



Family Law



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Hindu Law

Contents

CHAPTER	TOPIC
1.	Introductory Chapter
2.	Sources and Schools of Hindu Law
3.	The Hindu Marriage Act, 1955
4.	The Hindu Adoption and Maintenance Act, 1956
5.	The Hindu Minority and Guardianship Act, 1956
6.	Joint Hindu Family, Coparceners and Joint family property
7.	Rights and Powers of Karta and Coparceners
8.	Partition and Reunion
9.	Hindu Succession Act, 1956

special property of females, marriage, divorce, maintenance, dower, guardianship, gifts, trust and trust properties and waqfs, all Muslims are governed by Muslim personal law. Further, any adult Muslim resident in India, may, by filing a declaration, elect that in respect of adoption, wills and legacies he will be governed by Muslim law. If he does so, then Muslim personal law will apply to him and his descendants.

Effect of Conversion to Christianity

- In **Abraham v. Abraham**, it was observed that upon conversion of a Hindu to Christianity, the Hindu law ceased to have any continuing obligatory force upon the convert.
- The convert may renounce the old law as he renounced his old religion or, if he thinks fit, may abide by the old law, even though he had renounced his old religion.
- If a Hindu convert to Christianity dies intestate, succession to his property will be ordinarily governed by the Indian Succession Act.
- A Hindu or Muslim convert to Christianity cannot retain his personal law in the matter of polygamy, and if after conversion he takes another wife, the second marriage will be void. However, his conversion will not invalidate his former marriage. If, before conversion, he had two wives, both of them would continue to be his lawful wives.
- Under the Converts Marriage Dissolution Act, 1866 if a person converts to Christianity, and his or her spouse for a period of six continuous months deserts or repudiates the marriage, he can bring a petition for restitution of conjugal rights. If the decree for restitution of conjugal rights is not complied with for a period of one year, the converted spouse may sue for divorce. But if after conversion, the non-convert spouse does not refuse to cohabit with the convert, there is nothing in the Act which can entitle the convert to seek divorce.

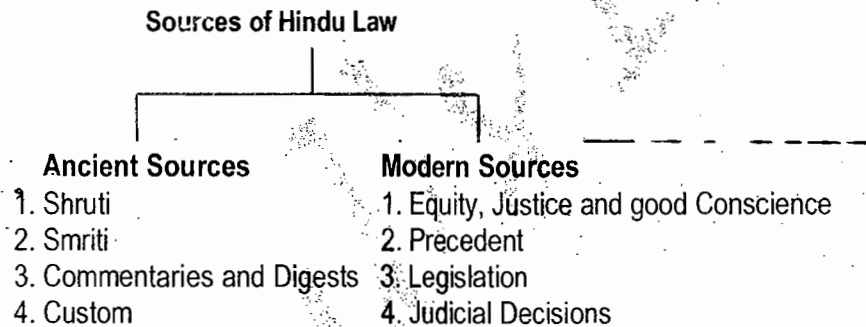
Chapter – 2

Sources and School of Hindu Law

SYNOPSIS

1. Sources of Hindu law
 - a. Ancient sources
 - b. Modern sources
 2. Schools of Hindu Law
 - a. Mitakshra School
 - b. Dayabhaga School
 - c. Differences between Mitakshara and Dayabhaga Schools
1. **Sources of Hindu Law** : Various sources of Hindu Law could be classified under following two heads

There are important sources of Hindu Law



Ancient Sources

(1) **Shruti**

Shrutis are believed to contain the very words of God. They are supposed to be the divine utterances to be found in the four Vedas, (namely the Rig Veda, the Yajur Veda, the Sama Veda and the Atharva Veda), the six Vedangas (i.e. appendages to the Vedas) and the eighteen Upanishadas. They are mostly religious in character. In theory Shruties are considered to be the primary and paramount sources of Hindu Law.

(2) **Smriti**

They are utterances and precepts of the Almighty, which have been heard and remembered, and handed down by the Rishis (sages) from generation to generation. The exact number of Smritis (or Codes) is not definitely known, but the earliest one seems to be the Manu Smriti. The Smritis are divided in to primary and secondary Smritis, the latter being later in date; the primary Smrities are again classified in to:- (i) Dharama Sutras (ii) Dharamshastras.

(3) **Commentaries and Digests**

The commentaries though professing and purporting to rest on the Smritis, explained, modified and enlarged the traditions recorded therein to bring them into harmony and accord with prevalent practice of the day to suit the felt necessities of the time.

The manusmriti and the Yajñavalkya smriti have found the greatest number of commentators.

(4) **Customs**

- Where there is a conflict between a custom and the text of the Smritis, such custom will override the text

- Custom may be defined as a habitual course of conduct generally observed in a community. In a singular contribution of historical school of jurisprudence that it conclusively established that in early societies. Custom was the main vehicle of legal development.

Kinds of Customs

- Customs may be broadly divided into (i) local customs, (ii) class customs, and (iii) family customs.
- **Essentials of a valid custom** – In order to be valid, a custom must satisfy the following six requirements:-
 - (a) It must be ancient.
 - (b) It must be certain.
 - (c) It must also be reasonable.
 - (d) It must be continuous.
 - (e) It must not be opposed to public policy.
 - (f) It must not be opposed to any law.

The following are **examples of customs, which the Courts have refused to recognise:-**

- (a) A caste custom, authorising a wife to abandon her husband, and marry again without his consent.
- (b) A custom permitting a husband to dissolve his marriage without the consent of the wife by paying a fixed sum of money.
- (c) The custom among dancing girls of adopting one or more daughters.
- (d) A custom in South India, according to which a man could marry his daughter's daughter.

Burden of proof

- The burden of proof of a custom of Hindu Law which is derogatory to that law is upon the person who asserts it. Conversely, when a custom has been proved, the burden of proving its discontinuance lies on the party who alleges such discontinuance.

Modern Sources

(1) Justice, equity and good conscience

- In the absence of any specific law in the Smriti, or in the event of a conflict between the Smritis, the principles of justice, equity and good conscience would be applied.
- The Supreme Court has observed in **Gurunath v. Kamlabai (A.I.R. 1955 S.C. 206)**, in the absence of any clear Shastric text, the Courts have the authority to decide cases on principles of justice, equity and good conscience.

(2) Precedent

Precedent is called to be a source of Hindu Law in two sense:-

Firstly:- All the important principles and rules of Hindu Law have now been embodied in case law. In such matters, recourse to original sources is not necessary. Reference to leading decision is enough. In this sense, precedent or case law is the source, by and large, of most of the law rules and principles of Hindu law.

Secondly:- Precedent is a source of law in the sense that by the process of judicial interpretation, doctrines, principle and rules of law stand modified or altogether new principles, doctrines and rules have been introduced in the body of Hindu Law.

(3) Judicial decisions

- Judicial decisions on Hindu Law are sometimes spoken of as a source of law. Almost all the important points of Hindu Law are now to be found in the law reports and to this extent it may be said that the decisions on Hindu Law have superseded the commentaries.
- In **Shri Krishna Singh v. Mathura Ahir, (1981) 3 S.C.C. 689**, it was observed that in applying Hindu law, the Judge should not introduce his own concepts of modern times, but should enforce the law as derived from recognised and authoritative sources of Hindu law, i.e. Smritis and commentaries, as interpreted in the judgments of the various High Courts, except where such law is altered by any usage or custom, or is modified or abrogated by statute.

(4) Legislation

- Several enactments had come into force with the coming of British rule in India, and kept coming after the British departure. These legislative enactments which declare, abrogate or modify the ancient rules of Hindu Law, thus form an additional modern source of Hindu Law.

- The **Hindu Law Committee**, appointed in 1941, recommended that this branch of the law should be codified in gradual stages. However, the most important enactments were those which came in force 1955 and 1956, namely the Hindu Marriage Act, the Hindu Minority and Guardianship Act, the Hindu Succession Act, Hindu Adoption and Maintenance Act.
- Several amendments have been made in the four principal Acts referred to above. Notable amongst such amendments was the one passed in 1976, which has radically modified in Hindu Marriage Act, as for instance, by introduction, for the first time amongst the Hindus, the concept of divorce by mutual consent.

SCHOOLS OF HINDU LAW

- There are two main schools of Hindu Law, the **Mitakshara** and the **Dayabhaga**. The Mitakshara (literally meaning "a concise work") is a running commentary on the code of **Yajnavalkya**. It has been written by **Vijnaneshwar** (11th century) and prevails in all parts of India, except in Bengal. The Dayabhaga School, which is followed mainly in Bengal, is not a commentary on any particular code, but is a digest of all the codes. It has been written by **Jimutavahana**, 12th century. It may also be noted that the Mitakshara is the orthodox school, whereas the Dayabhaga (or the Bengal school, as it is sometimes called) is the reformist school of Hindu Law. The Dayabhaga School is considered to be a dissident school of the old Benares School.
- The Dayabhaga is not divided into any sub-schools. However, the Mitakshara is sub-divided into four schools prevailing in different parts of India. These different schools have the same fundamental principles, but differ in matters of details, especially with reference to the topics of adoption and inheritance. These four sub-schools are as follows:-
 - (a) The **Benares School**, which prevails in northern and north-western India except in rural Punjab where its authority has been considerably modified by customary law. The main authorities of the school are: the *Virmitrodaya* and the *Nirnaya Sindhu*.
 - (b) The **Mithila School**, which has most of its followers in Bihar. The main authorities are: the *Vivada Chintamani*, the *Vivada Ratnakara*, the *Madana Parijata* and the *Vyavahara Mayukha*.
 - (c) The **Dravida or Madras School**, which prevails in southern India. The principle authorities are the *Smriti Chandrika*, the *Parashara Madhaviya*, the *Saraswati Vilasa* and the *Vyavahara Nimaya*.
 - (d) The **Maharashtra or Bombay School**, which prevails in western India. The main authorities of the school are: the *Viramitrodaya* and the *Nirnaya-Sindhu*.

The differences between the Mitakshara and Dayabhaga Schools: The fundamental points of difference between the Mitakshara and Dayabhaga Schools of law may be summarised as follows:

Mitakshara

(1) **As regards Joint Property**
 Right to property arises by birth (of the claimant); hence the son is a co-owner with the father in ancestral property. After the commencement of the Hindu Succession (Amendment) Act, 2005, the daughter of a coparcener is also a coparcener.
 Father has a restricted power of Alienation, and son can claim partition even against the father.
 The interest of a member of the Joint family would, on his death, passed to the other members by survivorship. Section 6(3) of the Hindu Succession Act, as substituted by the Hindu Succession (Amendment) Act, 2005 Abolishes the principle of survivorship.

(2) **As regards Alienation**

Dayabhaga

Right to property by death (of the last owner); hence son has no right to ancestral property during father's lifetime.

Father has absolute power of alienation and son cannot claim partition or even maintenance.
 The interest of every person would, on his death, pass by inheritance to his heirs, like widow or daughters.

Members of joint family cannot dispose of their shares while undivided.

(3) As regards Inheritance

The principle of inheritance is

Consanguinity (i.e., blood-relationship).

But cognates are postponed to agnates.

(4) As regards Doctrine of Factum Valet

A fact cannot be altered by hundred texts.

It is recognized to a very limited extent.

Any member of joint family may sell or give away his share even when undivided.

The principle of inheritance is spiritual efficacy (i.e., offering of pandas).

Some cognates, like sister's sons are preferred to many agnates.

Doctrine of factum valet is fully recognized.

Besides the above points, the other basis of difference between Mitakshara and Dayabhaga arose out of their differences in the meaning of the word "Sapinda". According to Dayabhaga 'Sapinda' means of the same 'pinda' means a ball of rice which is offered by a Hindu as obsequies to their deceased ancestors. The term 'Sapinda' thus connotes those related by the duty of one to offer 'pinda' to the other. On the other hand, Vijnaneswara defined 'Sapinda' relationship as the relationship arising between two persons through their being connected by particles of one body.

This fundamental difference in the term "Sapinda". Resulted in the formulation of the rules of law, which were in material respect quite distinct from each other.

Chapter – 3

HINDU MARRIAGE ACT 1955

SYNOPSIS

1. Concept and nature of Marriage
2. Ceremonies and Registration of Marriage
3. Conditions for a valid Marriage
4. Restitution of conjugal Rights
5. Void and voidable Marriages
6. Judicial Separation and Divorce
7. Children of void and voidable Marriages

General Introduction

The Hindu Marriage Act came into force on 18 May 1955. It amends and codifies the law relating to marriage among Hindus. Section 2 rules that the Act applies to any person who is a Hindu by religion in any of its forms and developments. Section 4 is of vital importance and gives an overriding effect to the provisions of the Act. It abrogates all the rules of the law of marriage hitherto 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 within the Act. The Act also supersedes any other law, contained in any Central or State legislation in force immediately before it came into operation in so far as such legislation is inconsistent with the provisions contained in the Act. Rules relating to matters for which no provision is made are not, however, overridden by the Act. So also, matters affecting marriage and divorce expressly saved from the operation of Act continue to be governed by previous law. Thus, for instance Sec. 29 (4) lays down in terms that:

Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act 1954 (43 of 1954), with respect to marriages between Hindus solemnised under that Act, whether before or after the commencement of this Act.

Concept and Nature of marriage

Marriage is the very foundation of a stable and civilized society. Even in uncivilized or tribal societies it is recognized in a subtle yet explicit way. Marriage is one of the essential sanskars for every Hindu. Under Hindu Law marriage is a sacrament and not a mere social legal contract. It is not performed for mere emotional gratification but is regarded as part of the life of the soul.

The sacramental marriage has three characteristics-(i) permanent (ii) eternal union (iii) holy union. According to Manu husband and wife are united to each other not merely in this life but even in the other world after death. Its implication has been that widow remarriage as a rule was not recognized in Hindu Law it was only in exceptional cases woman allowed to abandon her husband and take another.

The modern concept of marriage as a contract is an outcome of industrial revolution, its ideas of liberty and equality. Today it is an established notion of the western family law that marriage in order to be effective must be an agreement voluntarily entered into by both the parties. The consent of parties thus plays an important part in the formation of marriage contract.

The Hindu Marriage Act 1955 has reformed Hindu Law of marriage. Thus the person married may be a minor or unsound mind. If the marriage is duly solemnized is valid marriage (sec. 5). Under contract Act the contract of a minor or of a person of unsound mind is void. U/s 12 of HMA marriage is voidable if consent was obtained by force or fraud but it does not lay down that if the consent was not obtained the marriage is voidable. The marriage will continue to remain valid.

Sacrament or contract ?

By recognition of divorce and widow re-marriage the first two characteristics of sacramental marriage have been destroyed. However the third characteristic is still retained. In most of the Hindu marriages a

sacred or religious ceremony is still necessary. But third characteristics of the sacrament marriage is of least importance.

Conclusion: The Hindu marriage has not remained a sacramental marriage and also not become a contract though it has semblance of both. It has a semblance of a contract as consent is of some importance. It has a semblance of a sacramental ceremony is still necessary. However unlike Muslim Law marriage a Hindu marriage does not have the contractual procedural form ie why it is not proper to call a Hindu Marriage a contract. It can be called a socio-religious act.

Ceremonies and Registraion of marriage

Section 7: Ceremonies for a Hindu Marriage:- If there are certain religious ceremonies of marriage, the observance of such ceremonies can not overlooked by the application of the doctrine of factum valet. Sub section (1) of section 7 lays down that a Hindu marriage may be solemnized in accordance with the rites and ceremonies of either party to it. The word "may" has been used here in the sense of "must".

Sub-section (2)---where such rites and ceremonies includes the sapatapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes binding when the seventh step is taken.

Section 8: Registration of Hindu marriages

The section enacts that the state government may make rules relating to the registration of marriages between two Hindus solemnised in the ceremonial form. The obvious and immeasurable advantage of registration is that it facilitates proof of the factum of marriage in dispute cases. The Act does not lay down any rules relating to registration but merely empowers the state government to make rules providing for registration of Hindu marriages. It also empowers the state government in its discretion to provide that such registration shall be compulsory. The rules so framed must not in any manner be contrary to any provision of the Act and if they contravene any such provision, they would be ultra vires and of no binding effect.

In Smt. Seema v. Ashwani Kumar supreme court ordered compulsory registration of marriage irrespective of religion. It also gave the necessary directions to central as well as state Governments to provide sufficient law so as to register compulsorily all the marriages.

The validity of any Hindu marriage shall in no way be affected by the omission to make the entry in the marriage register. It may be noted that registration of marriage under this section simply provides for the proof of a lawfully solemnised Hindu-marriage. If there is no marriage, the registration certificate as such can not validate the marriage (Shaji v. Gopinath AIR 1995).

Conditions for a valid marriage Sec.5

1. **Monogamy sec 5(i) :-** Monogamy means that one is permitted to have only one wife or husband at a time. The condition laid down in this clause for a valid marriage is one of those conditions, contravention of which would make the marriage void u/s 11 of the Act. Section 17 would further render the offending party liable for prosecution u/s 494 and 495 IPC.

In Sarla Mudgal v. Union of India (1995, Supreme Court). The bigamy was in question. The husband already married under Hindu Law embraced Islam and Solemnised a second marriage under Muslim Law. The Supreme Court held that the second marriage would be invalid because unless and until the first marriage is dissolved by a decree under Hindu Marriage Act, the second marriage during subsistence of the first one would be in violation of the Hindu Marriage Act which strictly professes monogamy.

Lily Thomas v. Union of India, Supreme court held that the husband is guilty of the offence of bigamy u/s 494 IPC

2. **Sanity Sec 5 (ii) :-** It is necessary that the parties to marriage are of sound mind and are not suffering from any mental disability so as to be unfit for giving a valid consent at the time of marriage. Mental incapacity of any nature affecting the very purpose of marriage but marriage solemnized in contravention of this condition is not void, it is voidable u/s 12 of this Act.
3. **Age of parties to marriage Sec 5(iii) :-** Under this condition the minimum age for marriage is fixed. The bridegroom should have completed the age of 21 years and the bride the age of 18 years at the time of marriage. However the marriage in contravention of this condition is neither void nor voidable.

Section 18 of the Hindu Marriage Act provides that anyone who procures a marriage for himself in contravention of sec.5 (iii) shall be punished with up to 2 years imprisonment or with a fine up to one lakh rupees. The Prohibition Of Child Marriage Act 2006 provides for the prohibition of solemnization of child marriage and for the matters connected therewith or incidental thereto. The Child Marriage Restraint Act, 1929 has been repealed.

4. Beyond prohibited degree sec.5 (iv):- This clause prohibits marriage between parties who are within the prohibited degree of relationship with each other. According to 3 (g). 'Degrees of prohibited relationship' – two persons are said to be within the 'degrees of prohibited relationship'

- If one is a lineal ascendant of the other; or
- If one was the wife or husband of a lineal ascendant or descendant of the other; or
- If one was the wife of the brother or of the father's or mother's brother of the other; or
- If the two are brother and sister, uncle and niece, aunt and nephew, or children or brother and sister or of two brothers or of two sisters.

Explanation – For the purposes of clauses (f) and (g), relationship includes –

- Relationship by half or uterine blood as well as by full blood;
- Illegitimate blood relationship as well as legitimate;
- Relationship by adoption as well as blood; and all terms of relationship in those clauses shall be construed accordingly.

Section 18 of Hindu Marriage Act provides simple punishment upto one month or with fine upto 1,000 rupees for contravention of this condition.

But if the "custom" or "usage" governing each of the parties to the marriage allows the marriage within the degrees of prohibited relationship then such marriage will be valid and binding.

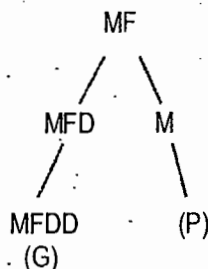
5. Beyond Sapinda relationship 5 (v) :- The word 'Sapinda' etymologically means. One of the 'same pinda.' In the Hindu texts the word has been used in two senses, firstly it means a relation connected through the same body and secondly relation connected through funeral obligation of food.

Section 5 clause (v) lays down as one of the conditions of valid marriage that *the parties must not be sapindas of each other unless there is a custom or usage governing each of them which permits of a marriage between them.*

The general rule is that no valid marriage can take place between two persons who are *sapindas* of each other as defined in this clause. This clause read with the **Explanation** added at the end of the section principally rules that:

- Sapinda* relationship extends as far as the third generation in the line of ascent through the mother in case of both the parties;
- Sapinda* relationship extends as far as the fifth generation in the line of ascent through the father in case of both the parties;
- Sapinda* relationship may subsist in case of both the parties through the father or in case of both through the mother; or it may subsist in case of one of them through the father and in case of the other through the mother.
- The line is traced upwards in case of both the parties counting each of them as the first generation; the generations in the line of ascent whether three or five are to be counted inclusive of the persons concerned and the common ancestor or ancestress.
- Sapinda* relationship includes relationship by half or uterine blood as well as by full blood and by adoption. It also includes both, legitimate and illegitimate blood relationship.

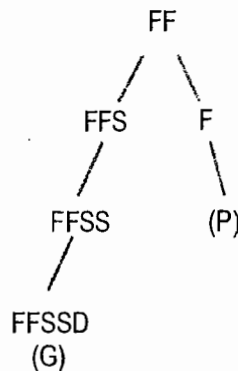
Exmple1. G is P's mother's sister (ie mausi's) daughter



P traces his relationship to MF (Mother' father)

Common ancestor through his mother M and G (MFDD ie Mother's Father's Daughter's Daughter) traces her relationship through her mother (MFS). Both being within three degrees to the common ancestor in the maternal line are sapindas to the common ancestor and therefore are sapinda to each other.

Example 2:- G is P's grandfather's son's son's daughter



Both G and P trace their relationship through paternal line. The common ancestor is F.F. They both are sapindas to the common ancestor. Each being within five degrees on paternal side and therefore sapindas to each other.

Restitution of conjugal rights – Section 9

The foundation of the right to bring a suit for restitution of conjugal rights is the fundamental rule of matrimonial law that one spouse is entitled to the society and comfort – *consortium* – of the other spouse and where either spouse has abandoned or withdrawn from the society of the other without reasonable excuse or just cause, the court should grant a decree for restitution.

The expression “withdrawal from the society of other” involves a mental process besides physical separation. The Act of temporarily leaving matrimonial home would not amount to withdrawal from the society of the other when there is no intention to withdraw permanently.

Each case must depend on its facts and circumstances and it is not possible to give an exhaustive statement of law what may or may not constitute “reasonable excuse”.

But the following grounds have been held by court to be valid considerations for living separately, disentitling the other spouse to a decree for restitution of conjugal rights:-

- (a) Grossly indecent behaviour
- (b) Agreement to live separately
- (c) Imputation of unchastity persisted by the husband
- (d) Apprehension of violence due to development of insanity
- (e) -----etc.

Section 9 must be read with section 23 of this Act which imposes on court the duty to inquire into and pass a decree *inter alia* for restitution of conjugal rights after satisfying itself about certain matters.

Constitutionality of section 9 of the Hindu Marriage Act:-

In I. Sareetha v. Venkata Subbaiah—The court has observed that the remedy of RCR provided under section 9 of the Act is a savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 and, and is arbitrary void as to offending Article 14 of the constitution.

Now the Supreme court has settled the law with regard to the constitutionality of section 9 of this Act that section 9 of this Act can not be said to be violative of Article 14 and 21 of the constitution. If the purpose of decree of restitution of conjugal rights is understood in proper perspective and if the method of its execution in cases of disobedience is kept in view (*Saroj Rani v. Sudharshan Kumar*).

The effect of the decree is that certain mutual rights and obligations arising from the marriage are as if they were suspended and the rights and duties prescribed by the decree are substituted therefore. The decree does not sever or dissolve the marriage tie, which continues to subsist. It affords an opportunity for reconciliation and adjustment. It may fall by a reconciliation of the parties in which case, the rights of respective parties, which flowed from the marriage and were suspended, are restored. Where there is no reconciliation and cohabitation is not resumed, it serves after one year of the passing of it as the basis for the dissolution of the marriage by a decree of divorce [Section 3 (1A)]. Although in a sense, the decree for judicial separation is provisional and conditional, the court cannot while passing the decree impose any terms on the parties as to the nature or duration of its operation.

A petition for judicial separation cannot obviously lie if the marriage between the parties was void *ab initio*.

Void and Voidable marriages:-

Void Marriages – Section 11

Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5.

A marriage may be solemnised in the sense that the parties to it have gone through the customary rites and ceremonies of either party thereto as laid down in section 7. However, such a marriage to be valid must in any event fulfil three of the conditions enacted in section 5. The three conditions are:

- (1) Neither party has a spouse living at the time of the marriage [clause (i)];
- (2) The parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two; [clause iv]
- (3) The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two section 11 is not applicable to marriage solemnized before the commencement of the Hindu Marriage Act, 1955 though such marriage may be void.[clause (v)].

The present section in terms lays down that non-fulfilment of any one of these conditions renders a marriage solemnised after the commencement of the Act, null and void from its inception, and either party to such marriage can obtain decree of nullity from the court.

A decree of nullity may be passed by the court at the instance of either party to the marriage solemnised after the commencement of the Act on the ground that the marriage was in contravention of any of the three conditions mentioned in the section. Either party to the subsequent marriage can seek relief under this section and not necessarily the aggrieved party. i.e. first wife during the subsistence of whose marriage the husband takes second wife has no right to move for declaration of nullity of the subsequent marriage. However under Specific Relief Act such a petition could be moved by the wife of first marriage for declaration that marriage of her husband with second is illegal and void. A marriage which does not fulfil these three conditions is no marriage at all in law being void *ipso jure* and it is open to the parties even without recourse to the court to treat it as a nullity [see sections 5 (i), (iv) and (v)]. Neither party is under any obligation to seek a declaration of nullity. It may be asked for the purpose of precaution or record.

Voidable Marriages – Section 12

A voidable marriage is a perfectly valid marriage so long as it is not avoided. A voidable marriage can be avoided only on the petition of one of the parties to the marriage. If one of the parties dies before the marriage is annulled no one can challenge the marriage. The marriage will remain valid for ever and children of such marriage are legitimate. But once voidable marriage is annulled the decree is given retrospective effect from the date of the marriage. The marriage is deemed to have been void for all purposes from its inception and parties are deemed to have never been husband and wife and children are deemed to have been illegitimate (subject to section 16 which lays down that the children of annulled voidable and void marriages are legitimate children (Rameswari Devi v. State of Bihar AIR 2000 SC)

A marriage may be annulled by a decree of nullity under section 12 on any of the following grounds namely:-

(a) **Impotency section 12(1) (a)** : Impotency means practical impossible of consumation of marriage i.e. inability to perform or permit performance of the complete act of sexual intercourse u/s 12 (1) (a) the respondent must be impotent at the time of consumation of marriage. However mere barrenness or sterility does not amount to impotency. The Supreme Court in Digvijay Singh v. Pratap Kumari 1970 has given the legal meaning of impotency as a physical or mental condition which makes consumation of marriage a practical impossibility.

If impotency can be cured by medical treatment or surgery it would not amount to impotency unless the respondent refuses to undergo treatment (M vs M. 1956)

(b) **Unsoundness of mind section 5 (ii)**: The Hindu Marriage Act still doesnot say that a valid consent is necessary for marriage. But a marriage which is in contravention of sec 5 (ii) is voidable u/s 12 (i) (b). The mental conditions specified in the clauses relate to pre-marriage conditions and not to post-marriage mental conditions for which other relief like divorce is available. The crucial time is the "time of the marriage".

(c) **Consent obtained by force or fraud section 12 (i) (c):** Clause (c) of section 12 says that marriage is voidable on the ground that the consent of the petitioner or of guardian has been obtained by force or fraud. Earlier Child Marriage Restraint (Amendment) Act, 1978. Which has been repealed and now prohibition of child marriage act, 2006 has fixed marriageable age of a groom at 21 years and that of the bride 18 years, therefore the question of consent of guardian is not relevant. But as the section applies to marriage solemnized before the Amendment Act 1978 and Act of 2006 also. It was necessary to refer to a case of consent of guardian also. If the consent of the petitioner or guardian in the marriage of petitioner was obtained by force or by fraud (a) as to the nature of the ceremony or (b) as to any material fact or circumstances concerning the respondent the marriage is voidable. Force means not only the actual use of force but threat to use force also. Fraud in matrimonial law has a technical meaning. It is not every misrepresentation or concealment which amounts to fraud but should relate to nature of ceremony or any material fact or circumstance concerning respondent. (Asha Qureshi v. Afaq Qureshi 2002 M.P.)

(d) **Pregnancy of the wife at the time of marriage :** In a Petition for annulment of marriage on this ground the petitioner has to prove beyond reasonable doubt that the respondent was pregnant by someone else at the time of marriage. Wife's admission of pregnancy plus the fact that husband had no access to her before marriage is sufficient to establish her pre-marriage pregnancy.

Medical evidence may also be given. In Baldev Raj v. Urmila Kumari (1979 SC) The testimony of the doctor clearly established that the respondent wife was pregnant long before the date of marriage. The testimony of the doctor was accepted.

Void and Voidable Marriage Distinction

Void Marriage	Voidable Marriage
1. A void marriage is void ab initio and is nullity. 2. It is no marriage so it is not necessary that a decree declaring a void marriage as void is passed. 3. The parties to a void marriage may perform another marriage and will not be guilty of bigamy. 4. Under section 11, a marriage solemnised after the commencement of the Act shall be null and void if contravention of clauses (i), (iv) and (v) of section 5	1. It is valid for all purposes unless it is annulled. 2. A voidable marriage will remain a valid marriage till a decree annulling it is passed. 3. Second marriage during the subsistence of voidable marriage and before it is annulled by a decree will be considered bigamous one. 4. Under section 12 any marriage may be annulled by a decree of nullity whether solemnized before or after the commencement of the Act.

Judicial Separation & Divorce

A judicial (or legal) separation is one which permits the parties to a marriage to live apart. If a decree for judicial separation is passed by a competent Court, it is no longer obligatory for either party to cohabit with the other.

Such a decree does not, however, dissolve the marriage or sever the matrimonial ties between the parties. Yet, it is equally true that certain mutual rights and obligations arising from the marriage are, so to say, suspended when such a decree is passed. Under the Act, a Petition for divorce can be presented on the ground that cohabitation has not been resumed for a period of one year (or more) after the passing of a decree for judicial separation.

Formerly, Section 10 provided six grounds on which either party to a marriage could present a Petition for judicial separation. However, when Section 10 was amended in 1976, these six grounds were deleted, and it is now provided that such a Petition can be presented on any of the grounds mentioned in Section 13 (1) (which are the grounds for divorce available to both the parties to a marriage), and in the case of the wife, also on any of the grounds specified in Section 13 (2) (which are the grounds for divorce available only to the wife).

(A reference may be made to Section 13, where the grounds for divorce – and now, also the grounds for judicial separation – are discussed at length.)

Effect of the decree [Section 10 (2)]: As stated above, when a decree for judicial separation has been passed, it is no longer obligatory for the Petitioner to cohabit with the Respondent. However, the Court has the power to rescind such a decree on an application by either party, if it considers it just and reasonable to do so.

It may be noted that the statutory relief of judicial separation is a discretionary one. The Court is not bound to grant such relief only because one of the prescribed grounds exists. Thus, if the Petitioner has connived at the adultery of the Respondent, the Court may refuse to pass a decree under Section 10. Similarly, if desertion by the Respondent is due to the Petitioner's cruelty, such relief may be refused by the Court.

Divorce

Divorce was unknown to general Hindu Law as marriage was regarded as an indissoluble union of husband and wife. The textual Hindu law does not recognize a divorce. Although Hindu law does not contemplate divorce. Yet it has been held that where it is recognized as an established custom it would have the force of law. In Bombay, Madras and Saurashtra it was permitted by legislation.

Hindu Marriage Act, 1955 has introduced vital and dynamic changes in the Hindu Law of Marriage and Divorce. However, "even if the Act seems to break violently with the past, it has to be conceded that it is characteristic of the age which is one of fast changing social, economic and political theories. The subject is dealt with in section 13, 13-B, 14 and 15 of the Act.

Section 13---Divorce

A marriage may on, a petition presented by either the husband or the wife be dissolved by a decree of divorce on the grounds mentioned in this Act.

The following eleven grounds of divorce available to either spouse, i.e. husband or wife:

- — — — — 4. **Adultery**, namely, that the other party has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse.

Formerly, to obtain a divorce on the ground of adultery, the Petitioner had to prove that the other party was living in adultery, which expression would cover a more or less continuous and habitual course of action, and not isolated acts of immorality. However, after the 1976 Amendment, in view of the above language, even one single and isolated act of infidelity would be a sufficient ground for obtaining divorce.

The term adultery has been defined as consensual sexual intercourse between a married person and another of the opposite sex during the subsistence of the marriage.

An attempt to commit adultery does not, however, amount to adultery, and cannot, therefore, be the basis of a petition for judicial separation.

Direct evidence of adultery is not necessary, and the nature of the act is such that it would not even be reasonable to expect any direct evidence. The Courts have, therefore, observed that circumstantial evidence is all that can be expected in such cases. The time and place of adultery, therefore, need not be proved. (*Barker v. Barker, AIR-1955 Mad 103*)

Thus, the proof which is required to prove adultery is not proof "beyond a shadow of doubt".

Evidence of sheer opportunity is, however, not enough. There must be something more than opportunity, as for instance, evidence of inclination or passion. In several cases, where the evidence consisted of entries in hotel register and of the respondent being seen in a room with a woman, the Courts have insisted on further evidence of a background of adulterous association. Thus, apart from evidence of opportunity, some evidence of disposition on the respondent's part is also required to be adduced.

2. **Cruelty**, namely, that the other party has, after the solemnization of the marriage, treated the petitioner with cruelty.

The legal concept of cruelty cannot be defined with any degree of precision. It would indeed be unsafe to attempt any comprehensive definition which would cover all cases of "cruelty".

Cruelty may be brutal or subtle. It may be physical or mental. It may be by words or by gestures or even by mere silence. Cruelty refers to "conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger."

(*Russel v. Russel, 1897 AC, 395*)

As observed by the Supreme Court, mental cruelty can be defined as "that conduct which inflicts upon the other party such mental pain and suffering as would make it impossible for that party to live with the other." (*Bhagat v. Bhagat, AIR 1994 SC 710*)

In **Bhagat v. Bhagat** (above), it was held that if the wife calls her husband (who, incidentally, was an Advocate) a lunatic, and further alleges that a streak of insanity ran through his entire family, such conduct would amount to mental cruelty.

The Rajasthan High Court has held that a wife's allegation that her husband is impotent, although only by way of an abuse, is a serious stigma on the husband's manhood, and is bound to cause great mental agony and pain to the husband. This would, therefore, amount to act to cruelty. (**Shanti Devi v. Raghav Prakash, AIR 1986 Raj 13**)

In **Shanti Devi's Case** (above), the wife had also burnt the thesis of her husband, who was a lecturer, and this too was held to be a form of gross cruelty on the wife's part.

In one case, a wife of an Army Officer sent a letter to his superior, falsely complaining about his affair with a woman for more than three years, and asking for his transfer to a field area, and that too, on a high altitude. Copies of the letter were also sent to the President, Prime Minister etc. The Court held since the charge of adultery was proved to be baseless, such conduct was mental torture and humiliation of an extreme kind, and amounted to cruelty. (**Jalan v. Jalan, AIR 1988 All 239**)

The Supreme Court has also held that cruelty also includes unintentional cruelty, as for instance, where there are repeated demands for dowry by the husband or his relatives. (**Shobha Rani v. Madhukar Reddi, AIR 1988 SC 121**)

The Courts have held that drunkenness, by itself, is not cruelty. But, persistent drunkenness, despite several warnings to the effect that such conduct is injuring the health of the other spouse, may, in a given case, amount to cruelty.

Thus, the Delhi High Court has held that although excessive drinking is not a ground for divorce under the Hindu Marriage Act, yet, if it is indulged in by a spouse despite strong remonstrances by the other, to whom it could cause great anguish and distress, it could amount to "cruelty" for the purpose of a divorce under the Act. (**Rita v. Brij Kishore Gandhi, AIR 1984 Delhi 291**)

Similarly, although accusing the other spouse of infidelity would not, per se, amount to cruelty, malicious charges of adultery, persistently made in bad faith, may so amount in a given case.

In one case, where a husband publicly called his wife a "prostitute" and tried to wipe her vermilion mark (on the forehead at the parting of her hair) by dashing her against a wall, it was held that it amounted to cruelty. (**Saptami Sarkar v. Jagdish, 73 CWN 502**)

The Gujarat High Court has held that a wild and reckless allegation made by a husband that his wife was unchaste, would amount to mental cruelty under the Act. (**A v. B, AIR 1985 Guj 121**)

However, in another case (**Kamlesh v. Paras Ram, AIR 1985 Punjab & Haryana 199**), the High Court of Punjab and Haryana has held that making a false allegation of adultery is only an instance of "legal cruelty". However, unless it is also proved that such allegations were of such a grave character so as to cause danger to life, limb or health, (or at least, a reasonable apprehension of such danger), the relief of divorce, on the ground of cruelty, cannot be granted.

In another case, the wife was informed, when she was in Delhi that her husband had met with a serious accident in Assam. However, she did not bother to go and see him in Assam. Even when the husband was brought to Delhi, she did not go to see her ailing husband. On these facts, the Delhi High Court held that the wife was guilty of cruelty. (**Rajinder Singh Joon v. Tara Wati, AIR 1980 Delhi 213**)

The Supreme Court has observed that the concept of cruelty is fast changing. A set of facts which amount to cruelty in one case may not be regarded as cruelty in another case. The concept of cruelty is to be viewed against the background of the way of life of the parties, their economic and social condition, their culture, sense of values, etc. Therefore, precedents cannot always be relied upon. (**Shobha Rani v. M. Reddi, AIR 1988 SC 121**)

Dr. N.C. Dastane v. Mrs. S. Dastane 1975 SC Threat of wife to put an end to her own life, to set her house on fire and persistent abused husband and insulted his father amounted to cruelty.

In **Naveen Kohli v. Neelu Kohli 2006 SC** the Court examined the development and evolution of the concept of mental cruelty in matrimonial causes. Mental cruelty in section 13(1) (ia) means the Conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other.

Manisha Tyagi v. Deepak Kumar 2010 SC held that to constitute cruelty it is enough that conduct of one of parties is so abnormal and below accepted norm that other spouse could not reasonably be expected to put up with it.

Malathi Ravi, MD v. B.V. Ravi M.D. 2014 SC The requirement under section 13(1)(b) is either party has deserted the other party for a continuous period of not less than two year immediately preceding the presentation of the petition. If husband admitted to have once stayed with wife at wife's place for 2 days within period of 2 years immediately preceding presentation of divorce petition by him it was held desertion not established.

In **Narendra v. K. Meena 2016 SC** it was held that unsubstantiated allegations and the threats and attempt to commit suicide by wife amounted to mental cruelty, hence it is valid ground to dissolve the Marriage by a decree of divorce.

3. **Desertion**, namely, that the other party has deserted the petitioner for a period of not less than two years immediately preceding the presentation of the petition.

It has also now been clarified (by the added Explanation) that the term desertion means desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage.

The leading Indian case on desertion is **Bipin Chander v. Prabhawati (1956 SCR 838)**, where the Supreme Court discussed the term, quoting extensively from Halsbury's Laws of England. The principles laid down in this case have also been followed by later decisions of the Supreme Court and other Courts.

It has been held that if a husband creates circumstances which compel the wife to leave the house, it is the husband, and not the wife, who is guilty of desertion. (**Asha Handa v. Baldev Handa, AIR 1985 Del 76**)

It is now well-established that two factors must co-exist to establish secondly, this must be accompanied by the **animus deserendi**, i.e. the intention to desert. Both these ingredients must continue throughout the statutory period (i.e. two years or more).

The Supreme Court has held that there is no obligation on the deserted spouse to appeal to the other spouse to change his (or her) mind. Omission to make efforts for reconciliation does not debar a deserted spouse from claiming matrimonial relief. (**Lachman v. Meena, AIR 1964 SC 40**)

In one case, it was shown to the Court that the husband and wife were living separately from February, 1979. Although the husband was informed of their child's death (in September, 1979), he did not bother to attend the funeral. Likewise, he also neglected to pay the maintenance ordered by the Court. In the circumstances, the Court granted a divorce to the wife, on the ground of her husband's desertion. (**Om Wati v. Kishan Chand, AIR 1985 Del 43**)

It will be seen that one of the essential ingredients of desertion is the separation of one spouse from another. Thus, as a general rule, there can be no desertion when the parties are living together. However, it has been held, in an English case, that in exceptional cases, there may be desertion even if the husband and wife are living in the same dwelling place, if there is such a forsaking and abandonment by one spouse of the other that the Court comes to the conclusion that the spouses have separate households. (**Baker v. Baker (1952) 2 All ER 248**)

It may be noted that desertion differs from other matrimonial offences (like adultery or cruelty) in that it does not consist of an act or a series of acts which are separate and distinct in themselves. Rather, it is an activity or course of conduct which must persist for the statutory period upto the presentation of the petition. If the period is broken, the broken periods cannot be added together to make a period of two years.

◆ Explanation of section 13 talks about constructive desertion when the one spouse creates a condition in which the other is compelled to leave the company and live separately, the spouse who left the company will not be guilty of desertion but who has created such situation will be guilty.

In **Savitri Pandey v. Prem Chandra Pandey 2002 SC** Desertion for the purpose of seeking divorce under the Act means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. Desertion therefore means withdrawing from the Matrimonial obligation that is not permitting or allowing and facilitating the cohabitation between the parties. Desertion is not a single act complete in itself it is a continuous course of conduct to be determined under the facts and circumstances of each case.

Ravi Kumar v. Julmi Devi 2010 SC In cases of desertion, the party alleging desertion must not only prove that other spouse was living separately but also animus deserendi on its part, that is intention to desert.

4. **Conversion**, namely, that the other party has ceased to be a Hindu by conversion to another religion.

Under the ancient, uncodified Hindu Law, there was no rule forbidding the subsistence of a marriage where one of the parties had ceased to be a Hindu. The Act now gives a right to the spouse who continues to be Hindu to obtain a divorce on the ground that the other spouse has ceased to be a Hindu by conversion to some other religion.

The term Hindu, as used in this clause, must be understood in the wide sense given to it in Section 2 of the Act, and would therefore include all Hindus, Buddhists, Jains and Sikhs. Thus, a person will continue to be a Hindu even if he is converted from, say, the Sikh to the Buddhist or Jain faith.

Further, a person does not cease to be a Hindu merely because he is an ardent admirer of some other religion, or if he professes a theoretical allegiance to such other religion. If, however, he abdicated the Hindu faith by a clear act of renunciation, and formally converts himself to the other religion, he would cease to be a Hindu under this clause.

5. **Insanity**, namely, that the other party has been incurably of unsound mind or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the Respondent.

As observed earlier under Section 5, one of the essential conditions of a valid Hindu marriage is that neither party should be an idiot or a lunatic at the time of the marriage. This section deals with supervening unsoundness of mind, and makes it a ground for divorce.

The onus of proving unsoundness of mind will be on the Petitioner, i.e. the spouse seeking divorce on this ground.

Further, the terms "mental disorder" and "psychopathic disorder" have also been defined as follows:

- (a) The expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind, and includes schizophrenia.
- (b) The expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence), which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment.

Dealing with this ground of divorce, the Supreme Court has cautioned that mere branding of a spouse as schizophrenic is not sufficient. The degree of mental disorder of the spouse must be proved to be such that the other spouse cannot reasonably be expected to live with him or her. (**Gupta v. Gupta, AIR 1988 SC 2260**)

In England, the Matrimonial Causes Act, 1950, recognises incurable unsoundness of mind as a ground for divorce, and requires that the Respondent should have been taking care and treatment continuously for at least five years before the divorce Petition.

6. **Leprosy**, namely, that the other party has been suffering from a virulent and incurable form of leprosy.

Leprosy was "the dreaded disease" once upon a time. However, modern medicine has taken great strides in the direction of its treatment, and with the new drugs that are now available, a scientific approach is warranted when answering the question whether in any given case, leprosy is virulent or not.

Before the 1976 Amendment, it was necessary that such leprosy should have existed for at least three years before the presentation of the petition. This minimum requirement of three years is no longer necessary.

7. **Venereal disease**; namely, that the other party has been suffering from venereal disease in a communicable form.

Before the 1976 Amendment, it was necessary that such venereal disease should have existed for at least three years before the presentation of the petition. This minimum requirement is no longer necessary.

8. **Renouncing the world**, namely that the other party has renounced the world, by entering any religious order.

Under the ancient Hindu Law, if a person entered a religious order, renouncing all worldly affairs, his action would tantamount to civil death. Under the Act, his action would afford a ground of divorce to the other spouse.

Two essential conditions have to be satisfied before a Court can grant divorce under this clause, viz.:-

- (1) Such person must have renounced the world; and
- (2) Such person should have entered any religious order.

Both these requirements must co-exist, and the presence of one of them will not suffice.

It is to be remembered that a person cannot be said to have adopted a religious order merely by declaring himself to belong to such order. Thus, for example, if a person calls himself a sanyasi, puts on clothes of a particular colour, and shaves his head; he does not thereby become a sanyasi. He will be deemed to have entered that order only if he has also performed the necessary rites and ceremonies prescribed for this purpose by the shastras.

9. Presumption of death namely, that the other party has not been heard of as being alive, for a period of at least seven years, by persons who would naturally have heard of him, had he been alive.

It is a well-established legal presumption that a person can be taken to be dead, if he is not heard of for a period of seven years or more, by those persons (like his near relatives and friends) who would have naturally heard of him, had he been alive. This is a presumption of legal convenience, and has been adopted by the Indian Evidence Act also.

Under this clause, the fact that for a long period of seven years (or more), the Respondent has been absent from the Petitioner, and the Petitioner (and other close relatives) have not heard of him at all, should normally be sufficient evidence that such a person is dead, and a divorce ought to be granted to the Petitioner.

It is to be noted that a decree of divorce granted under this clause is valid and effective, even if it is subsequently discovered that the Respondent was in fact alive when the decree was passed.

10. Decree of judicial separation, Section 13 (1-A) namely, that a decree for judicial separation between the parties has been passed, and there has been no resumption of cohabitation for a period of at least one year after the passing of such decree.

As pointed out earlier, the scheme of the Act is not to encourage divorce or to enforce conditions which may cause hardship to the parties. Therefore, a period of one year has been fixed, and this would give maximum opportunities of mutual adjustment after a decree of judicial separation. If cohabitation is not resumed during this period, the marriage ought to be regarded as having been a complete failure and a decree for divorce can be granted to either party to such a marriage.

It is to be noted that this clause does not confer any absolute or unrestricted right on a spouse to obtain a divorce. Under Section 23, the Court would still have to be satisfied that there is no bar of any kind (mentioned in Section 23) to the granting of such relief. Thus, for example, if the Court is satisfied that the Petitioner is taking advantage of his own wrong, the Court will decline to grant a divorce, even if the case falls under this clause.

Under this clause, either party to the marriage, and not necessarily the one who had obtained the judicial separation, can present a divorce petition.

Originally, the period prescribed under this clause was two years. This was reduced to one year by the 1976 Amendment.

11. Decree of restitution of conjugal rights, namely, that a decree for restitution of conjugal rights between the parties has been passed, but there has been no restitution of conjugal rights for a period of at least one year after the passing of such a decree.

Under this clause also, either spouse can present a divorce petition: In other words, this right is not given only to spouse who had obtained the decree for restitution of conjugal rights.

Originally, the period prescribed under this clause was two years. This was reduced to one year by the 1976 Amendment.

12. Grounds available to wife only

In addition to the eleven grounds of divorce discussed above, the following four additional grounds are available only in those cases where the wife applies for a divorce:

1. **Bigamy**, namely, that in the case of a marriage solemnised before the commencement of the Act, the husband has married again before such commencement, or that any other wife of the husband, married before such commencement, was alive at the time of the Petitioner's marriage.

This ground can obviously exist only in the case of a marriage solemnised before the Act came into force. As regard marriages solemnised after the Act, under Sections 5 and 11, such marriages would be bigamous and void ab initio, and there would naturally be no question of divorce in such cases.

It is also necessary under this clause that the other wife should be alive at the time when the Petition is presented to the Court.

It will be seen that this remedy is available to a wife, irrespective of the fact that the other marriage had taken place before or after the marriage of the petitioner wife with him. Thus, the remedy is available to the first as well as the subsequent wives.

2. Rape, sodomy or bestiality, namely, that the husband has been guilty of rape, sodomy or bestiality after the solemnisation of the marriage.

Rape refers to the ravishing of a woman, whereas sodomy and bestiality refer to carnal intercourse by a man against the order of nature with another man or with an animal, respectively. Although these are also offences under the Indian Penal Code, a divorce would be granted even if the husband has not been convicted of any of these offences in any criminal proceedings.

3. Decree of order awarding maintenance, namely, that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956, or in a proceeding under Section 125 of the Criminal Procedure Code, 1973, a decree or order has been passed against the husband awarding maintenance to the wife (notwithstanding that she was living apart), and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or more.

4. Repudiation of the marriage, namely, that the marriage was solemnised before the wife attained the marriage of fifteen years, and that she has repudiated the marriage after attaining that age, but before attaining the age of eighteen years. A petition on this ground can be obviously filed after she attains the age of eighteen years.

For the purposes of this ground of divorce, it is immaterial whether the marriage was consummated or not. However under Muslim law, it is also essential that the marriage had not been consummated before she repudiated it. The proof beyond reasonable doubt is not applicable in matrimonial disputes.

5. Alternate relief in divorce proceedings (Section 13A), Section 13A of the Act inserted by the marriage laws (Amendment) Act 1976, lays down that in any proceedings under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on grounds mentioned in section 13 (ii) clause (iii), (vi) and (vii).

Divorce by mutual consent section 13B

Section 13B of Act, inserted by the marriage laws (Amendment) Act 1976. Section 13B lays down that a petition for divorce by mutual consent may be presented jointly by both the spouses with the following averments:-

- (a) that they have been living separately for a period of one year
- (b) they have not been able to live together
- (c) they have mutually agreed to live separately all the above conditions should be fulfilled before divorce can be granted.

It is not necessary that parties should be living under separate roofs. They might be living in the same house but not as husband and wife and there is a state of complete breakdown of marriage.

After the presentation of petition, the parties are required to wait for six months though not for more than eighteen months, and then to move a motion in the court that divorce be granted, some courts hold that requirement of waiting for six months is mandatory. Some High courts do not share this view. Now trend to waive the waiting period of 6 months, considering the facts and circumstances of the cases.

The court observed that 6 to 18 months contemplated under sub section (2) of section 13B was inserted to give time and opportunity to the parties to reflect on their move and seek advice from relation and friends. In this transitional period one of the parties may have a second thought and change its mind not to proceed with the petition.

Sureshta Devi v. Om Prakash, The supreme court held that a party to the petition for divorce by mutual consent, can unilaterally withdraw his consent at any time till passing of the decree.

Ashok Hurra v. Rupa Bipin Zaveri, The supreme court has held that the surashtra Devi's decision that "consent can be withdrawn at any time before decree is passed are too wide and requires

considerations. In the above mention case wife had not withdraw her consent within 18 months, during the pendency of proceedings, the husband had contected another marriage and begot a child.

In this landmark decision the supreme court has dissolved the marriage under section 13B of Hindu Marriage Act by exercising its power under Article 142 of the constitution of India. So as to meet the ends of justice.

Anil Kumar Jain v. Maya Jain 2009 SC held that in the cases of divorce by Mutual Consent Normally consent of parties should subsist till passing of final decree on the petition and withdrawal of consent by one of the parties even after expiry of statutory period of six months would result in dismissal of the petition.

It was also held that irretrievable breakdown of Marriage is not a ground under section 13 or section 13B for grant of divorce, when proceeding under either S.13 or S.13B are before Supreme Court it can invoke the said doctrine and grant relief to the parties in exercise of extraordinary power under Article 142 to Convert proceeding under S.13 into one under S.13-B and grant decree for mutual divorce without waiting for statutory period of six months by applying doctrine of irretrievable breakdown of marriage. Except Supreme Court no other Court has power to grant relief by invoking doctrine of irretrievable breakdown of Marriage.

Hitesh Bhatnagar v. Deepa Bhatnagar 2011 SC it was held that in divorce by Mutual Consent under Section 13B, Consent can be withdrawn at any time before decree of divorce is passed. Non withdrawal of Consent before expiry of 18 Months is inconsequential. 18 Months period is specified only to ensure quick disposal of cases of divorce by Mutual consent and not to specify time period for withdrawal of consent.

Nikhil Kumar v. Rupali Kumar 2016 SC it was held that after looking to the fact and circumstances of the particular case, the apex court can invoke its Jurisdiction under Article 142 of the constitution of India for doing complete Justice between the parties and it can waive the statutory period of six months required under Section 13-B(2).

Judicial Separation distinguished from Divorce

The following are the main points of distinction which distinguish a divorce from judicial separation:

- (1) Judicial separation does not dissolve the marriage; it only absolves the parties from their marital duty of cohabitation. Divorce on the other hand, completely dissolves the marriage tie.
- (2) A decree of judicial separation can be subsequently rescinded by the Court, whereas a divorce decree cannot be so rescinded.
- (3) Non-resumption of cohabitation by a party for a period of one year or more after the passing of a decree for judicial separation by itself constitutes a good ground for dissolution of the marriage by a decree of divorce.
- (4) Prior to 1976, the provisions relating to divorce were more stringent than those for the grant of judicial separation. Now, of course, the grounds for both are exactly the same.

Legitimacy of children of void and voidable marriages (Section 16)

Under the general law, a legitimate child is one who is born in a lawful wedlock, and a child born out of a void marriage is necessarily a bastard. This would normally cause great hardship to a child. (for no fault of his own), and therefore, Section 16 provides that notwithstanding that a marriage is null and void under Section 11, any child of such a marriage, who would have been legitimate if the marriage had been valid, is to be considered to be a legitimate child. It is immaterial whether or not a decree of nullity is granted in respect of that marriage under the Act, and whether or not the marriage is held to be void otherwise than on a petition under this Act.

It has also been provided that if a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree. It had been dissolved, instead of being annulled, is to be deemed to be their legitimate child, notwithstanding the decree of nullity.

Thus, by a fictio juris (legal fiction), a child born of a void or voidable marriage is deemed to be the legitimate child of his parents. The effect of this fiction is that for all purposes, including rights of inheritance and succession, such child is to be regarded as a legitimate child of the parents.

It may be noted that Section 16 comes into play only if a marriage was proved to have taken place between a man and a woman, but which is otherwise null and void under Section 11. So, when there has been no marriage at all. Section 16 cannot be involved, and legitimacy cannot be conferred on any child. (*Sudarshan Karir v. The State, AIR, 1988, Del. 368*)

Following the above principles, the Madras High Court has reiterated that a child born out of a void marriage will share the father's property equally with the other legitimate children. (*Margabandhu v. Kothandarama, AIR 1984, Mad. 270*)

When divorced persons can re-marry (Section 15)

Formerly, it was provided that when a Hindu marriage had been dissolved by a decree of divorce, either party could marry again after the one year had elapsed from the date of the decree in the Court of the first instance, provided that –

- (a) There was no right of appeal against the decree; or
- (b) If there was such a right of appeal.
 - a. The time for appealing had expired without an appeal having been filed; or
 - b. An appeal had been filed and dismissed.

This rule was founded on the well-recognised principle that it would be contrary to good morals and public policy that a divorced person should be allowed to re-marry some other person with indecent haste. The rule was intended to ensure that a divorce was obtained as an extreme remedy, and not for the sheer purpose of marrying some other person.

However, this one year restriction was, however, removed by the 1976 Amendment, with the result that it is now open to persons divorced under the Act to marry at any time after the divorce, provided that conditions (a) and (b) above are satisfied, i.e. provided the period of appeal has expired.

The Kerala High Court has clarified that Section 16 applies to marriages that are void under Section 11 of the Act (which applies only to those marriages which are solemnized after the Act came into force). Therefore, children born of a second marriage which is void, and which was solemnized prior to the Act are not entitled to be legitimised. (*P. E. Kanaprayan v. K. Devi, AIR 1989, Ker. 279*)

In the above case, it was also held that Section 16 is not violative of Article 14 of the Constitution.

However, an important exception is also made to the above rule. The effect of the exception is that what has been stated above does not confer upon any child of a marriage which is null and void, or which is annulled by a decree of a nullity, any rights in or to the property of any person, other than the parents, in any case where, but for passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents. This also means that a child of void marriage is not entitled to an interest in which his father is a coparcener.

Situations:

- (1) The marriage of X and Y was performed in accordance with the requisite ceremonies, and Z, a son, was born out of the marriage. Thereafter, Y obtained a decree of annulment of the marriage (under Section 12) on the ground that her consent to the marriage was obtained by X's fraud. Will Z be deemed to be the legitimate child of X and Y, and will he have a right to inherit from X and Y?

Ans – In this case, although the decree of annulment will operate from the date of the marriage, Z will be deemed to be legitimate child of X and Y, and he will therefore have a right to inherit from both his parents, X and Y.

- (2) X married Y according to customary rights and ceremonies, Z, a son, was born of this marriage. Actually, the marriage was void, as X had another wife living at the time of the marriage, and on a Petition presented to the Court, the marriage was declared null and void. Is Z entitled to succeed to the property of X and Y?

Ans – Z will be deemed to be the legitimate son of X and Y notwithstanding the decree of nullity, and will, therefore, be entitled to succeed to the property of his parents, X and Y.

Punishment for Bigamy Section 17

This section makes a marriage void ab initio and punishable under section 494 IPC if the marriage is solemnized after the commencement of the Act and at the date of marriage either party has a spouse living.

Birendra Bikram Singh v. Kamla Devi, On husband's taking second wife the (first) wife has no remedy under section 11 and 17 of this Act where in common law she has a right to file a suit for declaration that the second marriage of her husband is illegal and void.

Lily Thomas v. Union of India, Any marriage solemnised by husband during the subsistence of first marriage in spite of his conversion to another religion would be an offence triable under section 17 of the Hindu Marriage Act read with section 494 IPC.

Punishment for contravention of certain other conditions of a Hindu Marriage (Section 18)

This section of the Act prescribes punishment to the person who contravenes the conditions specified in clauses (iii), (iv) and (v) of section 5 of this Act as follows:-

- (a) contravention of condition specified in clause (iii) of section 5 with rigorous imprisonment which may extend to two years or five which may extend to one lakh or with both
- (b) contravention of condition specified in clause (iv) or clause (v) of section 5 with simple imprisonment which may extend to one month or with five which may extend to 1000 or with both.

Section 24 – Maintenance pendent lite and expenses of proceedings–

Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.

Manisha Jain v. Akansha Jain 2017 SC it was held that in arriving at the quantum of interim Maintenance to be paid by one spouse to another the Court must have regard to the income of petitioner and the income of respondent.

Section 25 – Permanent alimony and maintenance–

- (1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.
- (2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section(1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.
- (3) If the court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just.

Kalyan Dev Chowdhury v. Rita Dey Chowdhury Nee Nandy 2017 SC it was asserted by the hon'ble Court that amount awarded to wife must be befitting status of parties and capacity of Spouse to pay maintenance. Maintenance is always dependant on factual situation of case. Court would be justified in moulding claim for maintenance passed on various factors.

Custody of minor children (Section 26)

Section 26 provides that in any proceeding under the Act, the Court may, from time to time, pass interim orders and make provisions as regards the custody, maintenance and education of minor children, consistently with their wishes, wherever possible. Similarly, even after passing the decree, the Court may, upon an application for the purpose, make similar orders from time to time. The Court may also revoke, suspend or vary such orders from time to time.

Needless to mention, the most important consideration for the Court under this section would be the welfare of the minor.

The term "children" (used in this section) would include not only legitimate children, but also those children who are born out of void or voidable marriages, and are deemed to be legitimate under Section 16 of the Act.

It has been observed that in matters relating to custody of a minor, the Court should look at the substance of the application, and should not pay too much importance to mere technicalities of the pleadings. (*Snehlata v. Mahendra*, AIR 1980, Raj. 64)

As observed by the Orissa High Court, Section 26 vests a complete discretion in the Court to make such orders as it deems fit and proper, taking into consideration, the welfare of the minor. (*H. Dasgupta v. S. Misra*, AIR 1985 Orissa 239)

In one case, the question of the custody of a girl of seven years was before the Court. Admittedly, the girl was away from her father since five years and was greatly attached to the mother, who had a steady income. The Court felt that she would not find any happiness, if placed in the father's custody, and that her welfare would be fully protected if she remained in the custody of her mother. (*Archana Barthakur v. Dr. Ranjit Barthakur*, AIR 1985 NOC 125 Gauhati)

Disposal of property (Section 27)

In order to avoid multiplicity of litigation, Section 27 lays down that in any proceeding under the Act, Court can make such provisions in the decree, as it deems just and proper, with respect to any property presented jointly to the husband and the wife at the time of the marriage. It is to be noted that in the absence of such an express provision, a Matrimonial Court would have no jurisdiction to dispose of any property jointly owned by the spouses.

THE HINDU ADOPTIONS AND MAINTENANCE ACT 1956

SYNOPSIS

1. Adoption

- (i) Introduction
- (ii) Who may take in Adoption
- (iii) Who may give in Adoption
- (iv) Who may be taken in Adoption
- (v) Other conditions of a valid adoption
- (vi) Effect of Adoption
- (vii) Relationship of Adopted child
- (viii) Proof of Adoption

2. Maintenance

- (i) Wife
 - (a) Under Hindu Marriage Act 1955
 - (b) Under Hindu Adoption and Maintenance Act, 1956
 - (c) Under Criminal Procedure Code
- (ii) Widowed Daughter in Law
- (iii) Children and Aged Parents
- (iv) Dependents
- (v) Amount of Maintenance

Introduction

The desire for male offspring was very natural in all early societies. The veda declares; endless are the worlds of those who have sons; there is no place for the man who is destitute of male offspring. Manu explained the necessity of a son because through a son, a man conquers the world, through a grandson he obtains immortality and through his great-grandson he gains the world of the son. It is the foremost duty of a man, who is sonless to have a son by any means.

The Hindu Adoptions and Maintenance Act 1956, has steered off clearly from all the religious and sacramental aspects of adoption and has made adoption a secular institution and secular act, so much that even a religious ceremony is not necessary for adoptions. It prescribes only ceremonies of giving and taking under this Act a daughter can also be adopted whereas she can neither offer funeral cake nor can perform last rites of deceased.

Adoption is neither recognized under Mohammedan law, nor by the Parsi law. It is recognised by the Hindu law but even in that system by proved custom families or castes were prohibited to take child in adoption, effect was given to it by court.

Short title and extent section 1

(1) This Act may be called the Hindu Adoptions and Maintenance Act 1956

(2) It extends to the whole of India except the state of Jammu and Kashmir

Application of Act section 2

Same as discussed in Hindu Marriage Act and Hindu Minority and Guardianship Act.

Definitions section 3

Section 3(b) "Maintenance" includes

(1) in all cases, provision for food, clothing, residence, education and medical attendance and treatment

(2) in the case of an unmarried daughter, also the reasonable expenses of an incident and treatment

Section 3 (c) 'Minor' Means a person who has not completed his or her age of eighteen years.

Over-riding effect of Act section 4

Adoption to be regulated by this chapter

Section 5 of the Act lays down that no adoption shall be made after the commencement of the Act except in accordance with the provision contained in the chapter of Adoption and any adoption made in accordance with the provision contained in the chapter shall be void. But a valid adoption made before the commencement of the Act shall not be deemed to be void irrespective of the fact that such an adoption is not in accordance with the provisions of this Act with regard to the valid adoption under the old law, the Act is not retrospective in its operation. The adoptions which were lawful under the prior law, but are not valid under this Act are deemed to be valid.

Requisites of a valid adoption section 6—No adoption shall be valid unless—

(1) the person adopting has the capacity, and also the right, to take in adoption;

(2) the person giving in adoption has the capacity to do so;

(3) the person adopted is capable of being taken in adoption; and

(4) the adoption is made in compliance with the other conditions mentioned in this chapter.

According to section 6 of the Act one of the conditions to make the adoption valid is that the person taking in adoption must have the capacity to adopt as well as the right to adopt. So the capacity and right and right to take in adoption are two different things. A person may have the capacity to adopt but at the same time he may not have a right to adopt. Therefore to constitute a valid adoption both things must be present.

Who may adopt:

Section 7 and 8 of the Hindu Adoption and Maintenance Act, 1956 deal with person who may adopt a child. Whether male or female the person who is adopting a child must have capacity and also the right to take a child in adoption.

Capacity of a male to take in adoption section 7

A major male Hindu of sound mind can adopt. Whether he is a bachelor, widower, divorcee or married person. But for a married Hindu male, it is obligatory to obtain the consent of his wife in case he

has more than one wife, consent of all the wives is necessary. An adoption made without the consent or separately shall be void. The consent of the wife may be express or implied. The consent of the wife or of any of the wives in case a person has more than one may be dispensed with in any of the following cases:-

- (1) if the wife has ceased to be a Hindu
- (2) if she has finally and completely renounced the world
- (3) if she has been declared by a court of competent jurisdiction to be of unsound mind.

Ghisalal v. Dhapubai (dead) by Lrs. and others 2011 SC It was held that consent of wife envisaged in proviso to Section 7 should either be in writing or reflected by an affirmative act voluntarily and willingly done by her. Consent cannot be inferred from mere presence, silence or lack of protest.

Capacity of a female Hindu to take in adoption section 8

Under the old Hindu law a female had no capacity to make an adoption to herself though a widow under certain circumstances could adopt a son to her deceased husband.

Under the Hindu Adoption and Maintenance Act, 1956, a Hindu unmarried woman widow or divorcee has capacity to adopt where a widow adopts a child she need not take the consent of a co-widow because she adopts the child in her own capacity (*Vijayalakshamma v. B.T. Shanker*). An unchaste woman also has capacity to adopt. Earlier a married Hindu Woman had no right to adopt a child even with the consent of her husband. Section 8 has totally been substituted by the personal Laws (Amendment) Act 2010. Now a married woman can adopt a child with the consent of her husband. An adoption made without the consent of husband is void except in any of the following three cases:-

- (a) If her husband has ceased to be a Hindu
- (b) If he has finally and completely renounced the world
- (c) If he has been declared by a court of competent jurisdiction to be of unsound mind.

Persons capable of giving in adoption section 9

Before 1956, the father's power to give his son in adoption was absolute and he could give the child in adoption even if his wife dissented from it. After father the mother but no one else could give the child in adoption. Under Hindu Adoption and Maintenance Act, father, mother and the guardian have the power to give the child in adoption.

The Father

The father can not now give the child in adoption without the consent of the mother of the child except where she has finally and completely renounced the world or she has ceased to be a Hindu or she has judicially declared to be of unsound mind. In no other case, even if the marriage has been dissolved consent of the mother can not be dispensed with. In absence of mother's consent adoption is void.

The expression father does not include an adoptive father, putative father or step father.

The Mother

The mother of an illegitimate child has power to give the child in adoption and no question arises of putative father's consent.

Before the personal Law (Amendment) Act 2010, the mother had no right to give the child in adoption even with the consent of the father except where father has finally and completely renounced the world or father has ceased to be a Hindu or he has judicially declared to be of unsound mind. Now, after 2010 Amendment father or mother if alive save with consent of the other shall have equal right to give the child in adoption. The consent of other is dispensed with under circumstances provided in amended section 9.

The mother does not include adoptive mother or stepmother. But it seems that a mother on conversion to any another religion or on divorce will not lose her right to give the child in adoption.

The Guardian

The term guardian includes both de jure and de facto guardians. Guardian can exercise the power if:-

- (a) both parents are dead or
- (b) parents have finally and completely renounced the world or
- (c) parents have judicially declared to be of unsound mind or
- (d) parents have abandoned the child or

(e) the percentage of the child is not known

When the guardian exercise power of giving the child in adoption prior permission of the court is necessary. No court will accord permission to a proposed adoption unless it will be for the welfare of the child. If the child is capable of expressing his wishes, his wishes will be taken into account though the court can pass order contrary to the child wishes because welfare of the child is paramount consideration.

The court may refuse to accord the permission to the proposed adoption if any thing in cash or kind has been given or taken or agreed to be given or taken in consideration of the adoption except cost of the performance of ceremonies of adoption, and cost of upkeep of the child that guardian has incurred from his own pocket.

Persons who may be adopted section 10

Prior to this Act, following was regarding the person who could be adopted:-

1. Must be a Hindu
2. Must be a male
3. Must be a nearest sapinda
4. Must be of the same caste
5. Must not be deaf and dumb
6. An orphan could not be validly adopted in the absence of a custom
7. Only eldest son
8. etc....

The present Act has taken a practical view of adoption and consequently the elaborate rules regarding the persons to be adopted have been dropped as will be evident from section 10 of the Act, under section 10 of Hindu Adoptions and Maintenance Act 1956, no person shall be capable of being taken in adoption unless following conditions are fulfilled namely:-

- (a) Male or female
- (b) Must be a Hindu
- (c) Child has not already been adopted
- (d) Should not be a married person unless custom permits
- (e) The child must not have completed the age of fifteen years unless custom and usages permit

Other conditions for a valid adoption section 11

Before 1956, the ceremonies relating to an adoption were:-

- (1) ceremony of giving and taking
- (2) data homan
- (3) other minor ceremonies

Ceremonies under the present law

The present Act requires only the ceremony of actual giving and taking of child in adoption as will be clear from section 11. (vi). This ceremony has to be performed by the person who gives the child in adoption whether he is father, mother or guardian and to be the person who takes the child in adoption. Ceremony of giving and taking is essential (Lakshman Singh Kothari v. Srimati Rup Kumar).

Datta Homan

Datta Homan is the sacrifice of burning of clarified butter which is offered as a sacrifice to fire by way of religious propitiation or ablation is no longer a necessary ceremony.

Other conditions

In every adoption, the following conditions must be complied with:-

- (a) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption.
- (b) If the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption.
- (c) If the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;
- (d) If the adoption is by a female and the person to be adopted is a male the adoptive mother is at least twenty-one years older than the person to be adopted;
- (e) The same child may not be adopted simultaneously by two or more persons;

- (f) The child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth { or in the case of an abandoned child or child whose parentage is not known, from the place of family where it has been brought up} to the family of its adoption;

Provided that the performance of data homan shall not be essential to the validity of adoption.

Effects of adoption section 12

Under Hindu law, both old and new, the adoption of a child means that the child is totally uprooted from the natural family and transplanted in the new family. For secular, religious and civil purposes, the adopted child ceases to be the child of the natural family. The natural parent's right of guardianship ceases with effect from the date of adoption, whatever be the age of the child.

Under section 12 of the Act the doctrine of relation back has been dispensed with (Kesarbai v. State of Maharashtra).

The adopted child is deemed to be the child of the adopter for all purposes. His position for all intents and purposes is that of a natural born son; he has the same rights, privileges and the same obligations in the adoptive family.

- Only tie that he retains with his natural family is that he can not marry any person in his natural family whom he could not have married before his adoption. [Proviso (a) of section 12]
- If the adopted child has been vested with some property of his or her family of birth, before adoption took place, the adoptee shall continue to enjoy that property and it will not go back to the family of birth but the property so vested will be liable for such encumbrance as the property may be liable to, in respect of maintenance or other charges due to members of that family of birth [Proviso (b) of section 12]
- The adopted child would only become the son or daughter entitled such to the properties, if any, left by his or her adopting parent on his or her death. Neither will the widow be divested of any property nor will any partition effected prior to the adoption be re-opened for purpose of re-adjustment of joint family property. The adopted child does not divest any person in the adoptive family of any property vested in such person before adoption. Where the entire property vested in the adoptive father alone before adoption, the adoption could not have the result of reducing his fall share in the property to one-half. [Proviso (b) of section 12]

Relationship of adopted child

- (1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.
- (2) Where an adoption has been made with the consent of more than one wife, the seniormost in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers.
- (3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child.
- (4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child.

Valid adoption not to be cancelled section 15

An adoption once made is irrevocable. A valid adoption made by any person can not be cancelled by any of the parties to the adoption or by any other person, nor can the adopted child give up his or her status as such adopted child and claim rights in the family of his or her birth it is however, open to the adopted child to give up or modify his or her rights to properties and inheritance in the adoptive family either before or after adoption.

Proof of adoption section 16

No writing or execution of any document is necessary on the validity of the adoption. So the fact of adoption must be proved with cogent evidence and the burden is on the person who sets an adoption (Kehrabai Padhan v. Biskishan Padhan)

The law as to proof of oral or written adoption is same as it was before the Act.

But now according to section 16 of the Act on adoption which is witnessed by a registered deed of adoption will be presumed to be valid unless disproved by positive evidence. The burden of proof in such as case is on the person who questions the adoption.

The act of giving and taking in adoption has to be proved positively otherwise presumption provided under section 16 will not arise. The presumption provided under this section is rebuttable. The details in deed of adoption is only a proof of adoption that is not the conclusive proof of adoption.

Dhanno v. Tuhi Ram, Mere placing of registered adoption deed without proof of the ceremonies of giving and taking and without proving that after adoption the adoptee was treated as his son by adopter, there is no valid adoption.

Jai Singh v. Shakuntala, The Supreme Court observed that section 16 envisages a statutory presumption that in the event of there being a registered document pertaining to adoption there would be presumption that adoption has been made in accordance with law.

Maintenance

"It is declared by Manu that the aged mother and father, the chaste wife, and an infant child must be maintained even by doing a hundred misdeeds".

Section 3 (b) of the Hindu Adoptions and Maintenance Act, 1956 defines maintenance. According to it maintenance includes (i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment (ii) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage.

The obligation to maintain besides being statutory in nature is also personal in the sense that it arises from the very existence of relationship between parent and the child. The obligation is absolute in terms and does not depend on the means of the father or the mother.

Maintenance of wife:- There are three different types of provisions regarding maintenance to a wife

- (i) Provisions under H.A.M.A. ,1956
- (ii) Provisions under H.M.A ,1955
- (iii) provisions under Cr.P.C. 1973

— (i) **Under H.A.M.A. 1956 :-** The right of a wife for maintenance is an incidence of the status or state of matrimony and a Hindu is under a legal obligation to maintain his wife. The obligation to maintain the wife is personal in character and arises from the very existence of the relation between the parties.

Under section 18 (1) of the Act, a Hindu married woman, irrespective of the date of marriage shall be entitled to be maintained by her husband throughout her life. This right to claim maintenance is her personal right against her husband irrespective of fact whether the husband has got any property either ancestral or self-acquired. A wife is entitled to be maintained out of the profits of her husband's property in the hands of the alienee with notice of her claim (section 39 TPA) but can not follow her husband's property in the hands of a transferee for valuable consideration, nor against government under section 82, 83 cr. P.C. but would be entitled to obtain a decree from a civil court creating a formal charge upon the specific property of her husband.

C.Obula Konda Reddi v. C. Pedda venkata Lakshmma

The court held that the words 'Hindu wife' in section 18 can not be interpreted to mean only a wife whose marriage is valid according to the provisions of the Hindu Marriage Act. The Hindu wife contemplated by section 18 means a wife whose marriage is solemnized, though void under Hindu Marriage Act. She will therefore be entitled to claim maintenance from the husband.

There is no absolute right vested in Hindu wife to be maintained by her husband. The maintenance is dependent on her living with him and discharging the duties as wife. The wife will also claim maintenance while living separately from her husband if any of the conditions laid down in section 18(2) is fulfilled.

The grounds which will enable the wife to live separately and claim maintenance from the husband are as follows:-

- (1) Desertion by husband
- (2) Cruelty by husband
- (3) Husband suffering from virulent form of leprosy.
- (4) Husband having another wife living
- (5) Husband keeping a concubine
- (6) Where husband has ceased to be Hindu by conversion
- (7) Other justifying cause.

The HAMA 1956 has repealed the Hindu Married women's Right to separate residence and maintenance act 1946. Section 18 (2) provides for Separate residence and maintenance to wife. As per section 18 (3), a Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu. Thus her right is not absolute.

(ii) Under H.M.A. 1955 :- Section 24 of Hindu Marriage Act deals with maintenance pendente lite while section 25 of HMA deals with permanent maintenance to be fixed at the time of passing of decree or subsequent thereto.

Unlike Hindu Marriage Act, the Hindu Adoption and Maintenance Act does not authorize and empower any court to pass an order for payment of litigation expenses and maintenance during the pendency of the proceedings. The court can pass an order under the H.A.M. Act for payment of permanent alimony and maintenance at the conclusion of the proceedings only. There being no specific provision in the Act for interim relief, the court may resort to its inherent powers under section 151 CPC to give interim relief if the circumstances of the case so require and the court is satisfied that thereby it tends to promote the ends of justice. [Shanti Saroop v. Mst Usha devi]

Interim maintenance sec 24 :- Under it the claim may be made (either by husband or by wife) for (1). Personal maintenance of the claimant and (2). Expenses of proceedings (i.e. any proceedings under this Act) only requirement is that the claimant should establish that he/she has no independent income sufficient for his/her maintenance and support and he/she has no means to meet the expenses of proceedings. If the respondent has no means and no income then the court need not fix any amount of maintenance. In fixing interim maintenance applicant's conduct is immaterial (e.g. accusation of adultery).

In Rita Mago v. V.P. Mago (AIR 1977 Del. 176) held that an order for interim maintenance and for the expenses of proceedings u/s 24 can be passed during the pendency of the proceedings only. Such an order can not be passed after the conclusion of trial and passing of the decree.

Permanent maintenance sec 25 :- On application of either spouse the court may pass an order for permanent alimony and maintenance at the time of passing any decree granting the petition or at any time subsequent thereto. The court may order the payment of gross or monthly or periodical sum for a term not exceeding the life of the applicant having regard to the income and other property of respondent and applicant, the conduct of the parties (e.g. conduct towards marriage) and other circumstance of the case.

Sec 25 confers on a spouse a special right though not absolute or discretionary. It must be remembered that right to maintenance is statutory right and therefore a party can not contract himself or herself out of the same. Thus a wife can not bind herself under an agreement with her husband to forgo her right of maintenance in case of matrimonial proceedings between them.

The wife under a void or voidable marriage is also entitled to maintenance and alimony u/s 25. u/s 25(2) the court has power to vary, modify or discharge any order of permanent alimony at the instance of either party (either prospectively or retrospectively) if change of circumstances is shown. u/s 25 (3) the court may rescind the order if the party in whose favour an order has been passed has remarried or if such party is the wife she has not remained chaste or if such party is the husband he committed adultery.

Under Cr.P.C. 1973 :- Section 125 of Cr.P.C. provides that if any person having sufficient means neglects or refuses to maintain his wife unable to maintain herself ... a Magistrate of the first class may upon proof of such neglect or refusal order such person to make monthly allowance for maintenance of his wife at such monthly rate as the Magistrate thinks fit.

Provide that if such person offers to maintain his wife on condition of her living with him and she refuses to live with him such Magistrate may consider any grounds of refusal stated by her and make an order notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation:- 'Wife' includes a woman who has been divorced by or has obtained divorce from her husband and has not remarried.

Note: 'Wife' means only a legitimate/legally wedded wife and therefore a marriage proved illegal can not give a wife any right of maintenance. The second wife or a woman living as 'wife' is not entitled to get maintenance.

Maintenance of widowed daughter-in-law section 19

Hindu law has all along recognized it to be an obligation of the joint family to maintain the wives and widows of coparceners. Her claim is enforceable against the karta so long as the daughter-in-law has a right to claim maintenance against the coparcenary property in the hands of father-in-law. Where father-in-law did not inherit any ancestral property he was not liable to pay any maintenance to his widowed daughter-in-law. (**Master Daljit Singh v. S.Dara Singh, 2000 Del. 292**)

Under section of this Act, the father-in-law's obligation to maintain the daughter-in-law is not a primary obligation; it is not even a secondary obligation. It is remote obligation. The father-in-law's obligation will arise only if:-

- (a) The daughter-in-law is unable to maintain herself out of their own earnings or other property (section 14 (1) of Hindu succession Act, 1956)
- (b) The daughter-in-law (in case she has no property of her own) is unable to obtain maintenance from:-
 1. the estate of her husband
 2. the estate of her father
 3. the estate of her mother, or
 4. her sons or daughters or from their estate.

The benefit of the right conferred by this section has been conferred on all daughters-in-law whether married before or after the commencement of the Act, and whether she became a widow, before or after the commencement of the Act. But the right under this section will occur from the date when the Act, has come in to force. It is clear from the section that this section only deals with the right of daughter-in-law to claim maintenance from his father-in-law. This presupposes that widow's husband predeceased her father-in-law. It is implicit in the rule laid down in this section that a daughter-in-law whose husband is alive has no right, moral or legal, to claim maintenance from her father-in-law.

Maintenance of children and aged parents section 20

The obligation to maintain one's children and aged or infirm parents is a personal obligation arises out of personal relationship of parent and child. Under old Hindu law, the father was required to maintain both his legitimate and illegitimate children and the obligation was imposed on son alone to maintain his aged or infirm parents. The modern Hindu law under section 20 Hindu Adoption and Maintenance Act imposed the obligation on both the parents and in respect of both legitimate and illegitimate children during the minority of children and makes it an obligation of sons and daughters to maintain their aged parents.

Under the old Hindu law, "parent" did not include a step-parent. Explanation to section 20 HAMA 1956 now includes a childless step-mother but step-father is still excluded from the purview of the expression "Parent".

Dependants defined section 21—For the purposes of this Chapter 'dependants' mean the following relatives of the deceased:-

- (1) his or her father;
- (2) his or her mother;
- (3) his widow, so long as she does not re-marry;
- (4) his or her son or the son of his predeceased son or the son of a predeceased son of his predeceased son, so long as he is a minor; provided and to the extent that he is unable to obtain maintenance, in the case of a grandson from his father's or mother's estate, and in the case of a great grand-son, from the estate of his father or mother or father's father or father's mother;
- (5) his or her unmarried daughter, or the unmarried daughter of his predeceased son or the unmarried daughter of a predeceased son of his predeceased son, so long as she remains unmarried; provided and to the extent that she is unable to obtain maintenance, in the case of a grand-daughter from her father's or mother's estate and in the case of a great-grand-daughter from the estate of her father or mother or father's father or father's mother;
- (6) his widowed daughter; provided and to the extent that she is unable to obtain maintenance—
 - (a) from the estate of her husband, or

- (b) from her son or daughter if any, or his or her estate, or
- (c) from her father-in-law or his father or the estate of either of them;
- (7) any widow of his son or of a son of his predeceases son, so long as she does not remarry: provided and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son or daughter, if any, or his or her estate; or in the case of a grandson's widow, also from her father-in-law's estate;
- (8) his or her minor illegitimate son, so long as he remains a minor;
- (9) his or her illegitimate daughter, so long as she remains unmarried.

Maintenance of dependants section 22

Under this section of the Act the liability to maintain is limited and extends only up to the estate of the deceased. Section 22(1) applies to the dependant of a person who had died after 21st of December 1956.

Sub section (2) covers cases of those dependants who do not succeed to any share or part of the estate of the deceased at his death, by reason that they have not been given any share by will or that they have been excluded due to existence of nearer relations than them or by not being heir in accordance with the provisions of Hindu Succession Act. The liability of the person who took the estate in this case also in proportion to the value of the share or part of the estate taken by him or her.

Sub section (4) 22 when the contributor to the maintenance of dependant is a dependant, this rule will be further contingent on the amount of the share received by him/her as an heir, if the contribution made to the maintenance of a dependant makes the share received as an heir less than the maintenance to which he or she is entitled as a dependant, then the liability to contribute would not be enforceable to that extent.

Ramabai v. Meerabai AIR 1967 MP 86

It was held that sections 21 and 22 of the Act do not in any way bridge the pre-existing right of maintenance holders and those provisions of the Act are prospective and apply only to those cases of Hindu whose death takes place after the commencement of this Act.

- The settled position of law is that an heir is legally bound to provide, out of the estate which descends to him maintenance for those persons whom the late proprietor was legally or morally bound to maintain.

Amount of maintenance section 23

No fixed rule can be laid down as to the amount of maintenance which each claimant is to have. Each case is to be judged according to the nature of its circumstances. Maintenance depends upon the totality of all the facts, the amount of free estate, the past life of married parties, a survey of the conditions and necessities and rights of the members; on a reasonable view of change of circumstances possibly required in future, regard being of course, had to the scale and the mode of living the age, habits, wants and class of the parties. [Ekradeshwari v. Hamshear (PC)]

Shashi Ammal v. Thaiyu Ammal AIR 1961 Mad 217

The fact that the rate of maintenance was fixed by a compromise decree makes no difference and she can make application for the increase of maintenance if she can prove or justify under section 23.

Section 23 vests the court with the discretion to determine the amount of maintenance to be paid and to refuse to award maintenance if it so thinks fit. But discretion is required to be exercised having regard to the considerations set forth in subsection (2) and (3) of section 23.

- (1) It shall be in the discretion of the Court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so, the Court shall have due regard to the considerations set out in sub-section (2), or sub-section (3), as the case may be, so far as they are applicable.
- (2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to—
 - (a) the position and status of the parties;
 - (b) the reasonable wants of the claimant;
 - (c) if the claimant is living separately, whether the claimant is justified in doing so;
 - (d) the value of the claimant's property and any income derived from such property, or from claimant's own earnings or from any other source;
 - (e) the number of persons entitled to maintenance under this Act.
- (3) In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to—
 - (a) the net value of the estate of the deceased after providing for the payment of his debts;

- (b) the provision, if any made under a will of the deceased in respect of the dependant;
- (c) the degree of relationship between the two;
- (d) the reasonable wants of the dependant;
- (e) the past relations between the dependant and the deceased;
- (f) the value of the property of the dependant and any income derived from such property, or from his or her earnings or from any other source;
- (g) the number of dependants entitled to maintenance under this Act.

Claimant to maintenance should be a Hindu Section 24

No person shall be entitled to claim maintenance under this chapter if he or she has ceased to be a Hindu by conversion to another religion.

Amount of maintenance may be altered on change of circumstances section 25

If the maintenance has been adjudicated upon, and court has fixed the quantum or rate of maintenance it may be altered or changed by the court. The amount of maintenance fixed by will can also be changed or altered (**Sitharathnam v. Seshamma**). The provision of this section would apply whether such decree or agreement was arrived at before or after the commencement of this Act. Maintenance can be changed or altered if the circumstances have materially changed to justify such alteration. The maintenance can under this section, altogether be stopped if circumstances justify the same.

In Shashi Ammal v. Thaiynu Ammal:- The Madras High Court held that the right conferred under section 25 supersedes any contract of not to claim a higher rate even if circumstances were to change.

Chapter – 5

THE HINDU MINORITY AND GUARDIANSHIP ACT 1956

SYNOPSIS

1. Introduction
2. Guardianship under H.M.G.A. 1956
 - (a) Natural guardians
 - (b) Testamentary guardians
 - (c) Guardian appointed by the court
 - (d) De facto guardians
3. Guardian not to be appointed for minor's undivided interest in JFP
4. Removal of Guardian

Introduction

Guardianship as conceived originally was, in most systems, an extension of paternal power. But in modern law, it essentially implies an idea of protection. The Hindu Minority and Guardianship Act, 1956 does not codify the entire law of guardianship applicable to Hindus, but amends and supplements the provisions of the Guardians and wards Act, 1890, in its application to Hindus only. Section 2 of the Act clearly provides that the provisions of the Act shall be in addition to the Guardians and wards Act of 1890. If there is a conflict on the same point the provisions of HMGA will apply in case of Hindus.

Definitions, Section—4

- (a) "minor" means a person who has not completed the age of eighteen years.
- (b) "guardian" means a person having the care of the person and property, and includes:-
 - (1) a natural guardian
 - (2) Testamentary guardian
 - (3) A guardian appointed or declared by the court

Natural guardians of a Hindu minor section 6

Every relation of the minor can not be natural guardian of the minor although the law does not restrict the list of guardians. In Hindu law, only three persons are recognized as natural guardians, Father, Mother and Husband.

Father

"Father is the natural guardian of his minor legitimate children, (sons and daughters)". Section 19 of the Guardians and wards Act, 1890 lays down that a father can not be deprived of the natural guardianship of his minor children unless he has been found unfit. The effect of this provision has now been considerably whittled down by judicial decisions and by section 13 of Hindu Minority and Guardianship Act. Which lays down that welfare of the minor is of paramount consideration and father's right of guardianship is subordinate to the welfare of the child. Before 1956, the father could prevent the mother from assuming the guardianship of her minor children even after his death by appointing a testamentary guardian. This can not be done now. The Act lays down that if the father appoints a testamentary guardian and the mother survives him, the appointment of testamentary guardian will be ineffective so long as the mother is alive. If the mother dies without appointing a testamentary guardian, the father's appointee will become the guardian.

Where the father is alive but he is no-functioning natural guardian the mother can act as the natural guardian (Jijabai v. Pathan Khan).

(1999 Supreme Court) The Apex court adopting the rule of harmonious construction that the ward 'after' in section 6 (a) of Hindu Minority and Guardianship Act, need not necessarily mean 'after the life time' but in the absence of. It is further held that absence would mean absence of father from the care of minor's person or property for whatever reason.

Mother

The mother is the natural guardian of the minor illegitimate children even if the father is alive. However, she is the natural guardian of her minor legitimate children only if the father is dead or otherwise is incapable of acting as guardian. Remarriage of the mother with a person of different faith can not disqualify her to be a guardian of her minor child, especially when the child was being looked after extremely well by the mother. Provisio to clause (a) of section (b), Hindu Minority and Guardianship Act lays down that the custody of a minor who has not completed the age of five shall ordinarily be with the mother. Thus, the mother is entitled to custody of the child below five years, unless the welfare of the minor requires otherwise. But this does not mean that she is not entitled to custody thereafter. Mothers' right of guardianship is not lost on her conversion to another religion so long as she is able to provide a congenial, comfortable and happy home (Sheela v. Soli)

Setp-parents are not entitled to guardianship unless they are specially appointed by the court, once a child goes in adoption, natural parents ceases to be natural guardian of the child.

Husband

The Hindu Minority and Guardianship Act, 1956, also lay down that husband is the natural guardian of the person and property of the minor wife unless he has ceased to be a Hindu or he has completely and finally renounced the world by becoming a hermit or an ascetic. It is submitted that it is open to the courts not to give custody of a minor wife to husband if they are satisfied that it will not be for the welfare of the minor wife.

Natural Guardian of adopted son Section 7

This Section only deals with the guardianship of adopted son. By passing of the Hindu Adoptions and Maintenance Act, 1956, a Hindu can take in adoption either son or daughter according to his/her choice. On the principle of section 12 of the Hindu Adoption and Maintenance Act that with effect from the date of adoption, the adopted child shall be deemed to be the adopted child of his or her adoptive father or mother. It should be held that adoptive father or adoptive mother shall be the natural guardian of their adopted daughter also.

Powers of natural guardian section 8

This section deals with all the powers which a natural guardian may exercise in respect of the person and property of his ward. It also enumerates the powers, which such guardian may exercise subject to the sanction and control of the court.

Section 8 (1) of the Act lay down the general powers of natural guardian. A guardian may do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate. However nothing in section 8 restricts the Karta's power of alienating minor coparcener's interest in the joint family property whoever he has power to do so.

(Sakharam v. Shiv Deorao). Manik Chand v. Ram Chand. Supreme court clearly laid down that under this Act, the natural guardian has been empowered to do all such acts which are necessary for the welfare and benefit of the child. He can even bind the minor by a covenant if it is so necessary. **Hurry Mohan v. Gandesh Chander**. A transaction to be binding on the family must be one which not only confers a benefit upon the estate but is necessary for its good management.

Section 8 (2) of the Act lays down that no transaction by sale, gift, exchange or otherwise of any part of the immovable property of the minor and lease of any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority shall be effected by the natural guardian without the previous sanction of the court.

The restrictions on the powers of the natural or testamentary guardians provided by the Act are identical with those prescribed by section 29 of the Guardian and Wards Act, 1890 on the powers appointed by the court. Previous permission of the court under section 8 of the Act is not required for disposing of undivided interest of minor in joint family property **(Sri Narayan Bal v. Sridhar Sutar)**. The Supreme Court held that a joint Hindu family by itself is a legal entity capable of acting through its karta and other adult members of the family property. Therefore in view of the express terms of sections 6 and 12 of this Act, Section 8 would not be applicable where joint Hindu family property is sold or otherwise disposed of by the **Karta** involving undivided interest of minor in the joint Hindu Family property.

An alienation made with the permission of the court can not be impeached by the minor or any other person except in a case of fraud or underhand dealing.

Section 8 (3) lays down that any disposal of immovable property by a natural guardian which is not necessary, reasonable, proper or not for the benefit of the estate or which has not been sanctioned by the court or is effected by a lease for a period beyond the period prescribed by a clause (b) section 8 (2) without sanction is voidable (not void) at the option of the minor or person claiming under him by a suit filed by such minor or person claiming under him within 3 years from the date when a minor attains majority. Article 44 of Limitation Act.

Procedure and principles which will govern grant of permission by the court to a natural or his testamentary guardian to transfer the immovable property are prescribed by sub-sections (4), (5) and (6) of section 8 of this Act.

Testamentary guardians and their powers section 9

Under this Act, testamentary guardian can be appointed only by a will of the natural guardian entitled to act as a guardian for the minor. Needless to say that a will becomes effective only after the death of the testator. Earlier case law testamentary power in respect of appointment of guardian was considered to be nothing but a manifestation of paternal power and therefore father alone had this power. Mother has no such power under the Hindu Minority and Guardianship Act, 1956. testamentary power of appointing a guardian has now been conferred on both parents. Parents have power of

testamentary appointment of guardians in all cases where they are competent to act as natural guardian.

Who May Appoint

The Act recognizes the right of the following persons to appoint guardian of person and separate property of a Hindu minor.

1. **Father (Natural and adoptive):-** A Hindu father may by will appoint a guardian in respect of minor's person or of separate property or both but not of undivided interest in the joint family property. The father can not supersede the mother to act as the natural guardian in case he predeceases her but if the mother dies without appointing any guardian the appointment made by father shall revive.
2. **Widowed mother (Natural and adoptive):-** A Hindu widow who is entitled to act as the natural guardian of her legitimate children may by will appoint a guardian for any of them in respect of minor's person or separate property or both. Any appointment made by her husband will be no effect on the face of the appointment made by the widow. The mother is the natural guardian of her illegitimate children and can appoint a person to act as guardian in the lifetime of her husband. So the death of her husband will make no difference in so far as the appointment of guardian for illegitimate children is concerned.
3. **Mother (Natural and adoptive):-** A Hindu mother entitled to act as natural guardian of her minor legitimate children by reason of the fact that father has become Yati, Sanyasi or Vanprastha, may by will appoint a guardian for any of them in respect of minor's person or separate property or both. Similarly a Hindu Mother entitled to act as natural guardian of her illegitimate children may by will appoint a guardian for any of them in respect of the minors person or minor's separate property or both. In this case it not necessary that father must be incapable of acting as natural guardian because in the lifetime of mother of the illegitimate children, the father has no right to act as guardian and the mother can even appoint a guardian to the exclusion of the father.

NOTE:- Father of an illegitimate child has no power to appoint a testamentary guardian of the child.

Power of testamentary guardian

The testamentary guardian has the right to act as the minor's guardian after the death of the natural guardian and to exercise all the rights and powers of a natural guardian to such extent and subject to such restrictions as are specified in the Act section 8 of the Act and in the will.

Guardian appointed by the court :- In appointing a guardian the court takes into consideration various factors including age, sex wishes of deceased parents, character and capacity of the guardian, previous and existing relations of the minor with proposal guardian, personal law of the child, the child's preference if the minor is of sufficient maturity etc.

Sec 13 of HMGA also lays down that when the court appoints any person as guardian. The welfare of the minor will be the paramount consideration. The term "welfare" includes not only the physical and material well being of the minor but also every matter connected with moral and religious welfare education and upbringing of the minor.

The HMGA also provides that if the court is of the opinion that a particular person's guardianship will not be for minor's benefit such a person shall not be entitled to be the guardian even if he or she is otherwise entitled to do so under the provisions of the Act or any law relating to guardianship in marriage among Hindus.

De Facto Guardian not to deal with minor's property

After the commencement of this Act, no person shall be entitled to dispose of or deal with the property of a Hindu minor merely on the ground of his or her being a de facto guardian of minor.

A de-facto guardian of a minor is neither a legal guardian nor a testamentary guardian, nor a guardian appointed by the court but he is a person who himself take over the management of the affairs of the minor as if he was a natural guardian. After the enforcement of this Act; a de facto guardian can not deal with the property of a minor. Such property includes separate property of minor as well as his undivided interest in joint family. Section 6 and section 9 of this Act deal with natural guardian and testamentary guardian and their powers where guardian can deal with the separate property of the minor he is appointed as guardian of such property under section 11 effect of de facto guardian as such is not recognised under this Act. Any alienation made after the commencement of Act would be void ab initio where before the commencement of this Act it was voidable and not void.

The doctrine of de facto guardianship enunciated in case of **Hanuman Prasad v. Mst Babooee**, laid its origin in the practical equity of the Hindu jurists who felt necessary protecting the transactions

entered in to for the minor's benefit or necessity when the character of the people changed and high ideals of generosity and philanthropy gave place to selfishness and dishonesty, the institution of de facto guardianship underwent a corresponding deterioration and became an easy instrument of unscrupulous profits of friends and relations at the cost of the minor. Hence it was thought desirable to abolish the de facto guardianship altogether so that no further encouragement might be given to such dishonest relations of the minors to profit at another's cost.

Guardian not to be appointed for minor's undivided interest in joint family property, section 12

Where a minor has an undivided interest in the joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest provided that nothing in this section shall be deemed to affect the jurisdiction of a high court to appoint a guardian in respect of such interest.

Incapacity of minor to act as guardian of property section 10

A minor shall be incompetent to act as guardian of the property of the minor. But this does not apply to joint family property. In a joint family property even a minor may be a karta and there is no prohibition in Hindu Law against it. There is nothing in section 10 of the Act to prevent a minor from acting as a guardian of the person of minor child or minor wife.

Removal of Guardian:-

Disabilities to be a guardian

- (1) Disabilities arising from apostasy
- (2) Disabilities arising from civil death
- (3) Disabilities due to minority (section 11)
- (4) His guardianship will not be for the welfare of the minor

Section – 13 Welfare of minor to be paramount consideration-

- (1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.
- (2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

Mohan Kumar Rayana v. Komal Mohan Rayana 2010 SC it was held by the Supreme Court that under section 6 & 13 of the Hindu Minority and Guardianship Act, 1956 the paramount consideration of the Court in determining the question as to who should be given the custody of a Minor child is the 'welfare of the child' and not rights of the parents under the statute for the time being in force. The Court has to give due weightage to the child ordinary contentment, health, education, intellectual development and favourable surroundings and the moral and ethical values should also be considered.

JOINT HINDU FAMILY COPARCENERS AND JOINT HINDU FAMILY
(MITAKSHARA LAW)

SYNOPSIS

1. Joint Hindu Family
2. Hindu Coparcenary
3. Joint family Property
4. Separate property
5. Distinction between coparcenary property and separate property

Joint Hindu Family

The Institution of the join Hindu Family is peculiar and unique institution of the Hindus

- A joint Hindu family consists of all persons lineally descended from a common ancestor & includes their wives and unmarried daughters. A daughter ceases to be a member of her father's family on marriage & becomes a member of her husband's family.
- An undivided Hindu family is ordinarily joint not only in estate, but also in food and worship. The existence of joint estate is not an essential requisite to constitute a joint family and a family, which does not own any property; may nevertheless be joint.
- Mere severance in food and worship does not operate as a separation.
- Possession of joint family property is not a necessary requisite for the constitution of a joint Hindu family. Hindu gets a joint family status by birth, and the joint family property is only an adjunct of the joint family.
- A joint or undivided Hindu family may consist of a single male member and widows of deceased male members. For instance, a joint Hindu family may consist of a male Hindu, his wife and his unmarried daughter. It may similarly consist of a male Hindu and the widow of his deceased brother. It may even consist of two female members. However, there must be at least two members to constitute it. An unmarried male Hindu on partition does not by himself alone constitute a Hindu undivided family.
- For taxation purposes a Joint Hindu Family is called a HUF (Hindu Undivided Family).
- It is different from composite family a creature of custom and agreement, where two or more families agree to live and work together, pool their resources, throw their gains and labour in to joint stock and shoulder the common risk.
- It is an unit and in all affairs it is represented by its karta (head).

Hindu Coparcenary

- A Hindu Coparcenary is a much narrower body than a Joint Hindu family
- A Hindu coparcenary includes only those persons who acquire by birth an interest in the joint or "coparcenary property". These being the sons, grandsons and great-grandsons of the holder of the joint family property for the time being.

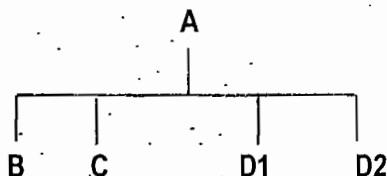
Before the Hindu Succession (Amendment Act 2005, Mitakshara Coparcenary consisted of only male members and females were not members of it. Hindu Succession (Amendment) Act, 2005 has substituted Section 6 of the Hindu Succession Act and has made the daughter of a Mitakshara Coparcener, a coparcener in her own right in the same manner as the son.

- The doctrine of coparcenary applies only with respect to ancestral and not self acquired property.

Formation of Coparcenary (Some rules):

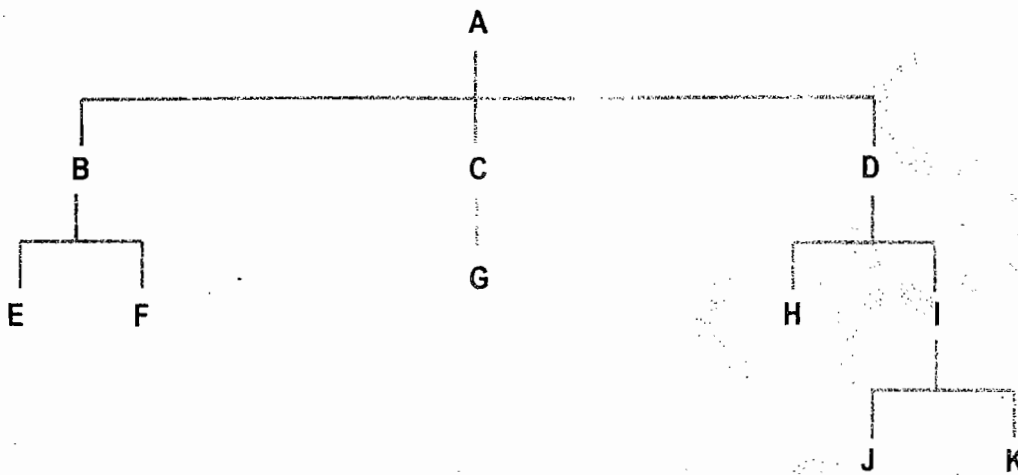
- The conception of a joint Hindu family constituting a coparcenary is that of a common male ancestor with his lineal descendants in the male line within four degrees counting from and inclusive of such ancestor (or three degrees exclusive of the ancestor). No coparcenary can commence without a common male ancestor, though after his death, it may consist of collaterals, such as brothers, uncles, nephews, cousins, etc.
- A coparcenary is purely a creature of law; it cannot be created by act of parties, save in so far that by adoption a stranger may be introduced as a member thereof.
- Before the Hindu Succession (Amendment) Act, 2005, Mitakshara Coparcenary consisted of only male members and female were not members of it. Hindu Succession (Amendment) Act, 2005 has substituted section 6 of the Hindu Succession Act and has made the daughter of a Mitakshara Coparcener, in her own right in the same manner as the son

illustration



In the above illustration, during the lifetime of A, the male holder in the family, B, C the two sons of A, D1 and D2 the two daughters of A, will constitute the coparcenary along with A.

- **Example** – In the given table, A with his three sons B, C and D and their sons and grandsons constitute the 'main' family. B with his two sons E and F, C with his son G, D with his sons H and I and his grandsons J and K, and I with his sons J and K, constitute 'branch' families. All the families have one common ancestor A. Each branch family has also its own head, namely B, C, D and I. On A's death, the coparcenary will consist of the three brothers, B, C and D and their male issue. On the death of B and C, the coparcenary will consist of D, his nephews E, F & G & his male issue H, I, J & K.



- **Example** – A inherits certain property from his father X. He has a son B and a grandson C, both members of an undivided family. A, B and C are coparceners. A son D is then born to C. D becomes a coparcener by birth with A, B and C. Subsequently, a son E is born to D. E is not a coparcener, for being fifth in descent from A, he cannot demand a partition of the family property. On A's death, however B will become the head of the joint family and E will step into the coparcenary as the great-grandson of B, though he is fifth in descent from A, the older. Likewise, on B's death, F (E's son) will step into the coparcenary as the great-grandson of C, the head of the family for the time being, though he is sixth in descent from A, the original holder.

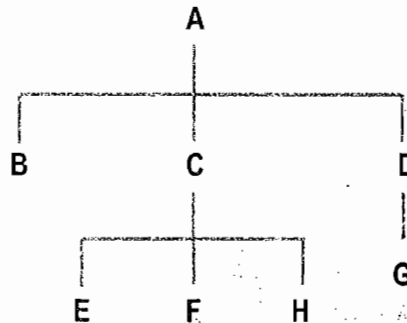


Undivided Coparcenary Interest

- The coparcenary property is held in collective ownership by all the coparceners in a quasi-corporate capacity. The **incidents of coparcenary** are: (1) The lineal male and female descendants of a person upto the third generation, acquire on birth ownership in the ancestral properties of such person; (2) That such descendants can at any time work out their rights by asking for partition; (3) That till partition, each member has got ownership extending over the entire

property conjointly with the rest; (4) That as a result of such co-ownership, the possession and enjoyment of the properties is common; (5) That no alienation of the property is possible unless it is for legal necessity, without the concurrence of the coparceners; and (6) That the interest of a deceased member passes on his death to the surviving coparceners.

- **Example** – A family consisting of A and his sons B and C, on a partition each will take one-third. However, if D was born while the family remained joint, each would take one-fourth. The family still remains undivided; on the death of A, the possible shares of the three sons would be enlarged to one-third; and if B were subsequently to die without issue, the shares of C and D would be enlarged to one-half; as C and D married, their sons E, F and G would enter into the family, they acquire an interest in the property, but that interest again would be shifting interest, depending on the state of the family. If C were to die leaving only two sons E and F and they claimed a partition against D, E and F would each take one-half of one-half, and D would take the other half. However, if H had previously been born, E, F and H would each take one-third of one-half, i.e. one-sixth each. If they put off their claim for a division until D and G had both died, E, F and H would each take one-third of the whole.



Note that on a partition between C and D after the death of A and B, C would take one-half and D would take the other half. If C is dead, his issue E, F and H will take per stripes as regards D, i.e. they will take the one-half share of C, and D will take the other half, but as regards each other, they will take per capita i.e. each will take an equal one-sixth share.

Females are Coparceners

- By virtue of Hindu Succession (Amendment) Act, 2005, now the daughter of a Mitakshara coparcener is also a coparcener in her own right and in the same manner as a son.

Note:

- Sections 6, 8 and 30 of the Hindu Succession Act, 1956 have altered to a great extent, the concept of succession in a Mitakshara coparcenary (discussed later).

COPARCENARY PROPERTY

Obstructed and Unobstructed Heritage

- Property in which a person acquires an interest by birth is called **unobstructed heritage**, *apratibandha daya*, because the accrual of the right to it is not obstructed by the existence of the owner. Property inherited by a Hindu from his father, father's father, or father's father's father, but not from his maternal grandfather, is unobstructed heritage as regards his own male and female issue, now after commencement of the Hindu Succession (Amendment) Act, 2005 a daughter of a Mitakshara coparcener also acquires an interest by birth in the Mitakshara coparcenary property.
- Property, the right to which accrues not by birth but on the death of the last owner without leaving a male and female issue, is called **obstructed heritage**. It is called obstructed, because the accrual of right to it is obstructed by the existence of the owner. Property which devolves on parents, brothers, nephews, uncles, etc. upon the death of the last owner, is obstructed heritage. These relations do not take a vested interest in the property by birth. Their right to it arises for the first time on the death of the owner. Until then, they have a **mere spes successionis** or a bare chance of succession to the property.
- **Example** – A inherits certain property from his brother. A has a son B. The property is obstructed in A's hands. B does not take any interest in it during A's life. After A's death, B will take it as A's

heir by succession. The existence of A is an obstruction to the accrual of any rights in the property to B.

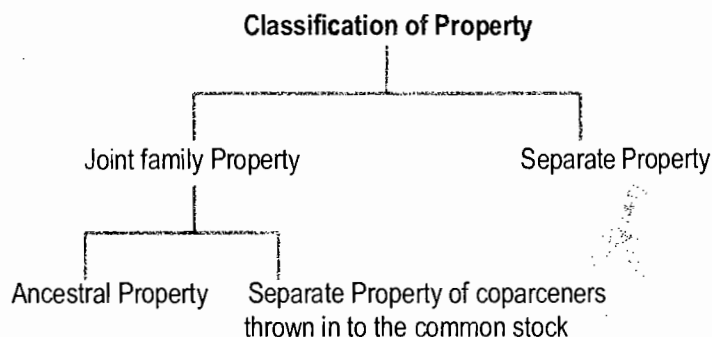
Classification of Property

According to the Hindu Law, property may be divided into two classes –

- (1) Joint family property or coparcenary property
- (2) Separate property (includes self-acquired property)

Joint family property may be divided (according to the source from which it comes) into:

- (1) Ancestral property, and
- (2) Separate property of coparceners thrown into the common coparcenary stock.



Incidents of Joint Family or Coparcenary Property

- Joint family or coparcenary property is that in which every coparcener has a joint interest and a joint possession.
- Joint family or coparcenary property –
 - (a) Devolves by succession not by survivorship.
 - (b) Is the property in which the male and female issue of the coparceners acquires an interest by birth.

Ancestral Property

- **Property inherited from paternal ancestor** – The essential feature of ancestral property according to Mitakshara law is that the sons, grandsons and great-grandsons also a daughter of a Mitakshara coparcener of the person who inherits it, acquires an interest, and the rights attached to such property at the moment of their birth. Thus, if A inherits property, whether movable or immovable, from his father or father's father, or father's father's father, it is ancestral property as regards his male issue. If A has no son, son's son, or son's son's son in existence at the time when he inherits the property, he holds the property as absolute owner thereof. However, if a son, son's son or son's son's son also a daughter of a Mitakshara coparcener is born to him subsequently, they become entitled to an interest in it by the mere fact of their birth in the family, and A cannot then claim to hold the property as absolute owner nor can he deal with the property as he likes.
 - If a person inheriting property from another one of his three immediate paternal ancestors has no son, son's son, or son's son's son, the property is his absolute property.
 - **Example** – Succession under the traditional Hindu Law. When a son inherits the property from his father vis-à-vis sons, he takes it as joint family property. Hindu Succession Act has introduced a new set of heirs when a Hindu inherits the property from his father under section 8, Hindu Succession Act, he takes as his separate property.
- **Property obtained by a gift or will from paternal ancestor** – Where a Hindu, instead of allowing his self-acquired or separate property to go by descent, makes a gift of it to his son, or bequeaths it to him by will, the question arises whether such property is the separate property of the son, or whether it is ancestral in the hands of the son as regards his (son's) issues.
 - In *Arūnachala Mudaliar v. Muruganatha*, the Supreme Court, after a consideration of the texts on the subject and the variant opinions of the High Court took the view that the question was primarily one of intention of the donor or the testator to be gathered from the terms of the deed of gift or will. If there are no clear words describing the kind of interest intended to be given the court would have to collect the intention from the language of the document taken along with the

surrounding circumstances in accordance with the established canons of construction. The material question in such cases would be whether the grantor really wanted to make a gift of the property to his son, or the apparent gift was only an integral part of a scheme to partition the same. There is no presumption that he intended the one or the other. A, who had three sons, after giving certain properties to his wife and other relations, provided that the properties in Schedules A, B and C of the will, which were his self-acquired properties, shall be taken by his eldest, second and third sons respectively, and that the sons shall enjoy the properties allotted to them with absolute rights and with powers of alienation such as gift, exchange, sale etc. from son to grandson is hereditary. It was held that the property bequeathed to the sons was not ancestral property in their hands vis-à-vis their own male issues.

- A gift of property made by a father to his son on the occasion of the son's marriage is not ancestral property in the hands of the son and it is his separate property.
- Sons, grandsons and great-grandsons and now daughters of Mitakshara coparcener acquire a vested interest not only in the income and accretions of ancestral property, which accrued after their birth, but also in the income and accretions, which accrued prior to their birth.

When jointly acquired property becomes joint family property

- When property is acquired by a joint family by joint labour (by way of business, profession or vocation) with the aid of joint family property, it becomes joint family or coparcenary property.
- Even if such property is acquired without the aid of joint family property, there is a presumption that such property is joint family property in the absence of any indication of an intention to the contrary.
- The principle applies only where all the members of a family jointly acquire the property. Therefore, when property is acquired by only some of the members, no such presumption would arise.

Property thrown into common stock

- Property which was originally the separate or self-acquired property of a member (coparcener) of a joint family may, by operation of the **doctrine of blending**, become joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established.
- Where members of a joint family, who have control over the joint estate, blend with that estate property in which they have separate interests, the effect is that all the property so blended becomes joint family property.
- The basis of the doctrine is the existence of coparcenary and coparcenary property, as well as the existence of separate property of a coparcener.
- The doctrine of blending will apply in the cases where coparceners' separate properties are involved.

Pushpa Devi v. Commissioner of Income Tax, AIR 1977 SC 2230 – Though she cannot blend her separate property with the joint family property, she can make a gift of such property to the joint family.

- The act by which the coparcener throws his separate property into the common stock is a unilateral act and the matter of individual volition.
- **Example** – A joint Hindu family, consisting of a father and his three sons, owns certain villages, which are the joint property of the family. The father as the head of the family opens an account with a banker, with whom he deposits from time to time, the income arising from the villages. The father also earns a large sum of money every year and these are also deposited by him with the banker in the same account. There is nothing to show that he discriminated between the income of the joint properties and his personal income. On the other hand, the evidence shows that he blended them both in one general account. Upon these facts, it was held by the Privy Council that the self-acquisitions of the father must be treated as joint family property, and that he had no power, therefore, to dispose them by his will.
- If there is no coparcenary property, there can obviously be no blending or throwing of self-acquired property into the common stock.
- The doctrine of blending of properties cannot be stretched, so as to include properties inherited by a male coparcener from his relations on the maternal side. Such properties would be his separate properties.

- If a member of a joint family builds a house on ancestral land with his own money, the other members have a claim on him only for compensation for their share of the land:

Incidents of Separate or Self-acquired Property

- A Hindu, even if he be joint, may possess separate property which belongs exclusively to him. No other member of the coparcenary, not even his male issue, acquires any interest in it by birth. He may sell it, or he may make a gift of it, or bequeath it by will, to any person he likes. It is not liable to partition, and, on his death intestate, it passes by succession to his heirs, and not by survivorship to the surviving coparceners.

Separate Property

The various types of separate properties are:-

1. **Obstructed heritage** – Property inherited as obstructed heritage (sapatibandha daya). In *Om Prakash v. Sarjit Singh* the Himachal Pradesh High Court held that property inherited by a Hindu from a person other than his father, grand father or great grand father is an obstructed heritage and character of such property would not remain ancestral.
2. **Gift** – It has been all along recognized that the father-Karta has power of making gift of small portion of movable joint family property as a gift of love and affection. In the hands of a donee such property is his separate property.
3. **Government grant** – Property granted by government to a member of a joint family is the separate property of the grantee, unless it appears from the grant that it was intended for the benefit of the family.
4. **Property lost to family** – Ancestral property lost to the family, and recovered by a member without the assistance of joint family property will be (a) the separate property of the recoverer if the recoverer is the Karta of the family irrespective of fact whether the recovered property is movable or immovable (b) if the recoverer is any other coparcener and property is movable the property will be the separate property of the recoverer (c) in case the recoverer is a coparcener other than the karta and property recoverer is immovable property the recoverer will take one-fourth of it as its separate property and rest will become joint family property in which all members including the recovering coparcener will have an interest.
5. **Income of separate property** – The income of separate property and purchases made with such income will be his separate property.
6. **Share on partition** – Property obtained as his share on partition by a coparcener who has no issue.
7. **Property held by sole surviving coparcener** – Property held by a sole surviving coparcener, when there is no widow in existence who has power to adopt.
8. **Separate earnings** – Separate earnings of a member of a joint family.
9. **Gains of learning** – All acquisitions made by means of learning are declared by the Hindu Gains of Learning Act 1930, to be the separate property of the acquirer.

Gains of Learning (Gains of Science)

Gains of learning or gains of science is also known as vidhyadhana. The term gains of learning means all acquisitions of property made substantially by means of learning (of whatever kind).

Before 1930, income earned by a member of a joint family by the practice of a profession or occupation requiring a special training imparted at the expenses of the joint family property was considered to be joint family property.

After 1930, the position is governed by the Hindu Gains of Learning Act, 1930 and accordingly, gains of learning are to be the exclusive and separate property of the member of the joint family who acquires them, even if –

- (a) His learning had been (in whole or in part) imparted to him by any member of his family, or with the aid of the joint funds of the family, or with the aid of funds of any member of the family; or
- (b) He himself or his family had, while he was acquiring such learning, been maintained or supported (wholly or in part) by the joint funds of the family, or by the funds of any member of the family.

The above Act came into force on 25th July 1930. It is retrospective in operation, and all gains of learning whether made before or after the said date, constitute the self-acquired property of the person acquiring them.

Moreover, under the said Act, the term "learning" is given a wide meaning to mean all types of education, whether elementary, technical, scientific, special or general, and training of every kind for pursuing any trade, industry, profession or avocation in life.

10. Property which was formerly ancestral, but was alienated by the family, and later purchased by a member out of his self-acquired funds.

The difference between coparcenary property and separate property can be summed up as follows:

Coparcenary Property	Separate Property
(1) All coparceners have community of interest and unity of possession in coparcenary property.	(1) Other members of the family have no interest in separate property.
(2) Sons, son's sons and son's son's sons acquire interest in coparcenary property by birth. (Now daughter is also a coparcener)	(2) No person can acquire interest in separate property by birth.
(3) Prior to 1956, a coparcener could not dispose off his undivided interest in coparcenary property by will.	(3) Even prior to 1956, separate property could be disposed off by will.
(4) A coparcener cannot gift his undivided interest in coparcenary property, without consent of other coparceners.	(4) The owner of separate property can gift such property to any person, to any extent.
(5) Subject to certain exception, a coparcener cannot sell or mortgage his undivided interest in coparcenary property, without the consent of other coparceners.	(5) The owner can freely sell or mortgage his separate property.
(6) Coparcenary property can be partitioned.	(6) No question of partitioning separate property arises.

Differences between an Ordinary Partnership and Joint Hindu Family Firm is as follows:

Ordinary Partnership	Joint Hindu Family Firm
1. It is created by act of parties.	1. It is a creature of the law.
2. A issue of a partner does not acquire any interest in the partnership property by birth.	2. A issue of a coparcener whether son, grandsons, great-grandsons of common male ancestor as well as a daughter of a coparcener acquires an interest by birth.
3. It is dissolved by the death of a partner (in the absence of a contract to the contrary.)	3. It is not dissolved by the death of a member.
4. It can be dissolved only in the circumstances mentioned in the Indian Partnership Act.	4. It may be dissolved at any time if a coparcener manifests his intention to separate himself.
5. A retiring partner has a right to ask for accounts.	5. A separating coparcener has no right to ask for accounts.
6. A partner has a definite share in the business.	6. The share of a coparcener is a fluctuating one.
7. Any partner can bind his co-partners by debts incurred for the purposes of the partnership business.	7. A coparcener, who is not the manager, cannot contract debts for the purposes of the family business.
8. A partner's share in the firm, as well as his separate property, is liable for the payment of partnership debts.	8. The separate property of a coparcener, who is not the manager, is not liable for the payment of debts of the family business.
9. A minor coparcener's separate property is likewise not liable.	9. In the case of minor, only his share in

	the firm is liable; his separate property is not.
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- If a member of a Hindu joint family decides to do business in partnership with other persons who are not members of that family; the case will be governed by the provisions of the Indian Partnership Act, and not by the special provisions of Hindu Law. In such a case, neither the other members of the family become partners, nor can the family, as a unit, be regarded as a partner in such business. As such a partnership will be governed by the Partnership Act, the death of one of the partners will (in the absence of a contract to the contrary) dissolve the partnership.
- When manager of a joint family enters into a partnership and contributes capital from the joint family funds. In such a case, contractual relations are established between the third party and the manager, and no privity of contract exists between the third party and the family as a whole. Therefore, the manager will be accountable to the family for his share of the profits and business assets. However, upon his death, the surviving members cannot claim to continue as partners; nor can they institute a suit for the dissolution of the partnership. (**Sokkanadha v. Sokkanadha, 28 Mad. 344**) The other partner (who is not a member of the family), cannot sue the surviving members as partners for the manager's share of the loss in the business. His only remedy in such a case would be proceed against the manager's estate, if any.
- If the manager of a trading family enters into a partnership with strangers for the purpose of carrying on the same kind of business as that of the family, the members of the family would be liable to the extent of their interests in the family property.

RIGHTS AND POWERS OF KARTA AND COPARCENERS

SYNOPSIS

1. Who may act as karta
2. Position of karta
3. Powers of karta
4. Duties of karta
5. Rights of coparceners
6. Coparcener's power of alienation
7. Rights and Remedies of an Alienee of a coparcener's interest
8. Duty of an Alienee

Who May Act as Karta

- The father if living or senior most male member would generally be the manager or 'Karta' of the joint Hindu family. Thus it has been held that the father is in all case naturally and in the case of infant sons, necessarily the manager of the joint estate. And where father is not alive and the family consists of brothers, the elder brother in the absence of any evidence to the contrary should be presumed to be the manager of the family.
- A minor can not be the manager of the joint Hindu family.
Under the Hindu law coparcenership is a necessary qualification for the membership of a joint Hindu family. Before the Hindu Succession (Amendment) Act, 2005 a female was not a coparcener, therefore, she could not be karta. But after the Hindu Succession (Amendment) Act, 2005 daughter of a coparcener is a coparcener. Therefore, it is submitted that she may become a karta of Mitakshara coparcenary, provided she is seniormost coparcner.
- A widow was not a coparcener, she had no legal qualification to become the manager of joint Hindu family.

In Gangoli v. H.K.Channappa the Karnataka High Court expressed the view that the mother as natural guardian of her minor sons can manage the joint family property and appointment of a guardian by court will not be justified. This is obviously the situation where father is dead and there is no adult male member.

Position of Karta

The position of karta is sui generic. The position of Karta is determined by birth and he is not appointed by anyone nor does the consent of other coparceners is required. He is entitled to be the karta because he is the senior most. So long he is alive, may be aged, infirm or ailing he will continue to be the karta. Thus karta can not be removed. Whether insanity or other disqualifications will defeat his right is not clear but it seems that in such a case the next senior male member will take over. The relationship between him and other members are not that of principal or agent or partners. Needless to say, he is the head of the family and acts on behalf of other members, but he is not like a partner, as his powers are almost unlimited undoubtedly he is the master of the grand show of the joint family and manages all its affairs and its business he stands in fiduciary relationship with other members but he is not a trustee. Ordinary he is accountable to none unless charge of misappropriation, fraud or conversion are leveled against him under Dayabhaga law his position approximates more closely to that of a trustee than under the Mitakshara law as under Dayabhaga law he is liable to account for his past dealings with the property.

Powers of the Karta

As long as the family remains joint, his authority cannot be revoked. The special powers of the Karta can be classified as follows

- (1) Powers over the income and expenditure of the family
- (2) Power of alienation of joint family property for legal necessity or for benefit of the estate
- (3) Power to contract debts
- (4) Power to acknowledge debts
- (5) Power to start a new business
- (6) Power to give a valid discharge
- (7) Power to refer disputes to arbitration
- (8) Power to represent the joint family in suits and other proceedings
- (9) Power to compromise
- (10) Power to enter into contracts

(1) Karta's power over income and expenditure

The Karta of a joint Hindu family has complete control over the income and expenditure of the joint Hindu family.

The family purposes for which the Karta is authorised to spend the family income are the maintenance, residence, education, marriage, sraddha and other religious ceremonies of the coparceners and their families. A Karta cannot, however, misappropriate the family funds or misapply them to purposes other

than those of the family. If he does so, he is liable to make good all such sums to the other members of the family.

(2) Karta's power to alienate coparcenary property

- a. Legal Necessity
- b. Benefit of estate
- c. Acts of indispensable duty for religious, pious or charitable purpose

When karta exercise power of alienation in above three cases the consent of other coparceners will be implied. Karta can also alienate the property even if none of the above cases exists but with the consent of other coparceners.

An alienation of the Karta which is neither for a legal necessity nor for the benefit of the estate, and which is made without the consent of the other coparceners is not, however, **void ab initio**; it is merely voidable at the option of the other coparceners. Until they avoid it, such an alienation remains valid and binding.

From the decided cases, however, one can give the following as examples of legal necessity or family necessity, viz. –

- (b) Payment of Government revenue.
- (c) Payment of debts which are payable out of the family property.
- (d) Payment of debts due to the landlord, or payment under a decree for arrears of rent passed in favour of the landlord.
- (e) Costs of necessary litigation in recovering or preserving the estate of the family.
- (f) Costs of defending the head of the joint family (or any other member) against a serious criminal charge.
- (g) Maintenance of coparceners and their daughters.
- (h) Marriage expenses of coparceners and their daughters.
- (i) Performance of funeral and other ceremonies.
- (j) Costs of building a residential house for the family.
- (k) Sale of family property for conveniently adjusting the shares of the members of the family.
- (l) Expenses for augmenting the means of livelihood of the family, unless it is risky or speculative.
- (m) Similar purposes provided that these purposes cannot be met out of the income of the family or the cash on hand.

Examples of transactions which have been held to be for the benefit of the estate, justifying alienation of joint family property:

- (a) An advantageous acquisition of property made in the interests of the family;
- (b) A sale of small shares in inferior lands in different villages, for the purpose of acquiring a compact share in fertile land in one village;
- (c) A sale of joint family property, which is unproductive and inconveniently situated, for the purpose of investing the sale proceeds in a better piece of property;
- (d) A sale of a house in a dilapidated condition, in respect of which a notice had been received from the Municipality for pulling it down;
- (e) A mortgage for making additions to, and improvements upon, the family house; and
- (f) A gift to a stranger of a small portion of land with a view to defeat a claim of pre-emption.

When the Manager of a joint family happens to be a father, he has two additional powers, viz. –

- (a) He can make a gift out of affection within reasonable limits.
- (b) He can sell or mortgage the joint family property (including his son's interests therein) to discharge a debt contracted by him for his own personal benefit, provided the debt was an antecedent debt, and it was not contracted for illegal or immoral purposes.

Cases:

Hanooman Prasad v. Mussumat Babooee (1856) – The leading case on the subject of alienation for necessity is **Hundoman Prasad case**. In that case, their Lordships of the Privy Council said:

The power of the manager for an infant heir to charge an estate not his own is under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. However, where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded..... Their Lordships think that the lender is

bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. However, they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under the circumstances, he is bound to see the application of the money..... The purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution, but is himself deceived.

The question in *Hanooman Prasad's case* was as to the extent of the power of a mother as manager of the estate of her minor son to alienate the estate. The case related to a mortgage created by the mother, but the same principles apply to a sale. The principles laid down in that case have been held to apply to alienations by:

- a) The manager of a joint family acting on behalf of minor members of the family.
- b) A Hindu widow and other limited heirs of property inherited by them from males.
- c) Managers of religion endowments.
- d) Managers of the estate of lunatics.

(3) Power of the manager to contract debts

The manager of a joint family has an implied authority to contract debts and pledge the property of the family for family purpose, such debts are binding on the members of the joint family. However, the manager himself would be liable personally also, and not only to the extent of his interest in the property but he being a party to the contract.

(4) Power of the manager to acknowledge debts

A manager of a joint family has the power to acknowledge a debt, but he has no power to relinquish a debt due to the family. Nor can he pass a promissory note to revive a debt which is already time-barred.

(5) Power to give a valid discharge

The Karta has the full power to give a valid discharge for all debts due to the family. This power is absolute, and can be exercised even when there are dissensions in the family. If one of the members is a minor, he can not claim benefit of section 7 of Limitation Act.

(6) Power of the manager to refer a dispute to arbitration

Karta has the power to refer disputes (relating to joint family property) to arbitration, provided he does so bona fide, i.e. without any fraud or collusion, and for the benefit of the family. Other members of joint family, including minor are bound by the reference and consequently by the award made upon it.

(7) Power of the manager to represent the joint family in suits and other proceedings

The manager of a joint family may sue or be sued in respect of any transaction entered into by him as the manager of the family, and if a decree is passed against him in such a suit, it would be binding on all the members of the family. If a member of the joint family contends that what the manager did was beyond his power, such a person is not properly represented by the manager, and ought to be joined as a party to the suit.

(8) Karta has the power to enter into a compromise also.

Duties and liabilities of the manager

- a) **Duty to render accounts** – Karta is duty bound to render amounts to the other coparceners regarding his dealing with the coparcenary property and income thereof. But a karta is not liable to account for his past dealings with the family property unless there is clear proof of misappropriation or fraudulent use of the family funds or estate by him.
- b) **Duty to recover debts due to the family.**
- c) **Duty to spend reasonably.**
- d) **Duty not to start a new business without the necessary consent.**
- e) **Duty not to alienate coparcenary property.**

Rights of coparceners:-

- 1: **Right to joint ownership**

2. Right to joint possession, enjoyment and use of joint family property
3. Right of maintenance
4. Right to challenge and restrain alienation when improper
5. Right of alienation

Coparcener's power of alienation

(1) Gift of undivided interest

A coparcener cannot dispose of his undivided coparcenary interest by gift. As such a transaction is altogether void; there is no estoppel which would preclude the donor from asserting his right to recover the property which is transferred. However, he can make gift inter vivos with the consent of other coparceners provided it is in favour of all coparceners.

(2) Disposition by 'will' of undivided interest

Under Section 30 of the Hindu Succession Act, a Hindu can now dispose of his interest in coparcenary property by will or any other testamentary disposition.

(3) Sale or mortgage of undivided interest

In the State of Tamil Nadu, Madhya Pradesh, Maharashtra and Gujarat, a coparcener can sell, mortgage or otherwise dispose off for value, his undivided interest in coparcenary property without the consent of the other coparceners.

However, in the States of West Bengal, Bihar, Orissa, Punjab and U.P., no coparcener can alienate, even for value, his undivided interest, without the consent of the other coparceners, unless such alienation is for a legal necessity or for payment by a father of his antecedent debts. The consent of the other coparceners is necessary, even if the alienation is made in favour of a coparcener of the same family. (*Chandar v. Dampat, 1894, 16 All. 369*)

(4) Alienation in execution of a decree

The undivided interest of a coparcener can be taken in execution of a decree against him for his separate debts. But attachment before death.

(5) Renunciation

A coparcener has a power to renounce his interest in the joint family property. Consent of other coparceners is not necessary. It does not result in general partition. Renunciation to be valid must be of the entire interest in favour of the entire body of coparceners. Renunciation of share by a coparcener in favour of his wife is ~~not valid~~. If renouncing coparcener remains a member of joint family, his sons including sons born to him after renunciation can not be deprived of their interest in the joint family property but if the renouncing coparcener ceases to be a member of joint family his after born son can not claim any right by birth in such property.

Sole surviving coparcener's right of alienation:-

Sole surviving coparcener

A sole surviving coparcener is entitled to dispose of the coparcenary property as if it was his separate property. If another member is born to such a coparcener after the alienation, such another member cannot object to such an alienation. Similarly, a sole surviving coparcener can dispose of the property by will. However, as the will operates from the date of the death of the testator, if a coparcener comes into existence or in the womb of mother before his death, the will would not take effect, and the property would pass by Succession. The sole surviving coparcener can not alienate the interest of any female vested in her by virtue of operation of section 6 Hindu Succession Act.

RIGHTS AND REMEDIES OF AN ALIENEE OF A COPARCENER'S INTEREST

(1) No Right of joint possession

The purchaser of an undivided interest of a coparcener in specific property –

- (a) At a Court sale in the State of West Bengal and U.P., or
- (b) At a Court sale or a private sale in the State of Tamil Nadu, does not acquire a right to joint possession with the other coparceners. He is only entitled to compel a partition of such property.

In Maharashtra and Gujarat, if the purchaser is a stranger (i.e. not a coparcener of that family), and has not obtained possession of the property, he cannot be given joint possession with the other coparceners, and his proper remedy would be to sue for a partition. But, if such a person has obtained possession, the non-alienating coparceners are entitled to have joint possession with him.

(2) Right to partition

In Tamil Nadu, Maharashtra and Gujarat, the purchaser of the undivided interest of a coparcener in some specific property belonging to the joint family, is not entitled to a partition of that property alone. His only remedy would be a suit for general partition. But in Allahabad and Calcutta, the purchaser need not file a suit for a general partition, and that he is entitled to sue for a partition of that specific property.

The other coparceners (i.e. the non-alienating ones) are entitled to sue the purchaser for a partition of the alienated property, without bringing a suit for general partition. But one of such coparceners cannot sue the purchaser for his own share of the alienated property. (*Shyam Sunder v. Jagannath*, 1923 2 Pat. 925)

(3) Right to sue for partition after vendor's death

The purchaser of the interest of a coparcener may sue for partition even after the death of the coparcener. His right to partition is not lost by the death of the coparcener.

(4) Right to share on partition

The share to which a transferee is entitled on a partition is the share to which the transferer was entitled at the date of the alienation, and not at the date when the transferee seeks to take the possession of such property.

(5) Equitable right of the purchaser on partition

The alienee of a specific property or of the undivided interest of a coparcener in such property has on a general partition, an equitable right to have the property, or his alienor's share in that property, as the case may be, assigned to him, if it could be done without injustice to the other coparceners. However, there may be equities between the coparceners or liabilities attaching to the alienor's share, which may render it inequitable or impracticable to do so. In such a case, the alienee is entitled to recover from his alienor, property of an equivalent value out of the properties allotted to the alienor for his share in substitution of the property alienated. In making adjustments, the court will take the value of the properties at the time of the division and not at the time of the sale.

It has been held by the Madras High Court in *Sabapathi v. Thandavaroya*, that such equitable relief by way of obtaining substituted property cannot be claimed by or granted to a purchaser at a court sale, there being no warranty of title at such sale and no privity of contract between the auction purchaser and the judgment-debtor. This decision was followed by the Bombay High Court in *Chidambargauda v. Channappa*.

(6) Right to mesne profits

The purchaser of the interest of a coparcener is not entitled to mesne (past) profits between the date of the purchase and the date of the suit for partition. Where, however, there is a partition of the family without a division of property by metes and bounds, the purchaser of the undivided share of one of the members of the family is entitled to claim mesne profits from the members who are in possession of such property.

(7) No Right to sue for specific performance

If, before the completion of the sale, the coparcener who has sold his interest dies, the purchaser is nevertheless entitled to sue for specific performance of the agreement for sale.

(8) Right to impeach previous alienations

The purchaser of the entire interest of the whole family in the coparcenary property, which is alienated, is entitled to challenge or object to the previous alienations in respect of such property.

(9) Purchaser takes subject to equities

The transferee of a coparcener's interest takes the property subject to all the charges, encumbrances and liabilities affecting such property or the coparcener's interest therein. Thus, for instance, the purchaser of a son's undivided family property takes that interest subject to the liability attaching to such interest to pay the personal debts to his father, provided such debts are not tainted with immorality.

Examples:

1. A mortgages certain ancestral property to M. Subsequent to the mortgage, a son B is born to A. Thereafter, a partition takes place between A and B, and the mortgaged property is divided between them equally. M then sues A and B for a sale of the mortgaged property. B objects to a decree against his half share. B's objection must be overruled and a decree passed for the sale of the whole property, as the father was entitled to the whole of the property at the date of the mortgage. (The same principle applies to sales.)

Chapter – 8

PARTITION AND REUNION

SYNOPSIS

- (1) What property is divisible on partition
- (2) Persons entitled to a share on partition
- (3) Restraint against partition
- (4) Allotment of shares
- (5) Partition how effected
- (6) Re-opening of partition
- (7) Effect of partition
- (8) Reunion
- (9) Partition created by so-called will

Ranvika IAS

Meaning of Partition

According to Mitakshara law partition means two things:-

1. Severance of status or interest and
2. Actual division of property in accordance with the shares so specified, known as partition by metes and bounds.

Partition under Mitakshara law may be defined as, "the crystallization of the fluctuating interest of a coparcenary in to a specific share in the joint family estate.

(1) What property is divisible on partition

- The only property that can be divided on a partition is coparcenary property.
- 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.
- Family idols and places of worship are not divisible. 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.
- 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.
- Where a coparcener, who is joint with his male and female 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 and female issue.
- If no partition can be made without destroying the intrinsic value of a property, then a money compensation should be given instead of the share which would fall to a coparcener by partition.

The following should be deducted first from the Joint family property:-

- (1) Joint family debts, which are payable out of the joint family property.
- (2) Personal debts of the father not tainted with immorality.
- (3) Maintenance of dependent female members and of disqualified heirs.
- (4) The marriage expenses of unmarried daughters.
- (5) Where a partition takes place between the sons, provision must also be made for the funeral ceremonies of the widow and the mother of the last male holder.

Persons who have right to Partition :- Partition of the joint Hindu Family property takes place at the instance of the following:-

1. Son; Grandson and great grand son:- Under the Mitakshara Law the right of a son, grandson and a great grandson as well as every other adult male member of the coparcenary to demand partition even against the consent of others has been fully settled. But in Bombay school the son has no right to partition without the assent of father if father is joint with his own father, brother or other collaterals.
2. Daughter of coparceners:- Before the Hindu Succession (Amendment) Act, 2005 Mitakshara coparcenary consisted of only male members and female were not members of it. Hindu Succession (Amendment) Act, 2005 has substituted section 6 of the Hindu succession Act and has made the daughter of Mitakshara coparcener a coparcener in her own right in the same manner as the son.
3. After born Sons and after born daughter of a coparcener:- After born sons may be considered in two sets. Firstly those born as well as begotten after partition and secondly, those born after partition but begotten before it or those in their mother's womb at the time of partition. A son in mother's womb at the time of partition is treated in point of law in existence and is entitled to reopen the partition to receive a share equal to that of his brothers. In the case of a son born as well as begotten after the partition if his father has taken a share for himself and separated from the other sons then the after born son is entitled to his father's share at the partition and also his separate sons and is not entitled to reopen the partition. The same principle would now apply in case of a daughter of a coparcener. Who is a coparcener in her own rights after the commencement of the Hindu Succession (Amendment) Act, 2005
4. Illegitimate sons:- An illegitimate son among the three regenerate classes having no vested interest in the property, can not demand a partition but he is entitled to maintenance out of his

father's estate. The Madras and the Allahabad High Court held that the illegitimate son of sudra may enforce a partition against his legitimate brothers but not against his father. But Calcutta High Court held that the share of an illegitimate son is half of that a legitimate son. In *velliyyappa chetty v. Nataraja* 1931 the privy council appeal the Madras decision and held that the illegitimate son is not entitled to demand a partition of JFP though he is entitled as a member of the family to maintenance out of that property.

5. **Adopted Child:-** An adopted child is treated as a natural born child and therefore he would be entitled to demand partition any time after adoption. Now under Hindu Adoption and Maintenance Act, 1956 and adopted child is entitled to a share equal to that of natural born child on partition (Sec 12 HAMA-1956).
6. **Minor Coparcener:-** The right of minor coparcener is same as that of major coparcener however a minor is a person of immature intellect and the court acting as *parens patriae* has duty to protect minor's guardian or the next friend of guardian may file a suit for partition on minor's behalf and the court has to see whether partition is for the benefit of minor or not. If it is not for his benefit then partition will not be allowed.
7. **Alienee:-** A purchaser of a coparcener's interest in a court sale or in a private sale where the coparcener has such a power the alienee can demand partition.

Persons who take share on partition:- There is another category of members of the joint family who have no right to partition but if partition takes place are entitled to share.

1. **Father's wife:-** On a partition between her husband and her son the wife is entitled to a share equal to the share of son. If no share is allotted to her, she can get the partition reopened.
2. **Widowed mother:-** A widowed mother has a right to take equal share to that of a son if partition occurs among the sons (Mother and step-mother each take a share equal to the share of a son)
3. **Paternal grand-mother:-** She would be entitled to share only if partition is between her grandchildren or between collaterals and her own children being dead. She gets a share equal to that of grandson.
4. **Coparcener's widow:-** The widow of a deceased coparcener takes the same share in property which her husband had at the time of partition.

(3) Allotment of Shares

Shares on partition

On a partition between the members of a joint family, shares are allotted according to the following rules:

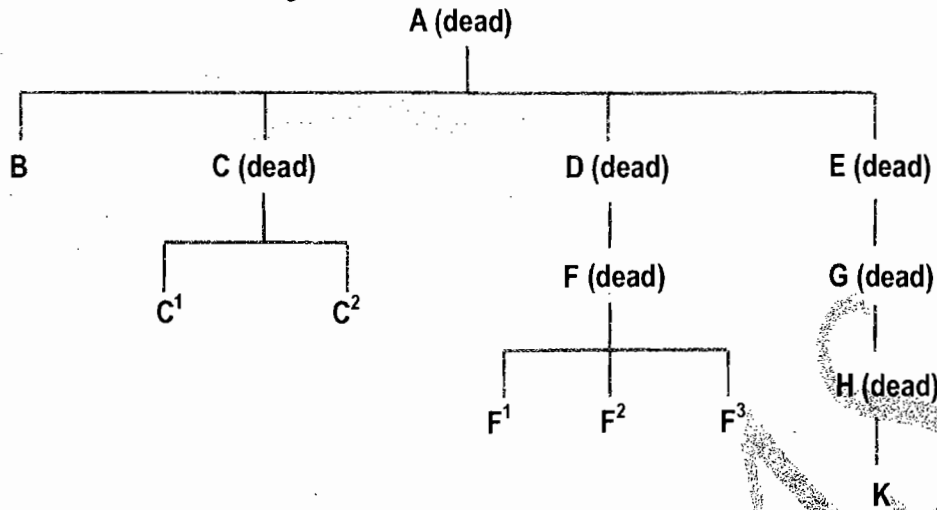
- (1) On a partition between a father and his children, each child takes a share equal to that of the father. Thus, if a joint family consists of a father and three sons, the property will be divided into four parts, each of the four members taking one-fourth.
- (2) Where a joint family consists of brothers, they take equal shares on a partition.
- (3) Each branch takes *per stripes* (i.e. 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 [Illustrations (a) and (b)].

The ordinary rule is that partition should be made ***rebus sic stantibus*** as on the date of the suit, i.e. 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. According to the Bombay High Court, the rule is to be applied at both partitions [see illustrations (c) and (d)].

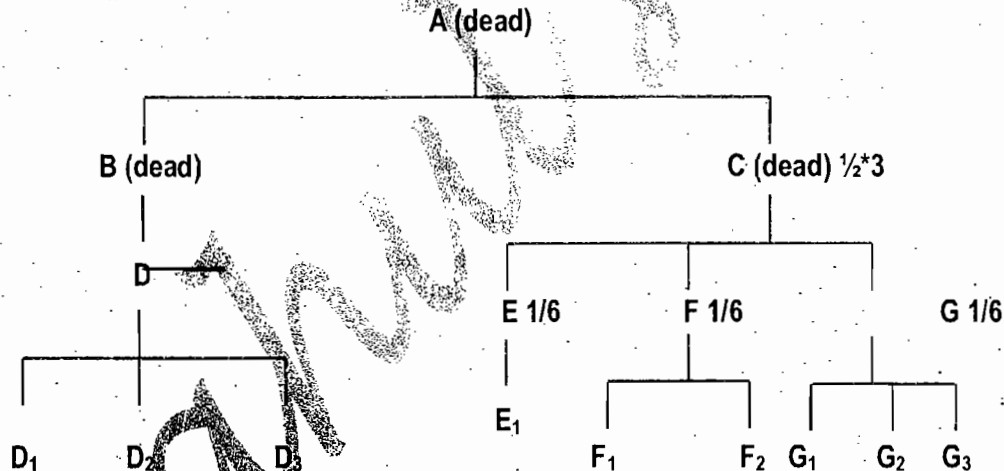
Illustrations:

- (a) A dies leaving a son B, two grandsons C¹ and C², three great-grandsons F¹, F² and F³ and one great-great-grandson K. 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. 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, C¹ and C² will take the one-third share of C equally between them,

each taking $\frac{1}{2}$ of $\frac{1}{3}$, that is $\frac{1}{6}$ and F^1 , F^2 and F^3 will take the one-third share of D equally between them each taking $\frac{1}{3}$ of $\frac{1}{3}$, that is $\frac{1}{9}$.



(b) A dies leaving four grandsons, D, E, F and G and nine great-grandsons. 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 $\frac{1}{2}$ and C's branch taking $\frac{1}{2}$ as to B's branch, D and his sons D_1 , D_2 and D_3 , will each take $\frac{1}{4}$ of $\frac{1}{2}$, i.e. $\frac{1}{8}$, 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 $\frac{1}{3}$, i.e. $\frac{1}{6}$, E and E_1 will each take $\frac{1}{2}$ of $\frac{1}{6}$, i.e. $\frac{1}{12}$; F, F_1 and F_2 , will each take $\frac{1}{3}$ of $\frac{1}{6}$ i.e. $\frac{1}{18}$ and G, G_1 , G_2 and G_3 , will each take $\frac{1}{4}$ of $\frac{1}{6}$, that is, $\frac{1}{24}$.



PARTITION HOW EFFECTED

There are two necessary conditions partition which bring about a severance of the joint status or interest:

- Formation of an intention to separate
- Declaration of an intention to separate

The declaration involves the expression on intention plus communication of the intention to sever. It is the declaration of intention that actually sever status. The communication of intention to sever must be communicated to all interested parties. Dr. Paras Diwan is of opinion that the interested parties mean here the coparceners only and not the other members of the family.

Severance of status is effective from the date on which the communication was put in to transmission. The vested rights accruing between the date of transmission of communication and receipt of communication are preserved *Subha Rao j. in Raghavamma v. Chenachamma*, observed. "If the doctrine of relating back is involved without any limitation thereon vested rights so created will be effected and settled title may be disturbed."

The Supreme Court laid down in Puitorangamma v. Rangamma that it is now well settled doctrine of Hindu Law that a member of joint family can bring about his separation in status by a definite, unequivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severality. It is immaterial whether the other coparceners in such a case give their assent to the separation or not.

(1) 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 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. A grandfather has no power to bring about a separation among his grandsons. Even if he allots shares, they remain joint.

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, it acquiesced in by them. 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.

(2) 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.

The filing of a suit is strong evidence, but not conclusive evidence of an intention to separate.

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.

(ii) Minor's Suit for Partition

The minor can file a suit through a guardian. 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.

It has been held by the Supreme Court in Redasubhiya v. Akkamma AIR 19589 SC 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.

(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.

Rule: 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.

Examples:

- (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. The result would be the same if A, B and C appointed an arbitrator to partition the property, and A died pending arbitration.

1. Partition by Notice
2. Partition by will
3. Partition by agreement
4. Conversion to another religion
5. Etc.

Partial Partition :- The partition of a joint family people may be partial either:-

- a. As to property or
- b. As to persons separating

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 remaining their status as joint family and holding the rest as properties of a joint and undivided family.

Partial as to persons separating:- It is open to a member to separate himself from the other members of joint family and to have his share ascertained and partitioned off. The remaining coparceners without any special agreement may continue to be coparceners and to enjoy the remainder as a joint family.

But the consequence of partial partition is to be determined from the intention of the parties and intention thus becomes the main factor in determining whether the properties and the family will continue to be joint.

Re opening of Partition :- Under Shastric Law, once a partition is made is irrevocable. However there are certain exceptions to this general principle. A partition can be re-opened under the following circumstances:-

- (a) Fraudulent distribution of properties unless the person affected by the fraud acquiesces in with full knowledge of material facts.
- (b) If at the time of partition a son (now daughter of coparcener) is in womb and no share is reserved for him.
- (c) Son conceived and born after partition can get the partition re-opened where the father does not take a share on partition
- (d) Adopted son is entitled to re open the partition
- (e) Disqualified coparcener recovering from his disqualification can get the partition re-opened.

Note:- The Supreme Court in Ratan Chettiar v. S.M. Kuppu Swami has held that a partition effected between members of the Hindu Undivided family by their own volition and with their consent can not be reopened unless it is shown that the same is obtained by fraud, coercion, misrepresentation or undue influence.

Re--union

General Rule—As stated above, according to Manu "once a partition is made once is a damsel giving in marriage, once does a man say, 'I give'—these are by good men done once for all and irrevocably." Therefore, the legal consequences of a partition cannot be controlled or affected by the subsequent conduct of parties.

Exception.----Re-union is, however, an exception to this general rule which is based on the text of Brihaspati who says: "He who, being once separated, dwells again through affection with his father, brother or paternal uncle, is termed "re-united".

The Mitakshara, the Dayabhaga and Madras School take this text literally and say that a member of a joint family once separated can reunite only with the father, brother and paternal uncle but not with any other relations, as for example, a grandmother or a paternal uncle's son. Hence according to these schools, a re-union can only take place between----

- (i) a father and sons;
- (ii) brothers; or
- (iii) a paternal uncle and nephews, and any other re-union, such as, between cousins, is invalid and inoperative.

According to the Mithila and the Mayukha Schools the words 'father', 'brother' and 'paternal uncle' are used in an illustrative sense and a re-union can be effected between others provided they were parties to the original partition.

In Bhikshari Charan Naik v. Bhaba Bewa, the Orissa High Court reaffirmed the law by observing that re-union in partitioned estate can happen only between parties to original partition. Therefore it cannot arise by adopted grandson of a coparcener living with his natural father possessing jointly the shares of branch with that of another.

In order to constitute a re-union, there must be evidence on the part of the parties to re-unite in estate and interest. The mere fact of living together at the same place of residence or carrying on a joint trade cannot constitute re-union. There cannot be re-union unless there is an agreement between the parties to re-unite in estate with the intention to preserve their former status as members of a joint family.

Effect of re-union---The effect of re-union is to revert the united members to their status as members of joint Hindu family.

THE HINDU SUCCESSION ACT, 1956

SYNOPSIS

1. Introduction
2. Definition of certain terms
3. Devolution of interest in Mitakshara Coparcenary property
4. General rules of succession in the case of male
5. General rules of Succession in the case of female
6. Property of a female Hindu
7. Other provisions

INTRODUCTION

This Act has added certain clauses in the list of class I heirs viz., predeceased granddaughter's children.

The Hindu Succession Act, 1956 has undergone a lot of change by virtue of the Hindu Succession (Amendment) Act, 2005. The section 6 of the said Act, has been totally replaced by a new provision. Also Two sections viz., sections 23 and 24 which were discriminated against woman have been omitted by the Amending Act, 2005.

By this Amendment Act daughter of a Mitakshara coparcener has been made a coparcener in the Mitakshara joint family property with the same rights and obligations which a male coparcener has and she is now entitled to dispose of her interest in Mitakshara coparcenary property by will. The devolution of interest of a Mitakshara coparcener in joint Hindu family has been done away with by this Amendment Act.

CERTAIN TERMS EXPLAINED

Agnate and cognate Section 3 (a), (c)

Agnate means a person related by blood or adoption, but wholly through males ; where as cognate means a person related by blood or adoption but not wholly through males. The agnatic relation may be male or female. So is the case with cognatic relation. Where a person is related to the deceased through one or more females he or she is called cognate: Thus son's daughter's, son or daughter, sister's son or daughter, mother's brother's son etc. are cognates. Where as one's father, grandfather etc. in the ascending line; father's brother's son etc. in the collateral line; or son. Grandson in the descending line are agnates.

A cognate or an agnate may be in ascending or descending line.

- **Heir, Section 3(f):** It means any person male or female, who succeeds to the property of an intestate under this Act. The term 'heir' is contrary to reversioner. Reversioners had only a chance of Succession where as heir is the person male or female who has immediate right to inherit the properties of a deceased dying intestate.
- **Intestate, Section 3(g):** A person is deemed to die intestate in respect of property of which he or she had not made a testamentary disposition (will).
- **Related, Section 3(j):** Means related by legitimate kinship. Kinship is created by blood or under Hindu law by adoption. Legitimacy depends upon marriage law and is to be determined accordingly.

Provided that illegitimate children shall be deemed to be related to their mothers and to one another and their legitimate descendates shall be deemed to be related to them and to one another and by word expressing relationship or denoting a relative shall be construed accordingly.

Note: The Hindu Succession Act, 1956 deals with both testamentary (Section 30) and intestate succession.

SECTION 6 – DEVOLUTION OF INTEREST IN COPARCENARY PROPERTY:-

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu Family governed by the Mitakshara law, the daughter of a coparcener shall---

(a) By birth become a coparcener in her own right in the same manner as the son;

(b) Have the same rights in the coparcenary property as she would have had if she had been a Son;

(c) Be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,---

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation---For the purpose of this sub section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. (4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson's or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt.

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

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation---For the purposes of clause (a), the expression "son", "grandson", or great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation---For the purpose of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.

Before this amending Act, Mitakshara coparcenary consisted of male members only. Now daughter of a Mitakshara coparcener has also been made a coparcener. The principle of survivorship has been abolished by this amending Act and a Mitakshara coparcenary would be divided after the death of a coparcener.

Post amendment daughters are entitled to share in ancestral property in the capacity of a coparance.

The amendment gives the right to daughters from 2005 and not merely to daughters who were born after 2005. The daughters have been brought at par with sons and it has removed gender discrimination and has brought this provision at par with Articles 14 and 15 of the constitution.

Gurupad Khandappa Magdum v. Hirabhai Khandappa Magaum and others 1978 SC The Explanation to section 6 that is legal fiction should be given its due and full effect. The assumption which the statue require to be made is 'that a partition had in fact taken place' between the deceased and coparceners immediately before the death. This interpretation will further the legislative intention with regard to the enlargement of the share of the female heirs, qualitatively.

State of Maharashtra v. Narayan Rao 1985 SC it was held that **Gurupad** case has to be treated as an authority only for explanation I to section 6. It is not an authority for the proposition that a female member cease to be a member of the family on the death of a Male member whose interest devolve on her without her volition to separate herself from the family.

GENERAL RULES OF SUCCESSION IN THE CASE OF MALES: SECTION 8

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

- a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;
- b) secondly, if there is no heir of Class I then upon the heirs, being the relatives specified in class II of the Schedule;
- c) thirdly, if there is not heir of any of the two classes, then upon the agnates of the deceased; and
- d) lastly, if there is no agnate, then upon the cognates of the deceased.

HEIRS IN CLASS I AND CLASS II

Class I

ORDER OF SUCCESSION

Clause (A): Class I of the Schedule

Firstly, the heirs of a male Hindu who dies intestate after the commencement of this Act are:

Son

Daughter

Widow

Mother

Son of a predeceased son

Daughter of a predeceased son

Son of a predeceased daughter

Daughter of a predeceased daughter

Widow of a predeceased son

~~Son of a predeceased son of a predeceased son~~

Daughter of a predeceased son of a predeceased son

Widow of a predeceased son of a predeceased son

Son of a predeceased daughter of a predeceased daughter

Daughter of a predeceased daughter of a predeceased daughter

Daughter of a predeceased son of a predeceased daughter

Daughter of a predeceased daughter of a predeceased son.

These are heirs in Class I of the Schedule. They take simultaneously and to the exclusion of all other heirs. (Section 9)

Son

(i) Adopted Son

The expression 'son' used in Class I of the Schedule has not been defined in the Act. It includes both a natural son and a son adopted in accordance with the law relating to adoption among Hindus in force at the time of the adoption. A son given in adoption loses all the rights of a son in his natural family including the right of claiming any share in the estate of his natural father or any share in the coparcenary property of his natural family.

Where a son is born after adoption to the adoptive father the adopted son is entitled to inherit just as if he were a natural-born son and is now entitled to the same share as a natural-born son.

(ii) Posthumous son

A son of the intestate, who was in the womb at the time of the death of the intestate though subsequently born, is to be deemed for the purpose of succession as if born before the death of the intestate.

(iii) Son born after partition

When there has been a partition of joint family property between a father and his sons and thereafter a son is born to the father, the son will take an interest by birth in the property obtained on partition by the father and the property will be their coparcenary property. In case of death of the father after the commencement of this Act devolution of the father's interest in such coparcenary property will be governed by Section 6 of the Act and succession to the father's separate and self-acquired property will be in accordance with the rules laid down in Section 8.

(iv) Divided son

In matters of succession the Act does not differentiate between a divided son and a son who had remained joint with his father or his father and other coparceners except in cases falling under Section 6 which relates inter alia to the undivided interest of a father in a Mitakshara coparcenary. The separate or self-acquired property of the father will, therefore, devolve by succession upon his heirs specified in Class I of the Schedule including a son who had separated from the father as well as one who had continued to remain joint with the father. Under the old law, the divided son was not entitled to claim any share in separate or self-acquired property of the father where the father after partition had continued to remain joint with his other sons or where he had a son born to him after partition and who was joint with him.

(v) Illegitimate son

The illegitimate son of a male Hindu dying intestate is not entitled to any share of the inheritance; not even in case of a Shudra dying intestate after the commencement of the Act. It will be noticed that the law in respect of the right of an illegitimate son of a Shudra to succeed to his father is now wholly changed. The illegitimate son of a male Hindu of any caste is, however, entitled to claim maintenance from the father and in case of death of the father, from his heirs out of his estate inherited by them so long as the illegitimate son remains a minor and does not cease to be a Hindu.

(vi) Son born of a void or voidable marriage

Section 16 of the Hindu Marriage Act 1955, relates to legitimacy of children of void and voidable marriages.

One effect of the above mentioned section is that sons and daughters of parents, covered by it, are to be deemed to be the legitimate children of their parents and entitled to succeed to the property of such parents as if they were born in lawful wedlock.

Illustration.

A and B are the father and mother of S. After S was born B obtains from the court a decree of nullity of marriage on one of the grounds mentioned in clause (i), (iv) or (v) of Section 5 of the Hindu Marriage Act 1955. Notwithstanding, the decree of nullity of the marriage of his parents, S is entitled to succeed as an heir to the property of his father, A and his mother B as if he was a child born in lawful wedlock. The same will be the status and right in the above case of a daughter to succeed as an heir to the property of A and B as if she were a child born in lawful wedlock.

(vii) Step-son

A step-son, that is a son of a previous marriage of the wife of the intestate, is not entitled to succeed to the property of the step-father. In this case, there is no relationship with the step-father by full blood, half-blood or uterine blood.

Where a widow or an unmarried woman adopts a child, any man whom she marries subsequently is deemed to be the step-father of the adopted child. Such child is entitled to succeed to the property of the mother but not to that of the step-father.

(viii) Son having physical or mental defects

Under the old Hindu Law certain defects, deformities and diseases excluded an heir, as for instance a son, from inheritance. The Hindu Inheritance (Removal of Disabilities) Act 1928, declared that no person shall be excluded from inheritance on any of those grounds unless he was from birth a lunatic or an idiot. That restricted disqualification also is now removed by Section 28 of this Act, with the result that no person is now disqualified from succeeding to any property on any ground whatever save as provided in this Act.

- I. Father.
- II. (1) Son's daughter's son; (2) Son's daughter's daughter; (3) brother; (4) sister.
- III. (1) Daughter's son's son; (2) daughter's son's daughter; (3) daughter's daughter's son; (4) daughter's daughter's daughter.
- IV. (1) Brother's son; (2) sister's son; (3) brother's daughter; (4) sister's daughter.
- V. Father's father; father's mother.
- VI. Father's widow; brother's widow.
- VII. Father's brother; father's sister.
- VIII. Mother's father; mother's mother.
- IX. Mother's brother; mother's sister.

Explanation – In this Schedule, references to a brother or sister do not include reference to a brother or sister by uterine blood.

Daughter

(i) Daughter

The daughter, whether married or unmarried, inherits simultaneously with a son, widow and the other heirs specified in Class I of the Schedule. Each daughter takes one share that is equal to that of son. She takes her share absolutely and not as woman's estate. There is no priority among married and unmarried daughters. Unchastity of a daughter is no ground for exclusion. Since a daughter is an enumerated heir, if a father has made a gift to the daughter at the time of her marriage, it would not disentitle her claiming a share as her father's heir.

(ii) Adopted daughter

'Daughter' would include an adopted daughter. A male Hindu has now the capacity, under Section 7 of the Hindu Adoptions and Maintenance Act 1956, to take a daughter in adoption. An adopted daughter is, therefore, one of the heirs under Class I of the Schedule. Also, see 'Relative by adoption'.

(iii) Illegitimate daughter

The illegitimate daughter of a male Hindu dying intestate is not entitled to any share of the inheritance; not even in case of a Shudra. It will be noticed that the position of an illegitimate son of a Shudra was different under the old law. An illegitimate daughter of a Hindu is entitled to inherit to her mother. The illegitimate daughter of a male Hindu is, however, entitled to claim maintenance from the father and in case of death of the father, from his heirs out of his estate inherited by them so long as she remains a minor and does not cease to be a Hindu.

Mother

The mother inherits simultaneously with a son, widow, daughter and other heirs specified in Class I of the Schedule. She takes her share absolutely (Section 14). Unchastity of a mother is no bar to her succeeding as heir to her son; nor does divorce or remarriage constitute any such bar. The Hindu Widow's Remarriage Act 1855, is not repealed, but Section 4 of the present Act in effect abrogates the operation of that Act in respect of matters dealt with by it. Even if that Act could apply to the case of a mother before this Act came into operation there can be no doubt that the present section and Sections 4 and 14 of this Act have the effect of laying down, that her remarriage is no bar to her succeeding as heir to her son and that there can be no divesting of the interest that she acquires in his property by reason of a remarriage.

Mother includes adoptive mother because under the old Hindu Law and now under the Hindu Adoptions and Maintenance Act 1956, an adopted son is deemed to be the child of the adoptive parent or parents for all purposes with effect from the date of the adoption.

DISTRIBUTION OF PROPERTY AMONG HEIRS IN CLASS I OF THE SCHEDULE: SECTION 10

The property of an intestate shall be divided among the heirs in Class I of the Schedule in accordance with the following rules:

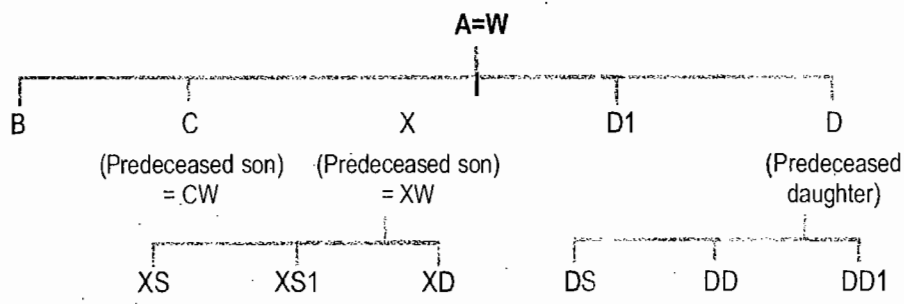
Rule 1 – The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2 – The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3 – The heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share.

Rule 4 – The distribution of the share referred to in Rule 3 –

- ii) among the heirs in the branch of the predeceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his predeceased sons gets the same portion;
 - iii) among the heirs in the branch of the predeceased daughter shall be so made that the surviving sons and daughters get equal portions.
- a) A dies leaving surviving him his widow W; a son B; CW widow of a predeceased son C; XW, XS, XS1 and XD the widow, two sons and daughters respectively of a predeceased son X; a daughter D1 and DS, DD and DD1 the son and two daughters of a predeceased daughter D as appears from the following diagram.



These are among heirs enumerated in Class I of the Schedule and therefore entitled to take the property of A simultaneously as his preferential heirs. W takes one share in accordance with rule 1. B and D1 as surviving son and surviving daughter take one share each in accordance with rule 2. The branches of C, X and D get one share each in accordance with rule 3. CW takes one share as the only heir of A in the branch of the predeceased son C, in accordance with rule 3. XW, XS, XS1 and XD between them take only one share as heirs of A in the branch of X the predeceased son. XW, XS, XS1 and XD will each take an equal portion of that one share in accordance with rule 4 (i).

DS, DD and DD1 between them take only one share as heirs of A in the branch of the predeceased daughter D, DS, DD and DD1 will each take an equal portion of that one share in accordance with rule 4 (ii). In distribution W will take one-sixth; B and D1 will each take one-sixth, CW will take one-sixth as constituting the branch of C; XW, XS, XS1 and XD will take a one-sixth share between them as constituting the branch of X, that is the portion of each of them will be one-twenty-fourth of A's property; and DS, DD and DD1 will take a one-sixth share between them as constituting the branch of D, that is the portion of each of them will be one-eighteenth of A's property.

ORDER OF SUCCESSION AMONG AGNATES AND COGNATES: SECTION 12

The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder:

Rule 1 – Of two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule 2 – Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3 – Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

COMPUTATION OF DEGREES: SECTION 13

- (1) For the purposes of determining the order of succession among agnates or cognates, relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent or both, as the case may be.
- (2) Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.

(3) Every generation constitutes a degree either ascending or descending.

In accordance with the rules laid down in Section 12, agnates and cognates may conveniently be divided into the following sub-categories or grades:

Agnates

- b) *Agnates who are descendants*: They are related to the intestate by no degree of ascent. Such for instance are son's son's son's son and son's son's son's daughter.
- c) *Agnates who are descendants*: They are related to the intestate only by degrees of ascent and no degree of descent. Such, for instance are father's father's father and father's father's mother.
- d) *Agnates who are collaterals*: They related to the intestate by degrees both of ascent and descent. Such for instance are father's brother's son and father's brother's daughter.

Cognates

- b) *Cognates who are descendants*: They are related to the intestate by no degrees of ascent. Such for instance are son's daughter's son's son and daughter's son's son's son.
- c) *Cognates who are ascendants*: They are related to the intestate only by degrees of ascent and no degree of descent. Such for instance are father's mother's father and mother's father's father.
- d) *Cognates who are collaterals*: They are related to the intestate by degrees both of ascent and descent. Such for instance are father's sister's son and mother's brother's son.

The following are illustrations of the rules of computation of degrees:

- a) The heir to be considered is the father's mother's father of the intestate. He has no degrees of descent but has four degrees of ascent represented in order by: (a) the intestate; (b) the intestate's father; (c) that father's mother; and (d) her father (the heir).
- b) The heir to be considered is the son's daughter's son's daughter of the intestate. She has no degrees of ascent, but has five degrees of descent represented in order by: (a) the intestate; (b) the intestate's son; (c) that son's daughter; (d) her son; and (e) his daughter (the heir).
- c) The heir to be considered is the mother's father's sister's son (that is mother's father's father's daughter's son) of the intestate. He has four degrees of ascent represented in order by: (a) the intestate; (b) the intestate's mother; (c) her father; and (d) that father's father and two degrees of descent represented in order by: (a) the daughter of the common ancestor (namely, the mother's father's father); and (b) her son (the heir).

Rules of Preference

Rule 1 – This Rule is pivotal and enacts that, of two heirs the one who has fewer or no degrees of ascent is preferred. It applies to all agnates and cognates and means that of two competing heirs in the category of agnates or of cognates –

- i) The one who has no degrees of ascent, that is, one who is only related to the *propositus* by degrees of descent, is to be preferred to the one who has any degrees of ascent;
- ii) Where both are related to the *propositus* by degrees of ascent, the one who has fewer degrees of ascent is to be preferred to the other;

In cases of descendants of the *propositus* there can be no degree of ascent and therefore all such descendants form a grade by themselves from whom and excluding all others the nearest agnate or the nearest cognates, as the case may be, has to be ascertained. As among the descendants the order of succession will be in accordance with rule II and that heir is preferred who has fewer degrees of descent. Thus for instance among descendants who are cognates the daughter's daughter's daughter's son is to be preferred to a son's son's son's daughter's son because the former has fewer degrees of descent than the latter. The application of the rule in case of ascendants of the *propositus*, either agnates or cognates, are equally simple. They may be said to belong to the second grade or sub-category as already stated and become entitled to succeed only when there are no descendants of the *propositus* but having no degree of descent, they exclude all collaterals. As regards the ascendants, the order of succession will be in accordance with the initial part of rule I that, of two heirs the one who has fewer degrees of ascent is preferred. Thus for instance among agnates the father's father's mother will be preferred to the father's father's father's father, degrees being only of ascent and four and five respectively. The position of ascendants that are cognates is similar.

The rule of considerable importance in determining the order of succession among collaterals either agnates or cognates. Among collaterals who may be competing agnates or competing cognates preference is to be given to one who has fewer degrees of ascent than the other and his rule of preference is to be applied regardless of the degrees of descent. It is an obvious corollary of rule 1 that the order of succession among collateral agnates or collateral agnates or collateral cognates is not determined merely by the total of the degrees of ascent and of descent, because of two such heirs preference is given to one who has the fewer degrees of ascent. So among two competing collateral agnates, one who is descended from the nearer ancestor of the intestate is to be preferred, to one who claims descent from a remoter ancestor; and among two competing collateral cognates one who is descended from the nearer ancestor or ancestress of the intestate is to be preferred to one who claims from a remoter ancestor or ancestress. Rule 1 is pivotal and lays absolute stress on the degrees of ascent; the fewer the degrees of ascent the nearer is the heir and one with no degree of ascent at all, is a preferred descendant to another having degrees of ascent however few.

Illustrations

- b) The competing heirs are two collateral agnates: (a) brother's son's daughter's (father's son's son's daughter); and (b) paternal uncle's son (father's father's son). The former who has only two degrees of ascent is to be preferred to the latter that has three degrees of ascent. It will be noticed that the order of succession among collateral agnates or cognates is not determined by the total of degrees of ascent and of descent because of two such heirs preference is primarily given to one who has fewer degrees of ascent. In this illustration if the degrees both of ascent and descent had to be totalled up both the heirs would have been related to *propositus* by the same aggregate number of degrees, say, five. But that is not the rule.
- c) The competing heirs are two cognates: (a) son's daughter's son's son, and (b) sister's daughter's son (father's daughter's daughter's son). The former who has no degree of ascent is preferred to a collateral.
- d) The competing heirs are two collateral cognates: (a) brother's daughter's daughter (father's son's daughter); and (b) mother's sister's son (mother's father's daughter's son). The former who has only two degrees of ascent is preferred to the latter that has three degrees of ascent. Here both the heirs are collaterals and the one with fewer degrees of ascent is preferred, although she is a female.
- e) The competing heirs are two collateral cognates: (a) sister's daughter's daughter (father's daughter's daughter's son's daughter); and (b) maternal uncle's son (mother's father's son's son). The former who has only two degrees of ascent is preferred to the latter that has three such degrees.
- f) The competing heirs are two collateral cognates: (a) mother's sister's son's (mother's father's daughter's son's son); and (b) father's father's son (father's father's father's son's son). The former who has three degrees of ascent is preferred to the latter that has four degrees of ascent. Here both the heirs are collaterals and the one with fewer degrees of ascent is preferred. It will be noticed that it makes no difference that one heir (the heir preferred) is a cognate *ex parte materna* and the other heir is a cognate *ex parte materna*.
- g) The competing heirs are uterine brother, and father's sister's son (father's father's daughter's son). The uterine brother has two degrees of ascent (of the intestate and of his mother) and the father's sister's son has three degrees of ascent. The uterine brother is, therefore, preferred. The position would have been the same if instead of the uterine brother the competing heir had been a uterine sister.

Rule 2 – This rule enacts that where the numbers of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent. It applies to all agnates and cognates and means that:

- ii) of two heirs who have no degrees of ascent, that is, are descendants, being related to the *propositus* only by degrees of descent, the one who has fewer degrees of descent is to be preferred to the other;
- iii) of two heirs who have the same degrees of ascent, the one who has fewer degrees of descent is to be preferred to the other.

Illustrations

- a) The competing heirs are two collateral agnates: (a) brother's son's daughter (father's son's son's daughter); and (b) brother's son's son's daughter (father's son's son's daughter). Both the claimants have two degrees of ascent but the former has three degrees of descent and the latter has four degrees of descent with the result that the former is to be preferred to the latter. The

result would have been the same if the claimants had been the brother's son's daughter and brother's son's son's son. A male heir it will be noticed is not preferred to a female heir. It will not make any difference whether the grandchildren and great-grandchildren under consideration are of the same brother of the *propositus* or of different brothers. Succession here is not governed by any doctrine of representation.

In the undermentioned case, the heirs were competing collateral agnates. The degrees of ascent were the same and collaterals with five degrees of descent were preferred to those with six or more degrees of descent.

- b) The competing heirs are two collateral cognates: (a) sister's daughter's daughter (father's daughter's daughter's daughter); and (b) brother's son's daughter's son (father's son's son's daughter's son). Both the claimants have two degrees of ascent but the former has three degrees of descent and the latter has four degrees of descent with the result that the former is to be preferred to the latter. If however the competing heirs had been the sister's daughter's daughter and the brother's daughter's son, the case would have been governed by rule III and not by rule II.
- c) The competing heirs are: (a) mother's father's mother; and (b) father's father's sister's son (father's father's father's daughter's son). The number of degrees of ascent in both cases is the same, viz., three, but the former has no degrees of descent while the latter has two such degrees. The former is, therefore, preferred. Here an ascendant cognate (on the mother's side) is preferred to a collateral cognate (on the father's side).
- d) The competing heirs are two collateral cognates: (a) sister's son's son (father's daughter's son's son); and (b) brother's son's daughter's son (father's son's son's daughter's son). The number of degrees of ascent in both cases is the same; say, two, but the former has only three degrees of descent while the latter has four degrees of descent. The former is, therefore, preferred.
- e) The competing heirs are uterine brother and full brother's daughter's son. Both the claimants have two degrees of ascent (counting the intestate and of the intestate's mother in one case and the intestate and the intestate's father in the other), but the uterine brother has only one degree of descent and the other heir has three degrees of descent. The uterine brother is, therefore, preferred. The position would have been the same if instead of uterine brother the competing heir had been the intestate's uterine sister. If, however, the competing heirs had been on the one hand the uterine brother or uterine sister and on the other a full-brother's (or a step-brother's) son or daughter or a full-sister's (or step-sister's) son or daughter the position would have been totally different because the uterine brother or uterine sister is only a cognate, whereas the others are heirs enumerated in Class II of the Schedule and therefore entitled to priority.

Rule 3 – This rule enacts that where neither heir is entitled to be preferred to the other under rule I or rule II they take simultaneously. In case of descendants of the *propositus* either agnates or cognates, the order of succession will be governed by this rule when the competing descendants are so related to the *propositus* that none of them is entitled to claim greater proximity to the *propositus* in terms of degrees of descent. In case of ascendants of the *propositus*, either agnates or cognates, the application of this rule is equally simple. This for instance among agnates a father's father's father and a father's father's mother both stand in the same degree of ascent, say, four and no degree of descent. There being no rule of discrimination between male and female heirs, neither is entitled to be preferred to the other under rule I or rule II and must therefore take simultaneously. The same is the position among cognates, for instance, of a father's mother's father and a mother's mother's mother.

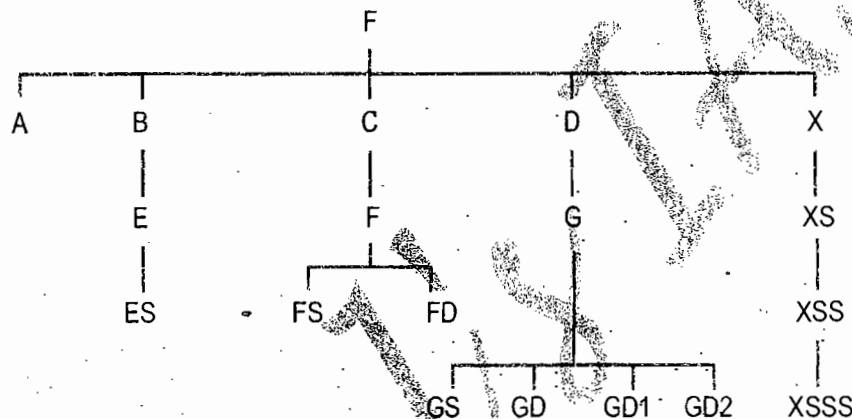
The rule is of considerable importance in fixing the order of succession among competing heirs who are collateral cognates or collateral cognates. Among two competing collateral agnates, where both are in the same degrees of descent from the same male ascendant of the intestate, they will take simultaneously. Among two competing collateral cognates, where both are in the same degrees of descent from the same ascendant male or female of the intestate or of different ascendants of the intestate in same degrees of ascent to the intestate, they will take simultaneously as none of them can claim greater proximity to the intestate in terms of degrees of ascent or descent under rule I or rule II.

Illustrations

- a) The competing heirs are two agnates: (a) son's son's son's son; and (b) son's son's son's daughter. There are no degrees of ascent and the number of degrees of descent is the same in case of both. Therefore, neither heir is entitled to be preferred under rule I or rule II and result is that they take simultaneously. Here, both heirs are descendants and stand in the same degrees of descent.

- b) The competing heirs are two cognates: (a) daughter's son's son, and (b) son's son's daughter's son. The position is similar to that in the illustration a) above and they take simultaneously.
- c) The competing heirs are two cognates: (a) father's mother's father; and (b) mother's mother's mother. There are in the same degrees of ascent, say, four, and no degree of descent in case of both. Therefore, neither heir is entitled to be preferred under rule I and rule II and the result is that they take simultaneously. Here both heirs are ascendants and stand in the same degree of ascent.
- d) The competing heirs are all collateral agnates as appears from the following diagram. A, the *propositus*, had four brothers B, C, D and X. E, F, G and XS were sons respectively of B, C, D and X. All of them died during the lifetime of the *propositus*, E leaving a son ES; F leaving a son FS and a daughter FD; G leaving a son GS and three daughters GD, GD1 and GD2; and XS leaving XSSS a son of a predeceased son XSS. A dies intestate leaving surviving him ES, FS, ED, GS, GD, GD1, GD2 and XSSS.

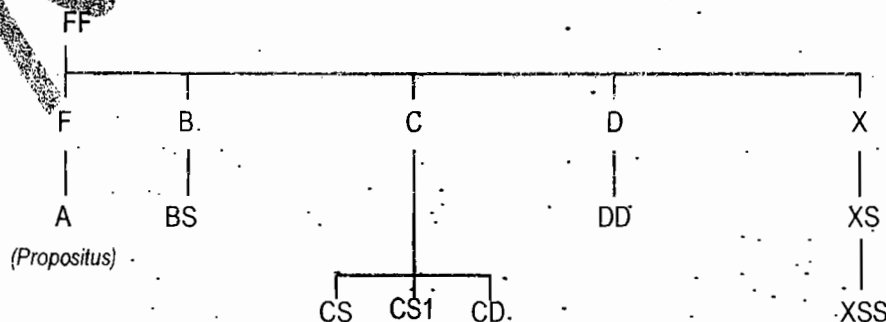
ES, FS, FD, GS, GD, GD1 and GD2 are all grandchildren of A's brother and have the same degrees of ascent, viz., two, and also the same degrees of descent, viz., three. Among them none is, therefore, entitled to any preference under rule I or rule II and they must all take simultaneously. They will take *per capita* and each of them will get one-seventh share in the property of A. XSSS has the same degrees of ascent, say, two, four degrees of descent with the result the ES, FS, FD, GS, GD, GD1 and GD2 having fewer degrees of descent are all entitled to be preferred to him



under rule II. XSSS, therefore, is not entitled to succeed to A although his father XSS if he had been alive at the time of A's death would have ranked with the others.

- e) A similar position will arise if in the above diagram ES, FS, FD, GS, GD, GD1, GD2 and XSSS are all collateral cognates. Such will be the case if B or E or both had been females; and C or F or both had been females; and D or G or both had been females; and X, XS and XSS had all or any one or more of them been females; and X, XS and XSS had all or any one or more of them been females. None of the seven heirs ES, FS, FD, GS, GD, GD1 and GD2 is among themselves entitled to any preference under rule I or rule II and will therefore take simultaneously, each getting one-seventh share in the property of A. XSSS is not entitled to succeed to A as he has one more degree of descent than the others.

- f) The competing heirs are all collateral agnates. A, the *propositus*, had four uncles B, C, D and X (brothers of his father) B, C, D, X and XS (son of X) all died during the lifetime of A. A dies leaving surviving him BS, son B; CS, CS1 and CD, two sons and a daughter respectively of C; DD, daughter of D; and XSSS the son of XS.

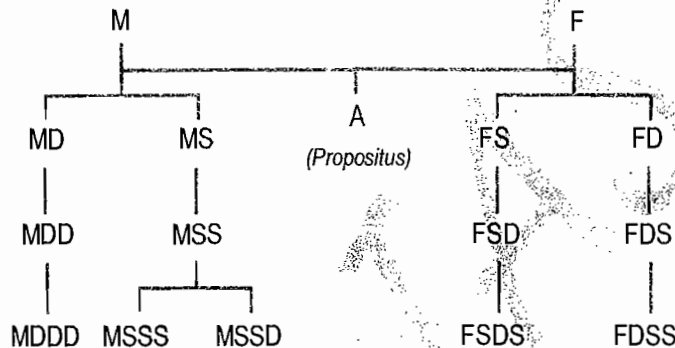


BS, CS, CS1, CD and DD are all children of A's father's brothers and have the same degree of ascent, say, three, and also the same degrees of descent, say, two. Among themselves none is, therefore, entitled to any preference under rule I and rule II and they must take simultaneously. They will

take *per capita* and each of them will get one-fifth share in the property of A. XSS has the same degrees of ascent say, three but three degrees of descent with the result that BS, CS, CS1 CD and DD having fewer degrees of descent are all entitled to be preferred to him under rule II. XSS, therefore, is not entitled to succeed to A although if XS had been alive at the time of A's death he would have ranked with the others.

- g) The competing heirs are collateral cognates: (a) mother's brother's son; (b) mother's sister's daughter; and (c) father's sister's son. All three are in the same degree of ascent, say, three, and the number of degrees of descent is the same in case of all of them, say, two. Therefore, none of them is entitled to be preferred under rule I or rule II and the result is that they take simultaneously.
- h) The competing heirs are collateral cognates and some of them are related to the intestate by uterine blood as appears from the following diagram:

FS was full brother of A and FD was full sister of A. A's mother had remarried after the death of A's father and MS was the uterine brother of A and MD was the uterine sister of A. FSD was the daughter of FS; FSD was the son of FD; MSS was



the son of the uterine brother MS; and MDD was the daughter of MD, the uterine sister. All of them died during the lifetime of A. A dies leaving: FSDS, the daughter's son of the full brother; FDSS, the son's son of the full sister; MSSS and MSSD the son's son and son's daughter respectively of MS, the uterine brother and MDDD, the daughter's daughter of MD, the uterine sister. Here MSSS, MSSD and MDDD are related to A by uterine blood and FSDS and FDSS are related to A by full-blood and they are all collateral cognates. Here both the father and mother of A constitute an ascending degree. FSDS, FDSS, MSSS, MSSD and MDDD are all related to the *propositus* by the same degrees of ascent, say, two, and are related to him by the same degrees of descent, say, three. Relationship by uterine blood does not create any exclusion in case of cognates. None of the five heirs is entitled to preference under rule I or rule II with the result that they will all take simultaneously. They take *per capita* each of them will get one-fifth share in the property of A.

PROPERTY OF A FEMALE HINDU TO BE HER ABSOLUTE PROPERTY: SECTION 14

- (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation— In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

- (2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

Section 14 (1) is not violative of Article 14 or 15 (1) of the Constitution. Nor is it incapable of implementation.

Case:

In *Eramma v. Veerupana* (AIR 1966 SC 1879), the Supreme Court examined the ambit and objects of this section and observed:

The property possessed by a female Hindu, as contemplated in the section, is clearly property to which she has acquired some kind of title, whether before or after the commencement of the Act. It may be noticed that the *Explanation* to Section 14 (1) sets out the various modes of acquisition of the property by a female Hindu and indicates that the section applies only to property to which the

female Hindu has acquired some kind of title, however restricted the nature of her interest may be. The words 'as full owner thereof and not as a limited owner' in the last portion of sub-section (1) of the section clearly suggest that the legislature intended that the limited ownership of a Hindu female should be changed into full ownership. In other words, Section 14 (1) of the Act contemplates that a Hindu female, who, in the absence of this provision, would have been limited owner of the property, will now become full owner of the same by virtue of this section. The object of the section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu law and to make a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property with all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder..... It does not in any way confer a title on the female Hindu where she did not in fact possess any vestige or title.

The section should be read with Section 4 which gives overriding effect to the provisions of this Act with respect to all matters dealt with in the Act and also enumerates matters which are not affected by this Act.

Jupudy Pardha Sarathy v. Pentapati Rama Krishna and others 2015 SC it was held that, A limited interest created in whatever form in favour of a widow who has having a pre existing right of Maintenance becomes an absolute right by the operation of section 14(1) of the Hindu succession Act 1956.

Co-widows: (will be common owner and not joint owners ⇒ absolute owner of her share).

Examples:

- i) A governed by Mitakshara School died after the Hindu Women's Rights to Property Act 1937, came into force but before the commencement of the present Act, leaving surviving him W his widow, B and C his two sons and SSW the widow of SS-a predeceased son of his predeceased son S. At the time of his death A was joint with his sons B and C and the family owned property. Both S and SS had been members of the joint family at the time of their death and S had predeceased SS leaving surviving him as his only son. A also left separate property. Both W and SSW had acquired the same interest in the joint family property which A and SS respectively had [Section 3 (2) of the Act of 1937], but the interest which devolved on them was the limited interest known as Hindu Woman's Estate [Section 3 (3) of the Act 1937]. In the separate property which A left, W and SSW had acquired equal shares with the two sons B and C by right of inheritance [Section 3 (1) of the Act of 1937], but the interest which devolved on them by inheritance was the limited interest known as Hindu woman's estate. There was partition of the joint family property and division of A's separate property between B, C, W and SSW soon after A's death and before the commencement of the present Act. It was stated in the deed of partition that W and SSW took only limited interest in the property allotted to them. The effect of the present section is to enlarge that limited interest of W and SSW into full ownership.

The result will be similar if A has been governed by Dayabhaga School although the case would have been affected only by Section 3 (1) and Section 3 (3) of the Act of 1937. The result will be similar where A was governed by the Mysore Act 10 of 1933.

- ii) A governed by Mitakshara School died after the Hindu Women's Right of Property Act 1937 came into force, but before the commencement of the present Act, leaving surviving him his widow W and his son S. The son alienated certain lands in 1962. In a suit filed by W challenging the alienation it was held that the son had no right to transfer the half share of W of which she had become an absolute owner.
- iii) A Hindu governed by the Banaras School died before 1937 leaving a widow, a daughter and a paternal uncle's sons. Prior to the commencement of this Act the widow surrendered her interest in the property inherited by her and handed over possession of it to her daughter. The surrender was valid but according to the Banaras School the daughter though in possession took a limited estate, in other words, she did not take the property absolutely. Under the old law, on the death of the daughter, the property would have passed to the uncle's son. The effect of the present section is that from the date of the commencement of the Act the daughter holds the property as full owner and if she does not dispose of it during her lifetime it will devolve on her heirs.
- iv) A governed by Mitakshara School, died in 1934, leaving surviving him his widow. He also left some ancestral lands. The widow adopted a son J in 1964. It was held that by operation of this

section she was an absolute owner of the property and the adopted son got no interest in the same and the fact that it had been ancestral property in the hands of A, before the commencement of the 1937 Act, made no difference since it was not a joint family property at the date of adoption.

Cases:

In **Kotturuswami v. Veeravva** 1959 Supp (1) SCR 968, AIR 1959 SC 577, (1959) SCJ 437, the Supreme Court expressed, in the context of property acquired by a widow before the commencement of the Act, its approval of and agreement with the view taken by the High Court of Calcutta, that the opening words of the Section 14, that is, 'property possessed by a female Hindu', obviously mean that to come within the purview of the section, the property must be in possession of the female concerned at the date of the commencement of the Act. They clearly contemplate the female's possession when the Act came into force. The possession might have been either actual or constructive or in any form recognised by law, but unless the female Hindu, whose limited estate in the disputed property is claimed to have been transformed into an absolute estate under this particular section, was at least in such possession, taking the word 'possession' in its widest connotation, when the Act came into force, the section would not apply.

In **Jagannathan Pillai v. Kunjitha Padam Pillai** (AIR 1987 SC 1493), decided by the Supreme Court it was held that since the section in terms applied even to property which was acquired 'after' the commencement of the Act no question of the property being in possession of the female concerned on the date of the commencement of the Act can arise and it would suffice if she was in possession of the property when the claim to be the absolute owner of the same was challenged.

Possessed

The word 'possessed' is used in this section in a broad sense and in its widest connotation and as pointed out by the Supreme Court in **Kotturuswami v. Veeravva Jagannathan Pillai's case** above it means 'the state of owning or having in one's hand or power'. It need not be actual physical possession or personal occupation of the property by the female but may be possession in law. It may either be actual or constructive or in any form recognised by law. Thus, for instance the possession of a licensee, lessee or a mortgagee from the female owner would be her possession for the purpose of this section.

In **Mangal Singh v. Rattno** (AIR 1967 SC 1786), the Supreme Court pointed out that the section covers all cases of property owned by a female Hindu although she may not be in actual, physical or constructive possession of that property, provided of course that she has not parted with her rights and is capable of obtaining possession of the property. In that case a Hindu widow came into possession of land on the death of her husband in 1917 and continued in possession until 1954 when she was wrongfully dispossessed and filed a suit on 12 March 1956 and died in 1958. It was held that on coming into force of the Act in 1956 after institution of the suit she must be regarded as a female Hindu who possessed the property for the purpose of this section and as one who became full owner of it. In any such case, the female owner would be regarded as being 'possessed' of the property, if the trespasser has not perfected his title by adverse possession before the Act came into force.

Case:

In **Sukhrum v. Gauri Shankar case**, decided by the Supreme Court H and S; two brothers and C, the son of S, constituted a joint Hindu family governed by Mitakshara law of the Banaras School. H died in 1952 leaving surviving him his widow K. In December 1956, after this Act came into force, K sold half the share in a house and a shop belonging to the joint family. In a suit by S and C challenging the sale it was held that K having become full owner of her husband's interest was competent to effect the sale. Compensation awarded in respect of property in the possession of a widow, who had not at the date of the acquisition, absolute interest therein, and kept under the provisions of the Land Acquisition Act with the Land Acquisition Court on the date when the present Act came into operation in 1956, is property 'possessed' by her within the meaning of the section.

This section can have no application where a female Hindu never acquired any property at all or where having acquired it she happens to have lost her title thereto by alienation, surrender or otherwise and of which she was not or could not be in juridical possession at the commencement of the Act, unless she subsequently acquired property and possession as, for instance, in the case of

Jagannathan. In order that the female Hindu can be said to be 'possessed' of the property two things are necessary:

- a) She must have had a right to the possession of the property; and
- b) She must have been in possession of that property either actually or constructively.

It necessarily follows that if her possession was that of a trespasser when the Act came into force and then thereafter till her death she cannot be said to have acquired any right under this section.

Example: G died in 1920 and on his death, his widow L took possession of his property as his heir. In 1936, she gifted the property to N and on the death of N the plaintiffs came into possession of the same. In 1951, L took wrongful possession of the property. In a suit by the plaintiffs it was held that L could not be said to be 'possessed' of the property when the Act came into force because she had no right to be in possession of the property and she did not acquire any right under the section. The position, however, would be different in case of property acquired by a female Hindu by prescription.

Remarriage (still absolute owner)

Once a widow succeeds to the property of her husband and acquires absolute right over the same under this section, she would not be divested of that absolute right on her remarriage and Section 2 of the Hindu Widows Remarriage Act 1856 will not be attracted on account of the overriding effect given to the provisions of this Act under Section 4. This is subject to the qualification, that the remarriage was post 1956, i.e. after the coming into force of this Act. A constricted or limited entitlement of maintenance would necessarily fructify into a full estate for a widow, provided she had not remarried before the Act came into force.

Restricted Estate: Sub-section (2)

As already pointed out, the more recent decisions of the Supreme Court have given 'a most expansive interpretation' to the general rule enacted in sub-section (1). It has been held by the Supreme Court that this sub-section (2) must be read only as a proviso or exception to sub-section (1) and its operation must be confined to cases where property is acquired for the first time as a grant without any pre-existing right under a gift, will, instrument, decree, order or award, the terms of which prescribed a restricted estate in the property. Where, however, property is acquired by a female Hindu at a partition or in lieu of maintenance, it is in lieu of a pre-existing right and such an acquisition would not be within the scope and ambit of sub-section (2), even if the instrument, decree, order or award allotting the property prescribes a restricted estate in the property.

In *Badri Pershad v. Kanso Devi (AIR 1970 SC 1963)*, the Supreme Court pointed out that it would depend on the facts of each case whether the same is covered by the first or the second sub-section. It was observed that sub-section (2) is more in the nature of a proviso or an exception to sub-section (1).

It was also observed that sub-section (2) can come into operation only if acquisition in any of the methods indicated in it is made for the first time without there being any pre-existing right to the female Hindu who is in possession of the property. The Court also expressed agreement with the view that the object of the section was to remove the disability on women imposed by law and not to interfere with contracts, grants or decrees etc. by virtue of which a woman's right was restricted.

In *Tulasamma's case* referred to above, **Bhagwati J** observed:

Being in the nature of an exception to a provision which is calculated to achieve a social purpose by bringing about change in the social and economic position of women in Hindu society, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-section (1). It cannot be interpreted in a manner, which would rob sub-section (1) of its efficacy and deprive a Hindu female of the protection sought to be given to her by sub-section (1).

GENERAL RULES OF SUCCESSION IN THE CASE OF FEMALE HINDUS: SECTION 15

- (3) The property of a female Hindu dying intestate shall devolve according to the rule set out in Section 16 -

- b) - Firstly, upon the sons and the daughters (including the children of any pre-deceased son or daughter) and also the husband;

- c) Secondly, upon the heirs of the husband;
- d) Thirdly, upon the mother and father;
- e) Fourthly, upon the heirs of the father; and
- f) Lastly, upon the heirs of the mother.

(4) Notwithstanding anything contained in sub-section (1) –

- a) Any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and
- b) Any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

Broadly stated, the two exceptions are that if the female dies *without leaving any issue*, then: (1) in respect of property inherited by her from her father or mother, that property will devolve not according to the order laid down in the five Entries, but upon the heirs of the father; and (2) in respect of property inherited by her from her husband or father-in-law it will devolve not according to the order laid down in the five Entries but upon the heirs of the husband.

Situation 1: A died in 1927, leaving surviving him his widow W and a married daughter D. W who was in possession of the property left by A, who died in 1946. D died in 1958 leaving her surviving daughter D1, her son S and four children of a daughter D2 who had pre-deceased D. In a suit by D1 for partition and possession of a one-third share, it was held that D had become full owner of the property (Section 14) in 1956 when the act came into operation and succession to her property would be under this section and the claim of D1 was upheld.

Situation 2: D gifted her entire estate in favour of her two daughters A and S. Both the daughters were alive when the present Act came into force. S died in 1972 without leaving her husband or a descendant. At the time of her death, her husband's son HS by a previously deceased wife was alive. HS died after the death of S leaving behind his widow and children. The estate of S would be inherited by the widow and children of HS under sub-section (1) (b) of this section and the case would not be governed by sub-section (2) of the section.

The effect of the rules laid down in this section is that the property of a female intestate will devolve as summarised in the following propositions:

- i) *The general order of succession* laid down in entries (a) to (e) in sub-section (1) applies to all property of a female intestate however acquired except in case of property inherited by her from her father, mother, husband or father-in-law.
- ii) In case of a female intestate leaving a son or a daughter or a child of a predeceased son or of a predeceased daughter, that is leaving any issue, all her property, howsoever acquired, devolves on such issue, regardless of the source of acquisition of the property and such issue takes the property simultaneously; and if the husband of the intestate is alive they take simultaneously with him in accordance with entry (a). In such a case sub-section (2) does not at all come into operation.
- iii) In case of a female intestate dying without issue but leaving her husband, the husband will take all her property, except property inherited by her from her father or mother which will revert to the heirs of the father in existence at the time of her death.
- iv) In case of a female intestate *dying without issue* property inherited by her from her husband or father-in-law (the husband being dead), will go to the heirs of the husband and not in accordance with the general order of succession laid down in sub-section (1).
- v) In case of a female intestate *dying without issue* property inherited by her from her father or mother will revert to the heirs of the father in existence at the time of her death and not in accordance with the general order of succession laid down in sub-section (1).

Note: A step-son is not entitled as 'son' to inherit to his step-mother as one of the heirs under this Entry, but he can succeed to her property as an heir of her husband under Entry (b) of the sub-section.

Illustrations

- a) A dies leaving surviving her a son S; two daughters D and D1; DD2 the daughter of a predeceased daughter D2; SS1 the adopted son of a predeceased son S1; and SSS2 the son of a predeceased son of a predeceased son S2. All the property of A, howsoever acquired, will devolve simultaneously upon S, D, D1, SS1 and DD2 as heirs specified in Entry (a). SSS2, although a great-grandson of A will not succeed as her heir with the others. He is not an heir under Entry (a) and will be excluded by the others who are heirs specified in that Entry.
- b) A dies leaving her surviving a son S; and adopted daughter D; and her husband H. All the property of A, howsoever acquired, will devolve simultaneously upon S, D and H as heirs specified in Entry (a).
- c) A dies leaving her surviving SSS the son of a predeceased son of a predeceased son and HB the brother of her husband H. A's property will devolve on SSS alone as the heirs of her husband under this Entry. SSS is the heirs of H specified in Class I of the Schedule to Section 8 and SDS and HB are heir specified in Class II of the Schedule. SSS will, therefore, exclude SDS and HB.
- d) A dies leaving her surviving S and D, the son and daughter of her deceased husband by another wife, and her brother B. A's property will devolve on S and D under this entry as heirs of the husband. Property that A might have inherited from her father or mother will not devolve on S or D and will devolve on B as an heir of A's father.
- e) A dies leaving her surviving SHB and DHB, the son and daughter of her husband's brother and HS her husband's sister. A's property will devolve on the heirs of her husband H. HS the husband's sister will take the property to the exclusion of SHB and DHB as she is an heir specified in Entry II of Class II of the Schedule while SHB and DHB are heirs specified in Entry IV of that class.
- f) A dies leaving her surviving SW, the widow of S, her predeceased son and B her brother. The property of A will devolve upon SW as the heir of her husband under this entry.
- g) A dies unmarried leaving her surviving her step-mother FW and her brother B. A's property will devolve on FW and B as heirs of her father under this Entry. Property that she might have inherited from her own mother will also be included because it will not on A's death devolve upon the heirs of the mother, but upon the heirs of the father under sub-section (2) (a).
- h) A dies unmarried leaving her surviving her brother B and WB1 the widow of a predeceased brother. A's property will devolve under this entry on the heirs of her father. B and WB1 will take simultaneously as heirs of the father in Class I of the Schedule to Section 8.
- i) A dies unmarried leaving her surviving MB by her mother's brother and MSD her mother's sister's daughter. If A's mother had died immediately after A, she would have been survived only by MB and MSD, her brother and sister's daughter, respectively. There being no heir of A under Entries (a)-(d) all the property of A will devolve upon the heirs of the mother. With the mother as the starting point, MB and MSD will take, simultaneously by reference, to the Entry (d) read with Class I of the Schedule (as the only heirs of the mother's father).
- j) A dies unmarried leaving her surviving UB a uterine brother, US a uterine sister and SF her stepfather, her mother having remarried after the death of A's father. There being no heir of A under entries (a)-(d) all the property of A will devolve upon the heirs of the mother. With the mother as the starting point, UB, US and SF will take simultaneously by reference to Entry (a).
- k) A and C were the illegitimate daughters of M, their mother. C had married and died during A's lifetime leaving her surviving her son CS and CSS the son of a predeceased son. A dies unmarried leaving surviving her CS and CSS. All the property of A must devolve upon the heirs of M with M as the starting point. CS being the daughter's son of M will take the property to the exclusion of CSS who does not come under Entry (a) [see Section 3 (1) (j)].
- l) A and C were the illegitimate daughters and B was the illegitimate son of M, their mother. B had married and died during the lifetime of A leaving surviving him BS, his son. C died during the lifetime of A leaving her surviving CD, an illegitimate daughter. A dies unmarried leaving her surviving BS and CD. All the property of A must devolve upon the heirs of M. BS being the legitimate descendant of the illegitimate son of M will take the property to the exclusion of CD, who is the illegitimate daughter of C, the illegitimate daughter of M. In this case if C had survived A she would have succeeded to A's property simultaneously with BS [see Section 3 (1) (j)].
- m) A dies leaving her surviving DD her daughter's daughter, H her husband and M her mother. A had inherited property from her father. All property of A including that inherited by her from her father will devolve simultaneously on DD and H. The case does not fall under clause (a) of sub-section (2) because A had left issue. It is governed by Entry (a) of sub-section (1).
- n) A dies leaving her surviving H her husband, M her mother and B her brother. A had inherited property from her father. A's (other) property will devolve on H; but the property inherited by A from her father will not devolve on H and will devolve on M and B who will take it simultaneously as heir of her father.

- o) A dies leaving her surviving her brother and her step-mother (her father having married again after the death of A's mother). A had inherited the property from her mother. The property will devolve upon the brother and the step-mother in equal shares as heirs of her father.
- p) A dies leaving her surviving her father's sister and her father's brother's son. A had inherited property left by her father. The property will devolve on the father's sister in preference to the father's brother's son, as a sister under Class II of the Schedule is a nearer heir than a brother's son.
- q) A dies leaving her surviving sons and daughters of her father's sister and sons and daughters of her father's brother. A had property which she had inherited from her mother who in her turn had inherited the same from her husband, that is A's father. A becomes a full owner of the property when the Act came into force in 1956. The property will devolve on all the children of the father's sister and the father's brother simultaneously and in equal shares.
- r) A dies leaving her surviving FBD her father's brother's daughter, MB her mother's brother, and MS her mother's sister. A left property which she had inherited from her mother. The property will devolve on FBD as heir of her father.
- s) A dies leaving her surviving H her husband, B her full brother and US her uterine sister, her mother having remarried after the death of her father. A left property which she had inherited from her mother. The property will not devolve upon H but will devolve upon B as heir of A's father. US is not an heir of A's father and cannot claim any share. Also, see Illustration under Entry (b) of sub-section (1).
- t) K died childless leaving her surviving her husband as her nearest heir. K had acquired property under a will of her mother M, whereby M had devised her property in favour of K as a legatee. The property will devolve upon the husband of K under clause (a) of sub-section (1) and not upon any heir of K's father under sub-section (2) (a).
- u) K had acquired property under the will of her mother. K died after her husband. The property will devolve upon her husband's brother's son under clause (b) of sub-section (1) and not upon any heir of her father under sub-section (2) (a).
- v) K who was a widow died without leaving any issue. K left property, which she had received by way of gift from her father during the father's lifetime. The property will devolve upon the heirs of K's husband under clause (b) of sub-section (1) and not upon K's brother under sub-section (2) (a). This is because sub-section (2) (a) applies only to property which was 'inherited' by the female Hindu.
- w) C died in 1947 leaving surviving him his daughter B by his first wife and CW his second wife whom he had married after the death of B's mother. CW remarried before the Hindu Succession Act 1956 came into force and B became entitled to the entire property left by her father. B died unmarried after coming into force of the Act of 1956 leaving her surviving the step-mother and her father's sister. It was held that CW the step-mother having remarried before 1956 she could not be regarded as an heir of the father of B; nor could she be regarded as the mother of B. The property left by B would go to the sisters of C as the heirs of the father of B under the present clause.
- x) A died in about 1933 leaving surviving him his widow R, a daughter M and his sister S. R died in 1945 and M became entitled to the property left by A. She became absolute owner of the property in 1956 when the Hindu Succession Act came into force. M died in 1969 survived only by her husband. The property will devolve not on her husband, but on S as the heir of M's father under the present clause.
- y) A dies childless leaving her surviving H2 her second husband whom she remarried after the death of H her first husband. H had died leaving surviving him his widow A and his two brothers B and C. On the death of H, A had inherited his entire property. The property so inherited by A will on A's death devolve under this clause upon B and C as the heirs of H and not upon H2. The same will be the position if A had inherited property from the father of H as the widow of a predeceased son and thereafter remarried H2.
- z) A had remarried H2 after the death of H, her first husband. H had died leaving surviving him his widow A and his two brothers B and C. On the death of H, A had inherited his entire property. H2 died during the lifetime of A, leaving surviving him his widow A and SH2, a son by a predeceased wife. On A's death A's (other) property will devolve upon her step-son SH2, but the property inherited by her from H will revert to the heirs of H as if the property had been of H and H had died immediately after A. B and C will take the property as 'the heirs of the husband' under this clause. SH2, the step-son of A, although an heir of H2 the second husband, will not be entitled to claim heir of H2 the second husband, will not be entitled to claim such property as an heir of A's husband under Entry (b) of sub-section (1), although the other property left by A will devolve upon him.

- a. dies leaving her surviving a son S and a daughter D by her first husband, and H2 whom she had remarried after the death of H, her first husband. Along with S and D, A had inherited an equal share in the property left by H and A left that property (her share) when she died. The property left by her will devolve in equal shares upon S, D and H2 under sub-section (1) (a) and clause (b) of sub-section (2) will not be applicable. S and D cannot exclusively claim the property on the ground that the property had been inherited by A from H.
- b. A dies leaving her surviving her second husband H2. She had inherited property from her first husband H. On A's death the property will not devolve on H2, but upon the heir of H as if H had died incidentally after A.

ORDER OF SUCCESSION AND MANNER OF DISTRIBUTION AMONG HEIRS OF A FEMALE HINDU: SECTION 16

Rule 1 – Among the heirs specified in sub-section (1) of section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2 – If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3 – The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's, as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

Illustrations

- a) A dies leaving her surviving H her husband, S1 and S2 her two sons, SS the son of S a predeceased son, WS3 the widow of S3 another predeceased son, D1 and D2 two daughters, DD the daughter of D a predeceased daughter, and B her brother. All these except WS3 and B will succeed to A's property howsoever acquired as heirs included in Entry (a) of sub-section (1) of Section 15. They will take simultaneously and to the exclusion of WS3 and B. WS3 could have been an heir only under Entry (b) and B could have been an heir only under Entry (d) and are not entitled to succeed, as there are heirs included in Entry (a).

In the above illustration S1, S2, SS, D1, D2, DD and H who succeed simultaneously will each take one-seventh share. If S, the predeceased son, had instead of SS left more children they would also have taken only one share between themselves and could not have claimed an equal share with S1, S2 and the others. In their case the distribution would have been per stirpes and not per capita.

- b) A dies leaving her surviving S a son by her first husband H; and H; and S1 and D son and daughter respectively by her second husband H2. A had inherited property from H. All her property including the property inherited from H will devolve upon S, S1, D and H2 simultaneously and they will each take a one-fourth share. The case will not be governed by clause (b) of Section 15 (2) because A dies leaving issues.

- c) A dies leaving her surviving SW, the widow of S her predeceased son; SSS1 and DSS1 the son and daughter respectively of SS1 the predeceased son on her predeceased son S1. None of these are heirs included in Entry (a) of section 15 (1), but are heirs of her husband under Entry (b). The property of A will be so divided between them that SW will take one-half and SS1 and DSS1 and will each take one-fourth share. However, property that A might have inherited from her mother or father will not devolve upon any of these persons as the heirs of A's husband in accordance with Entry (b), but will devolve upon the heirs of her father under Section 15 (2) (a).

Also, see illustrations under Section 15.

- d) A dies unmarried leaving her surviving B, her brother; SB1 and DB1, the son and daughter respectively of her predeceased brother B1; CS1, CS2 and CS3, the sons of C, her predeceased sister; and FW, her step-mother. In the absence of any heirs enumerated in Entries (a) to (c), A's property will devolve upon B, SB1, DB1, CS1, CS2, CS3 and FW as the heirs of her father. SB1 and DB1 will take only one share between them and CS, CS2 and CS3 will take only one share between them. The shares of B and FW will be one-fourth each. The shares of SB1 and DB1 will be one-eighths each; and the share of CS1, CS2 and CS3 will one-twelfth each. The distribution will be in accordance with rule 3 of section 10. The property to be distributed will include any property that A might have inherited from her mother or father.

- e) A's mother M had remarried MH2 after the death of A's father F and left her surviving A, MH2 and UB and US her son and daughter respectively by MH2, her second husband. Upon the death of her mother, A had inherited her share of the property left by M. A dies unmarried leaving her surviving UB and US (her uterine brother and uterine sister); MH2 her step father; and FB and FSis her own father's brother and sister respectively. A's property including proper inherited by A from M will devolve upon FB and FSis in equal shares as the heirs of her father F, in preference to the heirs of her mother [section 15 (2) (a)].

FULL-BLOOD PREFERRED TO HALF-BLOOD: SECTION 18

Heirs related to an intestate by full-blood shall be preferred to heirs related by half-blood, if the nature of the relationship is the same in every other respect.

This section is a substantial reproduction of the rule of Hindu law whereby relations of the whole blood are preferred to those of the half-blood. The section lays down a rule of general applicability to heirs, male and female, alike.

The rule laid down in the section applies only when the nature of relationship is the same according to every relevant mode or manner affecting its nature and the rules of preference laid down in the Act for determination of the order of succession.

Illustrations

- a) P, a male intestate dies leaving surviving him A, a full-sister's daughter and B, a half-brother's son. Brother's son and sister's daughter are both heirs specified in Entry IV of Class II of the Schedule. The nature of their relationship with the intestate is the same and the full sister's daughter will be preferred to the half-brother's son.
- b) P, a male intestate dies leaving surviving him A, his father's half-brother; B his father's sister; C, his father's full brother's son; and D, his mother's full-brother. A and B are heirs specified in Entry VII of Class II of the Schedule, D is an heir under Entry IX and C is only an agnate. C and D are excluded as remote heirs. The relationship of A and B with the intestate is the same in every respect except that B is related to him by full-blood and A by half-blood. B will be preferred to A and inherit the whole of P's property.
- c) P, a male intestate dies leaving surviving him A, his mother's half-brother; B, his mother's half-sister; and C, his mother's full-brother's son. C is excluded as a remote heir. The relationship of A and B with the intestate is the same in every respect and both are specified as heirs under Entry IX of Class II of the Schedule. They are both related to the intestate by half-blood and not entitled to any preference inter se and will take P's property in equal shares.

MODE OF SUCCESSION OF TWO OR MORE HEIRS: SECTION 19

If two or more heirs succeed together of the property of an intestate, they shall take the property

- a) Save as otherwise expressly provided in this Act, per capita and not per stirpes; and
- b) As tenants-in-common and not as joint tenants.

The section lays down the general rule of distribution that two or more heirs of a male or female intestate who succeed together under the Act take property per capita and as tenants-in-common and on *per stirpes* unless there is an express provision to the contrary.

Thus for instance distribution among the four heirs of a male intestate mentioned in Entry II of Class I of the Schedule, namely, son's daughter's son, son's daughter's daughter, brother and sister is per capita. They all succeed together and each has an equal share in his or her own right as an heir claiming relationship *in equali jura* declared to exist by one specific Entry.

In distribution *per stirpes* the claimant gets a share as representing another person. Thus for instance in case of distribution of property of a male intestate among his heirs in Class I of the Schedule, while the surviving sons and daughters and the mother of the intestate are each entitled to take one share, that is *per capita* the heirs in the branch of a predeceased son or a predeceased daughter take between them one share as expressly laid down in Section, rule 3. In case of the latter, distribution is *per stirpes* and on the principle of representation.

Instances of exceptions to the general rule about distribution *per capita* are expressly provided in rr 1, 3 and 4 of Section 10, rule 2 of Section 16, by operation of sub-section (2) of Section 1; hereunder the property of a female intestate devolves in certain cases on the heirs of the father or husband of the intestate; and under the proviso to Section 6 which beings about the operation of rr 1,

3 and 4 of Section 10 in the case of a male Hindu who dies leaving any heirs mentioned in the proviso to Section 6 and having at the time of his death an interest in a Mitakshara coparcenary.

In a tenancy-in-common, each sharer has an independent share in the common property and ordinarily cannot act for the others or assume the authority of a manager unless so appointed by all the others. Thus for instance one of several female heirs who are co-tenants cannot alienate the property held as co-tenants though, or course, in a given case the Court may as far as possible try to protect the interest of the alienee on equitable considerations.

RIGHT OF CHILD IN WOMB: SECTION 20

A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the death of the intestate.

The section is worded in sufficient amplitude and applies not only to cases where under the Act the heir, male or female, in order to become entitled to succeed to the intestate must be born of *justum matrimonium*, but also to those cases where an illegitimate child is entitled to claim relationship and inheritance by virtue of the proviso to Section 3 (1) (j). The rule will also apply to the case of children of a void or voidable marriage who are within the purview of Section 16 of the Hindu Marriage Act 1955. That section in terms speaks of children in the womb of their mother. The operation of that section is, however, limited.

PRESUMPTION IN CASES OF SIMULTANEOUS DEATHS: SECTION 21

Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

Examples:

- i) M and her daughter K died in fire and on consideration of evidence the conclusion was reached that they had perished in circumstances rendering it uncertain whether either of them had survived. Applying the rule of presumption laid down in this section, it was held that K the daughter had survived her mother. Prior to her death M had executed a will and left her property to K as a legatee and the property devolved on the heirs of K.
- ii) A defendant in a partition suit was murdered at night along with her foster daughter in whose favour the defendant had bequeathed her property by will. It was uncertain as to who died first. The heirs of the foster daughter were directed to be brought on the record of the partition suit in preference to the sons of the defendant who claimed to be the heirs of the latter on basis of intestacy.

PREFERENTIAL RIGHT TO ACQUIRE PROPERTY IN CERTAIN CASES: SECTION 22

- (1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in Class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.
- (2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.
- (3) If there are two or more heirs specified in Class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation – In this Section, 'court' means the Court within the limits of whose jurisdiction the immovable property is situated or the business is carried on, and includes any other Court which the State Government may, by notification in the Official Gazette, specify in this behalf.

The effect of the section may be thus summarised:-

- i) In case any heir specified in Class I of the Schedule desires to dispose off his interest in the property (immovable property or interest in a business) inherited by him simultaneously with any other heir or heirs of an intestate under the provisions of the Act, the latter have a preferential right to acquire that interest by purchase.
- ii) If the parties are unable to agree as to the quantum of consideration payable by the heir or heirs who intend to exercise the right conferred by sub-section (1), the price will be determined by the court in an application made for the purpose. The intending purchaser is not, however, bound to pay the price fixed by the Court. If he does not choose to pay the same, he will only be liable to pay costs of the application.
- iii) In case of two or more heirs seeking to exercise the right conferred by sub-section (1) that heir who offers the highest consideration must be preferred and allowed to acquire the interest.

The provision of the section were necessary in order to safeguard the interests of co-heirs, otherwise the very foundation of the Hindu family would have been shattered. The preferential right to acquire property in certain cases as is provided under this section is limited only to those cases where the property has devolved upon two or more heirs specified in class I of the schedule.

Before the preferential right can be decreed under this sub-section, the conditions laid down should be satisfied:-

1. Available to heirs of class I
2. Available at the time of transfers
3. consideration
4. Court to which application lies
5. preference to the heir who offers highest consideration

Suit

Where in a case envisaged by this section any property is already transferred by co-heir the remedy of the other co-heirs to enforce their pre-emptive right would be by a regular suit and not by way of an application under this section.

Transfer not void but voidable – The alienation envisaged in the section is not void but voidable.

SPECIAL PROVISIONS RESPECTING DWELLING HOUSES: SECTION 23

Section 23 of the Hindu Succession Act has been omitted by section 4 of the Hindu Succession (Amendment) Act, 2005.

CERTAIN WIDOWS RE-MARRYING MAY NOT INHERIT AS WIDOWS: SECTION 24

Section 5 of the Hindu Succession (Amendment) Act, 2005 has omitted this section. Therefore, remarriage by these widow is no longer a disqualification.

MURDERER DISQUALIFIED: SECTION 25

A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

The section has the effect of laying down that a person who commits murder or abets the commission of murder is disqualified from inheriting –

- i) The property of the person murdered; or
- ii) Any other property he may become entitled to succeed by reason of furtherance of succession resulting from the murder.

The expression 'murder' would be read in a wide sense and would take in its import even culpable homicide, though, of course, to some extent the matter would depend upon the facts and circumstances of the case.

Example: If A has a brother B and a nephew C (the son of a predeceased brother) and C commits the murder of B (B being the nearer heir would have been entitled on A's death to succeed to A's property to the exclusion of C), C becomes disqualified from inheriting the property of A.

CONVERT'S DESCENDANTS DISQUALIFIED: SECTION 26

Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

Thus where A died leaving three Sons, B, C, and D, and B had accepted Islam during the lifetime of A, on the death of A, B, C and D would equally take one share each i.e. 1/3 of the property left by A, B is not disqualified from inheriting the property of A despite the fact that he had embraced Islam and is no longer a Hindu. The reason is that under section 26 the convert himself is not disqualified from inheriting. The descendants of a convert born subsequently after conversion would be disqualified to inherit.

SUCCESSION WHEN HEIR DISQUALIFIED: SECTION 27

If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.

It follows that no person can claim a right of inheritance to such property, through him or her. For, this can only happen if the property had vested in the disqualified person and he or she had thereafter immediately died. The property, in fact never vests in the disqualified person. Therefore, a disqualified heir can not a fresh stock of descent and a person claiming as an heir of the disqualified person can not inherit.

The section is prospective not retrospectively.

DISEASE, DEFECT, ETC. NOT TO DISQUALIFY: SECTION 28

No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, or any other ground whatsoever.

The Madras High Court held that the effect of section 28 read with section 4 of the Act is that unchastity of a widow has ceased to be a disqualification for succession after the Act came into force. A widow though, unchaste can now succeed to the property of her son as her father's widow.

FAILURE OF HEIRS: SECTION 29

If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government; and the Government shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

Escheat in Indian law is the term commonly employed to denote lapsing of property to the Crown or Government in default of heirs on the death of the owner intestate. In recent times, escheat is rare, for persons owning property but having no known heirs make wills and even when they do not, some person having remote kinship is usually found. Under the previous law on failure of all heirs of an intestate, the Crown took by escheat.

TESTAMENTARY SUCCESSION: SECTION 30

Any Hindu male/female may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.

Notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section.

The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member in the property of a *tarwad*, etc. is a property now capable of being disposed of by will, notwithstanding any other rule of law to the contrary.

According to Mitakshara law, no coparcener, not even a father, could dispose of by will his undivided coparcenary interest even if the other coparceners consent to the disposition, the reason being that at the moment of the death the right of survivorship (of the other coparceners) is in conflict with the right by device. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by device. That rule of Mitakshara law is now abrogated by the Explanation which lays down in explicit terms that such interest is to be deemed to be property capable of being disposed of by will notwithstanding anything contained in any provision of the Act or any other law for the time being in force.

The power conferred by this section upon a member of a joint family to make a will in respect of his interest in the joint family property cannot be extended to a case of gift.

Prior to the coming into force of this Act, neither under Mitakshara nor under Dayabhaga law, could a widow or other limited female heir in any case dispose of by will any property inherited by her or any portion thereof, whether the property was movable or immovable. The effect of Section 14 of this Act inter alia is to abrogate that traditional limitation. She is now a full owner of all property howsoever acquired and held by her and can dispose of it by will. The only qualification to this rule is that she cannot do so where she holds any property as 'restricted estate' as visualised under Section 14 (2). This is so because in any such case she is not and has not become full owner of the property.

Chapter II

Sources and Schools of Hindu Law

1. Give the main sources of Hindu Law. **[RJS – 1991]**
2. What is the importance of Shruti in Hindu Law? **(Bihar JE – 1991)**

Chapter III

The Hindu Marriage Act, 1955

1. Define the nature of Hindu Marriage under Hindu Law. What are the characteristics of sacramental marriage among Hindus? How far these have been affected by the Hindu Marriage Act, 1955? **[UPPCS (J) – 1992, Delhi JS – 1990]**
2. Is the following marriage valid under the H.M. Act and what remedy is open to the wife: The husband had a wife, at the time of marriage, the first marriage having been performed in England before 1955? **(DJS – 1990)**
3. What is prohibited decree in Hindu Law? **[RJS – 1991]**
4. What do you understand by 'void' and 'voidable' marriages? Illustrate your answer. **[UPPCS (J) – 1982, 1984, 1986]**
5. When would a court refuse to pass a decree of divorce under the Hindu Marriage Act? **[RJS – 1992]**
6. What is the scope of Section 27 of the H.M. Act for disposal of property of Hindu spouse? Discuss. **[DJS – 2000]**
7. W files a petition for restitution of conjugal rights against her husband, H, and applies for maintenance pendente lite. H contends that no marriage took place between him and W, and insists that the question of marriage be decided first. Can the court under Section 24 grant to W the expenses for contesting the question of marriage between H and W? Decide. **[Punjab C.S. (J.B.) – 1999]**

Chapter IV

The Hindu Adoption and Maintenance Act, 1956

1. Discuss the authority of a Hindu widow to adopt a son to her husband under the Hindu law and the changes introduced by HAMA, 1956? **[UPPCS (J) – 1983]**
2. What are the consequences of an Adoption? **[RJS – 1992]**

Chapter V

The Hindu Minority and Guardianship Act, 1956

1. Who are natural guardians of a son in Hindu Law? What are the powers of natural guardian? **[RJS – 1989, 1991]**
2. Who is a de facto guardian of a Hindu minor? Can he dispose of the minor's property for the latter's education and moral welfare? **[RJS – 1999]**

Chapter VI

Joint Hindu Family, Coparceners and Joint family property

1. Who are coparceners? **[RJS – 1991, 1992]**
2. Explain the concept of coparcenary. Can a female be a coparcener? **[Punjab C.S. (J.B.) – 1999]**
3. What constitutes coparcenary property? Explain. **[UPPCS (J) – 1985]**
4. 'A' as managing member of Joint Hindu Family borrowed Rs. 5000/- from 'B' for the necessities of the Joint Family. 'B' obtained the decree against 'A' as manager of the Joint Family. Could the decree be executed against the whole coparcenary property? Could the decree be executed against personal properties of all the members of the joint family? **[DJS – 1982]**

Chapter VII
Rights and Powers of Karta and Coparceners

1. Write a short note on Pious obligation. [UPPCS (J) – 1997, RJS – 1991]
2. State concisely what you understand by Pious obligation of a son to pay debts of his deceased father, when no property is inherited from the father. [DJS – 1980]
3. Define an antecedent debt. Under what circumstances can a joint family property be alienated for discharging an antecedent debt? [UPPCS (J) – 1983]

Chapter VIII
Partition and Reunion

1. What is partition? [UPPCS (J) – 1992]
2. Name some properties which are incapable of division. [UPPCS (J) – 1992]
3. "Partition is made only once" (Manu). Discuss. [UPPCS (J) – 1991, 1999]

Chapter IX
Hindu Succession Act, 1956

1. How does the self-acquired property of a Hindu male dying intestate devolves? [RJS – 1992]
2. A and his sons B and C constitute a coparcenary. B separates himself after getting $1/3^{\text{rd}}$ share of coparcenary property. A dies intestate leaving his surviving daughter D and sons B and C. Examine the claims of daughter D and son B to the property (coparcenary and self-acquired) left by A. [DJS – 1980]
3. What is the right of a child in womb under the Hindu Succession Act? [RJS]
4. What are the rights of a female heir in a dwelling house occupied by members of Hindu Undivided Family? [RJS]
5. A Hindu female after the promulgation of Hindu Succession Act, 1956 becomes the full owner of the property inherited by her in her possession. Are there any exceptions to this rule? [UPPCS (J)]
6. Describe the facts and principles of law laid down in *V. Tulsamma vs. Shesha Reddy*. [RJS]

Muslim

Law

Muslim Law

Contents

CHAPTER	TOPIC
1.	Introductory Chapter
2.	Sources and Schools of Muslim Law
3.	Muslim Marriage
4.	Dower (Mahr)
5.	Divorce/Dissolution of Marriage
6.	Maintenance
7.	Gift (Hiba)
8.	Will
9.	Wakf
10.	Paternity, Legitimacy, Acknowledgment and Adoption
11.	Succession and Administration
12.	Inheritance

MUSLIM LAW

Chapter – 1

Introduction

In religious sense Islam means 'Submission to the will of God' and in secular sense Islam means the 'establishment of peace'.

Muslim law in India means "that portion of Islamic civil law which is applied to Muslims as a personal law" (Fyzee). Muslim law is founded upon 'Al-Quran' which is believed by the Muslims to have existed from eternity, subsisting in the very essence of God.

There are mainly two different conceptions of Muslim Law, one of divine origin as in the case with the Hindu law and another man made. Muslim law is founded upon revelation and is blend with religion. There is in Islam, a doctrine of 'certitude' (ilm-ul-yaqin in the matter of Good and Evil. What is morally beautiful that must be done, and what is morally ugly must not be done. This is law of shariat which means the totality of Allah's commandment. It is a doctrine of duties.

The Muslim legal system differs from other modern systems, in the sense that it purports to have its sole source of Divine will communicated, on its final form, through a single human channel. God alone is the legislator in Islam and has Supreme legislative power in the Islamic system. But as laws are needed for the benefit of the community the Divine Legislator has delegated to it power to lay down laws by the resolution of those men in the community who are competent in that behalf, i.e., the Mujtahids (or jurists). In this system the legal rules are so deeply connected with the moral and religious rules that it is difficult to separate them. In the words of Mr. Justice Mohmmood "Hindu and Mohammedan law are so intimately connected with religion that they cannot readily be dissevered from it."

Who is Muslim : Muslims, for the purpose of the application of Muslim Law falls into the two categories

- a. Muslims by birth or origin and
- b. Muslims by religion or conversion
(Persons who profess Islam or persons who undergo the formal ceremony of conversion)

a. By birth or origin : when both parents are Muslims the child will be Muslims according to Shariat Act even if one of the parents is a Muslim, the child will be Muslim. It has been seen that under Hindu Law if one of the parents is Hindu and other is Muslim and if the child is brought up as a Hindu the child will be Hindu. The rule of Muslim law, it is submitted will be subject to this rule of Hindu Law.

b. By religion or conversion : A convert is a person who renounces his faith and adopts another. When a person declares that he is a follower of Muslim faith and undergoes a formal ceremony of conversion prescribed by the caste or community to which he converts. If such a conversion is bonafide and not made with any ulterior motive or intention it amounts to his having accepted the Muslim approach of God.

In *Sarla Mudgal v. Union of India* (Air 1995 SC 1531). The husband already married. Under Hindu law embraced Islam and solemnized a second marriage under Muslim Law. The court held that the second marriage of a Hindu husband after conversion to Islam without having his first marriage dissolved under law would be invalid.

In *Lily Thomas v. Union of India* (Air 2000 SC 1650) one personal law can not be used to defeat the spirit or purpose of another personal law. Supreme Court held that the husband is guilty of the offence of Supreme Court held that bigamy u/s 494 IPC.

Effect of conversion to Islam : The rights and the status of the convert become subject to the Mohammedan Law. In the absence of a custom to the contrary in case of a Hindu converts to Islam succession and inheritance are governed by Mohammedan Law and not by Hindu Law.

Effect of Apostasy (renunciation) of Islam on marriage: Marriage of a Muslim husband with a Muslim wife is dissolved ipso facto on the renunciation of the husband of Islamic religion. The renunciation of Islam by a married Muslim woman does not by itself dissolve her marriage. But where a woman converted to Islam from some other faith re-embraces her former faith her marriage with the Muslim husband stands dissolved.

Important Questions

1. Discuss the nature of second Muslim marriage of a convert Hindu while he has an existing Hindu wife.

Ramkrishna

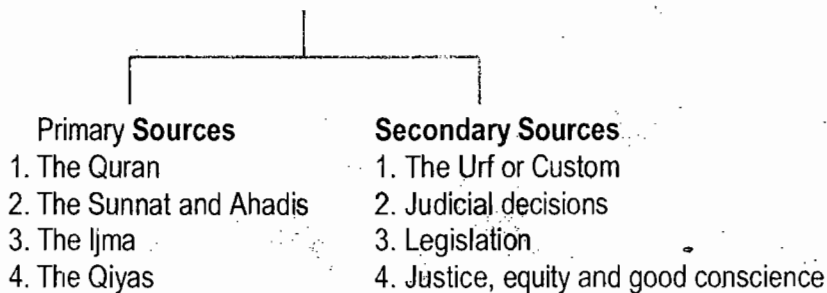
Chapter – 2

Sources and School of Muslim Law

SYNOPSIS

1. Introduction
2. Sources of Muslim law
 - a. Primary sources
 - b. Secondary sources
3. Schools of Muslim
 - a. Sunni School
 - b. Shia School
4. Difference between the Suni and Shia school

Sources of Muslim Law



I - Primary Sources

1. The Quran:- Quran is the primary source of Muslim law, in point of time as well as in importance, Quran is the first source of Muslim Law. It contains the very words of God and it is the foundation upon which the very structure of Islam rests. Quran regulates individual, social, secular and spiritual life of the Muslims.

The contents of Quran may be classified under the four heads:-

- (a) Metaphysical and abstract
- (b) Theological
- (c) Ethical and mystical
- (d) Rituals and legal

We are here concerned with the legal aspect only. The Quran has influenced the creation of Islamic legal system in following ways:-

- (1) The prophet faced legal problems and so did his companions and the Quran provided guidance. It gave such texts which possesses definite legal element.
 - (2) Non-legal texts in the Quran moral exhortations and Divine promises have been construed by reasoning to afford legal rules. The texts proclaiming that God will not punish any one Save for one's own sins have been applied to debts which a person leaves unpaid at his death with for reaching results in the law of administration of assests
 - (3) By pointing out that the previous revelations have been corrupted, the Quran declared the legal material with the people of the book unreliable and called people to abandon the customs of their ancestors which are outside the sphere of the Book and Sunnah.
2. The Sunnat and Ahadish (Traditions):- Sunna means the model behaviour of the Prophet. The narrations of "What prophet said, did or tacitly allowed" is called Hadis or Traditions. The traditions were not reduced to writing during the lifetime of Mohammad but preserved from generation to generation so a mintue inquiry is necessary to accept a Hadis.
 3. The Ijma:- Ijma has been defined by sir Abdul Rahim as "agreement of the jurists among the followers of Prophet Mohammad in a particular age on a particular question of law". According to classical theory, failing of Quran and traditions the consensus of opinion amongst the companions

of the prophet is recognised as the best guide of law. The authority of Ijma as a source of Muslim law is also founded on Quran and Traditions.

With the march of time, development of civilization and expansion of the Islamic influence numerous problems arose which could not be decided by reference to only Quran and traditions. For this purpose. The jurists evolved the principle of Ijma so legislator has delegated power to lay down rules by the resolution of those men in the community who are competent in that behalf.

4. **The Qiyas:-** This is the last primary source of Muslim Law. Qiyas means reasoning by analogy from the above three sources i.e. Quran, the Sunnat and the Ijma. In Qiyas rules are deduced by the exercise of reason. Qiyas does not purport to create new law, but merely to apply old established principles to new circumstances.

This source namely is of no value to persons belonging to the school of Ahmad Ibn Hanbal the great traditionalist. The shias also do not accept Qiyas because they are of the opinion that if law need to be enlarged it must be by the Imam and none else. Qiyas is a weak source of law, reason is that with respect to analogical deductions one can not be certain that they are what the law giver intended.

II - Secondary Sources

1. **Urf or Custom:-** Custom was never formally recognised as a source of Muslim law, though it has been occasionally to as supplementing the law. Custom does not command any spiritual authority but a transaction sanctioned by custom is legally operative, even if it be in violation of a rule of law derived from analogy; it must not, however, be opposed to a clear text of the 'Quran' or of any authentic tradition. The requirements of a valid custom are:-

- (a) General prevalence in the country is necessary
- (b) It must be territorial
- (c) It need not be existing from the time of the Prophet's companions. All that is necessary is that it should be immemorial.
- (d) It must be ancient
- (e) It should not be opposed to public policy

Shariat Act, 1937, aims at restoring the law of Islam to all Muslim communities residing in India and abolishing customs contrary to the Shariat.

2. **Judicial Decisions:-** These includes the decisions of the Privy council, the supreme court, as well as of the High courts of India. These decisions are regarded as precedents for the future cases. Strictly speaking, judicial decisions only declare the law as it is and as not a source of law but they undoubtedly supplement and modify the law. Muslim law is no exception to this rule. The Muslim law has been supplemented on many points by judicial decisions. On some points judicial decisions have modified the pure Muslim law. Thus under the pure Muslim Law, no interest is allowed on a loan. But in **Hammeera Bibi v. Zubaida Bibi**, the privy council allowed interest on the amount of unpaid dower.

3. **Legislation:-** In India, Muslims are also governed by various legislations passed either by the parliament or by state legislature. The following are the instances of the legislation in India. The usurious loan Act, 1918, freedom of religion Act, 1850, the guardians of wards Act, 1929, the Shariat Act, 1937 and the Dissolution of Muslim Marriage Act, 1939 and many others Acts.

4. **Justice, equity and good conscience:-** Abu Hanifa, the founder of the Hanafi sect of Sunni, expounded the principle that the rule of law based on analogy could be set aside at the option of the judge on a liberal construction or juristic preference to meet the requirements of a particular case. These principles of Muslim law are known as "juristic equity". The term "juristic preference" was used by the great jurist Abu Hanifa to express the liberty that he assumed of laying down law, which in his discretion, the special circumstances required rather than law which analogy indicated. The importance of justice, equity and good conscience as a source of Muslim law can be well assessed by the following observation of **Ameer Ali**; he says that "when the great expounders of Musalman law have enunciated divergent doctrines or expressed different opinions the judge administering Musalman law is to adopt the one most comfortable to equity and requirements of the times"

III Sources of law according to Shias:- The following are the sources of law according to shias:-

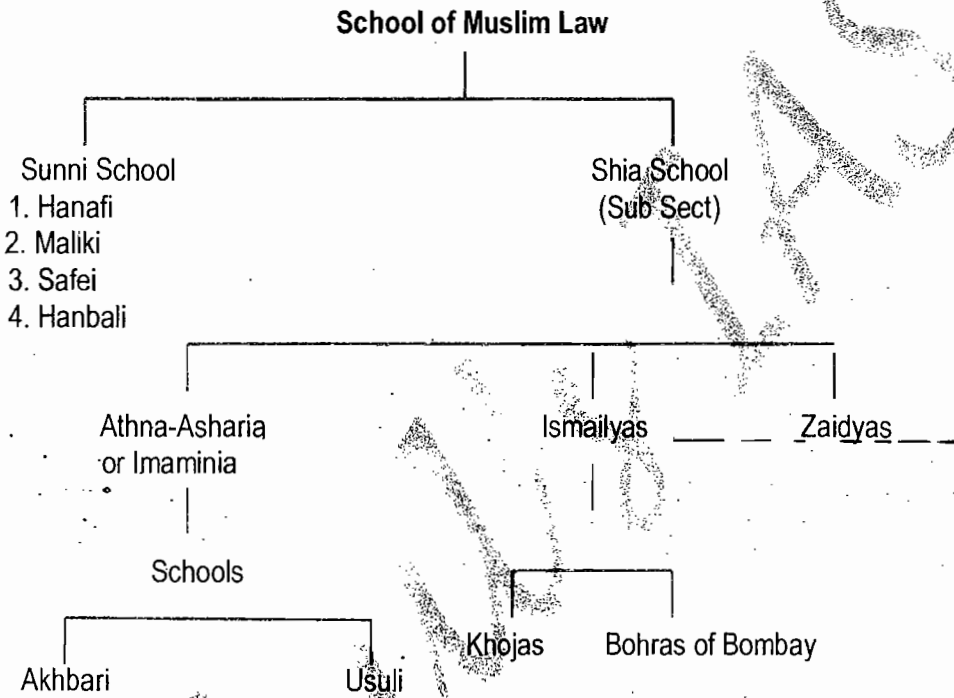
- (a) The Quran
- (b) Ahadis
- (c) The Ijma

The Muslim Law is applicable by courts in India to Muslims not in all but in some matters only. It has been held that as regards marriage and divorce the Shariat Act requires the courts to apply Muslim Law only if both parties are Muslims. If therefore, only one of them is Muslim the Act will not apply.

(Noorjahan v. E Tiscenko AIR 1941 CAL 582)

Schools of Muslim Law

There are two main schools of Muslim law. The Sunnis and Shias both sects are again divided into a number of schools, the majority of the Muslims are Sunni and hence it is presumed that the parties to a suit are Sunnis unless proved therwise. Shia law is also the law of the land.



Points of difference between the Sunni and Shia School

Diff on the point	Sunni Law	Shia Law
1. Marriage	(a) Muta marriage is unlawful (b) It recognizes a long list of guardians for marriage (c) Presence of two male witnesses at the time of marriage is necessary but not at the time of dissolution. (d) Child will be presumed legitimate only if born with 10 months from the dissolution of marriage	(a) Muta marriage is lawful (b) Only father and grandfather are guardians for marriage (c) Presence of two witnesses at the time of marriage is not necessary but at the time of dissolution (d) Child born within 2 years of the termination of marriage is presumed to be legitimate
2. Dower	Minimum 10 Dirhams Maximum no limit	Minimum no limit Maximum 500 dirhams
3. Divorce	(a) may be effected orally or by a written document (b) Presence of witnesses not necessary (c) Words of divorce used by husband	(a) Must be pronounced orally unless husband is physically incapable of pronouncing orally then in writing (b) Presence of two witnesses is

	under compulsion or voluntary intoxication is valid divorce	necessary
4. Maternity	(a) fixed with woman who gave birth to the child whether from adulterous act or valid marriage (b) child has got the right of inheritance from the mother	(c) Does not recognise divorce under such circumstances (a) fixed with woman who gave birth to the child only from valid marriage (b) does not permit mutual rights of inheritance between the mother and her illegitimate child
5. Guardianship	mother is entitled to custody of a boy until he has completed the age of 7 years and girl until she attains puberty	mother is entitled to custody of a boy until he attains the age of 2 years and girl until attains the age of 7 years
6. Maintenance	liability on children to maintain father even if the father is earning	not obligatory to maintain father if father is earning
7. Gift	Gift of undivided share in a property capable of division is irregular unless special conditions satisfied	gift of undivided share in property capable of partition is valid.
8. Waqf	A waqf inter vivos is completed by mere declaration of endowment by the owner	A waqf inter vivos can not be created by a declaration there must be delivery of possession
9. Pre-emption	recognises three classes of pre-emption	Recognises only one class of pre-emption that too when only two co-owners not more
10. Wills	A person can not bequeath anything in favour of an heir except with the consent of others heirs after the testator's death	(a) If the bequeath does not exceed 1/3 no consent necessary (b) If exceeds 1/3 consent may be given even during the life-time of testator
11. Inheritance	(a) Three classes of heirs-(i) sharers,(ii) residuaries, (iii) distant kindred (b) Does not recognise any right of primogeniture (c) Restricts the doctrine of representation of a few limited cases (d) Homicide is a bar to succession (e) Both husband and wife can take by return i.e. where there is residue (f) The doctrine of increase extends to all shares alike	(a) two classes of heirs (i) sharers (ii) residuaries (b) recognises it to some extent (c) it is the cardinal principle of succession (d) it is bar only if it is intentional (e) only husband is entitled to return not the wife (f) it applies only to the daughter and sister among shias

Chapter - 3

MUSLIM MARRIAGE

SYNOPSIS

1. Introduction
2. Definition
 - (a) Legal Aspects
3. Objects of Marriage
4. Essentials of Marriage
 - (a) Proposal and Acceptance
 - (b) Capacity for Marriage
 - (c) Legal Disability
5. Kinds of Marriages according to validity
6. Consequences of valid, void and irregular marriage
7. Muta Marriage

Marriage (Nikah)

It was Prophet Muhammad who brought about a complete change in the position of women. He advocated for almost equal rights for women in the exercise of all legal powers and functions. In pre-Islamic Arabia, women were treated as movable possession of men and were not given any right of inheritance and totally dependent upon men. Marriage (Nikah) in pre-Islamic Arabia meant different forms of sex relationship between a man and women established on certain terms.

Marriage though essentially a contract is also a devotional act which has for its object of legalizing sexual intercourse the procreation and legalizing of children. All the rights and obligations it creates arise immediately and, are not dependent on any condition precedent. Such as the payment of dower by a husband to a wife. After marriage, woman does not lose her individuality. She remains a distinct member of the community; the existence of personality is not merged into that of her husband. The contract of marriage gives no power to anyone over her person or property beyond what the law defines. She can enter into binding contract with her husband and proceed against him in law courts, if necessary.

Nature of Muslim Marriage: There is divergence of opinion with regard to the nature of Muslim marriage some jurists are of the opinion that Muslim marriage is purely a civil contract while others say that it is a religious sacrament in nature. In order to better appreciate the nature of Muslim marriage it would be proper to consider it in its different notions.

Legal Aspects

Juristically speaking, marriage is a civil contract and as such has three characteristics:-

- (a) Marriage requires proposal and acceptance
- (b) There can be no marriage without free consent
- (c) Provision is made for the dissolution of marriage either by will of the parties or by operation of law
- (d) The terms of marriage contract are within legal limits capable of being altered to suit individual cases.

Describing the nature of Muslim marriage. In the leading case of **Abdul Kadir v. Salima Justice Mahmood**, Observed that Marriage among Mohammedans is not a sacrament but purely a civil contract although it is solemnised generally with the recitation of certain verses from the Quran.

Justice Mahmood has himself cautioned that the dower in Muslim marriage should not be confused with consideration in the context of civil contract when he says in the same case "Dower under the Mohammedan law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage".

Thus we see that the similarities of a Muslim marriage to a contract are so pronounced that some jurists have treated it entirely as a civil contract.

Though sacramental nature of marriage is considered as an orthodox view but it is also supported by the judiciary.

Anis Begum v. Mohammad Istafa:- is a leading case on the point where C.J. Sir Shah Sulaiman, has tried to put a more balanced view of the Muslim marriage by holding it both a civil contract and a religious sacrament.

Though the learned C.J. does not himself say that marriage is a sacrament, but from the context in which he said, it is clear that he supported the view of Maulvi Samiullah. Taking religious aspect into account Muslim marriage is an ibadat.

If marriage is nothing but a civil contract then keeping in traditional view we could say. "He who enters into a civil contract completes have of his religion but it is enter in to marriage completes half of his religion.

It means Muslim marriage is something more than a civil contract. Justice Mahmood's observation i.e marriage is a civil contract can not be appreciated only because that up to same extent marriage resembles with civil contract. Besides same similarities there are so may basic differences between two, for instance:-

- (a) Unlike civil contract, it can not be made contingent on future event.
- (b) Unlike contract, it can not be for limited time (muta marriage is an exception)
- (c) Unlike contract of sale of goods which may be cancelled by unpaid seller. Wife of a muslim marriage is not entitled to divorce her husband or to remain with a third person if a part of his dower remain unpaid.

In the above ultimate analysis it can be said that the marriage in Islam is neither purely a contract nor as a sacrament. It is devoid of none but the blending of the two.

Objects of Marriage

A glossary on TARMIZI sets out five objects of marriage –

- (a) The restraint of sexual passion
- (b) The ordering of domestic life
- (c) The increase of the family
- (d) The discipline of the same in the care and responsibility of wife and children; and
- (e) The upbringing of virtuous children

Essentials of Marriage

Though in the Muslim communities, certain social functions and ceremonial rites are performed at the time of marriage, such functions or rites are not legally necessary. It is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage and an acceptance of the proposal by or on behalf of the other in the presence of and hearing of two male or one male and two female witnesses who must be sane and adult Mohammedans. If any of these requirements is not fulfilled the marriage becomes either void or irregular, as the case may be.

Proposal and Acceptance

Marriage like any other contract constituted by JAB O-QABOOL i.e. by declaration of an acceptance. One party to the marriage must make an offer (IJAB) to the other party. The marriage becomes complete only when the other party accepted that offer. The words conveying proposal and acceptance must be uttered in each other's presence or in the presence of the agents (VAKILS). In case the words are uttered in each other's presence, the parties should hear the words. The transaction of proposal and acceptance must be completed at one meeting. There must be reciprocity between offer and acceptance must not be conditional. A offers to marry B on Rs. 1000 as dower and B accepts the proposal on condition that Rs. 3000 should be paid to her as dower, there is no reciprocity between offer and acceptance and, therefore, there is no marriage.

Under Sunni Law, the proposal and acceptance must be made in the presence of two males or one male and two female witnesses who are sane, adults and Muslims. Absence of witnesses does not render marriage void but voidable. Under Shia Law, witnesses are not necessary at the time of marriage.

The parties contracting a marriage must be acting under their free will and consent. The consent should be without fear or under influence or fraud. In the case of a boy or a girl who has not attained the age of puberty, the marriage is not valid unless the legal guardian consented to it. The consent may be express or implied.

Capacity for Marriage

The party to a marriage must have the capacity of entering into a contract. In other words, they must be competent to marry. The parties must be able to understand the nature of their act.

- (a) Every Mohammedan of sound mind, who has attained puberty, may enter into a contract of marriage.
- (b) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians.
- (c) A marriage of a Mohammedan who is of sound mind and has attained puberty is void if it is brought about without his consent.

In Muslim Law, age of majority is understood with reference to attaining the age of puberty. Puberty is presumed, in the absence of evidence on the completion of the age of 15 years. The Indian Majority Act, 1875 does not apply to the Muslims in respect of marriage, dower and divorce.

Case: Gulam Bibi v. Muhammad Shafi AIR 1940 Pesh. 4

A girl aged 17 years was given in marriage by her grandfather without her consent. Girl left the husband home and came to her grandfather's home. Husband wanted the restitution of conjugal rights while the girl said she was never married to the petitioner. The court held that no valid marriage has taken place because consent of the girl was not there though she was a major.

Guardianship in Marriage

The right to contract to give a minor in marriage belongs successively to the following persons:-

- (a) Father
- (b) Paternal grandfather, how high so ever, and
- (c) Brother and other male relations on the father's side in the order of inheritance enumerated in the table of residuaries
- (d) Mother
- (e) The maternal uncle and aunt are other maternal relations without the prohibited degrees and
- (f) The State.

Under the Shia Law, only the father and the paternal grandfather how high so ever are recognized as guardians for contracting marriage of a minor.

Note

In certain circumstances a minor contracted in marriage by the guardian for marriage has the right of repudiating or ratifying the marriage on attaining puberty. This right of minor is known as the option of puberty (khyar-ul-Bulugh)

Legal Disability

Legal disability means the existence of certain circumstances under which marriage is not permitted.

Those prohibitions have been classified into four classes as follows:

- (a) Absolute incapacity
- (b) Relative incapacity
- (c) Prohibitory incapacity
- (d) Directory incapacity

(a) Absolute Incapacity

Absolute incapacity to marry arises from

- (a) Consanguinity
- (b) Affinity
- (c) Fosterage

Consanguinity (Qurrabat)

Consanguinity means blood relationship that bars a man from marrying

- (a) His mother or grandmother how high so ever
- (b) His daughter or grand-daughter how low so ever
- (c) His sister whether full, consanguine or uterine

Full – Where mother and father is common

Consanguine – Where mothers are different but father is common

Uterine – Where mother is common but fathers are different

- (d) His niece or grand-niece how low so ever
- (e) His aunt (father's sister, mother's sister) or great aunt how high so ever whether maternal or paternal.

A marriage with a woman prohibited by reason of consanguinity is void. The expression 'how high so ever' and 'how low so ever' denotes ascendants of any degree and descendants of any degree.

Affinity (MUSHAARAT)

A man is prohibited from marrying

- (a) His wife's mother or grandmother, how high so ever
- (b) His wife's daughter or grand-daughter how low so ever
- (c) Wife of his father or paternal grandfather how high so ever
- (d) Wife of his son or son's son or daughter's son how low so ever

A marriage with a woman prohibited by reason of affinity is void. Marriage with the wife's daughter or grand-daughter is prohibited only if the marriage with wife was consummated.

Fosterage (RIZA)

When a child under the age of two years has been suckled by a woman other than its own mother, the woman becomes the foster mother of the child. A man may not, for instance, marry his foster mother, or her daughter or his foster sister.

Exceptions

Under Sunni Law, there are few exceptions to the general rule of prohibition on the ground of fosterage and a valid marriage may be contracted with

- (a) Sister's foster mother
- (b) Foster sister's mother
- (c) Foster son's sister
- (d) Foster brother's sister

The Shia jurists place fosterage and consanguinity on the same footing and refuse to recognize the exceptions permitted by the Sunnis.

(b) Relative Incapacity

Relative incapacity arises from cases which render the marriage invalid only so long as the cause which creates the bar exists. The moment it is removed, the incapacity ends and the marriage become valid and binding. The following are the causes of relative incapacity:-

- (a) Unlawful conjunction
- (b) Polygamy or marrying a fifth wife
- (c) Absence of proper witness
- (d) Difference of religion
- (e) Woman undergoing Iddat

Unlawful Conjunction

A man may not have at the same time two wives who are so related to other by consanguinity, affinity or fosterage that if either of them had been a male, they could not have lawfully inter-married as for instance, two sisters or aunt and niece. The bar of unlawful conjunction renders marriage irregular and not void. A Muslim, therefore, cannot contract a valid marriage with his wife's sister till his first wife is living or not divorced. Under Shia Law, a Muslim may marry his wife's aunt but he cannot marry his wife's niece without wife's permission. Marriage prohibited by reason of unlawful conjunction is void under Shia Law.

Polygamy or marrying fifth wife

It is unlawful for the Mohammedans to have more than four wives at a time. Marriage with a fifth wife is invalid or irregular but this irregularity may be removed by divorcing one of them. Under Shia Law, marriage with a fifth wife is void. A Muslim woman cannot marry more than one husband. If she marries a second husband, she is liable for bigamy under Section 494 IPC and issues of such a marriage are illegitimate. In India, no Muslim marrying under or getting his marriage registered under the Special Marriage Act, 1954 can marry a second wife during the life time of his spouse.

Absence of proper witness

It is essential amongst the Sunnis that atleast two male witnesses or one male and two female witnesses must be present to testify that the contract was properly entered into between the parties. The witnesses must be of sound mind, adult and Muslims. In Shia Law, witnesses testifying the marriage is not required.

Difference of Religion

A Sunni male can marry a Muslim female or a kitabia. Marriage with a kitabia i.e. a woman who believes in revealed religion possessing a divine book viz. Islam, Christianity and Judaism is valid under Sunni Law. But he cannot marry an idolatress or a fire worshipper. It is irregular under Sunni Law and void under Shia Law. Under Shia Law, no Muslim, whether male or female can marry a non-Muslim in the Nikah form. However, Shia can contract a Muta marriage with a kitabia (including a fire worshipper). Muslims belonging to different sects may intermarry.

Woman Undergoing Iddat

Iddat is described as a period during which a woman is prohibited from marrying again after the dissolution of her first marriage. Under Sunni Law, marriage with a woman undergoing Iddat is irregular and it is void under Shia Law. The objective of Iddat is to ascertain the pregnancy of the wife so as to avoid confusion of parentage.

Duration of Iddat

- (a) **Iddat of widowhood** – When a person dies leaving a widow, she is prohibited from marrying before the expiration of 4 months and 10 days.
- (b) **Iddat of pregnant woman** – If the widow is pregnant at the death of her husband, the Iddat will not terminate until delivery or miscarriage. If delivery or miscarriage comes before 4 months and 10 days, the remaining period will have to be observed.
- (c) **Iddat of Talak** – The period of Iddat in cases of Talak is three courses. If the woman is subject to menstruation, otherwise three lunar months. If the woman is pregnant at the time of divorce, the Iddat will not terminate at delivery.
- (d) **Iddat when marriage is irregular** – If the marriage is irregular and parties have separated before actual consummation has taken place the wife is not bound to observe Iddat.
- (e) If the marriage is not consummated, Iddat has been observed in the case of death, but not in the case of divorce.
- (f) The period of Iddat begins from the date of the divorce or death of the husband and not from the date on which woman gets the information. If she gets the information after the expiry of the specified term, she need not observe the Iddat.
- (g) When a husband has divorced his wife and has died before completion of Iddat, the woman is required to undergo a fresh Iddat for 4 months & 10 days from date of husband's death.

Valid Retirement

When the husband and wife are alone together under circumstances which present no legal, moral or physical impediment to marital intercourse, they are said to be in valid retirement.

The valid retirement has the same legal effect as actual consummation in –

- (a) Confirmation of Mahr
- (b) Establishment of paternity
- (c) Observance of Iddat
- (d) The wife's right of maintenance and residence during Iddat
- (e) The bar of marriage with the wife's sister

But mere valid retirement does not prevent marriage with the wife's daughter and in the case of triply divorced couples, remarriage between them is impossible unless the divorced wife is married to another man and duly divorced by the second husband after actual consummation. Under Shia Law, valid retirement is not recognized.

(c) Prohibitive Incapacity

- (a) **Polyandry** – Polyandry is forbidden in the Muslim system and a married woman cannot marry second time so long as the first marriage subsists.
- (b) **A Muslim woman marrying a non-Muslim** – A marriage of a Muslim female with a non-Muslim male is irregular under Sunni Law and void under Shia Law.

(d) Directory Incapacity

- (a) **Marrying a woman 'enciente'** – It is unlawful to marry a woman who is already pregnant by her former husband.
- (b) **Prohibition of divorce** – When a marriage is dissolved, reunion is prohibited except after lawful marriage of woman with another man & then it is being dissolved after consummation.

- (c) **Marriage during pilgrimage** – Under Shia Law, marriage during pilgrimage is void but Sunnis regard such marriage to be legal.
- (d) **Marriage with a sick man** – Marriage with a sick man suffering from a disease which is likely to be fatal is invalid. If however, he recovers and marriage is consummated it is valid.

Kinds of Marriages according to validity

On the basis of the validity, a marriage may be of three kinds under Sunni Law, namely

- (a) Valid (SAHIH)
- (b) Void (BATIL)
- (c) regular or invalid (**Fasid**)

Valid Marriage (Sahih)

A marriage to be valid must satisfy following requirements:-

- (a) There must be proposal by one party and acceptance by the other.
- (b) Proposal and acceptance must have taken place at one meeting and before two witnesses.
- (c) The consent of the party is free.
- (d) The parties must have capacity to contract marriage.
- (e) There should be no impediment to marriage whether absolute, relative, prohibitive or directory.

Void (Batil) Marriage

A marriage contracted by parties suffering from absolute incapacity is void. They are of no legal effect and issues of a void marriage are illegitimate.

Shia Law – Following marriages are void:-

- (a) Marriage in violation of absolute incapacity.
- (b) Marriage with the wife of another person whose marriage is still subsisting.
- (c) Remarriage with one's own divorced wife there is a legal bar.
- (d) Marriage prohibited by reason of unlawful conjunction.
- (e) Marriage with a fifth wife.
- (f) Marriage during pilgrimage.
- (g) Marriage with any non-Muslim.
- (h) Marriage with a woman undergoing Iddat.

Irregular or Invalid (Fasid) Marriage

A marriage contracted by parties suffering from relative prohibitory or directory incapacity is invalid.

Some grounds of invalid marriage:-

- (a) Marriage contracted without witnesses.
- (b) Marriage with a fifth wife.
- (c) Marriage with a woman undergoing Iddat.
- (d) Marriage with a non-scholar woman.
- (e) Marriage by an unauthorized person.
- (f) Marriage contrary to the rules of unlawful conjunction.

According to Shia Law, marriage may be either valid or void. Those marriages which are irregular under Sunni Law are void under Shia Law. However, under Shia Law, marriage contracted without witnesses is valid. It is not void.

Consequences of Void Marriage

A void marriage is of no legal effect either before or after consummation. It does not create any rights and obligations between parties. The wife is not entitled for maintenance. One cannot inherit from the other but woman is entitled to dower if the void marriage has been consummated. The offsprings of void marriage are illegitimate. The parties can separate from each other at any time without divorce and may contract another marriage lawfully.

Consequences of Irregular Marriage

The consequences of irregular or invalid marriage may be studied from two different angles (a) before consummation and (b) after consummation.

Before Consummation

It has no legal effect. The wife is not entitled to dower. The spouse may separate from each other without divorce. Neither the divorce nor the intervention of a court is necessary. Wife is not bound to observe Iddat.

After Consummation

- (a) Wife has to observe Iddat.
- (b) She is entitled to get specified or proper dower whichever is less.
- (c) She is not entitled to maintenance during Iddat.
- (d) The children of such marriage are legitimate but an irregular marriage though consummated does not create mutual rights of inheritance between husband and wife.
- (e) Such marriage may be terminated by a single declaration on either side. The wife is bound to observe Iddat of divorce but not the Iddat of death.
- (f) The parties must be separated by courts.

Consequences of Valid Marriage

Valid marriage creates certain rights and duties between the wife and the husband.

- (a) **Mutual rights and obligations** – It legalizes sexual intercourse and the children born out of it are legitimate. Husband and wife get a right of mutual inheritance and prohibited degree of relationship are created so that they cannot marry within such degree.
- (b) **Right of wife and duties of husband** – The wife is entitled to receive maintenance from her husband. She is entitled to dower as a necessary consequence of marriage even if no stipulation for dower has been made. She has right to live with her husband and to have an apartment for her exclusive use if husband has more than one wife. She has a right to visit and be visited by her blood relations within prohibited degree.

Rights of a husband and the duties of a wife

- (a) She is bound to observe strict conjugal fidelity.
- (b) She is bound to allow her husband conjugal union with her. With due regard to her own health, decency and place.
- (c) She is bound to obey her legal commands.
- (d) She is bound to reside in his house and to observe Purdah, if necessary.
- (e) She is bound to observe 'Iddat' on her husband's death or divorce.

Muta Marriage or Temporary Marriage

The word Muta literally means 'enjoyment'. It may be rendered as marriage for pleasure. It is marriage for a fixed period for a certain reward paid to woman. It is prevalent in Shia Law. It is not recognized by Sunni Law. Muta marriage is void under Sunni Law because the words used at the time of proposal and acceptance must denote an immediate and permanent union. The specified period may be a day, a month or a year or a term of years.

A male Shia Muslim may contract Muta marriage with a Muslim, Christian, Jewish or a fire worshipper woman but not with the follower of any other religion. Muta marriage with a Hindu woman is void. A female Shia is not free to contract Muta with a non-Muslim.

It is essential to the validity of Muta marriage that (a) the period of cohabitation should be fixed (b) some dower should be specified. If period is not specified, it should be considered as a permanent union even if parties call it a Muta. (Case: Shohrat Singh v. Jafri Bibi (1914) 17 Bom. LR 13)

The main incidents of the Muta marriage

- (a) No mutual rights of inheritance created between the spouses but if there is an agreement to the contrary such agreement will be enforced and effective the children considered legitimate and capable of inheriting from both parents.
- (b) Wife is not entitled to maintenance but she can claim maintenance under section 125 Cr. P.C
- (c) If the marriage is not consummated, the wife is entitled to only half of the dower. If consummated then full dower.
- (d) When marriage has been consummated, the wife is required to undergo Iddat in case of death of her husband for a period of 4 months and 10 days (i) in case of pregnancy this period is to be extended till delivery (ii) the termination of muta marriage otherwise than by death of the husband is two courses if she was menstruating and 45 days if she was not (iii) where there has been no cohabitation Iddat is not necessary.
- (e) Husband has right to refuse procreation.

- (f) Marriage comes to an end on the expiry of the term, unless extended. Husband does not have a right of divorce, but he can terminate the union earlier by making a "gift of the term".

Inter sect and Inter school marriage: Under Muslim law there is no prohibition as to inter sect and inter-school marriage. Thus a Shia male/female may contract a valid marriage with sunni female/male marriage and also it doesnot imply change of sect or school. Thus a sunni woman contracting marriage with shia does not there by become subject to shia law. If parties to a suit are Muslims of different schools, the law of defendant will apply.

Ranvix IAS

Chapter-4

Dower (Mahr)

SYNOPSIS

1. Introduction
2. Definition
3. Object of dower
4. Classification of dower
5. Wife's rights and remedies on non payment of dower
6. Kharche -i- Pandon
7. Difference between Sunni and Shia Law relating to dower

Dower: Dower or Mahr is a peculiar Muslim Law concept. It is a sum that becomes payable by operation of law. However non specification of dower does not render a Muslim marriage void.

Definition: According to Mulla, "Dower" is a sum of money or other property which the wife is entitled to receive from the husband in consideration of marriage. The word 'consideration' is not used in the sense in which the word is used in the Indian contract Act. It is an obligation imposed upon the husband as a mark of respect to the wife.

Even in those cases where no dower is specified at the time of marriage, marriage is not void on that account but the law requires that some dower should be paid to the wife and even if no dower is fixed the wife is entitled to some dower from the husband.

(Hassina Bibi v. Zubaida Bibi (1916) 43 I.A. 294)

Importance of dower:- The reason of its importance lies in the protection that it imports to the wife against the arbitrary exercise of the power of divorce by the husband. In Muslim law, the husband can divorce his wife at his whim and so the object of dower is to check upon the capricious exercise of the husband of his power to terminate the marriage at will. It not only protects from his extravagance in having more than one wife.

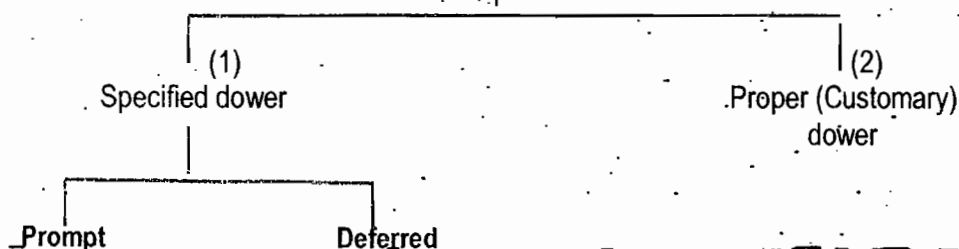
The question with regard to dower does not arise in case of marriages solemnized under the Special Marriage Act, 1954. But the right to Mahr fixed in a marriage first contracted under Muslim Law will not be effected merely by the fact of registration of marriage under the Special Marriage Act, 1954.

Object of dower

- (a) to impose an obligation on the husband as a mark of respect of the wife.
- (b) To place a check on the capricious use of divorce on the part of husband
- (c) To provide for her subsistence after the dissolution of her marriage

Increase or decrease of dower:- The husband may at any time after marriage increase the dower likewise, the wife may remit the dower wholly or partially. A Muslim girl who has attained puberty is competent to relinquish her Mahr although she has not attained majority (18 years within the Indian Majority Act). The remission of the Mahr should be with free consent and it is called hibe-e-Mahr.

Classification of dower



Dower

Payable immediately
On demand

dower

payable on dissolution of marriage either by
death or divorce

Specified dower:- If the amount of dower is stated in the marriage contract, it is called the specified dower. Dower may be settled by the parties to the marriage either before or at the time of the marriage or even after marriage. If the marriage of a minor or lunatic boy is contracted by a guardian, such guardian can fix the amount of dower. Dower fixed by the guardian is binding on the minor boy and he can not on attaining the age of puberty take the plea that he was not party to it.

The husband may settle any amount he likes by way of dower upon his wife, though it may leave nothing to his heirs after payment of the amount.

Prompt dower:- The following points must be noted regarding prompt dower:-

- it is payable immediately on marriage taking place and it must be paid on demand unless delay is stipulated for or agreed
- it does not become deferred after consummation of marriage and a wife has absolute right to sue for recovery of prompt dower even after consummation.
- It is only on the payment of prompt dower that the husband entitled to enforce the conjugal rights unless the marriage is already consummated.
- As it is payable on demand, limitation begins to run on demand or refusal. The period of limitation for this purpose is three years.

Deferred dower:- The following points must be noted regarding deferred dower:-

- it is payable on dissolution of marriage by death or divorce unless agreed otherwise
- the wife is not entitled to demand payment of deferred dower.
- The widow may relinquish her dower at the time of her husband's funeral by the recital of a formula but the relinquishment must be voluntary.
- The interest of the wife in the deferred dower is a vested one not a contingent one.

Proper (Customary) Dower:- When the amount of dower is not fixed in the marriage contract or even if the marriage has been contracted on the condition that she should not claim any dower, the wife is entitled to proper dower.

Determination of proper Dower:-

- Personal qualifications of wife: her age, beauty, fortune, understanding and virtue
- Social position of her father's family
- Dower given to her female paternal
- Economic condition of her husband
- Circumstances of time

Wife's rights and remedies on non-payment of dower:-

- Refusal to cohabit
- Right to dower as a debt
- Right to retain her deceased husband's property. (On death of husband or after divorce but not during the continuance of marriage)

Kharche-i-Pandan:- The kharch-e-Pandan literally means betel box expenses and is a personal allowance to the wife customary among Muslim families of rank specially in upper India. It is also called an allowance for mewakhori when the parties are minors, the contract is made between the respective parents and in such a case the wife as beneficiary is entitled to enforce it. Moreover this is fixed either before or after marriage and according to the means and position of the parties. It is payable to the wife so long as she lives with her husband and she can use it without any control of the husband.

Difference between Sunni and Shia Law relating to dower

Diff on the point	Sunni Law	Shia Law
1. Minimum Limit	A Minimum limit of 10 dirhams is prescribed for specified dower	No Minimum dower has been prescribed

2. Maximum Limit	There is no limit to proper/ specified dower	Proper dower should not exceed 500 dirhams
3. Agreement of no dower	An agreement that no dower shall be due is void	Such agreement by sane and adult wife is valid
4. Consumation of marriage	If marriage is dissolved by death and dower has not been specified , proper dower would be due whether the marriage was consummated or not	If either party dies before consumation of marriage , dower is not payable
5. Non specification of dower	The whole may be awarded as prompt it has to be regulated by the custom or usage of the wife's family Or In the absence of any proof of custom part is regarded as prompt and part as deferred	The whole is presumed to be prompt

DISSOLUTION OF MARRIAGE

SYNOPSIS

1. Introduction
2. Classification of divorce
 - (A) By the death of spouse
 - (B) By the act of the parties
 - (1) By the husband
 - a. Talak (repudiation) (i) Talak al Sunna (ii) Talak al Bidda
 - b. Ila (Vow of continence)
 - c. Zihar (injurious assimilation)
 - (2) By the wife
 - a. Talak-e-Tafwid
 - (3) By common consent
 - a. Khul (redemption)
 - b. Mubaraat (mutual freeing)
 - (C) By judicial process
 - a. Lian (mutual imprecation)
 - b. Faskh (Judicial rescission)
 - (D) By change of religion.

DISSOLUTION OF MARRIAGE

Introduction

Despite the precept of the Prophet, "oh, Allah, the most detestable of all permitted things is divorce", divorce is the most copious and unhibited aspect of Muslim Matrimonial law.

Distinction between talak and divorce

It is not easy to distinguish between talak and divorce. The term talak is used in two senses:-

- (a) A restricted sense in which it is confined to separation effected by use of certain appropriate words by the husband; and
- (b) A wide sense. In this category it covers all separations for causes originating in the husband.

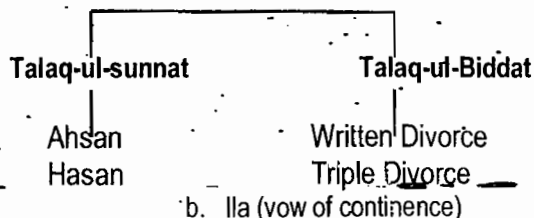
Talak is an act of repudiation of marriage by the husband in exercise of his power which has been conferred on him. The term divorce includes all separation originating from the husband and repudiation for talak in limited sense, namely of separated effected by use of appropriate words.

Classification of divorce

Under Muslim Law, a marriage is dissolved either by the death of the husband or wife or by divorce. After the death of the wife, husband may remarry immediately but the widow cannot remarry before a certain specified period called Iddat.

Generally both the parties to the marriage contract have an option of divorce but the husband's right in this respect is much greater than that of the wife. The husband can dissolve the marriage tie at his will. A divorce can also take place by mutual agreement but the wife cannot divorce herself from her husband without his consent. The following classification is proposed:

- (A) By the death of spouse
- (B) By the act of parties
 1. By the husband
 - a. Talaq (repudiation)



- c. Zihar (injurious assimilation)
2. By the wife
 - a. Talak-e-Tafwid
3. By common consent:
 - a. Khul (redemption)
 - b. Mubaraat (Mutual freeing)
4. By judicial process:
 - a. Lian (Mutual imprecation)
 - b. Faskh (Judicial rescission)

By the death of spouse

The death of the husband or the wife operates in law as dissolution of marriage. When the wife dies, the husband may remarry immediately but the widow has to wait for a certain period before she can marry. This period is known as period of Iddat.

By the act of the parties

By the husband

Talak – The word Talak is usually rendered as 'repudiation'. In law, it signifies the absolute power which the husband possesses of divorcing his wife at all times. A Muslim husband of sound mind may divorce his wife whenever he so desires without assigning any cause. The divorce operates from the time of the pronouncement of talak. It may not be essential that the talak has to be pronounced in the presence of the wife, it is essential that such pronouncement to be effective is made known to her. Communication is an essential element of pronouncement otherwise she would be deprived of her rights post talak and pre dissolution (*Masroor Ahmed v State* (NCT of Delhi 2008 (103) DRJ 137 (Del))). The words used must indicate a clear and unambiguous intention to dissolve the marriage. They may be expressed e.g. 'Jhonart divorced' or 'I have divorced thee' or 'I divorce X forever and render her 'haram' for me, in which case no proof of intention is necessary but if the words are ambiguous, the intention must be proved. For instance, 'I have given up all relations and would have no connection of any sort with you.'

In Shia Law, a strict adherence to certain form is essential. The pronouncement of talak in the Arabic tongue, must be uttered orally in the presence and hearing of two male witnesses who are Muslims of approved probity. Unless husband is physically incapable of pronouncing orally then in writing.

The pronouncement of talak may be either revocable or irrevocable. The revocable forms of talak are considered as the approved and the irrevocable forms are treated as the 'disapproved' forms.

The forms of talak may be classified as follows:-

1. Talak al Sunna
 - a. Ahsan (the most approved)
 - b. Hasan (approved)
2. Talak al Bida
 - a. Three declarations (so called triple divorce) at one time
 - b. One irrevocable declaration (generally in writing)

Talak al Sunna

Ahsan – The Ahsan form consists of one single pronouncement in the period of 'tuhr' (purity i.e. when the woman is free from her menstruation course, followed by abstinence from sexual intercourse during that period of sexual purity (tuhr) as well as whole of the Iddat. If any such intercourse during that period, mentioned above, takes place the divorce is void and of no effect in Shia Law.

Where the parties have been away from each other for a long time, or where the wife is old and beyond the age of menstruation, the condition of tuhr is unnecessary.

The pronouncement made in the Ahsan form is revocable during Iddat. This period is three months from the date of the declaration or, if the woman is pregnant, until delivery. The husband may revoke the divorce at any time during iddat. Such revocation may be by express words or by conduct. Resumption of conjugal intercourse is a clear case of revocation. After the expiration of the iddat, the divorce becomes irrevocable. The pronouncement of talak in the ahsan form is very best kind of talak.

A Muslim wife, after divorce is entitled to maintenance during the Iddat and so also her child, in certain circumstances.

Hasan – The Hasan is also an approved form but less approved than Ahsan. It consists of three successive pronouncements during three consecutive periods of purity (tuhr). Each of these

pronouncements should have been made at a time when no intercourse has taken place during that particular period of purity. In the case of non-menstruating wife the pronouncement should be made during the successive intervals of 30 days.

Talak al Bida (disapproved forms)

The triple declaration – In this form, three pronouncements are made in a single tuhr, either in one sentence e.g. 'I divorce thee triply or thrice; or in three sentences' I divorce thee. This is called a talak al bain, irrevocable divorce.

Single, irrevocable declaration – Another form of the disapproved divorce is a single irrevocable pronouncement made either during the period of tuhr or even otherwise and may be given in writing such a 'bill of divorcement' comes into operation immediately and severs the marital tie.

Divorce when effective

In the Ahsan form, the divorce is effective on the expiration of the iddat. In the Hasan form, the divorce is effective on the third pronouncement. In Talak al Bida, the divorce is effective immediately from the movement of pronouncement irrespective of iddat or the execution of the writing of divorce.

Legal effects of divorce

- (1) Where the divorce has become irrevocable, marital intercourse becomes unlawful between the couple, but they may remarry, unless there have been more than two pronouncements.
- (2) Where there has been a triple divorce, remarriage can only take place under certain stringent conditions.
- (3) If the husband or the wife dies during the period of Iddat following upon a revocable pronouncement of divorce each is entitled to inherit from the other.
- (4) If the pronouncement of divorce was irrevocable neither of them can inherit from the other.
- (5) The wife becomes entitled to maintenance during the 'iddat' of divorce; but not during the iddat of death.

Divorce During Death illness (Marz-ul-Mout): Death illness is that illness which causes apprehension of death in the mind of a person that his (her) death is certain and that person subsequently dies due to that very illness. Muslim Law presumes that during death illness a person does not have a normal state of mind. Therefore special rules have been provided for activities during death illness of a person. Where a husband divorce his wife during death illness the wife's rights of inheritance are subjected to following rules:

- a. Under Sunni Law: If husband dies during wife's Iddat, the divorced wife is entitled to inherit provided the wife herself had not requested for the divorce. But, if wife dies during Iddat the former husband can not inherit her properties.
- b. Under Shia Law: If husband dies within one year after divorce, the divorced wife is entitled to inherit the husband's property. But in case wife dies (within one year of divorce) her husband is not entitled to inherit her properties.
- c. In the above circumstances if the divorced wife has married another person (before the death of former husband) she is not entitled to inherit her former husband's properties.

By the wife

Talak-e-Tafweez – The husband in Mohammedan Law has the power to delegate his own right of pronouncing divorce to some third person or to the wife herself. A stipulation that under certain specified conditions the wife can pronounce divorce upon herself has been held to be valid provided, first, that the option is not absolute and unconditional and secondly, that the conditions are reasonable and not opposed to public policy.

The delegation of power of divorce may either be permanent or temporary. A temporary delegation of power is irrevocable but a permanent delegation may be revoked by the husband.

An antenuptial agreement by a Muslim husband, that he would pay separate maintenance to his wife in case of disagreement and that the wife should have the power to divorce herself in case of failure to pay maintenance for certain period is not opposed to public policy and is enforceable under the Mohammedan Law.

This form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court.

Case: Mohammad Khan v. Mst. Shahmali AIR 1972 J & K

In *Mohammad Khan v. Mst. Shahmali*, there was pre-nuptial agreement according to which the defendant agreed to live in the plaintiff's parental house and if he would leave that house, he would pay certain specified sum to the plaintiff in default of which the condition was not unconscionable and opposed to public policy, violation of such term would operate as divorce between the husband and the wife.

Husband's power to pronounce talaq inspite of tafweez

The mere fact that husband delegates to the wife power of pronouncing her talaq, does not deprive the husband himself of his right to pronounce talaq.

Ila (vow of continence)

Although it is mention in the Shariat Act 1937 Section 2, they are very rare in India and of no practical importance. In Ila, the husband swears by god not to have intercourse with the wife and abstains for four months or more. The husband may revoke the oath by resumption of marital life. After the expiry of the period of four months in Hanifi Law, the marriage is dissolved without legal process. This form is absolute in India and apparently there is no case law on the subject.

Zihar

The husband (who is sane and adult) compares his wife to his mother or any other female within a prohibited degree. If he intends to revoke this declaration, he has to pay money by way of expiation, or fast for a certain period. After the oath has been taken, the wife has the right to go to the court and obtain divorce or restitution of conjugal rights on expiation.

By common consent

In law it means laying down by a husband of his right and authority over his wife. A divorce by Khula is a divorce with the consent and at the instance of the wife in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. Khula in fact, is thus a right of divorce purchased by the wife from her husband.

Mubarat (Mutual agreement)

In mubarat the aversion is mutual and both sides desire separation. It involves an element of mutual consent. In this mode of divorce the offer may be either from the side of wife or from the side of husband. When an offer is accepted, it becomes an irrevocable divorce and iddat is necessary. In mubarat the question of consideration does not arise.

Legal effects of Khula and Mubarat

Khula and Mubarat operate as a single, irrevocable divorce. Therefore, marital life cannot be resumed by mere reconciliation; a formal remarriage is necessary.

In either case, iddat is incumbent on the wife and in the absence of agreement to the contrary, the wife and her children do not lose the rights of maintenance during the period.

Juveria Abdul Majid Patni v. Atif Iqbal Mansoori and Others 2014 SC held Khula is a mode of dissolution of Marriage when the wife does not want to continue with the marital tie. If the wife does not want to continue with marital tie and takes mode of khula for dissolution of Marriage, she is required to propose her husband for dissolution of Marriage. This may or may not accompany her offer to give something in return. The wife may offer to give up her claim to dower. The khula being a mode of divorce which proceeds from the wife the husband cannot refuse subject only to reasonable negotiation with regard to what the wife has offered to give him in return.

Dissolution by judicial process

Lian (mutual imprecation) – It is mentioned in the Koran and is supported by the traditions of the prophet. The procedure of Lian may be described briefly as follows:-

A husband accuses his wife of adultery but is unable to prove the allegation. The wife in such cases is entitled to file a suit for dissolution of marriage.

Faskh – The word 'Faskh' means annulment or abrogation. Hence, it refers to the power of the Muslim Qazi to annul a marriage on the application of the wife or if the husband and wife both come to

the conclusion that they can not live as husband and wife, they can refer the matter to Qazi. It may be defined as "the dissolution or rescission of the contract of marriage by judicial decree." Before the passing of the dissolution of Muslim Marriage Act 1939, there was no piece of legislation under which, a Muslim lady could ask for the dissolution of their marriage.

Judicial Divorce (dissolution of Muslim Marriage Act, 1939)

This Act may be regarded as a landmark in respect of matrimonial relief of a Muslim wife. The wife's right of divorce which was denied to her due to misinterpretation and misconception of Islamic law by the courts was restored to her under the Act. This Act is applicable to all Muslims irrespective of their schools to which they belong.

Section 2 of the dissolution of the Muslim Marriage Act 1939, provides nine grounds under which a Muslim wife can obtain a decree for the dissolution of her marriage. The grounds are:-

- (1) **Absence of husband** – If the whereabouts of the husband is not known for a period of four years a woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage but, a decree passed on this ground will not take effect for a period of six months from the date of such decree and if the husband appears either in person or through a authorized agent within that period and satisfies the court that he is prepared to perform his conjugal duties, the court must set aside the said decree.
- (2) **Failure to maintain** – If the husband has neglected or has failed to provide for her maintenance for a period of two years, a married Muslim woman can obtain a decree for the divorce.

Case: A. Yusuf V. Sowramma AIR 1971, Kerala 261

In this case, a girl of 17 years was married to the appellant defendant who was twice of her age. After having lived for a month in her husband's house, she went back to her parents and lived separately for over two years. During this period, the appellant admitted his failure to maintain his wife but alleged that he was willing and anxious to keep her with him. Mr. Justice Krishna Iyer rejected the husband's plea and upheld the decree for dissolution of marriage. The court held that a Muslim woman, under Section 2 (ii) of the Act, can sue for dissolution on the score that she has not as a fact been maintained even if there is a cause for it. In the opinion of the court, the reason why the husband has not maintained the wife for statutory period of two years is immaterial. The wife is entitled to decree for the dissolution of her marriage on this ground if the husband does not maintain her for two years, although during this period she lives separately from him without any reasonable excuse. It is submitted that this view is not correct.

Case: Mst. Nur Bibi v. Pir Bux AIR 1950 Sind 8

In this case, it was laid down that where a husband has failed to provide maintenance for his wife for a period of two years immediately preceding the suit, the wife would be entitled to a dissolution of her marriage under Section 2 (ii) of the Act in spite of the fact that on account of her conduct in refusing to live with her husband, she would not have been entitled to enforce any claim for maintenance against the husband in respect of the period during which the husband has failed to maintain her.

The husband cannot defend the suit merely on the ground that he was unable to maintain her due to his poverty, failing health, unemployment, imprisonment or any other ground, such as, personal properties of his wife, unless it is submitted, that her conduct has been such as to disentitle her to maintenance under Muslim Law.

- (3) **Imprisonment of husband** – If the husband has been sentenced to imprisonment for a period of seven years or upwards the wife is entitled to decree of the court dissolving her marriage but no decree can be passed on this ground unless the sentence has become final.
- (4) **Failure to perform marital obligations** – If the husband has failed to perform without reasonable cause his marital obligations for a period of three years, the wife can get her marriage dissolved by means of a decree.
- (5) **Impotency of husband** – If the husband was impotent at the time of the marriage and continues to be so, the wife is entitled to judicial divorce for the dissolution of her marriage. Before passing a decree on this ground, the court shall, on application by husband, make an order requiring the husband to satisfy the court within a period of one year from the date of such order that he has ceased to be impotent and if he does so satisfy no decree shall be passed on this ground.
- (6) **Insanity, leprosy or venereal disease** – If the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease the wife may claim a judicial

divorce. It is to be noted that leprosy and virulent disease need not to be two years old, it may be even recent.

- (7) **Repudiation of marriage by wife** – If she, having been given in marriage by her father or other guardian before attaining the age of 15 years repudiated the marriage before attaining the age of 18 years and the marriage is not consummated, she is entitled to a decree of divorce.

The courts have taken the view that the minor wife does not lose her right of repudiation if she does not know that she has the right and therefore she can exercise the right after she comes to know of it. Further she can exercise within a reasonable time after she became aware of it.

- (8) **Cruelty of husband** – Judicial divorce may also be claimed by a Muslim wife, if the husband treats her with cruelty, that is to say –

- a. Habitually assaults her or makes her life miserable by cruelty or bad conduct even if such conduct does not amount to physical ill-treatment.
- b. Associates with women of ill repute or leads an infamous life, or
- c. Attempts to force her to lead an immoral life or
- d. Disposes of her property or prevents her from exercising her legal rights over it, or
- e. Abstracts her in observance of her religious profession or practice, or
- f. If he has more wives than one, does not treat her equitably in accordance with the injunction of the Quran.

- (9) **Grounds of dissolution recognised by Mohammedan Law** – The wife is entitled to a decree for the dissolution of her marriage on any other ground which is recognized as valid for the dissolution of marriage under Muslim Law. This clause covers the divorces by Ila, Zihar, Khula, Mubaraat and Tafweez. Imputation of unchastity or a false charge of adultery against the wife makes a good ground for the dissolution of marriage under Muslim Law.

Case: Nur Jahan Bibi v. Kazim Ali AIR 1977 Calcutta 90

In *Nur Jahan Bibi v. Kazim Ali*, one Nur Jahan filed a suit against her husband Kazim Ali who charged her that she was of bad character and she was enamoured of one Asghar Ali and committed adultery with him. It was held by the Court that the doctrine of Ila has not become obsolete under the Muslim Law and, therefore, a Muslim wife can bring a suit for divorce against her husband on the ground that her husband has charged her with adultery falsely.

Note – Revocable and irrevocable divorce

A pronouncement of talak may be either revocable or irrevocable. A revocable pronouncement of talak does not dissolve the marriage until the period of Iddat has expired and may, at any time during the said period be revoked. During the period of Iddat, the husband possesses the power to revoke or withdraw the pronouncement. He may or may not resume the conjugal relation.

Case: Syed Mozuffar Ali v. Kamrunnissa Bi 1864 WR 32 (P-134)

In *Syed Mozuffar Ali v. Kamrunnissa Bi*, the husband claimed his right to revoke divorce as not proved that he had repeated formula three times. But the Court declined to accept the contention of the husband; the court said that since Iddat period has expired the husband has no right to revoke the talak pronounced by him.

Under the Hanafi Law, a Muslim husband can dissolve his marriage at any time. Shia Law does not recognize any of the form of irrevocable talak.

By change of religion

According to general principles of Mohammedan Law, a person who embraces Islam is immediately governed by Islamic law but a person who renounces Islam suffers greatly under civil law as well as criminal law. In order to understand the principle underlying the body of rules relating to the matrimonial status of a person renouncing and embracing Islam, we shall consider four classes of cases:

- a. Husband renounces Islam
- b. Wife renounces Islam
- c. Husband embraces Islam
- d. Wife embraces Islam

Husband renounces Islam

A Muslim husband who renounces Islam is an apostate and as such his marriage with his Muslim wife is dissolved ipso facto. A Muslim married couple abandoned Islam and adopts another faith; their marriage is not dissolved but remains intact.

Wife renounces Islam

- a. The mere renunciation of Islam by a Muslim wife does not by itself dissolve her marriage.
- b. The above rule does not apply to a woman converted to Islam from other faith who re-embraces her former faith.

Now, the dissolution of Muslim Marriage Act, 1939 gives a remedy, the statute provides that apostasy by itself does not dissolve the marriage, unless it be that a woman re-embraces her former faith.

Husband embraces Islam

According to Islamic law, conversion to Islam on the part of a man following a scriptural religion, such as Judaism or Christianity does not dissolve his marriage with a woman belonging to his old creed if the couple belong to a non-scriptural faith. In that case, the Muslim husband could not lawfully retain or non-Kitabia wife Islam was to be offered to her and on her refusal, a decree of dissolution was to be passed. In this branch of jurisprudence, where men and women often try to twist and mould the rules of law to suit their own selfish ends, the words of Blagden J. must always be kept in view:

A non-Muslim, lawfully married in accordance with his own law, cannot by a mere conversion to Islam dissolve his own marriage. Thus, if a Christian, lawfully married to a Christian woman, were to declare himself a convert to Islam and marry a Muslim woman in Muslim fashion, the second marriage would be, in the judgment of Supreme Court in *Sarla Mudgal v. Union of India* and *Lily Thomas v. Union of India*, invalid. But *aliter*, if there had been a bonafide conversion of both parties to the Islamic faith.

Wife embraces Islam

The conversion of a non-Muslim wife to Islam does not ipso facto dissolve her marriage with her husband and the ancient procedure of offering Islam to the husband and on her refusal, obtaining dissolution of marriage cannot be followed in India.

But *aliter* in Pakistan, Baqar Shah, a Muslim residing in British India, married Said Begum, a Muslim by birth. Later he married a second wife Madad Bi, a Hindu woman converted to Islam who had a Hindu husband living. There were no court proceedings declaring that Madad Bi's marriage with her Hindu husband had been duly dissolved; this being impossible under the older Hindu law. Baqar Shah died leaving offspring by both the wives. The question arose whether the issue of Madad Bi was legitimate. It was held *inter alia* that, immediately upon the conversion of Madad Bi to Islam, her marriage with her Hindu husband was dissolved and her marriage to Baqar Shah was lawful; wherefore her children by him were legitimate. For reasons which have been sufficiently discussed, it is respectfully submitted that the reasoning in this case is unsound and the decision erroneous.

A considered decision on the point is a Bombay case decided by Blagden J. in December 1945, and confirmed by a Division Bench on appeal. Robaba, an Iranian woman, Zoroastrian by religion, who was domiciled in India, was married to Khodadad in Persia according to Zoroastrian rites. Two sons were born of the union. She embraced Islam and 'offered Islam' to her Zoroastrian husband. On his refusal, she filed a suit for a declaration that her marriage in the circumstances stood dissolved. It was held that a Zoroastrian (or Christian) wife cannot do away with her marriage by a mere profession of Islam. Blagden J. in this case expressly dissents from a decision of the Calcutta High Court, *Mst. Ayesha Bibi v. Subodh Ch. Chakravarty*, the case of a Hindu woman, and agrees with the later decision of the same High Court in the case of a Jewish lady, *Sayeda Khatoon v. M. Obadiah*. It is submitted with respect that the decision in Robaba's case is correct.

Effects of dissolution

- (a) **Matrimonial intercourse** – After the dissolution is effective, matrimonial intercourse between the parties becomes unlawful.
- (b) **Remarriage reconciliation** – A divorced couple cannot always remarry.
- (c) **Fresh marriage:**
 - a. When the marriage was consummated, the wife has to wait till the expiration of her 'iddat' in order to be able to remarry.
 - b. Where the marriage was not consummated, the parties can marry immediately.
- (d) **Dower** – If the marriage was consummated, the whole dower is immediately due; if not half the dower is payable.
- (e) **Maintenance** – The husband has to provide maintenance to the wife during 'iddat'.
- (f) **Inheritance** – So long as the divorce is revocable can spouse can inherit from the other; but when the divorce becomes irrevocable, the rights of inheritance terminate *inter se*.

Chapter-6

MUSLIM MAINTENANCE

SYNOPSIS

1. Introduction
2. Principles of Maintenance
3. Requisites for a claim
4. Persons entitled to maintenance
 - (a) His descendants
 - (b) His ascendants
 - (c) His collaterals
 - (d) His wife
5. Scale of maintenance
6. Arrears of maintenance
7. Effects of apostasy on maintenance
8. Variation and enhancement of maintenance allowance
9. Distinction of the liability

Introduction

Maintenance is called nafqah and it comprehends food, raiment and lodging, though in common it is limited to the first. There are three causes for which it is incumbent on one person to maintain another marriage, relationship and property.

The highest obligation arises on marriage; the maintenance of the wife and children is a primary obligation irrespective of his and her means and his minor children if he is not indigent. He is obliged to maintain his other relatives from whom he can inherit if he has means to do so and they are indigent.

Principles of Maintenance

The principle upon which the Muslim laws of maintenance is based are briefly summarised as follows:-

- (a) As a general rule, no relation except a wife, who is in easy circumstances, has any claim for maintenance but a Muslim is bound to provide and is entitled to receive maintenance from his ascendants and descendants except under certain circumstances. According to Hanafi Law reciprocal rights and obligations regarding maintenance arise also between collateral relations of blood within prohibited degrees.
- (b) According to Muslim Law, only three persons are entitled to maintenance who are indigent and necessitous and are unable to earn their livelihood.

Kharcha-i-pandaan

The spouses can enter into an agreement that the husband will pay special allowance to his wife. According to Mulla, Kharcha-i-pandaan means betel box expenses and is a personal allowance to the wife customary among Muslim families of rank. Kharcha-i-pandaan is the absolute property of the wife and she is at liberty to use it according to her sweet will. The husband has no control over that money.

Case: Khwaza Muhammad Khan v. Nawab Hussain Begum (1910) 37 I.A. 152

In Khwaza Muhammad Khan v. Nawab Hussain Begum, the marriage was held during the infancy of the children. It was agreed by the parents that the father of the son will pay Rs. 500/- per month in perpetuity to his son's wife. The payment was known as Kharcha-i-pandaan and no conditions were laid down for its payment. The wife went to her husband's house and lived there for some years. Later on, there arose difference between husband and the wife. Consequently, the wife left her matrimonial home. She filed a suit for the realization of her Kharcha-i-pandaan. It was held that she was entitled to recover the whole amount notwithstanding the fact that she was not a party to the agreement. Kharcha-i-pandaan is a personal allowance and it can not be transferred even though payment secured on immovable property.

Requisites for a claim

The general rule in this regard is that only such person is entitled to maintenance

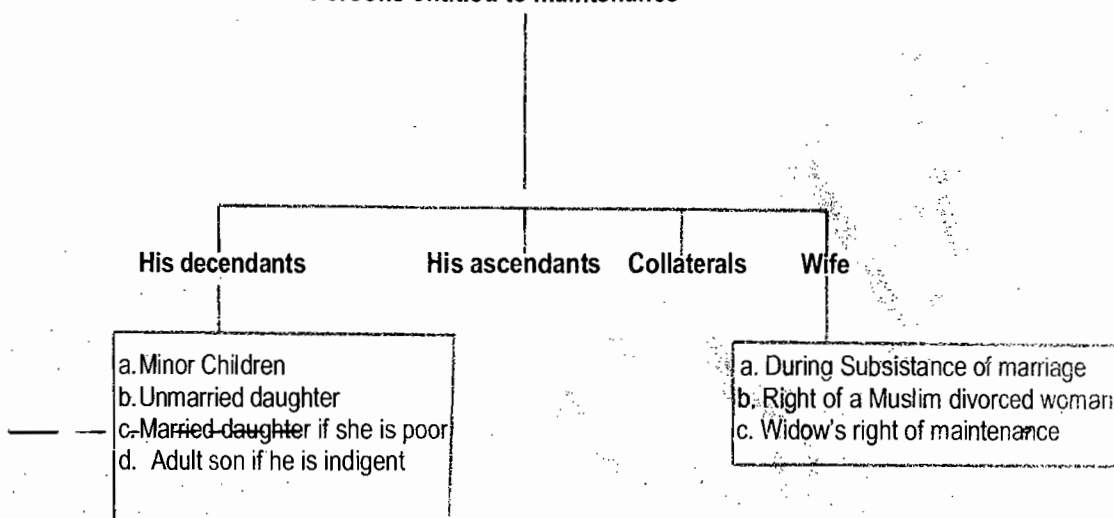
- (a) Who has no property of his own
- (b) Who is related within prohibited degrees to the person
- (c) The person from whom he claims is in "easy circumstances"

Exceptions

The above general rule does not apply to the following:-

- (a) When the claimant is wife and
- (b) When the claimants are minor sons or unmarried daughters except he has no means.

Persons entitled to maintenance



1. **His descendants** – The father's liability to maintain his children is absolute and is not affected by his indigence so long as he can earn. He is bound to maintain them even if they are in their mother's custody. A father is liable to provide maintenance to following:-

1. Minor children
2. Unmarried daughter
3. Married daughter, if she is poor
4. Adult son, if he is indigent

The daughter refuses the offer to live with father, she cannot claim maintenance.

Maintenance of children after the dissolution of marriage

Under the Muslim law so far as the children out of dissolved wedlock are concerned, the father's obligation to maintain them is absolute in terms. So long as he is in a position to do so or children have no independent income of their own. This right is not restricted, affected or controlled by divorced wife's right to claim maintenance for two years from the date of birth of the children under section 3 (1) (b) of Muslim woman (Protection of Rights on divorce) Act, 1986. This right of children is separate and independent under Muslim law.

Mother's Liability – When father has no means and is indigent, the mother is liable to maintain her children but she is entitled to recover the expenses from the father, when circumstances permit.

Grandparents' Liability – If parents fail to maintain their children, it is duty of the grandparents, maternal or paternal, to provide for their maintenance.

Father-in-law's liability – There is no obligation on father-in-law to maintain the widow of his son.

Under the Cr. P.C. 1973, a son is entitled to claim maintenance upto the age of 18 years. The adult son can not claim maintenance unless he is infirmed or disabled and is unable to maintain himself.

Under the Hanafi Law, an illegitimate child is entitled to maintenance from his mother but not from his father. But under Shia Law, the illegitimate child cannot claim maintenance from parents.

However, a father is bound to maintain his illegitimate or legitimate child under Cr. P.C. 1973. Section 125 of the Code provides that if a person having sufficient means neglects his illegitimate or legitimate child who is adult but unable to maintain himself due to any physical or mental abnormality or injury, a magistrate may order such person to make monthly allowances as such magistrate thinks fit (before Amendment Act 2001 not exceeding 500 rupees in whole)

2. **His ascendants:-**

Children's Liability – Children are liable to provide maintenance to their parents. Every child, whether male or female, adult or minor, who has sufficient property, is responsible to supply maintenance to his parents. Under Sunni Law, whether the parents are capable of earning or not make no difference but under Shia Law, the children are relieved of their duty if the parents are capable of earning.

Grandchildren's Liability – If there are no children or the children are indigent, it is liability of the grand children to provide maintenance to their grandparents. Maintenance is due to the step mother only when the father is weak and infirm and has no means to maintain her.

3. **Collaterals** – The Muslim law of maintenance of relatives is based on the principle of reciprocity. The relatives who are entitled to inherit the properties of a person have a corresponding obligation to maintain them. Under Hanafi Law, a Muslim is under an obligation to maintain her collateral relations within the prohibited degrees only in the following cases:-

1. When he is in 'easy circumstances' and
2. The relation claiming to be maintained has no other means of maintenance.

No person who is without means is under any obligation to maintain any collateral relation. However, in Shia Law, collaterals are not entitled in any case.

4. **Wife:**

1. **During subsistence of marriage** – A husband is bound to maintain his wife irrespective of being Muslim, non-Muslim, poor or rich, young or old if not too young to be unfit for matrimonial intercourse. In addition to the legal obligation to maintain, there may be stipulations in the marriage contract which may render the husband liable to make a special allowance called Kharch –e-Pandan, mewakhari etc. to the wife. The husband is bound to maintain if she fulfils the following conditions:

- She has attained puberty.
- She places and offers to place herself in his power so as to allow free access to herself at all lawful times and obeys all his lawful commands.

1. **She is not entitled to maintenance :-**

- If she abandons the conjugal domicile without any valid cause.
- If she refuses access to her husband without any valid cause.
- If she is disobedient to his reasonable commands.
- If she refuses to live with her husband without any lawful excuse.
- If she has been imprisoned.
- If she has eloped with somebody.
- If she is a minor on which account marriage cannot be consummated.
- If she deserts her husband voluntarily and does not perform her marital duties.
- If she makes an agreement of desertion on the second marriage of her husband.

Duration of right – The wife's right to maintenance ceases on the death of her husband for her right of inheritance supervene. But under Muslim Law, a divorced wife is entitled to be maintained by her former husband during the period of Iddat.

2. **Right of a Muslim divorced woman to maintenance**

Case: Shah Bano Begum v. Muhammad Ahmed Khan AIR 1985 SC 945

In Shah Bano Begum v. Muhammad Ahmed Khan, the five Judges bench of the Supreme Court held that a Muslim husband having sufficient means must provide maintenance to his divorced wife who is unable to maintain herself. Such a wife is entitled to the maintenance even if she refuses to live with the Muslim husband because he has contracted another marriage within the limit of four wives allowed to him by the Quran. The Supreme Court rejected this contention of the husband that Section 125 of the Criminal Procedure Code providing for the maintenance of divorced woman who is unable to maintain herself is inapplicable to Muslims. It was said that the religion professed by a spouse or the spouses has no place in the scheme of Section 125 of Criminal Procedure Code, which is a measure of social justice founded on an individual's obligation to the society to prevent vagrancy and destitution. Whether the spouses are Hindus, Muslims, Christians or Parsis, pagans or heathens, is wholly irrelevant to the

application of the Section 125 Cr.P.C. It was held that a Muslim divorced woman who cannot maintain herself is entitled to maintenance from her former husband till the time she gets remarried. They rejected the plea that maintenance is payable only till the period prescribed under Muslim personal law, during which she should abstain from sexual intercourse and other luxuries. The learned judges held that the ability of the husband to maintain his divorced wife till the expiration of the Iddat period extends only in case the wife is able to maintain herself. Pointing to the "Aiyats" of the Quran, the Judges declared that these clearly impose an obligation to provide maintenance to the divorced wife.

This contention that deferred mahr is payment on the divorce of a wife and hence such payment under the personal law excludes the payment of any maintenance by the husband to the wife was also rejected. It was said that under Section 127 (3) (b) Cr.P.C. mahr is an amount which the wife is entitled to receive from the husband in consideration of the marriage.

The Supreme Court in *M.A. Khan v. Shah Bano Begum* [AIR (1985) S.C. 945] has held that although the limit of the Muslim husband's liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim law to cases in which the divorced wife is unable to maintain herself. The courts, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 of the Code of Criminal Procedure.

This decision led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. The Parliament, therefore, decided to pass Muslim Women (protection of rights on divorce) Act 1986. The aim of the passing of this Act is to protect the rights of Muslim women who have been divorced by or have obtained divorce from their husbands and to provide for matters connected therewith or incidental thereto.

Where a Muslim divorced woman is unable to maintain herself after the period of Iddat, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law in the proportions in which they would inherit her property. But where a divorced woman has no relatives or such relatives or any one of them has not enough means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives, the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.

Suit for maintenance

If husband neglects or refuses to maintain his wife without any lawful cause the wife may sue him under the Muslim Law or under Section 125 and Section 126 of the Code of Criminal Procedure, 1973.

Past maintenance

A Muslim wife is not entitled to a decree for past maintenance, unless the claim is based on specific agreement. But under Shafei Law, she can even claim past maintenance.

When husband minor and wife adult

Even if the husband is minor [incapable to consummate] and the wife is adult, she is entitled to maintenance. If the minor husband has no source of income, the father or the guardian of the minor is liable for her maintenance though he has right to recover from his son.

Maintenance under agreement

A wife is entitled to recover antenuptial maintenance from her husband on the basis of an agreement made between the parties or guardians provided that such an agreement is not opposed to any law or the public policy or the policy of the Muslim Law.

Maintenance of pregnant woman

Under Sunni Law, the liability of the husband to maintain a pregnant wife whom he has divorced ceased at her confinement. Under the Shia Law, there is difference of opinion. One opinion is that pregnant wife has right of maintenance on the other hand, few say pregnant wife has no right of maintenance.

Position after passing the Muslim Women (Protection of Rights on Divorce) Act, 1986

The aim of the passing of this Act is to protect the rights of Muslim women who have been divorced or have obtained divorce from their husbands and to provide and to provide for matters connected there with or incidental thereto.

The cardinal principle which section 3 of the Act seeks to lay down is that the liability of the husband to make a fair and reasonable provision and pay maintenance is confined to the duration of iddat only under Muslim law, the position is clear. The concept of a reasonable and fair provision and maintenance arises out of Quranic verse. The legislature has provided that fair and reasonable provision and maintenance shall be paid within the period of iddat.

In Shah Bano's:- Case the Supreme Court recognised that there is no difference between the words "provision" and "maintenance" as are used in section 3. While dealing with the words of Holy Quran supreme court observed that provision and maintenance convey the same sense of providing maintenance to the wife during the period of iddat and it can not be said that while maintenance may be payable only for the period of iddat the liability to make fair and reasonable provision for the wife may extend beyond the period of iddat as well.

In Ali v. Sufaira:- The court held that under section (3) (1) (a), a divorced Muslim woman is not only entitled to maintenance for the period of iddat from her former husband but also to reasonable and fair provision for her future and directed the Magistrate to pass orders giving effect to the intention of the legislature.

Danial Latifi v. Union of India:- In this case court observed that the purpose of the Muslim woman (Protection of Rights on Divorce) Act, 1986 appears to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erst while wife after divorce and the period of iddat but a careful reading of the provisions of Act would indicate that divorced woman is entitled to a reasonable and fair provision for maintenance while upholding the validity of the Act, the supreme court sum up the conclusion.

- (1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by husband within the iddat period in terms of section 3(1) (a) of the Act.
- (2) Liability of a Muslim husband to his divorced wife arising under section 3 (1) (a) of the Act to pay maintenance is not confined to the iddat period.
- (3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under section 4 of the Act against her relatives who are liable to maintain her in to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the magistrate may direct the state waqf board established under the Act to pay such maintenance.
- (4) The provisions of the Act do not offend Articles 14, 15 and 21 of the constitution of India

Application of section 125-128 of Cr.P.C., 1973 after passing of the Muslim woman (Protection of Rights on Divorce) Act, 1986

This Act of 1986 does not totally bar the application of sections 125 to 128 of Cr.P.C. The Act of 1986 has now made the operation of sections 125-128 Cr.P.C. optional in respect of the Muslim Women. Section 5 of the Act provides that on the date of the first hearing the application if the divorced woman and her former husband declare by affidavit or any other declaration in such a form as may be prescribed either jointly or separately that they would prefer to be governed by the provisions of sections 125-128 of Cr.P.C. and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

Legality of orders already passed under Cr.P.C.

The Gujrat, Guhati and Punjab & Haryana High Court held that the orders already passed for maintenance under section 125 of the Cr.P.C. are not affected. The Act of 1986 is not retrospective. Thus the maintenance allowance granted to a divorced Muslim Woman u/s 125 Cr.P.C. before the commencement of the 1986 Act shall continue even beyond the period of iddat.

Widow's right of maintenance

A widow shall not have any right of maintenance after the death of her husband according to Hedaya.

Right to separate maintenance

Separate maintenance can be claimed by the wife when the husband has turned out or the treatment or misunderstanding between them is such that it is irremediable and her return to the husband's house is likely to give rise to fresh troubles and disputes.

Scale of maintenance

In determining the scale of maintenance due from the husband to the wife according to Sunni Law the social position of both the husband and wife must be considered. In Shia Law it is that the position of the husband should alone be considered and wife requirements in respect of condiments, food, clothing, services.

Arrears of maintenance

In Muslim Law, a wife is not entitled to claim arrears of maintenance from her husband except under Shafei Law and apart from her statutory right to maintain under Section 125 and 126 of the Cr. P.C. 1973.

A husband who wishes to contest his wife's claim for maintenance on the ground that she herself is working has to take this plea before a maintenance order is passed.

Case: *Gulshar Ali v. Mumtaz Fatima* [(1984) Cr. L.J. N.O.C. 97 (All) 34]

In this case, the husband took the plea of his wife's employment in proceedings for recovery of a maintenance allowance. The court held that he could not do so at this stage since the allowance had already become due to the wife under the decree. Such plea could now be raised for seeking modification or cancellation of the maintenance order.

Effects of apostasy on maintenance

Under Hanafi Law, where a wife is irrevocably divorced and she renounced Islam her right to maintenance is lost and does not revive by her subsequent return to Islam (Sunni Law). Again where the wife loses the right to maintenance owing to her disobedience to her husband or some other cause which does not dissolve the marriage her right to maintenance revives under the Hanafi Law by her ceasing to be disobedient or by the removal of the said cause, though she could in the meantime be irrevocably divorced, in which case she is entitled to maintenance during Iddat under statutory law. The liability to maintain is not, in India, affected by either party ceasing to profess Muslim religion.

Variation and enhancement of maintenance allowance

A maintenance allowance fixed under Section 125 can be enhanced, varied or cancelled if there is change in the circumstances of the parties and an application to this effect is made.

Distribution of the liability

If two or more persons are liable to maintain a person (or more persons) their liability to maintain is distributed among them in the proportion of their shares in the estate of the person to be maintained even though he may be a destitute and may not leave any property on his death. But liability in respect of one's wife is absolute.

Chapter-7

GIFT (HIBA)

SYNOPSIS

1. Introduction
2. Requisites of gift
 - a. Parties
 - b. Subject
 - c. Extent of donor's right to gift
 - d. Mode of gift
3. Delivery, how effected
4. Void gift

GIFTS

1. Introduction and definition

A man may lawfully make a gift of his property to another during his life time, or he may give it away to someone after his death by will. The first is called a deposition inter vivos; the second, a testamentary deposition. Mohammedan Law allows a man to give away the whole of his property during his life time; but only one-third of it can be bequeathed by will.

The English term gift is much wider than the Islamic word Hiba and two must not be confused. The term 'gift' is generic and is applied to a large group of transfers. The word Hiba, however, is a narrow and well defined legal concept. Hiba is the immediate and unqualified transfer of the corpus of the property without any return. So make a person the owner of the substance of a thing without consideration is a Hiba (gift). In its technical sense, it is defined as "unconditional transfer of property made immediately and without any exchange or consideration by one person to another and accepted by or on behalf of the latter. It is conferring of the property without consideration. The most essential ingredient of Hiba is the declaration "I have given". Since Muslim Law view the law of the gift as a part of the law of contract, there must be a tender and an acceptance and delivery of possessions.

2. Requisites of gift

The requisites or essentials of a valid gift are four in number as follows:-

- a. Parties
- b. Subject
- c. Extent and
- d. Mode of gift are formalities

Parties to gift

The parties to a gift transaction are two:

- a. The donor
- b. The donee

The donor

The capacity of making a gift depends on following conditions the donor must have (a) attained the age of majority (b) must be of sound mind (c) must be free of any fraudulent or coercive influence. A free gift must be free from undue influence.

A gift by a married woman is valid and subject to same legal consequences. A gift by a Pardanashin lady is valid, but in case of a dispute the burden of proving that it was not induced by undue influence and the donor understood the nature of the transaction while making it lies on the donee.

Case: *Mst. Hussaina Bai v. Mst. Zohra Bai* AIR 1960 MP 60

In *Mst. Hussaina Bai v. Mst. Zohra Bai*, a pardanashin Muslim lady was brought from Nagpur on a false pretext that her sister's husband was ill. She was not allowed to take independent advice and was made to affix her signature on the document on a misrepresentation that she was making a gift of the

Burhampur House alone to the plaintiff, which was to take effect only after her death. Their Lordships of Madhya Pradesh High Court observed: "In the case of a pardanashin lady the law is settled, namely, that it is necessary to satisfy the court that she executed the document with full understanding of execution and of the nature and effect of the transaction, and even in cases where she had independent advice. The court will scrutinize the transaction very closely to see that it is a fair one. Where the document is not in her mother tongue, the law further requires that she understood and not merely heard what was read". Held that the gift in question was not a voluntary transaction and was inoperative in law.

Case: Kulsumunnissa v. Ahmadi Begum AIR 1972 All. 219

Kulsumunnissa v. Ahmadi Begum, is an interesting case which is primarily concerned with succession but another point of interest decided in this case was regarding the execution of the document by a pardanashin lady.

In this case, a document was executed by a pardanashin lady in the presence of two witnesses. The sub-registrar endorsed the document with the recital that the executant "after hearing and understanding the nature and contents of the deed in my presence with her own lips from behind pardah" accepted the execution of document. Later on one of the attesting witnesses proposed the ignorance of the contents of document. It was held that ignorance of the witness though could not be correct but assuming it to be correct it cannot detract the document from its weight, for the endorsement of sub-registrar showed that the pardanashin lady has executed the document after it was read over to her and she had understood its contents. It was held that the endorsement of sub-registrar is admissible in evidence under Section 60 of the Registration Act.

It may be noted that the protection given by the rule relating to the pardanashin woman cannot plainly be the exclusive privilege of the class commonly known as pardanashin. The rule regarding transactions by pardanashin ladies applies equally to illiterate and ignorant woman though not pardanashin. A pardanashin lady is fully competent to dispose of his property by way of executing a document. In the case of a document executed by a pardanashin lady, intelligent execution must be proved. The extent and character of the explanation required must depend in the circumstances. The parda with its inhibitions may be an additional feature or element in the case but the real reason behind the rule is lack of understanding and appreciation of what an illiterate woman without independent advice has done.

The donee

A gift can be made to any person even to a non Muslim. In the case of a minor or a lunatic, possession must be handed over to the legal guardian. A gift can be made validly to an heir presumptive but it is abominable, though not unlawful, to prefer one child to another.

A Hiba, being the absolute transfer of all rights in property cannot be made to an unborn person as there is no one to take possession of his interest. However, the donee must be in existence at the time of making the gift. Formerly, it was said that a gift of future usufruct to unborn person shall not be valid. Later on this opinion was not adopted. In **Ghulam Hussain v. Fakir Muhammad AIR 1947 Bom 185 case**, it was held that a gift of future usufruct to unborn persons is valid provided that the donee is in being at the time when interest opens out for heirs.

Gifts may be made validly to mosques and charitable institutions like schools. Such gifts are treated as Sadaqa.

Subject of a gift

For the purpose of law of gifts, Mohammedan Law does not distinguish between ancestral or self-acquired property. The idea of property, 'MAL' is simple; all forms of property over which dominion can be exercised are proper subjects of gift. Choses in action and incorporeal rights may form the subject of gift equally with corporeal property.

- a. Anything over which dominion or right of property may be exercised or
- b. Anything which can be reduced to possession, or
- c. Anything which exists either as (a) a specific entity or (b) as an enforceable right; or
- d. Anything which comes within the meaning of the word MAL.
- e. For the valid subject of gift following conditions must
 - It can be designated under the term MAL.
 - It must be in existence at the time when the gift is made.
 - The donor must possess it e.g. gift by a trespasser where the donee cannot get possession is void.

Elements of subject of gift

Muslim Law recognizes and insists upon the distinction between the two elements of a property; the corpus and the usufruct. By a corpus is meant that absolute right of ownership over the property a right of ownership over the property which is heritable and is unlimited in point of time. By usufruct is meant the right of a person to use and enjoy the property. This right is limited in point of time and is not heritable. The right of the corpus of the property is called 'Hiba' while that of usufruct is called 'ariya'.

If it is a gift at the corpus then any condition which derogates from absolute dominion over the subject of gift will be rejected as repugnant. A gift must be at corpus. If the donor reserves to himself the right to possess properties for life time and donees were given right of possession after death of the donor, the gift is invalid. If the gift is in the usufruct of the property, it can take effect leaving the ownership of the corpus unaffected except for the period for which its enjoyment by the donor is postponed as a result of gift.

Kinds of subject

The qualifications that are essential for the subject matter of a gift:-

- (a) That the property or anything which can be designed under the term 'MAL' can be subject of a gift.
- (b) It must exist at the time the gift is made.
- (c) The donor must possess it.

The subject of a gift may either be corporeal (which has physical existence e.g. house, land, money etc.) or incorporeal (e.g. right to repayment of a debt or equity of redemption, copyright goodwill etc.).

Gift of services

Under Muslim Law, delivery of possession to the donee is a condition precedent to the validity of a gift. A gift will not be valid without seisin. It has, therefore, been held that a Muslim cannot make a gift of services.

Gift of equity of redemption

Where the mortgagee is not having possession over the mortgaged property a gift of equity of redemption can be made.

Gift of incorporeal property and actionable claims

Under Muslim Law, a donor can validly make a gift of incorporeal as well as corporeal property; whatever is 'MAL' can be lawfully gifted away. A Hiba can, therefore, be made of debts negotiable instruments, proprietary rights etc.

Gift of actionable claims

Under Muslim Law, actionable claim can be the subject matter of gift upon the execution of such an instrument all the rights and remedies of the transfer whether by way of damages or otherwise vest in the transferee.

Case: Anwari Begum v. Nezammuddin Shah 1898 21 All. 165b

In *Anwari Begum v. Nizamuddin Shah*, the Allahabad High Court said that the donor must so far as it is possible for him to transfer to the donee that which he gives namely such rights as the himself has, but this does not imply that where a right to property forms the subject of a gift, the gift will be invalid, unless the donor transfers what he himself does not possess, namely, the corpus of the property.

After the passing of the Transfer of Property Act, 1882, the Hiba of actionable claim is dealt with this Act. Now to this extent, the provision of Muslim Law has become obsolete.

A gift of the right of redemption

- a. Where the mortgagor is in the position of the mortgaged property. In such case, gift is not valid unless the mortgagor delivers the possession of the property to the donee.
- b. Where the mortgagee is in possession of the mortgaged property. There is conflict of opinion whether a gift of an equity of redemption where the mortgagee is in possession of the mortgaged property, is valid.

Case: Ismail v. Ramji 23 Bom. 628

Bombay High Court has held that such a gift is not valid. The ground of the Bombay decision is that the delivery of possession is a conditional essential to the validity of the gift and the mortgagor cannot deliver possession if the mortgagee is in possession.

Calcutta and Madras High Courts held that as a valid gift could be made by a mortgagor of his equity of redemption even though the property may be in possession of the mortgagee.

The view of the Calcutta High Court that such a gift is valid is correct and is followed by Patna High Court also.

Gift to two or more persons

- a. If the property is indivisible, a gift to two or more donees will be always valid.
- b. If the property is divisible and a gift is made to two or more persons without dividing the property the right is irregular but it may be rendered valid if separate possession is taken by each donee or the portion of the property is given to him.

Shia Law recognizes a gift to two or more donees irrespective of the fact that the property was not divided at the time of gift or afterwards.

Oral gift

Oral gift is effective provided it fulfils the conditions of a valid gift under Muslim Law. In the case of **Kamarunissa v. Hussaini Bibi 1880 3 All 266**, a verbal gift of landed property followed by transfer of possession was considered valid. The privileges in respect of oral gift have been recognized only by The Transfer of Property Act.

Hafeeza Bibi and others v. Shaikh Farid (Dead) by Lrs. and others 2011 SC held, Merely because a gift is reduced to writing by a Mohammedan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by a Mohammedan orally its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammedan law is that three essential requisites must be fulfilled that is (1) declaration of gift by donor, (2) acceptance of gift by donee and (3) delivery of possession. Writing is not essential for validity of gift. An oral gift fulfilling all three essential requirements makes the gift complete and irrevocable. It is not the requirement that in all cases where the gift deed is contemporaneous to the making of the gift then such deed must be registered under section 17 of the Registration Act. Each case would depend on its own facts.

Gift of a life interest

A gift of life interest is valid. It does not become automatically enlarged into a gift of corpus of the property absolutely. A 'life estate' implies the transfer of the corpus of the property to a certain person with certain limitations as to its use and alienation.

Case: Amjad Khan v. Ashraf Khan 1929 P.C. 149

In **Amjad Khan v. Ashraf Khan**, one Ghulam Murtuza Khan a Sunni Mohammedan of Hanafi School, executed a gift deed of his property in favour of his wife Mst. Waziran without any consideration by registered deed dated January 17, 1905. It was stipulated by the deed that out of the entire property mentioned in the deed of gift she shall remain in possession of shares worth Rs. 5000 with power to make at her pleasure any sort of alienation and that as to the rest, worth Rs. 10,000 she shall not possess any power of alienation but shall remain in possession thereof for life-time, and after her death the entire property gifted away by the document shall revert to the donor's collaterals, Ashraf Khan and others. Ghulam Murtuza Khan died on February 6, 1900 and his wife died on November 18, 1909, leaving her brother Salar Khan, the father of the appellant, as her sole heir. On her death, the two nephews of her husband Ashraf Khan etc. took possession of the property. Salar Khan (who died afterwards) brought a suit to recover the property from the defendants, as an heir of the widow.

Judgment: Their Lordships, reviewing the terms of the deed observed that the provision as to reversion of the property on the death of the donee to the donor's collaterals was not limited to the two-thirds over which the wife was to have no power of alienation but it is related to the entire property gifted away under the document. The entire property was to go to the collaterals but it would, of course, be subject to any mortgage, sale or gift which the wife was given power to make during her life time in respect of the one-third part of the property. It was held that the deed afforded clear proof that the donor intended to make and did make a gift to his wife of a life-interest only in the entire property together with the power of alienation of a one-third part of it.

For the reasons given above, it was held that the appellant had no title to the property and the appeal was dismissed.

Their Lordships did not express their opinion as to the validity of creating life estates. They only observed that the plaintiff appellant was "on the horns of a dilemma". If such a life interest was valid under Hanafi Law and was acquired by Musammatt Waziran, it came to an end on her death and if Hanafi Law does not permit transfer of such life interest by way of gift inter vivos, she did not acquire any interest in the property under the deed of January 17, 1905. In either case, the plaintiff as her heir can have no title to the property.

Extent of donor's right to gift

General rule – A general rule is that the donor's power to gift his property is unrestricted.

Exception

- (a) Firstly, he cannot gift more than 1/3 of his whole property and
- (b) Secondly, that it cannot be in favour of an heir.

Formalities

3. The act of making a gift should fulfil the following three conditions. There are known as essentials of a gift:-

- (a) A declaration by the donor
- (b) Acceptance by the donee
- (c) Delivery of possession by the donor and taking of possession by the donee

A declaration by the donor

There must be a clear and unambiguous intention of the donor to make the gift.

Acceptance of gift

There must be an acceptance of gift by or on behalf of the donee.

Delivery of possession

The other elements of 'Hiba' will have no legal effect unless they are accompanied by delivery of possession.

Different subjects delivery how effect, movable property

Money – Money must be actually transferred to the donee mere entry in the books of account to the effect that the amount has been paid to the donee will not complete the gift.

Immovable property

General rule – For completing the gift of immovable property, two things are essential

- (a) That the donor must physically depart from the premises and
- (b) That the donee formally enters into possession.

Exceptions

The above mentioned general rule has following exceptions

- (a) **Gift by a father to his minor or lunatic son or daughter or by the guardian to his ward** – No transfer of possession is required in this type of cases.

Case: *Mohammad Hesabuddin v. Mohammad Hesaruddin* AIR 1984 Gan 41

In *Mohammad Hesabuddin v. Mohammad Hesaruddin*, the donee was maintaining and looking after the donor. The other children of the donor were neglecting her. The gift was made from a mother to a son and it was based on love and affection. The donee was in possession of the land and got his name mutated in the revenue records with respect to the land. The Guwahati High Court made the following observations:

It cannot be taken as a sine qua non in all cases that wherever there is writing about a Mohammedan gift of immovable property, there must be registration thereof. The facts and circumstances of each case have to be taken into consideration before a finding whether the writing requires registration or not :..... In every case, the intention of the donor, the background of the alleged gift, and the relation of the donor and the donee as well as the purpose or motive of the gift all have to be taken into consideration.

It was held that all the requisite ingredients for a valid gift under Muslim Law were satisfied, namely, (a) declaration, (b) acceptance, and (c) delivery of possession. In the circumstances the gift was held as valid.

In this case, the Supreme Court made the following important observations:

The donor may lawfully make a gift of a property in the possession of a trespasser. Such a gift is valid provided the donor either obtains and gives possession of the property to the donee or does all that he can to put it within the power of the donee to obtain possession:

- (b) **When both donor and donee reside in the same house which is to be gifted** – It was observed in *Hayabuddin v. Abdul Gane* and others that in such cases the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of ownership over the subject of the gift.

Case: Humeera Bibi v. Najm-un-Nissa (1905) 28 All 147

In *Humeera Bibi v. Najm-un-Nissa*, a Muslim lady executed a deed of gift in favour of nephew, of a house in which both of them were residing at the time of the gift. The property was transferred in the name of the donee and the rents were recovered in his name. But the donor continued to live in the house with the donee and the house was not formally handed over to the donee. It was held that the gift was valid although there was no physical delivery of possession.

- (c) **Gift by husband to wife and vice versa** – The delivery of possession and the formalities regarding it viz. those of vacating the house or removing the goods if the donor is not essential. The fact that the husband continues to live in the house after donation and receives the rent thereafter, will not invalidate the gift as it is presumed that such act of the husband after the gift are on behalf of his wife.
- (d) **Gift by one company shares to another** – It is valid even without actual delivery of possession.
- (e) **Part delivery** – When there is evidence that a part of gift is delivered it can infer that rest will come in possession.
- (f) **Zamindari villages** – The gift may be completed by mutation of names and transfer of rents and incomes.
- (g) **Subject matter in occupation of tenant** – Gift may be completed by a request to the tenant by donor to give the possession or rent.
- (h) **Incorporeal rights** – The gift may be completed by any appropriate method of transferring all the control that the nature of the property admits of and by the donor divesting himself at all his rights in the property.
- (i) Gift of property held in adverse possession by another person to the donor, the gift is not valid, unless the donor, either recovers possession or does all that he can which is necessary to put the donee in possession.

Void gifts

- (a) Gift to unborn person
- (b) Gift in future
- (c) Contingent gift
- (d) **Gift of life interest** – A life estate implies the transfer of the corpus of the property to a certain person with certain limitation as to its use and alienation.
- (e) **Gift with a condition** – void

Gift of MUSHAA – Mushaa means undivided share in the property. Gift of an undivided share in an indivisible property is valid according to all schools of Muslim Law.

Khursida Begum and Others v. Mohammad Farooq and other 2016 SC The question comes before the Apex Court whether gift of undivided property under Muslim Law was valid. It was held by the Court the gift had no infirmity under the Muslim Law either on the ground that the possession was not delivered or on the ground that the gift was hit by Hiba-bil-Musha.

Oral gifts, writing and Registration: Under Muslim law, writing is not essential to the validity of a gift either of movable or of immovable property. By section 123 of Transfer of Property Act, 1882. It is provided that a gift of immovable property must be effected by a registered instrument signed by the donor and attested by at least two witnesses and a gift of movable property may be effected either by a registered instrument signed or by delivery, but the provision of section 123 do not apply to Muslim gifts.

Under section 17 of the Registration Act gift or immovable property worth over Rs. 100/- is required to be by registered instrument. Muslim law permits oral gift of immovable property, irrespective of value of the property. Section 17 of the Registration Act applies to gifts deals with Mohammedan law if the gift is granted not orally but in writing and if relates to immovable property worth Rs. 100/- or above, the document is compulsorily registrable.

Kinds of gift(Hiba):-There are certain other kinds of gift too, which are in fact variations of Hiba but yet differ from it in certain respects. These kinds of gift do not strictly fulfil the essential requisites of gift laid down in its definition.

Kinds of gifts

Hiba-bil-iwaz	Hiba-ba-Shartul-iwaz
1. Return is involved in the contract of gift as its direct and immediate consideration. 2. Delivery of possession is not essential for its validity 3. it becomes irrevocable from the moment of its making 4. it is like a contract of sale	1. It is stipulated and is contracted for with the original gift. 2. Delivery of possession is essential for its validity 3. it becomes irrevocable only after the payment of iwaz by donee 4. in the beginning it is a gift but it partakes of a character of sale when the iwaz has been paid

Death-Bed Transactions (Marz-ul-maut)

Meaning:-When a person suffering from a Marz (illness) is under apprehension of Maut (death) he is said to be suffering from Marz-ul-maut or death illness.

Essentials of death bed gift:- A gift made during death-illness is subject to certain restrictions. A death-bed gift partakes of the nature of both the gift and legacy. The law of such transaction is also partly of will and partly of gift but if basically being a gift must satisfy all the formalities that are essential for making of any other gift. i.e

- (a) declaration
- (b) acceptance of gift
- (c) delivery of possession

According to Dr. Jung, a gift made during illness would be valid to the whole extent if the donar recovers his health and even in case of prolonged illness which has continued for more than a year provided the gift was made after one year and before the donor had become absolutely bed-ridden in state of dying.

Limits of donar

1. He can not make a gift or more than 1/3 of his property in favour of no-heir unless other heirs give consent to the excess taking effect.
2. The gift to an heir made during death illness is altogether invalid unless the other heirs consent to it.
3. A gift made during death-illness is subject to all the conditions and formalities necessary to constitute a gift inter vivos.

Death-bed-Waqf:-A Waqf made on death bed is subject to the same rules that govern other death-bed dispositions i.e. it will take effect only to the extent of 1/3 of the property unless the heirs consent to it.

Dower contracted during death-illness:-It is governed by the rules of mehr-ul-misl (customary dower)

Marriage contracted on death-bed:-A marriage contracted on death-bed is invalid but if the person recovers from the malady, the consummation can cure the invalidity.

Repudiation of marriage by the sick:-It is valid both under shia and sunni law.

Chapter-8

WILL

SYNOPSIS

1. Nature and meaning of will
2. Formalities for making a will
3. Requisites of a valid will
4. Revocation of will
5. Difference between Shia and Sunni Law regarding will

Meaning

Generally wasiyat means 'will' but it has also other meanings. A will has been defined as "an instrument by which a person makes disposition of his property to take effect after his death and which is in its own nature, ambulatory and revocable during his life. According to section 2(h) of Indian succession Act 1925, "will is the legal declaration of the intention of a testator with respect to his property which he desires to be carried in to effect after his death".

Formalities for making a will—General rule:-No formality is required for making a will. Any expression of unequivocal expression will suffice.

Oral or in writing:- It is not necessary that a testamentary disposition should be in writing. If it is made orally, no particular form of words are required so long as the intention of the testator is clear. The burden of establishing an oral will is always a very heavy one on those who assert it.

Muslim law of will and the Indian Succession Act, 1925:-The provisions of Indian Succession Act 1925 are not applicable to Muslims. But where a marriage was held under the special marriage Act, 1954 provision of this Act shall be applicable even though will was made before or after the marriage where a will is governed by Muslim law it will be subject to the provisions of the Shariat Act 1937.

4. Nature and meaning of will

- (1) The testator must be competent to make the will
 - (2) The legatee must be competent to take the legacy or bequest
 - (3) The subject of bequest must be a valid one
 - (4) The bequest must be within the limits imposed on the testamentary power of a Muslim.
1. **Testator and his competence:**-Every adult Muslim of sound mind can make a will. According to Muslim law, the age of majority is 15 years. But this rule is not applicable to wills in India since age of majority in case of will is governed by the Indian Majority Act. According to which minority terminates at the age of 18 years but minor whose guardian has been appointed by court will terminate at the age of 21 years.
 2. **Legatee and his competence:**-Any person capable of holding property may be the legatee under a will. The title to the subject of bequest can only be completed with the express or implied assent of the legatee after the death of the testator.
 - (a) **Bequest to an institution:**-A bequest may be validly made for the benefit of an institution.
 - (b) **Bequest to a non-Muslim:**-A bequest in favour of a non-Muslim is valid provided the non-Muslim is not hostile towards Islam.
 - (c) **Bequest to testator's murderer:**-According to sunni law, a bequest to a person who caused the death of the testator whether intentionally or unintentionally is invalid. According to shia law, it is invalid if it is caused intentionally and not if accidentally.
 - (d) **Bequest to an unborn person:**-A child who is born within 6 months of the date of making the will is treated as a legatee in existence and hence competent to take the bequest. In shia law. It is valid if child is born in the longest period of gestation i.e ten lunar-months.

(e) **Bequest for a charitable object**:-A bequest for the benefit of a religious or charitable object is valid. Under Muslim law certain restrictions have been imposed on the right of the legators to make a will depriving the right of the heirs.

3. **Subject of will and its validity**:- Following are the requisites of a valid will:-

- (a) the property must be capable of being transferred
- (b) the property must be in existence at the time of testator's death not necessary at the time of making of the will
- (c) the testator must be the owner of the property to be disposed by will.

Bequest in future:-A bequest can not be made of anything to be performed as produced in future

Alternative bequest:-An alternative bequest of property i.e to one or falling him to the other person is valid.

Contingent bequest:-It is void.

Conditional bequest:-A bequest with a condition which derogates from it completeness will take effect as if no condition was attached to it.

Bequest of life-estate:-Sunni law treats a bequest to life-estate as bequest with a condition attached to it and as such the rule of a conditional gift applies, the bequest takes effect while the condition becomes void but under shia law conditional "will" take full effect.

4. **Testamentary power and its limits**:-The testamentary capacity of a Muslim is limited. There are two-fold restrictions on the power of a Muslim to dispose of his property by will and these are in respect of the person in whose favour the bequest is made and as to the extent to which he can dispose of his property.

Limitation as regards the person:-The general rule, in this regard has been very clearly laid down in **Ghulam Mohammed v. Ghulam Hussain**. It was held in this case that a bequest in favour of an heir is not valid unless other heirs consent to the bequest after the death of the testator.

Whether a person is an heir or not, will be determined at the time of the testator's death because a person who is an heir at the time of making the will may not remain an heir at the time of testator's death and vice-versa.

Under shia law no consent is required so long as it does not exceed 1/3 rd of testator's estate but if legacy exceeds 1/3 rd it is not valid unless the other heirs consent thereto before or after the death of the testator. But where the whole estate is to be bequeathed to one heir and the other heir are excluded entirely from inheritance the bequest is void in its entirety.

Limitation as regards the property:-The general rule with regards to the extent of property that may be disposed of by will is that no Muslim can make a bequest of more than one-third of his net assets after payment of funeral charges and debt.

Exception to the General rule

(d) Under Hanafi law, a bequest of more than one-third of the net assets may be valid, if the heirs whose rights are infringed there by give their consent to the bequest after the death of the testator. In shia law such consent validates the will whether given before or after the death.

(e) The above rule of bequeathable one-third will not apply to a case where the testator has no heir. The right of government to take the estate of an heirless person will not, in any way, restrict the right of a person to make a disposition of his property, as he likes. In other words, government is no heir to an heirless person.

Revocation of will:-Mohammedan law confers on a testator unfettered right to revoke his will, he may revoke it at any time. The revocation may be either express or implied.

Subsequent will:-Where a testator makes a will and by subsequent will gives the same property to some one else, the prior bequest is revoked. But a subsequent bequest. Though it be of the same property to another person in the same will does not operate as a revocation of the prior bequest and the property will be divided between the two legatees in equal shares.

Distinction between "will" and "Gift"

Gift	Will
1. Gift is an immediate transfer of right or interest	1. Will is a transfer of right to take effect after the death of the testator

2. Delivery of possession is necessary.	2. It is not required
3. Subject of gift must be in existence at the time of gift	3. It is sufficient if the subject is in existence at the death of the testator
4. After completion of gift cannot be revoked unless by a formal decree of a court.	4. A "will" may be revoked at any time after making of it.
5. Doctrine of Mushaa applies	5. Doctrine of Mushaa does not apply

Difference between Sunni and Shia Law regarding "Will"

Sunni Law	Shia Law
1. Bequest of any portion to an heir without the consent of other heirs is invalid	1. A bequest to the extent of 1/3 rd can be made to an heir without the consent of other heirs
2. A bequest to a child in womb is valid if born within 6 months	2. It is valid even if born in the longest period of gestation i.e. 10 months
3. A legatee who causes death even by accident is disentitled	3. Only intentional murder disentitles a legatee
4. Heir's consent should be given after the death of the testator	4. Heir's consent may be given before or after the death
5. Recognition of rateable distribution	5. Rateable distribution is not recognized
6. A will of a person committing suicide is valid	6. It is valid only when the will is made before taking any step towards the act of suicide
7. If the legatee does not survive the testator, the legacy lapses and reverts to the testator	7. The legacy does not lapse but passes to the heirs of the legatee. <u>It reverts</u> when the legatee dies without leaving any heir.
8. Acceptance of legacy before the testator's death is of no effect.	8. Acceptance of the legacy during the testator's life time is lawful.

Chapter-9

WAKF

SYNOPSIS

- (1) Introduction
- (2) Definition
- (3) Essentials of Wakf
- (4) Doctrine of Cypres
- (5) Legal incidents of Wakf
- (6) Doctrine of Mushaa
- (7) Wakf how created
- (8) Completion of Wakf
- (9) Kinds of Wakf
- (10) Salient features of the Wakf Act of 1913
- (11) Mutawalli
- (12) Who can be appointed as Mutawalli
- (13) Who can appoint a Mutawalli
- (14) Power and duties of Mutawalli
- (15) Removal of Mutawalli
- (16) Management of the Wakf property
- (17) Liability of Mutawalli to recount

Introduction

The law of Wakf is according to Ameer Ali, the most important branch of Mohammedan Law, for it is interwoven with the entire religious life and social economy of Muslims.

The word Wakf literally means detention but in Islamic Law, it means (a) State land which is inalienable and used for charitable purposes and (b) pious endowments. In India, generally, we are concerned with the second meaning.

We must now consider briefly the advantages and disadvantages of the institution. The religious motive of Wakf is the origin of the legal fiction that Wakf property belongs to almighty God. The economic ruin that it brings about is indicated by the significant phrase 'The dead Hand'. Wakf to some extent ameliorates poverty but it has also its dark side. Charitable aid often keeps people away from industry and lethargy breeds degeneration. Agricultural lands given in Wakf deteriorates due to lack of proper care. In India, instances of the mismanagement of Wakfs or the worthlessness of 'Mutawallis' (managers) and of the destruction of wakf property, have often come before the court. In Muslim countries and in India in particular, two general tendencies will appear with unmistakable clarity (a) There is tendency towards greater State control (b) A move in the direction of reduction of wakf and particularly of personal and family wakfs.

Definition

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

A wakf may be made in writing or the dedication may be oral. There must, however, be appropriate words to show an intention to dedicate the property. It is not necessary to use the word wakf.

Board of Wakf, west Bengal and anothers v. Anis Fatma Begum and others 2010 SC held that wakf Tribunal has power and Jurisdiction to decided all dispute, questions or other matters whatsoever and in whatever manner arising relating to wakf or wakf property. It has powers of a Civil Court and has power to grant temporary injunctions. Anyone having dispute relating to wakf or wakf property has to first raise it before wakf Tribunal.

Essentials of wakf

According to Sunni Law:-

1. A permanent dedication of any property

2. The dedication (wakif) should be a person professing a Musalman faith and of sound mind and not a minor or lunatic.
3. The dedication should be for a purpose recognized by the Musalman law as religious, pious or charitable.

Permanent dedication of any property

This phrase implies three things:-

- (a) There must be a dedication
- (b) The dedication must be permanent
- (c) The dedication must be of any property

Under Shia Law, no doubt, delivery of possession to the first person in whose favour the wakf has been created is essential.

Long user – Where land has for long been used as a wakf, proof of express dedication is not necessary and the legal dedication will be inferred. The wakfs of mosques and graveyards have been upheld on this ground.

Dedication must be permanent

If wakf is for a limited period or for a temporary purpose, it is void. Similarly a contingent or conditional wakf is not valid.

The dedication must be of any property (subject of wakf)

The subject of wakf may be any tangible property (MAL) capable of being used without being consumed. The property dedicated must be (a) MAL, tangible property (b) It must be capable of being used without being consumed. Subject to this there are no further restrictions.

To be more specific Hanafi Law (Sunni) recognizes the following as valid subjects of wakf:-

- (a) Immovable property
- (b) Accessories to immovable property
- (c) Quran or other books
- (d) Such other things as it are customary to make the subject of wakf. The subject of wakf must be of reasonably permanent character.

Subject of wakf must belong to wakif. One cannot dedicate another property to wakf. A person who in fact owner of the property but is under the belief that he is only a Mutawalli therefore is competent to make a valid wakf of the property.

Registration

A wakfnama by which an immovable property of the values of Rs. 100 or more is dedicated by way of wakf requires to be registered under the Indian Registration Act, 1908.

Case: *Md. Rustom Ali v. Mushtaq Hussain* 1920 47 IA 224

In Mohammad Rustom Ali v. Mushtaq Hussain, the wakf (dedicator) first executed a wakfnama by which he constituted himself Mutawallis. This document also defined the power and duties of the Mutawallis and the relation in which they were to stand to the property. After three months he executed another document called trusteesnama. Under this document, he appointed additional Mutawallis some to act jointly with him, and other to act after his death. He died after about a month, and the suit was brought by the Mutawallis to recover possession of the property from his heirs. The wakfnama was registered. It was, however, argued that it was not duly registered as certain rules laid down under section 69 of the Registration Act were not followed.

The Privy Council held that the document was duly registered. The trusteesnama was however not registered. It was argued that not being registered, it did not confer upon the Mutawallis any right of suit. But this argued was not accepted. It was held that the document, even if read with the wakfnama, did not purpose to assign the property to the Mutawallis, and not, therefore, require registration.

By a person professing Musalman faith

By 'person' is meant, a person who has attained the age of majority under the Indian Majority Act i.e 18 years and who is of sound mind. The second qualification of the person is that he should be professing Musalman faith.

For any person recognized by Muslim Law

The third essential of a valid wakf is that the dedication should be for a purpose recognized as religious, pious or charitable under Muslim Law.

Case: Mazharool Haq (1870) 13 W.R. 235, Mohammad Ahsanullah's Case (1889) 17 Cal. 498

The above illustration represents the facts of the case Mazharool Haq, approved by the Privy Council in Mohammad Ahsanullah's case so far as it purported to decide that "the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family, and which after they lapse, will leave the whole property intact for the original purposes for which the endowment was made does not render the endowment invalid under the Mohammedan Law.

However, on the basis of the decided cases and the text of eminent Mohammedan Jurists, certain objects which had been declared to be valid objects of wakf:-

- a. Mosques and provisions for Imams to conduct worship
- b. Celebrating the birth of Ali Murtuza
- c. Repairs of Imambaras
- d. Maintenance of Khankalis
- e. Burning lamps in mosques
- f. Reading the Quran in public places and also at private houses
- g. Maintenance to poor relations and dependants
- h. Payment of money to Fakirs
- i. Grant to an Idgah
- j. Grant to colleges and provisions for professors to teach in colleges
- k. Bridges and caravan in Sarais
- l. Distribution of Alms to poor persons and assistance to the poor to enable them to perform pilgrimage to Mecca
- m. Keeping Tizias in the month of Moharram and provisions for camels and Duldul for religious processing during Moharram
- n. Celebrating the death anniversary of the settler and of the members of the family
- o. Performance of ceremonies known as Kadam Sharif
- p. The construction of a Cobat or free boarding house for pilgrims at Mecca
- q. Performing the annual Fateha of the members of his family
- r. A Durgah or shrine of a Pir which has long been held in Veneration by the public.

The following are not recognized as valid objects of wakf by the Muslim Law:-

- (a) Objects prohibited by Islam e.g. erecting or maintaining achureh or temple
- (b) A wakf for the repairs of the wakf's secular property is invalid according to Shia Law
- (c) Providing for the rich exclusively
- (d) Objects which are uncertain
- (e) A direction to spend a certain sum of money for feasting Cutchi Memons Act every year on the anniversary of the settler's death is valid. (Cutchi Memons Act)

Objects to be reasonably certain

The object of a wakf must be indicated with reasonable certainty, if they are not, the wakf will be void for uncertainty. It is however not necessary on the part of the wakf to mention the objects for which the wakf has been established. Essentials according to Shia Law:-

- (a) It must be perpetual (as in Sunni Law)
- (b) It must be absolute and unconditional
- (c) Possession must be given of the thing appropriate
- (d) It must be entirely taken out of wakif. It means that the wakif should not reserve any benefit or interest even the usufruct of the dedicated property.

Doctrine of Cypres

It literally means as nearly as possible. This term is essentially applicable to trusts and in its technical sense means that if the wishes of the author of a trust cannot be carried out literally they will be carried out as nearly as possible in the way desired by the author.

This doctrine is applicable to wakf also. If from the change of circumstances and lapse of time or for some other proper reasons it has become impossible to apply the property of the wakf in the manner directed by the wakif. The court may apply (a) for similar purpose by different means as nearly as possible to the original intention of the wakif (b) it has also the power to vary the scheme accordingly.

Case: Salebhai v. Bai Safiabu (1912) 36 Bom 111

In *Salebhai v. Bai Safiabu*, their Lordships held "where the testator has indicated a general charitable intention in the bequest made by him, and if these bequests fail, the court can devote the property to religious charitable purposes, according to the Cypres doctrine."

In *Kulsoom Bibee v. Ghulam Hussain (1905) 10 C.W.N. 484 at p. 485*, it was held that "where the clear intention is expressed in the instrument of wakf, it will not be permitted to fail because the objects, if specified, happen to fail, but the income will be applied for the benefit of the poor or as near as possible to the objects which failed". For example, if a wakf is created for removing illiteracy among the adults of a locality, but after sometime it is found that illiteracy among the adults of that locality has been removed and they have become literate, then, the income of that property may be utilized for giving them further education or for educating children of that locality.

Legal incidents of wakf

- (a) Irrevocability (b) Perpetuity (c) Inalienability (d) pious or charitable use of usufruct and (e) absoluteness

Irrevocability

According to Abu Yusuf, a declaration of wakf is in its nature irrevocable which is followed in India.

Perpetuity

As the wakf property belongs to God, no human being can alienate it for his own purpose. Therefore, wakf property cannot be sold, transferred or encumbered. A wakf for a limited period is not valid.

Doctrine of Mushaa

The view of Abu Yusuf is that a wakf can be created of an undivided share (Mushaa) in a property whether capable of diversion or not. This is the generally accepted view.

Wakf how created

Modes of creation:

- (a) By an act inter vivos or
- (b) By will or
- (c) During death illness (marz-ul-mant) or
- (d) By immemorial user

1. **By an act inter vivos** - Inter vivos means between living voices i.e. during the life time. Thus a wakf by an act inter vivos is a wakf which is constituted during the life time of the wakf and takes effect from that very time.
2. **By will** - It takes effect after the death of the wakif and is also called testamentary wakf. A wakf by will cannot operate upon more than one third of net assets, without the consent of the heirs.
3. **Life gifts made which donor labours under marz-ul-mant**, the wakf made during death illness will operate only to the extent of one third of the property without the consent of the heirs of the wakif.
4. **Lapse of time** frequently renders difficult or impossible to establish dedication by direct evidence but wakf may be established by evidence of immemorial user.

Completion of wakf

The problem as to how wakf is completed may be studied from the following two angles:-

- (1) Where the third person is appointed as first Mutawalli
- (2) Where founder constitutes himself first Mutawalli]
- (3) **Third person as first Mutawalli** - According to Imam Mohammed, it is completed by
 - a. Declaration of wakf
 - b. Appointment of Mutawalli and
 - c. Delivery of possession to Mutawalli

The view of Abu Yusuf is followed in India and a mere declaration of endowment by the owner is sufficient to complete the wakf.

- (4) **Founder himself first Mutawalli** - In such cases, founder and Mutawalli being the same person
 - a. No physical possession is necessary
 - b. Nor is it necessary that the property be transferred from his name as owner into his name as Mutawalli.

The transaction must, however, be bonafide.

Shia Law – The character of the wakf's possession should be changed from that of the founder of the wakf to that of Mutawalli of the wakf e.g. by mutation of names in public register.

Kinds of wakfs

- (a) **Public wakfs** – This is for public, religious or charitable purposes.
- (b) **Private wakfs** – This is for the settler's family and descendants and is technically called wakf-alal-aulad.

Salient features of the Wakf Act of 1913

- (1) Under this Act, a Muslim can tie up his property in perpetuity for the support of his family, children and descendants, provided he makes a provision that the ultimate benefit goes to a charitable object of a permanent nature. It is now open to him to postpone benefit being conferred upon charity, till the extinction of all his family descendants.
- (2) **Ultimate benefit to charity** – It is no more necessary that there should also be a concurrent gift to charity. Under this Act, a Mohammedan need not provide for any gift to charity until after the extinction of the whole line of descendants of the settler's family.
- (3) Such reservation of ultimate benefit may be made either expressly or impliedly.
- (4) **Maintenance of a Hanafi Muslim** – Under this Act, a Hanafi Muslim cannot enjoy the whole income or a life interest in the income of the trust property. He can only share in the income by way of maintenance.
- (5) **Payment of personal debts by a Hanafi Muslim** – It validates, in the case of a Hanafi Muslim a provision for the payment of the debts of the settler out of the rents and profits of the property dedicated. Before the Act, he could not make a condition that his personal debts should be paid from the property.
- (6) **Controversy regarding movable properties** – In defining wakf as the permanent dedication of 'any property', the conflict between the various courts as to the validity of wakfs of certain movable properties has been resolved.
- (7) **The Act has been given a retrospective effect** – The Musalman Wakf Validating Act of 1930, came into effect on July 25, 1930, retrospectively and was made applicable to wakfs created before March 7, 1913.
- (8) **Object of wakf** – It is now declared by Section 3 of the Musalman Wakf Validating Act, 1913, that it is lawful for a person professing the Musalman faith to create a wakf which in all other respects is in accordance with the provisions of the Musalman law, for the following among other purposes:-
 - (a) For the maintenance and support wholly or partially of his family, children or descendants
 - (b) Where the person creating a wakf is a Hanafi Musalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Muslim Law as a religious, pious or charitable purpose of a permanent character.

Section 4 of the above Act lays down "No such wakf is to be deemed to be invalid merely because the ultimate benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf". The question whether or not, any purpose is religious, pious or charitable and is of permanent character, has to be determined in accordance with the Muslim Law.

Mutawallis

The manager or superintendent of the wakf is called Mutawalli under the Muslim system; in case of a wakf all rights of ownership to the property vest in God. Though Mutawalli is the superintendent or manager of the wakf unless otherwise provided in the deed of the wakf, he can have no beneficial interest in the income of the wakf the office of Mutawalliship-held jointly will pass to the survivor, if there is no direction, express or implied in the wakf deed and there is no evidence of custom supporting the usage to the contrary.

Who can be appointed as Mutawalli?

Any person who is of sound mind, has attained the age of majority and is capable of performing the functions to be discharged under a particular wakf can be appointed as Mutawalli.

Who can appoint a Mutawalli?

General rule – Generally, the Mutawalli is appointed by the founder of the wakf at the time of creation of wakf. But if the wakf is created without appointed of a Mutawalli wakif becomes the first Mutawalli according to Abu Yusuf and the wakf is valid and has to be administered by the beneficiaries according to Shia Law. Mutawalli can be appointed in the given order:-

- (a) By the founder
- (b) Failing him by the executor of the founder
- (c) Failing him, by the Mutawalli on his death bed
- (d) Failing him, by the court
- (e) In some circumstances, a Mutawalli may be appointed by congregation.

Power and duties of Mutawalli

A Mutawalli may do all acts that are reasonable and proper for the protection of the Wakf property and for the administration of the wakf under the circumstances of the case. The Mutawalli is not an owner of the wakf property; Mutawalli may employ agents where necessary or customary. He can not alienate or charge the wakf property except

- (a) By provision in the deed of wakf empowering him to do so
- (b) By permission of the court
- (c) By reason of any urgent necessity

A Mutawalli may do the following things with the permission of the court

- (a) Borrow money
- (b) Sell, mortgage or dispose of wakf property, in any other way.

A Mutawalli is perfectly competent to file a suit for protecting wakf property and for administering wakf property.

A Mutawalli is entitled to remuneration if any, fixed by the settler. If the amount fixed is too small, the Mutawalli may apply to the court for increasing the allowance.

Removal of Mutawalli

One Mutawalli is duly appointed, he cannot be removed by the wakif, but the court will remove a Mutawalli who –

- (a) Denies the wakf character of the property and sets up an adverse title to it in himself;
- (b) With sufficient funds in his hand neglects to repair the wakf premises and allows them to fall into disrepair;
- (c) Knowingly and intentionally causes damage or loss to the wakf property or misdeals with it (i.e. commits breach of trust). In *Bibi Sadique Fatima v. Mahmood Hasan* AIR 1978 S.C. 1362, the Supreme Court has held that use of wakf money for purchasing some property in the name of his wife would amount to breach of trust.
- (d) Is insolvent.

Management of the wakf property

If a person, who has not been authorized to act as Mutawalli by the wakif or the court, assumed the status to manage the property, he becomes "a trustee de son tort" and is responsible as such.

Liability of Mutawalli to account

If there is clause in the wakf deed which exempts the Mutawalli from accountability it is to be respected. Each beneficiary has right to claim account from a Mutawalli at anytime. If he wants his share of income, he can sue for a specified amount.

Parentage, Legitimacy, Acknowledgment, Adoption**SYNOPSIS**

- (1) Parentage
 - a. Maternity
 - b. Paternity
- (2) Legitimacy
 - a. Rules under Muslim Law
 - b. Under Indian Evidence Act 1872
 - c. Distinction between Legitimacy and legitimation
- (3) Acknowledgment
 - a. Conditions of valid acknowledgment
 - b. Effect of acknowledgment
- (4) Adoption
- (5) Distinction between Adoption and Acknowledgment
 - a. Under Muslim Law
 - b. Under Statutory Law

1. Parentage : Parentage is the legal relation between a child and the parents. Importance of this legal relation lies in the fact that it involves certain rights and obligations in respect of maintenance guardianship and inheritance.

a. Maternity:

Under Sunni Law: Legal relation between a child and mother is called maternity. Maternity is a matter of fact. It is established in the woman who gives birth to the child irrespective of whether the birth was the result of a wedlock or Zina (adultery). Such child is entitled to inherit the property of the mother.

Under Shia Law: Mere birth is not sufficient to establish maternity of a child is established in a woman only if the child is born to her out of her lawful marriage. A child of fornication (i.e. illegal intercourse) is legally speaking considered to have no mother at all and cannot inherit her property.

b. Paternity: Maternity is a fact whereas paternity is a presumption. Paternity of a child is established in a man by a legal presumption i.e. paternity depends upon the existence of marriage at the time of conception of the child. The marriage may be valid or irregular but it should not be void. Void marriage is no marriage. Paternity can not be attributed to a child born out of an illegal union of a man and woman.

2. Legitimacy: Legitimacy is a status which directly results from the fact of paternity of a child. When the paternity of a child is established its legitimacy is also established. It is established by a direct or indirect proof of marriage between the father and mother of the child.

a. Rules under Muslim Law :

- (i) A child born within less than six months after the marriage is illegitimacy unless the father acknowledges it.
- (ii) A child born after six months from the date of the marriage is presumed to be legitimate unless the putative father disclaims it.
- (iii) **A child born after dissolution of the marriage is legitimate:**
 - (i). Under shia Law, if born within 10 lunar months
 - (ii). Under Hanaffi Law, if born within 2 years
 - (iii) Under Shafai and Maliki Law, if born within 4 lunar years.

b. Under Indian Evidence Act 1872:

In India, the conclusive proof of the legitimacy of a child (whether Muslim or non-Muslim) is established under the provisions of the Indian Evidence Act, 1872. A uniform law relating to the conclusive proof of legitimacy has been laid down in section 112 of the Indian Evidence Act which provides the following facts of the legitimacy of a person.

- (i). That the person was born during the continuance of a valid marriage between his mother and any man or
- (ii). That the person born within two hundred and eighty days after the dissolution of the said marriage, the mother remaining unmarried.

Unless: It can be shown (in both the cases) that the parties to the marriage had no access to each other at any time when the person could have been begotten.

Q: Whether the Evidence Act supersedes the rule of pure Muslim Law:

Opinions are divided but the balance of authority remains in favour of the Evidence Act. In *A.G. Ramchandran v. Shamsunnisa Bibi* AIR 1977, the Madras High Court has held that sec. 112 of IEA is very general in its terms and it applies to all persons including Mohammedans who may have a personal law of their own relating to legitimacy as there is no provisions exempting them from the application of section 112.

Note: In so far as irregular marriage is concerned although it is not perfectly valid but it is true that it is not void under Muslim Law, neither the consumation is unlawful nor the children are illegitimate. It is submitted therefore, that legitimacy of a child born out of an irregular marriage may also be governed by the provisions of IEA.

(C). **Legitimacy and Legitimation:** Legitimacy is the status of a child resulting from certain facts about the relationship between the parents. If legitimacy of the child is in doubt but not disproved acknowledgment whether express or implied of its father confers upon it the status of legitimacy. If a child is proved to be illegitimate no acknowledgment can legitimize it Legitimation is a process to confer legitimacy upon one who was never a legitimate child is unknown in Mohammedan Law.

3. **Acknowledgment :** Acknowledgment of paternity by a person means that he has accepted himself as father of a child where the legitimacy of a child is neither proved nor disproved the acknowledgment of paternity by a person may establish the existence of a valid married and also the legitimacy of the child. It may be express or implied in the case of a child who is proved to be the child of a third person or illegitimate the acknowledgment shall carry no force

a. Conditions of a valid acknowledgment:

- (i). The acknowledgment must be with the distinct intention of conferring the status of legitimacy
- (ii). The acknowledger must be at least twelve and a half years older than the person acknowledged.
- (iii). The child so acknowledged must not be known to be the child of another.
- (iv). The child if adult must confirm or acquiesce in acknowledgment.
- (v). It is essential to show that a lawful marriage is possible between the acknowledger and child's mother and the child is not the fruit of an adulterous intercourse
- (vi). The acknowledger must be adult and sane.

b. Effects of acknowledgment : Acknowledgment of paternity raises a two fold presumption.

- (i). **In favour of child claimant :** It produces all the legal effect of a natural paternity and vests in the child the right of inheriting from acknowledger.
- (ii). **In favour of the wife (i.e. the mother of the acknowledged child):** It has the effect of giving her the status of legal wife and hence the right of inheritance.

4. **Adoption in Islam:** Muslim Law does not recognise adoption. There is nothing in the Mohammedan Law similar to adoption as recognized in Roman and Hindu system as a mode of filiation "Qur'an" expressly prohibits adoption as a mode of accepting other's child as one's own. The result is that adoption is un-Islamic.

Note: In the writ petition, *Shabana Hasmi v. Union of India* 2014. Three judge bench of Supreme Court held that the Muslim can adopt a child under the Juvenile Justice Act 2000 even if their personal law is against such adoption. Court said that J.J.A. is a secular legislation applicable to all religions and communities and is a small step in reaching the goal enshrined by Article 44 of the constitution but the Act is not compulsive in nature but leaving the person with the liberty of accessing the provisions of the Act if he so desires. Such a person is always free to adopt or chooses not to do

so and instead follow what he comprehends do to be the dictates of the personal law applicable to him.

5. Distinction between Adoption and Acknowledgment

Adoption	Acknowledgment
1. An adoptee is a son of another person 2. It is established by a gift from the natural parents to the adoptive parents 3. Parentage of the adoptive family is affiliated after renouncing the natural family 4. It has no connection between the natural descent of the adoptee and the adoptive father 5. The motive of adoption may be religious and spiritual	1. It proceeds on the basis of actual paternity. If the son is proved to be other's acknowledgment is ineffective 2. It is possible only when the paternity of the child is not known and at the same time child is not proved to be a child of another person. 3. No such transplantation is possible in acknowledgment 4. It relates to the theory of actual descent of the acknowledgee by legitimate means. 5. There is no such religious or spiritual motive

Chapter-11

Succession and Administration

SYNOPSIS

1. Introduction
2. Application of the property of a deceased Muslim
3. Representatives of a deceased Muslim
 - a. Executor or Administrator
 - b. Heirs
 - c. Derivate Executor
4. Devolution of inheritance
5. Suits by creditors against executor or administrator
6. Suits by creditors against heirs
7. Recovery of debt due to deceased

1. **Introduction:-** The Muslim law of succession which has been derived from the rules of succession to be found in the Quran, or in traditions as well as from such of the pre-Islamic customs as were approved by the prophet.

2. **Application of the property of a deceased Muslim:-** The estate of deceased Muslim is to be applied according to the Indian Succession Act, in following order:-
(i). Payment of his funeral expenses and death bed charges.
(ii). Expenses of obtaining probate, letters of administration or succession certificate
(iii). Wages due for services rendered to the deceased within 3 months next preceeding his death
(iv). All debts of the deceased according to their respective priorities
(v). Legacies not exceeding $\frac{1}{3}^{\text{rd}}$ of what remains after payment of items mention in (1) to (4) above
(vi). The residue to be distributed among to heirs according to the law of the sect.

Note:- The provisions of the Hindu succession Act prevail so for the claim to the property is concerned even if they come in conflict with Mohammedan law.

3. Representatives of a deceased Muslim

- (i). Executor or administrator
- (ii). Heirs
- (iii). Derivate executors

(i). **Execution or administrator:-** Executor means a person to whom the execution of the last will of a deceased person is, by the testator's appointment codified.

Administrator means a person appointed by competent authority to administer the Estate of deceased person where there is no executor

(ii). **Heirs:-** In default of any executor or administrator, the whole estate of the deceased devolves at the time of his death upon his heirs, in severalty in proportion to their respective rights of inheritance.

(iii). **Derivate executor:-** Under the Hanafi system, the executor of a deceased Muslim may validly and rightfully appoint a successor to himself who may carry out the purposes of the will under which he was made executor.

4. **Devolution of inheritance:-** The devolution is not suspended by reason merely of debts being due from the deceased. The heirs succeed to the estate as tenants-in-common in specific shares. Each heir is under the personal law liable to satisfy the debts of the deceased only to the extent of the share of the proportionate to his share in the estate.

5. Suit by creditors against executor or administrator: - If the estate is represented by an executor or administrator a suit by creditor of deceased should be instituted against them.

6. Suit by creditors against heirs: - If there is no executor or administrator, the creditor may proceed against the heirs of the deceased and where the estate of the deceased has not been distributed between heirs, the creditor can execute the decree against the property as a whole without regard to the extent of the liability for the heir's inter se.

7. Recovery of debts due to deceased: - As one heir can not give valid discharge of the debts due to the deceased, no court can pass a decree against a debtor of deceased Muslim for payment of his debts unless the claimant produces a probate, or letter of administrator or a succession certificate before passing of the decree and not necessarily at the time of institution of suit.

Chapter-12

Inheritance

SYNOPSIS

1. Introduction
2. What is heritable property
3. Comparison with Hindu Law
4. Application of certain rules
5. General rules of inheritance under Sunni Law

The greater part of Mohammedan law of inheritance is founded upon the Quran. Quran did not sweep away the existing law's of succession, but made a great number of amendments based on a few common principles. These amendments have been differently interpreted by the Sunnis and Shias.

What is heritable property:- What is left, after deducting the following items from the property left by a Muslim on his death is his heritable property. The items are:-

- a. Funeral expenses
- b. expenses of obtaining probate and letters of administration from the court
- c. wages for personal service of the deceased within 3 months of his death
- d. debts
- e. Legacies-subject to the limits of testamentary powers.

Comparison with Hindu Law

- a. In Muslim Law all property is one and there is no distinction between ancestral and self acquired (separate) property
- b. There is no such thing as joint Muslim family
- c. The right of an heir for the first time comes into existence on the death of the ancestor. A right by birth is unknown in Muslim Law
- d. Muslim Law does not recognise specific succession

Applicability of certain rules:- The main principles of succession are as follows:-

1. Rule of representation
2. Rule of exclusion
3. rule of primogeniture
4. rule of vested inheritance
5. rule of specific succession

1. **Rule of Representation:-** The principle of representation has more than one meaning. It may be applied for the purpose of deciding:-

- (a) what persons are entitled to inherit
- (b) quantum (share that he is entitled)

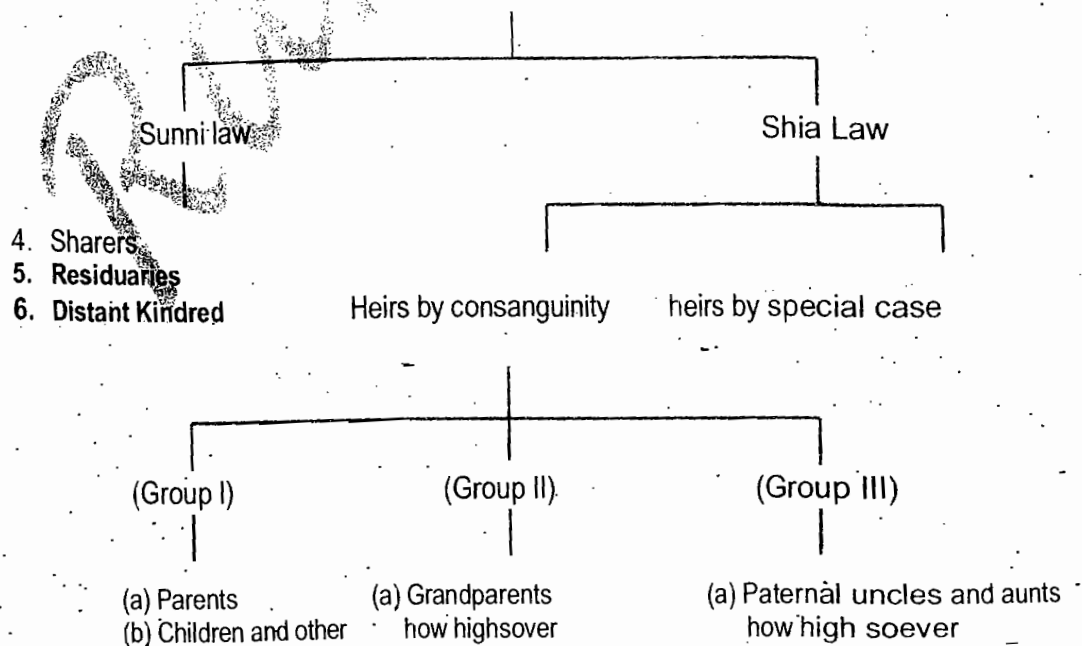
Per stirpes and per capita distinguished:- The division of an estate among heirs belonging to different branches may be according to the different stocks or branches to which different sets of heirs represent or it may be according to the individual heirs or claimants without regard to the representation of the branches to which they belong. The former is called division per stirpes while the latter is called division per capita. Under Shia Law the rules of representation is recognized but not under Sunni Law.

2. **Rule of exclusion:-** Every person including a child in the womb (provided it is born alive) is entitled to inherit unless there is specific rule of exclusion. According to this rule persons though heirs are excluded from inheritance due to certain impediments imposed on them by Muslim law. These impediments or grounds are as follows.

- (a) **Homicide:-** Under Sunni law a person who causes the death of a person is not entitled to inherit the property of that person; no matter whether the death was caused intentionally or by accident. Under Shia law, the murder of a person is disqualified to inherit him only when the death is caused intentionally.

- (b) **Illegitimacy**:- Under sunni law an illegitimate child is entitled to inherit his mother but not his father. Under shia law an illegitimate child is disqualified in herit both his mother and father.
- (c) **Slavery**:- This impediment to inheritance has been abolished by the Abolition slavery Act, 1843 and has no place in Mohammedan law as it is administered in India.
- (d) **Difference of religion**:- The case disabilities removal Act, 1850 does away in India with the exclusion from inheritance from a deceased Muslim on the ground of mere difference of religion whether due to apostasy or otherwise. The estate of Hindu converted to Islam and dying a Muslim is subject to Muslim law.
- (e) **Defference of allegiance etc**:- With the end of Muslim rule in India this ground of exclusion lost significance.
- (f) **Estoppel in succession**:- A person who first denies his relationship with the propositus can not be allowed subsequently to turn his back and claim inheritance when succession opens.
- (g) **Doctrine of exclusion**:- This doctrine consists of a set of three rules which governs inheritance and exclude certain heirs by recognizing the preferential claims of certain other heirs.
 Rule-1- A Person who is related to the propositus through another is excluded by the presence of the other
 Rule-2- within the limits of each class of heirs, an heir nearer in blood excludes the more remote
 Ruel-3- A person excluded may exclude others.
- (h) **Exclusion of daughter from the right of inheritance**:- Under Muslim Law, the daughters are given the right of succession. However this rule is not absolute. Under the customary law, a daughter may be excluded from the right of inheritance under the watan Act 1886 (Bombay) Muslim daughters were excluded from the right of inheritance.
3. **Rule of Primogeniture**:- Is that, where a person has several sons, the eldest son has a preferential claim over the estate of the deceased father generally this rule is not recognised by Mohammedan law. The shias, however recognise the exclusive right to the eldest son of such articles of the father as the wearing apparel, Quran, ring, sword, arms the mantle and the horse.
4. **Rule of vested inheritance**:- It is well established rule of Muslim law that property never remains in a state of obeyance but on death of proprietor passes to his various heirs. The moment a person takes his last breath, his property vests in his heirs though the actual distribution according to the shares of each heir may take place after some time.
5. **Ruel of spes-successions**:- While the rule of 'vested inhertance' explained above is applicable after the death of propositus, the rule of spes-successionis applies before the death of such person.

Who are entitled to inherit



lineal descendants
how low soever

(b) Brothers and sisters
their descendants how
low soever

(b) Maternal uncle and aunts
how high soever

Sunni Law Inheritance

(Quranic heirs) of the deceased. After ascertaining the sharers, their respective shares, which are already fixed for them, is allotted to each of them. If the whole property exhausts after distribution of the shares among each of them, the process of distribution does not proceed further. But if there still remains some property (residue) among the residuaries who constitute class II of legal heirs. However, where a propositus has no sharers at all, the whole property is inherited directly by the residuaries. If the propositus has neither any sharer nor any residuary then, in the third instance, the property is distributed among the Distant Kindreds.

It is to be noted that a Distant Kindred cannot inherit in presence of any heir belonging to the class of sharers or residuaries. Where a propositus has no heir belonging to any of the three principal classes (although such cases are rare) the property devolves directly upon the successive subsidiary heirs, one by one in the order of priority. In other words, if a propositus has no Sharer, Residuary or a Distant Kindred as his heir, his property is inherited by a successor by contract, if any and in his absence, by an acknowledged kinsman, if there be any and, and, in his absence too, it is inherited by the universal legatee if there is such a legatee under any will left by the deceased. But if there is none from among the above mentioned classes of heirs, the properties of the deceased are ultimately inherited by the state. State is the ultimate heir of every propositus.

However, the practical allotment of respective shares to each legal heir is not as simple as it appears from the scheme of distribution stated above. There are various rules and exceptions which make the distribution difficult. For instance, there are rules of exclusions under which one heir (of the same class) may be excluded by the presence of some other heir. Moreover, in some cases an heir may inherit in double capacity e.g. father is a Sharer but, in certain cases he inherits also as a Residuary. In the following lines attempt has been made to enumerate the heirs of each class, their respective shares and, rules relating to the distribution of properties among them.

The Sharers : Class I Heirs

Sharers or the Quranic heirs are Class I legal heirs of a propositus. The legal heirs of this class get preference over heirs of other classes. When the inheritance opens, following facts are to be ascertained : (1) Who are the heirs of Class I, i.e. who are the Quranic heirs of the propositus ? (2) What is the respective share of such heir of heirs ? (3) Whether such heir is excluded by or his share is reduced, in presence of any other heir of the same class? (4) any other fact which may affect his inheritance. On the basis of these facts, the heritable property is distributed first of all, among his Sharers. The Sharers, their respective shares and the conditions under which they inherit, is given in brief in the list given below. It is to be noted that the relations mentioned in the list are relations of the propositus e.g. widow means widow of the propositus or, child means child of the propositus etc.

Relations by Affinity

a. Husband

- i. The husband gets $\frac{1}{2}$ if there is no (a) child or, (b) child of son how low soever (hereinafter called h.l.s.)
- ii. The husband gets $\frac{1}{4}$ if there is (a) child, or (b) child of son h.l.s. That is to say, in the absence of childrer, the husband's share is $\frac{1}{2}$ whereas, in the presence of children his share is $\frac{1}{4}$.

b. Widow

- i. The widow gets $\frac{1}{4}$ if there is no (a) child, or (b) child of son h.l.s
- ii. The widow gets $\frac{1}{8}$, if she is with (a) child, or (b) child of son h.l.s

- iii. If the propositus had left more than one widow, all the widows share equally out of the $\frac{1}{4}$ or $\frac{1}{8}$ share, as the case may be.

Relation by Blood

c. Father

- i. Father without (a) child or, (b) child of son h.l.s. is treated as Residuary i.e. ceases to be a Quranic heir and is entitled to get the residue after allotment of shares to other Quranic heirs
- ii. Father together with (a) child or (b) child of son h.l.s. gets $\frac{1}{6}$. In other words, in the absence of children the father becomes a Residuary whereas in presence of the children his share is $\frac{1}{6}$

d. True Grandfather

- i. True grandfather is entitled to inherit only in the absence of father. That is to say, if the propositus dies leaving behind both, father and a true grandfather, the true grandfather cannot inherit.
- ii. If there is no father, the true grandfather inherits like a father. That is to say, if there is no father, the true grandfather would become Residuary in the absence of children. But in presence of the children a true grandfather gets $\frac{1}{6}$.

e. Mother

- i. The share of mother is $\frac{1}{3}$ in the absence of
 - 1. child, or
 - 2. child or a son h.l.s., or
 - 3. two full sisters, or
 - 4. two full brothers, or
 - 5. one brother plus one sister, whether full, consanguine or uterine.

In other words, if together with mother there are none of the above-mentioned relations, her share is $\frac{1}{3}$.

- ii. The share of mother is $\frac{1}{6}$ in the presence of
 - 1. child, or
 - 2. child or a son h.l.s., or
 - 3. two full sisters, or
 - 4. two full brothers, or
 - 5. one brother plus one sister, whether full, consanguine or uterine

In other words, if there are any one of the above-mentioned relations from (i) to (v) the share of mother is reduced to $\frac{1}{6}$.

- iii. If mother is with father and there is also widow (or husband) the mother gets $\frac{1}{3}$ of what remains after deducting the share of widow (or husband). In this peculiar combination the mother (without children) does not get $\frac{1}{3}$ of the whole property because in that case father's share would become half of mother which is against the general principle that share of a male should be double the share of female.

f. True Grandmother

- i. The true grand-mother inherits only where she is not excluded by the presence of any of the relations given below.
- ii. If not excluded, the share of true grandmother is $\frac{1}{6}$ whether she is one or more than one. Two or more grandmothers get $\frac{1}{6}$ jointly.
- iii. A maternal grandmother is excluded from inheritance in the presence of:
 - 1. Mother, or
 - 2. A nearer (maternal or paternal) true grandmother
- iv. A paternal grandmother is excluded from inheritance in the presence of:
 - 1. mother, or
 - 2. father, or
 - 3. a nearer true-grandmother whether maternal or paternal.

In other words, a maternal true-grandmother gets her $\frac{1}{6}$ share only in the absence of mother and any nearer grandmother. A paternal true-grandmother gets her $\frac{1}{6}$ share only in absence of mother, father and any nearer true grandmother.

g. Daughter

- i. The share of one daughter is $\frac{1}{2}$
- ii. If there are two or more daughters, the share is $\frac{2}{3}$ to be divided equally among them.
- iii. Daughter together with son, is treated as agnatic heir i.e. inherits as Residuary

h. Son's Daughter.

i. The son's daughters only in the absence of:

1. Two or more daughters, or
2. Son, or
3. Higher son's son, or
4. Two or more higher son's daughter

In other words the son's daughter is entirely excluded from inheritance in presence of the above relations.

- ii. In the absence of above relations, the son's daughter gets $\frac{1}{2}$ if single and $\frac{2}{3}$ if more than one.
- iii. If son's daughter is together with one daughter, the share of son's daughter is $\frac{1}{6}$ whether such son's daughter is single or more. For example, if there is a daughter and two son's daughters, the share of son's daughters would be $\frac{1}{6}$ which would be divided equally among them i.e each son's daughter would get $\frac{1}{12}$.
- iv. Son's daughter together with son's son is treated as agnatic heir i.e inherits as Residuary.

i. Full Sister

- i. The share of one full sister is $\frac{1}{2}$
- ii. The share of two or more full sisters is $\frac{2}{3}$ to be divided equally among them
- iii. If full sister is together with full brother, she becomes an agnatic heir and inherits as Residuary.
- iv. A full sister is excluded from inheritance in the presence of:
 1. child, or
 2. child of son h.l.s, or
 3. father, or
 4. father's father

j. Consanguine-Sister

- i. the share of one consanguine sister is $\frac{1}{2}$
- ii. the share of two or more consanguine sisters is $\frac{2}{3}$ to be divided equally among them
- iii. with one full-sister, the share of consanguine sister is $\frac{1}{6}$ whether single or more
- iv. the consanguine sister is excluded from inheritance in the presence of:
 1. child, or
 2. child of son h.l.s, or
 3. father, or
 4. father's father, or
 5. two full sisters, or
 6. one full brother
- v. With consanguine brother, the consanguine sister becomes agnatic heir and inherits as Residuary.

k. Uterine-Brother

- i. The share of one uterine brother is $\frac{1}{6}$
- ii. If there are two or more uterine brothers, their share is $\frac{1}{3}$ to be equally divided among them.
- iii. Uterine brother is excluded from inheritance in the presence of:
 1. child, or
 2. child of son h.l.s, or
 3. father, or
 4. father's father

l. Uterine-Sister

The share and the conditions under which an uterine sister inherits property is the same as that of uterine brother. That is to say:-

- i. The share of one uterine sister is $\frac{1}{6}$
- ii. If there are two or more uterine sisters their share is $\frac{1}{3}$ to be divided equally among them
- iii. Uterine sister is excluded from inheritance in the presence of (I) child (II) child of a son (III) father and (IV) father's father

Shia law of Inheritance

Under the Shia law, a person may become the legal heir of a propositus either because of his relationship through marriage or because of relationship through blood. Thus, the heirs may be either (a) heirs by marriage or (b) heirs by consanguinity.

Heirs by Marriage

The heirs related to the propositus by marriage are husband or wife. Marriage is regarded as a special cause for heirship.

Heirs by consanguinity

The heirs by consanguinity have been divided into following three classes:

Class I

This class includes---

- (a) parents, and
- (b) the children and other lineal and descendants how low soever

Class II

This class includes---

- (a) grandparents how high soever (true as well as false); and
- (b) brothers and sisters;
- (c) descendants h.l.s of brothers and sisters

Class III

Under this class are included---

- (a) the paternal, and
- (b) maternal uncles and aunts of the propositus and of his parents and grandparents h.h.s. and also their descendants h.i.s.

Respective Shares of the heirs

For purposes of determining the respective share of each heir, the shia law classifies them into two categories, the Sharers and the Residuaries. As against Sunni law, there is no separate category of Distant Kindreds. There are nine sharers whose shares are already assigned. The first two namely, the husband and wife are heirs by affinity or marriage and the rest are heirs by consanguinity. The sharers, their shares and rules relating to allotment of the shares to each of them has been given in brief, in the following list:-

1. Husband

- (a) without children or lineal descendants, the husband's share is $\frac{1}{2}$
- (b) with children or lineal descendants, the husband's share is $\frac{1}{4}$

5. Widow

- (a) without children or lineal descendants, the widow's share is $\frac{1}{4}$
- (b) with children or lineal descendants, the widow's share is $\frac{1}{8}$
- (c) a childless widow gets her $\frac{1}{4}$ share only out of the movable properties of the deceased husband.

6. Father

- (a) without children or lineal descendants, the father inherits as Residuary
- (b) with children, the father's share is $\frac{1}{6}$

7. Mother

- (a) in the absence of (I) child or lineal descendant or (II) two or more full or consanguine brothers or (III) one such brother and two such sisters or (d) four such sisters with father, the share of mother is $\frac{1}{3}$.
- (b) in the presence of (I) child or lineal descendants (II) two or more full or consanguine brothers (III) one such brother and two such sisters or (IV) four such sisters with the father the share of mother is $\frac{1}{6}$

8. Daughter

- (a) Share of a single daughter is $\frac{1}{2}$
- (b) Share of two or more daughters $\frac{2}{3}$ to be inherited collectively
- (c) In the presence of (I) full brother and (II) father's father, the full sister inherits but as a Residuary

9. Full Sister

- (a) The share of a single full sister is $\frac{1}{2}$ and that of two or more full sisters is $\frac{2}{3}$
- (b) The full sister gets the above mentioned share in the absence of (I) parents (II) lineal descendant (III) full brother and (IV) father's father, the full sister inherits but as a Residuary

10. Consanguine Sister

(a) The share of a single consanguine sister is $\frac{1}{2}$ and that of two or more consanguine sisters is $\frac{2}{3}$

(b) The above share is inherited by consanguine sister in the absence of (I) parent (II) lineal descendant (III) full brother (IV) full sister (V) consanguine brother and (VI) father's father

(c) In the presence of (I) consanguine brother and (II) father's father, the consanguine sister inherits as Residuary.

11. Uterine Brother

(a) the share of one uterine brother is $\frac{1}{6}$ and that of two or more uterine brothers is $\frac{1}{3}$

(b) the above share is inherited by uterine brother in the absence of (I) children or lineal descendants and (II) parents

9. Uterine Sister

(a) the share of one uterine brother is $\frac{1}{6}$ and that of two or more uterine brothers is $\frac{1}{3}$

(b) the above share is inherited by uterine brother in the absence of (I) children or lineal descendants and (II) parents

Ramul's 14S

MOHAMMEDAN LAW

Chapter I

Questions of Previous Years' Examinations

1. A Muslim man has two Muslim wives. The entire family converts to Christianity. Discuss the status of the wives and children. Can he divorce his wives by triple talaq post conversion. (Haryana CS (JB) 2011)

Chapter II

Questions of Previous Years' Examinations

2. What are the principal schools in Muslim Law? (RJS 1989)

Chapter III

Questions of Previous Years' Examinations

1. Marriage amongst Muslims is 'not a sacrament but a civil contract'. Elucidate. (Haryana CS (JB) 2010)
2. In Abdul Kadir v. Salima (1886) Justice Mahmood stated "Marriage among Muslims is not a sacrament but purely a civil contract." On the other hand, another noted scholar of Muslim Law, Abdul Rahim States that marriage among Muslims is both an ibadat as well as muamlat. In the light of these statements, Discuss the exact nature of Nikah, pointing out its essential features and referring to case law whether required. (Punjab (JB)) -2013)
3. Discuss the validity of the following marriages.
 - (i). A Sunni Muslim Marries a Christian Woman
 - (ii). A Shia Muslim marries a Sunni divorced woman, observing iddat
 - (iii) A Sunni woman marries a Jew male(Uttaranchal (J) -2009)
4. Discuss the validity of following marriages.
 - (i). A Muslim male marries a Muslim girl on high seas during hajj journey
 - (ii) A Muslim girl marries an idolater (Idol worshipper). (Uttaranchal (J) -2011)
5. State definition, essentials and nature of Muslim marriage (UPPCS (J)-2000)
6. What is Iddat? (RJS -1994)
7. What do you understand by Muta Marriage. (RJS-1991)

Chapter IV

Questions of Previous Years' Examinations

1. Draw Distinction between Istridhan and dower. (Haryana (JB)-2009)
2. What is mahr or dower? (DJS-2008)
3. Narrate the importance and function of 'Dower' in Muslim Law. (UPPCS (J)-1997)
4. State the nature and kinds of Mahr. Whether a Muslim widow can retain her husband's property in lieu of Mahr? Whether right to receive Mahr and enjoyment of the property is transferable or heritable. Discuss with the help of Maina Bibi's case. (Haryana (JB)-2003)

Chapter V

Questions of Previous Years' Examinations

1. 'B' a Muslim wife seeks dissolution of her marriage with 'A' on the ground that 'A' neglected to maintain her for a period of 2 years. In fact 'B' had voluntarily left 'A', When 'A' brought a second wife. Decide the claim of 'B'. (Haryana CS (JB) 2010)
2. State the consequences (legal effect) that follow from the divorce under Muslim Law. (M.P. (J)-2013)
3. A marries with a Hanafi woman. After some time in fit of anger, "A pronounces Talak three times and sends the wife to her parent's home. The next day 'A' repents and wants his wife to come back. The wife refuses and maintains that she has been divorced irrevocably. 'A' brings a suit for restitution of conjugal rights and declares he believes in pure and simple Islam and does not believe in sects. The wife also sues for her deferred dower. Discuss the rights of the parties. (M.P. (J)-2013)
4. Examine the conditions for which a Muslim woman prejudiced by marriage can get divorce from her husband. (Punjab (JB)-2012)
5. Can a Muslim wife divorce her husband? If so, under what circumstances? Can a divorced wife remarry her husband? (Uttanchal (J)-2009)
6. Draw Distinction between Ahasan Talak and Hasan Talak. (Haryana (JB)-2009)
7. Explain the concepts of Khula and Mubarat. (DJS-2008)
8. Discuss different kinds of Talaq under the Islamic Law. (Haryana (J)-2003)
9. What is option of puberty. (UPPCS (J)-2000)

Chapter VI

Questions of Previous Years' Examinations

1. Trace the history from Shah Bano Judgment which led to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and critically analyse the provisions of this legislation. Discuss the issues in relation to the constitutionality of this Act as raised before the Supreme Court in Danial Latifi and another v. Union of India AIR 2001 SC. (Punjab (JB)-2013)
2. Mention the circumstances which led to the enactment of the Muslim Women (Protection of Rights on Divorce) Act 1986. Whether the objectives of passing this Act have been achieved? Discuss. (Haryana (JB)-2009)
3. Applicability of section 125 of Cr.P.C. to Muslims after the enactment of Muslim women (Protection of Rights on Divorce) Act 1986. (Haryana (JB)-2007)
4. Under section 3 (1) of the Muslim Women (Protection of Right on Divorce) Act 1986 the husband is required to pay maintenance to the children for a period of 2 years from the respective date of birth of the children. What remedy is available for the maintenance of children after 2 years period? Discuss (DJS-1999)
5. What is the law of maintenance in respect of a Muslim wife. (UPPCS (J)-2000)

Chapter VII

Questions of Previous Years' Examinations

1. What are the essential conditions of a valid gift under Muslim Law? How far has the law of Mohammedan gift been affected by the Transfer of Property Act, 1882, Discuss (M.P. (J)-2013)
2. When and how can a gift be revoked by a donor under Muslim Law? In what cases the power to revoke comes to an end. (M.P. (J)-2013)
3. Draw distinction between Hiba and Hiba-bil-Iwaz. (Haryana (JB)-2009)
4. Whether oral Hiba of immovable property can be done? (RJS-1991)
5. A makes a gift to B of wheat that may be produced on his farm next years. Is this gift valid? (Punjab (JB)-1999)
6. "Life estate is unknown to Muslim law as administered in India, but life interest can be created". Discuss. (UPPCS (J) 1999)
7. Difference between Hiba, Hiba-bil-iwaz and Hiba-ba-Shart-ul-iwaz. (UPPCS (J) 1986)
8. What is death bed gift. (RJS-1992)

Chapter VIII

Questions of Previous Years' Examinations

1. Analyse the concept of wasiyat in Islam and explain clearly the requirements of a valid wasiyat and the means by which a wasiyat can be revoked. Highlight the exceptions to the one-third rule of testamentary disposition of property among Muslim. Also, reveal the differences between the Shia and Sunnis with respect to Law of wills. (Punjab (JB)-2013)
2. 'K' a Muslim dies leaving a son 'B', a widow 'X' and a grandson 'Y' by a deceased son. 'K' by his will bequeathed 1/3 of the estate to 'B' and 'Y'. 'X' does not consent to the bequest in favour of 'Y'. In this bequest valid? (Punjab (JB)-2012)
3. A Muslim who died leaving behind her husband made a will of her entire property in favour of her friend 'F'. What is the maximum share of which 'F' is entitled to under Muslim Law. (Haryana (JB)-2007)
4. What is 'bequeathable property'? How is it different from 'heritable property' (Haryana (JB)-2006)
5. Define will (Wasiyat) and discuss its essential characteristics. What restrictions have been imposed on Muslim bequests? (UPPCS (J)-1992)

Chapter IX

Questions of Previous Years' Examinations

1. Define Wakf. What are the legal incidents of a valid Wakf. (Haryana CS (JB) 2011)
2. What are the essentials of a valid Wakf. (RJS-1999)
3. Define "Mutawali." (RJS -1991)
4. Is a Wakf without designating a "Mutawali"? How can a Mutawali be appointed and by whom? (DJS-2000)
5. What is the difference between a "Mutawali" and "Sajjadanashin"? (RJS-1994)

Chapter X

Questions of Previous Years' Examinations

1. Explain the essential conditions of valid acknowledgment under Muslim Law. What are the legal effects of acknowledgment? Elucidate. (Uttaranchal (J)-2011)
2. What is the doctrine of Acknowledgment of Legitimacy under Muslim Law? How is it different from "legitimation" (Haryana (JB)-2006)
3. Define an acknowledgment under Muslim Law. Is it similar to an adoption under the Hindu Law? (UPPCS (J)-1994)

Chapter XI

Questions of Previous Years' Examinations

Chapter XII

Questions of Previous Years' Examinations

1. A, a Sunni has a son 'S' and a grandson 'G' by 'S'. S negligently causes the death of A. Can A succeed to estate of A? Would it make any difference if parties were governed by the Shia Law. (DJS-1989)
2. A Hindu who has a Hindu wife and children embraces Islam and marries a Muslim wife and bigots children. On his death, his Hindu widow and children claim a share in his assests. Are they entitled to any share? (DJS-1990)
3. How are heirs are classified under Hanafi Law and Shia Law in case of intestate succession? (UPPCS (J)-1985)
4. Discuss the position of residuaries in Hanafi and Shia Laws of inheritance. (UPPCS (J)-1987)