



## **The Entire Law Relating To Hindu Undivided Family (HUF) Explained**

By K. H. Kaji & Manish K. Kaji, Advocates

### **1. What is Hindu Undivided Family**

The expression “Hindu Undivided Family” has not defined under the Income Tax Act or in any other statute. When we dissect – essentials are (1) One should be Hindu, Jains, Sikhs and Buddhists are considered as Hindus but not Muslims or Christians; (ii) There should be a family i.e group of persons – more than one and (iii) They should be undivided i.e living jointly and having commonness amongst them. All these three essentials are cumulative. It is a body consisting of persons lineally descended from a common ancestor and include their wives and unmarried daughters, who are living together, joint in food, estate and, worship (not now necessary). The daughter, on her marriage, ceases to be a member of her father’s HUF and becomes a member of her husband’s HUF. However, after 1-9-2005, daughter married or unmarried, is a co-parcener like a son.

### **2. What is a Hindu Coparcenary? In what ways is it different from a HUF?**

A Hindu Coparcenary is a much narrower body within Hindu Undivided Family. Generally speaking, it is a body of individuals who acquires interest by birth in the joint family property. They are the son, grandson and great grandson of the holder of the joint property for the time being. Since 1-9-2005 daughters married or unmarried are now included. The coparcenary, therefore, consists of a common male ancestor and his lineal descendants in the male line within 4 degrees, running from and including such ancestor. No coparcenary can commence without a common male ancestor though after his death, it may consist of collaterals such as brothers, uncles, nephews etc. The essence of coparcenary is community of interest and unity of possession.

### **3. Who can be Co-parceners/members of a HUF?**

Birth of a male in a Hindu joint family makes him a Co-parcener of the HUF. In view of this, all male members automatically become members of the HUF. In addition to that, if a child is adopted then he also becomes a member of the HUF. Moreover, upon marriage, wife becomes a member of her husband’s joint family. Female child remains a member till marriage. Only male can be a coparcener. This is changed now after 1-9-2005 daughters are coparceners like sons.

### **4. What is the difference between a co-parcener and a member?**

A HUF, as such, can consist of a very large number of members including female members as well as distant blood relatives in the male line. However, out of this, coparceners are only those males (now daughters also) who are within 4 degrees in lineal descent from the common male ancestor. The relevance of concept of coparcenary is that only coparceners can ask for partition. The other male family members : i.e other than coparceners in a HUF, have no direct claim over HUF property, but can claim only through the coparceners.

#### **5. How does a HUF come into existence?**

The concept of Joint Family under Hindu law as well as the HUF in Income Tax Act, 1961 is broadly the same. HUF is purely a creature of law and cannot be created by an act of parties (except in case of adoption and reunion). A HUF is a fluctuating body, its size increases with birth of a member in the family and decreases on death of a member of the family. Females go and come into HUF on marriage. If there is family nucleus, there need not be more than one male member to form a Hindu undivided family as a taxable entity under the Income Tax Act. The expression "Hindu undivided family" in the Income Tax Act is used in the sense in which a Hindu joint family is understood under the personal law of the Hindus. Under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members, and the Income Tax Act does not indicate that a Hindu undivided family as an assessable entity must consist of at least two male members (Refer *Gowli Buddanna vs. CIT* (1966) 60 ITR 293(SC). Where a Coparcener having a wife and minor daughters and no son receives his share of joint family properties on partition, such property, in the hands of the coparcener, belongs to the HUF of himself his wife and minor daughters. (Refer *N.V Narendranath vs. CWT* (1969) 74 ITR 190(SC).

#### **6. Can a single male constitute HUF?**

Family always signifies a group. Plurality of persons is an essential attribute of a family. A single person, male or female does not constitute a family. A family consisting of a single individual is a contradiction in terms. Section 2(31) of the Income Tax Act, 1961, treats a Hindu undivided family as an entity distinct and different from an individual. Assessment in the status of a Hindu undivided family can be made only when there are two or more members of the Hindu undivided family. (Refer *C. Krishna Prasad vs. CIT* (1974) 97 ITR 493(SC). Husband and wife can constitute HUF if property is received on partition. An individual who receives ancestral property at a partition and who subsequently acquires family, but has no male issue, would hold that property only as the property of the family. Under the Hindu law the wife of the coparcener is certainly a member of the family. Whatever be the school of Hindu law by which a person is governed, the basic concept of a Hindu undivided family in the sense of who can be its members is just the same. Thus, in order to constitute a joint family it is not always necessary that there must be two male members. (Refer *CIT vs. Parshottamdas K. Panchal* (2002) 257 ITR 96 (Guj). In cases where the property held by the person who claims it to be his own, had in fact been held by a joint family earlier and is ipso facto capable of being held by other sharers as well in future if and when the family comes

into existence and a son, whether by birth or adoption, is added thereto, such property continues to retain the character of joint family property, even when the family is reduced to a single male member as in the case of a sole surviving coparcener. Though such a sole surviving coparcener may be assessable as an individual as he cannot be said to have a family, unless there are, in fact female joint family members in the family, the character of the property continues unaltered as joint family property though for the time being it is not shared with any other member of the family and may or may not be subject to any charge in favour of anyone else for any purpose. When the assessee got married and acquired a family that family constituted a Hindu undivided family and the ancestral property which the assessee had received at the partition became the property of that Hindu undivided family. In cases where the property even at the time it vested in the hands of the family had the character of ancestral property the absence of a son, who can claim partition, does not render what is joint family property, individual property. The test is not as to whether his issues are male or female. The test is whether the property was ancestral. Therefore an individual who receives ancestral property at partition and who subsequently acquires a family, but had no male issues would hold that property only a property of the Hindu undivided family. (Refer W.P.A.R Rajagopalan vs. C.W.T (2000) 241 ITR 344(Madras)).

**7. Can a son who is the sole surviving coparcener along with other females in the family after his father's death constitute an HUF?**

Yes. The HUF shall continue with the son as Karta and other female members as members.

**8. Can a son being a member of HUF consisting of his father, himself and his brothers, form an HUF consisting of himself, his wife and minor son?**

Under Hindu law, there can be a HUF within a HUF. Therefore, a son can have his own smaller HUF while he continues to be a member of his father's HUF. In his father's HUF, he is a mere member - coparcener and in his own HUF, he is Karta.

**9. Can there be a HUF with only female members?**

Yes. Under Hindu Law it is not predicated of a Hindu joint family that there must be a male member. So long as the property which was originally of the joint Hindu family remains in the hands of the widows of the members of the family and is not divided among them, the joint family continues. (Refer CIT v/s. RM AR. AR. Veerappa Chettiar (197)) 76 ITR 467(SC). However, after the enactment of the Hindu Adoptions and Maintenance Act, 1956 as well as Hindu Succession Act, 1956, this legal position does not seem to be correct. This is because such female members, upon such death would get their interest in the property absolutely and their absolute interest so crystallized cannot be divested by any subsequent event, for example remarriage or adoption.

**(10) HUF PROPERTY**

## **1. What is H.U.F and Individual property of a Hindu?**

Any property which is received from ancestors by way of partition or otherwise is HUF property. Any property received by the HUF by way of gift through Will, accretions to the existing properties, blended or properties thrown in common hotchpot or impressed with the Character of HUF property by any coparcener etc. are also HUF property, Character of the HUF property on partition in the hands of the coparcener, remains as HUF property.

Any property earned by an individual whether on account of own exertion or out of individual fund without investment of the HUF funds, earning of learning, service, personal qualifications, etc. is separate and individual property of a Hindu (Refer K.S Suffiah Pillai vs. CIT (1999) 237 ITR 11(SC)). Self acquired property of a Hindu will pass on to his/her legal heirs as per the rules of succession and the legal heirs receive the property as individual property. So also the share of the deceased co-parcener in HUF, which otherwise devolves by survivorship to other co-parcener goes by succession to legal heirs, which they hold as separate property, if such co-parcener has left certain class of female relatives or a male relative who claims through such female relative specified in Class I of the first schedule to Hindu Succession Act, 1956.

### **(11) Whether a family that does not own any property can have the character of Hindu joint family?**

Yes, the concept of HUF is not related to possession of any property by the family nor the existence of such joint property is an essential pre-condition for constituting a HUF. This is because Hindus get joint family status by birth and joint property is simply an adjunct to the joint family.

### **(12) What is the nature of property received by a male member after his marriage but before a male child is born?**

There is considerable controversy on these aspects. There are divergent views expressed by different courts from time to time. One view is that since a HUF, as known under Hindu law, can consist of even husband and wife only, once such a HUF has come into existence upon marriage of a Hindu male, such family can receive property from any source and regard the same as HUF property. However, the other view is that in such a case, a distinction should be made between a property that already has characteristic of a joint property (for example, property received on partition) and other than such properties. In case of receipt of properties of the former kind, such family (that is consisting only of husband and wife) can receive and treat such property as joint Hindu family property. But in case of latter (that is, in the cases like gift or will), unless there are at least two coparceners in the family, such HUF cannot receive or treat such property as HUF property. In other words since in such family of husband and wife there is only one coparcener i.e husband (wife being a mere member and not coparcener), if such HUF wants to receive and regard any property from an outside source as HUF property then

it has to have another coparcener in the family i.e son. The earlier view seems to a better one. Of course, a Donor or testator must indicate that he gives it to the person's HUF.

**(13) What is the nature of property received by a Hindu from his father and having only a wife and daughters in his family?**

This will depend upon whether the property received by such Hindu from his father is father's individual property or property of father's HUF. In case of the former, such Hindu will be receiving the property as a legal heir of the father and rules of succession as prescribed under Hindu Succession Act, 1956 will prevail. If the property is received from father's HUF, then it can form part of HUF of such Hindu. But the share of the father in the HUF upon his death can go to his legal heirs which will be their individual property if the father has left behind him any female relative or a male relative claiming through such female relative, as in Class I of the schedule to that Act. Of course by will he can give his share to son's HUF.

**(14) Whether property acquired on gift by the assessee with an intention of the donor that the money should be used for the benefit of his family is HUF property or not?**

HUF can receive gifts from anybody including a stranger. In any case, as held by the Supreme Court, (Ref CIT vs. Satyendra Kumar (1998) 232 ITR 360(SC) a gift by mother also can be a source of HUF property. In case of a gift whether from a father, mother, relative or a friend the intention of the donor is important. If there are express provisions to the effect in the deed of gift or will that the son would take the property for the benefit of the family, that is decisive. The donor or testator dealing with self acquired property may by evincing the appropriate intention, render to the property gifted the character of a joint family property or as the case may be a separate property in the hands of the donee vis-à-vis his male issue. (Refer C.N Arunachala Mudaliar vs. C.A Muruganatha Muddliar (1953) AIR 1953 SC 495 and CIT vs. M. Balasubramanian (1990) 182 ITR 117 (Mad). It is necessary to take care while making the Will or the gift. Clause should be specific and the donee HUF should open bank account in the name of the HUF. Indication should be clear (Refer CIT v/s. Maharaja Bahadur Singh & others (1986) 162 ITR 343(SC).

**(15) DOCTRINE OF BLENDING OR IMPRESSING WITH THE CHARACTER OF HUF.**

**1. What is the doctrine?**

If a Coparcener makes a declaration blending his individual property with that of HUF or impresses such property with the character of HUF property or throws the property in the common hotchpot – such property becomes H.U.F property and loses the character of individual or separate property.

**2. Can a coparcener blend his individual property into his smaller HUF wherein he is a Karta, while continuing to be a member of the bigger HUF consisting of his father, himself and his brothers?**

A Coparcener can be coparcener of two joint Hindu families. The blending is at his option, he may blend his property with either of the HUF's. In that view of the matter, a coparcener can blend his individual property with his smaller HUF, wherein he is Karta, while continuing to be a member of the bigger HUF consisting of his father himself and his brother.( Refer : CIT v/s. M.M Khanna (1963) 49 ITR 232 (Bom).

**3. What will be the position where the HUF consists of only his wife and minor daughter?**

The Supreme Court in Surjit Lal Chhabda vs. CIT (1975) 101 ITR 776 on the above question stated: "Kathoke Lodge was not an asset of a pre-existing joint family. Doctrine of blending or impressing with the Character of HUF party into the family hotchpot does not apply. The appellant has no son. His wife and unmarried daughter were entitled to be maintained by him from out of the income of Kathoke Lodge while it was his separate property. Their rights in that property are not enlarged for the reason that the property was thrown into the family hotchpot. Not being coparceners of the appellant, they have neither a right by birth in the property nor the right to demand its partition nor indeed the right to restrain the appellant from alienating the property for any purpose whatsoever. Their prior right to be maintained out of the income of Kathoke Lodge remains what it was even after the property was thrown into the family hotchpot: the right of maintenance, neither more nor less. Thus, Kathoke Lodge may be usefully described as the property of the family after it was thrown into the common stock, but it does not follow that in the eye of Hindu law it belongs to the family as it would have if the property were to devolve on the appellant as a sole surviving coparcener. The property which the appellant has put into the common stock may change its legal incidents on the birth of a son but until that event happens the property in the eye of Hindu law, is really his. He can deal with it as a full owner unrestrained by considerations of legal necessity or benefit of the estate. He may sell it, mortgage it or make a gift of it. Even a son born or adopted after the alienation shall have to take the family hotchpot as the finds it. A son born, begotten or adopted after the alienation has no right to challenge the alienation. It was held that income from the Lodge shall be chargeable to tax in the individual hand. It shall be assessable in the hands of the HUF on birth or adoption of the son. (Refer S.K Bohra vs. CIT (1988) 173 ITR 400(Rajasthan).

**4. Is it necessary for the HUF to have any ancestral property prior to receiving the property from one of the coparceners?**

No, it is not necessary for the HUF. Even an empty hotchpot can receive and hold any property that is thrown into it by the co-parcener (Refer: CIT vs. S. Sivaprakasa Mudaliar (1983) 144 ITR 285(Mad).

**5. Can a female member of the family blend her individual property into the HUF?**

Blending is a power given only to coparceners. Since females are not coparceners, a female member of a joint family cannot blend her individual property with HUF property. However, such an act shall be considered as a gift and it shall become property of the HUF. (Refer *Mallesappa vs. Desai* (AIR (1961) SC 1298) and *Pushpa Devi vs. CIT* 91977) 109 ITR 730(SC). After 1-9-2005 daughter, being a comparcener can blend her individual property into the HUF.

## **6. What are the clubbing provisions in tax laws?**

The clubbing provisions u/s. 64(2) of the Income Tax Act as well as section 4(1A) of the Wealth Tax Act shall apply. Under the Income Tax Act, the income arising from such converted property will be deemed to be income of the transferor individual. Moreover, on Partition of such property, in case such property is allotted to the wife of such individual the income arising there from shall continue to be taxed in the hands of the transferor individual. Income in respect of the property allotted to minor children till minority shall be clubbed in the hands of the father, on account of overriding provisions contained u/s. 64(1A) of the Income tax Act. Similarly under the Wealth Tax Act the converted property is deemed to be the asset belonging to the individual and when such converted property has been the subject matter of partition, the converted property or any part thereof, which is received by wife of the individual on such partition shall be deemed to be the property belonging to such individual and as such will be includible in the wealth of such individual. Under Gift Tax Act such act is considered as a transfer and is liable to tax as gift in respect of the value excluding share of the transferor in the HUF. However, at present there is no gift tax.

## **(16) GIFTS TO AND FROM HUF**

### **1. Can Hindu Undivided Family accept gifts from its members or co-parceners or outsiders?**

Yes. There is no restriction for a HUF to accept gifts from any source. However, the intention of the donor should be clear and gift should be genuine. The donee shall have to prove the identity and capacity of the donor as well as the genuineness of the gift. Friendship, relationship, closeness need be established. The Delhi High Court in *Sajjan Das & Sons vs. CIT* (2003) 264 ITR 435 held mere identification of the donor and showing the movement of the amount through banking channel was not sufficient to prove the genuineness of the gift. Since the claim of gift was made by the assessee, the onus lay on him not only to establish the identity of the person making the gift but also his capacity to make a gift and that it had actually been received as a gift from the donor. Gift being by cheque and of moveable property, no registration is necessary. However, gift declaration detailing complete information relating to the donor should be drawn and recorded. Gift cheque should go in a bank account in the name of the donee for realization and subsequent utilization.

### **2. Whether share of a Hindu can be bequeathed by Will?**

Yes, now there is a specific provision (section 30) under the Hindu Succession Act, 1956 by which any Hindu can dispose of, by will or other testamentary disposition any property which is capable of being so disposed of by him. It is specifically mentioned that the interest of a male Hindu in a Mitakshara co-parcenary property shall be deemed to be property capable of being disposed of by such Hindu. After amendment 2005, even daughters who are now coparcener can make of will bequeathing her share in joint family property.

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

### **3. Can a HUF give away its property by way of gift?**

Although sons acquire by birth rights equal to those of a father in ancestral property both movable and immovable, the father has the power of making within reasonable limits gifts of ancestral movable property without the consent of his sons for the purpose of performing "indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth". A "gift of affection" may be made to a wife, to a daughter, and even to a son. But the gift must be of property within reasonable limits. A gift of the whole, or almost the whole of the ancestral movable property to one son to the exclusion of the other sons, cannot be upheld as a "gift through affection" prescribed by the text of law. A Hindu father or other managing member has power to make a gift within reasonable limits of ancestral immovable for "pious purpose".

The essence of a coparcenary under the Mitakshara school of Hindu law is community of interest and unity of possession. A member of joint Hindu family has no definite share in the coparcenary property, but he has an undivided interest in the property which is liable to be enlarged by deaths and diminished by births in the family. An interest in the coparcenary property accrues to a son from the date of his birth. His interest will be equal to that of his father. So far as alienations of coparcenary property are concerned, it appears that such alienations were permissible in the eighteenth century. Although at the time of the judgment of the Privy Council in Suraj Bansi Koer's case, the Madras Courts recognized alienations by gift, as time passed, the courts of law declared alienations by gift of undivided interest in coparcenary properties as void. The rigour of this rule against alienation by gift has been to some extent relaxed by the Hindu Succession Act, 1956. The most significant fact which may be noticed in this connection is that while the Legislature was aware of the strict rule against alienation by way of gift, it only relaxed

the rule in favour of disposition by a will of the interest of a male Hindu in Mitakshara coparcenary property. The Legislature did not, therefore, deliberately provide for any gift by a coparcener of his undivided interest in the coparcenary property either to a stranger or to another coparcener. Therefore, the personal law of the Hindus, governed by the Mitakshara school of Hindu law, is that a coparcener can dispose of his undivided interest in the coparcenary property by a will, but he cannot make a gift of such interest. Hence, a gift by a coparcener of his undivided interest in the coparcenary property either to a stranger or to his relation without the consent of the other coparceners is void. (Refer *Thamma Venkata Subbamma vs. Thamma Rattamma* (1987) 168 ITR 760(SC).

Combined reading of the paragraph of Hindu Law and the case laws show that the position in Hindu Law is that whereas the father has the power to gift ancestral movables within reasonable limits, he has no such power with regard to the ancestral immovable property or coparcenary property. He can however, make a gift within reasonable limits of ancestral immovable property for “pious purposes”. However, the alienation must be by an act inter vivos, and not by will. This court has extended the rule in paragraph 226 and held that the father was competent to make a gift of immovable property to a daughter, if the gift is of a reasonable extent having regard to the properties held by the family. A father can make a gift of ancestral immovable property within reasonable limits, keeping in view, the total extent of the property held by the family in favour of his daughter at the time of her marriage or even long after her marriage. (Refer *R. Kuppayee vs. Raja Gounder* (2004) 265 ITR 551(SC).

#### **4. Whether the gift above reasonable limit or to stranger is void or voidable?**

It has been laid down by their Lordships of the Privy Council in *Hanuman Kamat vs. Hanuman Mandur* that the alienation by a manager of a joint Hindu family was not necessarily void but was only voidable if objections were taken to it by the other members of the joint Hindu family. The Lahore High Court in *Imperial Bank of India vs. Maya Devi*, AIR 1935 Lahore 867 observed: “*Where however the gift is not for religious purposes, or consists of the whole or large portion of the joint family property, the transaction is voidable, but only at the instance of the other coparceners. No person who is a stranger to the family and does not possess a right to have the transaction defeated on other grounds (e.g under section 53, T.P Act), has a locus standi to intervene and impugn it merely because it was in excess of the authority which the karta possessed to deal with it for family purposes*”. When gift is not void but only voidable it can be challenged by the members of the family and not the strangers. (Refer *CIT v/s. Motilal Ramswaroop* (1970) 76 ITR 43 (Rajasthan), *R.C Malpani v/s. CIT* (1995) 215 ITR 241 (Gauhati), *Raghuban Chaman Prasad Narain Singh vs. Ambica Prasad Singh* – AIR 1971 SC 776, *CIT vs. K.N Shanmughasundaram* (1998) – 232 ITR 354, *CIT vs. Bharat Prasad Anshu Kumar* – (2001) 249 ITR 755(Delhi).

### **(17) KARTA / MANAGER, MEMBERS, THEIR RIGHTS AND OBLIGATIONS**

#### **1. Who can become Karta of a HUF?**

An adult male member who manages the affairs of the HUF is known as Karta or Manager of the family. Only a co-parcener can become Karta. Generally, the senior most male adult member of the family is made Karta of HUF. However, such senior member may give up his right of management and a junior member may by consent, be appointed as Karta. Where a junior member is in custody, control or possession of the property or the eldest member is not working in the interest of the family or is working against the interest of the family, junior member may be recognized as Karta.

Coparcenership is a necessary qualification in order to become the karta of a joint Hindu family. The effect of the Hindu Women's Rights to Property Act (XVIII of 1937) is merely to confer upon the widow an interest in the share of the husband and the estate created in that interest is the interest of a Hindu widow. She is also entitled to claim partition of the properties but all these rights either individually or cumulatively do not have the effect of conferring upon the widow the status of a coparcener in the family. Nor do they clothe her with a right to represent the other members of the family as karta of a joint Hindu family. Under Hindu Law the widow could not become the Karta of a joint Hindu family (Refer V.M.N Radha Ammal (1965) 57 ITR 510). However, a minor can act as Karta of the joint family through his natural guardian, his mother, in certain exceptional circumstances, for example, where whereabouts of the father are not known at the time. However, after 1-9-2005, daughter married or unmarried is now made a coparcener and can become Karta of her father's family.

## **2. What are the rights of a Coparcener or member?**

No coparcener is entitled to any special interest in the coparcenary property nor is he entitled to exclusive possession of any part of the property. As observed by their Lordships of the Privy Council, "there is community of interest and unity of possession between all the members of the family". A member of a joint Mitakshara family cannot predicate at any given moment what his share in the joint family property is. His share becomes defined only when a partition takes place. As no member, while the family continues joint, is entitled to any definite share of the joint property it follows that no member is entitled to any share of the income of the property. The whole income of the joint family property must be brought according to the theory of an undivided family, to the common chest or purse and there dealt with according to the modes of enjoyment by the members of an undivided family.

## **3. After the marriage of female member after 1-9-2005 whether the daughter would continue to be a member of her father's family and also would become member of her husband's family?**

Yes. She continues to be a coparcener of her father's HUF. A very peculiar position will arise inasmuch as such daughter upon her marriage will automatically become a member of her husband's family while she will continue to be co-parcener in her father's family.

## **4. Can such female member demand partition of her father's HUF as well as her husband's HUF?**

As after 1-9-2005 daughter continues to be a coparcener of her father's family, having all the rights and privileges as of a coparcener, she can demand partition of her father's HUF property. However, as far as her husband's HUF is concerned, she is a mere member of the family and not a coparcener and as such cannot demand partition of her husband's HUF property. But would be entitled to a share in case of partition between her husband & her sons or between her sons.

#### **5. What is property of Sole Surviving Coparcener and its incidents?**

When the family is reduced to only one male coparcener with female members only, such coparcener is called as Sole Surviving Coparcener. Though for purposes of assessment a sole surviving coparcener is assessed in the status of a Hindu undivided family, his powers are wide and unrestricted and akin to that of an individual. He is free like an individual to alienate the property in whatever manner he likes. Therefore, when he alienates the property he disposes of the same with the powers vested in him as that of an individual. (Refer: Attorney General vs. Arunachalam Chettiar (1958) 34 ITR (ED) 42 (PC) , M.S.P Rajah vs. CGT (1982) 134 ITR 1(Madras), CIT v/s. Anil J. Chinai (1984) 148 ITR 3 (Bombay), CIT vs. N. Kannaiyiram (1999) 240 ITR 892(Madras).

#### **(18) MITAKASHARA LAW OF INHERITANCE**

1. Under Hindu Mitakashara law, a joint family consists of father, son and grand sons and in joint family property all of them are co-parceners. In the estate of the joint family, all the co-parceners would have equal share. Wife also would have share equal to that of the husband and the sons. Provided that she cannot claim the share unless there is partition between husband & her sons or partition between sons. The grand sons would share equally in the share belonging to the son i.e their father. If there is a partition of a joint family, shares will be allotted to the various co-parceners according to Hindu law. However, radical change is introduced in the aforesaid legal position of a joint Hindu family by provisions of Hindu Succession Act. Section 6 . More particularly as amended by Act of 2005 provides that a co-parcener of a joint Hindu family dies following consequences with follow:-

(1) Daughter (married or otherwise) is made a coparcener same as a son to claim partition.

(2) Will have same rights as a son with all incidents of coparcenary.

(3) Property devolves as per s. 8 Hindu Succession Act where sons, daughters, wife, mother are equal shares Class I. Hence not only daughter is made coparcener to have her own share in HUF, further on death of father intestate, she is one of heirs in father's separate portion. Deceased share will devolve on heirs as per 8 while deemed partition takes place of all coparcenary properties to herein, entitled including daughter further in fathers HUF share fictionally advice & child as well as daughter's child are entitled to interest their parents share if deceased.

Share in the joint family does not go by survivorship to the other co-parceners of the joint family but will go to her sons intestate succession as listed in section 8 of the Act. Similarly, a co-parcener (including daughter now) is now entitled to make a Will with regard to his/her share in the joint Hindu family and his share will, therefore go according to the provisions of the Will.

## **2. Restrictions on Hindus power to make a Will**

There are no restrictions with regard to the power of a Hindu making a Will with regard to his individual property. As regards his/her share in the joint family property under s. 30 of Hindu Succession Act if he/she is a co-parcener, he/she will be entitled to make a Will of his/her share in the joint family property. His/her share in the joint Hindu family will go by testamentary succession if he/she and s. 15 if female has made a Will or by intestate succession as provided in section 8 if a male. So far as restrictions are concerned, there does not appear to be any restriction on the power of a Hindu to make a Will. However, it may be noted that section 22 of the Hindu Adoption and Maintenance Act, 1956 creates an obligation on the heirs receiving the estate of the deceased either by intestacy or by way of testamentary succession to maintain the dependents of the deceased out of the estate received if such dependents have not received any share in the estate by testamentary or intestate succession.

So far s female Hindus are concerned, there is no restriction on them regarding making of the Will of their individual properties and now daughters married or unmarried. However, though wives are entitled to a share in the joint family property when partition takes place between father and son or between sons, they being not entitled to a share, in absence of such partition they cannot make a Will with regard to their share in the joint family property unless she has received it. The status of women is altered radically by Hindu Succession (Amendment) Act, 2005, whereby daughters whether married or unmarried are coparceners and entitled to a share in the joint family properties. Wife and daughter can also ask for partition of her share. The amendment applies to agricultural property also. Amendment Act applies as from 9-9-2005. However, transactions such as partition which is by a deed of partition duly registered or decree of Court prior to 20-12-2004, will not be affected by the amendment.

## **(19) EFFECT OF THE SPECIAL MARRIAGE ACT, 1954**

### **1. Ambit of sections 19 and 21 of the Special Marriage Act.**

It is open to person of any community in India to solemnize a marriage under the Special Marriage Act, 1954, but it has certain consequences with regard to the mode of succession to their properties and their joint Hindu family. Section 19 of the Act lays down that the marriage solemnized under this Act of any member of an undivided family who professes Hindu, Buddhist, Jain or Sikh religion shall be deemed to effect his severance from such family. Thus, automatic severance from the family would take place.

Further, section 21 provides that notwithstanding any restrictions in the Indian Succession Act with respect to its application to members of certain community, succession to property of any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act. Thus the parties to the marriage would lose their personal law of succession and would be governed by the Indian Succession Act.

## **2. Effect of Marriage Laws (Amendment) Act, 1976**

However, this position was not a welcome situation and accordingly an amendment has been effected by Marriage laws (Amendment) Act, 1976 with effect from May 27, 1976 wherein section 21A has been introduced in the Special Marriage Act, 1954.

Under this new section, where marriage is solemnized under the said Act of any person who professes Hindu, Buddhist, Sikh or Jain religion with a person who professes Hindu, Buddhist, Sikh or Jain religion, section 19 and section 21 shall not apply. The result of this amendment would be that if both the parties to the marriage under this Act are Hindus etc. there will be no severance from the joint family nor will they lose their personal law of succession.

## **(20) PARTITION**

### **1. What is Partition?**

Partition is the severance of the status of Joint Hindu Family, known as Hindu Undivided Family under tax laws. Under Hindu Law once the status of Hindu Family is put to an end, there is notional division of properties among the members and the joint ownership of property comes to an end. However, for an effective partition, it is not necessary to divide the properties in metes and bounds. But under tax laws for an effective partition division by metes and bounds is necessary. There should be physical partition of the property and not the notional partition. Partition under Hindu law, can be total or partial. In total partition all the members cease to be members of the HUF and all the properties cease to the properties belonging to the said HUF. Partition could be partial also. It may be partial vis-à-vis members, where some of the members go out on partition and other members continue to be the members of the family. It may be partial vis-à-vis properties where, some of the properties are divided among the members other properties continue to be HUF properties. Partial partition may be partial vis-à-vis properties and members both. However, Tax Laws do not recognize partial partition of property or/and persons after 30-3-1978 on insertion of Sub-Section (9) to Sec. 171 of the I.T Act. This restriction was put to avoid creation of multiple HUFs which was a misuse.

### **2. How a partition can be effected and what is its effect?**

To constitute a partition all that is necessary is a definite and unequivocal indication of intention by a member of a joint family to separate himself from the family. What form such intimation indication or representation of such interest should take would depend

upon the circumstances of each case. A further requirement is that this unequivocal indication of intention to separate must be to the knowledge of the persons effected by such declaration. A review of the decisions shows that this intention to separate may be manifested in diverse ways. It may be by notice or by filing a suit. Undoubtedly, indication or intimation must be to members of the joint family likely to be effected by such a declaration.

Partition is word of technical import in Hindu Law. Partition in one sense is a severance of joint status and coparcener of a coparcenary is entitled to claim it as a matter of his individual volition. In this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. Such an unequivocal intention to separate brings about a disruption of joint family status at any rate in respect of separating member or members and thereby puts an end to the coparcenary with right of survivorship and such separated member holds from the time of disruption of joint family as tenant in common. Such partition has an impact on devolution of share of such member. It goes to his heirs displacing survivorship. Such partition irrespective of whether it is accompanied or followed by division of properties by metes and bounds covers both a division of right and division of property. A disruption of joint family status by a definite and unequivocal indication to separate implies separation in interest and in right although not immediately followed by a de facto actual division of the subject matter. This may at any time, be claimed by virtue of the separate right. A physical and actual division of property by metes and bounds follows from disruption of status and would be termed partition in a broader sense. (Refer : Kalyani vs. Narayanan – AIR 1980 SC 1173).

### **3. Can there be an oral partition?**

Yes. It is not necessary to effect partition by a written partition deed. It can be effected orally and be acted upon. Even a partition of an immovable property can be by an oral agreement (Refer : Papatlal Devram vs. CIT (1970) 77 ITR 1073 (Orissa), Padam Lochan vs. State of Orissa 84 ITR 88(Orissa).

*“Partition in the Mitakshara sense may be only a severance of the joint status of the members of the coparcenary that is to say what was once a joint title, has become a divided title though there has been no division of any properties by metes and bounds. Partition may also mean what ordinarily is understood by partition amongst co-shares who may not be members of a Hindu coparcenary. For partition in the latter sense of allotting specific properties or parcels to individual coparceners, agreement amongst all the coparceners is absolutely necessary. Such a partition may be effected orally, but if the parties reduce the transaction to a formal document which is intended to be the evidence of the partition, it has the effect of declaring the exclusive title of the coparcener to whom a particular property is allotted by partition and is thus within the mischief of section 171(1)(b) (Refer Nani Bai vs. Gita Bai – AIR 1958 SC 706, Rishan Singh vs. Zila Singh – AIR 1988 SC 881, Hansraj Agarwal vs. CCIT (2003) 259 ITR 265 (SC). No particular method is prescribed – AIR 1964 SC 136. However, after 1-9-2005*

partition after 20-12-2004 is not recognized to the daughter to deprive her share as coparcener. Further, partition before 20-12-2004 has to be in writing & registered.

#### **4. Does a partition take place at the time of death of a coparcener?**

A partition is an act effected inter vivos between the parties agreeing to the partition. A death of a coparcener cannot bring about an automatic partition and on such a death, the other surviving members continue to remain joint. However, under the provisions of 6 of the Hindu Succession Act, there is a deemed partition for a limited purpose of determining the share of the deceased coparcener for the purpose of succession under the Act. The right of a female heir to the interest inherited by her in the family property gets fixed on the death of a male member under section 6 of the Act but she cannot be treated as having ceased to be a member of the family without her volition as otherwise it will lead to strange results which could not have been in the contemplation of Parliament when it enacted that provision and which might also not be in the interest of such female heirs. The female heir shall have the option to separate herself or to continue in the family as long as she wishes as its member though she has acquired an indefeasible interest in a specific share of the family property which would remain undiminished whatever may be the subsequent changes in the composition of the membership of the family. (Refer State of Maharashtra vs. Narayan Rao Sham Rao Deshmukh (1987) 163 ITR 31(SC)).

#### **5. Can a widow or wife claim partition?**

A widow steps in the shoes of her husband. Earlier on account of the Hindu Women's Right to Property Act, 1937 and now being a heir in Class I can claim the partition on the death of her husband. There can be a valid partition between a widowed mother and son (Refer Ram Narain Paliwal vs. CIT (1986) 162 ITR 539(P & H), CIT vs. Mulchand Sukmal Jain (1993) 200 ITR 528(Gauhati). However, a wife during the lifetime of her husband cannot claim a partition but in case there is a partition, she shall get share equal to that of her son and husband. (Refer : Kundanlal vs. CIT (1981) 129 ITR 755( P & H)).

#### **6. Is partition a transfer?**

Partition is not a transfer. Each co-parcener has an antecedent title to the joint Hindu family property. Though its extent is not determined until partition takes place. That being so, partition really means that whereas initially all the coparcenes had subsisting title to the totality of the property of the family jointly, that joint title is transformed by partition into separate title of the individual coparceners in respect of several items of properties allotted to them respectively. As this is the true nature of a partition, the contention that partition of an undivided Hindu family property necessarily means transfer of the property to the individual coparceners cannot be accepted. (Refer Ajit Kumar Poplai and Another AIR (1965) SC 432). Partition does not give a co-parcener a title or create a title in him, it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his formal co-shares (Refer Girija Bhai vs. Sadha Shiv Dund Raj AIR 1916 PC 104).

In view of the unit of ownership and community of interest of all coparceners in a joint Hindu family business the position on partition of the joint Hindu family business, whether it be partial or complete, is very similar in law to the position on dissolution of a partnership firm. On partition the shares of the coparceners in the joint family business become defined and their community of interests is separated. Division of assets is a matter of mutual adjustment of accounts as in the case of a dissolved partnership firm. The property which so comes to the share of the coparcener, therefore, cannot be considered as transfer by the joint family to a coparcener or the extinguishment of the right of the joint family in that property, the joint family not having its own separate interest in that property which can be transferred. (Refer CIT vs. S. Balasubramanian (1988) 230 ITR 934 (SC)). The partition does not effect any transfer as generally understood in the Transfer of Property Act. (Refer CIT vs. N.S Jetty Chettiar (1971) 82 ITR 599).

### **7. Can there be an unequal partition?**

Yes. It is at the sweet will of the co-parceners and members as to whether to allot on partition in accordance with the share specified under the Hindu Succession Act or to allot lower or more to anyone or more persons. The partition in the family could not be considered to be a disposition conveyance, assignment, settlement, delivery, payment or other alienation of property. A member of a Hindu undivided family has no definite share in the family property before division and he cannot be said to diminish directly or indirectly the value of his property or to increase the value of the property of any other coparcener by agreeing to take a share lesser than what he would have got if he would have gone to a court to enforce his claim (Refer CGT vs. N.S Getti Chettiar 91971) 82 ITR 599(SC)). In the light of the said law, it can be a sound tool of tax planning by giving larger share to the less financially sound co-parcener and lesser share to the affluent.

### **8. Whether physical division by metes and bounds is necessary?**

Hindu Law does not require division of joint family property physically or by metes and bounds. However, partition as defined under Explanation to Sec. 171 of the Act means – (i) where the property admits of a physical division, a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition : or (ii) where the property does not admit of a physical division, then such division as the property admits of but a mere severance of status shall not be deemed to be a partition). Hence physical division of the property as the property admits of is an condition precedent for recognition of partition u/s. 171 of the Act.

Income tax law introduces certain conditions of its own to give effect to the partition under s. 171 of the Act. The ITO can record a finding that a partition has taken place only if the partition in question satisfies the definition of the expression “partition” found in the Expln. To s. 171. A transaction can be recognized as a partition under s. 171 only

if where the property admits of a physical division, a physical division of the property has taken place. In such a case a mere physical division of the income without a physical division of the property producing the income cannot be treated as a partition. Even where the property does not admit of a physical division, such division as the property admits of should take place to satisfy the test of a partition under s. 171. Mere proof of severance of status under Hindu law is not sufficient to treat such a transaction as a partition. If a transaction does not satisfy the above additional conditions, it cannot be treated as a partition under the I.T Act even though under Hindu law there has been a partition – total or partial (Refer *Kalloomal Tapeswari Prasad vs. CIT* (1982) 133 ITR 690 (SC), *CIT v/s. Venugopal Inani* (1999) 239 ITR 514. In case of single property like house or chawl division by plan is valid, so also allotting different portions of a single building is valid.

The family business can be partitioned by making necessary entries of division of capital of the family. Such division must, of course be effective so as to bind the members. For an asset like family business or share in partnership, there cannot be said to be any other mode of partition open to the parties if they wish to retain the property and yet hold it not jointly but in severalty and the law do not contemplate that a person should do the impossible (Refer *Chandas Haridas and another vs. CIT* (196) 39 ITR 202 (SC), *CIT v/s. Shio Lingappa Shankarappa and Brothers* (1982) 135 ITR 375(Bom). Where however, division was not effected of the property the claim was rejected (Refer *Kaluram & Co. vs. CIT* (2002) 254 ITR 307). It is also open to parties to allot whole house to one member on his undertaking to pay money value of the shares to due to other members & the amount paid to other coparcenes will be available to the members addition to his cost of his share if the house is later sold. See *Lalitaben Hariprasad v/s. CIT* – 180 Taxman 213, 224 CTR 306, 320 ITR 698(Guj). Similar Gujarat decision *Vimalbhai Nagindas Shah v/s. CIT* 140 ITR 29 (partial partition), *CIT v/s. Vajubhai Chunilal, CIT v/s.* 120 ITR 21(Guj).

#### **9. What shall be the nature of the property received on partition?**

The nature of the joint family property on partition shall be as that of joint family property as and when the recipient person is married. Hence the character of the property shall remain that of the joint family property. Such property shall be assessed as individual property, as long as the recipient is unmarried or is reduced to a single person. The property which devolves on a Hindu u/s. 8 of the Hindu Succession Act would be individual property. Thus individual property shall continue to be individual property on inheritance and HUF property on partition shall be that of the joint Hindu family subject to the existence of family during the relevant assessment year (Refer *CWT vs. Chander Sen* (1986) 161 ITR 370(SC), *CIT vs. P.L Karuppan Chettiar* 91992) 197 ITR 646(SC), *CIT vs. Arun Kumar Jhunjhunwala 7 Sons* (1997) 223 ITR 43).

#### **10. Whether an order u/s. 171 is required when an HUF has not been hitherto assessed?**

Sec. 171(1) of the Act starts with the expression “a Hindu Family hitherto assessed as undivided”. Hence, if an HUF has not been assessed to tax, sec. 171 shall be inapplicable. Sec. 171 of the Income Tax Act, 1961, has no application to a case of a Hindu undivided family which has never been assessed before as a joint family i.e as an unit of assessment. In other words, this section has application to a Hindu undivided family which has been assessed before as a joint family and if the Hindu undivided family has never been assessed to tax, this section has no application (Refer Additional CIT vs. Durgamma (P) (1987) 166 ITR 776 (AP), CIT vs. Kantilal Ambalal (1991) 192 ITR 376(Gujarat), CIT vs. Hari Kishan 920010 117 Taxman 214. In such a case even partial partition will be valid.

### **11. What are the rights of daughters and female members not entitled to share on partition?**

Female members who have right of maintenance and marriage have a charge on the joint Hindu family property in respect of the said right. Hence, at the time of partition amount of such expenses deserve to be quantified provided and only balance to be shared by the persons entitled to share on partition. In lieu of such maintenance and other expenses, the female members can be allotted shares at the time of partition so that the divided properties are free of encumbrances (Refer State of Kerala vs. K.P Gopal (1987) 166 ITR 111(Ker-FB). This position is changed since 1-9-2005 as daughters are made coparceners and are entitled to a share.

### **12. What is notional partition and whether such concept exist under the Income Tax Act?**

When a Hindu male dies on or after 17th June, 1956 having at the time of his death an interest in co-partnery property, leaving behind a female heir of the class one category, then his interest in the co-partnery property shall devolve by succession and not by survivorship. The interest of the deceased will be carved out over devolution, though there is no actual partition. Such an act is considered as a notional partition under the Hindu Law. The concept of notional partition is non-existent under the Income-tax Act. The Income-tax Act recognizes only an actual partition and not the notional partition.

### **(21) THE HINDU SUCCESSION AMENDMENT ACT, 2005 - w.e.f 1-9-2005**

#### **6. Devolution of interest of coparcenary property.-**

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

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

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

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

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

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

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

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

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

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

Explanation - For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

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

Explanation – For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or partition effected by a decree of a court.

Sec. 14. Property of a female Hindu to be her absolute property. (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

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

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

## **(22) SOME ASPECTS OF HINDU JOINT FAMILY AND THE EFFECT OF HINDU SUCCESSION AMENDMENT ACT, 2005.**

### **I. Can HUF give gift to its members?**

Earlier HUF could not give or receive gift to or from its members beyond a sum of Rs. 50,000/- without making the donor liable to tax under s. 56(2). However, the position is slightly changed by reason of Finance Act, 2012 which has extended the definition of a "relative" to include gift from any member of an HUF to HUF. Thus it is now clear that an HUF can receive a gift from its member exceeding Rs. 50,000/- without any liability to pay tax u/s. 56(2) of Income Tax Act.

However, the question still remains whether an HUF can give a gift to its member exceeding Rs. 50,000/- without making the member liable to tax U/S 56(2). In other words can an individual receive gifts from his HUF. It is submitted that prohibition still remains, as "joint Hindu family" cannot be considered as a "relative" of member. The converse case is still not included in the amendment carried out by Finance Act, 2012 which is given retrospective effect from 1-10-2009. However the HUF can distribute its income to its member/members under the General Hindu Law principles as such distribution is not a gift. Further, the HUF can spend for marriage, education etc of its members also under general principle for Hindu Law as it is considered as part of its obligation towards its members.

### **II. Consequences of daughter becoming a co-parcener of her father's HUF.**

Another major issue which can now be dealt with is the impact of the Amendment Act, 2005 qua the position of daughters of a father who is co-parcener in a HUF.

The amended section 6 provides that in a joint Hindu family governed by Mitakshara Law, the daughter of co-parcener shall be co-parcener in the same manner as a son. The

question arises whether the section applies only to a daughter born after the Amendment Act which came into force on 9-9-05 or equally applies to daughter born before that date and who is a daughter married or unmarried of her father who is a co-parcener.

It is obvious that amended section 6 is prospective and not retrospective. In other words by the amendment daughter does not become co-parcener from any earlier date. However, the question remains whether in an HUF which is continuing, a co-parcener who has a daughter before 1-9-05 is included now as co-parcener. It is submitted that though the amendment is not retrospective it is retroactive meaning thereby it includes earlier events like birth of a daughter but operates with effect from 1-9-05. A prospective legislation can draw for its application earlier events to which amendment applies from the date of its coming into force.

It is submitted that the amended section would equally apply to a daughter born before 1-9-05 and she becomes co-parcener not from the date of her birth but only from 1-9-05. In such a situation the proviso to section 6 applies and induction of the daughter into coparcenery will not affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which has taken place before 20-12-04.

Thus a limited retrospective operation is given to amended Section 6 upto 20-12-04. Therefore, daughter does not get any rights nor can she challenge any disposition including partition which has taken place before 20-12-04. Unfortunately there are divergent views taken by various High Courts in India on the correct interpretation of amended Section 6 as to whether it applies to daughter born before 1-9-05.

The Bombay High Court in its decision in the case of *M/s. Vaishali Satish Ganorkar v/s. Satish Keshorao Ganorkar* reported in AIR 2012 Bom 101 held that the amended section 6 does not apply to a daughter born before 1-9-05. However, fortunately, this judgment is reversed by Full Bench of Bombay High Court in the case of *Badrinarayan Shankar Bhandari v/s. Omprakash Shankar Bhandari* now reported in AIR (2014) Bom – November issue holding that s. 6 as amended applies also to daughters born before 1-9-2005.

Reference may be made to the judgment of Orissa High Court in the case of *Pravat Chandra Pattnaik & Ors v/s. Sarat Chandra Pattnaik & Anr.* Reported in AIR 2008 Orissa 133 holding that the provisions are prospective but it did not accept the contention that only daughter born after 1-9-05 would be treated as co-parcener. Further Bombay judgment refers a judgment of Karnataka High Court in the case of *Pushpalatha N.V v/s. V. Padma* – AIR 2010 Karnataka 124 where it considered that the section is retrospective in the sense that it applies to daughter born earlier.

### **III. Distinction between Ancestral property and Joint family property.**

Another interesting point which can be dealt with in this article is the difference between ancestral property and joint family property. As the word “ancestral” indicates it is the property received by the person from his father, grandfather etc. The said ancestral

property will assume the character of joint Hindu Family if the recipient has wife and children or only wife. Till then he can deal with it fully. However as soon as he marries the ancestral property becomes joint family property.

It may be noted that such ancestral property would be HUF property in the hands of the recipient. However, if the father has given his individual property to the son by will or gift it may not assume the character of joint family property in son's hands unless the father has so indicated. Even courts have held that by reason of section 8 of the Hindu Succession Act individual property received on the death of the father will become the individual property of the son. This was held by the Supreme Court in the case of CWT v/s Chander Sen 161 ITR 370(SC) and Yudhister v/s. Ashok Kumar AIR (1987) S.C 558. Thus there are basically two sources of joint family property (1) property received from ancestors by the son from his father etc and (2) property received on partition of an existing joint family property. However if the chest of the HUF is zero, by gift from an outsider, such property will also become HUF property.

Reference may be made to the Mulla Hindu law 19th Edition Vol. 1 page 369 which states "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 co-parcenary consists of the father and the son".

In other words every ancestral property received by a male Hindu from his ancestors becomes joint family property. However individual property of the ancestor may either become joint family property in the hands of the son or his individual property depending on the wording of the will or gift by the father or grandfather. However, property received from any other collateral relation or even mother will not become joint family property in his hands except when it is so intended and so mentioned in the will or gift deed.

The above distinction between Mitakshara co-parcenary property and joint family property has been recognized by the Supreme Court in Hardeo Rai v/s. Shakuntala Devi – AIR 2008 SC 2489.

Incidentally certain other questions consequential on daughter becoming co-parcener would arise which questions have been noted in the last paragraph of our earlier article. Some of those questions can be dealt with in some details.

#### **IV. Whether sister married or unmarried can be come coparcener?**

A peculiar question arises as whether if the father is dead and the HUF continues with his sons their sister becomes a co-parcener if the father dies before 1-9-05. It is submitted that daughters becomes co-parceners only if their father is alive on 9-9-05 as sisters are not covered by Section 6.

#### **V. General:**

In reality it is a very unusual situation created that a married daughter becomes a karta in her father's HUF but not in her husband's HUF.

It is submitted that it would have been better if instead of making a married daughter coparcener in her father's family to make wife a coparcener in her husband's family, though under Hindu Law she entitled to share only when partition takes place between the father and son or between the sons but she cannot demand partition.

### **(23) POSERS & ANSWERS IN RESPECT OF HINDU SUCCESSION AMENDMENT ACT, 2005**

**(1) Can unmarried daughter or the married daughter born before 5-9-2005 become karta of her father's HUF, whether after father's death, before 5-9-2005.**

Answer: It is the rights of daughters that were not recognised and given earlier that are recognised under the amended provision. What is essential is that the law does not make any distinction between married and unmarried daughters. Traditionally males were Karta's, however, under the amended provision, since equal rights are conferred upon daughters, such daughter can become Karta. On a more practical note, I would however enter a caveat here. Since the married daughter would find it difficult to manage the affairs of her paternal HUF, she should not normally act as Karta if there are brothers present. If however a situation arises where there is no male coparcener, the answer is obvious.

I would invite attention to the decision of the Bombay High Court in Jagannath Chauhan vs. Suman Ghawte AIR 2014(NOC) 491(Bom) which takes the view that I have expressed here. It has been held that the married daughter would not be Karta, the married son would be Karta. I emphasize on the word married.

**(2) Whether children of married daughter or her husband becomes member / coparcener in her father's HUF.**

Answer: I think the question itself is self explanatory. For this the genesis of a coparcenery has to be considered. Earlier it was the sons, grandsons and great grand sons of the holder of property (which now includes daughters after the amendment) Coparcenery means one has to be born within the family (the coparcenery concerned), therefore it is only the daughter who being a coparcener would be entitled to be a member of the coparcenery. Attention is invited to sub section 3(b) and (c), it is notable that the husband has been left out for self sufficing and obvious reasons and further, a deemed share is recognised for the children. It could never have been the legislative intent that a male could be a coparcener even in his wife's paternal family and so could their children. This is because they would be members of their own family coparcenery by virtue of birth in that family. Birth being the genesis of coparcenery.

**(3) Where the father is dead before amendment Act but the HUF continues between brothers and sister will the sister become coparcener after 9-9-2005.**

Answer: If the coparcenery continues between the brothers as suggested in the question, the sister becomes a coparcener. This position is somewhat doubtful & debatable, as sister & is not made coparcener but only the daughter. Father has to be alive on 1-9-2005. The explanation says that partition before 20-12-04 is not effected by 2005 Act but the same is required to be registered. Does it mean that partition deed should be executed before 20-12-04 or that it should be also registered before 20-12-04, though a document can be registered within 4 months of its execution and within 8 months with penalty.

**(4) Does the section rule out oral partition or even written partition of movables which does not require registration.**

Answer: Before the explanation is looked at, sub-section 5 should be seen. It says that partitions affected before 20/12/2004 are not affected. The explanation says that partition means a partition by deed duly registered. "The explanation says that partition before 20-12-04 is not effected by 2005 Act but the same is required to be registered" It is because the Supreme Court held in Ganduri Koteswaramma and Anr. v. Chakiri Yanadi and Anr. reported in AIR 2012 Pg 169 as under that it must be accepted that even partitions before the cut off date have to be in the manner prescribed.

*"The right accrued to a daughter in the property of a joint Hindu family governed by the Mitakshara Law, by virtue of the 2005 Amendment Act, is absolute, except in the circumstances provided in the proviso appended to sub-section (1) of Section 6. The excepted categories to which new Section 6 of the 1956 Act is not applicable are two, namely, (i) where the disposition or alienation including any partition has taken place before December 20, 2004; and (ii) where testamentary disposition of property has been made before December 20, 2004. Sub-section (5) of Section 6 leaves no room for doubt as it provides that this Section shall not apply to the partition which has been effected before December 20, 2004. For the purposes of new Section 6 it is explained that 'partition' means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or partition effected by a decree of a court. In light of a clear provision contained in the Explanation appended to sub-section (5) of Section 6, for determining the non-applicability of the Section, what is relevant is to find out whether the partition has been effected before December 20, 2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a court....."*

Normally when we speak of registration it is as regards land etc. Oral partition seems to have been ruled out. If we refer to any and only movables being partitioned then registration may not be required, if however they are included with real property i.e land and or constructed property, which is normally the case, it could be considered as a composite unit and may require registration.

**(24) The Hindu Succession Act, 1956 – with effect from September 1, 2005**

## 6. Devolution of interest of coparcenary property.-

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

- (a) by birth become a coparcener in her own right in the same manner as the son;
- (b) have the same rights in the coparcenary property as she would have had if she had been a son;
- (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.

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

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

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

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

Explanation - For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.....

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

Explanation – For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or partition effected by a decree of a court.

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

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

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

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