquiry into the extent of the property as it existed when partition was demanded.

Funeral Ceremonies of Mother

Under Hindu law, the sons are bound to perform at their expense, the funeral ceremonies of their widowed mother, even if she leaves *stridhana* and the *stridhana* descends to her daughters.[20] If no provision is made for expenses of such ceremonies on a partition between the sons, then if one of the sons performs the ceremonies at his own expense, he is entitled to a contribution from his brothers.[21]

Adverse Possession

It has been held by the High Court of Madras,[22] dissenting from the High Court of Bombay,[23] that possession, though exclusive, of a coparcener of a portion of the joint property for upwards of 12 years, is not adverse against the other coparceners, if all the coparceners are in joint possession of the rest of the joint property. The other coparceners are therefore entitled to partition also of that portion of the property (as to exclusion from joint family, see § 235 (3a)).

Maintenance and Marriage Expenses

Where a coparcener spends his own money for the maintenance of those persons whom the late proprietor was bound to maintain, eg, his widow and daughters, and for the marriage expenses of the late owner's daughter, he is entitled to payment on partition of the amount so spent by him.[24]

§ 305. MODE OF TAKING ACCOUNTS

(1) No coparcener is entitled to call upon the manager to account for his past dealings with the joint family property, unless he establishes fraud, misappropriation or improper conversion (§ 238).

20 *Vrijbhukandas v Bai Parvati* (1908) 32 Bom 26.

21 *Vaidyanatha v Aiyasama* (1909) 32 Mad 191, 200 IC 408. See ss 69–70, Contract Act.

22 *Kamarappa v Saminatha* (1919) 42 Mad 431, 52 IC 470, AIR 1919 Mad 531. Reference may also be made to *Lakshmi Reddi v Lakshmi Reddy* AIR 1957 SC 314; *Bujahwan Singh v Shyamal Devi* AIR 1964 Pat 301; *Om Prakash v Bhagwan* AIR 1974 All 389; *Shambhu Prasad v Phool Kumari* AIR 1971 SC 1337, 1345; *Shivsaran Singh Thakur v Ram Sarup Thakur* AIR 1990 HP 1.

23 *Vishnu v Ganesh* (1897) 21 Bom 325.

24 *Mst Bholi Bai v Dwarka Das* (1924) 5 Lah 375, 84 IC 168, AIR 1925 Lah 32; *Rajagopalan v Venkatarama* 51 CWN 829 (PC).

(2) No charge is to be made against any coparcener because a large share of the joint income was spent on his family in consequence of his having a larger family to support.[25] Similarly, no credit to be given to any coparcener, because a smaller share of the income was spent on him and his family.

It was held by the Nagpur High Court, that an agreement which provides that certain items of expenditure were to be treated as individual and not joint, to be debited at the time of partition to the individual coparcener, is not repugnant to Hindu law.[26]

(3) A coparcener, who is entirely excluded from the enjoyment of the family property, is entitled to an account of the income derived from the family property, and to have his share of the income ascertained and paid to him, in other words, he is entitled to what are called mesne profits.[27]

Mesne profits may also be allowed on partition where the family property or any part thereof has been held by a coparcener, who claims it as his exclusive property,[28] or where an arrangement has been made between the coparceners to enjoy the family property in specific and distinct shares, and the enjoyment of those shares is disturbed.[29] Except in cases of this character, mesne profits are not recoverable in a suit for partition, and the partition must be made of property as it exists at the time when partition was demanded.[30]

The above rule does not mean that the parties are bound to accept the statement of the *karta* as to what the family properties are. An inquiry on their behalf, would be directed by the court in a manner usually adopted in such cases. In what manner this inquiry should be held, would depend on the facts and circumstances of the case.[31]

One member is in general entitled on partition to interest on money collected, but not invested by another. Where one member had to pay more income tax than was really due on behalf of the family by reason of his negligence, he is not entitled to a credit for the excess amount.[32]

25 *Abhaychandra v Pyari Mohan* (1870) 5 Beng LR 347, 349.

26 *Shridhar v Martand* (1954) Nag 479, AIR 1954 Nag 361.

27 *Krishna v Subbanna* (1884) 7 Mad 564; *Venkata v Narayya* (1879) 2 Mad 128, 136–37, 7 IA 38, 51; *Venkata v The Court of Wards* (1882) 5 Mad 236, 9 IA 125. See s 2(12) and O 20, r 12, Code of Civil Procedure.

28 *Bhivrav v Sitaram* (1895) 19 Bom 532.

29 *Shankar v Hardeo* (1889) 16 Cal 397, 16 IA 71.

30 *Pirthi Pal v Jowahir Singh* (1887) 14 Cal 493; 14 IA 37; *Lakshman v Ramchandra* (1876) 1 Bom 561; *Konerrav v Gurrav* (1881) 5 Bom 589; *Jugmohandas v Mangaldas* (1886) 10 Bom 528, 561; *Narayan v Nathaji* (1904) 28 Bom 201, 208; *Parmeshwar v Gobind* (1916) 43 Cal 459, 33 IC 190, AIR 1916 Cal 500, *Tammireddi v Gangireddi* (1922) 45 Mad 281, 70 IC 337, AIR 1922 Mad 236; *Laxman v Bayabai* (1955) ILR Nag 656, AIR 1956 Nag 241.

31 *Narayanswami v Ramkrishna* AIR 1965 SC 289.

32 *Yasobadra Nainar v Somanthabadram* (1936) 59 Mad 154, 160 IC 602, AIR 1936 Mad 12.

Money laid out by one member of the family upon the improvement or repair of the property, or for any other objects of common benefit, would constitute a debt to him from the rest of the family, only if the money which he had expended were advanced out of his separate property, without an intention of making a present of it to the family. He would then be entitled to reimbursement for his outlay as well on partition as before it,[33] provided such claim is not barred by limitation.[34]

Interest on Mesne Profits

As to interest on mesne profits, see *Ramasamy v Subramania*.[35]

II. Persons Entitled To A Share On Partition

§ 306. PERSONS ENTITLED TO A SHARE

Every coparcener is entitled to a share upon partition.[36] However, every coparcener has not an unqualified right to enforce or sue for a partition (see §§ 307–308).

Also see Hindu Women's Rights to Property Act 1937, § 35, for the rights of a widow, a predeceased son's widow and the widow of a predeceased son of a coparcener. Reference may also be made to s 6 of Hindu Succession Act 1956, and notes thereunder. The rules stated in §§ 307–18, must now be read in the context of s 6 of the Hindu Succession Act 1956, and particularly the proviso to that section.

§ 307. SONS, GRANDSONS AND GREAT-GRANDSONS

Every adult coparcener is entitled to demand and sue for partition of the coparcenary property at any time. In Bombay, it has been held that without the assent of his father, a son is not entitled to a partition, if the father is joint with his own father, brothers or other coparceners, though he may enforce a partition against the father, if the father is separate from them.[37] The other High Courts do not recognise any such exception.[38]

33 *Mayne*, 11th edn, p 517.

34 *Subramanian v Kumarappa* AIR 1955 Mad 114, (1955) 1 MLJ 355.

35 *Ramasamy v Subramania* (1923) 46 Mad 47, 74 IC 804, AIR 1923 Mad 147.

36 *Sartaj Kuari v Deoraj Kuari* (1888) 10 All 272, 287, 15 IA 51, 64.

37 *Apaji v Ramchandra* (1812) 16 Bom 29 (Telang J dissenting); *Rai Bishen Chand v Amaida Koer* (1884) 6 All 560, 11 IA 164, 179; *Jivabhai v Vadilal* (1905) 7 Bom LR 232 (a case under the Mayukha); *Aber Hamiry v Aber Duda* AIR 1978 Guj 10; contra *Narayan v Arjun* AIR 1986 Bom 122. In Bombay, *Apaji*'s case has been accepted as good law for over 70 years. It does not seem to have been overruled by the Supreme Court.

38 *Jogul Kishore v Shib Sahai* (1883) 5 All 430 (FB) (Stuart CJ dissenting); *Rameshwar-*

continued on the next page

It has been held in *Aber Hamir v Aber Duda*,[39] decided under the Mayukha, Sub-School of Mitakshara, that assent of the father is not necessary to a suit, against the grandfather and his collaterals, for partition by metes and bounds, where there had already been severance of status.[40]

Son Born of a Marriage Void or Voidable Under the Hindu Marriage Act 1955

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 Hindu coparcenary of a son 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.

Illustrations

(a) If a joint family consists of a father and sons, the sons can enforce a partition of the joint family property against the father.[41] Similarly, if a joint family consists of a grandfather and grandsons, the grandsons can enforce a partition against the grandfather.[42] Likewise, if a joint family consists of a great-grandfather and great-grandsons, the great-grandsons can enforce a partition against the great-grandfather.[43] Thus, so far, there is no difference of opinion between the various High Courts.

(b) A joint Hindu family consists of *A*, *B* and *C*, *A* being *C*'s grandfather, and *B* being *C*'s father. *C* sues *A* and *B* for a partition of the joint family property. Is *C* entitled to a partition? According to the Bombay High Court, he is not, unless his father *B* consents to the partition. In the view taken by that court, the father obstructs the son's right to a partition. According to the other High Courts, *C*, taking as he does a vested interest in the ancestral property by birth, can compel a partition even during the lifetime of his father *B*.

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v Lachmi (1904) 31 Cal 111, 128–29; *Subba v Ganasa* (1895) 18 Mad 179, 183; *Digambar v Dhanraj* (1922) 1 Pat 361, 67 IC 156, AIR 1922 Pat 96; *D Tukiya v Shirgya* AIR 1973 Mys 4. It is now settled law that in Delhi, a son can ask for partition from the father.

39 AIR 1978 Guj 10; *Jaswantlal v Nichabhai* AIR 1964 Guj 283.

40 *Nanak Chand v Chander Kishore* AIR 1982 Del 520 (it had been earlier held that in Delhi, like in Punjab, a son cannot do so).

41 *Suraj Bunsi Koer v Sheo Persad* (1880) 5 Cal 148, 165, 6 IA 88, 100; *Jugmohandas v Mangaldas* (1886) 10 Bom 528; *Kali Parshad v Ram Charan* (1876) 1 All 159 (FB).

42 *Nagalinga v Subbiramantya* (1862) 1 Mad HC 77; *Laljeet v Rajcoomar* (1874) 12 Beng LR 373.

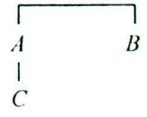
43 *West and Buhler's Digest*, fourth edn, p 622.

Table XVI.1



(c) A joint family consists of *A*, *B* and *C*, *A* being *C*'s father and *B* being *C*'s uncle. *C* sues *A* and *B* for partition. Is *C* entitled to a partition? According to the Bombay High Court, he is not, unless his father (*A*) consents to a partition. According to the other High Courts, he is.

Table XVI.2



The conflict of decisions referred to above has arisen from different readings of the same text of Mitakshara (see Mitakshara, Chapter I, s 5, verse 3).

In *Sartaj v Deoraj*,[44] their Lordships of the Privy Council said:

> The property in the paternal or ancestral estate acquired by birth under Mitakshara law is, in their Lordships' opinion, so connected with the right to a partition, that it does not exist where there is no right to it.

Persons Entitled to a Share on Partition in Punjab

See *Hari Kishan v Chandu Lal*.[45]

§ 308. MINOR COPARCENERS

(1) Where a suit is brought on behalf of a minor coparcener for partition, the court should not pass a decree for partition, unless the partition is

44 (1888) 10 All 272, 287, 15 IA 51, 64.

45 (1917) Punj Rec No 105, p 408, AIR 1918 Lah 291 (FB).

likely to be for the benefit of the minor by advancing his interests or protecting them from danger.[46]

In *Pedasubbayya v Akkamma*,[47] the Supreme Court pointed out that it is in the exercise of its jurisdiction over minors, that the court requires to be satisfied that the next friend of a minor has, in instituting a suit for partition, acted in his interest. It has also been pointed out that what brings about the severance in status is the institution of the suit by the next friend, the decree of the court merely rendering it effective by deciding that what the next friend had done was for the benefit of the minor. In a later case, the Supreme Court has reiterated that view.[48]

Where an adult coparcener in possession of the family property is wasting the property, or sets up an exclusive title in himself, or otherwise, denies the minor's rights, or declines to provide for the minor's maintenance, it is in the minor's interest that the family property should be partitioned, and the minor's share set apart and secured for him. However, if there be nothing to show that the partition would be for the benefit of the minor, the court should refuse to direct partition.[49]

The reason is that generally speaking, 'the family estate is better managed and yields a greater ratio of profit in union than when split up and distributed among the several coparceners'; moreover, the minor would as the result of a partition, loose the benefit of survivorship, which he might obtain if the family continued joint.[50] The Privy Council has held that the fact that there had been increased estrangement between the father and the two minor sons by his first wife, on whose behalf a suit for partition was brought, and the fact that two sons were born to the second wife of the father, were not good grounds for holding that the suit for partition was in the interests of the minor.[51]

(2) However, though a suit cannot be brought for partition on behalf of a minor except in the cases mentioned above, the minority of a coparcener is no bar to a partition between the coparceners. A partition by agreement, though entered into during the minority of a coparcener, is binding on the minor, unless it is unfair or prejudicial to his interests.

46 *Mahadev v Lakshman* (1895) 19 Bom 99 (maintenance refused); *Bholanath v Ghasi Ram* (1907) 29 All 373 (suit against father); *Thangam v Suppa* (1889) 12 Mad 401; *Kamakshi v Chindambara* (1866) 3 Mad HC 94; *Damodar v Senabutty* (1882) 8 Cal 537; *Naggappa v Subramanian* (1946) Mad 103; *Chinna Venkata v Venkata Rama* AIR 1957 AP 93.

47 AIR 1958 SC 1042.

48 *Venkata Reddi v Lakshmama* AIR 1963 SC 1601, (1964) 1 SCJ 45, *Nabisha Begum v Alumiya Thaver* AIR 1966 Mad 111.

49 *Bachoo v Mankorebai* (1905) 29 Bom 51–60; affirmed on appeal (1907) 31 Bom 373, 379, 34 IA 107 (suit by a posthumous son against an adopted son—partition refused); *C Sriramamurthi v Official Receiver* AIR 1957 AP 692.

50 Supra (1866) 3 Mad HC 94, 96, 98.

51 *Appalaswami v Suryanarayana Murti* (1948) Mad 440 (PC).

If the partition is unfair or prejudicial to the minor's interests, the minor may, on attaining majority, have it set aside by proper proceedings, so far as he is concerned. He may also, on attaining majority, enforce the agreement by suit, and it is no answer to the suit that he was not a party to the agreement.[52] Where the family consists of an adult and a minor, the adult coparcener can put an end to the joint status by his conduct and declaration.[53]

Reopening of Partition at the Instance of a Minor

See §§ 339A and 309.

Institution of a Suit for Partition by Minor, Whether Operates as a Partition

See § 325(1)(ii). As to minor attaining majority pending such suit, see the undermentioned cases.[54]

Marumakkathyam Tarwad

See the undermentioned decisions.[55]

§ 309. SON BEGOTTEN AT THE TIME OF PARTITION, BUT BORN AFTER PARTITION

A son, who was in his mother's womb at the time of partition, is entitled to a share, though born after partition, as if he was in existence at the time of partition. If no share is reserved for him at the time of partition, he is entitled to have the partition re-opened and share allotted to him.[56]

52 *Balkrishen Das v Ram Narain* (1903) 30 Cal 738, 30 IA 139 (agreement held to be fair); *Chanvirappa v Danava* (1895) 19 Bom 593 (ditto); *Awadh v Sita Ram* (1907) 29 All 37 (agreement enforced on a suit of a minor); *Lal Bahadur v Sispal* (1892) 14 All 498 (where the full share of the minor was not assigned to him); *Krishna Bai v Khangowda* (1894) 18 Bom 197 (where no share was reserved for the minor at all); *Hiralal v Fulchand* AIR 1956 Sau 89; *Chanam v Narayan* AIR 1957 Hyd 29; *Raghunath Tiwary v Ramkant Tiwary* AIR 1991 Pat 145 (minority of a coparcener is not a bar for execution of partition).

53 *Dnyaneshwar Vishnu v Anant Vasudeo* (1936) 60 Bom 736, 38 Bom LR 579, 164 Bom HC 632, AIR 1936 Bom 290; *Mogalappa v Vithoba* AIR 1955 Hyd 21 (FB) (all members were minors).

54 *Rukhmabai v Ramratan* (1951) ILR Nag 367, AIR 1951 Nag 350; *Rama Rao v Venkata* AIR 1937 Mad 274, 276.

55 *PTV Cherudevi v PTV Tarurad Kamavan* AIR 1917 Mad 845, 846; *Kunjumangali v Krishnan* AIR 1975 Ker 112.

56 *Yekeyamian v Agniswarian* (1870) 4 Mad HC 307; *Kalidas v Krishan* (1869) 2 Beng LR 103, 118–21 (FB); *Hanmant v Bhimachaya* (1888) 12 Bom 105, 108–109; *Mandliprasad v Ramcharanlal* (1947) ILR Nag 848; *Jagat Krishna v Ajit Kumar* AIR 1964 Ori 75.

Illustrations

(a) *A* and his two sons *B* and *C* are members of a joint Hindu family. The father and sons propose to divide the joint family property. *A*'s wife, *Z*, is pregnant at the time, and the pregnancy is known to the family. In such a case, the property should be divided into five parts of which *A*, *B*, *C* and *X* will each take one part, and the fifth part should be set apart to abide the event, so that if a son is born, it may be allotted to him, and if a daughter is born, it may be divided again between *A*, *B*, *C* and *X*.

(b) *A* and his son *B* are members of a joint family. The father and son divide the joint property between themselves, each taking one-half. Five months after the partition, a son *C* is born to *A*. The partition should be re-opened and the property should be divided into three parts, each member taking one-third.

§ 310. SON BEGOTTEN AS WELL AS BORN AFTER PARTITION

A father separating from his sons, may or may not reserve to himself, a share on partition. The rights of a son born as well as begotten after partition are different, depending upon whether the father has or has not reserved a share to himself.

(1) Where the father has reserved a share to himself, a son who is begotten as well as born after partition, is not entitled to have the partition reopened; but in lieu thereof he is entitled, after the father's death, to inherit not only the share allotted to the father on partition, but the whole of the separate property of the father, whether acquired by him before or after partition, to the entire exclusion of the separated sons.[57]

Thus, if *A* has three sons *B*, *C* and *D* and he separates from them all, reserving one-fourth share to himself, and a son *F* is born to *A* three years after the partition, *F* will take on *A*'s death, the one-fourth share allotted to *A* at the partition and also the whole of *A*'s separate property to the entire exclusion of *B*, *C* and *D*. If *A* has dissipated his share, and leaves no property, *F* takes nothing.[58] Next, suppose, that *A* does not separate from all the three sons, but separates from *B* alone and remains joint with *C* and *D*, and *F* is subsequently born to *A*. In this case *C*, *D* and *F* will, on *A*'s death, all take in equal shares of the portion of the

57 *Kalidas v Krishan* (1869) 2 Beng LR, 103, 118–21 (FB); *Nawal Singh v Bhagwan Singh* (1882) 4 All 427.

58 *Shivajirao v Vasantrao* (1909) 13 Bom 267, 272, 2 IC 294; *Anjaneyulu v Ramayya* AIR 1965 AP 177 (FB).

joint property allotted to *A*, *C* and *D* at the partition, and also *A*'s separate property, ie, the separate property of *A* and the portion of the joint family property allotted to *A*, *C* and *D* at the partition will be divided equally among *C*, *D* and the after-born son *F*.[59] The same principle applies if *A* separates from *B* and *C*, and remains joint with *D*, and *F* is subsequently born to *A*.

Now see s 8 of the Hindu Succession Act 1956. Section 8 has now abolished the distinction between a divided son and an undivided son in the matter of inheritance of the father's separate property (see commentary on s 8 of the Hindu Succession Act).

The rule of Hindu law, that where upon a partition, a share has been allotted to the father, a son begotten or born afterwards is not entitled to re-open the partition, applies even when no actual division of the property has taken place and severance of joint status has been effected only by institution of a suit for partition.[60]

(2) Where the father has not reserved a share to himself on a partition with his sons, a son who is born as well as begotten after the partition is entitled to have the partition reopened and to have a share allotted to him not only in the property as it stood at the time of the original partition, but in the accumulations made with the help of that property.[61]

Where at a partition between a father and his son by the first wife and two sons by the second wife, a small item was allowed to the father for maintenance, with a clause that an after-born son should be provided out of the share allotted to his mother and full brothers, it was held that the right of the after-born son to re-open the partition was not affected by the clause.[62]

§ 311. ADOPTED SON

As to the share of an adopted son in a partition:

(1) between him and after-born natural sons of his adoptive father, see § 497;

(2) between him and other coparceners, see § 499(2).

Reference may also be made to § 336 for the right of a son validly adopted by the widow of a deceased coparcener to re-open a partition.

59 *Ganpat v Gopalrao* (1899) 23 Bom 636. See this case criticised in *Ghose's Hindu Law*, Third edn, pp 572–73. *Fakirappa v Yellappa* (1898) 22 Bom 101; *Nana v Ramchandra* (1909) 32 Mad 377, 2 IC 519.

60 *Bhagwat Ram v Ramji Ram* (1947) 51 CWN 909 (PC); *Venkata Reddi v Sidda Reddi* (1947) Mad 603.

61 *Chengama v Munisami* (1897) 20 Mad 75; *Satyabadi Tripathy v Sankirtan* (1974) 40 Cut LY 568.

62 *Athilinga Gounder v Ramaswami Goundar* (1945) ILR Mad 297.

§ 312. ILLEGITIMATE SON

(1) An illegitimate son of a Hindu may be a son by a concubine, who is a *dasi*, or he may be a son by a concubine, who is not a *dasi*. A *dasi* is a concubine, who is in the exclusive and continuous keeping of a Hindu. An illegitimate son of a Hindu by a *dasi* is called *dasiputra*.[63] We are here concerned only with a *dasiputra*.

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 Hindu coparcenary of a son 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) Illegitimate sons of the three regenerate classes (§ 1) are not entitled to inheritance or to any share on partition; they are entitled to maintenance only.[64] This proposition is founded on Mitakshara, Chapter I, s 12, para 3.

(3) Illegitimate sons of Sudras are entitled to certain rights of inheritance and partition (Mitakshara, Chapter I, s 12, para 2).

A Sudra father may be joint with his collaterals or he may be separate from them. Mitakshara text refers to the estate of a separated householder.[65] The following propositions are well-established:

(A) The illegitimate son of a Sudra does not acquire by birth any interest in his father's estate. He cannot, therefore, enforce a partition against his father in his lifetime.[66] However, the father may, in his lifetime, give him a share of his property, even a share equal to that of a legitimate son.[67] The gift by the father of some property, describing it as his self-acquired property, for maintenance, does not separate the illegitimate sons in respect of the joint family property.[68]

(B) On the father's death, however, he succeeds to his estate as a coparcener with the legitimate son of his father, with a right of

63 *Rahi v Govind* (1876) 1 Bom 97, 110; *Sadu v Baiza* (1880) 4 Bom 37 (FB); *Krishnayya v Muttusami* (1884) 7 Mad 407, 412; *Brindavana v Radhamani* (1889) 12 Mad 72, 86; *Soundarajan v Arunachalam* (1916) 39 Mad 136, 33 IC 858, AIR 1916 Mad 1170; *Sarasuti v Mannu* (1879) 2 All 134; *Hargobind v Dharam Singh* (1884) 6 All 329; *Rajani Nath Das v Nitai Chandra Dey* (1921) 48 Cal 643, 63 IC 50, AIR 1921 Cal 820 (FB).

64 *Roshan Singh v Balwant Singh* (1900) 22 All 191, 27 IA 51; *Chuoturya v Sahub Purhulad* (1857) 7 MIA 18.

65 *Ranoji v Kandoji* (1885) 8 Mad 557, 561.

66 *Raja Jogendra v Nityanand* (1891) 18 Cal 151, 155, 17 IA 128; *Sadu v Baiza* (1880) 4 Bom 37, 44–45.

67 *Karuppanna v Bulokam* (1900) 23 Mad 16; *Packirisuamy v Dorasuamy* (1931) 9 Rang 266, 132 IC 817, AIR 1913 Raj 216.

68 *Sakharam Saju v Shamrao* (1932) 34 Bom LR 191, 137 IC 572, AIR 1932 Bom 234.

survivorship, and he is entitled to enforce a partition against the legitimate son.[69] In *Gur Narain Das v Gur Tahal Das*,[70] the Supreme Court held that *though* an illegitimate son of a Sudra cannot enforce partition during his father's life-time, he can enforce partition after his father's death, if the father was separate from his collaterals and has left separate property and a legitimate son. On a partition between an illegitimate and a legitimate son, the illegitimate son takes only one-half of what he would have taken if he were legitimate, ie, the illegitimate son takes one-fourth, and the legitimate son takes three-fourth.[71] If either of them dies before partition, the survivor takes the whole estate.[72]

Where a legitimate son has obtained property by way of partition of the joint family property, which he held along with his collaterals, such property would be ancestral property in his hands, obtained by virtue of the right which he possessed to represent his father. Such property would be held by him in coparcenary with his illegitimate half brother, notwithstanding the fact that the father died undivided with his brothers. A claim to a share in such property is within the ambit of the rights given to the illegitimate son under the texts.[73]

(C) If the father was joint at his death with his collaterals, eg, his brothers or their sons, or his uncles or their sons, the illegitimate son is not entitled to demand a partition of the family property, but he is entitled as a member of the joint family to maintenance out of such property, provided his father left no separate estate.[74]

§ 313. ABSENT COPARCENER

An absent coparcener stands on the same footing as a minor, and his right to receive a share extends to his descendants.[75]

The right of the descendants, however, would be subject to the law of limitation; see the Indian Limitation Act 1963, arts 65 and 110.

69 *Shamrao v Mannabai* (1948) ILR Nag 678; *Sadashiv v Bala* AIR 1972 Bom 164.

70 [1952] SCR 869, AIR 1952 SC 225.

71 *Kamulammal v Visvanathaswami* (1923) 50 IA 32, 46 Mad 167, 71 IC 643, AIR 1923 PC 8; *Uderam v Thaggu* (1949) ILR Nag 248; *Gur Narain Das v Gur Tahal Das* [1952] SCR 869, 875, AIR 1952 SC 225.

72 *Raja Jogendra v Nityanand* (1891) 18 Cal 151, 17 IA 128.

73 *Doraj Babu v Gopalakrishna* AIR 1960 Mad 501.

74 See notes to § 43, nos 1–3, 'Illegitimate sons'. *Vellaiyappa Chetty v Natarajan* (1932) 55 Mad 1, 53 IA 402, 134 IC 1084, AIR 1931 PC 294; *Ranoji v Kandoji* (1885) 8 Mad 557; *Sadu v Baiza* (1880) 12 Mad 401; *Karuppa v Kumarasami* (1902) 25 Mad 429; *Gopalasami v Arunachelam* (1904) 27 Mad 32; *Parvathi v Thirumalai* (1887) 10 Mad 334; *Krishna Kumar v Sheo Prasad* (1947) ILR Nag 162.

75 *Strange Hindu Law*, Vol I, p 206; Vol II, p 341.

§ 314. PURCHASER

A purchaser of the undivided interest of a coparcener at a sale in execution of a decree can demand partition according to all schools. A purchaser of the interest of the coparcener by private contract can claim partition in Bombay, Madras and Madhya Pradesh, but not in Bengal or Uttar Pradesh. The reason is that according to Mitakshara law as interpreted in Bengal and Uttar Pradesh, a coparcener cannot sell his interest in the coparcenary (§§ 260 and 261).

A gift or devise by a coparcener of his undivided interest is void according to Mitakshara law as applied in all the states (§ 258). Therefore, a donee or a devisee of an undivided interest cannot sue for partition.[76] However, now see s 30 of the Hindu Succession Act 1965, which permits devise of a coparcenary interest by a coparcener.

§ 315. WIFE

(1) A wife cannot herself demand a partition,[77] but if a partition does take place between her husband and his sons, she is entitled (except in Southern India) to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband.[78] Where at a partition between a father and his three sons, the wife was not allotted a share, it was held that she was entitled to reopen the partition, there being no waiver merely by her not asking for a share but that in the partition, the value of the ornaments taken by her must be taken into account.[79]

Where a son institutes a suit for the partition of joint family property impleading his mother and other members of the family as defendants, and a preliminary decree is passed, the mother does not become owner of the share allotted to her until the preliminary decree is carried out and there is a division by metes and bounds. Therefore, a mortgagee suing on a mortgage before the property is actually divided can obtain a valid mortgage decree without impleading the mother.[80] This does not mean

76 *Baba v Timma* (1884) 7 Mad 357 (FB).

77 *Punna Bibee v Radha Kissen* (1904) 31 Cal 476.

78 *Shiromani v Hem Kumar* AIR 1968 SC 1299 (Bombay school); *Dular Koeri v Dwarkanath* (1905) 32 Cal 234 (suit for partition by son against father); *Jairam v Nathu* (1906) 31 Bom 54 (ditto); *Sumrun v Chunder Mun* (1882) 8 Cal 17; *Partap Singh v Dalip Singh* (1930) 52 All 596, 125 IC 762, AIR 1930 All 537; *Dhanabati Bibi v Pratapmull Agarwalla* (1934) 61 Cal 1056, 54 IC 655, AIR 1935 Cal 131; *Jagat Krishna v Ajit Kumar* AIR 1964 Ori 75. Reference may also be made to *Lakshmi Chand v Ishroo Devi* AIR 1977 SC 1694.

79 *Radhabai v Pandharinath* (1942) ILR Nag 534, 194 IC 724, AIR 1941 Mad 135.

80 *Pratapmull Agarwalla v Dhanabati Bibi* (1936) 63 IA 33, 63 Cal 691, 38 Bom LR 323, 159 IC 1080, AIR 1936 PC 20. *Bhiwra v Renuka* AIR 1952 Nag 215.

that the sons can defeat the right of the mother merely by omission to apportion her a share and place her in its possession. So where the sons, while partitioning the property, did not allot any share to the mother and the mother did not give her consent to the same, it was held that the share of the mother in the property could not be attached in execution of a decree against the sons.[81]

In a suit by a son for partition and separate possession of his share after setting aside an alienation of the joint family property made by his father, the mother, who was a party, was entitled to a share, if the court came to the conclusion that the alienation was not binding on the family. The alienation can be upheld only to the extent that it affects the father's interest.[82]

(2) The expression 'wife' in relation to 'sons' includes their step-mother.[83]

(3) If the wife has *stridhana* given to her by her husband or father-in-law, its value should be deducted from her share.[84]

(4) The above rules also apply when a father himself makes a partition of ancestral property among his sons (§ 325).

Illustrations

(a) *A* has two wives *B* and *C*, a son *D* by *B*, and four sons by *C*. *D* sues his father *A* for partition. Each of these eight persons is entitled to a one-eight share including *B* and *C*.[85]

(b) *A* has a wife *B*, two sons by *B* and a son *C* by a predeceased wife. *C* sues his father *A* for partition. Each of these five persons is entitled to a one-fifth share including *B*.[86]

Madras State

In Southern India, the practice of allotting shares upon partition to females has long since become obsolete.[87]

Putrabhaga: Patnibhaga

When the division is by number of sons, it is called *putrabhaga*; when the division is according to wives, it is known as *patnibhaga*. *Putrabhaga*

81 *Laltabai v Krishnarao* AIR 1959 MP 100.
82 *Parappa v Mallappa* AIR 1956 Bom 332 (FB).
83 (1907) 31 Bom 54 (Mayukka); *Hosbanna v Devanna* (1924) 48 Bom 468, 80 IC 468, AIR 1924 Bom 444 (Mitakshara).
84 (1907) 31 Bom 54.
85 *Dular Keori v Dwarkanath Misser* (1905) 32 Cal 234. See § 316.
86 *Jairam v Nathu* (1907) 31 Bom 54.
87 *Subramanian v Arunachelam* (1905) 28 Mad 1, 8; also see *Seethamahalakshmamma v Y Cholamaiah* AIR 1974 AP 130 (FB).

is now the recognised mode of division. However, the custom of *patnibhaga* prevails in some places and in some families, especially among Sudras.[88] In *Kaliamma v Jayardhan*,[89] the Supreme Court held that the special type of *patnibhaga* pleaded had not been established, since the decision relied on had not been based on evidence.

Whether a Share Allotted to a Wife on Partition is Her Stridhana?

The share allotted to a wife (which expression includes stepmother), on partition is not her *stridhana*, unless it be shown that it was given to her absolutely (§ 128).

The present section deals with the rights of a female, who occupies the position of a wife. The next two paragraphs deal with the rights of a female, who has become a widow.

§ 315A. WIDOW

See Hindu Women's Rights to Property Act 1937, § 35, for the rights of a widow, a predeceased son's widow and the widow of a predeceased son of a predeceased son of a coparcener.

§ 316. WIDOW-MOTHER

(1) A mother cannot compel a partition so long as the sons remain united. However, if a partition takes place between the sons, she is entitled [except in Southern India (Madras state)] to a share equal to that of a son in the coparcenary property.[90] She is also entitled to a similar share on a partition between the sons and the purchaser of the interest of one or more of them.[91]

Where unmarried son sued his two brothers for partition, but died during the pendency of the suit and the mother was brought in as the legal representative, she was held entitled only to his share and not a mother's share.[92]

88 *Palaniappa v Alayyan* (1921) 48 IA 539, 44 Mad 740, 64 IC 439, AIR 1922 PC 228; *Umaraparvathy v Bhagwathy Amma* AIR 1972 Mad 151.

89 AIR 1973 SC 1134, p 404 (Krishnanvak community of South India).

90 *Damoodur v Senabutty* (1882) 8 Cal 537; *Damodardas v Uttamram* (1893) 17 Bom 271; *Chowdhry Ganesh Dutt v Jewach* (1904) 31 Cal 262, 271, 31 IA 10, 15; *Isree Pershad v Nasib Koer* (1884) 10 Cal 1017 (alleged waiver of right to partition); *Gopal Narain v Goenka* AIR 1971 Del 61; *Saraswathi Ammal v Anantha* AIR 1966 Ker. 66.

91 *Bhiwo v Dina Nath* (1881) 3 All 88; *Amrita Lall v Manick Lal* (1900) 27 Cal 551; *Jogendra v Fulkumari* (1900) 27 Cal 77 (judgment rested on the Dayabhaga); *Vishva Nath v Prem Nath* AIR 1975 J&K 92.

92 *Parbatidevi v Bansidhar* (1943) All 810, AIR 1943 All 360.

(2) If the mother has received *stridhana* from her husband or father-in-law, its value should be deducted from her share.[93]

(3) The term 'mother' in this section includes stepmother.[94]

(4) On a partition between sons by different mothers, when more than one mother is alive, the rule is first to divide the property into as many shares as there are sons, and then to allot to each surviving mother a share equal to that of each of her sons in the aggregate portion allotted to them.[95]

Illustrations

(a) *A* dies leaving a widow *B*, three sons by *B*, and *X* by a predeceased wife. *X* sues his stepmother *B* and his three half-brothers for a partition. The property will be divided into five parts, each of the five persons above-named including *B* taking one-fifth.[96]

(b) *A* dies leaving two widows, *B* and *C*, two sons by *B*, and three sons by *C*. On a partition between the sons of *B* and *C*, the mode of division is first to divide the property into five shares corresponding to the number of sons. The two sons of *B* will share 2/5 equally with their mother *B*, each take 1/3 of 2/5, ie 2/15. The three sons of *C* will share 3/5 equally with their mother *C*, each taking 1/4 of 3/5, ie, 3/20. Thus, *B* will take 2/15, and *C* will take 3/20.

(c) *A* dies leaving two widows *B* and *C*, and two sons *D* and *E* by *B*. *C* has no son. *D* sues *E*, *B* and *C* for partition. The property will be divided into four parts, there being two widows and two sons, and each widow and son one-fourth. The fact that *C* has no son does not affect her right to a share.[97]

Partition between Paternal Uncle and Nephew

The mother of the uncle who is the grandmother of the nephew as well as the mother of the nephew, is entitled to a share each. The word 'mother' in Yajnavalkya's text includes grandmother and stepmother.[98]

93 *Kishori v Monimohun* (1886) 12 Cal 165; *Jadoo Nath v Brojonath* (1874) 12 Beng LR 385; *Piara Lal v Hirdey Nath* AIR 1953 J&K 9; *Purna Chandra v Chandramani Debya* AIR 1966 Ori 98.

94 *Damodar v Senabutty* (1882) 8 Cal 537; *Damodardas v Uttamram* (1893) 17 Bom 271, 286–87; *Har Narain v Bishambhar* (1916) 38 All 83, 31 IC 907, AIR 1915 All 340; *Tegh Indar v Harnam* (1925) 6 Lah 457, 90 IC 1035, AIR 1925 Lah 568; *Saheb Rai v Shafiq Ahmad* (1927) 31 CWN 972, 101 IC 426, AIR 1927 PC 101.

95 *Kristo Bhabiney v Ashutosh* (1886) 13 Cal 39.

96 *Damodardas v Uttamram* (1893) 17 Bom 271.

97 *Damodar v Senabutty* (1882) 8 Cal 537; *Premshankar v Taradevi* AIR 1980 MP 1771.

98 *Rambhau v Balu* (1946) ILR Nag 732, AIR 1946 Nag 206.

Partition between Legitimate and Illegitimate Sons of a Sudra

Among Sudras, a mother is entitled to a share on a partition between her sons and the illegitimate sons of her husband.[99]

Madras State

In Madras, a mother is not entitled to a share, she is entitled only to a provision for her maintenance, which must not in any case exceed the share of a son.[1]

Whether the Share Allotted to a Mother on Partition is Her Stridhana

See § 128.

Omission to Reserve a Share for the Mother

The omission to reserve a share for the mother does not render the partition invalid; but the mother would not be bound by it.[2]

Sale of One of the Properties Before Decree in a Partition Suit

See § 353 (7).

§ 317. GRANDMOTHER

(1) A paternal grandmother (father's mother) cannot herself demand a partition, but when a partition takes place between her son's son, her own sons being dead, she is entitled to a share equal to that of a son's son.[3] She is similarly entitled to a share when a partition takes place between her son and the sons of a deceased son.[4] However, when partition takes place between her son and his sons, it has been held by the High Courts of Allahabad[5] and Bombay[6] that she is not so entitled; and by the High Court of Calcutta[7] and Patna[8] that she is; the last

99 *Manchharam v Dattu* (1920) 44 Bom 166, 54 IC 110, AIR 1920 Bom 241.
1 *Venkatammal v Andyappa* (1883) 6 Mad 130; *Ramlu v Vithal* (1947) ILR Nag 267. *Smriti Chandrika*, Chapter IV, paras 12–17. See also notes to § 315.
2 *Chowdhyry Ganesh Dutt v Jewach* (1904) 31 Cal 262, 271, 31 IA 10, 15.
3 *Kanhaiya Lal v Gaura* (1925) 47 All 127, 83 IC 47, AIR 1925 All 19; *Vithal v Prahlad* (1915) 39 Bom 373, 28 IC 967, AIR 1915 Bom 35.
4 *Babuna v Jagat Narain* (1928) 50 All 532, 109 IC 61, AIR 1928 All 330.
5 *Sheo Narain v Janki Prasad* (1912) 34 All 505, 16 IC 88.
6 *Jamnabai v Vasudeo* (1930) 54 Bom 417, 124 IC 793, AIR 1930 Bom 302; *Jotiram Ekoba v Ramchandra Trimbak* (1941) Bom 638, 197 IC 788, AIR 1941 Bom 382.
7 *Badri Roy v Bhugwat* (1882) 8 Cal 649.
8 *Krishna Lal v Nandeshwar* (1919) 4 PLJR 38, 42–44, 44 IC 146, AIR 1918 Pat 91.

decision proceeds on a text of Vyasa, which allows her a share on such a partition.

(2) The expression 'grandmother' in this section includes stepgrandmother.[9]

Illustration

A has a son *B*, a mother *M*, and two wives *W* and *W1*. *B* sues *A* for partition. Under Dayabhaga law, each of these five persons would be entitled to 1/5. Under Mitakshara law, *M* would not be entitled to a share and each of the other persons would take 1/4.

Whether the share allotted to a grandmother on partition is her *stridhana* or not, see § 128.

No female except those mentioned in §§ 315–17 is entitled to a share on partition. Thus daughter, sisters, etc are not entitled to a share on partition. However, on a partition, provision must be made for their maintenance and marriage expenses (see § 304).

§ 318. DISQUALIFIED COPARCENERS

Persons who by Hindu law are disqualified by physical infirmity from inheriting, are also disentitled to a share on partition. This subject is dealt with in §§ 106–109.

III. Restraint Against Partitions

§ 319. AGREEMENT NOT TO PARTITION

It has been held by the High Court of Calcutta,[10] Allahabad[11] and Madras,[12] that an agreement between coparceners not to partition coparcenary property, binds the actual parties thereto, but it does not bind their assigns, unless there be a stipulation not to assign. A compromise followed by a decree providing that certain properties should be divided and certain other items should be kept joint forever, was held to be enforceable in law.[13] On the other hand, it has been held by the High Court of

9 *Vithal v Prahlad* (1915) 39 Bom 373, 28 IC 967, AIR 1915 Bom 35; *Sriram v Haricharan* (1930) 9 Pat 338, 125 IC 518, AIR 1930 Pat 315.

10 *Anand Chandra v Pran Kisto* (1869) 3 Beng LR OC 14; *Anath Nath v Mackintosh* (1871) 8 Beng LR 60; *Rajender v Sham Chund* (1881) 6 Cal 106; *Srimohan v Macgregor* (1901) 28 Cal 769, 786; *Krishendra v Debendra* (1908) 12 CWN 793.

11 *Rup Singh v Bhubhuti* (1920) 42 All 30, 58 IC 632, AIR 1920 All 341.

12 *Arumugha Chetty v Ranganathan Chetty* (1934) 57 Mad 405, 146 IC 1057, AIR 1933 Mad 847.

13 *Jyotish Chandra Narayan v Rathika Chandra Narayan* (1933) 60 Cal 1078, 149 IC 150, AIR 1933 Cal 892.

Bombay, that such an agreement, does not bind even the parties thereto, so that any party may, notwithstanding the agreement, sue the other parties for a partition.[14]

Illustration

Calcutta decisions—*A* and *B*, two Hindu brothers, agree not to partition the coparcenary property. After the date of the agreement, *A* sells his interest in the joint property to *P*. The agreement is not binding upon *P*, there being no stipulation not to assign. *P* may, therefore, sue *B* for partition (see ss 10–11, Transfer of Property Act 1882).

It is open to Hindu brothers to divide the family property and to agree that upon the death of any one of them without male issue, his share shall pass to the surviving brothers. Such an agreement is not in contravention of the provisions of Hindu law.[15] However, it is not open to the contracting parties to lay down a rule of inheritance for the property in the hands of the last survivor in derogation from the ordinary rules of Hindu law.[16]

An agreement by a coparcener, that he would forego his right to claim partition on receipt of certain properties for his maintenance is a good and binding agreement and a claim for partition in contravention of such agreement would not be entertained.[17]

§ 320. DIRECTION IN A WILL PROHIBITING PARTITION

A direction in a will prohibiting a partition, or postponing a partition for an indefinite period, is invalid.[18]

IV. Allotment of Shares

§ 321. SHARES ON PARTITION

On a partition between the members of a joint family, shares are allotted according to the following rules:

(1) On a partition between a father and his sons, each son takes a share equal to that of the father. Thus, if a joint family consists of a father

14 *Ramlinga v Virupakshi* (1883) 7 Bom 538.

15 *Kanti v Al-i-Nabi* (1911) 33 All 414, 9 IC 935; *Ram Nirunjun v Prayag Singh* (1882) 8 Cal 138.

16 *Bageshar Rai v Mahadevi* (1924) 46 All 525, 79 IC 514, AIR 1924 All 461.

17 *Sobhag Singh v Pirthe Singh* AIR 1951 Nag 259.

18 *Mokoondo v Gonesh Chunder* (1876) 1 Cal 104; *Raikishori v Debendranath* (1888) 15 Cal 409, 15 IA 37; *Poorendra Nath v Hemangini* (1909) 36 Cal 75, 77, 1 IC 523. See ss 77 and 163, Indian Succession Act 1925.

and three sons, the property will be divided into four parts, each of the four members taking one-fourth.

(2) Where a joint family consists of brothers, they take equal shares on a partition.

Jyeshtabhagam as understood in ancient Hindu law, has become obsolete and the court will not enforce any claim by the eldest member or manager to a larger share of the joint family property then that allotted to the other coparceners.[19] Nor, according to the High Court of Mysore, will the court confirm any such unequal allotment in every such case, simply on the ground that the arrangement had been acted upon.[20]

In a suit for partition, if it is found that properties are in possession and enjoyment of different members in separate portions, the partition cannot be reopened.[21]

(3) Each branch takes per stirpes (ie, according to the stock) as regards every other branch, but the members of each branch take per capita as regards each other. This rule applies equally whether the sons are all by the same wife or by different wives (ills (a) and (b)).[22]

It has been laid down by the High Court of Madras following the authority of *Smriti Chandrika*, that r 3 applies to cases in which all the coparceners desire partition at the same time. In cases in which only some of the members of a joint family separate from it at one time and others on a subsequent occasion, regard should be had to the shares allotted at the first partition in computing the shares to be allotted at the second partition.[23] On the other hand, it has been laid down by the High Court of Bombay, following the authority of the *Vyavahara Mayukha*, that in allotting shares at the second partition, regard is to be had to the state of the family at the time of the second partition, and not to the state of the family at the first partition.[24] The ordinary rule is that partition should be made *rebus sic stantibus* as on the date of the suit, ie, according to the condition of the family as on the date of the suit. According to the Madras High Court, this rule is to be applied at the first partition only and not at the second partition. The High Court of Karnataka has expressed agreement with the Madras view.[25] According to the Bombay High Court, the rule is to be applied at both partitions (see ills (c) and (d)).

19 *Siromani v Hemkumar* AIR 1968 SC 1299; *P Naik v B Naik* AIR 1972 Ori 85 (father and sons); *Jugal Kishore v Gobind Singh* AIR 1992 Pat 128.

20 *Veerabhadrappa v Lingappa* AIR 1963 Mys 5, also see *Panchanana v Balusingh* AIR 1972 Ori 85; *Harekrishna v Bhagirathi* AIR 1975 Ori 97.

21 *Radhamoni Bhuiyanin v Dibakar Bhuiya* AIR 1991 Pat 95 (*Siromani v Hemkumar* AIR 1968 SC 1299 relied upon).

22 *Kalyani v Narayanan* AIR 1980 SC 1173.

23 *Manjanatha v Narayana* (1882) 5 Mad 362; *Narayana v Shankar* (1930) 53 Mad 1, 121 IC 1, AIR 1929 Mad 865 (FB).

24 *Pranjivandas v Ichharam* (1915) 39 Bom 734, 30 IC 918, AIR 1915 Bom 255.

25 *Thotappa v Gurusiddappa* AIR 1977 Kant 175.

Variation in Shares After Preliminary Decree

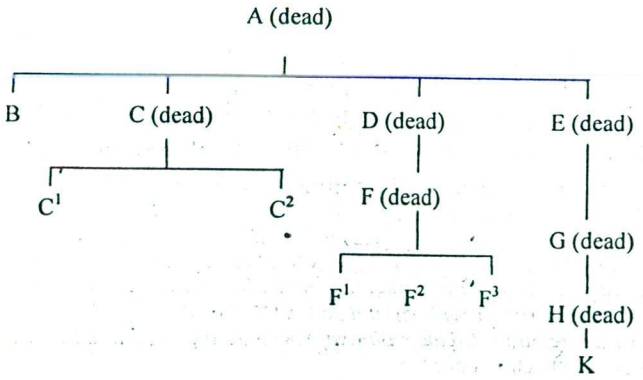
Though a suit is generally to be tried in all its stages on the cause of action as it existed at the date of commencement, notice may be taken of events which have happened since the institution of the suit and relief afforded to the parties on the basis of the altered conditions. This may, in a proper case, be done even after a preliminary decree for partition has been passed. Thus, for instance, where after the preliminary decree, defendant no 1, the father, died and in the course of the *darkhast*, the plaintiff applied to have the decree amended and to have awarded to him his augmented share, it was held that the original decree should be suitably amended.[26] Statutory changes in the law can be taken into account at the time of passing a final decree.[27]

(4) On the death of a coparcener leaving male issue, his right to a share on partition is represented by his male issue, ie, it passes to his male issue, provided such issue be within the limits of the coparcenary. This rule was modified by the Hindu Women's Rights to Property Act 1937. It must now be read in the context of s 6 of the Hindu Succession Act 1956, and particularly the proviso to that section. Reference may be made to the notes under that section. The illustration below must be read in the light of what is stated above.

Illustrations

(a) *A* dies leaving a son *B*, two grandsons C^1 and C^2, there great-grandsons F^1, F^2 and F^3 and one great-great-grandson *K*.

Table XVI.3



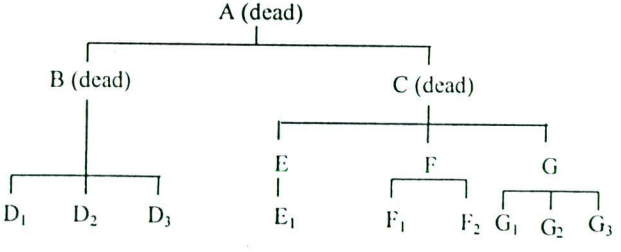
26 *Parashuram v Hirabai* AIR 1957 Bom 59; *Sham Singh v Lal Singh* AIR 1956 Pepsu 97.

27 *Narayana Reddy v Sai Reddy* AIR 1990 AP 263 (daughter treated equally with sons on partition of coparcenery property as per AP amendment).

Here, there are four branches of the joint family represented respectively by the four sons of *A* and their descendants. *E*'s branch takes nothing as *K*, the only surviving members of that branch, is outside the limits of the coparcenary, being beyond the fourth degree of descent from *A*, the common ancestor (§ 215). The joint property will therefore be divided per stripes into three parts corresponding to the remaining three branches, each branch taking 1/3. The result is that *B* will take 1/3, C^1 and C^2 will take the one-third share of *C* equally between them, each taking 1/2 of 1/3, that is 1/6 and F^1, F^2 and F^3 will take the one-third share of *D* equally between them each taking 1/3 of 1/3, that is 1/9.

(b) *A* dies leaving four grandsons, *D*, *E*, *F* and *G* and nine great-grandsons as shown in the Table XVI.4:

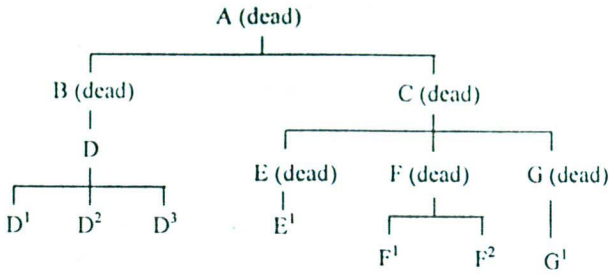
Table XVI.4



All the coparceners are desirous of separating from one another. Here, there are two branches of the joint family represented respectively by the two sons of *A*. The property will, therefore, be divided into two parts, *B*'s branch taking 1/2 and *C*'s branch taking 1/2 as to *B*'s branch, *D* and his sons D_1, D_2 and D_3, will each take 1/4 of 1/2, ie, 1/8, each son taking a share equal to that of the father. As to *C*'s branch, each of the three sub-branches represented by *E*, *F* and *G*, will take 1/3, ie, 1/6, *E* and E_1 will each take 1/2 of 1/6, ie 1/12; *F*, F_1 and F_2, will each take 1/3 of 1/6, ie, 1/18 and *G*, G_1, G_2 and G_3, will each take 1/4 of 1/6, that is, 1/24.

(c) A Hindu, *A*, governed by Mitakshara School of Hindu law, dies leaving a grandson *D*, and seven great-grandsons as shown in Table XVI.5:

Table XVI.5



D^1, D^2, F^1, F^2 and G^1 institute a suit against D, D^3 and E^1 for partition. What are the respective shares of the parties in the property? Here there are two branches of the joint family, the property will therefore be divided into two parts, B's branch taking 1/2 and C's branch taking 1/2. As to B's branch, D and his sons D^1, D^2 and D^3 will each get 1/4 of 1/2, ie, 1/8. As to C's branch, each of the three sub-branches represented by E, F, G will get 1/3 of 1/2 ie, 1/6, E^1 will get 1/6, F^1 and F^2 will each get 1/2 of 1/6, ie, 1/12 and G^1 will get 1/6. The five plaintiffs take their respective shares, and leave the family. D, D^3 and E^1 continue joint as before. Their shares, it has been seen, are as follows:

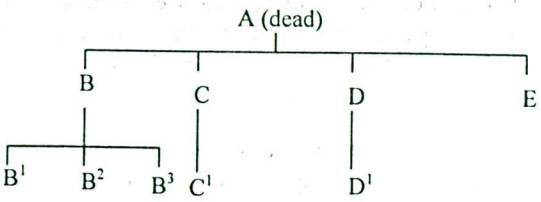
Table XVI.6

D	1/8
D^3	
E^1	1/6
	5/12

D then dies. After D's death, his son D^3 sues E^1 to recover his share of the family property. What is the share of D^3 in the property? According to the Bombay High Court, D^3 as representing B's branch is entitled to 1/2 x 5/12 = 5/24, and E^1 as representing C's branch is entitled to the remaining 5/24. According to the Madras High Court, on the death of D, the right to represent his share passes to his son D^3 so that D^3 is entitled to get 1/8 + 1/8, ie, 1/4 and E^1 retains his original share, 1/6. See rule 3 above.

(d) A Hindu, *A*, governed by Mitakshara school of Hindu law, dies leaving four sons, *B*, *C*, *D* and *E*, five grandsons, B^1, B^2, B^3, C^1 and D^1, as shown in Table XVI.7

Table XVI.7



Thereafter, *B* dies. In 1892, B^2 receives his share 1/3 x 1/4 = 1/12, and leaves the family. The rest of the family continues joint. Then *C* dies, then *D*, then *E*, and then B^3.

In 1911, B^1 sues C^1 and D^1 for a partition. According to the Bombay High Court, the property is to be divided into three parts, as there are three branches subsisting at the date of the suit, namely *B*'s branch, *C*'s branch and *D*'s branch, so that B^1, C^1 and D^1 will each take 1/3. According to the Madras High Court, B^1 is entitled to 1/3–1/2 (1/12 being the share allotted to B^2 when he left the family) = 1/4, and not 1/3. See rule 3 above.

(5) See Hindu Women's Rights to Property Act 1937, § 35, for the rights of a widow, predeceased son's widow and the widow of a predeceased son of a predeceased son of a coparcener.

(6) See s 6 of the Hindu Succession Act 1956, and notes thereunder.

V. Partition How Effected

§ 322. WHAT IS PARTITION

According to the true notion of an undivided Mitakshara family, no individual member of that family whilst it remains undivided, can predicate of the joint property, he, that particular member, has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in a numerical division of the property; in other words, it consists in defining the shares of the coparceners in the joint property; an actual division of the property by metes and bounds is not necessary.[28] Once the shares are defined, whether by an agreement between the parties or

28 *Apporier v Rama Subba Aiyan* (1866) 11 MIA 75, 89–90, *Ram Pershad v Lakhpati* (1903) 30 Cal 231, 255, 30 IA 1; *Sheodan v Balkaran* (1921) 43 All 193, 59 IC 116, AIR 1921 All 337. As to the meaning of 'metes and bounds' reference may be made to *Jabarlal v Ananda Chandra* AIR 1981 Cal 424.

otherwise, the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds, or they may continue to live together and enjoy the property in common as before. However, whether they do the one or the other, it affects only the mode of enjoyment, but not the tenure of the property. The property ceases to be joint and immediately the shares are defined, and henceforth, the parties hold the property as tenants-in-common.[29] In *Kalyani v Narayanan*,[30] the Supreme Court reviewed the case law on the subject and reiterated the principle that:

> ...a disruption of joint family status by a definite and unequivocal indication to separate implies separation in interest and in right although not immediately followed by a de facto actual division of the subject-matter. This may at any time be claimed by virtue of the separate right. From the time of such disruption, each member holds his aliquot share as tenant-in-common irrespective of whether there is actual division of the properties by metes and bounds. Such would be the position, unless there is proof or reunion as understood in law. It is established law that actual physical division or partition by metes and bounds is not an essential ingredient for the purpose of effecting severance of status. That is really a formality in the process of partition.

Placing reliance on the decision of the Supreme Court in *Kalyani v Narayan*, the Orissa High Court held that a suit for partition could not be dismissed on the ground of prior partition, the suit was decreed.[31]

Where, at a partition between a Hindu, his two sons, and his two wives, one-fifth was allotted to each of the sons and three-fifths to the father and his wives, it was held that the father and his wives became tenants-in-common, but though they had not divided their shares by metes and bounds inter se, there could be no reunion between them, and the father therefore had no right to sell the properties of the wives and any such alienation by him was not binding on them.[32]

§ 323. PARTITION BY FATHER DURING HIS LIFETIME

The father of a joint family has the power to divide the family property at any moment during his life, provided he gives his sons equal shares

29 *Balkishen Das v Ram Narain* (1903) 30 Cal 738, 751, 752, 30 IA 139; *Darshan Singh v Prabhu Singh* (1946) All 130; *Narasamma v Venkata Narasi* AIR 1954 Mad 282, (1953) 2 MLJ 695.

30 AIR 1980 SC 1173.

31 *Brajananda Pradhan v Sachinanda* AIR 1990 Ori 29; *Pata Saahu v Hiru Sahu* AIR 1990 Pat 276.

32 *Nanuram v Radhabai* (1942) ILR Nag 24, AIR 1940 Nag 241.

with himself, and if he does so, the effect in law is not only a separation of the father from the sons, but a separation of the sons inter se. The consent of the sons is not necessary for the exercise of that power.[33] However, a grandfather has no power to bring about a separation among his grandsons. Even if he allots shares, they remain joint.[34] This right of a father at times described as his 'superior power' or 'peculiar power' or *patria potestas* was reiterated by the Supreme Court in *Apporva Shantialal v IT Commissioner, Gujarat*,[35] after referring to a number of decisions on the subject and it was observed that it was recognised in ancient Hindu law and due effect was given to the same. It was also held that a father was entitled to effect a partial partition of joint family properties by virtues of his right as *patria potestas* (see the newly added art 328 (2A)).

When under a partition by a father, unequal shares are given to the sons, the transaction will be binding on the sons as a family arrangement, if acquiesced in by them.[36] If the partition is unequal and unfair, it is open to the sons if they are majors to repudiate the partition; but if they are minors, it is open to them to avoid it after they attain majority. The partition will be good, until it is set aside. The right of a minor is a personal right and cannot be exercised by others.[37] In any case, it is not necessary for the minor to formally set aside the earlier partition before filing a suit for partition.[38] If the sons find that the partition was not just and fair or unequal, it would thus be open to challenge.[39]

§ 324. WHETHER FATHER CAN EFFECT PARTITION BY A WILL

No coparcener, not even the father, has a right to make a partition by will of joint family property among the various members of the family except with their consent.[40]

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33 *Kandasami v Doraisami* (1880) 2 Mad 317, 321; *Meyyappa v IT Commissioner* AIR 1951 Mad 506, (1950) 2 MLJ 353; *Nirman v Fateh* (1930) 52 All 178, 126 IC 337, AIR 1929 All 963; *Mulan Chand v Kanchhendillal* AIR 1958 MP 304; *Venkatasubramania v Easwara Iyer* AIR 1966 Mad 266.

34 *Subbarami Reddi v Chenchuraghava Reddi* (1945) ILR Mad 1714; *Meyyappa v IT Commissioner* AIR 1951 Mad 506.

35 AIR 1983 SC 409.

36 *Brijraj Singh v Sheodan Singh* (1913) 35 All 763, 102 IC 66, AIR 1927 All 454.

37 *Meyyappa v IT Comissioner* AIR 1951 Mad 506. Reference may also be made to *Deveerachar v Visweswariah* AIR 1968 Mys 211; *Gadadhar v Gangadhar* AIR 1972 Ori 24.

38 *Hiralal v Fulchand* AIR 1956 Sau 89; *GP Gaekwad v State* AIR 1986 Bom 124.

39 *Gurusami Naiker v G Jayaraman* AIR 1996 Mad 212.

40 (1913) 35 All 337, 346, 40 IA 161; *Kalyani v Narayanan* AIR 1980 SC 1173 (such a will, if there is consent of all coparceners, may operate as family arrangements); *Harkash Singh v Hardevi* (1927) 49 All 763, 102 IC 66, AIR 1927 All 454.

§ 325. HOW PARTITION MAY BE EFFECTED

Partition is a severance of joint status, and as such, it is a matter of individual volition.[41] All that is necessary, therefore, to constitute a partition, is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. The Supreme Court pointed out in the undermentioned case,[42] that there should be an intimation, indication, or representation of such intention and that what from that manifestation should take would depend upon the circumstances of each case. It is implicit in this principle that this manifestation or declaration of intention should be to the knowledge of the persons affected, for a mere uncommunicated declaration may amount to not more than merely harbouring an intent to separate. It is immaterial, in such a case, whether the other members assent. Once a member of a joint family has clearly and unequivocally intimated to the other members, his desire to sever himself from the joint family, his right to obtain and possess his share is unimpeachable, whether or not they agree to a separation, and there is an immediate severance of the joint status. The intention to separate may be evinced in different ways, either by explicit declaration or by conduct.[43] It may be expressed by serving notice on the other coparceners,[44] and the severance of status takes place from the date when the communication was sent and not when it was received.[45] Once a communication of the intention is made by a member, which has resulted in the severance of the joint family status, it would not thereafter be open to him to nullify its effect by revoking or withdrawing the notice. He cannot get back to the old position by mere revocation of the intention.[46] The notice, however, may be withdrawn with the consent of the other coparceners.[47] It may also be expressed by the institution of a suit for partition. An oral request made by an elder brother, at the time of his death, to his younger brother to give half the property to the widow of the former, does not amount to a

41 *Girja Bai v Sadashiv* (1916) 43 IA 151, 161, 43 Cal 1031, 1049, 37 IC 321, AIR 1916 PC 104.

42 *Raghaamma v Chenchamma* AIR 1964 SC 136; *Puttrangamma v Rangamma* AIR 1968 SC 1018 (relevant texts examined); *Krishanabai v Nimbalkar* AIR 1979 SC 1880 (Subsequent document interpreted in light of severance of status); *Fatechand v State of West Bengal* AIR 1972 Cal 177; *Nilkanth v Ramachandra* AIR 1991 Bom 10 (son can sue for partition during lifetime of father).

43 *Dnyaneshwar Krishna v Anant Vasudeo* (1936) 60 Bom 736, 38 Bom LR 579, 164 IC 632, AIR 1936 Bom 290; *Girdharilal v Fatechand* AIR 1954 MB 148; *Bal Mukandji v Gokaran Singh* AIR 1956 All 124; *Balkrishna Das v Radha Devi* AIR 1989 All 133 (intention to separate may be oral or in writing).

44 *Girija Bai v Sadashiv* (1916) 43 IA 151, 43 Cal 1031, 37 IC 321, AIR 1916 PC 104.

45 *Narayana Rao v Purushothama Rao* (1938) Mad 315, AIR 1938 Mad 390.

46 *Puttrangamma v Rangamma* AIR 1968 SC 1018.

47 *Banke Bihari v Brij Bihari* (1929) 51 All 519, 166 IC 285, AIR 1929 All 170.

separation.[48] A mere declaration and definition of his share by an undivided coparcener cannot amount to a valid transfer of his share without an unequivocal expression of his intention to separate.[49] A statement by a member in his will, that he is entitled to a particular share, does not by itself amount to an expression of intention to separate.[50] Nor will a mere declaration in a trust deed regarding intention to separate from the family amount to communication of such intention.[51] However, a will may contain a clear and unambiguous declaration of intention to separate from the family and if the intention is communicated, that may be sufficient.[52] Communication of intention to all the members of the family is, however, not essential. It may suffice, if it is to the managing member of the family or in the case of *tarwad* to the *karnavan*.[53]

Prima facie, a document expressing the intention to divide brings about a division in status, but it is open to a party to prove that the document was a sham or a nominal one, not intended to be acted upon and executed for some ulterior purpose. It sometimes happens that persons make statements, which serve their purpose, or proceed upon ignorance of the true position: and it is not their statements, but their relations with the estate which is the determining factor.[54]

It is often a question of interpretation of a document as to whether there was the intention to separate. The mere fact that it is recited in a document that owing to lack of amity, a person has been residing separately, would not establish that he had gone out of the family.[55] Whether a document executed by members of a family records an outright partition or a mere arrangement for maintenance, may depend on the effect of all the provisions of the document and relevant factors.[56]

As to minor coparceners, see § 308. Reference may also be made to § 330. Where a simple money decree was obtained against the father, and in a suit on behalf of his minor sons for a declaration that the debt for which the decree was passed was immoral, the district munsiff found that the debt was not immoral, but on the ground that the decree was a money decree, declared that the son's share was not liable to be sold

48 *Shivappa Rudarappa v Rudrava Chambasappa* (1933) 57 Bom 1, 142 IC 164, AIR 1932 Bom 410.

49 *Sushil Kumar v Ram Chandra* AIR 1982 All 129.

50 *Mulan v Kanchhendillal* AIR 1958 MP 304.

51 *Madhusudan Das v Narayanbai* AIR 1983 SC 114.

52 *Raghavamma v Chenchamma* AIR 1964 SC 136; *Lakshmi Perumallu v Krishnavenamma* AIR 1965 SC 825.

53 *Katheesumma v Beechu* (1950) ILR Mad 502, AIR 1951 Mad 561; *Appalanarasimhan v Udalama* AIR 1959 AP 407.

54 *Rukhmabai v Laxminarayan* AIR 1960 SC 335; *Mudigouda v Ram Chandra* AIR 1969 SC 1076.

55 *Rajagopal v Pakkiam Ammal* AIR 1975 SC 895.

56 *Vesudevan v Rani & ors* AIR 1985 Ker 250.

in execution. It was held that these facts did not constitute separation of the sons from the father.[57]

Severance by Dividing Book Balance

Having regard to the facts and circumstances of a case, there can be severance in case of a business as a going concern, by a specification of shares in the accounts without any physical division of the business.[58]

Exercise of Volition on Behalf of Minor

It has been held by the High Court of Madras,[59] disagreeing with the High Court of Andhra Pradesh,[60] that a guardian of a minor acting on his behalf can exercise volition on behalf of the minor to effect partition, subject to the condition that such exercise of volition should be approved of by the court and that it is not necessary for the exercise of that volition that any suit or partition suit should be pending before the court.

Date of severance in status

Question arises as to the date from which severance in status is deemed to have taken place. Is it the date of expression of intention by a coparcener to sever himself from the joint family, or the date when such intention is brought to the knowledge of the other coparceners? Obviously, the answer would affect rights of the other parties. In *Raghavamma v Chenchamma,* the Supreme Court held that the date of severance would be that of manifestation of intention to separate by virtue of the doctrine of relation back. Even so, the rights accrued to others in the joint family property between such manifestation of intention and the knowledge of it by the other coparceners would be saved.[61]

(1) Partition by Institution of Suit

(i) Suit by Adults

The institution of a suit for partition by a member of a joint family is an unequivocal intimation of his intention to separate, and there consequently is a severance of his joint status from the date when it is instituted. A decree may be necessary for working out the results of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate,

57 *Patru Lal v Parbhawati Kuar* (1943) All 205, 207 IC 228, AIR 1943 All 214.
58 *VPR Prabhu v SPS Prabhu* AIR 1985 Ker 265.
59 *Ramaswamy v Kuppa Chetti* AIR 1962 Mad 31; *Nabisha Begum v Arumuga* AIR 1974 Mad 273.
60 *Ayyanna v Kotayya* AIR 1960 AP 70.
61 AIR 1964 SC 136.

whether he obtains a consequential judgment or not.[62] Moreover, if the plaintiff dies, the suit can be continued by the heir.[63] However, if the suit is withdrawn before trial, the plaintiff, not desiring separation, there is no severance of the joint status.[64] Nor is there any severance, if the suit is proved to be a sham transaction resorted to for the purpose of creating evidence of separation.[65] On the other hand, if the defendant dies and the suit is withdrawn on that ground, there is no separation.[66] The filing of a suit is strong evidence, but not conclusive evidence of an intention to separate.[67] Even a decree passed by consent does not effect a severance, if its terms are not carried out and the members continue to live together having abandoned their decision to separate.[68]

When a suit for partition is instituted by members of a joint family, the court has power not only to divide the properties by metes and bounds, but also to effect a separation of status without actual division of the property. Such direction may be useful, when a minor is a party to the partition suit, and the declaration is considered beneficial in the interests of the minor.[69]

Withdrawal of Suit The Madras High Court has held that when in a suit for partition, the plaint contains a clear and unambiguous expression of an intention to separate from the date of filing the suit, and summons have been duly served on the other coparceners, division in status is effected from the date of filing the suit, even if the suit is subsequently withdrawn. The reason is that, except in case of an agreement to reunite, it is not open to a coparcener to revoke or withdraw an unambiguous expression of an intention to separate, which is communicated to the other members.[70]

62 *Girja Bai v Sadashiv* (1916) 43 IA 151, 43 Cal 1031, 37 IC 321, AIR 1916 PC 104; *Kawal Nain v Prabhulal* (1917) 44 IA 159, 39 All 496, 40 IC 286, AIR 1917 PC 39; *Surjaj Narain v Iqubal Narain* (1913) 40 IA 40, 45, 35 All 80, 87, 18 IC 30; *Ramalinga v Narayana* (1922) 49 IA 168, 45 Mad 489, 68 IC 451, AIR 1922 PC 201; *Sundarajan v Arunachalam* (1916) 39 Mad 136, 33 IC 858, AIR 1916 Mad 1170 (FB); *Hazari Lal v Ram Lal* (1925) 47 All 456, 88 IC 422, AIR 1925 All 813. The same rule applies where the estate is impartible—*Jagadamba v Narain Singh* (1923) 2 Pat 319, 50 IA 1, 77 IC 1041, AIR 1923 PC 59; *Dhanabathi Babi v Pratapmull Agarwalla* (1934) 61 Cal 1056, 154 IC 655, AIR 1935 Cal 131; *Ramamurthy v Venkatasubbarayudu* AIR 1954 AP 34.

63 *Rajrup Rai v Sheo Shankar Rai* AIR 1945 All 287.

64 *Kedar Nath v Ratan Singh* (1910) 37 IA 161, 32 All 415, 7 IC 648; *Palani Ammal v Muthuvenkatacharla* (1925) 52 IA 83, 48 Mad 254, 87 IC 333, AIR 1925 PC 49. *Shagun Chand v Data Ram* (1927) 49 All 664, 101 IC 868, AIR 1927 All 465.

65 *Bhagwant Kishore v Bishambhar Nath* AIR 1950 All 54.

66 *Shankershing v Gulapchand* AIR 1945 Nag 444.

67 *Joala Prasad Singh v Chanderjet Kuer* (1938) 17 Pat 430, 175 IC 783, AIR 1938 Pat 278.

68 *Chokalingam v Muthukaruppan* (1938) Mad 1019, AIR 1938 Mad 849.

69 *Bhagirathibai v Manohar* AIR 1951 Nag 164.

70 *Radhakrishna v Satya Narayan* AIR 1949 Mad 229.

In *Palani Ammal*'s case,[71] the Judicial Committee observed that a plaint claiming a partition, even if withdrawn would, unless explained, afford evidence that an intention to separate had been entertained.

Attachment of Undivided Share In a decision of the Calcutta High Court,[72] it has been held that attachment of the undivided share of a coparcener in a Mitakshara family during his lifetime, operates as division of interest and causes a severance of status. The correctness of this view, it is submitted, must be doubted. The Patna High Court has expressed disagreement with the Calcutta view.[73]

(ii) Minor's Suit for Partition

In a suit for partition brought by the father and his minor son as plaintiffs against the other members of the joint family, in which it was contended by the minor's mother as the guardian, and found by the court that the separation was not in the interests of the minor, it was held, that the institution of the suit does not effect a separation of the minor from the rest of the family, though it may operate as a separation of the father from the rest of the family.[74] Where the court dismisses the suit on the ground that a partition was not beneficial to the minor plaintiff, no severance is effected.[75] If the court holds that a division is necessary in the interests of the minor, and passes a preliminary decree for partition, the divided status of the minor dates from the date of the institution of the suit and not from the date of the preliminary decree.[76]

In a suit for partition filed on behalf of the minor son against the father, the plaint was returned to be presented to the proper court and, after an interval, was re-presented and the court found that the partition was beneficial to the interests of the minor. In the interval, the father executed a mortgage. It was held that the son became divided from the father, only from the date of re-presentation of the plaint and that it could not be contended that the mortgage was not binding on the son, on the ground that they were divided when it was executed. It was also held that the document was not affected by the principle of *lis pendens*.[77] In a minor's suit for partition, where another son was born to the

71 *Palani Ammal v Muthuvenkata Charla* (1925) 52 IA 83, 48 Mad 254, 87 IC 333, AIR 1925 PC 49.

72 *Muneswari v Jugal Mohini* AIR 1952 Cal 368.

73 *Sheonandan v Ugrah Sao* AIR 1960 Pat 66.

74 *Ganapathy v Subramanyam* (1929) 52 Mad 845, 122 IC 167, AIR 1929 Mad 738.

75 *G Sriramamurthi v Official Receiver* AIR 1957 AP 692.

76 *Krishnaswami v Pulukaruppa* (1925) 48 Mad 465, 88 IC 424, AIR 1925 Mad 717; *Sri Ranmga v Srinivasa* (1927) 50 Mad 866, 104 IC 72, AIR 1927 Mad 80; *Atul Krishna Roy v Lala Nandanji* (1935) 14 Pat 732 (FB), 157 IC 53, AIR 1935 Pat 275; *Ram Singh v Fakira* (1939) ILR Bom 256; *Mandiliprasad v Ramcharanlal* (1947) ILR Nag 848. Reference may be made to *Varadammal v Ambalal Vyas* AIR 1927 Mad 371.

77 *Nathusingh v Anandrao* (1941) ILR Nag 652, 186 IC 688, AIR 1940 Nag 185.

plaintiff's father even before the preliminary decree, it was held by the High Court of Patna, that the institution of the suit itself effected a severance of the joint status and that the minor's share did not suffer a diminution by reason of the birth of another son.[78]

There was divergence of judicial opinion,[79] about the effect of the death of a minor plaintiff pending any such suit. It has now been held by the Supreme Court,[80] that any such suit instituted on behalf of a minor coparcener brings about a division in status. What brings about the severance in status is the action of the next friend in instituting the suit, the decree of the court merely rendering it effective by deciding that what the next friend has done is for the benefit of the minor. Such a suit does not abate on death of the minor but can be continued by his legal representative (reference may also be made to §§ 308 and 330).

According to a Patna decision, the minor's interest will pass to his heirs unconditionally.[81] As to the effect on the minor plaintiff's shares by subsequent births and deaths, see also § 330.

(2) Partition by Agreement

A partition may also be effected by an agreement between the parties (§ 326). In some cases, it is stated that a severance of joint status can take place only by an agreement between the parties or by a decree of the court (§ 329).

However, this is a mistaken view.[82] As stated above, a definite and unambiguous indication by one member of his intention to separate and to enjoy his share in severalty, may amount to a partition.

(3) Partition by Arbitration

An agreement between the members of a joint family, whereby they appoint arbitrators for dividing the joint family properties among them, amounts to a severance of the joint status of the family from the date thereof.[83] The

78 *Krishna Lal v Nandeshwar* (1919) 4 PLJR 38, 46–48, 44 IC 146, AIR 1918 Pat 91.

79 *Rangarsayi v Nagaratnamma* (1934) 57 Mad 95 (FB), 146 IC 769, AIR 1933 Mad 890; *Ramsingh v Fakira* (1939) Bom 256, AIR 1939 Bom 169; *Mandiliprasad v Ramcharanlal* (1947) ILR Nag 848. Contra see *Chelimy Chetty v Subamma* (1918) 41 Mad 442, 42 IC 860, AIR 1918 Mad 379; *Lalta Prasad v Sri Mahadeoji* (1920) 42 All 461, 58 IC 667, AIR 1920 All 16; *Hari Singh v Pritam Singh* (1936) Lah 504.

80 *Redasubbyya v Akkamma* AIR 1958 SC 1042. Reference may also be made to *Venkata Reddi v Lakshmama* AIR 1963 SC 1601.

81 *Krishna Lal v Nandeshwar* (1919) 4 PLJR 38, 46–48, 44 IC 146, AIR 1918 Pat 91.

82 *Girja Bai v Sadashiv* (1916) 43 IA 151, 162, 43 Cal 1031, 1050, 37 IC 321, AIR 1916 PC 104.

83 *Syad Kasam v Jorawar Singh* (1922) 49 IA 358, 50 Cal 84, 68 IC 573, AIR 1923 PC 353; *Kashinathsa v Narshingsa* AIR 1961 SC 1077; *Krishna v Bnalaram* (1896) 19 Mad 290; *Subbaraya v Sadashiva* (1897) 20 Mad 490; *Balmukund Lal v Musammat Sahano* (1929) 8 Pat 153, 119 IC 817, AIR 1929 Pat 164; *Ramadin v Gokulprasad* AIR 1959 MP 25.

mere fact that no award has been made, is not evidence of a renunciation of the intention to separate.[84]

Where a father refers the family dispute between himself and his minor son (represented by his mother) to an arbitrator, the award of the arbitrator directing a partition effects a severance between the father and the son from the date of reference.[85]

A reference to arbitration for effecting partition made on his behalf by his natural guardian must be for the benefit of the minor. If not so, it will not in any event bind him.[86]

(4) It is a mistake to suppose that there can be no partition until there is a division of the joint family property by metes and bounds. It is very important to keep the two considerations quite distinct from each other, namely, partition, ie, the severance of the joint status, which is a matter of individual decision, and the de facto division of the property, ie, the allotment of shares which may be effected by different methods, eg, by private agreement, by arbitrators appointed by the parties, or, in the last resort, by the court.[87]

(5) A coparcener does not on insolvency, cease to be a member of a joint family, nor does the fact that a coparcener has alienated the whole or part of his undivided share, effect a partition between him and his family.[88]

Illustrations

(a) *A* and his brothers *B* and *C* are members of a joint Hindu family. *A* sues *B* and *C* for partition. After the suit, but before the decree, *A* dies leaving a widow. *A*'s share does not pass by survivorship to *B* and *C*, but it descends to his widow as his heir, and she as such is entitled to continue the suit.[89] The result would be the same if *A*, *B* and *C* appointed an arbitrator to partition the property, and *A* died pending arbitration.[90]

(b) *A* and his father *B* are members of a joint Hindu family. *A* sues *B* for partition. *B* admits that he and *A* are joint, but alleges that

84 *Ram Kali v Khamman Lal* (1929) 51 All 1, 111 IC 33, AIR 1928 All 422; *Panchpagesa v Kalyanasundaram* AIR 1957 Mad 472 (revocation of arbitration after severance).

85 *Shantilal Mewaram v Munshilal Kewalram* (1932) 56 Bom 595, 139 IC 820, AIR 1932 Bom 498.

86 *Kamal Singh v Sekkar Chand* AIR 1952 Cal 447.

87 (1919) 43 IA 151, 161, 43 Cal 1031, 1049, 37 IC 32; *Mukund v Balkrishna* (1927) 54 IA 413, 419, 52 Bom 8, 15, 105 IC 703, AIR 1927 PC 224; *Sumi Devi v Pranakrushna* AIR 1956 Ori 68.

88 *Lakshmanan Chettiar v Srinivasa Iyenger* (1937) Mad 203, 166 IC 378, AIR 1937 Mad 131; *Sheonandan v Ugrah Sao* AIR 1955 Pat 189.

89 *Girija Bai v Sadashiv* (1916) 43 IA 151, 43 Cal 1031, 37 IC 32, AIR 1916 PC 104.

90 *Syed Kasam v Jorawar Singh* (1922) 49 IA 358, 50 Cal 84, 68 IC 573, AIR 1923 PC 353.

> the fact stated in the plaint, namely, that *B* had failed to maintain *A* is untrue, and asks that A's suit should be dismissed on the ground that the facts alleged by *A* in his plaint are not proved. Such a dismissal is quite wrong. The institution of the suit operates as a partition between *A* and *B*, though the suit is dismissed.[91]

§ 326. PARTITION BY AGREEMENT

(1) As regards partition, no act done by any member of a joint family, can operate as a partition, unless it has been done with the intention to put an end to his status as coparcener and acquire a new status, ie, the status of a separate owner.[92] As stated by their Lordships of the Privy Council in the leading case of *Appovier v Rama Subba Aiyan*,[93] the true test of partition of property according to Hindu law is the intention of the members of the family to become separate owners. Intention being the real test, it follows that an agreement between the members of a joint family to hold and enjoy the property in defined shares as separate owners operates as a partition, although, there may have been no actual division of the property by metes and bounds. As observed by the Judicial Committee in the case above referred to:[94]

> ...in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although, the property itself has not been actually severed and divided.

In such a case, the interest of each member is divided, though the property remains physically undivided. That interest, therefore, will descend, and may be dealt with, as separate property, except where the separating member remains joint with his own male issue.[95] A partition,

91 See sub-§ (1). *Kawal Nain v Prabhu Lal* (1917) 44 IA 159, 39 All 496, 40 IC 286, AIR 1917 PC 39.

92 See § 325. *Appovier v Rama Subba Aiyan* (1866) 11 MIA 75, 92–93; *Baboo Doorga Pershad v Kundun* (1874) 13 Beng LR 235, 239, 1 IA 55.

93 (1866) 11 MIA 75, 90.

94 See above.

95 See § 223, sub-§ (4). *Rajah Suranent v Venkama Row* (1969) 13 MIA 113; *Doorga Pershad v Kundun* (1873) 13 Beng LR 235, 1 IA 55; *Balkishen Das v Ram Narain* (1903) 30 Cal 738, 30 IA 139; *Ram Pershad v Lakhpati* (1903) 30 Cal 231, 253, 30 IA 1, 10; *Parbati v Naunihal Singh* (1909) 31 All 412, 36 IA 71, 3 IC 195; *Mahdo v Mebraban* (1891) 18 Cal 157, 17 IA 194; *Sri Raja Viravara v Sri Raja Viravara* (1897) 20 Mad 256, 24 IA 118; *Raja Setrucherla v Raja Setrucherla* (1899) 22 Mad 470, 26 IA 167; *Gajapathi v Gajapathi* (1870) 13 MIA 497, 517; *Babaji v Kashibai* (1880) 4 Bom 157; *Ananta v Damodhar* (1889) 13 Bom 25; *Tej Protap v Champa* (1889) 12 Cal 96; *Sarada v Umakanta* (1923) 50 Cal 370, 392, 77 IC 450, AIR 1923 Cal 485; *Adi Deo v Dukharan* (1883) 5 All 533; *Raghubir v Moti Kunwar* (1913) 35 All 41, 17 IC 766 (PC).

if otherwise genuine, will sever the joint status, even if the motive is to defeat the claims of creditors.[96] Where a member of the joint family executed a sham sale deed in favour of his brother, it was held that he did not become divided from the family and on his death, his nephews got the property by survivorship and his creditor could not execute a money-decree against the property which so devolved on his nephews.[97]

The mere fact, however, that the shares of the coparceners have been ascertained, does not by itself necessarily lead to an inference that the family has separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be. To constitute a partition, the shares should be defined with the intention of an immediate separation.[98] For an instance, where there was no such intention, see *Poornandachi v Gopalasami*.[99]

(2) An agreement to separate is not required by law to be in writing.[1] If it is in writing, and clearly indicates on the face of it an intention to separate and hold the property in defined shares as separate owners, no evidence is admissible of the subsequent acts of the parties to alter or control its legal effect.[2] However, where the agreement is not in writing, or where it is in writing, but does not declare on the face of it what the intention of the parties was, evidence of subsequent conduct of the parties becomes material in order to determine whether there was a partition or not.[3] This subject is further explained in the next section in another form.

96 *Kuppan Chetiar v Masa Goundan* (1937) Mad 1004, 169 IC 400, AIR 1937 Mad 424; *KSRM Firm v Subbiah* (1945) Mad 138; *Hirday Narain v Ram Das* AIR 1951 All 606; *Lila Wati v Paras Ram* AIR 1977 HP 1, also see § 292.

97 *Merla Ramanna v Chelikani Jagannadha Rao* (1941) Mad 886, 195 IC 6, 8 IA 75, AIR 1942 PC 48.

98 *Palani Ammal v Muthuvenkatcharla* (1925) 52 IA 83, 86, 48 Mad 254, 267, 268, 87 IC 333, AIR 1925 PC 49; *Ramabadra v Gopalaswami* (1931) 54 Mad 269, 129 IC 801, AIR 1931 Mad 404; *Kochukutti v Bhavani Amma* AIR 1954 Tr & Coch 169; *Chandrakanto v Ram Mohini* AIR 1956 Cal 577 (specification of shares in settlement records); *Gangabai v Punau Rajwa* AIR 1956 Nag 261.

99 (1936) 63 IA 436, 38 Bom LR 1247, 164 IC 26, AIR 1936 PC 281; and § 327(3).

1 *Rewun Persad v Radha Beeby* (1846) 4 MIA 137, 168 *Budha Mal v Bhagwan Das* (1891) 18 Cal 302, PC; *Parbati v Naunihar Singh* (1909) 31 All 412–23, 36 IA 71, 3 IC 195; *Alamelu v Balu* (1920) 43 Mad 849, 26 IC 455, AIR 1915 Mad 103; *Bhimraj v IT Commissioner* AIR 1955 Pat 172.

2 *Balkishen Das v Ram Narain* (1903) 30 Cal 738, 752, 30 IA 139 (case of an unambiguous *ikrarnamah*); *Jai Narain v Baij Nath* (1928) 50 All 615, 108 IC 449, AIR 1928 All 419; *Hira Singh v Mst Manglan* (1928) 9 Lah 324, 106 IC 877, AIR 1928 Lah 122 .

3 *Doorga Pershad v Kundon* (1874) 13 Beng LR 235, 239–40, 1 IA 55 (case of an ambiguous *inkarnamah*); *Ram Pershad v Lakhpati* (1903) 30 Cal 231, 253, 30 IA 1, 10 (case of an ambiguous decree); *Chowdhry Ganesh Dutt v Jewach* (1904) 31 Cal 262, 270, 31 IA 10 (case where there was no writing); *Sita Ram Prasad v Mahadeo Rai* AIR 1980 Pat 254 (mortgaged property allotted to one coparcener in oral partition).

Illustration

A joint Hindu family consisting of six members, is entitled to a moiety of certain villages and to three other properties, *x*, *y* and *z*. All the six members execute a deed, whereby they divide the three properties, *x*, *y* and *z*, by metes and bounds into six parts, each taking one-sixth. As to the moiety belonging to the family in the said villages, the deed says:

> But inasmuch as it is not convenient to divide now (that is, to divide by metes and bounds) our moiety of the villages, we shall divide every year in six shares the produce of them and enjoy it, after deducting the *sirkar's kist* and charges on the villages the deed concludes with the words: 'we have henceforward no interest in each other's effects and debts except friendship between us.' The question is whether the deed operates as a partition of the family's interest in the villages, regard being had to the fact that there was no division of the villages by metes and bounds. The answer is that it does, as the effect of the deed is—using the language of the English law merely by way of illustration—that the joint tenancy is severed and converted into a tenancy in common. In delivering the judgment of the Judicial committee, Lord Westbury said:
>
> > Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy-in-common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement and that is a separation in interest and in right, although not immediately followed by a de facto actual division of the subject-matter. This may at any time be claimed by virtue of the separate right...We find, therefore, a clear intention to subject the whole of the property to a division of interest, although it was not immediately to be perfected by an actual partition. It (the deed) operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, viz, that it is sufficient to make, a divided family, and to make a divided possession of what was previously undivided without the necessity of its being carried out into an actual partition of the subjectmatter.[4]

(It is enough to constitute a partition that there should be a division of title—It is not necessary that there should be an actual division of the property.)

4 *Apporier v Rama Subba Aiyan* (1866) 11 MIA 75.

Registration

A mere agreement to divide does not require registration. However, if the writing itself effects a division, it must be registered.[5] In addition, if there is an actual oral partition and if the property is divided not by metes and bounds but according to actual measurements, both the document of partition and registration of such document are necessary.[6] It is well-settled that the document though unregistered, can, however, be looked into for the limited purpose of establishing a severance in status, though that severance may ultimately alter the nature of possession held by members of the separated family as co-tenants.[7] Where the plaintiff alleged that all the family properties were divided, except one item, and the defendant denied the partition, it was held that an unregistered document evidencing the partition may be used for the limited and collateral purpose of showing that the subsequent division of the properties allotted to the defendant's branch was in pursuance of the original intention to divide.[8]

An unregistered deed of partition and other deeds of transfer between the parties to the partition, though not admissible to prove partition, can be referred to under s 49 of the Registration Act to show that the parties dealt with the property on the footing that there was a previous partition.[9]

§ 327. EVIDENCE OF PARTITION AND BURDEN OF PROOF

This branch of the subject may be divided into five parts:

1. The clearest case is where the members of a joint family divide the joint property by metes and bounds, and each member is in separate possession and enjoyment of the share allotted to him on partition. Permanency is an essential feature, though not the sole test, of an arrangement of outright partition.[10]

5 *Rajangam v Rajangam* (1923) 46 Mad 373, 50 IA 134, 69 IA 123, AIR 1922 PC 266; *Nani Bai v Gita Bai* AIR 1958 SC 706, (1958) SCJ 925; *Chhotalal v Bai Mahakore* (1917) 41 Bom 466, 40 IC 83, AIR 1917 Bom 206.

6 *Balkrishna Das v Radha Devi* AIR 1989 All 133.

7 *Mathyalareddy v Venkatareddy* AIR 1969 AP 242 (FB); *Krishana Bai v Shivnath Singh* AIR 1993 MP 65 (unregistered document of partition is inadmissible in evidence, but can be used for a collateral purpose of proving intention of partition); *Digambar Patil v Devram* AIR 1995 SC 1728.

8 *Ganpat v Namdeo* (1942) ILR Nag 73, 196 IC 278, AIR 1941 Nag 299; *Tejraj v Mohanlal* AIR 1955 Raj 157.

9 *Girija v Girdhari* (1950) Pat 628, AIR 1951 Pat 277; *Subbu Naidu v Vardarajulu* (1947) Mad 694; *Panchapagesa v Kalyanasundaram* AIR 1957 Mad 472; *Ramnagina v Haribar* AIR 1966 Pat 179.

10 *Kochukutti v Bhavani Amma* AIR 1954 Tr & Coch 169.

2. The next case is of the kind dealt with by the Privy Council in *Appovier v Rama Subba Aiyan*,[11] where the coparceners, with a view to partition executed a writing, whereby they agreed to hold the joint property in defined shares as separate owners. Such writing operates in law as a partition, though the property is not physically divided. This is a case where the agreement declares on the face of it, the intention of the parties to hold the joint property as separate owners, and no evidence is admissible of the subsequent acts of the parties to control or alter the effects of the document (§ 326, sub-§ (2)).
3. The third case is of the kind dealt with by the Privy Council in *Doorga Pershad v Kundun*,[12] where the agreement was in writing, but the document did not declare on the face of it, the intention of the parties to hold the joint property as separate owners. In such a case, when the question arises as to whether the document operates as a partition, the intention of the parties is to be inferred from: (1) the document; and from (2) their subsequent acts.[13]

Where an instrument of partition, after giving one member his share, provided that the rest of the property was to be divided in a particular manner and that the remaining members should live like an ordinary undivided family subject to survivorship, it was held by the Privy Council that there was no partition between the other members.[14]

4. The last case is of the kind dealt with by the Privy Council in *Ganesh Dutt v Jewach*,[15] a case where there was no writing at all. In such a case, when the question arises as to whether there has been a partition or not, the intention of the parties as to separation can only be inferred from their acts. The question is one of fact to be decided with due regard to the cumulative effect of all the facts and circumstances, and primarily the burden of showing that there has been a partition is on the person setting it up.

In case of old transactions, when no contemporaneous documents are maintained and when most of the active participants in the transactions have passed away, though the burden still remains on the person who asserts that there was a partition, it is permissible to fill up gaps in the

11 (1866) 11 MIA 75.
12 (1873) 13 Beng LR 235, 1 IA 55.
13 See § 326, sub-§ (2). *Doorga Pershad v Kundun* (1873) 13 Beng LR 235, 239, 1 IA 55.
14 *Poornanandachi v Gopalasami Odayar* (1936) 63 IA 436, 38 Bom LR 1247, 164 IC 26, AIR 1936 PC 281.
15 (1904) 31 Cal 262, 31 IA 10; *Durga v Lal Bahadur* (1929) 4 Luck 138, 112 IC 387, AIR 1928 Ori 509; *Budha Mal v Bhagwan Das* (1891) 18 Cal 302 (PC).

evidence more readily by reasonable inferences from the evidence on record, than in a case where the evidence is not obliterated or lost by passage of time.[16]

In *Ganesh Dutt*'s case, a Hindu widow alleging that her husband *B* has separated from his three brothers in Fasli 1295, brought a suit against them to recover her husband's share in the family as his heir. The defence was that *B* died joint and undivided. The Privy Council held that there was a partition as evidenced by the following five facts: (1) payment of revenue of certain villages belonging to the family, one-fourth in the name of *B* and three-fourths in the names of his three brothers; (2) crediting to *B* in Fasli 1295, one-fourth of a share of Rs 35,000 recovered by the family under a decree and three-fourths to the three brothers; (3) payment of rent by a lessee of a factory belonging to the family as to one-fourth to *B* and as to three-fourths to the three brothers; (4) purchase in Fasli 1295, by the four brothers of an estate in their names in equal shares; and (5) a suit instituted after *B*'s death by one as the adopted son and heir of *B* to recover a debt due to the family; as to this last fact, it is to be observed that if *B* had died undivided, the suit would have been brought by the surviving brothers and the adopted son as coparceners. In the above case, it was also contended on behalf of *B*'s widow that *B* had become separate from his brother in food and worship in Fasli 1295, and that fact was of itself conclusive proof of partition. As to this contention their Lordships said:

> Cesser of commonality is an element which may properly be considered in determining the question whether there has been a partition of joint family property, but it is not conclusive. It is therefore necessary to consider whether the evidence in other respects supports or negatives the theory that the cesser in this case was adopted with a view to partition in the legal sense of the word.

Cesser of commensality, it is stated above, is not a conclusive proof of partition, the reason is that a member may become separate in food and residence merely for his convenience.[17] Separate residence of the members of the joint family in different places where they are in service does not show separation.[18] Similarly, other acts, though standing by themselves, are not conclusive proof of partition, yet may lead to that conclusion in conjunction with other facts. They are separate occupation

16 *Bhagwan Dayal v Reoti Devi* AIR 1962 SC 287, 294, (1962) SCJ 348.

17 *Rewun Persad v Radha Beeby* (1846) 4 MIA 137, 168; *Anundee v Khedoo Lal* (1872) 14 MIA 412, 422; *Suraj Narain v Iqbal Narain* (1913) 35 All 80, 40 IA 40 (difference in religious opinions); *Kesavan v Narayanan* AIR 1953 Tr & Coch 118.

18 *Mohan Lal v Ram Dayal* (1941) 16 Luck 708, 194 IC 61, AIR 1941 Ori 331; *Purna Bai v Ranchhoddas* AIR 1992 AP 270.

of portions of the joint property,[19] division of the income of the joint property,[20] definement of shares in the joint property in the revenue of land registration records,[21] mutual transactions[22] etc.

> The mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be.[23]

Separate enjoyment for sake of awareness is not partition.[24] When, besides entries in revenue records showing that the two brothers who constituted a joint family, held separate *khatas* of *sir* and *khudkashi* lands, it was proved that letters were written by the brothers to one of their near relations expressly indicating their intention to effect partition as soon as possible, and separate suits were filed in the name of the individual brothers against the tenants, it was held that from these facts, partition could be inferred.[25] The burden, however, of proving that the family continued to be joint in such a case lies on the person alleging it.[26]

(5) Admission of severance made in legal proceedings, if not explained, can be very cogent evidence of partition.[27]

19 *Runjeet Singh v Gujrat Singh* (1873) 1 IA 9; *Murari v Mukund* (1891) 15 Bom 201.

20 *Sonatum v Juggutsoondree* (1859) 8 MIA 66, 86; *Appavu v Manikkam* (1946) Mad 557 (an agreement merely to enjoy or share income in a particular manner does not by itself amount to partial partition). *Charandas v Commissioner of Income-Tax* (1955) 57 Bom LR 430, AIR 1955 Bom 343; *Udayanath v Ratnakar* AIR 1967 Ori 139 (division of a property for convenience).

21 *Gajendar v Sardar Singh* (1896) 18 All 176; *Ram Pershad v Lakhpati* (1903) 30 Cal 231, 30 IA 1; *Parbati v Naunihal Singh* (1909) 31 Cal 412, 36 IA 71, 3 IC 195; *Nageshar v Ganesha* (1920) 47 IA 57, 42 All 368, 56 IC 306, AIR 1920 Pat 46; *Mst Bhagwani v Mohan Singh* (1925) 29 CWN 1037, 88 IC 385, AIR 1925 PC 132; *Dattatraya v Shakuntalabai* AIR 1956 Nag 95; *Bal Mukundiji v Gokaran Singh* AIR 1956 All 124; *Chanderjit Das v Debi Das* AIR 1951 All 522; *Ramchandra v Keshav* AIR 1953 MB 184; *Arjun Mahto v Monda Mahtain* AIR 1971 Pat 215; *Dukhi Dibya v Landi Dibya* AIR 1978 Ori 182 (also other factors); *Shivaganda Patil v Director of Resettlement* AIR 1992 Bom 72; *Digambar Patil v Devram* AIR 1995 SC 1728.

22 *Ram Bahadur Nash v Kedar Nash* AIR 1977 Pat 59.

23 *Paleni Ammal v Muthuvenkatahala* (1925) 52 IA 83, 85, 48 Mad 254, 157, 87 IC 333, AIR 1925 PC 49; *Girijandandini Devi v Bijendra Narain* AIR 1967 SC 1124; *Lingraj v Ananta* AIR 1957 Ori 63 (subsequent conduct); *Thotappa v Gurusiddappa* AIR 1977 Kant 175; *Baboo Ram v Bachni* AIR 1974 P&H 343; *Ganesh Sahu v Dwarika Sahu* AIR 1991 Pat 1 (proof that the members possessed property separately).

24 *P Kallippa v Muthusami* AIR 1987 Mad 24.

25 *Shyam Lal v Ranbir Singh* AIR 1951 All 386.

26 *Beti v Sikhdar Singh* (1928) 50 All 180, 108 IC 721, AIR 1928 All 39.

27 For instance, *Prakash Chand v Narendra Nath* AIR 1976 SC 2456.

The statements of a particular person that he is separated from a joint family of which he was a coparcener, and that he has no further interest in the joint property or claim to any assets left by his father, would be statements made against the interest of such person, and, after such person is dead, they would be relevant under s 32(3) of the Evidence Act. The assertion that there was separation not only in respect of himself but between all the coparceners, would be admissible as a connected matter and an integral part of the same statement. It is not merely the precise fact, which is against interest that is admissible, but all matters that, are 'involved in it and knit up with the statement'.

§ 328. PARTIAL PARTITION

(1) A partition between coparceners may be partial either in respect of the property or in respect of the persons making it.[28]

After a partition is affected, if some of the properties are treated as common properties, it cannot be held that such properties continued to be joint properties, since there was a division of title, but such properties were not actually divided.[29]

(2) *Partial as to property.*—It is open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint and undivided family.[30] However, where there is evidence to show that the parties intended to sever, then the joint family status is put to an end, and with regard to any portion of the property which remained undivided the presumption would be that the members of the family would hold it as tenants-in-common, unless and until a special agreement to hold as joint tenants is proved.[31] When a partition is admitted or proved, the presumption is that all the property was divided and a person alleging that family property, in the exclusive possession of one of the members after the partition, is joint and is liable to be partitioned, has to prove his case.[32]

28 *Rewun Persad v Radha Beeby* (1846) 4 MIA 137, 168; *Appovier v Rama Subba Aiyan* (1866) 11 MIA 75, 90; *Muthusami v Nallakulanth* (1895) 18 Mad 418; *Sudarsanam v Narasimhulu* (1902) 25 Mad 149, 197; *Lilawati v Paras Ram* AIR 1977 HP 1.

29 *Hariharan v Padaril* AIR 1994 Ker 36.

30 *Ramalinga v Narayana* (1922) 49 IA 168, 45 Mad 489, 68 IC 451, AIR 1922 PC 201; *Jagmohan v Ranchhoddas* (1945) ILR Nag 892.

31 *Dagadu v Sakhubai* (1922) 47 Bom 773, 73 IC 369, AIR 1924 Bom 31, dissenting from *Govirishankar v Atmaram* (1894) 18 Bom 611; *Martand v Radhabi* (1930) 54 Bom 616, 127 IC 510, AIR 1931 Bom 97; *Beni Parshad v Mst Gurdevi* (1923) 4 Lah 252, 73 IC 894, AIR 1923 Lah 497; *PC Pai v Agricultural ITO* AIR 1970 Mys 168; *Kashibai v Putalbai* AIR 1987 Kant 156.

32 *Kumarappa Chettiar v Adaikkalam Chetty* (1932) 55 Mad 483, 137 IC 616, AIR 1932

continued on the next page

(2A) In *Apporva Shantilal's* case, to which reference has been already made above, it was also held that the father was entitled to effect a partial partition of family properties between himself and his minor sons, if in the interest of the joint family and its members, he feels that such partial partition will be in the best interest of the joint family and its members including minors. There was a subsequent amendment in s 171 of the Income Tax Act, that no such partial partition would be recognised for the purposes of that section.

It has been held by the Supreme Court that if a preliminary decree for partition is passed, it would not amount to partition, unless actual physical partition of the properties is carried out pursuant to a final decree.[33] Under the Hindu law, a mere declaration by one of the members of the undivided family is sufficient to constitute a partition and with such a declaration, the status of the joint family comes to an end and therefrom, they hold the property as tenants-in-common with definite shares. However, under the provisions of s 171 of the Income-tax Act, as also under the provisions of s 20 of the Wealth-tax Act, such partitions as under Hindu law, are not recognised, and unless the members of the family hold their definite shares on partition for the purposes of the above Acts, the members will be assessed as a joint Hindu family.[34] An assessment of the above, therefore may demonstrate that if by agreement, the members of a joint family have already separated, either partially or fully, and if such partition is recognised under any one or both the above taxing statutes, the partition may be said to have taken effect. De-recognition of a partial partition under s 171(a) of the Income Tax Act 1961, is not invalid for the purposes of that statute.[35]

(3) *Partial as to the persons separating.*—Just as a partition may be partial as regards the property, so it may be partial as regards the person separating. This case arises when there is no general partition amongst all the members of the family.

Separation of One Coparcener

When one coparcener separates from the others, the question arises whether the latter are to be deemed to be joint or reunited or separate. This distinction is important, for the devolution of the estate of a Hindu is governed by different rules depending on whether he was joint, reunited, or separate. Formerly, there was difference of opinion on this

Mad 207; *Nadiammai Achi v Mariappa* AIR 1951 Mad 625, (1949) 2 MLJ 806; *Kaulesari v Ambika Dutt* AIR 1950 Pat 365; *Ramjugeshwar v Gajadhar* (1950) ILR Pat 980; *Tejraj v Mohanlal* AIR 1955 Raj 157; *Dwarka Nath v Kedar Nath* AIR 1951 Pat 445; *Chhatradhari v Akleshwar* AIR 1952 Pat 382.

33 *IT Officer, Calicut v NK Sarada Thampatty* AIR 1991 SC 2035.

34 *Tatavarthi Rajah v Wealth-tax Commr, Hyderabad* AIR 1997 SC 2072.

35 *Union of India v M V Vellappan* AIR 1999 SC 2526.

point.[36] However, there have been several important pronouncements by the Judicial Committee and by the Supreme Court thereafter. The result of the decisions may be stated as follows:

(1) The general principle is that every Hindu family is presumed to be joint unless the contrary is proved. This presumption, however, does not continue after one member has separated from the others.

> There is no presumption when one coparcener separates from the others, that the latter remain united...An agreement amongst the remaining members of a joint family to remain divided or to reunite must be proved like any other fact.[37]

It is open to the non-separating members to remain joint and to enjoy as members of a joint family what remained of the joint family property after such a partition. No express agreement is necessary for this purpose. The intention to remain joint may be inferred from the way in which their family business was carried on after their former coparcener had separated from them,[38] or it may be inferred from other conduct indicating such an intention.[39] These principles were stated with approval by the Supreme Court in *Bhagwati Prasad v Dulhin Rameshwari*.[40] It has also been observed in this case, that it would be a question of fact to be

36 *Jauduibchunder v Benodbeharry* (1863) 1 Hyd 214; *Keshub Ram v Nand Kishore* (1869) 11 WR 308; *Petambur v Harish Chunder* (1871) 15 WR 200; *Upendra v Gopee Nath* (1883) 9 Cal 817; *Bata v Chintamani* (1886) 12 Cal 262; *Sudarsanam v Narasimhulu* (1902) 25 Mad 149, 157; *Ranganatha v Narayanasami* (1908) 25 Mad 482; *Rangasami v Sundarajulu* (1916) 31 MLJ 472, 35 IC 52, AIR 1917 Mad 722.

37 *Balabux v Rukhmabai* (1903) 30 IA 30, 137, 30 Cal 725 (brothers); *Jatti v Banwari Lal* (1923) 50 IA 192, ILR 4 Lah 350, 74 IC 462, AIR 1923 PC 136 (brothers); *Bal Krishna v Ram Krishna* (1931) 58 IA 220, ILR 53 All 300, 132 IC 613, AIR 1931 PC 154 (brothers); *Babanna v Parawa* (1926) 50 Bom 815, 100 IC 147, AIR 1927 Bom 68 (brothers); *Bhimabai v Gurunathgouda* (1928) 30 Bom LR 859, 114 IC 392, AIR 1928 Bom 367; *Martand v Radhabai* (1930) 54 Bom 616, 127 IC 510, AIR 1931 Bom 97 (brothers). The decision to the contrary in the following cases do not seem to be correct—*Sarju Prasad v Nand Gopal* (1927) 2 Luck 691, 104 IC 315, AIR 1927 Ori 815; *Mst Menda Kuar v Mirtunjai Bakhsh* (1928) 3 Luck 220, 105 IC 337, AIR 1927 Ori 580; *Ramchandra v Tukaram* (1921) 45 Bom 914, 61 IC 761, AIR 1921 Bom 267; *Bhagwati Prasad v Dulhin Rameshwari* [1951] SCR 603; *Pramod Kumar v Damodar* AIR 1953 Ori 179; *Shu Ram Kishen v State of Uttar Pradesh* AIR 1958 All 35; *Kalyani v Narayanan* AIR 1980 SC 1173; *Brajananda Pradhan v Sachinananda* AIR 1990 Ori 29 (members living separately, suit for partition by one member cannot be dismissed on ground of prior partition).

38 *Palani Ammal v Muthuvenkatachala* (1925) 52 IA 83, 48 Mad 254, 87 IC 333, AIR 1925 PC 49; *J Seethamma v J Veeranna* (1950) 2 MLJ 21, AIR 1950 Mad 785.

39 *Ram Pershad Singh v Lakhpati Koer* (1903) 30 IA 1, 30 Cal 231.

40 [1951] SCR 603; *Bhagwan Dayal v Reoti Devi* AIR 1962 SC 287, (1962) 1 SCJ 348; *Jaigobind Singh v Brij Behari Singh* AIR 1966 Pat 168; *Chunia Mahatani v Sobha Mahto* AIR 1999 Pat 189.

determined in each case upon the evidence relating to the intention of the parties, whether there was a separation among the other coparceners or they remained united, and the burden would lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief. The principles were also stated by the Supreme Court in *Girijanandini v Bijendra Narain*.[41]

(2) When there has been a separation between the members of a joint family, there is no presumption that there was a separation between one of the members and his descendants. Thus, if two brothers *A* and *B* separate, there is no presumption that there was a separation between *A* and his sons, or a separation between *B* and his sons.[42]

(3) A Hindu father may separate from his sons, and the sons may remain joint or he may separate from his sons by one wife, and remain joint with his sons by another wife. Here again, it is conceived, it is a question of their intention to remain joint, which must be proved like any other fact.[43]

(4) Where in a suit, a decree is passed for partition, and the question arises whether the separation effected by the decree was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other, the decree alone should be looked at to determine that question. It is the decree alone, which can be the evidence of what was decreed.[44]

Reference may also be made to the undermentioned decision of the Supreme Court.[45]

The following are the leading Privy Council cases on the subject:

(a) In this case, three brothers, *G*, *K* and *L*, owned a shop which had been founded by their father. In 1870, *K* separated from his brothers, took out his share amounting to about Rs 11,000 and started a shop of his own. In 1894, *L*'s son sued *G*'s widow for possession of property held by her as belonging to her husband, alleging that *G* and *L* had continued joint after *K*'s separation, and that on *G*'s death, he became entitled to the property by survivorship. The widow denied that her husband continued

41 AIR 1967 SC 1124; *Jugal Kishore v Gobind Singh* AIR 1992 Pat 128 (burden to prove partition on person who asserts as such).

42 *Hari Bakhsh v Babu Lal* (1924) 51 IA 163, 5 Lah 92, 83 IC 418, AIR 1924 PC 126; *Deputy Commissioner v Sheo Nath* (1927) 2 Luck 459, 100 IC 689, AIR 1927 Ori 149.

43 *Sengoda v Muthu* (1924) 47 Mad 567, 78 IC 927, AIR 1924 Mad 625.

44 *Palani Ammal v Muthuvenkatachala* (1925) 52 IA 83, 87, 48 Mad 254, 259, 87 IC 333, AIR 1925 PC 49; *Ram Pershad v Lakhpati* (1903) 30 IA 1, 10, 30 Cal 231, 253.

45 *Girijanandini v Bijendra Narain* AIR 1967 SC 1124.

joint with *L*. It was held that *K* having admittedly separated himself in 1870, the burden lay on the plaintiff to prove that there had been an agreement after *K*'s separation between *G* and *L* to remain united or to reunite, and that no such agreement having been proved, the plaintiff was not entitled to succeed.[46]

(b) In this case, a joint family consisted of four cousins. The cousins entered into an agreement, which stated that defined share in the whole joint family property, had been allotted to the several coparceners. The agreement also gave them liberty either to live together or to separate their own business. It was held that the agreement defining the share effected a partition in estate, and that evidence of some of the coparceners having continued to enjoy their shares in common would not affect the tenure of the property or their interest in it. It was also held that the clause giving the parties the option of being joint or separate was not inconsistent with a separation in estate.[47]

(c) In this case, a joint family consisted of four brothers. The brothers executed a deed by which the joint family property was described as divided between them, and one of them was finally paid out. Thereafter, the family business was carried on by the three remain brothers, and the profits of the business were transferred in equal shares to their separate accounts. In subsequent proceedings, the question arose whether the remaining three brothers were joint or separate. It was held that the deed, coupled with the mode in which the accounts were kept, showed that the remaining three brothers had ceased to be coparceners.[48]

(d) In this case, the Judicial Committee held that the fact of a separation having been effected between brothers, raises no presumption that there was a separation of the joint family constituted by one of the brothers and his descendants. Thus, if a joint family consists of two brothers *A* and *B*, and each brother has a son, and *A* and *B* separate, there is no presumption that the separation between *A* and *B* involves necessarily a separation between *A* and his son or between *B* and his son. To hold otherwise, 'would be introducing a novel principle into the law of joint Hindu families governed by the law of Mitakshara'.[49]

(e) In this case, their Lordships of the Privy Council observed as follows:[50]

46 *Balabux v Rukhmabai* (1903) 30 IA 130, 137, 30 Cal 725.
47 *Balkishen Das v Ram Narain Sahu* (1903) 30 IA 139, 30 Cal 738.
48 *Jatti v Banwari Lal* (1923) 50 IA 192, 4 Lah 350, 74 IC 462, AIR 1923 PC 136.
49 *Hari Baksh v Babu Lal* (1924) 51 IA 163, 5 Lah 92, 83 IC 418, AIR 1924 PC 126.
50 *Palani Ammal v Muthuvenkatachala* (1925) 52 IA 83, ILR 48 Mad 254, 87 IC 333, AIR 1925 PC 49.

It is also now beyond doubt that a member of such a joint family (that is Mitakshara family) can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off, for him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. It is also quite clear that if a joint Hindu family separates, the family or any members of it may agree to reunite as a joint Hindu family, but such a reuniting is for obvious reasons, which would apply in many cases under the law of Mitakshara, of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is strictly proved. The leading authority for that last proposition is *Balabux Ladhuram v Rukhmabai.*[51]

(5) In a suit for partition, which proceeds to a decree, the decree for partition is the evidence to show whether the separation was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other.[52]

(6) A renunciation or relinquishment by a member of his interest in the family property stands on a different footing altogether from the case where one member receives his share in the property and separates from the other members.[53] In the former case, the other members continue joint as before. The effect of renunciation is to reduce the number of persons to whom shares would be allotted as and when a division of the estate takes place.

(7) It has been laid down in some cases that where a partial partition is proved, the presumption is that there has been a complete partition both as to parties and property.[54] Pronouncements of

51 (1903) 30 IA 130, ILR 30 Cal 725.

52 *Palani Ammal v Muthuvenkatachala* (1925) 52 IA 83, ILR 48 Mad 254, 87 IC 333, AIR 1925 PC 49.

53 See § 264. *Sundarsanam v Narasimhulu* (1902) 25 Mad 149, 156; *Parsotam Das v Jagan Nath* (1919) 41 All 361, 50 IC 357, AIR 1919 All 381; *Alluri Venkatapathi Raju v D Venkatanarasimha Raju* (1936) 63 IA 397, (1937) Mad 1, 38 Bom LR 1238, 164 IC 1, AIR 1936 PC 264.

54 *Vaidyanatha v Aiyasamy* (1909) 32 Mad 119, 1 IC 408; *Ananadibai v Hari* (1911) 35 Bom 293, 10 IC 911; *Ramchandra v Tukaram* (1921) 45 Bom 914, 61 IC 761, AIR 1921 Bom 276.

the Judicial Committee and now of the Supreme Court show that there is no such general presumption.

(8) Though a partition may be partial by mutual agreement of parties, no coparcener can by a suit, enforce a partial partition against the other coparceners. The suit must be one for a complete partition (§ 333).

(9) A resume of the legal portion relating to partial partition was given in *Kallomai v CST, Kanpur*, a decision of the Supreme Court.[55]

§ 329. PARTITION BY DECREE OF COURT

The view that where a suit is brought for partition, there is no partition or severance of the joint status until a decree is passed,[56] is no longer tenable; for, as held by the Judicial Committee, the very institution of a suit for partition operates as a partition except in the case of minor's suit (§ 325 (1) and (2)), though a decree may be necessary for working out the results of the severance and for allotting definite shares (§ 325).

Where a decree for partition is passed, the decree is evidence to show whether the separation was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other. 'It is the decree alone which can be evidence of what was decreed'.[57]

Although a suit does not in terms seek a partition, yet if it indicates a distinct intention to obtain a separation in estate, and the decree gives effect of the intention of such decree (it is submitted, the very institution of the suit) effects a partition as regards the joint title.[58]

As to decrees in suits for partition, see s 54 and O 20, r 18, Code of Civil Procedure 1908.

Births and Deaths Pending Suit

§ 330. BIRTHS AND DEATHS PENDING SUIT FOR PARTITION

(1) The institution of a suit for partition by a member of the joint family effects a severance of the joint status of the family. His share, therefore,

55 Also see § 328 (2A). *Kalloomai v CST, Kanpur* AIR 1982 SC 760.

56 *Chidambaram v Gauri Nachiar* (1879) 2 Mad 83, 6 IA 177; *Ram Pershad v Lakhpati* (1903) 30 Cal 231, 30 IA 1; *Subbaraya v Manika* (1896) 19 Mad 345; *Lakshman v Narayan* (1900) 24 Bom 182; *Mahadev v Govind* (1912) 36 Bom 550, 16 IC 991; *Thandayuthapani v Raghunatha* (1912) 35 Mad 239, 10 I C 660.

57 See § 325(1). *Palani Ammal v Muthuvenkatachala* (1925) 52 IA 83, 87, 48 Mad 254, 259, 87 IC 333, AIR 1925 PC 49; *Ram Pershad v Lakhpati* (1903) 30 Cal 231, 253, 30 IA 10.

58 *Joy Narain v Girish Chunder* (1878) 4 Cal 434, 5 IA 228.

is not liable to be diminished by the birth of another member of the family subsequent to the date of the suit, as the latter is not to be counted for a share; nor is it augmented by the death of any of the members subsequent to that date as his share will pass to his heirs.[59] Consequently, the heirs of the deceased party are entitled to prosecute the suit for partition.[60]

There has been a divergence of judicial opinion as to the legal position where the suit is brought by a minor whether as a sole plaintiff or as a co-plaintiff with an adult coparcener. The question will now require to be determined in accordance with the principle laid down by the Supreme Court in *Pedasubbayya v Akkamma*,[61] to which reference has been made under § 325. According to the Madras and Bombay High Court, the mere institution of such a suit does not effect a severance of the joint status, but if a decree is passed in the suit, the partition dates from the date of the suit (§ 325(1)(ii)). The result is that if a decree is passed, the minor's share will not decrease by the birth of a member subsequent to the date of the suit; nor will it increase by the subsequent death of a member. However, if the court refuses to decree separation as regards the minor, the minor's share will increase by subsequent deaths.[62] According to the Patna High Court, the mere institution of a suit by a minor effects a severance of the joint status as much as a suit by an adult (§ 325(1)(ii)). His share, therefore, is not diminished by subsequent births nor is it increased by subsequent deaths.[63]

In *Palaniappa v Alayan* the question was left open.[64] Reference may be made to §§ 308 and 325.

(2) See the Hindu Women's Rights to Property Act 1937, § 35.

§ 331. DEATH OF A COPARCENER PENDING SUIT FOR PARTITION

This section is now amalgamated with § 330.

59 *Girja Bai v Sadashiv* (1916) 43 IA 151, 43 Cal 1031, 37 IC 321, AIR 1916 PC 104; *Sayed Kasam v Jorawar Singh* (1922) 49 IA 358, 50 Cal 84, 68 IC 573, AIR 1922 PC 353.

60 *Rajrup Rai v Sheo Shankar* (1945) All 287.

61 AIR 1958 SC 1042; *Natisha Begum v Alumuga Thaver* AIR 1966 Mad 111.

62 *Ganapathy v Subramanyam* (1929) 52 Mad 845, 122 IC 167, AIR 1929 Mad 738; *Ramsing v Fakira* (1939) ILR Bom 256; *Suryanarayana v Ganesulu* (1953) 2 MLJ 439, AIR 1954 Mad 203 (property sold in attachment before preliminary decree).

63 *Kishna Lal v Nandeshwar* (1919) 4 Pat LJ 38, 46–48, 44 IC 146, AIR 1918 PC 91.

64 *Palaniapppa v Alayan* (1921) 48 IA 539, 542, 543, 44 Mad 740, 743, 64 IC 439, AIR 1922 PC 228.

§ 332. DEATH OF A FEMALE ENTITLED TO A SHARE PENDING SUIT FOR PARTITION

The share allotted to a female on partition is not her *stridhana* (§ 128). Therefore, if such a female dies before the final decree, though after the preliminary decree, her share remains an integral part of the estate, available for division among the male members of the family,[65] including those born after the suit but before her death,[66] and the court is bound to take notice of such deaths and make the necessary changes in the preliminary decree.[67] Also see the Hindu Women's Rights to Property Act 1937, § 35. The rule stated above must now be read in the context of s 6 of the Hindu Succession Act 1956, and particularly the proviso to that section.

Suit for Partition

§ 333. SUIT FOR PARTITION: PARTIES TO THE SUIT: WHAT PROPERTY IT SHOULD COMPRISE

Any one of several members of a joint family is entitled to require partition of joint family property, and his demand to that effect, if not complied with, can be enforced by a suit.[68] The following are the leading points to be noted in connection with a suit for partition.

(1) *Who may sue for partition.*—Subject to the provisions of §§ 307 and 308, every coparcener and every purchaser of the interest of a coparcener is entitled to institute a suit for partition.

A suit by a coparcener excluded from coparcenary property to enforce his right to share therein must be brought within 12 years from the date when the exclusion becomes known to him.[69]

(2) *Parties to suit.*—(a) The plaintiff in a partition suit should plead as defendants:

(i) the heads of all branches;[70]
(ii) females who are entitled to a share on partition;
(iii) the purchaser of a portion of the plaintiff's share, the plaintiff himself being a coparcener;
(iv) if the plaintiff himself is a purchaser from a coparcener, his alienor.

65 *Sheo Dyal v Judoonath* (1868) 9 WR 61; *Raoji v Anant* (1918) 42 Bom 535, 46 IC 750, AIR 1918 Bom 175; *Shamrao v Kashibai* AIR 1956 Nag 110.
66 *Krishna Lal v Nandeshwar* (1919) 4 Pat LJ 38, 48–49, 44 IC 146, AIR 1918 Pat 91.
67 *Bhiura v Renuka* (1949) Nag 400.
68 *Madho Parshad v Meharban Singh* (1890) 17 IA 194, 18 Cal 157, 161.
69 The Limitation Act 1963, art 110. See § 235(3a).
70 *Pahaladh v Luchmunbuty* (1869) 12 WR 256; *Digambar v Dhanraj* (1922) 1 Pat 361, 67 IC 156, AIR 1922 Pat 96; *Bhikulal v Kisanlal* AIR 1959 PC 260.

The above are necessary parties and if any of them is not jointed, the suit is liable to be dismissed. The entire joint family must be represented either expressly or implicitly.[71] Reference may be made to s 6 of the Hindu Succession Act 1956, and particularly to the proviso to that section. Also, see notes under that section post.

(b) It is desirable that the following persons should be made parties; though not necessary parties, they are proper parties to such a suit:

(i) a mortgagee with possession of the family property or of the undivided interest of a coparcener;[72]
(ii) simple mortgagees of specific items of the family property;
(iii) purchaser of the undivided interest of a coparcener;
(iv) persons entitled to provision for their maintenance and marriage, ie, widows, daughters, sisters and such like and distinguished heirs;
(v) any person entitled to maintenance from the family.[73]

the plaintiff may also plead any other coparcener or any person interested in the family property such as a mortgagee or a lessee. Such a person may himself apply and be made a party.

Illustrations

(1) If A has two sons S^1 and S^2 and grandsons by S^1 and S^2, in a suit for partition by S^1 against A and S^2, the grandsons are not necessary parties though they may be proper parties.[74]
(2) Where the suit is not for partition between all the coparceners inter se, but only between the two branches of the families, the heads of each branch are the only necessary parties.[75]

(3) *Persons entitled to sue and property to be comprised in a suit for partition.—A suit for partition may be instituted*:

(i) by a coparcener against the other coparceners;
(ii) by the purchaser of the interest of a coparcener against his vendor and the other coparceners;
(iii) against the purchaser of the interest of a coparcener by the other coparceners;

71 *Ramanathan v Veerappa* AIR 1956 Mad 89.
72 *Sadu v Ram* (1892) 16 Bom 608; *Duri v Tadepatri* (1910) 33 Mad 246, 4 IC 392. See O 1, r 10, Code of Civil Procedure. Also see *Krishnamachari v Dhanalakshmi* AIR 1968 Mad 142 (purchaser from a coparcener who claimed a property to be his self-acquired property).
73 *Sadu v Ram* (1892) 16 Bom 608; *Jotiram Ekoba v Ramchandra Trimbak* (1941) Bom 638, 197 IC 788, AIR 1941 Bom 382. See O 1 r 10, Code of Civil Procedure.
74 *Digambar v Dhanraj* (1922) 1 Pat 361, 67 IC 156, AIR 1922 Pat 96.
75 *Bishambar Das v Kanshi Prashad* (1932) 13 Lah 483, 141 IC 45, AIR 1932 Lah 641.

(iv) by the purchaser of the interest of a coparcener in one of the several joint family properties against the purchaser of the interest of the other coparceners in the same property.

Whether a suit for partition should comprise all the joint family properties, in other words, whether the suit should be one for general partition, or whether it can be one for a partial partition only depends upon who the parties to the suit are:

(i) The general rule is that where a suit for partition is brought by a coparcener against the other coparceners, it should embrace the whole family property.[76] This rule is subject to certain qualifications. Thus, where a portion of the property is not available for actual partition,[77] as being in the possession of a mortgagee,[78] or where it is held jointly by the family with a stranger,[79] a separate suit for partition may be brought in respect of that portion. Similarly, where part of the joint property consists of land situated outside the jurisdiction of the court in which the suit for partition is brought, a separate suit may be brought in respect of that portion in the court of the place where that portion is situated.[80]

(ii) The next case is where a coparcener sells his undivided interest in one of several properties belonging to the coparcenary, and a suit for partition is brought by the purchaser of such interest against his vendor and the other coparceners. In this case, there is a conflict of decisions as to whether he can sue for partition of that property alone in which he is interested as a purchaser, or whether he should sue for general partition of all the family properties. This subject is dealt with in § 261 (3).

(iii) The third case is where a coparcener sells his undivided interest in one of several properties belonging to the coparcenary, and

76 *Nanabhai v Nathabhai* (1870) 7 Bom HCAC 46; *Trimbak v Narayan* (1874) 11 Bom HC 69; *Ganpat v Annaji* (1874) 11 Bom HC 69; *Ganpat v Annaji* (1899) 23 Bom 144; *Haridas v Pran Nath* (1886) 12 Cal 566. See O 22 rr 1 and 2, Code of Civil Procedure. The rule, however, is not absolute—*Haribar v Nabakishore* AIR 1963 Ori 45.

77 *Pattaraty v Audimula* (1870) 5 Mad HC 419; *Balunki v Benudhar* AIR 1967 Ori 30.

78 *Narayan v Pandurang* (1875) 12 Bom HC 148; *Kristayya v Narasimhan* (1900) 23 Mad 608.

79 *Purushottam v Atmaram* (1899) 23 Bom 597; *Lachmi v Janki* (1901) 23 All 216 (where the property was the exclusive property of some of the coparceners only); *Laximan v Bayabai* (1955) ILR Nag 656, AIR 1955 Nag 241.

80 *Subba v Rama* (1867) 3 Mad HC 376 (see s 16, Code of Civil Procedure). *Punchanun v Shib Chunder* (1887) 14 Cal 835; *Balaram v Ramchandra* (1898) 22 Bom 922 (see cl 12, Letters Patent). *Abdul Karim v Badruddeen* (1905) 28 Mad 216; *Jaganath v Diocession Corporation* (1950) 29 Pat 1065.

a suit for partition is brought by the other coparceners against the purchaser. As to the rights of the other coparceners in such a case, see § 261(3).

(iv) The last case may be put in the form of an illustration. *A* and *B* are members of a joint family. The family property consists of three houses *X*, *Y* and *Z*. *A* sells his interest in house *X* to *C*. *B* sells his interest in the same house to *D*. In such a case, *D* can sue *C* for partition of house *X*, without asking for a partition of houses *Y* and *Z*. *A* and *B*, no doubt, must be joined as defendants; but the real contest in this case is between strangers to the family, namely, *C* and *D*, and there is no reason why such contest should not be determined without reference to the remaining property of the family.[81]

Hotchpot

A member of a joint family suing his coparceners for partition of family property is bound to bring into hotchpot, in order that there may be a complete and final partition, all family property that may be in his possession,[82] even though it is land situated beyond the local limits of the ordinary original jurisdiction of the court in which the suit is brought,[83] provided it is situated within India.[84]

As has been stated, all family property must be brought into the hotchpot while affecting a partition. In this regard, the decision in the case of *Nilkanth v Ramchandra*,[85] following the decision in the case of *Malladi Venkata Sastry v Venkatramanayya*,[86] has held that construction of a separate floor to an ancestral house with separate funds of a coparcener is not excludable from the hotchpot.

Withdrawal of Partition Suit

A plaintiff has no absolute right of withdrawing a partition suit. Even the defendants may have a right to claim partition.[87]

81 *Subbarazu v Venkataratnam* (1892) 15 Mad 234; *Iburamsa v Thirumalai* (1911) 34 Mad 269, 7 IC 559.

82 *Ramlochun v Rughoobur* (1871) 15 WR 111; *Lallijeet v Rajcoomar* (1876) 25 WR 353; *Satchidananda Samanta v Ranjan Kumar Basu* AIR 1992 Cal 222.

83 *Hari v Ganpatrao* (1883) 7 Bom 272; *Bolaram v Ramchandra* (1898) 22 Bom 922, 928.

84 *Ramacharya v Anantacharya* (1894) 18 Bom 389.

85 *Nikanth v Ramchandra* AIR 1991 Bom 10.

86 *Malladi Venkata Sastry v Venkatramanayya* AIR 1940 Mad 626.

87 *Manohar Singh v Sardar Bai* AIR 1987 Raj 177; *R Ramamurthi v Pashwarrao* AIR 1973 SC 643.

Miscellaneous

§ 334. CONVERSION AND PARTITION

Conversion of a member of a joint family to Mohammedanism,[88] or to Christianity,[89] or to any other religion operates as a severance of the joint status as between him and the other members of the family, but not as a severance among the other members inter se. It extinguishes the right of survivorship as between the convert and his coparceners. He ceases to be a coparcener from the moment of his conversion, and is entitled to receive his share in the joint family property as it stood at the date of his conversion.[90]

A member of a joint Hindu family does not by his conversion forfeit his interest in the joint family property (see § 97, ill (a), and the Caste Disabilities Removal Act 1850).

§ 334A. SPECIAL MARRIAGE ACT 1872: SPECIAL MARRIAGE ACT 1954

By operation of s 22 of the Special Marriage Act 1872, their results severance of status of a person marrying under the Act. The Act of 1954 repeals the earlier enactment. The effect of s 19 of the Act of 1954 is the same, namely, the marriage results in severance of the person from the joint family. Reference may be made to the case noted below.[91]

§ 335. THE PARTITION ACT 1893

(1) Where in a suit for partition, it appears to the court that a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the court may, if it thinks fit, on the request of any such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

Owelty

While effecting a partition of joint family properties, it would not be possible to divide the properties by metes and bounds, there being of

88 *Gobind v Abdul* (1903) 25 All 546 573; *Ram Pergash v Mst Dahan Bibi* (1924) 3 Pat 152, 78 IC 749, AIR 1924 Pat 420.

89 *Khunni Lal v Gobind* (1911) 33 All 356, 38 IA 87, 10 IC 477, on appeal from 29 All 487; *Kulada v Haripada* (1913) 40 Cal 407, 17 IC 257.

90 *Kulada v Haripada* (1913) 40 Cal 407, 17 IC 257; *Vella Venkatasubbayya v Yella Venkatramayya* (1944) ILR Mad 33.

91 *Girdharilal v Fatechand* AIR 1955 MB 148.

necessity an allocation of properties of unequal values amongst the members of the joint family. Properties of a larger value might go to one member and properties of a smaller value to another and therefore there would have to be an adjustment of the values by providing for the payment by the former to the latter by way of equalisation of their shares. This is known as principle of owelty or equality of partition.[92] A lien or a charge created in favour of a member on regard to such owelty, obtains precedence over an incumbrance as pointed out in the above decision. Where property in possession of one is given under an award to another, member of the joint family with owelty money to the former, the former can retain possession till payment of owelty.[93]

(2) Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of the family, it is open to any member of the family who is entitled to a share in the dwelling house to buy the share of the transferee at a valuation made by the court. The expression 'dwelling house belonging to an undivided family' in s 4 of the Partition Act relates to family not divided qua dwelling house, even though the coparcenaries have defined shares.[94]

The partition suit need not be the transferee.[95] This section reproduces the provisions of ss 2 and 4 of the Partition Act 1893. As to powers of the court de hors provisions of the Act, see *Ramaprasada Rao v Subbarameiah*.[96]

Covenant to pre-empt

An agreement between two brothers at a partition that if one sharer wishes to sell his share in the house or if his share was sold in any other way, the other sharer would be entitled to buy it at a certain amount, is not void under s 14 of the Transfer of Property Act and is binding on the representative of the party.[97]

VI. Reopening Of Partition

Note.—Under Hindu law, partition is made only once, but there are some exceptions to this rule. The posthumous son can claim a re-partition and so can the heir of a disqualified person and an absent coparcener. The case of the adopted son also must be included amongst the exceptions. A partition may also be reopened on grounds mentioned in §§ 337–39 below.

92 *Swaminatha Odayar v Official Receiver* AIR 1957 SC 577.
93 *Ram Krishna v Nemai Krishna* AIR 1974 Cal 173.
94 *Nirupama Basak v Baidyanath* AIR 1985 Cal 406.
95 *Ramaswami v Subramania* AIR 1967 Mad 156.
96 AIR 1958 AP 647, AIR 1957 Pat 566.
97 *Ratanlal v Ramanujdas* (1945) ILR Nag 174.

§ 336. RIGHTS OF SONS

A partition may be reopened by an after-born son in the circumstances mentioned in §§ 309 and 310 or a person validly adopted to a deceased coparcener (who if existing at the time of the partition would have been entitled to a share) by his widow after the partition.[98]

In reopening a partition, made between the surviving members of a joint Hindu family, at the instance of a son adopted by the widow of a deceased coparcener, the adopted son is entitled to claim that the properties alienated not for justifying necessity by the surviving coparceners, should be assigned to their shares and that he should be awarded his share in the property existing at the date of his adoptive father's death. Whenever a partition is reopened, shares must be allocated on a fair and equitable principle. Equity in such a case could be satisfied if, in determining the share of the adopted son, the alienation made by one of the coparceners is allotted to his share and the partition is opened on that basis and the properties are reallotted on that basis. This in no way can be said to interfere with the right of a divided coparcener to deal with his share as his own or of impairing the principle that an adopted son is bound by all lawful alienations made prior to the adoption, does arise.[99]

Where in a partition between two brothers, one brother transferred a portion of his share to the other in consideration of the fact that the latter had discharged joint family debts out of his separate property, the son of the former cannot question the transfer.[1]

§ 337. FRAUD

A partition may be reopened, if any coparcener has obtained an unfair advantage in the division of the property by fraud upon the other coparceners.[2]

If in a suit for partition, no fraud is pleaded initially in the plaint, the plea cannot be allowed to be changed belatedly that the partition was fraudulent.[3]

98 *Sankaralingam Pillai v Veluchami Pillai* (1943) Mad 309, 205 IC 1, AIR 1943 Mad 43; see 'Adoption'.

99 *Krishtappa v Gopal* AIR 1957 Bom 214 (FB); *Irappa v Ramappa* AIR 1974 Kant 143 (right of accretions).

1 *Ananthachari v Krishnaswami* (1938) Mad 410, 174 IC 599, AIR 1938 Mad 102.

2 *Moro Vishvanath v Ganesh* (1873) 10 Bom HC 444, 451; *Lakshman v Gopal* (1899) 23 Bom 385, also see § 292. Also see *Veerabhadrappa v Lingappa* AIR 1963 Mys 5 (no proof of fraud, unfair dealing or overreaching). Reference may also be made to *A Venkappa Bhatta v Gangamma* AIR 1988 Ker 133 (undue influence and mere presentation).

3 *Raghunath Tiwary v Ramakant Tiwary* AIR 1991 Pat 145.

§ 338. MISTAKE

Where, after a partition has been made, it is discovered that property allotted to one of the coparceners did not belong to the family, but to a stranger, or that it was subject to a mortgage, the coparcener to whom such property has been allotted is entitled compensation out of the shares of the other coparceners, and the partition may, if necessary, be reopened for readjustment of the shares.[4]

§ 339. WHERE A PORTION OF JOINT PROPERTY WAS EXCLUDED FROM PARTITION

Where a partition of the joint property has been excluded from partition by mistake, accident or fraud, such portion continues to be the joint property to the family, and it must be divided amongst the persons who took under the partition.[5] It is not necessary in such a case to reopen the original partition.[6]

Finality of partition

'Once is the partition of inheritance made, once is a damsel given in marriage; and once does a man say, "I give"; these three act by good men done once for all and irrevocably.'[7] Therefore, a partition once made cannot be reopened except in the cases mentioned in the above section. Where a partition is prejudicial to the interests of a minor coparcener, it may be set aside as regards himself (see § 339 A and § 308, sub-§ (2)).

§ 339A. REOPENING OF PARTITION AT THE INSTANCE OF A MINOR

The law on the subject was very clearly summarised by the Supreme Court in a decision[8] in the form of propositions:

(a) Where the partition is effected between the members of the

4 *Maruti v Rama* (1897) 21 Bom 333; *Purushottam v Atmaram* (1899) 23 Bom 597; *Balaji v Annapurnabai* (1952) ILR Nag 99, AIR 1952 Nag 2; *Debabrata Ghose v Jnanendra* AIR 1960 Cal 381; *Damodra Nayak v Vatsala Nayak* AIR 1990 Ker 348.

5 *Jogendra v Baladeb* (1907) 12 CWN 127; *Bhowani v Juggernath* (1908) 13 CWN 309, 316; *Lachman v Sanwal* (1878) 1 All 543; *Ganeshi Lal v Babu Lal* (1918) 40 All 374, 45 IC 4, AIR 1918 All 223.

6 *Colebrooks Digest*, Vol III, p 400, *Kumaraswami v Kajamanikkam* AIR 1966 Ker 266.

7 *Manu*, IX, 47.

8 *Ratnam Chettiar v Kuppuswami* AIR 1976 SC 1 (having regard to the facts and circumstances of the case, the Supreme Court itself quantified the amount payable to the minor plaintiffs); *Bishundeo v Seogani Rai* AIR 1951 SC 280, 283; *Sukhrani v Hari Shanker* AIR 1979 SC 1436; *Meenambai v Chokalinga* AIR 1978 Mad 230.

family, which includes minor coparceners, it is binding on the minors also, if it is done in good faith, and in bona fide manner, keeping into account the interest of the minors.

(b) Where, however, a partition is proved to be unjust and unfair and is detrimental to the interest of the minors, the partition can be reopened at any time. In such a case, it is the duty of the court to protect the interest of the minors. The onus of proof that the partition was just and fair is on the party supporting the partition.

(c) Where there is a partition of immovable and movable properties and the two transactions are distinct and separable, or have taken place at different times, it is open to the court to maintain that which is just and fair and reopen only that which is unjust and unfair.

Also see the decision below.[9]

VII. Effect of Partition

§ 340. DEVOLUTION OF SHARE ACQUIRED ON PARTITION

The effect of a partition is to dissolve the coparcenary, with the result, that the separating members thenceforth hold their respective shares as their separate property, and the share of each member will pass on his death to his heirs. However, if a member while separating from his other coparceners continues joint with his own male issue, the share allotted to him on partition, will in his hands, retain the character of a coparcenary property as regards the male issue (§ 223, sub- § (4)).

§ 341. WHETHER SEPARATING SON CAN INHERIT AS AN HEIR

(1) It has been held by the High Court of Bombay, Madras, Allahabad and some other High Courts that on the death of a father leaving self-acquired property, an undivided son takes such property to the exclusion of a divided son (see § 43 'divided and undivided sons'). Section 8 of the Hindu Succession Act 1956, has abolished distinction between a divided son and an undivided son in the matter of inheritance of self-acquired property.

(2) If there is no undivided son, the divided son is entitled to succeed to such property in preference to his father's widow.[10] Under s 3 (1) of

9 *Radhamani Bhuiyanin v Dibakar Bhuiya* AIR 1991 Pat 95 (separate enjoyment established—no reopening).

10 *Ramappa v Sithammal* (1879) 2 Mad 182; *Balkrishna v Savitribai* (1879) 3 Bom 54.

the Hindu Women's Rights to Property Act 1937 and s 8 of the Hindu Succession Act 1956, the father's widow inherits simultaneously with the son, whether divided or undivided.

(3) If the deceased dies leaving a divided son and a divided grandson by a predeceased son, the divided son does not exclude the divided grandson, but they succeed to the property in equal shares.[11]

Propositions (2) and (3) proceed on the ground that partition does not destroy the final relation nor the rights of inheritance incidental to such relation.

The Patna High Court has applied this principle in favour of a separated grandson in the matter of succession to the separate property of the deceased grandfather.[12]

VIII. Reunion

§ 342. WHO MAY REUNITE

'A reunion in estate properly so called, can only take place between persons who were parties to the original partition.'[13] It would appear from this that a reunion can take place between any person who where parties to the original partition. Only males can reunite.[14]

The commentators, however, are not unanimous on this point. According to Mitakshara,[15] Dayabhaga (Bengal school), and the *Smriti Chandrika* (Madras school), a member of a joint family once separated, can reunite only with his father, brother or paternal uncle, but not with any other relation, as for instance, paternal grandfather or paternal uncle's son, though such relation was a party to the original partition. According to the *Vivada Chintamani* (Mithila school) and the Mayukha (which is the paramount authority in Gujarat, the island of Bombay and the Northern Konkan), a person may reunite with any relation who was party to the original partition.[16]

11 *Marudayi v Doraisami* (1907) 30 Mad 348.

12 *Bhairab v Birendra* (1949) 28 Patna 123, AIR 1950 Pat 1; *Jatru Pahan v Ambikajit Prasad* AIR 1957 Pat 570.

13 *Balabux v Rukhmabai* (1903) 30 Cal 725, 734, 30 IA 130, 136; *Akshay v Hari* (1908) 35 Cal 721; *Vishwanath v Krishnaji* (1866) 3 Bom HCAC 69; *Lakshmibai v Ganpat* (1867) 4 Bom HCOC 150, 166.

14 *Nanuram v Radhabai* (1942) ILR Nag 24, AIR 1940 Nag 241

15 *Hira Singh v Mst Mangla* (1928) 9 Lah 324, 106 IC 877, AIR 1928 Lah 122; *Rama Narain Chaudhury v Pan Kuer* (1935) 14 Pat 268, 62 IA 16, AIR 1935 PC 9.

16 *Basanta v Jogendra* (1906) 33 Cal 371 (Mitakshara); *Vishwanath v Krishnaji* (1866) 3 Bom HCAC 69, 73, 74 (Mayukha); *Bal Kishen Das v Ram Narain* (1903) 30 Cal 738, 753, 30 IA 139 (Dayabhaga); *Abhai Churn v Mangal* (1892) 19 Cal 634, 638 (Dayabhaga).

No writing is necessary for a reunion. Even persons who are parties to a registered deed of partition may reunite by an oral agreement.[17]

§ 343. EFFECT OF REUNION

The effect of a reunion is to remit the reunited members to their former status as members of a joint Hindu family.[18]

The question whether there has been a reunion or not, derives its importance from the fact that the devolution of the interest of a reunited member is governed by the special rules laid down in § 60 (Mitakshara law) and § 94 (Dayabhaga law).[19]

When a separated coparcener is reunited, the effect of such repatriation would be that the property, as a whole, would come within the fold of the joint family and not to a particular coparcener.[20]

§ 344. INTENTION NECESSARY TO CONSTITUTE REUNION

To constitute a reunion, there must be an intention of the parties to reunite in estate and interest.[21] In *Bhagwan Dayal v Reoti Devi*, the Supreme Court pointed out that it is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite in estate with an intention to revert to their former status. Such an agreement may be express or may be implied for the conduct of the parties. The conduct must be of an incontrovertible character and the burden lies heavily on a party who asserts reunion.[22]

The mere fact that the parties who have separated live together or trade together after partition, does not amount to reunion.[23] Such an intention may be inferred if the parties jointly take a mortgage in which

17 *Mahalakshmamma v Suryanarayana* (1928) 51 Mad 977, 117 IC 113, AIR 1928 Mad 113. Such an agreement, however, would be a difficult matter to establish—*Narasamma v Venkata Narasi* AIR 1954 Mad 282, (1953) 2 MLJ 695.

18 See §§ 60 and 54. *Prankishen v Mothooramohun* (1865) 10 MIA 403, 406.

19 *Paramanand v CIT* [1982] 135 ITR 673 (Sanskrit test examined).

20 *Chunia Mahatani v Sobha Mahato* AIR 1999 Pat 189.

21 *Balkishen Das v Ram Narain* (1903) 30 Cal 738, 753, 30 IA 139, 150; *Jatti v Banwari Lal* (1923) 50 IA 192, 74 IC 462, AIR 1923 PC 136, very strong evidence would be required when there was a decree for partition—*Parashuram v Hirabai* AIR 1957 Bom 59.

22 AIR 1962 SC 287, 296, (1962) 1 SCJ 348; *Ramadin v Gokulprasad* AIR 1959 MP 251; *Gokul Pati Datta v Pashu Pati Nath Datta* (1942) 1 Cal 85, 201 IC 642, AIR 1942 Cal 331; *Kaliammal v Sundarammal* (1949) ILR Mad 171; *Manorama Bai v Rama Bai* AIR 1957 Mad 269; *Radhakrishna v Subbaiah* AIR 1976 AP 293.

23 *Ram Hutree v Tribee Ram* (1871) 15 WR 442; *Gopal v Kenaram* (1867) 7 WR 35; *Venkata Chenchayya v Ramalingam* AIR 1957 AP 744; *Annappa Reddy v U Krishna* AIR 1982 Kant 301.

it is recited that they are members of a joint family, provided it is clearly shown that the recital is known to all the parties. If there is no such evidence, it cannot be inferred that the parties have reunited.[24] However, possession of family properties by a reuniting member at the time of reunion is not essential.[25] Since a minor is not competent to contract, it follows, that an agreement to reunite cannot be made by, or on behalf of, a minor.[26] If a partition suit instituted by one of the family members ends in a compromise by way of a family arrangement, it cannot be construed as a reunion of the family, since some of them were minors at the time when the suit was compromised.[27]

Where the parties lived jointly, but there was no reunion, the ordinary law of inheritance applies.

IX. Partition Created By So-Called Will

§ 345. PARTITION OR FAMILY ARRANGEMENT OR AGREEMENT CREATED BY SO-CALLED WILL

(1) No member of a joint family, although he may be the head of the family, has a right to make a partition by will of joint family property among the members of the family except with their consent. A document, though called a will, may not be a will in fact, but one intended to operate from the date of its execution; such a document may be good evidence of a family arrangement contemporaneously made and acted upon by all parties, the effect of which may be to create a partition of the joint family property.[28]

(2) Similarly, no member of a joint family can dispose of even his own share by will. Now s 30 of the Hindu Succession Act 1956 permits a coparcener to dispose of his own share by will.

A document, though called a will, may not be a will in fact, but one intended to operate from the date of its execution. If a member of a joint family purports by such a document to dispose of his interest in the joint family property, then if the disposition is assented to by the other members of the family, the document may be good evidence of a family arrangement, and effect will be given to the disposition so made.[29]

24 *Govindoss v Official Assignee of Madras* (1934) 57 Mad 931, 61 IA 257, 150 IC 1.

25 *Godavarthi Venkanna v G Venkatanarayana* (1947) ILR Mad 382.

26 See § 328, sub-§ (3). *Balabux v Rukmabai* (1903) 30 Cal 725, 734–35, 30 IA 130, 136; *Kuta v Kuta* (1864) 2 Mad HCAC 235; *Bhagirathibai v Manohar* (1950) ILR Nag 698, AIR 1951 Nag 164; *Balasubramania v Narayana* AIR 1965 Mad 409.

27 *Haribaran v Padaril* AIR 1994 Ker 36.

28 *Brijraj Singh v Sheodan Singh* (1913) 35 All 337, 40 IA 161, 19 IC 826.

29 *Lakshmi Chand v Anandi* (1926) 53 IA 123, 48 All 313, 95 IC 556, AIR 1926 PC 34; *Kuppuswami v Perumal* AIR 1964 Mad 291.

Illustrations

(1) By a document called a 'will' the father and head of a joint family recorded a division of the joint family property amongst his three sons, giving himself no share, but allotting a double share to his eldest son. The document recited inter alia that he had divided the property among his sons in the proportions mentioned in it, and that in anticipation of the execution of the document, the sons had been put into possession of their shares some two months previously. The evidence showed that the division had been assented to, acquiesced on, and acted upon by the sons for a period of 10 years. It was held that the document was not a will, but was intended to operate from its date, and was evidence of a family arrangement contemporaneously made and acted upon by all the parties.[30]

(2) Two brothers, having no male issue, and constituting a joint Hindu family governed by Mitakshara, signed a document, described therein as an agreement by way of will. The document provided in effect that if either party died without a male issue, his widow should take a life interest in a moiety of the whole estate, and that if both parties died without a male issue, the daughters of each, or their male issue, should divide the father's share. The document was registered. A few days after its execution, one brother died, and his widow was entered as owner of a moiety of the estate. Subsequently, the other brother sued for a declaration that the document was null and void. It was held that the document could not operate as will; but that, as a co-sharer in a Mitakshara joint family with the consent of all his co-sharers, could deal with the share to which he would be entitled on a partition, the document was an agreement entitling the widow of the deceased brother to a life interest in a moiety.[31]

30 *Brijraj Singh v Sheodan Singh* (1913) 35 All 337, 40 IA 161, 19 IC 826.

31 *Lakshmi Chand v Anandi* (1926) 53 IA 123, 48 All 313, 95 IC 556, AIR 1926 Pat 54.

XVII

PARTITION—DAYABHAGA LAW



Note.—Attention has been drawn to the Hindu Women's Rights to Property Act 1937, the Hindu Succession Act 1956, and s 16 of the Hindu Marriage Act 1955, in the note at the beginning of chapter XIII. Reference may be made to that note.

§ 346. SCOPE OF THE CHAPTER

The object of the present chapter is to indicate the point of distinction between Mitakshara and Dayabhaga law of partition. Except as to those points, the rules of Mitakshara law of partition apply *mutatis mutandis* to cases governed by Dayabhaga law.[1]

§ 347. WHAT IS PARTITION

According to the true notion of a Mitakshara family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, that he (that particular member) has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in ascertaining and defining the shares of the coparceners; in other words, it consists in a numerical division of the property by which the proportion of each coparcener in the property is fixed (§ 322).

According to Dayabhaga law, on the other hand, each coparcener has, even whilst the family remains undivided, a definite share in the joint property of which he is the absolute owner. The property is held in defined shares, though the possession is the joint possession of the whole family. Partition, according to that law, consists in separating the shares of the coparceners, and assigning to the coparceners specific portions of the property.[2]

1 See § 272 and the case cited therein.

2 Dayabhaga, Chap I, paras 8–9.

As under Mitakshara law, so under Dayabhaga law, the true test of a partition lies in the intention of the parties to separate (§ 326). In the case of a joint Mitakshara family, that intention may be manifested by a mere agreement between the coparceners to hold and enjoy the property in defined shares as separate owners without an actual division of the property by metes and bounds (§ 326).[3] In the case, however, of a joint Dayabhaga family, such an agreement as aforesaid, is not a sufficient manifestation of the intention to separate; for according to Dayabhaga law, the joint property is held, even while the family remains joint, in defined and specific share. To constitute a partition according to Dayabhaga law, there must be something more than such an agreement.[4] There must be a separation of the shares, and the assignment to each coparcener of specific portions of the joint property (see § 279).

§ 348. PERSONS ENTITLED TO PARTITION

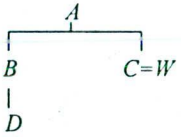
Under Dayabhaga law, every adult coparcener, male or female,[5] is entitled to enforce a partition of the coparcenary property. In addition, see Hindu Women's Right to Property Act 1937.

As regards minor coparceners, a suit may be brought on their behalf for a partition in the circumstances mentioned in § 308.

The rules stated in §§ 349–54 and the illustrations thereunder, should now be read in the context of the changes brought about in the law of succession by the Hindu Succession Act 1956.

Illustration

Table XVII.1



A, a Hindu, governed by Dayabhaga school, dies leaving two sons, *B* and *C*. On *A*'s death, *B* and *C* inherit the property left by *A* as coparceners. *B* dies leaving a son *D*. On *B*'s death, *D*

3 *Appovier v Rama Subba Aiyan* (1866) 11 MIA 75; *Balkishen Das v Ram Narain* (1903) 30 Cal 738, 30 IA 139; *Parbati v Naunihal* (1909) 31 All 412, 36 IA 71, 3 IC 195.

4 *Bata v Gopal* (1907) 5 Cal LJ 417. As to actual partition by separation of specific portions and connotation of metes and bounds, reference may be made to *Jabar Lal v Anand Chandra* AIR 1981 Cal 424 and decisions there considered.

5 *Durga Nath v Chintamoni* (1904) 31 Cal 214.

inherits *B*'s share in the coparcenery property as *B*'s heir and he becomes a coparcener with *C*. *C* dies next leaving a widow *W*. On *C*'s death, *W* inherits *C*'s share in the coparcenery as his heir, and she becomes a coparcener with *D*. The position at this stage is that we have a coparcenary consisting of two members, namely, *D* and *W*, ie, one male and one female (§ 277). *W* sues *D* for partition. Is she entitled to do so? Yes, and the court will allot to her a moiety of the joint property both movable and immovable.[6]

§ 349. SONS, GRANDSONS AND GREAT-GRANDSONS

Under Dayabhaga law, a son is not entitled to a partition of the coparcenary property against his father. The reason is that a son, according to that law, does not acquire by birth an interest in ancestral property. The same rule applies to grandsons and great-grandsons (§§ 273–74).

According to Dayabhaga law, there can be no coparcenary in the strict sense of the term between a father and sons, or between a grandfather and grandsons, or between a great-grandfather and great-grandsons (see note to § 277). Under that law, the father has absolute power of disposal of the property, whether ancestral or self-acquired.

§ 350. ILLEGITIMATE SONS

According to all the schools, the illegitimate sons of the three regenerate classes (§ 1) are not entitled to any share of the inheritance nor to any share on partition. They are entitled to maintenance only. Reference may also be made to ss 20–22 of the Hindu Adoption and Maintenance Act 1956. As to the illegitimate sons of a Sudra, see 43, nos 1–3 (as to inheritance) and § 312 (as to partition).

§ 351. PURCHASER

Where a fractional share in a property, which forms part of a joint estate has been sold, the purchaser may sue for partition of that property only and for possession of the share brought by him, without asking for partition of the whole joint estate.[7]

Illustration

A dies leaving two sons, *B* and *C*. The family owns two immovable properties *X* and *Y*. *B* sells his one-half share in *X* to *D*. *D* may sue for partition of *X* and for possession of a moiety thereof, without including property *Y* in the suit.

6 *Durga Nath v Chintamoni* (1904) 31 Cal 214.

7 *Barabi v Debkamini* (1893) 20 Cal 682.

§ 352. WIFE

According to Mitakshara law, though a wife cannot herself demand a partition, she is entitled to a share on a partition between her husband and his sons (§ 315). No such question can arise under Dayabhaga law, for according to that law, a father is the absolute owner of his property, whether ancestral or self-acquired, and the sons not being entitled to any interest in his property in his lifetime, cannot demand a partition against him (§§ 273–75).

Since a father, according to Dayabhaga law, has absolute power of disposal over his property, whether ancestral or self-acquired, he may in his lifetime, divide his property among his sons in such proportions, as he likes. He is not bound to divide it equally between them, not even the ancestral property.[8]

§ 353. MOTHER

(1) As under Mitakshara law, so under Dayabhaga law, a mother cannot herself demand a partition; but if a partition takes place between her sons, she is entitled to a share equal to that of a son, after deducting the value of *stridhana*, if any, which she may have received from her husband or father-in-law (§ 316).[9] Reference may also be made to the Hindu Women's Rights to Property Act 1937.

(2) If a son dies before partition, leaving the mother as his heir, the mother is entitled, upon a partition between her surviving sons, to receive a share as heiress of her deceased son as well as a share in her own right. The share, which she is entitled to receive as the heiress of her deceased son, is not *stridhana*, for property inherited by a mother is not *stridhana* at all, and it is not therefore to be taken into account in determining the value of her share on partition [Illust (a)].[10]

The rule laid in *Indu Bhusan v Mrityunjoy*,[11] has been now overruled by the decision of the special Bench noted in *Milan Kumar Das v Purnasashi*.[12]

(3) A Hindu governed by Dayabhaga law may dispose of the whole of his property, ancestral as well as self-acquired, by a will to deprive his widow of a share on a partition between her sons. The reason is that,

8 *Bhattacharaya's Hindu Law*, Second edn, p 361; *Mitra's Law of Joint Property and Partition*, p 320; *Sarolah v Bhoobun* (1888) 15 Cal 292, 306–307.

9 *Kishori v Moni Mohun* (1886) 12 Cal 165; *Jogendra v Fulkumari* (1900) 27 Cal 77.

10 *Jugomohan v Sarodamoyee* (1878) 3 Cal 149; *Poorendra Nath v Hemangini* (1909) 36 Cal 75, 1 IC 523; *Milan Kumar Das v Purnasashi* AIR 1974 Cal 380 (spl Bench).

11 (1946) 1 Cal 128.

12 AIR 1974 Cal 380 (Spl Bench).

according to that law, a widow has no indefeasible vested right in the property left by her husband. However, if the whole property be willed away, she has, by virtue of her marriage, a right to maintenance out of her husband's property [Illust (b)].[13]

(4) Under Dayabhaga law, a sonless stepmother is not entitled to a share on a partition between her stepsons [Illust (c)].[14]

(5) On a partition between sons by different mothers, where there is more than one son of each mother, the rule is first to divide the property into as many shares as there are sons, and then to allot to each mother a share equal to that of each of her sons in the aggregate portion allotted to them [Illust (d)].[15] A mother who has only one son, is not entitled to a separate share. Her only right is to maintenance out of the portion allotted to him [Illust (e)].[16]

(6) According to Dayabhaga law, the share allotted to a mother on a partition between her sons is given to her in lieu of, or by way of provision for, her maintenance [§ 128(1)]. Such being the case, she is not entitled to a share, if only a portion of the joint property is divided and the bulk of the property remains undivided; provided that she can be adequately maintained from the undivided property.[17]

(7) The mere institution of a suit for partition by a son does not entitle the mother to a share in her husband's estate. If the suit is dismissed or withdrawn, she can claim no share. It is only if a decree is passed in the suit that she is entitled to a share. It follows that if one of the properties is mortgaged by the sons, and it is sold at the instance of the mortgagee before a decree for partition is passed, she is not entitled to any share in that property. Nor is she entitled by reason of the sale of the property to a larger share in the other properties. Whether she would be entitled to any charge for her, maintenance on the property sold is an open question.[18]

Illustrations

(a) *H* dies leaving a widow *A*, and three sons *B*, *C* and *D*. *B*, *C*, and *D* remain joint. After some time, *D* dies intestate and unmarried. On *D*'s death, *A* is entitled to his share as his heir (§ 88). A year after *D*'s death, *B* sues *C* and *A* for partition. The property will be divided into four shares of which one will be allotted to *B*,

13 *Debendra v Brojendra* (1890) 17 Cal 886, (1909) 39 Cal 75, 1 IC 523.
14 *Srimati Hemangini v Kedaranth* (1889) 16 Cal 758, 765, 16 IA 115.
15 *Kristo Bhabiney v Ashutosh* (1886) 13 Cal 39.
16 (1889) 16 Cal 758, 16 IA 115; *Sorolah v Bhoobun* (1888) 15 Cal 292, 307.
17 *Barabi v Debkamini* (1893) 20 Cal 682.
18 *Baldeodas v Sarojini* (1930) 57 Cal 597, 126 IC 408, AIR 1929 Cal 697.

one to *C* and two to *A*, one as *D*'s heir and the other in her own right.[19]

(b) *A* dies leaving a widow *B*, and two sons, *C* and *D*. *A*, by his will, bequeaths the whole of his property, ancestral as well as self-acquired, absolutely to *C* and *D*. *C* sues *D* for partition. Is *B* entitled to a share at such partition? No; because the whole property has been willed away to the sons. She is entitled to maintenance only.[20]

(c) *A* dies leaving a widow *B* who has no son, and two sons, *C* and *D* by a predeceased wife. *C* sues *D* for partition. Is *B* entitled to share on partition? No, for *B* is not the mother, but the stepmother of *C* and *D*. (According to Mitakshara law, *B* would take one-third—see § 316.)

(d) *A* dies leaving two widows, *B* and *C*, and two sons by *B* and three sons by *C*. On a partition between the sons of *B* and *C*, the mode of division is first to divide the property into 5 shares corresponding to the number of sons. The two sons of *B* will share 2/5 equally with their mother *B*, each taking 1/3 of 2/5, ie 2/15. The three sons of *C* will share 3/5 equally with their mother *C*, each taking 1/4 of 3/5, ie, 3/20. Thus, *B* will take 2/15 and *C* will take 3/20.

(e) *A* dies leaving a widow *B*, a son *C* by *B*, and two sons, *D* and *E*, by a predeceased wife. *C* sues *D* and *E* for partition. Each of the three sons takes one-third. *B* is not entitled to share the one-third allotted to her son *C* with him as she has only one son. However, she is entitled to maintenance out of the one-third allotted to her son *C*.[21]

§ 354. GRANDMOTHER

A grandmother (father's mother) cannot herself demand a partition but:

(i) if a partition takes place between her sons and grandsons, or between her sons and a predeceased son's daughter, who acquired a share as heir of her father,[22] she takes the share of a son;

(ii) if a partition takes place between her grandsons, she takes the share of a grandson; and

(iii) if a partition takes place between her grandson and great-grandsons, she takes the share of a grandson.[23]

19 *Jagomohan v Sarodamoyee* (1878) 3 Cal 149 (according to Mitakshara law, *D*'s share would pass to *B* and *C* by survivorship).

20 *Debenbra v Brojendra* (1890) 17 Cal 886.

21 *Hemagini v Kedarnath* (1889) 16 Cal 758, 16 IA 115.

22 *Sibbosoondery v Bussoomutty* (1881) 7 Cal 191.

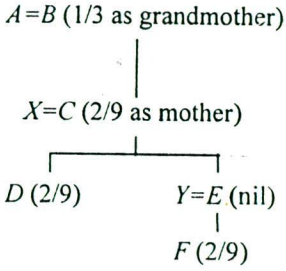
23 *Sibbosoondery v Bussoomutty* supra; *Purna Chandra v Sarojini* (1904) 31 Cal 1065.

In each case, if she has received any *stridhana* from her husband or her father-in-law, she is entitled to so much only as together with what she has already received would make her share equal to that of a son or grandson as the case may be.[24]

The grandmother gets a share only if the subject matter of partition is the property of her husband.[25]

Illustration

Table XVII.2



A dies leaving a widow *B*, and a son *X*. *X* dies leaving a widow *C*, and two sons *D* and *Y*. *Y* dies leaving a widow *E* and a son *F*. *D*, who is *A*'s grandson, sues *F*, who is *A*'s great-grandson, *B*, his grandmother, *C*, his mother, and *E* his brother's widow, for a partition of *A*'s property. Here the partition is really between *D*, *B*'s grandson, and *F*, *B*'s great-grandson. Therefore *B*, as grandmother of *D* is entitled to a share, equal to that of her grandson *D*. Similarly, *C*, as *D*'s mother is entitled to a share equal to that of her son *D*. What are the shares of *B* and *C*? As *B* is entitled to a share equal to that of a grandson, the property will first be divided into three parts of which *B* will take 1/3, *D* will take 1/3 and the heirs of *Y*, that is *E* and *F* will take 1/3. Similarly, as *C* is entitled to a share equal to that of a son and the portion allotted to the sons *D* and *Y* is 2/3, *C* will take 1/3 of 2/3, ie 2/9, *D* will take 2/9, and *F* will take 2/9. *E* is not entitled to share her son *F*'s 2/9, with him, as according to Dayabhaga law, a mother who has only one son is not entitled to a share on partition.[26]

24 *Kishori v Moni Mohun* (1886) 12 Cal 165.
25 *Kiranbala v Sushil* 53 CWN 709.
26 Ibid.

§ 355. ALLOTMENT OF SHARES

On a partition, shares are allotted according to the following rules:

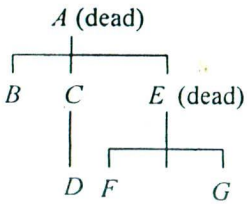
(1) on a partition between brothers, they all take equally;[27]

(2) the share of a brother who is dead is taken by his heir, devisee, or assignee;

(3) each branch takes per stirpes (ie according to the stock) as regards every other branch, but the members of a branch take per capita as regards one another.

Illustration

Table XVII.3



A dies leaving two sons *B* and *C*, a grandson *D* by *C*, and two grandsons *F* and *G* by a predeceased son *E*. The property will be divided into three portions per stirpes, *B* taking one-third, *C*, taking one-third, and *F* and *G* together taking one-third. *F* and *G* take per capita, ie, each taking one-sixth. *D* takes nothing, for under the Bengal school, sons do not take any interest in ancestral property during their father's lifetime. (If *B* had died leaving a widow, his third share would have gone to her (rule 2); according to Mitakshara law, it would have passed by survivorship to *C* and *E*).

27 Dayabhaga, Chap III, s 2, para 27.

XVIII
GIFTS



§ 356. 'GIFT' DEFINED

Gift consists in the relinquishment (without consideration) of one's own right (in property) and the creation of the right of another; and the creation of another man's right is completed on that other's acceptance of the gift, but not otherwise.[1]

§ 357. WHAT PROPERTY MAY BE DISPOSED OFF BY GIFT

(1) A Hindu, whether governed by Mitakshara or Dayabhaga school, may dispose of by gift his separate or self-acquired property, subject in certain cases to the claims for maintenance of those whom he is legally bound to maintain (§ 222). Reference may be made to ss 18–22 of the Hindu Adoptions and Maintenance Act 1956.

(2) A coparcener under Dayabhaga law may dispose off his coparcenary interest by gift, subject to the claims of those who are entitled to be maintained by him (§ 282).

A coparcener under Mitakshara law, however, has no such power (§ 258), unless he is the sole surviving coparcener (§ 257).

(3) A father under Dayabhaga law, may by gift, dispose of the whole of his property, whether ancestral or self-acquired, subject to the claims of those who are entitled to be maintained by him.[2]

The reason is that according to the Bengal School, 'where property is held by the father (as the head of the family), his issue have no legal claim upon him or the property except for their maintenance. He can dispose it off as he pleases, and they cannot require a partition. The sons have no ownership while the father is alive and free from defect. Upon his death, the property in the sons arises, and with it the right to a

1 *Mitakshara*, Chap 3, ss 5 and 6. See § 358, and notes under 'Acceptance of Gift'.
2 *Nagalutchmee v Gopoo* (1856) 6 MIA 309, 344 (case of a will).

partition' (§§ 273, 275).[3] A father under Mitakshara law has no such power over joint family property. He cannot dispose of it, not even his own interest therein, by gift. In certain cases, however, he has a special power, by virtue of his position as father, to dispose off, by gift, a small portion of joint family property (§§ 225 and 226).

(4) A female may dispose of her *stridhana* by gift or will, subject in certain cases to the consent of her husband (§ 143). The rights of a female have been considerably enlarged by s 14 of the Hindu Succession Act 1956. Reference may, be made to the notes under that section.

(5) A widow may, in certain cases, by gift, dispose of a small portion of the property inherited by her from her husband (§ 181B(2)(v)), but she cannot do so by will. Her rights have now been considerably enlarged by s 14 of the Hindu Succession Act 1956. Reference may be made to the notes under that section.

(6) A widow governed by Mayukha law may alienate by gift movable property inherited by her from her husband, though she cannot dispose of it by will (§ 179). Her rights have now been considerably enlarged by s 14 of the Hindu Succession Act 1956. Reference may be made to the notes under that section.

(7) The owner of an impartible estate may dispose of the estate by gift or will, unless there be a special custom prohibiting alienation, or the tenure is of such a nature that the estate cannot be alienated.[4]

Marumakkatayyam Law

As to the effect of a gift by a husband to his wife and her children by him, her children by her former husband being alive at the date of the gift, see the undermentioned case.[5]

§ 358. DELIVERY OF POSSESSION

(1) A gift under pure Hindu law need not be in writing. However, a gift under that law is not valid unless it is accompanied by delivery of possession of the subject of the gift from the donor to the donee.[6] Mere registration of deed of gift is not equivalent to delivery of possession; it is not therefore sufficient to pass the title of the property from the donor

3 *Sartaj v Deoraj* (1888) 10 All 272, 288, 15 IA 51.

4 See Chapter XXVII. *Surtaj v Deoraj* (1888) 10 All 272, 15 IA 51; *Venkata Surya v Court of Wards* (1899) 22 Mad 383, 26 IA 83; *Rao Bhimsingh v Fakirchand* (1947) Nag 649.

5 *Moithiyan v Ayssa* (1928) 51 Mad 574, 110 IC 480, AIR 1928 Mad 870.

6 *Harijivan v Naran* (1867) 4 Bom HCAC 31; *Abaji v Mukta* (1894) 18 Bom 688; *Venkatachella v Thathammal* (1869) 4 Mad HC 460, *Gordhandas v Bai Ramcoover* (1902) 26 Bom 449; *Mst Nozi v Mobanlal* AIR 1957 Raj 128.

to the donee.[7] However, where from the nature of the case, physical possession cannot be delivered, it is enough to validate a gift, if the donor has done all that he could do to complete the gift, so as to entitle the donee to obtain possession.[8]

Illustrations

(a) *A* executes a deed of gift of certain immovable property to *B*. At the date of the gift, the property is in the possession of *C*, who claims to hold it adversely to *A*. *B* sues *C* to recover possession of the property from him, joining *A* in the suit as a defendant. *A* by his written statement, admits *B*'s claim. *C* contends that the gift is void, inasmuch as *A* was out of possession at the date of the gift, and possession was not given to *B*. The gift is valid, though possession was not delivered by the donor to the donee. 'The donor has done all that she can to complete the gift, and is a party to the suit, and admits the gift to be completed.'[9]

(b) A gift of property in the occupation of tenants may be completed by the tenants attorning to the donee at the donor's request.[10]

(c) If the donee is already in possession, the gift may be completed by declaration of gift on the part of the donor, and by acceptance on the part of the donee.[11]

(c1) A gift among the Hindus of Berar before the application of the Transfer of Property Act to that state, is invalid, unless accompanied by delivery of possession.[12]

(d) It has been held by the High Court of Allahabad that mere delivery of a registered deed of gift is sufficient to complete a gift.[13] This view cannot be supported, unless the case was one governed by the Transfer of Property Act (see sub-§ (2)).

(e) For the purpose of making a gift of an incorporeal right, the transfer may be effected in the same manner as the transfer of a chose in action.[14]

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7 *Vasudev v Narayan* (1883) 7 Bom 131; *Dagai v Mothura* (1883) 9 Cal 854; *Lakshimoni v Nityananda* (1893) 20 Cal 464.

8 *Kalidas v Kanhaya Lal* (1884) 11 Cal 121, 11 IA 218 (where the gift was effected by an *Ikrarnama*); *Joitaram v Ramkrishan* (1903) 27 Bom 31; *Rajaram v Ganesh* (1889) 23 Bom 131; *Bhakar v Sarasvatibai* (1893) 17 Bom 486.

9 *Kalidas v Kanhaya Lal* (1884) 11 Cal 121, 11 IA 218; *Man Bhari v Nainidh* (1882) 4 All 40, 45.

10 *Bank of Hindustan v Premchand* (1868) 5 Bom HCOC 83.

11 *Bai Kushal v Lakhama* (1883) 7 Bom 452.

12 *Chandrabhaga v Anandarao* (1939) Nag 293.

13 *Balmakund v Bhagwan Das* (1894) 16 All 185.

14 *Chalamanna v Subbamma* (1884) 7 Mad 23 (gift of a *nibandha* or corrody); *Khursedji v Pestonji* (1888) 12 Bom 573 (gift of government promissory notes).

(2) As regards Hindu gifts to which the Transfer of Property Act 1882 applies, the rule of pure Hindu law, that delivery of possession is essential to the validity of a gift, is abrogated by s 123 of that Act.[15] Under that Act, delivery of possession is no longer necessary to complete a gift, nor is mere delivery sufficient to constitute a gift except in the case of movable property. A gift under that Act can only be effected in the manner provided by s 123. That section is as follows:

> (i) For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by least two witnesses.
>
> (ii) For the purpose of making a gift of movable property, the transfer may be effected by a registered instrument signed as aforesaid or by delivery.

Gifts by Hindus to Which the Transfer of Property Act 1882 Applies

Section 123, Transfer of Property Act 1882, has been applied to gifts by Hindus by s 129 of that Act. The Act came into force on the first day of July 1882. The provision of s 123, Transfer of Property Act apply to all gifts made by Hindus in the territories to which that Act applies since the date on which the Act came into force in those territories.

Writing

Writing is not necessary under Hindu law for the validity of any transaction.[16] Therefore, in cases of gifts by Hindus to which the Transfer of Property Act does not apply, a gift may be made orally or in writing.

The effect of s 123, Transfer of Property Act is to dispense with delivery of possession.[17] However, the Act does not dispense with the necessity of acceptance as is clear from s 122. The mere execution of a registered deed by the donor is no proof of acceptance by the donee. Acceptance must be proved as an independent fact.

15 *Kalyanasundaram v Karuppa* (1927) 54 IA 89, 50 Mad 193, 100 IC 105, AIR 1927 PC 42; *Atmaram v Vaman* (1925) 49 Bom 388 (FB), 87 IC 490, AIR 1925 Bom 210; *Dharmodas v Nistarini* (1887) 14 Cal 446; *Balbhadra v Bhowani* (1907) 34 Cal 853; *Bai Rambai v Bai Mani* (1899) 23 Bom 234; *Ramamirtha v Gopala* (1896) 19 Mad 433; *Alabi v Mussa* (1901) 24 Mad 513, 522; *Phulchand v Lakkhu* (1903) 25 All 358; *Lallu Singh v Gur Narain* (1923) 45 All 115; 68 IC 798, AIR 1922 All 467 (FB); *Ranganadha v Baghirathi* (1906) 29 Mad 412, 415. However, see *Moosabhai Yacoobhi* (1905) 29 Bom 267; *Sadik Hussain Khan v Hashim Ali Khan* (1916) 43 IA 212, 222, 223, 38 All 627, 647, 36 IC 104, AIR 1916 PC 27.

16 *Balram v Appa* (1872) 9 Bom HC 121; *Hurpurshad v Sheo Dyal* (1876) 26 WR 55, 3 IA 259.

17 *Dharmodas v Nistarini* (1887) 14 Cal 446, 448.

Gifts and Bequests to Unborn Persons

See §§ 260 and 373.

§ 359. GIFT TO UNBORN PERSON: RULE APART FROM STATUTE

Under pure Hindu law, a gift cannot be made in favour of a person who was not in existence at the date of the gift.[18] This rule still applies to cases to which the provisions of the three Acts mentioned in the next section (§ 360) do not apply.[19]

For exception to this rule, see notes to § 372. As to bequests, see § 372. As to trusts, see § 366. As to gift to an idol, see § 410.

§ 360. GIFT TO UNBORN PERSON: RULES AS ALTERED BY STATUTE

(1) The rule of Hindu law stated in § 359 that a gift cannot be made in favour of a unborn person has been altered by three Acts, namely, the Hindu Transfers and Bequests Act 1914, the Hindu Disposition of Property Act 1916, and the Hindu Transfers and Bequests (City of Madras) Act 1921. The rule as altered by these Acts may be stated as follows:

Subject to the limitations and dispositions contained in Chapter II of the Transfer of Property Act 1882, no gift is invalid by reason only that any person for whose benefit it may have been made was not born at the date of the gift.

This rule, however, is not of universal application, but is confined to the following transfers, by way of gift:

(i) to transfers executed on or after 14 February 1914, by Hindus domiciled in the State of Madras except the City of Madras, and in the case of transfers executed before that date, to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to that Act ie, the Hindu Transfers and Bequests Act 1914. The Hindu Transfers and Bequests Act 1914, which applied to the State of Madras except the city of Madras, now stands repealed with effect from 1 February 1960 and the Hindu Disposition of Property Act 1916 has now been made applicable to the State of Madras also;[20]

18 *Tagore v Tagore* (1872) 9 Beng LR 377, 397, 400, IA Sup Vol 47, 67, 70, *Bai Mamubai v Dossa* (1891) 15 Bom 443; *Sri Raja Venkata v Sri Rajah Suraneni* (1908) 31 Mad 310.

19 *Raman Nadar v Rasalamma* AIR 1970 SC 1759.

20 Miscellaneous Personal Laws (Extension) Act XLVII of 1959.

(ii) to transfers executed on or after the 20 September 1916, by Hindus in any part of India except the State of Madras (Hindu Disposition of Property Act 1916). The Hindu Disposition of Property Act 1916, which originally applied to the rest of India except the State of Madras, has now been made applicable to the State of Madras also;

(iii) to transfers executed on or after the 27 March 1921, by Hindus domiciled within the limits of the ordinary original civil jurisdiction of the High Court of Madras, and, in the case of transfers executed before that date, to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to the 14 February 1914 (Hindu Transfers and Bequests (City of Madras) Act 1921). The Hindu Transfers and Bequests (City of Madras) Act 1921, which applied to the City of Madras, stands repealed with effect from 1 February 1960 and the Hindu Disposition of Property Act 1916 has now been made applicable to the City of Madras also.[21]

(2) The limitations and provisions contained in Chapter II of the Transfer of Property Act 1882 are discussed in §§ 383–87. For the present, they may be summarised as follows:

(a) if the gift to an unborn person is preceded by a prior disposition, the gift shall be of the whole residue;

(b) the gift shall not offend the rule against perpetuities;

(c) if a gift is made to a class of persons with regard to some of whom it is void under (a) or (b), the gift fails in regard to those persons only and not in regard to the whole class;

(d) if a gift to an unborn person is void under (a) or (b), any gift intended to take effect after such gift is also void.

History of the Legislation on the Subject

It was held by the Privy Council in the *Tagore* case in 1872, that a Hindu cannot dispose of his property by gift in favour of a person who was not in existence at the date of the gift (§ 35), nor could he dispose of his property by will in favour of a person who was not in existence at the date of the death of the testator (§ 372). The first enactment, which validated gifts and bequests in favour of unborn person, was the Hindu Transfers and Bequests Act 1914. This was an Act of the Madras legislature. It applied in terms to the whole of the State of Madras and was intended so to apply. It was followed by Hindu Disposition of Property Act 1916, which was an Act of the Imperial legislature. It applied to the whole of British India except the province of Madras, for which legislation had

21 Ibid.

already been made by the local Act of 1914. After the Act of 1916 was passed, the High Court of Madras held as to the Madras Act of 1914, that the local legislature had no power to take away the right of a Hindu domiciled within the local limits of the ordinary original civil jurisdiction of the High Court of Madras, to be governed by the Hindu law as it stood when the High Courts Act 1861, was passed. The fact, however, was that Hindu law, as it then stood did allow gifts and bequests in favour of unborn persons, and the *Tagore* case had misinterpreted that law.[22] This led to the enactment by the Imperial legislature of the Hindu Transfers and Bequests (City of Madras) Act 1921. This Act extends in effect the local Act of 1914 to Hindu domiciled in the City of Madras. It also validates gifts and bequests made by Hindus domiciled in the City of Madras subsequent to 14 February 1914, being the date on which the local Act of 1914 came into force. The result is that as between them, the Acts of 1914 and 1921 apply to the whole State of Madras, and the Act of 1916 apply to the rest of India.

It may be noted, however, that, as stated earlier, with effect from 1 February 1960, the Hindu Transfers and Bequests Act 1914, and the Hindu Transfers and Bequests (City of Madras) Act 1921 stands repealed. The Hindu Disposition of Property Act 1916, has now been made applicable to the whole of India including the State and City of Madras, excepting the State of Jammu and Kashmir (see Miscellaneous Personal Laws (Extension) Act XLVIII of 1959).

Gift and bequests, however, in favour of unborn persons, could only be made subject to certain limitations and provisions. These limitations and provisions were not the same under the three Acts. To attain uniformity, the three Acts were amended by the Transfer of Property (Amendment) Supplementary Act, being Act 21 of 1929, which came into force on 1 April 1930. These limitations and provisions are more or less the same, both in the case of gifts and of will, and they are dealt with together in §§ 383 and 384. Except as to these, we have dealt separately with gifts and bequests in favour of unborn persons, not because there is any material difference between them, but because a separate treatment must conduce to a clear understanding of the subject. As to bequests to unborn persons, see § 373.

§ 361. RESERVATION OF LIFE INTEREST

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

22 *Raman Naddar v Rasalamma* AIR 1970 SC 1759.

Illustration

A executes a registered deed of gift of seven villages to her daughter, and delivers immediate possession of four villages to her. As to the remaining three villages, the condition is that she will retain possession and enjoy the profits thereof during her lifetime, but will not have power to make any transfer in respect thereof. The gift is valid not only as regards the four villages, but as to the other three also. There being an intention to effect a transfer *in praesenti* of the proprietary interest in all the seven villages and to vest the same in the donee, the reservation of the right to enjoy the usufruct on the three villages during her own lifetime does not make the gift invalid as to the three villages.[23]

§ 362. CONDITIONS RESTRAINING ALIENATION OR PARTITION

Where property is given subject to a condition absolutely restraining the donee from alienating it,[24] or it is given to two or more persons subject to a condition restraining them from partitioning it,[25] the condition is void, but the gift itself remains good (§ 393).

§ 363. REVOCATION OF GIFT

A gift once completed is binding upon the donor, and it cannot be revoked by him,[26] unless it was obtained by fraud or undue influence.[27]

Where gift is made by a Hindu widow, the burden lies upon the donee to show that she made the gift with a full understanding of what she was doing and was aware of her rights.[28]

23 *Lallu Singh v Gur Narain* (1923) 45 All 115, 68 IC 798, AIR 1922 All 467 (FB).

24 *Anantha v Nagamuthu* (1882) 4 Mad 200; *Ali Hasan v Dhirja* (1882) 4 All 518; *Bhairo v Parmeshri* (1885) 7 All 516 (case of a deed of compromise); *Muthukumara v Anthony* (1915) 38 Mad 867, 24 IC 120; *Rukminibai v Laxmibai* (1920) 44 Bom 304, 56 IC 361, AIR 1920 Bom 73 (*agrahar* gift). See s 10, Transfer of Property Act. *Hari Singh v Bishan Lal* AIR 1992 P&H 11 (gift to temple).

25 *Narayanan v Kannan* (1884) 7 Mad 315 (s 11, Transfer of Property Act).

26 *Ganga Baksh v Jagat Bahadur* (1896) 23 Cal 15, 22 IA 153; *Rajaram v Ganesh* (1899) 23 Bom 131; *Ammaponammal v Shanmugam* AIR 1971 Mad 370; *Punnuswami Servai v Balasubramaniam* AIR 1982 Mad 281 (of undivided interest in coparcenary property by father in favour of minor son only).

27 *Manigavri v Narondas* (1891) 15 Bom 549.

28 *Deo Kuar v Man Kaur* (1894) 17 All 1, 21 IA 148 (gift set aside—suit brought eight years after date of gift—document not explained to donor).

§ 364. GIFT IN FRAUD OF CREDITORS

A gift made with the intent to defeat or defraud creditors is voidable at the option of the creditors.[29]

§ 365. DONATIO MORTIS CAUSA

A *donatio mortis causa*, ie, a gift made in contemplation of death, is recognised by the Hindu law.[30]

§ 366. TRUSTS

(1) Trusts are no more alien to the Hindu than to the English system of law.[31] Before the enactment of the Indian Trusts Act 1882, a trust could only be created by delivery of possession, or its equivalent,[32] to trustees as in the case of a gift. However, a Hindu trust governed by the Act can only be created in the manner provided by s 5 of that Act. That section is as follows:

> (i) No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust of the trustee.
>
> (ii) No trust in relation to movable property is valid unless declared as aforesaid or unless the ownership of the property is transferred to the trustee.[33]

(2) A trust cannot be created except in favour of a person to whom a gift or bequest can be validly made. Nor can a trust be made a means of effecting a course of devolution opposed to the Hindu law of property and succession. In other words, trusts are to be regarded as gifts alike as to the property, which can be transferred as to the persons to whom it can be transferred.[34]

29 *Nasir v Mata* (1880) 2 All 891; *Rai Bisben Chand v Mst Asmaida Koer* (1884) 6 All 560, 11 IA 164.

30 *Visalatchmi v Subbu* (1871) 6 Mad HC 270; *Bhaskar v Sarasvatibai* (1893) 17 Bom 486, 495.

31 *Tagore v Tagore* (1872) 9 Beng LR 377, 401–402, IA Sup Vol 47–71, 72; *Sri Sridhar Jiu v Manindra Kumar Mitra* (1940) 2 Cal 285, 195 IC 475, AIR 1941 Cal 272.

32 *Gordhandas v Bai Ramcoover* (1902) 26 Bom 449, 470–71.

33 *Ranganadha v Beghirathi* (1906) 29 Mad 412, 415.

34 *Re Kahandas Narrandas* (1881) 5 Bom 154, 173–74; *Tagore v Tagore* (1869) 9 Beng LR 377, 401–402, IA Sup Vol 47, 71–72; *Rajender v Sham Chund* (1881) 6 Cal 106.

There is some authority for the proposition that under the Hindu law, in cases not governed by the Indian Trusts Act 1882, a mere declaration of trust, not amounting to a legal transfer, can be enforced in favour of the object of the trust.[35]

35 *Chatti v Pandrangi* (1884) 7 Mad 23; *Hirbai v Jan Mahomed* (1883) 7 Bom 229; *Bhaskar v Sarasvatibai* (1893) 17 Bom 486, 498–501; *Gardhandas v Bai Ramcoorer* (1902) 26 Bom 449, 472.

XIX
WILLS

Note.—Under Hindu law, a Hindu cannot by will, bequeath property which he could not have alienated by gift inter vivos. That rule is now considerably modified in case of persons governed by Mitakshara law. Section 30 of the Hindu Succession Act 1956, now permits a member of a Mitakshara coparcenary to dispose off by will, his undivided interest in the coparcenary property. A coparcener under Mitakshara law has no power to dispose off his coparcenary interest by gift. That sale is not affected by the new legislation, but he is now entitled to dispose off such interest by will. The position of a coparcener under Dayabhaga law has not been altered in any manner. He could always dispose off his coparcenary interest by gift or will, subject to the claims of those who are entitled to be maintained by him.

§ 367. PERSONS CAPABLE OF MAKING WILLS

Subject to the provisions hereinafter contained, every Hindu who is of sound mind and not a minor, may dispose of his property (§ 371) by will.[1]

Burden of Proof

As regards the onus of proof in cases of wills, the rules of law are quite clear. The first rule is, that:

> ...the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.

1 *Hardwari v Gomi* (1911) 33 All 525, 9 IC 1017; *Bai Gulab v Thakorelal* (1912) 36 Bom 622, 17 IC 86; *Krutishnamachariar v Krishanamachariar* (1915) 38 Mad 166, 19 IC 452, AIR 1915 Mad 815; *Sonam Topgyal v Gompu* AIR 1980 Sikkim 33 (Sikkimese Buddhist can make a will); *Ajit Kumar v Mukunda Lal* AIR 1988 Cal 197 (see the decisions cited therein).

The second rule is, that:

> ...if a party writes or prepares a will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the court, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved the contents of the will, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever they rely on to displace the case for proving the will.[2]

Reference may be made to the undermentioned decisions where the Supreme Court has considered the general principles relating to proof.[3]

Wills Unknown to Pure Hindu Law

The idea of a will is wholly unknown to pure Hindu law. However, the testamentary power of Hindus has now long been recognised, and must be considered as completely established.[4]

Joint Will

See notes below 'A Document Described as a Will May Not Be a Will.'

Minor's Will

A Hindu who has not attained majority within the meaning of s 3, Indian Majority Act 1875, is not competent to make a will. See also s 2(c), Indian Succession Act 1925, where the expression 'minor' is defined.

A Document Described as a Will May Not be a Will

The expression 'will' is defined in the Indian Succession Act 1925, as the legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death. A document by which no property is disposed off, but which merely gives an authority to adopt, though described by the testator as a will, is not a will.[5] Similarly, since a minor is not competent to make a will, any declaration

2 *Lachho Bibi v Gopi Narain* (1901) 23 All, 472; *Shama Charn v Khettromoni Dasi* (1900) 27 Cal 521, 27 IA 10; *Sukh Dei v Kedar Nath* (1901) 23 All 405, 28 IA 186; *Rash Mohini v Umesh Chunder* (1898) 25 Cal 824, 25 IA 109.

3 *Rani Purnima v Kumar Khagendra* [1962] 3 SCR 195; *Venkatachala v Thimmajamma* [1959] Supp 1 SCR 426. Reference may also be made to *Brij Mohan Lal v Girdhari Lal* AIR 1978 SC 1202 (widow of 70 years proved to be of sound mind, though physically incapable of signing her name).

4 *Soorjeemoney Dossee v Denobundoo Mullick* (1862) 9 MIA 123, 136; *Beer Pertab v Rajender Pertab* (1867) 12 MIA 1, 37–38.

5 *Jagannatha v Kunja* (1921) 48 IA 482, 44 Mad 733, 64 IC 458, AIR 1922 PC 162.

by him with respect to his property cannot be said to be 'legal' declaration, and the document comprising the declaration, though described as a will, is not a will at all.[6]

Registration in Book Not Appropriate for Will

Where is appears from the terms of a document and the circumstances in which it was executed, that it is a will, the fact that it is registered in Book IV (miscellaneous register) kept under the Registration Act 1908, instead of in Book III, is insufficient to outweigh those terms and circumstances.[7]

§ 368. WHAT PROPERTY MAY BE BEQUEATHED BY WILL

(1) Prior to the coming into operation of the Hindu Succession Act 1956, it was a rule firmly established that a Hindu cannot by will, bequeath property which he could not have alienated by gift inter vivos (§ 357). In the *Vailliammai Achi v Nagappa Chettiar*, the Supreme Court pointed out that a father in a Mitakshara family has a very limited right to make a will and the mere fact that the father after making some dispositions, gave the residue to his son and the son took out probate and carried out the wishes of the father, would not change the nature of the joint family property.[8] Even after the Succession Act 1956, a Hindu cannot by will, so dispose of his property, so as to defeat the legal right of his wife or any other person to maintenance. Reference may be made to s 18–22 of the Hindu Adoptions and Maintenance Act 1956.[9]

(2) Section 30 of the Hindu Succession Act 1956, permits a member of a Mitakshara coparcenary to dispose of by will, his undivided interest in the coparcenary property. Reference may be made to notes under that section (see Indian Succession Act 1925, Sch III, paras 1 and 2).

Election

Reference may be made to the *Kishan Chand v Narinjan*, where a son had to make an election in respect of a bequest by will of such interest to a third person in the father's will.[10]

6 *Kondapalli Vijayaratnam v Mandapaka Sudarsana Rao* (1925) 52 IA 305, 48 Mad 614, 89 IC 733, AIR 1925 PC 196.

7 *Krishna Rao v Sundara Siva Rao* (1931) 58 IA 148, 54 Mad 440, 131 IC 318, AIR 1931 PC 109.

8 AIR 1967 SC 1153.

9 For decisions prior to the Act, see *Sonatun v Juggutsoondree* (1859) 8 MIA 66–68; *Beer Pertab v Rajender Pertab* (1867) 12 MIA 1, 38; *Proinotha Nath v Nagendrabala* (1908) 12 CWN 808.

10 AIR 1928 Lah 967.

(3) As regards property which a Hindu could dispose off by will, the following propositions are to be noted:

(i) according to all the schools, a Hindu could dispose off by will his separate or self-acquired property (§ 222);[11]

(ii) according to Dayabhaga law, a father could dispose off by will all his property, whether ancestral or self-acquired (§ 274). Similarly, a coparcener could dispose off by will, the whole of his interest in the joint family property (§ 282).[12]

According to Mitakshara law, no coparcener, not even a father, could dispose of by will his undivided coparcenary interest,[13] even if the other coparceners consented to the disposition, the reason being that:

> ...at the moment of death, the right of survivorship (of the other coparceners) is in conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise.[14]

A sole surviving coparcener could, however, bequeath the joint family property as if it was his separate property.[15]

Since a will operated from the date of the testator's death, it was held that if a coparcener subsequently came into existence, such as a son adopted by him,[16] a son subsequently born to him,[17] including a posthumous son[18] or the posthumous son of a deceased coparcener, the will, so far as it dealt with the coparcenary property, was inoperative and

11 *Beer Pertab v Rajender Pertab* (1867) 12 MIA 1, 38.

12 *Nagalutchmee v Gopoo* (1856) 6 MIA 309, 344; *Sartaj v Deoraj* (1888) 10 All 272, 288, 15 IA 51.

13 *Vitla Butten v Yamenamma* (1874) 8 Mad HC 6; *Lakshman v Ramchandra* (1881) 5 Bom 48, 7 IA 181; *Harilal Bai Mani* (1905) 29 Bom 351; *Lalta Prasad v Sri Mahadeoji* (1920) 42 All 461, 58 IC 667, AIR 1920 All 116; *Venkatarao v Venkateswararao* AIR 1956 AP 1. Reference may be made to *MN Aryamurthi v ML Subbaraya* AIR 1972 SC 1279.

14 *Vitla Butten v Yamenamma* (1874) 8 Mad HC 6; *Lakhmi Chand v Anandi* (1926) 53 IA 123, 48 All 313, 95 IC 566, AIR 1926 PC 54; *Bhikhabhai Purshottam* (1926) 50 Bom 558, 96 IC 421, AIR 1926 Bom 378 (will though made with consent of son held void); *Anandrao v Administrator-General of Bombay* (1896) 20 Bom 450 explained, *Subbarami v Ramamma* (1920) 43 Mad 824, 59 IC 681, AIR 1920 Mad 637.

15 *Nagalutchmee v Gopoo Nadaraja* (1856) 6 MIA 309; *Narottam v Narsandas* (1866) 3 Bom HCAC 6; *Toaram v Ramabai* AIR 1976 Bom 315.

16 *Venkatanarayana v Subbammal* (1915) 43 IA 20, 39 Mad 107, 32 IC 373, AIR 1915 PC 37; *Parma Nand v Shiv Charan Das* (1921) 2 Lah 69, 59 IC 256, AIR 1921 Lah 147; *Vitla Butten v Yamenamma* (1874) 8 Mad HC 6; *Rani Raghubans v Raghuraj Singh* (1947) ILR All 556.

17 *Lalita Devi v Ishar Das* (1933) 14 Lah 178, 138 IC 58, AIR 1933 Lah 544.

18 *Hanmant v Bhimacharya* (1888) 12 Bom 105; *Minakshi v Virappa* (1885) 8 Mad 89.

the property passed to him by survivorship. However, if the son, whether natural born or adopted, died in the lifetime of the testator, the will stood, and the devisee was entitled to the property given to him by the will.[19]

Though a father could dispose of a small portion of ancestral movables by way of gift, he could not do so by will.[20]

(iii) A Hindu female could dispose of her *stridhana* by will, subject to in certain cases with the consent of her husband (§ 143). After the coming into force of the Hindu Succession Act 1956, her rights are considerably enlarged. See s 14 of that Act and notes thereunder.

(iv) The owner of an impartible estate could dispose of it by will, in the absence of a special custom prohibiting alienation, or where the tenure was of such a nature, that it could not be alienated.[21]

Disinheritance

There is nothing to prevent a Hindu from so disposing of his property by will as to defeat the rights of his sons, wife, or other heirs even to the extent of completely disinheriting them.[22] No express words are necessary to disinherit the heirs; it is sufficient, if the property is bequeathed to some other person.[23] However, if the bequest to that person is not valid, there will be an intestacy to that extent, and the property will go to the heir, notwithstanding express directions in the will that he shall not take. The estate must go to somebody, and if there is no valid disposition, it must go to the heir.[24] Similarly, where under the terms of a will, the corpus of the estate is not to vest until the happening of a certain event, it will in the meantime vest in the heir.[25]

Will by Father Making Gifts to Charity

A will by father making gifts to charity was valid if it was consented to by the sole surviving son.[26]

19 See sub-para (2); *Bodi v Venkataswami* (1915) 38 Mad 369, 21 IC 73, AIR 1915 Mad 1077.

20 See §§ 225–26; also see sub-para (2). *Parvatibai v Bhagwant* (1915) 39 Bom 593, 31 IC 280, AIR 1915 Bom 265; *Subbarami v Ramamma* (1920) 43 Mad 824, 59 IC 681, AIR 1920 Mad 637; *Patra Chariar v Srinivasa* (1917) 40 Mad 1122, 40 IC 118, AIR 1918 Mad 531 (where the other coparceners had consented to the bequest).

21 See chapter XXVII; *Sri Raja Rao Venkata Surya v Court of Wards* (1899) 22 Mad 383, 26 IA 83 (will); *Sartaj v Deoraj* (1888) 10 All 272, 15 IA 51 (gift); *Thyagasundaradoss v Pandia* AIR 1965 SC 1730.

22 *Mulraz v Chalekany* (1838) 2 MIA 54; *Subbayya v Surayya* (1887) 10 Mad 251; *Narottam v Narsanaas* (1836) 3 Bom HCAC 6.

23 *Prosunno v Tarruckhath* (1873) 10 Beng LR 267.

24 *Tagore v Tagore* (1872) 9 Beng LR 377, 402.

25 *Amulya v Kali Das* (1905) 32 Cal 861.

26 *Srinivasagam v Chinnammal* (1946) ILR Mad 676.

§ 369. SECTION 57, INDIAN SUCCESSION ACT 1925

The Indian Succession Act 1925, consist of 11 parts. Part VI relates to testamentary succession and comprises ss 57–191. Of these, only some apply to Hindu wills, being those mentioned in Schedule III to the Act. However, these again do not apply to all Hindu wills, but only to such classes of wills as are specified in s 57 of the Act.

> Section 57.—The provisions of this Part (ie, Part VI of the Act) which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply:
>
> (a) to all wills and codicils made by any Hindu, Buddhist, Sikh, or Jain, on or after the 1st day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay;
>
> (b) to all such wills and codicils made outside those territories and limits so far as relates to immovable property situated within those territories or limits; and;
>
> (c) to all wills and codicils made by any Hindu, Buddhist, Sikh, or Jain, on or after the 1st day of January, 1927, to which those provisions are not applied by clauses (a) and (b).

§ 369A. FORM OF WILL

The following Hindu wills and codicils are required to be in writing signed by the testator and attested by at least two witnesses,[27] as provided by s 63 of the Indian Succession Act 1925:

(a) all wills and codicils made by any Hindu, Buddhist, Sikh, or Jain, on or after the 1st day of September 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay;

(b) all such wills and codicils made outside those territories and limits so far as relates to immovable property situated within those territories or limits; and

(c) all other wills and codicils made by any Hindu, Buddhist, Sikh, or Jain, on or after the 1st day of January 1927.

This section is but a limb of s 57 of the Indian Succession Act 1925, see § 369 above.

Before the Hindu Wills Act 1870, no Hindu will was required to be in writing, the will could be oral or in writing.[28] If the will was in writing,

27 *Umakanta v Biswambbar* (1929) 8 Pat 419, 117 IC 874, AIR 1929 Pat 401.

28 *Hari v Moro Lakshman* (1887) 11 Bom 89, 93; *Bhagwan v Kala* (1877) 1 Bom 641.

it did not require to be signed or attested.[29] Probate was granted of oral wills as well as of written wills.[30] The Hindu Wills Act was the first enactment which required Hindu wills to be in writing. That Act, however, applied to certain wills only, being those specified in cll (a) and (b) of this section. Other wills were not required to be in writing. They could be made orally. By the Indian Succession (Amendment) Act 1926, all wills were required to be in writing. This Act is reproduced in cl (c) of this section. The result is that every Hindu will made after 1 January 1927, must be in writing signed by the testator and attested by at least two witnesses as provided by s 63, Indian Succession Act 1925.

No Particular Form Necessary For a Will

A will need not be in any particular form. It is sufficient, if it contains the testamentary wishes of the deceased. Thus, a petition to the revenue authorities,[31] a statement made before a revenue official and recorded by him,[32] entries in a *wajib-ul-arz*,[33] a matrimonial arrangement deed,[34] a *mooltiarnamah* or power of attorney,[35] a deed of settlement made at the time of adoption,[36] and a *tamlikanama* or deed of assignment,[37] containing testamentary dispositions of property, have been held to amount to a will.

§ 370. REVOCATION OF WILL: ALTERNATIONS IN WILL

(1) No will or codicil specified in cll (a) and (b) of § 369A, above can be revoked except in the manner provided by s 70, Indian Succession Act 1925. Nor can it be altered except in the manner provided by s 71 of that Act.

(2) The above rule applies also to wills and codicils specified in cl (c) of para 369A, but only to such revocation and alterations as are made on or after 1 October 1929.

(3) The will of a Hindu is not revoked by the marriage of the maker thereof,[38] nor is it revoked, as regards self-acquired property, by the subsequent birth or adoption of a son (§ 498).

29 *Tara Chand v Nobin Chunder* (1865) 3 WR 138; *Radhabai v Ganesh* (1879) 3 Bom 7; *Re Bapuji Jagannath* (1896) 20 Bom 674; *Janki v Kallu Mal* (1909) 31 All 236, 2 IC 213 (draft will).

30 *Gokul Chand v Mangal Sen* (1903) 25 All 313.

31 *Mahomed Shamsool v Shewukram* (1874) 14 Beng LR 226, 2 IA 7.

32 *Kalian Singh v Sanwal Singh* (1885) 7 All 163.

33 *Mathura Das v Bhikhan Mal* (1897) 19 All 16.

34 *Din Tarini v Krishna* (1909) 36 Cal 149.

35 *Kollany v Luchmee* (1875) 24 WR 395.

36 *Lakshmi v Subrananya* (1889) 12 Mad 490.

37 *Thakur Ishri Singh v Baldeo Singh* (1884) 10 Cal 792, 11 IA 135.

38 Section 57, Indian Succession Act 1925.

Rule of Hindu Law Before Legislation

No writing was necessary under the Hindu law to make a will or to revoke a will. Nor was actual destruction of a will necessary to constitute a revocation, if definite authority was given by the testator to destroy it with the intention of revoking it.[39]

§ 371. WILLS FOUNDED ON THE LAW OF GIFTS

Bequests stand substantially on the same footing as gifts.[40] It has been so laid down by their Lordships of the Privy Council in the *Tagore* case. In that case their Lordships said:

> Even if wills are not universally to be regarded in all respect as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred.[41]

'Persons to Whom it Can be Transferred'

Just as before the Acts referred to in § 360, a gift could not be made in favour of a person who was not in existence at the date of the gift, so a bequest could not before those Acts be made in favour of a person who was not in existence at the testator's death (see §§ 372, 373).

§ 372. BEQUEST TO UNBORN PERSONS: RULE APART FROM STATUTE

A person capable of taking under a will must, either in fact or in contemplation of law, be in existence at the death of the testator.[42] This rule still applies to cases to which the provisions of the three Acts mentioned in the next section (§ 373) do not apply. This rule was discussed by the Supreme Court in *Raman Nadar v S Rasalamma*.[43]

Child in the Womb

A bequest to a person not in existence at the testator's death is invalid. A child in the womb and a son adopted by a widow after the death of

39 *Maharajah Pertab Narain v Subhao Kooer* (1877) 3 Cal 626, 643, 4 IA 228, 245; *Venkayyamma v Venkataramanayyamma* (1902) 25 Mad 678, 29 IA 156.

40 *Seth Mulchand v Bai Mancha* (1883) 7 Bom 491, 493.

41 *Tagore v Tagore* (1872) 9 Beng LR 377, 399, IA Sup Vol 47, 69; *Motivahu v Mamubai* (1897) 21 Bom 709, 721, 24 IA 93, 105.

42 *Tagore v Tagore* supra 397, 400 IA Supp Vol 47, 67, 70; *Chandi Churn v Sideswari* (1889) 16 Cal 71, 15 IA 149; *Venkata v Suraneni* (1908) 31 Mad 310; *Bai Mamubai v Dossa* (1891) 15 Bom 443.

43 AIR 1970 SC 1759.

her husband is in contemplation of law in existence at the death of the testator.

A bequest to the wife of the testator's son in case he should marry within 10 years from the testator's death is valid, provided, the son marries a girl who was in existence at the testator's death,[44] as the rule in this section does not apply.

Illustration

A bequest to the eldest child of *L* takes no effect, if *L* has no child, at the time of the death of the testator, although, *L* has a son born some time after the testator's death.[45] The decision is also based on another ground.

Exceptions to the Rule

In laying down the above rule in the *Tagore* case, the Judicial Committee desired 'not to express any opinion as to certain exceptional cases of provisions by means of contract or of conditional gift on marriage or other family provision for which authority may be found in Hindu law or usage.' For instance, see the undermentioned cases.[46]

The rule in this section applies to the office of a *shebait* and a direction in the will that the office should be held by an unborn person was held to be invalid.[47]

The rule laid down in this section is applicable to all wills, whether they are governed by Dayabhaga law or Mitakshara law,[48] and whether they are or are not subject to the provisions of the Indian Succession Act 1925, relating to Hindu wills.[49] It may here be observed that the testator in the *Tagore* case was governed by Dayabhaga school, and the will was made long before the Hindu Wills Act 1870, came into force. As to the law as altered by statue, see § 373.

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44 *Dinesh Chandra v Biraj Kamini* (1912) 39 Cal 87, 11 IC 671.

45 *Nakshetramali Devi v Brajasunder Das* (1933) 12 Pat 708, 146 IC 865, AIR 1933 Pat 647.

46 *Rajah of Ramnad v Sundara* (1919) 46 IA 64, 42 Mad 581; 49 IC 704; AIR 1918 PC 156; *Khajeh Solehman Quadir v Nawab Sir Salimullah* (1922) 49 IA 153, 49 Cal 820, 69 IC 138, AIR 1922 PC 107; *Jatindra v Ghanesyam* (1923) 50 Cal 266, 72 IC 1019, AIR 1923 Cal 27.

47 *Monohar Mukherji v Bhupendranath Mukherji* (1933) 60 Cal 452, 141 IC 544, AIR 1932 Cal 791 overruling *Mathura Nath v Lakhi Narain* (1923) 50 Cal 426, 75 IC 435, AIR 1924 Cal 68.

48 *Mangaldas v Krishnabai* (1882) 6 Bom 38.

49 *Alangamonjori v Sonamoni* (1882) 8 Cal 637; *Radha Prasad v Ramimoni Dasi* (1911) 38 Cal 188, 8 IC 1061 (SC); on appeal 41 Cal 1007, 41 IA 176, 23 IC 713, AIR 1914 PC 149.

§ 373. BEQUEST TO UNBORN PERSONS: RULE AS ALTERED BY STATUTE

(1) The rule of Hindu law stated in § 372 that a bequest cannot be made in favour of a person who was not born at the date of the testator's death has been altered by three Acts, namely, the Hindu Transfer and Bequests Act 1914, the Hindu Disposition of Property Act 1916, and the Hindu Transfers and Bequests (City of Madras) Act 1921. The rule as altered by these Acts may be stated as follows:

Subject to the limitations and provisions contained in ss 113, 114, 115 and 116 of the Indian Succession Act 1925, no bequest shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of the testator's death.

This rule, however, is not of universal application, but is confined to the following cases, namely to:

(i) wills executed on or after 14 February 1914, by Hindus domiciled in the State of Madras except the City of Madras, and in the case of wills executed before that date, to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to that date (Hindu Transfers and Bequests Act 1914);

(ii) wills executed on or after 20 September 1916, by Hindus in any part of India except the State of Madras (Hindu Disposition of Property Act 1916);

(iii) wills executed on or after 27 March 1916, by Hindus domiciled within the limits of the ordinary of original civil jurisdiction of the High Court of Madras, and, in the case of wills executed before that date, to such of the dispositions thereby made as are to come into operation at a time subsequent to the 14 February 1914 (Hindu Transfers and Bequests (City of Madras) Act 1921).

For the three Acts mentioned in the section and the history of the legislation on the subjects see notes to § 360.

The limitation, subject to which a bequest can be made in favour of an unborn person, are set out in §§ 383–87.

It may be noted that with effect from 1 February 1960, the Hindu Dispositions of Property Act 1916 has been extended to the whole of India including the State of Madras and the City of Madras, and the Hindu Transfers and Bequests Act 1914 and the Hindu Transfers and Bequests (City of Madras) Act 1921 stands repealed.

§ 374. ELECTION

Though a Hindu governed by Mitakshara law, prior to the enactment of s 30 of the Hindu Succession Act 1956, could not dispose of by will his

undivided interest in coparcenary property, he could bequeath his self-acquired property to his coparcener and his undivided interest in the coparcenary property to a third person. Such a disposition was valid, and the coparcener to whom the self-acquired property was bequeathed, has to elect after the testator's death, as to which of the two properties he would take. He could not take both.[50]

§ 375. PROBATE, LETTERS OF ADMINISTRATION AND SUCCESSION CERTIFICATE

(1) In the case of Hindu wills of the classes specified in cll (a) and (b) of s 57, Indian Succession Act 1925 (§ 369), no right as executor or legatee can be established in a court of justice, unless a court of competent jurisdiction shall have granted probate of the will. However, no probate is necessary to establish such right in the case of other Hindu wills.[51]

(2) Where a Hindu dies intestate, it is not necessary in any case to obtain letters of administration to the estate of the deceased to establish a right to any part of the property of the deceased.

(3) However, where the suit is one to recover a debt due to the estate of a deceased Hindu, no decree can be passed against the debtor except on the production of a probate or letters of administration or a succession certificate.

Sub-§ (1)

Sub-section (1) is a reproduction of s 213, Indian Succession Act 1925.

Where probate is necessary to establish a claim in a court of law, it is sufficient if the probate is produced when the decree is passed. The suit may be instituted without a probate.[52]

Sub-§ (2)

See s 212, Indian Succession Act 1925.

Sub-§ (3)

This sub-section is a reproduction of s 4 of the Succession Certificate Act 1889, now s 214, Indian Succession Act 1925. A succession certificate is necessary in a suit by a son to recover money, which was self-acquired property of his deceased father,[53] or in the execution by a widow of a

50 *Kishan Chand v Narinjan* (1929) 10 Lah 389, 113 IC 298, AIR 1928 Lah 967.

51 *Ahemed v Ghisia* (1945), ILR Nag 562, AIR 1945 Nag 237.

52 *Chandra Kishore v Prasanna Kumari* (1911) 38 IA 7, 38 Cal 327, 9 IC 22, a case under s 187, Indian Succession Act 1865, as applied to Hindu will by the Hindu Wills Act (now s 213, Indian Succession Act 1925, as applied by s 57 of that Act).

53 *Viravan v Srinivasachariar* (1921) 44 Mad 499, 62 IC 944, AIR 1921 Mad 168 (FB); *Venkataramanna v Venkayya* (1891) 14 Mad 377.

money decree obtained by her husband.[54] However, no such certificate is necessary to recover money to which the plaintiff becomes entitled by survivorship.[55]

Who May Oppose Grant of Probate

Where the nearest reversionary heir to a Hindu testator refuses without sufficient cause to oppose grant of probate, the next person in the line of succession may oppose it.[56] In the last mentioned case, the court applied the principles stated in § 207.

Letters of Administration Where Deceased Was Joint in Estate

No probate or letters of administration can be granted in respect of joint family property. However, where such property stands in the name of the manager or other members of the family, letters of administration may be granted to the surviving coparcener as his heir to the legal estate in that property, and limited to that property, under s 250, Indian Succession Act 1925.[57] This constantly happens in the case of share of a limited company.

§ 376. VESTING OF ESTATE IN HINDU EXECUTOR OR ADMINISTRATOR

The executor or administrator of a deceased Hindu is his legal representative for all purposes, and all the property of the deceased vests in him as such.[58]

See s 211, Indian Succession Act 1925, corresponding with s 4 of the Probate and Administration Act 1881.

No Vesting of Coparcenary Property

Coparcenary property cannot be disposed of by will. Hence, it cannot vest in the executor.[59]

54 *Jadaobai v Purammal* (1944) ILR Nag 832.

55 *Raghavendra v Bhima* (1892) 16 Bom 349; *Jagmohandas v Allu Maria* (1895) 19 Bom 338; *Sital Proshad v Kaifuc Sheikh* (1922) 26 CWN 488, 65 IC 367, AIR 1922 Cal 149. Reference may be made to *Chhotki v Chandra Prakash* AIR 1964 Raj 32 (case falling under Hindu Women's Rights to Property Act 1937—succession certificate under s 214 not necessary).

56 *In the goods of Shib Charan Das* (1929) 56 Cal 1070, 121 IC 687, AIR 1930 Cal 150.

57 *Gopalaswamy v Meenakshi* (1929) 7 Rang 39, 115 IC 905, AIR 1929 Rang 99; *Bank of Bombay v Ambalal Sarabhai* (1900) 24 Bom 350; *Mst Uttam v Dina Nath* (1819) 54 Punj Rec no 139, 46 IC 454.

58 *Sir Mahomed Usuf v Hargovandas* (1923) 47 Bom 231, 70 IC 268, AIR 1922 Bom 392; *Ramiah v Venkatasubbamma* (1926) 49 Mad 261, 44 IC 83, AIR 1926 Mad 434 (FB); *Ganapathi v Sivamalai* (1913) 36 Mad 575, 17 IC 4.

59 *Ujambai v Harakchand Govindji* (1935) 59 Bom 644, 37 Bom LR 300, 156 IC 621, AIR 1935 Bom 242.

Character of Hindu Executor

For position of executor of a deceased Hindu prior to Hindu Wills Act 1870, see the undermentioned cases.[60]

The Hindu Wills Act 1870 incorporated s 179, Indian Succession Act 1865, which provided that 'the executor or administrator, as the case may be, of a deceased person, is his representative for all purposes and all the property of the deceased person vests in him as such'. The Hindu Wills Act 1870, however, applied only to: (a) wills made within certain local limits; and (b) to wills relating to immovable property situated within those limits (see § 369). The Probate and Administration Act, which applied to all Hindu wills, was not passed until 1881. The latter Act repealed the said s 179 as part of the Hindu Wills Act, but re-enacted it as part of itself in s 4. Both these Acts have been repealed and re-enacted by the Indian Succession Act 1925, s 211 of the latter Act corresponds to s 4, Probate and Administration Act.

Vesting of Property in Executor Without Probate

The estate of the deceased vests in the executor whether he has obtained probate or not.[61]

The contrary decision of the Calcutta High Court on the Probate and Administration Act 1881, is now of no importance.[62]

Illustration

> *A* and *B* are executors of *C*'s will. *A* alone obtains probate. This is no bar to *B*'s acting as a legal representative of *C*'s estate.[63]

§ 376A. POWER OF HINDU EXECUTOR OR ADMINISTRATOR TO DISPOSE OFF PROPERTY

(1) A Hindu executor has power to dispose of the property of the deceased vested in him (§ 376). In the case, however, of immovable property, this power is subject to any restriction contained in the will,

60 *Maniklal v Manchershi* (1876) 1 Bom 269, 275; *Jagmohandas v Pallonjee* (1898) 22 Bom 1; *Kherodemoney v Doorgamoney* (1878) 4 Cal 455, 468; *Sarat Chandra v Bhupendra Nath* (1898) 25 Cal 103; *Amulya v Kali Das* (1905) 32 Cal 861; *Kurratulain v Nuzbat-ud-Dowla* (1906) 33 Cal 116, 129, 130, 32 IA 244, 257–58.

61 *Mahomed Yusuf v Hargovandas* (1923) 47 Bom 231, 70 IC 268, AIR 1922 Bom 392; *Venkatasubamma v Ramayya* (1932) 55 Mad 443, 59 IA 112, 136 IC 111, AIR 1932 PC 92.

62 *Sakina Bibee v Mahomed Ishak* (1910) 37 Cal 839, 8 IC 655.

63 *Chidambara v Krishnasami* (1916) 39 Mad 365, 368–69, 28 IC 221, AIR 1916 Mad 720.

unless he has obtained probate of the will and also leave from the court which granted the probate to dispose of such property.

(2) A Hindu administrator has power to dispose of the property of the deceased vested in him (§ 376). In the case, however, of immovable property, he cannot mortgage it or charge it or transfer it by sale, gift, exchange or otherwise, or grant a lease of it for a term exceeding five years, unless he has obtained the permission of the court, which granted the letter of administration to do so.

See Indian Succession Act 1925, s 307, corresponding with s 90 of the Probate and Administration Act 1881.

§ 377. INTENTION OF TESTATOR

> In determining the construction (of a will) what we must look to, is the intention of the testator. The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor... is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the will are to be considered. They convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances no doubt must be regarded.[64]
>
> In all cases, the primary duty of a court is to ascertain from the language of the testator what were his intentions, ie, to construe the will. It is true that in doing so, they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure: 'The court is entitled to put itself into the testator's armchair'. Among such surrounding circumstances which the court is bound to consider none would be more important than race and religious opinions, and the court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. The court...is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. However, those intentions must be ascertained by the proper construction of the

64 *Soorjeemoney Dossee v Denobundoo Mullick* (1857) 6 MIA 526, 551; *Lakshmana Nadar v R Ramier* [1953] SCR 848.

words he uses, and once ascertained, they must not be departed from.[65]

In interpreting a will, the court will be slow in accepting the contention that the testator intended to create joint tenancy, which is something unknown to Hindu law (except, in a sense in case of coparcenary).[66]

It is a well-settled rule of construction that the same words used in a document (will) are to be given the same meaning, unless there is a clear intention to the contrary.[67] Clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention.[68] Technical words or words of legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense. Thus, the words 'become *malik* (owner)' confer a heritable and alienable estate, unless the context indicates a different meaning. Similarly, the word 'putra putrade krame' have acquired a technical force, and are used as meaning an estate of inheritance.[69] The words 'shall vest in my wife with power to alienate' amount to an absolute grant.[70] The word 'pouthrasanthathis' would include an adopted son.[71]

At the same time, it must be recognised that documents in the vernacular are often expressed in loose and inaccurate language, and thus sometimes a meaning more extended or more restricted than the literal meaning may have to be given to particular words in vernacular documents, provided the context justifies doing so.[72] Particular words in a will should

65 *Narasimha v Parthasarathy* (1914) 37 Mad 199, 221–23, 41 IA 51, 70–72, 23 IC 166; *Sasanka Bhusan v Gopi Ballav* AIR 1935 Cal 716, (1936) 63 Cal 385, 159 IC 437; *Gurusami v Sivakami* (1895) 18 Mad 347, 358, 22 IA 119; *Tagore v Tagore* (1872) 9 Beng LR 377, 395, IA Sup Vol 47, 65; *Tarokessur Roy v Soshi* (1883) 9 Cal 952, 10 IA 51.

66 *Venkatakrishna Rao v Satyavathi* AIR 1968 SC 751.

67 *Thyagasundaradoss v Pandia* AIR 1965 SC 1730, 1733.

68 *Vasantkumar Basu v Ramshankar Ray* (1932) 59 Cal 859, 138 IC 882, AIR 1932 Cal 600.

69 *Lalit Mohun v Chukkun Lal* (1897) 24 Cal 834, 24 IA 76; *Surajmani v Rabi Nath* (1908) 30 All 84, 35 IA 17; *Pratapsingh v Agarsinghji* (1919) 46 IA 97, 43 Bom 778, 50 IC 457, AIR 1918 PC 192; *Soorjeemoney Dosse v Denobundoo Mullick* (1857) 6 MIA 526, 551; *Bissonauith v Bamasoondery* (1867) 12 MIA 41, 59; *Ram Narayan Singh v Ram Saran Lal* (1919) 46 IA 88, 46 Cal 683, 50 IC 1, AIR 1918 PC 203.

70 *Gopala Menon v Sivaraman Nair* (1981) 3 SCC 586; *Raj Kumari v Rajinder Naik* AIR 1987 Del 323 (wife absolutely prohibited from transferring—held only their life interest).

71 *Appaswami v Sarangapani* AIR 1978 SC 1051.

72 *Rajendra Prasad v Gopal Prasad* (1930) 57 IA 296, 10 Pat 187, 127 IC 743, AIR 1930 PC 242.

not be construed with reference to similar words in another will. The will must be read as a whole to ascertain the intention of the testator and where the intention is clearly expressed by unambiguous words in certain clauses, other words in other clauses repugnant to them may be discarded.[73]

Where a testator bequeathed his property to his wife absolutely with a condition that if unchastity is established, the reversioners should share the property equally, it was held that unchastity does not cover re-marriage in the absence of a clause prohibiting re-marriage.[74]

§ 378. ORDINARY NOTIONS AND WISHES OF HINDUS TO BE TAKEN INTO CONSIDERATION

In construing the will of a Hindu, it is not improper to take into consideration what are known, to be the ordinary notions and wishes of Hindus with respect to the devolution of property. The predilections of the class to which the testator belongs may be kept in view.[75] Where a testator gave certain properties to his daughters with a direction that they should enjoy the interest with their sons, grandsons etc and that neither the daughters nor their sons or grandsons etc, should be entitled to give, sell or mortgage the properties, it was held that the daughters and the daughter's sons took only life estates.[76]

In construing a will, made after the coming into operation of the recent legislation and particularly the Hindu Succession Act 1956, the court may assume that the testator knew of the radical changes that have been brought about in the general law of inheritance and that women now, as a general rule, take absolute estates of inheritance.

Reference may be made to the Supreme Court decisions cited under § 401. Also, see the undermentioned case.[77]

73 *Kanhya Lal Missir v Mst Hira Bibi* (1936) 15 Pat 151, 163 IC 940, AIR 1936 Pat 323; *Shiv Sakti v Piarayal* (1947) ILR All 403.

74 *Har Bux Singh v Mst Shanti Devi* (1941) 16 Luck, 414, 192 IC 53, AIR 1941 Ori 353.

75 *Sasanka Bhusan v Gopi Ballav* (1935) 159 IC 437, AIR 1935 Cal 716; *Sundararamiar v Sarojini* AIR 1984 Mad 227 ('*santati*—*varish* interpreted').

76 *Bibha Bati Debee v Mahendra Chandra Labiri* (1937) 1 Cal 400, 173 IC 857, AIR 1938 Cal 34.

77 *Harnam Singh v Mohan Lal* AIR 1970 J&K 181.

XX

RULES COMMON TO GIFTS AND WILLS

§ 379. *TAGORE* CASE

The leading case of Hindu wills and gifts is the *Tagore* case, decided by the Judicial Committee in 1872.[1] A synopsis of that case is given in Illust (e) to § 382. The rules laid down in that case and the decisions founded thereon, are set out in the following sections. The fundamental principle underlying those rules may be stated as follows:

> Subject to the provisions of § 368, a Hindu may give or bequeath his property to any one he likes. He may not only direct who shall take the estate, but may also direct what quality of estate they shall take. However, the person who is to take must be in existence at the date when the gift or bequest is to take effect, and the estate given to such person must be an estate recognised by Hindu law. As to what estates are not recognised by that law, see § 382. The rules laid down in the *Tagore* case as applicable to Hindu wills, are applicable to hereditary offices and endowments as well as to immovable property.[2]

In cases governed by the Hindu Disposition of Property Act 1916, a grant may be made to an unborn person subject, however, to the limitations and provisions contained in that Act (see §§ 383 to 387).

§ 380. ESTATE OF INHERITANCE

(1) An important rule applicable to wills and deeds of gift is that benignant construction is to be used; and that if the real meaning of the document

1 *Tagore v Tagore* (1872) 9 Beng LR 377, IA Sup Vol 47.
2 *Ganesh Chunder v Lal Behary* (1936) 63 IA 448, 38, Bom LR 1250, 164 IC 347, AIR 1936 PC 318.

can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name of description, or in any other manner incorrect, provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the law allows.

If the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs. If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law an estate of inheritance. Thus, a gift to *A* simply without the words 'and his heirs' would, in the absence of conflicting context, pass by Hindu law an absolute estate. If there were added to such a gift, an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by law, an estate of inheritance would pass. If again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though, he has added a qualification which the law does not recognise.

If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as for instance, if an estate was granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, then inasmuch as inheritance so described is not legal. Such a gift cannot take effect, except in favour of such persons as could take under a gift and to the extent to which the gift is not inconsistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention.[3]

§ 381. LIMITED ESTATE

A Hindu may create a life-estate or successive life-estate or any other estate for a limited term, provided the donee is a person capable of taking under the deed or will.[4]

3 *Tagore v Tagore* (1872) 9 Beng LR 377, 395, IA Sup Vol 47, 66; *Manikyamala v Nanda Kumar* (1906) 33 Cal 1306.

4 Also see s 14(2), Hindu Succession Act 1956; *Tagore v Tagore* supra 405, IA Sup Vol 47, 75; *Tarokessur Roy v Sosbi* (1883) 9 Cal 952, 10 IA 51.

§ 382. ESTATES REPUGNANT OR UNKNOWN TO HINDU LAW

A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or policy.

Inheritance does not depend on the will of the individual owner. Inheritance is a rule laid down (or, in the case of custom, recognised) by the state, not merely for the benefit of individuals, but for reasons of public policy. It follows directly from this, that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate and that the gift must fail, and the inheritance take place as the law directs.[5] A will in favour of the testator's widow prohibiting all transfer of the property directing that all management of the property should be made after consultation of certain persons and giving her powers of nominating a legatee by her will, such legatee possessing certain qualifications is an attempt to create an estate unknown to Hindu law and is void.[6]

A will or deed cannot institute a course of succession unknown to Hindu law, and in conferring successive estates, the estate of inheritance must be such as is known to Hindu law. All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such. An English estate tail is an estate unknown to the Hindu law; no person, therefore, can succeed under a gift or will as heir to such an estate.[7] On this ground, wills and gifts which direct and estate to go in an order of succession, which excludes female heirs[8] (ie, an estate in tail male), or male heirs,[9] or heirs by adoption,[10] or daughters and their sons,[11] or includes only some of the heirs,[12] have been held invalid to that extent.

5 *Tagore v Tagore* (1872) 9 Beng LR 377, 394–95, Supp Vol 47, 65–66.

6 *Ramu v Kashi* (1944) ILR All 9.

7 *Tagore v Tagore* (1872) 9 Beng LR 377, 396, IA Sup Vol 47; *Kristoromoni v Narendro* (1889) 16 Cal 383, 392, 16 IA 29.

8 *Tarokessur Roy v Soshi* (1883) 9 Cal 952, 10 IA 51; *Vullubhdas v Gordhandas* (1890) 14 Bom 360; *Venkata v Chellayammi* (1894) 17 Mad 150; *Lakshmakka v Boggaramanna* (1896) 19 Mad 501; *Bai Dhanlaxmi v Hariprasad* (1921) 45 Bom 1038, 62 IC 37, AIR 1921 Bom 262.

9 *Kunhamina v Kunhambi* (1909) 32 Mad 315, 1 IC 195; *Chandrachoor Deo v Bibhutibburban Deva* (1944) 23 Pat 763.

10 *Suriya Rau v Raja of Pittapur* (1886) 9 Mad 499, 13 IA 97.

11 *Purna Sashi v Kalidhan* (1911) 38 Cal 603, 38 IA 112, 11 IC 412.

12 *Manohar Mukherji v Bhupendranath Mukherji* (1933) 60 Cal 452, 141 IC 544, 32 AC 791.

Illustrations

(a) Property is bequeathed to *B* and after him to the male heirs of his body, ie, his heirs in tail male.

This case gives rise to the following three points:

1st point.—The estate tail is void.—The bequest to *B*'s heirs is void, for the estate attempted to be conferred upon them is an estate in tail male, and such an estate is unknown to Hindu law.

2nd point.—B takes an estate for life.—Does *B* take any interest under the will? If so, does he take an absolute estate or a life-estate only? The answer is, that *B* takes a life-estate only. He does not take an absolute estate. However, *B* certainly does take an estate for life, as in respect of him 'the giver had at least that intention'. The presumption is that the testator intended to benefit *B* personally for it is clear that if the bequest to B and his heirs in tail made were valid, it would have carried with it the enjoyment by *B* of the property during his life. 'This intention, though it is mixed up with an intention to give an estate tail, may lawfully take effect.'

3rd point.—Heir-at-law entitled to whole estate after B's death.— The result is that *B* takes an estate for life, and on his death, the property will revert to the testator's estate, ie, it will go to the testator's heirs.[13]

(b) *A*, after providing for certain legacies, bequeaths the residue of his property to his executor upon trust, to pay the income to his daughter *B* during her lifetime, and after her death, upon trust to convey the property to his brothers *C* and *D* in equal shares and to the heir or male heirs of their or either of their bodies and no failure of these to the sons of this daughter *B*.

C had three sons living at *A*'s death. *D* had no son living at the time of *A*'s death, but two sons are born to him after *A*'s death, and during *B*'s lifetime. *B* had no son at the time of *A*'s death, but six sons are born to her after *A*'s death. What are the rights of the parties under the will?

B takes an estate for life. *C* and *D* each takes an estate for his life in one moiety of the residue in remainder expectant on the death of *B*. The bequest to the heirs of *C* and *D* is void, as it is a bequest of an estate tail. *B*'s sons are not entitled to any interest under the will, as none of them was in existence at the

13 *Tagore v Tagore* (1872) 9 Beng LR 377, IA Sup Vol 47, 66; *Manikyamala v Nanda Kumar* (1906) 33 Cal 1306; *Lallubai v Mankuvarbai* (1878) 2 Bom 388.

testator's death, and further, because the estate purporting under the will to be devised to them was already void, before it could pass to them. The result is that on the deaths of *C* and *D* respectively, his moiety will pass to the testator's heir. If *C* dies in *B*'s lifetime, and if *B* is the heir-at-law, *C*'s moiety will pass to *B*, so that *B* will be entitled in possession to one moiety of the residue.[14]

(c) *A* bequeaths certain property to his three nephews, *B*, *C*, and *D*, 'for the payment of the expenses of their pious acts'. He then directs as follows: 'my three nephews shall possess the property in equal shares. They shall have no rights to alienate the same by gift or sale; but they, their sons, grandsons and their descendants in the male line shall enjoy the same. If any one of them dies without leaving a male child, his share shall devolve on the surviving nephews and their male descendants, but not on his other heirs.'

A dies leaving him surviving the three nephews, *B*, *C* and *D*, and a son *F*. *B* dies unmarried. Then, *C* dies leaving a widow, but no issue. *F* sues *D* for declaration of his rights in the property. What are the rights of the parties at this stage in the property.

The bequest to the sons, grandsons and descendants of the nephews in the male line is void, for the effect of it is to exclude females altogether. Such an estate of inheritance is inconsistent with the general law of inheritance, which admits males as well as females to succession. The attempt to confine the succession to males to the entire exclusion of females, is a distinct departure from Hindu law, 'excluding' in the terms of the judgment in the *Tagore* case, 'the legal course of inheritance'.

On *A*'s death, *B*, *C* and *D* each took an estate for life in one-third of the property. On *B*'s death, his share went to his two brothers, *C* and *D*. On the death of *C*, *D* as the survivor of the three brothers, became entitled to a life-estate in the whole of the property (§ 389).

In the case on which this illustration is based, it was contended that the intention of the testator was to confer an absolute estate in *B*, *C* and *D*, and that the intention might be effectuated by striking out that portion of the will, which excluded females from succession. However, this contention was overruled. The result is that on *D*'s death, the whole property will revert to *A*'s estate and pass to his heirs. If *F* is alive at *D*'s death, it will pass to him as the heir of *A*.[15]

14 *Kristoromoni v Narendro* (1889) 16 Cal 383, 16 IA 29.
15 *Tarokessur v Soshi* (1883) 9 Cal 952, 10 IA 51.

(d) Two brothers, subject to Dayabhaga school of Hindu law, execute a joint will, whereby they purport to provide for the permanent devolution of their respective properties in the direct male line, including adopted sons, with the conditions that on failure of lineal male heirs in one branch, the properties belonging to that branch should go to the other. This is subject to the same rule, and that only in the absence of male descendents in the direct line in either branch, should the properties go to female heirs or their descendents. The document is invalid and void. The object of the document is clearly to alter the rule of succession in the family in which the parties belonged, by excluding female heirs and their descendents. Under it, the female heirs and their descendents are not to receive the shares prescribed for them by the Hindu law of inheritance, until there is an indefinite failure of male issue in both branches of the family. The result is that on the death of either of the two executants, his share will pass to his heirs according to Dayabhaga law.[16]

Note.—The above case as well as the *Tagore* case (ill (e)) must be distinguished from a case like the one in ill (a) to § 389. The latter case does not point to an indefinite failure of male issue, but to a failure of male issue of any of the testator's sons at the time of the death of that son.[17]

(e) *Tagore* case.—In the *Tagore* case, property was bequeathed:

(1) To *A* for life;
To *A*'s eldest son for life;
in strict settlement upon the first and other sons of such eldest son successively in tail male; = to *A* and his heirs in tail male;

(2) 'after the failure or determination' of the above estate, to *B* and his heirs in tail male;

(3) 'after the failure or determination' of the last mentioned estate, to the heirs of *C* in tail male.

The will expressly adopted primogeniture in the male line through males, and excluded females and their descendents.[18]

At the time of the testator's death, *A*, the head of the first series of estates, had no son. *B*, the head of the second series of estates, had a son *D* born in the lifetime of the testator. *C* was

16 *Purna Sashi v Kalidhan* (1911) 38 Cal 603, 38 IA 122, 11 IC 412.
17 *Soorjeemoney Dosseey v Denobundoo Mulick* (1862) 9 MIA 123, 134.
18 *The Administrator General of Bengal v Lalbihari Dhar* (1934) 61 Cal 393, 152 IC 710, AIR 1934 Cal 629.

dead at the time of making of the will, but left a grandson *F* born in the lifetime of the testator. The testator died leaving an only son, *S*. No provision was made for him in the will, as he had become a Christian. Some time after the testator's death, his son *S* brought a suit to set aside the will. It was held that *A* took an estate for life, that all other bequests were void, and that the plaintiff as the heir of the testator, was entitled to the whole estate after the death of *A*. The estates tail were void, for they were inconsistent with the Hindu law of inheritance. It was also held that *B* and *D*, though they were in existence at the time of the testator's death, took nothing under the will, for they were only to take 'after the failure or determination' of the previous series of estates, ie, after the actual exhaustion of the line of *A* in conformity with the will. This event had not arisen and could not arise. The incapacity of *A*'s line to succeed because of the illegality of the will, did not entitle *B* or *D* to any benefit under the will. For the same reason, *F*, though he was in existence at the time of the testator's death, took nothing under the will.[19] The plaintiff's conversion to Christianity was no bar to his succession to his father's estate, having regard to the provisions of the Caste Disabilities Removal Act 1850.

Note.—A Hindu may entirely disinherit his son or other heirs by bequeathing the whole of his property to another. By so doing, he does not create an estate inconsistent with the general law of inheritance, he merely exercises the power which the Hindu law allows him. However, what the Hindu law does not allow is to confer upon any legatee an estate, which would be inconsistent with the Hindu law of inheritance, in other words, an estate which would exclude the legal course of inheritance. An estate is said to be inconsistent with the Hindu law of inheritance, if it is given to *A* and the heirs male of the body, for the effect is to exclude female heirs. If it were given to *A* absolutely, then, on *A*'s death intestate, the estate would pass according to the general law of inheritance of *A*'s heir, whether the heir was a son, or a widow or a daughter. However, the attempt to give an estate to *A* and the male heirs of his body is to exclude female heirs; in other words, it is an attempt to alter the line of succession allowed by law.

(f) A Hindu by a deed of settlement conveys property to trustees upon trust to pay the income arising therefrom to himself for life and after his death, as to one-fourth share, to his married daughter

19 *Tagore v Tagore* (1872) 9 Beng LR 377, IA Supp Vol 47.

K 'for her sole and separate use and after her death in trust for the male heirs of the said *K*, share and share alike'. *K* survives the settlor and dies some years after the date of the settlement, leaving six sons, all of whom were in existence at the date of the deed. The gift of the sons is an absolute gift to them of the property and they take the property as tenants-in-common in equal shares...

> Their Lordships do not think that the male heirs of Krishnabai took by inheritance from her. They are of opinion that the estate that Krishnabai took was defined and limited by her life interest, and that it was not by descent from her but by virtue of a wholly independent gift that her male heirs were beneficiaries under the deed. These male heirs being in fact living at the date of the deed, no difficulty arise... It is true that the gift is in the form of a gift of income but it is a gift unlimited in point of time, and if there be no restriction in the gift and no limitations beyond the actual beneficiaries at Krishnabai's death, such a gift carries the whole estate.[20]

The rule in this section applies to wills providing for succession of *shebaits* of an endowment.[21]

When the husband gave his wife full powers of transfer over the property, but without giving her an absolute estate such a disposition is not repugnant to Hindu law and alienations by her are binding on the reversioner.[22]

§ 383. LIMITATIONS SUBJECT TO WHICH A GIFT OR BEQUEST CAN BE MADE TO AN UNBORN PERSON

As has already been stated, a Hindu may, under the Acts of 1914, 1916 and 1921, referred to in §§ 360 and 373, dispose of his property by transfer inter vivos or by will in favour of an unborn person. This, however, can only be done subject to certain limitations and provisions. These limitations and provisions are in respect of dispositions by:

(a) transfers inter vivos, those contained in Chapter II of the Transfer of Property Act 1882; and

(b) will, those contained in ss 113, 114, 115 and 116, Indian Succession Act 1925.

20 *Madhavrao v Balabhai* (1928) 55 IA 74, 52 Bom 176, 107 IC 119, AIR 1928 PC 33.

21 *Ganesh Ghunder v Lal Behary* (1936) 63 IA 448, 38 Bom LR 1250, 164 IC 347, AIR 1936 PC 318; *Gokul Chand De v Gopi Nath Dev* AIR 1952 Cal 705 (deed of trust); *Raikishori Dassi v Official Trustee* AIR 1960 Cal 235, 64 CWN 646.

22 *Bishun Singh v Shri Takurji Mangla Nain Bhagwan* (1944) 72 IA 27, (1945) ILR All 231.

Chapter II of the Transfer of Property Act 1882 did not originally apply to Hindus. It has now been extended to Hindus by s 3, Transfer of Property (Amendment) Act, 20 of 1929, s 3. The sections of the chapter material for the present purposes are ss 13, 14, 15 and 16, which correspond to ss 113, 114, 115 and 116 of the Indian Succession Act 1925. Both these sets of sections are similar in substance; they are therefore dealt with together in §§ 384, 385, 386 and 387.

All the eight sections assume that a gift or bequest can be made in favour of an unborn person. They did not apply to Hindus at first. They were gradually made applicable to Hindus. The Hindu Transfers and Bequest Act 1914, and the Hindu Transfers and Bequests (City of Madras) Act 1921, incorporated only s 14 of the Transfer of Property Act and the corresponding s 114 of the Indian Succession Act, being the sections which relate to the rule against perpetuity. The Hindu Disposition of Property Act 1916 incorporated two more sections, namely, s 13, Transfer of Property Act and the corresponding s 113 Indian Succession Act. The first time all the eight sections were applied to Hindu gifts and wills was by the Transfer of Property (Amendment) Supplementary Act, 21 of 1929, by which all the three Acts mentioned above were amended and they were all made uniform (see ss 11, 12 and 13 of Act 21 of 1929).

§ 384. DISPOSITION IN FAVOUR OF UNBORN PERSON SUBJECT TO PRIOR DISPOSITION

Where a gift is made to a person not in existence at the date of the gift, or a bequest is made to a person not in existence at the death of the testator, subject to a prior gift or bequest, the later gift or bequest shall not take effect, unless it extends to the whole of the remaining interest of the donor or testator in the property.

Illustrations

(1) *Gift*—*A* transfers property of which he is the owner to *B* in trust of *A* and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for *A*'s second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of *A*'s remaining interest in the property.

(2) *Bequest.*—Property is bequeathed by a father to his son for life, after his death, to his son's wife for life and after her death to certain other persons. The son's wife was not in existence at the

date of the testator's death. The bequest to her, not being of the whole interest, is void.[23]

This section is a combination of s 13, Transfer of Property Act 1882, and s 113, Indian Succession Act 1925.

§ 385. RULE AGAINST PERPETUITY

(1) *Gift.*—No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of the period, and to whom, if he attains full age, the interest created is to belong.

(2) *Bequest*—No bequest is valid whereby the vesting of the thing bequeathed, may be delayed beyond the lifetime of one or more persons living at the time of the testator's death, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong. The rule applies to a private trust also.[24]

Illustrations

(a) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B*'s death to such of the sons of *B*, who shall first attain the age of 25. *A* and *B* survive the testator. Here, the son of *B*, who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain the age of 25 until more than 18 years have elapsed from the death of the survivor of *A* and *B*; and the vesting of the fund may thus be delayed beyond the lifetime *A* and *B* and the minority to the sons of *B*. The bequest after *A*'s death is void.

(b) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B*'s death to such of *B*'s sons as shall first attain the age of 25. *B* dies in the lifetime of the testator, leaving one or more sons. In this case, the sons of *B* are persons living at the time of the testator's death and the time which either of them will attain the age of 25 necessarily falls within his own lifetime. The bequest is valid.

(c) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, with a direction that after *B*'s death, it shall be

23 *Kappusami Pillai v Jayalakshmi Ammal* (1935) 58 Mad 15, 154 IC 537, AIR 1934 Mad 705; *Bibha Bati Debee v Mahendra Chandra Lahiri* (1937) 1 Cal 400, 173 IC 857, AIR 1938 Cal 34.

24 *Ajitkumar Mitra v Tarubala Dasee* (1936) 63 Cal 209.

divided amongst such of *B*'s children as shall attain the age of 18, but that, if no child of *B* shall attain that age, the fund shall go to *C*. Here, the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of *B*, a person living at the testator's decease. All the bequests are valid.[25]

Sub-section (1) is s 14 of the Transfer of Property Act 1882, sub-s (2) is s 114 of the Indian Succession Act 1925. Both these sections are the same in substance, though different in form.

The rule against perpetuity does not apply to charitable or religious endowments (see § 411).

Rule of Hindu Law Before Legislation

The above rules apply only to gifts and bequests which are within the Hindu Transfers and Bequests Act 1914, the Hindu Disposition Property Act 1916, and the Hindu Transfers and Bequests (City of Madras) Act 1921, dealt with in § 360. As to gifts and bequests which do not come within those Acts, the old rule still applies. That rule may be stated as follows:

> Where it appears from the will that the intention of the testator was not to pass the estate at all, but to create a perpetuity, as where the will contains a direction, as regards the corpus, that it should be kept intact for ever, and, as regards the income of the property, that portion thereof should be enjoyed by the testator's sons, grandsons and their descendants for ever and that the rest should be accumulated, the direction is invalid, and the estate will pass as an estate intestate. The Hindu law does not allow property to be tied up in perpetuity except in the case of religious and charitable endowments.[26] The same principle applies to transfers inter vivos (gifts). This rule may be explained by the following illustration.

Illustration

A will contains as to the property purported to be bequeathed thereby the following directions that:

(1) the property shall not be alienated at all;
(2) six-sixteenths of the net income of the property shall be applied towards the maintenance of the members of the testator's family and the families of his sons, grandsons and their descendants in perpetuity;

25 *Basti Ram v Ved Parkash* AIR 1974 P&H 152.

26 *Shookmoy Chandra v Monoharri Dassi* (1885) 11 Cal 684, 12 IA 103; *Raikishori v Debendranath* (1888) 15 Cal 409, 15 IA 37; *Vullabhdas v Gordhandas* (1890) 14 Bom 360; *Kumara Asima v Kumara Krishna* (1869) 2 Beng LROC 11.

(3) the remaining ten-sixteenths should be accumulated and carried to the credit of the estate.

The will is invalid, and the property will descend to the testator's heirs as on intestacy. The will starts with a provision against alienation, and this provision is confirmatory of the other parts of the will, which clearly show an intention to create a perpetuity.[27]

§ 386. GIFT OR BEQUEST TO A CLASS

If a gift or bequest is made to a class of persons with regard to some of whom it fails by reason of the rules contained in §§ 384 and 385, such gift or bequest fails in regard to those persons only and not in regard to the whole class.

Illustrations

(a) A fund is bequeathed to *A* for life, and after his death to all his children who shall attain the age of 25 (the gift to *A*'s children is a gift to a class). *A* survives the testator, and has some children living at the time of the testator's death. Each surviving child at the time of the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest (§ 385 (2)). However, *A* may have children after the testator's death, some of whom may not attain the age of 25 until more than 18 years have elapsed after the death of *A*. The bequest to *A*'s children, therefore, is inoperative as to any child born after the testator's death and in regard to those who do not attain the age of 25 within 18 years after *A*'s death, but is operative in regard to the other children of *A*.

(b) A fund is bequeathed to *A* for his life, and after his death to *B*, *C*, *D* and all other children of *A* who shall attain the age of 25. *B*, *C*, *D* are children of *A* living at the time of the testator's death. In all other respects, the case is the same as that supposed in ill (a). Although, the mention of *B*, *C* and *D* by name does not prevent the bequest from being regarded as a bequest to a class, the bequest is not wholly void. It is operative as regards any of the children *B*, *C* or *D*, who attains the age of 25 within 18 years after *A*'s death.

This is a combination of s 15, Transfer of Property Act 1882, as amended by the Transfer of Property (Amendment) Act, 20 of 1929, ss 9 and 115 of the Indian Succession Act 1925, as amended by s 14, Transfer of Property (Amendment) Supplementary Act 21 of 1929. Before

27 See above.

the amendment, if a gift or bequest to a class failed as to any member thereof, the gift or bequest was wholly void. Since the amendment, it is not wholly void. It is void only as to those in regard to whom it fails. The above illustrations are ills (i) and (ii) to s 115, Indian Succession Act as amended by the Supplementary Act.

Rule of Hindu Law as to Gift to a Class and Subsequent Legislation

Before the Acts of 1914, 1916 and 1921, relating to gifts and bequests to unborn persons (§§ 360, 373), a gift to a person who was not in existence at the date of the gift was void; and so was a bequest to a person who was not in existence at the date of the testator's death. This proceeded on the principle that a person who was not in existence at the material date was incapacitated from taking. Thus, if a gift was made by a Hindu to his grandsons, and none of them was in existence at the date of the gift, none of them had the capacity to take, and the gift was therefore void. However, what if a gift was made by a Hindu to his grandson *S*, who was in existence at the date of the gift, and to her other grandsons (brothers of *S*) who might be born after the date of the gift. It is obvious that the grandsons who were born after the date of the gift could not take, but could *S* take? In some of the earlier cases, it was held that the gift having failed as to the other grandsons, it was wholly void, and that *S* too could not take. However, it was held in later cases and by the Judicial Committee that the incapacity of the other grandsons to take, did not incapacitate *S* from taking, with the result that *S* took the whole of the property which was the subject matter of the gift.[28]

We shall now observe the course of legislation. First came the Madras Act of 1914. It validated gifts and bequests in favour of unborn persons, and thus removed the bar of incapacity. It also applied for the first time, the rule against perpetuity to cases governed by that Act. Similar provisions were introduced by the Hindu Disposition of Property Act 1916, and the Hindu Transfers and Bequests (City of Madras) Act 1921, §§ 360 and 37. The result of all that was that in the case put above grandsons other than *S*, though not in existence at the date of the gift, could also take under the deed.

28 *Rai Bishenchand v Mst Asmaida Koer* (1884) 6 All 560, 11 IA 164; *Ram Lal Sett v Kanai Lal Sett* (1886) 12 Cal 663; *Bhagabati v Kalicharan* (1911) 38 Cal 468, 38 IA 54, 10 IC 641 (affirming Supreme Court in ILR 32 Cal 992), *Rani Moni v Radha Prasad* (1914) 41 Cal 1007, 41 IA 176, 23 IC 713, AIR 1914 PC 149; *Manjayamma v Padmanabhayya* (1889) 12 Mad 393; *Ranganadha v Baghirathi* (1906) 29 Mad 412; *Mangaldas v Tribhuvandas* (1891) 15 Bom 652; *Tribhuvan Das v Gangadas* (1894) 18 Bom 7; *Krishnarao v Benabai* (1896) 20 Bom 571; *Khimji v Morarji* (1898) 22 Bom 533; *Advocate-General v Karmali* (1905) 29 Bom 133, 155–56; *Kanai Lal v Kumar Purnendu* (1944) 51 CWN 227, (1947) 1 Cal 48, *Rabindra Nath v Sushi Chandra* AIR 1952 Cal 427.

The Indian Succession Act in force, when the three Acts were passed, was that of 1865. Section 101 related to the rule against perpetuity; it is now s 114, Indian Succession Act 1925. Section 102 related to bequests to a class; this corresponds to s 115, Indian Succession Act 1925, before it was amended in 1929. Another Act in force when the three Acts were passed was the Hindu Wills Act 1870. Certain sections of the Indian Succession Act 1865 were made applicable to cases governed by the Hindu Wills Act, one of them being s 102. Section 102 was in the following terms:

> If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of s 100 or s 101, such bequest is wholly void.

Though s 101 was incorporated in all the three Acts, s 102 was not, the intention being to keep alive the rule of Hindu law that if a gift or bequest was made to a class of persons with regard to some of whom it was inoperative by reason of the fact that they were not in existence at the material date, the gift or bequest failed in regard to those persons only and not in regard to the whole class. However, the legislature seemed to have overlooked the Hindu Wills Act, and particularly the inclusion in that Act of s 102. This was not noticed until the decision of the Judicial Committee in *Soundara Rajan v Natarajan*,[29] where it was held that the bequest being void as to some members of the class under s 101, it was wholly void under s 102. This led to the amendment of s 15 of the Transfer of Property Act 1882, and s 115 of the Indian Succession Act 1925, in the manner stated above.

§ 387. FAILURE OF PRIOR DISPOSITION

Where a gift or bequest fails by reason of any of the rules contained in §§ 384 and 385, any gift or bequest intended to take effect after on failure of such prior gift or bequest, also fails.

This is a combination of s 16 of the Transfer of Property Act 1882, and s 116 of the Indian Succession Act 1925.

A fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of 25 for his life, and after the death of such son to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect after the bequest to such of the sons of *A* as shall first attain the age of 25, which bequest is void under s 114 of the Indian Succession Act 1925 (§ 385(2)). The bequest to *B* is also void.[30]

29 (1925) 52 IA 310, 48 Mad 906, 92 IC 289, AIR 1925 PC 244.

30 *Tagore v Tagore* (1872) 9 Beng LR 377, 410, IA Sup Vol 47, 80; *Soundaminey Dossee v Jogesh Chunder* (1877) 2 Cal 262; *Javerbai v Kablibai* (1892) 16 Bom 492; in appeal from ILR 15 Bom 326.

§ 388. INDEPENDENT AND ALTERNATIVE BEQUESTS

Where there are independent and alternative gifts or bequests, of which one is good at the time the document takes effect, and the other is void, the former will take effect, and the latter will be disregarded.[31] Where a testator made some bequests of property in favour of his relations and other bequests for charitable purposes and some of the former bequests were invalid, the latter were held to be valid as they were separable from and not dependent on the former.[32]

§ 389. GRANT SUBJECT TO DEFEASANCE: EXECUTORY BEQUEST

It is competent to a Hindu to make a grant of an absolute estate defeasible on the happening of a subsequent event. However, the event must happen, if at all, immediately on the close of a life in being, and the gift over must be in favour of some person in existence at the date of the gift or at the death of the testator, as the case may be; otherwise, the gift over is void, and the absolute estate granted to the first donee remains unaffected.[33]

In cases, however, governed by the Hindu Disposition of Property Act 1916, the gift over may be made in favour even of a person not in existence at the death of the testator.

Illustrations

(a) A Hindu bequeaths his property to his five sons in equal shares, and directs that in the event of any of his sons dying without sons or son's sons, his share shall pass over to the sons then living on their sons. All the five sons survive the testator. One

31 *Raikishori v Debendranath* (1888) 15 Cal 409, 15 IA 37.

32 *Kayastha Pathshala Allahabad v Mst Bhagwati Devi* (1937) 64 IA 5, (1937) All 3, 39 Bom LR 322, 166 IC 4, AIR 1937 PC 4.

33 *Soorjemoney Dossee v Denobundoo Mullick* (1862) 9 MIA 123, SC 6 MIA 526; *Kristoromoni v Narendro* (1888) 16 Cal 383, 392, 16 IA 29; *Bissonauth v Bamasoondery* (1867) 12 MIA 41, 48 (devise held absolute); *Bhoobun Mohini v Harrish Chunder* (1878) 4 Cal 23, 5 IA 138 (held gift operated as an absolute grant, as the event specified did not occur); *Tarokessur Roy v Soshi* (1883) 9 Cal 952, 10 IA 51 (case of gift over of a life-estate); *Lalit Mohan v Chukkun Lal* (1897) 24 Cal 834, 850, 24 IA 76; *Purna Sashi v Kalidhan* (1911) 38 Cal 603, 619, 620, 38 IA 112, 120, 11 IC 412; *Lakshminarayana v Vallammal* (1911) 34 Mad 250, 11 IC 767; *Sarajubala v Jyotirmoyee* (1931) 58 IA 270, 59 Cal 142, 134 IC 648, AIR 1931 PC 179; *Narsingh Rao v Maha Lakshmi Bai* (1928) 55 IA 180, 50 All 375, 109 IC 703, AIR 1928 PC 156. See also ss 28, 30, Transfer of Property Act 1882. *Mt Rameshwar Kuer v Sheo Lal Upadheya* (1935) 14 Pat 640, 156 IC 33, AIR 1935 AP 401; *Mst Tejo v Chhape Ram* AIR 1956 Punj 45.

of the sons, *A* dies leaving a widow, but without leaving sons or sons' sons. The gift over to the surviving sons is valid, and they are entitled to the one-fifth share of the deceased son to the exclusion of his widow. The effect of the will is to give an absolute estate to each son, if he dies leaving sons or son's sons subject to defeasance in the event of his death without leaving sons or son's sons. If *A* had died leaving sons or son's sons, he would have taken an absolute estate which he could have disposed of by will,[34] and which on intestacy would have passed to this heir.[35] It may be observed that any son of the testator may alienate his share even before the event happens, but the alienee will in that case take the share subject to the defeasance clause.[36]

Note.—The case put above was not governed by the Hindu Wills Act 1870. Had it been governed by that Act, the will would have to be construed with reference to s 111, Indian Succession Act 1865 (now s 124 of the Act of 1925), it being one of the sections made applicable by the Hindu Wills Act to wills governed by that Act. Section 111 provides that:

> ...where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such even happens before the period when the fund bequeathed is payable or distributable.

Illust (a) to s 111 is as follows: 'A legacy is bequeathed to *A*, and, in case of his death, to *B*. If *A* survives the testator, the legacy to *B* does not take effect'.

In the case of the above illustration, the uncertain event on the happening of which the one-fifth share of a son is to go to his brothers is the death of the son without leaving sons or son's sons. Under s 111, the rule has been taken from an English case which has been overruled by later English cases. The section, it has been held, should be applied strictly to cases coming within its scope.[37]

Section 124 of the Indian Succession Act 1925 (s 111 of the Act of 1865), is one of the sections mentioned in Sch III to that Act. Those sections applied in the first instance to wills of the classes specified in cll (a) and (b) of s 57 of that Act, being 'wills to which the Hindu Wills Act 1870, applied. Since the Indian Succession

34 *Bhoobun Mohini v Hurrish Chunder* (1879) 4 Cal 23, 5 IA 138.

35 *Soorjeemoney Dosee v Denobundoo Mullick* (1862) 9 MIA 123, SC 6 MIA 526; *Chunilal v Bai Samrath* (1914) 38 Bom 399, 23 IC 645, AIR 1914 PC 60; *Navalchand v Manekchand* (1921) 23 Bom LR 450, 62 IC 98, AIR 1921 Bom 25.

36 *Navalchand Chhaganlal v Manekchand Melakchand & ors* (1921) 23 Bom LR 450, 62 IC 98, AIR 1921 Bom 25.

37 *Bhupendra v Amarendra* (1916) 43 IA 12, 43 Cal 432, 34 IC 892, AIR 1915 PC 101.

(Amendment) Act 1929, those sections apply also to other wills executed on or after 1 January 1927. The Act of 1929 came into force on 1 October 1929.

(b) A Hindu testator bequeathed a moiety of his estate to his son and provided that the other moiety was to be held by the son and other persons in trust for the son's male issue and further provided that in case of the son's death without male issue, it should go to a certain named charitable institute. The son died without a male issue. It was held by the Judicial Committee, that the gift to the trust took effect on the death of the son and that the gift to charity, which was subject to the above condition, was valid.[38]

(c) *A* executes a deed of settlement whereby he gives certain property to his daughter *B* absolutely, with the condition superadded that the property should revert to *A*'s heirs on failure of the male descendants of *A*. Here, the event on the happening of which the defeasance clause is to operate, namely, the indefinite failure of male issue, may not take place at *B*'s death. The gift over to *A*'s heirs is therefore void, and the absolute estate granted to *B* remains unaffected.[39]

(d) By a deed of settlement executed in 1875, the settlor created an absolute estate in favour of his wife with a condition that if a son was born to the settlor's son (whom he had disinherited), the property should go to him. It was held that the gift over to the grandson being a gift in favour of an unborn person was void, with the result that the absolute estate granted to the wife remained unaffected. Had the case been governed by any of the Acts mentioned in the second paragraph of this section, the gift over would have been valid.[40]

As to settled estates in Bengal, see the Bengal Settled Estates Act 1904.

§ 390. GIFT OR BEQUEST BY WAY OF REMAINDER

A grant by way of remainder is valid, provided:

(1) the grant is to take effect immediately on the close of a life in being; and

38 *Gadadhur Mullik v Official Trustee of Bengal* (1940) 1 Cal 415, 187 IC 108, 67 IA 129, AIR 1940 PC 45.

39 *Sarajubala v Jyotirmayee* (1931) 58 IA 270, 59 Cal 142, 134 IC 648, AIR 1931 PC 179.

40 *Narendra Nath v Kamalbasini Dasi* (1896) 23 Cal 563, 23 IA 18; *Lal Ramjeuan v Del Koer* (1897) 24 Cal 406.

(2) it is made to a person in existence at the date of the gift or at the death of the testator as the case may be.[41]

In cases however, governed by the Hindu Disposition of Property Act 1916, a gift by way of remainder may be made in favour of an unborn person.

Illustration

A property is bequeathed to *A* for life, and after his death to *B*. Both *A* and *B* are in existence at the death of the testator. *A* takes an estate for life. *B* takes the remainder after *A*'s death. The bequest to *B* by way of remainder is valid.[42]

§ 391. TRUST VALID FOR VALID PURPOSES

Trusts are not unknown to Hindu law, but they can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests, which are recognised by that law. A disposition of property, which is inherently illegal, as where the donee is not a person legally capable of taking, or the estate which he is given is not recognised by Hindu law, cannot be made to take effect by the medium of a trust. That which cannot be done directly by gift cannot be done indirectly by the intervention of a trustee.[43] See as to gifts, §§ 357, 359 and 360, and as to will §§ 368, 372 and 373.

§ 392. CONDITION REPUGNANT TO INTEREST CREATED

Where by the terms of a deed or will, an absolute estate of inheritance is created in favour of a person, any subsequent clause purporting to restrict that interest is invalid, and the donee will take an absolute estate as if the document contained no such clause.[44]

41 *Ranganadha v Baghirathi* (1906) 29 Mad 412; *Soorjeemoney Dossee v Deenobundoo Mullick* (1862) 9 MIA 123 (SC); 6 MIA 526; *Motivahu v Mamubai* (1897) 21 Bom 709, 721, 24 IA 93; *Ram Bahadur v Jagannath* (1918) 3 Pat LJ 199, 45 IC 749, AIR 1918 AP 469 (FB); *Basti Ram v Ved Parkash* AIR 1974 P&H 152.

42 *Ranganadha v Bagirathi* (1906) 29 Mad 412.

43 *Tagore v Tagore* (1872) 9 Beng LR 377, 401–402, IA Sup Vol 47, 71, 72; *Rajendar v Sham Chund* (1881) 6 Cal 106; *Kahandas Narrandas* (1881) 5 Bom 154, 173–74.

44 *Bhaldas v Bai Gulab* (1922) 49 IA 1, 46 Bom 153, 65 IC 974, AIR 1922 PC 193; *Raggbunath Prasad v Deputy Commissioner* (1929) 56 IA 372, 4 Luck 483, 120 IC 641, AIR 1929 PC 283; *Sarajubala v Jyotirmayee* (1931) 58 IA 270, 59 Cal 142, 134 IC 648, AIR 1931 PC 179; *Partap Chand v Mt Makhni* (1933) 14 Lah 485, 144 IC 651, AIR 1933 Lah 365; *Kandarpamohan Goswami v Akshaychandra Basu*-(1934) 61 Cal 106, 150 IC 179, AIR 1934 Cal 379; *Mehma Singh v Dhan Kaur* AIR 1986 P&H 355 (case under s 30, Hindu Succession Act).

§ 393. CONDITION RESTRAINING ALIENATION OR PARTITION

Where property is given absolutely to a person, but the transfer or will contains a direction that it shall not be alienated,[45] or partitioned,[46] or that it shall be applied or enjoyed in a particular manner,[47] such direction is inoperative, and the donee will take the property as if the document had contained no such direction (§ 362).

§ 394. DIRECTION POSTPONING PAYMENT TO DONEE OR LEGATEE

Where a transfer or will confers an absolute estate, but directs that the property shall not be made over to the donee or legatee until he has attained a certain age beyond the period of his majority, such direction is inoperative, and he is entitled to the property on attaining majority, as if the document contained no such direction. However, the direction will be valid and it will take effect, if during the interval, the income of the property is disposed of in favour of some other person.[48]

Thus, if property is bequeathed to *A*, a minor, with a direction that it shall be handed over to him until he attains the age of 20 years, the direction is inoperative, and *A* is entitled to receive the property on his attaining majority. However, if the will contains a direction that until *A* attains the age of 20 years, the income of the property shall be given to *B*, then *A* is not entitled to receive the property until he attains the age of 20 years.

The rule laid down in this section is based on the decision in *Gosling v Gosling*,[49] which is the leading English case on the subject. The same rule has been applied to cases governed by the Indian Succession Act 1925.[50]

45 *Tagore v Tagore* (1872) 9 Beng LR 377, 395, IA Sup Vol 47, 65; *Ashuthosh v Durga* (1880) 5 Cal 438, 6 IA 182; *Gokul Nath v Issur Lochun* (1887) 14 Cal 222; *Raikishori v Debendranath* (1888) 15 Cal 409, 15 IA 37; *Chandi Churn v Sidheswari* (1889) 16 Cal 71, 15 IA 149; *Lalit Mohan v Chukkun Lal* (1897) 24 Cal 834, 24 IA 76; *Rameshwar v Lachmi Prosad* (1904) 31 Cal 111; *Sarajubala v Jyotirmayee* (1931) 58 IA 270, 59 Cal 142, 134 IC 648, AIR 1931 PC 179; *Umrao Singh v Baldeo Singh* (1933) 14 Lah 353, 143 IC 615, AIR 1933 Lah 201.

46 *Mokoondo Lall v Ganesh Chunder* (1875) 1 Cal 104; *Raikishori v Debendranath* (1888) 15 Cal 409, 15 IA 37.

47 *Cally Nath v Chunder Nath* (1882) 8 Cal 378; *Motivahu v Mamubai* (1895) 19 Bom 647.

48 *Gosavi Shirgar v Rivett Carnac* (1889) 13 Bom 463; *Husenbhoy v Ahmedboy* (190[illegible] 26 Bom 319 (case of Khojas); *Cally Nath v Chunder Nath* (1882) 8 Cal 378; *M[illegible] Kuar v Atma Singh* (1927) 8 Lah 181, 103 IC 506, AIR 1927 Lah 404.

49 (1859) Johns 265.

50 *Lloyd v Webb* (1897) 24 Cal 44.

Contingent Gift

A gift by a Hindu to a living person on his attaining a particular age, is not invalid, even if the donee has not attained that age at the date of transfer and there is no prior gift supporting it. The artificial rule of English law that every contingent gift must be supported by prior estate and it must vest *eo instanti* that the prior estate determines, has not been applied to gifts made by Hindus.[51]

§ 395. GIFT OF INCOME WITHOUT LIMIT OF TIME

Where gift is made of the income, but the estate given is not in terms limited to the lives of the beneficiaries, nor is any line of descent provided after their deaths, the gift is an absolute gift.[52]

§ 396. IMMORAL CONDITION

A gift to which an immoral condition is attached remains a good gift, while the condition is void.[53]

§ 397. DIRECTION FOR ACCUMULATION

(1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than:

(a) life of the transferor; or

(b) a period of 18 years from the date of the transfer, such direction shall, save as hereinafter provided (sub-§ (3)), be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period, the property and the income thereof shall be disposed of, as if the period during which the accumulation has been directed to be made had elapsed.

(2) Where the terms of a will directs that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of 18 years from the death of the testator, such direction shall, save as hereinafter provided (sub-§ (3)), be void to the extent to which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of 18 years, the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

51 *Kanai Lal v Kumar Purnendu* (1946) 51 CWN, (1947) 1 Cal 48.

52 *Madhavrao v Balabhai* (1928) 55 IA 74, 52 Bom 176, 107 IC 119, AIR 1928 PC 33. *Ram Sarup v Bela* (1884) 6 All 313, 11 IA 44; s 25, Transfer of Property Act 1882.

(3) This section shall not affect any direction for accumulation for the purpose of the:

(i) payment of debts of the transferor or the testator or any other person taking any interest under the transfer or will; or

(ii) provision of portions for children or remoter issue of the transferor or of the testator or of any other person taking any interest under the transfer or will; or

(iii) preservation or maintenance of the property transferred; and such direction may be made accordingly.

Sub-§ (1) of this section is sub-s (1) of s 17, Transfer of Property Act 1882, as amended by s 10, Transfer of Property (Amendment) Act, 20 of 1929. Section 17 is one of the sections of Chapter II of the Transfer of Property Act, and that chapter now applies to Hindus.

Sub-§ (2) of this section is sub-s (1) of s 117 of the Indian Succession Act 1925, as amended by s 14 (3) Transfer of Property (Amendment) Supplementary Act, 21 of 1929. By s 14 (3) of the same Act, s 117 as amended was included in Sch III to the Indian Succession Act, so as to apply to Hindu wills also.

Sub-§ (3) of this section is a combination of sub-s (2) of s 17, Transfer of Property Act and sub-s (2) of s 117, Indian Succession Act.

Both the amending Acts came into force on 1 April 1930. All transfer and wills executed before that date will still be governed by the rule of Hindu law as it was before those Acts.

Religious Endowments

The rules stated in this section do not apply to religious endowments (see § 411 A).

Rule of Hindu Law Before Legislation

Whether a direction for accumulation is valid or not, is a question which depends upon the facts of each case. No hard and fast rule can be laid down; in each case, the particular direction must be examined to see what the object of the testator was and what the effect of carrying out the direction would be. If there is nothing per se illegal in a direction to accumulate, made in a transfer inter vivos or a will, and if such direction is neither so unreasonable in its conditions as to be void against public policy, nor given for the purpose of carrying out an illegal object, nor in its effect inconsistent with Hindu law, effect should be given to the direction.[54]

54 *Rajendra Lall v Raj Cooman* (1907) 34 Cal 5; *Benode Behari v Nistarini Dassi* (1905) 32 IA 193, 33 Cal 180, and the cases cited in the illustrations.

The period during which an accumulation can be validly directed is the period for which the absolute vesting of the entire interest can be withheld, or, for so long a time as that during which the corpus of the property can be rendered inalienable or the course of its devolution can be directed and controlled by a testator.[55]

Illustrations

(a) *Where the object is to create a perpetuity.*—Where there is no disposition of the beneficial interest in the property of which the income is directed to be accumulated and the direction to accumulate is an attempt to create a perpetuity as in the case put in the illustration to s 393, the direction is invalid, and the property will pass as on intestacy.[56]

(b) *Where the direction to accumulate is repugnant to the grant.*—Where there is a present gift of property to a person, but the gift is followed by provisions postponing payment and directing accumulation, such provisions are invalid, and the donee is entitled to receive the property as if there were no such directions in the deed of gift or will. The reason is that an absolute gift cannot be qualified by a direction to postpone payment and to accumulate.[57]

(c) *Accumulation for payment of debts or for benefit of minors.*—A direction to accumulate for the payment of debts, or for the benefit of minor donees, is not invalid.[58]

(d) *Accumulation for charitable purposes.*—A direction to accumulate the income of property for a charitable purpose is not invalid. It has accordingly been held that a direction to accumulate the income of property until it amounted to Rs 10,000 and then to spend the proceeds in feeding the poor is valid.[59]

(dd) *Accumulation for marriage expenses.*— A direction to accumulate for the purpose of providing for the marriage expenses for the testator's son is valid.[60]

(e) *Where the direction is in its effect inconsistent with Hindu law.*—A Hindu bequeathed his property to trustees upon trust to pay

55 *Watkins v Administrator-General of Bengal* (1920) 47 Cal 88, 93, 56 IC 376, AIR 1920 Cal 951.

56 *Shookmoy Chandra v Monoharri Dassi* (1885) 11 Cal 684, 12 IA 103; *Kumara Asima v Kumara Krishna* (1868) 2 Beng LROC 11, 37.

57 *Cally Nath v Chunder Nath* (1882) 8 Cal 378; *Bramamayi v Jages Chandra* (1871) 8 Beng LR 400; *Mokoondo Lall v Gonesh Chunder* (1875) 1 Cal 104.

58 *Amrito Lall v Surnomoni* (1898) 25 Cal 662, 691.

59 See § 411. *Rajendra Lall v Raj Coomar* (1907) 34 Cal 5.

60 *Nafar Chandra v Ratan* (1910) 15 CWN 66, 7 IC 921.

a fixed monthly sum to his wife during her life, and to accumulate the surplus until the death of his wife. The testator also authorised his wife and two other persons to adopt a son, with a direction that neither the corpus nor the accumulations were to be handed over to the adopted son until the death of his wife. *B*, alleging that he was adopted to the testator pursuant to the authority given by him, contended that the direction for accumulation till the death of the widow was void, and claimed immediate possession of the corpus and the accumulations, subject to the payment to the widow of the monthly sum directed to be paid to her under the will. Jenkins J held that the adoption was proved, but that the direction to accumulate was valid and that the plaintiff was not entitled to possession until the death of the widow. The learned Judge said:

> It appears to me, on principle that, if accumulations are permissible, then in the absence of special provision, the limit must be that which determines the period during which the course or devolution of property can be directed and controlled by a testator.

The learned judge added:

> It is true that the object of the testator's bounty is not ascertained at the testator's death (for the son was to be adopted after his death), but that in itself is not a necessary indication of illegal remoteness.[61]

On appeal, it was held that adoption was invalid, and it therefore became unnecessary to consider the validity of the direction for accumulation. Trevelyn J however, said:

> I cannot see how a direction to accumulate can be valid unless there be a present gift to support the direction to accumulate.[62]

The Judicial Committee agreed with the appellate court that the adoption was invalid and declined to enter upon the other question. Referring to the observation of Trevelyan J, Sir Lawrence Jenkins said in a later case which related to the same will:

> I do not clearly understand what the learned Judge here intended to lay down, and his Lordship reiterated the views expressed in the earlier judgment.

61 *Amrito Lall v Surnomoyee* (1897) 24 Cal 589.
62 *Amrito Lall v Surnomoyee* (1898) 25 Cal 662, 673, 690–91.

Accumulation to follow capital.—In the absence of any direction to the contrary, it is the rule of Hindu law that accumulations go with the capital.[63]

§ 398. POWER OF APPOINTMENT

A Hindu may, by deed or will, grant a power of appointment to a person or persons named in the will. Before the Hindu Transfer and Bequests Act 1914, the Hindu Disposition of Property Act 1916, and the Hindu Transfers and Bequests (City of Madras) Act 1921, it was necessary to the valid exercise of the power, that it should be exercised in favour of a person who was in existence either actually or in contemplation of law at the date of the gift or at the testator's death, as the case might be.[64] Since the passing of those Acts, the power may be exercised in favour even of an unborn person, subject however, to the limitations and provisions contained in those Acts (see §§ 383–87).

When an appointment is made pursuant to a power in favour of two or more persons, and the appointment is invalid as to some or one of them, it may still be valid as to the rest.[65]

Illustration

X by his will gives certain property to *A* for life, and at his death to *A*'s sons, but if *A* dies without male issue, then to such persons as *A* may by deed or will appoint. *A* has no male issue. *A*, in the exercise of the power, leaves the property by his will to his own daughters, *C* and *D*, to be divided equally between them. *C* was in existence at the death of the testator. *D* was born after the death of the testator. *C* is entitled to a moiety of the property. *D* is not entitled to anything, as she was born after the death of *X*. The share appointed by *A* to *D* will go to the heirs of *X* as on intestacy.[66] (Under the Hindu Disposition of Property Act 1916, the execution of the power in favour of *D*, though not in existence at the death of the testator, would be valid).

The leading case on the subject is that of *Motivahu v Mambubai*,[67] decided by the Privy Council in the year 1897. In that case, it was

63 *Bissonauth v Bamasoondery* (1867) 12 MIA 41, 60; *Sonatun v Juggutsoondree* (1859) 8 MIA 66 (where there was a direction to the contrary).

64 *Motivahu v Mambubai* (1897) 21 Bom 709, 24 IA 93; *Upendra Lal v Hem Chundra* (1898) 25 Cal 405; *Manorama v Kali Charan* (1904) 31 Cal 166; *Brij Lal v Suraj Bikram* (1912) 39 IA 150, 34 All 405, 16 IC 92; *Mahim Chandra v Hara Kumari* (1915) 42 Cal 561, 569, 30 IC 798, AIR 1915 Cal 47.

65 *Javerbai v Kahlibai* (1892) 16 Bom 492.

66 Ibid.

67 (1897) 21 Bom 709, 24 IA 93.

contended that there was no place for a power of appointment in the Hindu system of law. This contention was negatived overruling a Madras case.[68]

§ 399. CAUTION AGAINST APPLYING ENGLISH RULES

> English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing...It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently and speak differently from Englishmen.[69]

The Supreme Court has endorsed this view in a number of cases.

§ 400. GIFT OR BEQUEST TO TWO OR MORE PERSONS

(1) Where a gift or bequest is made to two or more persons, the question arises whether they take as tenants-in-common or as joint tenants or as coparceners.

If the donees or legatees take as tenants-in-common, the share of each will, on his death, pass to his heirs by succession. If they take as joint tenants, the undivided interest of each donee will pass on his death by survivorship. If they take as coparceners, the undivided coparcenary interest of each donee will pass on his death by survivorship, and, further, the male issue of each donee will acquire an interest by birth in the property, as if it were coparcenary property. (Note that the question whether the donees or legatees take as coparceners can only arise when they are members of a coparcenary. The reason is that a coparcenary is purely a creature of law; it cannot be created by an act of parties (see § 215).

(2) Where a gift or bequest is made to two or more persons, who are not members of a coparcenary without specification of shares, it has been held by the Judicial Committee that they take as tenants-in-common, and not as joint tenants,[70] overruling a Madras case.[71] It was pointed out that the court would not be justified in importing into the construction of a Hindu law with an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu law, except in the case of a coparcenary between the members of an undivided family.

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68 *Vydinada v Nagammal* (1888) 11 Mad 258.

69 Per Wilson J in *Ram Lal Sett v Kanai Lal Sett* (1886) 12 Cal 663, 678, approved by the PC in *Bhagabati v Kalicharan* (1911) 38 Cal 468, 38 IA 54, 10 IC 641; *Narasimha v Parthasarathy* (1914) 37 Mad 199, 222, 41 IA 51, 71, 23 IC 166.

70 *Jogeswar Narain v Ram Chandra Dutt* (1896) 23 Cal 670, 23 IA 37.

71 *Vydinada v Nagammal* (1888) 11 Mad 258.

Illustrations

(a) A Hindu bequeaths his property to his widow and her son for their maintenance with power to them to alienate the property by sale or gift. Here, the legatees take as tenants-in-common, and each takes an absolute interest in a moiety of the property, so that on the death of either of them, his or her share will pass to his or her heirs by succession.[72]

(b) A Hindu bequeaths his property to his two married daughters without specification of shares. The legatees take as tenants-in-common, and not as joint tenants.[73]

(c) A Hindu bequeaths his property to his daughter and her husband without specification of shares. The legatees take as tenants-in-common.[74]

(3) Where a gift or bequest is made to two or more persons, who are members of a coparcenary, they nevertheless take as tenants-in-common, and not as joint tenants or coparceners, unless a contrary intention appears from that grant.[75]

Illustrations

(a) A Hindu executes a deed of gift by which he gives his property to *A* and *B*, who are brothers and members of a joint Hindu family. The Bombay High Court held that the donees take as tenants-in-common, and on the death of either of them, his share will pass to his heirs by succession.[76] In the course of the judgment, Fulton J said:

> If an unexpressed intention could be presumed, it would, we think, be more reasonable to suppose that the gift was meant to be to the two brothers as coparceners; but we doubt whether such a gift could be made consistently with the principles of *Tagore* case, for a gift in coparcenary would purport to create interests in sons and grandsons who might be unborn at the time.

72 *Jogeswar Narain v Ram Chandra Dutt* (1896) 23 Cal 760; *Suravreddy v Venkata Subbareddy* AIR 1960 AP 368.

73 *Gopi v Musammat Jaldhara* (1911) 23 All 41, 7 IC 697.

74 *Mst Jio v Mst Rukman* (1927) 8 Lah 219, 100 IC 54, AIR 1927 Lah 126.

75 *Buchibai v Nagpur University* (1946) ILR Nag 433.

76 *Bai Diwali v Patel Bechardas* (1902) 26 Bom 445; *Kishori Dubain v Mundra Dubain* (1911) 33 All 665, 10 IC 565; *Babu Rani v Rajendra Bakhsh Singh* (1933) 8 Luck 121, 60 IA 95, 142 IC 3, AIR 1933 PC 72; *Ram Piari v Krishna Piari* (1921) 43 All 600, 63 IC 301, AIR 1921 All 50 (gift to daughter's sons).

(b) A Hindu father bequeaths a house to his three sons in these terms: 'Therefore, my three sons shall use and enjoy the house from son to grandson and so on in succession without power to give as gift or sell the same.' As regards his other properties, he directs the income therefore to be divided among his sons: 'in equal shares' and the corpus to be divided among his grandsons after the death of his sons 'according to their respective shares'. One of the sons dies leaving a son, who dies leaving a widow. The widow claims a third share of the house, alleging that the three sons took the house as tenants-in-common. On the above facts, it was held by the High Court of Madras that the sons took house as a Hindu coparcenary with right of survivorship. Subramania Ayyar J said:

> ...as to the terms of the gift they are clear to the effect that the donees were to take not in severalty but in coparcenary. That the distinction between the two was perfectly clear to the mind of the testator is beyond question, for where he wishes them to take as tenants-in-common, he uses apt expressions, as the words 'in equal shares' in the paragraph relating to the income, and 'according to their respective shares' in the paragraph relating to the division to the corpus (of the other properties), while with reference to the house under consideration, he directs common enjoyment without any possibility of division.[77]

(c) *A* and his sons are members of a coparcenary. *A*'s brother *B* bequeaths certain property to *A* and *A*'s sons in these term: 'Items 4, 5, 6, 7, 8 and 9. I bequeath and leave to my brother *A* and his sons.' The legatees, though members of a coparcenary, take as tenants-in-common, there being no express words in the will that they should take as members of a coparcenary.[78]

§ 401. GIFT AND BEQUEST TO WIDOWS, DAUGHTERS AND OTHER FEMALES

(1) *Absolute gift and limited gift.*—When property is given to a female by a deed or will, the question frequently arises whether the gift passes an estate of inheritance, ie, an absolute estate, or merely a limited estate. If a gift made to a female, eg, the mother, daughter, brother's daughter, sister etc passes an estate of inheritance, she can dispose of it at her

77 *Yethirajulu v Mukunthu* (1905) 28 Mad 363, 373; *Sonatun v Juggutsoondree* (1859) 8 MIA 66; *Bissonauuth v Bamasoonderry* (1867) 12 MIA 41.

78 *Janakiram v Nagamony* (1926) 49 Mad 98, 93 IC 662, AIR 1926 Mad 273.

pleasure,[79] but not if it passes a limited estate.[80] In the former case, the property passes on her death intestate to her *stridhana* heirs.[81] In the latter case, it passes to the donor's heirs.[82] The same rule applies where a gift is made by a husband to his wife, whether the gift be of movable or of immovable property. If the gift passes an absolute estate, she can dispose of the property at her pleasure by act inter vivos or by will,[83] but not if it passes a limited estate.[84] In the former case, the property passes on her death intestate to her *stridhana* heirs;[85] in the latter case, it passes to her husband's heirs.[86]

(2) Whether a gift passes an absolute or a limited estate depends on the terms of the grant in each case.[87] This is so not only under the Hindu law, but under all other systems of law in force in India. The Judicial Committee laid down in an early case, that in construing a deed of gift or a will made by a Hindu in favour of female relations, the court was entitled to assume that a donor intended the donee to take a limited estate only, unless the contrary appeared from the deed or will. The basis of the rule was that females, as a rule, took a limited estate only in property inherited by them from male relations, and the donor must be presumed to have made the gift with that fact present to his mind.

79 *Atul v Sanyasi* (1905) 32 Cal 1051 (bequest to mother); *Lala Ramjewan v Dal Koer* (1897) 24 Cal 406 (bequest to daughters and brother's daughters); *Kollany v Lwchmee* (1875) 24 WR 395 (gift to daughter); *Madavarayya v Tirtha* (1877) 1 Mad 307 (gift to daughter).

80 *Mahomed Shumsool v Shewukram* (1874) 2 IA 7, 14 Beng LR 226 (gift to daughter-in-law); *Radha Prasad v Ranee Mani* (1908) 35 Cal 896, 35 IA 118 (bequest to daughter). In both these cases, it was held that the donee took a limited estate only.

81 *Ramasami v Papayya* (1893) 16 Mad 466 (gift to daughter); *Basanta v Kamikshya* (1906) 33 Cal 23, 32 IA 181 (gift to sister—Dayabhaga case).

82 *Annaji v Chandrabai* (1893) 17 Bom 503.

83 *Surajmani v Rabi Nath* (1908) 30 All 84, 35 IA 17 (will upheld); *Fateh Chand v Rup Chand* (1916) 43 IA 183, 38 All 446, 37 IC 122, AIR 1916 PC 20 (will upheld); *Ramachandra v Ramachandra* (1919) 42 Mad 283, 291–92, 52 IC 94, AIR 1919 Mad 557 (will upheld); *Janki v Bhairon* (1897) 19 All 133 (will upheld); *Padan Lal v Tek Singh* (1907) 29 All 217 (mortgage upheld); *Damodar v Purmanandas* (1883) 7 Bom 155 (will upheld—case of movable property). In some of the earlier cases, it was held that a wife cannot dispose of immovable property given to her by her husband to the prejudice of her *stridhana* heirs, even if the gift was absolute, not even after her husband's death. That view, it is submitted, is no longer law. The cases above referred to are *Kotarbasappa v Chanverova* (1873) 10 Bom HC 403; *Bhujanga Rau v Ramayamma* (1884) 7 Bom 387; *Nannu Meah v Krishnaswami* (1891) 14 Mad 274; *Rudranarain v Rup Kuar* (1878) 1 All 734, 743–44.

84 *Jamna Das v Ramautar* (1905) 27 All 364 (mortgage set aside); (1891) 14 Mad 274 (sale set aside).

85 *Kessarbai v Hunsraj* (1906) 30 Bom 431, 33 IA 176.

86 *Harilal v Bai Reva* (1897) 21 Bom 376.

87 *Ram Narain v Pearay* (1883) 9 Cal 830.

The leading case on the subject is *Mohamed Shumsool v Sheewukaram.*[88] In that case, their Lordships of the Privy Council said:

> In construing the will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus, with respect to the devolution of property. It may be assumed that Hindu...know that, as general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate.

In construing a will, made after the coming into operation of the recent legislation and particularly the Hindu Succession Act 1956, the court may assume that the testator knew of the radical changes that have been brought about in the general law of inheritance and that women now, as a general rule, take absolute estates of inheritance.

Though the rule laid down by the Privy Council applied alike to all females, who took a limited estate in property inherited by them, the courts in India, following the spirit of the texts cited in § 141, drew a distinction between cases where a gift or devise of immovable property was made by a Hindu husband to his wife, and those where it was made by a Hindu to other females. In the former case, ie, where a gift was made by a husband to his wife, they started with a presumption against the gift being absolute, and held that the gift must be presumed to pass a limited estate, unless by express words or necessary implication, an absolute estate was expressed to be conveyed.[89] In the latter case, ie, where a gift was made to other female relations, eg, a mother,[90] they did not in all cases start with that presumption. However, there was nothing in *Mahomed Shumsool*'s case to justify this distinction. The rule there laid down purported to apply to all females who took a limited estate in property inherited by them. In fact, the Judicial Committee applied it in

88 (1874) 2 IA 7, 14–15, 14 Bom LR 226, 231 (bequest to daughter-in-law held to pass a limited estate); *Rabutty v Sibchunder* (1854) 6 MIA 1 (deed of family arrangement). See in this connection, the observation of Mukherjea in *Jiban Krishna v Jitendra Nath* AIR 1949 FC 64, 72.

89 *Harilal v Bai Rewa* (1897) 21 Bom 376 (bequest to widow—limited estate); *Jamma Das v Ramautar* (1905) 27 All 364 (gift to wife—limited estate); *Seshayya v Narasamma* (1899) 22 Mad 357 (bequest to widow—limited estate); *Hirabai v Lakshmibai* (1887) 11 Bom 573 (bequest to widow—limited estate); *Nannu Meah v Krishnaswami* (1891) 14 Mad 274; *Motilal v Advocate-General of Bombay* (1911) 35 Bom 279, 11 IC 547; *Janki v Bhairon* (1897) 19 All 133 (bequest to widow—absolute estate); *Padam Lal v Tek Singh* (1907) 29 All 217 dissenting from *Surajmani v Rabi Nath* (1903) 25 All 251.

90 *Atul v Sanyasi* (1905) 32 Cal 1051. In *Annaji v Chandrabhai* (1892) 17 Bom 503, the gift was by a son to his mother and the court started with the presumption against the gift being absolute and held that it passed a limited estate only.

a latter case, where a bequest was made to a daughter.[91] The case was one from Bengal where daughters take a limited estate. The Madras High Court applied this rule in a case where father gave on partition a share to a widowed daughter, who was without children.[92] However, the presumption was held to be weaker where the property given was movable property.[93] The rule was held not applicable to a case where there was no gift by the husband to the wife, but where the widow got the property as a result of a compromise with her relations.[94] The principle of *Mahomed Shumsool*'s case applied not only to wills mentioned in cll (a) and (b) of s 57, Indian Succession Act 1925 (§ 369), but to all other wills.[95]

After the coming into force of the Hindu Succession Act 1956, there is no scope for any assumption in favour of any limited estate. Ofcourse, if the deed of gift or will prescribes a restricted estate, the position would be quite different.[96]

(3) *Gift to a woman as 'malik'*.—In most of the cases referred to above, the High Courts interpreted the rule in *Mahomed Shumsool*'s case to mean that a gift of immovable property to a woman cannot be deemed to confer upon her an absolute estate of inheritance, which she could alienate at her pleasure, unless the deed or will give her in express terms, a heritable estate or power of alienation. However, there was no warrant for such an interpretation. In fact, later decisions of the Judicial Committee made it clear:

> ...that if words (are) used conferring absolute ownership upon the wife, the wife enjoys the rights of ownership (including a full right of alienation) without their being conferred by express and additional terms unless the circumstances or the context were sufficient to show that such absolute ownership was not intended...[97]

91 *Radha Prasad v Ranee Mani* (1908) 35 Cal 896, 903, 35 IA 118, 129 (held that the daughters took a limited estate only). In *Ammammanna v Kodanda Rao* (1940) ILR Mad 223, 190 IC 190, AIR 1940 Mad 210, (1940) 1 MLJ 188, it was held that the daughter took 'a limited estate of a daughter' and the daughter's son's 'interest, if any, was not vested remainder'.

92 *Mangamma v Doraiyya* (1937) Mad 335, 166 IC 59, AIR 1937 Mad 100.

93 *Koonjbehari v Premchand* (1880) 5 Cal 684.

94 *Pandit Adya Shankar Tewari v Mst Chandrawat* (1935) 10 Luck 35, 150 IC 519, AIR 1934 Ori 265.

95 *Radha Prasad v Ranee Mani* (1908) 35 Cal 896, 903, 35 IA 118, 130 (bequest to daughter—limited estate); *Bhola v Peary Lall* (1897) 24 Cal 464, 650–51 (bequest to widow—limited estate); *Caralapathi v Cota* (1910) 33 Mad 91, 93, 3 IC 475 (bequest to widow—limited estate). In *Saroda v Kristo* (1900) 5 CWN 300, the court proceeded upon the plain meaning of s 82, Succession Act, and held that the bequest to the widow was absolute.

96 See s 14(2).

97 *Bhaidas v Bai Gulab* (1922) 49 IA 1, 8, 46 Bom 153, 159 IC 974, AIR 1922 PC 193.

and that it was possible by the use of words of sufficient amplitude to convey in the term of gift itself the fullest rights of ownership including the power to alienate.[98] Even then, difficulty was felt in deducing the principle of law. The matter was clarified when the Supreme Court held,[99] that to convey an absolute estate to a Hindu female, no express powers of alienation need be given; it is enough if the words are of such amplitude as would convey full rights of ownership. In another case, the Supreme Court reiterated this proposition and endorsed the view that there is no presumption one way or the other and there is no difference between the case of a male and the case of a female, and the fact that the donee is a woman, does not make the gift less absolute where the words are sufficient to convey an absolute estate to a male.[1] In effect, these decisions laid down that the rule of interpretation laid down in *Mahomed Shumsool v Shewurkram*,[2] had come to be regarded as unsound. The decisions under this head may be divided into two classes, namely:

(a) where the gift is coupled with a power of alienation;
(b) where the word '*malik*' (owner), or other words importing absolute ownership, are used in the deed or will.

In case (a), ie, where a gift is coupled with a power of alienation, the court readily infers an intention to grant an absolute estate. Thus, where a testator bequeathed certain property to his daughter and her son 'for your maintenance', with power of making alienation thereof by sale or gift, it was held by their Lordships of the Privy Council that each of them took an absolute interest in a moiety of the property, and the words 'for your maintenance' did not reduce the interest of either of them to one for life only.[3]

98 *Ramachandra v Ramachandra* (1922) 45 Mad 320, 49 IA 129, 67 IC 408, AIR 1922 PC 80; *Narsingh Rao v Maha Lakshmi Bai* (1928) 55 IA 180, 50 All 375, 109 IC 703, AIR 1928 PC 156; *Shalig Ram v Charanjit Lal* 57 IA 282, 11 Lah 645, 128 IA 265, AIR 1930 PC 239 (*waris*, ie heir); *Jagmohan Singh v Sri Nath* (1930) 57 IA 291, 128 IC 270, AIR 1930 PC 253 (gift to wife to be enjoyed by her generation after generation); *Lakshmeyya v Tirupathamma* AIR 1958 AP 720; *Jagannadha Rao v Jatmal Madanlal* (1957) ILR AP 806, AIR 1958 AP 662 ('for Pasupukumkuma'); *Krishnaswami Ayyar v Ramachandra Rao* (1934) 67 Mad LJ 821, 153 IC 1005, AIR 1934 Mad 464; *Shivappa Rudrappa v Rudrava Chanbasappa* (1933) 57 Bom 1, 142 IC 164, AIR 1932 Bom 410.

99 *Ram Gopal v Nand Lal* AIR 1951 SC 139; *Harnam Singh v Mohan Lal* AIR 1970 J&K 181; *Mohinder Singh v Balbir Kaur* AIR 1968 P&H 545; *Basant Kaur v Tej Kaur* AIR 1967 P&H 429 (for maintenance); *Tulsan v Sahib Ram* AIR 1966 Punj 262; *Rampyari Kuer v Bachuraj Kuer* AIR 1965 Punj 217 (*malik*); *Madhusudhan v Govind Sabat* AIR 1965 Ori 54.

1 *Nathoo Lal v Durga Prasad* [1955] SCR 51; AIR 1954 SC 355; *Seshayya v Padalamma* AIR 1957 AP 534; *Venkatarama v Rajyalakshmi* AIR 1960 AP 509.

2 (1874) 2 IA 7, 14 Beng LR 226.

3 *Jogeswar Narain v Rom Chandra Dutt* (1896) 23 Cal 670, 23 IA 37; *Kesserbai v Hunsraj* (1906) 30 Bom 431, 442, 33 IA 176, 186–87; *Paikabai v Anyabai* (1935) Nag 170, AIR 1952 Nag 327; *Yadeorao v Vithal* (1952) ILR Nag 60, AIR 1952 Nag 55.

The second class of cases is the one whether the word '*malik*' (owner) or other words importing absolute ownership are used in the deed or will. The word '*malik*' (owner) or *malik mustakil*,[4] imports full proprietary rights including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that full proprietary rights were not intended to be conferred. Hence, it has been held those words of disposition in a deed of gift,[5] or will that the donee shall 'become *malik* (owner) of all my properties,' or similar words, confer an heritable and alienable estate in the absence of a context which indicates a different meaning.[6]

In *Ram Gopal v Nand Lal*, decided by the Supreme Court,[7] a Hindu widow, who was entitled to maintenance as the wife of a predeceased son of the proprietor against the heir of the latter, relinquished by a deed all her rights to the property of her father-in-law in favour of the latter's heir, and as a part of the same transaction, received two items of property for her maintenance by a deed of transfer, which was described as a '*tamliknama*'. The document expressly stated that the grantee was made a '*malik*', though there were no words making the gift heritable or alienable. It was held that an absolute estate was conveyed, although, the gift was expressed to be for maintenance and residence. The desire to provide maintenance or residence for the donee, it was observed in the judgment, only showed the motive, which prompted the donor to

4 *Krishna Beharilal v Gulabchand* AIR 1971 SC 1041.

5 *Bishnath Prasad Singh v Chandika Prasad Kumari* (1933) 55 All 61, 60 IA 56, 142 IA 6, AIR 1933 PC 67.

6 *Lalit Mohun v Chukkun Lal* (1897) 24 Cal 834, 24 IA 76, 88-89; *Surajamani v Rabi Nath* (1908) 30 All 84, 35 IA 17; *Fateh Chand v Rup Chand* (1916) 43 IA 183, 38 All 446, 37 IA 122, AIR 1916 PC 20 (*malik-o-qabz*, ie owner in possession); *Sasiman v Shib Narayan* (1922) 49 IA 25, 34, ILR 1 Pat 305, 315, 66 IC 193, AIR 1922 PC 63 (*molikiyati*); *Sarajubala v Jyotiramajee* (1931) 58 IA 270, 59 Cal 142, 134 IC 648, AIR 1931 PC 179 (gift to daughter as *malik*); *Hitendra Singh v Maharaja of Darbhanga* (1928) 55 IA 197, ILR 7 Pat 500, 109 IC 858, AIR 1928 PC 112 (to hold the property from generation to generation); *Lala Ramjewan v Dal Koer* (1897) 24 Cal 406, 409; *Naulakhi v Jai Kishan* (1918) 40 All 575, 46 IC 905, AIR 1918 All 255 (*malik mustaquil*); *Kessarbai v Hunsraj* (1906) 30 Bom 431, 442, 33 IA 176, 186–87; *Wazir Devi v Ram Chand* (1920) 1 Lah 415, 58 IC 988 (*kullikhtiyar wamilkiat*); *Mohan Lal v Niranjan Das* (1921) 2 Lah 175, 60 IC 619, AIR 1921 Lah 11 (*malik*); *Hitendra Singh v Rameswar Singh* (1925) 4 Pat 510, 87 IC 849, AIR 1925 Pat 625 (transfer to wife of 'all my *zamindari* rights' with power to enter into possession and spend the produce of the property *ba farzandan naslan bad naslan*, ie, with sons generation after generation); *Thakur Jagmohan v Musammat Sheoraj* (1928) 3 Luck 19, 106 IC 593, AIR 1928 Ori 49 (FB); *Mst Rani Kuar v Atma Singh* (1927) 8 Lah 181, 103 IC 506, AIR 1927 Lah 404; *Kamla Prasad v Murli Manohar* (1934) 13 Pat 550, 152 IC 446, AIR 1934 Pat 398; *Matru Mal v Mehri Kanwar* (1940) All 416, 189 IC 600, AIR 1940 All 311; *Haripada Ojha v Ichhhamayee Debi* (1944) 23 Pat 404; *Sita Saran v Chandrabban* (1949) ILR All 368.

7 AIR 1951 SC 139.

make the gift, and it could not be read as a measure of the extent of the gift.

It has been stated above that, a bequest to a woman as '*malik*' imports full proprietary rights unless there is something in the context to qualify it. In the undermentioned cases,[8] it was held that context cut down the absolute estate imported by the word '*malik*' and that the donee did not take an absolute estate.

In *Bhaidas v Bai Gulab*,[9] a testator: (1) constituted his wife, '*malik*' (owner) of his property; and (2) provided that she should leave 'whatever property might remain after her death' to two named daughters 'as she liked'. Their lordships of the Privy Council held that the widow took an absolute estate, the second clause not constituting trust in favour of the daughters as the subject-matter namely, what might remain was uncertain. Similarly where a Hindu transferred by way of gift to his wife 'all my *zamindari* rights' with power to enter into possession and spend the produce of the property *ba farzandan naslan bad naslan* (lit, with sons, generation after generation) it was held that the words 'spend the produce' did not indicate that she was given a life-estate only.[10] The word '*malik*' in a *wazib-ul-arz*, when used with reference to widows and qualified by words like '*tahayat*' does not indicate an absolute estate.[11]

8 *Mahomed Shumsool v Shawukran* (1875) 2 IA 7, 14 Beng LR 226; *Motilal v Advocate-General of Bombay* (1911) 35 Bom 279, 11 IC 547 (widow's estate); *Mithibai v Meherbai* (1922) 46 Bom 162, 64 IC 397, AIR 1922 Bom 179 (life-estate); *Ashurfi Singh v Bisesar* (1922) 1 Pat 295, 65 IC 977, AIR 1922 Pat 362 (widow's estate); *Basantkumar Basu v Ramshankar Roy* (1932) 59 Cal 859, 138 IC 882, AIR 1932 Cal 600; *Mehtab Singh v Anrik Singh* AIR 1957 Punj 146.

9 (1922) 49 IA 1, 46 Bom 153, 65 IC 974, AIR 1922 PC 193.

10 *Hitendra Singh v Rameswar Singh* (1925) 4 Pat 510, 519, 87 IC 349, AIR 1925 Pat 625.

11 *Tirbeni Sahai v Ramsingh* (1938) 13 Luck 230, 167 IC 925, AIR 1937 Ori 361.

XXI

RELIGIOUS AND CHARITABLE ENDOWMENTS

§ 404. ENDOWMENTS

A Hindu who is of sound mind, and not a minor, may dispose of his property by gift or by will for religious and charitable purposes, such as the establishment and worship of an idol,[1] feeding Brahmans and the poor,[2] performance of religious ceremonies like *shraddha*, Durga *pujah* and Lukshmi *pujah*,[3] and the endowments of a university[4] or an hospital.[5] A list of what conduces to religious merit in Hindu law can be exhaustive. However, when any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit, though lacking in public benefit, it must be shown to have a Shastric basis.[6] The heads of religious purposes determined by belief in acquisition of religious merit cannot be allowed to be widely enlarged consistently with public policy and needs of modern society.[7]

When the question is whether the endowment is real or fictitious, the mode of dealing with it by its donors and successors is an important element for consideration.[8]

1 *Bhupati Nath v Ram Lal* (1910) 37 Cal 128, 3 IC 642; *Khusalchand v Mahadevgiri* (1875) 12 Bom HC 214.

2 *Dwarkanath v Burroda* (1878) 4 Cal 443; *Rajendra Lall v Raj Coomari* (1907) 34 Cal 5; *Manorama v Kali Charan* (1904) 31 Cal 166.

3 *Prafulla v Jagendra Nath* (1905) 9 CWN 528; *Lakshmishankar v Vaijnath* (1882) 6 Bom 24.

4 *Manorana v Kali Charan* (1904) 31 Cal 166.

5 *Fanindra v Adm-Gen of Bengal* (1901) 6 CWN 321.

6 Reference may be made to the recent decision of the Supreme Court in *Nagu Reddiar v Banu Reddiar* AIR 1978 SC 1174.

7 *Saraswathi Ammal v Rajagopal Ammal* [1954] SCR 277 287, AIR 1953 SC 491.

8 *Chaturbhuj Singh v Sarada Charan Guha* (1932) 11 Pat 701, 141 IC 157, AIR 1933 Pat 6.

Doubt as to Certain Gifts

The High Court of Calcutta has expressed a doubt as to whether gifts to *pundits* holding *tolls* for learning in the country at the time of Durga *pujah*, or for the reading of the *Mahabharata* and *Poorana*, or for the prayer of God during certain months are valid.[9]

Superstitious Uses Not Forbidden

The English law relating to superstitious uses does not apply to Hindu religious endowments. Thus, a gift in favour of an idol or for the performance of the worship of a deity is valid according to the Hindu law, though, it may not be valid according to the English law.[10] Dispositions for religious purposes are highly favoured by Hindu law and the leaning of the courts also is in the same direction. Dedication of property by a Hindu to a deity is not only lawful, but also commendable in a high degree from the Hindu point of view.[11]

Games or Sports: Education

In case of a trust created to set up an *akhara*, it cannot be said that there was a dedication for religious or charitable purpose, even though two idols and *taswir* were installed there to attract wrestlers of both the Hindu and the Muslim community. Distinction has been drawn between cases where the object of the dedication was the promotion of games and sports as part of education, and cases where the object was the promotion of games or sports simplicitor. The former only has been upheld on the ground that the object was to promote education.[12]

§ 404A. NEW LEGISLATION

A number of statutes have been enacted by state legislatures in the last few years dealing with religious and charitable trusts and endowments. The validity of the provisions of a number of them has been challenged under various Articles of the Constitution and courts have considered those provisions inter alia in the context of property of the trust or endowment, deities, idols, temples and institutions, as also the income and management of the property and affairs of the same, including the right to and management of the worship of certain deities and idols. It

9 *Dwarkanath v Burroda* (1878) 4 Cal 443. However, see *Re Darling* [1986] 1 Ch 50.

10 *Juggut Mohini v Sokheemoney* (1871) 14 MIA 289, 301–302; *Khusalchand v Mahadegiri* (1875) 12 Bom HC 214.

11 *Bhupati Nath v Ramlal* (1910) 37 Cal 128 136–37, 141; 3 IC 642; *Ananthakrishnan v Chidambaran* AIR 1953 Tr & Coch 442; *Brajabala v Sree Saradiya Durgamata* (1953) 2 Cal 268, AIR 1953 Cal 285.

12 *Ramchandra v Shree Mahadoji* AIR 1970 SC 458.

is not necessary in this chapter to refer to those decisions in any detail or to the constitutional questions raised and it will suffice only to mention several of those decisions:

(1) *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra.*

(2) *Thirtha Swamiar*[13]—Madras Hindu Religious and Charitable Endowments Act (19 of 1951).

(3) *Ratilal v State of Bombay*[14]—Bombay Public Trusts Act 1950 (29 of 1950).

(4) *Sri Jagannath v State of Orissa*[15]—Orissa Hindu Religious Endowments Act (4 of 1939).

(5) *Venkataramana Devaru v State of Mysore*[16]—Madras Temple Entry Authorisation Act (5 of 1947).

(6) *Moti Das v S P Sahi*[17]—Bihar Hindu Religious Trusts Act (1 of 1951).

(7) *State of Bihar v Charusila Dasi*[18]—Bihar Religious Trusts Act (1 of 1951).

(8) *State of Bihar v Bhabapritananda*[19]—Bihar Religious Trusts Act (1 of 1951).

(9) *Narayana v State of Andhra*[20]—Madras Hindu Religious and Charitable Endowments Act (19 of 1951) (extinction of *mahant*'s rights).

(10) *Sadavarthy v Commissioner Hindu Religious and Charitable Endowments*—Madras Hindu Religious Endowment Act (2 of 172) (temple).

(11) *Sudhindra Thirtha Swamiar v Commissioner for Hindu Religious and Charitable Endowments*[21]—Madras Hindu Religious Endowments Act (19 of 1951 as amended by Act 27 of 1954) (Udipi *math* founded by Sri Madhavacharya).

(12) *Tilkayat Shri Govindlalji v State of Rajasthan*[22]—Rajasthan Nathwara Temple Act (13 of 1959).

(13) *KA Samajam v Commissioner of HR&C Endowments, Hyderabad.*[23]

13 AIR 1954 SC 282.
14 AIR 1954 SC 388.
15 AIR 1954 SC 400.
16 AIR 1958 SC 255.
17 AIR 1959 SC 942.
18 AIR 1959 SC 1002.
19 AIR 1959 SC 1073.
20 AIR 1959 AP 471.
21 AIR 1963 SC 510.
22 AIR 1963 SC 1638.
23 AIR 1971 SC 891.

§ 405. GIFT TO *DHARAM* VOID

A gift or bequest to *dharam* is void for vagueness and uncertainty; so also a bequest for good work.[24] The objects meant by that word are too vague and uncertain for the administration of them to be under the control of a court.[25]

The new enactments indicated in § 404 A, contains their own definitions and deal inter alia with public and charitable trusts as therein defined. As to the content and extent of the expression 'religion' and 'matters of religion', reference may be made to the decisions of the Supreme Court referred to in § 404A, and particularly to *Ratilal v State of Bombay* there mentioned.

It is a maxim of equity that the execution of a trust shall be under the control of the court. The trust, therefore, must be of such a nature that it can be under that control. For that purpose, it is necessary that the subject and object of the trust must both be such as can be ascertained by the court. If the subject or object cannot be ascertained, the trust cannot be enforced by the court, and it is void.[26] In the case of a gift to *dharam*, the Judicial Committee observed in *Runchordas v Parvatibai*,[27] that the objects which can be considered to be meant by that word are vague and uncertain. In *Wilson's Dictionary*, the word '*dharam*' is defined to be law, virtue, legal or moral duty. Relying upon this definition of *dharam*, the Judicial Committee held that the word '*dharam*' was as vague as the words 'purposes charitable or philanthropic,' which, on account of their vagueness, render a trust for those purposes void in the English law.[28] Gifts for 'charitable or other purposes' or gifts expressed in other alternative terms are not charitable; for they may be executed

24 *Gauri Shankar & ors v Mohan Lal* (1940) 15 Luck 674, 187 IC 597, AIR 1940 Ori 275; *Jairan v Bhagirathi* (1949) ILR Nag 765 (subject-matter uncertain).

25 *Runchordas v Parvatibai* (1899) 23 Bom 725, 26 IA 71 affirming (1897) 21 Bom 646.

26 *Morice v The Bishop of Durham* (1804) 10 Ves 522 (objects of benevolence of liberality); *Re Riland* (1881) WN [Eng] 173 (charitable or benevolent purposes); *Re Macduff* [1896] 2 Ch 451 (purposes, charitable or philanthropic); *Blair v Duncan* [1902] AC 37 (such charitable or public purposes as my trustee thinks proper); *Hunter v Att-Gen* [1889] AC 309; *Grimond v Grimond* [1905] AC 124. As to what are charitable objects, see the judgment of Lord Macnaughten in *Commissioners of Income Tax v Pemsel* [1891] AC 531, 583.

27 (1899) 23 Bom 725, 26 IA 71.

28 *Runchordas v Parvatibai* (1899) 23 Bom 725, 26 IA 71; *Parthasarathy v Thiruvengada* (1907) 30 Mad 340 (*dharam*); *Gangabai v Thavar* (1863) 1 Bom HC 71 (*dharam*); *Advocate-General v Damodhar* (1852) Perry's Oriental Cases 526 (*dharam*); *Cursandas v Vundravandas* (1890) 14 Bom 136 (*dharamada*); *Devshankar v Motiram* [1894] 18 Bom 136 (*dharamada*); *Venkatanarasimha v Subba Rao* (1923) 46 Mad 300, 73 IC 991, AIR 1923 Mad 376.

without any part of the property being applied to charitable purposes.[29] Thus, a gift for 'charitable or benevolent purposes' is void.[30] Applying the above principles, it has been held that a trust for *sarakam* (good work),[31] a trust for 'purposes of popular usefulness or for purposes of charity as may be approved by the trustees',[32] a trust for spending money 'in proper and just acts for the testator's benefit',[33] and a trust for disposing of the residue 'in a righteous manner, in a pious and charitable way, as may appear advisable to all my three executors, and in such manner that people may speak well of me and that all my three heirs may acquire great fame',[34] are all void. Similarly, an ultimate residuary gift to any agnate, and failing agnates to any Brahmin, who would live in the testator's ancestral house, has been held to be void.[35] A direction to trustees to pay a certain sum of money at their discretion towards dispensaries, hospitals, charitable societies, schools or any students' association, feeding of the poor, etc, marriage, *upanayana*, etc, excavation and consecration of tanks, etc, or in the construction *ghats* or *math*, has also been held to be void.[36] Where the bequest is for *dharam*, *dharamshala* and Sanskrit education, the bequest for *dharam* being void, the entire bequest is void.[37] A gift for spreading of Hindu religion is void.[38]

However, a gift to be established at a definite place is valid.[39] A gift to 'such charities as the trustees may think deserving' is also valid;[40] and so a gift with power to trustees to give away the property 'in charity in such manner and to such religious and charitable purposes, as they may in their discretion think proper'.[41]

A gift 'for the performance of ceremonies and giving feasts to Brahmans' is not void for uncertainty.[42] Nor is a devise of property to executors upon trust to distribute the same among the testator's poor relations,

29 *Halsbury's Laws of England*, Vol IV, p 146, art 230.
30 *Re Riland* (1881) WN [Eng] 173; *Re Harbison* (1902) 1 IR 103; *Re* Sidney [1908] 1 Ch 488.
31 *Bai Bapi v Jamnadas* (1898) 22 Bom 774.
32 *Trikumdas v Haridas* (1907) 31 Bom 583; *Jamnabai v Dharsey* (1902) 4 Bom LR 893.
33 *Gokool Nath v Issur* (1887) 14 Cal 222.
34 *Nanalal v Harlochand* (1890) 14 Bom 476, 479.
35 *Shyam Charan v Sarup Chandra* (1912) 17 CWN 39, 14 IC 708.
36 *Sarat Chandra v Pratap Chandra* (1913) 40 Cal 232, 21 IC 194.
37 *Brij Lal v Narain Das* AIR 1933 Lah 833.
38 *Venkatanarasimha v Subba Rao* (1923) 46 Mad 300, 73 IC 991, AIR 1923 Mad 376.
39 *Morarji v Nenbai* (1893) 17 Bom 351.
40 *Smith v Massey* (1906) 30 Bom 500; *Gordhan Das v Chunni Lal* (1908) 30 All 111; *Surbomungola v Mohendronath* (1879) 4 Cal 508.
41 *Parvati v Ram Barun* (1904) 31 Cal 895.
42 *Lakshmishanker v Vaijnath* (1882) 6 Bom 24; *Suryanarayanarao v Rajeshwari* AIR 1966 AP 269.

dependants and servants.[43] There is a conflict of opinion whether a gift for the spread of Sanskrit language is void for uncertainty.[44]

When there is a bequest for feeding the poor—a bequest which is valid in law—the fact that it is referred to in a later part of the same will as '*dharam*' does not make it invalid.[45]

Samadhi

An endowment of property for the purpose of a *samadhi kainkaryam*, ie, worship at the *samadhi* (tomb) of a person is not valid.[46] The Supreme Court, in another case, pointed out that the above rule is subject to certain exceptions, such for instance, as the *samadhis* of saints.[47]

§ 406. SUBJECT OF ENDOWMENT

A Hindu may dedicate for religious and charitable objects all property which he can validly dispose of by gift or by will (§ 357 and § 368).

There is nothing to prevent a Hindu from dedicating the whole of his property for religious and charitable purposes.[48]

§ 407. ENDOWMENT HOW CREATED

(1) No writing is necessary to create an endowment,[49] except where the endowment is created by a will, in which case, the will must be in writing and attested by at least two witnesses, if the case is governed by s 57, Indian Succession Act 1925 (§ 369).

A mere entry in the account of a firm of moneylenders showing that the firm is indebted to the temple, followed by crediting of interest, does not create an endowment.[50]

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43 *Manorama v Kali Charan* (1904) 31 Cal 166.

44 *Venkatanarasimha v Subba Rao* (1923) 46 Mad 300, 314–15, 73 IC 991, AIR 1923 Mad 376 (Spencer J), 325–45, (Devados J).

45 *Vaidyanatha v Swaminatha* (924) 47 Mad 884, 51 IA 282, 82 IC 804, AIR 1924 PC 221.

46 *Saraswathi Ammal v Rajagopal Ammal* [1954] SCR 277, AIR 1953 SC 491; *Veluswami v Dandapani*.(1947) ILR Mad 47; *Ramanasaraman v Commissioner HR and CE* AIR 1961 Mad 265, (1960) Mad 922; *Ravanna K Karuppannan v VP Tirmalai* AIR 1962 Mad 500 (*samadhi* and education of poor pupils); *G Murthanna v G Chinna Ankiah* AIR 1975 All 97.

47 *Nagu Raddiar v Banu Reddiar* AIR 1978 SC 1174 (settlement in favour of *matam* and *samadhi* attachment to it).

48 *Sir F MacNaghten's Considerations on Hindu Law*, p 385.

49 *Maddun Lal v Komul Bibee* (1867) 8 WR 42; *Ramalinga v Sivachidambara* (1919) 42 Mad 440, 49 IC 472, AIR 1919 Mad 809; *Pallayya v Ramavadhanulu* (1903) 13 Mad LJ 364; *Gangi Reddi v Tammi Reddi* (1927) 54 IA 136, 50 Mad 421, 101 IC 79, AIR 1927 PC 80 on appeal from (1922) 45 Mad 281, 70 IC 337, AIR 1922 Mad 236; *RV Reddiar v Krishnaswamy* AIR 1971 Mad 262.

50 *Soonlram Ramniranjendass v Alogu Nachyar Koli* (1939) ILR Rang 59.

(2) A Hindu, who wishes to establish a religious or charitable institution, may, according to his law, express his purpose and endow it. A trust is not required for that purpose. All that is necessary is that the religious or charitable purposes should be clearly specified, and that the property intended for the endowment should be set apart for or dedicated to those purposes. Even in the case of a dedication to an idol, which cannot itself physically hold lands, it is not necessary, though it is usual, to vest the land in trustees. Nor is it necessary that there should be any express words of gift to the idol.[51] No religious ceremony such as *sankalp, samarpan, pranapratishta* or *kumbhabhishekam* etc[52] is necessary and a clear and unequivocal manifestation of intention to create a trust and vesting of the same in the donor or another as a trustee, is enough to constitute dedication.[53]

The Indian Trusts Act 1882, s 1

The Indian Trusts Act 1882, does apply to public or private religious or charitable endowments.[54]

The Transfer of Property Act 1882, s 123

It has been held by the High Court of Madras that a dedication of land for a public temple is not a gift within the meaning of s 122, Transfer of Property Act 1882. The provisions, therefore, of s 123 of the Act, which require a gift of land to be effected by registered instrument, do not apply to such a dedication.[55]

Revocation of Endowment

A valid endowment, once created, cannot be revoked by the donor.[56]

§ 407A. ILLUSORY ENDOWMENTS

(1) The mere execution of a deed, though it may purport on the face of it to dedicate property to an idol, is not enough to constitute a valid

51 *Manohar v Lakhmiram* (188) 12 Bom 247, 263; *Bhuggobutty v Gooroo* (1898) 25 Cal 112, 127; *Prafulla v Jogendra Nath* (1905) 9 CWN 528, 534; *Venkatanarasimha v Subba Rao* (1923) 46 Mad 300, 73 IC 991, AIR 1923 Mad 376; *SNP Nadar v TPT Charity* AIR 1971 Mad 253 (dedication to a temple to be built for a deity).

52 *Pichai v Commissioner HR&C Endowments* AIR 1971 Mad 405.

53 For a brief statement on the subject, reference may be made to *Ramchandra v Shree Mahadeoji* AIR 1970 SC 548; *Prem Nath v Hari Ram* (1935) 16 Lah 85, 154 IC 229, AIR 1934 Lah 771; *Jai Dayal v Ram Saran Das* (1938) Lah 704; *Deep Lal v Gulabchand* AIR 1956 Raj 171; *Ram Ratan Lal v Kashinath* AIR 1966 Pat 235; *Bipin v Rudranarayan* AIR 1978 Ori 203.

54 *Gopu v Sami* (1905) 28 Mad 517; *Narasimha v Venkatalingum* (1927) 50 Mad 687, 103 IC 302, AIR 1927 Mad 636 (FB).

55 *Pallayya v Ramavadhanulau* (1903) 13 Mad LJ 364; *Narasimha v Venkatalingum* (1927) 50 Mad 687, 103 IG 302, AIR 1927 Mad 636 (FB).

56 *Dasami v Paran* (1929) 51 All 621, 116 IC 433, AIR 1929 All 315.

endowment; for the real object of the executant may be to defraud creditors, or to defeat the provisions of the ordinary law of decent, or to restrain alienations and keep the property in perpetuity in the family. It is necessary for the validity of a deed of endowment that the executant should divest himself of the property. Whether he had done so or not, is to be determined by his subsequent acts and conduct. Thus, if the profits of the property are appropriated by the executant to his own use, and not to the worship of the idol, and his subsequent dealings with the property show that he did not intend to create an endowment, the dedication will be inoperative, and the property cannot be treated as *debutter*, ie belonging to the idol. The property will still continue to be his, and it may be attached in execution of a decree against him.[57] Similarly, if a Hindu purchases property in the name of his idol, without setting up the idol for public worship and without appointing priests for its worship, the property does not become the property of the idol, but remains his own private property.[58]

However, when an endowment is created by a will and is to take effect on the death of the testator, then unless there is evidence to show that the testator gave directions during his lifetime contrary to the terms of the will, his mode of dealing with the endowed property is irrelevant for the purpose of determining the true nature of the endowment. The conduct of the manager, after the testator's death, even if it is contrary to the terms of the will, cannot also be regarded as reflecting the intentions of the testator.[59]

(2) Where there is no real dedication of property for the worship of an idol, but only an attempt to create a perpetuity in favour of the settlor's descendants, the gift to the idol is void.[60] The mere fact, however, that the members of the settlor's family are nominated as *shebaits* or *mutawallis* to the temple and that they are to be remunerated out of the income of the property, is no ground for holding that the dedication is

57 *Watson & Co v Ramchand* (1891) 18 Cal 10; *Kanwar Doorganath v Ram Chunder* (1877) 2 Cal 341, 349, 4 IA 52; *Suppammal v Collector of Tanjore* (1889) 12 Mad 387; *Ram Dhan v Prayag* (1921) 43 All 503, 62 IC 862, AIR 1921 All 37; *Siri Thakur v Atkins* (1919) 4 Pat LJ 533, 53 IC 106; *Parmod Banabihari v Atkins* AIR 1919 Pat 442; *Bhekdhari Singh v Sri Ramchanderji* (1931) 10 Pat 388, 136 IC 290, AIR 1931 Pat 275; *Mahant Dasi v Pareshnath Thakur* AIR 1954 Ori 198; *Sri Gopal Thakur v Pravasini* AIR 1967 Ori 85; *Radha Gobinda v Kamala Devi* AIR 1974 Cal 283; *Dharma Raja v Rama Ammal* (1978) 1 Mad LT 492 (there must be real dedication, absolute or partial, mere execution of instrument is not enough).

58 *Brojosoondery v Luchmee* (1873) 20 WR 95 (PC).

59 *Siva Kanta v Rajantram* AIR 1950 Assam 154.

60 *Promotho v Radhika* (1875) 14 Bom LR 175; *Sri Thakurji v Sukhdeo Singh* (1920) 42 All 395, 58 IC 583, AIR 1920 All 63 (FB).

not real, provided the remuneration is reasonable having regard to the income of the property.[61]

§ 408. COMPLETE DEDICATION—ABSOLUTE GRANT IN FAVOUR OF CHARITY

A dedication of property to religious or charitable uses may be complete, or it may be partial. If the dedication is complete, a trust in favour of public religious charity is created. If the dedication is partial, a trust in favour of the charity is not created, but a charge in favour of the charity is attached to, and follows the property which retains its original private and secular character.[62] The question whether it is complete or partial, depends on the construction of the instrument of grant as a whole.[63] Dedication to charity need not necessarily be by instrument or grant. It can be established by cogent and satisfactory evidence of conduct of the parties and user of the property, which show the extinction of the private secular character of the property and its complete dedication of charity.[64]

When there was no formal dedication of a bathing *ghat* and the plaintiff (or his predecessors) acted as owners and not as *shebaits* in effecting repairs and levying tolls, it was held that the plaintiff is the owner and that there was no dedication.[65]

Where the whole property is dedicated absolutely to the worship of an idol, and no beneficial interest in it is given to any person, the dedication is said to be absolute and complete. In such a case, the property is held by the idol, though it is only in an ideal sense that,

61 *Jadu Nathu Singh v Thakur Sita Ramji* (1917) 44 IA 187, 39 All 553, 42 IC 225, AIR 1917 PC 177; *Chandi Charan v Dulal Chandra* (1927) 54 Cal 30, 98 IC 684, AIR 1926 Cal 1083; *Ishwari Bhuvaneshwari Thakurani v Projonath Dey* (1937) 64 IA 203, (1937) 2 Cal 447 39, Bom LR 933, 168 IC 765, AIR 1937 PC 185; *MA Ramanujacharyulu v M Venkatanarasimhachanryulu* AIR 1974 AP 316.

62 *Dasaratharami v D Subb Rao* AIR 1957 SC 797, [1957] SCR 1122; *Shanmugam Pillai v K Sanmugam Pillai* AIR 1972 SC 2069; *Gouri Shankar v Thakur Dass* AIR 1972 J&K 53 (property dedicated descendible to heirs).

63 *Pande Har Narain v Surja Kanwari* (1921) 48 IA 143, 43 All 291, 63 IC 34, AIR 1921 PC 20; *Nirala Bala v Balai Chand* AIR 1965 SC 1874; *Lakshminarasimhachari v Agastheswaraswamivaru* AIR 1960 SC 622; *Iswar Dashabhuja v Kanchanala* AIR 1977 Cal 473; *Bhekdhari Singh v Sri Ramchanderji* (1931) 10 Pat 388, 136 IC 290, AIR 1931 Pat 275; *Ananthakrishnan v Chidambaram* AIR 1953 Tr & Coch 442. The above statement of law was examined in *Kamalnarayan v R Kishorelal* AIR 1958 MP 246, 252; *Panchanan Dalai v Lakshmidhar* AIR 1958 Ori 65; *Nirmala Bala v Balai Chand* (1959) 64 CWN 546; *Narasi v Balamma* AIR 1963 AP 130; *Sri Thakur Krishna v Kanhaylal* AIR 1961 All 206; *Ram Ratan Lal v Kashinath* AIR 1966 AP 235; *Vadivelu Mudaliar v NS Rajabada Mudaliar* AIR 1937 Mad 175 (benefit meant essentially to charity).

64 *Dasaratharami v D Subbha Rao* AIR 1957 SC 797.

65 *Maharani Hemanta Kumari v Gauri Shankar Tewari* (1941) All 401, 193 IC 882, 68 IA 53, AIR 1941 PC 38.

property is so held, and it cannot be alienated except in the cases mentioned in § 415.[66]

In *Ramkishorelal v Kamalnarayan*,[67] the Supreme Court had to construe and award embodying partition among members of a joint family. Under the award, a village was given to a co-sharer *R kul huq haquq samet milkiyat* and then followed mention of the purposes (meeting expenses of worship and maintenance of a public temple) for which the village was being given to *R*. It was held on a consideration of the instrument as a whole that the intention was not to make *R* the absolute owner of the village, but to give him possession and management of the village for the benefit of the deity Shri Ramchandra Swamy.

However, mere use of the word '*debutter*' or *vishnuprit* or *sheoprit* may not suffice to constitute dedication.[68]

§ 408A. PARTIAL DEDICATION—CHARGE IN FAVOUR OF CHARITY

Where by the grant, a mere charge or trust is created in favour of an idol, the dedication is said to be partial or qualified. In such a case, the property descends, and is alienable and partible, in the ordinary way; but subject always to the trust or charge in favour of the idol.[69] Where the surplus income, after the expenses of worship and ceremony were met, was to be invested in houses, for the residence of the settlor's descendants, it was held that there was no complete dedication.[70]

In determining whether the will of a Hindu gives the estate to an idol subject to a charge in favour of the heir of the testator, or makes the gift

66 *Jagadindra Nath v Hemanta* (1905) 32 Cal 129, 31 IA 203; *Jadu Singh v Thakur Sita Ramji* (1917) 44 IA 187, 39 All 533, 42 IC 225, AIR 1917 PC 177; *Shri Ganesh v Keshavrao* (1891) 15 Bom 625; *Rajendra v Sham Chund* (1881) 6 Cal 106; *Bhuggobutty v Goorroo* (1898) 25 Cal 112; *Sathinama v Saravanabagi* (1895) 18 Mad 266; *Chandi Charan v Daulat Chandra* (1927) 54 Cal 30, 98 IC 684, AIR 1926 Cal 1083.

67 AIR 1963 SC 890.

68 *Sunderlal v Jogeshwar* AIR 1975 Pat 246 (caselaw).

69 *Jagadindra Nath v Hemanta* (1905) 32 Cal 19; 31 IA 203; *Sonatun v Jugutsoondree* (1859) 8 MIA 66; *Ram Coomar v Jogender Nath* (1879) 4 Cal 56; *Ashutosh v Doorga Churn* (1880) 5 Cal 438, 6 IA 182; *Kulada Prosad v Kali Das* (1915) 42 Cal 536, 24 IC 899, AIR 1914 Cal 813; *Mahim Chandra v Hara Kumari* (1915) 42 Cal 459, 30 IC 798, AIR 1915 Cal 487; *Gopal Lal Sett v Purna Chandra Basak* (1922) 49 IA 100, 49 Cal 459, 67 IC 561, AIR 1922 PC 253; *Pande Har Narai v Surya Kanwari* (1921) 48 IA 143, 43 All 291, 63 IC 34, AIR 1921 PC 20; *Bhekdhari Singh v Sri Ramchanderji* (1931) 10 Pat 388, 136 IC 290, AIR 1931 Pat 275; *Parshadi Lal v Brij Mohan Lal* (1936) 11 Luck, 575, 159 IC 117, AIR 1936 Ori 52; *Gouri Shankar v Thakur Dass* AIR 1972 J&K 53.

70 *Surendrakrishna Ray v Shree Shree Ishwar Bhubanshwari Thakurani* (1933) 60 Cal 54, 144 IC 792, AIR 1933 Cal 295; *Ishwari Bhuvnshauri Thakurani v Projonath Dey* 64 IA 203, (1937) 2 Cal 447, 39 Bom LR 933, 168 IC 765, AIR 1937 PC 185; *Gauri Shankar v Thakur Dass* AIR 1972 J&K 53. Also see cases under § 408.

to the idol a charge upon the estate, there is no fixed rule depending on the use of particular terms in the will; the question depends on the construction of the will as a whole. A will provided that the property of the testator 'shall be considered to be the property of' a certain idol, and further provisions such as that the residue after defraying the expenses of the temples 'shall be used by our legal heirs to meet their own expenses'. The circumstances such as that, in respect of the ceremonies to be performed, the expenditure was fixed by the will and would absorb only a small proportion of the total income, may indicate that the intention was that the heirs should take the property, subject to a charge for the performance of the religious purposes named.[71]

Similar would be the position, where it appears from the nature and situation of the properties and the directions given for their development, that it must have been contemplated that the income derived from them would be a growing one and must exceed the expenditure required for the prescribed ceremonies and charities.[72]

The question has to be determined by a conspectus of the entire provisions of the deed or will, by which the properties are dedicated. A provision giving a right to the *shebaits* to reside in the properties dedicated to the idol for the purpose of carrying on the daily and periodical worship and festivals does not detract from the absolute character of a dedication to the idol.[73] Reference may also be made *Sree Sree Ishwar v Sushila Bala.*[74]

§ 409. APPLICATION OF PROFITS OF PROPERTY— EVIDENCE OF DEDICATION

(1) Where there is no instrument of grant, the mere fact that the profits of any land are being used for the support of an idol, is not proof that the land formed an endowment for the purpose; by where there is apparently good evidence going back for a long period, eg, for more than half a century, that the land was given for the support of an idol, proof that from the time the profits had been so expended would be strong corroboration.[75]

The fact that the deceased *karta* of a joint Hindu family regularly paid the expenses of a charitable institution out of the profits of a family

71 *Pande Har Narain v Surja Kanwari* (1921) 48 IA 143, 43 All 291, 63 IC 34; *Parshadi Lal v Brij Mohan Lal* (1936) 11 Luck 575, 159 IC 117, AIR 1936 Ori 52. Reference may also be made to *Ram Ratan Lal v Kashinath* AIR 1966 Pat 235.

72 *Jadugopal v Pannalal* AIR 1978 SC 1329; *Iswari Bhoobaneshwari v Brojo Nath* AIR 1937 PC 185.

73 AIR 1954 SC 69, [1954] SCR 407. Also see cases under § 408.

74 *CIT, West Bengal v Jagannath Jew* AIR 1977 SC 1523.

75 *Muddun Lal v Sreemutty Komul Bibee* (1867) 8 WR 42, 44; *Konwar Doorganath v Ram Chunder* (1877) 2 Cal 341, 349, 4 IA 42.

property, those expenses, however, not exhausting the whole of those profits, does not establish a dedication of the property to the charity.[76] In this case, the Judicial Committee while reversing the decree passed by both the subordinate judge and the High Court, observed that the subordinate judge had failed to notice the distinction between meeting of the expenses of a charity out of a particular property, and applying all the receipts of that property to the charity.

(2) Though the mere fact of the profits of any land being used for the support of an idol, may not be proof that the land formed an endowment for the purpose, yet it is a fact that might well be taken into consideration in cases where the intention of the founder is to be gathered from an ancient document expressed in ambiguous language.[77] In the construction, again, of such of a document, evidence is admissible as to the manner in which the property has been possessed and used.[78]

§ 410. BEQUEST TO IDOL NOT IN EXISTENCE AT TESTATOR'S DEATH

The principle of Hindu law, which invalidates a bequest other than to a person in existence at the death of the testator (§ 372), does not apply to a bequest to trustees for the establishment of the image of a deity after the death of the testator. Such a gift is valid, though the image is to be established and consecrated after the testator's death.[79] Similarly, a dedication of immovable property by means of an *arpanama* to a number of deities, some of which were installed at the date of the disposition, are valid.[80]

Illustration

> *A* bequeaths his property to his executors upon trust to establish after his death, an image of the goddess Kali in the name of his mother, and to devote the income of the balance to the worship of the goddess. The bequest is valid, though the image is to be installed for the first time after the testator's death (see §§ 359–62, and §§ 375–78).

76 *Gangi Reddi v Tammi Reddi* (1927) 54 IA 136, 50 Mad 421, 101 IC 79, AIR 1927 PC 80 reversing on this point same case in (1922) 45 Mad 281, 70 IC 337, AIR 1922 Mad 236.

77 *Abhiran v Shyama Charan* (1909) 36 Cal 1003, 1012, 36 IA 148, 4 IC 449.

78 *Kulada Prosad v Kali Das* (1915) 42 Cal 536, 543–44, 24 IC 899, AIR 1914 Cal 815.

79 *Bhupati Nath v Ram Lal* (1910) 37 Cal 128, 3 IC 642; *Mohar Singh v Het Singh* (1910) 32 All 337, 5 IC 584; *Chatarabhuj v Chatarjit* (1911) 33 All 253, 8 IC 832.

80 *Bhoopati Nath Chakrabarti v Vasantkumari Debee* (1936) 63 Cal 1098, AIR 1936 Cal 556.

Dedication to a Temple

Dedication to a temple, which has yet to be built for a deity as indicated in a deed of trust and for services to be performed in the temple, is valid.[81]

The Idol Must be Specified

The dedication must be to a particular deity. A dedication to '*the Thakurji in my thakurdwara*,' without mentioning the particular *Thakurji* to whom the bequest is to be given, is void for uncertainty.[82] In a Madras case, however, opinion has been expressed that a gift for worship of God without mentioning any particular deity is valid.[83]

Mutilation of Idol

The destruction or mutilation of the image does not effect the endowment. A new image may be established, and the endowment kept up.[84] The actual installation of an idol in a temple or the construction of a temple for the purpose is not necessary for validating a settlement in favour of that idol.[85]

§ 411. ENDOWMENTS AND RULE AGAINST PERPETUITIES

(1) A dedication of property for a public, religious or charitable purpose is not invalid, because it transgresses the rule, which forbids the creation of perpetuities. The rule against perpetuity applies to gifts and bequests in favour of private individuals (§ 385). It does not apply to religious and charitable endowments.[86]

(2) Where the estate created by a grant is in its nature, secular, the mere fact that the motive for the grant was religious, does not constitute it a religious endowment, so as to exempt it from the rule against perpetuities.[87]

81 *Pachamuthu Nadar v TPT Charities* AIR 1971 Mad 253.

82 *Phundan Lal v Arya Pritbi* (1911) 33 All 793, 11 IC 260; *Chandi Charan v Haribola* (1919) 46 Cal 951, 51 IC 275, AIR 1919 Cal 199.

83 *Veluswami v Dandapani* (1947) Mad 47.

84 *Bijoychand v Kalipada* (1914) 41 Cal 57, 20 IC 78, AIR 1914 Cal 200; *V Raghavachari v Narayana* AIR 1974 Mad 166; *Raghavachari v Narayana* AIR 1973 Mad 323 (renovation of old temple, existence of *moolavar* deity).

85 *Sarad Sukh v Ram Prasad* (1924) 46 All 130, 135, 78 IC 1018, AIR 1924 All 357.

86 Section 18, Transfer of Property Act 1882, s 118, Indian Succession Act 1925; *Bhuggobutty v Gooroo* (1898) 25 Cal 112; *Prafulla v Jogendra Nath* (1905) 9 CWN 528.

87 *Anantha v Nagamuthu* (1882) 4 Mad 200. Reference may also be made to *M Kesava Gounder v DC Rajan* AIR 1976 Mad 102 (statue of father).

Illustration

A, actuated by religious motives, makes a gift of certain property to *B* and *C*, both Brahmins, subject to the condition that they should not alienate the property and that it should be enjoyed by them and their heirs for ever. The restrain against alienation is void, and *B* and *C* take the property absolutely.

§ 411A. ENDOWMENTS AND DIRECTIONS FOR ACCUMULATIONS

The rule stated in § 397 as to directions for accumulations, does not apply to religious endowments.

See s 18, Transfer of Property Act 1882.

§ 412. ESTATE IN REMAINDER

An endowment in not invalid because it is to take effect after the determination of an estate for life.[88]

Illustration

A executes a deed by which he reserves to himself a life-estate in certain property and directs that after his death, the income of the property shall be paid to his daughter for life and after her death, it shall be devoted to a certain temple. The endowment is valid, though it is to take effect after the determination of the life-estate in favour of the settler and his daughter.

§ 413. DEVASTHANAM, *MATH*, *SHEBAIT*, *MAHANT*, *DEBUTTER* PROPERTY

Where property is devoted absolutely to religious purposes, in other words, where the dedication is absolute and complete, the possession and management of the property belongs in the case of a *devasthanam* or temple, to the manager of the temple, called *shebait*; but a *shebait* is not a mere *pujari* or *archak* of the temple. He is a human ministrant of the deity, until a *pujari* is appointed by the founder or the *shebait* to conduct worship. The *pujari* is thus a servant of the *shebait*.[89] In case of a *math*, that is an abode for students of religion, the possession and management of the property belongs to the head of the *math* called *mahant*; and this carries with it the right to bring whatever suit are

88 *Gobind v Gomu* (1908) 30 All 288.

89 *Kalimata Thakurani v Jibandhan* AIR 1962 SC 1329.

necessary for the protection of the property. Every such right of suit is vested in the case of temple property in the *shebait* and, not in the idol, and in the case of *math* property in the *mahant*.[90] *Math* means a place for the residence of ascetics and their pupils and the like. Since the time of Sankaracharya, who established Hindu *maths*, these *maths* developed into institutions devoted to the teaching of different systems of Hindu religious philosophy, presided over by ascetics, who were held in great reverence, and religious preceptors and princes and noblemen endowed these institutions with large grants of property. In *Krishna Singh v Mathura Ahir*, the Supreme Court has fully and critically examined the subject.[91] Reference may also be made to *Hari Bhanu Maharaj v Charity Commissioners*, decided by the Supreme Court as to factors to be considered in determining whether a *math* is private or public.[92]

For position of *shebait* and *mahant*, see § 414. Property dedicated to religious uses in called *debutter* property. *Debutter* means literally 'belonging to a deity'.

Succeeding *shebaits* of a temple and *mahants* of a *math* form a continuous representation of the property of the idol or of the *math*.[93]

Distinction Between Temples and Maths

The religious foundations known as *devasthanams* or temples, are the most numerous in India and have the largest endowments, especially in the shape of lands, assignment of public revenue, and jewellery. These institutions have been established for the spiritual benefit of the Hindu community in general, or for that of particular sects or sections thereof. Next to the temples, the most important religious foundations in this country are the ancient *maths* or monasteries presided over almost invariably by *sanyasis* or monks. The object of these *maths* (or *mutts*) is generally the promotion of religious knowledge, and the imparting of spiritual instruction to the disciples and followers of the *math*. In the case of *maths*, though there are idols connected therewith, the worship of them is a secondary matter. The two classes of institutions, namely, temples and *maths*, are thus supplementary to each other in the Hindu ecclesiastical system, both conducive to spiritual welfare, the one by affording opportunities for prayer and worship, the other by facilitating

90 *Jagadindra Nath Roy v Hemanta Kumari Devi* (1905) 32 Cal 129, 31 IA 203; *Badajirao v Laxmandas* (1904) 28 Bom 215; *Bidhu v Kuladaprasad* (1919) 46 Cal 877, 50 IC 525, AIR 1919 Cal 245; *Jodhi Rai v Basdeo Prasad* (1911) 33 All 785, 11 IC 47 (FB); *Govinda Ramanuj Das Mohanta v Mohanta Ramcharan Ramanuj Das* (1936) 63 Cal 326.

91 AIR 1980 SC (caselaw examined). It may also be noticed that a number of *maths* have been established in the South by Sundra ascetics.

92 *Hari Bhanu Maharaj v Charity Commissioners* (1986) 4 SCC 162.

93 *Gulabhai v Sohangdasji* (1928) 52 Bom 431, 110 IC 263, AIR 1928 Bom 183.

spiritual instruction and the acquisition of religious knowledge. In the case of temples, the endowed property vests in the idol; in the case of *maths*, it vests in the *math* itself as a juristic person.[94] The *mahant* like the *shebait*, is the manager or custodian of the institution. The view taken in *Vidyapurna v Vidyanidhi*,[95] that in case of *maths* the ideal person is the office of the spiritual teacher which, as it were, is incarnate in the person of each successive *mahant* who, for the time, is the real owner is not tenable after the pronouncement of the Judicial Committee in *Vidya Varuthi v Balusami*.[96] The actual decision in *Vidyapurna v Vidyanidhi*,[97] is, however, correct, for it was held there that the *mahant* of an institution does not forfeit his office by reason of subsequent lunacy. So long as the duties of a *mahant* or *shebait* can be discharged by an agent or guardian, subsequent lunacy would not occasion a forfeiture of rights or furnish any grounds of removal.[98]

Arya Samajist

An Arya Samajist, who is a Hindu, can be a *shebait*, but the rites of the deity must be performed by a proper qualified person.[99]

Gurdwara

A gurdwara is a juristic person and can hold property.[1]

Property Held by an Idol

It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as *shebait*, or manager.[2]

Property Held by a *Math*

A *math*, like an idol, is in Hindu law, a juridical person capable of acquiring, holding and vindicating legal rights, though of necessity, it can

94 As to what is a '*mutt*' within the scope of the Madras Hindu Religious Endowments Act, see *Raghavendra Swami Mutt v Board of Commissioners HRE, Madras* AIR 1957 AP 150.

95 *Vidyapurana v Vidyanidhi* (1904) 27 Mad 435; *Sammantha v Sellappa* (1879) 2 Mad 175, 179; *Giyana v Kandasami* (1887) 10 Mad 375, 389.

96 48 IA 302.

97 (1904) 27 Mad 435.

98 *Nirmal Kumar Banerji v Jyoti Prasad Banerji* (1941) 2 Cal 128, 197 IC 761, AIR 1943 Cal 562.

99 *Iswar v Kshetra* AIR 1949 Cal 253.

1 *Piara Singh v Guru Granth Sahib* AIR 1973 P&H 470.

2 *Prosunno Kumari v Golab Chand* (1875) 14 Beng LR 450, 459, 2 IA 145, 152, *Pramatha Nath v Pradyumna* (1925) 52 IA 245, 251–52, 52 Cal 809, 816, 87 IC 305, AIR 1925 PC 139.

only act in relation to those rights through the medium of some human agency. When the property is vested in the *math*, then litigation in respect of it has ordinarily to be conducted by, and in the name of the manager (*mahant*).[3]

Idols and Maths are both, Juridical Persons

The Hindu law, like the Roman law and those (systems of law) derived from it, recognises not only corporate bodies with rights of property vested in the corporation, apart from its individual members, but also the juridical persons or subjects called foundations.[4]

Though there are some points of similarity between a minor and a Hindu idol, still the idol is not a perpetual minor.[5]

Suit in the Name of Temple

A temple is not a juridical person; no suit, therefore, relating to the temple property, can be instituted in the name of the temple.[6]

Although, a Hindu idol has a juridical status, it cannot be regarded as a 'person' capable of cultivating lands personally in the context of the Bombay Tenancy and Agricultural Lands (Vidarbha) Act of 1958.[7] However, it is a juristic entity capable of holding property and of being taxed through its *shebaits*.[8] Hindu law accords recognition to an idol as a juristic person, which is capable of holding property. An idol hitherto unknown to Hindu *Shastras*, but of which the investiture ceremony has been undertaken by proper consecration as ordained by the Hindu *Shastras*, cannot be termed as a fake deity and is to be termed as a juridical person capable of holding property.[9]

Management

Where in case of a public temple, there was no proof as regards exclusive right of management nor any deed conferring such right, the Supreme Court directed framing of a scheme for the purpose.[10]

3 *Babajirao v Laxmandas* (1904) 28 Bom 215, 223.

4 *Manohar v Lakhmiram* (1888) 12 Bom 247, 263 affirmed in *Chotalal v Manohar* (1900) 24 Bom 50, 26 IA 199; *Narasimha v Venkatalingam* (1927) 50 Mad 687, 103 IC 302, AIR 1927 Mad 636; *Re Sarjubai* (1944) Nag 81 (FB). Also see *Lakshmi Narayan v State of Bihar* AIR 1978 Pat 330.

5 *Tarit Bhusan Roy v Sree Iswar Sridhar Salgramsila Thakur* (1941) Cal 477, 199 IC 486, AIR 1942 Cal 99.

6 *Thakardwara Pherti Mal v Isbar Das* (1928) 9 Lah 588, 110 IC 384, AIR 1928 Lah 375.

7 *Kalanka Devi Sansthan v Maharashtra Revenue Tribunal* AIR 1970 SC 439.

8 *Jogendra Nath v IT Commissioner* AIR 1969 SC 1089.

9 *Ram Jankijee Deities v State* AIR 1999 SC 2131 (over ruling *Ram Jankee v State* AIR 1992 Pat 135).

10 *Jagdish Prasad v Mahant Tribhuvan Puri* AIR 1988 SC 323.

Right to Sue

The idol itself is a juridical person with the power of suing and being sued.[11]

Section 92, Civil Procedure Code is not a bar to the maintainability of a suit by the idol for possession of its property from a person who is in illegal possession of the same.[12] The Privy Council held in *Maharaja Jagadindra Nath Roy v Hemanta Kumari Debi*,[13] that:

> ...possession and management of the dedicated property belong to the *shebait* and this carries with it the right to bring whatever suits are necessary for the protection of the property.

When a *shebait* is unwilling or incapable of bringing a suit, such suit can be instituted by the prospective *shebait*, the heirs of the founder, or any person interested and the deity itself can sue through a next friend.[14] In any such case, as was pointed out by the Supreme Court,[15] a person interested in the worship of the idol can certainly be clothed with an ad hoc power of representation to protect its interest. Reference may also be made to the undermentioned cases.[16]

As to suit on behalf of a deity against the *shebait*, see *Bhagabat v Ajodhya Das*.[17]

The Madras High Court has held in a full bench case that in the absence of a *de jure* trustee, a *de facto* trustee of a public religious or charitable endowment, who is in possession and management of the institution, is entitled to maintain a suit for recovery of trust property against an adverse claimant.[18]

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11 *Pramatha Nath v Pradyumma* (1925) 52 IA 245. Reference may be made to *Jagesh Chandra v Sri Iswar Braj Raj Thakur* AIR 1981 Cal 259 (suit against *shebait* by a person as next friend of the deity).

12 *Bishwanath v Radha Ballabhji* AIR 1967 SC 1044.

13 31 IA 203.

14 *Girish v Upendra* 35 CWN 768; Sree *Sree Gopal v Baldeo Narain* (1946) 2 Cal 447; *Monmohan Haldev v Dibbendra* AIR 1944 Cal 199; *Mahadoba Devasthan v Mahadoba* (1952) 54 Bom LR 645, AIR 1953 Bom 38, (1952) ILR Bom 1971; *Sushama Roy v Atul Krishna* AIR 1955 Cal 624; *Thakur Sree Sree Annopurna Devi v Shiba Sundari Debi* (1944) 2 Cal 344; *Vishwakarma Mandir Trust v Madan Mohan Prasad* AIR 1986 Pat 158 (suit can be brought by a co-trustee looking after management of the properties).

15 *Bishwanath v Radha Ballabhji* AIR 1967 SC 1044.

16 *Jangi Lal v Panna Lal* AIR 1957 All 743; *Iswara Dashabhuja v Kanchanbala* AIR 1977 Cal 473. In exceptional cases, persons other than a *shebait* can sue—*Kishore v Guman* AIR 1978 All 1.

17 AIR 1978 Ori 194.

18 *Sankaranarayana Ayyar v Sri Poovanatha Swami Temple* (1950) Mad 191 (FB); *Ganesamuthuriar v Sri Koruppuswamy* AIR 1975 Mad 23.

Female Manager

There is nothing to prevent a female from being the manager of a religious endowment, but she cannot perform any spiritual functions.[19] According to the practice and precedents prevalent in the Madras state, a Hindu female is not incompetent because of her sex to succeed to the office of an *acharya* in a temple and to the emoluments attached thereto.[20]

Trustees

Property belonging to a religious institution may, by the usage and custom of the institution, vest in trustees other than the spiritual head.[21]

§ 414. POSITION OF *SHEBAIT* AND *MAHANT*

(1) *Shebait* —A *shebait* is, by virtue of his office, the administrator of the property attached to the temple of which he is the *shebait*. Both the elements of office and property or duties and personal interest are blended together in the conception of shebaitship and neither can be detached from the other.[22] As regards the property of the temple, he is in the position of a trustee. However, as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity.[23] It would be wrong to regard him as a mere *pujari* or *archak*.[24]

It was laid down by the judicial committee, that a *shebait* has not the legal ownership in, but only the title of manager of a religious endowment.[25] It follows from this that the rent of property dedicated to the services of an idol,[26] as well as offerings made to the idol (§ 442), belong to the idol, and not to the *shebait*. A *shebait* being a manager only, ceases to be a *shebait* when he ceases to manage the property and carry on the worship of the idol. Where the founder has reserved to himself the *puja* of the idol he is the *shebait*, but if he choose not to administer the endowment property and appoints another to perform the duty, the former is competent to dismiss the latter.[27]

19 *Janoki Debi v Gopal* (1882) 9 Cal 766, 10 IA 32; *Keshavbhai v Bhagirathibai* (1866) 3 Bom HCAC 75.

20 *Annaya v Ammakka* (1918) 41 Mad 886, 47 IC 341, AIR 1919 Mad 598 (FB).

21 *Arunachellam v Venkatchalapathi* (1919) 46 IA 204, 43 Mad 253, 53 IC 288, AIR 1919 PC 62.

22 *Commissioner, Hindu Religious Endowments, Madras v Swamiar* AIR 1954 SC 282, [1954] SCR 1005.

23 *Ramanathan v Murugappa* (1906) 29 Mad 283, 33 IA 139; *Moti Das v SP Sahi* AIR 1959 SC 942.

24 *Sree Kalimata Thakurani v Jibandhan* AIR 1962 SC 1329.

25 *Shibessouree v Mothooranath* (1869) 15 MIA 270, 273.

26 *Bhuban Mohan v Narendra Nath* (1931) 35 CWN 478, 135 IC 865, AIR 1932 Cal 27.

27 *Ram Das v Shri Ram Lakshman Janki* (1943) All 845, 209 IC 463, AIR 1943 All 352.

Benami Purchase by *Shebait* of Debutter Property

As a *shebait* occupies a fiduciary position with respect to debutter property, a purchase of such property by him *benami* and without disclosing that he is the real purchaser, is invalid, even if he buys at a sale execution proceedings and has paid the full market value.[28] The purchase may, however, be legal having regard to the facts and circumstances of the case, for instance, where the *shebaits* have no fiduciary relationship in their dealings.[29]

Adverse Possession

No *shebait* can, as long as he continues to be the *shebait*, claim adverse possession against the idol for that would be a notion void of all content.[30]

Transfer of *Shebaitship*

Neither a temple, nor a deity nor the *shebait* right can be transferred for pecuniary consideration. Such transfer would be void and illegal.[31]

Shebaitship is Immovable Property

The hereditary office of *shebait* enjoyed by turn is immovable property and a gift of it must be by registered instrument.[32]

(2) *Mahant.*—The property of a *math* is held by the *mahant* as spiritual head of the institution, but the property may by the usage and custom of the institution vest in trustees other than the spiritual head. In any case, the property is held solely in trust for the purposes of the institution;[33] surplus income must be added to the endowment and not applied for the personal enjoyment of the head of the *math*.[34] A *mahant*

28 *Peary Mohan v Manohar* (1921) 48 IA 258, 48 Cal 1019, 62 IC 76, AIR 1922 PC 235. Reference may be made to *Amal Deb v Biswanath* AIR 1984 Cal 85 (purchase by *shebait* at auction sale of *debutter* property may, however, be legal having regard to the facts and circumstances of the case, for instance, where the *shebaits* had no financial relationship in their dealings).

29 *Amal Deb v Biswanath* AIR 1984 Cal 85 (auction sale).

30 *Sree Sree Ishwar v Sushila Bala* [1954] SCR 407; *Surendrakrishna Ray v Shree Shree Ishwar* (1933) 60 Cal 54, 77.

31 *Kali Kinkor v Panna* AIR 1974 SC 1932.

32 *Ram Rattan v Bajrang Lal* AIR 1978 SC 1393.

33 *Gobinda Ramanuj Das Mohanta v Mohanta Ramchandaran Ramanuj Das* (1936) 63 Cal 326.

34 *Annachellam v Venkatachalapathi* (1919) 46 IA 204, 43 Mad 253, 53 IC 288, AIR 1919 PC 62; *Ram Parkash Das v Anand Das* (1916) 43 IA 73, 43 Cal 707, 33 IC 583, AIR 1916 PC 256; *Sethuramaswamiar v Meruswamiar* (1918) 45 IA 1, 41 Mad 296, 43 IC 806, AIR 1917 PC 190; *Balaswamy v Venkataswamy* (1917) 40 Mad 745, 40 IC 531, AIR 1918 Mad 984.

is not a trustee in the English legal sense of the term.[35] His functions and duties are regulated by custom. His very wide discretion as to the application of the income is subject to the obligation to manage the property so as to serve effectively the objects for which the *math* exists.[36] In the conception of mahantship, as in shebaitship, both the elements of office and property are blended together and neither can be detached from the other. The personal or beneficial interest of the *mahant* in the endowments attached to an institution is manifested in his large powers of disposal and administration and his right to create derivative tenures in respect of endowed properties; and these and other rights of a similar character of proprietary right which, though anomalous to some extent, is still a genuine legal right. A *mahant*, as a superior of a *math*, has, in addition to his duties, a personal interest of a beneficial character which is much larger than that of a shebait in *debutter* property.[37] *Mahant* of a *math*, though not duly installed, can maintain a suit to recover the property for its benefit from trespassers.[38]

The hereditary trusteeship of a religious institution constitutes 'property' within the ambit of s 7 of the Guardian and Wards Act 1890.[39]

Dharmakarta

A *dharmakarta* is no more than a manager, and his rights, apart perhaps from the question of personal support, are never higher than those of a mere trustee; in this respect, he differs from a *shebait* or the head of a *math*. Those functionaries have a much higher right with larger powers of disposal and administration.[40] Reference may be made to the *Full Bench* decision of the Madras High Court.[41] Referring to the full bench decision, the Madras High Court in another case held that a testator creating a trust under a will in favour of certain persons without any further direction as to succession, must be deemed to have prescribed succession in favour of the trustees and heirs.[42]

35 *Ananta Krishna Shastri v Prayag Das* (1937)1 Cal 84.

36 *Mahant Kehso Das v Amar Dasji* (1935) 14 Pat 379, 156 IC 1099, AIR 1935 Pat 111.

37 *Commissioner, Hindu Religious Endowments, Madras v Swamiar* AIR 1954 SC 282, [1954] SCR 1005.

38 *Mahadeo Prasad Singh v Karia Bharti* (1935) 57 All 159, 62, IA 47, 153 IC 1100, AIR 1935 PC 44; *Sri Radha Krishna Asthapit Thakurdwara v Mst Maharaj Kunwar* (1937) 12 Luck 331, 164 IC 919, AIR 1937 Ori 69.

39 *Kanteti v Venkateswara* AIR 1950 AP 232.

40 *Srinivasa Chariar v Evalappa Mudaliar* (1922) 49 IA 237, 45 Mad 565, 68 IC 1, AIR 1922 PC 325.

41 *Manathunainatha v Sundaralingam* AIR 1971 Mad 1 (FB); *Jayarama v Tirupathi* AIR 1972 Mad 183; *Santhanam Iyer v Sundarathanmal* AIR 1981 Mad 244 (succession in favour of wife of last holder).

42 *Pappa v Shanmughathammal* AIR 1991 Mad 90.

Poojari (Pujari) *Dharmadhaikari*

A *poojari* is not a *shebait*.[43] In case of small temples with meager income, the office of hereditary *poojari* and trusteeship may vest in the same individuals.[44]

Office of Hereditary Trustee

The position of a hereditary trustee of a religious or charitable endowment or institution is not in any way different from that of a *dharmakarta* or a mere manager or custodian of any such endowment or institution. The only difference being that he succeeds to the office as of right and in accordance with the rules governing succession. His position cannot be equated with that of a *shebait* or the head of a *math*.[45]

Maintenance of *Chela* or Disciple

Though the head of a *math* is bound to maintain his disciples, and such maintenance is a legitimate expenditure of the *math* property, yet no specific right in favour of individual *chelas* can be recognised, apart from usage, which can be made the subjectmatter of a suit. The remedy in such cases is the general remedy by way of administration of trust.[46]

Married *Mahants*

As a rule, the *mahant* is a celibate. There are certain exceptional cases where the *mahant*, who presides over the *math*, is permitted to marry. There are instances of *maths* in which the mahantship descends to a personal heir of the *mahant*.[47]

Personal Property of Mahant

A *mahant* of a *math* may own and acquire personal property. Reference may be made to *Gurcharant Prasad v Krishnanand*, a case decided by Supreme Court.[48] The undermentioned case affords an additional instance of a *mahant* of Dashnami Sanyas *math* having personal properties acquired out of his personal earnings.[49]

43 *Veerabasavaradhya v Devotees of Lingadagudi Mutt* AIR 1973 Mys 280.
44 *Venkataraman v VLA Thangappa* AIR 1972 Mad 119.
45 *KA Samajam v Commissioner of HR&C Endowments* AIR 1971 SC 891.
46 *Ramamohan Das v Basudeb* AIR 1950 Ori 28.
47 *Tulasiram v Kamprasanna* AIR 1956 Ori 41. As to celibacy and *mahants*, reference may be made to *Swami Harbanschari v State* AIR 1981 MP 82 (case-law).
48 AIR 1968 SC 1032.
49 *Mathsona v Kedar Nath* AIR 1981 SC 1878.

Acharjo,[60] that apart from such necessity to create a new and fixed rent for all time, though adequate at that time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in the *mahant*.

Legal Necessity

In *Prosunno Kumari v Golab Chand*,[61] their Lordships of the Privy Council said: 'The power, however (of a *shebait*), to incur debts must be measured by the existing necessity for incurring them.'

In that case, it was found that the shebait was a man of profligate habits, and that he, having spent the income of the *debutter* property on this own pleasures, borrowed Rs 4,000 to defray the expenses of the worship of the idol, and mortgaged the property as security for the advance.

In a suit to enforce the mortgage, a decree was passed for the mortgagee providing for the realisation of the loan out of the profits of the mortgaged property. In a suit by the successor to set aside the decree, it was held that the debts having been contracted for legal necessity, the decree was binding upon the successor in office, and that decision was confirmed by the Judicial Committee. The principle of that decision was applied by the Judicial Committee in the later case of *Niladri Sahu v Mahant Chaturbhug Das*.[62] In that case, the *mahant* of a *math* borrowed money at two per cent mensem mainly for constructing *pakka* buildings for the accommodation of wealthy devotees visiting the *math* and in part for the ordinary expenses of the worship. Afterwards, he mortgaged certain properties of the *math* at one per cent per mensem in order to discharge the loan at two per cent per mensem, which was an accumulating burden upon the endowment. In a suit to enforce the *mortgage*, it was held that the mortgage was for legal necessity so as to be within the power of the *mahant*, even if the original loans were incurred recklessly and not for the benefit of the *math*, which, however, was not shown to be the case. In the course of the judgment their Lordships said:

> The importance of this case in its application to the present consists in this, that it was the immediate not the remote cause, the *causa cousans* of the borrowing which has to be considered.

The principle was applied by the Supreme Court where a *mahant* had borrowed money to meet legal expenses of litigation against a trespasser

60 (1869) 13 MIA 270.

61 (1875) 2 IA 145, 151–52, 14 Beng LR 450 (mortgage).

62 (1926) 53 IA 253, 6 Pat 139, 98 IC 576, AIR 1926 PC 112; *Laxmi Narasingha Swami v Patta Sahani* AIR 1957 Oudh 86.

claiming hostile title against the *math* and had executed a mortgage and subsequently a sale of the *math* property.[63]

Though a *mahant* has agreed in a suit to the validity of an alienation made without legal necessity, his successor is not bound by such agreement, and it cannot prevent an investigation into the original nature of the transaction.[64]

Constructing *pakka* buildings for the accommodation of visitors to a *math* is a legal necessity.[65] So in addition, is the rebuilding of a dining hall for feeding visitors.[66]

'For the Benefit of the Estate'

The phrase 'benefit of the estate,' as used in the decisions with regard to the circumstances justifying an alienation by the manager for an infant heir or by the trustee of a religious endowment, cannot be precisely defined, but includes the preservation of the estate from extinction, its defence against hostile litigation, its protection from inundation, and similar circumstances.[67]

Scheme

As to alienation, where there is a scheme framed by the court, see *Jogendra Nath v Official Receiver*.[68]

§ 415A. BURDEN OF PROOF OF NECESSITY

(1) Where an alienation is made of *debutter* property, the burden lies on the alienee to prove either that there was a legal necessity in fact, or that he made proper and bona fide inquiries as to the existence of such necessity and did all that was reasonable to satisfy himself as to the existence of such necessity. An order of court, giving a trustee or *shebait* leave to mortgage the trust property, on the ground of necessity may be relied on by the mortgagee as prima facie evidence of his having made due and proper enquiries as to the necessity. Such an order cannot be

63 *Biram Prakash v Narendra Dass* AIR 1966 SC 1011.

64 *Mahanth Ramdhan Puri v Mst Parbati Kuer* (1937) 16 Pat 476, 171 IC 457, AIR 1937 Pat 519.

65 *Nilmadri Sahu v Mahant Chaturbhuj Das* (1926) 53 IA 253, 267, ILR 6 Pat 139, 98 IC 576, AIR 1926 PC 112.

66 *Vibhudapriya v Lakshmindra* (1927) 54 IA 228, ILR 50 Mad 497, 101 IC 545, AIR 1927 PC 131.

67 See § 233A, where this subject is fully discussed. *Palaniappa v Devasikamony* (1917) 44 IA 147, 155, 40 Mad 709, 718, 39 IC 722, AIR 1917 PC 33; *Jogendra Nath v Official Receiver* AIR 1975 Cal 389.

68 *Jogendra Nath v Official Receiver* AIR 1975 Cal 389.

questioned on the ground of defect of procedure or incorrect exercise of jurisdiction.[69] In fact, the rules as to burden of proof in the case of an alienee from a *shebait* or *mahant* are the same as those, which apply to the case of an alienee from the manager for an infant heir.[70] Those rules are set froth in §§ 182 and 244. The notes to § 243 may also be referred to as throwing further light on the subject. Where only a portion of the loan is proved to have been applied to purposes of necessity, the rule laid down in § 245 applies.[71]

Where the validity of a permanent lease granted by a *shebait* comes in question, a long time after the grant, so that it is not possible to ascertain what were the circumstances in which it was made, the court should assume that the grant was made for necessity so as to be valid beyond the life of the grantor.[72]

§ 415B. WHO CAN MAINTAIN A SUIT

In § 413, reference has already been made to the right of a *shebait* and a *mahant* to bring a suit for the protection of the property of a *devasthanam*, temple or *math*. It is also well-established that a person who has been in de facto possession and management of *math* properties, has sufficient interest to maintain a suit for the protection of the interest of the public trust. Such a person can maintain a suit for the benefit of the *math*.[73]

§ 416. CREDITOR'S SUIT FOR MONEY LENT FOR LEGAL NECESSITY

(1) Where a *shebait* or *mahant* contracts a debt for legal necessity, the creditor is entitled to a decree against him providing for the payment of the decretal amount out of the profits of the *debutter* property, even if no charge was created on the property to secure the loan. After the death

69 *Pashupathinath Seal v Pradyumnakumar Malik* (1936) 63 Cal 454.

70 *Konwar Doorganath v Ram Chunder* (1877) 2 Cal 341, 351–52, 4 IA 52, 62–64; *Murugesam v Manickavasaka* (1917) 44 IA 98, ILR 40 Mad 402, 39 IC 569, AIR 1917 PC 6; *Baidyanath v Kunja Kumar* AIR 1949 Pat 75. As to burden of proof, reference may also be made to *Chedda Lal v Ujiaray Lal* AIR 1987 All 127.

71 *Konwar Doorganath v Ram Chunder* ILR 2 Cal 341.

72 *Bawa Magniram v Kasturbhai* (1922) 49 IA 54, 46 Bom 481, 66 IC 162, AIR 1922 PC 163 (lease impeached after 100 years).

73 As to suit on behalf of the idol, reference may be made to notes under § 413. *Mahanth Ram Charan Das v Naurangi Lal* (1933) 60 IA 124, 126; *Mahadeo Prasad Singh v Keria Bharti* 62 IA 47; *Mahant Ram Sarup Das v Lakshmi Ojha* (1957) 36 Pat 1022. However, if he claims to sue as a *shebait*, he must make out that basis of his claim, *Chamelibai v Ramchandrajee* AIR 1965 MP 167.

of the debtor, the creditor is entitled to a similar decree against his successor.[74]

In a case where the loan was made for legal necessity, the proper decree to be passed in a creditor's suit, whether the loan be secured or unsecured, and whether the suit is brought against the debtor or his successor, is one directing the defendant to pay the decretal amount within a fixed period, and directing further that if the amount is not paid within that period, a receiver shall be appointed to realise the rents and profits of the *debutter* property and the proceeds from offerings, etc. This realisation is subject to the payment of all expenses connected with the institution and the performance of the ceremonies and festivals and a reasonable provision for the maintenance of the *shebait* or *mahant*; the balance shall be applied in discharge of the plaintiff's debt until such debtor has been paid off.[75]

§ 417. DECREE AGAINST *SHEBAIT* OR *MAHANT*, WHEN BINDING ON SUCCESSOR

It being competent to a *shebait* or *mahant* to borrow money for necessary purposes, it follows that judgments obtained against a *shebait* or *mahant* in respect of debts so incurred, are binding upon his successors who form a continuing representation of the *debutter* or endowed property. However, before applying the principle of res judicata to such judgments, the court should be satisfied that the judgments relied upon were not obtained by fraud or collusion, and that the necessary and proper issues were raised, tried, and decided in the suits which led to them.[76] If the decree is based on compromise, the courts should be satisfied that the compromise was entered into bona fide in the interest of the temple or *math*.[77]

Temple

A temple cannot be sold in execution of a decree against the *mahant* or *shebait*.[78]

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74 *Shankar v Venkapa* (1885) 9 Bom 422; *Sree Iswar Gopal Jieu v Pratapmal* AIR 1951 SC 214 affirming *Pratap Mull v Iswar Gopal Jieu* 48 CWN 172; *Srinath Dasvasikamani v Noor Mahomed* (1908) 31 Mad 47; *Lakshmindrathirtha v Raghavendra* (1920) 43 Mad 759, 59 IC 287, AIR 1920 Mad 678; *Sundaresan v Viswanada* (1922) 54 Mad 703, 72 IC 103, AIR 1922 Mad 402; *Vibhudapriya v Lakshmindra* (1927) 54 IA 228, 230 (argument of counsel), 50 Mad 497, 101 IC 545, AIR 1927 PC 131.

75 *Vibhudapriya v Lakshmindra* (1927) 54 IA 228, ILR 50 Mad 497, 101 IC 545, AIR 1927 PC 131; *Niladri Sahu v Mahant Chaturbhuj Das* (1926) 53 IA 253, 6 Pat 139, 98 IC 576, AIR 1926 PC 112.

76 *Prosunno Kumari v Golab* (1875) 14 Beng LR 450, 2 IA 145.

77 See s 11, expl VI, Code of Civil Procedure 1908; *Manikka v Balagopalakrishna* (1906) 29 Mad 553.

78 *Mukundji Maharaj v Persotam* AIR 1957 All 77.

§ 418. DEVOLUTION OF OFFICE OF *MAHANT*: NOMINATION

(1) The succession to the office of *mahant* depends on the usage of each particular *math*. As observed by their Lordship of the Privy Council:

> ...the only law as to mahants and their office, functions and duties is to be found in custom and practice, which is to be proved by testimony.

The custom that prevails in the majority of cases is that the *mahant* nominates his successor by appointment during his lifetime or by will. Where there is no such custom, or where no nomination has been made, the usage of some institutions is to have a successor appointed by a system of election by all the *mahants* of the sect in the neighbourhood. In some cases, the succession depends upon election by the disciples and followers of the *math*.[79] In *Amar Parkash v Prakash Nand*, the Supreme Court has noticed the position about appointment or nomination of a successor by the reigning *mahant*.[80] Reference may also be made to *Krishna Singh v Mathura Ahir*, a case decided by the Supreme Court relating to the Garvaghat *math* of the Satmat Sampradaya.[81] The appointment as a general rule is to be made from among the disciples of the deceased *mahant*, and failing, disciples from among his spiritual kindred.[82] Where the *mahant* has the power to appoint his own successor, he cannot delegate or transfer that power to a *mahant* of a neighbouring *math* or to any other person.[83]

For a nomination to be valid, performance of religious ceremonies are not mandatory unless, ofcourse, the usage of the institution has made it absolutely necessary,[84] that there should be ceremonies relating to

79 *Gredharee Doss v Nundokissore Doss* (1857) 11 MIA 405, 428; *Genda Puri v Chatar Puri* (1837) 9 All 1, 13 IA 100; *Ramalingam v Vythilingam* (1893) 16 Mad 490, 20 IA 150; *Ram Prakash Das v Anand Das* (1916) 43 IA 73, 43 Cal 707, 33 IC 583, AIR 1916 PC 256; *Lahar Puri v Puran Nath* (1915) 42 IA 115, 37 All 298, 29 IC 724, AIR 1915 PC 4; *Bhagaban v Ram Prapanna* (1895) 22 Cal 843 (PC); *Madho Das v Kamta Das* (1878) 1 All 539; *Vidyapurna v Vidyanidhi* (1904) 27 Mad 435; *Trimbakpuri v Ganga Bai* (1887) 11 Bom 514; *Bishambar Das v Mst Phulgari* (1930) 11 Lah 673, 125 IC 621, AIR 1930 Lah 715; *Premanand Bharaty v Yogendra Bharaty* (1965) Ker LT 824.

80 AIR 1979 SC 845; *Rukminibai v Nanabuva* (1979) Mah LJ 186 following *Mahant Bhagwan Bhagat v Girija Nandan* AIR 1972 SC 814; *Iqbal Singh v Santokh Singh* AIR 1984 P&H 366; *Ramdas v Vaishnavdas* AIR 1983 MP 73 (the power of nomination must, ofcourse, be exercised bona fide and in the interest of the *math* and not corruptly or for ulterior reasons).

81 *Krishna Singh v Mathura Ahir* AIR 1980 SC 707.

82 *Sital Das v Sant Ram* AIR 1954 SC 606.

83 *Mahanath Ramji v Lachbu* (1902) 7 CWN 145.

84 *Krishna Singh v Mathura Ahir* AIR 1980 SC 707, [1972] 2 SCR 1005, 1010; *MB Bhagat v CV Bhagat* AIR 1972 SC 814.

installation. As to the head of a *math*, being a celibate, reference may be made to the undermentioned cases.[85]

(2) It is now well-established that religious offices can be hereditary and that the right to such an office is in the nature of property. In *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar*,[86] the Supreme Court reiterated and extended the rule to the office of a *mahant*.

(3) *Partition*.—The headship of a *math* is not a matter of partition;[87] nor is the property of the *math*.[88]

As to succession to the head of Kasi *math*, see *Mahalinga Thambiran v Arulnandi Thambiran*.[89]

As to Garvaghat *math* of the Satmat Sampradaya see *Krishna Singh v Mathura Ahir*.[90] By custom, a Sudra can be ordained to religious order and he can be installed as a *mahant* of this *math*.

In the case of a maurasi *math*, the senior *chela* succeeds *a fortiori* in the absence of a valid nomination by the reigning *mahant*.[91] The *mahant* can change nomination of a *chela* to become successor made in a will by another will.[92] As to succession to Turki Asthal, see *Girjanand v Bhagwan*.[93]

Where the appointment of a successor is not made bona fide in the interests of the *math*, but in furtherance of the interests of the appointer, the appointment is invalid.[94] Similarly, a collusive appointment is nevertheless valid.[95]

Where the head of a *math* designates his successor, but dies before the latter can be formally initiated, the appointment is not valid.[96]

When the usage is a *math* consisting of several *asthals*, has been to have only one *mahant*, a separation of the office, it would seem, is improper, unless there are special circumstances justifying it.[97]

85 See observations in *Krishna Singh v Mathura Ahir* AIR 1980 SC 707; *Swami Harbans Chari v State* AIR 1981 MP 82, and the decisions cited there.

86 [1954] SCR 1005, AIR 1954 SC 282; *Raj Kali Kuer v Ram Ratan Pandey* [1955] 2 SCR 186, AIR 1955 SC 493.

87 *Sethuramaswamiar* (1918) 45 IA 1, 9, 41 Mad 296, 305, 43 IC 805, AIR 1917 PC 190

88 *Gobinda v Ram Charan Das* (1925) 52 Cal 748, 89 IC 804, AIR 1925 Cal 1107.

89 AIR 1974 SC 199.

90 AIR 1980 SC 707.

91 *Gobinda v Ram Charan Das* (1925) 52 Cal 748, 89 IC 804, AIR 1925 Cal 1107.

92 *Ramaprapanna v Sudarsan* AIR 1961 Ori 137.

93 *Girjanand v Bhagwan* AIR 1967 Pat 101.

94 *Ramalingam v Vythilingam* (1893) 20 IA 150, ILR 16 Mad 490; *Nataraja v Kailasam* (1921) 48 IA 1, ILR 44 Mad 283, 57 IC 564, AIR 1921 PC 84

95 *Ram Prakash Das v Anand Das* (1916) 43 IA 73, ILR 43 Cal 707, 33 IC 583, AIR 1916 PC 256

96 *Krishnagiri v Shridhar* (1922) 46 Bom 655, 67 IC 129, AIR 1922 Bom 202.

97 *Ram Charan v Gobinda* (1928) 56 IA 104, ILR 56 Cal 894, 114 IC 571, AIR 1929 PC 65.

For *Puthravarga math*: *Muthina Kanthi math*, see *NPVM Hiramath v SMK Hiramath*.[98]

§ 419. DEVOLUTION OF OFFICE OF SHEBAIT

(1) The devolution of the office of *shebait* depends on the terms of the deed or will by which it is created. Where there is no provision in the deed or will as to the succession or where the mode of succession prescribed in the deed or will comes to an end, the title to the property or to the management and control of the property as the case may be, follows the ordinary rules of inheritance according to Hindu law; in other words, it follows the line of inheritance from the founder and passes to his heirs,[99] unless there has been some usage or course of dealing which points to a different mode of devolution,[1] eg devolution on a single heir.[2] This rule is also applied where the right of nomination is given to a committee, but the committee has ceased to exist.[3] However, this rule cannot be applied to vest the shebaitship in persons who, according to the usages of the worship, cannot perform the rites of the office.[4]

In the undermentioned cases, it has been held that a founder cannot lay down a line of succession for shebaitship inconsistent with general law.[5] Nor can a *shebait* or *sarvarkar* alter the line of succession by

98 AIR 1976 Kant 103.

99 *Chokalinga Setharayar v Arunanayakam* AIR 1969 SC 569; *Profulla Chorone v Satya Chorone* AIR 1979 SC 1682 (concept, legal character and incidents of shebaitship, distinction between public and private *debutter*. Also, construction of will). *Ganesh Chunder Dhur v Lal Behary Dhur* (1936) 63 IA 448, 38 Bom LR 1250, 164 IC 347, AIR 1936 PC 318; *Bhaba Tarini Debi v Asha Lata Debi* (1943) 2 Cal 137, 207 IC 377, AIR 1943 PC 89; *Surendra Narayan Sarbadhikari v Bhola Nath Ray Chaudhuri* (1944) 1 Cal 139; *Manathunamatha v Sundaralingam* AIR 1971 Mad 1 (FB). Reference may also be made to *Venugopala v Krishnaswamy* AIR 1971 Mad 262 (right of heir of founder); *Anath Bandhu v Krishna Lal* AIR 1979 Cal 168 (revert back to heirs of founder); *Bhut Nath v Kalipada Mandal* AIR 1982 Cal 534, 536 (nature of right of succession—deeds of endowment).

1 *Gossami Sri Gridhariji v Ramanlalji* (1890) 17 Cal 3, 16 IA 137; *Jagadindra Nath Roy v Hemanta Kumari Debi* (1905) 32 Cal 129, 31 IA 203; *Ghanasambanda v Velu* (1900) 23 Mad 271, 27 IA 69; *Janoki v Gopal* (1883) 9 Cal 766, 10 IA 32; *Rajah Vurmah v Ravi Vurmah* (1876) 1 Mad 235, 4 IA 76; *Rajah Muttu v Perianayagum* (1874) 1 IA 209; *Mohan v Madhsudan* (1910) 32 All 461, 6 IC 77; *Sheo Prasad v Aya Ram* (1907) 29 All 663, (1918) 45 IA 1, ILR 41 Mad 296, 43 IC 806, AIR 1917 PC 190; *Sheoratan v Ram Pargash* (1896) 18 All 227; *Chandrika Bakhsh Singh v Bhola Singh* (1938) 13 Luck 344, 168, IC 593, AIR 1937 Ori 373; *Gulab Dass v Manohar Dass* (1938) 13 Luck 577, 171 IC 81, AIR 1937 Ori 490; *Mst Anuragi Kuer v Parmanand Pathak* (1939) ILR Pat 171; *Jogendra Nath v Charan Das* AIR 1958 Ori 160.

2 *Ayiswaryanandaji v Swaji* (1926) 49 Mad 116, 92 IC 928, AIR 1926 Mad 84.

3 *Dhram Narain v Suraj Narian* (1940) ILR All 815, 193 IC 657, AIR 1941 All 1.

4 *Mohan Lalji v Gordhan Lalji* (1913) 35 All 283, 40 IA 97, 19 IC 837; *Sri Sankareswar v Bhagbati* AIR 1949 Pat 193.

5 *Hiranbala Devi v Bishnupada* AIR 1976 Cal 404; *Anath Bandhu v Krishna Lal* AIR 1979 Cal 168; *Manohar v Bhupendra Nath* AIR 1932 Cal 791 (FB).

making a gift to the deity or endowment and by unilaterally imposing conditions which would change the line of succession.[6] In the undermentioned cases, it has been held that it is competent to a heir of a founder of a shrine in whom the trusteeship has rested, owing to the failure of the line of the original trustee to create a new line of trustees.[7]

There in no power in a *shebait* to relinquish his right to exclude his heirs, where under the terms of the endowment, the right of shebaitship is inherited by heirs in direct line.[8]

(2) On the view that *shebaiti* is property, the Supreme Court in *Angurbala v Debobrata*,[9] recognised the right of a female to succeed to the religious office of shebaitship, where the question for consideration was as to the applicability of the Hindu Women's Right to Property Act 1937. However, while the right to such office is property, it involves also substantial elements of duty. In the above case it was said:

> ...both the elements of office and property, of duties and personal interest are blended together (in such offices) and neither can be detached from the other.

In respect of such offices, especially where they are attached to public institutions, the duties are to be regarded as primary and that the rights and emoluments are only appurtenant to the duties.[10]

(3) When the office has become vested by descent in more than one person, it is lawful for the parties interested to arrange among themselves for the due execution of the functions belonging to the office in turn or in some settled order and sequence.[11] If the parties do not agree, then, if the right to worship carries with it the right to receive offerings, any one of them may sue for a division of the right just as he may sue for partition of the joint family property, and to have periods fixed during which he may exercise the right. Such a right is 'property' liable to partition, and the joint owners are entitled to perform the worship in turn.[12] However, if the right to worship does not carry with it the right to receive offerings, a suit for a division of the right does not lie. In such

6 *Satyadevi v Behariji Maharaj* AIR 1980 All 220.

7 *Gaurang Sahu v Sudevi Mata* AIR 1918 Mad 1278 (FB); *Venkataramana v LA Thangappa* AIR 1972 Mad 119.

8 *Janki Raman v Koshalyanandan* AIR 1961 Pat 293.

9 [1951] SCR 1125, (1952) 2 Cal 209, AIR 1951 SC 293.

10 *Raj Kali Kuer v Ram Rattan Pandey* (1955) 2 SCR 186, 189, 190, AIR 1955 SC 493.

11 *Ramanathan v Murugappa* (1906) 29 Mad 283, 33 IA 139; *Meenakshi v Somasundaram* (1921) 44 Mad 205, 59 IC 464, AIR 1921 Mad 388.

12 *Mitta v Neerunjan* (1874) 14 Beng LR 166; approved in *Pramatha Nath v Pradyumna Kumar* (1925) 52 IA 245, 52 Cal 809, 87 IC 305, AIR 1925 PC 139; *Mancharam v Pranshankar* (1882) 6 Bom 298; *Limba v Rama* (1889) 13 Bom 548; *Trimbak v Lakshman* (1896) 20 Bom 495; *Setburamaswamiar v Meruswamiar* (1911) 34 Mad 470, 4 IC 76; *Seshacharyulu v Venkatacharyulu* AIR 1957 AP 876.

a case, the parties are bare managers or trustees, and the *debutter* property must be managed by them jointly.[13]

A civil court is competent to entertain a suit, the object of which is to have a scheme framed for the administration of a private *debutter*. If the deity is interested in the result of the suit, the deity will be made a party and, in cases in which the interests of the *shebaits* are adverse to those of the deity, it will have to be represented by a disinterested person; but if the only dispute relates to the right of management and the deity's interests will not be affected by the adjustment of the individual rights of the *shebaits* the deity is not a necessary party.[14] A worshipper has no unqualified right to sue for a declaration that certain property is *debutter* property of the idol; if the *shebait* is negligent or alienates the property in breach of trust, either a prospective *shebait* or a member of the family (in case of family endowment) may maintain the suit.[15] However, a suit can be brought by a person who has made large donations to a private Hindu temple against a *pujari*.[16] One of two *shebaits* cannot sue for his half share of the royalty due to the deity under a lease.[17] If the parties are members of a joint family governed by Mitakshara law, the senior male member is entitled to manage the property; the other members are not entitled to demand the exercise of the right by rotation.[18]

The founder himself may appoint joint *shebaits*.[19] In *Pramatha Nath v Pradyumma*,[20] the question arose whether one of three brothers, who was entitled under an arrangement between themselves to his annual turn of worship, had the rights to remove the idol to his own house during his turn of worship. The Judicial Committee held that the idol could not be regarded as a mere chattel, and that the will of the idol as to its location must be respected, and the suit was remanded in order that the idol might appear by a disinterested next friend to be appointed by the court.

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13 *Sri Raman v Sri Gopal* (1897) 19 All 428; *Padmabati Dassi v Bisvanath* AIR 1976 Cal 344 (*pala* of *shebait* is not property).

14 *Bimal Krishna Ghosh v Jnonendra Krishna Ghosh* (1937) 2 Cal 105, 172 IC 161, AIR 1937 Cal 338.

15 *Sashi Kumari Debi v Dhirendra Kishore Ray* (1941) 1 Cal 309, 196 IC 241, AIR 1941 Cal 248.

16 *Ramchand v Thakur Janki Ballabhji Maharaj* AIR 1970 SC 532; *Kapoor Chand v Ganesh Dutt* AIR 1993 SC 1145; *Puran Singh v Ajaib Singh* AIR 1991 Punj 247 (worshipper can maintain suit). In the same decision, it is also held that such a sale must be for the benefit of the Idol; *Hari Singh v Bishan Lal* AIR 1992 P&H 11.

17 *Baraboni Coal Concern Ltd v Gokulananda Mohanta Thakur* (1934) 61 IA 35, 61 Cal 313, 147 IC 884, AIR 1934 PC 58.

18 *Thandayaroya v Shunmugan* (1909) 32 Mad 167, 2 IC 314.

19 *Asita Moban v Nirode Moban* (1920) 47 IA 140, 24 CWN 794, AIR 1920 PC 129.

20 (1925) 52 IA 245, 52 Cal 809; 87 IC 305, AIR 1925 PC 130.

It may sometimes become necessary to distinguish between a shebaitship and bare managership.[21] Distinction has also been drawn at times between a *shebait* and a *pujari*.[22]

(4) *Nomination by will.*—There is a conflict of decisions as to whether a *shebait* can nominate his successor by will. It has been held by the High Court of Calcutta that he cannot, unless there be a usage justifying a nomination by will.[23] On the other hand, it has been held by the High Court of Bombay, that a valid devise may be made of the office of *shebait*, provided the devisee is a person standing in the line of succession, and is not disqualified by personal unfitness.[24] The High Court of Allahabad has taken much the same view as the Calcutta High Court.[25] In view, however, of the law now well-settled, that shebaitship is property and not a mere office, shebaitship can be the subject matter of a disposition by will.[26] In any case, it is clear that where a person is appointed *shebait* with a power of appointing his successor, he may nominate his successor by an act inter vivos or by will. If he dies without exercising the power, the office reverts to the founder or his heirs.[27] It is not competent for a shebait by his act to alter the line of succession to the office of the *shebait*. However, if he makes a fresh grant to the existing endowment, making a new line of *shebaits* an essential condition to the grant, the grant may be rejected on behalf of the deity, but if it is accepted, it must be accepted subject to the condition.[28]

§ 419A. DEVOLUTION OF OFFICE OF *PUJARI*

Though a female is personally disqualified from officiating as a *pujari* for the shastraically installed and consecrated idols in the temples, the usage of a female succeeding to a priestly office and getting the same performed

21 *Sri Kishan v Jagannathji* (1953) 2 All 822, AIR 1953 All 289.

22 *Dharam Karan v Shahzad Kunwar* (1953) 2 All 631, AIR 1953 All 359.

23 *Rajeshwar v Gopeshwar* (1908) 35 Cal 226. However, see *Sovabati Dassi v Kashi Nath* AIR 1972 Cal 95.

24 *Mancharam v Pranshankar* (1882) 6 Bom 298.

25 *Chandranath v Jadabendra* (1906) 28 All 689; *Goswami Puran Lalji v Ras Bihari Lal* (1922) 44 All 590, 67 IC 328, AIR 1922 All 285.

26 *Banku B Das v Kashi N Das* AIR 1963 Cal 85. Reference may be made to *Sovabati Dassi v Kashi Nath* AIR 1972 Cal 95 for an analysis of the case-law on the point. *Nandlal v Kesharlal* AIR 1975 Raj 226 (gift of shebaitship to one in line of succession). Reference may be made to *Shyam Sunder v Moni Mohan* AIR 1976 SC 977 (construction of a will).

27 *Annasami v Ramakrishna* (1901) 24 Mad 219; *Ranjit Singh v Jagannath* (1886) 12 Cal 375; *Jagannath v Runjit Singh* (1898) 25 Cal 354; *Radha Nath Mukerji v Shaktipado Mukherji* (1936) 58 All 1053, 164 IC 595, AIR 1936 All 624.

28 *Nirmal Kumar Banerji v Jyoti Prasad Banerji* (1941) 2 Cal 128, 197 IC 763, AIR 1941 Cal 562.

through a competent deputy has been well-recognised, and it is not contrary to textual Hindu law nor opposed to public policy. In *Raj Kali Kuer v Ram Rattan Pandye*,[29] the Supreme Court upheld such usage. Subject to the proper and efficient discharge of the duties of the office being safeguarded by appropriate action when necessary, a Hindu female has a right to succeed to the hereditary priestly office of a *pujari* and *panda* held by her husband and to get the duties of the office performed by a substitute, except in cases where usage to the contrary is pleaded and established.

Baridar

The right of *baridars* of the temple of Shri Vaishno Devi to share offerings is transferable and heritable, and would descend in accordance with the provisions of the Hindu Succession Act 1956.[30]

§ 420. TRANSFER OF RIGHT OF MANAGEMENT

(1) *Sale.*—A sale by a *shebait* or *mahant* of his right to manage *debutter* property is void, even though the transfer may be coupled with an obligation to manage the property in conformity with the trust attached thereto.[31] Nor can the right be sold in execution of a decree against him.[32] Even if a custom be proved, which sanctions the sale of such a right, the courts should refuse to recognise it, as being against public policy, especially where the sale is made to a stranger for the pecuniary benefit of the vendor.

In *Rajah Vurmah v Ravi Vurmah*,[33] which was a case of sale by the *uralers* (managers) of a certain pagoda, of their right to manage the pagoda, the Judicial Committee said:

> Their Lordships are of opinion that no custom which can qualify the general principle of law has been established in this case; and they desire to add that if the custom set up was one to sanction not merely the transfer of a trusteeship but as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be

29 [1955] 2 SCR 180, (1955) ILR Pat 530, AIR 1955 SC 493. Reference may also be made to *Shambu v Thakur Ladli Radha* AIR 1985 SC 905.

30 *Badri Nath v Panna* AIR 1979 SC 1314.

31 *Rajah Vurmah v Ravi Vurmah* (1876) 1 Mad 235, 4 IA 76; *Kali Kinkor v Panna* AIR 1974 SC 1932; *Gnanasambanda v Velu* (1900) 23 Mad 271, 27 IA 69; *Kuppa v Dorasami* (1882) 6 Mad 76; *Govinda Ramanuj Das Mohanta v Mohanta Ramcharan Ramanuj Das* (1936) 63 Cal 326; *Biranchi Narayan v Biranchi Narayan* AIR 1953 Ori 333.

32 *Durga v Chanchal* (1881) 4 All 81; *Ganesh v Shankar* (1886) 10 Bom 395.

33 (1876) 1 Mad 235, 4 IA 76, 84–85.

disposed to hold that circumstance alone would justify a decision that the custom was bad in law.

The doctrine of alienation of shebaitship on the ground of necessity or benefit to the deity is based upon a misconception of certain pronouncements of the Judicial Committee.[34]

(2) *Gift.*—It has been held in Bombay that it is competent to the *shebait* to renounce his right of management and transfer it without receiving any consideration to a person standing in the line of succession, provided the transferee is not disqualified by personal unfitness.[35] However, a transfer by way of a sale to a divided agnatic relation of the transferor will not be upheld.

In Bombay, the restrictions on alienations of offices are less strictly enforced when the alienee happens to be a member of the family. In the Madras Presidency, greater objection would seem to have prevailed in the matter.[36] The High Court of Andhra Pradesh has expressed agreement with the Bombay view.[37] Where there are several joint *shebaits*, they may renounce their right in favour of any of them, provided the arrangement is for the benefit of the endowment.[38] The transfer of a *shebait* right or of the idol with the endowed property is invalid in law.[39] A gift of the right of management made to a stranger is not valid, unless it is sanctioned by custom.[40] A bona fide compromise by the plaintiff in a suit for the office of *shebait*, relinquishing the claim in favour of the person in possession of the office who would be entitled to it after the plaintiff, is valid.[41]

Removal of Image from one Temple to Another

The manager of a public temple has no right to remove the image from the temple, in which it is installed and install it in a new building, especially when the removal is objected to by a majority of the worshippers.[42]

34 *Kali Kinkor v Panna* AIR 1974 SC 1932, 1936.

35 *Mancharam v Pranshankar* (1882) 6 Bom 298, 300; *Hanmappa v Hanmantgauda* (1947) ILR Bom 789, AIR 1948 Bom 233.

36 Reference may be made to *Sheshacharyulu v Venkatacharyulu* AIR 1957 AP 876 where the Madras decisions are reviewed.

37 *Sheshacharyulu v Venkatacharyulu* AIR 1957 AP 876.

38 *Nirad v Shibadas* (1909) 36 Cal 975, 3 IC 76; *Narayana v Ranga* (1892) 15 Mad 183; *Bameswar Bamdev v Anath Nat* AIR 1951 Cal 490.

39 *Surendra Narayan Sarbadhikari v Bhola Nath Ray Chaudhuri* (1944) 1 Cal 139; *Bairagidas v Udayachandra* AIR 1965 Ori 201 (gift).

40 *Rajaram v Ganesh* (1899) 23 Bom 131; *Ukoor Doss v Chunder* (1865) 3 WR 152.

41 As to transfer of right to receive offerings, see § 422. *Srinathi Sahitri Thakurain v Mrs Savi* (1933) 12 Pat 359, 145 IC 1, AIR 1933 Pat 306.

42 *Hari v Antaji* (1920) 44 Bom 466, 56 IC 459, AIR 1920 Bom 67.

their lawful purposes, but they cannot resume the grant.[56] If the trust fails for want of objects, they may move the court to apply the funds cy-pres, ie, to other objects as nearly as may be of a similar character.[57]

Where a trust is made inter vivos for a charity which fails for illegality, there is no scope for application of the doctrine of cy-pres unless a general charitable intent can be gathered from the document.[58]

Where there has been no permanent endowment, but only a temporary arrangement, it is not irrevocable.[59]

§ 422. OFFERINGS

Offerings made to an idol belong to the idol as much as land dedicated to an idol, and not to the officiating priests, unless there be a custom or an express declaration by the founder to the contrary. Such offerings are intended to contribute to the maintenance of the shrine with all its rites, ceremonies and charities, and not to become the personal property of the priest.[60] However, there may be cases in which the offerings, though made to the idols, are received by certain persons and when they are so received independently of any obligation to render services, they are alienable and attachable.[61]

The right to receive offerings from pilgrims resorting to a temple or shrine is inalienable.[62] By custom, there can be hereditary priesthood in a family, and such right may be analogous to real property. The right to *yajman vritti* is right in property and is heritable and divisible.[63]

§ 423. REMOVAL OF SHEBAITS AND MAHANTS—SCHEME FOR MANAGEMENT

The courts have jurisdiction to deal with the managers of public Hindu temples, and if necessary for the good of the religious endowment, to remove them from their position as managers.[64] The court may also

56 *Ram Narayan v Ramoon* (1874) 25 WR 76; *Monesh Chunder v Kovlash Chunder* (1869) 11 WR 443.

57 *Mayor of Lyons v Adv-Gen of Bengal* (1876) 26 WR 1.

58 *Kanippannan Ambalam v Trumalai Ambalam* AIR 1962 Mad 500.

59 See ss 92–93, Code of Civil Procedure 1908; (1932) 11 Pat 701, 141 IC 157 AP 6.

60 *Manohar v Lakhmiram* (1888) 12 Bom 247, 265; affirmed in *Chotalal v Manohar* (1900) 24 Bom 50, 26 IA 199; *Girijanund v Sailajanund* (1896) 23 Cal 645; *Shibessourcee v Mothooranath* (1869) 13 MIA 270, 273 (as to rents).

61 *Nand Kumar Datt v Ganesh Das* (1936) 58 All 457, 159 IC 812, AIR 1936 All 131.

62 *Puncha v Bindeswari* (1916) 43 Cal 28, 28 IC 675, AIR 1916 Cal 269.

63 *Ghisibai v Mongnai* AIR 1953 MB 7; *Sidhe Nath v Prem* AIR 1972 All 324.

64 *Chintaman v Dhondo* (1891) 15 Bom 612; *Ram Parkash Das v Anand Das* (1916) 43 IA 73, 43 Cal 707, 33 IC 583, AIR 1916 PC 256; *Srinivasa v Eraloppa* (1922) 49 IA 237, 253–54, 45 Mad 565, 583–85, 68 IC 1, AIR 1922 PC 325 (concocting of accounts); *Bhagwan Dass v Jairam Dass* AIR 1965 Punj 260.

remove a *shebait* of a private endowment for misconduct and direct him to render accounts for a certain period in its discretion. Though ordinarily, all the *shebaits* must join in a suit on behalf of the idol when the suit is for the removal of a *shebait* for misconduct, this rule need not be followed. Such a suit by one of the *shebaits* is maintainable.[65] However, a *shebait* whether de jure or de facto, must be a party to the suit before he can be removed.[66] It is sufficient ground for removing a *shebait* from his office that in the exercise of his duties, he has placed himself in a position, in which the court thinks that he can no longer faithfully discharge the obligations of the office.[67] A member of the interested community may sue in a representative capacity for rendition of accounts of the profits collected by the *shebait*, but is not entitled to call upon the defendant to hand over the funds of the temple except on proof of gross mismanagement or misapplications of the funds.[68] However, a mere mistake on the part of the manager as to his true legal position or a mere laxity of management on his part, not accompanied by any fraud or dishonest misappropriation, does not of necessity, afford a ground for removing him from his post of manager, and entrusting it to new hands. In such a case, the court may appoint a committee to supervise and control him, and, if necessary, frame a scheme for the management of the temple. It does not make any difference that the office is a hereditary office.[69]

As to the framing of a scheme, see ss 92–93, Code of Civil Procedure. No scheme can be framed under those sections in the case of a private endowment.[70]

Where a person claiming, as his own, what is really a public charity, appoints a trustee to manage the property, the appointment is invalid.[71]

65 *Nirmal Kumar Banerji v Jyoti Prasad Banerji* (1941) 2 Cal 128, 197 IC 763, AIR 1941 Cal 562.

66 *Doongarsee v Tirbhawan* (1947) ILR All 263.

67 *Peary Mohan v Monohar* (1921) 48 IA 258, 48 Cal 1019, 62 IC 185, AIR 1942 Nag 105.

68 *Phuttibai v Shri Dev Mandir* (1942) ILR Nag 555, 202 IC 185, AIR 1942 Nag 105.

69 *Annaji v Narayan* (1897) 21 Bom 556; *Damodar v Bhogilal* (1898) 22 Bom 493; *Tiruvengadath v Srinivasa* (1899) 22 Mad 361; *Manohar v Lakhmiram* (1888) 12 Bom 247 affirmed in *Chotalal v Manohar* (1900) 24 Bom 50; *Prayag Dass v Tirumala* (1900) 30 Mad 138, 34 IA 78, in app from 28 Mad 319; *Thackersey v Hurbhum* (1884) 8 Bom 432; *Sivashankara v Vadagiri* (1890) 13 Mad 6; *Nelliappa v Punnaivanam* (1927) 50 Mad 567, 101 IC 420, AIR 1927 Mad 614.

70 *Gopal Lal Sett v Purna Chandra Basak* (1922) 49 IA 100, 49 Cal 459, 67 IC 561, AIR 1922 PC 253.

71 *Vaidyanatha v Swaminatha* (1924) 51 IA 282, 47 Mad 884, 82 IC 804, AIR 1924 PC 221.

§ 423A. *SADABARTAS*, TANKS, SEATS OF LEARNING, HOME FOR DISABLED OR DESTITUTES

In a decision, the Supreme Court held that a tank can be an object of charity and when a dedication is made in favour of a tank it can be considered as a 'charitable institution'.[72] The court, while referring to the statement of law in Mukerjee's standard work, did not decide whether such an institution could also be considered as a juristic person.

> Though *maths* and temples are the most common forms of Hindu religious institutions, dedication for religious or charitable purposes need not necessarily take one of these forms and the maintenance of *sadabartas*, tanks, seats of learning and homes for the disabled or the destitutes and similar institutions are recognised by and were known to Hindu law, and when maintained as public institutions, they must be taken to have a legal personality as a *math* or the deity in a temple has, and the persons in charge of the management would occupy a position of trust.

A school meant for imparting general education to the public would be a charitable institution, and such an institution will be regarded as possessing a juristic personality and will be capable of holding property.[73]

§ 424. DISTINCTION BETWEEN PUBLIC AND PRIVATE ENDOWMENTS: PUBLIC AND PRIVATE TEMPLES

(1) Religious endowments are either public or private. In a public endowment, the dedication is for the use or benefit of the public. The essential distinction between a public and a private endowment is that in the former, the beneficial interest is vested in an uncertain and a fluctuating body of persons, either the public at large or some considerable portion of it, answering a particular description; in a private endowment, the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained. The fact that the fluctuating and uncertain body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion, would not make it a private endowment.[74] The essence of a public endowment consists in its being dedicated to the public; and in the absence of any document creating the endowment, long user is the

72 *Venkatakrishana Rao v Sub-Collector, Ongole* AIR 1969 SC 565

73 *DAV College v S.N.A.S.H. School* AIR 1972 P&H 245 (FB).

74 *Ram Saroop Dasji v SP Sabi* AIR 1959 SC 951; *State of Bihar v Charusila Dasi* AIR 1959 SC 1002; *Deoki Nandan v Murlidhar* AIR 1957 SC 133; *Pratapsinghji v Dep Charity Commissioner, Gujarat* AIR 1987 SC 2064; *Nabi Shirazi v Province of Bengal* (1942) 1 Cal 211, 228.

material factor from which an inference of dedication may arise. Besides, user by the public, conduct of the founder and his descendants is also relevant, and if they in fact held out the temple to be a public one, a very strong presumption of dedication would arise.[75] When property is set apart for the worship of a family God, in which the public are not interested, the endowment is a private one.[76] Where the main purpose of the endowment was the *puja* of deity established by the settler in a house, and the surplus income was directed to be utilised for feeding the poor and helping students, it was held that the trust was a private one and that all the trustees must join in its execution.[77]

In *Radhakanta Deb v Commissioner, Hindu Religious Endowments, Orissa* decided by the Supreme Court, there was a document to prove the nature and origin of the endowment relating to the installation of a family deity in a temple.[78] In such a case, the massive structure of the temple and the facts that *bhog* was offered in consonance with rules observed by the public, are not determinative factors, and it was held that the endowment was of a private nature. Its use pointed out that the question must depend on various relevant factors and considerations and the facts established in each case. There is no overriding test by general application and the result must depend on balancing of all the facts and circumstances attending the case and the broad general principles laid down in the decisions of the Supreme Court on the subject. Reference was made to a series of such decisions.

In the Madras state, 'it is very unusual for a Hindu to construct a temple outside his dwelling house for private worship,[79] and the general presumption is that temples in the southern state are public temples, unless the contrary is proved.' There is no such presumption in Bengal, or in Bihar.[80]

In Bombay, the question arose in some cases whether a temple in which the idol is worshipped by the Vaishnava devotees of the Vallabha cult is a private or public temple on the ground of dedication. It has been held that the historical origin of the temple, the rights exercised by the devotees in regard to the worship in the temple, the consciousness

75 *Pujari Lakshmana v Subramania* 29 CWN 112 (PC). However, mere fact that the public was allowed to worship and perform some *pujah* is not conclusive—*Sarjoo v Ayodhya Prasad* AIR 1979 All 74.

76 Reference may be made to *Bihar State Board v Palat Lal* AIR 1972 SC 57 (Bihar Hindu Religious Trusts Act 1950); *Jugalkishore v Lakshmandas* (1899) 23 Bom 659.

77 *Prasaddas Pal v Jagannath Pal* (1933) 60 Cal 538, 144 IC 894, AIR 1933 Cal 519. See, however, *State of Bihar v Charusila Dasi* AIR 1959 SC 1002.

78 AIR 1981 SC 798; *Mahalinga Iyer v State of Madras* (1981) 1 SCC 445.

79 *Peesapati v Kanduri* (1915) MWN 842; *Nallakaruppan v Commissioner HR&C Endowments* AIR 1966 Mad 99; *Mahalinga Iyer v State Madras* (1981) 1 SCC 445.

80 *State of Bihar v Charusila Dasi* AIR 1959 SC 1002; *Bihar State Board of R Trust v Rameshray Prasad* AIR 1977 Pat 272.

of the manager and the consciousness of the devotees themselves, and similar other considerations have to be weighed in deciding the question. If it is shown that the rents and profits of any property are exclusively utilised for the purpose of public charity for a fairly long period, it may be possible to infer dedication of such property to public charity.[81]

The question of dedication is a mixed question of law and fact. In an endowment in favour of the idol itself, proof of user by the public without interference is cogent evidence that the dedication was in favour of the public. Performance of *pratishta*, which is a ceremony relating to the installation of an idol, may show that there was dedication to the public. The court will consider all the aspects of the matter.[82] When used by the public generally, to the extent to which there is a worshipping public in the locality is established, it would be reasonable to presume that the user by the public was as of right, unless there are circumstances clearly suggesting that the user must have been permissive, or that the authorities in charge of the temple have exercised such arbitrary power of exclusion, that it can only be ascribed to the private character of the institution.[83] As mentioned above, the court will take into consideration all the aspects of the matter and the pertinent circumstances. The grants and gifts made to the temple would be pertinent to the enquiry. The manner in which accounts of the temple have been maintained would also be a pertinent factor.[84] Where, evidence in regard to the foundation of a temple is not clearly available, the court will consider all these aspects, as also certain other facts which are treated as relevant. Is the temple built in such an imposing manner that it may prima facie appear to be a public temple? Are the members of the public entitled to take part in the festivals and ceremonies arranged in the temple? Are their offerings accepted as a matter of right? The participation of the members of the public in the *darshan* in the temple and in the daily acts of worship or in the celebration of festival occasions may be very important factors to consider in determining the character of the temple.[85] In making the requisite induction, the court will also address questions such as: Are the temple expenses met from contributions made by the public?

81 *Ranchhoddas v Mahalaxmi Vahuji* (1952) 54 Bom LR 982 affirmed in appeal *Gosvami Shri Mahalaxmi Vahuji v Ranchhoddas* AIR 1970 SC 2025; *Sri Ram v Prabhu Dayal* AIR 1972 Raj 180.

82 *Deoki Nandan v Murlidhar* AIR 1957 SC 133. The question at times becomes somewhat difficult—*Sarat Chandra v Rabindra Nath* AIR 1957 Cal 11; *Heir of Maharaj Purshottamlalji v Collector of Junagadh* AIR 1986 SC 2094 (*Vallabh* temple held to be public trust. However, offerings made to *guru* personally held to belong to him).

83 *Narayan v Gopal* AIR 1960 SC 100.

84 *Ranchhoddas v Mahalaxmi Vahuji* (1952) 54 Bom LR 982 affirmed in appeal.

85 *Tilkayat Shri Govindlalji v State of Rajasthan* AIR 1963 SC 1638, 1648; *Sri Ram v Prabhu Dayal* AIR 1972 Raj 180.

Whether the *sevas* and the *utsavas* conducted in the temple are those usually conducted in public temples? Has the management as well as the devotees been treating the temple as a public temple?[86] A temple, which began as a private temple may, in course of time, become a public temple by express or implied dedication.[87] If a temple is proved to have originated as a private temple or its origin is unknown or lost in antiquity, then there must be proof to show that it is being used as a public temple.[88]

Important legal consequences flow from the distinction between private and public endowments, and they have a material bearing on the question as to what remedies are open to the parties in cases where there is maladministration of the endowment by the manager or trustee. A private endowment lies outside the purview of the Religious Endowments Act of 1863 and the Charitable and Religious Trust Act of 1920 and what is more, s 92 of the Civil Procedure Code cannot be invoked unless the endowments is of public character.

In a decision, the Supreme Court pointed out that the civil courts have jurisdiction to frame a scheme for the management of a temple, even though there is a private and no a public trust.[89] Section 92 of the Civil Procedure Code 1908, would not apply to a suit in respect of the temple. Any person, who has made large donations for the maintenance of the temple, has a substantial interest to maintain a suit on behalf of the deity to prevent mismanagement and protect the property of the temple. The *pujari*, who had set up a personal title to the temple properties and had converted the properties to his own use, was removed from management and possession, and appropriate directions were given by the court.

According to English law, the beneficiaries in a private trust, if they are *sui juris* and of one mind, can at their option, modify or put an end to the trust.[90] In *Konwar Doorganath v Ram Chunder*,[91] their Lordships of the Privy Council observed:

> Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it, but in the case of a family idol, the consensus of the whole family might give the estate another direction.

86 *Goswami Shri Mahalaxmi Vahuji v Ranchhoddas* AIR 1970 SC 2025.

87 *V Mahadeva v Commissioner HRE* AIR 1956 Mad 522; *Bala Krishna v Ganesh Prasad* AIR 1952 Ori 203.

88 *Goswami Shri Mahalaxmi Vahuji v Ranchhoddas* AIR 1970 SC 2025.

89 *Ramchand v Jankiballabhji* AIR 1970 SC 532; *Thenappa Chettiar v Kerippan Chettiar* AIR 1968 SC 915 (foundation for conducting certain *pujas*); *Radhamohan Dev v Nabakishore* Air 1979 Ori 181 (scheme—private *debutter*).

90 *Underhill on Trust and Trustees Act*, p 55.

91 (1877) 2 Cal 341, 4 IA 52, 58.

The observation was an *obiter dictum* pure and simple, as the property in dispute was not found to be *debutter* at all. The observation was treated as authoritative in a Calcutta case, where it was held that properties dedicated to a family idol may be converted into secular property by the consensus of the family and that in that particular case, the properties had been so converted with common consent.[92] The correctness of this decision has been doubted in subsequent cases, and it has been said that even if the consent of the family could effect such a diversion, it must be the consent of all members of the family, both males and females, as they are all interested in the worship of the idol.[93]

As to the tests for determining whether a temple is a public or private charity, also see the cases in footnote.[94] Where there was a complete dedication, the temple being built, in a place removed from the residential house of the testator and the public having free access, it was held that the temple was a public temple and the existence of a *samadhi* in memory of religious persons is not inconsistent with this conclusion.[95] In a case, where the members of the family treated the temple as a family property, dividing profits (offerings or rents), excluding the public from worship at the time of marriages and other ceremonies in their home, erecting *samadhis* in honour of the dead, it was held that the mere fact the public are not turned away ordinarily from the temple, worship in the temple does not show that it was a public temple.[96] Remission of land revenues in respect of land, on which the temple stands, is one of the decisive factors in determining whether the temple was a public or private one.[97]

The Religious Endowments Act 1863

The Religious Endowments Act 1863, does not apply to private endowments.[98] As to the history of the Act and the cases to which it applies, see *Mulla's Code of Civil Procedure*, notes to s 92. See also *Prannath Sarasvati's Tagore Lectures on the Hindu Law of Endowments*.

Though *maths* as a rule are public endowments, a *math* may be a private institution.[99]

92 *Gobinda Kumar v Debendra Kumar* (1907) 12 CWN 98.
93 *Gopal v Radha* (1925) 41 Cal LJ 396, 426, 88 IC 616, AIR 1925 Cal 996; *Chandi Charan v Dulal Chandra* (1927) 54 Cal 30, 98 IC 684, AIR 1926 Cal 1083.
94 *Puranya v Poonachi* 40 Mad LJ 289, 62 IC 655; *Parmanand v Nihal Chand* (1938) 65 IA 252, 1938 Lah 453, 40 Bom LR 907, 175 IC 459; AIR 1938 PC 195; *Mahant Amar Das v SGP Committee* AIR 1992 P&H 288.
95 *Premo v Sheo Nath Pandit* (1933) 8 Luck 266, 140 IC 896, AIR 1933 Ori 22.
96 *Bhagwan Din v Gir Harsaruoop* (1940) 15 Luck 1, 185 IC 305, 67 IC 1, AIR 1940 PC 7. Reference may also be made to *Bihar State Board of Religious Trust v Biseshwar Das* AIR 1971 SC 2057.
97 *Laxmanrao v Govindrao* (1950) ILR Nag 1, AIR 1950 Nag 215.
98 *Protab Chandra v Brojnath* (1892) 19 Cal 275.
99 *Sathappayyar v Periasami* (1891) 14 Mad 1.

§ 425. RIGHT OF WORSHIP

Where a temple is established for the worship of members of a particular sect, persons belonging to other sects are not entitled to worship in the temple.[1]

The right of entry and worship in a public temple can be regulated as to time and hours, during which members of the public would be allowed access to the shrine. It is competent to the temple authorities to make and enforce rules to ensure good order and proper worship.[2] As to religious rites and ceremonies, reference may be made to *Ramachandra Keshav v Gavalaksha Ganghadhar Swamy*.[3]

Fees for Admission to the Sanctuary of a Temple

Rules prohibiting, except upon payment of fixed fees, entry into the inner sanctuary of a temple, are illegal.[4]

§ 426. LIMITATION

(1) *Unauthorised alienation by shebait and mahant.*—Where the head of a *math* grants a permanent lease of *math* property or sells it without legal necessity, or where the *math* property is sold in execution of a decree passed against him for a debt not contracted for a legal necessity, the question arises as to the period of limitation for a suit by his successor for possession of the property. Difficulties frequently arose as regards this question, and the Indian Limitation Act 1908, was amended by Act 1 of 1928, to meet those difficulties. This was done by inserting a new para in s 10 of the Act of 1908, and four new articles in Sch I to the Act, namely, 134A, 48B, 134B and 134C. (See next page for tables showing relevant articles.) The Act of 1928 came into force on 1 January 1929.

1 *Sankaralinga v Rajeswara* (1908) 31 Mad 236, 35 IA 176.

2 *Nar Hari Shastri v Badrinath Temple Committee* [1952] SCR 849, AIR 1952 SC 245; *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar* [1954] SCR 1005, 1031, AIR 1954 SC 282.

3 (1973) 75 Bom LR 668.

4 *Asharam v Manager of Dakore Temple Committee* (1920) 44 Bom 150, 55 IC 956, AIR 1920 Bom 153.

Table XXI.1

Table showing relevant articles relating to religious and charitable endowments under the old Indian Limitation Act, 9 of 1908, as amended in 1929 and the new Limitation Act, 36 of 1963

Indian Limitation Act, 9 of 1908				Limitation Act, 36 of 1963			
Article	Description of Suit	Period of Limitation	Time from Which Period Begins to Run	Article	Description of Suit	Period of Limitation	Time from Which Period Begins to Run
134A	Suit to set aside a transfer of immovable property comprised in a Hindu, Mohammedan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	12 years.	When the transfer becomes known to the plaintiff.	94	Suit to set aside a transfer of immovable property comprised in a Hindu, Mohammedan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	12 years.	When the transfer becomes known to the plaintiff.
48B	Like suit to set aside a sale of movable property.	3 years.	When the sale becomes known to the plaintiff.	95	Like suit to set aside a transfer of movable property.	3 years.	When the transfer becomes known to the plaintiff.
134B	Suit by the manager of a Hindu, Mohammedan or Buddhist religious or charitable endowment to recover possession of	12 years.	The death, resignation or removal of the transferor.	96	Suit by the manager of a Hindu, Muslim, or Buddhist religious or charitable endowment to re-	12 years.	The date of death, resignation or removal of the transferor or the date of appoint-

	immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.				cover possession of movable or immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.		ment of the plaintiff as manager of the endowment, whichever is later.
134C	Like suit to recover possession of movable property which has been sold by a previous manager.	12 years	The death, resignation or removal of the seller.				

Note: Articles 134A and 48B (new arts 94 and 95) apply to suit by persons interested in the endowment. Articles 134B and 134C (new art 96) apply to suits by the successor in office of the transferor or seller.

Article 13B (new art 96) would apply to suit to set aside a lease of property comprised under a religious endowment, and where more than 12 years have elapsed, the lease is binding on the actual *mahant* and he can only recover the agreed rent.[5] This article has no application to an execution sale.[6]

The transfer of a portion of a *math* and the properties appertaining thereto by one *mahant* in favour of another, in settlement of bona fide dispute between the two *mahants* about the office of the *mahant* of the *math*, is a transfer for a valuable consideration.

Alienation by manager of properties of religious endowment as his own has been expounded in *Srinivasa v Ramaswamy*.[7] Transfer contemplated by art 134B is an authorised and illegal transfer by previous manager.[8]

'Valuable consideration': meaning of.[9]

Articles 91, 95—see the undermentioned case.[10]

5 *Ram Kishore Das Mohanta v Ganga Gobinda Patil* (1937) 2 Cal 242, 172 IC 315, AIR 1937 Cal 305.
6 *Sudarsan v Ram Kirpal* 77 IA 42.
7 [1966] 3 SCR 120.
8 *Veeraraju v Venkama* [1966] 1 SCR 831.
9 *Jagadguru Gurushiddaswami v Dakhina MD Jain Sabha* [1954] SCR 235.
10 *Ningawwa v Byrappa* [1968] 2 SCR 797.

(See corresponding s 10 and corresponding arts 94, 95 and 96, of the new Limitation Act 1963.)

When the sale is an execution of a money decree against the *shebait* or manager personally, it is a void sale, and time runs against the purchaser from the date of sale.[11]

(2) *Amendments.*—Originally, s 10, Indian Limitation Act 1908, prior to its amendment hereinafter mentioned, stood as follows:

> 10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

Before the Indian Limitation (Amendment) Act 1 of 1929, neither a *shebait* nor a *mahant* was regarded as a trustee of the *debutter* property. By that Act, s 10 of the Indian Limitation Act 1908, was amended, and the following paragraph was inserted in it:

> For the purposes of this section any property comprised in a Hindu Mohammedan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof.

By the same Act, four new articles were inserted in Sch 1 to the Act 9 of 1908. The old Indian Limitation Act 9 of 1908 has now been repealed and replaced by the new Limitation Act 36 of 1963.

(3) *Where a shebait or mahant is dispossessed of debutter property during his minority*, he is entitled to sue for possession within 12 years from the date of the dispossession, or within three years from the date on which he attains majority, whichever is the longer period. The fact that he has no proprietary interest in *debutter* property, does not disentitle him to the benefit of the provisions of s 8, Indian Limitation Act 1908.[12]

Where a *shebait* appointed for life, died, and his heirs took possession of the property, the suit by the heirs of the founder to recover the property was held to be governed by art 144 (art 65 of 1963 Limitation Act) and not by art 120.[13]

(4) *Suit for possession of hereditary office.*—A suit for possession of an hereditary office must be brought within 12 years from the date when

11 *Subbaiya v Mustapha* 50 IA 295; *Sudarsan v Ram Kirpal* 77 IA 42; *Guranditta v Amar Dass* AIR 1965 SC 1966 (date of effective possession where the *mahant* represented the institution: *akhara*).

12 Now see corresponding s 8 of the new Limitation Act 1963. *Jagadindra Nath v Hemanta* (1905) 32 Cal 129, 31 IA 203.

13 *Chandrika Bakhsh Singh v Bhola Singh* (1938) 13 Luck 344, 168 IC 593, AIR 1937 Ori 373.

the defendant takes possession of the office adversely to the plaintiff or the plaintiff's predecessor in title.[14]

Note that the office of a hereditary priest (*yajman vritti*) is *nibhanda* and is ranked among the hereditary rights of immovable property.[15]

(5) *Suit by reversioner against alienee of widow for recovery of shebaiti right.*—A suit by a reversioner for recovery of a *shebaiti* right from a person to whom a widow, who had succeeded to the right on the death of her husband, had alienated, it is governed by art 124, Limitation Act and not by art 141, and the period of limitation begins to run against the reversioner only when the succession opens to him.[16]

Now see arts 107 and 65 of the new Limitation Act 1963.

14 *Gnanasambanda v Velu* (1900) 23 Mad 271, 27 IA 69.

15 *Ghelabhai v Har Gowan* (1912) 36 Bom 94, 12 IC 928; *Dhuram Narain v Suraj Narain* (1940) All 815, 193 IC 697, AIR 1941 All 1.

16 *Kalipada v Palani Bala* [1953] SCR 503, AIR 1953 SC 125.

XXII
MARRIAGE

LAW PRIOR TO THE HINDU MARRIAGE ACT 1955

Note.—Material and important changes in the law relating to marriage have been brought about by legislation embodied in the Hindu Marriage Act 1955. Those changes have been briefly pointed out in the Introductory Note to that Act. The Act abrogates all the rules of the law of marriage previously applicable to Hindus, whether by virtue of any text or rule of Hindu law or any custom or usage having the force of law, in respect of all matters dealt with in the Act. It also supersedes any other law, contained in any Central or state legislation in force, immediately before it came into operation, insofar as such legislation is inconsistent with the provisions contained in it. The rules in the following paragraphs of this chapter state the law before the coming into operation of that Act.

§ 427. MARRIAGE: MINORITY, LUNACY, FRAUD

(1) Marriage, according to the Hindu law, is a holy union for the performance of religious duties.[1] It is not a contract; the mere fact, therefore, that a marriage was brought about during the minority of either party thereto, does not render the marriage invalid.[2] However, even considering Hindu marriage to be entirely a sacrament, as the acceptance of the bride is a necessary and indispensable part of the ceremony, a person whose loss of reason is complete, should be held incompetent to accept the bride, and the marriage must be regarded as invalid on that ground. There are however degrees of insanity; and if the mental aberration is not of such a character as to make the bridegroom incapable of understanding the ceremonies of marriage, and taking an

1 *Sundrabai v Shivanarayana* (1908) 32 Bom 81.

2 *Purshotamdas v Purshotamdas* (1897) 21 Bom 23, 30–31; *Atma Ram v Banku Mal* (1930) 11 Lah 598, 123 IC 369, AIR 1930 Lah 561; *Khwaja Muhammad Khan v Husaini Begam* (1910) 32 All 410, 37 IA 152 (a Mahommedan case).

intelligent part in them, the marriage should be held to be valid.[3] When a congenital idiot's marriage was arranged by his father and his wife gave birth to two sons, it was held that he was lawfully married.[4]

(2) A marriage brought about by force or fraud is altogether invalid.[5]

It has been held by the High Court of Bombay that marriage is a *sanskara* or sacrament. It is the last of the 10 sacraments enjoined by the Hindu religion for purifying the body from inherited taint.[6] The same view has been taken by the High Court of Madras.[7]

Marriage with an impotent

It has been held in some cases, that the marriage of a person who is impotent and has not been able to consummate the marriage, is a nullity.[8]

Child Marriage Restraint Act 1929, 19 of 1929

The Child Marriage Restraint Act 1929, restrains the solemnisation of marriages between children. The word 'child' has been defined in the Act as a male under 18 years of age and a female under 15 years of age. It makes it penal for a male above the age of 18 years to marry a girl under the age of 15 years. It also prescribes punishment for parents and guardians, who are parties to a marriage between a minor boy and a girl under the age of 14 years. However, the Act does not affect the validity of such marriages.

§ 428. FORMS OF MARRIAGES

(1) The ancient Hindu law recognised eight forms of marriage, of which four were approved forms, and four unapproved. The approved forms were *brahma*, *daiva*, *arsha* and *prajapatya*. The unapproved forms were

3 *Rameshwari v Bhagwati* 1949 FCR 715, AIR 1950 FC 142 (per Mukherjea J); *Mouji Lal v Chandrabati* (1911) 38 Cal 700, 706, 38 IA 122, 125, 11 IC 502. However, see *Venkatacharyulu v Rangacharyulu* (1891) 14 Mad 316, 318.

4 *Amirthammal v Vallimayil Ammal* (1942) Mad 807, 203 IC 648, AIR 1942 Mad 693.

5 See § 434. *Venkatacharyulu v Rangacharyulu* (1891) 14 Mad 316, 320; *Kunta Devi v Sri Ram* AIR 1963 Punj 235.

6 *Sundrabai v Shivanarayana* (1908) 32 Bom 81; however, see *A v B* (1953) ILR Bom 486, AIR 1952 Bom 486.

7 *Gopalkrishnam v Venkatnarasa* (1914) 37 Mad 273 (FB), 17 IC 308, AIR 1914 Mad 432; overruling *Govindarazulu v Devarabhotla* (1904) 27 Mad 206 (case of Brahmans); *Kameswara v Veeracharlu* (1911) 34 Mad 422, 8 IC 195 (case of Sudras).

8 *Sm Ratan Monti Debi v Nagendra Narain Singh* AIR 1949 Cal 404; *A v B* AIR 1952 Bom 486; contra *Malla Reddy v Subbama* AIR 1956 AP 237; *Kantilal v Vimal* AIR 1952, Sau 44. However, see *Ram Devi v Raja Ram* AIR 1963 All 564, (1963) ALJ 658.

asura, *gandharva*, *rakshasa* and *paishacha*. The only forms of marriage now recognised are:

(i) the *brahma* form, which is one of the approved forms; and
(ii) the *asura* form, which is one of the unapproved forms.

Also see the footnote below, for another customary form of marriage.[9]

(2) Where the father or other guardian of the bride gives the bride in marriage without receiving any consideration from the bridegroom for giving the girl in marriage, the marriage is called *brahma*. However, where he receives such consideration, which is technically called *shulka* or bride's price, the marriage is called *asura*, even though, it may have been performed according to the rites prescribed for the *brahma* form. The test is twofold: 'There shall', as the Supreme Court has laid down, 'not only be benefit to the father, but the benefit shall form a consideration for the sale of the bride'.[10]

Bearing of the expenditure of the marriage wholly or partly by the bridegroom of the parent is not a criterion of the matter. Such an indirect gain by the bride's father cannot be regarded as *shulka* or price for giving the bride in marriage.[11] The mere giving of a present to the bride or to her mother as a token of compliment to her does not render it an *asura* marriage.[12]

It has been held in Madras that a marriage in which *memmekanom* is taken, need not necessarily be a marriage in the *asura* form. The decision would depend upon the fact as to whether payment was actually taken as a price for the bride, or as a matter of form only out of respect or a custom.[13]

(3) Hindus belonging to any class may marry either in the *brahma* form or the *asura* form. Thus, a Brahman may contract an *asura* marriage, and a Sudra may contract a *brahma* marriage.[14]

The *brahma* form is the only one now left of the four approved forms. It is required that the bridegroom be 'a man learned in the *Veda*,' and it was originally peculiar to *Brahmans*. However, even a Sudra may now marry in that form. The *asura* form is the only one now left, of the

9 *Shakuntalabai v LV Kulkarni* AIR 1989 SC 1359 (*Udiki* form of marriage, recognised by community after dissolution of earlier marriage as per custom of Lingayat community); *Guru Basawwa v Irawwa* AIR 1997 Kant 87.

10 *Veerappa v Michael* AIR 1963 SC 933.

11 See above.

12 *Chunilal v Surajram* (1909) 33 Bom 433, 3 IC 756; *Authikesavulu v Ramanujam* (1909) 32 Mad 512, 3 IC 541; *Hira v Hansji* (1913) 37 Bom 295, 17 IC 949; *Govind v Savitri* (1919) 43 Bom 173, 177, 47 IC 883, AIR 1918 Bom 93; *Kaliasanatha Mudaliar v Parasakthi Vadivanni* (1935) 58 Mad 488, AIR 1935 Mad 740.

13 *Muthu v Narayanan* (1949) 2 MLJ 804, AIR 1950 Mad 351.

14 *Bhaoni v Maharaj Singh* (1881) 3 All 738; *Kishan Dei v Sheo Paltan* AIR 1926 All 1.

four unapproved forms. What distinguished the one form from the other is that in the *brahma* form, it is a gift of the girl, pure and simple. In the *asura* form, it is a sale of the bride for pecuniary consideration. That consideration is called *shulka.*

Of the other three unapproved forms, only the *gandharva* requires notice. The *gandharva* marriage is the voluntary union of a youth and a damsel, which springs from desire and sensual inclination. It may be noted that the essential marriage ceremonies are as much a requisite part of this form of marriage as any other, unless it is shown that some modification of those ceremonies has been introduced by custom in any particular community or caste.[15] In an Allahabad case, it was remarked that the *gandharva* form had become obsolete. The Madras High Court has expressed the view that the *gandharva* form of marriage is not obsolete in the State of Madras.[16] In Calcutta, the view has been taken that this form of marriage has fallen into disuse and it is only by custom that it is validated in case of *bairagis.*[17] It has been held in Patna that a minor girl is incompetent to contract a marriage in the *gandharva* form;[18] the Patna High Court has decided however that the *gandharva* form of marriage is not invalid according to the Mithila School of Hindu law; at any rate, the relationship created by such marriage is sufficient to entitle the wife to claim maintenance from her husband.[19] Among Sudras, a marriage in the *katar* form (in which the bride is given to the bridegroom with a sword or dagger in place of the bridegroom) is not a valid marriage, in the absence of proof that the ordinary ceremonies of a Hindu marriage were performed.[20] It is not necessary that a marriage should take place in the presence of a priest. Tying of a *tali* in the presence of an idol was considered to be a valid form of marriage in Madras.[21]

Shulka was originally regarded as the property of the bride's father. Though marriages by sale fell into disrepute, the custom of paying the *shulka* remained; but it was no longer regarded as the property of the bride's father; it came to be regarded as the bride's *stridhana.* Though *shulka* is now regarded as *stridhana,* it still preserves its original character, in that it devolves in the first instance, unlike *stridhana* of other kinds on the bride's mother and brothers (§ 146). Although, a marriage when performed in the *asura* form is valid, an agreement to pay money to the

15 Quoted in *Bhaurao v State of Maharashtra* AIR 1965 SC 1564, 1566.

16 *Deivani v Chidambaram* (1955) 1 MLJ 120, AIR 1954 Mad 657; *Brindavana v Radhamani* (1889) 12 Mad 72.

17 *Lalit Mohan v Shyamapada Das* AIR 1952 Cal 771; but see *Ram Chandra v Manju* AIR 1975 Cal 118.

18 *Bamdeb Das v Raja Brajasunder Deb* (1938) 17 Pat 134.

19 *Kamani Devi v MD Sri Kameshwar Singh* (1946) 25 Pat 58.

20 *Ramsaran Singh v Mahabit Sewak Singh* (1934) 61 IA 106, 147 IC 667, AIR 1934 PC 74.

21 *Re Ponnuswami* AIR 1950 Mad 777.

father in consideration of such marriage is not valid and the money cannot be recovered by suit. This is on the ground that such an agreement is to be regarded as opposed to public policy.[22] The questions of validity of the marriage and invalidity of such consideration requires to be distinguished. Error is almost sure to arise, if the distinction between a point of status and the point of a contract falling within the purview of s 23 of the Act is not emphasised. In a decision of the High Court of Travancore-Cochin,[23] this aspect of the matter appears to have been overlooked.

§ 429. PRESUMPTION AS TO FORM

When there is a question as to whether a marriage was in the *brahma* form or the *asura* form, the court will presume, even where the parties are Sudras, that it was in the *brahma* form; in other words, that no consideration for the marriage passed from the bridegroom to the father or other guardian of the bride. However, this presumption may be rebutted by showing that the marriage was in the *asura* form.[24]

Where a woman dies without leaving issue, if her marriage was in the *brahma* form, her *stridhana* devolves in one way, and if in *asura* form, it devolves in another way (§§ 147, 151). Hence, the importance of the distinction between the two forms of marriage. The essential ceremonies for these forms of marriage are the same as will be seen presently.

Pat-marriage

A *pat*-marriage of a Hindu widow, in the absence of any evidence to show payment to the bride's relations is to be regarded as a marriage in an approved form.[25]

Such marriage with a divorced woman would not be regarded to be in an unapproved form, because a payment was made for securing the divorce.[26]

For presumption as to legality of marriage, see § 438.

22 *Venkata Kristnayya v Venkatachalam* 32 Mad 185 (FB). See *Pollock and Mulla's Contract Act*, s 23, 'Marriage Brocage Contracts' where some cases on the subject are considered. Also see *Gopi Tibadi v Gokhei Panda* AIR 1954 Ori 17.

23 *Chidambara Iyer v Ananthakrishna* AIR 1954 TC 231 (it is submitted that the execution of a promissory note can make no difference).

24 *Mst Thakoor Deybe v Rai Baluk Ram* (1866) 11 MIA 139; *Veerappa v Michael* AIR 1963 SC 933; *Chunilal v Surajram* (1909) 33 Bom 433, 437, 3 IC 765; *Jagannath v Narayan* (1910) 34 Bom 553, 7 IC 459; *Authikesavulu v Ramanujam* (1909) 32 Mad 512, 3 IC 541; *Hira v Hansji* (1913) 37 Bom 295, 17 IC 949 (remarriage of divorced Koli woman); *Kishan Dei v Sheo Paltan* (1926) 48 All 126, 90 IC 358, AIR 1926 All 1 (marriage in Karao form); *Kamla Prasad v Murli Manohar* (1934) 13 Pat 550, 152 IC 446, AIR 1934 Pat 398; *Gopi Tibadi v Gokhel Panda* AIR 1954 Ori 17.

25 *Mahadeo v Chandrabhagabai* (1946) Nag 378; *Ningu v Sadashiv* AIR 1987 Bom 27.

26 *Kodu v Lola* (1947) ILR Nag 885.

§ 430. NO RESTRICTION AS TO NUMBER OF WIVES

A Hindu may marry any number of wives, although, he has a wife or wives living,[27] except in those states in which anti-bigamy Acts have been passed.

The Bombay Prevention of Hindu Bigamous Marriage Act, XXV of 1946, was held to be valid when it was challenged on the ground that it contravened the fundamental rights guaranteed under arts 14, 15 and 25 of the Constitution.[28] The Madras Hindu (Bigamy Prevention and Divorce) Act VI of 1949 also was held not to offend arts 15 and 25 of the Constitution.[29]

§ 431. ONLY ONE HUSBAND AT A TIME

A woman cannot marry another man while her husband is alive, except where her marriage has been dissolved by divorce (§ 441).

§ 432. REMARRIAGE OF WIDOWS

The remarriage of Hindu widows is now expressly legalised by the Hindu Widows' Remarriage Act 1856.

The parties to such a marriage must observe the formalities and ceremonies for a valid marriage under general law or requisite by usage governing their marriage.[30]

The rule of prohibited degrees of marriage apply to the case of a remarriage by a widow except where such marriage is sanctioned by custom.[31]

Forfeiture of Property by Remarriage

See notes to § 43, no 4 (widow), under the head 'Remarriage'.

§ 433. WHO MAY GIVE IN MARRIAGE

(1) The *Shastras* enjoin the marriage of a female before she arrives at puberty, and prescribe rules for guardianship in marriage. The following persons are qualified, in the order mentioned below, to give a girl in marriage:

27 *Virasami v Appasami* (1863) 1 Mad HC.
28 *State v Narsu Appa* (1951) Bom 775, (1951) 53 Bom LR 779.
29 *Srinivasa Iyer v Saraswathi Ammal* (1953) ILR Mad 78, AIR 1952 Mad 193.
30 *Damroolal v Laxminarayan* (1976) Mad LJ 518; *Dewanai Achi v Chidambaram* AIR 1954 Mad 657.
31 *Aksboy Kumar v Jatindra Nath* AIR 1955 Cal 612.

According to Mitakshara school:

(1) the father;
(2) the paternal grandfather;
(3) the brother;[32]
(4) other paternal relations of the girl in order of propinquity;
(5) the mother.

According to the Bengal School

The Bengal school places the maternal grandfather and maternal uncle before the mother. In other respects, the rules are the same as under Mitakshara.

(2) The marriage of a male minor is not prohibited, and his lawful guardian may consent to his marriage.

Mother

Though the mother is postponed to the paternal male relation, it does not follow that she, who in the absence of the father, is the legal guardian of her daughter (§ 518), is to have no voice at all in the choice of a husband for the daughter. The only reason why the mother is postponed, is that she cannot perform the ceremony of giving the girl in marriage called *kanyadana*, and even when in default of paternal male relation, she makes the gift, she has to employ some male to perform that ceremony.[33] The Madras High Court has gone further and said that even if there be a paternal grandfather, the mother as the natural guardian of her daughter is entitled to select a husband for her.[34] The Lahore High Court is inclined to the same view.[35] A stepmother has no right to give her stepdaughter in marriage, if there is a paternal grandmother.[36]

Paternal Relatives and Maternal Relatives

So long as there are competent paternal relatives in existence, the maternal relatives of a girl have no authority to give her in marriage; but where the paternal relatives refuse to act or have disqualified themselves from acting, the maternal relatives acquire authority to contract marriage on behalf of the girl.[37]

32 *Nek Ram v Emperor* AIR 1935 All 920.
33 *Bai Ramkore v Jamnadas* (1913) 37 Bom 18, 17 IC 95.
34 *Ranganaiki v Ramanuja* (1912) 35 Mad 728, 734, 11 IC 570.
35 *Mst Indi v Ghania* (1920) 1 Lah 146, 53 IC 783; *Mst Jiwani v Mula Ram* (1922) 3 Lah 29, 67 IC 253, AIR 1922 Lah 112.
36 *Ram Bunsee v Soobh Koonwaree* (1867) 71 WR 321.
37 *Kasturi v Panna Lal* (1916) 38 All 520, 36 IC 245, AIR 1917 All 451.

Remarriage of Widows

As to the consent necessary to the remarriage of minor widows, it is provided by s 7 of the Hindu Widows' Remarriage Act 1856, that if the widow remarrying is a minor, whose marriage has not been consummated, she shall not remarry without the consent of her father, or, if she has no father, her paternal grandfather, or, if she has no such grandfather, of her mother, or, failing all these, of her elder brother, or, failing also brothers, her next male relative. A marriage made in contravention of the above provision, eg, a marriage of a widowed girl with the consent of her mother-in-law,[38] may be declared void by the court, but not after it has been consummated. In the case of a widow who is of full age, or whose marriage has been consummated, her own consent is sufficient to constitute her remarriage lawful and valid.

The Indian Majority Act 1875

Minority, according to Mitakshara school terminates on completion of the 16th year; according to the Bengal school, on completion of the 15th year. The Indian Majority Act 1875, does not apply to Hindus in matters of marriage, divorce and adoption.

§ 434. MARRIAGE WITHOUT CONSENT OF GUARDIAN

(1) The primary duty, and the correlative right, of giving a girl in marriage, rests with the father. This right is not lost merely because the father has been convicted of theft or any other offence not connected with domestic relations.[39] However, where the father has deserted his wife and daughter, the mother can give the daughter in marriage without the consent of the father.[40] Even where the father is alive and otherwise capable of giving away his daughter, the court will not declare a marriage invalid, merely because the daughter was given in marriage by the mother without his consent, provided the necessary ceremonies have been performed, and there has been no force or fraud.[41] This rests on the principle that guardianship for the purpose of marriage is not so much a right as a duty, and the consent, therefore, of the guardian is not a condition precedent to the validity of the marriage.[42] There is a difference of opinion among Hindu text writers as to the correctness of this principle.[43] Whatever the correct view may be, the rule established

38 *Sant Ram v The Crown* (1930) 11 Lah 178, 189, 124 IC 310, AIR 1929 Lah 713.
39 *Nanabhai v Janardhan* (1888) 12 Bom 110, 119.
40 *Khushalchand v Bai Mani* (1887) 11 Bom 227.
41 *Venkatacharyulu v Rangacharyulu* (1891) 14 Mad 316.
42 *Khushalchand v Bai Mani* (1887) 11 Bom 247.
43 See *Ghose's Hindu Law*, third edn, pp 802–803, *Banerji's Law of Marriage*, fifth edn, pp 55, 56, *G Sarkar's Hindu Law*, seventh edn, p 165.

overlooked by applying the doctrine, unless it is shown that the ceremonies have been modified by custom.[49]

It has similarly been held that the texts which prohibit the adoption of an only son, and those which enjoin the adoption of a relation in preference to a stranger, are only directory; therefore, the adoption of an only son, or a stranger in preference to a relation, if completed, is not invalid. In cases such as above, where the texts are merely directory; the principle of *factum valet* applies, and the act done is valid and binding.[50] But the texts relating to the capacity to give, the capacity to take, and the capacity to be the subject of adoption are mandatory. Hence, the principle of *factum valet* is ineffectual in the case of an adoption in contravention of the provision of those texts.[51]

§ 435. IDENTITY OF CASTE OR OF SUB-CASTE

(1) A marriage between persons belonging to different sub-divisions of the same caste is valid.[52] This has been expressly embodied in the Hindu Marriage Disabilities Removal Act, 28 of 1946, and the Hindu Marriages Validity Act, 21 of 1949.

Both these Acts have been repealed by s 30 of the Hindu Marriage Act, 25 of 1955, and their provisions now been embodied in s 29(1) of the Hindu Marriage Act, 25 of 1955.

A marriage between a *grihasth goshain* and a woman of another caste initiated as a *Goshain* is valid.[53]

(2) For the purposes of marriage, converts to Hinduism are regarded as Sudras. Therefore, the marriage of a Hindu, who is a *sudra* by caste,

49 *Deivanai v Chidambaram* AIR 1954 Mad 657, (1955) 1 MLJ 120.

50 *Wooma Daee v Gokoolanund* (1878) 3 Cal 587, 5 IA 40; *Balusu v Balusu* (1899) 22 Mad 398, 26 IA 113; *Mulchand v Budhai* (1898) 22 Bom 812.

51 *Lakshmappa v Ramaya* (1875) 12 Bom HC 364, 398; *Balusu v Balusu* (1899) 22 Mad 398, 26 IA 113, 144; *Ganga v Lekhraj* (1887) 9 All 253, 296–97; *Gopal v Hanumant* (1879) 3 Bom 273, 293–94; *Padajirav v Ramrav* (1889) 13 Bom 160, 167; *Mulchand v Budhai* (1898) 22 Bom 812; *Banwar Lal v Mangi Bai* AIR 1955 Raj 625; *Nene v Mabadeo* AIR 1952 VP 20.

52 Marriage between persons belonging to Sudra sub-castes—*Inderun Valungypooly v Ramaswamy Talaver* (1869) 13 MIA 141, 158–59; *Ramamani v Kulanthai* (1871) 14 MIA 347; *Upoma v Bholaram* (1888) 15 Cal 708; *Fakirgauda v Ganji* (1898) 22 Bom 277; *Biswanath v Shorashibala* (1921) 48 Cal 926, 66 IC 590, AIR 1921 Cal 48; *Sohan Singh v Kabla Singh* (1929) 10 Lah 372, 112 IC 593, AIR 1928 Lah 706 (Jat male and Maskadi female); *Har Prasad v Kewal* (1925) 47 All 169, 83 IC 163, AIR 1925 All 26 (Bisa husband and Dasa wife); *Gopikrishna Kasadhan v Mt Jagga* (1936) 63 IA 295, 58 All 397, 38 Bom LR 751, 162 IC 993, AIR 1936 PC 198; *Kshiteesh Chandra Chakrabarti v Emperor* (1937) 2 Cal 221, 168 IC 708, AIR 1937 Cal 214 (a case of Brahmin sub-castes). Marriage between Golwara and Agarwala—which are two sub-divisions of Vaisya caste is valid—*Kashi Nath v Bhawan Das* 1947 All 578.

53 *Kaura Devi v Indra Devi* (1943) All 703, 210 IC 464, AIR 1943 All 310.

by the decision is that a marriage which is duly solemnised, and is otherwise valid, is not rendered invalid, because it was brought about by misrepresentation to the guardian,[44] or without the consent of the guardian for the purpose of marriage,[45] or in contravention of an express order of the court.[46] However, a marriage, though performed with the necessary ceremonies, may be set aside by the court, if it was brought about by force or fraud.[47]

(2) The rule referred to in the preceding sub-section applies only where a marriage has been actually celebrated. However, while there is only a contract for marriage, it is competent to a guardian to sue for an injunction to prevent the marriage of his ward to a person of whom he does not approve, and the court may grant an injunction subject to such terms as it may consider necessary to impose on the guardian for the benefit of the minor.[48]

Factum valet quod fieri non debuit

It is a doctrine of the Hindu law enunciated by the author of Dayabhaga and recognised also by Mitakshara school, that 'a fact cannot be altered by a hundred texts'. The 'texts' referred to above are texts that are directory as distinguished from those that are mandatory. The meaning of the doctrine is that where a fact is accomplished, in other words, where an act is done and finally completed, though it may be in contravention of a hundred directory texts, the fact will stand, and the act will be deemed to be legal and binding. (The maxim of the Roman civil law corresponding to this doctrine is *factum valet quod fieri non debuit*, which means that what ought to be done is valid when done.) It is otherwise, where an act is done in contravention of texts, which are in their nature mandatory. The texts which prescribe rules for the consent of guardians for the purpose of marriage have been held to be merely directory; hence, a marriage once performed and solemnised, though it be without the consent of the guardian, has been held to be valid. However, the non-observance of essential ceremonies cannot be

44 *Kshiteesh Chandra Chakrabati v Emperor* (1937) 2 Cal 221, 168 IC 708, AIR 1937 Cal 214.

45 *Khushalchand v Bai Mani* (1887) 11 Bom 247; *Venkatacharyulu v Rangacharyulu* (1891) 14 Mad 316; *Sivanady v Bhagiathyamma* AIR 1962 Mad 400; *Mulchand v Bhudhai* (1898) 22 Bom 812; *Ghazi v Sukru* (1897) 19 All 515; *Brindabun v Chundra* (1886) 12 Cal 140; *Kasturi v Chiranji Lal* (1913) 35 All 265, 18 IC 927; *Gajja Nand v The Crown* (1921) 2 Lah 288, 64 IC 500, AIR 1922 Lah 139.

46 *Bai Diwali v Moti* (1898) 22 Bom 509.

47 *Venkatacharyulu v Rangacharyulu* (1891) 14 Mad 316; *Mulchand v Bhudhai* (1898) 22 Bom 812.

48 *Re Kashi* (1882) 8 Cal 266; *Shridhar v Hiralal* (1888) 12 Bom 110; *Kasturi v Panna Lal* (1916) 38 All 520, 36 IC 245, AIR 1917 All 451 (damages for wrongful injunction).

Calcutta has held that a marriage between a Brahman and a Sudra woman both of whom are Jati Vaishanavas is valid.[61] A similar view has been taken by the Assam High Court.[62] It has been held by the Madras High Court that a Nattukottai Chettiar, who is a Sudra, can legally marry a dancing girl who has not been dedicated to temple. Whether he could marry a girl who was actually dedicated was not decided in the case.[63]

Even *anuloma* marriages were held to be invalid in Allahabad and Madras.[64]

Marriage of Illegitimate Persons

In the case of the marriage of an illegitimate person, who, strictly speaking, belongs to no caste, he or she must be treated as belonging to the caste, the members of which have recognised him or her as a caste fellow.[65]

Mixed Marriages

The Hindu law lays down certain rules for determining the caste of offspring of unions between parents belonging to different castes, and gives separate names to the mixed castes to which such offspring belong. When intermarriages were permitted by ancient Hindu law, children born of mixed marriages were termed *anulomajah*, ie, offspring of *anuloma* marriage, and their caste was neither that of their father nor that of their mother. They belonged to an intermediate caste higher than that of their mother, and lower than that of their father.[66] This section does not apply to Arya Samajists (Act XIX of 1937).

The Indian Christian Marriage Act 1872

As to marriages between Hindus and Christians, see the Indian Christian Marriage Act 1872, and the undermentioned cases.[67]

61 *Nalinaksha v Rajanikanta* (1931) 58 Cal 1392, 134 IC 1272, AIR 1931 Cal 714.

62 *Makhana Katani v Thaneshwar* AIR 1956 Assam 11.

63 *Nagappa v Subramanian* (1946) ILR Mad 103.

64 *Padam Kumari v Suraj Kumari* (1906) 28 All 458 (Brahman male and Kshatriya female); *Swayampakula Subbaramayya v Swayampakula Venkatasubbamma* (1941) Mad 989, AIR 1941 Mad 513. Reference may also be made to observations in *Kastoori Devi v Chiranji Lal* AIR 1960 All 446.

65 *Re Ram Kuamari* (1891) 18 Cal 264; *Emperor v Madan Gopal* (1912) 34 All 589, 16 IC 513.

66 Reference may be made to *Brindavana v Radhamani* (1889) 12 Mad 72, 78–80; *Jwala Singh v Sardar* (1919) 41 All 629, 51 IC 216, AIR 1919 All 317.

67 *Chetti v Chetti* (1909) Probate 67; *Chandramani Dubey v Dubey* (1951) 2 All 439, AIR 1951 All 529.

with a Christian woman, who has become a convert to Hinduism before the marriage, is treated as a marriage between two Sudras, and it is valid, if it otherwise complies with the requirements of the Hindu law.[54]

The second marriage of a person, who was reconverted from Christianity to Hinduism during the lifetime of his first wife is valid.[55]

(3) *As to identity of castes.*—Section 3 of the Hindu Marriages Validity Act 1949, laid down that no marriage between Hindus shall be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belong to different religions, castes, sub-castes or sects.

The object of the Act obviously was not to regularise the status of husband and wife, but also to confer legitimacy on the children born of the marriage validated.[56] The Act validated inter-caste marriages and gave retrospective effect to the Hindu Marriage Disabilities Removal Act 1946. As regards marriages between sub-divisions of the same caste, they are regarded as valid, even under the existing decisions. The provision that Hindu marriages should be valid, though the parties belong to different religions, does not mean that a marriage between a Hindu and a Christian, or between a Hindu and a Mohammedan would be valid, the object of the Act being to legalise marriages between Hindus, Jains and Sikhs, who, though they belong to different religions, come under the description of Hindus as defined in s 2 of the Act.

Old Law

Ancient texts prohibited *prathiloma* marriages, ie, between males of lower caste and females of higher caste. Accordingly, such marriages have been held by courts to be invalid.[57] However, *anuloma* marriages were permitted and recognised by the texts.[58] Accordingly, the Bombay High Court held that a marriage between a Vaisya male and a Sudra female,[59] or a Brahman male and a Sudra female is valid. In the latter case, it was held that the son born of such a marriage is legitimate and is entitled to inherit a one-tenth share in the estate of his uncle, the other nine-tenths going to the reversioner of the uncle.[60] The High Court of

54 *Muthusami v Masilamani* (1910) 33 Mad 342, 5 IC 42, where the earlier decisions are reviewed.

55 *Goona Durgaprasad Rao alias Pedda Babu v Goona Sudarsanswami & ors* (1940) Mad 653, 190 IC 868, AIR 1940 Mad 513.

56 *Sadagopa v Bakthavatsalam* AIR 1964 SC 1126.

57 *Lakshmi v Kalian Singh* (1900) 2 Bom LR 128 (Kshatriya male and Brahman female); *Bai Kashi v Jamnadas* (1912) 14 Bom LR 547, 16 IC 133 (Sudra male and Brahman female); *Manni Lal v Shiama* (1926) 48 All 670, 97 IC 347, AIR 1926 All 656 (Sudra male and Vaisya female).

58 Manu, Yajanavalkya, Sankha, Gauthama, Vyas, Vishnu and Mitakshara.

59 *Bai Gulab v Jiwanlal* (1922) 46 Bom 871, 65 IC 602, AIR 1922 Bom 32.

60 *Natha v Mehta Chhotalal* (1931) 55 Bom 1, 130 IC 17, AIR 1931 Bom 89.

§ 436. PROHIBITED DEGREES OF RELATIONSHIP

No marriage is valid, if it is made between persons related to each other within the prohibited degrees, unless such marriage is sanctioned by custom.[68]

A *karewa* marriage between a father-in-law and daughter-in-law among the Jats (who are presumed to be Sudra) is invalid and cannot be validated by custom.[69]

The following are the rules regarding prohibited degrees:

(1) The Hindu Marriage Disabilities Removal Act 1946, laid down that notwithstanding any text, rule of interpretation of Hindu law or any custom or usage, a marriage between Hindus, which is otherwise valid, shall not be invalid by reason only of the fact that the parties thereto belong to the same *gotra* or *pravara*.

Before this Act, it was held that a man could not marry a girl of the same *gotra* or *pravara*, the theory being that his father and the girl's father were both descendants of a common ancestor in the male line. It was held in Allahabad, that where a widow had remarried a person belonging to her father's *gotra*, the marriage was not valid as she had not reverted to her father's *gotra* by her husband's death and her issue was legitimate.[70] In a later case, it was held in Madhya Pradesh that a widow remarrying another person in her deceased husband's *gotra* was validly married, as she could be regarded as having reverted to her father's *gotra*.[71] The rule did not apply to Sudras, the reason given being that Sudras have no *gotra* of their own. It has been held by the Bombay High Court that in accordance with a custom prevailing in the Deccan Brahmin community, a marriage between persons of the same *gotra* is valid, provided before the marriage, the girl is given in adoption to a person of another *gotra*.[72]

This rule is called exogamy. Its effect is that a man cannot marry the daughter of an agnate. The next rule provides for the case where the girl is a cognate relation of the boy, ie, related to him through a female.

(2) A man cannot marry a girl who is his *sapinda*. This rule is accepted both by the Bengal and Mitakshara schools. However, there is a difference of opinion between the two school, as to who are *sapindas* for marriage.

68 *Banerjee's Law of Marriage*, fifth edn, pp 70–71, 269–74, 285, 289. The custom must not be opposed to public policy or abhorrent to decency and morality—*Balusami v Balkrishna* AIR 1957 Mad 97.

69 *Jagnahar Singh v Sadhu Ram* (1934) 15 Lah 688, 149 IC 94, AIR 1934 Lah 283.

70 *Radha Nath Mukerji v Shaktipado Mukerji* (1936) 58 All 1053, 164 IC 595, AIR 1936 All 624.

71 *Rewa v Galharisingh* AIR 1961 MP 164.

72 *Madhavrao v Raghavendrarao* (1946) ILR Bom 375.

Bengal School

According to Dayabhaga law, a man cannot marry a girl:

(a) if she is within the 7th degree in descent from his father or from one of his father's six ancestors in the male line;

(b) if she is within the 5th degree in descent from his maternal grandfather or from one of his maternal grandfather's four ancestors in the male line;

(c) if she is within the 7th degree in descent from his father's three technical *bandhus* or from one of their six ancestors through whom the girl is related to him [§ 46 sub-§(4), *pitri bandhus*];

(d) if she is within the 5th degree in descent from his mother's three technical *bandhus* or from one of their four ancestors through whom the girl is related to him [§ 46, sub-§ (4), *matri bandhus*].[73]

Exception

A girl, though related within the degrees mentioned above, may be taken in marriage if she is removed by three *gotras* from him.[74]

Mitakshara School

According to Mitakshara law, a man cannot marry a girl if their common ancestor, being traced through his or her father, is not beyond the seventh in the line of ascent from him or her or, if their common ancestor, being traced through their mothers, is not beyond the fifth in line of ascent from him or her.[75] In other words, descendants up to the seventh degree through males or females of paternal ancestors up to the seventh degree, and descendants up to the fifth degree of maternal ancestors up to the fifth degree, are excluded as being *sapindas*.[76]

In the Madras state, the rules restricting marriages between cognate *sapindas* are practically obsolete, eg, the marriage of cognate first cousins (children of brother and sister) is common among Andhraites. It was recognised by Baudhayana. The marriage of male to his sister's daughter is common among southern communities. The marriage of cognate *sapindas* beyond these limits has always been regarded as lawful and is not prohibited in the whole of Southern India, except between cousins who are children of two sisters.

73 *Bijan Majumdar v Ranjit Lal Sen Gupta* (1924) 2 Cal 443, 202 IC 33, AIR 1942 Cal 458.

74 *Banerjee's 'Law of Marriage'*, fifth edn, pp 69–70.

75 *Ramachandra v Vinayak* (1914) 41 IA 290, 309–11, 42 Cal 384, 417–19, 25 IC 290, AIR 1914 PC 1.

76 *Bhattacharya's 'Hindu Law'*, second edn, p 90.

(3) In computing the degree for the purposes of sub-§ (2), the common ancestor and the person in question are each to be counted as one degree.

(4) Relationship by marriage is not by itself an impediment to marriage. Thus, a man may marry the daughter of his wife's sister.[77]

Sagotra

Two persons are *sagotra*, ie, of the same *gotra* or family, if both of them are descended in the male line from the *rishi* or sage, after whose name the *gotra* is called, however distant either of them may be from the common ancestor.

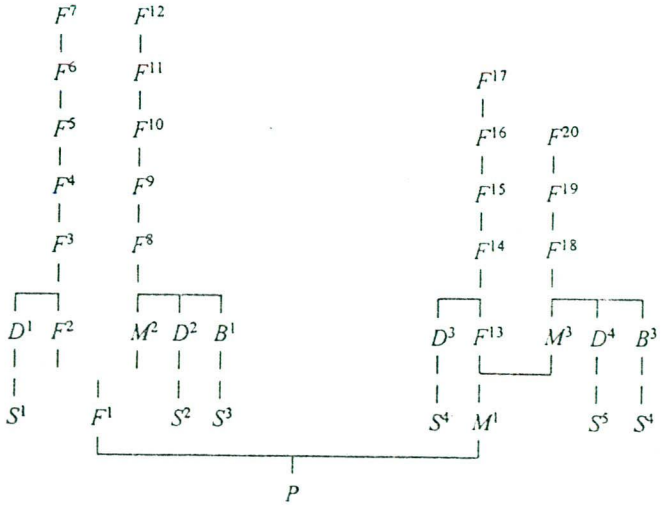
Samana-pravara

Two persons are *samana-pravara*, ie, of the same *pravara*, if they are descendants in the male line of the three paternal ancestors of the founder of a *gotra*.[78]

Sub-section (2)

The following diagram will enable the reader to understand the four rules applied by Dayabhaga school to determine sapindaship.[79]

Table XXII.1



77 *Ragavendra v Jayaram* (1897) 20 Mad 283; *Ramakrishna v Subbamma* (1920) 43 Mad 830, 59 IC 268, AIR 1920 Mad 715.

78 *G Sarkar's Hindu Law*, seventh edn, p 89.

79 The diagram is reproduced from *G Sarkar's Hindu Law*, seventh edn, p 140.

In the above diagram, P is the bridegroom, F^1 is his father, M^{11} is his mother, M^2 is his father's mother, M^3 is his mother's mother.

F^3 to F^7 are his seven paternal ancestors in the male line, F^8 to F^{12} are his father's maternal ancestors in the male line. F^{13} to F^{17} are his mother's five paternal ancestors in the male line. F^{18} to F^{20} are his mother's three maternal ancestors in the male line. S^1, S^2 and S^3 are his father's *bandhus*. S^4, S^5 and S^6 are his mother's *bandhus*.

According to sub-r (a), P cannot marry a girl within 7th degree in descent from any one of his seven paternal ancestors F^1 to F^7.

According to sub-r (b), P cannot marry a girl within the 5th degree in degree from any one of his mother's five paternal ancestors F^{13} to F^{17} (F^{13} is P's maternal grandfather).

For the purpose of sub-r (c), the father's *bandhus* are restricted to the three relations expressly mentioned as such in Mitakshara, namely:

(λ) Father's (F^1) father's (F^2) sister's (D^1) son, ie, S^1;
(β) Father's (F^1) mother's (M^2) sister's (D^2) son, ie, S^2;
(γ) Father's (F^1) mother's brother's (B^1) son, ie, S^3.

According to sub-r (c), P cannot marry a girl with the seventh degree in descent from:

(i) S^1, S^2, S^3;
(ii) F^3 to F^7, ancestors of S^1, already included in sub-r (a);
(iii) any one of the five persons among F^8 to F^{12}, ancestors of S^2 and S^3;
(iv) B^1, father of S^3.

For the purposes of sub-r (d), the mother's *bandhus* are restricted to the three relations expressly mentioned as such in Mitakshara, namely:

(λ) Mother's (M^1) father's (F^{13}) sister's (D^3) son, ie, S^4;
(β) Mother's (M^1) mother's (M^3) sister's (D^4) son, ie, S^5;
(γ) Mother's (M^1) mother's brother's (B^2) son, ie, S^6.

According to sub-r (d), P cannot marry a girl within the fifth degree in descent from:

(i) S^4, S^5 or S^6;
(ii) F^{14} to F^{17}, ancestors of S^4, already included in sub-r (b);
(iii) any one of the three persons, F^{18} to F^{20}, ancestors of S^5 and S^6; and
(iv) B^2, father of S.

The reader will find above rules in *Dr Banerjee's Law of Marriage*. The rules relating to the Bengal school are set forth in Raghunandan's *Udavahattattava*, a work of authority in Bengal, and are repeated by Kamalakara Bhatta in his *Nirnayasindhu*, a work of authority in the

Benares school. The Bengal rules are in accordance with the interpretation put by Raghunandan upon the text of Manu.

There is no difference between *sapinda* relationship in respect of marriage and that in respect of inheritance.[80]

§ 437. MARRIAGE CEREMONIES

There are two ceremonies essential to the validity of a marriage, whether the marriage be in the *brahma* form or the *asura* form, namely:

(1) invocation before the sacred fire; and
(2) *saptapadi*, ie, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire.

The marriage becomes complete when the seventh step is taken, till then, it is imperfect and revocable.[81] Consummation is not necessary to make a marriage complete and binding.[82]

(2) A marriage may be completed by the performance of ceremonies other than those referred to in sub-§ (1), where it is allowed by the custom of the caste to which the parties belong.[83]

If the community to which the parties belong has modified by long established usage, the ceremonies prescribed by the *Shastras* and has adopted new forms and new conventions, they must be recognised by the courts. However, the essential requisite for recognition of such a custom is that it must be sufficiently ancient and definite, and the members of the caste or sub-caste to alter it at their will and pleasure, for the essence of custom or usage is that it is an ancient one recognised and adopted by the caste and has certainty about it. The validity of a marriage has to be tested and determined in accordance with the provisions of the law governing the parties and not in accordance with the rules laid down by any association or a society. If the caste has been able to establish its usage regulating the form and the requisites of a valid marriage, such a usage being transcendent law, is obligatory and is binding not only

80 *Babu Lal v Nanku Ram* (1895) 22 Cal 339; *Ramchandra v Vinayak* (1914) 41 IA 290, 309, 311, 42 Cal 384, 417–19, 25 IC 290, AIR 1914 PC 1.

81 *Chunilal v Surajram* (1909) 33 Bom 433, 437–38, 3 IC 765; *Authikesavalu v Ramanujam* (1909) 32 Mad 512, 519–20, 3 IC 514; *Brindabun v Chundra* (1886) 12 Cal 140, 143; *Sitabai v Vithabai* AIR 1959 Bom 508; *Ram Amadh v Krishna Nand Lal* (1981) All 432 (Arya Samaj marriage—*saptapathi* is essential).

82 *Adm-Gen of Madras v Anandachari* (1886) 9 Mad 466, 470; *Dadaji v Rukmabai* (1886) 10 Bom 301, 311; *Emperor v Munshi Ram* (1936) 58 All 402, 158 IC 1007, AIR 1936 All 11.

83 *Kally Churn v Dukhee* (1880) 5 Cal 692; *Hurry Churn v Nimai* (1884) 10 Cal 138; *Rampiyar v Deva Rama* (1923) 1 Rang 129, 76 IC 475, AIR 1923 Raj 202.

upon the parties, but also on the courts, who are bound to recognise and give effect to the usage.[84]

Marriage of Widows

According to the Hindu law, it is sometimes said that no religious ceremonies are necessary in the case of marriage of widows. See s 6, Hindu Widows' Remarriage Act 1856. As to religious ceremonies in the case of such marriages, see the undermentioned cases.[85]

Betrothal

Betrothal precedes marriage; but unlike marriage, it is revocable, so that a girl betrothed to one person may be validly given in marriage to another person, though in such a case, a suit may be brought for damage against the father or other guardian of the girl, who brought about the contract of marriage. Betrothal is more than a promise to marry. In the case of minors, the promise is given by the father or other legal guardian. Where there is a breach of the promise, the appropriate remedy is not specific performance, but damages.[86] When the plaintiff (bridegroom) dies pending a suit for damages, his legal representative can only recover the out of pocket expenses incurred during betrothal.[87]

§ 438. PRESUMPTION AS TO LEGALITY OF MARRIAGE

Where it is proved that a marriage was performed in fact, the court will presume that it is valid in law,[88] and that the necessary ceremonies have been performed.[89] A Hindu marriage is recognised as a valid marriage in English law.[90]

84 *Deivanai v Chidambaram* AIR 1954 Mad 657, (1955) 1 MLJ 120; *Rakappa v Chokalingam* (1963) 2 Mad LJ 550, AIR 1964 Mad 126 (Nattukotta Chettys—*saptapadi* not essential).

85 *Deivanani v Chidambaram* AIR 1954 Mad 657; *Mahila Gumano v Ram Dayal* AIR 1953 MB 159.

86 *Purshotamdas v Purshotamdas* (1897) 21 Bom 23; *Rambhat v Timmaya* (1892) 16 Bom 673 (suit for restoration of presents); *Jekisondas v Ranchoddas* (1917) 41 Bom 137, 38 IC 588, AIR 1916 Bom 51; *Khimji v Narsi* (1915) 39 Bom 682, 28 IC 408, AIR 1915 Bom 300 (procuring breach of promise of marriage); *Khubchand v Maniklal* AIR 1953 MB 91.

87 *Balubhai v Nanabhai* (1920) 44 Bom 446, 55 IC 614, AIR 1920 Bom 225.

88 *Inderun v Ramaswamy* (1869) 13 MIA 141, 158; *Fakirgauda v Gangi* (1898) 22 Bom 277, 279.

89 *Mouji Lal v Chandrabati* (1911) 38 Cal 700, 38 IA 122, 11 IC 502; *Veerappa v Michael* AIR 1963 SC 933; *Brindabun v Chundra* (1886) 22 Bom 509; *Administrator-General of Madras v Anandashari* (1886) 9 Mad 466; *Appibai v Khimji Cooverji* (1936) 60 Bom 455, 38 Bom LR 77, 162 IC 188, AIR 1936 Bom 138; *Sridhar Dey v Kallapa De* AIR 1987 Cal 213.

90 *Srinivasan v Srinivasan* 73 LT 102.

Presumption as to Marriage and Legitimacy

There is an extremely strong presumption in favour of the validity of a marriage and the legitimacy of its offspring, if from the time of the alleged marriage, the parties are recognised by all persons concerned as man and wife and are so described in important documents and on important occasions. The like presumption applies to the question whether the formal requisites of a valid marriage ceremony were satisfied.[91] Similarly, the fact that a woman was living under the control and protection of a man, who generally lived with her and acknowledged her children, raises a strong presumption that she is the wife of that man. However, this presumption may be rebutted by proof of facts showing that no marriage could have taken place.[92]

§ 439. SPECIAL MARRIAGE ACT 1954

It is provided by the Special Marriage Act 1954 (which repeals the Special Marriage Act 1872) that a marriage may be celebrated before a registrar between any two persons.

The marriage under the Special Marriage Act 1954, of any member of an undivided family, shall be deemed to effect his severance from such family. Further, a person marrying under the Special Marriage Act 1954, shall have the same rights and be subject to the same disabilities,[93] in regard to any right of succession to any property, as a person to whom the Caste Disabilities Removal Act 1850, applies. Also, the succession to the property of any such person, and to the property of the issue of such marriage, shall be regulated by the provisions of the Indian Succession Act 1925. No such person shall have right of adoption, but his father shall, if he has no other son living, have the right to adopt another person as a son under the law to which he is subject (see the Special Marriage Act 1954, §§ 19–21).

§ 440. MARRIAGE EXPENSES

In the case of a joint family governed by Mitakshara law, the joint family property is liable, while the family is still joint, for the legitimate marriage

91 *Mouji Lal v Chandrabati* (1911) 38 Cal 700, 38 IA 122, 11 IC 502; *Subarna v Arjuno* AIR 1951 Ori 337; *Sitabai v Vithabai* AIR 1959 Bom 508; *Bikash Kumar v Nanda Rani* AIR 1979 Cal 358; *Ningu v Sadashiv* AIR 1987 Bom 27 (case-law).

92 *Chellammal v Ranganathan* (1911) 34 Mad 277, 12 IC 247; *Nagarajamma v State Bank of India* AIR 1962 All 260; *Shivalingiah v Chowdamma* AIR 1956 Mys 17; *Vishnu Namboodiri v Kuttiparu Amma* AIR 1957 Tr & Coch 85, FB; *Thunthi v Dhant Ram* AIR 1953 HP 66; *Anandi Lal v Onkar* AIR 1960 Raj 251.

93 Reference may be made to *Girdharilal v Fatechand* AIR 1955 MB 148.

expenses of male members of the family,[94] and also of the daughters of male members of the family.[95]

The decision in *Subbayya v Ananta*,[96] implies that a father in possession of joint family property is under a legal obligation to get his daughter married. It follows that if a father, so in possession, neglects his duty, the mother may perform it and recover the expenses from her husband. When there is no joint family property in the hands of the father, there is no legal obligation on his part to marry his daughter and bear the expenses of marriage. It is doubtful also whether the marriage of an infant girl could be brought under the head of 'necessaries', within the meaning of s 68, Indian Contract Act.[97] On the other hand, the proposition of law laid down in *Sundari v Subramania Ayyar*,[98] that 'under the Hindu law, a father is under no legal obligation to get his daughter married', appears to have been stated too broadly. The obligation may not exist when the father is not a member of a joint family and has no ancestral property.

The text enjoins the payment of expenses of *sanskaras* or sacraments out of the family property. Marriage is a *sanskara*, and its expenses, therefore, are to be provided for out of the joint family property. A debt contracted for the marriage of a coparcener or the daughter of a deceased coparcener in a joint Hindu family is a debt contracted for a family purpose and, therefore, for the benefit of the family (see §§ 234 and 427).

As to expenses of a marriage after the institution of a suit for partition, see § 304(2). As to the power of a widow to provide for the marriage expenses of her daughter out of her husband's estate, see § 181B (iv).

§ 441. DIVORCE

Divorce is not known to the general Hindu law. The reason is that a marriage, from the Hindu point of view, creates an indissoluble tie

94 *Sundrabai v Shivnarayana* (1908) 32 Bom 81; *Bhagirathi v Jokhu Ram* (1910) 32 All 575, 6 IC 465; *Gopalakrishnam v Venkatanarasa* (1914) 37 Mad 273, 17 IC 308, AIR 1914 Mad 432 (FB) overruling *Govindarazulu v Devarabhotla* (1904) 27 Mad 206; *Kameswara v Veeracharlu* (1911) 34 Mad 422, 8 IC 195; *Debi Lal v Nand Kishore* (1922) 1 Pat 266, 65 IC 315, AIR 1922 Pat 22.

95 *Vaikuntam v Kallapiran* (1900) 23 Mad 512; *Vaikuntam v Kallipinam* (1903) 26 Mad 497; *Ranganaiki v Ramanuja* (1912) 35 Mad 728, 11 IC 570; *Srinivasa v Thiruvengodatheiyargar* (1915) 38 Mad 556, 23 IC 264, AIR 1914 Mad 226 (unmarried sisters); *Thiruvathammal v Vagunathan* AIR 1952 Mad 479; *Alagammal v Veerappa* AIR 1956 Mad 428.

96 53 Mad 84.

97 *Sadhu Laxmi v Sadhu Suryanarayana* AIR 1950 Mad 274.

98 ILR 26 Mad 505.

between the husband and the wife. Neither party, therefore, to a marriage can divorce the other, unless divorce is allowed by custom.[99]

There is no rule of Hindu law, which forbids the subsistence of a marriage, one of the parties to which is a non-Hindu. The law does not refuse to recognise a conjugal union merely because of a difference of religion.[1]

Change of religion or loss of caste does not operate as dissolution of marriage, nor does the adultery of either party, nor even the fact that the wife has deserted her husband and has become a prostitute.[2]

As to change of religion, it is now provided by the Native Converts' Marriage Dissolution Act 1886, that where a Hindu becomes a convert to Christianity, and in consequence of such conversion, the husband or wife of the convert, deserts or repudiates the convert, the court may, on a petition presented by the convert, pass a decree dissolving the marriage, and the parties may then marry again, as if the prior marriage had been dissolved by death. Conversion does not operate per se as a dissolution of marriage.[3]

In many states, however, divorce is allowed on certain grounds as the result of legislation permitting divorce (also see Hindu Marriage Act 1955).

Divorce by Custom

It has been held in Bombay that a caste custom, which permits a woman to desert her husband at her pleasure and marry again without his consent, is void for immorality,[4] and it has been doubted by the same court whether the custom would be valid, even if it allowed her to marry with his consent.[5] The Madras High Court has held that a custom, which permits a divorce by mutual agreement, is not void for immorality.[6] A

99 *Kudomce v Jotteeram* (1878) 3 Cal 305; *Sankaralingam v Subban* (1894) 17 Mad 479; *Tatayya v Nakaraju* AIR 1958 AP 611.

1 *Re Chandramani Dubey* (1951) 2 All 439, AIR 1951 All 529.

2 *Government of Bombay v Ganga* (1880) 4 Bom 330; *Admn-General of Madras v Anandachari* (1886) 9 Mad 446; *Re Ram Kumari* (1891) 18 Cal 264; *Subbaraya v Ramasami* (1900) 23 Mad 171, 177; *Narain v Trilok* (1907) 29 All 4; *Chandramani Dubey v Dubey* AIR 1951 All 529; *Pakkiam v Chelliah Pillai* (1923) 46 Mad 839, 75 IC 17, AIR 1924 Mad 18 (FB); *Gopal Krishna Kasaudhan v Mst Jaggo* (1936) 63 IA 295, 58 All 397, 38 Bom LR 751, 162 IC 993; *Banarsi Das v Samat Prasad* (1936) 58 All 1019, 164 IC 1047, AIR 1936 All 641; *Gul Mohammad v King Emperor* (1947) Nag 205.

3 *Gobardhan v Jasamoni* (1891) 18 Cal 252.

4 *Narayan v Laving* (1878) 2 Bom 140.

5 *Khemkor v Umidshankar* (1873) 10 Bom HC 381.

6 *Sankaralingam v Subban* (1894) 17 Mad 479; *Premanbai v Channoolal* AIR 1963 MP 57 (custom among Patruas of Madhya Pradesh permitting divorce by mutual consent, held valid).

similar custom recognising dissolution of marriage, followed by marriage in *kudike* form, has been accepted as valid in case of certain castes in Mysore.[7] A custom granting divorce in the *Pakhali* community with the consent of the husband is valid.[8] As to custom of divorce among Sikh Jats in Amritsar district, see *Balvinder Singh v Gurpal Kaur*.[9]

It has been held in Bombay, that a custom which permits a dissolution of marriage tie by either husband or wife against the wish of the other, the sole condition attached being the payment of a sum of money fixed by the caste, is void as being opposed to public policy.[10] Nor can a marriage be dissolved by a decision of the caste *panch*.[11]

The Indian Divorce Act 1869

The Indian Divorce Act 1869, provides inter alia for dissolution of marriage, but it applies only to cases where 'the petitioner or respondent professes the Christian religion' (s 2 of Act). Section 7 of the Act provides that the court shall act and give relief on principles of the English divorce courts. There is a conflict of opinion whether the Indian Divorce Act 1869, applies only to monogamous marriages, such as a Christian marriage or also to polygamous marriages such as a Hindu marriage, where one of the parties, being the petitioner, changes his religion for Christianity after the marriage. *A* and his wife *B*, both Hindus, marry according to the rites of Hindu law. *A* and *B* subsequently become Christians. *A* then applies to the court for the dissolution of the marriage, on the ground that his wife has, since the solemnisation of the marriage, been guilty of adultery (s 10 of the Act). Is *A* entitled to relief under the Act? It has been held by the Calcutta High Court that he is, the ground of the decision that *A* professed the Christian religion at the time of presenting the petition and that fact was sufficient to give jurisdiction to the court, under the Act, though the marriage was a Hindu marriage.[12] On the other hand, it has been held by the Madras High Court, that having regard to s 7, the Act applies to monogamous marriages only, and that the court has no jurisdiction to entertain *A*'s petition under the Act.[13]

7 *Shivalingiah v Chowdama* AIR 1956 Mys 17, (1941) Bom 535, 195.
8 *Jina Magan v Bai Jethi* (1941) Bom 535, 195 IC 841, AIR 1941 Bom 298.
9 AIR 1985 Del 14; *Gurdit Singh v Angerz Kaur* AIR 1968 SC 142.
10 *Keshav v Bai Gandi* (1915) 39 Bom 538, 29 IC 952, AIR 1915 Bom 107; *Sudha v Sankappa Rai* AIR 1963 Mys 245.
11 *Bai Ganga v Emperor* AIR 1916 Bom 97, (1917) 19 Bom LR 56, 39 IC 308. See *Nallathangal v Nainan Ambalam* (1960) 1 MLJ 134, AIR 1960 Mad 179.
12 *Thapita v Thapita* (1894) 17 Mad 235; *Gobardhan v Jasadamoni* (1891) 18 Cal 252.
13 *Sankaralingam v Subban* (1894) 17 Mad 235; *Perianayakam v Pottukanni* (1891) 14 Mad 382.

Conversion to Islam

It has been held by a single Judge of the Calcutta High Court, that when a Hindu wife embrace Islam, the Hindu law ceases to have any control over her; the marriage becomes automatically dissolved and there is nothing in Hindu law, which prevents the court from giving a declaration to that effect.[14]

§ 442. MARITAL DUTIES

(1) The wife is bound to live with her husband and to submit herself to his authority. An agreement enabling the wife to avoid a marriage or to live separate from her husband, if he leaves the village in which his wife, and her parents reside, or if he marries another woman, is void. Such an agreement is against public policy and contrary to the spirit of Hindu law. An agreement of this kind is no answer to a suit for restitution of conjugal rights by a husband against his wife.[15]

(2) The husband is bound to live with his wife and to maintain her.

The above propositions could not be read as absolute and inflexible rules. They had to be applied having regard to the facts and circumstances of each case.[16]

§ 443. GUARDIANSHIP OF WIFE

(1) The husband is the lawful guardian of his minor wife,[17] and is entitled to require her to live with him, however young she may be, unless there is a custom enabling the wife to live with her parents until she has reached puberty.[18]

(2) After the husband's death, the guardianship of the wife, if she is a minor, devolves on the husband's relations, in preference to her paternal relations.[19] However, if the husband's family be extinct, or has no male members, her father or the kin of her father are the guardians of the widow.[20]

It has been held in a Madras case,[21] that in default of the husband, no other person is entitled to act as guardian de jure of the minor wife. A co-widow is not the natural guardian of her minor co-widow.[22]

14 However, see *Mulla's Mohammedan Law*, s 20. *Ayesha Bibi v Subodh Ch Chakravarty* AIR 1949 Cal 436.

15 *Sitaram v Abeeree* (1873) 11 Beng LR 129; *Tekait v Basanta* (1901) 28 Cal 751.

16 See notes under s 9, Hindu Marriage Act 1955.

17 *Re Dhuronidhur* (1890) 17 Cal 298.

18 *Arumuga v Viraraghava* (1901) 24 Mad 255.

19 *Khudiram v Bonwari Lal* (1889) 16 Cal 584; *Aswini Kumar v Fulkumari Dasi* 77 Cal WN 349 (*sapindas*, Dayabhaga).

20 *Annapurnamma v Ramanjaneyaratnam* AIR 1959 AP 40, 46.

21 *Ethilavulu v Pethakkal* AIR 1950 Mad 390.

22 *Kashubai v Chandrabbaga* (1947) ILR Nag 455.

§ 444. RESTITUTION OF CONJUGAL RIGHTS

(1) Either party to a marriage may sue the other for restitution of conjugal rights.[23]

The court may refuse to pass a decree for restitution of conjugal rights against the wife, if the husband is suffering from a loathsome disease, such as leprosy or syphilis,[24] or if he keeps a concubine in the house, or is guilty of cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion,[25] or if he adopts another religion.[26] However, the mere fact of the husband marrying a second wife,[27] or mere infidelity on the part of the husband,[28] or the fact that the wife is a minor,[29] is not by itself sufficient to disentitle the husband from claiming restitution of conjugal rights.

Under s 18(2)(d) Hindu Adoptions and Maintenance Act, 78 of 1956, and s 125, Criminal Procedure Code, the taking of a second wife by a husband would constitute a ground for claiming separate residence and maintenance by the wife. It follows therefore that now the husband's claim for restitution of conjugal rights can justly be refused, if he has taken a second wife (also see s 9, Hindu Marriage Act 1955).

(2) In a suit for restitution of conjugal rights by a Hindu husband, the husband is not necessarily entitled to a decree in the absence of a plea of cruelty by the wife. Where the wife has pleaded that she was deserted or neglected[30] by her husband, and that the suit is not bona fide, she should be allowed to lead evidence, so that the court may be in a position to judge whether the relief sought for by the husband be granted or not, and if so, on what conditions, if any.[31]

(3) Now see s 9 Hindu Marriage Act and Notes thereunder.

It has been held by the High Court of Calcutta,[32] and following it, by the High Court of Rangoon,[33] that the presumption that the requisite ceremonies have been performed (§ 438), applies only to cases involving questions of inheritance, so as to avoid illegitimacy, and that no such presumption arises in a suit for restitution of conjugal rights. In such a suit, where the validity of the marriage is disputed, the court must find specifically, whether the requisite ceremonies were performed.

23 *Tekait v Basanta* (1901) 28 Cal 751; *Dadaji v Rukmabai* (1886) 10 Bom 301.
24 *Bai Premkuvarv Bhika* (1868) 5 Bom HCAC 209.
25 *Dular Koer v Dwarka Nath* (1905) 34 Cal 971; *Yamunabai v Narayan* (1876) 1 Bom 164.
26 *Paigi v Sheonarain* (1886) 8 All 78.
27 *Motilal v Bai Chanchal* (1902) 4 Bom LR 107.
28 *Binda v Kaunsila* (1891) 13 All 126, 164.
29 See § 443. *Tekait v Basanta* (1901) 28 Cal 37; *Dadaji v Rukmabai* (1886) 10 Bom 301.
30 *Ude Singh v Mst Daulat Kaur* (1935) 16 Lah 892, 158 IC 223, AIR 1935 Lah 386.
31 *Bai Jivi v Narsingh* (1927) 51 Bom 329, 101 IC 403, AIR 1927 Bom 264.
32 *Surjyamoni v Kali Kanta* (1901) 28 Cal 37, 50.
33 *Rampiyar v Deva Rama* (1923) Rang 129, 76 IC 475, AIR 1923 Raj 202.