

**Hindu Law**

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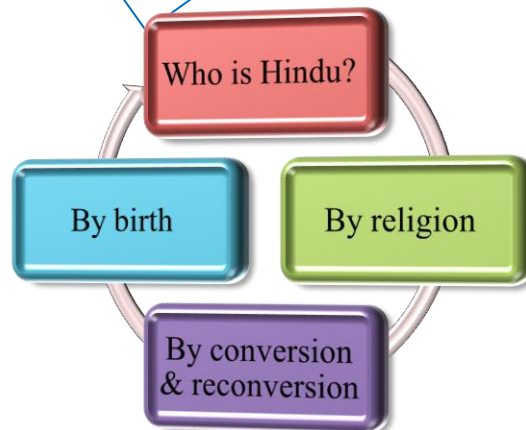
**Introduction**

- 1. Nature of Hindu Law**
- 2. Hinduism, Origin and Development, Definitions.**
- 3. Schools and Sources.**

From thousands of years people living in the Indian subcontinent have been leading their lives by following the guidelines and concepts given in the Vedas. These guidelines have evolved into rules followed by the people and enforced by the rulers and have thus become de facto law. In this modern time, the same laws have been retrofitted to suit present conditions and have been codified in the form of several acts of which the important ones are - Hindu Marriage Act 1955, Hindu Adoption and Maintenance Act 1956, Hindu Minority and Guardianship Act 1956, and Hindu Succession Act 1956.

**Application of Hindu Law**

A precise definition of Hinduism does not exist. Hence, it is impossible to define fixed criteria for determining who is a Hindu. So a negative definition of 'who is not a Hindu' is used. Further, in this land, several religions have been born and they follow the same customs and practices. So it cannot be said that Hindu Law can be applied only to people who are Hindus by religion. Due to these reasons, in general, the following people are considered to be Hindu with respect to application of Hindu Law.

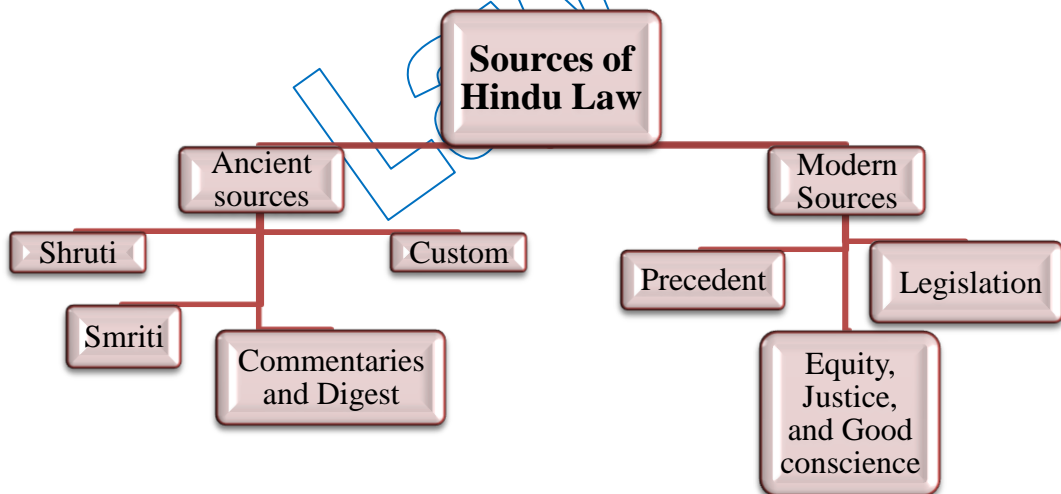


1. **Hindu by Birth** - A person who is born of Hindu parents. If only one parent is a Hindu, the person can be a Hindu if he/she has been raised as a Hindu. In **Sapna vs State of Kerala, Kerala HC**, the son of Hindu father and Christian mother was held to be a Christian. Persons who are not Muslim, Christian, Jew, or Parsee by religion are Hindu.
2. **Hindu by Religion** - A person who is Hindu, Jain, Bauddha, or Sikh by religion. In **Shastri v Muldas SC AIR 1961**, SC has held that various sub sects of Hindus such as Swaminarayan, Satsangis, Arya Samajis are also Hindus by religion because they follow the same basic concept of Hindu Philosophy.
3. **By conversion and reconversion** - Converts and Reconverts are also Hindus. SC, in the case of **Peerumal v Poonuswami AIR 1971**, has held that a person can be a Hindu if after expressing the intention of becoming a Hindu, follows the customs of the caste, tribe, or community, and the community accepts him. In **Mohandas vs Dewaswan board AIR 1975**, Kerala HC has held that a mere declaration and actions are enough for becoming a Hindu.

**Origins of Hindu Law**

It is believed that Hindu law is a divine law. It was revealed to the people by God through Vedas. Various sages and ascetics have elaborated and refined the abstract concepts of life explained in the Vedas.

Sources of Hindu Law can be divided into two parts - Ancient and Modern.

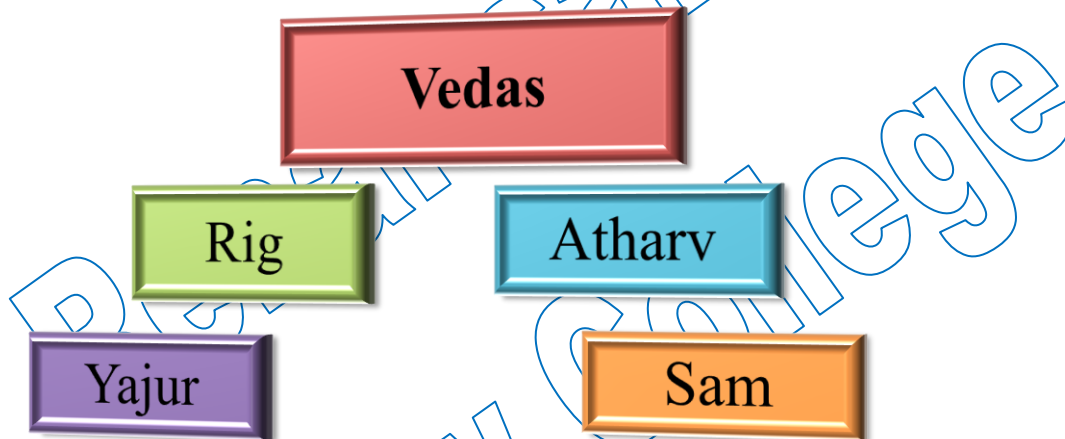


## 1. Ancient Sources

Before the codification of Hindu Law, the ancient literature was the only source of the law. These sources can be divided into four categories:

### a. Shruti

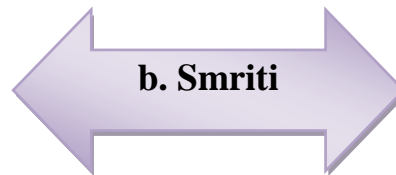
Shruti means "what is heard". It is believed that the rishis and munis had reached the height of spirituality where they were revealed the knowledge of Vedas. Thus, shrutis include the four Vedas, rig, yajur, sam, and athrava along with their brahmanas.



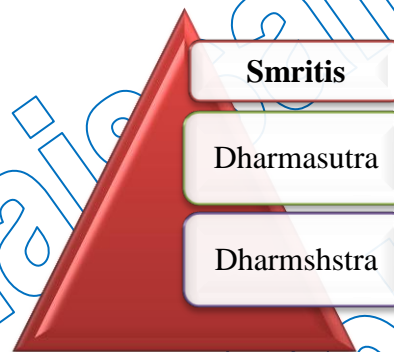
The brahmanas are like the appendices to the Vedas. Vedas primarily contain theories about sacrifices, rituals, and customs. Some people believe that Vedas contain no specific laws, while some believe that the laws have to be inferred from the complete text of the Vedas. Vedas do refer to certain rights and duties, forms of marriage, requirement of a son, exclusion of women from inheritance, and partition but these are not very clear cut laws.

During the vedic period, the society was divided into varns and life was divided into ashramas. The concept of karma came into existence during this time. A person will get rewarded as per his karma. He can attain salvation through "knowledge". During this period the varna system became quite strong. Since vedas had a divine origin, the society was governed as per the theories given in vedas and they are considered to be the fundamental source of Hindu law. Shrutis basically describe the life of the Vedic people.

The vedic period is assumed to be between 4000 to 1000 BC. During this time, several pre-smriti sutras and gathas were composed. However, not much is known about them today. It is believed that various rishis and munis incorporated local customs into Dharma and thus multiple "shakhas" came into existence.



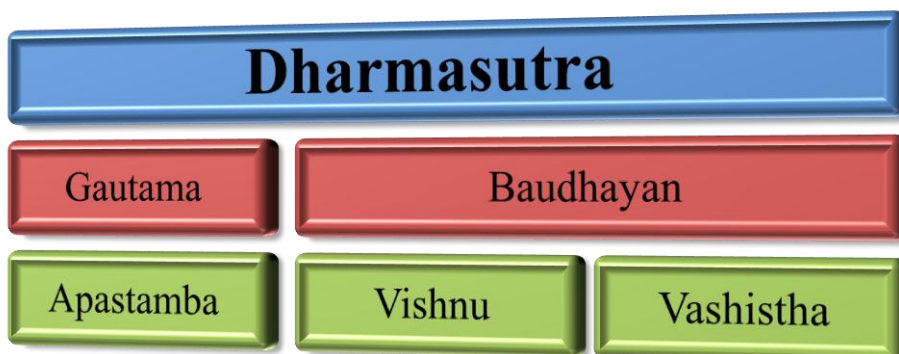
Smrit means "what is remembered". With smritis, a systematic study and teaching of Vedas started. Many sages, from time to time, have written down the concepts given in Vedas. So it can be said that Smritis are a written memoir of the knowledge of the sages. Immediately after the Vedic period, a need for the regulation of the society arose. Thus, the study of vedas and the incorporation of local culture and customs became important. It is believed that many smritis were composed in this period and some were reduced into writing, however, not all are known. The smritis can be divided into two - Early smritis (Dharmasutras) and Later smritis (Dharmashastras).



### **Dharmasutras**

The Dharmansutras were written during 800 to 200 BC. They were mostly written in prose form but also contain verses. It is clear that they were meant to be training manuals of sages for teaching students. They incorporate the teachings of Vedas with local customs. They generally bear the names of their authors and sometime also indicate the shakhas to which they belong. Some of the important sages whose dharmasutras are known are : Gautama, Baudhayan, Apastamba, Harita, Vashistha, and Vishnu.

They explain the duties of men in various relationship. They do not pretend to be anything other than the work of mortals based on the teachings of Vedas, and the legal decisions given by those who were acquainted with Vedas and local customs.



**Gautama** - He belonged to Sam veda school and deals exclusively with legal and religious matter. He talks about inheritance, partition, and stridhan.

**Baudhayan** - He belonged to the Krishna Yajurved school and was probably from Andhra Pradesh. He talks about marriage, sonship, and inheritance. He also refers to various customs of his region such as marriage to maternal uncle's daughter.

**Apastamba** - His sutra is most preserved. He also belonged to Krishna Yajurveda school from Andhra Pradesh. His language is very clear and forceful. He rejected prajapatya marriage.

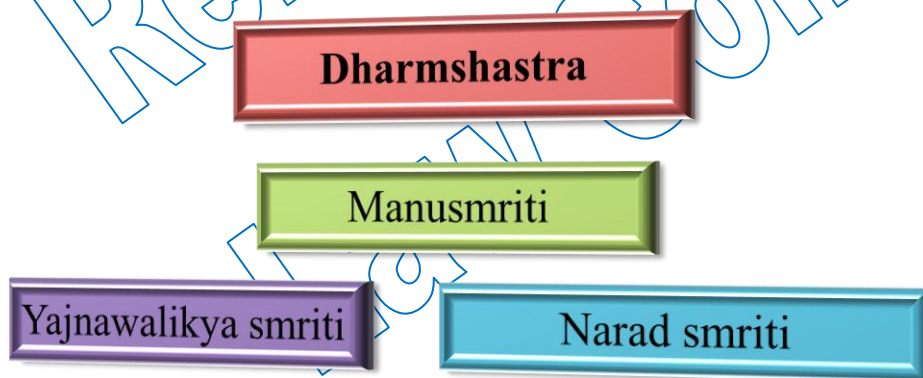
**Vashistha** - He was from North India and followed the Rigveda school. He recognized remarriage of virgin widows.

### **Dharmashastras**

Dharmashastras were mostly in metrical verses and were based of Dharmasutras. However, they were a lot more systematic and clear. They dealt with the subject matter in three parts:

- Aachara : This includes the theories of religious observances,
- Vyavahar : This includes the civil law.
- Prayaschitta : This deals with penance and expiation.

While early smritis deal mainly with Aachara and Prayaschitta, later smritis mainly dealt with Vyavahar. Out of many dharmashastras, three are most important.



### 1. **Manusmriti**

This is the earliest and most important of all. It is not only defined the way of life in India but is also well known in Java, Bali, and Sumatra. The name of the real author is not known because the author has written it under the mythical name of Manu, who is considered to be the first human. This was probably done to increase its importance due to divine origin. Manusmriti compiles all the laws that were scattered in pre-smṛiti sutras and gathas.

He was a brahman protagonist and was particularly harsh on women and sudras. He holds local customs to be most important. He directs the king to obey the customs but tries to cloak the king with

divinity. He gives importance to the principle of 'danda' which forces everybody to follow the law. Manusmriti was composed in 200 BC.

There have been several commentaries on this smriti. The main ones are: Kalluka's Manavarthmuktavali, Meghthithi's Manubhashya, and Govindraja's Manutika.

## 2. Yajnavalkya Smriti

Though written after Manusmriti, this is a very important smriti. Its language is very direct and clear. It is also a lot more logical. He also gives a lot of importance to customs but hold the king to be below the law. He considers law to be the king of kings and the king to be only an enforcer of the law. He did not deal much with religion and morality but mostly with civil law. It includes most of the points given in Manusmriti but also differs on many points such as position of women and sudras. He was more liberal than Manu. Vijnaneshwar's commentary 'Mitakshara' on this smriti, is the most important legal treatise followed almost everywhere in India except in West Bengal and Orissa.

## 3. Narada Smriti

Narada was from Nepal and this smriti is well preserved and its complete text is available. This is the only smriti that does not deal with religion and morality at all but concentrates only on civil law. This is very logical and precise. In general, it is based on Manusmriti and Yajnavalkya smriti but differ on many points due to changes in social structure. He also gives a lot of importance to customs.

### c. Commentaries and Digest

After 200 AD, most of the work was done only on the existing material given in Smrutis. The work done to explain a particular smriti is called a commentary. Commentaries were composed in the period immediately after 200 AD. Digests were mainly written after that and incorporated and explained material from all the smrutis. As noted earlier, some of the commentaries were manubhashya, manutika, and mitakshara. While the most important digest is Jimutvahan's Dayabhag that is applicable in the Bengal and Orissa area.

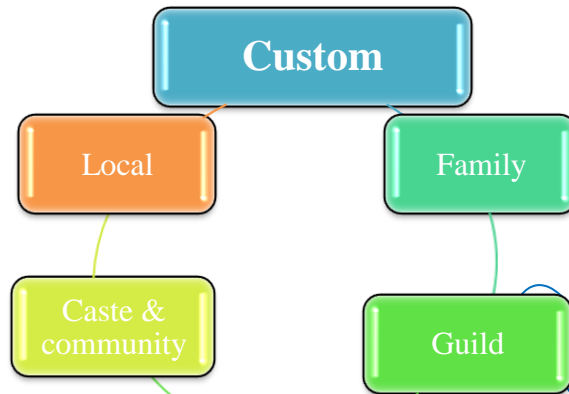
Mitakshara literally means 'New Word' and is paramount source of law in all of India. It is also considered important in Bengal and orissa where it relents only where it differs from dayabhaga. It is a very exhaustive treaties of law and incorporates and irons out contradicts existing in smritis.

The basic objective of these texts was to gather the scattered material available in preceding texts and present a unified view for the benefit of the society. Thus, digests were very logical and to the point in their approach. Various digests have been composed from 700 to 1700 AD.

### d. Customs

Most of the Hindu law is based on customs and practices followed by the people all across the country. Even smrutis have given importance to customs. They have held customs as transcendent law and have

advised the Kings to give decisions based on customs after due religious consideration. Customs are of four types:



- 1.
2. **Local Customs** - These are the customs that are followed in a given geographical area. In the case of **Subbane vs Nawab**, Privy Council observed that a custom gets its force due to the fact that due to its observation for a long time in a locality, it has obtained the force of law.
3. **Family Customs** - These are the customs that are followed by a family from a long time. These are applicable to families wherever they live. They can be more easily abandoned than other customs. In the case of **Soorendranath vs Heeramonie** and **Bikal vs Manjura**, Privy Council observed that customs followed by a family have long been recognized as Hindu law.
4. **Caste and Community Customs** - These are the customs that are followed by a particular caste or community. It is binding on the members of that community or caste. By far, this is one of the most important sources of laws. For example, most of the law in Punjab belongs to this type. Custom to marry brother's widow among the Jats is also of this type.
5. **Guild Customs** - These are the customs that are followed by traders.

## Essentials of valid custom





1. **Ancient** : Ideally, a custom is valid if it has been followed from hundreds of years. There is no definition of ancientness, however, 40yrs has been determined to be a ancient enough. A custom cannot come into existence by agreement. It has to be existing from long before. Thus, a new custom cannot be recognized. Therefore, a new form of Hindu marriage was not recognized in Tamil Nadu.

In the case of **Rajothi vs Selliah**, a Self Respector's Cult started a movement under which traditional ceremonies were substituted with simple ceremonies for marriage that did not involve Shastric rites. HC held that in modern times, no one is free to create a law or custom, since that is a function of legislature.

2. **Continuous**: It is important that the custom is being followed continuously and has not been abandoned. Thus, a custom may be 400 yrs old but once abandoned, it cannot be revived.
3. **Certain**: The custom should be very clear in terms of what it entails. Any amount of vagueness will cause confusion and thus the custom will be invalid. The one alleging a custom must prove exactly what it is.
4. **Reasonable**: There must be some reasonableness and fairness in the custom. Though what is reasonable depends on the current time and social values.
5. **Not against morality**: It should not be morally wrong or repugnant. For example, a custom to marry one's granddaughter has been held invalid. In the case of **Chitty vs. Chitty 1894**, a custom that permits divorce by mutual consent and by payment of expenses of marriage by one party to another was held to be not immoral. In the case of **Gopikrishna vs. Mst Jagoo 1936** a custom that dissolves the marriage and permits a wife to remarry upon abandonment and desertion of husband was held to be not immoral.
6. **Not against public policy**: If a custom is against the general good of the society, it is held invalid. For example, adoption of girl child by nautch girls has been held invalid. In the case of **Mathur vs Esa**, a custom among dancing women permitting them to adopt one or more girls was held to be void because it was against public policy.
7. **Not against any law**: If a custom is against any statutory law, it is invalid. Codification of Hindu law has abrogated most of the customs except the ones that are expressly saved. In the case of **Prakash vs Parmeshwari**, it was held that law mean statutory law.

### Usage and Custom

The term custom and usage is commonly used in commercial law, but "custom" and "usage" can be distinguished. A usage is a repetition of acts whereas custom is the law or general rule that arises from such repetition. A usage may exist without a custom, but a custom cannot arise without a usage accompanying it or preceding it. Usage derives its authority from the assent of the parties to a transaction and is applicable only to consensual arrangements. Custom derives its authority from its adoption into the law and is binding regardless of any acts of assent by the parties. In modern law, however, the two principles are often merged into one by the courts.

### Modern Sources

Hindu law has been greatly influenced by the British rule. While it might seem that the British brought with them the modern concepts of equity and justice, these concepts existed even in dharamashastras

albeit in a different form. Narada and Katyayana have mentioned the importance of dharma (righteousness) in delivering justice. However, we did not have a practice of recording the cases and judgments delivered. So it was not possible to apply stare decisis. This process started from the British rule.

The following are the modern sources of Hindu law:

### 1. Equity, Justice, and Good conscience

Equity means fairness in dealing. Modern judicial systems greatly rely on being impartial. True justice can only be delivered through equity and good conscience. In a situation where no rule is given, a sense of 'reasonableness' must prevail. According to Gautama, in such situation, the decision should be given that is acceptable to at least ten people who are knowledgeable in shastras. Yagyavalkya has said that where ever there are conflicting rules, the decision must be based on 'Nyaya'. This principle has been followed by the privy council while deciding cases.

### 2. Precedent

The doctrine of *stare decisis* started in India from the British rule. All cases are now recorded and new cases are decided based on existing case laws. Today, the judgment of SC is binding on all courts across India and the judgment of HC is binding on all courts in that state.

### 3. Legislation

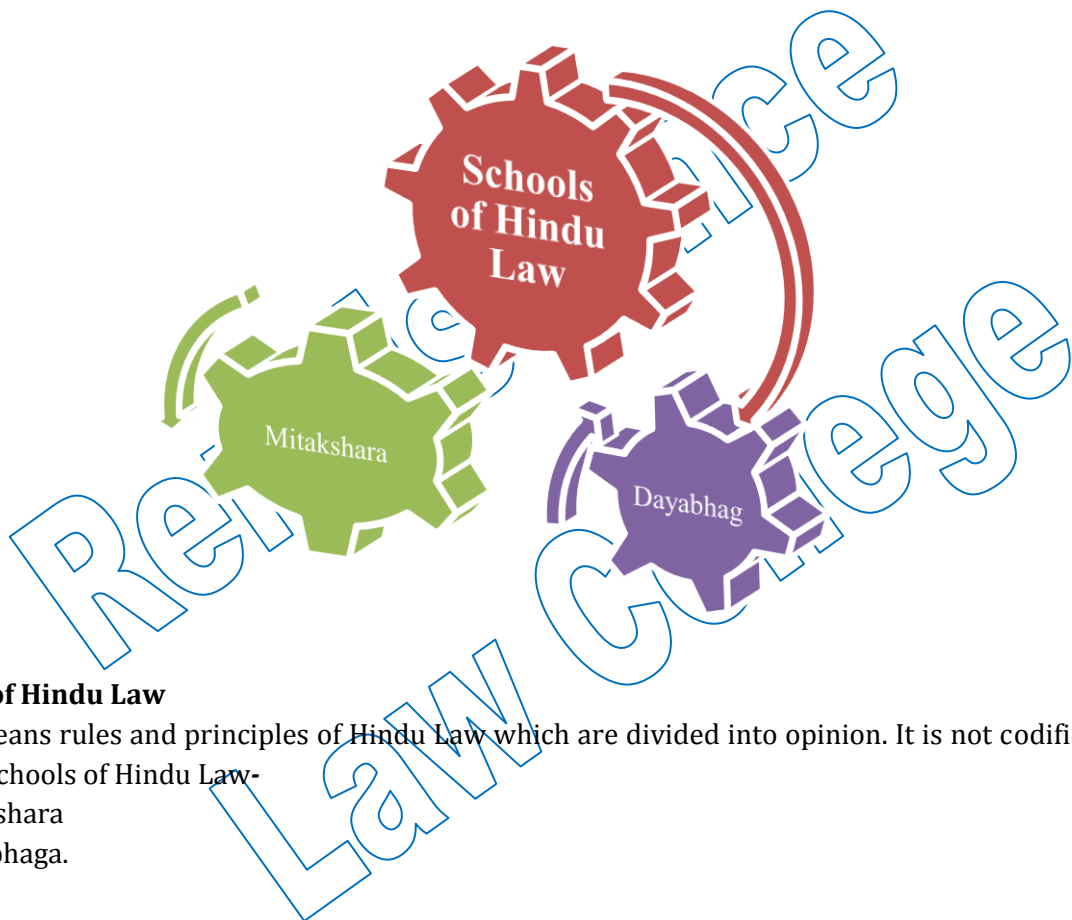
In modern society, this is the only way to bring in new laws. The parliament, in accordance with the needs society, constitutes new laws. For example, a new way of performing Hindu marriages in Tamil Nadu that got rid of rituals and priests was rejected by the SC on the basis that new customs cannot be invented. However, TN later passed an act that recognized these marriages.

Also, most of the Hindu laws have now been codified as mentioned in the beginning.

### Critical Comments

In the past, due to the vast size of the country, various kinds of customs prevailed. Further, due to lack of effective communication, there were several contradictions among the practices and the judgment

delivered. Thus, the country went on the way to being divided. Instead of becoming the law of the land (lex-loci), Hindu Law became the law of a person. However, this can only be an excuse for the past. Today, because of media and communication, judgment delivered in one place is felt in another. A practice or custom followed in a village can be repugnant to people in cities. We must take advantage of this situation and put the country on the course of a unified law. Instead of being a country of personal laws, we should truly have a single law of the land. Time is ripe for implementing article 44. This will ensure the future unity and integrity of our country.



### **Schools of Hindu Law**

School means rules and principles of Hindu Law which are divided into opinion. It is not codified. There are two Schools of Hindu Law-

- (a) Mitakshara
- (b) Dayabhaga.

Mitakshara School prevails throughout India except in Bengal. It is a running commentary on the code of Yagnavalkya. Mitakshara is an orthodox School whereas the Dayabhaga is Reformist School.

The Mitakshara and Dayabhaga Schools differed on important issues as regards the rules of inheritance. However, this branch of the law is now codified by the Hindu Succession Act, 1956, which has dissolved the differences between the two. Today, the main difference between them is on joint family system.

**Mitakshara**- Rights in the joint family property is acquired by birth, and as a rule, females have no right of succession to the family property. The right to property passes by survivorship to the other male members of the family.

**Dayabhaga**- Rights in the joint family property are acquired by inheritance or by will, and the share of a deceased male member goes to his widow in default of a closed heir.

**Differences between the two Schools**

<b>Mitakshara</b>	<b>Dayabhaga</b>
i) Right of a son by birth in the ancestral property equal to the interest of his father.	i) A son is entitled to his ancestral property only on the death of his father. The father is the absolute owner of his property in his lifetime.
ii) A son becomes coparcener right after his birth. His right is applicable to the property of his grandfather and grand-grandfather.	ii) A son becomes coparcener by death of his father. This right is not available within the property of his father, grandfather or grand-grandfather.
iii) Everyone is entitled to the property as a unit. Their shares are not defined. They have only the commodity of ownership. There is joint-tenancy.	iii) Everyone's share is defined. There is tenancy-in-common.
iv) One cannot transfer his share to the third party.	iv) One can transfer his share.
v) The joint-property can be partitioned. In that case, it will be partitioned as it was in case of the father.	v) As the shares are defined, one can easily partition with his share.

**Differences between the two Schools in Succession**

<b>Mitakshara</b>	<b>Dayabhag</b>
1. Property of a deceased Hindu is partitioned into two ways as the property is of two types- (a) Ancestor's property, (b) Separate property.  Ancestor's property is partitioned in accordance to the Rules of Survivorship. But a Separate property is partitioned to the descendants.	1. Property is of two types- (a) Joint, (b) Separate. The descendants inherits the property whatever type it is.
2. In default of close heir, brother and immediate survivors inherit, the wife does not inherit.	2. If coparcener dies, his widow will get the property in default of a close heir but she cannot alienate.

3. The order of heirs is decided by nearness of blood.

3. The order of heirs is decided by the competence to offer Pinda and Sraddho to the deceased.

### Effect of migration

A person follows the school of his area. But if he migrates to another place, he will follow the School of that locality. This has been decided in various cases-

**Gope v. Manjura Govalin-** The burden of proving migration lies on him who pleads it. The original place of a family can be inferred from the chief characteristics of that family.

**Keshavarao v. Swadeshrao, 1938-** Migration means leaving to another place forever. But if a place is divided into two administrative area, that will not be regarded as migration.

**Moolchand v. Mrs. Amrita Bai-** A person migrates will all of his personal laws. Personal law unlike local law moves with whom he covers.

**Notraz v. Subba Raya-** A person can be given an option to give up the law of the old place and adopt the new one.

## UNIT-II

1. Marriage
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### **Concept of Marriage - Sacramental or Contractual?**

**Historical Perspective** – According to Manu wife is ardhangini and marriage is an essential sanskara. Man is incomplete without wife. Once marriage is performed, it cannot be dissolved.

**Modern Perspective** – Marriage is a civil contract which can be dissolved. They cannot force to live together.

### **Why is it Sacramental?**

The sacramental marriage among Hindus has 3 characteristics :

- it is a permanent & indissoluble union,
- it is an eternal union, and
- it is a holy union.

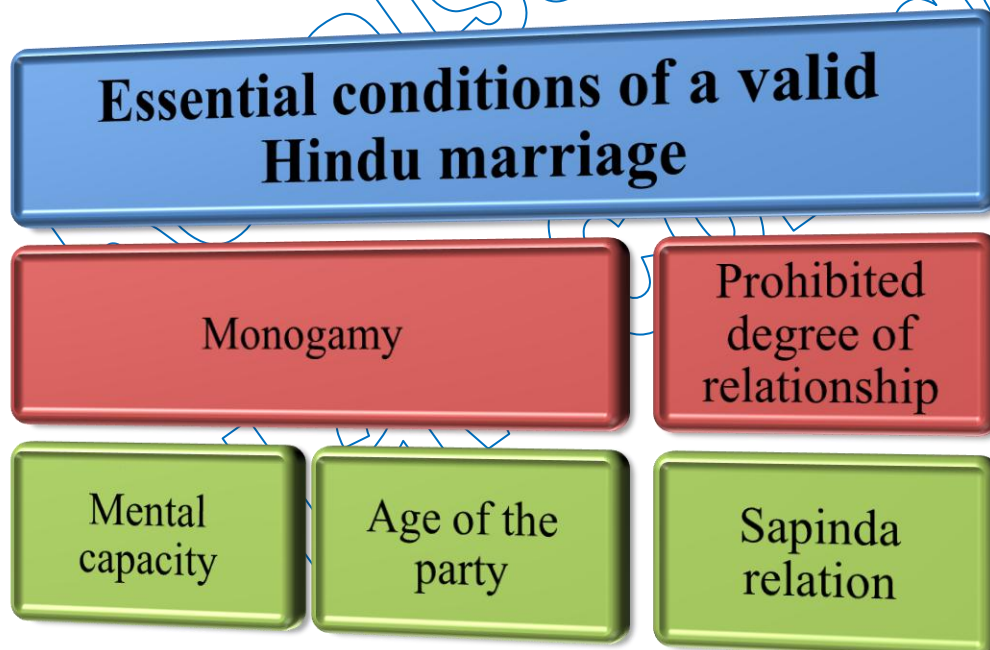
It is evident that the first element has been destroyed by the act since divorce is recognised. Second element was destroyed in 1856 by recognition of Widow Remarriage. Probably to some extent third element is still retained. In most of the Hindu Marriages a sacred or religious ceremony is still necessary. But the ceremonial aspect of the sacramental marriage is of least importance.

Section 7 of HMA 1955 requires that religious ceremonies are a must to complete a marriage. A marriage done without "saptapadi" is void. In the case of **Dr. A N Mukherji vs State 1969**, a person could not be convicted of bigamy because he performed 3 marriages without doing necessary ceremonies.

It has a unique blend of sacramental and contractual characteristics. Even now bachelors are not eligible to perform several religious ceremonies. Only married couples are allowed. Thus, it still retains its sacramental property. No-fault divorce, as available in western countries, is not available in HMA 1955. Thus, breaking up of a marriage is very difficult.

#### Why is it Contractual?

1. The fact that consent of the boy and the girl is required means that it is contractual. If the consent is obtained by force or fraud, the marriage is voidable.
2. Marriage is no more permanent since divorce is available by mutual consent.
3. Marriage is no more eternal since widow remarriage is permissible.
4. Marriage is no more holy because a marriage can be done without all the ceremonies such as vivah homam. Only saptapadi is required.



Under the Hindu Marriage Act, 1955 certain conditions are necessary for a valid Hindu Marriage. Those conditions have been laid down in Sec 5 and 7 of the Act. Section reads as follows.

By virtue of section 5 of the Hindu Marriage Act 1955, a marriage will be valid only if both the parties to the marriage are Hindus. If one of the parties to the marriage is a Christian or Muslim, the marriage will not be a valid Hindu marriage

“A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

1. neither party has a spouse living at the time of the marriage
2. at the time of marriage, neither party:-
  - a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
  - b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
  - c) has been subject to recurrent attacks of insanity or epilepsy
3. the bridegroom has completed the age of 21 years and the bride the age of 18 years at the time of marriage;
4. the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two
5. the parties are not sapindas (one is a lineal ascendant of the other) of each other, unless the custom or usage governing each of them permits of a marriage between the two.

This section lays down five conditions for a valid marriage. They are:

1. **Monogamy** (Sec 5 Clause (1))

This provision prohibits bigamy. The marriage should be monogamous. Under the Hindu Law a person can validly marry if he or she is either unmarried or divorced or a widow or a widower. If at the time of the performance of the marriage rites and ceremonies either party has a spouse living or the earlier marriage had not already been set aside, the later marriage is void. A bigamous marriage is null and void and is made punishable.

2. **Mental Capacity** (Sec 5 Clause (2))

The parties to the marriage should not suffer from unsoundness of mind, mental disorder or insanity. In all the cases given in sec 5 clause (2) the party is regarded as not having the mental capacity to solemnize the marriage. So if a party who solemnize the marriage is suffer from unsoundness of mind, mental disorder or insanity, the marriage is voidable at the opinion of the other party.

It is to be noted that Sec 5(2) (c) of the Hindu Marriage Act 1955 has been amended by the Marriage Laws (Amendment) Act 1999 and the word 'epilepsy' is omitted. The result is that at present even if a party to the marriage is subject to recurrent attacks of epilepsy, the marriage is valid and the other party cannot seek for nullity of marriage.

3. **Age to the parties** (Sec 5 Clause (3))

At the time of marriage the bridegroom has completed the age of 21 years and the bride the age of 18 years. If a marriage is solemnized in contravention of this condition is neither void nor voidable.

Punishment :- By Section 18 of the Act, anyone who procures a marriage in violation of the condition is liable to be punished with simple imprisonment which may extend up to 15 days or with fine which may extend upto Rs. 1000/- or with both.

4. **Degrees of Prohibited relationship** (Sec 5 Clause (4))

The parties to the marriage should not come within the degrees of prohibited relationship. Two persons are said to be within the degrees of prohibited relationship:-

- i) if one is a lineal ascendant of the other; or
- ii) if one was the wife or husband of lineal ascendant or descendant of the other; or



- iii) if one was the wife of the brother or of the father's or mother's brother or of the grandfathers or grandmothers brother of the other; or
- iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters.

A marriage between two persons who come within the degrees of prohibited relationship shall be void. However, if there is a valid custom or usage governing both the parties allows they can marry even though they come within the degrees of prohibited relationship. All over India, there are such custom which validate marriage between persons who come within the degrees of prohibited relationship.

For instance, marriage between the children of brother and sister is common among the marumakathayam of kerala. In some parts of Tamil Nadu, Marriage between a person and his eldest sister's daughter is common. Here the parties though come within the degrees of prohibited relationship; they can validly marry by virtue of custom or usage. It is essential that the custom or usage should be certain, reasonable and not opposed to public policy.

Punishment :-According to Sec.18(b) A marriage solemnized between the parties within the degrees of prohibited relationship is null and void and the parties of such marriage are liable to be punished with simple imprisonment for a period of one month or fine or Rs. 10000/- or with both.

#### 5. Sapinda Relationship (Sec 5 Clause (5))

The parties to the marriage should not be related to each other as Sapindas. A marriage between sapindas is void.

Under Section 3(f):-

- (i) "Sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation.
- (ii) Two persons are said to be "sapindas" of each other if one is a lineal ascendant of the other within the limits of "sapinda" relationship, or if they have a common lineal ascendant who is within the limits of "sapinda" relationship with reference to each of them.

No marriage is valid if it is made between parties who are related to each other as 'sapindas' unless such marriage is sanctioned by usage or custom governing both parties. The custom which permits of a marriage between people who are sapindas of each other must fulfil the requirements of a valid custom. The custom must be certain, reasonable and should not be opposed to public policy.

Punishment :-A marriage in contravention of this clause is void. Under Sec 18(b)A person contravening this provision are liable to be punished with simple imprisonment which may be extend to Rs. 1000/- or with both

## Nullification of Marriage - An Annulled Marriage

Marriage is necessarily the basis of social organization and the foundation of important legal rights and obligations. In Hindu Law, Marriage is treated as a Samaskara or a Sacrament. Divorce, however is a thorny question and Annulment is a very unusual remedy. In our modern world, an Annulment tends to be more a creature of religion than of law. Annulments are rarely granted and when they are, very specific circumstances must exist.

### What Is Annulment of Marriage

In strict Legal terminology, annulment refers only to making a voidable marriage null; if the marriage is void ab initio, then it is automatically null, although a legal declaration of nullity is required to establish this.

**Annulment** is a legal procedure for declaring a marriage null and void. With the exception of bigamy and not meeting the minimum age requirement for marriage, it is rarely granted. A marriage can be declared null and void if certain legal requirements were not met at the time of the marriage. If these legal requirements were not met then the marriage is considered to have never existed in the eyes of the law. This process is called annulment. It is very different from divorce in that while a divorce dissolves a marriage that has existed, a marriage that is annulled never existed at all. Thus unlike divorce, it is retroactive: an annulled marriage is considered never to have existed.

### Grounds for Annulment

The grounds for a marriage annulment may vary according to the different legal jurisdictions, but are generally limited to fraud, bigamy, blood relationship and mental incompetence including the following:

- 1) Either spouse was already married to someone else at the time of the marriage in question;
- 2) Either spouse was too young to be married, or too young without required court or parental consent. (In some cases, such a marriage is still valid if it continues well beyond the younger spouse's reaching marriageable age);
- 3) Either spouse was under the influence of drugs or alcohol at the time of the marriage;
- 4) Either spouse was mentally incompetent at the time of the marriage;
- 5) If the consent to the marriage was based on fraud or force;
- 6) Either spouse was physically incapable to be married (typically, chronically unable to have sexual intercourse) at the time of the marriage;
- 7) The marriage is prohibited by law due to the relationship between the parties. This is the "prohibited degree of consanguinity", or blood relationship between the parties. The most common legal

relationship is 2nd cousins; the legality of such relationship between 1st cousins varies around the world.

8) Prisoners sentenced to a term of life imprisonment may not marry.

9) Concealment (e.g. one of the parties concealed a drug addiction, prior criminal record or having a sexually transmitted disease)

### **Basis of an Annulment**

**In Section 5 of the Hindu Marriage Act 1955**, there are some conditions laid down for a Hindu Marriage which must be fulfilled in case of any marriage between two Hindus which can be solemnized in accordance with the requirements of this Act.

Section 5 Condition for a Hindu Marriage - A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

- (i) Neither party has a spouse living at the time of the marriage;
- (ii) At the time of the marriage, neither party,-
  - (a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or
  - (b) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
  - (c) has been subject to recurrent attacks of insanity or epilepsy;
- (iii) The bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage;
- (iv) The parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
- (v) The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

An annulment may be granted when a marriage is automatically void under the law for public policy reasons or voidable by one party when certain requisite elements of the marriage contract were not present at the time of the marriage

## Void and Voidable marriage

### **Void Marriages**

A marriage is automatically void and is automatically annulled when it is prohibited by law. Section 11 of Hindu Marriage Act, 1955 deals with:

**Void marriages** - Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party be so declared by a

decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v), Section 5 mentioned above.

**Bigamy** - If either spouse was still legally married to another person at the time of the marriage then the marriage is void and no formal annulment is necessary.

**Interfamily Marriage**- A marriage between an ancestor and a descendant, or between a brother and a sister, whether the relationship is by the half or the whole blood or by adoption is void.

**Marriage between Close Relatives**- A marriage between an uncle and a niece, between an aunt and a nephew, or between first cousins, whether the relationship is by the half or the whole blood, except as to marriages permitted by the established customs.

### **Voidable Marriages**

A voidable marriage is one where an annulment is not automatic and must be sought by one of the parties. Generally, an annulment may be sought by one of the parties to a marriage if the intent to enter into the civil contract of marriage was not present at the time of the marriage, either due to mental illness, intoxication, duress or fraud

Section 12 of Hindu Marriage Act, 1955 deals with

**Voidable Marriages**- (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-

(a) that the marriage has not been consummated owing to the impotency of the respondent; or  
(b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5; or  
(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978, the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or  
(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage-

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if-  
(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered ; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied-

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.

**Impotency** - If either spouse was physically incapable of entering the marriage at the time of the marriage, usually because of a lack of ability to have sexual intercourse, and if this inability appears incurable or if the spouse refuses to take any action to cure the inability, there are grounds for an annulment. The inability must continue and must exist at the time of suit.

**Lack of Mental Capacity** - If the court finds that either spouse did not have ability to understand the nature of the marriage contract or the duties and responsibilities of the marriage contract, then there may be grounds for an annulment. However, if the spouse who did not have the ability to understand the contract gains the capacity to understand it and freely lives with the other spouse, then this ground does not apply. This particular ground most often applies to someone who has been mentally ill or who has suffered from mental or emotional disorder.

**A Party was Under the Age of Consent** - If you were married while you are under the legal age, your marriage may be annulled. The legal age for boys is 21 years and for girls is 18 years. A marriage by an underage party may become legally binding and incapable of annulment if the cohabitation of the parties as husband and wife continues voluntarily after the person reached the age of consent.

**Fraud or Force** - If the consent to the marriage contract was obtained either by fraud or force, then there are grounds for an annulment. Fraud is simply not telling the truth in order to induce the other party to enter into the marriage contract. Whether the failure to tell the truth will be grounds for annulment depends of the facts of the case. Force implies the use of or threat of the use of physical violence to make a person get married. The person who has been threatened or deceived about the marriage contract continues to live with the spouse after the discovery of the fraud or the deception or after being forced into the marriage, it is possible that this ground will not apply.

Section 11 provides the grounds what make a Hindu marriage void .On the other hand section 12 enumerates the grounds of voidable marriage .There is gulf difference in between the void and voidable marriage .

The points of distinctions may be shown in the following tabular form.

	<b>Void Marriage.</b>	<b>Voidable Marriage.</b>
1.	In a void marriage, the parties do not acquire any status of husband and wife as such it does not confer any mutual rights and obligations upon the parties.	On the other hand, in a voidable marriage the parties acquire status of husband and wife and it confers mutual rights and obligations upon the parties for all purposes until a decree of court annuls it.
2.	A void marriage is void <i>ab initio</i> . It is void from the very beginning. No decree of Court is required to annul the	But a voidable marriage remains perfectly valid unless it is avoided by a decree of court nullifying it.

	void marriage. However, if parties so wishes , a void marriage is merely declared by the court as void by a decree of annulment.	
3.	In a void marriage, either of the parties to the marriage may marry again without getting a decree declaring the marriage void. The offence of bigamy is not attracted.	On the other hand, as the voidable marriage is valid unless avoided, neither of the parties can marry again without obtaining a decree of nullity of marriage or else the offence of bigamy is attracted.
4.	In a void marriage, a wife is not entitled to claim maintenance under section 125 of Cr.P.C as she acquires no status of wife.	But in a voidable marriage, the wife can claim maintenance until the marriage is annulled by a decree of declaration.
5.	In void marriage, neither of the parties acquire right of inheritance on the death of other party when succession opens.	In case of voidable marriage, either of the parties acquire right of inheritance on the death of other party when succession opens, if the marriage is not annulled.

### **Rights of Children from Annulled Marriages**

The court has the ability to establish rights and obligations related to the children from such marriages. Children from an annulled marriage are legitimate.

Section 16 of Hindu Marriage Act, 1955 deals with **Legitimacy of children of void and voidable marriages -**

(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such a child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of the marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case, where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

Thus, such children would be regarded in law as legitimate children of the parents for all purposes including succession.

### **Annulment Process**

Now that no-fault divorce is readily available, marriage annulment is not very common. To get an annulment, a person first needs to meet the residency requirements of the state that they live in. The jurisdictional requirements are similar to those required for dissolution or divorce: one of the parties must live in the state where the marriage annulment is filed for a continuous ninety-day period. Similar to a divorce filing, marriage annulment case proceeds with a filing, petition, summons, and ancillary documents. An annulment case can be initiated by either the husband or the wife in the marriage. The grounds for marriage annulment are stated in the petition. The annulment procedure is similar to that of a standard divorce. A divorce can be much more complicated than an annulment.

### **Effects of Marriage Annulment**

Annuling a marriage simply erases it from the records, as if it never took place. The result of a marriage annulment is a decree that the marriage never existed. It nullifies the marriage, returning the parties to their prior single status.

It's a common misconception that short marriages can be annulled, but the length of the marriage is not a qualifying factor. Many times, annulments occur after very short marriages, so there is no need to divide assets or debts or decide custody of children produced by the marriage. In the case of a longer marriage that is annulled, the court will divide the property of the parties.

An annulment is a legal procedure which cancels a marriage between a man and a woman. Annuling a marriage is as though it is completely erased – legally, it declares that the marriage never technically existed and was never valid. Annulment of marriage is very important in the scheme of matrimonial laws as there is no point in carrying the burden of divorce in cases where marriage has been solemnized on the strength of fraud or where the marriage is solemnized despite the fact that the responding spouse was already married

## **Judicial Separation and Divorce**

Judicial separation is a state of marriage authorized by the court where a husband and wife do not live like a married couple. In many situations it becomes impossible for either spouse to live with the other person. At the same time, they either do not want a divorce or do not have enough ground for divorce. In such a situations, court may grant a decree of judicial separation.

### **Difference between judicial separation and divorce**

Section 13 of the Hindu Marriage Act lays down the grounds of divorce and section 13A says that if the Court considers it just to do it may pass a decree for Judicial separation instead of Divorce. Section 13B also provides the circumstances when decree of divorce by mutual consent can be passed.

On the other hand section 10 of the Act provides the same grounds of divorce as also the grounds of Judicial separation. Though the grounds are same, there is material difference in between Divorce and Judicial Separation.

The points of distinctions may be shown in the following tabular form.

	<b>Divorce.</b>	<b>Judicial separation.</b>
1.	Marital tie comes to an end by divorce.	Judicial separation does not put the marital tie to an end.
2.	In the case of divorce the mutual rights and obligations of husband and wife ceases to continue.	But in case of judicial separation the mutual rights and obligations of husband and wife remain suspended only.
3.	Divorce ends the bonds between husband and wife. The wife is only entitled to the maintenance and alimony under section 25 and custody, maintenance and education of the children under section 26 of the Hindu Marriage Act.	In Judicial separation, the parties continue to remain as husband and wife.
4.	Divorce gives the right to the parties to remarry.	But judicial separation does not give the parties the right to remarry because the marital tie continues.
5.	After divorce, the former husband's intercourse with his former wife, without her consent, is a punishable offence under section 376 of I.P.C.	But in case of Judicial separation , if the cohabitation does not take place between the parties for a period of one year or upwards , either of the parties may seek for divorce under section 13 (1A)(i) of the Act . So, cohabitation is expected for reconciliation amongst the parties in case of Judicial separation.

### Grounds for Judicial separation and divorce

Grounds for Judicial separation are same as given in section 13(1), which are applicable for divorce. A wife has the grounds given in section 13(2) as well. They are:-

#### Section 13 (1) at fault Grounds

##### a) **Adultery**

Voluntary intercourse with third person is called adultery. It does not include rape.

**Vira Reddy vs Kistamma 1969** - One single act of adultery is enough for divorce or judicial separation. Burden of proof is on the petitioner. Earlier it had to be proved beyond doubt but now only high probability is required.

**Sanjukta vs Laxmi 1981** - Circumstantial evidence is sufficient.



### b) **Cruelty**

Legal concept of cruelty has varied from time to time, place to place, and situation to situation. In early law, intention was considered an essential element of cruelty but in modern law it is not so. The intention of the law is to protect the innocent party from any harm -physical or mental. Scolding or nagging has also been considered as cruelty.

#### **Definition**

There is no precise definition of cruelty because the term is so wide. Several situations and cases over past 100 years have shown that cruelty can be mental or physical. In the case of **Dastane vs Dastane 1970 Bom**, it was held that cruelty could be through words, gestures, or even by mere silence.

A general explanation of cruelty can be found in the case of **Russel vs Russel 1897**, in which it was held that any conduct that poses a danger to life, limb, or health - physical or mental, or causes reasonable apprehension of such danger, is cruelty.

Earlier, the petitioner had to show that the act of the respondent caused reasonable apprehension of danger. Thus, in the case of **Sayal vs Sarla 1961 Punjab**, when wife administered love-potion to the husband, causing his hospitalization, it was held to be cruelty even though she did not mean to hurt her husband because it caused reasonable apprehension of danger. However, now it is not required. The clause merely says, "if the respondent has treated the petitioner with cruelty". In the case of **GVN Kameshwara Rao vs G Jalili 2002, SC** held that it is not necessary that the act has caused a reasonable apprehension in the mind of petitioner. The emphasis will be on the act or conduct constituting cruelty. It further held that social status of the parties, their education must be considered while determining whether the act constitutes cruelty or not. Thus, what amounts to cruelty in one case may not amount to cruelty in another.

#### **Intention to be cruel is not material**

Earlier intention was necessary but now it is not so. In the case of **Jamieson vs Jamieson 1952**, House of Lords observed that unintentional acts may also amount to cruelty. In **Williams vs Williams 1963 Allahbad**, the necessity of intention in cruelty was finally rejected in India. In this case husband was insane and constantly accused the wife of adultery. This was cruelty without intention.

Thus, in the case of **Bhagwat vs Bhagwat 1976 Bom**, when husband tried to strangle wife's brother and he younger son in a fit of insanity, he was held to be cruel. Temporary insanity or schizophrenia cannot be a defense against the plea of cruelty.

#### **Cruelty need not only be against the petitioner**

In **Bhagwat vs Bhagwat**, cruelty against his step daughter was held as cruelty against wife.

#### **The act or omission need not only be of the respondent**

Since most women have to live in husband's joint family, they have to put up with their actions also. In the case of **Shyam Sundar vs Santa Devi 1962**, the wife was ill treated by the in-laws and husband stood their idly without caring for wife. This was held as cruelty.

However, in the case of **Gopal vs Mithilesh 1979 Allahbad**, husband's stand of neutrality regarding wife and mother and his inaction about his mother's nagging of his wife was not considered cruelty because it is normal wear and tear of a married life.

### **Cruelty of Child**

Generally, cruelty by child towards one parent does not amount to cruelty. However, in the case of **Savitri vs Mulchand 1987 Delhi**, mother and son acted in concert and the son tortured the father by squeezing his testicles to force him to do what they wanted him to do, was considered cruelty against the wife.

### **Types of cruelty - Physical and Mental**

#### **Physical Cruelty**

Injury to body, limb, or health, or apprehension of the same. In the case of **Kaushalya vs Wisakhiram 1961 Punj**, husband beat his wife so much so that she had to lodge police complaint even though injury was not serious. It was held that serious injury is not required.

#### **Mental Cruelty**

In **Bhagat vs Bhagat 1994 SC** held that a conduct that causes such a mental pain and suffering that makes it impossible to live with that person is mental cruelty. Mental cruelty must be such that it cannot reasonably be expected to live together. This has to be judged on the circumstances of the case.

In the case of **N Sreepadchanda vs Vasantha 1970 Mysore**, wife hurled abuses at the husband and quarreled over trivial matters so much so that he became a laughing stock in the locality. This was held to be mental cruelty against the wife.

In **Saptami vs Jagdish 1970 Calcutta**, false accusations of adultery were held to be mental cruelty.

**Yashodabai vs Krishnamurthi 1992** - Mere domestic quarrels with mother in law is not cruelty.

**Shobha vs Madhukar 1988 SC** - Constant demand for dowry is cruelty.

In the case of **Jyotishchandra vs Meera 1970**, husband was not interested in wife, he was cold, indifferent, sexually abnormal and perverse. It was physical as well as mental cruelty.

### **c) Desertion**

There are 3 Types of desertion-

- Actual Desertion,
- Constructive Desertion,
- Willful neglect.

**Actual Desertion** - factum of desertion, animus deserendi, without reasonable cause, without consent, 2 yrs must have passed.

**Lachman vs Meena - 1964** - Wife was from rich family. She was required to live in joint family of husband. She went back to parents. Kept making fake promises of return but never did. Held desertion.

**Jagannath vs Krishna** - Wife became brahma kumari and refused to perform marital obligations. Held desertion.

**Bipinchandra vs Prabhavati SC 1957** - Husband went to England. Husband's friend came to house in India. Husband came back. Alleged affair, which was refuted by wife. Wife went to her parents for attending marriage. Prevented her from coming back. Held no desertion by wife.

**Sunil Kumar vs Usha 1994** - Wife left due to unpalatable atmosphere of torture in husband's house. Held not desertion.

**Constructive Desertion** - If a spouse creates an environment that forces the other spouse to leave, the spouse who created such an environment is considered deserter.

**Jyotishchandra vs Meera 1970** - Husband was not interested in wife, he was cold, indifferent, sexually abnormal and perverse. Went to England. Then came back and sent wife to England for PhD. When wife came back, did not treat her well. Abused her and his inlaws physically. Wife was forced to live separately. Held desertion by husband.

**willful Neglect** - If a spouse intentionally neglects the other spouse without physically deserting, it is still desertion.

**Balihar vs Dhir Das 1979** - Refusing to perform basic marital obligations such as denial of company or intercourse or denial to provide maintenance is willful neglect.

### Reasonable Cause

1. If there is a ground for matrimonial relief. ( ground for void, voidable marriage or grounds for maintenance under sec 18 of HAMA).
2. If spouse is guilty of a matrimonial misconduct that is not enough for matrimonial relief but still weighty and grave.
3. If a spouse is guilty of an act, omission, or conduct due to which it is not possible to live with that spouse.

**Chandra vs Saroj 1975** - Forcing a brahmin wife to eat meat.

### Without Consent

**Bhagwati vs Sadhu Ram 1961** - Wife was living separately under a maintenance agreement. Held not desertion.

### Other Grounds

4. Section 13 (ii) : **ceased to be a Hindu.**
5. Section 13 (iii) **unsound mind.** - includes mental disorders such a incomplete development of brain or psychopathic disorder or schizophrenia
6. Section 13 (iv) **virulent and incurable Leprosy**
7. Section 13 (v) **communicable venereal disease**
8. Section 13 (vi) **renounced the world**
9. Section 13 (vii) **presumed dead** - not heard of in 7 years.
10. Section 13 (1-A) **Breakdown Theory**
  - (i) no cohabitation for 1 yr after passing the decree of judicial separation.
  - (ii) no cohabitation for 1 yr after passing the decree of restitution of conjugal rights. Effected by provisions in section 23.

### 11. Section 13(2) **Additional grounds for wife**

- (i) Another wife of the husband is alive.
- (ii) Rape, Sodomy, Bestiality.
- (iii) Wife was awarded maintenance under section 15 of HAM 1956 or under section 125 of CrPC and no cohabitation has occurred for 1 yr after the award.
- (iv) If wife was under 15 at the time of marriage and if she repudiates the marriage before 18.

**Section 13-An Alternate relief in divorce proceedings** - If the judge feels that sufficient grounds do not exist for divorce, he can grant judicial separation.

### 12. Section 13-B Divorce by mutual consent

Divorce by mutual consent means that the case is not like usual ones wherein one party petitions against the other for divorce and the other party resists the same. Here both the parties make a joint petition to the court for divorce between them. They genuinely desire to get rid of each other and they part amicably for good. If divorce is not given their life would be spoiled and it would result in moral degradation. If divorce by mutual consent is given the parties will not wash their dirty linen in public. There are unfounded objections against this type of divorce that consent of the unwilling party would be obtained by force, fraud or some other contrivance, and this is a divorce by collusion. But both these arguments and doubts are unfounded. Every collusion is no doubt by consent but every consent does not mean collusion. Collusion is a secret agreement for a fraudulent purpose; it is a secret agreement by two or more persons to obtain an unlawful object. Collusion is different from compulsion. Compulsion occurs when one party can dominate the will of the other. The Hindu Marriage Act now permits divorce by mutual consent under Section 13B. One may well say that from an unbreakable bondage under the Smritis, a Hindu Marriage has been transferred under the Hindu Marriage Act into a consensual union between one man and one woman. Everything static must drop and die and ideas of marriage and divorce are no exception.

### Restitution of conjugal rights under Hindu law

Marriage according to Hindu law is a sacrament. By saying that marriage is a sacrament it means that the primary function of marriage is the performance of religious and spiritual duties by married couple and that the union is a permanent one.

In order to maintain the permanency of marriage, law provides for the provision of restitution of conjugal rights in the event of one party withdrawing from the society of the other without any reasonable cause. The law seeks to maintain a stability of marital relations and favors all attempts in order to prevent the breakdown of marriage.

**Section 9 of the Hindu Marriage Act provides for the restitution of conjugal rights.**

Section 9 states that: When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

The essential provisions of this section are:

- (1) One party has withdrawn from the society of the other,
- (2) Such withdrawal is without any reasonable reason,
- (3) The aggrieved party applies for the restitution of conjugal rights.

The object of decree of restitution of conjugal rights is to bring about cohabitation between the estranged parties so that they can live together in the matrimonial house with amity. It does not aim at forcing a person to sexual relationship. Further, the decree is granted if the reason for withdrawal is not reasonable. If the court finds that the petitioner is guilty then the decree of restitution of conjugal rights is not granted. Further, if after the passing of the decree, the parties do not cohabit continuously for one year, then it becomes a ground for dissolution of marriage under Section 13.

#### Reasonable grounds for withdrawal:

- (A) If there exists a ground on which the respondent can claim any matrimonial relief.
- (B) If the petitioner is guilty of any matrimonial misconduct.
- (C) If the petitioner is guilty of such act, omission or conduct which makes it impossible for the respondent to live with him.

Husband's neglect of his wife or the constant demand for dowry is reasonable grounds for the wife to stay at her parent's place.

#### Burden of proof:

The initial burden to prove that the respondent has withdrawn from the society of the petitioner is on the petitioner. Once that burden is discharged, it is for the respondent to prove that there exists a reasonable excuse for the withdrawal.

#### Constitutional validity of Section 9

It has been contended in many cases that Section 9 of the Hindu Marriage Act, 1955, is violative of right to privacy under Article 21. In many cases the wife has stated that the Section is misused by husbands to force the wife into living with them against her wish. In the case of **T Sareetha v T Venkata Subbaih**, the court observed that Section 9 is violative of right to privacy and human dignity given under Article 21 of the Constitution and hence, ultra vires the Constitution. However, this was overruled by the Supreme Court in **Saroj Rani v Sudarshan**.

Law seeks to provide stability of marriage; it does not force a person into unwanted relations. The decree is passed only when there is an unreasonable withdrawal of society. However, it may be misused by husbands or wives into coercing their unwilling partners into cohabitation. Therefore, it is the duty of the courts to enquire judiciously and order accordingly.

**UNIT-III**

- 1. Joint family (Hindu undivided family)**
- 2. Coparcenaries, property under Mitakshara and Dayabhag.**
- 3. Partition and Re-union, women estate, stridhan.**

**Coparcenary & joint  
Hindu family**

**Joint Hindu Family**

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

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

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

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

In **Narenderanath v. Commissioner of Wealth Tax**, the Supreme Court held that the expression 'Hindu

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

In **Commissioner of Income Tax v. Gomedalli Lakshminarayan** there was a joint family consisting of a father and his wife and a son and his wife, the son being the present assessee. On the death of father the Question raised is whether the assessee is to be assessed as an individual or as a member of the joint Hindu family, It was held that the son's right over the property is not absolute because two females in the family has right of maintenance in the property, therefore the income of the assessee should be taxed as the income of a Hindu undivided family.

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

### **Coparcenary**

A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the sons, grandsons and great-grandsons of the holder of the joint property for the time being, in other words, the three generations next to the holder in unbroken male descent.

Ancestral property is a species of coparcenary property. As stated above if a Hindu inherits property from his father, it becomes ancestral in his hands as regards his son. In such a case, it is said that the son becomes a coparcener with the father as regards the property so inherited, and the coparcenary consists of the father and the son. However, this does not mean that coparcenary can consist only of the father and his sons. It is not only the sons but also the grandsons and great grandsons who acquire an interest by birth in the coparcenary property. Coparcenary begins with a common male ancestor with his lineal descendants in the male line within four degrees counting from and inclusive of such ancestor. The Mitakshara concept of coparcenary is based on the notion of son's birth right in the joint family property.

Though every coparcenary must have a common ancestor to start with, it is not to be supposed that every extant coparcenary is limited to four degrees from the common ancestor. When a member of a joint family is removed more than four degrees from the last holder, he cannot demand a partition, and therefore he is not a coparcener. On the death, however, of the last holder, he would become a member of the coparcenary, if he was fifth in descent from him and would be entitled to a share on partition, unless his father, grandfather and great-grandfather had all predeceased the last holder. Whenever a break of more than three degrees occurs between any holder of property and the person who claims to enter the coparcenary after his death the line ceases in that direction and the survivorship is confined to those collaterals and descendants who are within the limit of four degrees.

In **Ceylon- Attorney-General of Ceylon v. A. R. Arunachalam Chettiar** case a father and his son constituted a joint family governed by Mitakshara School of Hindu Law. The father and the son were domiciled in India and had trading and other interests in India. The undivided son died and father became the sole surviving coparcener in a Hindu Undivided family to which a number of female members belonged. In this the court said that the widows in the family including the widow of the predeceased son had the power to introduce coparceners in the family by adoption and that power was exercised after the death of son.

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

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

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

The essence of a coparcenary under Mitakshara law is unity of ownership. The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by Mitakshara law, no individual member of that family, whilst it remains undivided, can predicate, of the joint and undivided property, that he, that particular member, has a definite share. His interest is a fluctuating interest, capable of being enlarged by deaths in the family, and liable to be diminished by births in family. It is only on partition that he becomes entitled to a definite share. The most appropriate term to describe the interest of a coparcener in coparcenary property is 'undivided coparcenary interest'. If a Mitakshara coparcener dies immediately on his death his interest devolves on the surviving coparceners.



The Supreme Court has summarised the position and observed that the coparcenary property is held in collective ownership by all the coparceners in a quasi-corporate capacity. The incidents of coparcenary are :

1. The lineal male descendants of a person upto the third generation, acquire on birth ownership in the ancestral properties of such person;
2. such descendants can at any time work out their rights by asking for partition;
3. till partition each member has got ownership extending over the entire property conjointly enjoyment of the properties is common;
4. as a result of such co-ownership the possession and enjoyment of the properties is common;
5. no alienation of the property is possible unless it is for necessity, without the concurrence of the coparceners and
6. the interest of a deceased member passes on his death to the surviving coparceners.

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

#### **Difference between Joint Hindu Family and Coparcener**

1. In order to constitute a Joint Hindu family the existence of any kind of property is not required whereas in Coparcenary there exists a ancestral property.
2. Joint Hindu family consist of male and female members of a family whereas in Coparcenary no female can be a coparcener.
3. Coparceners are members of the Joint Hindu Family whereas all the members of Joint Hindu family are not Coparceners.
4. Dayabhaga School on Coparcenar and Joint Hindu Family :

According to the Dayabhaga law, the sons do not acquire any interest by birth in ancestral property. Their rights arise for the first time on the father's death. On the death they take such of the property as if left by him, whether separate or ancestral, as heirs and not by survivorship. Since the sons do not take any interest in ancestral property in their father's lifetime, there can be no coparcenary in the strict sense of the word between a father and sons according to the Dayabhaga law. The father can dispose of ancestral property, whether movable or immovable by sale, gift, will or otherwise in the same way as he can dispose of his separate property. Since sons do not acquire any interest by birth in ancestral property, they cannot demand a partition of such property from the father. A coparcenary under the Dayabhaga law could thus consist of males as well as females. Every coparcenar takes a defined share in the property, and he is owner of that share. It does not fluctuate with birth and deaths in family.

**Joint Hindu family  
property**

Mitakshara divides property into two classes, namely:-

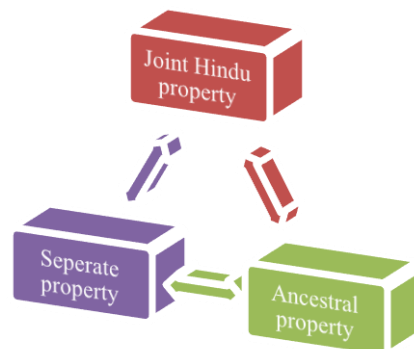
- apratibandha daya or unobstructed heritage, and
- sapritibanda daya or obstructed heritage.

Property in which a person acquires an interest by birth is called unobstructed heritage, because the accrual of the right to it is not obstructed by the existence of the owner. The right to it arises from the mere fact of their birth in the family, and they become coparceners with their paternal ancestor in such property immediately on their birth, ancestral property is unobstructed heritage. All properties inherited by a Hindu male from a direct male ancestor, not exceeding three degrees higher to him is called apratibandha daya.

Property, right to which accrues not by birth but on the death of the last owner without leaving male issue, is called obstructed heritage. It is called obstructed, because the accrual of the right to it is obstructed by the existence of the owner. Thus the property which devolves on parents, brothers, nephews, uncles, etc., upon the death of the last owner, is obstructed heritage. These relations do not take a vested interest in the property by birth. Their right to it arises for the first time on the death of the owner.

Coparceners can restrain the holder of sapratibandha daya from alienating it, while in case of apratibandha daya its holder, so long as he is living, has absolute rights of alienation over it: he may gift it inter vivos or by will, he may sell it or mortgage. Unobstructed heritage devolves by survivorship, obstructed heritage, by succession.

The distinction between obstructed and unobstructed heritage is peculiar only to Mitakshara School. According to Dayabhaga, all heritages are obstructed, for, according to the doctrines of that school, no person, not even a son, takes an interest by birth in the property of another. Dayabhaga does not recognise the principle of survivorship.



### **Joint Family Property**

The Joint Hindu family is purely a creature of Hindu law, and those who own it are called coparceners. Property jointly acquired by the members of a joint family with the aid of ancestral property is joint family property. The Hindu joint family property is like a big reservoir in which property flows in from various sources and from which all members of joint family drew out to fulfill their multifarious needs. The joint family property may flow into it from various sources. Property according to the Hindu law, may be divided into two classes, namely :-

#### **1. Ancestral Property**

All property inherited by a Hindu male from his father, father's father, or father's father's father, is ancestral as regards his male issue, even though it was inherited by him after his death of a life-tenant. A father cannot change the character of joint family property into absolute property of his son by merely making a will and bequeathing it or part of it to the son as if it was the self-acquired property of the father. In the hands of the son the property will be ancestral property and the natural or adopted son of that son will take interest in it and be entitled to it by survivorship as joint family property. Where a number of sons inherit their father's self-acquired property, they hold it as joint family property if at the time of his death they are living as members of a joint family.

In **Atar Singh v. Thakar Singh** it was stated that judgment that unless the lands came "by descent from a lineal male ancestor in the male line, they are not deemed ancestral in Hindu Law."

Property acquired by a father by adverse possession would not be ancestral property in his hands and his sons would not take interest in it by birth. In a case the Privy Council held that a maternal uncle is not an ancestor, and it has accordingly been held that property inherited from a maternal uncle is not ancestral property.

In **Chelikani Venkayamma v. Venkatar Amanayamma** the property which had descended from the maternal grand-father to his two grandsons. On the death of one of the grandsons the widow of the deceased claimed to recover a moiety of the estate from the surviving grandson (Brother). The question was whether the property of the maternal grandfather descended, on the death of his daughter, to her two sons jointly with benefit of survivorship. Their Lordships decided that the estate was governed by the rule of survivorship, and the claim of the widow was, therefore, negated. This decision of the court was criticised.

In **Muhammad Husain Khan v. Babu Kishva Nandan Sahai** one G inherited certain property from his maternal grandfather J. Under a will made by G the property which G inherited from his maternal grandfather was to go to his son B and on the death the property was to vest in B's widow, Giri Bala. During the life time of B, in an execution of a money decree against him the said property was sold. B then brought a suit, claiming possession of the property. The validity of the will executed by G is challenged on the ground that the testator had no authority to dispose of the property, as it belonged to a Hindu coparcenary consisting of himself and his son. In their Lordships' opinion the estate which was inherited by G, from his maternal grandfather cannot be held to be ancestral property in which his son had an interest jointly with him. G consequently had full power of disposal over that estate, and the devise made by him in favour of his daughter-in-law could not be challenged by his son or any other

person. ON the death of her husband, the devise in her favour came into operation and she became the absolute owner of the village property, as of the remaining estate; and the sale of that village in execution proceedings against her husband could not adversely affect her title.

Property inherited by a person from collaterals, such as a brother, uncle, etc, or property inherited by him from a female is his separate property. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. If the coparcener dies without leaving male issue, it passes to his heirs by succession. Accumulations of income of ancestral property, property purchased or acquired out of income proceeds of sale of ancestral property and property purchases out of such proceeds are ancestral property.

In **C.N. Arunachala Mudaliar v. C.A. Muruganatha Mudaliar** case, Issue was whether property obtained by a gift or will from paternal ancestor are to be regarded as ancestral or self-acquired properties. In this case there were allegations that there were joint property of a family consisting of himself, his father and his brothers and that he was entitled in law to one-third share in the same. Plaintiff and his brother are both sons are from first wife of their father, who predeceased her husband. The father asserts an exclusive title to the joint family property denying any right of his sons. Father claimed that some of the property is his self acquired property and other properties were self-acquired property of his father and he got them under a will executed by his father. In connection to this case the court referred the case of **Ram Balwant v. Rani Kishori**. In this case the Lordship held that chap.1,Sec.1 verse 47 of Mitakshara contained only moral or religious precepts while those in S.5, verses 9 and 10 embodied rules of positive law. It was held that the father of a joint family governed by Mitakshara law has full and uncontrolled powers of disposition over his self acquired immovable property and his male issue could not interfere with these rights in any way. Further in **Muddan Gopal v. Ram Buskh** it was held that a Mitakshara father is not only competent to sell his self-acquired immovable property to a stranger without the concurrence of his sons. While referring another case **Sital v. Madho and Bawa Misser v. Rajah Bishen** where it was held that a Mitakshara father can make a gift of his self acquired property to one of his sons to the detriment of another and he can make even an unequal distribution amongst his heirs. Going through above cases court concluded that a property gifted by a father to his son could not become ancestral property in the hands of the donee simply by reason of the fact that the donee got it from his father or ancestor. On reading the will as a whole the court held that it becomes clear that the testator intended the legatees to take the properties in absolute right as their own self-acquisition without being fettered in any way by the rights of their sons and grandsons.

Son takes at his birth in the ancestral property is wholly independent of his father. He does not claim through the father, and, therefore, a transfer is allowed by law, cannot affect the interest of the son in the property. However, the father has a special power of disposal of ancestral property for certain purposes. The father has the power of making within reasonable limits gifts of ancestral movable property without the consent of his sons. A Hindu father of other managing member has power to make a gift within reasonable limits of ancestral immovable property for pious purposes. A member of a joint family cannot dispose of by will a portion of the property even for charitable purposes and even if the portion of the property bears a small proportion to the entire estate.

## 2. Separate Property

Property acquired in any of the following ways is the separate property of the acquirer; it is called 'self acquired' property. Following are the some examples of Separate Property:-

- 1 Obstructed Heritage
- 2 A gift of a small portion of ancestral movable made through affection by a father to his male issue is his separate property.
- 3 Property granted by Government to a member of a joint family.
- 4 Ancestral property lost to the family, and recovered by member without the assistance of joint family property.
- 5 Income of separate property.
- 6 Property obtained as his share on partition by a coparcener who has no male issue
- 7 Property held by sole surviving Coparcenar when there is no widow in existence who has power to adopt.
- 8 Separate earnings of a member of a joint family.
- 9 Gains of learning.

In **Dipo v. Wassan Singh**, plaintiff sued to recover possession of the properties which belonged to her brother, who died. She claimed to be the nearest heir. The defendants the sons of paternal uncle contest that they were preferential heirs according to custom, as the whole of the land was ancestral in the hands of the deceased. The court said that properties in the hands of deceased are properties which originally belonged to his ancestors. But deceased was the last male holder of the property and he had no male issue. There was no surviving member of a joint family, be it a descendant or otherwise, who could take the property by survivorship. Property inherited from paternal ancestors is, of course, 'ancestral property' as regards the male issue of the propositus, but, it is his absolute property and not ancestral property as regards other relations. It was held that the defendants were collaterals of deceased and as regards them the property was not 'ancestral property' and hence the plaintiff was the preferential heir.

## Karta

### Concept of Karta in Hindu Joint Family

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

### Who can be a Karta?

#### Senior-most Male Member:

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

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

#### **Junior Male Member:**

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

#### **Female Members as Karta:**

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

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

#### **Characteristics of a Karta:**

1. Karta's position is sui generis. As had been explained earlier, his position/ office is independent and there is no comparable office in any system in the world.
2. He has unlimited powers and even though he acts on behalf of other members, he is not a partner or agent.
3. He manages all the affairs of the family and has widespread powers.
4. Ordinarily he is accountable to no one. The only exception to this rule is if charges of misappropriation, fraud or conversion are levelled against him.
5. He is not bound to save, economies or invest. That is to say that he need not invest in land if the land prices are about to shoot up, and hence miss out on opportunities etc. He has the power to use the resources as he wishes, unless the above mentioned charges are leveled against him.
6. He is not bound to pay income of joint family in any fixed proportion to other members. This means that the Karta need not divide the income generated from the joint family property equally among the family members. He can discriminate one member from another and is not bound to treat everyone impartially. Only responsibility is that he has to pay everyone something so that they can avail themselves of the basic necessities such as food, clothing, shelter, education etc.
7. Apart from all the unlimited powers that are bestowed upon the Karta, he also has liabilities thrust on him.

#### **Karta's Liabilities:**

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

2. He is responsible for marriage of all the unmarried members in the family. Special emphasis is laid with respect to daughters in this case.
3. In case of any partition suit, the Karta has to prepare accounts.
4. He has to pay taxes on behalf of the family.
5. Karta represents the family in all matters including legal, religious and social matters.

#### **Powers of Karta:**

The powers of a Karta are divided into two parts:

##### **1. Power of Alienation:**

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

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

##### **A few illustrative cases are:**

- a) Food, shelter and clothing.
  - b) Marriage (second marriages are not considered a legal necessity).
  - c) Medical care.
  - d) Defence of person accused of a crime (exception to this rule is murder of a family member).
  - e) Payments of debts, taxes etc.
  - f) Performance of ceremonies (like marriage, grihapravesham).
  - g) Rent etc.
- b. **Benefit of Estate:** Karta, as a prudent manager, can do all those things which are in furtherance of the family's advancement, to prevent probable losses, provided his acts are not purely of speculative or visionary nature. The last clause means that the property cannot be converted into money just because the property is not yielding enough income.
  - c. **Indispensable Duties:** This term implies the performance of those acts which are religious, pious or charitable. Examples of indispensable duties are marriages, grihapravesham etc. In this case there is a requirement to differentiate between alienation made for indispensable duties and gifts for charitable purposes. The difference lies in the fact that in the former case while discharging indispensable duties,

the Karta has unlimited powers in the sense that he can alienate the entire property for that purpose. But in the case of gifts for charitable purposes, only a small portion can be alienated.

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

**Other Powers:**

These powers of the Karta are almost absolute. There are 9 powers in all and each of them has been dealt with in brief below:

2. **Powers of Management:** It is an absolute power. The Karta may mismanage or may discriminate between members and cannot be questioned on such aspects. But the Karta cannot deny maintenance and occupation of property to any member altogether. The check on his powers in this case is the power of "partition" vested in the coparcener.
3. **Right to Income:** All incomes of the joint family property should be brought to the Karta and it is for the Karta to allot funds to members and to look after their needs and requirements.
4. **Right to Representation:** The Karta represents the family in all matters legal, social and religious. His acts are binding on the family.
5. **Power of compromise:** The Karta has the power to compromise in all disputes relating to the family property or management. His acts are binding on the members of the family; but in case of a minor, it has to be approved by the court under O.32, Rule 7, CPC. The compromise made by the Karta can be challenged in court by any of the coparceners only on the ground of malafide.
6. **Power to refer a dispute to Arbitration:** The Karta has the power to refer any dispute with respect to family property or management to an arbitration council and the decision is binding on the family.
7. **Power of Acknowledgement:** The Karta can acknowledge any debt due to the family or pay interest on a debt or make part or full payment of principal etc. But the Karta has no power to acknowledge a time-barred debt.
8. **Power to Contract Debts:** The Karta has implied authority to contract debts and pledge the credit and property of the family. His decision is binding on the members of the joint family.
9. **Loan on Promissory Note:** When the Karta takes a loan for family purposes and executes a promissory note, then the other members may be sued as well even if they are not parties to the note. But the members are liable to the extent of their shares whereas the Karta is personally liable on the note.
10. **Power to enter into Contracts:** The Karta has the power to enter into contracts which are binding on the family.



**Burden of Proof:**

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

a) Proof of actual necessity.

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

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



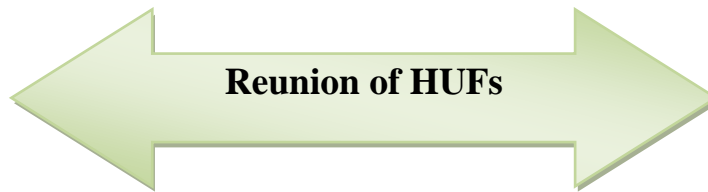
**Partition of HUFs**

A joint Hindu family springs from a common male ancestor and consists of his descendants in the male line, their spouses and unmarried daughters. Every male Hindu even when he is a member of joint Hindu family can and does constitute a joint family with his own descendants, a family which nevertheless is a part of the bigger family of which he is a member. Such a smaller family of the Hindu male who is himself a member of the bigger family constitutes a branch of the main family. Similarly sub-branches of the family can be formed by each of his male descendants. Each of these branches or sub-branches is in itself a HUF.

Partition is the ascertainment of individual shares of coparceners in the HUF and a later division by allotting separate properties to the members. The partition is a mere agreement to divide the properties and, therefore, does not require registration unless the division is through a written instrument. If the partition is oral, however, a memorandum of partition should be recorded. The memorandum does not have to be registered. Partition can be whole or partial.

On a partition between the members of the joint family, the shares are to be allotted as under.

- \* On a partition of a HUF, which includes the father, mother, and sons, the mother has no right to claim partition, but when the partition is actually affected she takes the share equal to the sons.
- \* On a partition between a father and his sons where the mother is not living, each son takes a share equal to that of the father.
- \* On a partition of a joint family consisting of brothers they take equal shares.
- \* Each branch takes per stripe as regards every other branch, but members of each branch take per capita as regards each other.
- \* None of the unmarried daughters has a right to share on partition but the partition should provide for their maintenance and education till their marriage and for their marriage expenses.



Even after a total partition, it is possible for the coparceners to reunite undoing the earlier partition among themselves. The effect of such reunion is to bring back to life, the former status of the HUF. A reunion can only take place between persons who are parties to the original partition. If a joint Hindu family separates, the family or any member of it may agree to reunite as a joint Hindu family.

The conditions precedent for a valid reunion under the Hindu Law are:

- \* There must have been a previous state of union. Reunion is possible only among persons who were on earlier date members of the HUF.
- \* There must have been a partition in fact.
- \* The reunion must be effected by the parties or some of them who had made the partition.
- \* There must be a junction of estate and reunion of property because reunion is not merely an agreement to live together as tenants in common.

Reunion is intended to bring about a fusion in the interest and in the estate among the divided members of an erstwhile HUF once again. Therefore, reunion creates a right on all the reuniting members in the joint family properties which is the subject matter of partition among them to the extent they were not dissipated before the union.

There should, however, be a proper agreement between the parties so that the intention to revert to the original status of the HUF is expressed clearly and unambiguously. The burden of proof of reunion is on the party asserting the reunion and must be discharged along with proof by the persons reuniting. It should also be remembered that if the partition comprising immovable properties was by a registered deed then the reunion, which follows if it is to be valid in law, must also be affected by a registered deed.

In a reunion, a few of the properties of the former HUF and also a few members of the former HUF may remain out of the reunited HUF. Thus, one may observe that it is possible that a partial partition which is not otherwise recognised by the tax law may to a limited extent be possible by the use of the reunion of a HUF.



**Meaning of Stridhan:** The word stridhan is composed of two words: Stri (woman) and Dhana (Property). The word means the property belonging to a woman or woman's property. This is the etymological sense but the word has a technical meaning given in law. As observed in **Rajamma vs. Varidarajula Chetti, AIR 1957 Mad 198**, a gift given to a Hindu woman before and after her marriage constitute woman's property. Thus conjunctively these two words imply that property over which a

woman has an absolute ownership. By the authors of different schools and sects it has been used in different senses, yet it connotes a meaning which comes out from the word itself.

This term was for the first time used in Smritis and in the Dharmasutra of Baudhayan which meant 'woman's absolute property'. Under the modern Hindu law stridhan does not represent any specific property but it includes all those properties of a Hindu Woman Over which she has absolute ownership and which is inherited by her Successors.

### Stridhan And Womans' Estate

The two important differences between the term woman's estate and stridhan are:

(a) A Woman has a limited right of alienation with respect to the properties coming under term woman's estate. The right of alienation can be exercised by her only in dire necessity, legal necessity, or in the interest of the estate itself; however, with respect to stridhan she has an absolute right of voluntary alienation of the property coming under it.

(b) In case of woman's estate the property after the death of the woman owner, is inherited by the descendants of the male known as reversioners and not by the descendants of the woman but in case of stridhan the property is inherited by the descendants of the woman herself as was the rule under the old Hindu law".

Section 14 of the Hindu Succession Act 1956 provides that any property possessed by a Hindu female, whether acquired before or after the commencement of this Act shall be held by her as full owner thereof and not as limited owner sub-section (1) explains further that 'property' in this subsection includes both movable and immovable property acquired by her by inheritance, partition, gift or will or acquired in lieu of maintenance or arrears of maintenance or acquired by her own skill or exertion or by purchase or by prescription or any other manner whatsoever, and also any property held by her as *stridhana* immediately before the commencement of the said Act.

It is immaterial whether it be obtained by inheritance of the deceased husband's separate property or of his share in coparcenary property by virtue of the proviso to section 6 of the Act, or by devise of her deceased husband or gift from a relative or any other person, and whether before, at or after her marriage. But, as expressly provided by sub section (2) of this section, a Hindu female shall not be entitled to hold any property as an absolute owner if she has acquired the same by way of gift, or under a will or any other instrument, or under a decree or order of a civil court or under an award, where the terms of the gift, will or other instrument or the decree order or award prescribe a restricted estate in such property.

Thus Section 14 has abolished women's estate by converting it into stridhan and woman's estate and has converted existing woman's estates into full estates. It has introduced fundamental changes in the traditional Hindu law of property of woman. The objects of this section are:

- To remove all disability of Hindu woman to acquire and deal with property, that is, all the property that she acquires will be her absolute property.

- To convert existing woman's estate into full estate.

It incorporates the following propositions.

(A)

- Any property acquired by a Hindu female after the commencement of the Act will be held by her as her absolute property.
- Any property held by a Hindu female as woman's estate and is in her possession will also become her property.
- But, if any property is covered by the provision of subsection (2) neither (a) nor (b) above will apply. In other words, if any property is acquired by a Hindu female by way of gift or under a will or any other instrument under a decree or order of a civil court or under an award, and the terms of the gift, will or other instrument or the decree order or award prescribe a restricted estate in such property, she will take it accordingly.

(B) The requirement of being possessed in subsection (1) applies only to the woman's estate existing at the time of the commencement of the Act; this obviously cannot apply to the properties acquired by her after the commencement of the Act.

(C) The definition of the term property contained in the explanation applies to both types covered under (a) and (b) of (A).

(D) This section has qualified retrospective application. It applies retrospectively to those woman's estates which were in the possession of the Hindu female when the Act came into force. It does not apply to those women's estate over which she had no possession when the Act came into force. To such estates old Hindu law continues to apply.

### **Kinds of Woman's Property**

What is the character of property that is whether it is stridhan or woman's estate, depends on the source from which it has been obtained. They are:

- **Gifts and bequests from relations**- Such gifts may be made to woman during maidenhood, coverture or widowhood by her parents and their relations or by the husband and his relation. Such gifts may be inter vivos or by will. The Dayabhaga School doesn't recognize gifts of immovable property by husband as stridhan.
- **Gifts and bequests from non-relations**- Property received by way of gift inter vivos or under a will of strangers that is, other than relations, to a woman, during maidenhood or widowhood constitutes her stridhan. The same is the position of gifts given to a woman by strangers before the nuptial fire or at the bridal procession. Property given to a woman by a gift *inter vivos* or bequeathed to her by her strangers during coverture is stridhan according to Bombay, Benaras and Madras schools.
- **Property acquired by self exertion, science and arts**-A woman may acquire property at any stage of her life by her own self exertion such as by manual labour, by employment, by singing, dancing etc., or by any mechanical art. According to all schools of Hindu Law, the property thus acquired during widowhood or maidenhood is her stridhan. But, the property thus acquired during coverture does not constitute her stridhan according to Mithila and Bengal Schools, but according to the rest of the schools it is stridhan. During husband's lifetime it is subject to his control.

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

Stridhan has all the characteristics of absolute ownership of property. The stridhan being her absolute property, the female has full rights of its alienation. This means that she can sell, gift, mortgage, lease, and exchange her property. This is entirely true when she is a maiden or a widow. Some restrictions were recognised on her power of alienation, if she were a married woman. For a married woman stridhan falls under two heads:

- **The *saudayika*** (gifts of love and affection)- gifts received by a woman from relations on both sides (parents and husband).
- **The *non-saudayika***- all other types of stridhan such as gifts from stranger, property acquired by self-exertion or mechanical art. Over the former she has full rights of disposal but over the latter she has no right of alienation without the consent of her husband. The husband also had the power to use it.

On her death all types of stridhan passed to her own heirs. In other words, she constituted an independent stock of descent. In *Janki v. Narayansami*, the Privy Council aptly observed, "her right is of the nature of right of property, her position is that of the owner, her powers in that character are, however limited... So long as she is alive, no one has vested interest in the succession."

### **Powers of a Hindu Female over Her Woman's Estate**

- (a) **Power of Management**- like the *Karta* of a Hindu joint family she has full power of management. The *Karta* is merely a co-owner of the joint family, there being other coparceners, but she is the sole owner. She alone is entitled to the possession of the entire estate and its income. Her power of spending the income is absolute. She need not save and if she saves, it will be her stridhan. She alone can sue on behalf of the estate and she alone can be sued in respect of it. Any alienation made by her proper or improper is valid and binding so long as she lives. She continues to be its owner until the forfeiture of estate by her re-marriage, adoption, death or surrender.
- (b) **Power of Alienation**- She has limited powers of alienation, Like *Karta* her powers are limited and she can alienate property only in exceptional cases. She can alienate the property for the following:
- **Legal necessity** (that is, for her own need and for the need of the dependants of the last owner)
  - **For the benefit of estate**, and
  - **For the discharge of indispensable duties** (such as marriage of daughters, funeral rites of her husband, his shrada and gifts to brahmins for the salvation of his soul; that is, she can alienate her estate for the spiritual benefit of the last owner, but not for her own spiritual benefit.)

Under the first two heads her powers are more or less the same as that of the *Karta*. Restrictions on her powers of alienation are an incident of the estate and not for the benefit of the reversioners.

As to the power of alienation under the third head, a distinction is made between the indispensable duties for which the entire property could be alienated, and the pious and charitable purposes for which only small portion of property can be alienated. She can make alienation for religious acts, which are not essential or obligatory but are still pious observances which conduce to the bliss of her deceased husband's soul.

(c) **Surrender**- means renunciation of estate by the female owner. She has the power of renouncing the estate in favour of the nearest reversioner. This means that by a voluntary act she can accelerate the estate of the reversioner by conveying absolutely the estate thereby destroying her own estate. This is an act of self-effacement on her part and operates as her civil death. For a valid surrender, the first condition is that it must be of the entire estate<sup>8</sup>, though she may retain a small portion of her maintenance<sup>9</sup>. The second condition is that it must be in favour of the nearest reversioner or reversioners, in case there are more than one of the same category. Surrender can be made in favour of female reversioners also. The third condition is that the surrender must be bonafide and not a device of dividing the estate with the reversioners.

(d) **Reversioners**- On the death of the female owner the estate reverts to the heir or the heirs of the last owner as if the latter died when the limited estate ceased. Such heirs may be male or female known as

reversioners. So long as the estate endures there are no reversioners though there is always a presumptive reversioner who has only a *spes successionis* (an exception). The property of the female devolves on the reversioners when her estate terminates on her death, but it can terminate even during her lifetime by surrender.

(e) **Right of Reversioners** - the reversioners has a right to prevent the female owner from using the property wastefully or alienating it improperly. It is this context that the expression “presumptive reversioner” came into vogue. The reversioners have the following three rights:

- They can sue the woman holder for an injunction to restrain waste.
- They can in a representative capacity sue for a declaration that alienation made by the widow is null and void and will not be binding on them after the death of the widow. However by such a declaration the property does not revert to the woman nor do the reversioners become entitled to it. The alienee can still retain the property so long as the widow is alive.
- They can after the death of the woman or after the termination of estate, if earlier, file a suit for declaration that an alienation made by the widow was improper and did not bind them. The Supreme Court, observed that when a Hindu female holder of woman’s estate improper makes alienation, the reversioners are not bound to institute a declaratory suit during the lifetime of the female holder. After the death of the woman, they can sue the alienee for possession of the estate treating alienation as a nullity.

**UNIT- IV**

1. Gifts, wills.
2. Hindu adoption and maintenance Act, 1956.
3. Hindu Minority and Guardian Ship Act,

**Gift**

Gift is a relinquishment without consideration of one's own right in property and the creation of the right of another. A gift is completed only on the other's acceptance of the gift.

**What property may be gifted**

- A Hindu may dispose of by gift his separate or self acquired property, subject in certain cases to the claims for maintenance of those he is legally bound to maintain.
- A coparcerner, may dispose of his coparcernary interest by gift subject to the claims of those who are entitled to be maintained by him.
- A father may by gift dispose of the whole of his property, whether ancestral or self acquired, subject the claims of those he is entitled to be maintained by him.
- A female may dispose of her stridhana by gift or will, subject in certain cases to the consent of her husband.
- A widow may in certain cases by gift dispose of a small portion of the property inherited by her from her husband, but she cannot do so by will.
- The owner of an impartible estate may dispose of the estate by gift or will, unless there is a special custom prohibiting alienation or the tenure is of such a nature that it cannot be alienated.

A gift under Hindu law need not be in writing. However, a gift under the law is not valid unless it is accompanied by delivery of possession of the subject of the gift from the donor to the donee. However where physical possession cannot be delivered, it is enough to validate a gift, if the donor has done all that he could do to complete the gift, so as to entitle the donee to obtain possession.

**Gifts by Hindus where transfer of property act applies**

A gift under the above act can only be affected in the following manner.

- a. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.



For the purpose of making a gift of a movable property, the transfer may be effected by a registered document signed by the donor or by delivery.

### **Gifts to unborn persons**

Under pure Hindu law, a gift cannot be made in favor of a person who was not in existence at the date of the gift. This rule has been altered by 3 acts namely The Hindu Transfers and Bequests Act 1914, Hindu Disposition of Property act 1916, and the Hindu Transfers and Bequests (City of Madras) Act 1921

### **Reservation of life interest**

A gift of property is not invalid because the donor reserves the usufruct of the property to himself for life.

### **Conditions restraining alienation or partition**

Where property is given subject to a condition absolutely restraining the donee from alienating it, or it is given to two or more persons subject to a condition restraining them from restraining it, the condition is void, but the gift itself remains good.

### **Revocation of gift**

A gift once completed is binding on the donor, and it cannot be revoked by him unless it is obtained by fraud or undue influence.

### **Gift in fraud of creditors**

A gift made with the intent to defeat or defraud creditors is voidable at the option of the creditors.



## **Will**

Everybody likes to make sure that the life he has led has been meaningful and is concerned about his property after his death. A person can ensure as to how his property should devolve and to whom it shall devolve, after his death, through a Will. If a person dies without leaving behind his Will, his property would devolve by way of law of intestate succession and not testamentary succession (i.e. in accordance to the Will) Hence, it is preferable that one should make a Will to ensure that one's actual intension is followed and the property is devolved accordingly. Will is an important testamentary instrument through which a testator can give away his property in accordance to his wishes.

The origin and growth of Will amongst the Hindus is unknown. However Will were well known to the Mohammedans and contact with them during the Mohammedan rule, and later on with the European countries, was probably responsible for the practice of substituting informal written or oral testamentary instruments with formal testamentary instruments. The Indian Succession Act, 1925, consolidating the laws of intestate (with certain exceptions) and testamentary succession supersedes

the earlier Acts, and is applicable to all the Wills and codicils of Hindus, Buddhists, Sikhs and Jains throughout India. The Indian Succession Act, 1925, does not govern Mohammedans and they can dispose their property according to Muslim Law

### Definition of Will & Other Related Terms

**Will:** A Will is a solemn document by which a dead man entrusts to the living to the carrying out of his wishes. S. 2(h) of Indian Succession Act, 1925 provides that Will means the legal declaration of the intention of a person with respect to his property, which he desires to take effect after his death Will has been defined in Corpus Juris Secundum as A 'Will' is the legal declaration of a man's intention, which he wills to be performed after his death, or an instrument by which a person makes a disposition of his property to take effect after his death.

**Codicil:** Codicil is an instrument made in relation to a Will, explaining, altering or adding to its dispositions and is deemed to be a part of the Will. The purpose of codicil is to make some small changes in the Will, which has already been executed. If the testator wants to change the names of the executors by adding some other names, or wants to change certain bequests by adding to the names of the legatees or subtracting some of them, a Codicil in addition to the Will can be made to do so. The codicil must be reduced to writing and has to be signed by the testator and attested by two witnesses. It is also the duty of the court to arrive at the intention of the testator by reading the Will and all the codicils.

**Executor:** An executor is appointed by the testator, as distinguished from an administrator who is appointed by the court. Where the Will confers the powers to collect the outstanding, pay debts and manage the properties, the person can be said to be appointed as an executor by implication.

**Probate:** Probate is an evidence of the appointment of the executor and unless revoked, is conclusive as to the power of the executor. The grant of probate to the executor however does not confer upon him any title to the property.

**Letter of Administration:** Letter of Administration is a certificate granted by the competent court to an administrator where there exists a Will authorizing him to administer the estate of the deceased in accordance with the Will. If the Will does not name any executor, an application can be filed in the court for grant of Letter of Administration for the property

**Attestation of Will:** Attesting means signing a document for the purpose of testifying the signature of the executants. Therefore an attesting witness signing before the executants has put his mark on the Will, cannot be said to be a valid attestation. It is necessary that both the witnesses must sign in the presence of the testator but it is not necessary that the testator have to sign in their presence. Further it is not necessary that both the witnesses have to sign at the same time. It is also not necessary that the attesting witnesses should know the contents of the Will.

## Essential Features of a Will

A Will can be made at any time in the life of a person. A Will can be changed a number of times and there are no legal restrictions as to the number of times it can be changed. It can be withdrawn at anytime during the lifetime of the person making the Will. A Will has to be attested by two or more witnesses, each of who should have seen the testator signing the Will.

The essential features are:

1. **Legal declaration:** The documents purporting to be a Will or a testament must be legal, i.e. in conformity with the law and must be executed by a person legally competent to make it. Further the declaration of intention must be with respect to the testator's property. It is a legal document, which has a binding force upon the family.
2. **Disposition of property:** In a Will, the testator bequeaths or leaves his property to the person or people he chooses to leave his assets/belongings. A Hindu person by way of his Will can bequeath all his property. However, a member of an undivided family cannot bequeath his coparcenary interest in the family property.
3. **Takes effect after death:** The Will is enforceable only after the death of the testator,

Under section 18 of the Registration Act the registration of a Will is not compulsory. Also, the SC in **Narain Singh v. Kamla Devi** has held that mere non-registration of the Will an inference cannot be drawn against the genuineness of the Will. However it is advisable to register it as it provides strong legal evidence about the validity of the Will. Once a Will is registered, it is placed in the safe custody of the Registrar and therefore cannot be tampered with, destroyed, mutilated or stolen. It is to be released only to the testator himself or, after his death, to an authorized person who produces the Death Certificate. Since a testamentary disposition always speaks from the grave of the testator, the required standard of proof is very high. The initial burden of proof is always on the person who propounds the Will.

### Who Can Make A Will

- S.59 of Indian Succession Act provides that every person who is of **sound mind** and is **not a minor** can make a Will.
- **Persons Of Unsound Mind**  
U/s. 59 of ISA the existence of a sound mind is a sine quo non for the validity of the Will. Most of the Wills are not made by young persons who are fully fit but are made by persons who are aged and bed ridden hence, law does not expect that the testator should be in a perfect state of health, or that he should be able to give complicated instructions as to how his property was to be distributed.  
A sound disposing mind implies sufficient capacity to deal with and understand the disposition of property in his Will -

- 1) the testator must understand that he is giving away his property to one or more objects
- 2) he must understand and recollect the extent of his property
- 3) he must also understand the persons and the extent of claims included as well as those who are excluded from the Will.

➤ **Minors**

A minor who has not completed the age of 18 years is not capable of making Wills. The onus of proof on determining whether the person was a minor at the time of making a Will is on the person who has relied upon the Will. S.12 of the Indian Contract Act also provides that a minor is incompetent to contract.

➤ **Other Persons Incapable Of Making A Will**

- ❖ **Explanation I** to S.59 of ISA provides that a Hindu married woman is capable of disposing by Will only that property which she can alienate during her lifetime.
- ❖ **Explanation II** provides that the persons who are deaf, dumb or blind can prepare a Will if they are able to prove that they were aware of what they were doing.
- ❖ **Explanation III** provides for persons who are mentally ill and insane. However subsequent insanity does not make the Will invalid i.e. if a person makes a Will while he is of sound mind and then subsequently becomes insane the Will is valid and is not rendered invalid by subsequent insanity. Further a person of unsound mind can make a Will during his lucid interval. A Will made by a person who is intoxicated or is suffering from any other illness, which renders him incapable of knowing what he is doing, is invalid.

Though the burden of proof to prove that the Will was made out of free volition is on the person who propounds the Will, a Will that has been proved to be duly signed and attested Will be presumed to have been made by a person of sound mind, unless proved otherwise. Further, a bequest can be made to an infant, an idiot, a lunatic or other disqualified person as it is not necessary that the legatee should be capable of assenting it.

**Revocability**

S.62 of the Indian Succession Act deals with the characteristic of a Will being revocable or altered anytime during the lifetime of the testator. S. 70 of ISA provides the manner in which it can be revoked.

A mere intention to revoke is not an effective revocation. The revocation of the Will should be in writing and an express revocation clause would revoke all the prior Wills and codicils. If there is no express clause to the effect then the former Will would become invalid to the extent of its inconsistency with the latest Will, this is known as an implied revocation (however it should be shown that the differences are irreconcilable). However if there is no inconsistency between the Wills then they cannot be considered as two separate Wills but the two must be read together to indicate the testamentary intention of the testator.

Revocation can also be made in writing through declaring an intention to revoke and the writing must be signed by the testator and attested by two witnesses. The deed of revocation has to be executed in the same way as the Will itself.

The Will maybe burnt or torn by the testator or by some other person in his presence and by his direction with the intention of revoking the same. The burning of the Will must be actual and not symbolic. The burning must destroy the Will atleast to the extent of his entirety. Further the Will need not be torn into pieces. It would be sufficient if it is slightly torn with the intent of revocation.

The Will can be revoked expressly by another Will or codicil, by implied revocation, by some writing, by burning or tearing or by destroying otherwise. Cancellation of a Will by drawing lines across it is not a mode of revocation. Under the Hindu Law the Will is not revoked by marriage or by subsequent birth.

### **Alterations**

S.71 of ISA is applicable to alterations if they are made after the execution of the Will but not before it. The said section provides that any obliteration, interlineations or any other alteration in a Will made after its execution is inoperative unless the alteration is accompanied by the signatures of the testator and the attesting witnesses or it is accompanied by a memorandum signed by the testator and by the attesting witnesses at the end of the Will or some other part referring to the alterations, the alterations if executed as required by the section would be read as a part of the Will itself. However, if these requirements are not fulfilled then the alterations would be considered to be invalid and the probate will be issued omitting the alterations. The signatures of the testator and the attesting witnesses must be with regards to the alteration and must be in proximity of the alteration. Further they should be in the Will itself and not in a separate distinct paper. But if the obliteration is such that the words cannot be deciphered then the Will would be considered as destroyed to that extent.

### **Wording of The Will**

S.74 of ISA provides that a Will maybe made in any form and in any language. No technical words need to be used in making a Will but if technical words are used it is presumed that they are in used in their legal sense unless the context indicates otherwise. Any want of technical words or accuracy in grammar is immaterial as long as the intention is clear.

Another general principle applied is that the Will is to be so read as to lead to a testacy and not intestacy i.e if two constructions are possible then the construction that avoids instestacy should be followed.

Further there is another principle, which says that the construction that postpones the vesting of legacy in the property disposed should be avoided. The intention of the testator should be decided after construing the Will as a whole and not the clauses in isolation. In **Gnanambal Ammal v. T. Raju Aiyar** the Supreme Court held that the cardinal maxim to be observed by the Court in construing a Will is the intention of the testator. This intention is primarily to be gathered from the language of the document, which is to be read as a whole.

The primary duty of the court is to determine the intention of the testator from the Will itself by reading of the Will. The SC in **Bhura v Kashi Ram** held that a construction which would advance the intention of the testator has be favoured and as far as possible effect is to be given to the testator's intention unless it is contrary to law. The court should put itself in the armchair of the testator. In **Navneet Lal v. Gokul & Ors** the SC held that the court should consider the surrounding circumstances, the position of the

testator, his family relationships, the probability that he would use words in a particular sense. However it also held that these factors are merely an aid in ascertaining the intention of the testator. The Court cannot speculate what the testator might have intended to write. The Court can only interpret in accordance with the express or implied intention of the testator expressed in the Will. It cannot recreate or make a Will for the testator.

### **Execution of A Will**

On the death of the testator, an executor of the Will (executor is the legal representative for all purposes of a deceased person and all the property of a testator vests in him. Whereas a trustee becomes a legal owner of the trust and his office and the property are blended together) or an heir of the deceased testator can apply for probate. The court will ask the other heirs of the deceased if they have any objections to the Will. If there are no objections, the court grants probate. A probate is a copy of a Will, certified by the court. A probate is to be treated as conclusive evidence of the genuineness of a Will. It is only after this that the Will comes into effect.

### **Signature of The Testator**

S.63(a) of ISA provides that the testator shall sign or affix his mark. If the testator is unable to write his signature then he may execute the Will by a mark and by doing so his hand maybe guided by another person. In another words a thumb impression has been held as valid.

### **Restrictions on a Will**

#### **1. Transfer to unborn persons is invalid:-**

Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers that description, the bequest is void. S.113 of Indian Succession Act, 1925 provides that for a transfer to an unborn person, a prior interest for life has to be created in another person and the bequest must comprise of whole of the remaining interest of the testator. In *Sopher v. Administrator-General of Bengal* a grandfather made the bequest to his grandson who was yet to be born, by creating a prior interest in his son and daughter in law. The Court upheld the transfer to an unborn person and the Court held that since the vested interest was transferred when the grandsons were born and only the enjoyment of possession was postponed till they achieved the age of twenty one the transfer was held to be valid.

In *Girish Dutt v. Datadin*, the Will stated that the property was to be transferred to a female descendant (who was unborn) only if the person did not have any male descendant. The Court held that since the transfer of property was dependent on the condition that there has to be no male descendant, the transfer of interest was limited and not absolute and thereby the transfer was void. For a transfer to a unborn person to be held valid, absolute interest needs to be transferred and it cannot be a limited interest.

#### **2. Transfer made to create perpetuity:-**

S.114 of the Indian Succession Act, 1925 provides that no bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

The rule against perpetuity provides that the property cannot be tied for an indefinite period. The property cannot be transferred in an unending way. The rule is based on the considerations of public policy since property cannot be made inalienable unless it is in the interest of the community. The rule against perpetuity invalidates any bequest which delays vesting beyond the life or lives-in-being and the minority of the donee who must be living at the close of the last life. Hence property can be transferred to a unborn person who has to be born at the expiration of the interest created and the maximum permissible remoteness is of 18 years i.e the age of minority in India.

In **Stanely v. Leigh** it was laid down that for the rule of perpetuity to be not applicable there has to be 1) a transfer 2) an interest in an unborn person must be created 3) takes effect after the life time of one or more persons and during his minority 4) unborn person should be in existence at the expiration of the interest

### 3. **Transfer to a class some of whom may come under above rules:-**

S.115 of ISA provides that if a bequest is made to a class of persons with regard to some of whom it is inoperative by reasons of the fact that the person is not in existence at the testator's death or to create perpetuity, such bequest shall be void in regard to those persons only and not in regard to the whole class.

A number of persons are said to be a class when they can be designated by some general name as grandchildren, children and nephews. In *Pearks v. Mosesley* defined gift to a class as a gift to all those who shall come within a certain category or description defined by a general or collective formula and who if they take at all are to take one divisible subject in certain proportionate shares.

### 4 **Transfer to take effect on failure of prior Transfer:-**

S.116 of ISA provides that where by reason of any of the rules contained in sections 113 and 114 and bequest in favour of a person of a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same Will and intended to take effect after or upon failure of such prior bequest is also void.

The principle of this section is based upon the presumed intention of the testator that the person entitled at the subsequent limitation is not intended to be benefited except at the exhaustion of the prior limitation. In *Girish Dutt* case one S gave property to B for life and after her death if there be any male descendants whether born as son or daughter to them absolutely. In the absence of any issue, whether male or female, living at the time of B's death, the gifted property was to go to C. it was held that the gift in favour of C was dependent upon the failure of the prior interest in the favour of daughter and hence the gift in favour of C was also invalid. However alternative bequests are valid.

## Invalid Wills

### **Wills invalid due to fraud, coercion or undue influence**

S.61 of ISA provides that a Will, or any part of Will made, which has been caused by fraud or coercion, basically not by free will, will be void and the Will would be set aside.

Fraud: S.17 of the Indian Contract Act provides for fraud. Actual fraud can be committed through 1) misrepresentation 2) concealment. Fraud in all cases implies a willful act on the part of anyone whereby, another is sought to be deprived by illegal or inequitable means, of which he is entitled to.

**Coercion:** S.15 of Indian Contract Act defines coercion. Any force or fear of death, or of bodily hurt or imprisonment would invalidate a Will. In **Ammi Razu v. Seshamma**, a man threatening to commit suicide induced his wife and son to give him a release deed. It was held that even though suicide was not punishable by the Indian Penal Code yet it was forbidden by law and hence the release deed must be set aside as having been obtained by coercion.

**Undue influence:** Undue influence u/s.16 of Indian Contract Act is said to be exercised when the relations existing between the two parties are such that one of the parties is in the position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. However neither fiduciary relationship nor a dominating position would raise a presumption of undue influence in case of Wills as all influences are not unlawful. Persuasion on the basis of affection or ties is lawful. The influence of a person in fiduciary relationship would be lawful so long as the testator understands what he is doing. Thus it can be said that a testator maybe led but cannot be driven.

#### **Wills Void Due To Uncertainty**

S.89 of ISA states that if the Will were uncertain as regards either to the object or subject of the Will then it would be invalid. The Will may express some intention but if it is vague and not definite then it will be void for the reason of uncertainty. The Will may dispose of the property absurdly or irrationally i.e the intention maybe irrational or unreasonable, but that does not make it uncertain. For uncertainty to be proved it has to be proved that the intention declared by the testator in the Will is not clear as to what is he giving or whom is he giving. Only if the uncertainty goes to the very root of the matter, then only the Will has to be held void on the grounds of uncertainty.

#### **Will Void Due To Impossibility of Condition**

S. 124 of ISA provides that a contingent legacy can take effect only on happening of that contingency. A conditional Will is dependent on the happening of a specific condition the non-happening of which would make the Will inoperative. S.126 of ISA provides that a bequest upon an impossible condition is void. The condition maybe condition precedent or condition subsequent.

#### **Will void due to illegal or immoral condition**

S.127 of ISA provides that a bequest, which is based upon illegal or immoral condition, is void. The condition which is contrary, forbidden, or defeats any provision of law or is opposed to public policy, then the bequest would be invalid. A condition absolutely restraining marriage would also make the bequest void. S.138 of ISA provides that the direction provided in the Will as to the manner in which the property bequeathed is to be enjoyed then the direction would be void though the Will would be valid.



## Adoption

### Historical Perspective

Since the Vedic period, Hindu society has given a lot of importance to male child. It was said that a male child saves the father from 'put' hell; hence the male child is called Putra. This was the main reason which has prompted the son-less to adopt a male child.

**Manusmriti** says that when the natural father and mother give wholeheartedly their son with the offering of water to another person in distress, it is called Dattak.

**Vashistha** has given several guidelines on dattak. It says that the father and the mother of an offspring have complete right on selling or giving the offspring to another. A Dattak cannot be taken from the person who has only one son. A child whose kinsmen are not known cannot be taken as dattak. A woman had no right to adopt.

**Sounaka** has said metaphorically that a Dattak son must be a reflection of the father, which means that a Dattak can only be taken from a mother whom the person could have married before her marriage. Thus, one could not adopt daughter's son, sister's son, or mother's sister's son. Thus, the practice of Dattak in the old days had been practiced mostly for religious reasons. This is also evident from the fact that only a male child was to be adopted because only he can perform the religious duties for the father. Slowly, the secular reasons such as continuance of the family name also became important. More recently, ulterior motives such as changing the course of inheritance of property has also prompted people to adopt.

Based on the above three authors and many other customs, the Dattak ceremony primarily involved a Dattak grahan, i.e. the actual giving and taking of the child and a Dattak homam.

However, there were several controversies because there was no one standard rule. So, in 1956, the Hindu Adoption and Maintenance Act was enforced which standardized as well as modernized the rules and process for adoption.

### Some important features of this act are:

1. Adoption has been made a secular thing. There is no necessity of any religious ceremonies or other religious aspects.
2. Both a man and a woman can adopt on their own right.
3. Both a boy or a girl can be adopted.
4. Orphans, out of cast children, or children in close relation, can also be adopted.
5. Widow, widower, and bachelors can also adopt.
6. In the case of **Naidu vs Naidu AIR 1970, SC** has held that the court need not look into the motives of adoption.

### Requisites for Adoption

**Section 6** of the HAM Act 1956 lays down the following 4 requirements:-

1. The person who is adopting must have the capacity and the right to adopt.
2. The person who is giving the child in adoption must have the capacity to give.

3. The person who is being adopted must be eligible to be adopted.
4. The adoption must satisfy all the rules given in this act.

**Hindu Male is capable of adoption** (Section 7):

1. Any Hindu male who has attained the age of majority and who is of sound mind can adopt.
2. If he is married, he must take consent from his wife. If he has multiple wives, consent from all the wives is required. In the case of **Bhooloram vs Ramlal AIR 1989, MP HC** has held that if the consent of the wife living with the husband is obtained but the consent of the wife living away has not been obtained then the adoption is void.
3. A wife's consent is not required if the wife has completely renounced the world and has become a Sanyasin, has changed her religion and has ceased to be a Hindu, or has been proven by a competent judge to be mentally unsound.

**Hindu Female is capable of adoption** (Section 8):

1. She must be a major and must not be mentally unsound.
2. She is unmarried, is a widow or a divorcee. In the case of **Vijayalakshamma vs B T Shankar, AIR 2001, SC** has held that consent from a co-widow is not required because a widow can adopt on her own right.
3. A married woman is allowed to adopt only if the husband has renounced the world completely, or is of unsound mind, or has ceased to be a Hindu.  
This is a big change from pre-act situation. Earlier, a woman had no right to adopt.

**who has the capacity to give a child in adoption** (Section 9 )

1. Only the natural father has the right to give a legitimate child in adoption. However, the father must get consent from the natural mother unless the mother has been declared by a competent court to be of unsound mind, has renounced the world, or has ceased to be a Hindu.
2. If the father is mentally unsound, or has renounced the world, or has ceased to be a Hindu, or is dead, the mother can give the child in adoption.
3. Only the mother of an illegitimate child has the right to give the child in adoption. However, she cannot adopt the child herself because a giver cannot be taker at the same time.
4. If both the natural mother and father are dead, or have renounced the world, or have abandoned the child, or are of unsound mind, a guardian, testamentary or court appointed can give a child in adoption, including to the guardian himself, upon prior permission of the court.
5. While granting permission, the court must see the welfare of the child and the wishes of the child depending on the child's age.

In the case of **Dhanraj vs Suraj, 1981 SC** held that guardian includes - de jure and de facto. Thus, a manager or secretary of an orphanage, or the person in whose case the child is, or the person who has brought up the child can give the child in adoption.

**who is capable of being adopted** (Section 10 )

1. The child must be a Hindu.
2. The child must not have already been adopted.
3. The child must be unmarried. However, if a custom to the contrary exists, such an adoption may take place.

4. The child must be less than 15 yrs of age. However, if a custom to the contrary exists, such an adoption may take place.

There is no restriction on who can be adopted regarding Sapinda relationships. Even a daughter's son, or sister's son can be adopted.

#### **some other conditions for a valid adoption** (Section 11 )

1. If a male child is being adopted, the person who is adopting must not already have a son, son's son, or son's son, whether natural or adopted.
2. If a female child is being adopted, the person who is adopting must not already have a daughter or son's daughter.
3. If a male is adopting a female child, then their age difference must be greater than 21 yrs.
4. If a female is adopting a male child, then their age difference must be greater than 21 yrs.
5. Two persons cannot adopt the same child.
6. The actual giving and taking of the child must happen. Only mere intention of giving and taking is not enough. The child must be transferred from the home of the natural parents, or in case of orphans, from the place he grew up, to the adoptive parent's home. The ritual or ceremony of Dattak homam is not necessary.

In the case of **Sandhya Supriya Kulkarni vs Union of India, AIR 1998**, these conditions were challenged on the ground that they violate fundamental rights; however, SC held that personal laws do not fall under the ambit of part III of the constitution.

#### **Effects of Adoption**

**Section 12** says that an adopted child is deemed to be a natural child of his adopted parents for all purposes. All relations with the natural parents and family are severed and new relationships with the adopted parents are established. Only exception is that the adopted child cannot marry anybody from his natural family in contravention of Sapind and prohibited relationships. It further says that the adopted child is not divested of his property that has vested in him before adoption and that an adopted child cannot divest anybody of his vested property after adoption.

An important change from the old law here is that the concept of "relating back", which means that when a widow adopts a child the adoption is considered to be done from the date the husband died, has been abolished. However, in the case of **Sawan Ram vs Kalawati AIR 1967**, SC has held that the deceased father is still considered the adoptive father.

#### **Ante-adoption agreement** (Section 13)

Section 13 says that subject to any ante-adoption agreement, the adoptive parents do not lose their right of alienation of their property after adoption.

#### **Position of mothers in certain situations** (Section 14):

1. When a male adopts with the consent of the wife, the wife becomes the adoptive mother.
2. If a single adoptive father later marries, the wife of the adoptive father becomes the step mother.
3. If a single adoptive mother later marries, the husband of the adoptive mother becomes the step father.

4. If an adoptive father has multiple wives, the senior most by marriage, not by age, wife becomes the adoptive mother and other wives become the step mothers.

**valid adoption cannot be canceled** ( Section 15 )

It can be done either by the adoptive father or mother. Neither can the adopted child renounce the adoptive parents and go back to the family of his birth.

**Section 16** says that whenever any document made under any law in force at the time, purporting to record an adoption, and has been signed by the giver and taker of the child, is produced before the court, the court shall presume that the adoption has been made in accordance with the provisions of this act unless and until it is disproved.

In the case of **Pentakota Satyanarayana vs Pentakota Seetharatham AIR 2005 SC**, the plaintiff brought a suit for partition and possession. However, he failed to provide any proof of the adoption. His adoptive father was estranged from adoptive mother and the adoptive mother had asked for maintenance for herself but not for the adoptive son. There was no document or agreement. The plaintiff could not provide any essential details such as date of adoption or fixing of Muhurtam etc. Thus, SC held that there was no adoption and the alleged adopted son had no right in the property.

**Section 17** forbids receipt of any payment as a consideration for the adoption. If any such payment is taken, he shall be punishable by 6 months imprisonment and/or a fine or both.

**Maintenance**

**Historical Perspective**

Maintenance means the right of dependents to obtain food, clothing, shelter, medical care, education, and reasonable marriage expenses for marriage of a girl, from the provider of the family or the inheritor of an estate. The basic concept of maintenance originated from the existence of joint families where every member of the family including legal relations as well as concubines, illegitimate children, and even slaves were taken care of by the family. However, maintenance does not mean unreasonable expectations or demands.

In the case of **Ekradeshwari vs Homeshwar in 1929**, Privy Council had enunciated certain principles in governing the amount of maintenance. It said that maintenance depends on a complete analysis of the situation, the amount of free estate, the past life of the married parties and the family, the requirements of the claimants, and a consideration regarding future changes.

Joint family system has been a main feature of the Hindu society since vedic ages. In a joint family, it is the duty of the able male members to earn money and provide for the needs of other members such as women, children, and aged or infirm parents.

In Manusmriti, it has been said that wife, children, and old parents must be cared for even by doing a hundred misdeeds.

HAMA 1956 codifies a lot of principles governing the maintenance of dependents of a Hindu male. Under this act, the obligation can be divided into two categories - personal obligation and obligation tied to the property.

### **Dependents based on personal obligation**

Personal obligation means that a Hindu is personally liable, irrespective of the property that he has inherited or his earnings, to provide for certain relations who are dependent on him. These relations have been specified in the following sections of HAMA 1956.

**Section 18(1)** declares that whether married before or after this act, a Hindu wife shall be entitled to claim maintenance by her husband during her lifetime. Sec 18(2) says that a wife is entitled to live separately without forfeiting her right to claim maintenance in certain situations. 18(3) that a wife shall not be entitled to separate residence and maintenance of she is unchaste or ceases to be a Hindu.

In the case of **Jayanti vs Alamelu, 1904 Madras HC** held that the obligation to maintain one's wife is one's personal obligation and it exists independent of any property, personal or ancestral. **Section 20(1)** declares that a Hindu is bound to maintain his children, legitimate or illegitimate, and aged or infirm parents. 20(2) says that a child, legitimate or illegitimate, can claim maintenance from father or mother, until the child is a minor. 20(3) says that the right to claim maintenance of aged or infirm parents and unmarried daughter extends in so far as they are not able to maintain themselves through their other sources of income. In this case, a childless step-mother is also considered a parent.

### **Dependents based on obligation tied to property**

A person has obligation to support certain relations of another person whose property has devolved on him. In this case, this obligation is not personal but only up to the extent that it can be maintained from the devolved property.

Section 21 specifies these relations of the deceased who must be supported by the person who receives the deceased property.

1. father
2. mother
3. widow, so long as she does not remarry
4. son, predeceased son's son, or predeceased son's predeceased son's son until the age of majority. Provided that he is not able to obtain maintenance from his father or mother's estate in the case of grandson, and from his father or mother, or father's father or father's mother, in the case of great grandson.
5. daughter or predeceased son's daughter, or predeceased son's predeceased son's daughter until she gets married. Provided that he is not able to obtain maintenance from his father or mother's estate in the case of granddaughter, and from his father or mother, or father's father or father's mother, in the case of great granddaughter.

6. widowed daughter, if she is not getting enough maintenance from her husband's, children's, or father in law's estate.
7. widow of predeceased son, or widow of predeceased son's son, so long as she does not remarry and if the widow is not getting enough maintenance from her husband's, children's or her father or mother's estate in the case of son's widow.
8. illegitimate son, until the age of majority
9. illegitimate daughter, until she is married.

Section 22 (1) says that heirs of a Hindu are bound to maintain the dependents of the deceased out of the estate inherited by them from the deceased. Thus, this obligation is to be fulfilled only from the inherited property and so it is not a personal obligation. 22(2) says that where a dependent has not received any share, by testamentary or intestate succession, he shall be entitled to maintenance from those who take the estate. 22(3) says that the liability of each heir is in proportion to the estate obtained by him. 22(4) says that a person who himself is a dependent cannot be forced to pay any amount of maintenance if the amount causes his share to reduce below what is required to maintain himself.

#### **How much maintenance**

Section 23(1) says that courts will have complete discretion upon whether and how much to maintenance should be given. While deciding this, the courts shall consider the guidelines given in sections 23(2) and 23(3).

Section 23(2) says that while deciding the maintenance for wife, children, and aged or infirm parents, the courts will consider:

1. the position and status of the parties.
2. the reasonable wants of the claimants.
3. If a claimant has a separate residence, is it really needed.
4. the value of the estate and the income derived from it or claimant's own earning or any other source of income.
5. the number of claimants.

Section 23(3) says that while determining the maintenance for all other dependents the courts shall consider the following points:

1. the net value of the estate after paying all his debts.
2. the provisions, if any, made in the will in favor of the claimants.
3. the degree of the relationship between the two.
4. the reasonable wants of the dependent.
5. the past relations between the deceased and the claimants.
6. claimant's own earnings or other sources of income.
7. the number of dependents claiming under this act.

#### **Discretion of Court**

In the case of **Mutyala vs Mutyala 1962 AP HC** held that amount of maintenance cannot be a matter of mathematical certainty.

### Position and Status of parties

In the case of **Kiran Bala vs Bankim 1967 Calcutta HC** observed the living standard of the wife, and her reasonable wants in determining the maintenance amount.

### Reasonable wants

In the case of **Kiran Bala vs Bankim 1967 Calcutta HC** observed that the husband had a second wife and so the fact that the claimant is living separately will not go against her in determining the amount.

In the case of **Krishna vs Daimati 1966 Orrisa HC** held that when a minor child lives with the mother, the necessities of the child constitute reasonable demands of the mother.

### Separate earning of the claimant

Whether the claimant has separate earning on income is a question of fact and not a question of presumption. It cannot be, for example, presumed that a college educated girl can maintain herself. In the case of **Kulbhushan vs. Raj Kumari** wife was getting an allowance of 250/- PM from her father. This was not considered to be her income but only a bounty that she may or may not get. However, income from inherited property is counted as the claimant's earning.

### Arrears of Maintenance

In the case of **Raghunath vs Dwarkabai 1941 Bom HC** held that right of maintenance is a recurring right and non-payment of maintenance prima facie constitutes proof of wrongful withholding.

### Wife's right to separate residence without forfeiting the right to maintenance

Section 18(2) says that a wife can live separately and still claim maintenance from husband in the following situations.

1. **Desertion**: If the husband is guilty of deserting the wife without her consent, against wife's wishes, and without any reasonable cause, the wife is entitled to separate residence. In the case of **Meera vs Sukumar 1994 Mad**, it was held that willful neglect of the husband constitutes desertion.
2. **Cruelty**: If husband through his actions creates sufficient apprehension in the mind of the wife that living with the husband is injurious to her then that is cruelty. In the case of **Ram Devi vs Raja Ram 1963 Allahbad**, if the husband treats the wife with contempt, resents her presence and makes her feel unwanted, this is cruelty.
3. If the husband is suffering from a virulent form of **leprosy**.
4. **If the husband has another wife living**. In the case of **Kalawati vs Ratan 1960 Allahbad**, it has been held that it is not necessary that the second wife is living with the husband but only that she is alive.
5. If the **husband keeps a concubine** or habitually resides with one. In the case of **Rajathi vs Ganesan 1999 SC**, it was held that keeping or living with a concubine are extreme forms of adultery.
6. If the **husband has ceased to be a Hindu** by converting to another religion.
7. **For any other reasonable cause**. In the case of **Kesharbai vs Haribhan 1974 Mah**, it was held that any cause due to which husband's request of restitution of conjugal rights can be denied could be a good cause for claiming a separate residence as well as maintenance. In the case of **Laxmi vs Maheshwar 1985 Orrisa**, it was held that if the husband fails to obey the order of restitution of conjugal rights, he is liable to pay maintenance and separate residence. In the case of **Sobha vs Bhim 1975 Orrisa**, mere drinking habit is not a sufficient cause for separate residence.

Section 18(3) says that a wife is not eligible for separate residence and maintenance if she is unchaste or has ceased to be a Hindu.

In the case of **Dattu vs Tarabai 1985 Bombay**, it was held that mere cohabitation does not by itself terminate the order of maintenance passed under 18(2). It depends on whether the cause of such an order still exists.

## Guardianship

In Hindu dharmashastras, not much has been said about guardianship. Due to the concept of joint families, a child without parents was usually cared for by the head of the joint family. Further, it was well accepted that the king is the guardian of all the orphans. Thus, no specific laws were required regarding guardianship. During British period, guardianship was primarily based on the extension of paternal authority. Thus, after parents, elder brothers, paternal uncles, and then maternal relations used to look after the interests of the minor. The British also introduced the concept of testamentary guardians in India.

The concept of guardianship has changed from paternal power to the idea of protection in modern times and the HMG Act 1956 codifies the laws regarding minority and guardianship with the welfare of the child at the core.

A person below the age of 18 yrs is considered to be a minor as per Section 4 of HMGA 1956. Such a person is not capable of taking care of himself or of handling his affairs and thus requires help, support, and most importantly, protection, which is usually provided by the parents. However, in many unfortunate cases, parents are not available and in those cases other relatives or persons come to the rescue. Thus, parents and other people who look after a minor are called as guardians in general parlance. Sec 4 of HMGA 1956 defines Guardian as follows:

### **Definition as per Section 4 of HMG 1956**

Guardian means a person having the care of a person of a minor or of his property or of both the person and his property. This includes:

- natural guardian
- guardian appointed by the will of a natural guardian (testamentary guardian)
- a guardian appointed or declared by court
- a person empowered to act as such by the order of Court of Wards.

This list of 4 types of guardians is not exhaustive. A person who is taking care of a minor without authority of law, can also be a guardian under the above definition and is called a de facto guardian. De facto guardians include self appointed guardians and guardians by affinity, such as guardians for a minor widow. However, a person does not have right to sell or deal with minor's property if he is merely a de factor guardian as per section 11.



### **Natural Guardian (Sec 6)**

Section 6 of HMG Act 1956 defines only three natural guardians:

- For a legitimate boy or a girl, the father, and after father, the mother, provided that the custody of a child less than 5 yrs of age will be with the mother.
- For an illegitimate boy or a girl, the mother, and after mother, the father.
- For a married woman, the husband.

It further states that no person shall be entitled to be a natural guardian of a minor if he ceases to be a Hindu or

- he renounces the world completely by becoming a sanyasi.

Here, by father and mother, natural father and mother are meant. Step father or step mother do not have any right to guardianship unless appointed by court.

As per **section 7**, natural guardianship of an adopted son passes on to his adoptive father and after adoptive father, to adoptive mother.

### **Position of Father**

Pre- 1956, the right of the father was supreme. He could even appoint a person to act as a guardian after his death even if the mother was alive. This is not the case now. Further, as held in the case of **Lalita vs. Ganga AIR 1973 Raj.**, a father's right to guardianship is subordinate to the welfare of the child. In the case of **Githa Hariharan vs RBI AIR 1999 SC** held the mother to be the natural guardian in spite of the father being alive and further held that the word "after" means "in the absence" rather than "after the life" of the father. Thus, if a father is incapable of protecting the interests of a minor due to any reason, he can be removed from guardianship.

### **Position of Mother**

The mother is the natural guardian of her illegitimate minors. In case of legitimate minors, the mother has right to custody of a minor less than 5 yrs of age. This does not mean that mother does not have the right to custody after 5 yrs of age. In case of **Sheela vs Soli, 1981 Bom HC**, it was held that a mother's right to guardianship is not lost upon conversion to another religion if she is able to provide proper care to the minor. Further, in **Kumar vs Chethana AIR 2004**, SC has held that the mother's right to guardianship is not lost automatically after her remarriage. In all such cases, welfare of the child has to be considered above all including the convenience and pleasure of the parents.

### **Position of Husband**

In Hindu shastras, husband and wife are considered to be one. Thus, it is believed that the guardianship of a minor wife belongs to the husband. However, due to section 13, a court may revert the guardianship to the father or mother depending on the best interests of the minor.

### **Powers of a natural guardian (Sec 8)**

Section 8 of HMGA 1956 describes the powers of a natural guardian as follows:

1. A guardian can do any act, subject to provisions of this section, that are necessary or are reasonable and proper for the benefit of the minor or the benefit of the minor's estate. But the guardian, in no case, shall bind the minor by a personal covenant.

2. he guardian cannot, without prior permission from the court,
  3. mortgage, charge, or transfer the immovable property of the minor by way of sale, gift, exchange, or otherwise.
  4. lease the immovable property for a term more than 5 years or where the lease ends one year after the minor attains majority.
- Any sale of immovable property in violation of the above two points, is voidable at the insistence of the minor.
  - The court shall not give permission for sale of immovable property unless it is necessary or clearly in the benefit of the minor.

These powers also include the following

- right in education
- right to determine religion
- right to custody
- right to control movement
- right to chastisement

In the case of **Manik Chandra vs Ram Chandra AIR 1981 SC** has held that the meaning of "necessity" and "advantage" of a minor are quite wide and the courts have the power to widen their scope as per the case facts before giving the permission. As per section 12, no guardian can be appointed for the undivided interest in the joint property of the minor. However, the court may appoint a guardian for the complete joint family if required.

### **Custody of a minor**

Custody of a minor is also subordinate to section 13, which declares the welfare of the child to be of paramount interest. Regarding a child, who is at the age of discretion, his wishes are also to be considered, though his wishes may be disregarded in his best interest.

That a mother is preferred to father for custody is not right. Better economic condition of the father than maternal grandfather is considered to be in favor of the father. In **Kumar vs Chethana AIR 2004, SC** has held that mother's remarriage is not a sufficient cause in itself to lose custody of a minor. It was further held that convenience of the parents is irrelevant.

To ensure the welfare of the child, the custody may even be given to the third person as was given to the mother and grand father by SC in case of **Poonam vs Krishanlal AIR 1989**.

In the case of **Re Madhab Chandra Saha 1997**, a father was never active in the interest a minor and after a long time demanded the guardianship. His claim was rejected.

In the case of **Chakki vs Ayyapan 1989**, a mother who says she will keep living with friends and may beget children from others, was not considered appropriate for custody in the minor's interest.

### **Power over minor's property**

In general, a guardian may do all acts that are in the interest of the minor. A third party may deal safely with the guardian in this respect. However, this excludes fraudulent, speculative, and unnecessary deals.

Before this act, a natural and testamentary guardian had the power to alienate the minor's property if it is necessary as determined by SC in **Hanuman Prasad vs Babooee Mukharjee 1856**. However, this rule has been restricted through sec 8, which mandates courts permission before alienating the minor's interest in the minor's property. Also, a guardian does not have any right over the joint family interest of a minor.

In the case of **Vishambhar vs Laxminarayana, 2001, SC** has held that a sale of minor's immovable property without courts permission is voidable and not void ab-initio. It further held that Sec 60 of Limitations Act would be applicable when the minor repudiates the transaction.

In case, a minor repudiates an improper alienation made by the guardian, he is liable to return the consideration.

#### **Liabilities of a guardian**

- Since the legal position of a guardian is fiduciary, he is personally liable for breach of trust.
- he is not entitled to any compensation unless explicitly specified in a will.
- A guardian cannot take possession of minor's properties adversely.
- must manage the affairs prudently.
- liable to render all accounts.

If the minor, after attaining majority, discharges the guardian or reaches a settlement of account, the guardian's liability comes to an end.

#### **Rights of a guardian**

A guardian has a right to:-

- Represent the minor in litigations.
- get compensation for legal expenses from minor's property.
- sue the minor after he attains majority to recover expenses.
- refer matters to arbitration if it is in the best interest of the minor.
- have exclusive possession of minor's property.

#### **Removal of a guardian**

Court has the power to remove any guardian in accordance to section 13. ceases to be a Hindu.

- becomes hermit or ascetic.
- court can remove if it finds that it is not in the best interest of the child.

#### **Testamentary Guardian (Sec 9)**

A person who becomes a guardian due to the will of a natural guardian is called a testamentary guardian. Section 9 defines a testamentary guardian and his powers.

- For a legitimate boy or a girl, the father, who is a natural guardian, may appoint any person to act as the guardian of the child after the death of the father. However, if the mother is alive, she will automatically become the natural guardian and after her death, if she has not named any guardian, the person appointed by the father will become the guardian.

- A widow mother who is a natural guardian, or a mother who is a natural guardian because the father is not eligible to be a natural guardian, is entitled to appoint a person to act as a guardian after her death.
- For an illegitimate child, the power of appointing a testamentary guardian lies only with the mother.

### **Powers**

A testamentary guardian assumes all powers of a natural guardian subject to limitations described in this act and to the limitations contained in the will. A testamentary guardian is not liable personally for the expenses and he can ask the guardian of the property of the minor to meet the expenses through the property.

The rights of the guardian appointed by will cease upon the marriage of the girl.

### **Guardianship by Affinity**

In **Paras Nath vs State, Allahbad HC 1960**, held that the father-in-law is the rightful guardian of a minor widow. However, this view has not been adopted by Nagpur HC. Madras HC also did not hold this view and held that the welfare of the child is to be considered first before anything else.

### **De Facto Guardian**

Section 11 says that a de facto guardian is not entitled to dispose or deal with the property of the minor merely on the ground of his being the de facto guardian. There is controversy regarding the status of a de facto guardian. Some HC consider that alienation by de facto guardian is void while alienation by de jure guardian is voidable (**Ashwini Kr vs Fulkumari, Cal HC 1983**), while some HC have held that both are voidable (**Sriramulu' case 1949**). It is now well settled that de facto guardian does not have the right to assume debt, or to gift a minor's property, or to make reference to arbitration.

### **Welfare of the minor is of paramount importance (Sec 13)**

- While appointing or declaring a guardian for a minor, the court shall take into account the welfare of the minor.
  - No person shall have the right to guardianship by virtue of the provisions of this act or any law relating to the guardianship in marriage if the court believes that it is not in the interest of the minor.
- Thus, under this doctrine, any guardian may be removed depending on the circumstances on per case basis and the court may appoint a guardian as per the best interests of the minor.

**UNIT-V**

1. General rules of Succession
2. Disqualification relating to Succession
3. Hindu Succession Act, 1956
4. Religious Endowment.

**Hindu Succession  
Act**

Although the Hindu Succession Act ("**the Act**") is not a piece of commercial or corporate legislation but its importance in today's business world is being felt because of family separations and family feuds becoming the order of the day the Act. The Act governs the law relating to intestate succession among Hindus. Indian businesses have traditionally been family owned and run and often when the family patriarch dies intestate it leads to family disputes over succession issues. These disputes are not just restricted to non-corporate entities but corporate India too has also witnessed some of the most bitter succession issues.

It is quintessential to note that this Act would have no application in case of a testamentary succession, i.e., in a case where there is a will. The Act would thus, only apply in a case where a Hindu male or female dies without making a will and leaves behind various classes of heirs and property.

**Application**

The Act applies only in case of intestate succession by Hindus. The Act applies to Hindus, Jains, Sikhs, and Buddhists and to any person who is not a Muslim, Christian, Parsi or a Jew. Any person who becomes a Hindu by conversion is also covered by the Act. The Act overrides all Hindu customs, traditions and usages and specifies the heirs entitled to such property and the order or preference among them.

The Act lays down separate rules for succession for males and females. It is important to note that succession can never be in abeyance, i.e., it can never lie in a vacuum. The moment a Hindu dies intestate, his heirs (in order of succession) become entitled to succeed to his property.

### Male intestate succession

The rules governing intestate succession of a Hindu male are specified in ss. 8 to 13 of the Act. The property of an intestate Hindu male devolves on the following heirs in the order specified below:

- (a) Firstly, upon his **Class I heirs**
- (b) Secondly, if there is no Class I heir, then upon his **Class II heirs**
- (c) Thirdly, if there is no Class II heir, then upon his **Agnates**
- (d) Fourthly, if there is no Agnate, then upon his **Cognates**

The order of succession is in the order specified above. Thus, Class I heirs take the property in exclusion to all others and so on and so forth.

**Class I heirs:** The following 12 heirs are Class I heirs -

- I. Son;
- II. daughter;
- III. widow;
- IV. mother;
- V. son of a pre-deceased son;
- VI. daughter of a pre-deceased son;
- VII. son of a pre-deceased daughter;
- VIII. daughter of a pre-deceased daughter;
- IX. widow of a pre-deceased son;
- X. son of a pre-deceased son of a pre-deceased son;
- XI. daughter of a pre-deceased son of a pre-deceased son;
- XII. widow of a pre-deceased son of a pre-deceased son.

The above Class I heirs take the property in priority succession to all other heirs. Amongst them the distribution is as follows:

(i) The intestate's children, mother and widow each take one equal share. It does not matter whether the daughter is unmarried or married. She gets an absolute share equal to that which the son gets.

(ii) The heirs in the branch of each predeceased child take one share between them.

It may be noted that the terms 'son' and 'daughter' include both those which are natural and those which are adopted.

**Class II heirs:** The following heirs are Class II heirs -

- I. Father
- II. Son's daughter's children and Siblings
- III. Daughter's grandchildren
- IV. Children of Siblings
- V. Father's parents
- VI. Father's widow (step-mother), Brother's widow
- VII. Father's siblings
- VIII. Mother's parents
- IX. Mother's siblings

Among the heirs specified in Class II, those in the first entry take the property simultaneously and in exclusion to those in the subsequent entries and so on and so forth. Thus, if the father is surviving, he takes the property in exclusion to all other Class II heirs, Agnates and Cognates. As regards the heirs specified in one entry all of them get an equal share in the property.

### **Agnates**

Two people are called Agnates of each other if they are related (by blood or by adoption) wholly through males. Agnates could be males or females. Thus, a father's brother's daughter is an Agnate but a father's sister's son is not an Agnate because the relation is not entirely through males.

### **Cognates**

Cognates On the other hand, two people are called Cognates of each other if they are related (by blood or by adoption) but not wholly through males. Cognates could be males or females. A mother's brother's daughter or a father's sister's son is a Cognate because the relationship is not wholly through males.

The relationship of Agnates and Cognates does not extend to those relationships which arise because of marriage. Among two or more Agnates/ Cognates, the order of succession is that the heir who has fewer or no degrees of ascent is preferred. If the degrees are same then those who have fewer or no degrees of descent are preferred.

### **Female Hindu's property**

By virtue of the provisions of s.14 of the Act, all property, whether movable or immovable, belonging to a female Hindu is held by her as full owner and not as a limited owner. The property may be acquired by her by way of inheritance, partition, will, gift, on marriage, own efforts, purchase, etc. However, in case she has acquired the property by way of a gift or under a will and the terms of such gift/will prescribe a limited estate, then such restriction shall prevail. Thus, a female Hindu has absolute power to deal with her property and she can dispose off her property by way of a will, gift, etc. Prior to s.14 coming into effect a female Hindu did not have any power to dispose of her property by will. But now that embargo has been removed by virtue of the statutory provision.

### Female intestate succession

The rules governing intestate succession of a Hindu female are specified in ss. 15 and 16 of the Act. Under s.15(1), the property of an intestate Hindu female devolves on the following heirs in the order specified below :

- (a) Firstly, upon her sons and daughters (including the children of any pre-deceased children) and husband;
- (b) Secondly, upon the heirs of her husband;
- (c) Thirdly, upon her parents
- (d) Fourthly, upon the heirs of her father
- (e) Fifthly, upon the heirs of her mother

The order of succession is in the order specified above. Thus, the heirs in the first entry take the property simultaneously and in exclusion to all others and so on and so forth. Thus, the children and husband of a female Hindu take the property in preference to all other heirs specified. The order of devolution as regards her husband's heirs would be as if it was her husband's property and he had died intestate. The same principle would apply as regards devolution on her father's heirs.

S.15(2) carves out an exception to the order of succession specified above. In case of a Hindu female dying intestate and without any issue or any children or any predeceased children, any property inherited by her from her parents shall devolve upon the heirs of her father. Such property shall not devolve upon the other heirs specified u/s. 15(1). Thus, property inherited from her parents would not devolve upon her husband or his heirs. Recently, the Supreme Court, in an unreported decision, has reiterated the proposition that according to s.15(2) the result would be that if a property is inherited by a woman from her father or her mother neither her husband nor his heirs would get such property but it would revert back to the heirs of her father.

Similarly, in case a Hindu female dies intestate and without any issue or any children or any predeceased children, then any property inherited by her from her husband or her father-in-law shall devolve upon the heirs of her husband. Such property shall not devolve upon the other heirs specified u/s. 15(1). Thus, property inherited from her husband would not devolve upon her father or his heirs.

It is important to note that both the above provisions of s.15(2) would only apply if the female dies without leaving behind any children or children of any predeceased children. If she has left behind any children, then they would take the property in preference to all other heirs. Further, the provisions only apply to "**inherited**" property and not property acquired by way of a will or under a gift.



## Interest in HUF Property

On the death of a male Hindu his interest in a Hindu Undivided Family (HUF) devolves by survivorship upon the other surviving members and is not governed by the succession rules laid down under the Act. Thus, if a father dies, then his interest in the HUF will devolve by survivorship upon the other HUF members. However, it is important to remember that this provision can only apply if the Hindu has not already disposed off his interest in the HUF by way of a will. S.30 now expressly permits a Hindu to make a testamentary disposition of his HUF interest.

An exception to the above provision is that in case the deceased has left behind a female relative specified in **Class I** or a son of a predeceased daughter, then the interest of the deceased devolves by intestate succession under the Act and not by survivorship.

An important amendment has been made in the State of Maharashtra by the insertion of ss.29A to 29C. By virtue of s.29A, in an HUF, a member's daughter would have the same rights in the HUF as that of a son and she would become a member of the HUF just as a son would become. She would be subject to the same rights and liabilities as a son would in the HUF property. Thus, a Hindu daughter would become a co-parcener in the HUF property. She is also capable of disposing of such property by will. It is important to note that the above provisions only apply to female Hindus who are **married after 22<sup>nd</sup> June, 1994**. Further, if she dies intestate, her interest in such HUF property shall devolve by survivorship upon the surviving members and not in accordance with the provisions of the Act, i.e., ss. 15 to 16.

## Dwelling Houses

S.23 makes a special provision in respect of partition of dwelling houses. Where a Hindu (male or female) intestate dies leaving behind **both** male and female heirs specified in Class I, and his / her property includes a dwelling-house wholly occupied by member of his / her family, then, any such female heir cannot claim partition of the dwelling-house until the male heirs choose to do so. However, the female heir shall be entitled to a have right of residence in such house. If such female heir is a daughter, then she will be entitled to a right to residence in the dwelling-house only if she is unmarried or has been deserted / separated from her husband, or is a widow. Thus, this section prevents the female members from claiming partition of a dwelling-house till such time as the male members decide to do so.

## Escheat

In case there are no heirs of an intestate who are qualified to succeed to the property in accordance with the provisions of the Act, then such property would devolve upon the Government and the Government would take such property.

## Religious Endowment

The definition of endowments recognised by the courts since long includes the properties set apart or dedicated by gift or devise for the worship of some particular deity or for the maintenance of a religious or charitable institution, or for the benefit of the public or some section of the public in the advancement of religion, knowledge, commerce, health, safety or for any other object beneficial to the mankind.

Amongst the religious and charitable endowments, hospitals, schools, universities alms houses (for distribution of food to Brahmanas or poor), establishment of idols etc., are included. According to Raghvachariar an endowment is referred to as the setting apart of property for religious and charitable purposes in which there is a Karta and a specific thing which can be ascertained. A disposition in India to be a public trust must be made with the purpose of advancement of either religion, knowledge, commerce, health, safety or other objects beneficial to the mankind.

### Different Kinds of Endowments

Endowments are of different kinds which can be placed in different categories in the following manner—

- (a) Public or private;
- (b) Real or apparent;
- (c) Absolute or partial;
- (d) Religious or charitable;
- (e) Valid or invalid.

### Public and Private Endowment:

In order to ascertain the nature of the endowment as to whether it is public or private the subsequent conduct of the settler and use of the evidence of the property set apart by the public at large are to be considered. In fact when a temple is thrown open for public at large for worship, a valid inference can be drawn that a public trust has been intended to have been created. Where the outsiders along with the members of the family of the settler take part in worship in celebration of festivals in a temple as in public temples, the state of affairs point out to the public nature of the endowment.

In contrast private endowment is that in which the public has no ingress, as an endowment for the worship of the family deity of the settler. Where the property is kept separate safely for the worship of family deity by family members only, with whom the public has nothing to do, it is a private endowment.

Even if other Hindu worshippers are allowed to worship a family deity, it will not confer public nature to the endowment. In **Venugopaldaswamy v. H. R.E. Board**, it was laid down that where the temple was initially set apart for the use of the family members only and subsequently if some outsiders are allowed ingress therein, it will not automatically alter the private nature to public.

The Madras High Court too in **Keshav Gounder v. D.C. Rajan**, held that there is very minute difference between the public and private endowment. In public endowment the interest of general public or of a group of persons is protected and involved, wherein in private endowment the interest of the settler of the trust or his family members only is protected and involved. In fact in private trust the interest is to dedicate pleasurly to the family diety something and the public has nothing to do with it.

Again the Supreme Court in **G.S. Kaha Lakshmi v. Shah Ranchod Das**, said that the temple of Sri Gokulnath Nadeyad in a public temple and the trust created is of public nature dedicated and created by the Ballabh cult and its supporters of Nadiad. The fact that any individual could enter into the temple only after the worshipping by goswami is over, does not militate in any way the public nature of the temple. Further the fact that temple is having house like appearance does not clearly establish that the temple is not a public temple.

The Supreme Court has delivered an important judgment after a lapse of a decade in **Radha Kant Deo v. The Commissioner, Hindu Religious Charitables**. The Court observed that a religious endowment of private nature cannot be conceived under English law. It can only be thought of in Hindu law. The court laid down the following test to determine the public and private nature of endowment—

- (1) Where the origin of endowment cannot be ascertained, the question to be determined is as to whether the members of public use it by way of right.
- (2) Another fact to be determined is that whether it is controlled by a group of persons or by the founder of endowment only.
- (3) It may be concluded that the endowment is of public nature where the document with respect to its creation is available and it is clear from the language of the deed that the control over the endowment is vested in the founder or in his family and a greater part of the property of the founder has been dedicated in the endowment to that temple.
- (4) Again in absence of any evidence to show that the founder has given any classification with respect to the fact that the member of public would contribute any share to it, this itself proves that the endowment is of private nature.

The Allahabad High Court too in **Suit. Sarjoo v. Ayodhya Pd.**, founded the view that it is not possible to conclude about the nature of endowment from a single characteristic alone. In fact the entire evidence and circumstances are to be examined under which it was created. Non-appointment of a pujari shows the private nature; but appointment of pujari by members of different families establish the public nature.

Even giving permission to the members of public to perform puja will not convert it into public. In **Radha Kant Deo v. The Commissioner of Hindu Religious Charitables**, the Supreme Court took the view that the idea of a private religious trust could be conceived in Hindu law only and is foreign to the English law.

In such an endowment the prime purpose of the beneficiary is to establish a temple for the family worshippers. Though public may be allowed access to such a temple but that will not convert its nature as the property in fact vests with the beneficiaries and not with the deity. Certain worth mentioning tests were formulated by the court which is as under—

- (1) Where the origin of endowment is not known, the question arises as to whether members of public use it by way of right.
- (2) The fact whether it is controlled by a group of persons or by the founder of endowment will also be considered.
- (3) Where the documentary evidence is available which clearly establishes that the control invested in the founder or in his family and a greater part has been dedicated to the temple, so that it may be properly managed, it all will suggest that the endowment is of a private nature.
- (4) Again in absence of any proof available to show that the founder intended the public to contribute any share to it, it will be treated as a private endowment.

#### **Charitable Endowments:**

Where the gifts are made for charitable purposes such as for the institution of Dharmashala, Anathashram (choultries), Sadavratas of the establishment of educational and medical institutions or/and for the construction of Anathashrams (orphanage) tanks, wells and bathing ghats etc., they are known as charitable endowments. In such endowments property is dedicated through the usual ceremonies of Sankalpa and Utsarga.

The popular charitable institutions created through endowments and recognised under the Hindu law are Dharmashala or rest houses, Sadavrats Anathashram, public institutions, constructions of tanks, wells, groves etc. Dharmashalas are the rest houses provided for the travellers known as Pratishraya Griha in ancient times.

The property dedicated to the Dharmashalas vest in Dharmashalas itself. Its management may vest in the founder himself or a committee constituted by the founder. The benefit of Dharmashala may be available to public in general or it may be restricted to the members of a community or to the follower's of a particular religion.

Sometimes gifts are made for the establishment of educational institutions or hospitals. Imparting free education to the people in general has been one of the prime objects of charity throughout the ages amongst Hindus. Similarly hospitals and dispensaries known as Arogashalas have also been the objects of charitable endowments.

The establishment and maintenance of Goshalas is also a valid charitable purpose. Similarly the excavation of tanks and wells has also been recognised as charitable objects from the very beginning.

According to Dharmashastra, construction of a well is equal to Agnistoma sacrifice; in desert it equals the Aswamedha. The well flowing with drinking water destroys all sins. The well maker, attaining heaven, enjoys all the worldly pleasures. The consecration of trees and groves is also a well recognised charitable purpose amongst Hindus. Dedications for groves and trees have been held valid.

Similarly Sadavrats, where free distribution of food and alms to the needy and poor are arranged, have been well known charitable institutions amongst Hindus. Langars and Anathashram are species of Sadavrats. Endowments for them have been held valid. Similarly endowments for reciting sacred books and for the food and maintenance of Brahmacharies and Brahamans have also been held valid.

#### **Temples and Maths:**

The religious needs of the Hindus are served by Temples and Maths. God is worshipped in temples. It is usual to install a particular idol in the temple representing the deity as an aid to concentration in worship.

The Maths are monasteries where Hindu scriptures are studied by monks or sanyasis. They are centres for preaching and propagating Hinduism. For these purposes property may be dedicated resulting in a religious endowment.

A religious endowment may be set up orally by dedicating the property for the particular religious object in view. Thus property may be given to idols and Maths and the particular purpose for which it should be applied may also be specified.

#### **Shebait and Mohants:**

The Manager of a temple is called Shebait or Dharmakarta. The Manager of a Muth is called a Mohant or Matadhipati. In *Vidyavaruthi v. Baluswami*, 44 Mad. 831 (PC), the Privy Council pointed out that the Dharmakarta of a temple is not the legal owner of the endowed property. He is only the Manager. The Supreme Court has pointed out in *Sirur Muth* case as regards the office of Mohant: "In the office of Mohantship, the elements of office and property, of duties and personal interest are blended together and neither can be detached from the other". The head of the Mutt is a saintly religious preacher and his devotees and disciples present offerings at his feet. These are entirely in the personal disposition of interest of the Shebait in debut tar property, i.e. property of the deity.

#### **Alienatory Powers:**

The alienatory power of the Shebait and the Mohant over the endowed property is analogous to the power of limited owners. That is, this power is governed by the rule in *Hanooman Persaud's* case.

#### **Devolution of the Office:**

It is open to the Shebait to nominate his successor. A similar power is enjoyed by the Mohant. Custom and practice regulates the devolution of the office. **Greedharee Doss v. Nundokisore Doss, 1857 (11) MIA 405**. These offices may also be hereditary by custom; *Sirur Mutt Case*. The Shebait right, i.e., right to management in such a case is virtually a property right and the heir of the Shebait succeeds to the office.

Even a female may thus become the Shebait as heir of the previous **Shebait. Angur Bala v. Debabrata, 1951 SCR 1125.**

**Local Legislation:**

Religious Endowments have been the subject matter of local legislation. The State Legislatures in various states have passed legislative enactments to regulate the management of religious endowments. Such legislation should not conflict with the guarantee relating to religious freedom and freedom of every religious denomination to manage the religious institutions under its control. Sirur Mutt Case.

**Powers, rights & duties of Shabiat**

The Shebait or manager of a temple is the administrator of the properties attached to it, as regards which he is in the position of the trustee. As regard the service of the temple and the duties appertaining to it, his position is that of the holder of an office of dignity.

Shebaitship involves two ideas:

- (i) the ministrant of the deity, and
- (ii) its manager. It is an office to which certain rights are attached. A Shebait has no legal property in the debutter; it vests in the idol. He has only the title of the manager, and as such, he is entitled to the custody of the idol and its property. Offerings made to an idol belong to
  - the temple, where they are of a permanent character, and
  - the Shebait, where they are of a perishable character.

The Shebait is bound to do whatever is necessary for the benefit or preservation of the debutter property. Thus, he may incur debts for the proper expenses of keeping up of the religious worship, repairing the temple or other possessions of the idols, instituting or defending hostile litigation, and to prevent the endowed properties from being brought to sale in execution of decrees binding upon the temple.

Being in the position of a trustee, he cannot purchase any part of the debutter property, even if he pays a good price for it. Thus, it has been held that a sale of debutter property with a view to “realise a fancy price” is void. If in the management of the property, he incurs any out-of-pocket expenses, he is entitled to be reimbursed from the property.

**Devolution of office of SHEBAIT:**

In the case of a temple, succession to the office of a Shebait is governed by the terms of the deed or will by which it is created, and in the absence of such a provision, by the custom or usage of the institution, and in the absence of such a custom, the right passes to the founder and his heirs, provided the person on whom the office devolves is not unfit, according to the usages of worship, to perform the rites of the office.

Some cases have laid down that a founder cannot lay down a line of succession for shebaitship which is inconsistent with the general law. However, other cases have held that it is competent for an heir of a founder to create a new line of succession on failure of the original line of succession.

There is also a conflict of decisions on whether a shebait can nominate a successor by will. The Bombay High Court has answered this question in the affirmative, whereas the High Courts of Calcutta and Allahabad have held that a Shebait cannot nominate his successor by will.

When the office of Shebait becomes vested in more than one person, the interested parties can arrange between themselves as regards the due execution of their functions, – in turns or in some settled order or sequence. When the right to worship carries with it the right to receive offerings also, any one of such persons can sue for a division of the right, in the same manner as a person can sue for a partition of a joint Hindu family. However, when the office does not carry with it the right to receive offerings, no suit will lie for a division of the right and the property must be managed by them jointly.

The Supreme Court has held that a female is also entitled to succeed to the religious office of shebaitship.

**Debutter property:**

Property absolutely dedicated to religious or charitable purpose is called debutter property. Debutter means literally belonging to a deity. Where the dedication is absolute and complete, the possession and management of the property belongs, in the case of a deosthana or temple, to the manager of the temple, called shebait but the property vests in the idol; and in case of math that is an abode for students of religion, to the head of the math called mahant.

**Power of alienation of debutter property:**

As a general rule, the property given to religious worship and charities connected with it is inalienable. It is however, competent for the shebait of the mahant to charge the property by incurring debts and borrowing money on a mortgage for the purpose of religious worship and for the benefit and preservation of the property. The power can be exercised only in cases of actual necessity.

The power of the shebait or a mahant alienate the debutter property is analogous to that of manager for an infant heir as defined in **Hanuman Prasad v. Mst. Babooee (1856) 6 M.I.A. 393**, a deity being looked upon as a particular minor. Thus he can alienate the property only in a case of need or for the benefit of the estate. He cannot grant a permanent lease of the debutter property except for legal necessity.

The duties and powers of a Mahant are similar to those of a shebait.