the affairs of the family. K without consulting his brother R, who is major, alienates a portion of the family property to purchase new property.

(b) The Hindu joint family has a plot in Trans-Yamuna area. The Government issues a notification to acquire that land (plot) for constructing a hospital for poor. Karta sells the plot to an industrialist at very high rates and deposits the money in a Bank.

Q. 4. X along with his two adult brothers Y and Z and one adult son S constitute a Mitakshara coparcenery. The family is settled in Delhi. Determine the validity of the following transactions:

(a) The family owns a valuable piece of land. An outsider approaches X and makes lucrative offer of Rs. 90 lacs to purchase the same. X without taking consent of other coparceners sells away the land.

(b) The family owns shares in a reputed multinational company. X sells the shares for the second marriage of his brother Y, while his first wife is already alive.

PART B

LAW OF PARTITION AND SUCCESSION

CHAPTER 5

PARTITION OF HINDU JOINT FAMILY PROPERTY

IMPORTANT POINTS/ISSUES

(1) **Meaning, Effect and Essence of Partition.**

: Severance of joint status (De jure Partition) and Partition by metes and bounds (De facto Partition)

(2) Evidence of Partition; Rules regarding Burden of Proof and Presumptions.

Case: 1982: SC: Kollomal (HUF) v. CIT.

(3) **Subject-matter of Partition.**

What Property is divisible and non-divisible on Partition?

Case: 2002: SC: M.L. Subbarayya Setty v. Nagappa Setty

Property available for partition after deductions and provisions.

(4) **Essentials for effecting severance of joint status (Partition).**

Legal Issue: Whether a member of a Hindu joint family becomes separated from the other members of the family by mere declaration of his unequivocal intention to divide from the family **without bringing the same to the knowledge** of the other members of the family?

Case: 1964: SC: Raghavamma v. Chenchamma

Legal Issue: What does amount to **"sufficient communication"** of intention to separate? Is it necessary that there should be a formal despatch to or receipt by other members of the family of the communication announcing the intention to divide on the part of one member of the joint family?

Case: 1968: SC: Puttrangamma v. Rangamma.

(5) **Various modes of effecting Partition.**
  (i) Partition by Will under Section 30, HSA.
  (ii) Partition by Death under Section 6, HSA.

(6) **Right to demand Partition.**

Be careful about the following four persons:
  (i) Adopted son.
  (ii) Son born of a void or voidable marriage.
  (iii) Illegitimate son.
  (iv) Purchaser from a coparcener (Alienee).

Legal Issue: Whether the rights of **an adopted son** are in all respect identical with that of a natural-born son? Whether the principle of relation back is an absolute principle or has it certain limitations? Whether the adopted son could divest the property vested in others prior to his adoption?

Case: 2003: SC: Namdev Ghadge v. Chandrakant Ghadge.

(7) **Minor's Suit for Partition.**

Legal Issue: Whether on the death of the minor plaintiff the suit for partition instituted on his behalf could be continued by his legal representative or should the suit be abated? What would be the effective date of severance of joint status of minor coparcener in case the suit for partition is held to be for the benefit of minor's interest?

Case: 1958: SC: Pedasubhayya v. Akkamma

(8) **Allotment of shares to female members.**

: Category of the members of the joint family who have no right to partition but, if partition takes place, they are entitled to share.

(9) **Three steps to ameliorate the conditions of woman.**

(10) **Rules relating to division of property.**

(11) **Reopening of Partition.**

(12) **Reunion**

MEANING, EFFECT AND ESSENCE OF PARTITION

Partition is an incident of Hindu joint family whereby joint family status among the coparceners comes to an end. On Partition the joint family ceases to be joint and nuclear families or different new joint families come into existence. **There can be no Partition unless there are at least two coparceners** because then only there would be a state of jointness amongst coparceners which shall cease by Partition. This implies that unless and until a coparcenary within a family exist, a partition cannot be effected.

The concept of coparcenary is intrinsically related to Hindu joint family property. Each coparcener has an antecedent title to the said property and all the coparceners as one body own the whole property. Their individual share are not defined. It is not possible to predicate that a particular coparceners has so much share in the coparcenary property. Thus the ownership of that property is one unit. Partition really means that joint ownership is transformed into separate titles of the individual coparceners in resepct of several items of properties allotted to them respectively. **Partition is a process whereby joint tenants become tenants-in-common** as there is severance of ownership of coparcenary property by coparceners. Thus, Partition has also been defined as "the crystalization of the fluctuating interest of a coparcenary into a specific share in the joint family estate."

Merely Division of Property is not sufficient: Under the Dayabhaga School, Partition means divisions of Property in accordance with the specific shares of the coparceners. But under the mitakshara school Partition does not merely mean division of property into specific shares, it basically means severance of status or interest. Existence of coparcenery is essential but existence of joint property is not essential for demanding Partition in Mitakshara School. Where there is no joint property to divide, there can be partition by the simple declaration for a Partition merely indicates state of mind. **It is a law by which the joint family severs and the coparcenary comes to an end.** Thus, according to Mitakshara law Partition has two distinct meanings. **Firstly**, it means "the severance of the joint status with the legal consequences resulting therefrom". **Secondly**, it means "the adjustment into specific shares the diverse rights of different members according to the whole of family property". Partition does not mean simply division of property into specific shares. All that is necessary to constitute a Partition is **a definite and unequivocal indication of intention** by a coparcener to separate himself from the family.

Effect of Partition

On Partition the separated member loses the membership of the old coparcenary. He is freed from the rights and responsibilities of a member thereof. The divided coparceners become tenants-in-common. There is no fiduciary relation between them. A tenant-in-common cannot impose upon

another tenant-in-common the obligation of a fiduciary nature by leaving the management in his hands. **On partition the shares of the coparceners get defined and stop fluctuating further due to births and deaths in the family.** Property acquired by a coparcener after Partition is treated as his separate property and devolves by succession. The share allotted to a divided coparcener will not devolve by survivorship upon the coparceners from whom he has got separated. On partition, a divided member can make a gift or a will or alienate his property for any value like his separate property. On death the share allotted to a coparcener passes to his *heirs*. However, it must be noted that the share, which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issues. **They take an interest in it by birth, whether they are in existence at the time of Partition or are born subsequently. Such share, however, is ancestral property only as regards his male issues.** As regards other relations, it is separate, and if the coparcener dies without leaving a male issue, it passes to his heirs by succession.

Severance of Joint Status (De jure Partition) and Partition by metes and bounds (De facto Partition)[1]

Coparcenary is a creature of Hindu law. The concept involves "Community of interest, Unity of possession and Common enjoyment". Each coparcener's right extends to the whole joint family property; though each one of them has interest in the whole family property, he has no definite share therein. Where the community of interest is broken or divided and **converted into a fixed share** and there is no scope of the application of the doctrine of survivorship, this type of partition **in strict sense** is called severance of joint status or de jure partition. This can be done either at the instance of one of the coparcener (unilaterally) or by a mutual agreement among all the coparceners.

Unity of possession can be maintained even after a severance of status. The shares might become fixed, but no coparcener can lay his hands on a specific item of property claiming it as falling into his exclusive share, as which part of the property would go to which coparcener, would be clear only when unity of possession is broken and is replaced by **exclusive possession**. Where the Unity of Possession is broken or divided by an actual physical division of property, this type of Partition in **broader sense**

Q. 1. What do you understand by the term "Severance of Status" and how does it differ from "Partition by metes and bound"?[D.U., LL.B. 2006]

Distinguish between a de jure and a de facto Partition.
[D.U., LL.B., 2011]

is called partition by metes and bounds or de facto partition. This is essentially a **multilateral** action and may be arrived at by agreement, by arbitration or by suit.

Essence of Partition (Severance of Joint Status): Partition should not be confused with the de facto division of property and allotment of shares. Partition by metes and bounds is not a must for completing the process of Partition. Whether the property is divided physically or not, affects only the mode of its enjoyment and management and not the nature of its tenure. If the property remains joint even after the division of the title, the property is held as tenancy-in-common and not as joint tenancy, without the incidents of fluctuation of interest and application of the doctrine of survivorship. A Partition, strictly speaking is complete the moment the Community of interest is severed or severance in joint status takes place.

EVIDENCE OF PARTITION AND BURDEN OF PROOF

It may happen that even after Partition has once taken place, demand may be made for Partition alleging that no Partition has taken place. In such a case, the possible situations can be as follows:

(1) Admission of severance made **in legal proceedings**, if not explained can be very cogent evidence of Partition. The statements of a particular person that he is separated from the family of which he was a coparcener is a relevant statement.

(2) Permanency is an essential feature, though not the sole test, of an arrangement of outright Partition. The clearest case is where the members of a joint family **divide the joint property by metes and bounds**, and each member is in separate possession and enjoyment of the share allotted to him on partition.

(3) The coparceners with a view of Partition executed a writing, whereby they agreed to hold the joint property in defined shares as separate owners. Such writing operates in law as partition, though the property is not physically divided. This is a case where the agreement declares on the face of it, **the intention of the parties to hold the joint property as separate owners**, and no evidence is admissible of the subsequent acts of the Parties to control or alter the effects of the document.

(4) The fourth case is where the agreement was in writing but the document did not declare on the face of it, the intention of the parties to hold the joint property as separate owners. In such a case, when the question arises as to **whether the document operates as a partition**, the intention of the parties is to be inferred

from: **(a)** the document; and from **(b)** their subsequent acts. Other facts and circumstances like separateness, separate residence, separate cultivation, separate transaction of properties, trustworthy oral evidence etc. coupled with document would prove Partition.

(5) The fifth case is that where there was no writing at all. In such a case, when the question arises as to whether there has been a Partition or not, the intention of the Parties as to separation can only be inferred from their acts. **The question is one of fact** to be decided with due regard to **the Cumulative effect** of all the facts and circumstances, and primarily the burden of showing that there has been a partition is on the person setting it up.

Is there any presumption of law on whether Partition is total or part? In **Kollomal (HUF) v. CIT**, (1982) 1 SCC 447, the Supreme Court held that it is a presumption of law that Partition is total in respect of both, Parties and Properties. However, the presumption is rebuttable and it is open to a party to plead and prove that it was part as to either the parties or the properties or both. Thus in both ways it becomes a question of fact. The decision will depend upon a survey of all the circumstances: whether all the members parted from one another or some of the members separated from the coparcenary.

SUBJECT MATTER OF PARTITION

The only property that can be divided on Partition is coparcenary property. Separate property of a member or members of the family cannot be the subject of partition amongst all the coparceners in the family. In a suit for partition were there is no evidence to show that there was an **adequate nucleus** of joint family with the Karta of family out of which lands in question were purchased and also there is no evidence regarding income of Karta which had yielded the nucleus but defendant showing by cogent evidence that said properties were purchased by him from his own income, those properties being self-acquired properties of defendant cannot be partitioned.

Principle of Partition: If Property can be Partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made. If, on the contrary, no partition can be made without destroying the intrinsic value, then a money compensation should be given in stead of the share which would fall.

In **M.L. Subbarayya Setty v. Nagappa Setty** (AIR 2002 SC 2066), the Supreme Court observed that if the joint family properties consist of movable and immovable properties then each party must necessarily be

given a share in all movable and immovable properties. It can happen that some coparceners may not get any share in immovable property. **No hard and fast rule can be laid**. It depends upon the nature of immovable property and number of such properties as also number of members to whom it is required to be divided. Properties of a larger value may go to one member and of lesser value to another. What is necessary is the adjustment of the value by providing for payment by one who gets property of higher value.

Properties not subject to Partition[2]

All kinds of joint family property are not divisible by metes and bounds. Certain Properties may be impartible or indivisible. The rules in this regard may be noted as follows:

(1) Impartible estates: Property which descends to one member of the family to the exclusion of other members either because of the application of the rule of primogeniture or by a custom or by terms of grant or under any provision of law, *e.g.*, a raj or principality.

(2) Property Indivisible by its nature: Certain properties are indivisible by their essential nature, *e.g.*, animals, furnitures, wells, passages or ways, courtyards, stair cases, utensils, ornaments of a coparcener's wife etc. These things cannot be divided without destroying their intrinsic value. These things may either be sold and its value is distributed or may be distributed by agreement against adjustment of their corresponding values. What is necessary to take care is that there is equalization of shares in value by the payment of owelty, **T.S. Swaminatha v. Official Receiver**, (AIR 1957 SC 577).

(3) Dwelling House: The smiritikars were of the view that dwelling house should not be partitioned. But the modern law does not consider the rule as sacrosanct. A Partition of a dwelling house will be decreed if insisted on but the Court will, if possible, try to effect such an arrangement as will leave it in the hands of one or more of the coparceners. If no agreement is agreeable which is equitable, the dwelling house may be sold and sale proceeds divided among the coparceners.

(4) Family Shrines, Temples and Idols: These are the species which can neither be divided nor sold. The possession may be given to the senior coparcener (or to a junior member, if he happens to be the most religious and suitable among all others) with the liberty to others for the purpose of worship at all reasonable times.

Q. 2. Name some properties which are incapable of division.
[U.P., (J), 1992]

(5) **Legislative prohibition:** Legislature may also render certain property indivisible for some social cause, for example, prevention of fragmentation of holdings. In such a case the Court should not just see whether coparcener demanding partition has got a right to it. It should first decide whether partition is permitted or prohibited by legislature.

Property available for Partition after deductions and Provisions

Where the coparceners are allowed to specify their shares as its owners, the members of the joint family who do not own coparcenary property, but have a right of maintenance out of the joint family funds, a right of residence in the joint family house and a right to enjoy the property till it was common, in their own right, will be left without any means to support themselves. **The rule, therefore, is that** before the coparceners actually effect a division of property among themselves, provision has to be made to meet certain expenses or liabilities out of the total joint family property. The remaining property is divided into shares. These expenses are as follows:

(1) **Joint family debts:** Provision must first be made for the repayment of joint family debts (which are payable out of joint family property) and personal debts of the father not tainted with immorality (in case joint family consists of the father and son).

(2) **Maintenance of dependent female members and disqualified Heirs:** These members are (a) mother, grand-mother etc.; (b) widowed daughters of deceased coparceners; (c) unmarried sisters, till they are married; (d) disqualified coparceners and their immediate dependants.

(3) **Marriage expenses:** When partition is between a father and his son, provision is to be made for the expenses for the marriage of an unmarried daughter of the father. When Partition is between brothers, they have to make provision for the marriage of their unmarried sister. The rule in the Mitakshara that the unmarried sisters are entitled to a share of the inheritance after the death of their father has been cut down by efflux of time to a provision for marriage expenses and maintenance till marriage. **No provision has to be made for the marriage of daughters of coparceners, since the marriage of such daughters is the responsibility of their respective fathers.** However, in case a coparcener dies before partition, leaving behind an unmarried daughter and no male issue, then a provision should also be made for her marriage. A coparcener who is unmarried at the date of the severance in interest is not entitled to have a provision made for his marriage expenses. He has his share to look to and in the case of an unmarried son or grandson, it is a liability of his branch.

(4) **Performance of ceremonies:** If a Partition takes place among the brothers, a provision has to be made for the funeral expenses of their mother. Similarly, provision is to be made for the performance of other essential ceremonies, such as upanayana (sacred thread) ceremony.

After the above provision has been made, an account must be taken of the joint family property in the hands of the manager and other members of the joint family. It would also be noted that no charge will be made against a coparcener, because a large share of the family income was spent on his family in consequence of his having a large family to support. The Supreme Court in **K.M. Narayanan v. Ranganathan**, AIR 1976 SC 1715, has held that while dividing the family estate, it is necessary for the joint family to take into account of both the assets and the debts for which the undivided estate is liable and to make provision for discharge of the debts. Where property is given to a member in lieu of his personal undertaking to discharge the debts of joint family the court is to recognise and sustain it. By the aforesaid arrangement other members were absolved of the responsibility to discharge family debts.

EFFECTING OF PARTITION

(Severance of Joint Status by Unilateral Declaration)[3]

Effecting of Partition basically implies nothing but effecting of severance of joint status of a coparcener from a Hindu joint family. It is established law that actual physical division or Partition by metes and bounds is **not an essential ingredient** for the purpose of effecting severance of status. That is really a **formality** in the process of Partition. Severance in joint status with all legal consequences resulting therefrom, is quite distinct from de facto division into specific shares of the property held jointly. The former is a matter of individual decision, **and is effected by unequivocal expression of a desire on the part of any one member to severe himself from the joint family** and to enjoy his hitherto undefined and unspecified share separately from the others, without being subject to the obligations which arise from the joint status. The latter is the natural resultant from his decision, the physical division and separation of his share, which may be arrived at, either by private agreement of the parties or, on failure of that, by intervention of the court.

Essentials for effecting severance of joint status (Partition)

The Mitakshara school entitled every coparcener to ask for his partition from the joint family at any time. He is not required to take permission of

Q. 3. Discuss the modalities of partition of the joint family property. [D.U., LL.B., 2010]

the other coparceners. It is of no importance that the other coparceners wish to remain united with him. A demand, in order to bring a severance of status, must comprise three essentials:

(1) formation of an intention to separate from the joint family;
(2) an unequivocal, unilateral and definite declaration of his intention to separate;
(3) sufficient communication of this intention to the karta and if he is unavailable to other coparceners.

Formation of Intention: The coparcener must have formed an intention as to partition. He should not be in any doubt as regards his intention for the partition of the property. The thinking must be clear that he does not believe in community of interest. There should be no ambiguity with regard to his thinking for Partition.

Declaration of Intention: Once a definite intention is formed, it must be followed by a definite, unequivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severality. Severance does indeed result by the mere declaration because severance is a particular state of mind and the declaration is merely a manifestation of that mental state. The declaration need not be accompanied with an explanation or reason or justification. No one (even court) is empowered to go into the reasons which necessitated the coparcener to take such a step.

Communication of Intention: It is implicit in the concept of "declaration", that it should be brought to the knowledge of the persons affected thereby. An uncommunicated expression/declaration of intention, at best, can amount to a desire to partition, it cannot amount to severance. What is essential is that the unequivocal communication of intention must be the conscious and informed act of the coparcener.

Legal Propositions regarding Communication of Intention and the resultant effect

The Supreme Court (speaking through **Justice Subba Rao**) has laid down certain propositions in **Raghavamma v. Chenchamma**, AIR 1964 SC 136 regarding the declaration by a coparcener of his intention to effect severance of status i.e. Partition. The Propositions are:

(1) Communication is a prerequisite to effect Partition: The member who seeks his separation from the other members must make his intention known to the other members of the family from whom he wants to separate. A declaration uncommunicated is no better than a mere formation or harbouring of an intention to separate. It is ineffective.

(2) Means of Communication: The process of manifestation of one's intention varies with the facts and circumstances of each case. In **Puttrangamma v. Ranganna** (AIR 1968 SC 1018), **Justice Ramaswami** developed this proposition thus: "it is not necessary that there should be a formal despatch to or receipt by other members of the family of the communication announcing the intention to divide on the part of one member of the joint family. The proof of such a dispatch or receipt of the communication is not essential, nor its absence fatal to the severance of the status. It is, of course, necessary that the declaration should reach the person or persons affected by some process appropriate to the given situation and circumstances of the Partition case."

(3) To whom should the Intention to sever be Communicated?: In this case, the Supreme Court did not categorically answer the question as to who should be given notice of the intention to separate. Is it enough to notify the karta alone? Or is it necessary that all the major coparceners are informed? Or is it necessary that a substantial body of them or every one of them is given notice? There were only two coparceners involved in **Raghavamma case**. Therefore the Court avoid dealing with this question. **Justice Subba Rao**, however, indicated that communication to karta alone will not be sufficient. The intention to sever must be communicated to all interested parties. If a notice is given to a coparcener who refuses to accept, the communication is enough and effective. On the question how notice is to be served on minor members, the Andhra Pradesh High Court said that notice to the karta is notice to the minor. It is **submitted** that notice to the karta is both necessary and sufficient. It is enough because the karta is the representative of the whole coparcenary. A notice to him will be taken to be a notice to all the coparceners (**Modern Hindu Law**, Nagpal; 2008 edn, p. 744).

(4) Effective date of the severance of joint status: The difficult question in this connection is when should the communication of intention to sever be deemed effective, from the date on which the communication is put into transmission or from the date on which it reaches the coparceners? If it is the latter date, is it the date when one of the coparceners first acquired knowledge or the date when the last of them acquired the said knowledge? **Justice Subba Rao** came to the conclusion that when the intention to separate is brought to the knowledge of all the coparceners, partition takes place with effect from the date when the intention is framed and expressed and not from the different dates of the knowledge of the all

the coparceners. He evolved this proposition on the analogy of the **doctrine of relation back** known to the old Hindu law of adoption.

(5) **Limit on the application of the doctrine:** The court put a reasonable and equitable limit on the application of the doctrine of relation back. The doctrine does not affect the rights which become vested between these two dates. If the doctrine is invoked without any limitation thereon, vested rights will be affected and settled titles may be disturbed. **Principles of equity requires and common sense demands that a limitation which avoids the confusion of titles must be placed on it.** What would be more equitable and reasonable than to suggest that the doctrine should not affect vested rights? The principle of retroactivity, unless a legislative intention is clearly to the contrary, saved vested rights. As the doctrine of relation back involves retroactivity by parity of reasoning, it cannot affect vested rights. For example, if the karta of the family has alienated the family property in the meantime for a legal necessity the transaction will bind the separating coparcener also.

(6) **Communication to be completed during the lifetime of the coparcener:** For the application of the doctrine of relation back, it is necessary that the communication of intention is completed during the lifetime of the coparcener. Where the communication is sent by the coparcener, but before it reaches the karta, he dies, his interest will be taken by the surviving coparceners and despite the karta receiving the communication later, no severance of status would take place. **The moment a coparcener dies, he loses his interest in the coparcenary property, the communication of his intention to separate after his death, is meaningless.** Therefore, where a coparcener communicates his intention to separate to the karta, through a letter, and executes a will of his share in favour of his friend, the Will became void if he dies before its receipts by the karta.

VARIOUS MODES OF PARTITION[4]

Partition is the division of status. The severance in the joint status could be brought about in more ways than one. These are as follows:

(1) Partition by father during his lifetime;
(2) Partition by individual coparcener through unilateral declaration;
(3) Partition by Agreement;
(4) Partition by Conduct;

Q. 4. What are the various modalities of demanding/effecting partition? **[DU, LL.B., 2010]**

(5) Partition by Suits;
(6) Partition by Notice;
(7) Partition by Mediation or Arbitration;
(8) Partition by Conversion;
(9) Partition by Marriage under Special Marriage Act;
(10) Partition by Adoption into another Family;
(11) Partition by Renunciation/Relinquishment of Share;
(12) Partition by Will;
(13) Partition by Death of a Coparcener;
(14) Partition by the Abolition of Hindu joint family.

Partition by father during his lifetime: If the coparcenary consists of the father and his sons only, he can bring about its division on his own. He can separate his sons from himself **and also** separate the sons from one another. The consent of the sons is not required for this purpose. This power of the father is a part of the patria potestas (Paternal power) that was recognised by Hindu law.

Partition by Individual Coparcener through unilateral declaration: The unilateral declaration of a coparcener to enjoy his interest in severalty has a force sufficient to break his tie with his coparcenary. Even when there is a total absence of common property, a partition is effected by the mere declaration 'I am separate from thee'.

Partition by Agreement: A partition may be effected between the coparceners by an agreement. Partition can not be recognised by the court if the agreement of partition is not acted upon, **Kalwa Devadattam v. UOI** (AIR 1964 SC 880). If the Partition is in fact acted upon. it will be upheld even if its object was to defeat the creditors. The Agreement of Partition need not be in writing. **It may be effected orally.** A written agreement need not be registered if it merely records what had happened. But if the properties are divided by the agreement, registration is compulsory.

Partition by Conduct: From what conduct severance of status may be deduced, will vary from case to case. There can be numerous circumstances from which such an inference can be drawn. When the members of the family actually divide the family property by metes and bounds and each member is in separate possession and enjoyment of the share allotted to him, a Partition is said to take place by conduct.

Partition by Suits: Filing of suit is the most unequivocal expression of one's intention to separate himself and consequently severance of status

takes place **from the date the suit is instituted**. A decree may be necessary for working out the definite shares but the status of the plaintiff as separate in estate is brought about on his assertion of his right to separate whether he obtains a consequential judgment or not. A minor coparcener as well as a major one can go to court for this purpose. The rules in both the cases differ because the law has a soft corner for a minor.

Partition by notice: A Partition merely requires an intention to separate; it can therefore be effected even by a notice, whether followed by a suit or not.

Partition by Mediation or Arbitration: An agreement between the members of a joint family whereby they appoint an arbitrator to arbitrate and divide the property operates as a partition from the date thereof. The mere fact that no award has been made is no evidence of a renunciation of the intention to separate.

Partition by Conversion: A Hindu who renounces the Hindu religion and embraces a non-Hindu religion is separated from his joint family by the very act of conversion. He loses the membership of the coparcenary but his conversion does not affect the unity of the remaining coparceners. Reconversion of the convert to Hinduism does not ipso facto bring about his coparcenary relationship in the absence of subsequent act pointing to a re-union.

Partition by Special Marriage: Marriage of a Hindu under the Special Marriage Act causes severance between him and the other members of the family. It is submitted that marriage under SMA should not be visited with the automatic division of the person from his joint family.

Partition by Adoption into another Family: When a child born in the Mitakshara family is given in adoption into another family, his undivided interest in the coparcenary property continues to vest in him even after adoption. An implication of this rule is that as the adoption of a child brings about his transplantation to the adoptive family from the family of birth, so does it work out the Partition of his interest in the coparcenary property of his birth.

Partition by Renunciation/Relinquishment of Share: Separation of a coparcener may be effected by his renunciation of his interest in the coparcenary. Such renunciation must be in favour of all the other coparceners and it must relate to the whole joint esate. However, it does not affect the status of the remaining members.

Partition by Will: The issue is whether the intention to separate expressed by a coparcener in his will bring about Partition. The position regarding testamentary disposition by a coparcener of his interest in the joint family property stands amended by the HSA, 1956. **Before that Act**, the undivided interest of a coparcener in the joint property devolved on his death by the rule of survivorship on his surviving coparceners. The Will of a person operates from the date of his death. This militates against the rule of survivorship. No sooner a coparcener dies than survivorship operates. No scope for the operation of the Will was left. **Therefore, a coparcener could not make a valid or effective Will for his coparcenary interest.** He could not separate his interest by his will. Even the father or the karta could not bequeath the joint family property by Will. **Section 30 of the HSA 1956 has brought about a significant, if not a radical, amendment in this law.** Section 30 has now conferred the right upon a Mitakshara coparcener also to make a testamentary disposition of his interest in the joint family property. He can utilize this right for his separation also. Thus a coparcener can make a valid Will to the effect that his interest should be separated to be donated to a hospital or a particular person. A **sole surviving coparcener** can make a will of the whole of the joint family property. He is the exclusive owner of that property. If no other member enters the coparcenary before his death, the will is operative. But if any member enters the coparcenary before his death, the interest of the newcomer cannot be affected by his will.

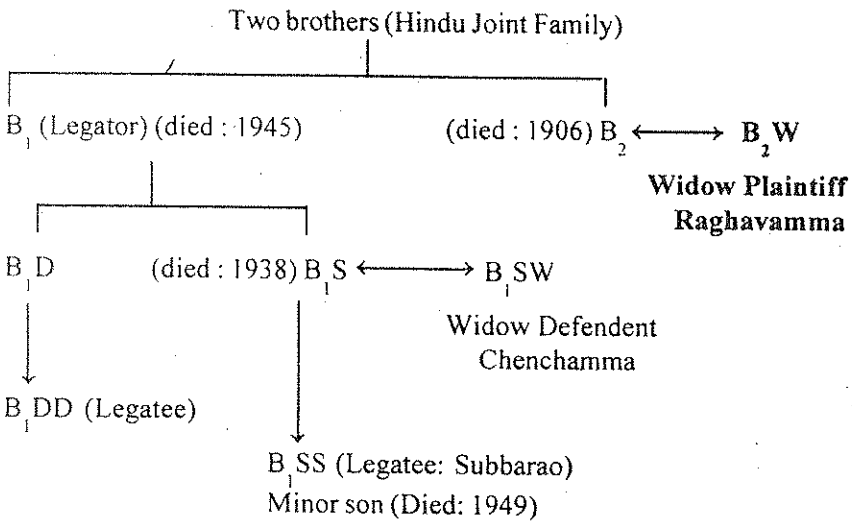
Partition by the death of a Coparcener: Before 2005 Amendment, it was provided by the original Section 6 of the HSA 1956 that on the death of a male member of the Mitakshara coparcenary, the devolution of his property was to take place by survivorship and by the operation of the proviso to that Section by succession. In the latter case for finding out the share of the deceased in the coparcenary property it is presumed that Partition of the joint family property has taken place immediately before his death. It is not material here to see whether or not the deceased coparcener had a right to claim partition. **This is a compulsive notional Partition.** It could only be partial because only the interest of the deceased coparcener is to be separated. The Hindu Succession (Amendment) Act, 2005 has **abolished devolution by survivorship** on the death of a coparcener. His interest is to devolve by testamentary or intestate succession. This interest would be carved out from the coparcenary property by assuming that Partition of the joint family property took place immediately before his death. Thus an incidence of death of a coparcener in a Mitakshara

coparcenery effects its notional partition under the pressure of the amendment of the HS Act in 2005.

LEADING CASE LAWS

Raghavamma v. Chenchamma; (1964) 2 SCR 933

Facts



A Hindu joint family consists of two brothers B_1 and B_2. B_2 predeceased B_1 leaving behind his widow B_2W (Raghavamma/Plaintiff/Appellant). The only son of B_1, B_1S also predeceased B_1 leaving behind his widow B_1SW (Chenchamma/defendant/respondent) and his minor son B_1SS (Subbarao). So ultimately the coparcenary consisted of B_1 and B_1SS. In 1945, B_1 died and therefore B_1SS became the sole surviving coparcener. B_1SS died in 1949 without attaining majority.

Plaintiff's stand: Four months before his death in 1945, B_1 executed a will of his undivided properties, dividing it into two equal parts, one part in favour of his grandson (B_1SS) and the other part to his granddaughter (B_1DD). Since both of them were minors, he provided in the will that till their minority the management of these properties would be in the hands of the plaintiff (B_2W: Raghavamma), who is the testator's brother's widow, and if any of these beneficiaries under the will died before attaining majority, his/her share will vest in Plaintiff absolutely. **The point to be noticed is**

that testator's own dauther-in-law (B_1SW: Chenchamma), who is the mother of B_1SS i.e. Legatee, was excluded from management as well as from inheritance. Upon death of B_1 (Legator), Plaintiff, who was to manage the properties as per the direction under the Will, allowed defendant to take possession and manage the properties on behalf of her minor son and B_1DD. B_1SS however, died four years later and as he died without attaining majority, his half share in the property was claimed by the plaintiff as directed in the Will.

Defendant's stand: Defendant contended that B_1SS had died as a sole surviving coparcenor and his share on his death will go by inheritance to her as she was his mother, and not as per the directions of the will. Her main argument was that B_1 was an undivided coparcener with his grandson (B_1SS), when he executed this will, and as an undivided coparcener he did not have the right to execute a will of his undivided share in the Mitakshara coparcenary. Therefore, the will was invalid and could not be given any effect.

Plaintiff's counsel argument: Partition requires a unilateral, unequivocal and clear declaration by a coparcener of his intention to bring about a severance in status, and in this case, the recitals in the will disclosed a clear and unambiguous declaration of the intention of B_1 to divide, and that in itself, should constitute a severance in the status, enabling him to execute a will. The fact that the said manifestation of intention was not communicated before his death to other coparcener or his guardian could not affect his status as divided member. The knowledge dated back to the date when the will was executed, and, therefore, when B_1 died he must be deemed to have died separated from the family with the result that the will would operate on his separate interest.

Issues

(1) Whether the testator in the present case, became separated from the joint family before his death merely because of the legal position that a will speaks only from the date of death of the testator?

(2) Whether a member of a Hindu joint family becomes separated from the other members of the family **by mere declaration** of his unequivocal intention to divide from the family **without bringing the same to the knowledge** of the other member of the family?

(3) Whether the knowledge of such a manifested intention on the part of the other affected members of the family is a necessary condition for constituting a division in status?

Supreme Court's Observations: The evolution of the doctrine of severance of joint status can be studied in two parts, namely,

(a) the declaration of the intention; and

(b) communication of it to others affected thereby.

As far as the **first part** is concerned the law is well settled, namely that a severance of joint status is a matter of individual discretion and that to bring about that state there should be an unequivocal and unambiguous declaration to that effect, even though no actual division takes place. **Severance does indeed result by the mere declaration** because severance is a particular state of mind and the declaration is merely a manifestation of this mental state.

As far as the **second part** is concerned, the Supreme Court observed that it is implicit in the concept of 'declaration', that it should be brought to the knowledge of the persons affected thereby. One cannot declare or manifest his mental state in a vacuum. **To declare is to make known, to assert to others. "Others" must necessarily be those affected by the said declaration.** It means the manifested intention must be "clearly intimated" to the other coparceners. If a coparcener did not communicate, during his life time, his intention to become divided to other coparceners, the mere declaration of his intention, though expressed or manifested, did not effect a severance in status. An uncommunicated declaration is no better than a mere formation or harbouring of an intention to separate. It becomes effective as a declaration only after its communication to the person or persons who would be affected thereby. Therefore, a member of a joint Hindu family seeking to separate himself from others will have to make known his intention to other members of the family from whom he seeks to separate.

Decision: Until and unless a clear and unequivocal declaration of intention to separate was made by the coparcener seeking Partition, law can not presume the factum of partition from the confused and ambiguous circumstances. Under the Hindu law presumption is always in favour of joint family. The burden to prove the partition lies on the plaintiff and this burden was not discharged. **Even if the "will" may be presumed to contain the intention of the executant to separate, partition cannot be effective unless such an intention is known to other members.** In

this case, it was not established that either the minor coparcener (Subbarao) or his guardian (mother-Chenchamma) were aware of the contents of the "Will" before the testator died. The plaintiff having failed to discharge the burden of proving the factum of partition, his entire case failed, and she could not claim possession of the properties since by survivorship the properties were devolved upon the minor sole surviving coparcener (Subbarao) and after his death, upon his guardian i.e. his mother (Chenchemma). Appeal dismissed.

Puttrangamma v. Ranganna; (1968) 3 SCR 119

Facts: The Plaintiff (Karta) and the defendants (Coparceners) were living together as member of Hindu joint family. The plaintiff had no male issue but only four daughters. In order to safeguard the interests of his daughters, since he became ill, he issues a notice to other coparceners declaring his unequivocal intention to separate from them. After the notices were registered at the post office certain well-wishers of the family intervened to bring about the settlement. **On their request he notified to the post office that he intended to withdraw the registered notices.** But as no agreement could be subsequently reached between the parties, the plaintiff instituted the present suit for Partition of his share in the joint family properties and for granting his separate possession of the same. The daughters of the Plaintiff are appellants in the Supreme Court.

Defendant's stand: There was no disruption of joint status at the time of death of the Plaintiff (Karta) either because of the notice or because of the institution of the suit on a later date. As far as the notice was concerned, there was no communication of any such notice to him and, in any case, the notices were withdrawn unconditionally from the post office. Similarly the institution of suit did not result in severance since Karta (Plaintiff) was 85 years of age and in a weak state of health and was not in a Position to understand the contents of the Plaint or to affix his thumb impression thereon as well as on the Vakalatnama.

Trail Court's decision: At the time of the issue of the notices and at the time of execution of the Plaint and the Vakalatnama, Karta/Plaintiff was in a sound state of mind and conscious of the consequences of the action he was taking. The notices were a clear and unequivocal declaration of the intention of the Karta to become divided in status **and there was sufficient communication of that intention** to other members of the family. The trail court accordingly granted a decree in favour of the Appellants/daughters.

High Court's decision: The joint family of which the deceased plaintiff was a member had not been disrupted by the issue of notice as there was no proof that the notice was communicated to other members of the family and, in any event, the notice has been withdrawn by the plaintiff and so **there was no severance of joint status from the date of the** notice. The suit could not be said to have been instituted by the Plaintiff as it was not proved that the Plaintiff executed the Plaint. The High Court reversed the decree of the trial court.

Legal Issues:

(1) whether Karta/Plaintiff died as a divided member of the joint family as alleged in the Plaint?

(2) Whether there was sufficient communication of notice? Whether there was sufficient knowledge of the notice to other members of the family?

(3) Whether the subsequent withdrawal of notice is sufficient to once again restore the joint family status?

Supreme Court's Observations

Nature and effect of communication: It is now a settled doctrine of Hindu law that a member of a Hindu 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 severalty. It is **not necessary** that there should be an agreement between all the coparceners for the disruption of the joint status. **It is immaterial in such a case whether other coparceners give their assent to the separation or not.** Once the decision have been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharers can question it nor can the court examine his conscience to find out whether his reasons for separation were well-founded or sufficient, the court has simply to give effect to his right to have his share allocated separately from the others.

Sufficiency of process of communication: The correct legal position is that in a case of a Hindu joint family subject to Mitakshara law, severance of status is effected by an unequivocal declaration on the part of one of the jointholders of his intention to hold the share separately from whom he seeks to separate. It is, however, necessary that the member of the Hindu joint family seeking to separate himself must make known his intention to other member of the family from whom he seeks to separate. **The process of communication may, however, vary in the circumstances of each particular case. It is not necessary that there should be a formal dispatch to or receipt by other members of the family of the communication announcing the intention to divide on the part of one member of the joint family.** The proof of such a dispatch or receipt of the communication is not essential, nor its absence fatal to the severance of the status. It is, of course, necessary that the declaration to be effective should reach the person or persons affected by some process appropriate to the given situation and circumstances of the particular case.

Effect of withdrawal of notice: It was contended that there could be no severance of the joint family after karta had decided to withdraw the notice by instructing the postal authorities not to forward the notices to other members of the joint family. There is no warrant for this argument. When once a communication of the intention is made which has resulted in the severance of the joint family status, **it was not thereafter open to karta/plaintiff to nullify its effect so as to restore the family to its original joint status.** If the intention of the karta had stood alone without giving rise to any legal effect, it could, of course, be withdrawn by karta, but having communicated the intention, the divided status of the Hindu joint family had already come into existence and the legal consequences had taken effect. **It was not, therefore, possible for karta to get back to the old position by mere revocation of the intention.** It is, of course, possible for the members of the family by a subsequent agreement to reunite, but the mere withdrawal of the unilateral declaration of the intention to separate which already had resulted in the division in status cannot amount to an agreement to reunite. Whether there was a subsequent agreement between the members to reunite is a question of fact to be proved as such.

Whether karta himself executed the plaint?: Whether the Karta affixed his thumb impression thereon after understanding its contents? There is no note of the necessary data in the medical case sheet to suggest that karta was not in conscious state on the date of execution of the plaint. It is necessary to notice that the plaint and the Vakalatnama are both counter-signed by a responsible advocate **and it is not likely that he would subscribe his signatures to these documents if they had been executed by a person who was unable to understand the contents thereof.** We are satisfied that the evidence adduced in the case had established that Karta validly executed the plaint and the Vakalatnama and that he was conscious and was in full possession of his mental faculties at the time of execution of these two documents.

Decision: The notices were produced in the court by the postal authorities during the hearing of the case. But there are enough evidences which proves that the family members had approached the karta to withdraw notices and promised the karta that the matter will be amicably settled. The circumstances also indicates that **though there was no formal communication of the notice**, defendants had **sufficient knowledge** of the contents of that notice and was fully aware of the clear and unequivocal intention of the karta to become separate from other members of the joint family. Applying the above narrated principles to the facts found in the present case, we are of the opinion that there was a definite, unilateral and unequivocal declaration of his intention to separate on the part of the karta and there was sufficient communication of this intention to other coparceners. The other members of the joint family had full knowledge of the intention of Karta. It follows therefore that there was a division of status of plaintiff/ karta from the Hindu joint family in law with effect from the date of notice. The appeal is accordingly allowed.

RIGHT TO DEMAND PARTITION[5]

(Persons who have a right to claim Partition and who are entitled to a share on Partition)

General Rule: Exclusivity of Coparceners: As a general rule, every coparcener is entitled to demand Partition of the coparcenary property at any time. However, every coparcener has not an unqualified and unbridled right to enforce Partition. The ambit of their right to effect Partition can be studied under the following heads:

(1) Special Power of Father.
(2) Son, grandson and great grandson.
(3) Son conceived before but born after Partition.
(4) Son conceived and born after Partition.
(5) Adopted son.
(6) Son born of a void or voidable marriage.
(7) Illegitimate son.
(8) Minor coparcener.
(9) Absent coparcener.
(10) Disqualified coparcener.

Q. 5. Discuss who can demand partition of the joint family property. [D.U., LL.B., 2010]

Exceptional Situations: Non-Coparceners: Apart from coparceners, a partition can be demanded in certain situations by non-coparceners without affecting the joint status of the family. The ambit of their right to effect Partition can be studied under the following heads:

(1) Alienee/Legatee/Donee.
(2) Females (Notional Partition).

Special Power of Father: A Hindu father under the Mitakshara law can effect a Partition between himself and his sons and not only that but also between the sons inter se. He can exercise this right despite the express dissent of the sons, **as their consent is not necessary**. The father can divide not only the title in the property, but also the corpus of the property by metes and bounds. This power of the father is a part of the patria potestas (Paternal Power) that was recognised by Hindu law.

This right of the father is not unbridled. There are **three restrictions** put on it. **First**, the father can divide his sons only during his lifetime but not by his Will after his death. The testamentary partition will be effective only when all the coparcener sons give their consent thereto. **Secondly**, a father cannot effect partial partition among his sons without their consent. **Thirdly**, the allotment of property must not be unequal and unfair. He should give to each son a share equal to his own and should not favour one son against the other. If a Partition which is not equal or fair is ratified by the sons, it will operate as a **family arrangement**. If the sons find that the Partition was not just and fair, it would thus be open to challenge. It can be reopened for the purpose of readjusting shares, **Gurusami v. Jayaraman**; AIR 1996 Mad 212. If a Partition were unfair or unjust or prejudicial to the interest of a minor, he might, on attaining his majority, set it aside by proper proceedings, **Bishundeo Narain v. Seogeni Rai**, AIR 1951 SC 280. It is **submitted** that it would be better if the right of the minor to set aside such a Partition immediately through his guardian is recognised. Of course, the court would see to it that this right is not frivolously used.

Son, Grandson and Great-grandson: All coparceners, who is major and of sound mind, irrespective of whether they are sons, grandsons or great-grandsons, can, at anytime, demand a Partition and specification of his share. A demand from the coparcener, with or without reasons, if manifested clearly, is sufficient and the Karta legally has no choice but to comply with this demand. **In Bombay**, however, this rule has been subject to the qualification laid down by the majority of a Full Bench of the Bombay High Court in **Apaji v. Ramchandra** (1892) 16 Bom. 29 (FB) that a son is not entitled to ask for a Partition in the lifetime of his father, without his

consent, when the father is not separated from his father, brothers or other collaterals. But where his father is separate from them, he can ask for Partition from his father. **In Punjab**, sons do not have a right by birth in the property held by the father, and thus here also a son has no power to enforce a Partition during his father's lifetime, **Hari Kishen v. Chandu Lal**, AIR 1918 Lah. 291 (FB).

Daughters: Earlier the four States of Andhra Pradesh, Tamil Nadu, Maharasthra and Karnataka by their legislatures and now the Parliament by the Hindu Succession (Amendment) Act, 2005 has admitted a daughter also to the Mitakshara Coparcenary like a son with all the rights that any coparcener has. Thus now in the whole of India wherever the Mitakshara law holds good, a daughter has acquired the right to claim Partition as if she were a son.

Son in Womb (Conceived before and born after Partition): A son who was in womb at the time of Partition and who is born alive thereafter, is entitled to a share as though he was in existence at the time of Partition. A child in womb is considered by Hindu law to be as good as in existence for this purpose. **A share has to be allotted to him also.** If it is not kept separate for him, he has the right to ask for the reopening of Partition so that his share may be allotted to him thereby. The time (or date) of conception is a question of fact. It has to be proved by evidence by the person who asserting it.

Son Conceived as well as born after Partition: The right of a son who is conceived and born after the Partition depend upon whether his father has taken a share for himself at the time of Partition from his sons. Where the father has taken no share for himself at the time of Partition, the son conceived as well as born after Partition can demand the reopening of the Partition and obtain his share. In such a case not only is that property which existed at the time of the earlier Partition subject to repartition **but also the acquisitions made thereafter**. Where the father has reserved a share to himself, a son who is begotten as well as born after Partition, is not entitled to have the partition reopened, but in lieu thereof he is entitled, after the father's death, to inherit not only the share allotted to the father on Partition, but the whole of the separate property of the father, whether acquired by him before or after Partition, to the entire exclusion of the separated sons, **Nawal Singh v. Bhagwan Singh**, (1882) 4 All 427. But now Section 8, HSA 1956 has given equal treatment to the divided and undivided sons in respect of his personal property.

Adopted Son: The HAMA, 1956 has abolished the inequality between the adopted son and the naturally born son on the issue of their share in the

coparcenary property on its partition. **They now get equal shares.** The rule before the HAMA was that at different places the adopted son took less than the naturally born legitimate son. Under the Classical law, an adopted son, in comparison to an after born natural son, takes in Bengal a one-third (1/3) share; in Bombay and Madras of one-fifth (1/5) share; and in Benares a one-fourth (1/4) of the share of the latter. Among Shudras in Madras and Bengal, an adopted son shares equally with the after-born natural son. The HAMA has enacted the rule prevailing among the Shudras as law for all the Hindus. It means that Parliament found the rule prevailing in Shudras more equitable than that obtaining among the regenerate castes.

Son born of a Void or Voidable Marriage: A child born of a void or voidable marriage, is a legitimate child of the parents and statutorily entitled to inherit their separate property, yet, at the same time, he cannot inherit from any other relation of the Parents. His rights are better than those of an illegitimate child, but inferior to those of a child born of a valid marriage. This statutory legitimacy is therefore, different from a Perfect legitimacy. Because of this statutory legitimacy, **he can be treated as a coparcener only for the properties held by the father.** He is not entitled to seek partition during the lifetime of the putative father. After the father's death, he can seek partition.

Illegitimate Son: The rights of an illegitimate son are the subject of special rules of Mitakshara. **Among the regenerates** or higher three classes, no illegitimate child of any kind is entitled to the membership of the coparcenary of his father. He cannot ask for Partition. But he is entitled to maintenance as long as he lives, in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance. **Among Shudras**, a distinction is made between a son by a concubine, who is a dasi and who is not a dasi. A dasi is a concubine, who is in the exclusive and continuous keeping of a Hindu. Dasiputra gets a favourable treatment among Shudras. On the father's death, if the father was separate from his collaterals, dasiputra becomes a coparcener with the legitimate sons of his father. He gets the right to ask for Partition from them. The extent of his share would be one-fourth of what other brother (legitimate sons of his father) would take. But on the contrary, if his father was not separate from his collaterals, he does not get entry into the coparcenary and, therefore, the question of his asking for Partition does not arise. Dasiputra gets no right by birth in the property of his putative father and, therefore, can not ask for partition during his father's lifetime.

Minor Coparcener: It is well established that existence of a minor coparcener is not a bar to Partition and a minor coparcener also has the right to claim Partition from the joint family just like an adult member. The only condition is that the suit is to be filed by his guardian or next friend. **But as regards the result of filing such a suit, there is a substantial difference.** A suit by a major coparcener itself brings about the Partition. But the minor's suit itself does not result in the Partition. The court passes the decree in its discretion if it is satisfied that the Partition is for the benefit of the minor. If the court finds it to be against his interest, it may dismiss the suit. This law is devised to protect minor's interest from unscrupulous transactions.

Absent Coparcener: If any coparcener is absent at the time of Partition, the proper course for the dividing coparceners is to obtain a declaration of the presumed death of the absentee before Partition and keep a share for him. Where this is not done, he is entitled, on his appearance, to demand the reopening of Partition and allotment of share to him.

Disqualified Coparcener: Persons who labour under any defect which disqualifies them from inheriting are equally disentitled to a share on Partition. Various grounds of disqualification were recognised by Hindu law. All these grounds with **the exception** of congenital lunacy or idiocy **have ceased to exist** as part of the Mitakshara law by virtue of the Hindu Inheritance (Removal of disabilities) Act, 1928. However, even these prohibitions are purely personal and do not extend to the legitimate issue of the disqualified person.

Purchaser from a Coparcener (Alienee):: If the sale of the joint property is **authorized**, the purchaser has the right to obtain possession of the property purchased, **Simokutty v. Panalal**, AIR 1980 Ori 169 (DB). It is also now well established that a purchaser of an undivided interest of a coparcener has got the right to asks for the Partition of the interest he purchased, **Kailash Pati Devi v. Bhubneshwari Devi**, (1985) 1 SCC 405. It is immaterial that the property was purchased in an auction sale by a court or under a private contract with a coparcener, [AIR 1980 Ori 169, (DB)]. But the purchaser of an interest in the joint family from a coparcener will take only his share and he cannot get more than that even if he purchased more. The share of the vendor-coparcener will be ascertained as it existed on the date of sale by him and not as on the date of his demanding partition. Where the vendor has purchased any specific property, he would be allotted that piece if it does not go against the interest of the other coparceners. It is held by the Supreme Court that where the property purchased from one

of the coparceners is the only joint family property available for being partitioned, there is no equities to be adjusted, (1985) 1 SCC 405.

Legatee: Now, the HSA 1956 (Section 30) has granted the right to a Mitakshara Coparcener to make a testamentary disposition of his undivided interest in the joint family property. This right was denied to him before the Act. **This newly conferred right necessarily implies** that the legatee who is given property by a coparcener of his undivided interest in the joint family property has got the right to seek the separation of the property given to him. If he has been given any particular piece of property under the Will, he may be allotted that property in agreement with the principles of equity when the interest of other coparceners are not injured thereby.

Donee: A Hindu coparcener has yet not got the right to make a gift of his interest in the coparcenary property. Hence, the donee is not entitled to obtain the proeprty donated to him.

Females: (*See*: Allotment of Shares to Female Members).

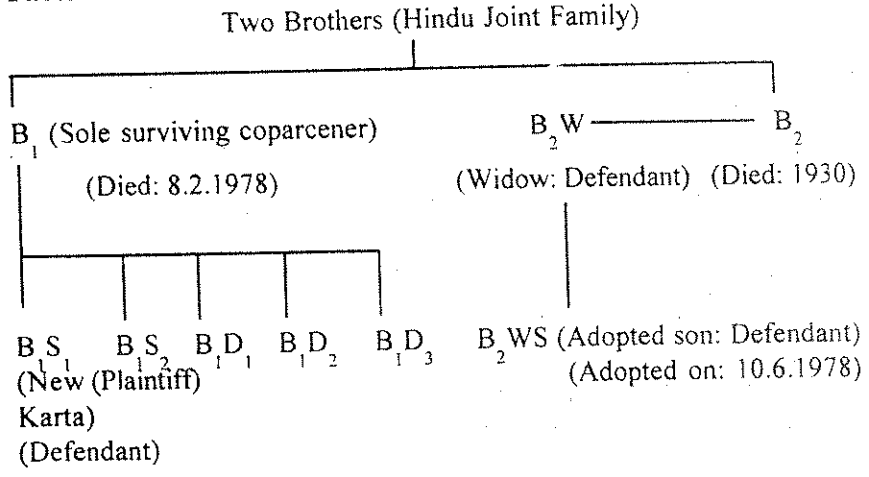
LEADING CASE LAWS

No divesting of estate vested in any person before the Adoption

Namdev Ghadge v. Chandrakant Ghadge; (2003) 4 SCC 71

[**Ratio:** On the death of a sole surviving coparcener, his interest in the joint family property devolves and vests in his heirs (sons and daughters) as per Section 6 HSA, 1956, and a son adopted by the widow of another pre-deceased coparcener will not divest the properties vested in the heirs of the sole surviving coparcener. The adoptee cannot claim a share in such vested property.]

Facts



A Hindu joint family consist of two brothers B_1 and B_2. B_2 predeceased B_1 in 1930 leaving behind his widow B_2W (defendant). Due to death of B_2, B_1 became the sole surviving coparcener and absolute owner of the suit property. The widow (B_2W) of the deceased coparcener had only the right of maintenance being a widow in the Hindu joint family. Maintenance used to be given to B_2W. B_1 died on 8.2.1978 leaving behind two sons and three daughters. On his death, opening of succession and devolving of properties of the joint family in his hands operated immediately and his share of the joint family properties stood vested in his heirs (sons and daughters) as per Section 6 of the H.S. Act, 1956. **About four months after the death of B_1, on 10.6.1978 B_2W (widow of predeceased coparcener) adopted a son, B_2WS (defendant).** Apart from that, B_1S_1 (New Karta) (defendant) in collusion with B_2W (widow) got the name of B_2W mutated in records showing half share in the suit property and got another half share mutated in his name in the suit properties being the karta of the family.

Plaintiff's (Appellant: B_1S_2) stand: Plaintiff filed complaint about the said mutation entry; however defendants obstructed their possession over the suit property. Hence the plaintiff filed a suit for Partition of his share in the suit property. It is further case of the plaintiff that as per Hindu Law, B_2W (widow) had no right over the suit property and had only right to maintenance. He further urged that **Section 12(c)** of the HAMA, 1956 precluded adopted son from claiming share in the already vested property before his adoption and this restriction is applicable to the interest vested in the sole surviving coparcener when the adoption was made **subsequent to the death** of the sole surviving coparcener.

Defendant's (Respondents: B_1S_1/Karta, Widow, Adopted son) stand: They contended that the adopted son is having a share in the suit property.

Legal Issues:

(1) What is the real ambit of effect of adoption which for certain purposes relates back to the death of the adoptive father? Is there any difference between adoption before and after collateral's death?

(2) Whether the rights of an adopted son are in all respect identical with that of a natural-born son? Whether the principle of relation back is an absolute principle or has it certain limitations?

(3) Whether the adoption of a son by the widow of a pre-deceased brother of a sole surviving coparcener, after the death of that sole surviving coparcener, makes any difference in determining the rights of the adopted son in relation to the family properties? Whether the said adopted son could divest the property, which devloved on the heirs of sole surviving coparcener and vested in them prior to his adoption?

Supreme Court's Observations

The Full Bench (Chagla, C.J., Gajendragadkar J. and Shah J.) of the Bombay High Court in **Jivaji Annaji v. Hanmant**, AIR 1950 Bom. 360, dealing with a case of adoption **after** the collateral's death and the principle of relation back held that "any adoption after the death of the collateral will not allow the adopted son to come in as an heir of the collateral. Adoption relates back to the death of the adopting father and an adopted son must be looked upon as if he was in existence at the date of the death of the adopting father. But it is not a correct proposition to say that the rights of the adopted son are in all respects identical with that of a natural-born son. **The principle of relation back is not an absolute principle but it has certain limitations.** For instance, one limitation is that any lawful alienations made by the last absolute owner would be binding on the adopted son. Similarly, an adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral."

In **1956**, the Parliament has enacted the Hindu Adoptions and Maintenance Act. This Act in express terms imposed certain restrictions on the rights of the adopted child. It is appropriate to extract **Section 12** of the Act, which reads:

"***12. Effect of Adoptions:*** *An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes* ***with effect from the date of the adoption*** *and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:*

Provided that:

(a) *the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;*

(b) *any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the*

obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) *the adopted child* ***shall not divest*** *any person of any estate which vested in him or her before the adoption."*

It is plain and clear that an adopted child shall be deemed to be the child of his or her adopted father or mother for all purposes with effect from the date of adoption as is evident from the main part of Section 12. Proviso (c) to Section 12 in clear terms states that the adopted child shall not divest any person of any estate, which vested in him or her before the adoption.

The Supreme Court speaking through **Justice Chinnappa Reddy** in **Vasant v. Dattu** (AIR 1987 SC 398), interpreting clause (c) of the Proviso to Section 12 of the Act, observed that "where the joint family properties has passed on to the hands of the remaining members of the coparcenary on the death of one of the coparceners no vesting of the property actually took place in the remaining coparceners while their share in the joint family properties might have increased on the death of one of the coparceners, which could decrease on the introduction of one more member into the family either by birth or by adoption. It did not involve any question of divesting any person of any estate vested in him and that the joint family continued to hold the estate, but, with more members than before with introduction of a member into the joint family by adoption; there was no fresh vesting or divesting of the estate in any way".

The Supreme Court in **Dharma Aglawe v. Pandurang Agalawe**, AIR 1988 SC 845 considered **the question** as to whether a person adopted by a Hindu widow after coming into force of the HAMA, 1956, can claim a share in the property which had devolved on a sole surviving coparcener on the death of the husband of the widow, who took him in adoption. **The Facts** in that case were that one Shamrao, who was governed by the Mitakshara Hindu law, died leaving behind him **two sons**, Dharma and Miragu. Miragu died issueless in the year 1928 leaving behind him his widow Champabai. The joint family properties passed on the hands of Dharma, the sole surviving coparcener on the death of Miragu. The widow had only right of maintenance in the joint family properties under the law, as it stood then. She took Pandurang in adoption on 9.8.1968, long after the Act came into force. Immediately thereafter the adopted son Pandurang and the widow filed a regular civil suit for Partition and separate possession of one-half share in the properties of

the joint family. **Before the adoption took place two items of the joint family properties had been sold in favour of others for consideration.** Dharma **resisted** the suit on the ground that the adopted son was not entitled to claim any share in the properties, which originally belonged to the joint family in view of clause(c) of the Proviso to Section 12 of the Act. The Supreme Court **observed** that: "The joint family property does not cease to be joint family property when it passes to the hands of a sole surviving coparcener. If a son is born to the sole surviving coparcener, the said properties become the joint family properties in his hands and in the hands of his son. The only difference between the right of a manager of a joint Hindu family over the joint family properties where there are two or more coparceners and the right of a sole surviving coparcener in respect of the joint family properties is that while the former can alienate the joint family properties only for legal necessity or for family benefit, the latter is entitled to dispose of the coparcenary property as if it were his separate property as long as he remains a sole surviving coparcener and he may sell or mortgage the coparcenary property even though there is no legal necessity or family benefit or may even make a gift of the coparcenary property. **If a son is subsequently born to or adopted by the** sole surviving coparcener or a new coparcener is inducted into the family on an adoption made by a widow of a deceased coparcener an alienation made by the sole surviving coparcener before the birth of a new coparcener or the induction of a coparcener by adoption into the family, whether by way of sale, mortgage or gift would however stand, for the coparcener **who is born or adopted after the alienation cannot object** to alienations made before he was begotten or adopted."

Finally, the Supreme Court in **Dharma case** concluded that the joint family property continued to remain in the hands of Dharma as joint family properties and that on his adoption Pandurang became a member of the coparcenary entitled to claim one-half share in them except the items, which had been sold by Dharma in the capacity of sole surviving coparcener.

Decision in the present case: The HAMA, 1956 has narrowed down the rights of an adopted child as compared with the rights of a child born posthumously. Under the classical law, if a child was adopted by a widow, he was treated as a natural-born child and, consequently, he could divest other members of the family of rights vested in them prior to his adoption. It is only with the limited object of avoiding any such consequence on the adoption of a child by a Hindu Widow that these provisions in clause (c) of the Proviso to Section 12, and Section 13 of

the Act were incorporated. In the **Dharma case**, the adoption of Pandurang took place during the lifetime of the Dharma and as such Pandurang became a member of the Coparcenary to claim the share. **In the Present case,** it is not disputed that adoption took place after the death of the sole surviving coparcener. Opening of succession and devolving of properties of the joint family in his hands operated immediately on his death and his share of the joint family properties stood vested in his heirs (sons and daughters) as per Section 6, HSA, 1956. In view of the Proviso (c) of Section 12, HAMA, 1956 the adopted son by virtue of his adoption four months after the death of the sole surviving coparcener could not divest the properties vested in the heirs of sole surviving coparcener so as to claim his share. Appeal is allowed accordingly.

MINOR'S SUIT FOR PARTITION[6]

If the minor has an undivided interest in the joint family property, the karta/manager of the joint family is the guardian of that interest of the minor in accordance with the rules of the Hindu law of joint family. But as far as right to demand Partition is concerned, his rights are precisely those of a major coparcener. It is absolutely true that no guardian can be appointed with reference to the coparcenary properties of a minor member in a joint family, because it is the karta that has under the law the right of management in respect of them and the right to represent the minor in transactions related to them. But that is only when the family is joint, so where there is disruption of the joint status, there can be no question of the right of the Karta of a joint family as such to act on behalf of the minor, and a Partition entered into on his behalf by a person other than his father or mother will be valid, provided that person acts in the interest of and for the benefit of the minor.

Minority is not a bar to Partition: It is now quite settled that a valid Partition may be made during minority of one or more coparceners. The existence of a minor coparcener is not a bar to Partition and a Partition effected in good faith and in bona fide manner keeping into account the interests of the minor is binding upon the minor also. But where he is given an unjust and unfair treatment, Partition can be reopened on his demand. The Supreme Court in **Ratnam v. Kuppuswami,** (1976) 1 SCC 214 held

Q. 6. Can a minor coparcener ask for partition of JFP ? If so, in what circumstances and how can he exercise this right? Discuss.

Or Short notes : Minor's right to ask for partition. **[D.U., LL.B., 2009]**
Or Under what situation can a minor coparcener demand a partition? Discuss, in light of relevant judicial precedents. **[D.U., LL.B., 2008]**

that it is the duty of a court in such a case to protect the interests of a minor and the onus of proof that the Partition was just and fair is on the party supporting the Partition.

Minor's suit for Partition: A minor coparcener also has the right to claim Partition from the joint family just like an adult coparcener by filing a suit through his guardian or next friend.

Decisive role of Court in Minor's suit: Unlike a suit filed by a major coparcener, the court has to play a decisive role in case of a minor's suit for Partition. The court is not bound to pass the decree for Partition unlike in the case of a major coparcener's suit. If the court finds that a Partition would not be beneficial to the interests of the minor, it may dismiss the suit. Therefore, **it cannot be said that** in all cases where a suit for Partition is instituted on behalf of a minor, the court will actually effect a Partition.

"In the interest of and for the benefit of the Minor": The Court passes the decree in its discretion if it is satisfied that the Partition is for the benefit of the minor. It requires that one of the following conditions is fulfilled:

(a) the interest of the minor is likely to be prejudiced if the property is left in the hands of the other coparceners;

(b) the property is not being properly managed;

(c) the rights of the minor are denied; or

(d) the manager fails to provide maintenance to the minor.

The **ultimate test** always is whether a partition in the circumstances is for the benefit of the minor. This law is devised to confer **double protection** upon a minor. **First,** he is given the right to asks for his partition (of course through a Guardian) even before he attains majority so that if the other coparcener(s) mismanage the joint property his interest may be saved from the risk involved in mismanagement. **Secondly,** if Partition is effected by the very institution of a suit by his guardian, an imprudent or mischievous guardian would get the power to bring about his partition which may not at all be in his interest. He has to act only for the good of the minor. This good must be evident to the satisfaction of the court.

Nature of Court's Duty/Power: The soverign as parens patriae has the power, and is indeed under a duty to protect the interests of minors, and that function has devolved on the courts. When the court decides that the suit has been instituted for the benefit of the minor and decrees partition, it does so not by virtue of any rule, special to Hindu law but in the exercise of a jurisdiction which is inherent in it and which extends over all minors.

Death of the minor before suit for Partition was decided: The Supreme Court has settled it in unmistakable terms that the death of a minor pending his suit for Partition does not abate the suit. It was explained in **Peda Subhayya v. Akkamma**, AIR 1958 SC 1042 that the maxim actio personalis moritur cum persona applies only when the action is one for damages due to a personal wrong. It may be contested by his legal representative on his behalf. The court will pass decree if it finds that the suit was instituted in the interest of the minor. If the court comes to the conclusion that Partition is not for the benefit of the minor, severance of status does not take place.

Date of Severance of Joint Status: On the question whether the institution of a suit for Partition by the next friend of a minor effects a severance in interest so as to make the minor coparcener divided in status from the other members, there is a conflict of decisions. The Supreme Court in **Pedasubhayya v. Akkamma**, AIR 1958 SC 1042 unanimously held that if a decree for Partition of a minor is passed, it is effective from the date of the institution of the suit and not from the date of the decree itself. Where a decree for Partition at the instance of a minor is made, it is an adjudication that Partition was properly claimed on the date of the suit and it must therefore **relate back to that date**. It implies that the joint family properties as they existed at the date of the filing of the suit would be made available for division. The karta will have to account for all the transactions entered into thereafter even if no charge of fraud or misappropriation is levelled against him.

It is **submitted** that the doctrine of relation back must be given a limited effect just as it has been given in **Raghavamma v. Chenchamma**, AIR 1964 SC 136 in the case of a gap between the date of communication of his intention to separate by a coparcener and the date of his knowledge to the other coparceners. The interest of a minor must be held bound by any lawful liability between the dates of the suit and of the decree. Otherwise it would become extremely difficult to transact any business by the other coparceners. (**Nagpal**, 2008 edn., p. 748)

LEADING CASE LAWS

Minor Coparcener's Claim to Partition through a next friend.

Pedasubhayya v. Akkamma; AIR 1958 SC 1042

[**Ratio:** Minority is not a bar to seek Partition, but a minor cannot seek partition directly. He can institute a suit for Partition through a next friend

in a court of law. Whether or not a Partition can be effected, would be subject to the outcome of the suit. The court will take cognisance of the situation and would enforce Partition only when it is satisfied that the Partition would be beneficial to or would promote the interest of the minor.']

Facts: The maternal grandfather of a minor, aged 2½ years, filed a suit for Partition on his behalf, as against his father and two major brothers (sons born from first wife). It was stated in the Plaint that the family was in good circumstances, and that there were no debts owing by it. In spite of that the Karta (father), along with his two major sons born to him from his first wife, were managing the joint family property in a manner that was detrimental to the interests of the minor. **They were selling the joint family properties, including the share of the minor and out of the sale proceeds, they were purchasing properties in their individual names.** The minor was also thrown out of the family house along with his mother (father's second wife) and sister. The petition was admitted, but during the pendency of the litigation, the minor died. After the death of the minor, his mother was recorded as his legal representative, and transposed as the plaintiff.

Legal Issues:

(1) What the nature of the jurisdiction is which the court exercise when they decide whether a suit is for the benefit of a minor or not?

(2) Whether the institution of the suit for the benefit of a minor or not? Whether the defendants were acting adversely to the minor?

(3) Whether on the death of the minor plaintiff the suit for Partition instituted on his behalf could be continued by his legal representative or should the suit be abated?

(4) What was the status of the minor on his death? Did he die as an undivided member of the coparcenary or as a separate member?

(5) What would be the effective date of severance of joint status of minor coparcener in case the suit for Partition is held to be for the benefit of minor's interest?

Supreme Court's Observations: About **first issue**, the court observed that the theory is that the Sovereign as **parens patriae** has the power, and is indeed under a duty to protect the interests of minors, and the function has devolved on the Courts. In the discharge of that function, therefore, they have the power to control all proceedings before them

wherein minors were concerned. They can appoint their own officers to protect their interests, and stay proceedings if they consider that they are vexatious. It is in the exercise of this jurisdiction that courts require to be satisfied that the next friend of a minor has while instituting a suit for Partition acted in his interest. When, therefore, the court decides that the suit has been instituted for the benefit of the minor and decrees Partition, it does so not by virtue of any rule, special or peculiar to Hindu law but in the exercise of a jurisdiction which is inherent in it and which extends over all minors.

About **second issue**, the Court observed that it is a pure question of fact whether the institution of a suit is for the benefit of a minor or not. Where a minor makes an application to the court for Partition through his next friend it is the duty of the court to examine all facts and ensure that the Partition is in the best interest of the minor. The facts established clearly proved that the defendants were continuously dissipating the ancestral estate by selling the lands and by incurring large-scale debts without any legal necessity. It is no doubt true that the plaintiff was not born on the date of those transactions, **but it is also true that when the transactions were concluded, the minor/plaintiff was in the womb, and the defendants admit knowledge of this in evidence.** The defendants used those documents, which might have been innocent when they came into existence, after he was born, for the purpose of defeating his rights in the properties comprised therein, that would be conduct hostile to him justifying Partition. These are materials from which it could rightly be concluded that the defendants were acting adversely to the interests of the minor and it was not in the interest of the minor to continue joint with the defendants, and that it would be beneficial to him to decree Partition.

About **third issue**, the Supreme Court observed that it has long been settled that a suit for Partition on behalf of a minor coparcener is maintainable in the same manner as one filed by an adult coparcener, with the difference that when the plaintiff is a minor the court has to be satisfied that the action has been instituted for his benefit. But what was **contended** that when a court decides that a Partition is for the benefit of a minor, there is a division brought about by such decision and not otherwise. It would follow from this **contention** that if a minor died before the court decided the question of benefit he would have died as an undivided coparcener of his family and his heirs could not continue the action. Thus, the solution to third issue ultimately depends upon the solution of fifth issue i.e., what would be the effective

date of severance of status in case of a minor plaintiff in a Partition suit. The same is true about the **fourth issue**. The status of the plaintiff/minor on his death is intrinsically related to the effective date of severance of status.

The **fifth issue**, which is the **core issue** in this case, is decisive in safeguarding the interest of minor/plaintiff and his legal representatives. The Supreme Court observed that when a court decides that a suit for Partition is beneficial to the minor, it does not itself bring about a division in status. That intention is, in fact, expressed by some other person, and the function which the court exercises is merely to decide whether that other person has acted in the best interests of the minor in expressing on his behalf an intention to become divided. **It is true that** no guardian can be appointed with reference to the coparcenary properties of a minor member in a joint family, because it is the karta that has under the law the right of management in respect of them and the right to represent the minor in transactions relating to them. **But that is only when the family is joint**, and so where there is disruption of the joint status, there can be no question of the right of the karta of a joint family as such to act on behalf of the minor, and on the authorities, a Partition entered into on his behalf by a person other than his father or mother will be valid, **provided that** person acts in the interests of and for the benefit of the minor. If, under the law, it is competent to a person other than the father or mother of a minor to act on his behalf, and enter into a partition out of court so as to bind him, is there any reason why that person should not be competent when he finds that the interests of the minor would best be served by a division and that the adult coparceners are not willing to effect a Partition, to file a suit for that purpose on behalf of the minor. Is there any reason why if the court finds that the action is beneficial to the minor, the institution of the suit should not be held to be a proper declaration on behalf of the minor to become divided so as to cause a severance in status?

Decision: In our judgement, when the law permits a person interested in a minor to act on his behalf, any declaration to become divided by him on behalf of the minor must be held to result in severance in status, subject only to the court deciding whether it is beneficial to the minor; and a suit instituted on his behalf if found to be beneficial, must be held to bring about a division in status. It is the action of the person acting on behalf of a minor that brings about a division in status. ***"The true effect***

of a decision of a court that the action is beneficial to the minor is not to create in the minor proprio vigore a right which he did not possess before but to recognize the right which had accrued to him when the person acting on his behalf instituted the action." Thus, 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.

Thus, the severance in status took place when the next friend of the minor filed the action, and if the minor dies during the pendency of the suit, the same can be continued by the legal representative of the minor. **If the Court holds that the suit was for the benefit of the minor, then the effective date of partition would be when the action was brought.** If the Court holds otherwise, the severance of status does not take place. Their Lordships, therefore, held that the suit was maintainable even after the minor-plaintiff dies, and the same consequences would follow as in the case of a suit by an adult coparcener. The appeal was consequently dismissed.

ALLOTMENT OF SHARES TO FEMALE MEMBERS[7]

(Persons who were entitled to a Share if Partition takes place)

The general rule is that the non-coparcener members of a joint family, whether male or female, are not entitled to get a share on the Partition of the joint family property. **This rule has certain exceptions** under the original Mitakshara law. The interest of the women of the family, whether wives, widows, mothers or daughters, where a Partition took place at the instance of other were **specially safeguarded** by the Mitakshara texts. These members of the Hindu joint family have no right to demand Partition, but, if Partition takes place, they are entitled to their respective shares. For these females, the entitlement to take a share arises only when not merely a severance of status among the coparceners, **but when** a partition by metes and bounds takes place. If a Partition takes place and she, though entitled, is not given a share, only then is she empowered to reopen the Partition and claim her share.

(1) Father's Wife: A wife could never demand a partition during the life of her husband, since, from the time of marriage, she and he are united

Q.7. Discuss whether a female can get a share if a partition of the joint family property takes place under the classical law.
[D.U., LL.B., 2010]

in religious ceremonies. But if Partition takes place between her husband and his sons, she is entitled to a share **equal to that of a son**. If the father was married prior to HM Act, 1955 and has more than one wife, each wife will get a separate share equal to that of a son, on Partition. She is entitled to keep that share separate from her husband. If the father dies before effecting a Partition, the son will take the entire property under the doctrine of survivorship and the wife/wives will not get anything.

(2) Widowed Mother: On the death of the father, when a Partition takes place among the brothers, their widowed mother takes a share **equal to the share of the brothers**. In this case, widowed mother includes step mother too if she was married to the father prior to the HMA, 1955. If the sons intend to remain united their mother cannot demand partition of the coparcenary. As in the case of the wife, the stridhana received by a widow from her husband or father-in-law must be taken into account in determining her share.

(3) Paternal Widowed grandmother: She has no right to demand partition but on a Partition between the grandsons, entitled to a share **equal to that of a grandson**. So also she would be entitled on a Partition between her son and the son of a predeceased son. Grandmother includes step grandmother too.

Besides these three females none other is entitled to receive a share on Partition. Even a daughter was not so entitled before the legislation which made her a coparcener. If the daughter claimed on the basis of a custom, the custom had to be established. She did not get when the custom averred was not proved.

THREE STEPS TO AMELIORATE THE CONDITION OF WOMAN

Hindu Women's Right to Property Act, 1937 and Coparcener's Widow: By this Act, the Widow of a deceased coparcener has in the joint family property the same interest as he himself had as for a Hindu woman's estate and has the same right to claim Partition and allotment of a share to her as fully as a male coparcener. But a widow's successful claim to her interest in the joint family in respect of which she can ask for a Partition, does not affect the status of the family. This Act was **repealed** by Section 31 HSA, 1956. The repeal however did not affect any right, privilege, obligation or liability acquired, accrued on incurred under the repealed Act.

Hindu Succession Act, 1956 (Section 6) and the Class I Heirs (Widow, Mother, Daughter): This Act placed further restrictions on the ambit of devolution of joint family property on the remaining coparceners

by survivorship. According to the Proviso to Section 6, if the deceased coparcener has left him surviving a female relative specified in Class I of Schedule to the Act or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenery property shall devolve by testamentary or intestate succession under this Act **and not by Survivorship**. Further under Section 30, a coparcener may make a testamentary disposition of his undivided interest in joint family property. Thus the rule of survivorship comes into operation only: **(i)** Where the deceased does not leave him surviving class I female heirs (widow, mother, daughter) or **(ii)** when the deceased has not made a testamentary disposition of his undivided share in the coparcenary property.

Hindu Succession (Amendment) Act, 2005 and the Position of Daughter: Complete Abolition of the concept of survivorship and the enhanced status of daughter as a coparcener is the hallmark of this Amendment Act. This Amendment Act has substituted Section 6 **with effect from 9.9.2005**. With effect from this date, the devolution of interest in the coparcenary property shall be governed by the amended Section. In a Mitakshsara joint Hindu family, 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.

RULES RELATING TO DIVISION OF PROPERTY

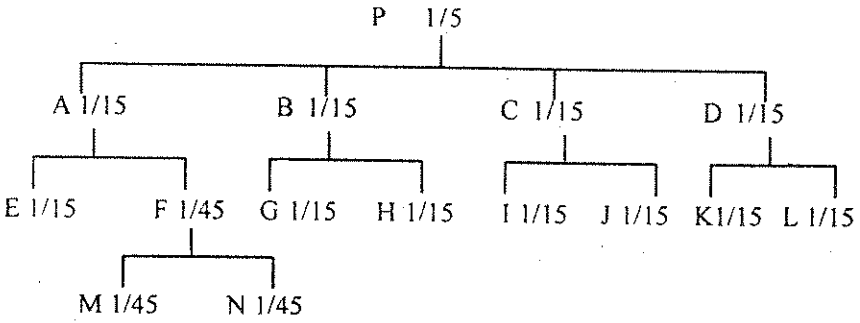
(Rules for allotment of Shares in a Partition by metes and bounds)

All the shareholders do not get equal shares on Partition. There are certain rules according to which the proportion of their shares is settled. In a partition by metes and bounds the shares are allotted to coparceners on the basis of the following rules:

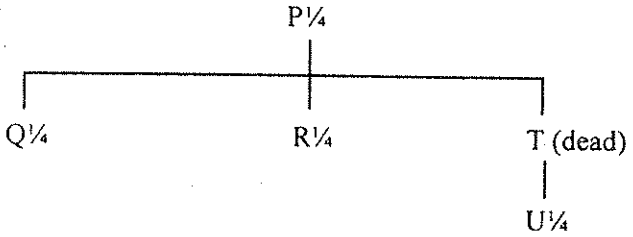
(1) Division between father and sons (per capita): When Partition takes place between father and sons, each son takes a share equal to that of the father. **For example:** A has three sons B, C and D. Each of them i.e., A, B, C and D will take equal share i.e. one-fourth (1/4) share in the joint family property.

(2) Division between brothers (per capita): When a coparcenary consists of brothers, on partition each brother will take equal share. **For example:** a coparcenary consists of four brothers A, B, C and D. Each of them will take equal share i.e., one-fourth (1/4) share in the coparcenary proeprty. This is called a per capita distribution.

(3) Division among branches (per stripes and per capita): When a coparcenary consists of several branches and a Partition takes place, the rule is that each branch takes per stripes as regards every other branch, and the members of each branch takes per capita (*i.e.*, per head) as regards each other. **For example:** A coparcenary consists of four generations, P, his sons, his grandsons and his great grand sons. Since there are four generations the partition will be in three steps.



(4) Right of Representation: Under the Mitakshara school, coparcener's interest devolves by survivorship. This is subject to the rule that where a deceased coparcener leaves male issues, the latter represent their ancestor in a Partition, and takes his share, **provided that** such issues are within the limit of coparcenary i.e., within three degree from common ancestor. Only a coparcener can represent his branch of family and no one else can represent. **For example:** A coparcenary consists of P, his sons Q and R, and U, the son of T, the predeceased son of P, then all will get equal share.



Note: Female member Post 2005: After the Amendment Act 2005 in all the above cases daughter in also treated as son.

REOPENING OF PARTITION

The general rule is that Partition once made cannot be reopened. Manu has said that shares are divided only once. The reason is that upon Partition, the erstwhile coparceners hold their shares as their separate properties with an exclusive and valid title to them. There are, however, certain exceptions to the general rule and the following are the cases where Partition may be re-opened:

(1) Readjustment of Assets: If at the time of Partition there has been a bona fide mistake as to the property divisible, it may cause loss to a coparcener. In such a case the coparcener has a claim to be reimbursed for the loss of the property. The burden of loss is to be borne by all the coparceners. In proper cases this may need a reopening of Partition. **Readjustment after the discovery of Mistakes is not barred by law.** It is also possible that some properties are left out without partition, as those properties under the occupation or possession of third persons, viz. usufructuary mortgage, court litigation etc. After the Partition the properties may be got back. In those circumstances, the properties may be divided among the members of such joint family. In some other occasions, any member of the joint family may feel that he got less property than the others. Then he may demand for the readjustment of the properties. On the principle of justice, equity and good conscience the properties may be readjusted.

(2) Use of malpractice (Fraud, Coercion etc.): A Partition effected between the members of the Hindu undivided family by their volition and with their consent cannot be reopened, unless it is shown that the same is obtained by **fraud coercion, misrepresentation or undue influence.** In such a case the court should require a strict proof of facts because an act inter vivos cannot be lightly set aside. A plea that the Partition was unfair cannot be countenanced when the facts show that it has been undertaken after due and proper deliberations. (AIR 2001 Mad. 184).

(3) Son in womb (conceived before and born after Partition): A son, who was in his mother's womb at the time of Partition is entitled to a share, though born after Partition, as if he was in existence at the time of Partition. If no share is reserved for him at the time of Partition, he is entitled to have the Partition re-opened and share allotted to him.

(4) Son begotten as well as born after Partition: A son begotten as well as born after Partition can demand a re-opening of Partition, if his father though entitled to a share, has not reserved a share for himself.

(5) Disqualified or Absentee Coparcener: A disqualified coparcener, who recovers from his disqualification after the Partition, can get the Partition reopened, as if he was an after born son. If at the time of Partition a coparcener is absent for any valid reasons, and no share is allotted to him, he can get the Partition reopened.

(6) Injustice to minor Coparcener: Where a Partition effected between the members of the Hindu undivided family which consists of minors is proved to be unjust and unfair and is detrimental to the interests of the minors, the partition can certainly be reopened whatever the length of time when the Partition took place.

REUNION

Meaning: It is established law that a Hindu family is presumed to be joint until the contrary is proved. But when one of the coparceners separates himself from the other member of the joint family and has his share in the joint family partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. Once a general partition has taken place, reunion is the only means by which the original joint status can be re-established and the remaining coparceners can again become members of the joint Hindu family.

Who may reunite: Only those members are permitted to reunite, who originally or at one point of time, had a joint status in a coparcenary. A reunion can take place only between persons who were parties to the original Partition. Further, a reunion under the Mitakshara law is possible only as: (a) between father and son, (b) between brothers, and (c) between nephews and paternal uncle.

How effected (Intention necessary to Constitute Reunion): To constitute a reunion, there must be an intention of the parties to reunite in estate and interest. Their intention should be to revert to their former status of joint tenancy. In the absence of such intention, their mere living together will not bring about a reunion between them. An unequivocal intention reestablishing community of interest and unity of possession must be there. Reunion cannot be an unilateral act. It can only be effected through mutual agreement whereby all the members agree to form a Hindu joint family

again. It is not necessary to have any formal agreement of reunion. It need not be in writing and if in writing it need not be registered. Reunion can be effected either by an oral agreement or by their subsequent conduct. Parties to a registered Partition dead may reunite by an oral agreement. Where the agreement to reunite is in writing, it would require registration where it affects immovable property of the requisite value.

Existence of properties not essential: Possession of family properties by a reuniting member at the time of reunion is not essential. A reunion is viewed as a desire on the part of the close relatives, to come back as part of the family and live together again for the sake of love and affection, and is not seen as a profitable, commercial opportunism. Where the son has dissipated all his properties, a reunion between him and his father is valid.

Effect of reunion: The effect of a reunion is firstly to remit the reunited members to their former status as members of a Hindu joint family and secondly property in the hands of separate members is again thrown into a pool of Hindu joint family property. The reunion restores the joint family to its former status and position so that it does not differ in any essential particular from the status of family before Partition. They regain the status of undivided coparceners and are subject to all the incidences of coparcenary. The share of a reunited survives to the other members of the reunited family like the share of a member of a normal joint family.

Burden of proof: The general presumption is that every Hindu family is joint, unless the contrary is proved. But once a Partition is proved, the presumption is that the family remains divided or separate. Reunion after Partition is a rare occurrence. **Therefore, when it is pleaded it must be strictly proved.** The burden of proof is heavy on the party asserting reunion. It can be established only by clear and consistent evidence. Ambiguous pieces of conduct equally consistent with a reunion or ordinary joint enjoyment cannot sustain a plea of reunion.

QUESTIONS WITH OBJECTIVE HINTS

Q. 1. [U.P., (J), 1992] What is Partition?

Q. 2. [U.P., (J), 1991, 1999] Discuss: "Partition is made only once" (Manu).

Q. 3. [D.U., LL.B., 2011] Can the demand of a partition once made be retracted/revoked subsequently?

Q. 4. [D.U., LL.B., 2010] Discuss the modalities of partition of the joint family property.

Q. 5. [D.U., LL.B., 2006] What do you understand by the term 'Severance of Status' and how does it differ from 'partition by metes and bound'?

Q. 6. [D.U., LL.B., 2005] How is partition effected under Hindu law? Discuss the steps involved in partition by referring to relevant case law?

Q. 7. [D.U., LL.B., 2004] Short Notes: **Puttrangamma v. M.S. Rangamma**, AIR 1968 SC 1018.

Objective Hints for Question No. 1 to 7

(1) Why Partition?: In Mitakshara school, there is a distinction between separate property and ancestral property. And in ancestral property, there is community of interest and unity of possession and all coparceners are joint tenants. There interests are not fixed but fluctuating. Every coparcener has right to ask for the ascertained share/interest in joint family property and this is possible only through partition.

(2) What is Partition?: Partition means bringing the joint status of the coparceners to an end and numerical division of joint family property among coparceners. Through Partition, the share of each coparcener becomes fixed and ascertained. Division of property is only logical end of right of partition. The moment his interest is demarcated, a coparcener becomes a separate entity and joint tenancy converts into tenancy in common.

(3) Stages of Partition: Once a coparcener asks for partition, there are two stages:

(i) **De jure Partition (Severance of status):** Means to define and ascertain the interest. Once the interest is fixed, it cannot be affected by later developments in the family.

(ii) **De facto Partition (Partition by metes and bounds):** Means actual division of property in connection with share so specified.

(4) How is Partition effected under Hindu law?

There are three necessary conditions of Partition, which brings about a severance of the joint status:

(i) formation of a definite intention to separate;

(ii) declaration of that definite intention to separate; **and**

(iii) communication of that intention to others affected thereby.

The moment a clear, definite, unambiguous and unequivocal intention to separate is communicated to other coparceners during the lifetime of the coparcener demanding the partition, the division in status takes place.

Legal propositions regarding effecting Partition

(a) Going for partition is a matter of individual decision of the coparcener, assent or dissent of other coparceners is immaterial. Also the motive of the separating coparcener is immaterial in this context.

(b) Coparcener must have formed a fixed and definite intention to separate, must not merely be in contemplation of it.

(c) This intention has to be declared, manifested, indicated or represented. This declaration or manifestation must be unequivocal, unmistakable, unambiguous and clear.

(d) One can not declare his mental state in a vaccum. The declaration or manifestation must be to those persons who are going to be affected by the said declaration.

(e) Unless intention is brought to the knowledge of other coparceners, it is uncommunicated intention which is no intention in the eyes of law.

(f) The communication of intention must be the conscious and informed act of the coparcener. The process of communication may vary with the circumstances of the case.

(g) Once intention is formed, it is immaterial who communicates it.

(h) If third party informs and the separating coparcener says he is not authorised, there is no partition. In case third party informs and coparcener dies, valid communication has taken place.

(i) The separating coparcener must communicate his intention during his lifetime.

(j) Communication to karta alone will not be sufficient. Intention must be brought to the knowledge of other coparceners. That gives proper sanctity to intention.

(k) The Partition is effected from the date on which communication is put into the transmission and not form the date on which it reaches other coparceners.

(l) Once there is communication, the intention to separate cannot be withdrawn.

(5) Raghavamma v. Chenchamma, (1964) 2 SCR 933: Whether the knowledge of such a manifested intention of a coparcener on the part of the

other affected members of a family is necessary condition for constituting a division in status? The Supreme Court observed that there must be intimation, indication, manifestation or expression of the intention to become separate. And what form that manifestation should take **would depend upon the circumstance** of each case, there being no fixed rule or rigid formula. But it is true that one cannot manifest his intention in vaccum. It is implicit in expression "declaration" that it should be to **the knowledge of the person affected thereby**. An uncommunicated declaration is no better than a mere formation or harbouring of an intention to separate; it becomes effective as a declaration only after its communication to the person or persons who would be affected thereby. Further intention must be communicated **during lifetime of the separating coparcener**. Thus, the knowledge of the members of the family of the manifested intention of one of them to separate is a necessary condition for bringing about that member's severance from the family.

(6) Puttrangamma v. Rangamma, (1968) 3 SCR 119

(a) Sufficiency of Process of Communication: It is necessary that the declaration to separate to be effective should reach the person or persons affected thereby by some process appropriate to the given situation and circumstances of the particular case. It is not necessary that there should be a formal dispatch to or receipt by other members of the family of the communication announcing the intention to divide on the part of one member of the joint family. The proof of such a dispatch or receipt of the communication is not essential, nor its absence fatal to the severance of the status.

(b) Effect of withdrawal of Notice: Can the demand of a partition once made be retracted/revoked subsequently? When once a communication of the intention is made which has resulted in the severence of the joint family status, it was not thereafter open to a coparcener to nullify its effect so as to restore the family to its original joint status. If the intention of a coparcener had stood alone without giving rise to any legal effect, it could, of course, be withdrawn by the coparcener, but having communicated the intention, the divided status of the Hindu joint family had already come into existence and the legal consequences had taken effect. It was not, therefore, possible for the coparcener to get back to the old position by mere revocation of the intention.

(7) Effective date of severance of joint status: When the intention should be deemed to have been brought to the notice of the other member

or members? The Supreme Court in **Raghavamma Case (1964)** observed that the doctrine of relation back has already been recognised by Hindu law and as per this doctrine when once that knowledge is brought home, it relates back to the date when the intention is formed and expressed. Thus severance of status is effective from the date on which communication is put into transmission and not from the date on which it reaches coparcener and not from the different dates of the knowledge of all the coparceners.

(8) **Doctrine of Relation back and Vested interests:** Between the date on which communication to separate is put into transmission and the date on which it reaches the coparcener, the person expressing the intention to separate may loose his interest in the family property, he may withdrawn his intention, he may die before his intention is communicated, the karta may sell away the entire property for debts binding on the family etc. Thus if the doctrine of relation back is invoked without any limitation thereon vested rights so created will be affected and settled titles may be disturbed. Thus, Supreme Court in **Raghavamma Case (1964)** laid down as a principle of reasonableness and equity that doctrine of relation back is not to affect the vested rights.

(9) **Communication to be completed during the lifetime of the Coparcener:** For the application of the doctrine of relation back, it is necessary that the communication of intention is completed during the lifetime of the coparcener. The moment a coparcener dies, he loses his interest in the coparcenary property, the communication of his intention to separate after his death, is meaningless.

Warnings: Before attempting to solve the practical problems regarding Partition following **five things** must be minutely observed:

(1) Whether the death of the coparcener (who has decided to separate) occurs **before or after** the completion of communication of the intention to separate? This point creates a lot of difference because for the application of the doctrine of relation back **it is necessary that** the communication of the intention to separate must be completed before the death of the coparcener.

(2) What is the **nature (valid or invalid) of the alienation** made by the karta between the date on which communication to separate is put into transmission and the date on which it reaches the karta? This point is so important because it helps in deciding the application of the doctrine of relation back to the fullest extent or to a limited extent.

(3) Whether the separating coparcener alienated his undivided interest by gift or by Will? Whether the Will has been made before or after HSA, 1956?

(4) Be careful about the implications of the Hindu Women's Right to Property Act, 1937. This Act has been repealed by HSA, 1956.

(5) **Be careful about following Dates:**

(i) Date of forming unequivocal intention to separate.

(ii) Date of completion of communication of his intention to separte.

(iii) Date of death of the separating coparcener.

(iv) Date of alienation of joint family property.

Q. 8. [D.U., LL.B., 2011] A Hindu joint family comprised of five brothers A, B, C, D and E. B who was not happy with the style of functioning of A as the karta, **filed a suit for partition** against him in a Court of law, claiming one fifth share in the coparcenary property. During the pendency of the litigation, A died and now B **wanted to withdraw the suit**, and assume charge as the karta. Can he do so? Discuss.

Solution: Filing of suit is the most unequivocal expression of one's intention to separate himself and consequently severance of status takes place from the date the suit is instituted. A decree maybe necessary for working out the definite shares but the status of the plaintiff as separate in estate is brought about on his assertion of his right to separate whether he obtains a consequential judgment or not.

In **Puttrangamma v. Rangamma**, AIR 1968 SC 1018, the Supreme Court observed that if the intention of the coparcener had stood alone without giving rise to any legal effect, it could, of course, be withdrawn by the coparcener, but having communicated the intention, the divided status of the Hindu joint family had already come into existence and the legal consequences had taken effect. **It was not, therefore, possible for the coparcener to get back to the old position by mere revocation of the intention.** It is, of course, possible for the members of the family by a subsequent agreement to reunite (Reunion), but the mere withdrawal of the unilateral declaration of the intention to separate which already had resulted in the division in status cannot amount to an agreement to reunite. Whether there was a subsequent agreement between the members to reunite is a question of fact to be proved as such.

Thus, in the given problem **it is not possible** for B to assume the charge of karta just by withdrawing the suit because the divided status of the Hindu joint family had already come into existence.

Q. 9. [D.U., LL.B., 2010] Sumit, a coparcener living in Delhi sends an e-mail to his father Vishal at Bombay expressing his intention to separate from the joint family on 20th May 2003. **He then executed a gift of his share in the property** in favour of an orphanage on the same day. Vishal was very busy as the elder brother of Sumit was involved in a motor vehicle accident that had seriously injured the life of a young boy. Vishal as the Karta of this joint family **sold the joint family property** including the share of Sumit to pay compensation to the accident victim in order to bring about a compromise and **to save the eldest son from the prospects of a penal litigation.** Due to this incident Karta failed to check his mails and came to know about the demand of Sumit only on 30th May, 2003. **Sumit files a suit** against Karta challenging the validity of the sale. Discuss whether he would be successful ?

Solution: Intention to separate has been validly communicated to the karta of the family. It is true that partition which occurred on 30th May, 2003 relates back to 20th May, 2003 according to the doctrine of relation back. But vested rights are not affected by this doctrine according to the ratio of **Raghavamma v. Chenchamma**, AIR 1964 SC 136. The karta Vishal sold the joint family property for the purpose which falls within the expression "legal necessity". Therefore, even though Sumit has been separated from the joint family, he would be unsuccessful in challenging the validity of the sale and the gift deed executed by him is of no consequence.

Q. 10. [D.U., LL.B., 2009] Neeraj, Nandan and Arjun are three brothers constituting a Mitakshara coparcenary. Arjun who is displeased with his eldest brother (Neeraj) informs him on **4.6.2008** on phone: "I am thinking of separating from the joint family." Two days later he sends a registered letter to his eldest brother expressing his unequivocal intention to separate from the joint family. On **10.6.2008** he makes a gift of all his property in favour of Vrinda. Arjun's death occurs on 14.6.2008. **Before the receipt of letter**, Neeraj alienates an item of joint family property on 9.6.2008 to meet the Marriage expenses of their sister Rita. The letter sent by Arjun actually reaches Neeraj on 2.7.2008. Examine:

(i) The status of Arjun at the time of his death whether he was member of joint family or not?

(ii) Whether Vrinda is entitled to the share of Arjun under gift deed?

(iii) Whether alienation made by Neeraj is valid?

Solution: In this case, the letter reaches on **2.7.2008** while Arjun died on **14.6.2008**. It means his death occurs **before** the completion of communication of his intention to separate. The following points may be noted in this regard:

(i) For a partition to be effected the separating coparcener must communicate his intention during his lifetime. If this communication occurs after the death of such coparcener, partition cannot take place. Therefore Arjun died as an undivided coparcener.

(ii) Even after HSA, 1956, a coparcener **cannot** make a valid gift of his undivided coparcenary interest. Therefore Vrinda **is not** entitled to the share of Arjun under a deed of gift.

(iii) Neeraj is the karta of the joint family and he can make an alienation of property for legal necessity. Marriage of a coparcener's sister is legal necessity, therefore the alienation made by Neeraj is valid.

(iv) It is also noted that the telephone conversation did not affect a partition because for partition, a coparcener must make an unequivocal and definite intention. The words "I am thinking of" betray the fact that Neeraj was still in the stage of contemplation. But sending a registered letter expressing unequivocal intention to separate is sufficient to constitute partition provided it reaches before his death.

Q. 11. [D.U., LL.B., 2008] K, a male Hindu governed by Mitakshara school, had two sons G and S. The family lived in Bombay. G was a business executive with a multinational firm and lived in a rented house in Delhi alongwith his wife H. Unfortunately, G met with a road accident on 20th March, 2007 and was admitted to a private nursing home. He wrote a letter on **25th March, 2007** expressing his intention in unequivocal terms to separate from the joint family. **He executed a Will on 26th March, 2007** with respect to his undivided interest in favour of his wife H **and died on the same day**. The letter was delivered to other members of the family on **30th March, 2007**. H, being the only heir of her deceased husband, claims the coparcenary interest of her husband under the Will? **Can she succeed?** Give reasons.

Also discuss her claims under the following circumstances:

(i) if G had died without making a Will.

(ii) If G had died in **1954** after executing a Will.

Solution: In this case, the letter was delivered on **30.3.2007** while G died on **26.3.2007**. It means his death occurs **before** the completion of communication of his intention to separate. The following points may be noted in this regard:

(i) For a partition to be effected the separating coparcener must communicate his intention during his lifetime. If this communication occurs after the death of such coparcener, partition cannot take place. Therefore, G died as an undivided coparcener.

(ii) However, G has made a Will of his coparcenary interest in 2007, and Section 30, HSA, 1956 gives him full power to do so. Therefore, H can succeed to the coparcenary interest of her husband under the Will even if he died as an unseparated member.

(iii) If G had died without making a Will, then H would still get this property. This is so because she is a female class I heir and Section 6, HSA would apply to the devolution of coparcenary interest of the deceased. Section 6 now abolished the devolution by survivorship.

(iv) If G had died **in 1954** after executing a Will, then a coparcenary could not make a valid will with regard to his undivided coparcenary interest before the passing of the HSA. H would not get anything under the Will **but she would get a limited estate in his coparcenary interest** due to the provisions of the Hindu Women's Right to Property Act, 1937.

Q. 12. [D.U., LL.B., 2001] R, S and A are three brothers constituting a Mitakshara coparcenary. S sends a registered letter **on 4.6.2000** to his eldest brother expressing his unequivocal intention to separate from the joint family. **On 15.6.2000** he makes a Will of all his property in favour of Neha. S dies **on 20.6.2000**. Before the receipt of the letter, R alienates some property **on 14.6.2000** to pay off the debt which his father had taken for his own **personal benefit**. The letter sent by S actually reaches R **on 2.7.2000**. Examine:

(i) Whether Neha is entitled to the share of S under the Will: and

(ii) Whether the alienation made by R is valid.

Will your answer be same if instead of a Will S had executed a gift deed and bequeathed all his property to Neha on 15.6.2000 and died on 20.6.2000?

Solution: In this case, the letter reaches on **2.7.2000** while S died on **20.6.2000**. It means his death occurs **before** the completion of communication of his intention to separate. The following points may be noted in this regard:

(i) For a partition to be effected the separating coparcener must communicate his intention during his lifetime. If this communication occurs after the death of such coparcener, partition cannot take place. Therefore, S died as an undivided coparcener.

(ii) S has made a Will of his coparcenary interest in 2000, and Section 30, HSA 1956 gives him full power to do so. Therefore, Neha can succeed to the coparcenary interest of S under the Will.

(iii) R alienates an item of joint family property on 14.6.2000 (i.e., before receipt of the letter) to pay off the debt which his father had taken for his own personal benefit which tantamounts to the creation of a vested right and if that debt is not tainted with illegality and immorality then it is binding on all undivided coparceners, according to the ratio of **Raghavamma Case (1964)**. Therefore, S's share in the joint family property is reduced proportionately to the property alienated to pay father's debt.

(iv) Even after HSA 1956, a coparcener **cannot** make a valid gift of his undivided coparcenary interest. Therefore Neha is not entitled to the share of S under a deed of gift.

Q. 13. [D.U., LL.B., 2002] Three brothers Ram, Shyam and Gopal form a Mitakshara Hindu joint family living in Delhi. Shyam a stage artist stationed in Bombay, writes a letter on 6 1.1950 addressed to the karta expressing his intention to separate from the joint family and also informs Bittoo a common friend of the family living in Bombay of his intention. Intending to post the letter, while on his way to rehearsal of a play he carries the letter. His pocket gets picked in a bus and he loses the letter along with all his money. In the meantime, on **10.1.1950** Bittoo who goes to visit Shyam's family conveys to the family Shyam's intention to separate. However, on **8.1.1950** a suit instituted for recovery of debt against the family was decreed and a portion of the family property was attached in furtherance of the decree. Bittoo on returning back to Bombay informs Shyam that he has conveyed to his family of his intention to separate. Shyam also receives a letter from Ram informing him of the attachment of the property by the Court decree. Decide:

(i) Is Shyam still supposed to be joint with his family or severance of status has taken place?

(ii) How does the court decree affect his share in the joint family property?

Solution: In this case, the communication of his (Shyam's) intention to separate reaches on **10.1.1950** while the property is attached by a decree of the Court on **8.1.1950 i.e. before** the completion of communication. The following points may be noted in this regard:

(i) Partition takes place when a coparcener communicates his unequivocal intention to separate from other coparceners. According to the law laid down in **Puttrangamma v. Rangamma**, AIR 1968 SC 1018, communication of his intention by a third person, in this case by a common friend Bittoo, is sufficient to effect partition.

(ii) A portion of joint family property has been attached by a court's decree. This tantamounts to the creation of a vested right, and it is binding on all undivided coparceners, according to the ratio of **Raghavamma v. Chenchamma**, AIR 1954 SC 136. Therefore, Shyam's share in the joint family property is reduced proportionately to the property attached by a Court's decree.

(iii) It is true that partition which occurred on **10.1.1950** relates back to **6.1.1950** according to the doctrine of relation back. But vested rights are not affected by this doctrine.

Q. 14. [D.U., LL.B., 1999] K had two sons G and S. He gave S in adoption to his maternal uncle, who was not in affluent circumstances. S complained to his natural father about the conditions in the adoptive family. Therefore, K wanted to leave his share by a Will to S. But G was opposing his father's move vehemently. When G went to a nearby town on business for a couple of days, K sent a letter to G on August 30, 1946 expressing his intention to separate from the joint family. After posting the letter he executed a Will disposing of his interest in the joint family property to S. He died on September 4, 1946. G on hearing the news of his father's death rushed back only on September 6, 1946; he received the letter of his father. Examine whether S is entitled to get his natural father's interest under the Will. What would be the position if the facts arose in 1995?

Solution: K's letter reached G after his death, therefore a partition has not been effected. *He executed a Will in 1946 when a coparcener could not make a valid Will in regard to his undivided coparcenary interest.* S would not get anything under the Will of his father. If these facts would have arisen in 1995 then by virtue of Section 30, Hindu Succession Act, 1956, K would be entitled to make a valid Will and S can acquire his natural father's interest in the property by virtue of valid Will.

Q. 15. [D.U., LL.B., 1995] K and his two sons G and S constituted a Mitakshara coparcenary. In 1950, G executed a Will bequeathing his undivided interest in favour of his wife H. Examine whether H is entitled to the share of G in the following cases:—

(i) G addressed a registered letter to K and S expressing his unequivocal intention to separate from them, but it reached them three days after G's death.

(ii) If G's share in the joint family properties had been attached in an execution proceeding after he addressed the letter expressing his intention to separate but before his death.

Will your answer be different if G had executed the Will in 1970 and died a few days later without separating from the joint family.

Solution: G could not have made a valid Will of his undivided coparcenary interest before 1956. Therefore H will be entitled to this interest only if G had died as a separated member.

(i) In the first instance K and S get information three days after his death. Thus according to the ratio of **Raghavamma v. Chenchamma**, AIR 1964 SC 136, his share has passed by survivorship and H cannot get any properties. But according to the Hindu Women's Right to Property Act, 1937 H will take a limited estate in such property.

(ii) The attachment of G's share is a creation of vested right. Thus even if G's letter reaches before his death, H will still not get any property. This proposition is also supported by the case of **Raghvamma v. Chenchamma**, AIR 1964 SC 136. If G had executed a Will in 1970, Sec. 30 HSA, 1956, would apply and H would be entitled to her husband's property under the Will.

TEST YOURSELF

Q. 1. [D.U., LL.B., 2000] Sohanlal along with his three sons (Manu, Akash and Ranjan) constitute a Mitakshara coparcenary. Ranjan is displeased with the other members of the family because of their opposition to his marriage. He emigrates to Canda. On **10.12.1999** he writes a letter to his father expressing his firm intention to separate from the joint family and **executes a gift deed** of all his properties in favour of his friend, Kamini. The letter reaches Sohanlal and his family on **3.1.2000**. Sohanlal seeks your advice on the following:

(a) Whether the intention to separate has been validly communicated?

(b) Whether the gift feed is valid?

(c) Whether the selling of an ancestral house in Chandigarh on **20.12.1999** for defending Manu against whom a serious criminal charge is leveled is valid?

Will your answer be same if instead of a gift deed, Ranjan had executed **a Will and bequeathed** all his properties to Kamini on 11.12.1999 and died the same day.

Hint: To answer this problem, the legal position regarding following four issues must be crystal clear:

(i) Law relating to Gift of share in ancestral properties.

(ii) Law relating to Doctrine of relation back and limitation placed on it.

(iii) Law relating to "legal necessity".

(iv) Law relating to "Will" under Section 30, HSA.

Q. 2. [D.U., LL.B., 2009(S)] A Mitakshara joint family residing in Delhi comprised of R and his sons Y and M. Y was employed at Bombay. On 1st January, 1946 Y addressed a registered letter to R and M expressing his intention to separate from the joint family. On 2nd January, 1946, he executed a Will bequeathing his interest in favour of his wife P. On 3rd January, 1946, R sold the whole joint family property for discharging family debts. **On 4th January, 1946 Y died of severe heart attack. The registered letter written by Y, however reached R and M on 5th January, 1946.** Examine whether P is entitled to the share of Y in the above situation. What would be your answer had Y executed a Will in 1961 and died a few days later without separating from the family.

Hint: To answer this problem the legal position regarding following three issues must be crystal clear:

(i) Law regarding validity of the Will of undivided share in ancestral property before and after HSA, 1956.

(ii) Law relating to Doctrine of relation back and limitation placed on it.

(iii) Law relating to "legal necessity".

(iv) The legal implications of the Hindu Women's Right to Property Act, 1937.

Q. 3. [D.U., LL.B., 2008(S)] A Hindu joint family comprised of the father, and his three sons X, Y and Z. On coming to know that the father was trying to sell some of the joint family properties without any legal

necessity, X who is aged 30 years walks upto Karta and says, "I want partition and please hand me my share", karta refuses. X executes a gift of one-fourth share of the property in favour of his friend and dies. Is the gift valid? Discuss in light of the rules relating to demand of a partition under Hindu law.

Hint: The decisive factor in this problem is whether X died before or after the completion of communication of intention to separate from the Hindu joint family.

Q. 4. [D.U., LL.B., 2006] A, a coparcener in a Mitakshara joint family sent a letter by post to his father who is Karta of the family on **1.1.2006** expressing his intention to separate from the joint family. On **10.1.2006**, A made **a gift** of his entire share in the joint family property to his friend C, through a registered gift-deed. A did not send any letter of his intention to separate to his minor brother B. A died on **12.1.2006** in a road accident. The karta received A's letter on 15.1.2006. **Examine:**

(a) Whether C is entitled to the share of A under the gift deed?

(b) Will it make any difference if A had made a Will instead of gift?